

ARBITRATION V (116/2010)

**IN THE ARBITRATION INSTITUTE OF THE STOCKHOLM
CHAMBER OF COMMERCE AND IN THE MATTER OF ARBITRATION
BETWEEN:**

**ANATOLIE STATI, GABRIEL STATI, ASCOM GROUP S.A., AND TERRA RAF
TRANS TRADING LTD.**

Claimants

- and -

REPUBLIC OF KAZAKHSTAN

Respondent

Respondent's Second Post-Hearing Brief

3 June 2013

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PART I: CLAIMANTS' FAILED CASE

- 1 At the end of these proceedings, it is necessary to recall the basic principles forming the basis of both any claim brought by a claimant and any decision to be taken by a tribunal: A claimant raising claims must state and prove his case. Stating one's case means that the claimant must present to a tribunal a complete, plausible and logical factual story without contradictions. Proving one's case means that the investor must prove that the tribunal has jurisdiction to hear the case and that the applicable treaty was breached by the state. The claiming investor must further prove causation, that is the claiming investor must prove that he incurred damages as a result of such breach. And finally the claiming investor must prove and specify the precise amount of the damages he requests the tribunal to award based on a certain valuation date which also needs to be correctly determined by the claiming investor.
- 2 These are mandatory and necessary stages for any claim and a tribunal has the duty to verify if the claiming investor has complied with its procedural duties on each stage as described above. Where this is not the case, the claims must be dismissed on that basis.
- 3 Regarding the stating and proving the case on damages, the need for the claimant to fulfil its procedural duties cannot be replaced by mere reference to an alleged discretion of a tribunal. A claimant may not simply anchor the highest possible value and the earliest valuation date he could think of and leave it to the tribunal to award a portion of this maximum threshold established by a claimant. Rather, any claimant must submit a specified request for damages based on specific and proven facts. A claimant must further establish a causal link between the alleged breach by a respondent and the requested damages. And this must be linked to a specific date for the valuation of the damages requested. Once the claimant has done so, he is bound by the choices he made as to facts, causation, amount requested and valuation date. Equally, the tribunal is bound by those choices and bound to verify whether the claimant has discharged its various procedural duties. Where this is not the case, the tribunal cannot put its own discretion to cover up for claimant's failure. Rather, if a claimant fails in any of the mandatory steps required of a claiming party, his claim must also fail.
- 4 Finally, a claimant and a respondent do not have equal duties. A respondent must not discharge its burden of proof by proving its own case. It is sufficient for the respondent to show that the claimant had not discharged its burden of proof.

5 In the following, it will be analysed whether Claimants have complied with their procedural duties as described above.

I. Claimants must state their case

6 First of all, Claimants are obliged to submit a complete and plausible factual basis which is free of contradictions. This entails that the case stated may not be changed wildly with each submission and that relevant details may not be introduced only in the last minute.

7 Presently, Claimants have failed to fulfil this standard. There are many instances in which Claimants have completely changed the basis of their claim, relying on other factual allegations as they saw fit. One of the most notable examples is Claimants sudden reliance on the 18 December 2008 INTERFAX press item which raised questions about the validity of a transfer in shares of TNG. In their Statement of Claim, Claimants scarcely mentioned this issue at all. In the Final Hearing, it took up a substantial portion of Claimants pleadings and became central to their claim and to their explanation why the Laren debt and the additional issuance of Tristan notes occurred. Conversely, Claimants' initial story of inspections and investigations in late 2008 being the cause of their alleged grievance basically vanished in the later stage of their submission. This is noteworthy because Claimants initially had numerous of their witnesses make hyperbolic and unsubstantiated accusations about the alleged impact of these inspections and investigations. By basically dropping this part of their claim, and by at the same time overemphasising the INTERFAX press item, Claimants made it clear that they do not have a case and basically rely on not what was actually relevant at the time but on whatever they think looks best in front of a tribunal.

8 Another instance of Claimants changing their case regards the Cliffson transaction for which Claimants only introduced in the Hearing on Quantum an entirely new background. Suddenly, the transaction was supposed to date back to September 2009, even though February 2010 was the earliest date mentioned in the Statement of Claim and in their Reply Memorials on Jurisdiction and Liability and on Quantum.¹ Claimants' story in this instance is again implausible.

¹ See Part IV, H.III below.

II. Claimants must prove their claims

- 9 Claimants must fully prove their claims in order to succeed. As indicated above, Claimants and the Republic by no means must comply with the same requirements. It is exclusively Claimants who must submit complete and convincing proof of their claims. This requirement does not apply to the Republic.
- 10 It may seem self-explanatory but needs to be explained in the context that mere allegations – even if repeated numerous times – do not translate into proof. This applies for example to the characterisation of KMG EP which is being called continuously the “state owned company” by Claimants and which they do not attempt to differentiate from KMG NC, the actual state-owned company.² This insinuates complete state control, whereas in fact, KMG EP is publicly traded and acting on a purely commercial basis.³
- 11 The same applies to the continuous reference to the Nazarbayev letter⁴ as “Nazarbayev’s directive”. In fact, the letter was nothing but a note forwarding President Voronin’s letter to the authorities competent for the accusations made therein. Again, the mere use of certain terms does not replace the need for Claimants to substantiate their arguments.
- 12 Even where Claimants go beyond mere assertions, their evidence is in many cases completely unreliable. This applies equally to Claimants’ witness statements, documentary evidence and expert reports.

1. Claimants’ witnesses

- 13 In the Republic’s First Post-hearing Brief, the testimony of Claimants’ witnesses was analysed with a view to credibility.⁵
- 14 At the Final Hearing, Claimants chose not to address the Republic’s analysis but to rather dogde this difficult subject by attempting to disparage the Republic’s analysis as a “*smear campaing*” which is not “*worthy of a more lengthy response.*”⁶
- 15 However, the Republic based its analysis on a reading of the transcript, the documents, the witness statements and Claimants’ submissions. The discrepancies

² Cf. e.g. Claimants’ Reply on Quantum, para. 66.

³ Note by President Nazarbayev dated 14 October 2008 (**Exhibit C-8**).

⁴ See for example Claimants’ Closing Submissions, Final Hearing, Transcript Day 1, p.128, line 23; p.132, lines 3,9; p.139, line 23; p.167, line 7; p.169, line 4; p.170, line 8; p.173, line 17.

⁵ Respondent’s First Post-hearing Brief, paras. 107 et seqq.

⁶ Claimants’ Closing Submissions, Final Hearing, Transcript Day 1, p.128, lines 12-13.

and contradictions found in the witness testimony cannot be dismissed. It is proven that they exist and they cannot be refuted.

- 16 To begin with, Mr. Stati demonstrably lied with regard to virtually every issue that is crucial and controversial in this case, namely: the Project Zenith sale process; the 3D seismic survey on the Contract 302 Area; the construction of the LPG Plant; the Cliffson transaction; gas pricing – just to name a few of them.⁷
- 17 As highlighted in the Republic’s First Post-hearing Brief, Mr. Stati did not stop short of lying when examined by counsel for the Republic, he even lied when questioned by members of the Tribunal about his ownership interest in CASCo Kazakhstan.⁸ One can only assume that he attempted to conceal how money was diverted from KPM and TNG to CASCo through overpriced service contracts and how CASCo built an LPG Plant with alleged investment costs of USD 245 million and created a ruin that can only be scrapped.
- 18 While the lies that the Republic discovered and disclosed to the Tribunal in its First Post-hearing Brief are many, the list is not conclusive. With regard to gas pricing for example, an issue that may account for a value of about USD 200 million,⁹ Mr. Stati during his testimony alleged that the prices for gas were going up from late summer to early 2009 and that counsel for the Republic must have confused gas prices with oil prices.¹⁰ His own counsel later proves him wrong when Claimants state in their First Post-hearing Brief that average gas prices did not at all increase but decline by 14.2% from 2008 to 2009.¹¹
- 19 Mr. Lungu is the author of probably the most brazen lie in these proceedings. As was demonstrated in the Republic’s previous submission, Mr. Lungu completely misrepresented all the basic parameters for the LPG Plant and thus sought to create the appearance that the construction of the LPG Plant had been processing smoothly when in fact it had been the burial ground of TNG’s money, and thus – more importantly – of their creditors’ money, from the very start.¹²
- 20 By presenting as the original plan what had only become the plan after many revisions and budget and time adjustments, Mr. Lungu attempted to conceal a budget overrun of at least 167.6% and a delay of almost two years. It is clear why: **No one**

⁷ Respondent’s First Post-hearing Brief, Section C.I, paras. 111 et seqq.

⁸ Respondent’s First Post-hearing Brief, paras. 121-146.

⁹ See Part IV, G.II.2 and Part IV, H.II.2 below.

¹⁰ Testimony of Mr. Stati, Hearing on Jurisdiction and Liability, Transcript Day 2, p.40, lines 10-16.

¹¹ Claimants’ First Post-hearing Brief, para. 412.

¹² Respondent’s First Post-hearing Brief, para. 140.

but FTI, no bidder for the assets during Project Zenith, not RBS and not Deloitte GmbH assumed that the value of the LPG Plant would be anywhere near the investment costs. Everyone but FTI agrees that Claimants should never have taken the decision to build the LPG Plant.

- 21 Another instance in which Mr. Lungu seriously distorted the facts in an attempt to mislead the Tribunal is his statement that Kemikal, TNG’s most important gas customer, “*inexplicably*” stopped payments towards the end of 2008.¹³ Claimants concluded from this statement that the Republic and Timur Kulibayev must have been behind the payment stop as part of the alleged harassment campaign.¹⁴
- 22 The PwC Due Diligence Report shows that this is pure invention. The report clearly refers to “Kemikal’s liquidity and insolvency” issues as the reason for the loss of Kemikal as a customer.¹⁵ There is nothing quite so inexplicable about an insolvent company stopping payments and Mr. Lungu must have been aware of that.
- 23 Mr. Cojin¹⁶ created a memorable moment at the Hearing on Jurisdiction and Liability, when he made a statement that caused his whole carefully drafted witness statement to fall into pieces. While his witness statement had stressed that inspections had been so burdensome that KPM and TNG had turned into two bodies that only existed to answer request from government bodies,¹⁷ he proudly testified at the Hearing that “*the financial police came from time to time to our office - they could not disturb us too often because we were very busy with production [...]*”¹⁸
- 24 Mr. Cojin was indeed the witness for special moments. Another striking example was his testimony – as the General Director of TNG at the time – that Contract No. 302 had allegedly expired in 2018¹⁹ when everybody in the room knew that Contract No. 302 had expired in March 2009.
- 25 His testimony was even more absurd when he described – in every detail and again, as the General Director of TNG at the time – how TNG drilled the Munaibay-2 well and which technology they used.²⁰ The truth is that Claimants never drilled the Munaibay-2 well. They only drilled Munaibay-1, got stuck long before the target

¹³ Second Witness Statement of Mr. Lungu, para. 6.

¹⁴ Claimants’ First Post-hearing Brief, para. 379. Cf. also Claimants’ Reply on Jurisdiction and Liability, para. 382.

¹⁵ PwC Due Diligence Report, p.19 (**Exhibit R-359**).

¹⁶ Respondent’s First Post-hearing Brief, Section C.III, paras. 147 et seqq.

¹⁷ First Witness Statement of Mr. Cojin, para. 6.

¹⁸ Testimony of Mr. Cojin, Hearing on Jurisdiction and Liability, Transcript Day 3, p.31, lines 7-10.

¹⁹ Testimony of Mr. Cojin, Hearing on Jurisdiction and Liability, Transcript Day 3, p.15, line 17 - p.16, line 6.

²⁰ Testimony of Mr. Cojin, Hearing on Quantum, Transcript Day 2, p.68, lines 8-14.

depth of 6,000m and allegedly planned to drill Munaibay-2 sometime in 2010. But in fact, TNG never drilled this well.²¹

- 26 When it comes to memorable moments at the Hearing, Mr. Broscaru’s testimony is certainly one that no one will forget.²² During his cross-examination, it turned out that he could not answer any question regarding a large portion of his witness statement entitled “Design and economic rationale of the LPG Plant” because as he testified, he could not “*answer to such questions [...]. I’m not a specialist in financial – in finance and economics. I cannot confirm anything in this subject.*”²³ Mr. Broscaru admitted that Mr. Lungu, Claimants’ witness and ostensibly Claimants’ financial expert, had provided him with financial “*information*” regarding the LPG Plant and he had written this information down in his witness statement.
- 27 Claimants did not provide any explanation for the fact that information that originated from one witness – ostensibly a financial expert – was inserted into the witness statement of another witness – obviously a person who was unable to do simple maths.²⁴
- 28 It is apparent that Claimants did so because they sought to insulate Mr. Lungu from cross-examination regarding the financial aspects of the LPG Plant. Even FTI calculated that the value of the plant of USD 450 million allegedly assumed by TNG was **overstated by up to USD 443 million**. Deloitte corrected FTI’s calculation further and came to the conclusion that TNG – with their own assumptions as set out in Mr. Broscaru’s witness statement – should have arrived at a **negative value for the LPG Plant**.²⁵
- 29 The testimony of Claimants’ other witnesses, Messrs. Romanosov,²⁶ Pisica,²⁷ Condorachi,²⁸ Stejar²⁹ and Calancea³⁰ fared no better. The Republic has demonstrated that all of these witnesses were caught lying, testified about events of

²¹ This can for example be seen from the “Interoil Reef” map prepared by Ryder Scott (**Exhibit R-391**) on which the existing wells on Contract No. 302 are marked. Munaibay-10 was drilled during Soviet times and Munaibay-1 was drilled by TNG. Munaibay-2 was never drilled and hence cannot be seen on Ryder Scott’s map.

²² Respondent’s First Post-hearing brief, Section C.VIII, paras. 180 et seqq.

²³ Testimony of Mr. Broscaru, Hearing on Quantum, Transcript Day 2, p.36, lines 1-20.

²⁴ Mr. Broscaru refused to do a very simple calculation, Hearing on Quantum, Transcript Day 2, p.35, line 23 - p.36, line 21.

²⁵ See Part IV, E.I. below.

²⁶ Respondent’s First Post-hearing brief, Section C.IV, paras. 160 et seqq.

²⁷ Respondent’s First Post-hearing brief, Section C.V, paras. 166 et seqq.

²⁸ Respondent’s First Post-hearing brief, Section C.VI, paras. 172 et seqq.

²⁹ Respondent’s First Post-hearing brief, Section C.VII, paras. 175 et seqq.

³⁰ Respondent’s First Post-hearing brief, Section C.IX, paras. 183 et seqq.

which they had no personal knowledge and omitted to state material information. They therefore have no credibility and the Republic fully refers to its First Post-hearing Brief in this regard.

2. Claimants' experts

30 Claimants' main attacks directed against the Republic's quantum experts are based on the falsely alleged lack of supporting documents and not on substance. However, such attacks do not relieve Claimants from their duty to prove their case. They are nothing but a distractive manoeuvre of Claimants aimed at concealing that the Republic's experts laid open the many flaws in Claimants' quantum case, thereby actually disproving it.

a) Ryder Scott

31 Throughout these proceedings, Ryder Scott have proven to be partisan instruments of Claimants.

32 First of all, as will be demonstrated further below,³¹ Ryder Scott were complicit in Claimants' procedural ambush at the Hearing on Quantum. Ryder Scott did not hesitate to help Claimants in introducing 3D seismic data that Claimants had had in their possession for more than one and a half years before first making use of it in these proceedings.

33 Importantly, in so doing, Ryder Scott were taking every effort to conceal the ambush they were planning.³² Prior to the Hearing on Quantum, they were negotiating with GCA regarding the Joint Issue List of the experts. This list was supposed to help the Tribunal in the preparation for the expert conferencing. During negotiations, Ryder Scott stated that they were in agreement with GCA on the issue of the GCoS for the Contract 302 Properties and this statement was ultimately included in the final version of the Joint Issue List. However, Ryder Scott never informed GCA during negotiations that they were analysing 3D seismic data at the time. Further, prior to their testimony, Ryder Scott informed no one that they had revised their GCoS estimate for the "Interoil Reef". They simply did not inform GCA that the Joint Issue List would have to be amended in order to reflect the newly created disagreement on GCoS.

³¹ See Part IV, A.I.1 below.

³² See Part IV, A.I.1 below.

34 Ryder Scott thus made sure that Claimants’ procedural ambush would work, accepting that they were misleading GCA in the process and that they were completely defeating the very purpose of the Joint Issue List. This is not the conduct of an independent expert that is trying to assist the Tribunal in establishing the facts.

35 Ryder Scott’s lack of independence is further evidenced by the fact that they presented findings made by Claimants to the Tribunal as their own. This again pertains to the ambush introduction of 3D seismic data,³³ but also to the development schedules for the “Interoil Reef”.

36 Tellingly, when asked at the Final Hearing whether he agreed that the role of an expert in arbitration is to independently assist a tribunal, Mr. Nowicki of Ryder Scott stated:

*“I’m really confused by that question. I mean, we’re engaged by our client. I guess in this proceeding we might have that role [...]”*³⁴

37 Apart from their lack of independence, it has also been demonstrated that Ryder Scott have made numerous mistakes in their estimates, in particular with regard to the Borankol field. Their estimates are based on fictional potential for recompletions which Ryder Scott were only able to assume by ignoring conclusive evidence showing that the intervals their recompletions are targeting are not filled with oil but with either water or gas.

b) FTI

38 The list of FTI’s methodological mistakes is mind-boggling. The number of serious mistakes leading to significant overstatement of values goes into the double-digits. FTI’s work is fully unreliable.³⁵ In addition, Claimants unilaterally dropped Laura Hardin as an expert without providing any serious explanation. They thus insulated one of the two authors of the First and Second FTI Reports from cross-examination.

3. Claimants’ documentary evidence

39 In its First Post-hearing Brief, the Republic discussed in great detail evidentiary misconduct on the part of Claimants.³⁶ In order to substantiate their baseless

³³ See Part IV, A.I.1 below.

³⁴ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.67, lines 7-12.

³⁵ See Part IV, A.IV. below.

³⁶ Respondent’s First Post-hearing Brief, Part V.

allegations and to make their story sound at least somewhat plausible, Claimants tried it all: They corrupted Kazakh officials to obtain internal government documents;³⁷ they submitted intentionally misleading translations³⁸ and they even forged documents.³⁹

40 In their First Post-hearing brief, Claimants failed to provide any convincing explanation as to why the translations of the documents they submitted as proof in these arbitration proceeding are riddled with errors, or why some of the documents are undated or unsigned, or how Claimants came into possession of a significant number of internal government documents.

41 Claimants attempt to downplay the gravity of the errors in their translations by calling these serious errors “minor”.⁴⁰ The Republic disagrees. When an incorrect English translation significantly changes the meaning of what is said in the document such error can hardly be considered “minor”. One clear example relates to Mr. Broscaru’s written testimony regarding the completion of the LPG Plant.⁴¹

42 It is even harder to believe that the errors are not intentional when most of the time, they change the content of the document to Claimants’ advantage. For example, Claimants’ incorrect translation of the Russia words “тщательно проверить” in President Nazarbaev’s Note as “investigate” better supports their far-fetched allegations of government harassment than the correct translation “thoroughly check”. Therefore, contrary to Claimants’ assertion, what might be a mere distinction becomes a significant difference when taken in the context of a particular case.

43 This is exactly what the Republic stated in its Rejoinder Memorial on Jurisdiction and Liability when it discussed Claimants’ translation of the MEMR’s letter to TNG of 9 April 2009.⁴² As it became customary for Claimants in the course of this arbitration, in their First Post-hearing Brief, they quoted only a part of the Republic’s statement - the one that suits them best - to argue that the Republic itself admits that both Claimants’ and the Republic’s translations are possible.⁴³ The entire paragraph states the following: *“It is admitted that the Russian wording generally allows for both translations. Bearing the process for the extension in mind,*

³⁷ Respondent’s First Post-hearing Brief, Part V.A.

³⁸ Respondent’s First Post-hearing Brief, Part V.C.

³⁹ Respondent’s First Post-hearing Brief, Part V.B.

⁴⁰ Claimants’ First Post-hearing Brief, para. 112.

⁴¹ Respondent’s First Post-hearing Brief, paras. 1169-1172.

⁴² Republic’s Rejoinder on Jurisdiction and Liability, paras. 419-424.

⁴³ Claimants’ First Post-hearing Brief, para. 113.

however, there can only be one correct translation.” The Tribunal can see for itself how crucial the context is for a correct understanding of the meaning. It is equally crucial for a correct translation.

- 44 While calling their translation errors “minor” and accusing the Republic of making “a distinction without a difference”, Claimants provide a scrupulous account of all errors and omissions that occurred in Mr. Ongarbaev’s witness statement.⁴⁴ However, what Claimants “forget” to mention is that the Republic submitted the revised English translation of said witness statement on 1 December 2012⁴⁵ and that none of the translation errors were either intentional or material. In particular, none of the minor inaccuracies in the English translation of Mr. Ongarbaev’s written testimony were to the Republic’s advantage.
- 45 Claimants allege that the Republic “erased Mr. Ongarbaev’s reference to the role of the Financial Police in the July 2010 audits, which is particularly egregious given counsel’s comments in the opening statement at the October 2012 Hearing that the Financial Police were not involved in those inspections.”⁴⁶ It may come as a surprise to Claimants but the Republic had no reason to erase this paragraph from Mr. Ongarbaev’s written testimony for one simple reason: The Republic’s counsel never made a statement – either during the October 2012 Hearing or at any other time – that the Financial Police were not involved in the July 2010 inspections. All counsel said was that the inspections were organized by the General Prosecutor’s Office and not by the Financial Police.⁴⁷ Moreover, Claimants accuse the Republic of not submitting requests for additional information to subsoil users seeking waiver of the state’s pre-emptive rights which, according to Claimants, Mr. Ongarbaev purported to attach to his statement. If Claimants had taken a closer look at para. 6.4 of Mr. Ongarbaev’s statement in the Russian language, which Mr. Ongarbaev confirmed was the true version,⁴⁸ they would have noticed that no requests were mentioned in this paragraph.
- 46 In its First Post-hearing brief, the Republic presented several examples of the documents submitted by Claimants which were partially or entirely forged.⁴⁹ One of the most outrageous examples is a report to the Chairman of the Agency for Fighting

⁴⁴ Claimants’ First Post-hearing Brief, para. 114.

