In the matter of an arbitration
under the Rules of Arbitration
of the Arbitration Institute of the
Stockholm Chamber of Commerce

No: V (116/2010)

ICC Hearing Centre
112 avenue Kléber
75016 Paris

Day 2 Friday, 3rd May 2013
Final Hearing

Before:

PROFESSOR KARL-HEINZ BÖCKSTIEGEL
PROFESSOR SERGEI LEBEDEV
MR DAVID R HAIGH QC

BETWEEN:

ANATOLIE STATI
GABRIEL STATI
ASCOM GROUP SA
TERRA RAF TRANS TRAIDING LIMITED

Claimants

-v-

THE REPUBLIC OF KAZAKHSTAN

Respondent

REGINALD SMITH, KENNETH FLEURIET, KEVIN MOHR, JAMES TOHER, HÉLOÏSE HERVÉ, AMY ROEBUCK FREY, ALEXANDRA KOTLYACHKOVA and VALERYA SUBOCHEVA, of King & Spalding, appeared on behalf of the Claimants.

DR PATRICIA NACIMIENTO, MAX STEIN and SVEN LANGE, of Norton Rose LLP, and JOSEPH TIRADO, of Winston & Strawn LLP, appeared on behalf of the Respondent.

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09:35 1 Friday, 3rd May 2013

2 (9.35 am)

3 THE CHAIRMAN: I am glad to see that everybody made it into
4 the building, and without much delay. Welcome to this
5 very last day of our hearings. Without further ado,
6 I would invite Claimant for its second-round closing
7 statement, please.

8 Rebuttal statement by MR SMITH

9 MR SMITH: Thank you, Mr Chairman. No doubt to the great
10 relief of the interpreters and the court reporter, I am
11 not going to attempt to go slide by slide in rebuttal.
12 But suffice it to say that there are a great deal of
13 errors, misstatements and misrepresentations that
14 Claimants believe are contained in the closing
15 presentation slides as prepared by and provided by the
16 Respondent. We will respond to those in due course in
17 connection with our second post-hearing submission.

18 I would like to address four issues in some depth
19 before turning over to Mr Fleuriet, on the issue of
20 damages.

21 The first issue I would like to revisit is the last
22 issue that was addressed by the Respondent yesterday,
23 and that is the issue of enterprise value. The
24 Respondent wishes to call it, we think for obvious
25 reasons, a "gross-up" of the debt, and it is nothing of

09:36 1 the sort.

2 Interestingly, if you look at Respondent's pleadings
3 in this matter, as well as their presentation yesterday,
4 there really is no mention of the Energy Charter Treaty
5 standard for defining "investment". We think the reason
6 for that is obvious, and that is in Article 1(6) of the
7 Energy Charter Treaty: "Investment" is very clearly
8 defined as being ownership or control of "a company or
9 business enterprise", or shares or debt.

10 It is in the disjunctive for a reason. And the
11 commentators, as I noted in my opening presentation
12 yesterday, have recognised that very clear distinction,
13 in that when a party wholly owns a company under the
14 Energy Charter Treaty that has been expropriated or
15 otherwise affected by state conduct, the claimant is
16 entitled to claim the value of that company.

17 To be very clear, the Claimants in this case are
18 seeking a recovery equal to the full asset value of KPM
19 and TNG. That is very clearly what is allowed and
20 permitted under Article 13(1) of the Energy Charter
21 Treaty as it relates to the standard for lawful
22 expropriation, which requires compensation for the fair
23 market value of the "Investment". And the "Investment"
24 is the companies that the Claimants wholly owned.

25 We believe that it is appropriate for the Tribunal

09:37 1 to address the issue of compensation as if this were
2 a forced asset sale, where the owner, here the
3 Claimants, have transferred their assets, KPM and TNG,
4 to the Republic of Kazakhstan, in a situation where
5 Kazakhstan has not acknowledged any of the liabilities
6 of those companies, but in fact those liabilities have
7 been retained by the Claimants.
8 This is not an effort to seek a debt gross-up.
9 Instead, it is more properly viewed as simply an award
10 of compensation equal to the full asset value of the
11 companies, ie the discounted cashflows of those
12 companies. That is not only consistent with what is
13 permitted and required, in fact, under the Energy
14 Charter Treaty; it is entirely consistent with the
15 Chorzów Factory standard of restitution in a situation
16 where restitution can't be provided but the cash
17 equivalent is provided.
18 The Claimants, as the sole owners of KPM and TNG,
19 had the ability, prior to the interference of the state,
20 to direct the cashflows in those companies in any way
21 they saw fit. In fact, what we do know, and it's
22 undisputed, is that Claimant Anatolie Stati created
23 Tristan as a special purpose vehicle solely for the
24 purpose of seeking to help finance the business operations of
25 KPM and TNG. And it was his full expectation, in the

09:38 1 creation of Tristan, and Tristan incurring the debt
2 obligations, that Tristan would be able to repay those
3 debt obligations from the working cashflows of KPM and
4 TNG.
5 If the purpose of compensation is to place the
6 Claimants in the position they would have been but for
7 the state's misconduct, then here it is appropriate to
8 award the entire discounted cashflow of KPM and TNG so
9 as to permit the Claimants to direct that cashflow as
10 they would have done had the state misconduct not
11 occurred. And it is very clear that a portion of that
12 cashflow would have been directed to satisfy the debt
13 obligations incurred by Tristan in order to finance the
14 operations of KPM and TNG.
15 So not only does the Energy Charter Treaty in its
16 express language make very clear that it is appropriate
17 to award the value of the companies, but here it is
18 entirely consistent with the notion of the award of
19 compensation that would be the cash equivalent of
20 restitution.
21 We also want to make it very clear -- and we think
22 it is clear to the Tribunal -- that the Claimants are
23 not claiming on behalf of the noteholders. The
24 Claimants are making their claim in this case under the
25 Energy Charter Treaty as the 100% sole owners of KPM and

09:40 1 TNG. The noteholders, in effect, are simply nothing
2 more than creditors of the Claimants pursuant to rights
3 that were granted under the pledge agreements. They
4 serve essentially as a creditor of the Claimants in
5 connection with the rights that arise under
6 a contractual undertaking that Claimants, Ascom and
7 Terra Raf, entered into with respect to the noteholders.
8 But the noteholders are not owners of the company; they
9 don't own any of the shares of the company.
10 And perhaps this is best pointed out by the cases
11 that were provided in the Respondent's presentation, the
12 Impregilo case, for example, or the PSEG case. The
13 reason that in those cases the full value of the
14 companies was not awarded to the claimants is that the
15 claimants didn't own the entirety of the companies. In
16 Impregilo, for example, Impregilo was a joint venture
17 partner in a joint venture where it was attempting to
18 claim damages for other joint venture partners that
19 didn't have the benefit of the treaty.
20 If this were a case where the Claimants only owned
21 50% of the stock, for example, of KPM and TNG, then
22 there would certainly be a legitimate argument in this
23 case that they are only entitled to 50% of the value of
24 those companies. But that is not the case here. The
25 Claimants own 100% of the shares of the companies. They

09:41 1 wholly own the companies.

2 The case that the Tribunal should direct its

3 attention to is the Occidental Petroleum v Ecuador case.

4 That is a case where this precise issue was addressed.

5 In that case, Occidental owned the shares of the

6 company, and therefore Occidental was entitled to 100%

7 of the compensation.

8 Interestingly, the Respondent quotes

9 Professor Stern's dissent in that case, and we invite

10 the Tribunal to read the dissent in that case. But we

11 also invite the Tribunal to read the majority opinion in

12 the case, and the majority opinion in the case disagreed

13 with Professor Stern, and in fact held that Occidental

14 did have standing to claim 100% of the damages, even

15 though it owed a contractual obligation -- such as the

16 Claimants owe a contractual obligation to the

17 noteholders -- to pass on some portion of the award to

18 a third party, under a contractual undertaking. But

19 that in no way divests the Tribunal of jurisdiction, and

20 that in no way suggests the Claimants aren't entitled to

21 full compensation.

22 Finally, and perhaps the reason that this all may be

23 a moot point, is that while there is a slide in the

24 Respondent's presentation, there is no serious argument

25 that the Claimants do not remain obligated under the

09:42 1 pledge agreements to pass on a portion of the award to
2 the noteholders. It is a payment in connection with and
3 relating to their equity interest. And the law is very
4 clear, and the Respondent conceded in its rejoinder on
5 quantum, and walked it back completely yesterday, that
6 if a liability remains with the claimant, it is not
7 appropriate to reduce that liability from the quantum in
8 the award. The Chorzów Factory case holds that, the
9 Enron v Argentina case holds that; I believe the Azurix
10 case holds that as well. And Respondent admitted that
11 in the rejoinder on quantum, and now they're trying to
12 walk it back, for obvious reasons.
13 The last point I would like to make is that there is
14 simply no inequity in awarding the Claimants the asset
15 value in this case, even if the Claimants have
16 a contractual obligation to pass on 100% of that
17 recovery to their creditors. That is of no concern to
18 the Republic of Kazakhstan. They are paying for exactly
19 what they stole. They are paying for the assets of the
20 company. They are paying no more than that. They are
21 paying for the assets. They didn't assume any of the
22 liabilities; those are the Claimants' liabilities.
23 Claimants are getting nothing more than they are
24 entitled to as the 100% owners of those assets. They're
25 not getting a dime more than they are entitled to in

09:44 1 connection with that. And the fact that the Claimants
2 may have an obligation to pay some portion of that to
3 noteholders, or to another third party, or may have
4 negotiated, after the fact, a relative prioritisation of
5 plaintiffs, quite frankly is none of the business of the
6 Government of Kazakhstan. They are paying only for what
7 they are obligated to pay for under the Energy Charter
8 Treaty.

9 So that, I think, ends the case as it relates to the
10 enterprise value question.

11 I want to now address a second issue, and it perhaps
12 was yesterday -- or should have been -- the elephant in
13 the room. And that is the RBS valuation. It is now
14 completely beyond dispute that the Respondent
15 wilfully -- wilfully and in bad faith, withheld that
16 valuation from production in this case, notwithstanding
17 the order of this Tribunal that it be produced.

18 There is no substantiation, not one iota of
19 evidence, that KMG ever claimed confidentiality as to
20 those materials. When they were produced to Kazakhstan,
21 there is no suggestion that they should be maintained in
22 confidentiality. Counsel has not produced one scrap of
23 evidence to support the statements and the arguments of
24 counsel that they were to be maintained in
25 confidentiality. One would have thought that would have

09:45 1 been produced in connection with the production of the
2 RBS report, if it in fact existed. It simply doesn't.
3 The Republic of Kazakhstan, through its misconduct,
4 has made an attempt to insulate its witnesses from
5 cross-examination, including its experts, from the
6 import of the RBS report. And the reason for that is
7 painfully obvious, and that is the fact that that
8 valuation is devastating -- devastating -- to the
9 Republic of Kazakhstan's case on damages. It simply
10 puts the lie to the work of Deloitte, to put it very
11 bluntly.
12 RBS, for the state-owned oil company, with no
13 incentive to inflate the values of KPM and TNG, provided
14 a fair market value as of October 2009 of between
15 $620 million to $760 million. Now, it is the view of
16 the Claimants in reviewing the RBS report -- and there
17 will be more on this in the second post-hearing
18 submission -- that RBS improperly deducted contingent
19 liabilities in the amount of about $244 million from
20 that amount that should be added back to the fair market
21 valuation, which would suggest a value of somewhere
22 between $855 million, in the base case, to slightly over
23 $1 billion.
24 Now, why is this so devastating? Well, the reason
25 it is so devastating is that this valuation prepared for

09:47 1 the state oil company was prepared one year after the
2 FTI valuation. So it fully accounted for the impact of
3 all of the market factors that are outlined in the
4 PricewaterhouseCoopers report. In fact, it references
5 the PricewaterhouseCoopers report. All of the effects
6 of the global financial collapse. The effect of a year
7 of additional production from the fields of KPM and TNG.
8 The effect of the watering of the fields, that
9 apparently is so significant according to Gaffney Cline.
10 The effect of the additional cost of compression that
11 would have to be required, again according to Gaffney
12 Cline. The effect of the lower reserves estimates in
13 the Miller & Lents report that was dated April 2009.
14 All of those effects would be built into the value that
15 RBS ascribed to Borankol, Tolkyn and the LPG facility.
16 Now, it was very interesting -- and somewhat
17 amusing, frankly -- yesterday, that you see two slides
18 from the Respondent, when they do have the courage to
19 actually address the RBS report, where they criticise
20 the report for overestimating the value of Tolkyn,
21 through arguments of counsel. Obviously no witnesses
22 have given any testimony on that, no experts have given
23 testimony that is subject to cross-examination on that.
24 And yet they embrace wholly the valuation of Borankol.
25 The reason for that is they like the Borankol valuation;

09:48 1 they don't like the Tolkyn valuation.

2 Frankly, they should not be allowed to speak on this

3 topic. They withheld this report from the Tribunal and

4 from the Claimants until after the hearing on quantum

5 was over and all of the witnesses had given testimony.

6 These are essentially, via the state oil company,

7 admissions against interest. They have no ability,

8 should be given no right to comment on the RBS valuation

9 in an effort to contrive reasons why now they want to

10 discredit or discard it.

