INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

CARATUBE INTERNATIONAL OIL COMPANY LLP
CLAIMANT
v.
REPUBLIC OF KAZAKHSTAN
RESPONDENT

ICSID CASE NO. ARB/08/12

Arbitral Tribunal:
Prof. Dr. Karl-Heinz Böckstiegel, President
Dr. Gavan Griffith QC, Arbitrator
Dr. Kamal Hossain, Arbitrator

Secretary of the Tribunal:
Milanka Kostadinova

Assistant of the Tribunal:
Yun-I Kim

Award

Claimant's counsel:

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Baiju S. Vasani (until 1 June 2012)
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Date of despatch to the Parties: 5 June 2012

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Abbreviations

BIT	Treaty between the United States of America and the Republic of Kazakhstan concerning the encouragement and reciprocal protection of investment of 19 May 1992
C	Exhibit to Caratube International Oil Company
C-I	Claimant's Request for Arbitration of 16 June 2008
C-IV	Claimant's Memorial of 14 May 2009
C-V	Claimant's Reply Memorial of 30 July 2010
C-VI	Claimant's Post-Hearing Brief of 27 June 2011
C-VIII	Claimant's Application for Costs of 7 November 2011
C-IX	Claimant's Comments on Respondent's Statement of Costs of 18 November 2011
CCC	Consolidated Contractors (Oil and Gas) Company S.A.L.
CIOC	Caratube International Oil Company
Contract, Contract No. 954	Contract for Exploration and Production of Hydrocarbons within Blocks CCIV-20-C (partially); CCIV-21-A (partially), including Karatube Field (oversalt) in Baiganin District of Aktobe Oblast of the Republic of Kazakhstan of 27 May 2002 (as amended)
DCF	Discounted Cash Flow
ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965
ILC Draft Articles (on State Responsibility)	Draft articles on Responsibility of States for Internationally Wrongful Acts (2001)
JOR	JOR Investments Inc.
MEMR	Ministry of Energy and Mineral Resources
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para(s).	Paragraph(s)
PO	Procedural Order
R	Exhibit to the Republic of Kazakhstan
R-I	Respondent's Summary Reply to Claimant's Request for Arbitration of 31 March 2009
R-III	Respondent's Counter-Memorial on Objections to Jurisdiction and the Merits of 22 December 2009
R-IV	Respondent's Rejoinder on Objections to Jurisdiction and the Merits of 14 December 2010
R-V	Respondent's Post-Hearing Brief of 27 June 2011
R-VII	Respondent's Statement of Costs of 7 November 2011
R-VIII	Respondent's Comments on Claimant's Application for Costs of 18 November 2011
Subsoil Law	The Law of the Republic of Kazakhstan "On Subsoil and Subsoil Use" dated 27 January 1996
Tr	Transcript of the Hearing on Jurisdiction and the Merits of 7 to 17 February 2011
Transfer Agreement	Transfer Agreement Regarding Subsoil Use of 8 August 2002
TU Zapkaznedra	Western Kazakhstan Territorial Administration of Geology and Subsoil Use, a sub-committee of the Committee on Geology and Subsoil Resources Management
USD	United States dollar(s)
VCLT	Vienna Convention on the Law of Treaties of 23 May 1969

A. The Parties

The Claimant	Caratube International Oil Company LLP
Represented by	Stuart H. Newberger Baiju S. Vasani Michael L. Martinez Ian Laird Theodore R. Posner Dana Contratto Crowell & Moring LLP 1001 Pennsylvania Avenue, N.W. Washington D.C. 20004-2595 **USA**
The Respondent	Republic of Kazakhstan
Represented by	Peter Wolrich Geoffroy Lyonnet Curtis, Mallet-Prevost, Colt & Mosle LLP 6, avenue Vélasquez 75008 Paris **FRANCE** Galileo Pozzoli Curtis, Mallet-Prevost, Colt & Mosle LLP Corso Venezia, 5 20121 Milano **ITALY** Gabriela Alvarez Avila Curtis, Mallet-Prevost, Colt & Mosle S.C. Ruben Dario 281 Piso 9 Col. Bosque de Chapultepec 11580 Mexico City **MEXICO** Askar Moukhitdinov Curtis, Mallet-Prevost, Colt & Mosle LLP The Nurlay-Tau Centre 13 al-Faraby Street Block 1-V, 4th floor, Suite 5 Almaty, Kazakhstan 050059 **KAZAKHSTAN** Jennifer Morrison Curtis, Mallet-Prevost, Colt & Mosle LLP 101 Park Avenue New York, New York 10178

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6, avenue Vélasquez
75008 Paris
FRANCE

B. The Tribunal

Appointed by the Chairman of the ICSID Administrative Council on 18 February 2009, after consultation with the Parties:

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

Appointed by Claimant by letter of 4 November 2008:

Dr. Gavan Griffith QC
Essex Court Chambers
24 Lincoln's Inn Fields
London WCA 3 EG
UNITED KINGDOM

Appointed by Respondent by letter of 22 December 2008:

Dr. Kamal Hossain
Dr. Kamal Hossain and Associates
Chamber Building, 2nd Floor
122-124 Motijheel Commercial Area
Dhaka 1000
BANGLADESH

C. Short Identification of the Case

1. A short identification of the case is set out below. It is made without prejudice to the full presentation of the factual and legal details of the case by the Parties and the Tribunal's considerations and conclusions.

C.I. Claimant's Perspective

2. The following quotation from Claimant's Memorial of 14 May 2009 summarises the main aspects of the dispute as follows (C-IV, paras. 7–12):

> *"7. In this Memorial, CIOC sets out what is a substantial claim against Kazakhstan, currently estimated in the Quantum Report to be* ***USD 1,121.4 million****, for damages and compensation (including interest) arising out of the expropriation of its investment, a significant oil field in an oil rich area of the country.* [Note by the Tribunal: the reference to the quantum of allegedly sustained damages in 'millions' was corrected by Claimant in later submissions to 'billions'.]
>
> *8. Not only had CIOC invested millions of dollars in the exploration of the oil field and its development, it was also entitled to an exclusive 25-year commercial production licence since it had a commercial discovery. These rights, of which CIOC has been deprived, underpin CIOC's claim for damages and compensation, but CIOC also claims non-material damages in respect of the moral harm that CIOC, its majority owner, senior management and employees have suffered at the hands of Kazakhstan.*
>
> *9. For five years CIOC had successfully, and without any serious controversy, pursued its investment. New oil wells were drilled and Soviet-era ones were reopened, extensive geological testing and exploration work was carried out, infrastructure was installed at the field and pilot production commenced. Suddenly in mid 2007, the political landscape changed. A political rivalry that had developed between President Nazarbayev and his powerful son-in-law, Rakhat Aliyev flared into open hostility. In Kazakhstan's campaign to persecute Rakhat Aliyev that followed, it seems it became no longer politically convenient for Kazakhstan to allow CIOC to continue its business since the brother of Devincci Hourani, CIOC's majority owner, is Rakhat Aliyev's brother-in-law. A reasonable person might have thought that CIOC was sufficiently far removed from the dispute between the President and Rakhat Aliyev however, in Kazakhstan, "politics is a family affair"* [emphasis in original and footnote omitted]. *Family, business partners and associates of Rakhat Aliyev have all been victimised in the course of the fall out between the President and Mr Aliyev.*
>
> *10. As a result, CIOC, its majority owner, senior management and employees have been subjected to a campaign of harassment, intimidation and persecution at*

the hands of the Kazakh authorities. As at the date of this Memorial the victimisation continues. Armed guards remain at the site of CIOC's oilfield and its offices in Aktobe. Kazakh authorities have seized and still retain (amongst other items) large numbers of CIOC's documents and files, as well as corporate seals and computer hard drives from CIOC's head office in Almaty, its branch office in Aktobe and from the oil field itself. Devincci Hourani, his brothers and his senior manager Omar Antar feel unable to return to Kazakhstan. CIOC is not the only investment that Devincci Hourani has lost as a result of the abusive exercise of Kazakh sovereign power. He and his brothers have lost all their substantial business interests in Kazakhstan.

11. Kazakh officials concocted unsubstantiated allegations that CIOC was in breach of its contractual obligations as a pretext for what was no more than a politically-motivated campaign against the company and its owner. CIOC's answers to these allegations went unheard and unanswered. In its haste to purport to terminate the Contract, Kazakhstan also failed to follow the stipulated legal procedures.

12. The Tribunal is likely to read and hear a great deal about CIOC's performance of its obligations under the Contract during the course of this proceeding, but this case is not about CIOC's contractual performance, which in any event provided no reason for complaint let alone termination. In the normal course, a contractual counterpart does not substantiate its grounds for termination by seizing the other party's majority owner from his bed in the middle of the night and subject him to hours of questioning at its interior Ministry. In the normal course, the focus of such questioning would not be on the owner's family relationship with the President's sworn political enemy. In the normal course, it would also be highly unlikely that parties would mutually agree to extend a contract by a further two years, for one party later to allege that all along the other had been in material breach. But this is not a normal case, and the dispute at its heart is not at all about contractual termination." (C-IV, paras. 7–12)

C.II. Respondent's Perspective

3. In its Summary Reply to Claimant's Request for Arbitration Respondent states (R-I, para. 6):

> *"[…] Respondent will show that all of the claims currently brought by Claimant relate to lawful actions the Republic took in an effort to obtain that to which it was rightfully entitled, namely Claimant's proper performance of the Contract. Despite Claimant's contention to the contrary, Respondent will demonstrate that the termination notices issued by the Republic were justified."*

4. The following quotations from Respondent's Counter-Memorial on Objections to Jurisdiction and the Merits further summarise the main aspects of the dispute (R-III, paras. 2, 5, 18):

"[…] The Contract was awarded to Consolidated Contractors (Oil and Gas) Company S.A.L. ("CCC") on May 27, 2002. CCC assigned it to CIOC for USD 9.4 million on August 8, 2002, less than three months later. CIOC had come into existence on July 29, 2002, a week before the assignment." (R-III, para. 2)

"[…] [A]s will be explained and fully documented in that Section, CIOC never came close in any year to fulfilling its obligations as set out in the Contract, the contractual Minimum Work Program and the Annual Work Programs. In particular, CIOC never even began drilling the required exploratory wells in the deeper subsalt region. CIOC was notified by the Republic of its non-performance and was threatened with termination on numerous occasions beginning in 2003. […] These facts belie what CIOC alleges in its Memorial: namely, that CIOC was performing perfectly well and that the Termination was caused by political motivations arising in mid-2007 and not by CIOC's material breaches of the Contract. In fact, the Termination occurred as part of the Republic's ongoing review of the contractual performance of sub-soil users in Kazakhstan. During the relevant period between late 2007 and early 2008, eighty-seven contracts were terminated for material breach, including CIOC's. Moreover, the record clearly shows that CIOC's material breaches and the Republic's repeated notices regarding those breaches occurred beginning in 2003, long before the unrelated political events referred to by CIOC." (R-III, para. 5)

"From the beginning and continuously throughout the life of the Contract, CIOC systematically and significantly failed to meet its annual investment obligations. This is indeed one of the reasons that led to the Termination of CIOC's Contract. In addition, there is no evidence that CIOC itself or its apparent owner and purported investor, Devincci Hourani, had the ability to finance or mobilize the financing necessary to sustain the future development of the Caratube project that CIOC predicts in its damage claim." (R-III, para. 18)

D. Procedural History

5. On 16 June 2008 Claimant filed its Request for Arbitration against the Republic of Kazakhstan with the International Centre for Settlement of Investment Disputes (ICSID) pursuant to the Treaty between the United States of America and the Republic of Kazakhstan concerning the encouragement and reciprocal protection of investment of 19 May 1992 (the "BIT"). The Centre registered the Request for Arbitration on 26 August 2008.

6. By letter of 4 November 2008 Claimant appointed Dr. Gavan Griffith QC as an arbitrator. By letter of 22 December 2008 Respondent appointed Dr. Kamal Hossain as an arbitrator. The Parties agreed to have the party-appointed arbitrators select the President of the Tribunal. The co-arbitrators were unable to reach such an agreement. On 18 February 2009, on the request of the Claimant and pursuant to Article 38 of the ICSID Convention, the Chairman of the ICSID Administrative Council appointed Professor Dr. Karl-Heinz Böckstiegel as presiding arbitrator in the case at hand. All three arbitrators accepted their appointments.

7. By letter of 23 February 2009, the Acting Secretary-General of ICSID notified the Tribunal and the Parties that the Tribunal was deemed to having been constituted and the proceedings to having begun on that date. Furthermore, the Acting Secretary-General advised that ICSID Counsel Tomás Solís would serve as Secretary of the Tribunal.

8. By letter of 25 February 2009 the Tribunal proposed to hold the First Session in Frankfurt, Germany on 16 April 2009, to which both Parties agreed.

9. By letter of 26 February 2009 the Tribunal asked Respondent to file a Summary Reply to Claimant's Request for Arbitration by 31 March 2009.

10. On 31 March 2009, Respondent submitted its Summary Reply to Claimant's Request for Arbitration.

11. By letter of 3 April 2009, the Parties submitted a joint advice on any points of the provisional agenda on which they were able to reach agreement.

12. On 14 April 2009, Claimant filed a Request for Provisional Measures.

13. The First Session of the Arbitral Tribunal was held at the Frankfurt International Arbitration Centre (FIAC) at the Frankfurt Chamber of Commerce in Frankfurt, Germany on 16 April 2009.

14. The Minutes of the First Session contained the following sections which are relevant for the later procedure:

> *"(...)*
>
> ***6. Place of Proceeding (Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3))***

The Parties agreed that the place of the proceeding shall be Frankfurt, Germany, although individual hearings may take place elsewhere if the Parties and the Tribunal so agree.

(…)

13. Written and Oral Procedures (Arbitration Rules 20(1)(e) and 29)

13.1. The proceedings shall consist of a written procedure and an oral procedure.

13.2. The length of time allocated to each Party during the oral procedure(s) shall in principle be equal, subject to the Tribunal's determination, based on all relevant factors, including the number of witnesses for each Party, that one Party should be afforded a greater share of the available time.

13.3. The oral procedure(s) may include oral closing arguments if so decided by the Tribunal. The oral procedure(s) may be followed by written post-hearing submissions if so decided by the Tribunal, limited by page number and including specific issues as may be identified by the Tribunal, unless the Parties otherwise agree.

14. Number and Sequence of Pleadings, Time Limits, Supporting Documentation (Arbitration Rules 20(1)(c) and 31)

14.1. By 14 May 2009:
Claimant's Principal Memorial on all aspects of the case including jurisdiction and the merits including quantum, together with witness statements, documents, and expert reports (if any). The Tribunal made reference to Exhibit 5 to the request for arbitration and invited the Claimant to comment in its Memorial on the assignment of the Contract.

14.2. By 14 July 2009:
The Respondent shall indicate whether or not it will request bifurcation of the proceeding.

14.3. By 14 September, 2009:
Respondent may submit a Brief with reasoned objections to jurisdiction and a request for bifurcation of the proceeding.

14.3. [sic] If such a Brief is submitted, by 16 November 2009:
The Claimant may submit a reasoned Reply-Brief.

14.4. Thereafter, the Tribunal will take appropriate steps to deal with this matter in consultation with the Parties, and, if it decides to bifurcate the proceedings, decide on a new timetable. The Tribunal shall issue a summary decision on bifurcation prior to the due date for the Respondent's Counter-Memorial (see item 14.6 below). The summary decision shall contain only the dispositif of the Tribunal's decision, a reasoned decision will be issued shortly thereafter;

14.5. If Respondent has not objected to jurisdiction or if the Tribunal has decided that there shall be no bifurcation of the proceeding, the Timetable shall continue as follows:

14.6. By 15 December, 2009:
Respondents'[sic] Principal Counter-Memorial on all aspects of the case including jurisdiction and the merits including quantum, together with witness statements, documents, and expert reports (if any)

14.7. By 15 January 2010:
Parties exchange document requests (if any) without sending copies to the Tribunal.

14.8. By 1 February, 2010:
Parties try to agree on document requests, if any.

14.9. By 19 February 2010:
In so far as they have not reached agreement, the Parties may submit reasoned applications to Tribunal in the form of "Redfern Schedules", to order the production of documents.

14.10. By 19 March 2010:
Tribunal rules on applications.

14.11. The parties shall produce the documents so ordered by 16 April 2010.

14.12. By 16 July 2010:
Claimant's Reply Memorial.

14.13. By 16 November 2010:
Respondents'[sic] Rejoinder Memorial.

14.14. In their Reply and Rejoinder Memorials, the Parties may only include new factual allegations and additional evidence of any kind responding to or rebutting matters raised by the other Parties in their 1st Round of memorials or regarding new evidence obtained in the above procedure on document production. Thereafter, no new evidence may be submitted, unless agreed between the Parties or expressly authorized by the Tribunal, in accordance with item 15.1 below.

14.15. By 17 December 2010:
Parties submit notifications of the witnesses and experts presented by themselves or by the other Party whom they wish to examine at the Hearing.

14.16. By 10 January 2011:
Pre-Hearing Conference between the Parties and the Tribunal, if considered necessary by the Tribunal, either in person or by telephone.

14.17. As soon as possible thereafter, [the] Tribunal issues a Procedural Order regarding details of the Hearing.

14.18. From 7 to 18 February 2011:
Hearing which shall be held in Paris, unless otherwise agreed between the Parties and the Tribunal.

14.19. After consultation with the Parties during the Hearing, the Tribunal may, if it considers that necessary, extend the Hearing from 21 to 22 February, 2011. The Parties and the members of the Tribunal will block all these days and book accommodation for the full period.

14.20[.] By dates set at the end of the Hearing after consultation with the Parties, Parties may submit Post-Hearing Briefs (no new documents allowed).

(…)

20. Claimant's Application for Provisional Measures

The Tribunal noted that the Claimant submitted on 14 April, 2009 a request for provisional measures.

The Respondent shall submit its response to the Claimant's request for provisional measures on 15 June 2009 (within two months from the first session). The Respondent noted that, if necessary, it may request an extension of this deadline.

A hearing on provisional measures is provisionally fixed by 30 June 2009 in London, if considered necessary by the Tribunal after consultation with the Parties.

If the need arises, the Tribunal shall request from the parties additional information prior to issuing its decision on the Claimant's request.

21. Assistant to the President of the Tribunal

The Parties agreed to the possibility of the President of the Tribunal hiring an assistant of the Tribunal for logistical assistance on the file in this case. In due time, the Parties will be informed of the costs involved and invited to submit any comments they might have.

(…)"

15. By letter of 24 April 2009, Claimant notified the Tribunal about purported violations of the integrity of the arbitral process by Respondent, namely that the Republic of Kazakhstan's Committee of National Security (KNB) had raided several of Claimant's offices in Kazakhstan on 16 and 17 April 2009. With this letter, Claimant requested relief against these purported measures by seeking a letter from the Tribunal to the Parties recommending to refrain from taking steps which aggravate the dispute or violate the Parties' duties of good faith and equality pending the hearing on the Request for Provisional Measures; further by requesting the Tribunal to accelerate the schedule for dealing with the Request for Provisional Measures and by urging the Tribunal to issue any other relief as it sees fit.

16. By a letter of 4 May 2009, the Tribunal set the date for the Hearing on Provisional Measures for 30 June 2009 at the International Dispute Resolution Centre in London, United Kingdom.

17. By letter of 11 May 2009, ICSID notified the Parties that in accordance with the arrangements of the First Session the President of the Tribunal had appointed Mr Dmitry Marenkov as assistant. The Parties did not raise any objections to this appointment.

18. On 14 May 2009 Claimant filed its Memorial.

19. By letter of 19 May 2009, Claimant notified the Tribunal of the alleged house arrest of two of Claimant's overseas workers at Claimant's office in Aktobe by Kazakh authorities. Claimant urged Respondent to release the two employees and return their purportedly confiscated travel and identity documents to them.

20. By letter of 2 June 2009, the Tribunal sent a draft Procedural Order No. 1 (PO-1) to the Parties regarding the details of the Hearing on Provisional Measures in London on 30 June 2009. The Parties were given the opportunity to comment on draft PO-1 by 17 June 2009.

21. On 15 June 2009, Respondent submitted its Response to CIOC's Amended Request for Provisional Measures.

22. On 17 June 2009, the Parties affirmed that after reviewing draft PO-1 they had no comments thereon.

23. On 18 June 2009 the Tribunal issued Procedural Order No. 1 regarding the details of the hearing on provisional measures on 30 June 2009.

24. By letter of 22 June 2009, Claimant responded to a letter dated 10 June 2009 by Executive Secretary of the Ministry of Energy and Mineral Resources (MEMR) Mr K. Safinov addressed to CIOC, a copy of which was sent to the Tribunal by ICSID. Claimant regarded this letter as reply to its letter dated 9 December 2008 where Claimant purportedly expressed its willingness to cooperate with the Kazakhstan government regarding the orderly handover of the Contract Area without prejudice to Claimant's legal rights and defences. In view of the upcoming Hearing on Provisional Measures on 30 June 2009, Claimant proposed a meeting on 24, 25, or 26 June 2009.

25. Respondent by letter of 24 June 2009 communicated that it was logistically not feasible to organise a handover meeting on the dates proposed by Claimant in its letter of 22 June 2009, however, Respondent confirmed its willingness to hold constructive meetings in the Contract Area.

26. A hearing on Claimant's Request for Provisional Measures was held on 30 June 2009 in London, UK.

27. On 2 July 2009, ICSID forwarded to the Tribunal a letter from Claimant dated 1 July 2009 addressed to Respondent regarding the handover meeting of the Contract Area on 8 and 9 July 2009. The letter contained logistical details as well as a draft handover agreement.

28. By letter of 6 July 2009, counsel for Claimant notified the Tribunal of further alleged measures of harassment of CIOC and its Director in the offices of Hourani family companies in Kazakhstan. Claimant requested the Tribunal to take these purported actions into account when considering Claimant's Amended Request for Provisional Measures.

29. Also on 6 July 2009, ICSID forwarded a letter from Respondent dated 3 July 2009 to Claimant regarding the handover of the Contract Area. On the same day, ICSID forwarded to the Tribunal a reply letter from Claimant addressed to Respondent dated 6 July 2009. In it, Claimant addressed *inter alia* terms and conditions for the handover meeting of the Contract Area and expressed its discontent with the representations made by opposing counsel in its letter of 3 July 2009.

30. In its letter to the Tribunal of 9 July 2009, **Respondent notified ICSID that it would not request a bifurcation of the proceedings**, but would reserve its right to submit objections to jurisdiction in its Counter-Memorial on the merits in accordance with ICSID Arbitration Rule 41(1). This declaration by Respondent was later amended in footnote 7 to the Counter-Memorial (p. 11):

> *"The Republic did not request the bifurcation of these proceedings, since it concluded that the Tribunal needed factual information in order to assess these objections* [to jurisdiction] *and such information was best presented with the merits of the case. This however does not mean that the Republic considers these objections to be less serious, and* ***the Republic therefore asks the Tribunal to uphold the objections and to refrain from considering the merits of the case****."* (emphasis added)

31. The Tribunal issued its **Decision Regarding Claimant's Application for Provisional Measures** on 31 July 2009. After a detailed reasoning, the decisions were as follows:

> *"**I. Decisions of the Tribunal***
>
> ***A. Regarding the individual Requests:***
>
> *I.1. Regarding Claimant's Request (a), the requested meeting has been held and therefore the Request is moot and thus there is no need any more for any recommendations in this regard.*
>
> *I.2. Regarding Claimant's Request (b), the Tribunal considers that presently there is no need to recommend provisional measures in this regard.*
>
> *I.3. Regarding Claimant's Requests (c), the Tribunal takes note of and confirms Respondent's undertaking that*
>
> - *all documents taken by Respondent shall be preserved by Respondent,*
> - *Respondent will grant to representatives of Claimant access to all documents to which Claimant requests access,*
> - *the Representatives of Claimant may copy any such documents,*
> - *the Representatives of Claimant may take such copies out of Kazakhstan to London.*
>
> *In this context, the Tribunal understands that the term "documents" includes files, computer disks and other material taken from Claimant's offices by representatives of Respondent so that the undertakings by Respondent above also refer to these other materials.*
>
> *The Tribunal does not consider it necessary to issue any further recommendations for provisional measures in this regard.*

I.4. Regarding Claimant's Requests (d), (e) and (f), the Tribunal confirms that the Parties have an obligation to conduct the procedure in good faith and that this obligation includes a duty to avoid any unnecessary aggravation of the dispute and harassment of the other party.

I.5. Regarding Claimant's Request (g), the Tribunal decides not to recommend any provisional measures concerning the criminal investigation conducted by Respondent, but points out that this is without prejudice to any claims for damages in this regard that the Claimant may raise in the procedure on the merits.

B. Concluding Decision:

I.6. Without prejudice to the rights of the Parties under the ICSID Convention to make renewed applications for provisional measures, for the reasons stated the Tribunal declines Claimant's requests for provisional measures."

32. By letter of 19 August 2009 to counsel for Respondent, Claimant addressed issues regarding the handover of the Contract Area as well as the alleged continuing harassment of its employees by Respondent's officials and agents. Also attached was a draft Handover Agreement for the Caratube oil field.

33. On 3 September 2009, ICSID forwarded a letter from counsel for Respondent of 2 September 2009 addressed to counsel for Claimant regarding the draft Handover Agreement and geological documents concerning the Contract Area. Also attached were a copy of the Minutes of the meeting of 8 and 9 July 2009 and a letter from the MEMR to CIOC of 2 September 2009 regarding the transmission of the above-mentioned geological documents.

34. By letter of 16 October 2009, ICSID forwarded a letter to the Tribunal directed from counsel for Claimant to counsel for Respondent regarding the proposal for the Handover Agreement and related issues thereto.

35. By letter of 30 November 2009, Respondent replied to Claimant's letter from 16 October 2009 referring to the Handover Agreement and related matters thereto.

36. Respondent submitted its Counter-Memorial on Objections to Jurisdiction and the Merits on 22 December 2009.

37. On 15 January 2010, ICSID notified the Tribunal and the Parties that Mr Marat Umerov has been appointed Secretary of the Tribunal to replace Mr Tomás Solís.

38. By letter of 12 February 2010, the Parties requested two amendments to the timetable for the production of documents on which they had reached agreement beforehand. The Tribunal by letter of 13 February 2010 notified the Parties that it did not object to the proposed extensions.

39. By letters of 26 February 2010, the Parties each submitted a document production request as specified in accompanying Redfern Schedules.

40. By letter of 1 March 2010, ICSID on behalf of the Tribunal invited the Parties to submit within one week from the date of the letter, any comments they might have on the other Party's submission of 26 February 2010 and within one further week, any comments in reply to the other Party's comments submitted the week before.

41. On 4 March 2010, Respondent referring to its letter of 30 November 2009 to Claimant, requested Claimant to advise as to Claimant's intentions regarding the handover of the Contract Area.

42. By letters of 8 March 2010, the Parties submitted their comments on the other Party's submission of 26 February 2010. Further, the respective Parties replied to these comments regarding the other Party's submission of 8 March 2010 in letters of 15 March 2010.

43. By letter of 20 April 2010, Respondent reiterated its request to Claimant concerning the orderly handover of the Contract Area and asked for a response within two weeks.

44. By letter of 21 April 2010, ICSID notified the Tribunal that Ms Milanka Kostadinova had been appointed Secretary of the Tribunal to replace Mr Marat Umerov.

45. By letter of 29 April 2010, Claimant notified the Tribunal of a change in counsel. Claimant also informed the Tribunal of a petition it filed under U.S. Code, Title 28, Part V, Chapter 117, § 1782 (Section 1782) in the U.S. District Court for the District of Columbia to compel the production of documents and requested an extension of six months to the procedural schedule.

46. On 3 May 2010, the Tribunal issued **Procedural Order No. 2 (PO-2)** concerning its decision on the Parties' document production requests. The Tribunal also invited Respondent to submit written observations on Claimant's Applications of 29 April 2010 by 10 May 2010. Claimant was granted the right to file a reply thereto by 17 May 2010 to which Respondent could file further comments by 24 May 2010.

47. In view of its later relevance for decisions taken in this Award, sections 1.5., 2.1, and 4 of PO-2 are hereafter quoted:

> *"**1. Introduction***
>
> *(...)*
>
> *1.5. Finally 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***
>
> *2.1 Having considered the related arguments by the Parties regarding the outstanding Requests of Claimant, the Tribunal invites the Parties to produce the documents and information so identified in the right hand column of the Redfern Schedules attached to this PO and also to conduct the investigations specified in the right hand column of the **annexed Redfern Schedules** and produce such documents if the investigations confirm that these documents are in Respondent's possession.*
>
> *(...)*

4. Adverse Inference

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

48. PO-2 was accompanied by two annexes containing both Claimant's and Respondent's Redfern Schedules with respective Decisions by the Tribunal. Some of the decisions dealt with documents allegedly seized by Respondent as follows:

"In so far as the documents were seized, they are to be produced if Respondent has the documents with TU Zapkaznedra. Otherwise, Respondent has to admit access to Claimant according to section I.A.I.3. of the Tribunal's Decision of 31 July 2009."

49. On 10 May 2010, Respondent provided their observations on Claimant's Applications of 29 April 2010, requesting the Tribunal to order Claimant to cease and desist from its action in the U.S. District Court and to reject Claimant's request for an extension of time.

50. On 17 May 2010, Claimant submitted their reply to Respondent's letter of 10 May 2010. In its letter, Claimant requested the Tribunal to confirm that no supportive order from the Tribunal was needed for Claimant's petition under Section 1782 and that the petition was not inconsistent with the rules guiding and governing the Tribunal. Claimant also reiterated its request to obtain a six-month extension.

51. By letter of 19 May 2010, Respondent commented on PO-2 requesting the Tribunal to decide that translations of documents need not be produced by the providing party.

52. Claimant disagreed with Respondent's request of 19 May 2010 by letter dated 21 May 2010, requesting the Tribunal that the paragraph at issue remain unchanged.

53. The Tribunal issued **Procedural Order No. 3 (PO-3)** on 26 May 2010 of which sections still relevant at this stage are quoted hereafter:

"(...)

2. Claimant's Request for a Minimum 6-Month Extension and Respondent's Requests regarding the Section 1782 Petition

(...)

2.5. First, change of counsel, in the view of the Tribunal, is a procedural choice of a party which in itself cannot form a basis for a substantial change in the agreed timetable. This particularly is the case where the application for a long extension is made late in the procedure, in this case four months after the last Memorial by Respondent and more than two months before the Claimant's Reply Memorial is due.