⁴⁵ Letter from Respondent to the Tribunal dated 1 December 2012 (**Exhibit R-386**).

⁴⁶ Claimants’ First Post-hearing Brief, para. 114.

⁴⁷ Respondent’s Opening Statement, Hearing on Jurisdiction and Liability, Transcript Day 1, p.157, lines 2-9.

⁴⁸ Testimony of Mr. Ongarbaev, Hearing on Jurisdiction and Liability, Transcript Day 6, p.76, lines 22-25.

⁴⁹ Respondent’s First Post-hearing Brief, Part V.B.

Economic Crimes and Corruption allegedly prepared by Mr. Serik Rakhimov.⁵⁰ In their First Post-hearing Brief, Claimants argue that the Republic “*fails to provide any convincing explanation for why Claimants would waste any time or energy to create 11 ‘fake’ reports outlining alleged violations of KPM and TNG in July 2010.*”⁵¹ Firstly, Claimants’ motives for faking the report are irrelevant. Secondly, the Republic provided something significantly more important than a convincing explanation of the Claimants’ motives: the Republic presented a written statement of the alleged author, Mr. Serik Rakhimov, who also testified during the Hearing on Jurisdiction and Liability that he did not write this report.⁵² And yet this “report” is on the record and it was submitted by Claimants.

47 Claimants’ argument that this report and 10 other reports that they submitted on 20 September 2012⁵³ and withdrew on 28 September 2012,⁵⁴ were emailed to the Financial Police, “*probably so [it] could approve and/or influence their results*”, cannot be taken seriously. It is a mere speculation of a party who is desperate to explain the unexplainable.

48 Claimants appear to be more successful in finding an explanation as to discrepancies in a letter from Terra Raf to KazRosGaz (**Exhibit C-520**). They simply call it “a clerical error.”⁵⁵ Claimants assert that it is the Republic’s burden to demonstrate how this misrepresentation affects the case. While this forged document alone might not have a significant impact on the case, when taken together with other procedural violations and evidentiary misconduct, it seriously undermines Claimants’ credibility and speaks volumes about their business ethics.

49 The fact that Claimants submitted a significant number of inter-governmental documents, which they should not have had access to, also does not add Claimants’ credibility. In its First Post-hearing Brief, the Republic explained that Claimants could not have legally obtained the hearing minutes of Mr. Cornegruta’s trial from the court.⁵⁶ As Mr. Kravchenko testified, pursuant to the Criminal Procedural Code

⁵⁰ Report to the Chairman of the Agency for Fighting Economic Crimes and Corruption allegedly signed by S.Rakhimov (undated) (**Exhibit C-711.1**).

⁵¹ Claimants’ First Post-hearing Brief, para. 119.

⁵² Witness Statement of Rakhimov Serik Dosymovich. Testimony of Mr. S. Rakhimov, Hearing on Jurisdiction and Liability, Transcript Day 6, p.28, line 21 - p.29, line 6.

⁵³ Letter from Claimants to the Tribunal dated 20 September 2012 (Exhibit R-383); Index to Claimants’ Additional Exhibits C-700 - C-717 (**Exhibit R-384**).

⁵⁴ Letter from Claimants to the Tribunal dated 28.09.2012 (**Exhibit R-397**).

⁵⁵ Claimants’ First Post-hearing Brief, para. 115.

⁵⁶ Respondent’s First Post-hearing Brief, Part V.A.

in force at the time, neither parties to a case nor third parties had a right to receive the minutes of the trial, let alone the unfinished draft of such minutes.⁵⁷

III. Claimants must specify their claims

1. Claimants' wildly oscillating prayers for relief

50 The weakness of Claimants' evidence and in particular the weakness of their valuation evidence is further demonstrated by Claimants' wildly oscillating requests for relief. As of this date, it is still not clear what Claimants actually request.

51 Claimants changed their initial damage claim as submitted in the Statement of Claim in their Reply Memorial on Quantum, during the Hearing on Quantum and in their First Post-hearing Brief. There are so many flaws in the analysis of FTI that Claimants could not help but continuously amend and correct them throughout these proceedings.

52 The following table summarizes the amendments made.⁵⁸ All changes in total amount to USD 841 million:

	Statement of Claim (million USD)	Δ	Reply on Quantum (million USD)	Δ	Hearing on Quantum (million USD)	Δ	1st PHB (million USD)
Borankol Field	193	+ 38.5	231.5	- 33.49	197.01		197.013
Tolkyn Field	561	- 52.6	508.4	- 29.47	478.93		478.927
LPG Plant (cost)	208.5	+ 36.5	245		245		245
Contract 302 (prospective)	1,766	- 186	1,580	- 132	1,448	+ 188.9	1,636.9
LPG Plant (prospective)	344	+ 64.3	408.3	- 79.2	329.1		329.1

53 Claimants admit in their First Post-hearing Brief that they still have not finalized the quantification of their own claims and that their request – after two years of proceedings – is still preliminary and subjecto changes. They request:

“[c]ompensation to Claimants for all damages they have suffered as set forth in Claimants’ Statement of Claim and Reply on Quantum and as further updated a the January 2013 Hearing and

⁵⁷ Testimony of Mr. Kravchenko, Hearing on Jurisdiction and Liability, Transcript Day 4, p.49, lines 14-18.

⁵⁸ The values stated in the table are taken from the following sources: Claimants’ Statement of Claim, para. 465; Claimants’ Reply on Quantum, para. 79; FTI Update Memo dated 25 January 2013, para. 25; Claimants’ First Post-hearing Brief, para. 664; FTI Consulting Third Expert Report, para. 12.19.

*in this submission, currently corresponding to the following amounts [...]*⁵⁹ (emphasis added)

54 As a matter of course, Claimants are not entitled to further amend their requests at this late stage after the taking of evidence, without the Republic being heard on those changes.

55 Irrespective of the Republic's procedural rights, Claimants' failure to comply with its duty to specify its own claims must be seen as what it is: A failure to discharge its burden to state and prove its case. If Claimants do not know what they want the Tribunal to award to them, the Tribunal certainly cannot help them. Claimants' duty to submit specific requests must be complied with and it cannot be replaced by the Tribunal's discretion as the Claimants frequently suggest.

2. Claimants' valuation date

56 Claimants' choice of their valuation date is at their own risk and they are bound by that choice: If they fail to convince the Tribunal of their early valuation date and if they fail to submit an alternative valuation as of another date, their claims must fail for those reasons alone.

57 In particular, the Tribunal will have to take into account that Claimants presented a single valuation date and that at this date no adverse state action had been taken. Such choice of valuation date is at the Claimants' own risk. Should the Tribunal not be convinced of Claimants' implausible early valuation date, the Tribunal cannot replace Claimants' failure to discharge their procedural duties by applying some form of discretion. Rather, Claimants must live with the improbably high stake they introduced in this arbitration. As counsel for Claimants stated,⁶⁰ both Parties presented their case as an "either/or" with the conclusion that the claims must be dismissed if Claimants are not in a position to convince the Tribunal. The Tribunal may not unilaterally assist Claimants by determining a discretionary value at another valuation date.

58 This is confirmed by the recent award in the case of *Rompetrol v. Romania*, in which the tribunal determined that no damages could be awarded because the claimant had presented only results of one valuation technique which the tribunal determined to be inappropriate. As there was no alternative presented, the tribunal found that

⁵⁹ Claimants' First Post-hearing Brief, para. 664.

⁶⁰ Claimants' Rebuttal Closing Submissions, Final Hearing, Transcript Day 2, p.91, lines 2-3.

damage was not proven.⁶¹ Importantly, the tribunal refrained from resorting to any kind of discretion in order to make up for the claimant's failure.

IV. Conclusion

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

⁶¹ *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 288 (**Exhibit R-396**)

PART II: FACTS

A. Claimants' lack of experience and wrong business decisions as well as a severe deterioration in the economic environment led to the demise of KPM and TNG

I. Numerous circumstances outside of the Republic's influence caused the demise of KPM and TNG and the ultimate termination of the contracts

60 In its First Post-hearing Brief and at the Final Hearing at the beginning of May 2013, the Republic laid down in detail its observations on the lack of causation between those of the Republic's actions Claimants' complain about and the demise of KPM and TNG. It was this demise, which was unrelated to the Republic, that led to breaches of the contracts and ultimately to the termination of the contracts and the invocation of the trust management regime.

61 In particular, the Republic demonstrated the following:

- (a) Claimants mismanaged their assets on numerous occasions, for example by putting alarmingly incompetent personnel in charge of important tasks and by promising sales to business partners that they could have never made.⁶² The mismanagement went so far that market observers were concerned about "*weak corporate governance standards at Tristan*".⁶³ The overall level of mismanagement comes as no surprise given that Claimants had no prior experience in oil and gas production and in the Kazakh or international markets.⁶⁴
- (b) KPM's and TNG's business was very risky from the start, as was set out clearly in the Tristan note prospectus.⁶⁵
- (c) KPM's and TNG's financing structure, which aimed at removing capital from the companies, made them vulnerable to situations of crisis.⁶⁶

⁶² Respondent's First Post-hearing Brief, paras. 20 et seqq.

⁶³ Fitch Ratings Press Release dated 10 July 2009 (**Exhibit C-743**).

⁶⁴ Respondent's Closing Submission of 2 May 2013, Slide 5.

⁶⁵ Respondent's First Post-hearing Brief, paras. 32 et seqq.

- (d) Claimants took business decisions aimed only at short-term profit. In particular the ramping up of production at the end of 2007 was short sighted, as it led to a loss of available gas production for the LPG Plant and the allegedly expected possibility of gas export (which the Republic denies).⁶⁷
- (e) In April of 2008, Claimants found out that their estimates for production from Borankol had been overstated by 300%. At the time, Claimants received the new Miller&Lents reserves report⁶⁸ which set out 2P reserves of 24.6 MMboe. The earlier report by Ryder Scott had provided for 2P reserves of 72.4 MMboe.⁶⁹ The effect of this loss was particularly significant because Borankol is a predominantly oil producing field and oil production is much more valuable than gas production.⁷⁰
- (f) KPM and TNG were already in severe financial difficulties as of Claimants' valuation date, as is evidenced by the development of the Tristan notes price.⁷¹
- (g) Severe drops in energy prices and in demand, in particular due to the loss of Kemikal as a customer, led to a very restricted cash position for KPM and TNG.⁷² At the same time, the need for capital expenditure increased markedly, putting further pressure on the companies.⁷³
- (h) Against this background, when uncontestedly legal tax demands were raised by the state in the summer of 2009, Claimants had to take out the horrendous Laren loan and issue new notes in the amount of USD 111.1 million in connection thereto.⁷⁴
- (i) Thereafter, Claimants deliberately chose to withdraw cash from KPM and TNG, all while not fulfilling the annual work programs. This was effectively the deliberate abandonment of the companies.⁷⁵

⁶⁶ Respondent's First Post-hearing Brief, paras. 36 et seqq.

⁶⁷ Respondent's First Post-hearing Brief, paras. 40 et seqq.

⁶⁸ Miller Lents Report 2008 (**Exhibit R-348**).

⁶⁹ Project Zenith – Vendor Due Diligence by KPMG dated 29 August 2008, p.32 (**Exhibit C-69**).

⁷⁰ Cf. Claimants' First Post-hearing Brief, para. 489.

⁷¹ Respondent's First Post-hearing Brief, paras. 46 et seqq.

⁷² Respondent's First Post-hearing Brief, paras. 46 et seqq.

⁷³ Respondent's First Post-hearing Brief, paras. 52 et seqq.

⁷⁴ Respondent's First Post-hearing Brief, paras. 58 et seqq.

⁷⁵ Respondent's First Post-hearing Brief, paras. 62 et seqq.

II. Deloitte GmbH have shown that KPM and TNG were already in severe financial difficulties as of Claimants' valuation date

62 In their First Post-hearing Brief and at the Final Hearing, Claimants contended lengthily that the financial situation of KPM and TNG prior to Claimants' valuation date was good.⁷⁶ They base this argument on pure ignorance of all indicators to the opposite.

63 The most important indicator to this effect is the trading price of the Tristan notes, which stood at USD 65.125 for a nominal value of USD 100; this translates to a yield to maturity of 26.319%.⁷⁷ As Deloitte GmbH have demonstrated at lengths, this trading price indicates that the markets expected Tristan to default on its debt.⁷⁸ Clearly, the market expectation of default, be it partial or in full, reflects badly on the companies' financial position at the time.

64 Claimants try to avoid this conclusion by referring to the testimony of Mr. Rosen of FTI, according to which the trading down of the Tristan notes was no reflection of a default risk but rather the effects of the financial crisis and the Lehman bankruptcy in particular.⁷⁹ Claimants understand this to mean that the markets "*were no longer trading on fundamentals*" at the time.⁸⁰

65 This statement is misleading, as it implies that the risks connected to the business of KPM and TNG could be determined without reference to the actual market situation and in particular the effects of the financial crisis. Claimants seem to suggest that KPM and TNG operated in a bubble, protected from the rapid change in the markets, and unaffected but for the change in the Tristan note price. This view is untenable for two reasons:

- (a) Oil and gas prices strongly decreased at the time, putting pressure on the companies' revenues. This had a direct effect on the financial position of the companies. KPM and TNG were thus clearly not operating in a bubble, protected from the financial crisis, and the markets were perfectly correct in having the Tristan notes trade down.⁸¹ Importantly, at the time, it was not to be

⁷⁶ Claimants' First Post-hearing Brief, paras. 401 et seqq.; Claimants' Closing Submission, Final Hearing, Transcript Day 1, p.153, line 9 - p.156, line 18.

⁷⁷ FTI Consulting Expert Report, Exhibit E, p.20.

⁷⁸ Deloitte & Touche Supplemental Expert Report, paras. 198 et seqq., in particular, paras. 202 and 210.

⁷⁹ Testimony of Mr. Rosen of FTI, Hearing on Quantum, Transcript Day 4, p.171, lines 8-24. See also FTI Consulting Third Expert Report, paras. 10.1 et seqq.

⁸⁰ Claimants' Closing Submission, Final Hearing, Transcript Day 1, p.155, line 18 - p.156, line 18.

⁸¹ Deloitte & Touche Second Supplemental Expert Report, para. 241.

seen whether and when prices would rebound, putting into question the functioning of the companies' business model as a whole.

- (b) In any event, the markets' risk perception alone is already a fact that can have a direct impact on a company's financial situation and its value.⁸² If the same amount of risk can only be financed against a higher premium, this directly entails a worsening of the financial situation. Increasing difficulty for a company to obtain financing must be taken into account.

66 As Deloitte GmbH state: "The unmistakable information from the bond market cannot be made disappear or be ignored."⁸³

67 However, even disregarding the trading down of the Tristan notes, there are clear indicators in the financial statements of KPM and TNG that demonstrate the worsening of KPM's and TNG's financial situation prior to Claimants' valuation date of 14 October 2008. Several key financial figures deteriorated in this timeframe. In particular, the so-called current ratio (current assets divided by current liabilities) of the companies decreased from 5.74 at year end 2007 to 3.06 on 30 June 2008.⁸⁴ Moreover, the quick ratio (ratio of current assets less inventory relative to current liabilities) decreased from 5.33 at the year end 2007 to 2.91 on 30 June 2008.⁸⁵ In addition, the cash ratio (ratio of cash and cash equivalents relative to current liabilities) decreased significantly from 0.51 (31 December 2007) to 0.13 (30 June 2008).⁸⁶

68 Purely as a matter of precaution, the Republic notes that Claimants are wrong to contend that the Republic "solely" relies on the work of Professor Olcott for its arguments on causation.⁸⁷ Professor Olcott's work⁸⁸ is only one part of the Republic's case on causation and for Claimants to contend any different requires them to overread pages and pages of detailed reasoning backed up by countless references in the various submissions by the Republic. In any event, Professor Olcott is perfectly competent to present her views on the matter.⁸⁹

⁸² Deloitte & Touche Second Supplemental Expert Report, para. 241.

⁸³ Deloitte & Touche Second Supplemental Expert Report, para. 244.

⁸⁴ Deloitte & Touche Second Supplemental Expert Report, para. 248.

⁸⁵ Deloitte & Touche Second Supplemental Expert Report, para. 249.

⁸⁶ Deloitte & Touche Second Supplemental Expert Report, para. 249.

⁸⁷ Claimants' Closing Submission, Final Hearing, Transcript Day 1, p.152, lines 23-25. Cf. also First Post-hearing Brief, para. 400.

⁸⁸ First Expert Report of Professor Olcott, paras. 162 et seqq.

⁸⁹ Cf. First Expert Report of Professor Olcott, para. 162, where Professor Olcott explains here economic qualifications.

III. The PwC Due Diligence Report confirms that external circumstances rather than state action are to blame

69 The chain of events as described above is supported very clearly by contemporaneous evidence, most notably the PwC Due Diligence Report prepared as part of the KMG EP due diligence in the summer of 2009.⁹⁰ Several key statements of the report are particularly noteworthy:

- (a) The report describes the decline in condensate prices as the “key reason” for falling sales and profitability of TNG⁹¹ and the decline in oil prices as the “key reason” for falling sales and profitability of KPM.⁹²
- (b) The report further clearly refers to the drop in demand and in particular to the loss of Kemikal as a customer.⁹³ Claimants have made much of the loss of Kemikal. Mr. Lungu in particular alleged that Kemikal “inexplicably” stopped payments.⁹⁴ Claimants concluded from this statement that the Republic and Timur Kulibayev must have been behind the payment stop as part of the alleged harassment campaign.⁹⁵ The PwC Due Diligence Report shows that this is pure invention. The report clearly refers to “Kemikal’s liquidity and insolvency” issues as the reason for the loss of Kemikal as a customer.⁹⁶ There is nothing “inexplicable” about that. In fact, Claimants themselves acknowledged that at the time, “slow payments and defaults cascaded through the industry”.⁹⁷ Against this background, Mr. Lungu’s statement that the stop of payments was inexplicable must be deemed another instance of Mr. Lungu not being honest in his testimony.
- (c) Further, the PwC Due Diligence Report identifies another reason for the companies’ cash constraints in the first half of 2009, namely one entirely of Claimants’ own making and resulting from the highly dubious financing structure mentioned above: In the first half of 2009, Claimants’ affiliate Montvale, which acted as an intermediary between KPM and TNG and Vitol, failed to make payments on KPM’s and TNG’s receivables. This led to an

⁹⁰ PwC Due Diligence Report (**Exhibit R-359**).

⁹¹ PwC Due Diligence Report, p.42 (**Exhibit R-359**).

⁹² PwC Due Diligence Report, p.48 (**Exhibit R-359**).

⁹³ PwC Due Diligence Report, p.19 (**Exhibit R-359**).

⁹⁴ Second Witness Statement of Mr. Lungu, para. 6.

⁹⁵ Claimants’ First Post-hearing Brief, para. 379. Cf. also Claimants’ Reply on Jurisdiction and Liability, para. 382.

⁹⁶ PwC Due Diligence Report, p.19 (**Exhibit R-359**).

⁹⁷ Claimants’ First Post-hearing Brief, para. 417.

accumulation of USD 170 million in such receivables.⁹⁸ Claimants themselves were responsible for Montvale’s failure, as they had Montvale invest funds received from Vitol in non-liquid assets.⁹⁹ In other words: The reason why KPM and TNG were short in liquidity was Claimants’ decision to invest available funds into non-liquid assets.

- (d) Importantly, the cash constraints caused by these problems had severe and immediate consequences, namely that KPM and TNG stopped their capital investment programs. This meant in particular that no new wells were being drilled, which was contrary to the companies’ annual work programs. Moreover, this also entailed the stop of the LPG Plant project and the “mothballing” of the Plant for a potential later continuation of construction.¹⁰⁰ The suspension in the construction of the LPG Plant was thus not caused by any of the Republic’s actions. It is for this reason that any valuation of the LPG Plant in this arbitration must take into account the costs of mobilisation and “de-mothballing” and GCA and Deloitte GmbH have prepared their analysis accordingly.¹⁰¹
- (e) As the PwC Due Diligence Report makes abundantly clear, a further consequence of these cash constraints was the “infamous” Laren loan and the corresponding issuance of USD 111.1 million in new Tristan notes.¹⁰² In referencing the reasons for the cash constraints and thus for the new debt, the report with no word refers to actions of the Republic. Instead, the report states that the cash deficit is “mainly due” to the accumulation of the receivables from Montvale.¹⁰³ Against this background, the horrendous Laren loan and the issuance of additional Tristan notes cannot be blamed on the Republic. This debt must hence be deducted from any enterprise value claimed by Claimants.¹⁰⁴

70 At the Final Hearing, Claimants have criticised the Republic’s references to the PwC Due Diligence Report as “cherry picking”.¹⁰⁵ This allegation is not only incorrect, it is also ironic, given that Claimants have made a habit out of referencing testimony so selectively that the original meaning of what the witness said is completely lost.

⁹⁸ PwC Due Diligence Report, p.17 (**Exhibit R-359**).

⁹⁹ PwC Due Diligence Report, p.17 (**Exhibit R-359**).

¹⁰⁰ PwC Due Diligence Report, p.17 (**Exhibit R-359**).

¹⁰¹ GCA Expert Report, paras. 62 et seq.

¹⁰² PwC Due Diligence Report, p.18 (**Exhibit R-359**).

¹⁰³ PwC Due Diligence Report, p.17 et seq. (**Exhibit R-359**).

¹⁰⁴ See below at Part II, A.VI.1.

¹⁰⁵ Claimants’ Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.22, line 16.