11 It is the Claimants' view that the RBS valuation

12 should be viewed as an absolute floor -- absolute floor by the Tribunal

13 when it begins to consider the value of Borankol, Tolkyn

14 and the LPG plant. We believe the FTI valuation is

15 a better valuation, a more appropriate valuation; it is

16 a valuation that is correct as to the valuation date,

17 a year earlier than the valuation provided by RBS. But

18 the simple fact is that, no matter how much the

19 Respondent wants to argue and nit-pick the relative

20 valuations of the parties -- and the parties can debate

21 until they are blue in the face whether the FTI

22 valuation is right, or the Deloitte valuation is

23 right -- but as I said at the beginning, the elephant in

24 the room is the RBS valuation. And that valuation, the

25 Respondent has to live with. And that should be

09:49 1 an absolute floor on value when the Tribunal begins to
2 consider value.
3 I will make one other note. There is a slide that
4 shows that RBS ascribed zero value to contract 302.
5 That is a gross misrepresentation. In fact, RBS didn't
6 value contract area 302 at all. There is no evidence
7 that they were asked to ascribe any value whatsoever for
8 contract 302; no evidence that they were asked to
9 provide any kind of prospective value, for example, for
10 contract 302. And of course, we don't have
11 Mr Suleimenov, who was here and gave testimony, and who
12 was the project sponsor for the RBS work on behalf of
13 KMG, who we can cross-examine and ask, "Did you ask that
14 a value be given for contract 302?" And I am sure we
15 will hear from the other side, "Oh, they were asked to
16 give a value and they said there was no value, and
17 Mr Suleimenov testified at the quantum hearing that they
18 gave no value." Well, his testimony has no credibility,
19 because he was completely insulated from
20 cross-examination on the valuation report that he
21 sponsored. He knew it existed, and yet it had not been
22 produced by the Respondent.
23 The bottom line is that the Republic of Kazakhstan
24 had its chance to attempt to distinguish and discredit
25 the RBS valuation in the light of day. It chose not to

09:51 1 do that. It chose that purely for strategic reasons in
2 violation of the Tribunal's orders. And therefore, it
3 should not be heard now to try to discredit that report
4 or distinguish that report where it has insulated all of
5 its witnesses from examination on it. The report stands
6 for what it is.
7 The next point I would like to go to, if you have
8 the Respondent's presentation from yesterday, if you
9 could pull that. If not, I will refer you to the slides
10 from yesterday. But I only go to some specific slides
11 that they provided as being symptomatic of --
12 THE CHAIRMAN: You mean this one? If you mention the slide
13 number, that would be helpful.
14 MR SMITH: I will, Mr Chairman. I would ask that you look
15 at slide 62, and I will be referring to 62 through 64.
16 These are the slides that were provided on FTI's
17 purported lack of independence. And the heading is:
18 "FTI hid that they used Claimants' cost estimates."
19 Again, this is symptomatic of what we've seen
20 throughout these slides. But the suggestion here, that
21 FTI was anything other than transparent in connection
22 with its cost estimates for well drilling, and the first
23 two pages are specifically related to well drilling
24 costs, is simply false. And it's false because -- let's
25 go to the FTI first report, at page 112, footnote 235,

09:53 1 where the report very plainly states, as a footnote to
2 the well cost estimates for contract area 302:
3 "We have discussed with Ryder Scott what
4 a reasonable estimate for capital costs for wells
5 drilled in the different depths/structures would be,
6 based on a review of Company's historical capital
7 expenditure costs for wells with adjustments made for
8 varying depths."
9 It's a very clear statement that FTI is relying on
10 the company's historical capital expenditures for wells,
11 and they have verified the reasonableness of those well
12 expenditure costs with Ryder Scott. There's nothing
13 hidden about that. It was in plain light in the
14 footnote that was contained in the first report.
15 On slide 63, they say:
16 "At the hearing on quantum, upon being confronted
17 with major flaws in the well cost estimates, Mr Rosen
18 admitted that these had been provided by the Claimants."
19 Well, he didn't admit they had been provided by the
20 Claimants, any more than it states it very clearly in
21 the FTI first report. And if you look at the testimony
22 of Mr Rosen that is cited, they cite lines 1 and 2 of
23 page 82, but let's go to the last line of page 81. It's
24 on the screen. Mr Rosen said:
25 "So again, as I say, I'm not the technical expert;

09:54 1 these drilling costs were provided to me by the
2 Claimants' technical people. I reviewed them for order
3 of magnitude, for reasonableness with Ryder Scott
4 people, who felt they were reasonable, and on that basis
5 they were included in this."
6 So that's Mr Rosen's testimony, which is entirely
7 consistent with the footnote in his first report. Then
8 if you'll look back to slide 62 on the second bullet,
9 they give some cropped excerpts from the report of FTI,
10 and this one relates to Tabyl Main, and these were wells
11 drilled to 3,700 metres. And they cited for:
12 "We applied a well cost of 5.5 million based on
13 Tolkyn's average shallow well cost."
14 And then they cut it. Well, if you go ahead and
15 read the next line, what it says is:
16 "That well cost estimate was based on Tolkyn's
17 historical cost."
18 It is just a misrepresentation. It crops the
19 explanation of where that well cost came from, and they
20 say, "Well, FTI made no disclosure as to where its well
21 costs came from". It's simply a misrepresentation of
22 what the evidence is. The fact is that FTI's field
23 staff reviewed well cost assumptions with the Claimants'
24 management and operating personnel in Moldova; they
25 reviewed Claimants' historical cost information. That

09:55 1 information, by the way, was produced within the scope
2 of work of the FTI first report. The Respondent has
3 that; they could have cross-examined any witnesses on
4 that if they had so chosen to do. And then FTI verified
5 the reasonableness of those well cost estimates with
6 Ryder Scott.
7 Now, one can certainly debate over which methodology
8 is more sound: having Gaffney Cline, a paid expert, come
9 in and, from whole cloth, come up with well costs and
10 capital expenditure estimates. That certainly is one
11 approach. The other is: go to the people who actually
12 have run a business in the region, who in fact have
13 incurred those costs, have drilled wells in the region,
14 who have historical cost records, sit down, review those
15 records, discuss with them, discuss with Ryder Scott the
16 reasonableness of the estimates that are derived from
17 those records, and the extrapolation of those records,
18 and then so disclose it in connection with your expert
19 report. Again, there can be a debate certainly over
20 which is the better approach. But the fact that that
21 approach was not transparent is simply a misstatement,
22 and it doesn't accurately represent the record.
23 I'll turn to one last point before I turn it over to
24 Mr Fleuriet, and that is the efforts now at the 11th
25 hour to try to describe FTI's valuation as an outlier.

09:57 1 I just want to look at one slide for brevity, and that's
2 slide 51 in the Respondent's presentation. That is
3 a slide that shows the FTI valuation at the far right.
4 And then you have -- and we see these for the first time
5 here -- various comparable company analyses, comparable
6 transaction analyses, and a variety of other analyses
7 that were performed by Deloitte.
8 Now, the first point is that Deloitte purposely
9 avoided employing any of these other valuation methods
10 until after the quantum hearing was over. FTI provided
11 its comparable valuations in connection with its first
12 report. Deloitte TCF did not respond to that. Deloitte
13 GmbH did not respond to that. In fact, they waited
14 until after Mr Gruhn was insulated from
15 cross-examination, and then he comes forward with his
16 other valuation methodologies analysis. Not
17 surprisingly it yields very low values, and has a number
18 of assumptions -- to the extent that they are
19 disclosed -- that we will deal with in our second
20 submission.
21 But the fact is: that is not in response to any new
22 issue, and that was the limitation on Mr Gruhn's work in
23 connection with his post-hearing submission report.
24 Plainly and simply, it's a sandbag. And he has been
25 insulated from cross-examination, and it should be

09:58 1 discarded. It's procedurally improper. There is
2 a gross violation of the Claimants' due process rights:
3 we don't have an opportunity to cross-examine Mr Gruhn
4 on this work. And we will respond to it: FTI will be
5 forced to respond to it in the second report. But
6 I think it should be taken with a heavy dose of salt,
7 given the context that it was produced in.
8 One thing that is obvious in looking at this is that
9 if one looks at the comparable transactions and
10 comparable companies numbers that were provided by
11 Deloitte, it is very clear that they manipulated the
12 multiples to drive the value down. Just as one example
13 of that, Deloitte used a multiple for comparable
14 companies, and this is a multiple that's applied to the
15 2P reserves of 1.74, and used comparable transaction
16 multiples of 2.84. FTI obviously used much higher
17 multiples. But look at what RBS used. RBS used
18 multiples for comparable companies of 8.6; that's five
19 times what Deloitte used. They used comparable
20 transaction multiples of 5.2, almost two times what
21 Deloitte used.
22 Now, again, we're going to respond in depth --
23 because we must -- to this in connection with our second
24 post-hearing submission, and the FTI supplemental report
25 in connection with that. But the simple fact is that

10:00 1 this work by Deloitte should have been done prior to the
2 hearing on quantum so that their witnesses could
3 actually be cross-examined regarding this work, and it
4 wasn't done. It is not in response to anything new, it
5 is a complete sandbag. And we think that for this and
6 many other reasons, the work of Deloitte should be
7 entirely discarded, because of the way that it has been
8 manufactured in this case after the fact and after
9 an opportunity, as to much of it, for cross-examination.
10 So with that, I will yield to Mr Mohr.
11 Rebuttal statement by MR MOHR
12 MR MOHR: Thank you. As I did yesterday, I would like to
13 spend a few more minutes today delving a bit deeper into
14 several of the key causation issues in this case.
15 I actually don't have that much to address, because we
16 frankly debunked most of Kazakhstan's causation
17 arguments in our presentation yesterday, and Kazakhstan
18 offered very little as meaningfully responsive to that
19 in its presentation. Also I think, after I finish my
20 presentation today, Mr Fleuriet is going to talk again
21 about some issues that will demonstrate pretty clearly
22 just how Kazakhstan's illegal actions caused serious
23 harm to our clients, beginning almost immediately after
24 President Nazarbayev issued his investigation order in
25 October 2008.

10:01 1 But Kazakhstan did attempt to make a few points
2 yesterday that are so riddled with errors of fact and
3 logic and law that they demand a response.
4 First, Kazakhstan's case on causation can be summed
5 up -- and I'm quoting here from Respondent's slide
6 presentation at slide 8 -- as: KPM and TNG were hit hard
7 by numerous economic developments in 2008 and 2009.
8 Yesterday I demonstrated pretty clearly, I think, that
9 Kazakhstan is grossly exaggerating that claim because,
10 among other reasons, it is confusing a temporary
11 liquidity problem with a long-term business fundamentals
12 problem.
13 But I also think that it's fair to step back from
14 that a bit, and ask the question: so what? Even
15 assuming that the companies were "hit hard", to use
16 Kazakhstan's words, by the economic environment in 2008
17 and 2009, that doesn't mean that they were not also hit
18 hard by the Government's numerous and extraordinary
19 violations of international law at the same time.
20 A difficult business environment doesn't alleviate
21 the harm caused by extraordinary criminal charges,
22 a very public accusation of fraud and challenge to the
23 ownership of TNG. It doesn't alleviate the harm caused
24 by the jailing of your general director, by the
25 imposition of millions of dollars in baseless tax debt,

10:03 1 by the imposition of a crippling $145 million criminal
2 penalty, by the attachment of your shares and making
3 them effectively inalienable. It doesn't alleviate the
4 harm of any of the other injuries that Claimants
5 suffered at the hands of Kazakhstan. In fact, it
6 amplifies the harm caused by Kazakhstan's actions,
7 because it is much harder to cope with the illegal
8 violations of your host state in a business environment
9 that is also very challenging than it would be if things
10 had been going swimmingly at that time in the oil and
11 gas industry.
12 Kazakhstan's only answers to that question really
13 are its twin theories that the Claimants abandoned their
14 investments, and that the financial woes actually led to
15 breaches of the subsoil contracts that resulted in
16 a lawful termination of the companies.
17 Now, I think that this abandonment argument is so
18 absurd that it really doesn't require any further
19 discussion. And Mr Fleuriet is going to talk again
20 today about the fact that there really is no evidence
21 that there was any legitimate basis for a legal
22 termination of the subsoil use contracts.
23 But moreover, Kazakhstan's evidence that the
24 Claimants' financial woes were either self-inflicted or
25 inevitable is seriously, seriously flawed. The

10:05 1 centrepiece of Kazakhstan's argument, as laid out in its
2 presentation yesterday, is that the
3 PricewaterhouseCoopers report didn't lay blame for the
4 financial woes of KPM and TNG at the feet of the Kazakh
5 state. Respondent devoted five slides to that topic,
6 the PwC report, yesterday, and cited PwC in several
7 more.
8 I just want us all to think about that for a second.
9 Just to remind the Tribunal, and Mr Smith has already
10 discussed this at length, this PwC report was prepared
11 by PricewaterhouseCoopers for KazMunaiGas, the
12 state-owned oil company, as part of its evaluation in
13 2009 of whether to purchase KPM and TNG. The report is
14 102 pages long, and to say that Kazakhstan relies on it
15 selectively in its presentation would be
16 an understatement. It cherry-picks a few lines from
17 that report, out of context, that it presents for the
18 truth of the report's authors' assertion in the report,
19 while ignoring other things in the report that
20 contradict its case.
21 As you heard from Mr Smith, they did the exact same
22 thing with the RBS report.
23 What's more, Kazakhstan had that PwC report in its
24 possession, and deliberately withheld it from this
25 Tribunal, despite the Tribunal's order to produce it,

10:06 1 throughout the evidentiary phases of this case. If
2 Kazakhstan offered some kind of justification for that
3 misconduct yesterday, I didn't hear it.
4 The prejudice caused by Kazakhstan's misconduct,
5 first by withholding that document throughout the
6 evidentiary phases of the case, and now trying to use it
7 as affirmative evidence against the Claimants, is
8 mind-boggling. This report addresses the financial
9 condition of KPM and TNG, as well as environmental and
10 tax issues that KPM and TNG and numerous of Claimants'
11 witnesses have a lot of knowledge about and things to
12 say about.
13 Because Kazakhstan withheld that document until long
14 after the evidentiary phase of this case was over,
15 Claimants have absolutely lost the opportunity to submit
16 any evidence from their witnesses addressing the
17 assertions made by PwC in that report. It's over. We
18 also have lost the opportunity to cross-examine Medet
19 Suleimenov and other Kazakhstan witnesses. And
20 Mr Suleimenov headed up the entire analysis project for
21 KazMunaiGas, and supervised the preparation of the PwC
22 report. We have lost the opportunity to cross-examine
23 him about the assertions that are made in that report.
24 So for Kazakhstan to withhold that evidence without
25 a word of excuse, and now to try to make hay of its own

10:08 1 to use against the Claimants in this case, frankly, I'm
2 just at a loss for words to describe how extraordinary
3 an abuse of process that is.
4 And it's not just a procedural abuse. It goes to
5 the weight and reliability of that evidence. The report
6 has not been subject to meaningful cross-examination, or
7 to rebuttal, in any way, by the Claimants' witnesses.
8 While there's no rule of evidence that precludes its
9 admissibility in this case, I think that certainly goes
10 to the weight that the Tribunal should give it when
11 Kazakhstan attempts to use unrebutted assertions in
12 those reports against the Claimants.
13 Moreover, lest there be any doubt about this, that
14 is a door that swings one way only. Kazakhstan alone is
15 responsible for concealing this document, as well as the
16 KMG 2008 valuation, the RBS report, and the Squire
17 Sanders documents -- that were created for or by its
18 state-owned oil company -- from the Tribunal and from
19 the Claimants in this case. Kazakhstan alone is
20 responsible for that.
21 So it is wholly appropriate for the Tribunal to give
22 due weight to the statements against Kazakhstan's
23 interest in those documents for its state-owned oil
24 company, and any reasonable inferences to be drawn from
25 those documents. It is perfectly reasonable for the

10:09 1 Tribunal to use those against Kazakhstan, while at the
2 same time ignoring Kazakhstan's self-serving attempts to
3 use those documents against the Claimants while it has
4 simultaneously obstructed the Claimants from submitting
5 any rebuttal to those documents.