2.6. Second, whilst the Tribunal might have been minded to find that its prior consent should have been sought by Claimant before the presentation of its Section 1782 petition, the Tribunal concludes that it is not necessary for it to order Claimant to cease and desist from the US action. A party starting a Section 1782 procedure before the US courts does so and chooses the time for such a petition at its own risk.

But the existence of such a petition to domestic courts cannot interfere with the Tribunal's maintenance of its authority over the arbitral procedure and with the timetable established with the consent of the Parties.

2.7. Regarding the additional request submitted by Respondent in its letter of 24 May 2010, the Tribunal considers that this is a matter for a later decision. Reference is made to section 2.3. of PO-2. Should Claimant, at a later stage of this arbitral procedure apply to admit any document produced in the Section 1782 procedure, this Tribunal will have to decide on such an application having regard to its obligation to accord procedural fairness to the Parties and particularly to Respondent's right to object and to reply to such a document.

3. Respondent's Request to change section 5.1. of Procedural Order No. 2 regarding the translation of documents

(…)

3.3. For the reasons mentioned in section 5.1 of PO-2, and as this provision equally applies to the production of documents by both parties, the Tribunal concludes that section 5.1 should be maintained."

54. By letter of 28 May 2010, Respondent informed the Tribunal that it is intervening in the petition under Section 1782 brought by Claimant in the U.S. District Court.

55. By letter of 12 July 2010 to the Parties, the Tribunal granted Claimant an extension to 30 July 2010 and Respondent a period of four months plus the extension used by Claimant. The Tribunal reminded the Parties that the date for submission of the lists of witnesses and experts of 17 December 2010 would be maintained.

56. Claimant submitted its Reply Memorial on 30 July 2010.

57. By letter of 12 August 2010, Claimant withdrew the witness statement of Mr Harvey Jackson due to a recent request by his employer.

58. By letter of 13 August 2010, Respondent advised the Tribunal that the court had rejected Claimant's petition under Section 1782 in a decision of 11 August 2010. Claimant's petition to reconsider was rejected on 22 September 2010.

59. By letter of 13 September 2010, Claimant requested the Tribunal to issue an order immunising Claimant's participants, witnesses, and experts from legal process. Claimant further asked the Tribunal to condemn asserted breaches by Respondent of Articles 21 and 22 of the ICSID Convention.

60. By letter of 22 September 2010, Respondent filed its observations regarding Claimant's Request for Immunity from Legal Process requesting the Tribunal to reject Claimant's request. The Parties exchanged further correspondence on the issue.

61. In its letter of 1 October 2010, Respondent objected to Claimant's request for witness immunity.

62. The Tribunal issued **Procedural Order No. 4 (PO-4)** regarding Claimant's Request for an Order on Immunity on 19 October 2010, sections of which are still relevant and are quoted hereafter:

"(...)

4. Regarding the alleged risks of Claimant's witness Dr. Rakhat Shoraz, born Aliyev, the Tribunal considers the following:

4.1. The article in the newspaper FALTER only reports on suspicions and allegations without confirming or proving their validity.

4.2. The "Memorandum" of the Austrian Federal Interior Ministry first reports on a letter received from Mr. Aliyev's attorneys KWR without confirming the authenticity or the correctness of the contents of the letter. However, the memorandum goes on to state:

> *"Regarding the facts at issue – after an exhaustive analysis of the letter – the order was given to inform Attorney Prof. Dr. Brandstetter of the current, actually existing danger situation regarding Dr. Soraz."*

From this wording, it is not clear which information was given by whom to Prof. Brandstetter. But the wording does indicate that the Austrian authority accepted that there was indeed some information regarding a current, actually existing danger situation regarding Dr. Soraz. Finally, the Memorandum records a statement of Prof. Brandstetter, the attorney of Mr. Aliyev, but does not confirm the contents of the statement.

5. While the Tribunal considers that the two documents of evidence submitted by Claimant in this context are not sufficient proof of the alleged threatening activity of Respondent, under the circumstances of this case, the Tribunal finds it appropriate to state the following.

5.1. The immunity granted by Art. 21 and 22 is applicable without a specific order of an ICSID Tribunal. This Tribunal confirms that the immunity granted by Art. 21 and 22 is also applicable to the persons participating in the present ICSID proceedings and particularly that Art. 22 is also applicable to Mr. Aliyev in his capacity as a witness in these proceedings. The tribunal notes with pleasure that Respondent, in its most recent letter of 15 October 2010, expressly states that it welcomes and has no objection to Mr. Aliyev appearing as a witness in the forthcoming hearing.

5.2. Beyond these provisions of Art. 21 and 22, the Tribunal agrees with the Tribunal in the Libananco Case (http://ita.law.uvic.ca/documents/ Libanco-Decision.pdf) that every ICSID tribunal has an inherent power required to preserve the integrity of its own process and assure that the parties can advance their respective cases freely without interference, and as well that the parties have an obligation to arbitrate fairly and in good faith, and that this duty also applies to States as parties to ICSID proceedings, even if in the exercise of their sovereign powers and including criminal proceedings, though the State's right to exercise such sovereign powers and criminal jurisdiction is not questioned.

5.3. This obligation includes the duty of parties not to intimidate, harass, retaliate against, or physically harm parties, witnesses and other participants in ICSID proceedings or prevent them from fulfilling their functions.

5.4. For the present case, this is recalled in view of concern expressed by the Austrian authorities in the Memorandum and also in view of the criminal proceedings of the Respondent against participants in the present case as parties or witnesses from Claimant's side, and particularly in view of the measures taken in Kazakhstan on the same date as the 1st Session of the present proceeding on 16 April 2009 during which many documents were taken from the Claimant's offices. In this regard, reference is made to the respective rulings in the Tribunal's Decision of 31 July 2009 regarding provisional measures and in Procedural Order No.2 regarding document production.

6. In so far as Claimant's Requests go beyond the Tribunal's Statements in section 4 above, they are dismissed."

63. By letter of 2 December 2010, the Tribunal urged the Parties to adhere to the time limits for their respective filings due before the Christmas holidays and reminded them to send these particular submissions not only to ICSID but also directly to the Members of the Tribunal as well as to the new Assistant of the Tribunal Ms Yun-I Kim.

64. By a letter of 13 December 2010, Claimant informed about asserted inacceptable conduct of Respondent which was purported to run counter to the arbitral process.

65. Respondent filed its Rejoinder on Objections to Jurisdiction and the Merits dated 14 December 2010, accompanied by witness statements, expert reports, and exhibits. Due to technical difficulties there was a delay of seven days in transmission of the documents to the Tribunal and to Claimant.

66. On 15 December 2010, Respondent submitted its Response to Claimant's Request to Examine Witnesses Under the Control of Respondent.

67. By email of 17 December 2010, Claimant requested an extension for the filing of the notifications of the witnesses and experts each party wished to examine at the hearing due to the tardy submission of Respondent's Rejoinder. Respondent commented on Claimant's request also on 17 December 2010, noting that Claimant's request was disproportionate.

68. By email of 18 December 2010, the President on behalf of the Tribunal granted an extension. The Parties were thus given time until 22 December 2010 to submit their notifications of the witnesses and experts from each side respectively who they wished to examine at the hearing. The Tribunal further reminded the Parties that they should send any comments they might have regarding draft Procedural Order No. 5 by 22 December 2010 also. Furthermore, Respondent was invited to submit a reply to Claimant's Application of 13 December 2010.

69. On 21 December 2010, ICSID transmitted hard copies of Respondent's Rejoinder and Respondent's Response to CIOC's Request to Examine Witnesses Under the Control of Respondent to the Tribunal.

70. By letter of 22 December 2010, the Parties submitted their respective lists of witnesses and experts whom they wished to examine at the hearing in Paris. By letter of that same date, Respondent submitted its comments on draft PO-5. In a further letter of that day, Respondent provided comments to Claimant's request of 13 December 2010.

71. By letter of 23 December 2010, Claimant provided its response to Respondent's letter of 22 December 2010 regarding Claimant's request of 13 December 2010.

72. By email of 29 December 2010, **Procedural Order No. 5** and **Procedural Order No. 6** were issued to the Parties. As the preparation of the hearing was highly disputed between the Parties, relevant sections are quoted hereafter:

"Procedural Order (PO) No. 5
Regarding further details of the Hearing in Paris

In order to allow the Parties an early and efficient preparation of the hearing in Paris scheduled to start on 7 February 2011 and without prejudice to the option for a pre-hearing conference provided in section 14.16. of the Minutes of the 1st Session, a draft of this PO has been communicated to the Parties who were invited to submit any comments they may have by 22 December 2010.

Now, taking into account:

- *the comments on the draft received from the Parties,*
- *the Respondent's Rejoinder,*
- *the Parties witness notifications[,]*
- *the further submissions received from the Parties,*

the Tribunal decides that in view of the extensive written submissions received from the Parties, a telephone conference is not necessary, and hereby issues the PO in its final form.

1. Introduction

*1.1. This Order recalls the **earlier agreements and rulings** of the Tribunal and particularly takes into account the recent submissions and letters of the Parties.*

1.2. In particular, sections 8 and 15 of the Minutes of the 1st Session are recalled and hereby confirmed. The Parties are invited to assure that these provisions are complied with.

1.3. By 17 January 2011, the Parties:

- *may submit further documents, but only in rebuttal of the recent submissions by the other Party; thereafter, no further documents may be submitted before or at the hearing unless expressly authorized by the Tribunal;*
- *shall submit notifications of the persons who will be attending the hearing on their respective sides;*
- *may submit a notification if they do not intend to examine any of the witnesses so far notified. If a Party does not call a witness for cross-examination at the hearing, this will not be considered as an acceptance of that witness' testimony;*

- *shall notify which of its witnesses and experts, if any, require interpretation from and to English;*
- *may submit a notification on any agreement they have reached regarding the order for the examination of witnesses and experts during the hearing;*
- *shall submit either agreed or separate lists suggesting which experts should be examined together by Expert Conferencing;*
- *shall submit either agreed or separate short lists of issues which they suggest for each group of experts to be raised by Expert Conferencing, taking into account that no repetition of the contents of the written expert reports is necessary and that the Conferencing should focus on the clarification of major issues on which the experts disagree.*

(…)

2.2. As agreed, ten working days are blocked from 7 to 18 February 2011, and the hearing may be extended to include 21 and 22 February 2011, if considered necessary by the Tribunal after consultation with the Parties.

2.3. 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. Conduct of the Hearing

*3.1. In addition to the provisions of **the Minutes of the 1st Session**, the following shall apply:*

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

1. Introduction by the Chairman of the Tribunal.
2. Opening Statements of not more than 1.5 hours each for the
a) Claimant,
b) Respondent.

3. Unless otherwise agreed by the Parties: Examination of Claimant's fact witnesses. For each:
a) Affirmation of witness to tell the truth.
b) Short introduction by Claimant (This may be up to 10 minutes and may be longer to include a short direct examination on new developments after the last written statement of the witness or expert.).
c) Cross-examination by Respondent.
d) Re-direct examination by Claimant, 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 Claimant's and Respondent's industry experts, if any, by the method of Expert Conferencing. For each: as under 3.a) to f) above. The Tribunal intends to start the Conferencing by questions of its own taking into account the above lists of issues received from the Parties, and thereafter, the Parties may raise further questions.*

6. *Examination of Claimant's and Respondent's experts on quantum, if any, by the method of Expert Conferencing. For each: as under 3.a) to f) above. The Tribunal intends to start the Conferencing by questions of its own taking into account the above lists of issues received from the Parties, and thereafter, the Parties may raise further questions.*

7. *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 or expert during the time of the Hearing.*

8. *At an appropriate time during the hearing, after consultation with the Parties, the Tribunal will decide, how much time of a break shall be allotted to the Parties for preparation of their Closing Statements.*

9. *Closing arguments of up to 2 hours each for the*
   a) Claimant,
   b) Respondent.

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

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

(...)

3.6. No documents may be presented at the Hearing, unless authorized by the Tribunal. According to section 15.1. second paragraph of the Minutes of the 1st Session, this also applies to documents impeaching the credibility of a witness or expert. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.

(...)

4.3. The Tribunal may change any of the rulings in this order Order[sic], after consultation with the Parties, if considered appropriate under the circumstances."

73. Attached to PO-5 was a timetable with a calculation of hearing time.

74. For the same reasons, hereafter PO-6 is quoted which was as well issued on 29 December 2010:

*"**Procedural Order (PO) No. 6***
regarding outstanding applications by Claimant

A. ***Claimant's Request to Examine Witnesses under the Control of Respondent***

1. *The Tribunal has taken note of the Claimant's Request dated 10 November 2010, of Respondent's undated Response received on 22 December 2010, and of the Parties' further submissions with further references to issues in that context. The Tribunal does not consider it necessary to repeat or summarize the factual and legal arguments submitted by the Parties which it has carefully evaluated and taken into account in coming to the following conclusions.*

2. *Regarding the Tribunal's authority to order the presence of persons for examination at the hearing, the Parties agree, and the Tribunal also agrees, that Art. 43 ICSID Convention provides for such an authority and that Art. 4.11 of the IBA Rules of Evidence (1999) provides guidance in this context.*

3. *The Tribunal recalls the agreement recorded in section 15.2 of the Minutes of the 1st Meeting.*

4. *In that context, the Tribunal clarifies that if a witness or expert 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 and in such a case the Tribunal may take the arguments of both Parties into account in its decision regarding the evaluation of the evidence provided by such testimony including the option to draw inferences from the non-appearance.*

5. *If the presence is requested by a Party of persons who have not submitted written statements, but on whose statements, letters or behaviour the Parties have relied in their submissions, guided by Art. 4.11 IBA Rules of Evidence, the Tribunal invites both Parties to use their best efforts to provide their appearance at the hearing. If such a person does not appear, the Tribunal will take into account the relevancy and materiality, if any, that could have been expected from an oral examination of that person in view of the existing submissions of the Parties, the reasons put forward for the non-appearance, as well as the respective arguments of both Parties, in its decision regarding the evaluation of the evidence of the case including the option to draw inferences from the non-appearance of such persons.*

6. *Particularly regarding any persons referred to by the Parties in connection with the allegedly forged documents, the Tribunal would consider it helpful if these persons could be available for oral examination at the hearing. In so far as they do not attend, the Tribunal will apply the approach described above in section 5.*

7. *The Parties are invited to submit by 17 January 2011 a list of the persons whose presence they will provide for at the hearing in view of the above rulings.*

B. ***Claimant's Request dated 13 December 2010 for an Additional Order***

1. The Tribunal has taken note of Claimant's Request of 13 December 2010, of Respondent's Reply letter of 22 December 2010, as well as of the other submissions by the Parties relevant in this context. Again, the Tribunal does not consider it necessary to repeat or summarize the factual and legal arguments submitted by the Parties which it has carefully evaluated and taken into account in coming to the following conclusions.

2. The Tribunal recalls its Procedural Order No.4.

3. The Tribunal considers that its following adapted rulings from section 5 of PO No. 4 shall also apply to all persons referred to above in section A of the present PO:

3.1. The immunity granted by Articles 21 and 22 of the ICSID Convention is applicable without a specific order of an ICSID Tribunal. This Tribunal confirms that the immunity granted by Articles 21 and 22 is also applicable to the persons participating in the present ICSID proceedings and, particularly, that Article 22 is also applicable to the persons participating according to section A above.

3.2. Beyond the provisions of Articles 21 and 22, the Tribunal agrees with the Tribunal in the Libananco Case (http://ita.law.uvic.ca/documents/Libanco-Decision.pdf) that every ICSID tribunal has an inherent power required to preserve the integrity of its own process and assure that the parties can advance their respective cases freely without interference, and as well that the parties have an obligation to arbitrate fairly and in good faith, and that this duty also applies to States as parties to ICSID proceedings, even if in the exercise of their sovereign powers and including criminal proceedings, though the State's right to exercise such sovereign powers and criminal jurisdiction is not questioned.

3.3. This obligation includes the duty of parties not to intimidate, harass, retaliate against, or physically harm parties, witnesses and other participants in ICSID proceedings or prevent them from fulfilling their functions.

3.4. For the present case, this obligation is recalled in view of the criminal proceedings of the Respondent against participants in the present case as parties or witnesses from Claimant's side, or as persons whose presence at the hearing Claimant now requests, in view of the measures taken in Kazakhstan on the same date as the 1st Session of the present proceeding on 16 April 2009 during which many documents were taken from the Claimant's offices, and also in view of the further actions which Claimant alleges Respondent [has] *taken thereafter but without prejudice to the correctness or relevance of such allegations. In this regard, reference is also made to the respective rulings in*

the Tribunal's Decision of 31 July 2009 regarding provisional measures and in Procedural Order No. 2 regarding document production.

4. *The Tribunal recalls section 15.1 of the Minutes of the 1st Session and, in order to have all relevant evidence available at the time of the final hearing in this case, hereby admits the evidence submitted by the Parties so far. In accordance with the last sentence of the 3rd paragraph of that section, the Tribunal, in section 1.3 of PO-5, has granted the Parties the opportunity to submit evidence in rebuttal by 17 January 2011.*

C. *In so far as Claimant's Requests go beyond the Tribunal's rulings in sections A and B above, they are dismissed."*

75. By letter of 29 December 2010, Respondent objected to Claimant's purported intention to file new exhibits in response to Respondent's Rejoinder without prior authorisation of the Tribunal.

76. By email of 4 January 2011, ICSID wrote to the Parties as instructed by the President of the Tribunal noting that Respondent's letter of 29 December 2010 seemed to have crossed with the issuance of PO-5 and PO-6 and informing them of clarifications and amendments regarding the filing of further exhibits. Claimant was thus required to submit any further exhibits in rebuttal to Respondent's Rejoinder by 12 January 2011 to which Respondent might submit evidence with its filings of 17 January 2011.

77. By email of 12 January 2011, Claimant submitted further exhibits in rebuttal to Respondent's Rejoinder of 14 December 2010.

78. By email of 13 January 2011, Claimant provided an additional exhibit it had just received that day in rebuttal to Respondent's allegation of forgery in Respondent's Rejoinder.

79. By letter of 14 January 2011 to the Parties, ICSID confirmed the hearing dates, time and location and invited them to advise ICSID of any logistical or other requirements by 19 January 2011.

80. By letter of 14 January 2011, Claimant submitted three further exhibits.

81. By letter of 17 January 2011, Respondent provided a list of witnesses and experts whom it wished to examine at the Paris hearing together with information on the persons who would be attending the hearing on their side, the witnesses Respondent did not intend to examine, the witnesses and experts who would require interpretation to and from English, the experts that Respondent suggested to be examined by Expert Conferencing, and issues that should be raised by each group of experts during Expert Conferencing.

82. By further letter of 17 January 2011, Respondent provided comments on Claimant's submissions of 13 and 14 January 2011 as well as Claimant's submissions of December 2010. The letter was accompanied by exhibits and expert opinions.

83. Also by letter of 17 January 2011, Claimant submitted a list of persons attending the hearing on its behalf, a list of those witnesses it did no longer intend to examine at the hearing, a list of witnesses requiring interpretation to and from English, a list of experts to

be examined together by Expert Conferencing, and further issues regarding the preparation of the hearing.

84. In a letter of 18 January 2011, Claimant sought authorisation by the Tribunal to submit further exhibits as rebuttal evidence in the proceedings. The exhibits at issue were attached to the letter.

85. By letter of 19 January 2011, Claimant responded to Respondent's letter of 17 January 2011 in which Respondent had requested the Tribunal to exclude certain exhibits submitted by Claimant between 12 and 14 January 2011. Claimant further addressed procedural issues with regard to the hearing.

86. By email of 19 January 2011, ICSID transmitted two letters from Mr Rashid Farah of the Lebanese law firm Abouhamad, Marheb, Nohra, Chamoun, Chedid to the Tribunal.

87. By email of 21 January 2011, ICSID transmitted a letter from one of Claimant's witnesses, Mr Fadi Hussein, who declined to testify at the hearing to the Tribunal.

88. By letter of 23 January 2011, Respondent provided comments on Claimant's letters of 17, 18, and 19 January 2011 as well as on issues regarding the hearing and recent filings of Claimant.

89. After many further submissions of the Parties, by **letter of 24 January 2011**, ICSID notified the Parties as instructed by the Tribunal of its decisions regarding the admissibility of certain party submissions, witnesses and experts, and further outstanding matters. In view of its relevance later in the proceedings, the letter is quoted hereafter:

> *"1. The Tribunal has carefully considered the many recent submissions by the Parties regarding the preparation and conduct of the Hearing in Paris. In view of the many issues addressed and in order to give the Parties guidance for their preparation of the Hearing without further delay within the very short time available up to the Hearing, and in order to avoid longer time that would be needed for the members of the Tribunal, who also have mandatory commitments in other cases during that period, to elaborate and agree on a longer text defining in detail the considerations and reasons of the Tribunal, the Tribunal has decided to hereby inform the Parties of its following preliminary rulings.*
>
> *2. Documents Submitted by the Parties*
>
> *2.1. The Tribunal appreciates the submissions of the Parties indicating that and why certain documents recently submitted by the Parties should or should not be admitted. However, the Tribunal considers it as important that, at the final hearing of this case, all documents that the Parties consider as relevant, can be considered and discussed.*
>
> *2.2. Therefore, the Tribunal provisionally admits all documents submitted [by] the Parties up to now, and the two letters submitted by Mr. Rashid Farah forwarded to the Parties by the Tribunal's Secretary at ICSID by e-mail of 19 January 2011.*
>
> *2.3. At the Hearing, the Parties should be prepared to comment on all new documents, may refer to and rely on these documents (provided they*

are in English or translated into English), may explain why they consider them admissible or inadmissible beyond what they have already argued in their written submissions, and may request to further discuss these documents in their post-hearing submissions.

2.4. Any further submissions by the Parties have to be made, as is the general rule in ICSID proceedings, to ICSID without any copies sent directly to members of the Tribunal.

2.5. Taking all these presentations of the Parties into account, the Tribunal will then decide on the final admissibility of documents it considers it[sic] relevant for its decisions and whether it can rely on such document for its decision.

3. Witnesses and Experts

3.1. Again, the Tribunal appreciates the submissions of the Parties indicating that and why certain witnesses and experts should or should not be admitted and examined at the Hearing. However again, the Tribunal considers it as important that, at the final hearing of this case, all evidence that the Parties consider as relevant, can be considered and discussed.

3.2. The Tribunal recalls and confirms its Procedural Order No. 6.

3.3. The Tribunal has taken note of and accepts the Parties' submissions regarding the witnesses and experts that will and will not be present at the Hearing and regarding the witnesses they do not intend to examine at the Hearing. The rulings of PO6 will be applied in this regard and their examination will be conducted in accordance with Procedural Order No. 5.

3.4. Since the Parties have not agreed on any changes, the examination will be conducted in the order given by the Agenda given in sections 3.2 and 3.3 of PO5.

3.5. In so far as certain witnesses or experts cannot be present for the entire period of the Hearing, the Parties are invited to agree on certain time frames in this regard and inform the Tribunal at the beginning of the Hearing.

3.6. The Tribunal has taken note that the Parties' suggestions regarding the groups of experts for the expert conferencing are not identical. The Parties are invited to agree in this regard and inform the Tribunal at the beginning of the Hearing.

4. Outstanding Matters

4.1. The Tribunal will deliberate in the morning before the hearing whether it considers any further rulings as necessary and inform the Parties at the beginning of the Hearing.

4.2. Any further outstanding matters will be discussed with the Parties at the beginning or at an appropriate time of the Hearing."

90. Also by letter of 24 January 2011, Claimant commented on Respondent's letter of 23 January 2011, in particular on Respondent's objection to the attendance of three persons at the hearing on Claimant's behalf.

91. By letter of 26 January 2011, the Tribunal proposed changes in the logistical arrangements of the upcoming hearing.

92. By letter of 31 January 2011, the ICSID Secretariat provided the Parties with further logistical information about the hearing.

93. Also on 31 January 2011, Respondent provided comments on ICSID's letter of 24 January 2011 concerning Claimant's filing of 13 December 2011 and Claimant's filing of voluminous documents shortly before the hearing. Respondent further commented on matters of procedure regarding witness and expert testimony as well as the proposed attendance of certain persons at the hearing.

94. On 1 February 2011, Claimant provided the Arabic transcription and the English translation of exhibit C-288.

95. On 2 February 2011, Claimant submitted several exhibits relating to the Law of the Republic of Kazakhstan "On Subsoil and Subsoil Use" No. 2828 of 27 January 1996 as requested by ICSID on 11 January 2011.

96. By letter of 2 February 2011, ICSID provided further information regarding the logistical arrangements for the upcoming hearing to the Parties.

97. By letter of 4 February 2011, Claimant introduced further exhibits with respect to allegations regarding the transfer of the Caratube Contract from CCC to CIOC (C-313 to C-317) for which it sought authorisation for submission in the proceedings.

98. With letter of 5 February 2011, Respondent informed the Tribunal of changes in the availability of one of its witnesses. Furthermore, Respondent modified its list of attendants for the hearing.

99. By letter of the same day, Respondent replied to Claimant's letter of 4 February 2011 and requested the authorisation to submit further exhibits in return should the Tribunal approve Claimant's request of 4 February 2011.

100. From 7 to 17 February 2011, the **Hearing on Jurisdiction and the Merits** was held in Paris, France. It was attended by:

Members of the Tribunal:
Prof. Dr. Karl-Heinz Böckstiegel, President
Dr. Kamal Hossain, Arbitrator
Dr. Gavan Griffith QC, Arbitrator

For the Tribunal:
Milanka Kostadinova, Secretary to the Tribunal
Yun-I Kim, Assistant to the Tribunal
Tanha Zarrin Ahmed, Assistant Accompanying Dr. Kamal Hossain

On behalf of the Claimant:
Stuart H. Newberger, Baiju S. Vasani, Michael L. Martinez, Ian Laird, Clifton Elgarten, Dana Contratto, Claire Stockford, Meriam Alrashid, Emily Alban, Julia Cayre, Staci Gellman, Natalie Figuereo, George Smith and Benjamin Folkinshteyn, Crowell & Moring, LLP
Bassem Waarie, Khalil Hawari and Danik Mashru, Caratube International Oil Company LLC
Didier Bollecker and Eve-Marine Bollecker, Human Rights Counsel for Dr Rakhat Aliyev
Dr Otto Dietrich, Austrian Counsel to Dr Rakhat Aliyev
Sven Tiefenthal, TRACS International
Tim Giles and Jessica Resch, Charles River Associates
Scott Horton, Expert to Claimant

On behalf of Respondent:
Peter M. Wolrich, Geoffroy Lyonnet, Gabriela Alvarez Avila, Jérôme Lehucher, Jennifer Morrison, Stéphanie Picot, Leila Shayakhmetova, Diora Ziyaeva, Jorge Stepensky Koplewicz, Kamilla Hassen, Suleika Jouad, Kateryna Kuntsevich and Noemie Solle, Curtis, Mallet-Prevost, Colt & Mosle LLP
Marat Beketayev, Executive Secretary of the Ministry of Justice of the Republic of Kazakhstan
Yerlan Tuyakbayev, Director of the Department of the Protection of Property Rights of the State of the Ministry of Justice of the Republic of Kazakhstan
Meiram Tautenov, Head of the Department of Central Transport Prosecutor Office of the Republic of Kazakhstan
Dr Mihir K. Sinha, Victoria Baikova and Suresh Chugh, IFM Resources, Inc.
Dr Mangat R. Thapar, International Geophysical Company, Inc.
Vladimir Brailovsky, Economía Aplicada SC
Max-Peter Ratzel, Former Head of the Department Counteracting International Crime at the German Bundeskriminalamt and Former Director of Europol
Martha Brill Olcott, Senior Associate at Carnegie Endowment for International Peace

Interpreters:
Vadim Poliakov, Iouri Ostrovski, Paul Belopolsky and Jan Krotki, Russian interpreters
Asma Benyagoub, Mohamed Assi and Anne-Marie Arbaji-Sfeir, Arabic interpreters

Court Reporter:
Trevor McGowan

101. The details of the hearing were provided in the Transcript delivered each day after the hearing in electronic and paper format. Regarding possible objections of the Parties to the procedure by the Tribunal, the following passage from the Transcript of the Hearing is quoted (Tr, day 10, p. 73–74):

> *"THE PRESIDENT: […] This then brings us to the real end of our procedure, and I would like to thank both counsel for being so helpful in finely focusing again [on] things in such a short time. Of course, we will get much more focusing and longer*

focusing in the post-hearing briefs, and that's indeed what we need, but this has been helpful, let me say that.
As we all know, this has not been an easy case. I think we have all had easier procedures in the past. There were many reasons for that, and I don't think we should go into that. We are also aware that at various stages a party put an objection on the record. That happens, and again that is nothing so unusual.
Nevertheless let me at this final stage also raise the usual question: do the parties have any objection of the way this Tribunal has conducted the procedure?

MR VASANI: Claimant has no objection.

THE PRESIDENT: Thank you. Respondent?

MR WOLRICH: Mr Chairman, respondent certainly has no objection to the manner in which the Tribunal has conducted this procedure. We just maintain whatever objections we made on the record for the record, and those we maintain. But they don't really go to the way the Tribunal conducted this hearing, which I think is exemplary.

THE PRESIDENT: Thank you very much indeed. […]"

102. Taking into account the discussion and agreement with the Parties at the end of the hearing, on 22 February 2011, the Tribunal issued **Procedural Order No. 7** regarding the post-hearing procedure. In view of their relevance for the final procedure in this case, the following excerpts are quoted hereafter:

" (…)

1.7. With regard to the withdrawal of the documents C162, C175, C238, C239, C240 and "ALIYEV 25" communicated by Claimant during the hearing, the Tribunal accepts such withdrawal. But the Parties may refer to the filing and withdrawal of these documents.

(…)

2. Questions of the Tribunal

Without prejudice to the final relevance the Tribunal may attribute to them for its decisions, the Parties are particularly requested to address the following questions and issues in separate sections of the Post-Hearing Briefs:

2.1. Which considerations do the Parties have regarding jurisdiction at this stage?

2.2. Which Party has the burden of proof for which aspects of the case?

2.3. To which extent may alleged breaches of the contract be relevant for alleged breaches of the BIT, either by application of the Umbrella-Clause or otherwise?

2.4. After receiving the Post-Hearing Briefs of the Parties, and in the course of its deliberations thereafter, the Tribunal may invite comments from the Parties regarding further issues.

(…)"

103. On 12 April 2011, the Tribunal issued Procedural Order No. 8 regarding the Parties' applications to submit further documents. It read as follows:

*"**Procedural Order (PO) No. 8***
Regarding the Parties' Applications to Submit Further Documents

The Tribunal has reviewed the Parties' letters of 4 April 2011 and the enclosed applications for the exceptional admission to submit further documents according to § 1.3 of Procedural Order No. 7.