The Republic invites the Tribunal to read the PwC Due Diligence Report as a whole and to form its own opinion on the statements made therein. This will put to rest Claimants' baseless allegation of "cherry picking".

71 Further, Claimants asserted that they had no possibility to rebut the statements made in the PwC Due Diligence Report because of its introduction into the proceedings at a later stage. Therefore, conclude Claimants, the statements in the report should be given less evidentiary weight.¹⁰⁶ Again, this conclusion is incorrect. If Claimants felt that they had been put at a disadvantage by the introduction of the report, they could have objected to the introduction or they could have asked for an opportunity to introduce counter-evidence, for example in the form of further witness statements. The Republic would not have opposed an application for leave to respond to the submission of the report and the Tribunal would in all likelihood have granted it. The Republic would also not have objected against a request to cross-examine Mr. Suleimenov of KMG EP again. However, Claimants did not make any application whatsoever. Against this background, Claimants' attempts to portray themselves as the victims of procedural misconduct are baseless. Claimants could have tried to respond to the report but did not do so. Thus, the statements in the report stand unchallenged.

72 Lastly, and most absurdly, Claimants contended that the PwC Due Diligence likely does not refer to the state's allegedly illegal actions since the report was prepared for "the state-owned oil company KazMunaiGas" and since PwC would not want to accuse the Kazakh state of illegality in such report.¹⁰⁷ This argument frankly reeks of desperation. Of course, no one could expect PwC to write up accusations of illegal actions by the state. Assessing the legality of state action was plainly not the scope of PwC's financial due diligence. However, what one would expect in PwC's financial due diligence is that PwC references all circumstances that have a negative impact on the financial situation – be they caused by the state in a legal or in an illegal way or be they not caused by the state at all. From the Claimants point of view, this would mean that the actions of the state that Claimants allege to have been illegal – such as the inspections and investigations as well as the "revocation" of the pre-emptive rights waiver – should have been mentioned in the report. However, this was not the case. Thus, it stands to reason that from the viewpoint of PwC, these state actions did not play a role in the financial problems of the companies.

¹⁰⁶ Claimants' Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.23, line 4 - p.25, line 5.

¹⁰⁷ Claimants' Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.25, lines 6-19.

IV. Claimants' critique of the Republic's causation case is baseless

1. Going concern qualification in the Interim Report for the Three Months Ended March 31, 2009

73 Claimants contend that the auditor's going concern qualification in the Interim Report for the Three Months Ended March 31, 2009¹⁰⁸ shows that the Republic's actions caused injury to Claimants.¹⁰⁹ This contention is again not true and Claimants' selective quoting from the going concern qualification is misleading.

74 To begin with, the going concern qualification references as the first and most important item the freezing of KPM's and TNG's bank accounts due to the non-payment of excess profits tax.¹¹⁰ In the present proceedings, Claimants have never objected to the excess profits tax or to the court order based on which KPM's and TNG's bank accounts were frozen because of the non-payment. Mr. Lungu even expressly acknowledged that the excess profits tax assessment was legal.¹¹¹ Thus, this item demonstrates that the going concern qualification was mainly driven by circumstances not subject to Claimants' complaints in these proceedings.

75 Likewise, the going concern qualification also references the payment arrears from Montvale mentioned above,¹¹² stating that as at 31 March 2009, receivable in the amount of USD 150 million were outstanding.¹¹³ A potential impairment of those claims is not excluded, demonstrating the severeness of the situation.

76 Against this background, the going concern qualification demonstrates quite clearly the severity of the situation that Claimants were facing due to the uncontestedly legal tax claims and the payment troubles of Montvale. Insofar as the pipeline dispute and the tax dispute are being referenced,¹¹⁴ there is no indication of an actual impact on the operations of KPM and TNG, so that the auditors' statement does not show that "injury" was caused to Claimants.

¹⁰⁸ Tristan Oil Ltd., Interim Report For the Three Months Ended March 31, 2009 (**Exhibit R-262**).

¹⁰⁹ Claimants' First Post-hearing Brief, para. 407.

¹¹⁰ Tristan Oil Ltd., Interim Report For the Three Months Ended March 31, 2009, p.F-2 (**Exhibit R-262**). The tax referenced at p.F-2 was excess profits tax, as can be seen at p.F-36 et seq.

¹¹¹ Testimony of Mr. Lungu, Hearing on Jurisdiction and Liability, Transcript Day 1, p.213, lines 3-4.

¹¹² See above Part II., A.III.

¹¹³ Tristan Oil Ltd., Interim Report For the Three Months Ended March 31, 2009, p.F-2 (**Exhibit R-262**).

¹¹⁴ Tristan Oil Ltd., Interim Report For the Three Months Ended March 31, 2009, p.F-2 et seq. (**Exhibit R-262**).

2. The impact of the oil price decline in 2008 and 2009 was severe

77 Claimants accept that the severe drop in oil and gas prices in 2008 and 2009 created challenging conditions for KPM and TNG.¹¹⁵ However, they try to create the impression that the drop was temporary and that with the recovery of prices in the summer of 2009, the revenue situation became sufficient to support KPM and TNG again.¹¹⁶ In so doing, Claimants overlook that the Republic never alleged that it was the price drop alone that caused problems for the companies. Rather, the drop in prices was one of many factors affecting the companies. Thus, when Claimants contend that “*KPM and TNG did not need prices to remain at 2008 levels to remain highly profitable*”, which they allege to be evidenced by the profits derived by the companies in 2007,¹¹⁷ this is an extremely oversimplified statement. Claimants cannot simply compare prices between 2007 and 2009 and ignore all other changes.

78 To begin with, Claimants’ theory does not address the drop in demand in any way. In particular the drop in demand for gas had severe consequences, as outlined for example by PwC.¹¹⁸ Importantly, this drop in demand persisted beyond the summer of 2009. For the most part of 2009, production at Tolwyn was on the level of 2005 and 2006 and it dropped off even further in 2010, to the levels of 2002, when production had just been started.¹¹⁹ Importantly, this meant that the production of associated condensate dropped as well. As condensate is the far more valuable part of the production at Tolwyn,¹²⁰ the drop in gas demand directly affected the profitability of Tolwyn even when the worldwide demand for condensate rebounded.

79 Moreover, Claimants’ theory also does not address the need for additional capital expenditure that became apparent in 2009. As explained in the Republic’s First Post-hearing Brief, the 2009 Miller & Lents Report reflected an increase in the need for capital expenditure in the amount of USD 276.2 million.¹²¹ Importantly, this increase only pertained to keeping the estimated 2P production near the levels estimated in the 2008 Miller & Lents Report. Even more importantly, these capital

¹¹⁵ Claimants’ First Post-hearing Brief, para. 409.

¹¹⁶ Claimants’ First Post-hearing Brief, paras. 409 et seqq.

¹¹⁷ Claimants’ First Post-hearing Brief, para. 413.

¹¹⁸ PwC Due Diligence Report, p.19 (**Exhibit R-359**).

¹¹⁹ GCA Expert Report, para. 32, Figure 2.

¹²⁰ Cf. PwC Due Diligence Report, p.42 (**Exhibit R-359**), where the drop in condensate prices is described as the “key reason” for the declining profitability of TNG.

¹²¹ Respondent’s First Post-hearing Brief, para. 56.

expenditure estimates were provided by the Claimants themselves so that they cannot ignore the relevance of this evidence now.¹²²

80 Thus, the situation between 2007 and 2009 is not comparable at all. Claimants cannot contend that comparable price levels in 2007 and 2009 lead to comparable gross profit expectations. Rather, Claimants needed much higher prices, for example such as those achieved in 2008, in order to cover the drop in demand and the need for additional capital expenditure.

81 In any event, Claimants also misrepresent the specific development of prices. In fact, the chart of Urals Mediterranean oil prices provided by Claimants illustrates that after the beginning of the financial crises in the Fall of 2008, oil prices were quite volatile.¹²³ Thus, when Claimants state that certain price levels were reached in 2009,¹²⁴ they fail to state that prices later dropped below those levels again. For example, the chart provided by Claimants shows that oil prices at times dropped below USD 70 per barrel even in 2010.¹²⁵

82 In addition, insofar as Claimants contend that gas prices did not decline significantly,¹²⁶ this is particularly noteworthy – less from a substantive viewpoint,¹²⁷ but more with a view to the fact that this is a direct contradiction to the testimony of Mr. Stati. At the Hearing on Jurisdiction and Liability, Mr. Stati had testified that between the Summer of 2008 and the beginning of 2009, gas prices had been going up.¹²⁸ Claimants’ themselves now admit that this was not the case and that between 2008 and 2009, the prices realised by KPM and TNG had declined by 14.2%.¹²⁹ This is shown particularly clearly by the drop in the realised gas sales prices between the nine months ended 30 September 2008 (USD 1.38 per Mcf)¹³⁰ and the three months ended 31 March 2009 (USD 1.20 per Mcf).¹³¹ Given these numbers and Claimants’ own admission, there can be no debate that this was another instance of Mr. Stati blatantly misstating the facts to the Tribunal.

¹²² Miller Lents Report 2009, p.5 (**Exhibit R-349**).

¹²³ Claimants’ First Post-hearing Brief, para. 410.

¹²⁴ Claimants’ First Post-hearing Brief, para. 411.

¹²⁵ Claimants’ First Post-hearing Brief, para. 410.

¹²⁶ Claimants’ First Post-hearing Brief, para. 412.

¹²⁷ As admitted by Claimants gas sales were of limited relevance to the profitability of the Tolwyn field compared to condensate sales. This entails that developments in the gas price equally do not have significant influence on the profitability of the Tolwyn operation.

¹²⁸ Testimony of Mr. Stati, Hearing on Jurisdiction and Liability, Transcript Day 2, p.40, lines 10-16.

¹²⁹ Claimants’ First Post-hearing Brief, para. 412.

¹³⁰ Tristan Oil Ltd., Interim Report For the Nine Months Ended September 30, 2009, F-8 (**FTI First Scope of Review, No. 69**).

¹³¹ Tristan Oil Ltd., Interim Report For the Three Months Ended March 31, 2009, F-8 (**Exhibit R-262**).

3. Claimants stripped KPM and TNG of cash in 2009 and 2010

83 Claimants' allegation that they did not strip KPM and TNG of cash in 2009 and 2010¹³² is pitiful. Claimants essentially rebut their own arguments as they present them.

84 For one, Claimants argue that the USD 72 million in dividends issued by KPM in 2009 and 2010 "*did not result in any cash being paid to the shareholders of KPM*".¹³³ This contention is however wholly irrelevant. Claimants had KPM transfer trade receivables to Ascom, meaning that potential cash inflow to KPM was stopped from occurring. As Deloitte GmbH have pointed out, this equals a cash outflow from an economic point of view.¹³⁴

85 Moreover, Claimants admit that the dividend payment was a conscious decision, allegedly to prevent that funds get seized by the state.¹³⁵ Irrespective of the motive, this is a direct admission that Claimants stripped KPM of cash through the dividend payments.

86 Insofar as Claimants contend that the dividend payment served to repay interest on the Tristan notes,¹³⁶ this is a particular misleading contention and it is denied. Claimants have not proven that any of the USD 72 million distributed as dividends were used to repay interest on the Tristan notes. Quite simply, the sections of the financial statements that Claimants refer to in footnote no. 601 of their First Post-hearing Brief do not relate to the issuance of the USD 72 million dividend whatsoever. With the reference in footnote no. 601, Claimants thus create the impression of an argument where they have none. What is more, there is no reason to assume that a dividend paid to Ascom would serve to satisfy the Tristan noteholders. Under the pledges, Ascom was only obliged to provide to the noteholders dividend payments on the occurrence of an event of default.¹³⁷ However, as Claimants admit themselves, the noteholders did not place Tristan in default at the time.¹³⁸ When asked in direct testimony about the USD 72 million

¹³² Claimants' First Post-hearing Brief, paras. 416 et seqq.

¹³³ Claimants' First Post-hearing Brief, para. 418.

¹³⁴ Deloitte & Touche Supplemental Expert Report, para. 335.

¹³⁵ Claimants' First Post-hearing Brief, paras. 418 et seqq.

¹³⁶ Claimants' First Post-hearing Brief, paras. 419, 421.

¹³⁷ Ascom and Terra Raf Pledge Agreements, Section 6 (**Exhibit C-585**).

¹³⁸ Claimants' First Post-hearing Brief, para. 419.

dividend, Mr. Lungu also never alleged that the money had been used to make payments on the interest accrued under the Tristan notes.¹³⁹

87 If Claimants had indeed wanted to use the amount of USD 72 million for the purpose of paying interest on the Tristan notes, they could, in any event, have simply had KPM pay back its loan to Tristan. This would have been the proper way to ensure the payment of interest to the Tristan noteholders, as Tristan was the party that owed this interest in the first place.

88 At the Final Hearing, Claimants also suggested that the dividends served to repay the Laren lenders and to keep paying KPM's employees.¹⁴⁰ This is an equally unproven contention which is denied.

89 In addition, Claimants try to mislead the Tribunal when they insinuate that the extension of payment terms for their largest customers Stadoil and General Affinities was merely a reaction to the financial troubles of these customers.¹⁴¹ In particular, Claimants try to create a connection between the tight financial situation in the middle of 2009, caused by the decline in prices and other problems outlined above, and the extension of these payment terms.¹⁴² This presentation of the facts is disingenuous, as the extension of the payment terms for Stadoil and General Affinities did not only occur in the middle of 2009. Rather, the payment terms were extended repeatedly and also at the end of 2009,¹⁴³ when, according to Claimants, the market situation had recovered sufficiently for KPM and TNG to operate properly.¹⁴⁴ Thus, Claimants cannot deny that the extensions, which practically worked as loans, stripped KPM and TNG of cash, without any economic consideration forcing Claimants to do so. This is supported not least by the fact that Claimants have to this day not clarified whether Stadoil and General Affinities ever made payments on the trade receivables in question. The fact that Claimants stay silent on this matter must lead to the conclusion that payment never occurred and that cash was thus siphoned off by Claimants.

90 Hence, contrary to Claimants' allegations, the evidence demonstrates that Claimants had indeed abandoned KPM and TNG and only kept the companies on "life support"

¹³⁹ Testimony of Mr. Lungu, Hearing on Jurisdiction and Liability, Transcript Day 1, p.202, line 13 - p.203, line 6.

¹⁴⁰ Claimants' Closing Submission, Final Hearing, Transcript Day 1, p.164, lines 13-23.

¹⁴¹ Claimants' First Post-hearing Brief, para. 417.

¹⁴² Ibid., last sentence.

¹⁴³ Cf. Tristan Oil Ltd. Annual Report FY 2009, p.F-43 (**Exhibit R-37.6**), where it is stated that subsequent to 31 December 2009, payment terms for USD 64 million in trade receivables owed by Stadoil and General Affinities were changed to payable on demand but only USD 18 million were paid back. This shows that payment was voluntarily delayed even beyond the beginning of 2010.

¹⁴⁴ Claimants' First Post-hearing Brief, para. 419.

in order to force the Republic to terminate the contracts, so that Claimants could advance further claims in the present arbitration.

V. The alternative causation case presented by Claimants is fictional

91 In their First Post-hearing Brief, Claimants have presented an alternative causation case according to which it was the actions of the Republic that caused harm to KPM and TNG and their operations. This case is fundamentally different from earlier causation theories presented by Claimants, it is riddled with inconsistencies and in many instances, the “facts” it is based on are plain fiction.

1. Claimants’ new causation case fundamentally differs from Claimants’ earlier causation theories

92 As the Tribunal will remember, the fundamental pillar of Claimants’ causation case throughout these proceedings was the contention that the inspections and investigations initiated in October 2008 had a severe impact on the operations of KPM and TNG. To that end, Claimants’ witnesses made some hugely exaggerated allegations in their written statements according to which the inspections and investigations supposedly “took up most of the time and energy of the in-country management and employees of KPM and TNG”,¹⁴⁵ “greatly interfered with our abilities to carry out necessary and day-to-day business operations”¹⁴⁶, transformed the companies into “companies whose sole function was to answer to requests from various Government officials and to write reports”¹⁴⁷ or caused that “approximately 80% of the accounting and finance staff in particular had to divert their attention away from their normal duties because they were solely devoted to responding to requests from the Financial Police”¹⁴⁸ Claimants themselves contended in earlier submissions that “[t]he number, scope, and intensity of the inspections were so great that they substantially interfered with Claimants’ ability to manage and operate their investments.”¹⁴⁹

93 With their First Post-hearing Brief, Claimants have essentially given up on this previously central part of their claim. Instead, Claimants now focus on the lack of funding of KPM and TNG which Claimants allege to have been caused by the

¹⁴⁵ First Witness Statement of Mr. Pisica, para. 11.

¹⁴⁶ First Witness Statement of Mr. Romanosov, para. 26.

¹⁴⁷ Second Witness Statement of Mr. Stati, para. 15.

¹⁴⁸ Second Witness Statement of Mr. Cojin, para. 13.

¹⁴⁹ Claimants’ Reply on Jurisdiction and Liability, para. 215.

Republic.¹⁵⁰ Apparently, Claimants no longer consider the allegation of harm from the inspections and investigations to be helpful, probably because it was disproven by admissions during the oral testimony of Claimants' own witnesses.¹⁵¹

94 This turnaround in Claimants' argumentation is remarkable, as it proves that Claimants are not trying to present to the Tribunal a true account of the facts. Rather, Claimants argue whatever they find most favourable to their case. The Tribunal should take due account of this when assessing the statements made by Claimants in their submissions as well as the testimony given by Claimants' witnesses – the latter in particular since Claimants themselves no longer rely thereon.

2. No injury to reputation and credit

95 As a replacement for its earlier causation claim based on the inspections and investigations, Claimants now rely predominantly on the INTERFAX press item of 18 December 2008 which, according to Claimants, caused an injury to reputation and credit.¹⁵²

96 Claimants' reliance on this press release is remarkable, foremost because Claimants increased their reliance thereon throughout these proceedings. What fills five pages full of complaints in their First Post-hearing Brief was discussed on little more than half a page in their Reply on Jurisdiction and Liability.¹⁵³ Moreover, when asked during his direct examination at the Hearing on Jurisdiction and Liability what caused the cashflow problems in 2009, Mr. Lungu referenced a variety of circumstances and made a variety of allegations against the state – but he did not mention once the pre-emptive rights waiver issue.¹⁵⁴ This speaks volumes about the sincerity of Claimants' newfound reliance on the so-called “revocation” of the pre-emptive rights waiver. Apparently, Claimants had to realise that their other causation arguments, in particular those based on the inspections and investigations, were failing, so that they had to find a new cause to cry foul. This renders their entire causation argumentation non-credible.

97 With regard to the facts, the Republic maintains that contrary to Claimants' allegations,¹⁵⁵ the INTERFAX press item¹⁵⁶ cannot be attributed to the Republic.

¹⁵⁰ Claimants' First Post-hearing Brief, paras. 346 et seqq.

¹⁵¹ Respondent's First Post-hearing Brief, paras. 71 et seqq.

¹⁵² Claimants' First Post-hearing Brief, paras. 346 et seqq.

¹⁵³ Claimants' First Post-hearing Brief, paras. 346 et seqq.; Claimants' Reply on Jurisdiction and Liability, paras. 228 et seqq.

¹⁵⁴ Testimony of Mr. Lungu, Hearing on Jurisdiction and Liability, Transcript Day 1, p.200, line 10 - p.201, line 22.

¹⁵⁵ Claimants' First Post-hearing Brief, para. 348.

The Republic has already shown¹⁵⁷ that the MEMR did not issue a press release on 18 December 2008¹⁵⁸ and that INTERFAX obtained the information in question from unofficial sources.¹⁵⁹ Conversely, Claimants have not shown that any state official was in any way involved in the publication of this press item.¹⁶⁰

98 In any event, the Republic maintains that the pre-emptive rights waiver issue did not have any proven effect on Claimants' ability to secure financing for their operations. Claimants' entire case to this effect boils down to one potential transaction – the negotiations with Credit Suisse for a bridge loan – and one piece of testimony – that of Mr. Lungu.¹⁶¹ This is clearly insufficient to support Claimants' case.

99 For a start, the mere reference to the Credit Suisse negotiations is patently insufficient. This is only one single transaction, which could have fallen through for any number of reasons. Credit Suisse may have found that there is another opportunity to invest money at a lower risk, they may have changed their company policy relating to risk in light of the financial crisis,¹⁶² they may have at some point identified additional risks in the oil and gas sector in general that they had not seen before¹⁶³ or they may have stepped back from the transaction for any number of other reasons. Claimants' reference to the failure of the negotiations is thus utterly non-conclusive. If Claimants had referred to a number of negotiations with banks which all looked promising prior but all failed after the the INTERFAX press item, such argument would be considered conceivable. However, the reference to one single set of negotiations proves nothing.¹⁶⁴

¹⁵⁶ INTERFAX News Article attached to Email from A. Petrosius to A. Lungu (**Exhibit C-625**).

¹⁵⁷ Respondent's First Post-hearing Brief, paras. 75 et seqq.; Respondent's Rejoinder on Jurisdiction and Liability, para. 750.

¹⁵⁸ Letter from the Secretary's Office of the MOG dated 21 June 2012 (**Exhibit R-265**).

¹⁵⁹ Letter from INTERFAX to the MOG dated 21 June 2012 (**Exhibit R-264**).

¹⁶⁰ Importantly, Claimants cannot rely on Article 7 of the ILC Draft Articles on State Responsibility, as they try to do in footnote no. 497 of their First Post-hearing Brief. Applied in the investment arbitration context, the article requires that an investor prove that a state organ or a person empowered to exercise elements of governmental authority acted in that capacity. Presently, Claimants have not even shown that a state organ or other person acted at all. Moreover, even if this was the case, it is no necessary conclusion that such organ or person then also acted in an official capacity.

¹⁶¹ Claimants' First Post-hearing Brief, paras. 350 et seqq.