6 That said, I think we can dispense with the PwC
7 report and Kazakhstan's argument regarding it, just by
8 examining the absurdity of Kazakhstan's position.
9 Kazakhstan seriously argues as evidence that the
10 Claimants' financial difficulties must not have been
11 caused by Kazakhstan's actions. The fact is that the
12 PwC report nowhere mentions Kazakhstan's illegal actions
13 as a cause of those issues. Well, of course it doesn't.
14 Just think about who PwC's client was: the state-owned
15 oil company KazMunaiGas. If anyone seriously thinks
16 that an accounting firm would accuse the Kazakh state of
17 illegality in a report that it prepared for the
18 state-owned oil company, that is an absurd position, and
19 it simply lacks any credibility.

20 Kazakhstan's desperation to show that Claimants were
21 the author of all of their own misfortune reaches its
22 apex regarding the Credit Suisse issue. Kazakhstan
23 clearly knows that it has a real problem with that
24 issue, because all of its self-inflicted injury
25 arguments go up in smoke if Kazakhstan had a hand in

10:11 1 denying Claimants that financing. And there's just no
2 way around that fact. So Kazakhstan resorts to several
3 of its -- I think I will just say "weakest" arguments
4 that it has made in this case on the Credit Suisse
5 issue.
6 First, on slide 18, if you could turn to that,
7 Kazakhstan attempts to argue that the Interfax press
8 article that resulted from the MEMR's leak on
9 December 18th 2008 did not cause the Credit Suisse loan
10 to fall through. They argue that Credit Suisse was not
11 willing to make that loan anyway, because of the
12 financial crisis in late 2008. And they cite some
13 testimony from Mr Rosen and Mr Seitinger, who both
14 testify in very general ways about the financial crisis
15 in support of that.
16 That is wildly out of context. Mr Rosen was talking
17 about the general behaviour of the markets in the weeks
18 after the Lehman bankruptcy as it related to
19 Kazakhstan's argument that the trading price of the
20 Tristan debt on October 14th 2008 reflected a market
21 judgment about the fundamentals of that specific
22 company. He said it didn't, because the markets in that
23 time period generally were not trading on fundamentals.
24 He didn't testify that no banks in the world were
25 offering any commercial loans in December 2008, or at

10:12 1 any time thereafter, more than two months later.
2 Mr Seitinger didn't testify to that either.
3 The fact is that we have specific evidence in this
4 case that Credit Suisse was prepared to make that bridge
5 loan in December 2008. We have provided to you
6 Exhibit 521, which is an email exchange between Mr Lungu
7 and one of his colleagues at Ascom, and
8 Antanas Petrosius at Credit Suisse. And over
9 a several-day period in December 2008, Ascom and Credit
10 Suisse have an extended discussion about this financing.
11 This concludes on December 5th of 2008 with Mr Petrosius
12 of Credit Suisse saying:
13 "Please find attached the preliminary term sheet.
14 We are still developing this internally but would
15 appreciate your thoughts/feedback in the meantime.
16 Should aim to sign next week."
17 Now, this term sheet is eight pages long and very
18 detailed. And if you recall, the Claimants actually had
19 first approached Credit Suisse about doing a deal like
20 this in September 2008, and then had put it on the shelf
21 for a while. So there actually had been quite a lot of
22 work that had gone into this deal already by
23 December 5th 2008, and Credit Suisse clearly indicated
24 that they were aiming to sign the document the following
25 week.

10:14 1 Now, obviously there was still some work to be done
2 to get the transaction to the point where it was final,
3 but nothing in this email exchange suggests that Credit
4 Suisse was sitting on the sidelines in general because
5 of the financial crisis, that it wasn't in a position to
6 lend. And nothing in this email suggests that Credit
7 Suisse saw any fundamental business issue that was going
8 to prevent the transaction from closing. They aimed to
9 sign it the next week.
10 Next Kazakhstan argues that we have no evidence that
11 the Interfax article was what quashed the deal. Now,
12 that is false also. We also have provided you Exhibit
13 C-625, and this is an email exchange between
14 Mr Petrosius of Credit Suisse and Mr Lungu of Ascom on
15 December 18th 2008.
16 What you see here is that, immediately after the
17 Interfax article comes out on December 18th 2008 that
18 publishes the MEMR's defamatory accusations of forgery
19 and fraud and calls into question the Claimants'
20 ownership of TNG, Credit Suisse immediately emails
21 Mr Lungu of Ascom asking him to respond to it. Mr Lungu
22 quickly attempts to reassure Credit Suisse that the
23 article must be a mistake, he thinks that it must be
24 from unofficial sources, because Claimants knew that the
25 facts in the article were wrong, and so they were hoping

10:16 1 that it was simply a mistake and that they were going to
2 be able to fix it with the Kazakh Government.
3 There is then an exchange about some phone calls to
4 try to discuss this. Mr Petrosius says:
5 "Tried returning your call. Please call me when you
6 free up."
7 Mr Lungu has testified that he had that conversation
8 with Mr Petrosius and, not surprisingly, what Credit
9 Suisse said was, "If this in fact was a mistake and
10 you're able to resolve this issue with the MEMR, then
11 fine, we'll be able to move on then. But come back to
12 us when you've resolved the issue". Well, as we all
13 know, Claimants were never able to resolve the issue.
14 Mr Lungu was unfortunately incorrect that this didn't
15 come from official sources. It did come from official
16 sources. And we know that because over the next several
17 months the Claimants went to the MEMR, tried to get the
18 MEMR to retract this accusation, including with
19 a meeting in March of 2008 with the minister himself,
20 Mr Batalov, and that retraction never came, because this
21 was not a mistake, it did come from official sources,
22 and it was part of an intentional campaign to interfere
23 with these companies and to destroy their credit
24 reputation. And that's the effect that it had.
25 Now, Kazakhstan's final argument on this issue, and

10:17 1 that's the argument that's set out on slide 19 of its
2 presentation yesterday, is that: even if the Claimants
3 had gotten this Credit Suisse loan in January, that
4 still would not have made a difference, because they
5 still would have needed to take out the "devastating
6 Laren transaction", in August. The argument here is
7 that, because the proposed term of the Credit Suisse
8 loan as set forth in the term sheet was only seven
9 months, that when that loan expired in August of 2009,
10 the Claimants still would have needed to turn to the
11 Laren lenders.
12 Well, that argument is transparently foolish. The
13 reason why the Claimants had to turn to the Laren
14 lenders in June 2009 is because the ratings agency
15 announcements in the spring of 2009, and the downgrades,
16 all of which specifically were based on the criminal
17 investigations and the preemptive rights issue raised in
18 the December 18th MEMR leak to the Interfax news agency,
19 had destroyed the credit reputation of these companies.
20 If that hadn't happened, and the Claimants were able
21 to obtain the Credit Suisse financing in January 2009,
22 there's no reason to think that they would not also have
23 been able to obtain financing on commercial terms,
24 whether it be from Credit Suisse or from somebody else,
25 if they had needed to refinance that debt in

10:19 1 August 2009.

2 In fact, conditions had improved by August 2009,
3 both in terms of the liquidity position of the companies
4 and the pricing environment in the markets. So it
5 absolutely makes no sense that, once that Credit Suisse
6 loan expired in August 2009, Claimants would have needed
7 to turn to the Laren lenders. It's just illogical.

8 Finally, there's one last issue that I want to
9 address, and that is the argument on slide 67, that the
10 Claimants have been unjustly enriched because the
11 Claimants claim damages for monies already pocketed.
12 I addressed this yesterday, and the reason why that's
13 false is because the Claimants don't claim any damages
14 for any of the receivables or cash that were on their
15 balance sheet and in their bank accounts as of
16 October 14th 2008. They claim damages only for the
17 operational assets that Kazakhstan stole, based on a DCF
18 valuation, which is a valuation that is forward looking,
19 in the sense that it counts the expected cashflows that
20 those assets would generate after October 14th 2008.

21 We explained this in our post-hearing submission,
22 I explained it again yesterday, and Kazakhstan to date
23 has not responded to the merits of that fact.
24 Kazakhstan merely keeps repeating the same incorrect
25 argument. And I think without anything further on this

10:21 1 subject, that argument simply needs to be dismissed.

2 Now I'll turn it over to Mr Fleuriet, thank you.

3 Rebuttal statement by MR FLEURIET

4 MR FLEURIET: I would like to begin by going back to one of
5 Mr Mohr's first points, which is the question of "so
6 what?", and just look at the same causation topic in
7 terms of the applicable legal standards that Claimants
8 submit the Tribunal should use to evaluate the case, and
9 particularly the case on causation.

10 Claimants are required obviously to prove one or
11 more breaches of the Energy Charter Treaty which caused
12 damage, and they are required to demonstrate the quantum
13 of loss suffered as a result of those breaches. But
14 that's it. Kazakhstan has attempted in this case to add
15 a number of other sorts of requirements, it's built up
16 a number of false arguments and, kind of like
17 Don Quixote, is chasing at the windmills in terms of
18 some of the arguments that it's raised.

19 I want to get back to kind of the basics here, in
20 terms of the legal standards, and our view of how the
21 Tribunal should approach this case. And that is that in
22 the case of multiple material breaches over time that
23 caused significant injury to Claimants' investments from
24 early on, and that ultimately lead to the total loss of
25 those investments, international law clearly allows

10:23 1 a claimant to quantify losses at the beginning of that
2 chain of events. And that's typically done by
3 establishing the fair market value of the investments.
4 Now, in a case where a state's breaches are clearly,
5 clearly causing significant injury, a claimant is not
6 required to demonstrate that it was otherwise operating
7 in a perfect world. The Energy Charter Treaty and
8 international law do not only protect investments in
9 boom times. There is no perfect external world
10 standard. There is also not a perfect investor
11 standard. The ECT does not only protect energy majors
12 who can demonstrate that they are so large that they
13 don't need external financing, or that they're
14 effectively immune from events, temporary downturns in
15 the market, or other events in the real world. The ECT
16 is designed to protect investments in the real world,
17 and claimants are simply not required to prove the
18 impossible.
19 Once claimants have established that a state's
20 breaches are causing significant injury, that their
21 investments are materially impaired by a state's
22 misconduct, it simply does not matter that they were
23 soon thereafter also in the midst of a temporary market
24 downturn.
25 Furthermore, international law does not require

10:24 1 Claimants or the Tribunal to parse out every last single
2 impact of every event over a nearly two-year period and
3 only award damages if the Tribunal concludes that there
4 was nothing else happening that cannot be attributed to
5 the state. That is simply not the standard or the rule
6 of international law.
7 Furthermore, international law does not require
8 there to have been an actual buyer waiting in the wings
9 at the very moment the harm was caused by the state.
10 And indeed, as the Tribunal knows, it is actually quite
11 rare to have an investment treaty case where there was
12 an actual buyer waiting in the wings. It's actually
13 fairly uncommon to have a case like this one, in which
14 the investor was actively engaged in a sales process.
15 As long as the Tribunal is satisfied that the
16 state's misconduct was materially impairing
17 an investment, the Tribunal can proceed to value that
18 investment using a hypothetical buyer, if it wants to
19 calculate fair market value.
20 So let's just take a specific example from the
21 events of this case. And let's put ourselves back in
22 the late spring of 2009, and in particular I would ask
23 the Tribunal to put themselves in Mr Stati's shoes, as
24 he is looking at the world of his investments in the
25 late spring of 2009. As of December 2008, the MEMR's

10:25 1 intentional leak to the Interfax news agency has created
2 serious questions about the title to TNG, the state has
3 made public accusations of fraud and forgery, KPM has
4 had a criminal investigation based on trumped-up
5 allegations launched against it publicly as of
6 December 2008.
7 Then in February/March 2009, TNG is also subjected
8 to the same trumped-up criminal investigation. And the
9 MEMR formally notifies TNG in February/March that in
10 fact the state's preemptive rights were violated, and
11 states that, as a result of that, Claimants are likely
12 to lose all three of their subsoil contracts. At the
13 same time, Cornegruta is arrested, and the financial
14 police are hunting TNG's managers.
15 Then on April 30th, the authorities sequester all of
16 the shares in all of the assets, including the subsoil
17 use contracts, of KPM and TNG.
18 That is the world that Mr Stati is looking at around
19 May 1st 2009. And the question is: in light of that,
20 who in their right mind would have, for instance,
21 continued investing in the LPG plant at that point,
22 knowing full well that essentially at that point it is
23 a sitting duck, and that, even though within several
24 months it could have been brought online, it's likely to
25 be lost to the state.

10:27 1 In light of all that, it simply does not matter, it's simply no answer for

2 Kazakhstan to call up its friends at KNOC and have them

3 come to this proceeding and testify that they did not

4 want to go forward with buying TNG in the summer of

5 2009. That's simply unresponsive to Claimants' case and

6 the evidence in this case on causation.

7 Similarly, it's unresponsive for Kazakhstan to come

8 back and say, "Well, you know what, at that specific

9 moment in time, gas prices happened to temporarily be

10 down." That is simply not the question that the

11 Tribunal needs to be asking; it's not part of the legal

12 standard. Claimants have demonstrated causation in this

13 case in spades, and a lot of the issues that we heard

14 yesterday are simply not responsive to the evidence of

15 causation in this case. Claimants have demonstrated in

16 spades that it was the acts of the state, the misconduct

17 of the state that harmed these investments. And that's

18 reflected in particular by the Fitch and Moody's ratings

19 that we saw yesterday, which just simply go through the

20 sequence of misconduct in this case, and note the impact

21 on the investments. Causation, in our view, has been

22 firmly established.