Taking into account the respective discussions during the hearing with regard to the criteria for the admission of new documents, in the view of the Tribunal the applications in the form of Redfern Schedules contain all relevant further arguments. The Tribunal therefore does not consider it necessary to repeat the arguments with regard to the individual applications in the Schedules.

Rather, after its evaluation of the respective arguments, the Tribunal herewith attaches the two Redfern Schedules in which, in the right hand column, the Tribunal has inserted its respective decisions regarding each individual application. The two Redfern Schedules form an integral part of this Procedural Order."

104. By letter of 3 May 2011, Claimant informed the Tribunal of alleged bankruptcy proceedings at the request of Kazakh authorities and requested the Tribunal to elicit Respondent to cease and desist, and instruct its organs to cease and desist, to declare Claimant bankrupt or seek its liquidation or change its legal status and require the Tribunal's permission before any other measure against Claimant of any nature is taken which could affect these proceedings.

105. On 17 May 2011, Respondent informed that the bankruptcy proceedings are being discontinued.

106. By letter of 3 June 2011, the Tribunal informed the Parties of a submission made by a non-disputing party. The Parties filed their observations in accordance with Rule 37(2) of the ICSID Arbitration Rules.

107. By letter of 22 June 2011, the Tribunal informed the Parties and Counsel for the non-disputing party that the submission of the non-disputing party shall not be admitted.

108. On 27 June 2011 the Parties submitted their post-hearing briefs.

109. By separate letters of 11 July 2011, Respondent submitted an application for rebuttal submissions. Claimant informed the Tribunal that it would not submit an application for rebuttal submissions.

110. On 2 August 2011, the Tribunal issued **Procedural Order No. 9** (PO-9) regarding the Parties' applications to submit rebuttal arguments, inviting the Parties to submit additional arguments simultaneously by 10 August 2011, in memorials not exceeding 10 pages.

111. By 10 August 2011, the Parties submitted short memorials in accordance with PO-9.

112. By letter of 12 October 2011, the Tribunal asked the Parties to submit their respective statements of costs no later than 31 October 2011 and to submit comments on each other's cost statements by 11 November 2011.

113. By letter of 26 October 2011, Claimant informed the Tribunal that the Parties had mutually agreed to an extension for the submission of statements of costs to 7 November 2011 and an extension to submit comments on each other's statements of costs by 18 November 2011.

114. By letter of 7 November 2011, the Parties simultaneously submitted their statements of costs and corresponding documentation.

115. On 18 November 2011, the Parties submitted comments on each other's statement of costs.

116. On 9 May 2012 the Tribunal closed the proceedings. The arbitrators are satisfied that both Parties had ample opportunities to present their case in written and oral form.

E. The Principal Relevant Legal Provisions

E.I. The Kazakhstan–U.S. Bilateral Investment Treaty

117. The principal relevant legal provisions for this arbitration in the BIT are as follows:

> *"Article I*
>
> *1. For the purposes of this Treaty,*
>
> *(a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:*
>
> *(i) tangible and intangible property, including movable and immovable property, as well as rights, such as mortgages, liens and pledges;*
> *(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;*
> *(iii) a claim to money or a claim to performance having economic value, and associated with an investment;*
> *(iv) intellectual property which includes, inter alia, rights relating to:*
> *literary and artistic works, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and*
> *(v) any right conferred by law or contract, and any licenses and permits pursuant to law;*
>
> *(b) "company" of a Party means any kind of corporation, company, association, enterprise, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled;*
>
> *(c) "national,[sic]" of a Party means a natural person who is a national of a Party under its applicable law;*
>
> *(d) "return" means an amount derived from or associated with an investment, including profit; dividend; interest; capital gain; royalty payment; management, technical assistance or other fee; or returns in kind;*
>
> *(e) "associated activities" include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices,*

factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual property rights; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; and the purchase of foreign exchange for imports;

2. *Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.*

3. *Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment."*

"Article VI

1. *For purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.*

2. *In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:*
   - *(a) to the courts or administrative tribunals of the Party that in[sic] a Party to the dispute; or*
   - *(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or*
   - *(c) in accordance with the terms of paragraph 3.*

3. *(a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:*
   - *(i) to the International Centre for the[sic] Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a Party to such Convention; or*

(ii) to the Additional Facility of the Centre, if the Centre is not available; or

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

(iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.

(b) Once the national or company concerned has so consented, either Party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

(a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and

(b) an "agreement in writing," for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").

5. Any arbitration under paragraph 3(a)(ii), (iii) or (iv) of this Article shall be held in a state that is a Party to the New York Convention.

6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.

7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concern ad[sic] has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention."

E.II. Contract No. 954 – The Exploration and Production Contract

118. Subject to the Parties' submissions, the following provisions from Contract No. 954 are the principal legal provisions relevant for this dispute:

> *"27. Procedure for Dispute Resolution*
>
> *27.1 The Parties shall take all measures to resolve all disputes arising from the Contract by negotiations.*
>
> *27.2 Referral to Arbitration. In the event that any dispute cannot be resolved by amicable settlement within sixty (60) days after notice in writing of such by one Party to the other Party, the Parties agree that their exclusive means of dispute resolution shall be (a) to submit the matter to arbitration for final settlement in accordance with the then current Rules of Conciliation and Arbitration of the International Centre for Settlement of Investment Disputes ("ICSID") if the Competent Authority has become a party to the ICSID Convention at the time a proceeding is instituted, or (b) to submit the dispute for resolution according to the Arbitration (Additional Facility) Rules of ICSID if the Competent Authority has not become a party to the ICSID Convention at the time when any proceeding is instituted. Any arbitral tribunal constituted pursuant to this Contract shall consist of three arbitrators, one appointed by the Contractor and one appointed by the Competent Authority, and a third arbitrator, who shall be president of the Tribunal and shall not be a resident of Kazakhstan, appointed by agreement of the Parties, or failing such agreement, by the Chairman of the Administrative Council of ICSID. In the event that the Contractor or the Competent Authority fails to appoint an arbitrator within ninety (90) calendar days after the notice of registration of a request for arbitration has been sent, the remaining arbitrators shall be appointed in accordance with the Rules under ICSID.*
>
> *27.3 If for any reason the request for the arbitration proceeding is not registered by ICSID or if ICSID fails or refuses to take jurisdiction over any matter submitted by the Parties under this Section 27, such matter shall be referred to and resolved by arbitration in accordance with the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules in effect at the date of submission of the matter. The seat of Arbitration shall be London, England. In such event the Parties hereby consent to the jurisdiction of the London Court of International Arbitration and all the provisions of this Article 27 shall equally apply to such arbitration.*
>
> *27.4 Proceedings. The English language shall be used throughout the arbitral proceedings and the proceedings shall be held in London, England unless otherwise agreed by the Parties. The Parties shall be entitled to be legally represented at the arbitration proceedings, however the absence or default of a Party shall not prevent or hinder the arbitration proceedings at any stage. All notices given by one Party to the other in connection with the arbitration shall be given in accordance with this Contract.*

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

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

27.7 Enforcement and Consent. Each of the Parties hereby consents to submit to 1CSID any dispute, controversy or claim arising out of or in connection with this Contact[sic]. Each of the Parties agrees that any judgement rendered by the arbitrators against it and entered in any court of record in London, England or any other competent court, may be executed against its assets in any jurisdiction. The Parties consent to being sued for enforcement of the award and any costs, fees or other charges for which they may be liable under this Article. Each of the Parties hereby agrees that all of the transactions contemplated by this Contract shall constitute and shall be deemed to constitute an investment within the jurisdiction of ICSID. The Competent Authority warrants that it is a structural subdivision and agent of the Government of the Republic of Kazakhstan.

27.8 Furthermore, it is hereby agreed that the Contractor is a resident of Lebanon, or in the event of assignment as a national of the resident country of the assignee, and therefore the Contractor shall be treated as a resident of Lebanon, or other country if appropriate, for purposes of the ICSID Convention.

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

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

performance of obligations under this Contract then the period for the performance of those obligations and any obligations relevant thereon shall be extended by the period between the date of the notice of arbitration to the date of compliance with the award."

E.III. Relevant ICSID Convention Provisions

119. The principal legal provision of the ICSID Convention relevant for the present dispute is as follows:

"Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1)."

E.IV. Vienna Convention on the Law of Treaties

120. The Parties in their submissions referred the Tribunal to the VCLT, the terms of which are also considered declaratory of customary international law. The principal relevant provisions are:

> *"Article 31*
> *General rule of interpretation*
>
> *1. A 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.*
>
> *2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
>
> *(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
>
> *(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
>
> *3. There shall be taken into account, together with the context:*
>
> *(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
>
> *(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
>
> *(c) any relevant rules of international law applicable in the relations between the parties.*
>
> *4. A special meaning shall be given to a term if it is established that the parties so intended.*
>
> *Article 32*
> *Supplementary means of interpretation*
>
> *Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*
>
> *(a) leaves the meaning ambiguous or obscure; or*
> *(b) leads to a result which is manifestly absurd or unreasonable."*

F. Relief Sought by the Parties

F.I. Relief Sought by Claimant

121. As identified in Claimant's Request for Arbitration of 16 June 2008, Claimant asks the Tribunal to award as follows (C-I, para. 86):

> *"Accordingly the Claimant requests the following relief:*
>
> *(i) an order declaring that Kazakhstan has violated Articles II(2)(a), (b) and (c) as well as Article III of the BIT, as well as its obligations under international law, Kazakh law and the Contract;*
>
> *(ii) an order directing Kazakhstan to pay damages equivalent to the financial loss and damage, including lost profit, which CIOC has suffered as a result of Kazakhstan's breaches of the BIT as well as its obligations under international law, Kazakh law and the Contract;*
>
> *(iii) an order directing Kazakhstan to pay all costs incurred in connection with these arbitration proceedings, including the costs of the arbitrators and of ICSID, as well as legal and other expenses incurred by CIOC including the fees of its legal counsel, experts and consultants and those of CIOC's own employees on a full indemnity basis, plus interest thereon at a reasonable rate from the date on which such costs are incurred to the date of payment; and*
>
> *(iv) such other relief as the arbitral tribunal may deem just and proper."*

122. Claimant's Memorial of 14 May 2009 contains the following prayer for relief (C-IV, para. 285):

> *"For the foregoing reasons, CIOC hereby requests:*
>
> *(1) orders adjudging and declaring:*
>
> *(a) that Kazakhstan has violated Article II(2)(a) of the Treaty, by failing to accord to CIOC's investment "fair and equitable treatment";*
>
> *(b) that Kazakhstan has violated Article II(2)(a) of the Treaty, by failing to ensure that CIOC's investment "shall enjoy full protection and security";*
>
> *(c) that Kazakhstan has violated Article II(2)(a) of the Treaty, by failing to ensure that CIOC's investment shall not be accorded "treatment less than that required by international law";*

(d) that Kazakhstan has violated Article II(2)(b) of the Treaty, by impairing CIOC's investment "by arbitrary or discriminatory measures";

(e) that Kazakhstan has violated Article II(2)(c) of the Treaty, by failing to "observe any obligation it may have entered into with regard to investments";

(f) that Kazakhstan has violated Article III of the Treaty by unlawfully expropriating CIOC's investment:

(i) without public purpose;

(ii) in a discriminatory manner; or

(iii) not in accordance with due process of law and the general principles of treatment provided for in Article II(2) of the Treaty;

(g) that Kazakhstan has violated Article III of the Treaty by expropriating CIOC's investment without payment of prompt, adequate and effective compensation; or

(h) that Kazakhstan has violated its legal obligations under customary international law, Kazakh law and the Contract;

*(2) an order directing Kazakhstan to pay to CIOC the sum of **USD 1,005.7 million**, being damages or compensation for the violations listed in sub-paragraphs 1(a) to (h) above and determined by reference to the "fair market value" of CIOC's investment as at 31 January 2008, in "fully realizable" and "freely transferable" currency;*

*(3) an order directing Kazakhstan to pay to CIOC interest on the sum of USD 1,005.7 million, at the rate of **3.7% per annum**, compounded quarterly, being a "commercially reasonable rate of interest", calculated from 31 January 2008 to the date of award;*

(4) an order directing Kazakhstan to pay to CIOC such monetary damages as the Tribunal considers reasonable in all the circumstances for the moral, non-material damage done to CIOC, its majority owner, senior management and employees;

(5) an order directing Kazakhstan to pay all costs incurred in connection with these arbitration proceedings, including the costs of the arbitrators and of ICSID, as well as legal and other expenses incurred by CIOC including the fees of its legal counsel, experts and consultants and those of CIOC's own employees on a full indemnity basis, plus interest thereon at a reasonable rate from the date on which such costs are incurred to the date of payment; and

(6) such other relief as the arbitral tribunal may deem just and proper."

123. Claimant corrected the requested amount of damages as stated in its Memorial from USD 1,005.7 million to USD 1.149 billion excluding interest and thus modified its relief sought in its Reply Memorial of 30 July 2010 requesting the Tribunal to award as follows (C-V, para. 377):

> *"[F]or the foregoing reasons, CIOC hereby requests:*
>
> *(1) orders adjudging and declaring:*
>
> *(a) that Kazakhstan has violated Article II(2)(a) of the Treaty, by failing to accord to CIOC's investment "fair and equitable treatment"'[sic]*
>
> *(b) that Kazakhstan has violated Article II(2)(a) of the Treaty, by failing to ensure that CIOC's investment "shall enjoy full protection and security";*
>
> *(c) that Kazakhstan has violated Article II(2)(a) of the Treaty, by failing to ensure that CIOC's investment shall not be accorded "treatment less than that required by international law";*
>
> *(d) that Kazakhstan has violated Article II(2)(a) of the Treaty, by impairing CIOC's investment "by arbitrary or discriminatory measures";*
>
> *(e) that Kazakhstan has violated Article II(2)(a) of the Treaty, by failing to "observe any obligation it may have entered into with regard to investments";*
>
> *(f) that Kazakhstan has violated Article III of the Treaty by unlawfully expropriating CIOC's investment:*
>
> *(i) without public purpose;*
>
> *(ii) in a discriminatory manner; or*
>
> *(iii) not in accordance with due process of law and the general principles of treatment provided for in Article II(2) of the Treaty;*
>
> *(g) that Kazakhstan has violated Article III of the Treaty by expropriating CIOC's investment without payment of prompt, adequate and effective compensation; or*
>
> *(h) that Kazakhstan has violated its legal obligations under customary international law, Kazakh law and the Contract;*
>
> *(2) an order directing Kazakhstan to pay to CIOC the sum of US $1.149 billion, being damages or compensation for the violations listed in sub-paragraphs 1(a) to (h) above and determined by reference to the "fair market value" of CIOC's investment as at 31 January 2008, in "fully realizable" and "freely transferable" currency;*

(3) an order directing Kazakhstan to pay to CIOC interest on the sum of US $ 1.149 billion, at the rate of 3.7% per annum, compounded quarterly, calculated from 31 January 2008 to payment in full of the Award;

(4) an order directing Kazakhstan to pay to CIOC such monetary damages as the Tribunal considers reasonable in all the circumstances for the moral, non-material damage done to CIOC, its majority owner, senior management and employees;

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

(6) such other relief as the arbitral tribunal may deem just and proper."

124. Claimant's Post-Hearing Brief of 27 June 2011 sets out as follows (C-VI, para. 218–220):

"[…]

Thus, his calculation that the fair market value of what was taken from CIOC, as of the day before the expropriation, is, at a minimum, $1.145 billion provides the proper basis for the award.

[219.] Beyond the core amount, the award should include the following:

(a) Interest at 3.7% per annum, compounded quarterly from February 1, 2008 to the date of payment of the award.

(b) Such moral damages as the Tribunal deems appropriate, given the nature of Respondent's actions.

(c) An award of costs and attorneys' fees, given the nature of Respondent's actions and its purported defenses here.

[220.] For the reasons and in the amounts set forth above, the Tribunal should render an award in favour of Claimant, Caratube International Oil Company."

F.II. Relief Sought by Respondent

125. In its Counter-Memorial on Objections to Jurisdiction and the Merits of 22 December 2009, Respondent sought the following relief (R-III, para. 468):

"For the reasons set forth above and to be developed further during the course of these proceedings, CIOC's claims should be rejected in their entirety for lack of jurisdiction or for inadmissibility. In the event that the Tribunal were to find jurisdiction and admissibility with respect to any of the claims asserted, those claims

should nevertheless be dismissed for the substantive reasons set forth above. In addition, CIOC should be ordered to reimburse the Republic for all reasonable costs and expenses relating to this Arbitration including without limitation legal fees and expert fees."

126. Respondent reiterated its prayer for relief in its Rejoinder on Objections to Jurisdiction and the Merits of 14 December 2010 (R-IV, para. 648):

"For the reasons set forth above and to be developed during the further course of these proceedings, CIOC's claims should be rejected in their entirety for lack of jurisdiction or for inadmissibility. In the event that the Tribunal were to find jurisdiction and admissibility with respect to any of the claims asserted, those claims should nevertheless be dismissed for the substantive reasons set forth above and in the Republic's Counter-Memorial. Should the Tribunal nonetheless find that CIOC is entitled to damages, which the Republic firmly denies, the Tribunal should reject the exaggerated damage claims of CIOC and only award damages as set forth by the Republic in this Rejoinder. In addition, CIOC should be ordered to reimburse the Republic for all reasonable costs and expenses relating to this Arbitration including without limitation legal fees and expert fees."

127. Respondent's Post-Hearing Brief of 27 June 2011 sets out the following (R-V, para. 191):

"For the reasons set forth above and in the Republic's prior submissions, CIOC's claims should be rejected in their entirety for lack of jurisdiction or for inadmissibility. In the event that the Tribunal were to find jurisdiction and admissibility with respect to any of the claims asserted, those claims should nevertheless be dismissed for the substantive reasons set forth above and in the Republic's prior submissions. Should the Tribunal nonetheless find that CIOC is entitled to damages, which the Republic firmly denies, the Tribunal should reject the exaggerated damage claims of CIOC and only award damages as set forth by the Republic herein and in the Rejoinder. In addition, CIOC should be ordered to reimburse the Republic for all reasonable costs and expenses relating to this Arbitration including without limitation legal fees and expert fees."

G. Summary of Facts

128. Without prejudice to their relevance for the considerations and conclusions of the Tribunal, the following section briefly summarises the facts of the case as presented by Claimant and Respondent in chronological order. A more comprehensive coverage of the facts can be found in Claimant's Memorial of 14 May 2009 (C-IV, paras. 46–155), Claimant's Reply Memorial of 30 July 2010 (C-V, paras. 16–114), Respondent's Counter-Memorial of 22 December 2009 (R-III, paras. 93–245) and Respondent's Rejoinder of 14 December 2009 (R-IV, paras. 87–345).

G.I. The Caratube Project

129. Kazakhstan is a former Soviet Republic that declared its independence from the Soviet Union in 1991. It is a country rich in natural resources, which are an important part of the country's economic success.

130. In December 2000, Consolidated Contractors (Oil & Gas) Company S.A.L. ("CCC") responded to Kazakhstan's open tender for exploration and development of an area of the Caratube oil field. The area was previously explored during the Soviet era. Some oil deposits were discovered, but no production was ever commenced. CCC is a large construction company owned by a Lebanese family – the Khourys.[1]

131. On 27 May 2002 the Kazakh Ministry of Energy and Mineral Resources ("MEMR"), acting on behalf of Kazakhstan, and CCC, signed the "Contract for Exploration and Production of Hydrocarbons within Blocks XXIV-20-C (partially); XXIV-21-A (partially), including the Caratube Field (oversalt) in the Baiganin District of the Aktobe Oblast of the Republic of Kazakhstan", also called "Contract No. 954" (C-4).

132. The Contract gave CCC the exclusive right to carry out exploration and production of hydrocarbons within the Contract area (Clauses 4.1 and 7.1). The exploration period under the Contract was five years (up to 2007), later extended by the Parties for another two years. The production period, commencing from the date of commercial production for each deposit, was 25 years (up to 2032) (Clauses 3.2 and 9.1). A Minimum Work Programme, subdivided into annual work programmes, was attached to the Contract

[1] The domicile of CCC is unclear. Claimant refers to CCC as a Greek company. (C-V, para. 193) The Tribunal notes that the Transfer Agreement refers to CCC as "duly registered in Lebanon" (C-53), and that in the Contract the parties "agreed that [CCC] is a resident of Lebanon". (C-4, para. 27.8) The issue whether CCC is domiciled in Greece or Lebanon was discussed but not decided before the English courts (C-292, *Masri v. Consolidated Contractors International Company SAL & Anor* [2007] EWHC 3010 (Comm) (20 December 2007). The issue of CCC's domicile is not relevant in the case at hand and therefore does need to be decided by the Tribunal.

("Five-Year Work Programme"). The key elements of the Five-Year Work Programme were:

a) to re-enter existing old wells and to drill new wells in the shallower, supra-salt formations;
b) to carry out pilot testing (trial production) in the supra-salt zone;
c) to carry out a 3D seismic survey (a geophysical study) by the end of the second year; and to prepare a report as to the available reserves; and
d) to drill two wells in the deeper sub-salt formation (one by the end of year four, another by the end of year five).

In case of a commercial discovery, the contractor had an exclusive right to proceed to the production stage. In case of a commercial discovery the contractor was entitled to reimbursement of its expenses in connection with exploration (Clause 10.5–10.6). If no commercial discovery was made by the end of the exploration period, the Contract terminated (Clause 9.6).

133. Western Kazakhstan Territorial Administration of Geology and Subsoil Use ("TU Zapkaznedra") is the competent regional branch of the MEMR's Geological Committee that was the body for the reporting and performance connected with the Contract. The main high-level supervisory body was a Monitoring Division of MEMR.

G.II. CIOC and Contract Assignment

134. On 8 August 2002, CCC and CIOC signed a "*Transfer Agreement Regarding the Right of Subsoil Use*". (C-53) ("Transfer Agreement") The Transfer Agreement contained no price. According to Claimant, and not contested by Respondent, CCC was paid approximately USD 9.4 million for transferring the Contract. The Transfer Agreement stated that it "*comes into effect from the date of registration at the [MEMR] of all amendments and addenda to the Contract which reflect the change of the Contractor's name (...).*" (C-53, Clause 3) MEMR approved the assignment on 7 November 2002. On 26 December 2002, MEMR approved Amendment 1 to the Contract reflecting the assignment. The motivation and circumstances of the decision to assign the Contract are disputed between the Parties.

135. CIOC is a Kazakh entity, registered on 29 July 2002. (C-54) Its founder was Fadi Hussein, a Danish citizen and a distant cousin of Devincci Hourani and his brothers: Issam Hourani and Hussam Hourani. It is not clear at what point a 7 % share in CIOC was acquired by Waheeb Antakly (a U.S. citizen). The Parties are disputing the role of Fadi Hussein in CIOC.

136. On 17 May 2004 Fadi Hussein and Devincci Hourani signed a share purchase agreement on the basis of which Devincci Hourani was to acquire an 85 % share in CIOC representing 850,000 tenge and sold for this amount. Ownership to the share was supposed to pass to Devincci Hourani upon payment of the full price for the share within three days and introduction of appropriate amendments to the founding documents of CIOC. (C-55)

137. On 8 April 2005 Waheeb Antakly and Devincci Hourani signed a share purchase agreement on the basis of which Devincci Hourani was to acquire a 7 % share in CIOC

representing 70,000 tenge and sold for this amount. Ownership to the share was supposed to pass upon payment of the full price for the share within three days and introduction of appropriate amendments to the founding documents of CIOC. (C-56)

138. On 18 May 2006 Devincci Hourani, acting on behalf of Fadi Hussein, signed a share purchase agreement with Kassem Omar. On the basis of that agreement Kassem Omar was to acquire an 8 % share in CIOC with a nominal value of 80,000 tenge and sold for this amount. The price was to be paid "*in a manner agreed to by the parties.*" (WS Kassem Omar, Exhibit 1) There is no mention in that agreement when and under what conditions the ownership to the share was supposed to pass to Kassem Omar.

139. Devincci Hourani is a U.S. citizen. He received his U.S. citizenship on 16 July 2001. Before that he did not hold the nationality of any country. He was a stateless Palestinian refugee born in Lebanon. His business interests in Kazakhstan started in the early 1990s, when he became a partner in his brother Issam's medical equipment business. His U.S. in-laws participated in an oil and gas business with Issam Hourani (Kulandy Energy Corporation) since the late 1990s. Devincci Hourani purchased 100 % of the shares in that company from Issam Hourani in 2002. He was also involved in a media (TV) business, in which Issam Hourani and Gulshat Aliyev had a majority stake. He advised his brother-in-law Kassem Omar in a poultry business and advised in other family businesses in Kazakstan (airline and airport operations).

G.III. Performance of the Contract by CIOC (2002–2007) and Contract Termination in 2008

140. The following facts are highlighted by the Parties in relation to the Contract performance and termination.

141. By letter of 8 December 2003, TU Zapkaznedra called CIOC's attention to its "*actual geological survey performance on exploration and extraction of hydrocarbons on the Caratube field for 9 months of 2003* [which] *is 44.1 % of the planned*" and requested it to "*take appropriate measures to complete the geological survey*" and provide "*written explanation of the reasons for non-fulfillment of approved amounts.*" (R-9)

142. On 29 December 2003 TU Zapkaznedra and CIOC met to discuss the performance results of the approved work programme for the reporting year 2003 and review the work programme for 2004. The minutes of the meeting record that, among other things, "*[t]he 3D seismic field survey was not fulfilled*" and that "*[a]ll outstanding obligations are carried over to 2004, and their fulfillment shall be guaranteed.*" The 2004 work programme included "*the outstanding unfulfilled obligations of the[sic] 2003 related to drilling and 3-D Seismic works.*" The 2004 work programme was approved. (R-17)

143. On 21 December 2004 TU Zapkaznedra and CIOC met to discuss the performance results of the approved work programme for the reporting year 2004 and review the work programme for 2005. The minutes of the meeting, according to Respondent's translation (R-9) record that, among other things, "*CDP Seismic 3D field surveys were not performed and therefore, the construction of a deep subsalt well was not performed*" and that "*[a]ll outstanding obligations are carried forward to 2005, and their fulfillment shall be guaranteed considering financial obligations for 2005*." (R-18) The 2005 work

programme was approved. The translation submitted by Claimant (C-105) differs slightly: "*Seismic field CDP 3D works were not performed and construction of a deep subsalt well.*"

144. On 17 January 2005 MEMR issued a "*Notice of Breach of Contract No. 954 of 27 May 2002*" to CIOC. The document notified CIOC that it is in breach of the Contract, in particular of "*the Work Program* [which] *has not been performed in full (clause 8.1)*". The notice called CIOC to "*eliminate the above-stated breaches, provide all necessary documents confirming the elimination of such breaches, and report on measures taken to eliminate and prevent further breach of contractual obligations (...).*" (R-10)

145. On 9 March 2005 CIOC replied to the MEMR's Notice of Breach informing that "*[a]t present we are conducting an expedited implementation of the 2005 Work Program approved by "TU Zapkaznedra", which provides for the correction of deficiencies with regards to the obligations*" and providing details of the works. CIOC informed that the 3D seismic study will be conducted in the first half of 2005 and the deep wells in the subsalt deposits will be constructed afterwards, also in 2005. (R-19)

146. On 21 December 2005 TU Zapkaznedra and CIOC met to discuss the performance results of the approved work programme for the reporting year 2005 and review the work programme for 2006. The minutes of the meeting record that "*it appears that production prevails over exploration, despite the fact that during the period of trial production (2002–2006) the company should have focused on geological exploration to create a basis for final evaluation and estimation of field reserves.*" The minutes also record that, among other things, "*CDP Seismic 3D field works were not performed and consequently construction of a deep subsalt well was not performed, due to the difficulty of developing methodology (...)*" and that "*[a]ll outstanding obligations are carried forward to 2006, and their fulfillment shall be guaranteed considering financial obligations for 2006.*" (R-20; Claimant's translation reads "*it appeared*" but is otherwise identical, C-102) The 2006 work programme was approved.

147. On 28 February 2006, TU Zapkaznedra issued a Notice to CIOC calling its attention to "*the non-fulfillment of the approved 2005 Annual Work Program*" and delay in filing their fourth quarter report. TU Zapkaznedra informed CIOC that it must take appropriate action to eliminate the non-performance and explain the reasons for delay by 10 March 2006. TU Zapkaznedra further pointed out that failure to do so would require it to "*take appropriate actions according to the legislation of* [the] *R*[epublic of]*K*[azakhstan]." (R-21)

148. On 11 July 2006, the Parties concluded Amendment 2 to the Contract which reduced the value added tax and at the same time increased the royalty rate.

149. On 18 August 2006 TU Zapkaznedra issued a Notice to CIOC calling its attention that from CIOC's report for the second quarter of 2006 it follows that CIOC's financial performance amounted to 12.7 % under the Annual Work Program of 2006 and asked CIOC to take appropriate measures to fulfil its obligations.

150. On 27 November 2006 CIOC sent a letter to MEMR requesting "*prolongation of the exploration period for 2 years (27.05.20087[sic])*". (R-36; C-83)

151. On 29 November 2006 TU Zapkaznedra and CIOC met to discuss the performance results of the approved work programme for the reporting year 2006 and review the work programme for 2007. The minutes of the meeting record, among other things, that the 3D survey was not completed and that "*[c]onstruction of the deep subsalt well has not been performed*." (R-23) The outstanding obligations under the Work Program with regard to drilling works were carried over to 2007.

152. By letter dated 11 December 2006, TU Zapkaznedra informed CIOC that "*based on the results from 9 months of the current year (...) [CIOC] was put on the list of companies whose performance of financial obligations, percentage-wise, amounted to less that 30 % (i.e. 20.9 %), which constitutes a breach of Contract (...).*" (R-11)

153. In a letter of 21 February 2007 MEMR informed CIOC that it decided to "*extend the period for hydrocarbon prospecting within the licensed blocks, including the Caratube field (suprasalt) (...) for two more years till 27.05.09 with the minimum working program for the amount of US$ 18 million during the extension period (...).*" (C-7)

154. On 25 March 2007 MEMR issued a "*Notice of Breach of Obligations under Contract No. 954 of May 27, 2002.*" The notice informed CIOC that it breached certain terms and conditions of the Contract. The list of breaches included that "*the Work Program has not been performed* [in Claimant's translation: "*fulfilled*"] *(clause 8.1)*". It requested that those breaches be eliminated within one month. The notice stated that in case of CIOC's failure to remedy the breaches MEMR "*may unilaterally dissolve the Contract*". No response from CIOC was received. Claimant claims that it received this notice only in September 2007. (R-24; C-109)

155. On 27 July 2007 MEMR and CIOC signed Appendix No. 3 to the Contract, extending the term for prospecting until 27 May 2009. The amendment also included the work program for the extended period.