¹⁶² There is ample evidence in these proceedings that the financial crisis had a severe influence on the availability of debt financing at the time, cf. Testimony of Mr. Rosen of FTI, Hearing on Quantum, Transcript Day 4, p.171, lines 20-23; Witness Statement of Mr. Seiting, para. 3.2. Moreover, the trading price of the Tristan notes at the time indicates that an interest rate of 15%, as contemplated in the Credit Suisse term sheet, was unrealistic, cf. Respondent's First Post-hearing Brief, para. 77 and Respondent's Rebuttal Closing Submission of 3 May 2013, Slide 22.

¹⁶³ In that regard, it is noteworthy that the Indicative Term Sheet from Credit Suisse dated 5 December 2008 (**Exhibit C-521**) explicitly stated that a business due diligence was to be condition precedent to the purported Credit Suisse loan, cf. p.6.

¹⁶⁴ In that regard, it is denied as unproven that "*quite a lot of work [...] had gone into this deal already by December 5th 2008*", cf. Claimants' Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.27, lines 17-25. The

- 100 This applies all the more since Claimants' whole argument regarding the failure of the Credit Suisse negotiation is based on the testimony of Mr. Lungu.¹⁶⁵ As the Republic has demonstrated in its First Post-hearing Brief as well as in the present submission, the testimony of Mr. Lungu is entirely non-credible because Mr. Lungu has misstated the truth in these proceedings on numerous occasions in an attempt to sway the Tribunal's findings in Claimants' favour.¹⁶⁶ It would thus be entirely inappropriate to rely on his testimony with regard to the Credit Suisse negotiations.¹⁶⁷
- 101 Based on their flawed arguments regarding the Credit Suisse negotiations, Claimants contend that "Claimants would not have needed to enter into the Laren transaction in June 2009 if they had obtained the Credit Suisse financing".¹⁶⁸ Again, they base their argument entirely on the testimony of Mr. Lungu,¹⁶⁹ which is, again, non-credible.
- 102 In addition, Mr. Lungu's testimony is also particularly illogical in this instance. As contemplated in the Indicative Term Sheet, the Credit Suisse loan was set to have a term of seven months.¹⁷⁰ Assuming the Credit Suisse loan would have been concluded in early January 2009, the loan would have been due for repayment in early August 2009. In that case, it is conceivable that the funds from the Credit Suisse loan would have been available for addressing the cash needs in June 2009 – assuming in Claimants' favour that the funds would not have been invested in other ways, for example for business activities in Iraq, as was contemplated at the time.¹⁷¹ However and in any event, the Credit Suisse loan would have needed to be refinanced in August 2009 already. Claimants would thus have needed to turn to financing, likely the "Laren loan sharks", in August 2009 instead of June 2009.
- 103 Claimants objected to this argument at the Final Hearing at the beginning of May, essentially accepting that refinancing would have become necessary, but suggesting

Indicative Term Sheet dated 5 December 2008 (**Exhibit C-521**) is obviously a standard document that could have been prepared in a short time frame, without either side investing much effort into the deal.

¹⁶⁵ Claimants' First Post-hearing Brief, para. 350, referring to Second Witness Statement of Mr. Lungu, para. 7. Claimants' reference to the e-mail exchange between Mr. Petrosius and Mr. Lungu (**Exhibit C-625**) is no proof whatsoever. The exchange only shows that there may have been a call between Mr. Petrosius and Mr. Lungu. As to the contents of this call, Claimants can only reference the non-credible evidence of Mr. Lungu.

¹⁶⁶ Cf. below Part IV.E.I. and Respondent's First Post-hearing Brief, paras. 138 et seqq.

¹⁶⁷ In that regard, it is irrelevant that the Republic did not question Mr. Lungu on the Credit Suisse negotiations, as Claimants contend at Claimants' First Post-hearing Brief, para. 352. Claimants provided very little documentation of the Credit Suisse negotiations as exhibits in this arbitration. Thus, the Republic was in no position to conduct a meaningful cross-examination on the topic.

¹⁶⁸ Claimants' First Post-hearing Brief, para. 353.

¹⁶⁹ Testimony of Mr. Lungu, Hearing on Quantum, Transcript Day 1, p.190, line 23 - p.191, line 1.

¹⁷⁰ Indicative Term Sheet from Credit Suisse dated 5 December 2008, p.2 (**Exhibit C-521**).

¹⁷¹ Testimony of Mr. Lungu, Hearing on Jurisdiction and Liability, Transcript Day 1, p.199, line 7 - p.200, line 9.

that without the INTERFAX press item, Claimants would have been in a position to obtain financing “on commercial terms”.¹⁷² This is a baseless contention. Claimants have not provided a shred of evidence that the markets had recovered sufficiently to assume that credit was available. In particular, while prices had rebounded to some extent from the low point in early 2009, there was still strong volatility and thus uncertainty in the markets.¹⁷³ This made the obtaining of financing particularly difficult even at this time. Moreover, the numerous problems Claimants were fighting at the time, such as the strong drop in demand and the sudden increase in the need for additional capital expenditure,¹⁷⁴ would have made the securing of any loan agreement “on commercial terms” in August of 2009 very unlikely.

104 As a matter of completeness, the Republic denies the unproven contentions made by Claimants regarding the Laren loan,¹⁷⁵ in particular the contention that Laren is no affiliate of Mr. Stati.¹⁷⁶

3. No interference with construction of the LPG Plant

105 Claimants’ contend, based on the testimony of Mr. Broscaru,¹⁷⁷ that the Republic interfered with the construction of the LPG Plant by refusing to renew work permits for non-Kazakh workers.¹⁷⁸ This allegation is denied. First of all, the contention is solely based on the testimony of Mr. Broscaru, who is non-reliable. Mr. Broscaru made numerous statements in his written witness statement to which he could not testify under cross-examination,¹⁷⁹ making him a non-credible witness.

106 Moreover, Claimants and Mr. Broscaru completely fail to substantiate how the alleged non-renewal of work permits affected the construction. There is no statement as to what work could not be done because non-Kazakh workers were allegedly not available. Such non-specific testimony can only be ignored entirely.

107 In any event, the Republic notes that it was under no obligation to extend work permits and that Claimants have never contended that it was. Thus, any alleged non-renewal of work permits is irrelevant for the purpose of this case.

¹⁷² Claimants’ Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.29, line 25 - p.31, line 7.

¹⁷³ The volatility at the time is clearly visible on the Urals Mediterranean oil prices chart provided by Claimants at Claimants’ First Post-hearing Brief, para. 410.

¹⁷⁴ See above Part II, A.IV.2.

¹⁷⁵ Claimants’ First Post-hearing Brief, paras. 353 et seqq.

¹⁷⁶ Claimants’ First Post-hearing Brief, para. 354.

¹⁷⁷ Witness Statement of Mr. Broscaru, paras. 25 et seq.

¹⁷⁸ Claimants’ First Post-hearing Brief, para. 358.

¹⁷⁹ Cf. Respondent’s First Post-hearing Brief, paras. 180 et seqq.

- 108 Claimants further suggest that the Republic interfered because it caused TNG's liquidity position to deteriorate and hindered the taking out of the Credit Suisse loan.¹⁸⁰ This is incorrect. As set out above, these developments were due to circumstances outside of the Republic's influence.¹⁸¹ This is also confirmed by the PwC Due Diligence Report which states clearly that the suspension of construction was due to the absence of funds¹⁸² and that the absence of funds was caused by numerous circumstances for which the Republic is not to be blamed.¹⁸³
- 109 The Republic denies Claimants' allegation that because of the alleged harassment campaign, the decision to suspend construction was appropriate.¹⁸⁴ There was simply no harassment campaign.¹⁸⁵ In order to be able to contend that the suspension decision was reasonable, Claimants would have to prove the existence of a harassment campaign, which they have failed to do.¹⁸⁶
- 110 It is also denied that without the delay in construction, an uplift on the revenue from Tolwyn would have occurred. Due to the lack of demand for gas at the time, the production at Tolwyn was severely curtailed.¹⁸⁷ As a result, there would have been very limited gas available to supply the LPG Plant, so that no significant uplift could have been expected. Importantly, it is not possible to simply produce more gas than is demanded and to flare the excess gas – gas flaring is not allowed in the Republic.
- 111 With regard to the alleged decision by Vitol to retract its investment in the LPG Plant, Claimants' non-credible contentions are denied. The Republic notes that Claimants' contentions are entirely based on the unreliable testimony of Messrs. Stati and Lungu.¹⁸⁸ This is despite the fact that Claimants could have easily provided written proof of their contentions. In any event, even if Vitol withdrew its investment, this would not, as explained above, be attributable to any actions of the Republic. As a consequence, any alleged underfunding due to Vitol's alleged decision to withdraw its investment is not to be blamed on the Republic.¹⁸⁹

¹⁸⁰ Claimants' First Post-hearing Brief, para. 360.

¹⁸¹ See above Part II, A.IV.2.

¹⁸² PwC Due Diligence Report, p.24, third bullet point (**Exhibit R-359**).

¹⁸³ PwC Due Diligence Report, p.17-19 (**Exhibit R-359**).

¹⁸⁴ Claimants' First Post-hearing Brief, para. 361.

¹⁸⁵ See above Part II, H.

¹⁸⁶ See below Part II, H.

¹⁸⁷ See above Part II, A.I.

¹⁸⁸ Cf. Claimants' First Post-hearing Brief, para. 364.

¹⁸⁹ Claimants are thus incorrect when they suggest the opposite, cf. Claimants' Closing Submission, Final Hearing, Transcript Day 1, p. 160, lines 12-23.

4. No interference with the development of Borankol and Tolkyn

- 112 The Republic also objects to Claimants' suggestion¹⁹⁰ that it was actions of the Republic that caused Claimants to reduce the development efforts at the Borankol and Tolkyn fields. As outlined above, numerous circumstances outside of the Republic's influence caused the liquidity situation of the companies to worsen and thus made the curtailing of expenditure necessary.¹⁹¹ In addition, TNG failed to fulfil its annual working program already in 2008,¹⁹² before any effects of the alleged harassment campaign could have occurred. This implies that Claimants intended to curtail expenditure in any event. Potentially, Claimants may have taken this decision after they had learned from their newly engaged reserves engineers Miller & Lents in April 2008 that their previous estimates of recoverable reserves for the Borankol field had been overstated by 300%.¹⁹³
- 113 Irrespective of the cause of the curtailing of expenditure, Claimants are trying to mislead the Tribunal when they suggest that the lack of development efforts "*artificially depressed the production 'curve' at Borankol and Tolkyn*".¹⁹⁴ While it is clear that reduced drilling efforts lead to less production, it is not correct for Claimants to contend (based on Ryder Scott's testimony) that the production rates at Borankol dropped off "*incredibly quickly*" after Claimants' valuation date.¹⁹⁵ This incorrectly insinuates that the reduction in production was larger than the normal decline in production that comes with age and increasing depletion of a field.
- 114 In fact, production from the various Borankol reservoirs had been declining since approximately 2003 already.¹⁹⁶ GCA have studied average normalised well performance for each reservoir unit in the Borankol field. This analysis confirmed that "*there is no adverse change in the decline rate beyond the Claimants' effective date of October, 2008 for any of the reservoir units. [Ryder Scott's] insinuation that well performance deteriorated more strongly beyond the Claimants' effective date is thus baseless.*"¹⁹⁷

¹⁹⁰ Claimants' First Post-hearing Brief, paras. 365 et seqq.

¹⁹¹ See above Part IV, J.

¹⁹² PwC Due Diligence Report, p.25, second bullet point (**Exhibit R-359**).

¹⁹³ Project Zenith – Vendor Due Diligence by KPMG dated 29 August 2008, p.32 (**Exhibit C-69**).

¹⁹⁴ Claimants' First Post-hearing Brief, para. 367.

¹⁹⁵ Testimony of Mr. Latham of Ryder Scott, Hearing on Quantum, Transcript Day 4, p.35, lines 2-20.

¹⁹⁶ GCA Fourth Expert Report, para. 50, Figure 3.3.

¹⁹⁷ GCA Fourth Expert Report, para. 50.

115 It is also not correct, as Claimants contend,¹⁹⁸ that the Republic hindered Claimants from addressing the water production at Tolkyin. In point of fact, it was Claimants who exacerbated gravely the water production by increasing gas production at the end of 2007 without providing for additional wells, contrary to good field development practice.¹⁹⁹

116 Lastly, the Republic notes that Claimants make an utterly illogical argument when they claim that the curtailing of development hindered Claimants from profiting from the production after their own valuation date of 14 October 2008.²⁰⁰ While it is of course correct that a decrease in production occurred, it is not the case that no production occurred. As a result, for the production that occurred, Claimants did earn revenues. Consequently, these monies, which have been siphoned off through dividends and by other means, must be deducted from Claimants' claim.²⁰¹

5. No interference with the exploration of the Contract 302 Area

117 Claimants' contentions on the alleged interference with the exploration of the Contract 302 Properties have become increasingly confusing and contradictory throughout these proceedings. This comes as no surprise, given that Claimants' Contract 302 case never made sense in the first place. In the following, the Republic will respond to Claimants' newest causation arguments:

118 To begin with, Claimants are in direct contradiction with their own experts of Ryder Scott when they allege that "but for Kazakhstan's actions, it is possible that TNG would have penetrated the Reef with the Munaibay No. 1 well before Contract 302 was set to expire on March 30, 2009."²⁰² Memorably, at the Final Hearing at the beginning of May 2013, Mr. Nowicki had stated clearly that based on the depth conversion method he considered best supported by the data and that he had selected from a range of methods,²⁰³ the Munaibay-1 well would not have reached the Interoil Reef.²⁰⁴ That is because the Munaibay-1 well would have needed to be drilled to more than 6,750m of depth while its target depth was only 6,000m.²⁰⁵

¹⁹⁸ Claimants' First Post-hearing Brief, para. 368.

¹⁹⁹ GCA Supplemental Technical Report, para. 50; Testimony of Mr. Goodearl of GCA, Hearing on Quantum, Transcript Day 4, p.17, line 20 - p.18, line 4.

²⁰⁰ Claimants' First Post-hearing Brief, para. 366.

²⁰¹ See below Part IV, J.

²⁰² Claimants' First Post-hearing Brief, para. 375.

²⁰³ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.50, lines 10-12.

²⁰⁴ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.51, lines 22-25.

²⁰⁵ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.51, lines 15-21. Importantly, it is not simply possible to extend a well beyond its proposed target depth. The diameter of a well gets smaller and smaller the deeper a well is drilled (cf. e.g. the plan for the M-3 well, Internal Ascom Memorandum on the Tabył Block,

Thus, contrary to Claimants' statement, it is clear from Mr. Nowicki's testimony that there was never a possibility that Claimants could have penetrated the "Interoil Reef" with the Munaibay-1 well – prior to the end of the contract term or at any other time.²⁰⁶

119 Moreover, even assuming contrary to all experts in this case that the Munaibay-1 well would have penetrated the "Interoil Reef" at its target depth of 6,000m, Claimants could not, in all likelihood, have reached the structure prior to the expiration of Contract No. 302 on 30 March 2009. That is because drilling of the Munaibay-1 well stopped at a depth of 4,700m in the Fall or Winter of 2008²⁰⁷ because the drilling rig used was not capable of dealing with the pressures encountered.²⁰⁸ Claimants would have needed to remove the old rig from the well, move a new rig there (as Claimants allege from Georgia, which requires either ship transport or a rail transport of more than 2,000km), assemble this new rig and drill the well to a depth of 6,000m all in a time span of potentially not more than three months. This is patently unrealistic.²⁰⁹

120 The Republic also maintains that even within an assumed extended contract period until 30 March 2011, it is highly unlikely that Claimants could have discovered the alleged reef.²¹⁰ As stated, Claimants could have continued drilling the Munaibay-1 well all they wanted, they would have never reached the supposed reef structure as the well was too shallow. Moreover, Claimants would have likely also failed to reach the reef with the supposed Munaibay-3 well. As GCA have shown, the alleged soviet-era drilling rig situated in Georgia (the existence of which Claimants have not proven in any event) would not have been capable to safely drill to the depth of the "Interoil Reef",²¹¹ so that this well would have likely failed too.

p.4 (**Exhibit R-382**)). This entails that when the well reaches its target depth, it cannot be extended further and in particular not a further 750m, as would be required according to Ryder Scott.

206 GCA equally found that the Munaibay-1 well would not have reached the "Interoil Reef", cf. GCA Third Expert Report, para. 105.

207 The M-1 well was still being drilled when the Financial Statement For the Nine Months Ended September 30, 2008 (**FTI First Scope of Review Document 69**, p.3) had been published but was stopped by the time of publication of the Financial Statement For the Year Ended December 31, 2008 (**Exhibit R-37.5**, p.4) was made available to investors.

208 Testimony of Mr. Cojin, Hearing on Quantum, Transcript Day 2, p.67, line 22 - p.68, line 10.

209 This is most notably the case because in their application for extension of Contract No. 302, Claimants had submitted a working program which foresaw that it would take from April 2009 the end of 2009 to drill the Munaibay-1 well from 5,200m to 6,000m, cf. Application from TNG to the MEMR dated 14 October 2008 (**Exhibit C-67**).

210 Claimants' allegation at Claimants' First Post-hearing Brief, para. 376 is hence denied.

211 GCA Third Expert Report, para. 209.

- 121 Insofar as Claimants allege that they had the intention to drill to the “Interoil Reef”,²¹² it is most noteworthy that Claimants completely fail to address the draft exploration program they submitted to the MEMR in April of 2009.²¹³ This program foresaw no “ultradeep drilling” to depths of 6,000m or more and clearly did not target the supposed “Interoil Reef”. Importantly, Claimants cannot simply claim that they would have ignored the contents of this program and would have done more exploration work than stated therein. As the 2008 Vendor Due Diligence sets out, it was TNG’s own position that the capital expenditure set out in their exploration programs for the state correctly reflected their own future intentions.²¹⁴ Claimants cannot now claim that they intended to do more than stated in the program when it was TNG’s usual practice to abide by their programs.
- 122 Interestingly, the April 2009 program was submitted after the 3D seismic survey on the Munaibay area had been conducted.²¹⁵ Claimants thus gave up on the “Interoil Reef” once they had acquired additional data on its viability as a prospect. This speaks volumes about their actual conviction to find hydrocarbons within the supposed reef structure at the time.²¹⁶
- 123 Lastly, insofar as Claimants suggest that they had acquired a drilling rig in Georgia for exploration of the “Interoil Reef”, this allegation is denied. Claimants’ submissions to this effect are entirely non-credible. That is because prior to the Hearing on Quantum, Claimants had applied to the Tribunal for leave to submit “[e]vidence that Claimants acquired a deep-drilling rig and began efforts to transport the rig to Kazakhstan in the fall of 2008 (consisting of two 1-page letters, a transportation proposal, and three photographs)”.²¹⁷ The Tribunal denied this request as belated²¹⁸ but allowed Claimants to submit new evidence with their First Post-hearing Brief.²¹⁹ Nonetheless, Claimants did not submit any of the evidence mentioned in their earlier application with their First Post-hearing Brief. Instead,

²¹² Claimants’ First Post-hearing Brief, paras. 369 et seqq.

²¹³ Draft Addendum No. 9 to the TNG Tabyl Subsoil Use Contract dated 30 April 2009 (**Exhibit C-168**).

²¹⁴ Project Zenith – Vendor Due Diligence by KPMG dated 29 August 2008, p.88, second bullet point (**Exhibit C-69**).

²¹⁵ According to Mr. Stati, the 3D seismic survey was finalised in early 2009, cf. Testimony of Mr. Stati, Hearing on Quantum, Transcript Day 2, p.85, line 12.

²¹⁶ Importantly, Claimants cannot contend in that regard that the draft working program they submitted in April 2009 had only “minimal” character. The program as such is binding. Claimants had however the possibility to apply for the addition of exploration activity to the program, cf. Third Expert Report of Professor Ilyassova, paras. 135 et seqq. It stands to reason that any exploration activity that they had not included in April 2009 was not planned by them at the time.

²¹⁷ Claimants’ Letter dated 18 January 2013, p.2, first bullet point.

²¹⁸ Tribunal’s Procedural Order No. 9, Section 2.

²¹⁹ Tribunal’s Procedural Order No. 10, Section 3.1.

Claimants only referred to the testimony of their non-credible witnesses.²²⁰ It is apparent that Claimants' story of the Georgian drilling rig does not add up, given that they first allege to have documents in their possession but then do not submit these documents and instead prefer the submission of unreliable witness testimony.

6. No interference with gas sales

124 It is incorrect that the Republic in any way interfered in the gas sales of KPM and TNG.²²¹ The loss of Kemikal as a customer is in no way attributable to the Republic. As explained above,²²² the PwC Due Diligence Report refers to "Kemikal's liquidity and insolvency" issues as the reason why Kemikal stopped making payments.²²³ Mr. Lungu's testimony²²⁴ that the stops in payment were "inexplicable" is thus blatantly false.

125 In any event, the conduct of Kemikal is not attributable to the Republic. Kemikal is a private company not acting in any kind of governmental capacity. Claimants have never alleged otherwise but have still not provided any legal theory how the conduct of Kemikal as a private company could be attributed to the Republic. In addition, it is denied that Kemikal was ever managed by the state.²²⁵

126 Lastly, insofar as Claimants allege that an interference with the management contributed to the gas sales problems,²²⁶ their argument rings hollow in light of their own witnesses' testimony. In particular Mr. Cojin has testified that the inspections and investigations "could not disturb" the people at TNG who were "very busy with production".²²⁷ Moreover, Claimants' allegations are utterly non-specific. Claimants do not contend that any specific gas sales contracts fell through because of the alleged interference in the ability to manage, they do not refer to negotiations and they do not specify which employees of TNG were allegedly so busy dealing with inspections and investigations that no time for securing contracts was left. Their unsubstantiated contentions are denied.

²²⁰ Claimants' First Post-hearing Brief, paras. 372 et seqq.

²²¹ Claimants' allegations at Claimants' First Post-hearing Brief, paras. 378 et seqq. are thus denied.