23 We also heard yesterday about contract termination.

24 I would like to spend just a moment on that, even though

25 the events of July 2010 are not essential to Claimants'

10:29 1 case. We heard again yesterday a story on contract
2 termination that candidly is belied by the evidence.
3 The story that Kazakhstan told yesterday, and that it
4 tried to tell at the hearing, is exemplary of a lot of
5 Kazakhstan's arguments in this case. It's essentially
6 just a post hoc justification that's expressly
7 contradicted by the contemporaneous evidence.
8 Kazakhstan claims, for instance, that the Claimants
9 were in continuing and serious breach of contracts 210
10 and 305, and it claims that various audits and
11 inspections had demonstrated systematic breaches by
12 Claimants. But there is absolutely no such evidence of
13 such breaches by Claimants that justified the
14 termination in July 2010.
15 I would like the Tribunal to look back for a moment
16 at what the MEMR said in February 2010, after it had
17 just inspected KPM and TNG in January 2010. And we
18 heard again yesterday that there was barbaric treatment
19 of the investments, that there were social tensions in
20 the region. But I want the Tribunal to look at the
21 contemporaneous evidence. This is what the MEMR were
22 saying about the state of KPM and TNG's operations back
23 in February 2010. It clearly states:
24 "... the requirements under the minimum work
25 programme were significantly overfulfilled, and all the

10:30 1 annual programmes were exceeded, both from the point of
2 view of the overall investment value and from the point
3 of view of the overall financial obligations. Any
4 falldown [which I think means shortcoming] for certain
5 years is compensated by the significant exceedings
6 registered in the next or previous years.
7 "The quality of conformance of the actual state of
8 Borankol field development with the projected one is
9 sufficiently high with respect to all its key figures."
10 Obviously the government is saying there that
11 irrespective of sufficient compliance in a certain year,
12 Claimants have so far exceeded what they were required
13 to do that they are getting an entirely clean bill of
14 health.
15 Let's look at the one for TNG as well. We have seen
16 this before, it's essentially the same message, it says
17 the clients are completely in compliance, and in fact
18 are in excess of their work requirements and obligations
19 under this programme.
20 These are simply not the conclusions that one would
21 expect if there had been any significant problems with
22 the fields and operations in early 2010. This is
23 clearly an absolutely clean bill of health.
24 Kazakhstan has also claimed that Mr Lungu has
25 admitted that Claimants were in breach of their minimum

10:32 1 work programmes. That is entirely false. That is not
2 what Mr Lungu testified to. What he testified to, back
3 in the January hearing on Day 1, was that Claimants had
4 not done everything that they had planned for KPM and
5 TNG in 2009. He was not referring to the minimum work
6 programme, he was referring to Claimants' own internal
7 plans for what they had expected to expend.
8 We heard again yesterday that there was social
9 tension; there is absolutely no credible evidence in the
10 record whatsoever of any social tension. In fact, the
11 evidence in this case is that all the workers were paid.
12 KPM's bank accounts were frozen, but because Claimants
13 wanted to continue to go ahead and pay the workers, they
14 were actually paying KPM's workers out of TNG's bank
15 accounts right up until the very end. There was also no
16 social tension in terms of people losing their jobs.
17 The people were simply rehired by KazMunai Tengyz who
18 came in and took over the fields. There was no mass
19 dismissal of employees, at least with regard to the
20 permanent employees. Obviously a year earlier the
21 contract employees on the LPG plant had been let go.
22 But there was absolutely no social unrest whatsoever in
23 mid 2010, and all of the evidence indicates the
24 contrary.
25 Finally, we also heard a reference again yesterday

10:33 1 to what -- and I'll conclude on this point, because it's
2 fairly amusing, but we heard that there was a serious
3 complaint that had been lodged with the general
4 prosecutor. The serious complaint that was referred to
5 yesterday was that two-page handwritten note from four
6 unknown residents of the Mangystau region, that
7 Mr Kravchenko tried to tell the Tribunal during the
8 hearing that he had received, and on the basis of that,
9 he had sent out seven national agencies, the very same
10 day, to investigate this serious complaint. That
11 testimony fell apart at the hearing, and he was
12 ultimately forced to concede that that is in fact not
13 a normal practice at all.
14 So all of the stories that Kazakhstan has told with
15 respect to the 2010 termination are simply belied by the
16 evidence in the record. There was absolutely no grounds
17 to terminate the contract, and none of the grounds that
18 Kazakhstan has more recently relied on in this
19 proceeding were in fact given as reasons for termination
20 back during the real time.
21 With that, I'll conclude, and just on behalf of
22 Claimants, thank the Tribunal again for their service in
23 this case, we appreciate it very much.
24 THE CHAIRMAN: Thank you very much indeed. We now have
25 a coffee break, and continue at 11.00.

10:35 1 (10.35 am)

2 (A short break)

3 (11.00 am)

4 THE CHAIRMAN: We come to the second closing statement by
5 the Respondent, please.

6 Rebuttal statement by DR NACIMIENTO

7 DR NACIMIENTO: Thank you, Mr Chairman. At this stage
8 I would like to invite the Tribunal to take a step back
9 and look at this case as a whole. What we see and we
10 heard again yesterday is that Claimants have taken the
11 Republic of Kazakhstan to arbitration claiming that
12 their assets in Kazakhstan had been expropriated
13 indirectly and directly, and that they had been treated
14 unfairly and inequitably, just to name a few of the
15 accusations. They further allege that they had
16 therefore lost valuable assets, and they should be
17 entitled to compensation in the range of billions of
18 dollars.

19 An investor, like any claimant raising claims, needs
20 to make his case and prove his case. Making his case
21 means the tribunal must have no doubts about the facts
22 as presented by the investor, meaning that, first of
23 all, there needs to be a full logical story without
24 contradictions. And the investor needs to prove his
25 story by fully discharging his burden of proof. The

11:01 1 investor needs to prove that the tribunal has the
2 jurisdiction to hear his case, he needs to prove that
3 the treaty was breached, he needs to prove that as
4 a result he incurred damages, and he needs to specify
5 these damages.
6 As we would see throughout this presentation,
7 Claimants failed to submit this story fully, logically,
8 and without contradictions. And we will also see that
9 Claimants failed to prove their claims.
10 Let's take a look at Claimants' means of evidence,
11 Claimants' documents, Claimants' witnesses and their
12 experts. I would start by looking at Claimants'
13 witnesses. We have particularly highlighted this
14 critical aspect of Claimants' evidence in our first
15 post-hearing brief. I assume that this is what counsel
16 for Claimants referred to as a "smear campaign"
17 yesterday. However, there is nothing improper about
18 testing Claimants' case, about pointing the Tribunal to
19 instances in which Mr Stati and Claimants' witnesses
20 were caught, and in which they contradicted Claimants'
21 case. What is improper is for witnesses to misstate the
22 truth or to omit crucial aspects in that testimony.
23 What is striking is that, other than accusing
24 Respondent of a smear campaign, Claimants had actually
25 very little to say about the actual contents of

11:03 1 Respondent's submission. The reason is that the
2 evidence for such misrepresentation is simply
3 undeniable, and we will present some examples of this.
4 As we have already demonstrated yesterday, Mr Lungu
5 was caught completely misrepresenting the parameters of
6 the LPG plant project. He eventually had to admit that
7 what he had depicted as the original was in fact the
8 plan as amended after years of delays and cost
9 explosions.
10 Mr Stati, the Claimant himself, contradicted himself
11 numerous times, and was often simply proven wrong by
12 contemporaneous documents. For example, in his witness
13 statement and at the hearing on quantum Mr Stati claimed
14 that he had only decided to also put up contract 302
15 properties for sale in January 2009. Mr Stati's
16 allegation is proven wrong by a letter from his own
17 investment bankers, Renaissance Capital. By that letter
18 of 20th November 2008, Renaissance Capital informed OMV
19 that the sellers had made the decision to include the
20 Tabyl block, that is the contract no. 302 area, into the
21 sales process. And this is, of course, important
22 because it relates to Claimants' allegation that they
23 always had the firm intention to explore the alleged
24 reef.
25 This was only one of Mr Stati's statements that

11:04 1 amounted to at least misleading statements.

2 Another one is that, even upon being asked
3 explicitly by one arbitrator, by Mr Haigh, he tried to
4 conceal the fact that he had remained the beneficial
5 owner of CASCo Kazakhstan, an attempt that can easily be
6 explained by the inflated costs TNG and KPM paid to
7 CASCo, which very likely served to transfer money to
8 related companies.

9 A common feature among Claimants' witnesses was also
10 that they testified regarding events of which they did
11 not actually have first-hand experience. Mr Cojin went
12 even further by claiming in his witness statement that
13 he had been present at an inspection when in fact he had
14 not, as he admitted under cross-examination. There are
15 numerous similar examples. And while some instances of
16 misrepresentations may have been missed, we summarised
17 a fair part of them in our first post-hearing brief.

18 There is even an instance in which Claimants'
19 witnesses were not caught lying under cross-examination,
20 but by their own experts. Mr Broscaru's witness
21 statement contained assumptions regarding revenue and
22 profit that TNG had allegedly had when it decided to
23 build the LPG plant. It went on to say that, based on
24 these assumptions, TNG had concluded the value of the
25 plant to be 450 million.

11:06 1 Firstly and strikingly, in the hearing on quantum,
2 it transpired that Mr Broscaru had received these
3 numbers from Mr Lungu, and he had jotted them down as
4 his own numbers in his witness statement. As it turned
5 out, Mr Broscaru outspokenly was a person with no
6 expertise whatsoever in finance and economics, and could
7 therefore not answer the simplest questions regarding
8 the underlying assumptions and the concluded value of
9 the LPG plant.
10 The Tribunal will recall that Mr Lungu submitted two
11 witness statements in these proceedings. Still, his
12 calculations regarding the value of the LPG plant ended
13 up in Mr Broscaru's witness statement, who refused to
14 give any testimony on these numbers. Mr Broscaru,
15 during his testimony, further expressed his hopes that
16 the numbers were not wrong.
17 Claimants therefore apparently thought that they
18 should ask FTI to check on the numbers in Mr Broscaru's
19 witness statement. FTI came to the conclusion that
20 Mr Broscaru's hopes had been in vain. FTI showed that,
21 depending on the assumed runtime of the plant, the
22 concluded value should not have been 450 million, but
23 a mere 7 million or 92 million. Mr Lungu, through
24 Mr Broscaru, miscalculated the value of the plant by
25 a minimum of US$358 million, and this is according to

11:08 1 Claimants' own experts.

2 We asked Deloitte to look at FTI's calculation, and
3 they indeed informed us that FTI's calculations
4 contained some mistakes. For example, FTI understated
5 the discount rate, they failed to consider taxes, and
6 they disregarded administrative costs. Taking this into
7 consideration, the value of the LPG plant, based on
8 TNG's assumption, would be far below zero, in the range
9 of 50 million below zero.

10 In other instances, Claimants' witnesses explicitly
11 contradicted the case that their counsel had brought
12 forward. For example, in the hearing on jurisdiction
13 and liability, we heard two different versions of
14 Claimants' case on contract 302. In the closing
15 submission, we heard once again that Claimants
16 complained of an alleged bad faith refusal of
17 a commitment to extend contract no. 302. Claimants
18 assert that this alleged commitment was communicated by
19 letter dated 9th April, and thus after the contract had
20 expired.

21 Surprisingly, TNG's general director at the time,
22 Mr Cojin, had a totally different view on contract
23 no. 302. In the hearing on jurisdiction and liability,
24 he told the Tribunal that contract 302 never expired.
25 While he conceded that the exploration period ended in

11:09 1 March 2009, he alleges that the contract then entered
2 into development and production.
3 Yesterday, Claimants, in an attempt to support their
4 untenable valuation date, divided Claimants' world into
5 before and after October 2008. The world before,
6 without any problems for TNG and KPM; the world after,
7 with the alleged many acts by the Republic.
8 Mr Stati himself however does not support this
9 theory. In fact, he testified at the hearing on
10 jurisdiction and liability that his companies had had
11 problems from as early as 2003. The Republic agrees
12 with Mr Stati's description, but it's telling that the
13 stark contrast is not between pre and post October 2008,
14 but between what we heard from Mr Stati and what we
15 heard from his counsel yesterday.
16 A quick look at the Claimants' documentary evidence.
17 The Republic highlighted the use of forged documents and
18 misleading English translations in the hearing on
19 jurisdiction and liability. For the benefit of the
20 Tribunal, we have put examples of this up on the slides.
21 Just as an example, in the hearing on jurisdiction and
22 liability, the Republic's witness Serik Rakhimov
23 testified that he had never seen -- let alone written --
24 the report Claimants submitted as Exhibit C-711.1 in
25 this arbitration.

11:11 1 In addition, some of the evidence presented by
2 Claimants was obtained in violation of the law of the
3 Republic of Kazakhstan. A significant number of
4 intergovernmental documents submitted by Claimants could
5 not have been obtained legally, as they were not
6 available to the public. Mr Kravchenko of the GPO
7 confirmed this during the hearing.
8 I will invite the Tribunal to take a closer look at
9 one specific document. This is the
10 January/February 2010 inspection report by the MEMR for
11 TNG, Exhibit C-386. What is shown on the slide is table
12 number 1P, which depicts how far TNG was compliant with
13 its obligations under the annual work programmes. This
14 document very prominently featured in Claimants'
15 presentation yesterday, and was depicted as a green
16 light, a clean bill of health.
17 The reason why I put up the Russian version is
18 easily explained if the Tribunal were to compare it to
19 the English translation, provided by Claimants, and we
20 just handed out these to the Tribunal and to Claimants.
21 The Russian original contains numbers up and until the
22 year 2009. The English translation is cut off at the
23 year 2006, as the next slide shows. On this slide, you
24 can see the English translation provided by Claimants
25 for Exhibit C-386. The translation is cut off at the

11:12 1 year 2006, so that the years starting from 2007, when
2 Claimants were not complying with the annual programme,
3 are not visible.
4 For a non-Russian speaker, this would not be
5 visible. A non-Russian speaker would fail to notice
6 that the alleged "clean bill of health" inspection
7 report in fact showed the following shortcomings of TNG.
8 Already in 2007, Claimants spent more than US$12 million
9 in total investments, less than envisaged by the annual
10 work programme. In 2008, 15 million; in 2009, another
11 10 million. The prescribed geological exploration
12 expenses were underperformed by 7 million in 2007,
13 18 million in 2008, and 4.5 million in 2009. And
14 finally, TNG missed the target of drilling work expenses
15 by 12 million in 2007, 21 million in 2008, 8 million in
16 2009.
17 What we see here is that the world after the
18 Claimants' valuation date was rather similar to the
19 world before it, namely that Claimants were mismanaging
20 their business.
21 Let's turn to Claimants' experts. During these
22 proceedings, Ryder Scott have been proven to lack the
23 independence necessary for an expert in arbitration.
24 An expert in arbitration is supposed to assist the
25 Tribunal in the assessment of a factual issue, and is