156. On 7 September 2007, the Prosecutor's Office in Aktobe issued a "*Recommendation on elimination of disregard of the rule of law*" for MEMR, stating that "*despite the continued nonperformance of the terms of the Contract and of the work programs (...) [TU "Zapkaznedra"] annually approves work programs and, moreover, carries over part of the unfulfilled obligations of the current year to the following year. This shows (...) [MEMR's] lack of appropriate monitoring of the activities of the subsoil user and failure to take measures to rectify noncompliance with the terms of the Contract.*" (R-27)

157. According to Respondent, from 11 to 30 September 2007, TU Zapkaznedra conducted an on-site audit at the Caratube field and subsequently issued a Prescriptive Order pointing out breaches and deficits that had to be remedied. According to Claimant it received the Prescriptive Order on 28 September 2007 (see C-IV, para. 127). (R-28; C-70)

158. In September 2007 (the date is disputed) MEMR resent its notice of 25 March 2007 to CIOC.

159. On 1 October 2007 MEMR sent a "*Notice of termination of operations under Contract No. 954 of May 27, 2002*" to CIOC. The notice reminded CIOC of MEMR's Notice of 25 March 2007 and informed CIOC that it had received it on 28 March 2007. However, during the hearing, Claimant alleged that it had not received the notice in March 2007. (Tr, day 6, pp. 134 and 135) MEMR further informed CIOC that documents requested in

the March notice have not been submitted within deadlines and "*[f]or this reason, in accordance with Article 45-2, clause 2 of the Law, [MEMR] is hereby requesting immediate termination of operations under Contract No. 954 of May 27, 2002, pending a decision on the unilateral termination of the contract.*" (R-26; C-10)

160. In a letter to MEMR of 1 or 3 October 2007 (Respondent states the letter was 'dated' 1 October, Claimant holds the letter was 'sent' 3 October, cf. C-IV, para. 130, R-III, para. 144) CIOC requested MEMR to re-examine its decision of the same day.

161. On 27 November 2007 MEMR responded with a "*Notice of Resumed Operations Under Contract No. 954 (...) and of Breach of Contract No. 954 (...)*". (R-32) (Claimant's translation (C-14) reads: "*Notification for Resumed Operations Under Contract No. 954 of May 27, 2002 and On the Failure to Exercise Provisions under Contract No. 954 of May 27, 2002*".) The notice allowed CIOC to resume operations but listed breaches of Contract. MEMR requested that the ongoing breaches be cured within one month.

162. On 3 December 2007 MEMR issued a "*Notification for Resumed Operations Under Contract No. 954 of May 27, 2002 and On the Failure to Exercise Provisions under Contract No. 954 of May 27, 2002*" (C-14; Respondent's translation is "*Notice of breach of obligations Under Contract No. 954 dated May 27, 2002*") in which it informed CIOC that, according to the 3rd quarter report data, CIOC was in breach of its obligations under the Contract. It requested that the breach be remedied within one month. The notice also informed that, in the event its requirements are not fulfilled MEMR "*will take the steps to terminate the Contract as provided for by the legislation of the Republic of Kazakhstan*". (R-15; C-15)

163. CIOC responded with a letter of 13 December 2007.

164. According to Claimant, on 29 December 2007, TU Zapkaznedra considered and approved CIOC's 2008 Annual Work Programme.

165. By an Order of 30 January 2008 MEMR ordered to terminate the Contract "*due to failure to fulfill the requirements of the Notice within the specified period.*" (R-33; Claimant's translation in C-17 is: "*due to failure of completion of notice requirements within the specified period.*") On 1 February 2008 MEMR issued a "*Notice of termination of the Contract No. 954 dated May 27, 2002*", requesting CIOC, among others, to hand over the Contract territory, return geological information and the Contract and fulfil the outstanding obligations and to rehabilitate the contract area. (C-18; R-34)

166. On 12 February 2008 CIOC sent a letter to MEMR requesting it to allow CIOC to complete the works under the Contract. In its letter of 6 March 2008 CIOC requested MEMR for a meeting to explore the possibility of resolving the dispute by way of negotiations under Article 27 of the Contract.

167. On 13–14 March 2008 MEMR and CIOC representatives met for discussion. In conclusion of the meeting "*[r]epresentatives of MEMR assured CIOC that they would notify the management of MEMR no later than by March 21, 2008,* [of] *the standpoint of CIOC, and shall respond on their position in writing, until March 29, 2008.*" (C-22)

168. In a letter of 14 May 2008, in response to CIOC's letters, MEMR reiterated its decision on termination.

169. According to Claimant, in June 2008, Claimant's bank accounts were frozen.

G.IV. Alleged Intimidation by the Authorities

170. The following facts are, among others, highlighted by Claimant in relation to its claims of alleged harassment and intimidation of CIOC, its employees and other individuals by Kazakh authorities.

171. On 27 June 2007 the building housing offices of many businesses belonging to the Hourani family, including CIOC, was raided by police, the premises were searched and computers, documents, and details of bank accounts were seized. Following the raid CIOC employees were interrogated at the company's office or at the Ministry of Interior, and further documents were seized.

172. On 28 June 2007, Devincci Hourani was questioned at the police station.

173. According to Claimant, in a meeting with the President's daughter Dariga Nazarbayeva in early July 2007, Devincci Hourani was informed that the nature of these attacks was of a political nature. At the same time, the Hourani family and CIOC's senior management were placed under surveillance by Kazakh authorities.

174. Claimant further held that until mid-July 2007 the offices raided on 27 June 2007 were inspected on a daily basis by a Kazakh police officer.

175. Devincci Hourani described being stopped and his car searched, extortion attempts, and receiving anonymous calls with threats. On 1 September 2007 the private homes of CIOC's Director Hussam Hourani, to which Devincci Hourani moved, was raided. Devincci Hourani was taken for interrogation. He left Kazakhstan on 4 September 2007 for London and came back in January 2008 and left again in March 2008. After that the harassment of CIOC's employees and Devincci Hourani continued.

176. In 2007 various criminal investigations were commenced by Kazakh authorities against Issam Hourani; an arrest warrant against him was issued by Interpol Astana and he was stripped of his Kazakh citizenship and his civil and diplomatic passports.

177. According to Claimant, Issam Hourani and Devincci Hourani were deceived or coerced to assign shares in their various companies to Dariga Nazarbayeva. One of their companies was forced into an unjustified bankruptcy.

178. From June to November 2007 CIOC was subject to many investigations, audits and complaints, including:

- an audit by the Customs Control Committee of the Ministry of Finance,
- an environmental audit by the Ministry of Environmental Protection,
- the imposition of a penalty by MEMR's Committee of State Emergency Situations and Industrial Safety Control for breach of safety rules in the petroleum industry,
- the imposition of a penalty by a state inspector of land use and protection for illegal use of state land,

- an inspection of arrangements on civil defense and rescue operations, finding the non-fulfilment of a previously issued prescriptive order and resulting in a new prescriptive order,
- an audit by the prosecutor for environmental protection resulting in the initiation of proceedings concerning the violation of the law against CIOC and CIOC's Director, Hussam Hourani,
- an inspection of legality of the financial and economic activities by public prosecutors,
- an audit of compliance with labour regulations by state labour inspection.

179. On 12 October 2007 the Investigations Unit of the Almaty City Department of Internal Affairs ordered seizure of CIOC's legal and accounting documents in connection with criminal investigations of a company (Ruby Roz Agricol) belonging to Issam Hourani.

180. Claimant links the alleged intimidation and harassment with political events in Kazakhstan, in particular with the fact that Issam Hourani had since 1996 been married to Gulshat Aliyev. She is a sister of Rakhat Aliyev. Rakhat Aliyev was married to Dariga Nazarbayeva, daughter of the President of Kazakhstan Nursultan Nazarbayev and belonged to the close circle of the President. In May 2007 a conflict arose between Rakhat Aliyev and the President, as the former opposed the idea of the constitutional changes granting Nursultan Nazarbayev presidency for life. As a result, Claimant alleges the resulting campaign of the Kazakh authorities against Rakhat Aliyev included also the Hourani family.

H. Short Summary of Contentions

181. The following summary of the Parties' contentions is subject to more details as set out in the submissions of the Parties and reflected in the Tribunal's considerations in later sections of this Award.

182. To provide a better understanding of the full dispute, the summaries include those on aspects of the case which, in view of later considerations and conclusions of the Tribunal regarding jurisdiction, need not be examined by the Tribunal later in this Award.

H.I. Contentions Regarding the Jurisdiction of the Tribunal

183. The Parties' contentions regarding jurisdiction will be taken up below in this Award together with the Tribunal's Considerations and Conclusions regarding jurisdiction.

H.II. Contentions Regarding the Admissibility of the Claims Presented

184. The matter of admissibility of claims was heavily disputed between the Parties as set out below.

H.II.1. Summary of Contentions by Claimant

185. A more comprehensive coverage of Claimant's contentions on admissibility can be found in Claimant's Reply Memorial of 30 July 2010 (C-V, paras. 149–202).

186. Claimant asserts that its claims are admissible and that CIOC has not waived its right to ICSID arbitration with regard to its claims under the BIT.

187. Claimant clarifies that its claims are properly identified as treaty claims, which cannot be waived by a forum selection clause in the Contract. Even if this were possible, no such waiver was ever declared. Also, according to Claimant the forum selection clause in the Contract was never intended as a waiver of ICSID jurisdiction and thus, should not be interpreted as one. Even if the forum selection clause applied to some of the claims at hand, Claimant assures that this Tribunal would be the proper forum to entertain those claims.

H.II.2. Summary of Contentions by Respondent

188. A more detailed presentation of Respondent's contentions regarding the admissibility of the claims can be found in Respondent's Counter-Memorial of 22 December 2009 (R-III, paras. 47–78) and Respondent's Rejoinder of 14 December 2010 (R-IV, paras. 55–69).

189. Respondent holds that CIOC's claims are inadmissible since the Contract contained a waiver by means of which CIOC had disposed of any right to jurisdiction it might have had before this Tribunal. As a consequence, all of CIOC's claims are rendered inadmissible before this Tribunal and the exclusive jurisdiction clause contained in the Contract has to be executed. Respondent points out that all of CIOC's claims are contractual in nature and as such a waiver is enforceable as a matter of international law.

190. Respondent strongly denies that Claimant has any rights under the BIT in this dispute. However, even if CIOC had brought claims under the BIT, these can no longer be entertained by this Tribunal.

H.III. Contentions Regarding Liability

H.III.1. Summary of Contentions by Claimant

191. A more detailed presentation of Claimant's contentions regarding liability can be found in Claimant's Request for Arbitration (C-I, paras. 43–53), Claimant's Memorial of 14 May 2009 (C-IV, paras. 156–238), and Claimant's Reply Memorial of 30 July 2010 (C-V, paras. 203–291).

192. Claimant holds that Respondent breached numerous obligations both under the Contract as well as under the BIT. With regard to the Contract, Claimant purports that Respondent violated the terms of Contract through the unilateral termination without cause, contrary to the provisions of the Contract. In addition, Respondent allegedly violated several obligations under the BIT.

193. Claimant affirms that Respondent failed to accord at all times fair and equitable treatment to its investment. In particular, Claimant upholds that Respondent failed to provide a stable legal and business framework. Further, Claimant asserts that Respondent did not act in good faith respecting the legitimate expectations of CIOC. Moreover, Respondent did not act in accordance with due process and procedural propriety nor did it act in a consistent, transparent and non-discriminatory manner.

194. Moreover, Respondent allegedly violated its obligation to grant full protection and security to CIOC's investment by failing to protect CIOC and its owners, senior management and employees from harassment and legal and physical abuse such as illegal detentions, interrogations, raids, searches, false allegations of criminal conduct, attempted extortions, and threats to personal safety.

195. According to Claimant, Respondent further impaired CIOC's investment by unlawfully terminating Contract No. 954. Claimant purports that this constitutes an unreasonable or discriminatory measure for the purposes of the BIT.

196. In Claimant's view, Respondent expropriated CIOC of all or substantially all of its investments without complying with any conditions that would render such an expropriation lawful. Respondent neither acted for a legitimate public purpose, nor did it act on a non-discriminatory basis or pay a prompt, adequate and effective compensation. In particular, CIOC was deprived of its long-term rights under the Contract to further explore and commercially develop hydrocarbons.

197. Claimant further alleges that Respondent failed to comply with obligations it has entered into with regard to Claimant's investment, especially with its obligations assumed under the Contract. According to Claimant, these breaches of the Contract are transformed into violations of the BIT and thus constitute direct breaches of the BIT's so called umbrella clause.

198. In addition, Claimant argues that Respondent accorded CIOC's investment treatment less than that required by international law and thus also violated the minimum standard of treatment in international law.

199. At the Hearing on Jurisdiction and the Merits, Claimant withdrew all documents which were challenged by Respondent (C-162, C-175, C-238, C-239, C-240, Aliyev 25) to avoid any controversy even though in Claimant's view "*no real record was developed to allow issues of authenticity and provenance to be resolved*", also in light of the fact that Respondent did not interrogate Dr Aliyev on the subject and likewise did not present witnesses which were asserted to have provided some of the documents. Claimant therefore holds that it will not, does not, and need not rely on these documents to make its case and that they should have no bearing on its credibility or the outcome of the Award. (C-VI, paras. 144–145)

H.III.2. Summary of Contentions by Respondent

200. Respondent's contentions on liability issues are covered in more detail in Respondent's Counter-Memorial of 22 December 2009 (R-III, paras. 79–347) and Respondent's Rejoinder of 14 December 2010 (R-IV, paras. 70–409).

201. With regard to a breach of the so-called umbrella clause which obliges Respondent to observe the obligations it has entered into with regard to investments, Respondent emphasises that at no point it has breached Contract No. 954 by any means.

202. Even if this were the case, Respondent observes that the umbrella clause cannot cure deficits with regard to jurisdiction and admissibility. In particular, Respondent points out that this clause does not transform CIOC's contract claims into treaty claims and that Claimant thus cannot circumvent its contractual obligations by invoking the umbrella clause. Moreover, Respondent affirms that even if the umbrella clause could transform some of Claimant's contract claims into treaty claims, they would be inadmissible.

203. In addition, Respondent notes that it has not expropriated any property from CIOC and CIOC has failed to meet its burden of proof with regard to its alleged expropriation. In particular, in Respondent's opinion Claimant has failed to show that it owned production rights under the Contract of which it could have been expropriated. Respondent further asserts that it exercised its rights under the Contract like any other party would have done in a similar situation and thus did nothing more than what it was legitimately entitled to.

204. Respondent also purports that it accorded CIOC fair and equitable treatment by providing a stable legal framework, fulfilling CIOC's legitimate expectations and adhering to the standards of transparency, due process and non-discrimination. Respondent argues that all it did was to exercise its rights under the Contract and enforce its regulations. In Respondent's opinion, Claimant has failed to prove otherwise and thus CIOC has not met its burden of proof concerning a breach of the standard of fair and equitable treatment.

205. Furthermore, Respondent holds that it fulfilled its duty to provide full protection and security to CIOC at all times. Acts taken in the exercise of legitimate state powers cannot form the basis for a claim to having violated the standard of full protection and security. Also, Respondent purports that this obligation does not include a duty to provide legal protection. Finally, Respondent asserts that Claimant once again failed to meet its burden of proof regarding a breach of full protection and security.

206. Lastly, Respondent contests that it acted in an arbitrary or discriminatory manner. On the contrary, Respondent claims that the measures taken were based on a rational policy, addressing a matter of public interest and were supported by logic and good sense.

207. In its Rejoinder, Respondent further sets out that no harassment of CIOC took place at any time. Moreover, Respondent purports that certain documents (C-162, C-175, C-238, C-239, C-240, Aliyev 25) brought forward by Claimant in the attempt to prove the allegations of harassment are "*almost certainly forged*". (R-IV, para. 332)

H.IV. Contentions Regarding Damages and Quantum

H.IV.1. Summary of Contentions by Claimant

208. A more comprehensive coverage of Claimant's contentions regarding damages and quantum can be found in Claimant's Memorial of 14 May 2009 (C-IV, paras. 239–284) and Claimant's Reply Memorial of 30 July 2010 (C-V, paras. 292–376).

209. Claimant holds that Respondent is internationally responsible for the violations of the Treaty as has been codified in the ILC Draft Articles on State Responsibility.

210. With regard to the asserted expropriation, Claimant opines that should the Tribunal fail to conclude that the expropriation was unlawful, CIOC should be entitled to compensation for a lawful compensation. The standard for compensation is to be taken from the BIT which specifies that the compensation should be equivalent to the fair market value.

211. If, however, the Tribunal determines that the expropriation was in fact unlawful, Claimant is purportedly entitled to damages. Claimant points out that the measure for damages can be higher than compensation in a case of a lawful expropriation.

212. Furthermore, Claimant asserts that it is entitled to moral damages due to the internationally wrongful acts caused by Respondent. Moreover, Claimant underscores that this entitlement is not affected by the fact that the claim is brought by a juridical person, namely CIOC. Claimant observes that moral damages can be awarded to both juridical and natural persons.

213. Claimant also affirms that Respondent is liable for breaches of the Contract, especially for the wrongful termination. Accordingly, Claimant is entitled to compensation for damages under Kazakh law which suffered as a result of the wrongful termination. Claimant notices that the alternative remedy of restoration of the Contract is not possible in the present case.

214. With regard to the appropriate valuation methodology, Claimant affirms that all compensation and damages should be calculated using the Discounted Cash Flow (DCF) Analysis. Claimant purports that this method is the most reliable to value the investment that had been expropriated by Respondent.

215. Claimant further requests relief for moral damages as the Tribunal considers reasonable in the circumstances, taking into account the damage done to CIOC, its management, its majority owner and its employees as well as the malicious nature of Respondent's conduct.

216. Lastly, Claimant substantiates its entitlement to compound interest.

H.IV.2. Summary of Contentions by Respondent

217. A more detailed presentation of Respondent's contentions regarding damages and quantum can be found in Respondent's Counter-Memorial of 22 December 2009 (R-III, paras. 348–467) and Respondent's Rejoinder of 14 December 2010 (R-IV, paras. 410–647).

218. Respondent maintains that Claimant is not entitled to lost profits. This would only have been the case if CIOC had made and declared a commercial discovery in the first place. Claimant's entitlement to commercial production was conditioned upon making a commercial discovery. However, Claimant only brought a certificate of reserves. Respondent opines that this does not constitute a declaration of a commercial discovery, especially in view of the fact that the certificate was not obtained from the competent authority.

219. Furthermore, any allegedly lost profits would have been highly speculative and uncertain and thus lack reasonable certainty; Respondent also points out that Claimant would not be entitled to future lost profits when applying the so-called Discounted Cash Flow (DCF) method on which Claimant based all its calculations regarding damages.

220. Respondent asserts that the appropriate valuation methodology is to apply the Updated Investment Value rather than the DCF method preferred by Claimant which, on top of being the inappropriate method as such, is also erroneous as applied by Claimant.

221. Respondent denies that CIOC has suffered any moral damages and is thus not entitled to the latter. Respondent claims that such extraordinary relief can only be granted for substantial harm and injury which amounts to egregious conduct. However, in Respondent's opinion such acts did not occur.

222. With regard to interest, Respondent emphasises that merely simple interest should be paid, the measure being a commercially reasonable interest rate. Also, interest payment should be calculated not earlier as of 31 January 2008.

I. Analysis by the Tribunal – Preliminary Matters

I.I. Applicable Law

I.I.1. Positions of the Parties

223. Claimant holds that the law applicable to its claims for breaches of the BIT is public international law since Claimant accepted Respondent's offer to arbitrate disputes arising under the BIT. Claimant further purports that this is necessarily so because its claims relate to the interpretation and application of provisions in a treaty. (C-IV, para. 157)

224. With regard to the substantive law applicable to the investment agreement and related agreements concluded on its basis, both Parties refer to Clause 26.1 of the Contract which reads (C-IV, para. 158; R-III, para. 61, note 57):

> *"This Contract and other agreements signed on the basis of this Contract, shall be governed by the law of the State unless stated otherwise by the international treaties to which the State is a party."*

225. In addition, Claimant asserts that to the extent that its claims require the interpretation of the Contract, said Contract would be interpreted in accordance with the applicable contract law without prejudice to the pertaining BIT claim. (C-V, para. 201) Respondent asserts that in the case at hand, breaches of contract remain an issue of private law since Respondent acted in its capacity as a private party. Therefore public international law is not applicable to the Contract. (R-V, para. 144) Claimant stresses in particular that Article 70 of the Subsoil Law is applicable in its version before December 2004, in accordance with the stability clause as provided by Clause 28 of the Contract. (cf. e.g. C-V, para. 110, note 212) Respondent counters that Article 70 of the Subsoil Law in either version is irrelevant since Respondent merely exercised its right of termination under Clause 29.6 of the Contract.

226. Overall, Claimant thus argues that international law, including customary international law and the BIT itself, and Kazakh law are applicable to the dispute. (cf. C-I, para. 83; C-IV, para. 180) Without elaborating on its applicability, Respondent concedes that international law is applicable to the dispute, e.g. by relying on principles of public international law in its argument, such as the Vienna Convention on the Law of Treaties, and the Draft Articles on State Responsibility of the International Law Commission. (cf. e.g. R-IV, paras. 7 *et seq.*)

I.I.2. The Tribunal

227. There does not seem to be a dispute between the Parties regarding the applicable procedural and substantive law.

228. Regarding the procedural rules to be applied by the Tribunal, the Parties have agreed that the ICSID Arbitration Rules as amended and effective on 10 April 2006, shall apply to the proceedings as has been recorded in paragraph I.5. of the Minutes of the First Session of the Arbitral Tribunal.

229. Furthermore, the Parties have agreed on Frankfurt, Germany, as the place of proceeding according to paragraph I.6. of the Minutes of the First Session of the Arbitral Tribunal.

230. Regarding substantive law, according to Art. 42 of the ICSID Convention, the Tribunal shall decide on the basis of the law of Kazakhstan and of such rules of international law as may be applicable. The latter particularly include the BIT, the VCLT, and rules of customary international law.

I.II. Treaty Interpretation and Relevance of Decisions of other Courts and Tribunals

231. In their written and oral submissions, the Parties rely on numerous decisions of other courts and tribunals. Accordingly, it is appropriate for the Tribunal to make certain general preliminary observations in this regard.

232. First of all, the Tribunal considers it useful to make clear from the outset that it regards its task in these proceedings as the very specific one of applying the relevant provisions of the BIT as far as necessary in order to decide on the relief sought by the Parties. In order to do so, the Tribunal must, as required by the "General rule of interpretation" of Article 31 of the VCLT, interpret the BIT's provisions in good faith in accordance with the ordinary meaning to be given to them in their context and in light of the BIT's object and purpose. The "context" referred to in the first paragraph of Article 31 is given a specific definition in the second paragraph of Article 31 and comprises three elements: (i) the BIT's text, including its preamble; (ii) any agreement between the parties to the BIT in connection with its conclusion; and (iii) any instrument which was made by one of the parties to the BIT in connection with its conclusion and accepted by the other party to the BIT. The "ordinary meaning" as defined above applies unless a special meaning is to be given to a term if it is established that the parties to the BIT so intended, as it is stated in the fourth paragraph of Article 31.

233. As provided in the "Supplementary means of interpretation" of Article 32 of the VCLT, the Tribunal may have recourse to supplementary means of interpretation (i) in order to confirm the meaning resulting from the application of Article 31 of the VCLT, or (ii) when the interpretation according to Article 31 of the VCLT either leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. Those supplementary means of interpretation include the preparatory work of the treaty and the circumstances of its conclusion. Thus, recourse to the supplementary means of interpretation of Article 32 may only be had if the situations mentioned at (i) and (ii) above occur.

234. It is not evident whether and if so to what extent arbitral awards are of relevance to the Tribunal's task. It is in any event clear that the decisions of other tribunals are not binding on this Tribunal. The many references by the Parties to certain arbitral decisions in their pleadings do not contradict this conclusion.

235. However, this does not preclude the Tribunal from considering arbitral decisions, and the arguments of the Parties based upon them, to the extent that it may find that they shed any useful light on the issues that arise for decision in this case.

236. Such an examination is conducted by the Tribunal later in this Award, after the Tribunal has considered the Parties' contentions and arguments regarding the various issues argued and relevant for the interpretation of the applicable BIT provisions, while taking into account the above-mentioned specificity of the BIT to be applied in the present case.

I.III. Procedural Issues regarding Late Submissions of Documents

237. Certain issues regarding the late submission of documents were highly disputed between the Parties before and during the hearing.

I.III.1. Claimant's Perspective

238. By letter of 12 January 2011, Claimant submitted exhibits C-180 to C-298 in rebuttal to Respondent's Rejoinder of 14 December 2010. Claimant stated that some of the exhibits had only been provided to Claimant's counsel "*in the last few days*" and that therefore, some exhibits had not been translated yet. However, Claimant noted that since most of these documents were in Respondent's official language Russian, this would not cause any undue inconvenience.

239. Claimant submitted an additional exhibit (C-299) on 13 January 2011 asserting that this exhibit had just been received and was filed in rebuttal to the allegation of forgery as set out in Respondent's Rejoinder.

240. Claimant provided three more partly untranslated exhibits to the Tribunal on 14 January 2011 (C-300 to C-302), purportedly rebutting allegations concerning the relationship between JOR and CIOC. Claimant further conceded that these exhibits had inadvertently not been produced due to a production error in Claimant's office. However, Claimant also observed that since these exhibits were official documents of the National Bank of the Republic of Kazakhstan, the submission of these exhibits should not be of any inconvenience to Respondent seeing that they should already be in Respondent's possession.

241. In a further letter dated 18 January 2011, Claimant sought the Tribunal's authorisation to submit four more exhibits (C-303 to C-306) which were attached to the letter. In support of its case, Claimant argued that the documents were "*offered solely in the nature of rebuttal evidence*" to Respondent's allegations of forgery and that Mr Aliyev, Claimant's witness, had made an effort to obtain these documents before the expiration of the 12 January 2011 deadline. However, Claimant pointed out that due to the sensitive nature of the exhibits at issue it had not been easy to access these documents "*by someone who is under constant threat of physical harm, and must regularly move his residence (and keep his whereabouts confidential)*" for protection. Lastly, Claimant underscored that it had tried to obtain Respondent's consent to submit these documents at this point of the proceedings which however, had been declined.

242. By letter of 19 January 2011, Claimant addressed Respondent's request of 17 January 2011 to the Tribunal to exclude the exhibits submitted by Claimant between 12 and 14 January 2011 and requested that Respondent's motion should be rejected.

243. Claimant purported that Respondent complained about the number of documents, the language they were in, their date, the date on which the exhibits were physically received and the fact that they were not accompanied by a written submission. Assertedly for these reasons the only way to protect Respondent's right of defence was to strike Claimant's new exhibits from the record. However, Claimant emphasised that out of the 123 new exhibits only 27 were such that Respondent could not have seen or noticed them previously.

244. With regard to the language of the submitted documents, Claimant pointed out that it did not receive Respondent's exhibits to its Rejoinder until 21 December 2010, thus seven days after the deadline for the Rejoinder and that Claimant then had a mere fourteen business days to submit exhibits in rebuttal of the rejoinder. Claimant thus held that it was to be excused for not providing translations of the submitted exhibits immediately. Claimant further drew support for its argument from the fact that translations were to be provided as soon as "*practicable*" and moreover, from the fact that virtually all untranslated exhibits were in Russian, an official language of Respondent which was also spoken by Respondent's counsel and Respondent's governmental representatives. Finally, Claimant put forward that nothing in Paragraph 7.1 of the Minutes of the First Session suggested that a timely submission of exhibits was prevented by not providing a corresponding English translation instantaneously.

245. In addition, Claimant expressed its astonishment with regard to Respondent's allegations of forgery of certain documents produced by Claimant and especially the fact that Respondent waited for almost five months before making its allegations while it had purportedly been in possession of said documents since early August 2010.

246. Regarding the date of the documents submitted, Claimant held that it was "*simply absurd*" that no documents could be produced that pre-dated its Reply Memorial. Rather, Claimant contended that documents could be brought forward regardless of their date as long as they were in rebuttal of issues discussed in Respondent's Rejoinder. Claimant further noted that Respondent itself on 17 January 2011 had produced exhibits in rebuttal which dated e.g. from 2002 and that it was thereby contradicting its own argument.

247. With regard to the physical receipt of the rebuttal exhibits, Claimant asserted that it had offered Respondent shipping options in order for Respondent to receive the exhibits "*as soon as can be arranged*" and that out of these options Respondent had accepted to pick up a flash drive at 10.30 a.m. on 13 January 2011 from Claimant's counsel's London office without contradiction. Therefore, Respondent could not legitimately hold this against Claimant now.

248. In its letter, Claimant further confirmed that all exhibits filed from 12 January 2011 were in rebuttal to matters raised in Respondent's Rejoinder and that when Claimant did not provide a written submission accompanying these exhibits, it acted in strict compliance with the Minutes of the First Session as well as with the Tribunal's Procedural Orders No. 5 and No. 6. Claimant further mentioned several examples of exhibits which were in direct rebuttal to matters raised in Respondent's Rejoinder.

249. Lastly, Claimant purported that "*Respondent's theory that it will not have a sufficient opportunity to respond to Claimant's rebuttal exhibits is flawed*." Claimant underscored that Respondent had been aware for some time that it would have five days to make submissions in rebuttal to Claimant's exhibits, that it could submit further exhibits if it showed the Tribunal "*good cause*" and that Respondent had weeks and months to comment on Claimant's exhibits at the hearing in Paris as well as in post-hearing briefs.

250. In its letter of 19 January 2011, Claimant also requested that the exhibits submitted on 18 January 2011 as well as exhibits C-307 and C-308 should be admitted into the record.