²²² See above Part II, A.V.2.

²²³ PwC Due Diligence Report, p.19 (**Exhibit R-359**).

²²⁴ Second Witness Statement of Mr. Lungu, para. 6.

²²⁵ This addresses Claimants' contentions at Claimants' First Post-hearing Brief, paras. 380 et seqq.

²²⁶ Claimants' First Post-hearing Brief, para. 383.

²²⁷ Testimony of Mr. Cojin, Hearing on Jurisdiction and Liability, Transcript Day 3, p.31, lines 7-10.

VI. Implications of the causality arguments

127 At the Final Hearing at the beginning of May 2013, the Tribunal addressed several questions to the parties regarding the implications of the respective causality arguments. In the following, the Republic will expand upon the answers given at the Hearing, in order to more fully address the questions asked.

1. Relationship between the financial difficulties of KPM and TNG and the valuations as of either 14 October 2008 or 21 July 2010²²⁸

128 Assuming liability of the Republic, the financial difficulties of the companies as outlined above have various consequences for the present case. First of all, it is the Republic's case that as a consequence of these financial difficulties, Claimants ultimately abandoned KPM and TNG. By admittedly stopping their investment programs and by stopping the payment of wages, Claimants ultimately forced the Republic to terminate the subsoil use contracts, thus giving them the last piece necessary for bringing the investment arbitration claim they had been planning to bring since early 2009. Claimants' claim thus already fails as a matter of causality.

129 Even assuming causality, the financial difficulties have major implications for the present case.

130 First of all, as further outlined below, it is the Republic's position that Claimants' valuation date of 14 October 2008 is completely untenable. While the Republic maintains that this means that Claimants' case must be thrown out for lack of proof alone, it means at a minimum that the financial difficulties play an important role for any alternative valuation of Claimants' assets. Should the Tribunal elect to base its damages findings on an alternative valuation date in 2009, it will have to take into account KPM's and TNG's financial difficulties as well as the market conditions that caused them in the ensuing calculations. As Mr. Gruhn of Deloitte GmbH explained, any valuation date comes with its own dataset different from any other dataset, entailing differences in the oil and condensate prices and in the applicable gas sales contracts.²²⁹ Further differences relate to the discount rate, as the market assess risks different at different valuation dates (discount rates are particularly high when the markets perceive risks more strongly, such as during the financial crisis), to taxes,²³⁰ and to many other issues. For example, it stands to reason that

²²⁸ Question by Mr. Haigh, Final Hearing, Transcript Day 2, p.81, lines 7-16 and p.82, lines 3-5.

²²⁹ Testimony of Mr. Gruhn of Deloitte GmbH, Hearing on Quantum, Transcript Day 4, p.145, line 11 - p. 146, line 1.

²³⁰ Conferencing of the Valuation Experts, Hearing on Quantum, Transcript Day 4, p.146, line 6 - p.147, line 11.

Claimants' own capex assumptions as of April 2009, and as reflected in the 2009 Miller & Lents Report, must be taken into account when valuing the assets.

131 Thus, a valuation at e.g. the beginning of 2009 cannot ignore the drop in prices that occurred in the meantime. In that regard, it is irrelevant whether the deterioration in market conditions was temporary, as Claimants contend.²³¹ The fact that prices rebounded to some extent over the course of 2009 was not known at the time when prices were especially low and price futures did not accurately reflect the later rebounding. Both experts in this arbitration agree that hindsight in valuation must be avoided,²³² so that a later rebounding of prices cannot be taken into account.

132 Second, KPM's and TNG's financial difficulties entailed specific consequences, in particular the issuance of USD 111.1 million in new Tristan notes and the entering into the Laren loan, as well as the suspension of construction of the LPG Plant, of the drilling of new wells on Borankol and Tol kyn and of exploration on the Contract 302 Area. As the financial difficulties were caused not by the Republic, but rather by numerous circumstances outside of the Republic's influence, these specific consequences all cannot be blamed on the Republic and thus have to be taken into account in a but-for-scenario valuation of the Claimants' alleged damages. This entails *inter alia* that:

- (a) the additional debt of USD 111.1 million in new Tristan notes and under the Laren loan must be deducted from Claimants' damage claim;²³³
- (b) the additional costs for restarting the construction of the LPG Plant must be fully deducted as capital expenditure when assessing the value of the plant – as was done by GCA and Deloitte GmbH²³⁴ but not by FTI;²³⁵
- (c) any alleged negative consequences of a reduced drilling program on Borankol and Tol kyn on the value of the fields must be reflected in the valuation (and also as valid reasons for the termination of the subsoil use contracts as a matter of liability); and
- (d) any alleged reduction of exploration activity on the Contract 302 Area due to lack of funds must be held against Claimants when assessing the possibility to

²³¹ Claimants' Rebuttal Closing Submissions, Final Hearing, Transcript Day 2, p.86, line 12 and p.89, lines 5-9.

²³² Conferencing of the Valuation Experts, Hearing on Quantum, Transcript Day 4, p.143, line 21 - p.145, line 10.

²³³ For more detail on the deduction of debt cf. below Part IV, K.

²³⁴ GCA Third Expert Report, para. 62.

²³⁵ FTI Consulting Expert Report, para. 16.6.

discover the reef within the contract period or the hypothetical extended contract period.

2. Relevance of the Republic's actions within the causality arguments²³⁶

133 The Republic maintains that all of its actions subject to Claimants' complaints were legal as a matter of international and domestic law. To the extent that the Tribunal should conclude differently, the Republic concurs that actions that were to be deemed illegal would have to be taken into account when assessing causality and would have to be excluded when determining damages (as part of the so-called but-for-scenario).

134 In any given case, it can of course be difficult to discern the consequences of state action on the one hand and external circumstances and Claimants' own failings on the other. However, this does not entail, as Claimants contend, that the Tribunal should simply choose the earliest valuation date imaginable.²³⁷ Rather, the valuation date must be determined as of the moment the state action, taken cumulatively, amounts to an expropriation.²³⁸ It is then necessary to conduct a thorough valuation as of that date. Claimants have not done so, meaning that they have not proven damages.

²³⁶ Question by Mr. Haigh, Final Hearing, Transcript Day 2, p.81, line 17 - p.82, line 2 and p.82, lines 6-8.

²³⁷ Claimants' Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.85, line 19 - p.86, line 4 and p.88, lines 21-25.

²³⁸ See below Part IV, M.1.

B. Claimants could not sell KPM and TNG because the companies were unattractive targets and because of the severe deterioration in the economic environment

- 135 In its First Post-hearing Brief, the Republic demonstrated that KPM and TNG were no interesting targets for acquisition.²³⁹ The markets were mostly uninterested and any interest that may have existed on behalf of some market players at some point vanished upon closer review of the companies. In particular, responses in the indicative bidding process were disappointing.²⁴⁰ Moreover, KNOC lost interest because of insufficient gas sales contracts.²⁴¹ Finally, TOTAL E&P conducted a thorough review of the “Interoil Reef” prospect, found the prospect not attractive enough and subsequently decided against going through with the deal.²⁴²
- 136 Thus, Claimants’ failure to sell the companies had nothing to do with the Republic’s actions but rather was caused by the lack of commercial attractiveness of KPM and TNG. In particular, there were no talks between TOTAL E&P or KNOC on the one side and Kazakh authorities on the other side in which TOTAL E&P or KNOC were dissuaded from purchasing KPM and TNG, as Claimants and their witnesses like to allege.²⁴³
- 137 Claimants have provided little in their First Post-hearing Brief and at the Final Hearing that would require a reply from the Republic on these matters. The few points raised will be addressed in the following.

I. TOTAL E&P

- 138 Claimants’ main contention regarding TOTAL E&P’s ultimate lack of interest in purchasing KPM and TNG is that Mr. Chagnoux was allegedly not a credible witness.²⁴⁴ This allegation is laughable.

²³⁹ Respondent’s First Post-hearing Brief, paras. 79 et seqq.

²⁴⁰ Respondent’s First Post-hearing Brief, paras. 81 et seqq.

²⁴¹ Respondent’s First Post-hearing Brief, paras. 95 et seqq.

²⁴² Respondent’s First Post-hearing Brief, paras. 98 et seqq.

²⁴³ Cf. e.g. Second Witness Statement of Mr. Stati, paras. 22 et seq.; First Witness Statement of Mr. Lungu, paras. 57, 60; Testimony of Mr. Lungu, Hearing on Jurisdiction and Liability, Transcript Day 1, p.219, line 18 - p.220, line 15.

²⁴⁴ Claimants’ First Post-hearing Brief, para. 390.

- 139 First of all, contemporaneous communications from TOTAL E&P all support Mr. Chagnoux' testimony.²⁴⁵ Claimants hence did not and could not point to a shred of evidence that Mr. Chagnoux gave false testimony. In fact, Claimants presented only one single argument against the correctness of Mr. Chagnoux's testimony, namely that Mr. Chagnoux was allegedly not able to explain TOTAL E&P's disappointment with existing field production and the potential for additional reserves at Borankol.²⁴⁶ However, this contention simply ignores Mr. Chagnoux's convincing explanation of TOTAL E&P's disappointment. Mr. Chagnoux stated very clearly that TOTAL E&P are always looking for situations in which they can "add value" or "increase the reserves" for the assets they are purchasing and that in the case of KPM and TNG, they were not able to find such additional value.²⁴⁷
- 140 Inable to contradict Mr. Chagnoux's perfectly correct testimony, Claimants try to counter his evidence with entirely desperate contentions. Claimants' argument that a business professional would give false testimony in a multi-million dollar arbitration because of "*hurt feelings*"²⁴⁸ is downright ridiculous. Equally, their suggestion that Mr. Chagnoux "*has a very cozy relationship with Kazakhstan and its counsel*"²⁴⁹ is incorrect and not substantiated in any way. In particular, it is not correct that Mr. Chagnoux provided confidential information to the Republic.²⁵⁰ Claimants are simply throwing mud at a witness whose testimony they consider dangerous to their case.
- 141 In addition, it should be noted that Mr. Chagnoux's credibility is underscored in particular by his very forthright testimony about TOTAL E&P's strategic decision to gain access to the data room by putting value on the worthless LPG Plant.²⁵¹ The fact that Mr. Chagnoux immediately admitted to TOTAL E&P being to a certain

²⁴⁵ Cf. Email from Total to Ascom dated 16 June 2009 (**Exhibit C-710**), E-mail by Mr. Mallard to TOTAL E&P colleagues dated 15 July 2009 (**Exhibit R-360**) and TOTAL E&P Tabyl Block Presentation (**Exhibit R-378**). These e-mails reflect very well TOTAL E&P's concerns about the "Interoil Reef" which ultimately led TOTAL E&P to abstain from going through with the deal (cf. Letter from Total E&P to Renaissance Capital dated 24 July 2009 (**Exhibit C-296**)). Mr. Chagnoux described these considerations in detail at the Hearing on Jurisdiction and Liability, cf. Transcript Day 4, p.7, line 21 - p.10, line 12 and p.32, line 8 - p.33, line 13.

²⁴⁶ Claimants' First Post-hearing Brief, para. 392.

²⁴⁷ Testimony of Mr. Chagnoux, Hearing on Jurisdiction and Liability, Transcript Day 4, p.8, lines 5-18, p.26, lines 12-21, p.28, lines 6-22.

²⁴⁸ Claimants' First Post-hearing Brief, para. 390.

²⁴⁹ Claimants' First Post-hearing Brief, para. 391.

²⁵⁰ Claimants make this allegation at para. 391 of their First Post-hearing Brief. However, the information in question was no longer confidential when TOTAL E&P provided it to the Republic. That is because the confidentiality agreements regarding the Project Zenith bidding process had a duration of three years and expired in the summer of 2011, cf. Testimony of Mr. Chagnoux, Hearing on Jurisdiction and Liability, Transcript Day 4, p.24, lines 12-13 and Testimony of Mr. Suleimenov, Hearing on Jurisdiction and Liability, Transcript Day 4, p.163, lines 17-20.

²⁵¹ Testimony of Mr. Chagnoux, Hearing on Jurisdiction and Liability, Transcript Day 4, p.21, lines 13-18.

extent dishonest when making that bid shows perfectly clearly that he was a credible and forthright witness.²⁵²

142 Lastly, it should be noted that the Republic also did not hinder the sale to TOTAL E&P by preventing TNG from proving the resources in the “Interoil Reef”.²⁵³ TNG itself failed to prove these reserves, as it failed to conduct a full and thorough 3D seismic analysis that covered all flanks of the supposed reef.²⁵⁴ Moreover, TNG also failed to drill a well to the “Interoil Reef”. The Munaibay-1 well broke down at 4,700m in the Fall or Winter of 2008²⁵⁵ and it could not have reached the “Interoil Reef” in any event because its target depth was too shallow, as Ryder Scott now admit.²⁵⁶ Claimants thus could have never made a discovery on the “Interoil Reef” prior to the expiration of the contract period at the end of March 2009.²⁵⁷ It was hence TNG’s own fault that the alleged potential of the “Interoil Reef” could not be proven to TOTAL E&P.

II. KNOC

143 Regarding KNOC’s decision not to purchase KPM and TNG, it is first of all noteworthy that Claimants now agree that it was the lack of gas sales contracts that caused KNOC’s lack of interest.²⁵⁸

144 This is a fundamental reversal to Claimants’ earlier position. So far in this arbitration, Claimants have argued that it were talks with the Kazakh authorities that deterred KNOC from purchasing KPM and TNG.²⁵⁹ Importantly, this contention had been based on the testimony of Mr. Stati and Mr. Lungu.²⁶⁰ Claimants’ giving up on this argument shows how reliable they themselves consider the testimony of their own witnesses compared to that of an actual serious businessman like Dr. Kim of KNOC.

²⁵² Claimants’ argument at Claimants’ First Post-hearing Brief, para. 390, is thus incorrect.

²⁵³ Claimants’ First Post-hearing Brief, paras. 393 et seq.

²⁵⁴ GCA Third Expert Report, paras. 143 et seq.

²⁵⁵ The M-1 well was still being drilled when the Financial Statement For the Nine Months Ended September 30, 2008 (**FTI First Scope of Review Document 69**, p.3) had been published but was stopped by the time of publication of the Financial Statement For the Year Ended December 31, 2008 (**Exhibit R-37.5**, p.4) was made available to investors.

²⁵⁶ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.51, lines 22-25.

²⁵⁷ See below Part II, A.V.5.

²⁵⁸ Claimants’ First Post-hearing Brief, para. 395.

²⁵⁹ Claimants’ Reply on Jurisdiction and Liability, para. 405.

²⁶⁰ Second Witness Statement of Mr. Stati, para. 23; First Witness Statement of Mr. Lungu, para. 60.

145 Moreover, Claimants' conclusions from the fact that KNOC attached great importance to the existence of gas sales are incorrect. Contrary to Claimants' unsupported suggestions, TNG' inability to secure a gas export contract is in no way to be blamed on the Republic.²⁶¹

III. KMG EP

146 Claimants' arguments regarding the involvement of KMG EP in the present case are entirely confused and illogical. On the one hand, Claimants argue that KMG EP was complicit in the alleged state harassment campaign.²⁶² However, on the other hand, Claimants treat KMG EP as a purely commercial entity for the purpose of their arguments on the alienability of the shares in KPM and TNG.²⁶³

147 This is entirely inconsistent. If Claimants were indeed correct and there had been a state harassment campaign in which KMG EP took part, it would be clear that as soon as KMG EP had taken over KPM and TNG, all the problems associated with those companies (e.g. the pre-emptive rights waiver issue) would have vanished and KMG EP would not have had to consider these problems at all. In that case, Claimants could not argue that these problems deterred KMG EP from going through with a purchase. Conversely, if Claimants maintain that KMG EP abandoned the purchase opportunity for commercial reasons, they cannot allege that KMG EP was involved in or was supposed to profit from the harassment campaign. Claimants cannot have it both ways: They cannot treat KMG EP as a state company that was to profit from state harassment and at the same time argue that KMG EP has to be treated as a purely commercial player whose commercial considerations allow meaningful conclusions about the effects of the state's actions on KPM and TNG.

148 In any event, a simple reality check demonstrates that it was not the state's actions that led to KMG EP's decision to not go through with a deal. As the RBS valuation showed, KMG EP assumed in the base case an enterprise value between USD 473 million and USD 751 million for KPM and TNG (taking into account potential synergy effects).²⁶⁴ At the same time, KPM and TNG were liable for USD 531.1 million in noteholder debt with an interest of 10.5%. In other words: There was a considerable likelihood that the equity value of KPM and TNG was

²⁶¹ Cf. below Part II, A.V.6 and Respondent's First Post-hearing Brief, paras. 592 et seqq.

²⁶² Claimants' First Post-hearing Brief, para. 326.

²⁶³ Claimants' First Post-hearing Brief, paras. 386 et seqq.

²⁶⁴ RBS Valuation Report dated 31 July 2009, p.34 et seq. (**Exhibit R-374**).

negative even disregarding any other liability but the noteholder debt. Thus, KMG EP's decision not to purchase KPM and TNG was perfectly reasonable even disregarding any of the other liabilities which Claimants (incorrectly) blame on the Republic's actions.²⁶⁵

149 As a result, the Republic did not hinder a potential purchase of KMG EP. In particular, neither the pre-emptive rights waiver issue nor the sequestration of shares played a role.²⁶⁶

IV. Burden of proof

150 Claimants also contend that “Kazakhstan seeks to hold Claimants to an impossibly high burden of proof” regarding the alleged interference with the sale of KPM and TNG.²⁶⁷ Even disregarding the incorrect terminology – Claimants presumably mean the “standard of proof” and not the “burden of proof” – Claimants’ contention is simply incorrect. Claimants’ have not shown one single legal authority in support of lowering the standard of proof in such situations. Moreover, even if they had, this would be irrelevant. Through the convincing testimony of Messrs. Chagnoux and Suleimenov as well as of Dr. Kim, the Republic has proven beyond doubt that various circumstances outside of the Republic’s influence caused the buyers not to go through with a purchase. Both Mr. Chagnoux of TOTAL E&P and Dr. Kim of KNOC in fact testified that their companies had not looked at legal issues at all and had instead refrained from the purchase for purely commercial reasons.²⁶⁸ Equally, as demonstrated above, KMG EP assumed a negative value for KPM and TNG irrespective of any actions of the Republic. Claimants’ standard of proof argument is thus irrelevant. None of the causes of complaint mentioned by Claimants, such as the sequestration of shares or the pre-emptive rights waiver issue, played a role in those companies’ decisions.

²⁶⁵ Mr. Suleimenov testified that KMG EP decided not to go through with a purchase precisely because the equity value of KPM and TNG was negative, cf. Witness Statement of Mr. Suleimenov, para. 2.25.

²⁶⁶ Claimants thus err when they argue that these were relevant issues for potential buyers of KPM and TNG, cf. Claimants’ First Post-hearing Brief, para. 385.

²⁶⁷ Claimants’ First Post-hearing Brief, para. 396.

²⁶⁸ Testimony of Mr. Chagnoux, Hearing on Jurisdiction and Liability, Transcript Day 4, p.6, line 22 - p.7, line 18, p.28, line 23 - p.29, line 7, p.29, lines 13-19; Testimony of Dr. Kim, Hearing on Jurisdiction and Liability, Transcript Day 6, p.15, lines 13-19, p.18, lines 13-17, p.19, lines 11-14.

C. The Republic's Inspections and Investigations led to a criminal charge against Mr. Cornegruta

151 The Republic has demonstrated that the charges brought against Mr. Cornegruta following inspections and investigations were carried out procedurally and substantively in accordance with Kazakh law. This has been amply demonstrated by the witness testimony of Mr. Turganbaev and Mr. Rakhimov and in the Republic's extensive submissions.²⁶⁹

152 To support their opportunistic claims against the Republic (in particular their hugely inflated damages claim), it is imperative for Claimants to argue that no sooner had President Nazarbayev issued an instruction to "thoroughly check" KPM and TNG in October 2008,²⁷⁰ than the Financial Police acted in concert with other government ministries to bring about Claimants' demise.²⁷¹ But Claimants have failed to demonstrate to the requisite level of proof:

- (a) that the Financial Police did anything wrong in the way that they inspected and investigated the suspected crime; or
- (b) that there was anything discriminatory or out of the ordinary with the inspections or investigations of KPM or TNG; or
- (c) that the financial police had any role in interfering with inspections and investigations leading to Mr. Cornegruta's arrest.

153 Therefore, there is simply no proof that the criminal charge was premeditated, nor that the inspections and investigations by the Financial Police were improper or unordered.

154 Claimants criticise the Republic for repeatedly asserting that the investigations were lawful. There is no more elaborate story than this to be construed out of the events leading to Mr. Cornegruta's arrest. The Claimants' further submissions do not change this.

²⁶⁹ First and Second Witness Statements of Mr. Turganbaev and Mr. Rakhimov, Respondent's Statement of Defence, Sections 26 and 27; Respondent's Rejoinder on Jurisdiction and Liability, Section VII; Respondent's First Post-hearing Brief, Section D, paras. 185-242.

²⁷⁰ Note by President Nazarbayev dated 14 October 2008 (**Exhibit C-8**); Respondent's Rejoinder on Jurisdiction and Liability, paras. 272-279.

²⁷¹ Claimants' Reply on Jurisdiction and Liability, para. 245; Respondent's Rejoinder on Jurisdiction and Liability, paras. 441-445.

I. Thorough process of evidence gathering in the inspections phase²⁷²

155 Claimants persist in their baseless allegations that the Financial Police “*fabricated*” and “*concocted*” the crime against Mr. Cornegruta.²⁷³ In response, the Republic must repeat and reiterate the properly sequenced approach taken by the Financial Police.