11:14 1 supposed to do so based on its independent convictions
2 and beliefs. Ryder Scott have proven to be unfit for
3 this role, because they were complicit in Claimants'
4 procedural ambush at the hearing on quantum, when
5 Claimants produced through the back door the 3D seismic
6 analysis they had been failing to produce since more
7 than one and a half years earlier.
8 Prior to the hearing on quantum, Ryder Scott and GCA
9 had agreed on a joint issue list. The purpose of that
10 list, requested by the Tribunal, was to help identify to
11 the Tribunal the issues under discussion, and the
12 experts' respective positions thereon.
13 With regard to the issue of the geological chance of
14 success, the parties had agreed the GCoS estimates are
15 fairly close, which was obviously the case, as the GCoS
16 for the Interoil Reef were 4% and 5% respectively.
17 It was only at the hearing that Ryder Scott
18 introduced a new GCoS estimate of 9%, and it turned out
19 that they had been preparing this for a while. Ryder
20 Scott deliberately withheld from the Tribunal their
21 position on this issue, and the basis for their
22 estimate, thus rendering in fact the joint issue list --
23 and also an important part of the quantum hearing --
24 meaningless.
25 At no time during discussions had Ryder Scott

11:16 1 indicated that they were reviewing 3D seismic data, and
2 that that they intended to increase their GCoS estimate
3 based on that data. Instead, they intentionally told
4 GCA that they were in agreement, indicating that the
5 issue of GCoS was off the table for the hearing. And
6 this is what we heard also yesterday, confirmed by
7 Mr Nowicki.
8 This is certainly not the conduct of an independent
9 expert that is interested in assisting the Tribunal and
10 in establishing all the necessary facts. This is highly
11 partisan conduct, actually helping the Claimants to gain
12 an unfair advantage in respect to Respondent, causing
13 a significant disruption in these proceedings. It's
14 certainly not the conduct of a reliable and independent
15 expert.
16 I am not going to dwell on Mr Nowicki's experience
17 in arbitrations, or the dates as to when he received or
18 did not receive the new data on 3D.
19 Ironically, Mr Nowicki had to step back from his
20 procedural ambush testimony during his cross-examination
21 yesterday. As you can see on this slide, Mr Nowicki had
22 stated at the hearing on quantum that, based on his
23 analysis, the M1 well would have reached the alleged
24 reef. He made no qualification to that statement
25 whatsoever, giving the Tribunal every reason to believe

11:17 1 that this was his sincere opinion based on thorough
2 analysis. Yesterday, Mr Nowicki admitted that he
3 assumes that the M1 well would not have reached the
4 alleged reef. Apparently, Mr Nowicki had hoped he could
5 make the statement at the hearing on quantum without
6 being recalled for cross-examination.
7 Let's turn to FTI's evidence. FTI have committed
8 a serious violation of good valuation practice by
9 advancing the so-called "enterprise value" based on the
10 implied market value of debt. FTI simply stated a cause
11 and effect relationship that does not exist. Namely,
12 FTI allege that there is a typical gearing in the oil
13 and gas sector according to which companies try to
14 achieve a ratio of 19.5% of debt to total capital. This
15 was based on the so-called Morningstar index, which
16 showed an average of 19.5 gearings in the oil and gas
17 sector.
18 Deloitte have looked at this in some detail, and
19 have found that the typical gearing allowed by FTI does
20 not exist. The Morningstar index does indeed show
21 an average of 19.5%, but that is the result of various
22 gearings ranging between zero and 97%. And you can see
23 this on the slide. The various dots represent different
24 companies' debt to total capital. If there was
25 a typical gearing of 19.5%, these companies should all

11:19 1 be close to the green 20% line. In fact, they are all
2 spread all over the chart, which disproves FTI's
3 premise. Needless to say that the method applied by FTI
4 is not a recognised valuation method.
5 We shall now take a brief look at a piece of work
6 FTI did for their third report, namely an analysis of
7 the LPG plant cost explosion. FTI attempted to show
8 that the cost explosion could be explained by reference
9 to an increase in construction costs. Their explanation
10 is so laughable that it only proves the opposite, namely
11 that the cost explosion can only be the result of
12 mismanagement.
13 First, FTI contradict themselves with their
14 analysis. They argue that inflation in Kazakhstan was
15 behind the increase in costs. However, in all their
16 prior analysis, FTI had applied US inflation in their
17 DCF analysis of the LPG plant. As of the January update
18 note, inflation applied by them was 1.61%, which is
19 clearly contradictory.
20 Second, and even more importantly, FTI arbitrarily
21 tweak the parameters of their analysis in order to
22 downplay the price increase. They completely ignore the
23 initial cost estimate of US$105 million, because it was
24 contained in the Ascom LPG business plan of 2006.
25 Claimants allege that this document was prepared by

11:21 1 Vitol, and FTI accept this argument willingly to
2 disregard the business plan. However, that is again
3 contradictory, because FTI actually rely on this
4 document themselves: it is quoted twice in their first
5 report. And this is in fact how the Republic got hold
6 of this document at all: it was among the supporting
7 documents of FTI's first report.
8 FTI also disregard the estimate of US$281 million
9 which is mentioned in the Broscaru witness statement.
10 Now, it's rather amusing, because FTI state as one of
11 the reasons for disregarding this estimate that the
12 estimate was provided to Mr Broscaru by Mr Lungu, and
13 apparently not even FTI found that information to be
14 reliable.
15 Overall, this leads FTI to state that there was only
16 a price increase of 53.5%. If one takes into account
17 the estimates we just looked at, we arrive at a cost
18 increase of 168%, and that's a price increase that even
19 FTI cannot explain away by reference to inflation.
20 We turn now to a few words about contradictions in
21 Claimants' case. There are in fact quite a few of
22 those, but I would like to focus on two we only heard
23 yesterday. As the Tribunal will be aware, Claimants
24 argue that they were indirectly expropriated.
25 Interestingly, they submit that an indirect

11:23 1 expropriation occurred as early as fall of 2008, due to
2 the alleged wrongful exercise of administrative
3 authority.
4 Applying the standard enunciated by the Tecmed
5 tribunal, Claimants thus argue that they were:
6 "... radically deprived of the economical use and
7 enjoyment of its investment, as if the rights related
8 thereto ... had ceased to exist ..."
9 ... already in the fall of 2008.
10 This submission does not sit well with what we heard
11 yesterday from the Claimants. Regarding their causation
12 theory, Claimants argue that they successfully worked
13 through severe cash constraints in 2009, and
14 successfully emerged on the other side. Claimants
15 cannot have it both ways. They cannot on the one hand
16 be hit so hard in the fall of 2008 that an indirect
17 expropriation occurred, and on the other hand, be
18 successful at saving the companies in 2009. This
19 undermines actually both Claimants' causation case and
20 their valuation date.
21 Another observation on Claimants' causation case,
22 which is that Claimants rely on all sorts of
23 contradictory intentions of Mr Stati. Yesterday,
24 Claimants told us that in late 2008, Mr Stati allegedly
25 thought it too risky to invest his own capital in

11:24 1 Kazakhstan, due to the situation with the government.
2 However, a few minutes later, they tell us that in the
3 summer of 2009, when the situation had allegedly gotten
4 worse, Mr Stati was suddenly willing to personally
5 guarantee the Laren loan, and to thus risk his own
6 capital. Apparently, Mr Stati does not provide counsel
7 for Claimants with information any less contradictory
8 than the testimony that he himself presented in front of
9 this Tribunal.
10 With such weak evidence, and in particular, such
11 weak valuation expertise, it is no surprise that
12 Claimants have fluctuated wildly throughout these
13 proceedings. There are just so many flaws in FTI's
14 analysis that Claimants could not help but correct and
15 recorrect throughout these proceedings.
16 Overall, there were changes in the amount of
17 US$841 million, as is apparent from the table on our
18 slide. This chart depicts the changes to FTI's 302
19 contract value. The next chart depicts the changes for
20 Tolkyn and the LPG plant, both from a cost perspective
21 and with the prospective valuation. It also includes
22 the changes for Borankol.
23 I now turn over to my colleague, Mr Tirado.
24 Rebuttal statement by MR TIRADO
25 MR TIRADO: Thank you. I would like to look at some more of

11:26 1 the substantive issues raised yesterday. Claimants
2 yesterday stated that the KMG EP due diligence document
3 supported their claims in this arbitration. In point of
4 fact, it's the other way around. The KMG EP due
5 diligence documents provide further support for the
6 Republic's position, and I will give the Tribunal a few
7 of the numerous examples to illustrate this point.
8 To begin with, the PwC report shows that KPM and TNG
9 were hit very hard by the financial crisis, and other
10 events outside the Republic's influence. It thus
11 confirmed the Republic's long-standing position that the
12 Laren loan was not the result of state actions.
13 Further, the RBS report confirms that values claimed
14 by Claimants in this arbitration are far exaggerated.
15 Taking into account the severe condensate overstatement
16 at Tolkyn, RBS did not arrive for a single asset at
17 a value even remotely close to the values derived by
18 FTI.
19 The Tribunal will also remember that the Squire
20 Sanders report supports the Republic's position on the
21 proper calculation of the income from the illegal
22 operation of a trunk pipeline without a licence.
23 Lastly, the 2008 KMG EP presentation also supports
24 the Republic's valuation arguments. As did Deloitte,
25 the presentation alludes to the fact that a comparable

11:28 1 companies and comparable transactions analysis leads to
2 overstated results in case of fields that are largely
3 gas producing, such as Tolkyn.
4 The Republic maintains that the Claimants' causation
5 case is absurd. Claimants have also alleged that the
6 Credit Suisse loan fell through because of state
7 interference. The Republic rejects this argument as
8 unproven, and further notes that, under the market
9 conditions at the time, it was no wonder that the loan
10 fell through. The market situation is well reflected by
11 the development of the Tristan notes at that time. This
12 showed a yield of maturity, or in other words, an effective
13 interest rate of 26% on 14th October 2008, and of 46% on
14 17th December 2008. This is markedly different from the
15 15% that had been contemplated in the Credit Suisse
16 loan, and it reflects that the Credit Suisse loan was
17 not realistic at that time. This is a difference of
18 some 11% and 31% respectively.
19 Of course, the Republic does not neglect the fact
20 that the Credit Suisse loan was set for a shorter period
21 of time, which typically translates into lower interest
22 rates. However, it should also be noted that the Credit
23 Suisse loan was supposed to be secured with subordinated
24 guarantees only, meaning that the Tristan noteholders
25 had first-tier guarantees, and Credit Suisse was

11:29 1 supposed to only get a second-tier guarantee. This is
2 typically something that increases an interest rate.
3 It is therefore the Republic's submission that the
4 disconnect in rates cannot be explained with the
5 difference in runtime alone.
6 Moreover, it should be kept in mind that the
7 Republic is in any event not responsible for the
8 Interfax press item. This cannot be attributed to the
9 Republic, and it was never authorised by a state
10 official, and no evidence -- I repeat no evidence -- has
11 been presented to that effect.
12 Yesterday, Claimants also argued that working
13 capital was increasing prior to the fall of 2008, and
14 that this indicates that the companies were in good
15 condition. However, this argument is also misleading.
16 Increasing working capital does not necessarily go hand
17 in hand with a better financial position. Working
18 capital may also increase because customers are delaying
19 the payment, and receivables accumulate. In some cases,
20 this may actually turn out to be a problem.
21 Just as a reminder, we talked about Montvale failing
22 to make payments yesterday, and how this caused
23 Claimants to take out the Laren loan. This is a clear
24 example of how the accumulation of receivables is not
25 an indicator of a healthy financial position.

11:31 1 As to jurisdiction, Claimants made a number of
2 misleading statements in relation to the legality of
3 their ownership of KPM and TNG during the closing
4 presentation yesterday. First, they refer to the Squire
5 Sanders report, to allege that KPM and TNG were legally
6 registered, established and re-organised. This was set
7 out in slide 3 of the Claimants' closing presentation.
8 However, when one looks at actual explanations in
9 that report, Squire Sanders actually support the
10 Republic's position. In particular, I refer the
11 Tribunal to page 64 of that report. This can be found
12 at Exhibit C-725, where they say:
13 "We do not possess sufficient information on
14 compliance with all necessary requirements of the laws
15 of Kazakhstan at the time of KPM's statutory
16 registration (establishment)."
17 They repeat this statement in relation to TNG at
18 page 118 of the report. As to Terra Raf's ownership in
19 TNG specifically, at page 120 of that report, Squire
20 Sanders also said:
21 "The documents provided to us do not include any
22 information on the performance by Terra Raf of its
23 obligations to purchase shares in TNG from the former
24 owner of TNG, ie Gheso, or any resolution by the former
25 shareholders of TNG to sell shares held by them to new

11:32 1 shareholders for the relevant periods."

2 In view of what I have just said, Claimants have no
3 grounds for saying that Squire Sanders concluded that
4 their ownership in KPM and TNG was legal. Claimants
5 also misleadingly stated yesterday that the preemptive
6 rights issue was not raised before October 2008. This
7 is quite simply wrong. As we stated yesterday, the MEMR
8 wrote to TNG on 13th February 2007, informing them of
9 the failure to obtain consent in relation to the
10 transfer from Gheso to Terra Raf, and also referring to
11 the Republic's preemptive right. Claimants effectively
12 misrepresented the position in their response to this
13 letter, and any investigations that took place after
14 that date directly resulted from that misrepresentation.