I.III.2. Respondent's Perspective

251. In a letter of 29 December 2010, Respondent objected to Claimant's intent to file new exhibits in response to Respondent's Rejoinder of 14 December 2011. Respondent relied on paragraphs 14.14 and 15.1 of the Minutes of the First Session to emphasise that new evidence can only be submitted upon consent of the Parties or express authorisation of the Tribunal and moreover, that any new and material evidence or new facts come to the knowledge of a Party or arisen since the date of a witness's or expert's last signed statement, may be addressed in writing to the Tribunal with a subsequent opportunity for the other Party to provide comments. Further, should such evidence be admitted, the other Party will be granted an opportunity to submit evidence, witness statements and expert statements in rebuttal. According to Respondent, Claimant's "*unilateral and unauthorized filing of new exhibits*" was thus seeking to bypass the procedural rules agreed upon previously.

252. Respondent further held that Claimant had already breached these rules when filing the witness statement of Mr Fadi Hussein on 13 December 2010 "*along with many other exhibits*" without obtaining prior authorisation of the Tribunal, and Respondent had requested to exclude and reject these exhibits from the record by letter of 22 December 2010. Respondent also contended that it was impossible to reply in rebuttal to these exhibits within the time available.

253. By letter of 17 January 2011, Respondent requested the Tribunal to exclude the exhibits submitted by Claimant on 13–14 January 2011 (C-299 to C-302). Alternatively, should these exhibits not be stricken from the record, Respondent noted it "*must regretfully state that it has no choice but to reserve all of its rights*". Respondent reiterated its request to strike Claimants exhibits from the record in its letter of 23 January 2011, claiming that their admissibility would violate the basic principles of fundamental fairness and due process.

254. Respondent complained that Claimant had not met its 12 January 2011 deadline for submission of new documents and that, on top of that Claimant's exhibits were not accompanied by Claimant's letter, but rather that Respondent had been invited to pick up the exhibits at issue itself at the London office of Counsel for Claimant on 13 January 2011.

255. In further support of its argument, Respondent emphasised that 102 of the 119 exhibits (C-180 to C-298) had never been submitted before. Furthermore, Claimant filed another four exhibits on 13 and 14 January 2011 (C-299 to C-302), which Respondent could not adequately rebut, given that Claimant had filed 575 pages of new documents, more than

150 pages of which were not in English and had come untranslated. This, Respondent alleged, was in violation of Paragraph 7.1 of the Minutes of the First Session. This was particularly true, in Respondent's view, given the short amount of time. Respondent pointed out that it only had five days until 17 January 2011, including two non-working days in Kazakhstan, to produce documents in rebuttal of Claimant's exhibits. Respondent contended that this constituted a violation of fundamental fairness and due process.

256. Moreover, Respondent purported that Claimant had infringed the spirit of Paragraph 15.1 of the Minutes of the First Session that all evidence is to be submitted together with the written submissions. However, according to Respondent, Claimant did not indicate which arguments the exhibits were trying to rebut and by doing so Claimant had robbed Respondent of a proper opportunity to reply to Claimant's arguments. Respondent gave several examples of documents which could easily have been submitted with Claimant's Reply Memorial and asserted that Claimant had failed to explain why it had not done so.

257. Respondent's position can best be summarised by citing the following passage from its letter of 17 January 2011 (p. 2):

> *"In light of the quantity of new documents and untranslated documents, it is physically impossible for Counsel for the Republic to translate, study, guess which of the Republic's arguments CIOC's new exhibits are supposed to rebut, discuss them with representatives of the Republic and then search for, translate, if necessary, and submit by January 17 a full set of new exhibits in response to CIOC's January 13-14 filings."*

258. Respondent alleged that Claimant had filed certain documents which purportedly contained a large number of unsubstantiated allegations, on the day before the filing date of Respondent's Rejoinder to ensure that these documents could not be replied to in the Rejoinder.

259. Respondent also commented on the asserted inadmissibility of Mr Harvey Jackson's witness statement. As Mr Jackson's witness statement had been withdrawn on 12 August 2010 at the request of Mr Jackson's employer at the time, Merrill Lynch, Respondent "*did not look for a corresponding witness to reply to him and did not deal with his withdrawn witness statement in the Rejoinder*". By submitting Mr Jackson's witness statement back on the record, Claimant had thus eliminated Respondent's possibility to reply adequately to the witness statement. Consequently, Respondent requested that Mr Jackson's witness statement be stricken from the record and that additionally, Mr Jackson be excluded from testifying at the hearing. Respondent reiterated its objections concerning Mr Jackson's witness statement in its letter to the Tribunal of 23 January 2011.

260. Respondent further noted in its letter of 23 January 2011 that to this date it had not received the English translations of the newly filed exhibits on 13 January and thereafter. In addition, Respondent pointed out that according to Section 5.1 of Procedural Order No. 2 the Parties were invited to produce documents which were not in English to the other Party together with an unofficial English translation and that Section 7.1 of the Minutes of the First Session provided that the procedural language shall be English.

261. With regard to the date on which Claimant had received the Rejoinder, Respondent pointed out that the 12 January 2011 deadline for Claimant's new exhibits had been set after the receipt of the Rejoinder and that the delays in December had been caused by

Claimant's submission of 13 December 2010, which had disrupted Respondent in finalising its Rejoinder.

262. Respondent further held that it was perfectly entitled to raise the allegations of forgery made in two of its exhibits for the first time together with its Rejoinder, as it constituted a written submission under Section 15.1 of the Minutes of the First Session.

263. Moreover, Respondent reproached that Claimant had still failed to fully explain or indicate which of Respondent's arguments it was trying to rebut in submitting Claimant's exhibits and thus continued "*to deprive the Republic of its right to know the underlying explanations*" (p. 11, para. 6) and by doing so violated the principles of fairness and due process. In Respondent's view, this also held true for recent exhibits filed on 18 January 2011 (C-303 to C-306) and thus Respondent requested that all of Claimant's exhibits should be stricken from the record, in particular the exhibits submitted by Claimant on 18 January 2011.

264. Respondent also noted that Claimant had requested to be provided with a "*live internet connection, including to Caratube International Oil Company's website*". As Claimant had not provided any explanation as to why it required such a connection, Respondent objected to the request in so far as the connection should serve to present new documents or to make the hearing available through the website (Respondent's letter of 23 January 2011, p. 10).

I.III.3. The Tribunal

265. The relevant passage from the letter of 24 January 2011 by the Tribunal as conveyed to the Parties by ICSID is recalled:

> *"1. The Tribunal has carefully considered the many recent submissions by the Parties regarding the preparation and conduct of the Hearing in Paris. In view of the many issues addressed and in order to give the Parties guidance for their preparation of the Hearing without further delay within the very short time available up to the Hearing, and in order to avoid longer time that would be needed for the members of the Tribunal, who also have mandatory commitments in other cases during that period, to elaborate and agree on a longer text defining in detail the considerations and reasons of the Tribunal, the Tribunal has decided to hereby inform the Parties of its following preliminary rulings.*
>
> *2. Documents Submitted by the Parties*
>
> *2.1. The Tribunal appreciates the submissions of the Parties indicating that and why certain documents recently submitted by the Parties should or should not be admitted. However, the Tribunal considers it as important that, at the final hearing of this case, all documents that the Parties consider as relevant, can be considered and discussed.*
>
> *2.2. Therefore, the Tribunal provisionally admits all documents submitted [by] the Parties up to now, and the two letters submitted by Mr. Rashid Farah forwarded to the Parties by the Tribunal's Secretary at ICSID by e-mail of 19 January 2011.*

2.3. At the Hearing, the Parties should be prepared to comment on all new documents, may refer to and rely on these documents (provided they are in English or translated into English), may explain why they consider them admissible or inadmissible beyond what they have already argued in their written submissions, and may request to further discuss these documents in their post-hearing submissions.

2.4. Any further submissions by the Parties have to be made, as is the general rule in ICSID proceedings, to ICSID without any copies sent directly to members of the Tribunal.

2.5. Taking all these presentations of the Parties into account, the Tribunal will then decide on the final admissibility of documents it considers it[sic] relevant for its decisions and whether it can rely on such document for its decision."

266. Regarding the admission of new documents, the Tribunal recalls the following passage from the Transcript of the Hearing on Jurisdiction and the Merits of 9 February 2011 (Tr, day 3, p. 6–7):

"THE PRESIDENT: […] Perhaps I should first define what we call new documents.

New documents from our side are all documents submitted on 13th December or later, except the documents submitted with the rejoinder. […]

Now regarding these new documents, our ruling is the following:

1. The Tribunal recalls its rulings in the minutes of the first session, paragraph 14.14, in Procedural Order No. 5, paragraph 3.6, in Procedural Order No. 6, paragraph B4, and in our letter of 24th January, section 2.

2. On that basis, the further procedure during this hearing shall be as follows:

(a) If a party wishes to rely on a new document, in the definition that I gave you, it shall identify the document and give the reasons why the Tribunal should admit the document.

(b) The other party will be heard in this regard.

(c) Then the Tribunal will decide on a document by document basis on the request."

I.IV. Procedural Issues regarding the Attendance of Persons and Examination of Witnesses at the Hearing

267. Certain issues regarding the attendance of persons and the examination of witnesses at the hearing were highly disputed between the Parties before and during the hearing.

I.IV.1. Claimant's Perspective

268. By letter dated 10 November 2010, Claimant submitted its Request to Examine Witnesses Under the Control of Respondent, petitioning that Respondent make available five individuals for the hearing in Paris in February 2011. Claimant asserted that none of these witnesses would appear voluntarily at Claimant's request. Claimant further explained that each of these persons could provide relevant and material testimony to the dispute.

269. Claimant also noted that the Tribunal had the authority to require the production of witnesses under the ICSID Convention, the ICSID Arbitration Rules, and according to the IBA Rules on the Taking of Evidence in International Commercial Arbitration. Furthermore, Claimant argued that its request was supported by the practice of ICSID Tribunals.

270. Claimant then substantiated why the testimonies of Ms Dariga Nursultanovna Nazarbayeva, Mr Aglan Espullayevich Musin, Mr Kanat Saudabayev, Mr Alexander Mirtchev, and Mr Timur Kulibayev were crucial to the proceedings and acknowledged that these persons would be subject to immunity as granted under Articles 21 and 22 of the ICSID Convention as stated in a previous Procedural Order of the Tribunal.

271. By letter of 22 December 2010, Claimant submitted its list of witnesses it wished to examine at the hearing in February 2011, a total of 14 witnesses for direct and 17 witnesses for cross-examination. With its submission, Claimant filed the witness statement of Mr Harvey Jackson, who was no longer employed by Merrill Lynch and was now ready to testify at the hearing.

272. Claimant also explained why in its opinion the testimony of certain persons under the control of Respondent as stated in its request of 10 November 2010, was crucial to the dispute. Moreover, Claimant added Ambassador Yerzhan Kazykhanov to its pending request of 10 November 2010.

273. On 23 December 2010, Claimant requested two more witnesses for cross-examination, Ambassador Idrisov and Mr Kasymbekov, to testify at the hearing in February 2011, on account of Respondent relying on letters of these persons rather than witness statements in trying to prove its allegations of forgery.

274. On 17 January 2011, Claimant submitted its list of attendees for the hearing in Paris. Claimant furthermore informed the Tribunal that in view of Respondent's abbreviated witness list, Claimant no longer intended to call six of the witnesses from the list submitted on 22 December 2010, among them Mr Harvey Jackson.

275. In its letter of 19 January 2011, Claimant notified the Tribunal that Mr Fadi Hussein and his family had purportedly been threatened by agents of Respondent and that Mr Hussein thus refused to testify at the hearing. Claimant requested that in light of the circumstances that led to Mr Hussein's non-appearance at the hearing, his witness statement remain on the record.

276. With regard to Mr Kassem Omar, Claimant pointed out that according to Paragraph 1.3 of PO-5 the Parties were permitted to notify the Tribunal by 17 January 2011 if they did not intend to examine any of the witnesses so far notified. Claimant emphasised that this provision only allowed for the dropping of a witness that had originally been required for

examination, however, that it did not entail that a witness could be added who had previously not been notified for examination. As Mr Omar had not been on Respondent's list of witnesses of 22 December 2010, and Claimant had subsequently decided not to call him either, Mr Omar upon notification of this decision, had made other plans and was thus no longer available. Claimant requested the Tribunal to confirm that no witnesses could be added to the original list of 22 December 2010.

277. Regarding the witness statement of Mr Harvey Jackson, Claimant contended that it had been admitted to the record in the Tribunal's letter of 4 January 2011 according to Section B.4 of PO-6.

278. Claimant further notified the Tribunal of its decision not to call Mr Mangat Thapar, the reason being that his interpretation of Claimant's 3D survey was "*utterly irrelevant*" to the decisive matters in dispute. Also, Claimant noted that it would be obviously unfair to pair its industry expert Mr Tiefenthal with two experts for Expert Conferencing as had been suggested by Respondent (Claimant's Letter of 19 January 2011, p. 10). Moreover, Claimant asserted that Mr Thapar's expertise as geophysicist was different from the expertise of its own expert witnesses and not conducive to Expert Conferencing. Claimant thus requested Mr Thapar to be limited to ten minutes of direct examination by Respondent.

279. With regard to Expert Conferencing, Claimant further requested the Tribunal to grant its experts a period on rebuttal only before starting Expert Conferencing. In addition, Claimant provided the order in which it would conduct direct examination of its witnesses and presented its proposal for Expert Conferencing.

280. Finally, Claimant added Dr Otto Dietrich, Counsel to Dr Rakhat Aliyev, to the list of attendees for the days on which Dr Aliyev would testify.

281. By letter of 24 January 2011, Claimant replied to Respondent's letter of 23 January 2011. In particular, Claimant underscored that neither Rule 32(1) of the ICSID Arbitration Rules nor any other rule entitled a party to require evidence from the opposing party to justify its selection of hearing attendees on its behalf. This held true even more so as none of the three individuals to which Respondent had objected were witnesses in the proceedings. "*Rather, they have been designated as agents of Claimant solely for the purpose of attending the hearing.*" (p. 1, section 1). Thus, in Claimant's opinion, Respondent had failed to provide any reason that would prevent these persons from attending the hearing, and had also failed to explain why these persons would have to be "*true corporate representatives*" (Respondent's letter of 23 January 2011, p. 10).

282. Claimant further explained that Dr Dietrich's presence at the hearing was important in light of proceedings brought by Respondent in Austrian courts against Dr Aliyev in which Respondent seeks Dr Aliyev's extradition to Kazakhstan. Dr Dietrich serves as counsel for Dr Aliyev's in these proceedings.

283. Mr Didier Bollecker and Ms Eve-Marine Bollecker of CAAvocats represent Dr Aliyev advising him on matters of safety, including immunity protection under the ICSID Convention, Dr Aliyev's travels to France as well as handling INTERPOL red bulletins and procedural and substantial matters arising under French law in this regard. Claimant thus held that their presence was crucial for Dr Aliyev's personal safety.

284. Lastly, Claimant added Mr Benjamin Folkinshteyn of Crowell and Moring LLP to the list of hearing attendees.

I.IV.2. Respondent's Perspective

285. In its Response to CIOC's Request to Examine Witnesses Under the Control of Respondent of December 15, 2010, Respondent requested that Claimant's petition be denied.

286. Although Respondent conceded that the Tribunal would have the authority to request the production of certain witnesses, Respondent emphasised that this was only the case if the testimony at issue was relevant and material for the outcome of the dispute. In Respondent's opinion, the witnesses in question would neither serve to clarify the facts of the case as Claimant itself had stated that it had already "*submitted numerous witness statements by individuals with first-hand knowledge*" of the relationships fundamental to the dispute and how it affected Claimant's investment (Claimant's Request, para. 20), nor would their testimonies be relevant and material to the dispute since the request for their examination was based on forged or almost certainly forged documents which would in consequence be inadmissible.

287. Relying on Article 9.2(g) of the IBA Rules on the Taking of Evidence, Respondent also pointed out that a Tribunal may decline to consider evidence in view of fairness or equality (Respondent's Response, para. 22).

288. Furthermore, Respondent submitted that Claimant's Request was to be rejected also on the ground of having been made in an untimely manner. In support of its argument, Respondent drew upon Claimant's late submission of the Oligarchs Report which had been available to Claimant for several months and its late request of individuals to appear as witnesses, whose purported involvement in the dispute had been known for some time, in case of Ms Dariga Nazerbaeva from the beginning of these proceedings and in case of Mr Kanat Saudabaev from at least January 2010.

289. On 22 December 2010, Respondent filed a list of the witnesses and experts whom Respondent wished to examine at the hearing in direct or cross-examination.

290. By letter of 17 January 2010, Respondent provided the Tribunal with a list of the witnesses and experts whose presence they would provide for at the hearing, the order in which they intended to conduct their examination, the persons attending the hearing on their side, notifications on the witnesses they did not intend to examine, the witnesses and experts who would require interpretation from and to English, the experts that should be examined together by Expert Conferencing and issues that should be raised by each group of experts during Expert Conferencing.

291. Respondent had added three additional witnesses, namely Ambassador Erlan Idrissov, Ambassador Yerzhan Kazykhanov, and Mr Sanat Isayev. Respondent further pointed out that it would not make available any of the five witnesses requested by Claimant in its motion of 10 November 2010 for the reasons stated in Respondent's Response to CIOC's Request to Examine Witnesses Under the Control of Respondent. In addition, Respondent explained that it would not present Major General Sergey Kuzmenko, Mr Adil Abenov, Mr Serik Burkitbayev, and Mr Murat Musabekov as these persons were currently serving

in prison and could not be released. Moreover, Respondent held that Claimant had failed to prove that any of these persons were in any way related to the documents in dispute. Further, Respondent noted that Mr Makhmud Bazarkulovich Kasymbekov would not serve as witness at the hearing due to his unavailability.

292. In another letter of 17 January 2011 dealing mainly with Claimant's submissions of exhibits on 13–14 January 2011, Respondent also commented on the inadmissibility of Mr Harvey Jackson as witness in the upcoming hearing. Since Respondent did not have an opportunity to deal with and reply adequately to Mr Jackson's witness statement, Respondent requested that Mr Jackson's witness statement be stricken from the record and that additionally, Mr Jackson be excluded from testifying at the hearing.

293. By letter of 23 January 2011, Respondent submitted comments on Claimant's letters of 17–19 January 2011, *inter alia* on issues regarding witnesses, experts and Expert Conferencing as well as on the hearing attendees and logistical requirements.

294. With regard to Dr Mangat Thapar, Respondent strongly objected to Claimant's request to limit Dr Thapar's testimony to ten minutes of direct examination. This would not only be in breach of the Party agreement to conduct Expert Conferencing for industry experts (cf. Respondent's letter of 22 December 2010 providing comments on PO-5, including agreed points between the Parties), but also run counter to Section 3.2.5 of PO-5 which provided for the examination of industry experts by the method of Expert Conferencing. Respondent thus held that it was entitled to Dr Thapar being examined by Expert Conferencing and that otherwise Respondent would be deprived of its right to be heard on crucial subjects in dispute.

295. Moreover, according to Respondent, Claimant's reasons why Expert Conferencing should be avoided were invalid. Respondent contended that Dr Thapar's expert report had been in direct rebuttal of Claimant's expert Mr Tiefenthal's statements covering compliance, discovery and reserves as far as 3D seismic was concerned. In fact, according to Respondent, Mr Thapar had conducted a review of Mr Tiefenthal's reinterpretation of Claimant's 3D survey rather than interpreting the 3D survey himself. In Respondent's view, Claimant cannot on the one hand regard Mr Tiefenthal as competent to express his views and conclusions on 3D seismic and on the other hand not regard him as competent to discuss these views and conclusions with Mr Thapar.

296. Respondent further argued that Claimant's assumption of Mr Thapar's interpretation of Claimant's 3D seismic being utterly irrelevant to the matters at dispute was erroneous. Rather, Respondent alleged that Claimant had either misunderstood the matter in dispute or was seeking to avoid a review of one of its purportedly most striking material breaches under the Contract as well as a recalculation of reserves and quantum.

297. Respondent also objected to Claimant's assertion in its letter of 19 January 2011 that Respondent had approved Claimant's 3D survey. Respondent pointed out that Claimant's 3D survey had been prepared for Claimant by SaratovNefteGeofysika, had been presented to TU Zapkaznedra and had been subjected to correction by the Scientific and Technical Council. Respondent noted that Claimant had neither produced this report in these proceedings nor given Mr Tiefenthal access to it.

298. Although Respondent was convinced that it would be more efficient to examine both Mr Chugh and Dr Thapar on the one side and Mr Tiefenthal on the other side through the

method of Expert Conferencing, Respondent would not be opposed to pair Mr Tiefenthal with Dr Thapar alone "*regarding the aspects of those areas that concern 3D seismic*" (Respondent's letter of 23 January 2011, p. 6).

299. With regard to Claimant's witness Mr Fadi Hussein, Respondent asserted that the allegations of threats and bribery were not true and that Respondent had had no knowledge about Mr Hussein's former wife or a son with her. Respondent also purported that caution should be exercised while examining Hussein's allegations, considering that he was related to the Houranis, obviously a member of their clan and due to the fact that his witness statement had been introduced late in the proceedings and that he had immediately thereafter been removed from examination as witness which "*raises very serious suspicions regarding his statements*" (p. 7). Respondent further indicated that Mr Hussein had made additional false allegations of coercion and bribery in July 2007 in his witness statement.

300. Respondent also purported that Claimant had withdrawn Mr Hussein as witness to avoid cross-examination. In addition, Respondent strongly emphasised that it welcomed Mr Hussein's appearance as witness at the hearing and in fact requested the Tribunal to order Claimant to produce Mr Hussein as witness at the hearing (p. 8).

301. With regard to Mr Harvey Jackson's witness statement, Respondent reiterated its objections of 17 January 2011 to strike it from the record (p. 9).

302. Respondent objected to Claimant's request to grant a period of direct examination with regard to rebuttal only before Expert Conferencing commences. Respondent held that this was not provided for in the rules. Paragraph 15.1 of the Minutes of the First Session and Paragraph 1.2 of PO-5 stipulated that expert reports constitute the direct testimony of each factual or expert witness and that there would be no direct examination at the oral procedure by the Party presenting the witness or expert, save an introduction to the witness. Paragraph 3.5 of PO-5 further provided that the direct examination of an expert or a fact witness shall be limited to a confirmation of their written testimony, a short introduction and questions on new developments that occurred after their last report or statement. Consequently, Respondent was opposed to Claimant's request for a direct examination of experts.

303. Respondent further objected to the presence of three individuals (Mr Waarie, Mr Hawari, and Mr Mashru) designated as Claimant's representatives as well as to the presence of Mr Didier Bollecker and Ms Eve-Marine Bollecker as human rights counsel for Dr Aliyev and Dr Otto Dietrich as Austrian counsel to Dr Aliyev. To support its argument, Respondent drew upon Rule 32 of the ICSID Arbitration Rules stating that none of the latter three were agents, advocates or counsel to Claimant, but only related to Dr Aliyev and should thus not be permitted to attend the hearing.

304. With regard to Mr Waarie, Mr Hawari and Mr Mashru, Respondent demanded that Claimant provide evidence to show that these persons were "*true corporate representatives*" of CIOC; otherwise Respondent would persist to object to the attendance of the hearing by these individuals (p. 10).

305. Lastly, Respondent added two representatives of IFM Resources, Inc., one attorney, three paralegals, and one IT specialist from Curtis, Mallet-Prevost, Colt & Mosle LLP to their list of hearing attendees.

I.IV.3. The Tribunal

306. The following excerpt from the Tribunal's letter of 24 January 2011 to the Parties concerning witnesses and experts is recalled:

> *"3. Witnesses and Experts*
>
> *3.1. Again, the Tribunal appreciates the submissions of the Parties indicating that and why certain witnesses and experts should or should not be admitted and examined at the Hearing. However again, the Tribunal considers it as important that, at the final hearing of this case, all evidence that the Parties consider as relevant, can be considered and discussed.*
>
> *3.2. The Tribunal recalls and confirms its Procedural Order No. 6.*
>
> *3.3. The Tribunal has taken note of and accepts the Parties' submissions regarding the witnesses and experts that will and will not be present at the Hearing and regarding the witnesses they do not intend to examine at the Hearing. The rulings of PO6 will be applied in this regard and their examination will be conducted in accordance with Procedural Order No. 5.*
>
> *3.4. Since the Parties have not agreed on any changes, the examination will be conducted in the order given by the Agenda given in sections 3.2 and 3.3 of PO5.*
>
> *3.5. In so far as certain witnesses or experts cannot be present for the entire period of the Hearing, the Parties are invited to agree on certain time frames in this regard and inform the Tribunal at the beginning of the Hearing.*
>
> *3.6. The Tribunal has taken note that the Parties' suggestions regarding the groups of experts for the expert conferencing are not identical. The Parties are invited to agree in this regard and inform the Tribunal at the beginning of the Hearing."*

307. The following ruling made during the Hearing on Jurisdiction and the Merits on 8 February 2011 concerning the attendance of persons and confidentiality of the proceedings is recalled (Tr, day 2, p. 36–37):

> *"The Tribunal has agreed on the following three rulings.*
>
> *1. Mr Waarie, Mr Hawari and Mr Mashru may not be present in the hearing room. Mr Omar Antar is accepted as the designated agent of the claimant and may be in the hearing room continuously.*
>
> *2. Mr Bollecker, Ms Bollecker, Dr Dietrich may only be present in the hearing room during the testimony of Dr Aliyev, but the claimant may request permission to show them designated parts of the transcript of the parties' opening statements.*

3. *The Tribunal orders that the proceedings of this hearing shall remain confidential, that neither the transcript of this hearing nor the audio recording of it shall be communicated to any third parties, and that all the individuals present in the hearing shall keep confidential the contents of these proceedings and not communicate them to third parties."*

308. The Tribunal furthermore recalls the following excerpt from the Transcript of the Hearing on Jurisdiction and the Merits of 8 February 2011 (Tr, day 2, p. 101–104):

> *"THE PRESIDENT: Now, as far as witnesses are concerned, we maintain the ruling of paragraph 3.5 of Procedural Order No. 5 which in fact means -- you can read it yourself -- but which in fact means ten minutes' introduction, direct examination, plus a short further introduction on new developments.*
> *We stick with the "short". Now, short does not mean two minutes; it's related to the subject obviously. But we feel we should stick with this "short". And I should also say -- it was raised later in your discussion, but it should be mentioned here -- that this examination, both the ten minutes and anything on new developments, should only be possible relating to the substance of the statement submitted by the witness and not any new subjects.*
> *Okay, that's number 1.*
>
> *Number 2, expert conferencing. We are not quite sure whether we only confirm something that you agreed to but let us make it clear. Each expert has ten minutes of introduction, that is what the parties agreed as well, and then conferencing starts right away. Later in the week, and perhaps not consistently for the two groups we have, we will discuss in the Tribunal whether we feel we should start with some questions or whether we would invite the parties first to raise questions. Of course we do have lists of issues that you have submitted in that regard.*
> *But anyway, there will be ten minutes plus any new development, if there is, related to the substance of the witness statement, and then conferencing starts right away.*
> *As far as the industry experts are concerned, we took note and accept what the parties agreed: that these ten minutes will come up three times for the three topics that you have: compliance, reserves and 3D, I think it is. So this is witness-conferencing.*
>
> *Number 3, witness statement of Fadi Hussain[sic]. The statement we noted is dated 6th November. It was submitted by claimant's letter of 13th December, where we have a reference to that on page 3. The Tribunal does not find in this letter of 13th December sufficient reasoning why the statement was, after having been available from 6th November, only filed at that particular date, 13th December.*
> *Therefore, for the time being it is not admitted, unless claimant can show that it submitted a reasoned application according to paragraph A4 of Procedural Order No. 6, because we didn't want to overlook anything that perhaps we have overlooked in that short period. But for the time being it is not admitted.*
>
> *The same applies basically to the witness testimony of Mr Jackson, which was submitted again by a letter of 22nd December as far as we can see. Again, we do not find either in that letter or otherwise from the claimant's side a reasoned application according to paragraph A4 of PO6 why it was submitted so late, even though -- well, we know the procedure; it had been submitted before and so on. Let me exemplify*

that. If, for instance, we were told that the employment stopped two days before 22nd December, that may perhaps be a consideration to be taken into account. But we don't see that.

Finally, number 5, just as a clarification -- again, we are not quite sure whether that is needed or whether the parties agreed on that -- the rule on no new documents is quite clear, we think. We maintain the ruling in paragraph 3.6 of Procedural Order No. 5, which means no new documents. Demonstrative exhibits may, of course, be shown."

J. Jurisdiction of the Tribunal

J.I. Introduction

309. Respondent requested the Tribunal to reject CIOC's claims in their entirety for lack of jurisdiction or for inadmissibility. (R-III, para. 468; R-IV, para. 648; R-V, para. 191) In this context, the Tribunal notes that, Article 41 of the ICSID Convention provides:

> *"(1) The Tribunal shall be the judge of its own competence.*
>
> *(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."*

Further, the Tribunal notes that Rule 41(2) of the Arbitration Rules provides that:

> *"The Tribunal may at its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence."*

The Tribunal agrees with the *Aguas del Tunari* tribunal that the Tribunal's authority also includes "*the power to consider ways in which an ambiguous or unclear objection may bear on jurisdiction and to restate such objections, as appropriate, so as to allow a full examination of jurisdiction.*"[2] The Tribunal will therefore first turn to the issue of jurisdiction.

J.II. The Requirements of the ICSID Convention for CIOC to Claim U.S. Nationality – Article 25(2)(b)

310. Respondent's principal objection to the Tribunal's jurisdiction is that Claimant is not a national of another Contracting State for the purposes of Article 25(1) of the ICSID Convention, inasmuch as Claimant contends it is a U.S. national by virtue of the BIT, and Article 25(2)(b) of the ICSID Convention, which allow locally incorporated companies to bring claims against States of their incorporation, "because of foreign control".

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[2] *Aguas del Tunari, S. A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction of 11 October 2005, para. 78 ("**Aguas del Tunari v. Bolivia**").

311. Both the U.S. and Kazakhstan are Contracting States of the ICSID Convention. The ICSID Convention entered into force in the United States of America on 14 October 1966 and for Kazakhstan on 21 October 2000.

312. Claimant is an entity incorporated in Kazakhstan and the key question for the Tribunal is whether Claimant satisfies the conditions pursuant to which a juridical person incorporated in the State which is a party to the dispute can be treated as a national of another Contracting State for the purposes of ICSID arbitration. The provision addressing this issue in the ICSID Convention is Article 25(2)(b).

313. The Parties disagree as to the content and application of the legal test required by Article 25(2)(b). Crucially, they disagree as to whether the test requires evidence that CIOC is an investment of Devincci Hourani. Further, if such a requirement indeed exists, the next question is what is meant by 'investment' in this context and what evidence should be presented.