156 The letter from the President of Moldova²⁷⁴ triggered the President’s order to check Mr. Stati’s companies. The goal of the inspection that Mr. Turganbaev, a Senior Inspector in the Financial Police,²⁷⁵ was involved in was to “*confirm or rebut the allegations regarding the criminal activity*”²⁷⁶ mentioned in the letter. This is a different function from investigation: It principally involves collecting information. As Mr. Turganbaev highlighted in his written evidence:

*“There are essential distinctions between inspections and investigations within the Financial Police which the Claimants seek to blur and which should be clarified.”*²⁷⁷

157 The MEMR’s inspection from 4 to 11 November 2008, which the Financial Police (within their powers to do so) organised and attended,²⁷⁸ provided some information regarding the licences held by KPM and TNG. The KPM report states (and it is not disputed by Claimants) that:²⁷⁹

“VIII. The Additional information

According to the reply of the Republic of Kazakh Agency on Regulation of Natural Monopolies, Open Company ‘Tolkynneftegaz’ and Open Company ‘Kazpolmunaj’ have licences by the following form of activity ‘operation of industrial explosive and mining facilities, elevating constructions, and also coppers, vessels and the pipe lines working under pressure, drillings for oil and gas’ ejected by the Department of Energy and Mineral Resources of the Republic of Kazakhstan.

²⁷² Respondent’s Rejoinder on Jurisdiction and Liability, paras. 446-448; Respondent’s First Post-hearing Brief, paras. 189-216.

²⁷³ Claimants’ First Post-hearing Brief, Section III.B.1.

²⁷⁴ President Voronin’s Letter to President Nazarbayev dated 6 October 2008 (**Exhibit C-77**).

²⁷⁵ Second Witness Statement of Mr. Turganbaev, para. 1.1.

²⁷⁶ Second Witness Statement of Mr. Turganbaev, para. 3.1.

²⁷⁷ Second Witness Statement of Mr. Turganbaev, para. 2.2.

²⁷⁸ Second Witness Statement of Mr. Turganbaev, para. 4.1; Article 9 of the Law of the RoK No. 336 dated 4 July 2002 “On Financial Police” (**Legislation Exhibit 38**).

²⁷⁹ Claimants’ First Post-hearing Brief, para. 156.

*The above-stated licences issued to these legal entities by the Department of Energy and Mineral Resources of the Republic of Kazakhstan, do not give them the right to use the main gas pipelines, oil pipelines and oil-products pipelines.*²⁸⁰

158 Claimants have alleged repeatedly that the Financial Police forced the insertion of the second of these two paragraphs into the KPM report (and similar paragraphs in the TNG report).²⁸¹ Only Mr. Cojin’s testimony supports this allegation. Most recently, in oral testimony, he stated that *“one of the officers of the Financial Police was very active and insisted that we should include this second sentence which describes the situation that we don’t have a licence or licences for operating main pipelines.”*²⁸²

159 However, the credibility of his testimony has been called into doubt: His recollection of the events around the time of the MEMR’s inspection is, at best, poor, if not entirely fictional. In any event, both now and at the time, he agrees with the statement in the reports. His allegation that the Financial Police forced his hand is not to be believed.²⁸³ Based on *no better evidence than this*, Claimants have argued throughout this case that the Financial Police manufactured a crime against Claimants.

160 Still based solely on Mr. Cojin’s unsound evidence, Claimants now seek to argue that the Financial Police manipulated the MEMR at this inspection, stating that *“it did not take the Financial Police long to identify which agency it could manipulate.”*²⁸⁴ Claimants’ continuing slurs in their First Post-hearing Brief as to the proprietary of the Financial Police’s actions should be ignored.

161 Mr. Turganbaev was also given access to the file of licences which contained correspondence between KPM and the ARNM from June 2008. Notably, he stated in oral evidence that:

“When I received the reply from the Agency for Regulation of Natural Monopolies, I obtained from the executor and inspector

280 Report on the results of the unscheduled audit of performance of the legislation of the Republic of Kazakhstan about oil, subsoil and subsoil use, and contract obligations of KPM, Section VIII (**Exhibit C-86**).

281 Report on the results of the unscheduled audit of performance of the legislation of the Republic of Kazakhstan about oil, subsoil and subsoil use, and contract obligations of TNG, Section VIII (**Exhibit C-87**).

282 Testimony of Mr. Cojin, Hearing on Jurisdiction and Liability, Transcript Day 3, p.26, lines 8-12.

283 First Witness Statement of Mr. Cojin, para. 4, Testimony of Mr. Cojin, Hearing on Jurisdiction and Liability, Transcript Day 3, p.25, lines 8-14, p.31, lines 11-16; Respondent’s First Post-hearing Brief, paras. 147-159 and 194-196.

284 Claimants’ First Post-hearing Brief, para. 154.

controlling this LLP the licence file, and there I saw in this file the correspondence between the Agency for Natural Monopolies and Kazpolmunay. Starting from June that year, there was quite a voluminous correspondence on the need to obtain a licence for main pipeline by KPM."²⁸⁵

- 162 Those letters that Mr. Turganbaev reviewed demonstrate that Mr. Cornegruta, on behalf of KPM, had written to the MEMR in May 2008 for the re-issue of KPM's licence for the performance of certain activities. In this application, the operation of trunk pipelines was not mentioned; other activities, notably the exploitation of storage of gas, **were** mentioned.²⁸⁶ The letters also showed that on 26 May 2008, the MEMR responded to KPM explaining the changes in the licensing system and setting out which activities were now regulated by the ARNM.²⁸⁷
- 163 Finally, the record showed that on 13 June 2008 KPM applied to the ARNM (whom they knew licensed the operation of trunk pipelines) for a reissue of its licence, listing the sub-activities for which it needed a licence, which included the exploitation of facilities for oil and gas and the operation of trunk pipelines.²⁸⁸ On any objective reading, this licence application specifically and deliberately requested a licence for the exploitation of facilities for the storage of gas and oil and the operation of trunk pipelines (and excluded other activities).²⁸⁹
- 164 Following requests for clarification from the ARNM by Mr. Turganbaev, the ARNM explained by way of a letter dated 14 November 2008 that the ARNM had not issued a licence to KPM for the operation of "*trunk gas, oil and oil product pipelines*" to KPM (or TNG).²⁹⁰ Moreover "[t]he state licences issued by the MEMR RK to these legal entities previously do not allow them to carry out the activity related to use of *trunk gas, oil and oil product pipelines*." Indeed, one of those existing licences related to the exploitation and production of hydrocarbons under the contract.²⁹¹ The other, renewed in 2005 and again in 2008, related to the exploitation of industrial or

²⁸⁵ Testimony of Mr. Turganbaev, Hearing on Jurisdiction and Liability, Transcript Day 5, p.95, lines 10-17.

²⁸⁶ Letters from KPM to the MEMR dated 5 May 2008 (**Exhibit C-662**).

²⁸⁷ Letter the MEMR to KPM dated 26 May 2008 (**Exhibit C-545**).

²⁸⁸ Letter from KPM to the ARNM dated 13 June 2008 (**Exhibit C-115**).

²⁸⁹ Respondent's Statement of Defence, paras. 25.10-25.14; Respondent's First Post-hearing Brief, paras. 205-208.

²⁹⁰ Respondent's Rejoinder on Jurisdiction and Liability, paras. 464-466; Letter from Financial Police to Agency for Regulation of Natural Monopolies dated 12 November 2008 (**Exhibit C-441**); Letter from the Agency for Regulation of Natural Monopolies to the Financial Police dated 18 November 2008 (**Exhibit C-88**).

²⁹¹ Contract No. 305 dated 30 March 1999 (clause 1.13 and 1.14 and licence, Appendices 1 as updated) (**Exhibit C-45**).

inflammable mining constructions and clearly did not pertain to or authorise the operation of trunk pipelines.²⁹²

165 Mr. Turganbaev also collated information from the Tax Committee regarding the financial status of those companies. This information was relevant to ascertaining whether a crime or a civil liability had been committed.²⁹³

166 In their First Post-hearing Brief, Claimants allege that the Financial Police approached the Tax Committee for information “*armed with the facially innocuous and uncontested confirmation that KPM and TNG did not have main pipeline licences.*”²⁹⁴ Presumably, the confirmation that they refer to consists of the two statements in the MEMR’s reports. Claimants thus insinuate that Mr. Turganbayev had no further fact supporting the inspection at that point. This is simply incorrect. The fact that Mr. Turganbaev did not simply rely on the MEMR inspections but that he had also reviewed pre-existing correspondence between KPM and the MEMR before approaching the Tax Committee and the ARNM has been conspicuously *omitted* by Claimants in their First Post-hearing Brief. This is particularly evident at paragraph 159 where Claimants quote selectively from Mr. Turganbaev’s testimony, leaving out Mr. Turganbaev’s substantive responses to the questions, in other words, the parts that do not suit their case.²⁹⁵

167 In the same paragraph 159, Claimants allege that the Tax Committee was contacted before any Kazakh authority had concluded that any of KPM’s pipelines were trunk, to calculate the amount of a penalty against KPM for the unlicensed operation of a trunk pipeline. Claimants draw significance from the fact that Mr. Turganbaev agrees with this statement. Claimants go on to state that Mr. Turganbaev’s oral testimony demonstrates that the inspections were pre-ordained. This is an incorrect extrapolation from Mr. Turganbaev’s testimony.

168 In fact, Claimants’ counsel hounded Mr. Turganbaev for an answer to the following question:

“Q. Had any governmental agency in Kazakhstan determined that KPM operated a main pipeline before you instructed the tax

²⁹² Licence issued to KPM dated 5 August 2005 (**Exhibit C-83**), Licence issued to KPM dated 29 May 2008 (**Exhibit C-472**).

²⁹³ Second Witness Statement of Mr. Turganbaev, paras. 5.4 and 5.5 and Respondent’s Rejoinder on Jurisdiction and Liability, para. 469.

²⁹⁴ Claimants’ First Post-hearing Brief, para. 158.

²⁹⁵ Claimants’ First Post-hearing Brief, para. 159.

committee to calculate the amount of income earned from operation of that pipeline; yes or no?”²⁹⁶

169 After lengthy cross-examination, Mr. Turganbaev stated clearly that the answer to this question was “*No. no.*”²⁹⁷ Claimants’ counsel went on to ask:

“You should have determined whether or not KPM in fact operated a main pipeline before issuing instructions to calculate the amount of money earned by KPM through a main pipeline?”²⁹⁸

170 Mr. Turganbaev was equally clear in this answer:

“No. I can say unambiguously no. Because this was following up different versions in the course of pre-investigation, and since I had letters confirming they had no licence for a main pipeline, this was sufficient grounds for me to order this expert examination. There was enough corroborating documentation both from the Ministry of Energy and from the Agency for Regulation of Natural Monopolies.”²⁹⁹

171 The above extracts show that Mr. Turganbaev did indeed agree that no Kazakh authority had concluded whether the pipelines KPM held were trunk or not at this stage.

172 In fact, this is also clearly shown from the written contemporaneous evidence. In discussing the Financial Police’s request to the Tax Committee, Claimants refer to an “*Order from the Financial Police to the Tax Committee dated 17 November 2008.*”³⁰⁰ Reviewing the authorisation, it is clear that at this stage of the investigation (mid November 2008), all that had been established are two non-contentious facts: Firstly that a pipeline (which is described here by its physical characteristics) was being operated by KPM and secondly, that KPM had no licences from the operation of a trunk pipeline licence. The Order states:

²⁹⁶ Testimony of Mr. Turganbaev, Hearing on Jurisdiction and Liability, Transcript Day 5, p.94, lines 16-19.

²⁹⁷ Testimony of Mr. Turganbaev, Hearing on Jurisdiction and Liability, Transcript Day 5, p.96, line 4.

²⁹⁸ Claimants’ counsel, Hearing on Jurisdiction and Liability, Transcript Day 5, p.96, lines 5-8.

²⁹⁹ Testimony of Mr. Turganbaev, Hearing on Jurisdiction and Liability, Transcript Day 5, p.96, lines 9-16.

³⁰⁰ Resolution of the Financial Police (**Exhibit C-89**). It should be noted that, this document is in fact an internal authorisation by the Financial Police in relation to next steps that the Financial Police should take. Evidence of the actual request by the Financial Police to the Tax Committee is not on the record. Claimants made this same error in relation to the Order from the Financial Police forwarded to the Forensic Expert under cover of a letter, see Respondent’s Rejoinder on Jurisdiction and Liability, paras. 551-553.

“In the course of the inspection, it has been established that Kazpolmunay LLP has been operating an oil and gas pipeline on the territory of 90.22 ha and an oil pipeline of 17,896 m long. as evidenced by certificate on state registration of rights to immovable property No. 2005/02-05/335 of July 14, 2005. Pursuant to reply of the Agency of the Republic of Kazakhstan for Regulation of Natural Monopolies No. 11-11-08/11897 of November 14, 2008, Kazpolmunay LLP does not have a state licence for operation of trunk gas-, oil- and oil products pipelines.”³⁰¹

173 Thus, there is no argument that Mr. Turganbaev contacted the Tax Committee before it had been determined that the pipeline was trunk. What is strongly contested is that there was anything untoward about this and that Mr. Turganbaev’s testimony demonstrates that the criminal charge was premeditated.

174 Mr. Turganbaev was simply gathering the relevant information together before Mr. Rakhimov’s department took up the next stage of the investigation. Part of that information was the income derived from the operation of the pipeline since, if it were determined that the pipeline had been operated without a license, the amount of income derived from that activity would have become important to determine whether criminal liability was the consequence.³⁰²

175 Importantly, Mr. Turganbayev had no role in deciding whether a criminal investigation should be initiated.³⁰³ At the end of the inspections phase, he handed the file over the Mr. Rakhimov, the chief inspector of the Financial Police.

176 In any case, what remains clear is that Claimants have again failed to demonstrate premeditated conduct by the Financial Police.

II. There were reasonable grounds for opening investigation and further evidence was properly procured

177 Claimants again allege that Mr. Rakhimov initiated the investigation with no evidence that the pipeline was trunk.³⁰⁴ Claimants’ counsel went to considerable

³⁰¹ Resolution of the Financial Police (**Exhibit C-89**).

³⁰² Article 190(2)(b) of the Kazakh Criminal Code requires income on an especially large scale as the basis for criminal liability, cf. **Exhibit R-58**.

³⁰³ Second Witness Statement of Mr. Turganbaev, para. 6.1.

³⁰⁴ Claimants’ First Post-hearing Brief, para. 168.

lengths when trying to demonstrate this in the cross-examination of Mr. Rakhimov. In so doing, Claimants have again sought to contort the process validly followed by the Financial Police in its investigations. However, Claimants' efforts are simply pointless. It is accepted that the investigations phase started in December 2008 without a conclusive finding that the pipeline was trunk.³⁰⁵ What is contested are the conclusions Claimants try to derive therefrom.

178 The Republic has shown that the decision to open an investigation on 15 December 2008 was, in accordance with Kazakh law, based on reasonable suspicions that KPM operated a main pipeline without a licence.³⁰⁶

179 The evidence reviewed was in the pre-investigations file which, as Mr. Rakhimov listed in written and oral testimony, included: 1) letters from KPM and TNG to the MEMR requesting the reissue of a licence, 2) a letter from KPM to ARNM requesting the reissue of a licence, 3) a geological committee report, 4) a letter from ARNM confirming that KPM and TNG held no licences for trunk pipelines, 5) an expert review based on a similar pipeline, and 6) the design documentation for the pipelines.³⁰⁷ Against this background, Claimants had no legitimate expectation not to be investigated given the weight of evidence giving rise to the suspicion.³⁰⁸ Accordingly the order stated that the Financial Police was:

*“1. To initiate the criminal case under Article 190 Part 2 item “b” CC RK involving the illegal entrepreneurial activity carried out by Kazpolmunai LLP and to accept it for examination.
2. To inform the stakeholders about this ruling.
3. To send a copy of the resolution to the supervisory prosecutor.”*³⁰⁹

180 In order for the investigators to discharge of their duties under Kazakh law, any matter must be investigated fully, in accordance with Section 24(1) of the Criminal Procedure Code.³¹⁰ This investigation process included searches at KPM's and

³⁰⁵ Testimony of Mr. Rakhimov, Hearing on Jurisdiction and Liability, Transcript Day 5, p.20, lines 19-25, p.21, line 1.

³⁰⁶ Respondent's Statement of Defence, Section 26; Respondent's Rejoinder on Jurisdiction and Liability, paras. 475-494; Respondent's First Post-hearing Brief, paras. 217-242.

³⁰⁷ Second Witness Statement of Mr. Rakhimov, paras. 3.5-3.8 and Testimony of Mr. Rakhimov, Hearing on Jurisdiction and Liability, Transcript Day 5, p.24-25.

³⁰⁸ Respondent's First Post-hearing Brief, para. 239.

³⁰⁹ Order Initiating Criminal Proceedings dated 15 December 2008 (**Exhibit C-632**), Article 25 of the Criminal Procedure Code (**Legislation Exhibit 1a**); Second Witness Statement of Mr. Rakhimov, para. 3.1; Respondent's Rejoinder on Jurisdiction and Liability, Section C.VII.4; Respondent's Post-hearing Brief, Section D. IV and paras. 218-221.

³¹⁰ Article 24(1) Criminal Procedure Code (**Legislation Exhibit 1a**).

TNG's offices in December 2008, February and May 2009. This included witness interviews of Mr. Cojin and Mr. Cornegruta, all carried out in accordance with the Criminal Procedural Code. It also entailed the collection of documentation regarding the companies, their incorporation and their financial status.³¹¹ At this stage, they were not investigated as potential defendants in any crime, but simply as witnesses.³¹²

181 Finally, it included an examination of the pipeline. The purpose of the investigation was clarified by Mr. Rakhimov:

*“The purpose of the inspection was to specify the process of production, refining and further transportation of hydrocarbon material. Another purpose was to make sure that the pipelines match the documents describing their construction, placement and other physical features.”*³¹³

182 Mr. Rakhimov procured further clarification from the MEMR (the authority competent to licence trunk pipelines prior to 2008) regarding the KPM pipeline³¹⁴ and on 13 February 2009, he received the reply from the MEMR stating that the MEMR were not able to provide a legal analysis of whether the pipelines were trunk or not.³¹⁵

183 Claimants now scrutinise the information provided by the MEMR to Mr. Rakhimov. They assert that the Financial Police “*ran into trouble*” when it got an answer it did not like from the MEMR. As has already been established, prior to the letter dated 13 February 2009, the MEMR had issued a letter dated 4 February 2009.³¹⁶ But the MEMR retracted the letter of its own accord, and reissued its message explaining that the previous letter had not been reviewed by the MEMR's legal department. In the letter dated 13 February 2009, the MEMR went to provide its own views as to how the definition of a “*trunk pipeline*” in Article 1 of the Law on Oil should be interpreted. Moreover, the MEMR indicated that the view of an expert was needed in

³¹¹ Respondent's Rejoinder on Jurisdiction and Liability paras. 477-480 and 483, Second Witness Statement of Mr. Rakhimov, paras. 4.1, 4.3 to 4.4, and 4.9; Article 25 of the Criminal Procedure Code (**Legislation Exhibit 1a**).

³¹² Respondent's First Post-hearing Brief, paras. 222-225.

³¹³ Respondent's Rejoinder on Jurisdiction and Liability, para. 481, Second Witness Statement of Mr. Rakhimov, para. 4.5.

³¹⁴ Third Witness Statement of Mr. Rakhimov, para. 3.1.

³¹⁵ Third Witness Statement of Mr. Rakhimov; Letter from the MEMR to the Financial Police dated 13 February 2009 (**Exhibit 4 to Third Witness Statement of Mr. Rakhimov**).

³¹⁶ Answer from the MEMR to the Financial Police, 4 February 2009 (**Exhibit C-719**), Respondent's First Post-hearing -Brief, paras. 229-230.

order to properly assess the question the Financial Police had asked. It specifically stated that:

*“The Ministry, however, notes that the foregoing is the view of the Ministry and may not be used as the basis of any decision. As a result, in the Ministry’s view, in order to determine the circumstance that is material to the case being heard, it is necessary to schedule an appropriate expert review, since, pursuant to Chapter 32, Article 240(1) of the Code of Criminal Procedure of the Republic of Kazakhstan, an expert review shall be scheduled in instances where circumstances that are material to a case may be determined as a result of a study of the case file conducted by an expert on the basis of specialized scientific knowledge.”*³¹⁷

184 Notably, Claimants do not go as far as to assert that Mr. Rakhimov had some hand in retracting this letter, despite considerable pressure by Claimants’ counsel to this effect in cross-examination. This allegation would have been untenable since Mr. Rakhimov testified indisputably that this is not the case. In oral testimony, he said:

*“No, I did not ask the Ministry of Oil and Gas or Ministry of Energy and Mineral Resources to withdraw this letter; I never said so.”*³¹⁸

185 Instead, Claimants now simply say that:

*“the **Financial Police** reversed its position on whether the MEMR was a ‘competent’ authority to render an opinion on the matter.”*³¹⁹
(emphasis added)

186 However, this allegation remains peculiar (if somewhat unclear), since Mr. Rakhimov has already established that he had no hand in the MEMR’s actions. In fact, there was nothing untoward in this chain of correspondence. As Mr. Rakhimov highlighted, the far more suspicious issue regarding this sequence of correspondence which remains to be clarified by Claimants is how it came to be that the Claimants have a copy of the 4 February 2009 letter. This was an internal

³¹⁷ Third Witness Statement of Mr. Rakhimov; Letter from the MEMR to the Financial Police dated 13 February 2009 (**Exhibit 4 to Third Witness Statement of Mr. Rakhimov**).

³¹⁸ Testimony of Mr. Rakhimov, Hearing on Jurisdiction and Liability, Transcript Day 5, p.49, lines 7-9.

³¹⁹ Claimants’ First Post-hearing Brief, para. 171.

government document, which had been retracted and therefore was *not* included in the criminal file which Mr. Cornegruta would later have reviewed. Mr. Rakhimov has commented in written testimony:

*“I also do not know how the Claimants have obtained a copy of it.”*³²⁰

187 The Republic has explained fully its concerns regarding the Claimants’ access to inter-governmental documents at Part V of its First Post-hearing Brief.