15 The Tribunal will see from the quote on this slide
16 that Squire Sanders effectively concluded -- this is in
17 page 167 of its report -- that there was significant
18 risk that Article 71 of the Subsoil Law had been
19 breached, and I will read this out for avoidance of
20 doubt. They say:

21 "Based on the information made available to us,
22 there is a significant risk related to the breach of
23 requirements in Article 71 of the Subsoil Law, related
24 to transfer by Gheso of its shares in TNG to Terra Raf
25 in breach of the government's first refusal right which

11:34 1 may result in the suspension or termination of Subsoil
2 Use Contracts no. 210 and 302."
3 Rather strangely, Claimants tried to use this very
4 quote yesterday to argue it was prevented from selling
5 TNG as a result of an improper assertion of the
6 Republic's preemptive right. However, it is clear that
7 this is not what Squire Sanders were saying. In fact,
8 Squire Sanders deemed the issue so serious that they
9 recommended that a waiver of preemptive rights be
10 a condition precedent to closing the transaction.
11 I refer the Tribunal to page 40 of the Squire Sanders
12 report in that regard.
13 Finally, in yesterday's hearing, Claimants
14 repeatedly stated that MEMR leaked to the Interfax news
15 agency that the state had a preemptive right over the
16 ownership of TNG. They also claimed that the MEMR
17 accused them of fraud and forgery. These allegations
18 are quite simply ludicrous. Claimants do not have and
19 never have had any evidence that the MEMR released
20 information to Interfax. By making such baseless and
21 unfounded allegations, it is actually the Claimants who
22 are behaving in a defamatory manner.
23 I will now turn to the inspections and
24 investigations. Before addressing specifically the
25 measures taken by the Republic, I would like to point

11:35 1 out another major change in Claimants' case. Throughout
2 the proceedings, Claimants have attached great
3 importance, claiming essentially that the inspections
4 and investigations practically amounted to expropriation
5 all on their own. From what we have heard yesterday and
6 today, Claimants have apparently given up on this claim.
7 This really comes as no surprise, as Claimants' own
8 witnesses have actually contradicted this theory.
9 In their closings, Claimants persisted with their
10 inaccurate and unreal chronology of events. They would
11 have us believe that in the beginning, there was
12 a decision that the pipe was a trunk one, followed by
13 enquiries about licences and profits, and finally,
14 belated enquiries with competent authorities as to what
15 the pipeline was classified as.
16 As we highlighted yesterday, even in December 2008
17 no authority had concluded that KPM and TNG operated
18 trunk pipelines, when the file was handed over to
19 Mr Rakhimov. And Mr Turganbayev is the first to explain
20 this. So Claimants' theory falls at the first hurdle.
21 There are numerous other holes in this theory. For
22 example, Claimants misled the Tribunal on the facts.
23 They said in closings that it took five months before
24 eventually, at the end of the process, the Republic
25 resorted to its own hand-picked expert,

11:37 1 Mr Baymaganbetov, "Mr B", to say that the pipeline was
2 a trunk pipeline. In fact, Mr Baymaganbetov was
3 approached in February 2009, not much more than a month
4 after the start of the investigation in late 2008, ie at
5 the beginning, not at the end of the investigation
6 process. This example shows that Claimants continue to
7 gloss over the important distinctions between the two
8 phases of investigation, in an effort to make the story
9 ring true.
10 Mr Turganbayev's pre-investigation role was to
11 collect information. So he collected, collated various
12 information for the MEMR, regarding the licences the
13 companies held; information from the tax committee
14 regarding the financial status of those companies; and
15 other information that might be relevant to ascertaining
16 whether a crime or civil liability had been committed.
17 It was for Mr Rakhimov and the investigations team
18 to assess the evidence and conclude whether there was
19 an issue that needed further investigating, and perhaps
20 prosecution.
21 Claimants claimed in closing that the financial
22 police ran into difficulties when it got an answer it
23 didn't like from the MEMR. As the Tribunal is well
24 aware, the MEMR letter dated 4th February 2009 was later
25 retracted and re-issued on 13th February 2009.

11:38 1 Claimants insinuate that Mr Rakhimov had some hand in
2 retracting this letter. In the October hearing,
3 Mr Rakhimov testified indisputably that this is not the
4 case. A quote from his testimony appears on this slide.
5 Now, Claimants say that the financial police dealt
6 with the letter by simply declaring that MEMR is
7 incompetent. This can be found at page 142 of the
8 transcript. This again implies that the financial
9 police had some omnipotent ability to influence the
10 MEMR. This is again simply not the case. The MEMR
11 retracted the letter of its own accord, and re-issued
12 its message explaining that the previous letter had not
13 been reviewed by the legal department. In fact,
14 Mr Rakhimov looked into procuring an expert opinion on
15 the KPM pipeline around the same time that he was
16 exchanging correspondence with the MEMR as to the
17 licences that KPM held and the nature of the pipeline.
18 In this revised letter, the MEMR stated its own
19 views as to how the definition of a trunk pipeline, in
20 Article 1(14) of the Law on Oil, should be interpreted.
21 However, it went on to say that the view of an expert
22 was needed in order to properly assess the question.
23 This letter was neither helpful nor unhelpful to
24 Mr Rakhimov. Mr Rakhimov had, by 13th February 2009,
25 already procured an expert, authorised under Article 243

11:40 1 of the Civil Procedure Code, to carry out an opinion.
2 Civil procedure is well within Mr Rakhimov's knowledge,
3 and therefore it is not surprising that he had already
4 approached the Ministry of Justice for an expert only
5 a few days earlier.
6 There has been much talk about competent authorities
7 in these proceedings. However, it is unproven
8 speculation that Mr Rakhimov was searching around for
9 a competent authority in the way the Claimants suggest.
10 The Republic has made clear in its submissions that it
11 was the judge who was competent to classify the KPM
12 pipeline in this case, and that there was help on hand
13 to clarify legal queries along the way, if the Claimants
14 had wanted it.
15 Everything that the financial police did in
16 procuring letters from the MEMR and opinions from
17 experts would simply have been part of the
18 investigations process that might lead to the
19 prosecution of a crime.
20 In relation to the operator's duty to procure
21 a licence, what is certainly clear and what has not been
22 highlighted by Claimants in the closings is that the
23 Claimants knew who the competent authorities were in
24 respect of licensing trunk -- and for that matter
25 non-trunk -- pipelines. More importantly, it was always

11:41 1 Claimants' responsibility to procure the licence for the
2 operation of its pipelines.
3 As Mr Akhmetov has explained in written evidence,
4 the procedure is simple, and the application process
5 hardly a burden, but that does not mean that the duty
6 can be taken lightly. Claimants have repeatedly glossed
7 over this point in submission. Worse still, they now
8 seek to make light of the obligation. Yesterday, they
9 described the failure to procure such a licence as
10 a "minor administrative violation". But it is worth
11 reminding the Tribunal that this is a serious duty.
12 Mr Akhmetov's explanation of why such licences are
13 required is set out in the slide before you now.
14 The pipeline that Claimants constructed on KPM's
15 soil joined the activities of KPM and TNG, and extended
16 beyond the contract area and beyond the boundaries of
17 KPM's existing licences. Claimants chose not to procure
18 a licence for it, knowing full well their duties to do
19 so. The consequence of that choice plays out in the
20 form of a criminal prosecution against KPM's general
21 director.
22 As to the recovery order, yesterday we heard
23 Claimants suggest that the recovery order against KPM
24 was disproportionate. That statement is belied by the
25 contemporaneous evidence of the Squire Sanders due

11:43 1 diligence. Squire Sanders considered a recovery order
2 exceeding US$80 million to be reasonable, as this was
3 what they calculated as the amount potentially subject
4 to recovery.
5 Moreover, Claimants' criticism misses the mark. As
6 the Republic's expert, Professor Kogamov, has explained,
7 the purpose of a recovery order is to address an unjust
8 enrichment as a result of a crime. The amount recovered
9 is thus not dependent upon the severity of the crime,
10 but on the extent of the enrichment. It is thus
11 irrelevant whether Claimants consider the crime to not
12 be severe. The extent of enrichment is decisive.
13 As for termination of the contracts, in yesterday's
14 closings, Claimants repeated their case that, following
15 inspections in January 2010, the Republic reported
16 an unqualified green light clean bill of health for KPM
17 and TNG. As we established yesterday, this clearly does
18 not stack up on the facts.
19 PwC stated in their due diligence report that TNG
20 had not met its targets for drilling of wells since
21 2008. This, of course, is in addition to the multiple
22 breaches that had already been committed by this point,
23 including the evasion of tax laws and operation of
24 a main pipeline without licence.
25 In any event, you have now just seen that one of the

11:44 1 two inspection reports Claimants rely on to claim it was
2 complying with its obligations -- that is for TNG, which
3 is Exhibit C-386 -- was only partially translated. The
4 translation somewhat conveniently omitted parts of the
5 report which demonstrated that Claimants were actually
6 not complying with their work programmes. They failed
7 to meet their financial obligation from years 2007 to
8 2009; which is ironic, given Claimants' whole case on
9 complying with their work programme is based on alleged
10 money invested.
11 There is simply no case for Claimants contending
12 that they were issued a "clean bill of health".
13 In the closings yesterday, Claimants also tried to
14 deny that there were operational problems prior to the
15 contracts being terminated in July 2010. They tried to
16 dismiss Minister Mynbaev's summary of the situation.
17 However, he wasn't the only one to comment on how
18 dire the position was. To quote Mr Kravchenko, stated
19 during the hearing on jurisdiction and liability in the
20 context of complaints received by KPM and TNG, he said:
21 "When we received this complaint, we approached the
22 prosecutor's office in the region. Of course we did not
23 make any written instructions, we just made a call,
24 a call about what was going on at these two enterprises,
25 and we received some clarifications to the fact that the

11:45 1 situation was not that good, to put it mildly, and this
2 social tension was increasing among the employees; and
3 on top of which it was also noticed by other residents,
4 by the population of the region, and it could not be
5 excluded that such a social explosion could affect the
6 entire region."
7 Mr Kravchenko has clearly testified that this
8 complaint was received, and the Claimants have no basis
9 for belittling the nature of it now. To coin a phrase
10 frequently used by Claimants' counsel, "So what?" So
11 what if the complaint was handwritten? So what if the
12 complaint came from anonymous sources? The fact is
13 Mr Kravchenko did receive the complaint, and he acted on
14 it.
15 Turning finally to the RBS valuation, yesterday we
16 also saw how the RBS valuation clearly disproved the
17 inflated valuation provided by FTI, and supports the
18 valuation provided by Deloitte. Yesterday, we also
19 heard the Claimants themselves calling the RBS valuation
20 highly persuasive, contemporaneous evidence. Against
21 this background, there can be little argument that FTI's
22 valuation is of no assistance to this Tribunal.
23 Now, FTI and Claimants have raised some arguments
24 suggesting that the enterprise values stated in the RBS
25 report have to be increased. Allegedly, say FTI and

11:47 1 Claimants, the enterprise values were reduced with
2 contingent liabilities in the amount of up to
3 US$243 million. Supposedly, this happened as part of
4 the RBS working capital calculation. This suggestion is
5 completely unsupported, and it is nothing but the
6 hopeless attempt of a party struggling to justify its
7 out-of-proportion claim. Apparently, FTI and Claimants
8 tried to create confusion in order to avoid the
9 clear-cut conclusion that the RBS report is bad news for
10 them.
11 First of all, nowhere in the RBS report is there any
12 statement that contingent liabilities have been deducted
13 from the enterprise value as part of the working
14 capital. I repeat, nowhere.
15 Second, contingent liabilities are conventionally
16 not part of the working capital. Not only is FTI's and
17 Claimants' assumption thus unproven, it is extremely
18 unlikely. As against this background, Claimants'
19 desperate attempts at twisting RBS's report in their
20 favour are unsuccessful. Claimants may not be allowed
21 to inflate the RBS values in order to save the inflated
22 FTI valuation.
23 Just a few words, if I may, about contract 302 and,
24 in particular, Claimants' claim that the Tribunal should
25 award an amount in its discretion. With Claimants'

11:48 1 first post-hearing brief, this approach has proven
2 highly disingenuous.
3 Let me explain. There should be no serious debate
4 that exercising discretion requires that all
5 circumstances relevant to the value of the 302
6 properties are being presented. Now, with regard to
7 GCoS, Claimants indeed did so. While we do not agree
8 with their GCoS, and with FTI's complete ignorance of
9 GCoS in their prospective value, Claimants and FTI at
10 least mention that GCoS exists. Now, with regard to
11 H2S, Claimants did not even state that this could be
12 an issue, and did not mention potential consequences on
13 costs until their first post-hearing brief. Only now do
14 Ryder Scott admit to a 50% chance that there will be
15 significant H2S in the hypothetical Interoil Reef gas
16 stream.
17 Claimants thus withheld until the very end
18 information from the Tribunal that is essential for the
19 Tribunal to exercise the discretion the Claimants ask it
20 to exercise. In fact, had there not been a third Ryder
21 Scott report, prompted by Claimants' own failure to
22 submit 3D seismic data in time, this submission would
23 have never come.
24 Finally, moving on to the issue of the condensate,
25 we demonstrated yesterday that Claimants' contract 302

11:50 1 has faltered throughout these proceedings, shrinking
2 from a claim for a full US$1.7 billion to a claim for
3 out-of-pocket expenses and what Claimants call
4 "substantial compensation". Claimants have quite
5 apparently realised the outlandishness of their claims
6 and have toned down their requests.
7 Nevertheless, Claimants grasp for some further
8 straws to save at least some of their claim. Having
9 ignored the issue of H2S completely for one and a half
10 years since the submission of the first Gaffney Cline
11 report, and then having to admit that there is a 50%
12 chance of high H2S being present, they now come back and
13 have Ryder Scott argue that, if Gaffney Cline assume
14 significant amounts of H2S, there needs to be a higher
15 condensate yield as well, leading to an increase in
16 value.
17 However, as we heard yesterday from Dr Wright that
18 there is no causal link between high H2S volumes and
19 high condensate ratio, the two are analysed separately
20 and can occur in many different kinds of combinations.
21 The necessary conditions for the creation of H2S, such
22 as high temperatures and a specific type of rock, can
23 occur in reservoirs with a high or with a low condensate
24 yield.
25 Now, what Mr Nowicki failed to mention yesterday was

11:51 1 that Ryder Scott actually concur with this view in their
2 report on a nearby exploration block of the company Max
3 Petroleum. They analyse prospects which were considered
4 analogous to the big H2S-rich fields, Tengyz,
5 Karachaganak and Kashagan. In the Max Petroleum report,
6 Ryder Scott agreed that high H2S volumes of up to 25%
7 are a necessary consideration. However, they also
8 expressly adjusted down the condensate yield compared to
9 a large field such as Tengyz. In the end they arrived
10 at a condensate ratio of 63 to 65 bbl, which is fairly
11 close to Gaffney Cline's estimate for the Interoil Reef.
12 Claimants referred yesterday to the indicative bids
13 made in the first phase for Project Zenith. Before
14 addressing a number of these bids in detail, it should
15 first be noted that these bids were massively overstated
16 for a number of reasons. Naturally, the bidders likely
17 were led by strategic considerations, in particular the
18 desire to get access to the data room. In fact,
19 Renaissance Capital pushed indicative bids by
20 threatening to deny access to the data room, and we have
21 testimony of Mr Chagnoux to that effect.
22 Moreover, many bidders simply assumed that the
23 KazAzot gas sales contract would be concluded. There
24 was a brief statement in the information memorandum
25 referring to the negotiation with KazAzot and

11:53 1 KazTransGas. Apparently many of the bidders used this
2 as an excuse to submit high bids in order to access the
3 data room. The bidders had, however, no means to assess
4 the chance of success of those contract negotiations.
5 In addition, all of these bids are overstated because
6 the bidders relied on numbers from the 2008 Miller &
7 Lents report. This report had provided for 2P reserves
8 that were 40% higher than even those provided by Ryder
9 Scott in this arbitration. The overstatement related
10 primarily to the Tolkyn field.
11 With that, I hand back to Dr Nacimiento. Thank you.
12 Rebuttal statement by DR NACIMIENTO
13 DR NACIMIENTO: So to conclude, we will now revisit the
14 issue of enterprise value versus equity value that we
15 already touched upon yesterday. As mentioned yesterday,
16 both considerations of sovereignty and ample arbitral
17 authority support the Republic's position. As regards
18 sovereignty, it must be repeated that the decision by
19 a state to enter into a BIT is a conscious decision to
20 open itself up to potential investor claims. Such
21 a decision is not taken randomly. Rather, by creating
22 certain jurisdictional requirements, most notably the
23 requirement of nationality of another contracting state,
24 states intentionally limit the liability and protect
25 their sovereignty. Such conscious decision may not be