314. Article 25(2)(b) provides that

> *"(2) "National of another Contracting State" means:*
>
> *(...)*
>
> *(b) (...) any juridical person which had the nationality of the Contracting State party to the dispute on [the date on which the parties consented to submit such dispute to arbitration] and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."*

315. In presenting their arguments the Parties use the notions of jurisdiction *ratione personae* and *ratione materiae*. These concepts are related to Article 25(1) of the ICSID Convention and the jurisdiction proper of the Tribunal. The issue whether, under Article 25(2)(b) of the Convention, a juridical person incorporated in the host State can bring a claim against that host State is a *threshold jurisdictional question*.[3] The threshold question is whether a juridical person can be regarded as a national of another Contracting State 'because of foreign control', in particular, whether 'because of foreign control' the parties have agreed to treat Claimant as national of another Contracting State. Only after this threshold is cleared may the Tribunal move to analysing whether the conditions of Article 25(1) of the ICSID Convention are satisfied.

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[3] The Tribunal agrees here with the *Vacuum Salt* tribunal: "*The parties diverge, however, on the threshold jurisdictional issue (...) regarding whether 'because of foreign control, the parties agreed [that Vacuum Salt] should be treated as a national of another Contracting State [Greece] for the purposes of [the] Convention', specifically Article 25(2)(b). It is crucial to ICSID jurisdiction in this case and it is to this issue that the Tribunal first must turn.*" See *Vacuum Salt Products Limited v. Government of the Republic of Ghana,* ICSID Case No. ARB/92/1, Award of 1 February 1994, para. 27 ("**Vacuum Salt v. Ghana**").

J.II.1. Claimant's Position

316. Claimant holds that it is majority owned and controlled by the U.S. national Mr Devincci Hourani and is therefore a national of the other party as required under Article VI(8) of the BIT as well as a "national of another Contracting State" under Article 25(2)(b) of the ICSID Convention. (C-I, paras. 61, 76; C-IV, paras. 25-45) By Claimant's interpretation, Article 25(2)(b) requires the elements of:

a) control,
b) by a foreign national, and
c) the parties' agreement to treat CIOC as a 'national of another Contracting State' because it is foreign controlled. (C-IV, para. 26)

317. The requirement of 'control' stems from the wording of Article 25(2)(b). Since 'control' is undefined in the Convention, Claimant relied on decisions of ICSID tribunals to establish the meaning of control, including consideration of various factors as evidence of such control, such as shareholding, domination in the company's decision-making, legal capacity to control.[4]

318. Hence, to satisfy this part of the test it suffices to show Devincci Hourani's 92 % participation in CIOC and his responsibilities at CIOC establish the required element of control of the company. (C-IV, para. 27; C-V, paras. 121–129)

319. The requirement of foreign nationality is met by proof that Devincci Hourani is a U.S. national in accordance with U.S. law. (C-IV, paras. 28–39)

320. The third requirement is met since CIOC, as a company controlled by a U.S. national, concluded an agreement with Kazakhstan to treat CIOC as a national of another Contracting State. Kazakhstan's offer to submit disputes to arbitration in Article VI of the BIT included Article VI(8) of the BIT, which constitutes an offer to conclude an agreement required by Article 25(2)(b) of the ICSID Convention. CIOC accepted this offer by filing its Request for Arbitration and thus concluded an agreement with Kazakhstan to treat CIOC as a national of another Contracting State. (C-IV, paras. 25–26, 40–42)

321. Claimant also fulfils the requirements of Article VI(8) of the BIT. CIOC is a company legally constituted under the laws and regulations of Kazakhstan. (C-IV, paras. 5–6, 61) Immediately before the occurrence of the events giving rise to the present dispute, CIOC was an investment of Devincci Hourani, who was a majority shareholder of CIOC and controlled that company. (C-I, para. 61; C-IV, para. 27; C-V, paras. 121–129) Lastly,

[4] Claimant relied here mainly on: *Vacuum Salt v. Ghana*; *Amco Asia Corporation and others v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Award of 5 June 1990 ("**Amco v. Indonesia**"); *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais,* ICSID Case No. ARB/81/2, Award of 21 October 1983 ("**Klöckner v. Cameroon**"); *Liberian Eastern Timber Corporation v. Republic of Liberia,* ICSID Case No. ARB/83/2, Award of 31 March 1986 ("**LETCO v. Liberia**") and *Aguas del Tunari v. Bolivia*.

Devincci Hourani is a national of the U.S. as he falls within the definition of a 'national' contained in Article I(1)(c) of the BIT. (C-I, paras. 6, 61; C-IV, paras. 28–39)

J.II.2. Respondent's Position

322. Respondent argues that the Tribunal must *first* discern whether the case falls within the jurisdictional requirements set out in the Convention. (R-III, para. 22) As a result Respondent bases its argumentation on Article 25 of the ICSID Convention.[5]

323. Respondent does not question Claimant's argument that the arbitration agreement between CIOC and Kazakhstan, which incorporates Article VI(8) of the BIT, constitutes an agreement required by Article 25(2)(b) of the ICSID Convention and thus, at least formally, confers on CIOC a status of a 'national of another Contracting State' under Article 25(1). Respondent argues, however, that the Tribunal must not limit itself to such formalities but investigate the existence of *actual* control arising from all of the facts and circumstances. The enquiry arises because protection granted by the ICSID Convention does not and cannot include an agreement to recognise sham transactions lacking *bona fides*. (R-IV, para. 34–37)

324. Respondent points out that Article 25(2)(b) was introduced to recognise "*the business model commonly employed by international investors, who often make their investments through a local investment vehicle.*" Its purpose is to include within the scope of the ICSID Convention all investors that operate through locally incorporated companies. To rely on Article 25(2)(b), CIOC has to be a local investment vehicle of a foreign investor. Inasmuch as Claimant asserts that this foreign investor is Devincci Hourani due to his purported ownership and control of CIOC, Respondent contends that the requirements for the materiality and existence of control need to be objectively proven and not limited to a mere semblance or formality. (R-III, paras. 27–29)

325. Respondent further contends that the decisive criterion for the existence of a foreign investment is the nationality of the investor; if Devincci Hourani made no investment in CIOC, the Tribunal has no jurisdiction. (R-III, para. 29) This inference may at first glance appear illogical.[6] However, the proposition is clear when read in conjunction with the passage from *Dolzer* and *Schreuer* relied upon by Respondent.[7] It follows from it that the requirement of nationality of ownership or control informs only the *foreignness* of an investment. It does not inform whether it is *an investment.* Thus, to rely on Article 25(2)(b) and the BIT, CIOC must be a foreign investment *of* Devincci Hourani. Claimant

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[5] This follows from Respondent's reliance on the *TSA Spectrum* award, where the tribunal stated that "*the provisions of the BIT cannot provide ICSID jurisdiction unless the conditions of Article 25(2)(b) of the ICSID Convention are satisfied.*" *TSA Spectrum de Argentina S.A. v. Argentine Republic,* ICSID Case No. ARB/05/5, Award of 19 December 2009, para. 156.

[6] It prompted the Claimant to observe that Respondent is "misstating the relevant test" (C-V, para. 118).

[7] "*The decisive criterion for the existence of a foreign investment is the nationality of the investor. An investment is a foreign investment if it is owned or controlled by a foreign investor. There is no additional requirement of foreignness for the investment in terms of its origin.*" [footnotes omitted] (R. Dolzer and C. Schreuer, *Principles of International Investment Law*, Oxford University Press (2008), pp. 67–68).

must show that it is *a foreign investment* but also that it is *an investment* of the U.S. national. (R-III, paras. 29–30)

J.II.3. Tribunal's Analysis

326. Respondent's jurisdictional objection is built around Article 25(1) and 25(2)(b) and their interpretation. The Tribunal therefore starts its analysis from the Convention.

327. Claimant interprets Article 25(2)(b) as requiring that a local company is controlled by a national of another Contracting State. Respondent contends that Article 25(2)(b) also requires that CIOC must be an investment of Devincci Hourani.

328. On this issue of construction of Article 25(2)(b) the Tribunal first turns to the 1969 Vienna Convention on the Law of Treaties (VCLT).

(a) Interpretation of Article 25(2)(b)

329. Article 31(1) of the VCLT requires the Tribunal to interpret Article 25(2)(b) in good faith, by discerning the ordinary meaning of its terms in their context and in the light of the object and purpose of the ICSID Convention. It is clear from the wording of Article 25(2)(b) that its application depends on the existence of an agreement of the parties. The Tribunal must therefore first identify such agreement and the first question for the Tribunal is: who are the parties to that agreement? The ICSID Convention consequently uses the word 'parties' to describe the parties to the dispute. Claimant argues, and Respondent does not deny, that the agreement between the disputing parties was concluded by Claimant's acceptance, in its Request for Arbitration, of Respondent's offer to submit to ICSID arbitration disputes contained in the BIT. While the Tribunal accepts such interpretation, if Claimant's reasoning is to mean that a mere existence of such an agreement gives Claimant standing in the present arbitration,[8] the Tribunal disagrees.

330. In most of the previous ICSID proceedings concerning Article 25(2)(b), its provisions were applied to an investment contract signed between a locally incorporated company (claimant) and a host State (respondent).[9] In such cases the agreement was negotiated directly between the parties to the dispute, with the host State's awareness of the identity

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[8] Claimant argued that "*By the offer to submit disputes to arbitration in Article VI of the Treaty, and CIOC's acceptance of that offer in filing its Request for Arbitration, the parties have agreed to treat CIOC as a* 'national of another Contracting State' *for the purposes of Article 25(2)(b) of the ICSID Convention.*" From this Claimant concludes that "*CIOC therefore has standing to claim by virtue of Article 25(2)(b) (...).*" (C-IV, paras. 25 and 40).

[9] Without having to rely on specific cases which the Parties have not commented upon, the Tribunal points to e.g. *Holiday Inns S.A. and others v. Morocco*, ICSID Case No. ARB/72/1 (an investment agreement); *Amco v. Indonesia* (an individual consent to ICSID arbitration); *Klöckner v. Cameroon* (a joint venture agreement); *LETCO v. Liberia* (a concession agreement); *Société Ouest Africaine des Bétons Industriels* (*SOABI) v. Senegal*, ICSID Case No. ARB/82/1 (an establishment agreement); *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited,* ICSID Case No. ARB/98/8 or *Vacuum Salt v. Ghana* (a lease agreement).

of the locally incorporated company. In many of those cases, the agreement to treat the locally incorporated company as a national of another Contracting State was implied from an ICSID arbitration clause contained in the investment contract. In such circumstances, the existence of an express or implied agreement to treat the locally incorporated company as a foreign national gave that company standing in the dispute. In the present dispute the investment contract between the parties (the Contract) contains an ICSID arbitration clause. However, Claimant is relying on the BIT, not the Contract, to establish the Tribunal's jurisdiction.[10]

331. If a tribunal's jurisdiction is based on an investment treaty, claimant does not negotiate an individual agreement with the host State but accepts a non-negotiable offer addressed to persons or entities that fulfil its conditions. That offer is contained in an investment treaty and its conditions are agreed between the parties to that investment treaty. Unlike in the context of investment contracts, the acceptance of an offer contained in an investment treaty cannot create an assumption that the claimant fulfils the conditions of that offer.

332. If a claimant wants to rely on Article 25(2)(b) of the ICSID Convention in the context of an investment treaty arbitration, that investment treaty must allow for the application of Article 25(2)(b). The decision of the parties to the investment treaty to allow application of Article 25(2)(b) in their bilateral relations is an exercise of their ultimate discretion, expressly reserved in the ICSID Convention, to consent to submit disputes to ICSID jurisdiction granted to the Contracting States.[11]

333. Article VI(8) of the BIT contains the decision of Kazakhstan and the United States to allow application of Article 25(2)(b) to disputes arising out of the BIT. However, Article VI(8) contains more than that. It spells out conditions of application of Article 25(2)(b) to disputes based on the BIT. In Article VI(8) of the BIT, Kazakhstan and the United States exercise their discretion, as parties to the ICSID Convention, to agree on the Convention's interpretation or application in a particular area of their bilateral relations. Such agreements are allowed, as long as they do not contradict the meaning of the treaty to which they pertain. The Tribunal is obliged to take any such subsequent agreement between the parties into account, to the same extent as the treaty's context. Article 31(3)(a) of the VCLT states:

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[10] The Tribunal notes that it does not follow from the Contract that Claimant can be treated as a national of another Contracting State. The Contract states that the parties "*agreed that the Contractor is a resident of Lebanon, or in the event of assignment as a national of the resident country of the assignee, and therefore the Contractor shall be treated as a resident of Lebanon, or other country if appropriate, for purposes of the ICSID Convention.*" (C-4, Clause 27.8) This original wording of the Contract, initially concluded between Kazakhstan and CCC, was not addressed in connection with the transfer of the Contract from CCC to CIOC.

[11] The last recital of the ICSID Convention Preamble provides that "*no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration*". This is also confirmed in para. 30 of the Report of the Executive Directors: "*A juridical person which had the nationality of the State party to the dispute would be eligible to be a party to the proceedings under the auspices of the Centre* ***if that State had agreed*** *to treat is as a national of another Contracting State because of foreign control.*" (emphasis added).

"There shall be taken into account, together with the context: [...] any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions [...]"

334. The discretion of the ICSID Convention Contracting States to agree the details of application of Article 25(2)(b) of the Convention also follows from the *rationale* of this provision. ICSID is an institution designed for the resolution of disputes between States and nationals of other States. Only in exceptional circumstances companies are permitted to bring claims against States of their incorporation, and the second half of Article 25(2)(b) sets out the conditions of this exception.

335. The wording of Article 25(2)(b) is a result of a compromise. This provision was introduced to prevent the exclusion from the ambit of the Convention of situations of foreign investors carrying out their business through a company organised under the laws of the host State.[12] In the drafting process two positions emerged with regard to dealing with this issue. One was to leave it to the discretion of the host State and the other to define the link between the company and a foreign national in the Convention.[13] The final wording combines "*the elements of agreement and foreign control by permitting agreement to treat a corporation of host State nationality as a national of another Contracting State because of foreign control*."[14]

336. It follows from the above, that the ICSID Convention Contracting States can agree on the conditions of their submission to ICSID jurisdiction as long as their agreement does not contradict the meaning of the Convention. Article 25(2)(b) sets 'foreign control' as such 'outer limit', an objective requirement that cannot be replaced by an agreement.[15] It is a floor below which the parties' agreement cannot reach. On the other hand, it gives the parties flexibility within those 'outer limits'. As stated by *Broches*, it leaves "*the greatest possible latitude to the parties to decide under what circumstances a company could be treated as a 'national of another Contracting State'*", which means that "*any stipulation (...) which is based on a reasonable criterion should be accepted.*"[16] This interpretation is uncontroversial and accepted by ICSID tribunals and commentators.[17] Hence, it is correct to say that the term 'foreign control' is 'flexible and deferential' and is meant "*to*

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[12] Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,* Recueil des Cours 1972 II, Vol 136, pp. 337–410, at pp. 358–359; C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, The ICSID Convention, A Commentary, 2nd edition, Cambridge University Press (2009), p. 296, para. 760; see also: *Aguas del Tunari v. Bolivia,* para. 216: "*(...) the ICSID Convention and the majority of BITs, recognises that the investor of one of the State Parties may incorporate an entity in the other State Party as a vehicle for its investment activity.*"

[13] Broches, *ibid.*, pp. 359–360; Schreuer et al., *ibid.*, pp. 296–297, paras. 761–762.

[14] Schreuer et al., *ibid.*, p. 297, para. 762.

[15] Schreuer et al., *ibid.*, p. 312, para. 813.

[16] Broches, *ibid.*, pp. 360–361.

[17] See e.g. *Vacuum Salt v. Ghana*, para. 37; *Aguas del Tunari v. Bolivia*, paras. 280–281; *Autopista Concesionada de Venezuela v. Venezuela,* ICSID Case No. ARB/00/5, Decision on Jurisdiction of 27 September 2001, paras. 109, 113–116; and comments by Schreuer et al., *ibid.*, para. 273, p. 287 (where it is stated that "*Any reasonable determination of the nationality of juridical persons contained in (...) a treaty should be accepted by an ICSID (...) tribunal.*").

accommodate a wide range of agreements between parties as to the meaning of 'foreign control'".[18]

337. The factual element of foreign control under Article 25(2)(b) of the ICSID Convention cannot be examined independently from the agreement on nationality contained in the applicable investment treaty, because it is the investment treaty that would normally contain the test by which such foreign control is established in the circumstances of the case. However, if the agreement plainly contradicts the meaning of the ICSID Convention, e.g. by stipulating that *any* locally incorporated company should be treated as a foreign national, the tribunal cannot go beyond the mandatory limits established by Article 25 of the Convention. Therefore, at least to the extent to which the agreement contradicts the Convention, the Tribunal must find that there is no agreement providing jurisdiction under Article 25(2)(b).

338. For the above reasons the Tribunal must first turn to Article VI(8) of the BIT.

(b) Article VI(8) of the BIT

339. Article VI(8) provides that:

> *"For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention."*

340. This provision contains the BIT parties' agreed conditions of application of Article 25(2)(b). The Tribunal thus needs to determine whether Article VI(8) contradicts the ICSID Convention and, if it does not, apply the test to the circumstances of the present case.

341. By virtue of its references to Article VI(3) of the BIT, which designates ICSID arbitration as one of the dispute settlement options, and to Article 25(2)(b) of the ICSID Convention, Article VI(8) of the BIT limits its application to arbitration under the ICSID Convention. It extends the BIT protection to companies that are registered in one Party to the BIT and constitute "*investment[s] of nationals or companies of the other Party*" to the BIT.

342. In interpreting the phrase "*any company legally constituted under the applicable laws and regulations of a Party*" the Tribunal applies the BIT's definition of the term "*company*" in Article I(1)(b):

> *""company" of a Party means any kind of corporation, company, association, enterprise, partnership, or other organization, legally constituted under the laws and*

[18] *Aguas del Tunari v. Bolivia*, paras. 280–286.

regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled (...)"

In the context of the present dispute, the juridical person can invoke ICSID jurisdiction if it is a Kazakh company, provided that all other jurisdictional requirements are met.

343. In interpreting the phrase "*investment of nationals or companies of the other Party*" the Tribunal resorts to the above definition of "*company*", as well as to the BIT's definitions of the terms "*investment*" and "*national*":

Pursuant to Article I(1)(c) of the BIT,

> *""national,[sic]"of a Party means a natural person who is a national of a Party under its applicable law"*.

Pursuant to Article I(1)(a) of the BIT,

> *""investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:*
>
> *(i) tangible and intangible property, including movable and immovable property, as well as rights, such as mortgages, liens and pledges;*
>
> *(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;*
>
> *(iii) a claim to money or a claim to performance having economic value, and associated with an investment;*
>
> *(iv) intellectual property which includes, inter alia, rights relating to:*
>
> *literary and artistic works, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and*
>
> *(v) any right conferred by law or contract, and any licenses and permits pursuant to law"*.

344. In the light of the above definitions, the meaning of the terms "*national*" and "*company*" is clear enough. However, the meaning of the term "*investment*" is not so immediately clear. The phrase

> *""investment" means every kind of investment"*

is problematic.

345. It appears to the Tribunal that the two words 'investment' used in the above phrase do not mean exactly the same thing. The first word 'investment' is defined: the text of Article I(1)(a) after the phrase '*"investment" means*' and finishing with the word '*law*' in

subparagraph (v) constitutes a definition of the first word 'investment'. However, if we substituted the second word 'investment' used in the above phrase with this definition, the result would be nonsensical.[19] Rather, following general rules of interpretation, the second word 'investment' in the above phrase should be treated as an undefined term and interpreted in accordance with its ordinary meaning in its context and in the light of the BIT's object and purpose pursuant to Article 31(1) of the VCLT which instructs the interpreter to interpret a treaty "*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.*" There is no evidence that the parties have intended to give that second word 'investment' any special meaning. Pursuant to Article 31(4) of the VCLT "*a special meaning shall be given to a term if it is established that the parties so intended.*"

346. The definition of investment in Article I.1(a) follows a familiar pattern of investment definitions in bilateral investment treaties. It consists of a general description of the meaning of the term 'investment', followed by a non-exhaustive illustrative enumeration of assets that are included in the definition of investment. However, the BIT defines 'investment' as "*every kind of investment (...)*". This phrase is common in U.S. bilateral investment treaties.[20] However, it differs from definitions used in other (non-U.S.) investment treaties, which define 'investment' as "*every kind of asset (...)*".[21] Thus, the parties to the BIT intended the term 'investment' to mean something different than merely an 'asset'.

347. Turning to the ordinary meaning of the term 'investment', the Tribunal consulted the following dictionaries:

The Oxford Compact English Dictionary (2nd ed., 2003):

> *'investment' 1. The action or process of investing. 2. A thing worth buying because it may be profitable or useful in the future.*
> *'invest' 1. To put money into financial schemes, shares or property with the expectation of achieving a profit. 2. Devote (time or energy) to an undertaking with the expectation of a worthwhile result. 3. (invest in, informal) Buy (something) whose usefulness will repay the cost.*

[19] It would actually require inserting the definition of Article I(1)(a) into itself *ad infinitum*.
[20] Of 45 bilateral investment treaties signed by the U.S. and available in the UNCTAD database, only four (with Cameroon, Egypt, Rwanda and Uruguay) do not define 'investment' as "*every kind of investment (...)*" or by equivalent wording.
[21] See e.g. bilateral investment treaties signed by Kazakhstan with: Belgium (Article 1.2: "*The term 'investments' shall mean any kind of assets (...)*"); Greece (Article 1.1: " *'Investment' means every kind of asset (...)*"); Hungary (Article 1.1: "*The term 'investment' shall comprise every kind of asset (...)*"); the Netherlands (Article 1(a): "*the term "investments" means every kind of asset (...)*"); Sweden (Article 1(1): "*The term 'investment' shall mean any kind of asset (...)*"); Switzerland (Article 1(a): "*The term 'investments' shall include every kind of assets[sic] (...)*"); Turkey (Article 1.2: "*The term 'investment' (...) shall include every kind of asset (...)*"); United Kingdom (Article 1(a): "*'investment' means every kind of asset (...)*").

Chambers 21st Century Dictionary (1999):

> *'investment' 1. A sum of money, invested. 2. Something, such as business, house, etc in which one invests money, time, effort etc. 3. The act of investing.*
> *'invest' 1. To put (money) into a company or business, eg by buying shares in it, in order to make a profit. 2. To devote (time, effort, energy, etc.) to something.*

Black's Law Dictionary (9th ed., 2009):

> *'investment': 1. An expenditure to acquire property or assets to produce revenue; a capital outlay. 2. The asset acquired or the sum invested.*
> *'invest' 2. To apply (money) for profit. 3. To make an outlay of money for profit.*

Oxford Dictionary of Business (1996):

> *'investment' 1. The purchase of capital goods, such as plant and machinery in a factory in order to produce goods for future consumption. This is known as* ***capital investment****; the higher the level of capital investment in an economy, the faster it will grow. 2. The purchase of assets, such as securities, works of art, bank and building-society deposits, etc., with a primary view to their financial return, either as income or capital gain. This form of* ***financial investment*** *represents a means of saving. The level of financial investment in an economy will be related to such factors as the rate of interest, the extent to which investments are likely to prove profitable, and the general climate of business confidence.* (emphasis in the original)

348. Dictionary definitions, much as they help establish the ordinary meaning of the phrase, are not the end of the Tribunal's analysis.[22] It must also look at the ordinary meaning of the terms of the treaty in their context and in the light of the object and purpose of the BIT, as required by Article 31(1) of the VCLT.

349. The preamble of the BIT provides (emphasis added):

> *"Desiring to promote greater* ***economic cooperation*** *between them, with respect to* ***investment by nationals*** *and companies* ***of one Party in the territory of the other Party****;*
>
> *Recognizing that* ***agreement upon the treatment*** *to be.[sic] accorded such investment* ***will stimulate the flow of private capital and the economic development*** *of the Parties;*

[22] C.F. Amerasinghe, *The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation,* 9 Vanderbilt Journal of Transnational Law 793 (1976), 815 ("*[D]ictionary definitions devised for the purpose of economic science or financial analysis may be irrelevant for the purpose of defining investment in connection with the Centre's jurisdiction. So also tax law or investment law definitions in municipal law are intended to relate to special objectives and would be of limited usefulness.*").

*Agreeing that fair and equitable **treatment** of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of **economic resources**;*

*Recognizing that the **development of economic and business ties** can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights; and*

Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment (...)".

350. The parties clearly refer in the preamble to investment understood as a **flow of private capital** from the U.S. to Kazakhstan and vice versa as a flow of capital stemming from nationals and companies of the respective parties. The primary subject-matter of the BIT is the treatment of *investments*. The BIT is approached as an "*agreement upon the treatment to be accorded* [to] *(...) investment*[s]" and one of its main goals was to stimulate the flow of private capital. This follows not only from the preamble but also from the U.S. President's letter of transmittal of the BIT to the Senate, which provides: "*The Treaty is fully consistent with U.S. policy toward international and domestic investment. A specific tenet, reflected in this Treaty, is that U.S. investment abroad and foreign investment in the United States should receive fair, equitable, and nondiscriminatory treatment.*"

351. Article I(1)(a) of the BIT defines 'investment' from the perspective of assets, claims and rights to be protected (or accorded specific treatment, prescribed in the following provisions of the BIT). As one of the goals of the BIT is the stimulation of flow of private capital, BIT protection is not granted simply to any formally held asset, but to an asset which is the result of such a flow of capital. Thus, even though the BIT definition of 'investment' does not expressly qualify the contributions by way of which the investment is made, the existence of such a contribution as a prerequisite to the protection of the BIT is implied.

352. In this context, the Tribunal notes the recent Decision of the Tribunal in the *Abaclat* case as a confirmation, though this Tribunal does not rely on this decision since the Parties did not have an opportunity to refer to it and comment on it. The *Abaclat* tribunal finds that the definition of investment, which is similar to the one in Article I.1(a) of the BIT applicable in the present case, "*is drafted in a way describing the rights and values which may be endangered by measures of the Host State, such as expropriation, and therefore deserve protection under the BIT. Thus the focus here is on the rights and the value that potential contributions from investors can generate. Nevertheless, this definition is of course based on the premise of the existence of such contribution*."[23] This reflects the two aspects which the concept of investment covers: (i) the contribution that constitutes the investment, and (ii) the rights and the value that derive from that contribution.

[23] *Abaclat et al. v. Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011, para. 347.

353. The preamble of the BIT also stresses the **economic aspect** of the subject of the treaty protection. The aim of the protections accorded by the BIT is the "*maximum effective utilization of economic resources*" stimulated by the flow of private capital from the other party to the BIT. That flow of capital will influence the economic development of the parties and increase their economic cooperation. Thus, in the light of the BIT's preamble, the investment is understood as a flow of capital that is economic in nature. This understanding is also bolstered by the U.S. President's letter of transmittal of the BIT to the Senate, which states that the BIT is "*designed to encourage economic opportunity (...) in both countries.*"

354. The concern of Kazakhstan and the United States with abuse of the BIT's protections when a claimant does not represent any economic link between the two States is visible in Article I(2) of the BIT. This provision allows each of the parties to deny the benefits of the BIT's protection to a company that is controlled by nationals of a third State and does not have any substantial activities in the other State-party to the BIT. The Tribunal is aware that Article I(2) of the BIT is not applicable to the present case. As a context of the term 'investment', however, it elucidates the economic aspects of the subject of the BIT's protection.

355. The Tribunal agrees with Claimant that, subject to express provisions to the contrary, the origin of capital used to make an investment is immaterial for jurisdiction purposes.[24] However, there still needs to be some economic link between that capital and the purported investor that enables the Tribunal to find that a given investment is an investment of that particular investor.[25]

356. This interpretation which the Tribunal makes is confirmed by the drafting history of U.S. Model BITs. As reported by *Vandevelde* in relation to the definition of the term 'investment':

> *"U.S. BIT drafters wanted to ensure that future forms of investment perhaps not anticipated by them would be covered by the agreement. Leaving the term undefined would permit it to evolve along with the changing nature of* ***economic circumstances****. (...)*
> *The most common definition of "investment" in the European BITs had been "every kind of asset." The purpose of the BITs, however, was to protect investment, not all U.S.-owned property in the territory of the BIT party.* ***U.S. negotiators thus wished to***

[24] Procedural Order No. 2, Annex 2. Claimant relied here on: *Tradex Hellas S. A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award of 29 April 1999; *Wena Hotels Limited v. Arab Republicc of Egypt*; ICSID Case No. ARB/98/4, Award of 8 December 2000; *Eudoro A. Olguín v. Republic of Paraguay,* ICSID Case No. ARB/98/5, Award of 26 July 2001; *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction of 29 April 2004; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, ICSID Case No. ARB/03/16, Award of 2 October 2006; *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures of 21 March 2007 and *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Decision on Jurisdiction of 11 April 2007.

[25] The capital can come from the investor's own funds located in any country, from its subsidiaries or affiliates located in any country, from loan, credit or other arrangements.

> ***make clear that an asset would be covered by the definition only if it had the character of an investment****. Accordingly, (...) the 1983 model (...) defines investment as "every kind of investment." In effect, the treaty applies to all investment and to nothing more or nothing less. Despite its circularity, this phrase was thought to convey the flexibility that BIT drafters wanted to incorporate into the definition.*
> *(...) The secretary of state's submittal letters have noted that the BIT concept of investment is "broad and designed to be flexible; although numerous types of* ***economic interests*** *are enumerated,* ***the intent is to include all legitimate interests in the territory of either Party*** *...* ***having economic value or 'associated' with an investment.****" (footnote omitted) The secretary's language (...) should have emphasized more clearly that* ***to be protected an economic arrangement must have the character of an investment.***
> *(...)*
> *The 2004 modified the tautological definition of investment that had appeared in the U.S. BITs since the inception of the program. It defines investment as "every asset ... that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk." Thus, the 2004 model continues the U.S. practice of limiting investment to those assets that have the character of an investment (...)."*[26]

357. Respondent argues that finding whether there is an investment requires the application of a comprehensive set of six factors, developed by the *Phoenix Action* tribunal.[27] From those six factors Claimant points out three which it regards as particularly important in the present case:

    a) contribution of money or assets,
    b) an element of risk, and
    c) assets invested *bona fide.* (R-III, paras. 32–33)

358. Claimant agrees that the term 'investment' has a certain inherent meaning and that there are certain features which are typical of most transactions that have been accepted as investments. However, Claimant disagrees that such features constitute a formal legal test for the purposes of ICSID jurisdiction. (C-IV, paras. 20–24; C-V, paras. 133–148) Describing his investment in CIOC Devincci Hourani explained that he saw the Caratube field as a considerable, interesting and potentially profitable investment with a great potential and that it was his "*major commitment between 2004 and 2009*". (WS 2 Devincci Hourani, paras. 27, 31) He testified that his investment in CIOC consisted not only of the purchase price for the share in the company, but also of other liabilities he took on, worth 'tens of millions of dollars'. He also explained that he took the risk

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[26] K. J. Vandevelde, *U.S. International Investment Agreements,* Oxford University Press (2009), pp. 114–115 and 121–122.