188 In any event, by 13 February 2009, Mr. Rakhimov had already procured an opinion from an expert authorised to give such an opinion pursuant to Article 243 of the Civil Procedure Code.³²¹ That expert opinion was procedurally and substantively appropriate.³²²

189 Only when it had become clearer that a crime or offence had been committed, did the process of identifying the key personnel involved in the potential offence start.³²³ So, in April 2009, four months after the initiation of the criminal investigation in December 2008, Mr. Cornegruta was detained under Articles 132 - 134 of the Criminal Procedural Code and was officially named as a potential defendant to proceedings on 20 April 2009.³²⁴

190 Lastly, Mr. Rakhimov also sought out a further expert opinion regarding the income of KPM which was delivered on 18 May 2009.³²⁵

191 Following all of this, in late June 2009, and after excluding certain potential crimes that were not adequately established,³²⁶ the file was transferred to the Western Prosecutor’s office for prosecution of the charge against Mr. Cornegruta.³²⁷

³²⁰ Third Witness Statement of Mr. Rakhimov, para. 4.2.

³²¹ Order from the Financial Police to the Ministry of Justice dated 9 February 2009 (**Exhibit C-109**); Letter from the Financial Police to the forensic examination department dated 9 February 2009 (**Exhibit R-362**); Expert Opinion dated 13 February 2009 (**Exhibit C-110**); Respondent’s Rejoinder on Jurisdiction and Liability, paras. 546-560, Respondent’s First Post-hearing Brief, paras. 226-228.

³²² Respondent’s Rejoinder on Jurisdiction and Liability, paras. 556-560, Respondent’s First Post-hearing Brief, paras. 259-260, Second Witness Statement of Mr. Kravchenko, para. 11.12, Witness Statement of Mr. Baymaganbetov.

³²³ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 485-489; Second Witness Statement of Mr. Rakhimov, paras. 7.1-7.2.

³²⁴ Resolution on the Institution of Criminal Proceedings and Commencement of Proceedings dated 20 April 2009 (**Exhibit R-243**); Second Witness Statement of Mr. Rakhimov, para. 7.5, Resolution to indict as defendant dated 25 April 2009 (**Exhibit 1 to Second Witness Statement of Mr. Rakhimov**), Respondent’s Post-hearing Brief, para. 230; Respondent’s Rejoinder on Jurisdiction and Liability, paras. 490-494.

³²⁵ Expert Report No. 1537 of the Ministry of Justice (**Exhibit C-184**).

³²⁶ Resolution of the Financial Police not to open an investigation dated 18 May 2009 (**Exhibit R-242**).

³²⁷ Indictment of Mr. Cornegruta dated 27 June 2009 (**Exhibit C-454**); Respondent’s Rejoinder on Jurisdiction and Liability, paras. 490-494.

192 The inspections and investigations started in November 2008 and were not finally concluded until June 2009. The Republic has demonstrated beyond reasonable doubt that the inspections and investigations were properly sequenced.

III. Claimants concede their evidence was not properly procured

193 In their First Post-hearing Brief, Claimants assert that the expert was “*hand-picked*”.³²⁸ Claimants simply have no evidence for this allegation. Mr. Baymaganbetov was the only expert that was selected through the proper channels. This is more than can be said for those who support Claimants’ view that the KPM Pipeline was a field one.

194 Claimants also now say that the evidence he relied upon was “*hand-picked*” by the Financial Police:

*“Most tellingly, the Financial Police decided upon the materials that Mr. Baymaganbetov would use for his review. Early in this proceeding, Kazakhstan attempted to hide the fact that Senior Inspector Turganbayev provided all the materials for Mr. Baymaganbetov to use in preparing his report.... However, Mr. Turganbayev admitted during the October 2012 Hearing that, in fact, he met with Mr. Baymaganbetov in February 2009, after his role in the case had supposedly ended, in order to provide him with the only materials he would use to prepare his ‘expert’ opinion.”*³²⁹ (emphasis added)

195 As the Republic already acknowledged in the Rejoinder on Jurisdiction and Liability submitted in August 2012, Mr. Turganbayev met with Mr. Baymaganbetov to hand over the materials that he had gathered in the pre-investigation and that would be needed for the expert opinion.³³⁰ There was nothing unusual about this and the Republic has not “*attempted to hide*” this fact. This is simply another baseless allegation.

196 Moreover, as the Republic has already explained,³³¹ Mr. Baymaganbetov was entitled to seek out as much further information as he needed. He did not need any

³²⁸ Claimants’ First Post-hearing Brief, para. 181.

³²⁹ Claimants’ First Post-hearing Brief, para. 182-187.

³³⁰ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 554.

³³¹ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 546-560, Respondent’s First Post-hearing Brief, paras. 226 -229.

more information than he was given. As Mr. Rakhimov clarified in the Hearing on Jurisdiction and Liability: *“the expert was given all the materials of the case, and he selected what was necessary and he requested from me what was necessary. I think it was sufficient for him to make the required examination.”*³³² That said, if the expert had thought otherwise, he could have requested further documents. As Mr. Rakhimov highlighted: *“If these documents were insufficient, then the examining expert or expert body should request additional materials.”*³³³ The four so-called expert opinions were not shown to Mr. Baymaganbetov because they would have potentially affected the independence of his decision.³³⁴

197 In their first Post-hearing Brief, Claimants persist in suggesting that the time that Mr. Baymaganbetov took to come to his decision regarding the KPM pipeline was too short.³³⁵ This is extremely surprising. As the Republic has already established, there was nothing untoward about the opinion taking three days.³³⁶ Claimants’ own evidence supports this.

198 Mr. Idrisov worked for the MES prepared a letter from the MES that stated that the KPM pipeline was a field one.³³⁷ This letter was later revoked by the MES, indeed by Mr Idrisov himself.³³⁸ This was entirely proper and unsurprising since the MES has no authority to issue licences in respect of trunk pipelines or to even comment on the issue.³³⁹

199 However, Claimants rely on this letter as evidence that the KPM pipeline was a field one.³⁴⁰ As Claimants note in their First Post-hearing Brief at paragraph 172, Mr. Idrisov also testified on behalf of Mr. Cornegruta in his trial. Since Claimants rely on Mr. Idrisov’s evidence, it is worth understanding more about his role. Firstly, it is evident from the trial transcript that Mr. Idrisov knew both Mr. Cornegruta and

³³² Testimony of Mr. Rakhimov, Hearing on Jurisdiction and Liability, Transcript Day 5, p.66, lines 9-13.

³³³ Claimants Reply Memorial on Jurisdiction and Liability, para. 309, Testimony of Mr. Rakhimov, Hearing on Jurisdiction and Liability, Transcript Day 5, p.63, lines 2-4.

³³⁴ Respondent’s First Post-hearing Brief, para. 227.

³³⁵ Claimants’ Reply Memorial on Jurisdiction and Liability, para. 309; Claimants’ First Post-hearing Brief, para. 187.

³³⁶ Respondent’s Rejoinder on Jurisdiction and Liability, para. 555; Witness Statement of Mr. Baymaganbetov, Section 4.

³³⁷ Letter from the Ministry of Emergency Situations to KPM, 19 November 2008 (**Exhibit C-90**).

³³⁸ Letters from MES to KPM and TNG dated 13 May 2009 (**Exhibit C-93**).

³³⁹ Respondent’s Statement of Defence, para. 26.12; Letter № 11-2/1813 from the Ministry of Emergency Situations of the Republic of Kazakhstan to Emergency Situations Department of Mangystau Region and the state enterprise National Science Research Centre for Industrial Security Problems (**Exhibit R-189**).

³⁴⁰ Claimants’ Reply Memorial on Jurisdiction and Liability, paras. 283 and 172.

Mr. Cojin personally (from inspections of KPM and TNG).³⁴¹ Secondly, he worked for the MES. He described their role, which exclusively pertains to:

*“[e]nsuring industrial safety and prevention of emergency situations at organizations, participation in the work and state committees when accepting facilities into services with respect to their industrial safety, participation in the committees for the accreditation of physical and legal entities regarding the effectuated works and the verifying that the workers of the hazardous industrial facilities know the safety instructions; issuing the acts on the results of inspections and acts with recommendations for companies upon the end of inspection with respect to the industrial safety at the hazardous industrial facilities in RK, etc.”*³⁴²

200 In other words, Mr. Idrisov is competent regarding industrial safety concerns. He also gave some insight into his role at the MES which was to “*check the conformity of the construction to the project documentation*”, and comment on “*observance of norms for industrial safety.*”³⁴³

201 Claimants’ own version of the trial transcript reveals that it took merely one day for Mr. Idrisov to come to his view. As he said in the hearing:

*“While preparing the answer, I studied regulatory legal acts and namely the RK Law ‘On Oil’, the construction standards and rules for trunk pipelines and oil product pipelines. After studying the regulatory legal acts, **on the same day** I prepared the answer that the pipelines in exploitation by ‘Kazpolmunay’ and ‘Tolkânneftegaz’ are not trunk pipelines”*³⁴⁴ (emphasis added)

202 It is patently clear that Mr. Isridov had no qualifications to classify pipelines, that he was not independent from either KPM or TNG, and that the basis on which KPM asked Mr. Isridov to determine the classification of the KPM Pipeline is unclear. Moreover, he made his determination as to the classification of the pipeline within one day only. By contrast, Mr. Baymagnabetov was appointed by the Ministry of Justice, pursuant to a request by the Financial Police. He is qualified to and

³⁴¹ Claimants’ version of the Hearing Minutes from Mr. Cornegruta’s Trial, p.51 (**Exhibit C-704**).

³⁴² Claimants’ version of the Hearing Minutes from Mr. Cornegruta’s Trial, p.51 (**Exhibit C-704**).

³⁴³ Claimants’ version of the Hearing Minutes from Mr. Cornegruta’s Trial, p 52 (**Exhibit C-704**).

³⁴⁴ Claimants’ version of the Hearing Minutes from Mr. Cornegruta’s Trial, p. 51 (**Exhibit C-704**).

experienced in the forensic examination of the construction of pipelines.³⁴⁵ It is difficult to see how Claimants can genuinely criticise Mr. Baymaganbetov's expert opinion in these circumstances and at the same time hold up Mr. Isridov as a more competent alternative.

203 The reality is that Claimants must now fabricate untenable arguments because their initial arguments have simply fallen away. In their Statement of Claim, Claimants stated that KPM and TNG "*promptly sought expert opinions to context the charge that their reclassified field gathering lines were 'main' pipelines*",³⁴⁶ claiming that "*Numerous Expert Opinions Concluded that KPM's and TNG's Field Pipelines Were not Main Pipelines*."³⁴⁷ Claimants relied on "opinions" from 5 government bodies or consultants which it said that KPM and TNG sought, in support of their assertion that KPM's pipeline was not a trunk pipeline:

- (a) Opinion of the Kazakh Scientific Research and Design Institute of Oil and Gas;³⁴⁸
- (b) Scientific Research and Design Institute of Oil and Gas Industry of NIPI Neftegaz;³⁴⁹
- (c) National Scientific and Research Centre on Industrial Safety Issues of the MES;³⁵⁰
- (d) Russian Science and Research Institute for the Construction and Operation of Pipelines and Energy Facilities;³⁵¹ and
- (e) Mr. Suleymenov, the Director of the Institute of Private Law of the Kazakh Law University of the National Academy of Science.³⁵²

³⁴⁵ Witness Statement of Mr. Baymaganbetov, para. 1.3.

³⁴⁶ Claimants' Statement of Claim, paras. 98-105.

³⁴⁷ Claimants' Statement of Claim, para. 97.

³⁴⁸ Letter No. 005-08-02 from the Kazakh Institute of Oil and Gas of the National Oil Company KazMunaiGas to KPM (**Exhibit C-99**) and Letters No. 004-08-02 from the Kazakh Institute of Oil and Gas of the National Oil Company KazMunaiGas to TNG (**Exhibit C-100**).

³⁴⁹ Letter from the Kazakh Scientific, Research, and Design Institute of Oil and Gas of NIPI Neftegaz to TNG (**Exhibit C-101**) and Letter from the Kazakh Scientific, Research, and Design Institute of Oil and Gas of NIPI Neftegaz to TNG (**Exhibit C-102**).

³⁵⁰ Report from the National Scientific and Research Center on Industrial Safety Issues of the Ministry of Emergency Situations of Kazakhstan for KPM (**Exhibit C-103**) and Report from the National Scientific and Research Center on Industrial Safety Issues of the Ministry of Emergency Situations of Kazakhstan for TNG (**Exhibit C-104**).

³⁵¹ Expert report from the Russian Science and Research Institute for the Construction and Operation of Pipelines and Energy Facilities for KPM (**Exhibit C-105**) and Letter and Advice Note from the National Scientific and Research Center on Industrial Safety Issues of the Ministry of Emergency Situations of Kazakhstan for KPM (**Exhibit C-107**).

³⁵² Legal Opinion of Mr. Suleymenov (**Exhibit C-108**).

- 204 As explained in the Statement of Defence,³⁵³ there were multiple problems with these so-called “expert opinions”. Firstly, Claimants have not evidenced KPM’s and TNG’s requests for these opinions. It is therefore impossible to divine the scope of the request that was put to them. Secondly, there is no guarantee that any of these bodies were independent of Claimants. Indeed, NIPI Neftegas designed the pipeline, MES signed off on the construction of the pipeline, and Mr. Suleymenov wrote the amendments to the Law on Oil which is heavily under criticism by the Claimants in this arbitration.³⁵⁴ Thirdly, none of these bodies were competent to classify pipelines or to provide guidance on the law since their opinions were purely technical, and contained no qualified legal analysis of the issues.
- 205 But most crucially, it is apparent than none of these “experts” were appointed in accordance with Kazakh law procedure, as set out in Article 243 of the Criminal Procedure Code.³⁵⁵ Being aware of this, it is perhaps not surprising then that Claimants have had to back-peddle from their previous depiction of the facts. Significantly, their First Post-hearing Brief refers to “statements” made by the different bodies: There is no longer any reference to “opinions”.³⁵⁶
- 206 Yet, in spite of the fact that they implicitly accept that these letters were not “expert opinions” in any true sense, they still place significance on the fact that these statements by Kazakh agencies and industry specialists were ignored by the Financial Police.³⁵⁷ They *were* ignored: But not before Mr. Rakhimov had thoroughly reviewed and considered the nature of the evidence and declared it inadmissible.³⁵⁸
- 207 The Claimants’ misdemeanours that have created confusion in order to distract from their own shortcomings and / or deliberate non-compliance with Kazakh law. In any case, the “opinions” / “statements” were wrong. This is addressed further below.

IV. Obligation to apply for a licence always lay with Claimants

- 208 It is increasingly apparent that in submission, Claimants seek to shift responsibility away from their own failings by falsely alleging that the Republic has transgressed

³⁵³ Respondent’s Statement of Defence, Section 28.

³⁵⁴ Decision of the Working Group on the commissioning of KPM’s pipeline, 4 March 2002 (**Exhibit C-469**); Expert Report of Professor Suleymenov, p. 3.

³⁵⁵ Article 243 of the Criminal Procedure Code (**Legislation Exhibit 24**).

³⁵⁶ Claimants’ First Post-hearing Brief, para. 172.

³⁵⁷ Claimants’ First Post-hearing Brief, para. 173.

³⁵⁸ Resolution on inadmissibility of certain materials as evidence, 18 May 2009 (**Second Witness Statement of Mr. Kravchenko, Exhibit 2**).

its own procedural law. In fact, it is Claimants who have repeatedly sought to undermine and disregard Kazakh law. This has been shown very clearly in relation to the purported “expert opinions” procured by KPM and TNG. Rather than allow Kazakh procedural law to take its course, Claimants peppered the Financial Police with irrelevant and incorrect letters in the hope that they might sway the Financial Police from their duties.

209 Claimants hold themselves out as having ample knowledge of Kazakh law. Mr. Condorachi, a Moldovan lawyer, explained in the Hearing on Jurisdiction and Liability, that his Kazakh law expertise comes from the similarities between Kazakh and Moldovan law, the law in which he was actually trained.³⁵⁹

210 As has been well-documented, the requirement for a licence for the operation of a trunk pipeline arises under Article 12 of the Law on Licensing 2007. By decree, the authority competent to issue licences for trunk pipelines was the ARNM.³⁶⁰

211 It was always Claimants’ responsibility to procure the relevant licences for the operation of its pipelines;³⁶¹ moreover, ARNM itself lacks resources to police licence holders and is under no obligation to do so.³⁶² As Mr. Akmetov has explained in written evidence, the procedure is simple and the application process is not burdensome.³⁶³ It is even a relatively cheap licence.³⁶⁴ Claimants have repeatedly glossed over this point in their submissions. Worse still, they now seek to make light of the obligation. In oral closings, Claimants’ counsel described a failure to procure such a licence the most “*minor administrative violation imaginable.*”³⁶⁵ However, the duty and the failure to comply with the duty are serious issues. By analogy, a driving licence is not costly, however, the responsibilities of driving a car are serious ones which, if breached, can have serious consequences. As Mr. Akhmetov has explained:

³⁵⁹ Testimony of Mr. Condorachi, Hearing on Jurisdiction and Liability, Transcript Day 2, p.128, lines 15-16 and lines 22-25, p.129, lines 1-21, Witness Statement of Mr Condorachi, para. 5.

³⁶⁰ Witness Statement of Mr Akhmetov, Section 2; Art. 12 of the Law on Licensing No 214 (**Exhibit R-366**).

³⁶¹ Testimony of Mr. Akhmetov, Hearing on Jurisdiction and Liability, Transcript Day 6, p.37, line 20 - p.39, line 3; Witness Statement of Mr. Akhmetov, paras. 2.4, Expert Report of Professor Didenko, Section IV, Respondent’s Rejoinder Memorial on Jurisdiction and Liability, para. 467, Respondent’s Post Hearing Brief, paras. 202-211.

³⁶² Respondent’s Rejoinder on Jurisdiction and Liability, paras. 462 and 590.

³⁶³ Witness Statement of Mr. Akhmetov, Section 3.

³⁶⁴ Around USD 110, cf. Testimony of Mr. Akhmetov, Hearing on Jurisdiction and Liability, Transcript Day 6, p.41, lines 20-23.

³⁶⁵ Claimants’ Closing Submissions, Final Hearing, Transcript Day 1, p.145, line 14.

*“Licensing of such activities is required in order to provide for national security, law enforcement, environmental protection, and safeguarding of the property, life and health of citizen.”*³⁶⁶

212 As was evident from the file that Mr. Turganbaev took over and the information that Mr. Turganbaev and Mr. Rakhimov sought out, KPM and TNG were separate companies with separate licences authorising the exploitation and production of oil and gas on the territories set out in the licence.³⁶⁷ The contract of sale and services between KPM and TNG dated 1 June 2003 clearly shows that the two companies were separate legal entities, that they operated as separate legal entities, and they took the benefits of their separate legal status.³⁶⁸

213 In 2002, after Claimants took control of the two separate companies, KPM and TNG, Claimants designed and constructed a pipeline system joining the operation of the two separate companies. Claimants assert that *“the Mangystau Region Department for Emergency Situations, the Fire Safety Supervising Agency, the State Sanitary Surveillance Department, the Ministry of Environmental Protection for the Mangystau Region, the State Inspection for Architecture and Construction, with a representative of the design institute, approved the design project, and, in 2002, authorized the commissioning of KPM’s 18-kilometer pipeline.”*³⁶⁹ To evidence of these technical sign-offs, Claimants rely on Mr. Romanosov’s witness testimony and the Decision of the Working Group, which Mr. Romanosov chaired. This document is a purely technical document which at most, sets out the technical characteristics of the KPM Pipeline and concludes that:

*“To CONSIDER the oil pipeline of Borankol field up to the commodity-raw material base on the Opornaya station ACCEPTED for operation.”*³⁷⁰

214 The Republic neither accepts nor denies that the KPM Pipeline received all relevant commissioning, certification and sign-offs. Neither is it disputed that KPM had licences in respect of the operation of hazardous materials. However, what is significant is that there is nothing regarding the classification of the KPM Pipeline in

³⁶⁶ Witness Statement of Mr. Akhmetov, para. 2.5.

³⁶⁷ Contract No. 305 issued pursuant to the License for the right to use subsoil, series MG No. 309-D (oil) (**Exhibit C-45**) and Contract No. 210 issued pursuant to the License for the right to use subsoil, series MG No. 242-D (**Exhibit C-52**).

³⁶⁸ Supplement 3 to Contract 305 (**Witness Statement of Mr. Latifov, Exhibit 12**).

³⁶⁹ Second Witness Statement of Mr. Romanosov, para. 13; Claimants’ Reply on Jurisdiction and Liability, para. 272.

³⁷⁰ Decision of the Working Group on the commissioning of KPM’s pipeline (**Exhibit C-469**).

this certification document, or exploration and production licences in the Contract Area and for certain activities such as the operation of hazardous facilities.³⁷¹

215 As set out above, Claimants applied for a trunk licence, but their application was incomplete.³⁷² In the following, Claimants chose not to procure a licence for the pipeline, knowing full well their duties to do so. The consequences of that choice played out in the form of a criminal prosecution against KPM's general director.

216 Claimants knew who the competent authorities were in respect of licensing trunk and, for that matter, non-trunk pipelines. More importantly, they knew what their duties were. And yet they chose not to make an application for a trunk pipeline licence.

217 Complaints that the licensing laws were confusing or that there was a lack of transparency in the licensing regime that belatedly appeared in Claimants' submissions have no legitimate basis.³⁷³ Even if Claimants establish that they *did not* know or that they were confused, it would have been very easy for them to seek clarification. As Mr. Akhmetov and Mr. Kravchenko highlighted in oral testimony, and as supported by Kazakh legislation, the GPO was always on hand to answer any questions regarding the licensing system.³⁷⁴ They never asked anyone for guidance as to whether they needed a trunk pipeline licence or not.