11:54 1 circumvented by way of one non-covered investor hiding
2 behind another allegedly covered investor, and this is
3 precisely what would happen here if enterprise value
4 were to be applied.
5 Esteemed international investment tribunals have
6 found accordingly in the past, in the case PSEG v
7 Pakistan, that claimants tried to include liabilities
8 they faced towards their joint venture partners in their
9 claim for compensation, just as Claimants try to include
10 their noteholders' claims in the present proceedings.
11 The tribunal even acknowledged that PSEG might be
12 obliged to forward part of the sum they would gain from
13 an award in their favour to the joint venture partners.
14 However -- and this is what is important with regard to
15 our case -- the tribunal found that although:
16 "... these entities might have a claim against PSEG
17 in the light of intracorporate arrangements, but this is
18 not something for which Turkey is liable, directly or
19 indirectly."
20 As another example, in the case of Impregilo, the
21 tribunal again refused to include the claimants'
22 liabilities towards their business partners. It found
23 that the fact that Impregilo may be obliged to account
24 to its partners in respect of any damages obtained in
25 these proceedings is also an internal GBC matter which

11:56 1 has no bearing on Pakistan's agreed exposure under the
2 BIT. If this were not so, any party would be at liberty
3 to conclude a variety of private contracts with third
4 parties, and thereby unilaterally expand the ambit of
5 a BIT.
6 By contrast, the cases Claimants rely upon do not
7 support their position. The first case Claimants refer
8 to, the Enron case, has nothing to do at all with the
9 question whether enterprise value or equity value is the
10 appropriate approach to take as a measure of damages.
11 Let us take a closer look at the facts of the case. The
12 tribunal had to decide whether Enron had lost part of
13 its participation in the local company after a debt
14 swap, as you can see from the quote in the file.
15 The issue of the extent of participation is
16 logically one step prior to the value of that
17 participation. In Enron, the question was: how many
18 shares of the business did Enron hold? And not, as in
19 our case: is it enterprise value or equity value that is
20 the appropriate measure of damages? Since the case
21 deals with different issues from this case, it has no
22 relevance for the determination of damages.
23 Again, the issue in the Occidental case was the
24 extent of participation, and not the value of that
25 participation. The Occidental tribunal had to determine

11:57 1 whether the claimant was still the unlimited owner of
2 the investment, or whether the claimant had actually
3 transferred 40% of the investment to a third company, by
4 concluding a farm-out agreement with that company. The
5 tribunal found that the farm-out agreement was invalid
6 and therefore calculated the damages on the basis that
7 Occidental was still the 100% shareholder.
8 Presently, the question is a fundamentally different
9 one, namely whether the Claimants add to their own claim
10 the claim of a third party, in order to allow that party
11 to circumvent requirements of its own claim against the
12 Republic.
13 So now finally, let's step back again and take
14 a look at what we have in front of us, at the very end
15 of this case. What is exactly Claimants' case? We
16 still don't know. And apparently Claimants are not so
17 sure of it either. There have been wide changes in the
18 facts and arguments leading as a whole to a completely
19 inconsistent story, and it seems that Claimants
20 themselves seem to have a different case from the case
21 their counsel is trying to make.
22 Have Claimants discharged their burden of proof?
23 Certainly not. The Tribunal will not be in a position
24 to ignore the many inconsistencies in Claimants'
25 testimony. Claimants' witnesses -- and even more

11:59 1 importantly, Mr Stati himself -- have proven to be
2 unreliable. And the Tribunal cannot ignore that
3 Claimants' experts were little more than willing tools
4 of Claimants. We all saw the last episode of this in
5 Mr Nowicki's testimony yesterday.
6 And finally, have Claimants specified their claim?
7 Certainly not. They tell us directly, in their first
8 post-hearing brief submission -- and this is the last
9 page that is up on the slide -- they admit to having
10 updated -- that is changed -- their claims, during the
11 quantum hearing and still even in the post-hearing
12 submission; and of course, after all witnesses have
13 given evidence.
14 Here, I may take up what I think is a fundamental
15 misconception of procedure on the part of Claimants. If
16 a party is of the opinion that a procedural right is
17 violated, this party must raise an objection and must
18 request a remedy, the remedy which it thinks is
19 necessary to repair that alleged violation.
20 What is not possible is what Claimants are doing in
21 this case. They wait until the end, and then the remedy
22 they request is exclusion of whatever is in front of
23 them. And that's actually the only request we ever
24 heard from Claimants in this case. We never in this
25 case saw a request from Claimants, for example, to

12:00 1 cross-examine certain witnesses they now complain not to
2 have seen, or to reply to certain issues they now
3 complain not to have been able to reply to.
4 Claimants continue to change their case, trying
5 actually to deprive Respondent from adequately
6 defending. And this is why Respondent in the end was
7 forced to raise several procedural issues and several
8 procedural objections.
9 Claimants even at this stage have not finished. As
10 we can see from Claimants' request for relief -- it's up
11 on the slide -- damages up to this date have still not
12 been specified. Claimants say "currently corresponding
13 to the following amounts". We are at the final stages
14 of this arbitration, and apparently Claimants still
15 struggle to even specify what they want the Tribunal to
16 award.
17 Against this background, the Claimants' claims must
18 be dismissed completely. Thank you.
19 THE CHAIRMAN: Thank you very much indeed; also for
20 sticking, on both sides, so closely to the time
21 available.
22 Our agenda now provides for final questions of the
23 Tribunal, if any.
24 Questions from THE TRIBUNAL
25 MR HAIGH: Thank you, Mr Chairman. I weigh in very

12:02 1 cautiously because I commend both sides for their
2 thoroughness and for their assistance to us, and I don't
3 want any inference to be drawn that simply because I ask
4 about a particular point, that I'm not attempting to
5 stand back and appreciate the full significance of the
6 submissions that have been made.
7 Let me begin with the Respondent's side. I guess
8 I want to understand about the position that the
9 Respondent has taken concerning the financial difficulty
10 that is alleged in relation to the companies that make
11 the claim in this case. Help me understand, if you
12 could please, a little better what the relationship is
13 between those difficulties and the value that should be
14 ascribed to those companies at the times that may be in
15 issue in this case, either in October 2008, or in July
16 of 2010.
17 And I supplementally ask this: can we overlook -- or
18 should we, in your submission, overlook -- the role of
19 the state in some of the actions taken?
20 And that in turn leads me to another question
21 related to it, and that is: can we accept that the
22 court's fine against the company in September 2009 is,
23 first of all, warranted legally, even though the company
24 didn't seem to be a party to the court proceeding, and
25 the $145 million fine or so seems to be, by any

12:04 1 standard, quite large, in relation to the use or illegal
2 use of the pipeline?
3 And so I kind of tie those altogether: how do we
4 look at the financial condition of the company in
5 relation to its value on the competing valuation dates?
6 And how do we in turn look at the impact that some of
7 the government actions may have had, such as the
8 criminal penalty?
9 And maybe that's enough meandering into that
10 thicket. I would be pleased to hear from you.
11 DR NACIMIENTO: Thank you, Mr Haigh. Very briefly
12 addressing this issue, because I think it is
13 an important issue, financial difficulties that we have
14 explained and described and I think also evidenced in
15 this case tie in to various issues of this case. And
16 it's not only with regard to the value, but it's
17 actually also with regard to causation, and in the end
18 of any award that might be issued in this case, taking
19 into consideration the debts. And this is where the
20 noteholders come in.
21 Financial situation is important first of all
22 because we have to look at Claimants' case. It's
23 Claimants' case that they were deprived of any financial
24 means at a certain time, and that they were deprived of
25 those means because of the Republic's actions. And we

12:06 1 have, I think, evidenced that no action actually relates
2 to anything causing the financial problems which
3 undoubtedly the companies had.
4 We described this in much detail. We described the
5 various causes that we think really led to the financial
6 situation. And that's the first point. It's really in
7 terms of causation. It's Claimants' case that the
8 Republic's actions caused the financial difficulties.
9 We have rebutted that case by showing that, yes, there
10 were financial difficulties, and those financial
11 difficulties were entirely even due to external factors
12 or to Claimants' own actions; but we have not found
13 a single action of the Republic leading to that
14 situation. That is causation.
15 Then, in terms of value, we come to the question:
16 what exactly is the value of the company? How do you
17 value a company which has debts, and which brings in
18 these debts, I would say, through the back door, through
19 the sharing agreement? Raising actually many
20 interesting procedural issues also as to jurisdiction of
21 the noteholders, as to bringing in or sneaking in
22 actually another claimant in this case. And this is the
23 second issue where the financial situation comes in: the
24 debts, how were they caused? And do you have to take
25 them into consideration, in the sense of do you have to

12:08 1 deduct them or not? Or do you have to add them
2 actually? This is what Claimants want the Tribunal to
3 do: to add those debts to whatever could be awarded in
4 this case.
5 And this is the second issue where the financial
6 situation comes in, and also the elements that have led
7 to that financial situation must be taken into
8 consideration.
9 MR HAIGH: Just on the last point, Dr Nacimiento, the
10 position in a simplified way from the Claimants' side
11 seems to be: if there was a wrongful taking, then the
12 state must compensate for what was taken. And what was
13 taken was the company as a going concern, the operating
14 assets. The indebtedness is a side or collateral
15 matter. It's not as if they are acting as surrogates
16 for Tristan noteholders, but rather they are simply
17 claiming for the asset that was taken.
18 Can you perhaps focus on that a little more, please?
19 DR NACIMIENTO: First of all, we obviously deny that there
20 was any wrongful taking of the companies.
21 MR HAIGH: Of course.
22 DR NACIMIENTO: At that stage also it was not a going
23 concern. We have established that actually at that
24 point in time Mr Stati had actually decided to leave the
25 country, to take out as much as he could from the

12:09 1 companies. It was not a going concern any more.

2 And even assuming that position, for the sake of
3 argument, Mr Stati and the Claimants at that point in
4 time are free of the debts, they are no longer liable
5 with regard to the noteholders. The position that needs
6 to be taken is rather that of a company being bought.
7 And here it goes without saying that you would deduct,
8 of course, the debts. The debts diminish the value of
9 any company.

10 MR HAIGH: Do Claimants want to make any short comment on
11 those replies?

12 MR SMITH: Let me respond briefly, Mr Haigh. As
13 I understand the question, the question is the
14 relationship between the financial condition of the
15 companies, both caused by factors that may be
16 attributable to the state, as well as perhaps by
17 external factors that are not attributable to the state,
18 and the value of the companies.

19 I think as a going-in position, the one point in
20 time when the Tribunal can comfortably value the
21 companies without factoring in the impact of state
22 actions is the valuation date that has been provided by
23 the Claimants, that is October 2008, because that
24 precedes the Nazarbayev directive, it precedes the
25 events that quickly followed that, including the impact

12:11 1 of the actions of December 2008. So the financial
2 condition of the companies in some way, from a valuation
3 perspective, was pristine, in a sense, prior to the
4 Nazarbayev directive.
5 It becomes far more complicated obviously after
6 that. Dissociating the effects of market factors: there
7 was a global financial crisis; there was a collapse of
8 global oil prices, which, as Mr Mohr has demonstrated,
9 was temporary and rebounded; there was a tightening of
10 the credit markets.
11 But at the end of the day it is Claimants' position
12 those were temporary liquidity problems that didn't just
13 confront the Claimants as it affected the value of their
14 companies, but affected everyone in the market equally.
15 And the state actions that took place had a direct
16 effect that exacerbated the temporary liquidity
17 problems, such as the denial of the Credit Suisse loan
18 facility which, in Claimants' view, was directly
19 attributable to the actions of the state, both the
20 initiation of the criminal prosecution, as well as the
21 calling into question of the Claimants' ownership of the
22 TNG shares.
23 By virtue of not being able to obtain that credit
24 facility in December 2008, the Claimants, as we know,
25 ultimately were required, in the summer of 2009, to

12:12 1 obtain a loan, the Laren facility, at extraordinarily
2 bad terms. That would not have happened but for the
3 state actions.
4 Mr Stati made the decision -- we believe reasonable,
5 under the circumstances -- as a result of the events in
6 the fall and winter of 2008, to suspend construction of
7 the LPG facility, which was very near completion. That
8 had an impact on the value of the companies that was not
9 attributable to external factors, but in the view of
10 Claimants was directly attributable to the actions of
11 the state.
12 Mr Lungu has testified, I think Mr Stati as well,
13 that also as a result of the state actions in the fall
14 of 2008, there was a reduction in the work programmes
15 for both KPM and TNG. And for example, as to KPM, and
16 Borankol in particular, recompletions were not done that
17 otherwise would have been done. In other words, there
18 was a reduction of production that was directly
19 attributable to the unwillingness of the Claimants to
20 essentially throw good money after bad, in a very
21 difficult environment with the government.
22 One of the arguments that has been made by
23 Respondent, we heard today, is that the Respondent, by
24 its own admission, by Mr Lungu's own admission in his
25 testimony, was not in compliance with the minimum work

12:14 1 programme. That was not Mr Lungu's testimony. His
2 testimony was that the Claimants did not fulfill their
3 own work programme, in other words what they had planned
4 to do with respect to Borankol and Tolkyn in 2009 and
5 2010. There's no question but that the Claimants were
6 in compliance with the minimum work programme. And we
7 will examine this chart that was provided, but the
8 bottom line is: if you look at the narrative conclusions
9 of the MEMR in January 2010, they very clearly find that
10 there's a clean bill of health, that we have exceeded
11 the minimum work programme requirements, up to and
12 including 2010.
13 Also, certainly as late as April 2009 -- we would
14 suggest earlier from a pragmatic standpoint, or
15 practical standpoint -- the alienability of the shares
16 of both KPM and TNG were directly inhibited by the
17 Government. They attached those shares; they could not
18 be sold at that point in time. There was a direct
19 seizure, essentially, of the equity interests of the
20 companies by virtue of the attachment.
21 So in terms of the financial condition of the
22 companies, we think that the first date and the latest
23 date you really can look and get a clean view of the
24 health of the companies, independent of state action, is
25 October 2008. We believe that to the extent that

12:15 1 external factors -- external of the state -- affected
2 the financial condition of the companies thereafter,
3 those, once you dissociate -- and it is concededly
4 difficult, but once you dissociate the effects of state
5 actions, what you essentially had was a temporary
6 liquidity crisis that the company had that would have
7 been remedied through the Credit Suisse loan facility,
8 and that clearly ended in the sense that the prices
9 rebounded later in the year.
10 Now, the other thing is, putting aside questions as
11 to the competence -- which have been raised by the
12 Respondent, and we refute those -- of the management of
13 the companies, how they managed the fields, or the
14 working cash of the companies, the bottom line is: from
15 a valuation perspective, the assets are the assets.
16 They're oil and gas assets, they're reserves in the
17 ground, they have a value.
18 And I think one way to look at that value is to look
19 at what is the value of those assets in the eyes of
20 a third-party purchaser. In other words, what would
21 a third party such as a KMG or a Total or another entity
22 come in and value those oil and gas resources to be?
23 That is the value that was placed on the resources by
24 FTI as of October 2008; but that was also the value that
25 RBS, in 2009, looked at, and they gave a fair market

12:16 1 valuation of those assets; not assuming that the
2 Claimants were going to manage those assets, but just:
3 what was the value of the assets at that point in time?
4 How much oil was in the ground? How much gas was in the
5 ground? What was the value of the LPG plant facility?
6 And the Tribunal has the benefit of the work of RBS as
7 it relates to that.
8 MR HAIGH: Alright, thank you. I would just like to ask the
9 Claimants' side a slightly different question, and then
10 given Dr Nacimiento an opportunity to respond.
11 Supposing for the sake of argument the Tribunal was
12 to find that there was cumulatively enough government
13 action that there was a taking, not in October 2008 but
14 at some other date, and supposing further that we're not
15 persuaded that it was deferred all the way through until
16 the formal taking in July 2010, some other date, such as
17 April 2009, when the seizure of assets occurs in the
18 context of the criminal proceeding, or the imposition of
19 the fine in September 2009, or some other time where we
20 might conclude potentially that a taking has occurred;
21 is it open to the Tribunal to find a different valuation
22 date and if so, what do we do with that? In other
23 words, are you presenting the case as an either/or, it's
24 all or nothing, kind of a basis?
25 MR MOHR: I'll address that question, and I think Mr Smith

12:18 1 may want to add to it.