[27] 1 – a contribution of money or other assets; 2 – a certain duration; 3 – an element of risk; 4 – an operation made in order to develop economic activity in the host State; 5 – assets invested in accordance with the laws of the host State; 6 – assets invested *bona fide*. (*Phoenix Action Ltd. v. The Czech Republic,* ICSID Case No. ARB/06/5, Award of 15 April 2009, para. 114 ("**Phoenix Action**").)

associated with investment in the Caratube field because he saw it as 'the opportunity of my life.' (Tr, Day 4, pp. 156–157)

359. The Tribunal is aware of lists of typical characteristics of an investment identified by ICSID tribunals. It is also mindful that most of them were developed in the context of Article 25(1) of the ICSID Convention. The context of 'investment' under Article 25(1) is different from the context of the term used in the BIT. In the present case the term 'investment' is not used to establish whether there is a dispute between the parties ('*legal dispute arising directly out of an investment*') but to determine whether the purported Claimant is a '*national of another Contracting State*' despite formally being a company registered in Kazakhstan. Thus, if any previous decisions of ICSID tribunals will be considered, this difference of contexts will have to be observed.

360. The inherent meaning of the term investment identified by tribunals and commentators includes existence of a contribution over a period of time and requiring some degree of risk.[28] Such minimum requirements have been identified not only by ICSID tribunals, but also in investment treaty arbitrations not based on the ICSID Convention.[29] Hence, the Tribunal is confirmed in its concluding that the term 'investment' used in the definition of investment in Article I(1)(a) of the BIT, in the circumstances of the present case, denotes an economic arrangement requiring a contribution to make a profit and thus involving some degree of risk.

361. Thus, in the circumstances of the present case, the conditions in Article VI(8) for treating CIOC as a U.S. company require that:

a) CIOC is a company legally constituted under the applicable laws and regulations of Kazakhstan;
b) it is an investment of a U.S. national, where:

    i. "investment" is defined in Article I.1(a) and requires evidence of:

        1. ownership or control by a U.S. national,
        2. being an investment (an economic arrangement requiring a contribution to make profit, and thus involving some degree of risk),

    ii. the U.S. nationality is determined under the U.S. law;

c) conditions defined in sub-section (b) were present immediately before the occurrence of the events that give rise to the dispute.

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[28] This approach is also followed by the 2004 U.S. Model BIT which defines "investment" as "*every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.*"

[29] E.g. *Romak S.A. (Switzerland) v. The Republic of Uzbekistan*, PCA Case No. AA280 (UNCITRAL Arbitration Rules), Award of 26 October 2006, para. 207.

362. The conditions must be analysed from the particular point of time, referred to in Article 25(2)(b) of the ICSID Convention, namely the date on which the Parties consented to submit their dispute to ICSID arbitration.

(c) Burden of Proof

363. Before the Tribunal turns to analyse whether Claimant satisfied the requirements of 'foreign control' as stipulated in Article VI(8), it must first make some observations concerning the issue of burden of proof, namely which of the Parties is required to present evidence that the requirements of Article VI(8) of the BIT have or have not been fulfilled.

364. In response to the Tribunal's question as to which Party bears the burden of proof, the Parties generally agreed that Claimant bears the burden of proof to establish that the Tribunal has jurisdiction over the present dispute. (PO-7, sec. 2.2; C-V, para. 162; R-V, paras. 2, 8–9)[30]

365. However, the Tribunal here refers to an argument, reported by *Schreuer et al.* in connection with Article 25(2)(b) of the ICSID Convention that "*an agreement on nationality would create a strong presumption in favour of foreign control that should be discarded only if it amounts to an unreasonable selection of the facts.*"[31] Such 'strong presumption' in the present case would mean that the burden of proof is on Respondent to show that the conditions of Article VI(8) of the BIT have not been met. Such an interpretation of the BIT would be unreasonable and the Tribunal rejects it.

366. The argument of the strong presumption in favour of existence of foreign control was suggested by Amerasinghe in the mid-1970s.[32] Later, in light of the early awards, he stressed that the main element to be proven is that the host State was "*at least (...) aware of the foreign control at the time of the agreement*"[33] and that burden of proof in that respect was on the claimant. This suggestion arose in the circumstances when investment treaty arbitration was not considered by any commentators or tribunals in the context of the 'parties' agreement' under Article 25(2)(b).[34] It cannot be applied to circumstances

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[30] Respondent by "preponderance of evidence" (R-V, para. 4), Claimant by bearing the "initial burden to produce evidence" (C-VI, para. 162).

[31] Schreuer et al., p. 313, para. 815.

[32] Amerasinghe, *Jurisdiction ratione personae under the Convention on the Settlement of Investment Disputes between States and Nationals of other States*, 47 British Yearbook of International Law (1975), p. 264 ("*(...) agreement between the parties on a foreign nationality based on foreign control would raise a strong presumption that there was adequate foreign control on which to predicate a foreign nationality.*"), repeated in Amerasinghe, *Interpretation of Article 25(2)(b) of the ICSID Convention,* in R. Lillich and C. Brower (eds.), *International Arbitration in the 21st Century: Towards 'Judicialization' and Uniformity?*, Twelfth Sokol Symposium, Transnational Publishers (1994), p. 240.

[33] Amerasinghe, *Interpretation of Article 25(2)(b)...*, *ibid.*, p. 232.

[34] Neither the drafters of the Convention nor early commentators or tribunals considered investment treaties as a source of the agreement required by Article 25(2)(b) of the ICSID Convention. It was assumed that any such agreements on nationality will be concluded between the host State and the locally incorporated companies or in a host State's legislation (see e.g. drafting history referred to by Broches and Schreuer; Report of the Executive Directors on the Convention, para. 24; commentaries by: Broches, Szasz, Amerasinghe (both articles); awards: *Amco v. Indonesia, Klöckner v. Cameroon, LETCO v. Liberia*, etc.).

when the host State is clearly not aware of the foreign control of the locally incorporated company at the time when that State agrees to treat a juridical person as a foreign national, i.e. when it signs an investment treaty in question. *Schreuer et al.* also do not seem to endorse it.[35]

367. Hence, the Tribunal concludes that the burden is on Claimant to show that it fulfils the criteria set out by Article 25(2)(b) of the ICSID Convention and Article VI(8) of the BIT.

368. The burden may shift with regard to issues reflected in documents that have been seized by Respondent from CIOC. The situations when such change of control over documents has occurred are addressed below in connection with the Tribunal's analysis of individual issues.

J.III. Does Claimant Satisfy the Requirements of Article VI(8) of the BIT?

369. The Tribunal will now apply the test identified in para. 361:

J.III.1. Is Claimant a Kazakh Company, as Defined in the BIT?

370. The first requirement of Article VI(8) of the BIT is for CIOC to show that it is a company legally constituted under the applicable laws and regulations of Kazakhstan (part a) of the test identified in para. 360). To fulfil this criterion CIOC can be "*any kind of corporation, company, association, enterprise, partnership, or other organization, legally constituted under the laws and regulations of a Party or a political subdivision thereof whether or not organized for pecuniary gain, or privately or governmentally owned or controlled.*"

371. Claimant presents a 'state registration certificate of a legal entity' issued by the Ministry of Justice of the Republic of Kazakhstan and dated 29 July 2002 as evidence that CIOC is a Kazakh company. (C-IV, para. 25; C-54) The certificate states that it

> *"grants the right to perform activities under the foundation documents in compliance with the legislation of the Republic of Kazakhstan."*

372. Respondent does not dispute the fact that CIOC is a Kazakh company.

373. There is no dispute between the Parties that CIOC is a company legally constituted under the applicable laws and regulations of Kazakhstan. However, it is not clear what kind of corporate entity CIOC is. It is referred to as "limited liability partnership" or "LLP" (C-

[35] In another part of their commentary, Schreuer et al. observe that: "*the existence of a consent agreement (...) cannot be taken as an automatic recognition that the investor has met the Convention's nationality requirements. This holds true also for the satisfaction of the nationality conditions to qualify for protection under investment protection treaties.*" (p. 264, para. 639)

54, C-55, C-56, C-173, C-174) as well as "limited liability company." (C-53) From Article 1.10 of its Charter and Section 4.1 of its Incorporation Agreement it follows that the shareholders' liability is limited to the value of their shares. (C-173, C-175) Thus, the tribunal assumes that CIOC's legal form is equivalent to a limited liability company.

J.III.2. Was Claimant an Investment Owned or Controlled by a U.S. National at the Time Immediately Before the Events which Gave Rise to the Dispute?

374. The Tribunal now turns to the next requirement of Article VI(8), as identified in para. 361, namely, whether immediately before the occurrence of the events that gave rise to the dispute Claimant was an 'investment' owned or controlled by a U.S. national. Since the issue of timing permeates the whole requirement, the Tribunal first turns to this issue.

(a) Events that Gave Rise to the Dispute

375. Claimant points to late 2007 or early 2008 as the time immediately before the occurrence of the relevant events:

> *"(...) 31 January 2008, being the day immediately before the notice of termination which completed the expropriation, or even earlier, in 2007 when Kazakh authorities suddenly made unfounded allegations with regard to CIOC's performance of the Contract and started to harass and intimidate Devincci Hourani and his family, as well as CIOC's senior management and employees."* (C-IV, para. 42)

376. There is no dispute between the Parties in relation to this assertion. However, Respondent points out that problems with performance by Claimant of its obligations under the Contract started already in 2003, five months before Devincci Hourani purchased his first share in CIOC. (R-9) This point is made to highlight the timing of acquisition of those shares. Respondent argues that, because the alleged share purchase happened when a dispute between CIOC and the Kazakh authorities over the Contract performance was already easily foreseeable, the transaction lacks *bona fides*. (R-III, para. 44) This issue will be addressed below.

(b) U.S. Nationality of Devincci Hourani

(1) Claimant's Position

377. Devincci Hourani is a U.S. national. Claimant submitted a copy of the U.S. passport of Devincci Hourani issued on 14 November 2007 which states "United States of America" in the section 'nationality'. (C-2) Claimant further submitted Devincci Hourani's certificate of naturalisation, issued on 16 July 2001 by the Attorney General of Detroit, Michigan. (C-59)

(2) Respondent's Position

378. Respondent is not contesting Devincci Hourani's U.S. nationality.

(3) Tribunal's Analysis

379. Article I(1)(c) of the BIT refers to the U.S. law as the law applicable to the determination of nationality of Devincci Hourani. The documents presented by Claimant, issued by U.S. authorities and confirming Devincci Hourani's U.S. nationality are sufficient evidence that he has been a U.S. national since 16 July 2001.

(c) Ownership or Control

380. As found above, in order to find that this Tribunal has jurisdiction, the Claimant must prove that it satisfies the requirements both of Article 25(2)(b) of the ICSID Convention, and of Article VI(8) of the BIT. Regarding the term 'investment' in Article VI(8), the BIT's definition in Article I(1)(a) uses the phrase 'owned or controlled' not merely 'control' as does Article 25(2)(b). The two words are connected by an 'or'. While, thus, this wording of the BIT seems to imply that it is sufficient to prove either ownership *or* control to satisfy this requirement, as seen above, the definition in the BIT cannot go beyond the limits established by Art. 25(2)(b) of the ICSID Convention which makes no reference to ownership, but expressly requires control.

381. In this context, the Tribunal is aware of the considerations of the *Plama*[36] tribunal (CLA-98) which also had to evaluate evidence regarding ownership and control (paras. 94 and 95). However, that case, though also administrated by ICSID, was a procedure based on the Energy Charter Treaty. The relevant Article 17 of the ECT requires that nationals "*own or control*" the entity claimed to be the investment. While that is the wording we also find in the BIT, it is different in scope to Art. 25(2)(b) of the ICSID Convention where, as seen above, only 'control' can be the basis for jurisdiction. Further, in the *Plama* procedure, the Tribunal had considerably more evidence supporting ownership or control to rely on than Claimant has provided in the present case to comply with its burden of proof.

382. On the other hand, if majority ownership is shown, such a finding implies a presumption of control, even though it will have to be examined whether in the present case this presumption is a sufficient indication of control. Therefore, the test of ownership will be separated from the issue of control in the Tribunal's analysis.

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[36] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 18 August 2008 ("**Plama**").

(1) Ownership

(i) Claimant's Position

383. Claimant argues that the requirement of ownership is met because Devincci Hourani "*holds 92 % ownership share in CIOC.*" (C-V, para. 126) Devincci Hourani acquired an 85 % share in CIOC on 17 May 2004 from Fadi Hussein. (C-55) He then acquired further 7 % of CIOC's shareholding on 8 April 2005 from Waheeb Antakly. (C-56)

(ii) Respondent's Position

384. Respondent points out that, even if payment was made, the purchase price for the share was nominal (it was the equivalent of USD 6,500 in local currency) and thus Devincci Hourani did not make an investment in CIOC.

(iii) Tribunal's Analysis

385. Here there are some unusual aspects to the determination of whether the Claimant has established ownership to the requisite level of proof.

386. Respondent requested documentary proof of payment in request No. 5 of Annex 2 to PO-2 (Respondent's Redfern Schedule, p. 16–17).

387. Claimant held that such documents had been seized by Respondent.

388. Respondent replied that such documents should be in the possession, custody or control of Devincci Hourani, as they concern his personal payments to the sellers of the shares, Fadi Hussein and Waheeb Antakly. However, if the Tribunal concluded that this was not the case, Respondent requested authorisation from the Tribunal to consult the seized documents in order to locate the requested document.

389. Claimant replied that the documents related to his personal bank account in Kazakhstan were kept by Devincci Hourani in his office in 92a Palezhayeva Street in Almaty, which had been raided by Kazakh officials.

390. Taking note of Claimant's assurance that the documents were among those seized in criminal investigations, which was not contested by Respondent the Tribunal concluded that said documents were in Respondent's possession and control. Respondent's document production request was therefore denied. Furthermore, the Tribunal noted that it did not see a basis for granting the authorisation requested by Respondent, but gave such authorisation should it be needed.

391. Respondent further requested from Claimant documents evidencing the source of funds used by Devincci Hourani to acquire the shares in CIOC. Claimant argued that the relevant documents were in possession of Respondent who seized them during a raid on Claimant's premises. The Tribunal denied this request, but authorised Respondent to

access the relevant documents. (PO-2, Annex 2, request 6, pp. 16–21) No documents were presented by Respondent.

392. In this context, the Tribunal is aware of the decision of the ICSID Tribunal in the *Saba Fakes* award[37] (CLA-101) which found that no sufficient proof had been provided by the claimant in that case that it acquired legal ownership of the share certificates. Though that case has certain similarities to the present one, particularly in view of the very low purchase price for the shares in both cases, as far as legal ownership is concerned the present case is to be distinguished from the *Saba Fakes* case, because the burden of proof regarding legal ownership turns out to lead to a different conclusion.

393. The Tribunal observes that the share purchase agreements presented by Claimant are conditional. They provide that the buyer acquires the ownership rights to the share in CIOC upon payment of the "*cost of the Share*" and introduction of appropriate amendments to the founding documents of CIOC. (C-55, C-56) There is no evidence of payment of the purchase price for the share in CIOC. However, regard has to be had that, as seen above, some of the documents evidencing payment of the purchase price for the shares were controlled by Respondent and not produced. The Claimant also presented no evidence of introduction of amendments to the founding documents of CIOC required by the share purchase agreements (e.g. minutes of the amendments to the previous version of the founding documents on or after the dates of the share purchase agreements, evidence of filing or registration of such amendments in an appropriate public register).

394. However, regarding ownership, payment of the purchase price and accurate company records, the Tribunal notes in particular:

First, here, the key evidence was controlled by Respondent. The Tribunal should not draw inferences from this silence in favour of Respondent. The Tribunal found that evidence of payment of the purchase price was controlled by Respondent and Respondent was granted permission to access the seized documents. Thus, the burden of proof was on Respondent, who did not address the issue of the documents later on.

Second, Respondent did not deny that Devincci Hourani acquired the shares and was an owner of the 92 % share in CIOC.[38]

Third, Respondent also requested from Claimant any minutes of CIOC's Board of Directors and/or shareholders concerning the shareholder's ownership of shares in CIOC and any transfer of shares of CIOC. (PO-2, Annex 2, request 8(iv), pp. 29–30) This request was granted by the Tribunal. No documents were presented by Claimant.

395. As mentioned above, the nature of the corporate entity of CIOC is not entirely clear. However, based on the text of its founding documents the Tribunal treats CIOC as a

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[37] *Mr. Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award of 12 July 2010 ("**Saba Fakes**").
[38] E.g. R-III, para. 41 ("*(...) he acquired 85 and 7 percent, respectively of the shares of CIOC for the total sum of approximately USD 6,500.*"); R-IV, paras. 38–39 ("*(...) Devincci Hourani acquired his interest in CIOC in 2004 for the negligible sum of USD 6,500 (...)*"); R-V, para. 32 ("*(...) Devincci obtained a majority stake in CIOC paying only USD 6,500 out of pocket.*").

proprietary company. Article 3.2 of its Incorporation Agreement of 10 May 2005 lists Devincci Hourani as holder of 92 % "membership interest" and Fadi Hussein as holder of 8 % "membership interest" in CIOC. (C-173) The Tribunal also notes that the share purchase agreement of 18 May 2006 between Devincci Hourani (representing Fadi Hussein) and Kassem Omar states that 92 % share in CIOC belongs to Devincci Hourani. (WS Kassem Omar, Exhibit 1) Thus, this indirect evidence appears to show that Devincci Hourani was an owner of a 92 % share in CIOC.

396. In view of the above considerations, the Tribunal concludes that jurisdiction cannot be denied for the mere reason that Claimant has not fully complied with its burden of proof regarding ownership by the U.S. national, Devincci Hourani.

(2) Control

(i) Claimant's Position

397. Devincci Hourani owns 92 % of CIOC's shareholding and exercises control over CIOC "*consistent with that ownership interest*" (C-IV, para. 27) Claimant argues that Devincci Hourani's responsibilities as a majority shareholder and director at CIOC constitute evidence of his control of the company. As evidence of these responsibilities Claimant points to CIOC's Charter and Incorporation Agreement and the authority granted to CIOC's shareholder by these documents. (C-V, para. 127; C-173, C-174) as well as witness statements of Devincci Hourani, who explained that he was regularly informed by CIOC's Director Omar Antar on matters relating to the company, participated in discussions concerning the project, negotiated certain contracts on behalf of CIOC, visited the Caratube project site three times, corresponded daily in relation to the project, made key decisions concerning the company and, when he himself was CIOC's Director from 15 August 2006 to 18 June 2007, he was "overseeing the running of CIOC". (WS 1 Devincci Hourani, paras. 11–13; WS 2 Devincci Hourani, paras. 29–31, 36) (C-V, para. 27)

398. Claimant relies here on the *Aguas del Tunari* majority decision that evidence of the *actual control* over a company is not required. A capacity to control is sufficient, whether or not the controlling shareholder actually exercises it. (C-V, paras. 124–125; *Aguas del Tunari v. Bolivia*, paras. 242–248, 264)

(ii) Respondent's Position

399. Respondent points out that Devincci Hourani did not exercise actual control, which, it argues, was exercised by JOR Investment, Inc. ("JOR") and those who controlled JOR. (R-V, paras. 39–44)

400. Respondent relies on *Vacuum Salt* to argue that the Tribunal must determine existence of actual control of Devincci Hourani over CIOC and take into consideration all facts and circumstances of the particular context. (R-IV, para. 36) Respondent's main arguments concentrate on whether CIOC was an investment of Devincci Hourani, where it implies that the actual control over CIOC was exercised by Issam Hourani, brother of Devincci Hourani. (R-IV, para. 31)

(iii) Tribunal's Analysis

401. Again, the starting point for the Tribunal's examination is that Claimant has the burden of proof.

402. In its request for evidence Respondent asked for minutes of meetings of CIOC's Board of Directors and/or shareholders' meetings concerning any investment in the Caratube project to assess the existence and materiality of Devincci Hourani's control over CIOC. The Tribunal ordered production of such documents. (PO-2, Annex 2, pp. 26–27)

403. Respondent also requested minutes of meetings of CIOC's Board of Directors and/or shareholders' meetings concerning the performance and management of the project. The Tribunal denied that request, as the documents were seized by Respondent and under its control, and granted Respondent authorisation to access the documents for the purposes of the proceedings. (PO-2, Annex 2, pp. 27–29)

404. The documents requested by Respondent and ordered by the Tribunal have not been produced by Claimant. Even if some of the relevant documents were among those seized by Respondent, it is to be noted that none were produced by Claimant, and it seems also highly unlikely to the Tribunal that none of the relevant documents were held by Claimant or the Hourani family outside Kazakhstan.

405. In this context, the Tribunal notes that Claimant did submit great numbers of other documents obviously held outside Kazakhstan. And while the allegedly forged documents were withdrawn by Claimant during the hearing (C-162, C-175, C-238, C-239, C-240, Aliyev 25; see Tr, day 6, pp. 228–229), and therefore the Tribunal will not rely on them, and while the Tribunal sees no indication that counsel for Claimant were aware of any doubts regarding these documents, the Tribunal cannot overlook that their submission and later withdrawal throw a doubt on Claimant's credibility. This has a bearing on the Tribunal's evidentiary evaluation of the fact that Claimant did not provide any documents showing the exercise of effective control by Devincci Hourani.

406. As a witness, Devincci Hourani admitted that he did not participate in a day to day running of CIOC in times when he was not a director of CIOC. (WS Devincci Hourani, para. 18) His evidence of control is based on a reference to CIOC's Charter and Incorporation Agreement, which give him certain competences. However, no evidence was shown that such competences and control were actually exercised by him.

407. Thus, there is not sufficient evidence of exercise **of actual control over CIOC** by Devincci Hourani. In view of the above considerations, the Tribunal concludes that Claimant has not provided sufficient proof for control as required by Art. 25(2)(b) of the ICSID Convention. The Tribunal is not satisfied that a legal capacity to control a company, without evidence of an actual control, is enough in light of Devincci Hourani's characterisation of his purported investment in CIOC (see para. 358 above). However, as Article I(1)(a) of the BIT requires ownership *or* control of an investment and, based on indirect evidence, Claimant *could* be regarded as owned by Devincci Hourani, a U.S. national, the Tribunal moves now to analyse further conditions for treating CIOC as a U.S. national under the BIT.

(d) Is CIOC an Investment of Devincci Hourani?

408. Even if control had been shown, as discussed above, existence of an investment denotes an economic arrangement requiring a contribution to make profit, and thus involving some degree of risk.

409. In answering the question whether CIOC is an investment of Devincci Hourani the Tribunal must first enquire whether Devincci Hourani made any contribution and took any risk. The elements are usually addressed individually for the sake of reasoning. However, at least in the context of the present case they are interdependent and therefore they will be assessed together hereafter.

(1) Respondent's Position

410. Respondent argues that Devincci Hourani made no contribution of money and assets of any significance, took no risk and, to the extent there were any assets invested by him, these assets were not invested in *bona fide.* (R-III, para. 40)

411. According to Respondent, to satisfy the requirement of a contribution, the putative investor should show that it contributed a substantial financial resource or transfer of know-how, equipment and personnel. The price paid and a guarantee put up need to be substantial enough relative to the entire project to be considered an investment. Similarly, a nominal price paid for assets that purportedly amount to an investment raises doubts as to an existence of an investment and requires in-depth inquiry into the circumstances of the transaction. (R-III, para. 34)

412. Respondent further argues that Devincci Hourani was not a viable **source of operating capital**. There is no evidence that CIOC looked to Devincci Hourani as a source of operating capital and that Devincci Hourani contributed any of his own assets to the operating expenses of the company. (R-III, para. 41)

413. Respondent argues that the financial arrangements between CIOC, JOR and Devincci Hourani do not reveal the existence of a contribution or risk on the side of Devincci Hourani. Rather, they show that Devincci Hourani provided a front for the real parties in interest, namely JOR and its shareholders, including his brother Issam Hourani. Neither JOR nor Issam Hourani, nor Kassem Omar, another of JOR's shareholders, were of a nationality that could grant them access to ICSID arbitration. According to Respondent, CIOC was financed by JOR from its inception, even before JOR was formally registered. Financing by JOR agreed at the time the majority share in CIOC was owned by Fadi Hussein was secured mainly by a collateral pledge on CIOC's 'right to use natural resources under the Contract' and any transaction with respect to that collateral required JOR's written consent. In case of CIOC's default, JOR would gain control over the Contract. Thus, these arrangements gave JOR the actual control over CIOC and the Contract. (R-V, para. 34) Respondent contends that a personal pledge provided by Devincci Hourani has no substance. (R-V, para. 37) Further, the explanation given by Devincci Hourani concerning Kassem Omar's purchase of an 8 % share in CIOC in lieu of interest on the loans to JOR is not credible. (R-V, paras. 38–43)

414. In Respondent's opinion, Devincci Hourani had no **expertise** to contribute to CIOC. He could not have acquired valuable expertise working at Kulandy, since he was at the same

time managing a Central Asian branch of a medical equipment company and was required to reside in the U.S. awaiting his citizenship. Section 1430 of Title 8 of the U.S. Code of Laws requires a person seeking citizenship to be a permanent resident in the U.S. for at least three years and spend at least one half of the time of the permanent residency physically in the U.S., including all of the three months immediately preceding the application. (R-III, para. 41) At the time when he allegedly was gaining his experience he was living in the U.S. and spending less than three months a year in Kazakhstan. (R-V, para. 30)

415. Respondent argues that, given the absence of evidence of any other contribution by Devincci Hourani to CIOC, the nominal amount, equivalent to USD 6,500, paid by him for a 92 % share in CIOC calls for an inquiry into the circumstances of the transaction. Respondent purports that all that is known is that Devincci Hourani neither made any substantial contribution nor took any risk. Moreover, in Respondent's opinion, it shows that CIOC did not acquire the Contract in good faith and that other persons and entities, not the nominal CIOC shareholders, are the real investors in the project. It therefore shows that Devincci Hourani's nominal ownership and control over CIOC was created only to gain access to international arbitration.

416. Existence of risk requires the use of an investor's own financial means at its own financial risk, with the objective of making a profit within a given period of time. For the risk to be present the investor must commit financial resources at the initial phase of the project. (R-III, para. 35)

417. Since as Respondent maintains Devincci Hourani did not make any financial commitments, invested nothing of significance in the CIOC and paid only nominal amount for his share in the company, he also took no risk. He was not able to personally recoup the profits of CIOC and his participation was more that of an employee. (R-III, para. 42)

418. As, according to Respondent, Devincci Hourani did not contribute anything of legitimate value to CIOC and took no risk, there was no legitimate business motive underlying the purchases of his share in CIOC. The only thing of value he had to offer was his U.S. nationality. Thus, Respondent points out the transactions are to be explained only by the motivation to gain access to ICSID arbitration by virtue of Devincci Hourani's U.S. nationality. This is reflected by the **timing** of the transaction, only five months after CIOC was cited for underperformance of the Contract. As CIOC was blacklisted for having low performance rate a year and a half later, it is also obvious in Respondent's view that Devincci Hourani did not purchase his share in the company to turn it around. (R-III, para. 43–44) The only motive for acquisition of his share in CIOC was to transform any emerging dispute as to the project into an international dispute subject to ICSID arbitration under the BIT. Respondent maintains that for this reason his purchase of the share was not a *bona fide* transaction and does not deserve international law protection. (R-III, para. 45)

419. Respondent further argues that CIOC is a creation of **Issam Hourani**, brother of Devincci Hourani. Issam Hourani cooperated with CCC in the bid for the Contract and according to Respondent later pushed CCC out of the project. Respondent contends that CIOC is a company set up for the purpose of the assignment of the Contract and it allegedly acquired the Contract by corporate raiding of CCC. Its capitalisation was only USD 6,500 and its founder, Fadi Hussein, was a young relative of Issam Hourani with no funds or

expertise in the industry. Furthermore, Respondent holds that CIOC received its financing almost entirely from JOR, a Lebanese company owned by Issam Hourani. As a collateral for its financing from JOR, CIOC pledged all of its rights under the Contract. The costs of financing were initially very high (50 % interest) but were later reduced to zero. Issam Hourani is a Kazakh citizen and is thus not eligible for the protection of international law. Respondent asserts that thus Issam Hourani sought to acquire protection of the BIT by transferring the shares to Devincci Hourani. The transaction therefore lacks *bona fides* and does not deserve protection. (R-IV, para. 21)

420. Because Issam Hourani was a Kazakh citizen, he thus sought to create an international protection for CIOC by placing its shares first in the hands of his cousin, Fadi Hussein, a Danish citizen, and then his brother, Devincci Hourani, a U.S. citizen. According to Respondent, CIOC was treated as a Hourani family business at the time the Contract was transferred from CCC to CIOC. In Respondent's view there is no explanation for Devincci Hourani's purchase of CIOC's shares for a low price and obtaining of completely non-commercial financing terms from JOR other than that he was acting on behalf of somebody else and providing them with the benefit of his U.S. nationality. (R-V, paras. 26–28) Shortly after he was granted U.S. citizenship, Devincci Hourani purchased shares in Kulandy Energy from his brother Issam Hourani. He did not remember how much money he paid for a 100 % share in that company, not even whether it was more than a million dollars. He admitted that he had never visited the oil field of Kulandy Energy. (R-V, para. 31)

(2) Claimant's Position

421. Claimant's position throughout this arbitration was that the issue whether Devincci Hourani made an investment in CIOC is not part of the applicable legal test. This position was based on the assumption that Claimant's submission of its Request for Arbitration constitutes an agreement by which the parties have agreed to treat a transaction as an investment and to treat Claimant as a national of another Contracting State. Thus, Claimant concentrated on the legal test provided in Article 25(1) of the ICSID Convention and the issue whether CIOC made an investment in Kazakhstan. (C-IV, para. 18; C-V, para. 119)

422. However, Claimant agrees that the term investment has some inherent meaning, even though the characteristics of investments recognised by investment tribunals should not be understood as jurisdictional requirements. (C-IV, para. 24)

423. Claimant submits that it presented documents and witness statements to show that Devincci Hourani invested in CIOC not only by way of payment of the purchase price for his share in CIOC but also by taking up a personal guarantee for loans owed by CIOC to JOR.