2 I think as the record stands now, both parties have
3 presented this as an either/or proposition. The
4 Claimants have presented a valuation -- with one
5 exception, I'll come back to that, the Claimants'
6 primary valuation is as of October 2008. The
7 Respondent's only valuation is as of July 2010.

8 Now, the Claimants have provided two other
9 indicators of value. We have presented the Cliffson
10 transaction, which is a third party, arm's length
11 transaction in the first half of 2010, which is evidence
12 of value at that point in time, that can be used as
13 an alternative value. There also is the RBS valuation
14 which was performed in July 2009, with an October 2009
15 valuation date. That is another piece of evidence of
16 value, if the Tribunal elected to select an alternative
17 valuation date in the middle.

18 Now, with that said, we believe that our valuation
19 is the correct one, because it is the only valuation
20 date that can be used to capture all of the harmful
21 conducts caused by the state's harassment, but I do
22 believe, based on the law that I've read, that the
23 Tribunal is not required to make a binary decision, and
24 could select a different valuation date if it believes
25 that's appropriate. We believe that there is evidence

12:20 1 in the record regarding value throughout the period that
2 the Tribunal could look to.
3 MR HAIGH: Thank you. Dr Nacimiento?
4 DR NACIMIENTO: Very briefly on that case, I just heard
5 counsel for Claimants saying both parties have presented
6 their case as an either/or. We are not equal parties
7 here. There is one claimant and there is one respondent
8 and it is claimant who must prove its case. It is not
9 respondent. We came up with an alternative valuation,
10 we proved that fully, but we did not stop there. We
11 also thoroughly investigated Claimants' valuation date
12 and Claimants' valuation.
13 It is our position that the valuation date chosen by
14 Claimants in fact does not support their claims. At
15 that stage, at that time, there was not a single action
16 they can really point to in order to really address and
17 specify their valuation date at that specific date.
18 FTI mentioned in its report that it has provided
19 an alternative valuation, and it alleges actually that
20 it has provided the valuation for Respondent's valuation
21 date. If you look into the report, that is simply
22 wrong. What FTI is doing is they simply refer to the
23 Cliffson transaction, it's not an independent valuation,
24 it's just a reference to the Cliffson transaction.
25 We had a lot of evidence in this case with regard to

12:22 1 the Cliffson transaction. It's not an arm's length
2 transaction, it's highly speculative, highly dubious,
3 and it certainly cannot replace a valuation from
4 Claimants.
5 If Claimants chose to present their case as
6 either/or, and if Claimants chose to put a very unlikely
7 early valuation date, that's Claimants' risk. We have,
8 as Respondent, to defend against it, and we have done
9 so, and we have submitted our own position, our own
10 valuation date, supported by evidence. There is no
11 either or/in this case, it's upon Claimants to prove
12 their claims.
13 MR HAIGH: Well, perhaps I could just ask a supplemental
14 question. The either/or that I think I was attempting
15 to ask about is first of all, to take the last bookend,
16 there's no question that the Republic says it
17 expropriated whatever the assets were in July 2010,
18 right? So that's part of the either/or proposition that
19 I thought I was asking about.
20 DR NACIMIENTO: It is not the Republic's case that the
21 assets were expropriated. In July 2010, the assets were
22 taken into trust management, and that's a clear date
23 referring to a clear action of the Republic.
24 MR HAIGH: Taken into trust but not expropriated, is that
25 the position?

12:23 1 DR NACIMIENTO: That's right.

2 MR HAIGH: No compensation is owed for that taking?

3 DR NACIMIENTO: This is our whole case, our whole position,
4 and we have submitted sufficient evidence to this. The
5 assets are currently held in trust management. Anything
6 deriving from those assets is being put in an escrow
7 account, and it's the Republic's case that this is not
8 an expropriation.

9 MR HAIGH: I see. Thank you for that clarification.

10 MR SMITH: Could I provide just one follow-up, Mr Haigh?
11 Your question, and the quandary presented by your
12 question, we believe is the very reason why
13 Professors Reisman and Sloane have recommended that you
14 look to a date that is, my word, pristine, that may be
15 too strong a word, but a date that clearly is a date
16 prior to the beginning of the significant state
17 interference.

18 Let me address that from a very practical
19 standpoint. If we had not chosen October 2008 -- and
20 it's very rare that you have a letter from a president
21 of a government declaring an onslaught of investigations
22 that led to the actions in November and December 2008,
23 the question would be, but at what date then do we
24 provide the alternate value? Do we provide it in
25 January, February, March, April, May, given basically

12:25 1 the march of the army toward the taking of these assets?
2 From a practical standpoint for the Tribunal though,
3 you do have some guidance. If the Tribunal, for
4 example, were to conclude that it was either April or
5 the summer of 2009, where, you know, you were more
6 comfortable setting the valuation date, again, our
7 position would be we would respectfully disagree with
8 that, but understanding that that may be the question
9 being asked, what you do have is you have not only the
10 indicative offers and the averages of those offers,
11 offered for what they are worth, they were indicative
12 offers, in September 2008, you have the FTI valuation,
13 but you also have a valuation, as of October 2009,
14 prepared for the state-owned oil company. We will
15 debate what that valuation reflects, but we believe it
16 very clearly at a minimum reflects a value of between,
17 I believe, $620 million and $750 million or $760 million
18 for three of the four assets at issue.
19 We believe that the contingent liability should be
20 added back in, that will obviously be the subject of
21 further briefing, but at the end of the day, if the
22 Claimants are right about that, then that valuation is
23 roughly comparable to the FTI valuation a year earlier.
24 Therefore you have, within the bookends of the summer of
25 2009, for example, and October of 2008, two roughly

12:26 1 comparable valuations for three of the four assets at
2 issue.
3 We believe, and we have cited the case authority for
4 this, to try to go through and parse it more
5 specifically, in terms of each action, is not only not
6 pragmatic, but we don't believe is required by
7 international law, and that's Mr Mohr's point, we
8 believe that the Tribunal has fully the discretion, with
9 the evidence that is in front of it, to select
10 a valuation that it thinks most fairly reflects the
11 impact on the company, at whatever point in time the
12 Tribunal ultimately selects, as being the proper
13 valuation date.
14 MR HAIGH: Thank you. Unless you needed to reply to that,
15 Dr Nacimiento?
16 DR NACIMIENTO: Just very briefly, we hear Claimants
17 referring in many instances to the Tribunal's
18 discretion. The discretion by no means can replace the
19 burden of proof by Claimants. Claimants chose a certain
20 valuation date, thereby raising the stakes and setting
21 them very, very high, and they have to live with this
22 risk. They have not presented an alternative valuation,
23 and they cannot simply leave everything they wish to the
24 discretion of the Tribunal.
25 It's the same that we saw happening with

12:28 1 contract 302, and over the life of this arbitration, we
2 saw how Claimants basically dropped that claim,
3 1.5 billion, leaving it to the discretion of the
4 Tribunal. It is Claimants' claim and Claimants must
5 prove it.
6 MR HAIGH: Thank you. Thank you, Mr Chairman. Those are my
7 questions.
8 THE CHAIRMAN: Any questions from your side?
9 PROFESSOR LEBEDEV: Yes, please, one question. The point
10 actually was discussed several times during our
11 proceedings, and particularly I recall yesterday
12 Mr Smith was speaking on this subject, but the
13 Respondent has raised this matter today in their
14 rebuttal closing statement on page 2, and they indicated
15 their position on this point, and in some other pages of
16 the rebuttal statement, this point is discussed on pages
17 24 and 25, and Mr Tirado has spoken about this today.
18 So the matter is not a new one, but it is presented
19 in a fresh manner, just at the last moment. It makes me
20 put this question to the Claimants, I mean, the point
21 raised on page 2 of the rebuttal statement, and it is
22 about the burden of proof, whether the Claimants bear
23 the burden of proof on certain points.
24 Specifically, my question is to the Claimants: do
25 you agree, as a principle matter in your answer, there

12:30 1 are many points, but generally, do you agree that it is
2 the burden of proof of the Claimants to show that the
3 Tribunal has jurisdiction?
4 MR FLEURIET: I believe we do, as a general proposition,
5 agree that it is for Claimants to demonstrate that the
6 Tribunal has jurisdiction. I think once that
7 demonstration has been made, there may be a shifting of
8 the burden of proof to the Respondent to rebut that, but
9 I do agree with the general proposition, and certainly
10 we feel like we've demonstrated that in this case.
PROFESSOR LEBEDEV: Okay, good.
11 THE CHAIRMAN: Alright. You will hear with relief that
12 I have no further questions at this stage. If I look at
13 our agenda, that means we come to a discussion of any
14 remaining procedural issues. You will recall that the
15 further timetable has been set in Procedural Order
16 No. 10, with a slight amendment in the rulings that
17 I mentioned at the end of my introduction yesterday,
18 there was one additional date really.
19 My question to the parties is: is there any further
20 procedural matter that they want to raise at this stage?
21 MR FLEURIET: Mr Chairman, I believe you addressed this
22 point yesterday by saying that the submissions due on
23 June 3rd were only meant to be in rebuttal, but given
24 our experience in this case, in terms of receiving
25 entirely new damages reports and disclosures of

12:32 1 documents after hearings and so forth, I just wanted to
2 ask you to more specifically confirm that what is due on
3 June 3rd is entirely meant to be in the nature of
4 rebuttal, and ask for the Tribunal's guidance in terms
5 of submissions of new evidence and documents at that
6 stage.
7 THE CHAIRMAN: Do you want to add anything?
8 It is certainly in rebuttal, as stated, but on the
9 other hand, we are all aware that almost everything has
10 been discussed in the first round post-hearing briefs,
11 and at this hearing, so probably it won't be easy to
12 distinguish, in practice, I could imagine -- I haven't
13 seen what you are going to send. But the rulings stand,
14 of course, that it will be in rebuttal. In other words,
15 something that happened in the fall of 2012, and could
16 have been addressed in a submission, in the first round
17 submission, for instance, cannot be taken up unless it
18 has been dealt with in the first round post-hearing
19 submission. So this is the idea.
20 I am also quite aware that in practice, there may be
21 issues where one can argue forever whether that is in
22 rebuttal or not, so we will have to live with that, but
23 the answer to the question is yes.
24 Alright, any further questions from your side,
25 procedural matters?

12:34 1 DR NACIMIENTO: Not from our side.

2 THE CHAIRMAN: Thank you very much. That then concludes
3 this aspect. The Tribunal has, of course, taken note of
4 the procedural objections that were put on record at
5 an earlier stage, and we take it that these will be
6 maintained. So my usual question at the end of
7 a hearing only is: are there any further procedural
8 objections at this stage regarding the way the Tribunal
9 has conducted this procedure?

10 MR SMITH: None from the Claimants.

11 DR NACIMIENTO: And none from Respondent.

12 THE CHAIRMAN: Thank you very much. Well, this then brings
13 us to the end of the last hearing. I don't have to tell
14 you that this has been not only a long but also very
15 complex case, procedurally and in substance, and that,
16 of course, was reflected in the submissions and
17 exchanges by the parties, but nevertheless, on behalf of
18 the Tribunal, I would like to express the Tribunal's
19 gratitude to the parties and their counsel for their
20 professional conduct in these circumstances. As usual,
21 I expressly add to this a specific thanks to the support
22 staff, because we are all aware how important they are
23 in order to do this, all what we are doing, in
24 an efficient way.

25 Our thanks also go to the interpreters, of course,

12:36 1 I am quite aware that it is very difficult, even though
2 we try to slow down, once in a while, but the slowing
3 down doesn't last for long, and still doesn't make it
4 easy for the interpreters. And of course, the same is
5 true for our court reporters, and they have dealt with
6 that very clearly.
7 As far as any corrections of the transcript are
8 concerned, I addressed that yesterday, and let me only
9 stress that really any discussion and exchange should
10 really only deal with matters that make a difference.
11 You don't have to go through the transcript and correct
12 any typos or whatever. So that's the way we approach
13 it. We will use the transcript as it is, taking into
14 account any corrections that come in that limited
15 approach to us.
16 Our thanks from my two colleagues and from myself
17 also go to our Tribunal Secretary, who has been very
18 efficient and hopefully will remain efficient for the
19 ball that is now in our ballpark, and that is all I can
20 say at this stage. Thank you very much again, and have
21 a good journey home.
22 MR SMITH: Thank you.
23 DR NACIMIENTO: Mr Chairman, on behalf of the Respondent,
24 this is one point where I agree with Claimants, thank
25 you.

12:37 1 (12.40 pm)

2 (Hearing concluded)

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