(3) Tribunal's Analysis

(i) Did Devincci Hourani Make Any Contribution to CIOC?

424. The Parties argued extensively the issue of Devincci Hourani's contribution to CIOC, discussing his alleged contribution of money, leverage and managerial skills. The main

reason for such an extensive discussion was the fact that Devincci Hourani paid only a nominal price for his 92 % share in CIOC.

425. With regard to the evidence regarding the existence of contribution, the tribunal notes that in the document production procedure, Respondent requested documentary evidence of:

a) the source of funds invested in the project (PO-2, Annex 2, pp. 11–12, request 2),
b) any loans made to CIOC and any guarantees related to these loans (PO-2, Annex 2, pp. 13–16, requests 3 and 4),
c) payment by Devincci Hourani for the shares in CIOC (PO-2, Annex 2, pp. 16–20, request 5),
d) the source of funds used by Devincci Hourani to pay for the shares in CIOC (PO-2, Annex 2, pp. 20–22, request 6),
e) any minutes of the meetings of CIOC's board of Directors and/or shareholders (PO-2, Annex 2, pp. 24, 26–27, 30–32) concerning

i. any investment in the project, and
ii. any loans to or by CIOC.

426. The requests a), b) and e) were granted. No documents were provided by Claimant.

427. Requests c) and d) were denied. However, given that the documents concerning these issues were seized by Respondent the Tribunal authorised Respondent to access them. No documents were produced.

428. Particularly regarding the requested documents evidencing the source of funds used by Devincci Hourani to acquire the shares in CIOC in request 6 of Annex 2 to PO-2 (Respondent's Redfern Schedule, p. 20), the following is recalled.

429. Claimant maintained that such documents were neither material nor relevant to the proceedings and in any event, that they had been seized by Respondent as they had been kept in Devincci Hourani's office in 92a Palezhayeva Street in Almaty, which had been raided by Kazakh officials.

430. Respondent maintained that the requested documents were relevant and material to the proceedings and that these documents should be in the possession, custody or control of Devincci Hourani. However, if the Tribunal concluded that this was not the case, Respondent requested authorisation from the Tribunal to consult the seized documents in order to locate the requested documents.

431. The Tribunal concluded that the documents at issue were in Respondent's possession and control. Furthermore, it did not see a basis for granting the requested authorisation, but gave such authorisation should it be needed. The document production request was denied.

432. Anyhow, no documents were produced.

433. Indeed, the nominal price, if any, paid for the acquisition of the shares raises doubts about the existence of an investment in which at least USD 9.4 million had already been sunk, especially if it is the only element of the transaction. In such situation the Tribunal is required to review closely the circumstances of the transaction.

434. The Tribunal notes that the above approach has also been taken by other ICSID tribunals including the *Phoenix Action* tribunal (para. 119, RL-20) and the *Saba Fakes* tribunal (para. 121 and 147, CLA-101). Regarding the latter, as noted above, it differs from the present case in so far as that tribunal found there was no legal transfer of ownership while in the present case this Tribunal has found that the jurisdiction does not fail on the lack of proof of ownership. However, the *Saba Fakes* tribunal concluded in its award, an only nominal price of only a few thousand US dollars paid cannot be reconciled with the significance of the underlying business as expressed in Claimant's valuation of the alleged investment and the relief sought in that respect. This Tribunal notes that, while that is not an ICSID case, this approach is also confirmed by the tribunal in *Société Générale v. Dominican Republic*[39] which is referred to in the *Phoenix* decision submitted by Respondent. In *Toto v. Lebanon*[40], at paragraph 84, the tribunal made the following observation: "*[I]n the absence of specific criteria or definitions in the ICSID Convention, the underlying concept of investment, which is economical in nature, becomes relevant: it implies an economical operation initiated and conducted by an entrepreneur using its own financial means and at its own financial risk, with the objective of making a profit within a given period of time*."

435. Indeed, payment of only a nominal price and lack of any other contribution by the purported investor must be seen as an indication that the investment was not an economic arrangement, is not covered by the term 'investment' as used in the BIT, and thus is an arrangement not protected by the BIT.

436. Further, the Tribunal recalls from its examination of ownership above that there is no direct evidence that Devincci Hourani actually paid even the nominal amount for the shares, but that Respondent was in control of the relevant documents which may establish payment. Given that Respondent did not present such evidence, and did not dispute that Devincci Hourani was at least formally the majority owner of CIOC, the Tribunal has inferred from that, as well as from indirect evidence, that jurisdiction cannot be denied in the present case simply due to lack of proof that Devincci Hourani paid the purchase price.

437. However, as already mentioned, the purchase price for the 92 % share in CIOC was the nominal price of USD 6,500-equivalent in the local currency, namely 920,000 tenge. The total charter capital of CIOC is 1,000,000 tenge. (C-173, C-174) CIOC claims USD 1.145 billion plus interest in damages in this arbitration in connection with its main economic activity – performance of the Contract. (C-VI, para. 219) When Devincci Hourani allegedly purchased his share in CIOC, CIOC was already a holder of the Contract for which it paid approximately USD 9.4 million. (WS Omar Antar, para. 39; Devincci Hourani, Tr, day 4, pp. 153–155) These facts necessarily raise doubts as to Devincci Hourani's investment in CIOC and require the Tribunal to analyse the circumstances of

[39] *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. The Dominican Republic*, LCIA Case No. UN 7927 (UNCITRAL Arbitration Rules), Award on Preliminary Objections to Jurisdiction of 19 September 2008, para. 36.

[40] *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction of 8 September 2009.

the transactions. A putative transaction to pay USD 6,500 for 92 % for an enterprise into which over USD 10 million have been invested[41] and for which later a relief of over USD 1 billion is sought calls for explanation and justification.

438. No documentation was provided concerning the valuation of CIOC's share for the purpose of its purchase by Devincci Hourani. Devincci Hourani did not answer questions concerning such valuations.[42] Neither Fadi Hussein nor Waheeb Antakly seem to have been interested in selling their participation for a market price. Devincci Hourani testified that only after he bought his share in CIOC he found out about the USD 9.4 million paid by CIOC to CCC for the Contract. (Tr, day 4, pp. 153–154) With regard to the share purchase from Waheeb Antakly, Devincci Hourani answered that he did not know how much Waheeb Antakly paid for his shareholding in CIOC as well when he became shareholder of CIOC. Devincci Hourani stated that "*[m]aybe I was never really interested in trying to find out.*" (Tr, day 4, pp. 160–161)

(ii) Personal Guarantee by Devincci Hourani

439. With reference to the low purchase price, Devincci Hourani explained that "*all sorts of obligations were associated with that*" that "*there was a personal risk involved, a personal obligation vis-a-vis JOR and others.*" (Tr, day 4, p. 156) He referred to "*debt I took on*", "*tens of millions of dollars that are still a noose around my neck that have to be returned to Fadi Hussein and to JOR Investment.*" (Tr, day 4, p. 157)

440. No evidence was presented of any debt owed by Devincci Hourani to Fadi Hussein.

441. Claimant further explained the above:

> *"... cash alone did not reflect what he* [i.e. Devincci Hourani] *invested. To acquire his shares, he personally guaranteed the company debt, then held by JOR Investment, a Lebanese company. Kassem Omar, the principal owner of JOR (with his brother) and a Hourani relative, also took 8 % equity interest in CIOC, partly in exchange for cancelling interest on loans to CIOC and providing an additional line of credit on very favourable terms."* (C-VI, para. 46)

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[41] CIOC paid USD 9.4 million for the concession and by May 2004 JOR invested USD 2.6 million into CIOC and was committed to provide further USD 12.4 million.

[42] Asked whether, when purchasing a share in CIOC, he had "*a valuation or an idea in your mind as to what you think the company was worth*" Devincci Hourani answered, "*I can't really answer that, because when you are involved in such a big deal, it wasn't just peanuts.*" (Tr, day 4, p. 158) Similarly, asked about the fair market value of CIOC as of 1 February 2008, at the time the Contract was terminated, Devincci Hourani said, "*I couldn't put a figure on the fair market value of the company in March of 2008, but I know that we had proven reserves (...). Now, I don't know how many billions it would be (...). That is really a question that would need to be put to experts, to perhaps engineers. I mean, my experts have put figures on paper and they've been very high. But, I mean, it's difficult to be precise*." (Tr, day 4, pp. 158–160) Asked whether the amount of the proven reserves as of February 2008 was greater than what was known in the Soviet times, Devincci Hourani answered, "*I fear that if I were to answer that question I might misinform you. I'm not an engineer. I think it would be more appropriate to put that question to an engineer.*" (Tr, day 4, p. 160)

442. The only document presented in relation to Devincci Hourani's 'personal guarantee' is a one-page document dated 1 June 2004 and signed between Devincci Hourani and JOR.[43] (WS 2 Devincci Hourani, Exhibit 8) The document contains the following obligations:

> *"1. Beginning in the second year of commercial production period at Caratube Oil field the first party* [i.e. JOR] *will pay, from his own personal income gained as net profit from the sale of the mentioned production, to the second party* [i.e. Devincci Hourani] *annual instalments of 20 percent of the loan amount in addition to 14 percent interest rate on the above 20 percent.*
>
> *2. The second party* [i.e. Devincci Hourani] *commits himself to pay all loans with the 14 percent annual interest with 10 years from the beginning of the second year of commercial production."*

443. If the agreement is to be seen as evidence of a personal guarantee by Devincci Hourani of debts owed by CIOC to JOR, the first paragraph of the agreement seems to contain an error, mixing up creditor and debtor. Assuming that it is a typographical error, Devincci Hourani's guarantee of the debt does not contain any contribution. He promises to use the profits from the investment to repay the loan. This does not explain how that promise can constitute a contribution to the investment in the first place.

444. However, this is not the only problem with the above document. No explanation has been provided what "*his own personal income gained as net profit from the sale of the (...) production*" is. As a shareholder, there is no evidence that he is entitled to anything more than a dividend.

445. The agreement refers to a loan agreement no. 2K-02 between JOR and CIOC dated 2 December 2002, i.e. from the first year of CIOC's corporate history, when Fadi Hussein held either 100 % or a majority share in CIOC. On the basis of that loan agreement JOR granted CIOC a loan of USD 15 million at 14 % interest p.a., to be repaid by 5 December 2007. That loan agreement was secured by CIOC's pledge of "*its rights to use natural resources under the Contract*" and CIOC's obligation not to perform any transaction with respect to that collateral without the written consent of JOR. Thus, if Devincci Hourani added his 'personal guarantee' to the above collateral, the 'personal guarantee' would be securing the same amount (loan plus interest) to be repaid from dividends Devincci Hourani would receive after CIOC has already paid the same amount. There is no economic sense in such 'personal guarantee'. More importantly, it does not constitute a contribution from the perspective of CIOC or, for that matter, an additional security to JOR. With or without Devincci Hourani's 'personal guarantee' the economic undertaking between CIOC and JOR remains unchanged.

446. More importantly, in the Financial Assistance Agreement dated 3 November 2004 and signed between CIOC and JOR, JOR granted CIOC a loan of USD 25 million to be repaid by 10 November 2014. (WS 2 Devincci Hourani, Exhibit 9) This time the loan was

[43] Respondent commented on this document in its Rejoinder (R-IV, para. 41).

interest-free. This loan was signed at the time when Devincci Hourani held an 85 % share in CIOC. The Financial Assistance Agreement states (in Section 8.2) that:

> *"All previous written and verbal agreements, pertaining to the subject and conditions of the present Agreement, are no longer valid, after the parties sign the present Agreement."*

Thus, the Financial Assistance Agreement annulled the agreement of 2 December 2002 and established a new, unsecured, obligation between CIOC and JOR.[44] As a result, the agreement of 1 June 2004 refers to and 'secures' a loan agreement that was annulled shortly after Devincci Hourani signed the 'personal guarantee.'

447. The timing of the 'personal guarantee' is also problematic. It is dated 1 June 2004 but refers to a meeting between CIOC and JOR of 25 November 2006, during which CIOC and JOR decided to cancel interest from the agreement no. 2K-02. CIOC and JOR signed an agreement to cancel the interest rate from the USD 15 million loan in an agreement dated 4 December 2006. (WS 2 Devincci Hourani, Exhibit 10) Thus, it seems that the agreement between Devincci Hourani and JOR was signed in 2006 rather than 2004. This also does not clarify the issue of Devincci Hourani's alleged investment in CIOC and does not answer the questions why the share purchase price was so low and what his other contribution to CIOC was.

448. Another aspect of Devincci Hourani's 'personal guarantee' of CIOC's debts is that no evidence was provided that JOR ever tried to enforce the security against him or against CIOC, once the problems with the Caratube project started.

449. There is also no evidence that Kassem Omar acquired the 8 % share in CIOC, on the basis of the share purchase agreement dated 18 May 2006, in return for cancelling the interest rate on the loan between JOR and CIOC. Even assuming that the loan was still in place, there is no evidence that Kassem Omar's purchase of shares was connected with the financial arrangements between Devincci Hourani and JOR. First, Kassem Omar did not purchase the share from Devincci Hourani but from Fadi Hussein, who still owned an 8 % share at the time. Secondly, Kassem Omar treated the purchase as "*my investment in the company*". In relation to the fact that JOR's office in Kazakhstan was in the same building as the offices of CIOC, he explained, "*In addition, as an officer of JOR Investment Inc., the Lebanese company that was providing financing to CIOC for its investment into the field, I was also kept aware of developments in CIOC's monetary expenditure.*" (WS Kassem Omar, para. 12) Thus, Kassem Omar's statement does not confirm that his shareholding in CIOC was anyhow connected with JOR's financing to CIOC.

450. From the above it follows that the evidence presented does not confirm that Devincci Hourani's alleged contribution to CIOC as his investment included a substantial personal guarantee of CIOC's debt to JOR. His alleged personal guarantee referred to a loan that

[44] The documents do not confirm Devincci Hourani's testimony that the loan of USD 25 million was additional to the previous loan of USD 15 million. (Devincci Hourani, Tr, day 4, pp. 177–178)

was annulled by the parties. Even assuming that the loan was still in place, it was already secured on the same assets and revenue stream. Devincci Hourani's alleged personal guarantee did not contribute anything to the economic arrangement existing between CIOC and JOR.

451. There is also no evidence that Devincci Hourani's contribution constituted of his know-how or managerial skills. Devincci Hourani admitted himself that:

> *"Other than when I was the Director of CIOC I have not been actively involved in the day to day running of CIOC."* (First WS Devincci Hourani, para. 18)

452. CIOC was not an ordinary business venture. It was set up to operate an oil concession the value of which CIOC now claims to be over USD 1 billion. Yet CIOC's nominal share capital is 1,000,000 tenge according to Article 4.1 of CIOC's Charter, i.e. about USD 7,000 (C-174) and it employs a maximum of 50 persons.[45] CIOC's shares were always held by individuals. Nothing is known about any substantial contribution by any of those individuals, neither in terms of money, nor assets or know-how. Fadi Hussein's total contribution to CIOC was USD 11,000. Both Fadi Hussein and Waheeb Antakly sold their shares for their nominal value and if any valuation was made in connection with those transactions, none was presented. No evidence of payment of even those nominal amounts was presented.

453. CIOC purchased its main asset, the Contract, from CCC and allegedly paid USD 9.4 million. No documentary evidence of this purchase price and its payment was provided. From the time of its establishment JOR was the main capital provider to CIOC. It was contributing to CIOC before CIOC finalised the transfer of the Contract from CCC and before JOR itself was formally registered in Lebanon. At the time Devincci Hourani purchased his share in CIOC, JOR provided CIOC with open credit lines of USD 15 million. The loan was granted at 14 % interest p.a. but CIOC never paid any interest under the loan agreements. (Tr, day 4, p. 169) The interest was ultimately cancelled.

454. Change of shareholding did not have any impact on the relationship between CIOC and JOR. In January and April 2004, shortly before Devincci Hourani acquired 85 % of the shares, JOR transferred USD 6 million to CIOC.[46]

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

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[45] Article 1.15 of its Charter describes it as "*small business with an average annual number of employees not exceeding 50 people*" (C-174).

[46] According to a table showing investments in favour of CIOC from 2001 to 2007, on 14 January 2004 JOR transferred almost USD 1.8 million and on 12 April 2004 JOR transferred USD 4.2 million (R-105).

456. Claimant insisted that the origin of capital used in investments is immaterial. This is correct, however, the capital must still be linked to the person purporting to have made an investment. In this case there is not even evidence of such a link.

457. Claimant insisted throughout the proceedings that it presented all necessary evidence to prove that the Tribunal has jurisdiction. The Tribunal disagrees. Claimant failed to discharge its burden of proof with regard to the fact that CIOC was an investment of U.S. national (Devincci Hourani) as required by Article VI(8) of the BIT. At the least, the Tribunal is not satisfied that Claimant has established the fact of that investment.

(iii) Bona Fides

458. Respondent devoted a substantial part of its submission on jurisdiction to the issue of *bona fides*. It followed the *Phoenix Action* tribunal which included 'assets invested *bona fides*' in its list of elements that have to be taken into account in determining whether an investment can benefit from international protection of ICSID. (*Phoenix Action*, para. 114, RL-20)

459. In this context, Claimant, as mentioned above in the respective summary, emphasises with regard to the additional criterion mentioned in *Phoenix Action* that an investment has to be made *bona fide*, that no tribunal has treated this criterion as a mandatory requirement. Claimant substantiates the argument that the so-called *Salini* criteria have not been established as a formal set of requirements that must be met by relying on numerous arbitral decisions and awards as well as several scholarly writings. (C-IV, paras. 17, 21–22, 24; C-V, paras. 130, 133–134, 136–146, 148, notes 256 and 257)

460. Relying on ICSID awards, Respondent argued that the object and purpose of the ICSID Convention – promotion of private investment in a balanced way – serves the interests of host States and investors. Protection under the Convention is available if an investment qualifies as such and has actually been made by a private party who itself qualifies as an investor under the terms of the Convention. States cannot be deemed to have consented to grant protection to investments not made in good faith. Acquisition of an investment must be a *bona fide* transaction. In the absence of a *bona fide* transaction there can be no ICSID jurisdiction. (R-IV, paras. 8–12)

461. Respondent's arguments with regard to lack of good faith in the circumstances of the present case concentrated on the following three issues:

a) CIOC's investment in the Contract was not *bona fides* because the Contract had been acquired by corporate raiding.
b) Devincci Hourani's investment in CIOC was not *bona fides* because he was not the real person in control.
c) Devincci Hourani's investment in CIOC was not *bona fides* because its only motivation was for CIOC to acquire protection granted by the BIT.

462. Regarding the first issue, Claimant notes that until this arbitration "*[t]here was not even a whisper from CCC, or anyone else for that matter, that CCC had somehow been "corporate raided" out of the project by Issam Hourani*". (R-V, para. 43) In Claimant's opinion, it would simply defy common sense that the Hourani family could pressure the multi-national, multi-billion dollar business CCC into refusing to cooperate with Respondent or to retreat from the Caratube concession. Claimant purports that the

evidence does not support such a conclusion. The Tribunal agrees that, given the economic strength of the parties involved, a raid has neither been shown nor does it seem probable. However, this does not, by itself, prove *bona fides*. This is not an issue arising under Article 25(2)(b) of the ICSID Convention. In the present case it is a question whether CIOC was itself an investment of Devincci Hourani. Since Claimant has not stepped successfully over the threshold jurisdictional question concerning CIOC's nationality, there is no need of addressing the issue of CIOC's investment in Kazakhstan.

463. The second issue is directly linked to the issue whether CIOC was an investment of Devincci Hourani and the Tribunal agrees that this is an important point in the present context. If Claimant had presented sufficient evidence to show that it was an investment of Devincci Hourani, the Tribunal would have to address the doubts raised by Respondent with regard to this issue. This is, however, not necessary, given that Claimant's evidence does not support a conclusion that CIOC was an investment of Devincci Hourani.

464. The third issue raises an important point, which prompted some previous ICSID tribunals to deny jurisdiction.

465. In the present case it could indeed be argued that the acquisition of a share in CIOC by Devincci Hourani for a nominal consideration in 2004 took place at a time when notices were being served to CIOC for underperformance rendering CIOC liable to have the exploration contract terminated. The evidence relating to the circumstances surrounding this acquisition could lead to the inference that the sole rationale for Devincci Hourani's belated involvement in CIOC was to invoke later the ICSID jurisdiction in order to seek BIT protection through ICSID, which would otherwise not have been available to either Lebanese or Kazakh investors, who would appear from the evidence to be the real investors. However, the Tribunal concludes that it does not have to rely on such a speculation and that there is not sufficient proof in the present case that the nationality shelter was the exclusive motivation for the transaction.

466. Regarding the relevance of the motivation for a transaction, this Tribunal is aware of the decision of the tribunal in *Saluka v. The Czech Republic*[47] that the definition of investment in the applicable BIT did not make the investor's motivation part of the definition of investment (CLA-50, cf. para. 209). However, as seen above, Claimant was first required to show the existence of an at least plausible economic motivation in Devincci Hourani's alleged investment in CIOC. Since no plausible economic motivation has been shown by Claimant, and in view of Claimant's burden of proof, the Tribunal is not obliged to enquire what the real motivation behind Devincci Hourani's purchase of the shares in CIOC was.

467. Therefore, the Tribunal concludes that no further examination of the issues of *bona fides* and good faith is required in the present case.

[47] *Saluka Investments BV (The Netherlands) v. The Czech Republic,* UNCITRAL Arbitration Rules/PCA, Partial Award of 17 March 2006.

J.IV. Conclusion on Jurisdiction

468. Resulting from the above considerations, the Tribunal concludes that the facts presented and proved by Claimant do not satisfy Claimant's burden of proof to establish jurisdiction of this Tribunal.

469. Accordingly, the Tribunal finds that it does not have jurisdiction over the claims raised in this case.

470. This conclusion also means that the Tribunal does not have to consider the further arguments of the Parties regarding admissibility and regarding the merits of the dispute because they are moot.

471. In this regard, the Tribunal notes that, while in view of the above conclusion of the Tribunal, in hindsight, it would have been more cost-efficient had the further submissions regarding admissibility and regarding the merits not been made and examined in the hearing, it must be recalled that

* according to sections 14.1 to 3. of the Minutes of the 1st Session, the Parties agreed that a bifurcation of the procedure with a first phase only regarding jurisdiction would only take place if Repondent so requested by 14 July 2009,

* and that, by its letter of 9 July 2009, Respondent gave notification that it did not request bifurcation;

* this declaration by Respondent was later amended in footnote 7 to the Counter-Memorial (p. 11): "*The Republic did not request the bifurcation of these proceedings, since it concluded that the Tribunal needed factual information in order to assess these objections* [to jurisdiction] *and such information was best presented with the merits of the case. This however does not mean that the Republic considers these objections to be less serious, and the Republic therefore asks the Tribunal to uphold the objections and to refrain from considering the merits of the case.*"

* the result is that a one phase procedure including both the jurisdiction and the merits of the case was conducted on the basis of the agreement of the Parties.

K. Considerations Regarding Costs

K.I. Claimant's Position

472. Regarding costs, Claimant seeks an order by the Tribunal directing Kazakhstan to pay all costs incurred in connection with the arbitral proceedings and further all legal and other expenses incurred by Claimant on a full indemnity basis. Furthermore, Claimant seeks interest at a reasonable rate from the date on which the costs are incurred to the date of payment. (C-I, para. 86; C-IV, para. 285; C-V, para. 377)

473. In Claimant's Application for Costs of 7 November 2011, Claimant requests a total amount of fees and costs of USD 5,948,908.25. (C-VIII, paras. 2, 15)

474. Claimant holds that the requested costs have been "***significantly reduced*** *from the full value of attorney time devoted to this matter*" (emphasis in original) as they only comprise amounts that have already been billed and paid under an alternative fee arrangement. (C-VIII, para. 5) Claimant further points out that its initial counsel Allen & Overy LLP had billed Claimant based on reduced hourly rates and additional write-downs. (C-VIII, para. 6)

475. Claimant submitted its comments on Respondent's Statement of Costs on 18 November 2011 claiming that "*it contains a number of unsupported accusations, distortions and misstatements*" which Claimant subsequently addresses in its comments. (C-IX, para. 1)

476. Claimant invokes Article 27.6 of the Contract to submit that in accordance with the Parties' agreement in the Contract the unsuccessful party should bear the costs of the proceedings. (C-IX, para. 2)

477. Claimant further contests Respondent's overall costs exceeding USD 15 million and holds that it is evident that Respondent has not conducted the necessary review and evaluation of the time and billings of counsel to ensure that Respondent's costs are reasonable. (C-IX, paras. 4, 6)

478. Claimant further comments on each of Respondent's specific cost claims one by one and details why, in Claimant's opinion, Respondent's request for an award of costs and fees should be rejected. These specific claims relate *inter alia* to the handover and request for provisional measures, to document production and withdrawal, proceedings in a U.S. Court, requests for witness examination and immunity, and Claimant's request for an extension. (C-IX, paras. 8–24)

K.II. Respondent's Position

479. Respondent requests the Tribunal to order CIOC to reimburse Respondent for all reasonable costs and expenses related to these arbitral proceedings including without limitation legal fees and expert fees. (R-III, para. 468; R-IV, para. 648; R-V, para. 191)

480. In its Statement of Costs dated 7 November 2011, Respondent requests to be reimbursed for its costs totalling USD 15,675,206.71. (R-VII, paras. 4, 49) Respondent holds that this is in accordance with the ICSID Convention and the ICSID Arbitration Rules, as in its opinion no contrary agreement of the Parties exists. (R-VII, para. 4)

481. Respondent further emphasises that its costs were "*reasonably incurred (...) in connection with these proceedings and out of necessity to defend its interests*" in the present case. Moreover, Respondent alleges that Claimant acted "*improperly*" and brought "*extravagant claims*" before the Tribunal. (R-VII, para. 49)

482. Respondent comments on Claimant's Application for Costs on 18 November 2011, holding that the alternative fee arrangement between Claimant and its counsel cannot serve as a basis to evaluate whether Respondent's fees and expenses regarding its counsel were reasonable. (R-VIII, para. 3)

483. Furthermore, Respondent maintains that the costs of the proceedings should be awarded against Claimant, noting that Claimant did not identify any separate procedural action by Respondent resulting in additional time and costs while Respondent attributed almost 20 % of its costs to be the result of Claimant's "*multiple maneuvers, unsuccessful requests and improper conduct*". (R-VIII, para. 4)

484. Lastly, Respondent criticises certain specific cost claims by Claimant as unnecessary and unreasonable such as the costs incurred in relation to the attendance of Rakhat Aliyev at the Hearing in Paris and costs incurred for unidentified third-party consultants. (R-VIII, para. 5)

K.III. The Tribunal's Decision

485. Each of the Parties' costs submissions claimed full actual costs were that party successful, with Claimant disclosing the existence, but not the terms, of an additional success fee arrangement. Respondent's claim was for professional fees for some 31,000 hours, and expenses, to the total of USD 11.387 million, USD 950,000 ICSID deposits and other witnesses' and experts' fees and reports and expenses to the total of USD 15.675 million.

486. Claimant's fees and expenses, expressed to be discounted and, apart from the element of success fee, was USD 5.948 million, plus USD 975,000 paid to ICSID (including USD 25,000 representing the case registration fee).

487. In the result Claimant has failed on the first hurdle of jurisdiction. With the wisdom of hindsight, the majority of the costs and expenses of each party and of the dispute, both in duration and expense, would have been avoided had Respondent opted for bifurcation and the preliminary determination of its equivalent of Rule 41(1) objections under the Rules.

488. In this regard, the savings in costs and expenses would have enured both for the benefit of Respondent, in defeating the claims on the threshold issue had it had the confidence to take that course, and for Claimant, who would have had its claim disposed at this initial level. Indeed, upon analysis, none of the experts' reports, directed to the subjects of technical, valuation, political and even authentication, and also the proceedings in the U.S. Courts for documentary disclosure would need to have been engaged. And the initial

(and as we now know, dispositive) hearings on jurisdiction would have been shorter and focussed.

489. Few of the score or more of counsel and experts on each side would have needed to attend over the extended two weeks of hearings engaging on the merits. In retrospect, apart from short parts of the opening, closing and post-hearing submissions, almost the entire hearings were directed to merits rather than jurisdictional issues, in a proportion of more or less 9:1.

490. Further, the Tribunal takes as its reference point for its assessment the level of reasonable rather than actual costs. No doubt Respondent's legal team has committed 31,000 hours to the matter, roughly 3,750 working days or 10 working years. As most of this effort was devoted to issues related to the merits, the advantage of electing for a bifurcated procedure is confirmed by the later events.

491. Further, Respondent also contends that in any event Claimant should bear the costs of applications for interim measures, contested disclosures of documents, including Redfern Schedules, U.S. discovery proceedings, hand-over issues and the authentication of documents proffered and later withdrawn by Claimant, and other procedural skirmishes.

492. As the Tribunal has determined this dispute short of any findings on the merits, even on cost issues it cannot make any informed allocation of responsibilities for costs.

493. Further, although the Tribunal did not order interim issues, on any view the actions of regulatory authorities during the pendency of this matter were aggressive, and even confrontational, as for example, steps being foreshadowed to wind up Claimant whilst the post-hearing procedures were engaged.

494. Doing the best it can on having regard to these factors, and the entire course of the robust pursuit by each party of it entitlement to contest, and to defend, exhaustively on each issue, the Tribunal regards it as appropriate to abate Respondent's amount of actual costs and expenses to an estimated proportion more obviously related to jurisdictional issues. It is also to take account of an estimate of Claimant's corresponding costs on merits issues which might not have been incurred were jurisdiction first determined.

495. The Tribunal's conclusion is that Respondent is to be awarded costs and expenses of USD 3 million, together with recovery of USD 200,000 from amounts paid as ICSID costs, to a total of USD 3.2 million.

(For convenience, the decisions and signatures of this Award are printed hereafter on a separate page)

Decision

The Tribunal decides and orders that:

1. **The Tribunal does not have jurisdiction over the Claimant's claims herein.**

2. **Costs: The Claimant pay the Respondent USD 3.2 million, comprising USD 3 million for its legal costs and USD 200,000 to recoup part of monies paid for ICSID deposit.**

Gavan Griffith QC
Arbitrator
Date: 15.05.2012

Dr. Kamal Hossain
Arbitrator
Date: 18 MAY 2012

Prof. Dr. Karl-Heinz Böckstiegel,
President
Date: 30 May 2012