218 Against this background and as set out in the Republic's previous submissions, it is abundantly clear that Claimants failed in their obligations to make an application for a trunk pipeline licence when they knew that they should have done.³⁷⁵ In summary, as set out in the Respondent's First Post-hearing Brief:

- (a) the Claimants knew that they had a duty to apply for a licence for the operation of pipelines;
- (b) they did apply for a licence from the MEMR and, subsequently from the ARNM for licences *specifically* in relation to the operation of trunk pipelines;
- (c) they failed to provide the proper paperwork for such a licence;

³⁷¹ Licence dated 29 May 2008 (**Exhibit 472**); Licence issued to KPM dated 5 August 2005 (**Exhibit C-83**). This was reissued from the licence issued in 2002 and 2005 (**Exhibit C-43**).

³⁷² Letter from KPM to the ARNM dated 13 June 2008 (**Exhibit C-115**).

³⁷³ Claimants' Opening Presentation, Hearing on Jurisdiction and Liability, Transcript Day 1, p.118, lines 15-19.

³⁷⁴ Testimony of Mr. Akhmetov, Hearing on Jurisdiction and Liability, Transcript Day 6, p.44, lines 4-8; Testimony of Mr. Kravchenko, Hearing on Jurisdiction and Liability, Transcript Day 4, p.43, lines 9-15; Respondent's Statement of Defence, para. 25.13; Law of the Republic of Kazakhstan "On Prosecutor's Office" No. 2709 dated 21 December 1995 (as amended on 22.07.2011) (**Exhibit R-126**); Respondent's First Post-hearing Brief, paras. 212-216.

³⁷⁵ Respondent's Rejoinder on Jurisdiction and Liability, paras. 459-466, 580-586, Respondent's First Post-hearing Brief, paras 198-216, Witness Statement of Mr. Akhmetov.

- (d) the ARNM told them that they had to provide different paperwork to apply;
and
- (e) Claimants never completed the application procedure, knowing that they needed to.³⁷⁶

³⁷⁶ Respondent's First Post-hearing Brief, para 202.

D. Trial found Mr. Cornegruta guilty and recovery was sought from KPM

I. Legal definition of “trunk pipeline” is supported by Claimants’ expert

219 A key pillar of Claimants’ allegations of harassment by the Republic is that the classification of the KPM pipeline by the court of Aktau as “trunk” was incorrect. The Republic’s position is that the correctness of the Kazakh courts in respect of a matter of Kazakh law is not a matter to be scrutinised by an international tribunal in a claim under the ECT. In any event, the Claimants forfeited its opportunities to appeal these decisions through the Kazakh legal system. That said, in summary of the Republic’s previous submissions, the Republic maintains that the decision was correct and, moreover that the finding of criminal activity by Mr. Cornegruta under Section 190(2)(b) of the Criminal Code was the logical consequence.³⁷⁷

220 As to the classification of the KPM Pipeline, the Law on Oil³⁷⁸ provides the key definition of “trunk pipeline” and this legislation carries weight above other relevant regulations and technical criteria.³⁷⁹ The purpose of the pipeline and the physical characteristics of the pipeline need to be examined against the relevant definition. In this instance:

- (a) the KPM Pipeline extends beyond the Contract Area;³⁸⁰
- (b) the KPM Pipeline Carried third party oil as well as commercial oil;³⁸¹
- (c) KPM earns money for the transportation of commercial oil;³⁸² and
- (d) the KPM Pipeline transports commercial oil to places of transshipment to other means of transportation, consumption and storage.

³⁷⁷ Respondent’s Statement of Defence, Sections 21 to 27; Respondent’s Rejoinder on Jurisdiction and Liability, paras. 513-545; 580-627; Respondent’s First Post-hearing Brief, paras. 261-285, paras. 202-211, Professor Didenko’s First, Second and Third Reports.

³⁷⁸ Exhibit 5(d) to the First Expert Report of Professor Didenko.

³⁷⁹ First Report of Professor Didenko, point 3(2).

³⁸⁰ Claimants’ Statement of Claim, para. 84; First Expert Report of Professor Suleymenov, para. 21; Contract No. 305 issued pursuant to the License for the right to use subsoil, series MG No. 309-D (oil) (**Exhibit C-45**).

³⁸¹ Expert Report of Mr Suleymenov, Exhibit 3, Section 4.2.5.

³⁸² Contracts regarding transshipment of oil to railway transport on the Opornaya station (**Exhibit R-132**).

- 221 As Mr. Suleymenov (Claimant’s expert) himself explained,³⁸³ KPM held a licence relating to the exploitation and production of hydrocarbons under the contract. Specifically, this allowed “*exploration and production of hydrocarbons on Borankol field within licence Blocks XXIX-16-E (partially), XXIX-16-F (partially) on the territory of Mangistau region.*”³⁸⁴ In other words, this licensed exploration and production within the Contract Area. KPM also held a licence for the subactivity of “*operation of mining facilities; repair and assembly of drilling, oil and gas field, flameproof electrical equipment.*”³⁸⁵ In other words, this licensed high risk facilities.
- 222 KPM did not have any licence for operations of trunk pipelines or indeed, any oil operations outside the Contract Area.³⁸⁶ Neither of these licences allowed for the ownership or operation of a pipeline outside the Contract Area, or allowed for the operation of trunk pipelines.
- 223 Claimants argue that since they did not operate a trunk pipeline, they had all the licences that they needed. The Republic’s position is that this can only be true if Claimants can demonstrate that they operated a field pipeline. They have not done this.³⁸⁷ In particular they have not demonstrated how a pipeline that goes beyond the Contract Area can be classified as a field pipeline. As both the Republic’s legal expert (Professor Didenko) and technical witness (Mr. Latifov) have confirmed: A field pipeline does not go beyond the Contract Area.³⁸⁸
- 224 Rather than squarely deal with this fatal issue,³⁸⁹ they merely assert that since the pipeline was designed as a field pipeline, and since it looks like a field pipeline, it must be a field pipeline³⁹⁰ and since the specifications to which it was designed were those for a field pipeline, this leads to the inevitable conclusion that it is a field pipeline. They rely on industry specialists and the technical parameters for this conclusion stating that:

“Kazakhstan’s contention that whether a pipeline is ‘main’ is ‘purely a legal question’ is fundamentally wrong.....The reality is

³⁸³ First Expert Report of Professor Suleymenov, paras. 73 -80.

³⁸⁴ Contract No. 305 dated 30 March 1999 (clause 1.13 and 1.14 and licence, Appendices 1 as updated) (**Exhibit C-45**).

³⁸⁵ Licence dated 29 May 2008, (**Exhibit 472**) and Licence issued to KPM dated 5 August 2005 (**Exhibit C-83**). This was reissued from the licence issued in 2002 and 2005 (**Exhibit C-43**).

³⁸⁶ Respondent’s Rejoinder on Jurisdiction and Liability, para. 587.

³⁸⁷ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 527-537, Respondent’s First Post-hearing Brief, paras. 272 - 285.

³⁸⁸ First Report of Professor Didenko, point 3.I (7); Witness Statement of Mr. Latifov, para. 4.7.

³⁸⁹ Professor Suleymenov attempts to deal with this issue, however, his reasoning is unpersuasive.

³⁹⁰ Claimants’ Opening Statement, Hearing on Jurisdiction and Liability, Transcript Day 1, p.85, lines 9-25, p.86, lines 1-3.

*that what constitutes a ‘main’ pipeline is fully understood in the industry and in Kazakhstan, and Professor Didenko’s ‘made for arbitration’ definition is unsupportable in law, fact, or logic. While all oil and gas operations must be conducted within the broad confines of the law, the technical parameters are important, can be **outcome determinative**, and cannot be dismissed. All of the Kazakh authorities familiar with the industry standards and the technical parameters who considered this matter agreed that KPM’s and TNG’s pipelines were field pipelines.”³⁹¹ (emphasis added)*

225 This simplistic conclusion is wrong; the reasoning employed ignores the pleadings of the Republic and the position of Claimants’ own expert.

226 In fact, the Republic never said that the question was “*purely a legal question*” (and no reference is given for this baseless allegation). The Republic has spent some time explaining that the classification of pipelines is a legal question, meaning that the facts and the evidence need to be applied to the legal definition of “trunk pipeline”.³⁹² The correct application of the legal instruments (which primarily constitutes the application of the relevant definition in the Law on Oil) necessarily means applying the key relevant factual and expert evidence which may include industry / technical evidence to determine the question.

227 Claimants’ reliance on physical aspects of the pipeline as “*outcome determinative*” of its classification is discredited by their own witness. Mr. Romanosov testified in October 2012 that only a layman would classify a pipeline by its outward appearance and thus by its size.

“[A] layman may judge by the outward appearance. But for a professional, the key issue is what is the purpose of this pipeline.”³⁹³

228 As is accepted by both experts in this arbitration, the correct classification of a pipeline as trunk or otherwise is a question of law. As is accepted by both experts in this arbitration, the classification of pipelines is not solely a matter of “industry” analysis, or more importantly, the visual size of the pipeline. Professor Suleymenov (Claimants’ expert) states that:

³⁹¹ Claimants’ First Post-hearing Brief, paras. 176 and 180.

³⁹² Respondent’s Rejoinder on Jurisdiction and Liability, paras. 499, 506 and 507.

³⁹³ Testimony of Mr. Romanosov, Transcript of Hearing on Jurisdiction and Liability, Day 2, p.94, line 25 and p.95, lines 1-4.

*“technical parameters have little or no effect on the legal analysis of a pipeline’s classification.”*³⁹⁴

229 He even quotes the Republic’s expert who states that “from a technical point of view, it’s difficult to find a clear distinction between the concepts of trunk pipeline and non-trunk pipeline”.³⁹⁵ Mr. Didenko clarifies this in his third report, stating that:

*“The need for interpretation of the concept of ‘trunk pipeline’ is evident because the definitions of the trunk pipeline are indicated in various normative legal acts and technical documentation and are different from one another.”*³⁹⁶

230 This is why, as Professor Didenko goes on to say, the legal assessment of a trunk pipeline needs to be based on various characteristics derived from the definition itself. These characteristics are that (i) the KPM Pipeline extends beyond the Contract Area (i.e. it is not a field / contractors pipeline), (ii) third party oil as well as commercial oil is carried by the pipeline, (iii) that the oil is commercial, and (iv) that the oil is transported to places of transshipment, transport, processing or consumption. Contrary to Claimants’ latest suggestion that there is no legal basis to Professor Didenko’s statements,³⁹⁷ the legal bases for each of these characteristics are reiterated in Professor Didenko’s Second Report.³⁹⁸

231 Claimants’ arguments on the classification of pipelines continue to be entirely incoherent and confused. For example, in their First Post-hearing Brief, they now argue that the Law on Oil “*excludes pipelines ‘involved in the “single technological process” of oil and gas production’ from classification as ‘main’ pipelines*”; i.e. that any pipeline in a single technological process is not a trunk pipeline.³⁹⁹ This assertion is wrong. Moreover, it bears no relationship to Mr. Romanosov’s testimony, which Claimants rely on to support this assertion. Mr. Romanosov actually stated:

“Well, probably, yes, one should take into account the law. But the legislation, as far as I know it, all the in-field pipelines involved in

³⁹⁴ Second Report of Professor Suleymenov, para. 30.

³⁹⁵ First Report of Professor Didenko, p.20.

³⁹⁶ Third Report of Professor Didenko, para. 8.

³⁹⁷ Claimants’ First Post-hearing Brief, para. 178.

³⁹⁸ Second Report of Professor Suleymenov, pages 3-7.

³⁹⁹ Claimants’ First Post-hearing Brief, para. 176.

the cycle of oil and gas production do not belong to the category of main pipelines under the law.”⁴⁰⁰

- 232 So, what he actually says is that *field* pipelines involved in a single technological process cannot be trunk pipelines: This stands to reason and is not disputed. He does not say that pipelines in the single technological process are excluded from classification as “trunk”. This would be absurd since the fact that a pipeline forms part of a “single technological process” does not assist in identifying whether a pipeline is trunk or not.
- 233 Furthermore, Claimants submitted an additional report from their expert, Professor Suleymenov which levies criticism at the Republic’s expert, Professor Didenko. Such criticism is unjustified since many of Professor Suleymenov’s further statements are either: (1) unsupported by law,⁴⁰¹ (2) distortions of or untrue statements regarding Professor Didenko’s or the Republic’s other witness’ testimony,⁴⁰² and / or (3) wrong,⁴⁰³ or (4) simply contradictory.⁴⁰⁴ Far from bolstering the Claimants’ unprincipled arguments that the KPM Pipeline is a “field” one, Professor Suleymenov’s further report simply serves to call his credibility and expertise into question.⁴⁰⁵ Professor Didenko’s observations are set out in a short rebuttal report.⁴⁰⁶
- 234 By way of example, Professor Suleymenov wrongly argues that the Contract Area is irrelevant to the classification of pipelines.⁴⁰⁷ Professor Suleymenov states that both (1) the fact that the KPM pipeline extends beyond the Contract Area, and (2) the geological and mining territorial area granted to licences though contracts or licences, are irrelevant to the issue of classification of pipelines. He goes on to assert that Professor Didenko admits that the KPM Contract allowed KPM to build any facility on the Contract Area or (with authorization) outside the contract territory. As Professor Didenko reiterates, the Law on Oil permits oil operations within the contractual territory (which is delimited by the geological or mining allotment).

⁴⁰⁰ Testimony of Mr. Romanosov, Hearing on Jurisdiction and Liability, Transcript Day 2, p.95, lines 10-14.

⁴⁰¹ On the importance of the Contract Area: Second Expert Report of Professor Suleymenov, para. 17 (see Third Report of Professor Didenko, paras 30-40).

⁴⁰² Second Expert Report of Professor Suleymenov, paras. 22-25, 29-30, 36-37, 41 (see Third Report of Professor Didenko, paras. 63-70, 77-79, 91-97, 99-101).

⁴⁰³ Second Expert Report of Professor Suleymenov, paras. 9 and 23 (see Third Report of Professor Didenko, paras. 20 and 56).

⁴⁰⁴ Second Expert Report of Professor Suleymenov, paras. 26, 27, 31-33 (see Third Report of Professor Didenko, paras. 71, 72-73, 80-84).

⁴⁰⁵ Third Expert Report of Professor Didenko, para. 107.

⁴⁰⁶ Third Expert Report of Professor Didenko.

⁴⁰⁷ Second Expert Report of Professor Suleymenov, paras. 16-18.

Activities beyond the contract territory are not regulated by the Law on Oil.⁴⁰⁸ In any case, the ability to build facilities beyond the Contract Area has nothing to do with the classification of or licensing for the operation of trunk pipelines which is defined by the Law on Oil. It is the definition in the Law on Oil itself that determines that any pipeline that goes outside the Contract Area has one of the characteristics that is indicative of a trunk pipeline.

235 Similarly, Professor Suleymenov asserts that the development of the Borankol and Tolkyn fields *always* envisaged the mixing of products from the TNG and KPM fields.⁴⁰⁹ This may be technically correct, but it is important to realise that the mixing of products from the fields was only envisaged as part of development and construction of and infrastructure, gathering and delivery systems developed in 2002. As is explained above, it was not the case when KPM and TNG originally procured their contracts and the licences that supported those contracts.

236 As to whether Mr. Cornegruta was an entrepreneur and whether a large income has been accrued as a result of the unlicensed activity, these requirements were also established.⁴¹⁰ Thus all the elements of criminal activity under 190(2)(b) of the Criminal Code were evidenced.

II. Procedure was followed in the trial

237 Separately, Claimants continue to allege that there were due process violations in the trial resulting in denials of justice.⁴¹¹ The Republic's position is that the trial, and the subsequent appeal of the outcome, was conducted fully in accordance with Kazakh law and international standards.⁴¹² A brief review of the key procedural aspects of the trial does not indicate failures of due process. For example:

- (a) There was an opportunity for Mr. Cornegruta to examine the evidence and ask for further evidence.⁴¹³
- (b) Mr. Cornegruta gained advice from qualified defence counsel.⁴¹⁴

⁴⁰⁸ Third Report of Professor Didenko, paras. 38-40.

⁴⁰⁹ First Report of Professor Suleymenov, para. 36 and Second Report of Professor Suleymenov, para. 27; Third Report of Professor Didenko, paras. 72 and 73.

⁴¹⁰ Respondent's Rejoinder on Jurisdiction and Liability, paras. 510-512, 592-627.

⁴¹¹ Claimants' First Post-hearing Brief, paras. 188-204.

⁴¹² Respondent's Statement of Defence, paras. 27.5-27.60; Respondent's Rejoinder on Jurisdiction and Liability, paras. 495-650; Respondent's First Post-hearing Brief, paras. 243-260.

⁴¹³ First Witness Statement of Mr. Condorachi, para 24, Testimony of Mr. Condorachi, Hearing on Jurisdiction on Liability, Transcript Day 2, p.138, lines 24 -25 and p.139, lines 1-4.

- (c) There were twelve substantive hearings of the issues which were fully documented in transcripts.⁴¹⁵
- (d) The defence attorneys' motions were not ignored by the judge; indeed they were granted.⁴¹⁶
- (e) There was ample opportunity for the Defendant to ask questions of witnesses.⁴¹⁷
- (f) The experts whose evidence was admitted to the arbitration were appointed in accordance with Article 243 of the Criminal Procedure Code.⁴¹⁸
- (g) There was a full appeal to the Mangistau Regional Court.⁴¹⁹

238 Nevertheless, Claimants continue with their allegations, returning, in their Post-hearing Brief, to the four discredited "opinions" that the Claimants commissioned.⁴²⁰ Claimants continue to take issue with the judge's decision to exclude these opinions from the hearing. The reason which they were excluded was because the experts did not turn up to court to support their reports. This was explained by the judge herself.⁴²¹ Claimants are dismissive of this reasoning, which is typical of their stance whenever the necessities of Kazakh procedural law are raised by the Republic.⁴²² In fact, Claimants recall Professor Malinovsky's allegation in his first report that, in providing this reasoning, the Republic misconstrued its own laws.⁴²³ The Republic contests this allegation. As Mr. Kravchenko stated in written testimony,⁴²⁴ Kazakh procedural law requires that an analysis of the expert evidence in direct testimony is necessary to test the expert's evidence - and is therefore a necessary part of due process - not the reverse.

⁴¹⁴ Second Witness Statement of Mr Kravchenko, para. 12.9; Minutes of the Trial against Mr. Cornegruta, 4 September 2009, p.1 (English version) (**Exhibit R-317**).

⁴¹⁵ Minutes of the Trial against Mr. Cornegruta from 30 July 2009 to 13 August 2009 (**Exhibit R-315.1, R-315.2, R-316 – 319**).

⁴¹⁶ Excerpt from Minutes of the Trial against Mr. Cornegruta (translation of the first paragraph), 12 August 2009 (**Exhibit R-316**), Hearing Minutes from Mr. Cornegruta's Trial, pp. 17 and 18 (English) (**Exhibit C-704**).

⁴¹⁷ Hearing Minutes from Mr. Cornegruta's Trial, p2 (English) (**Exhibit R-318**).

⁴¹⁸ Second Witness Statement of Mr. Rakhimov, para 5.12, Article 243 of the CPC (**Legislation Exhibit 24**).

⁴¹⁹ Decision on Appeal, 12 November 2009 (**Exhibit C-565**).

⁴²⁰ Claimants' First Post-hearing Brief, para. 199.

⁴²¹ Decision of the Aktau City Court, dated 18 September 2009, p. 10 (**Exhibit C-117**).

⁴²² Claimants' First Post-hearing Brief, para. 199.

⁴²³ First Report of Professor Malinovsky, p.25.

⁴²⁴ Second Witness Statement of Mr. Kravchenko, Sections 11.22-11.26; Article 311 of the Criminal Procedure Code (**Legislation Exhibit 1b**)

- 239 In any event, since Mr. Rakhimov had already deemed the opinions to be inadmissible, even if the experts had been present, their testimony would not have attracted any evidential weight, relevance or significance. Therefore, the judge was correct to dismiss “on the spot” the motion by Mr. Cornegruta’s lawyers that the trial schedule be postponed in order to hear the three absent experts on another day.⁴²⁵ There was no requirement for her to give reasons for this ruling or to move to a private chamber to deliberate this further. This practice is common and widespread.
- 240 Of course, if the prosecution’s evidence had not also been scrutinised, then there may have been some basis for complaint on the basis of lack of equality between the parties. However, even according to the version of the transcript on which Claimants rely, Mr. Baymaganbetov, the prosecution’s expert, was cross-examined on 28 August 2009.
- 241 Claimants also again try to find a way of evidencing their hopeless allegation that the Financial Police interfered in the trial.⁴²⁶ They have scoured their version of the trial transcript and found evidence of an application made by the defendant’s lawyers criticising Mr. Zlupacarov’s presence at the hearing. It is difficult to know what to make of this allegation since there is no way of now verifying whether Mr. Musin’s description of Mr. Zlupacarov’s actions is factually realistic or whether it is biased or exaggerated. What is apparent is that the hearing was a public one, and as such there is no reason why Mr. Zlupacarov could not attend. In any event, members of the Financial Police are often present at hearings, since they have duties, such as bringing witnesses to and from the court room. This is not unusual. Moreover, what is key, and what is significantly omitted by Claimants, is what happened *after* the request was made by the defendant’s lawyers: The request was forwarded to a separate court for consideration and Mr. Zlupacarov was asked to leave the court room. In other words, Mr. Cornegruta’s demand was immediately granted.

“Chief judge, after listening to the participants opinions, and taking counsel on the spot, ruled to send the request of the attorney to the prosecutor of the Manghistau region for investigation; Chief judge asked K.A.Zulpycarov to leave the court room.”⁴²⁷

- 242 This hardly evidences rough justice.

⁴²⁵ Claimants’ First Post-hearing Brief, para. 201.

⁴²⁶ Claimants’ First Post-hearing Brief, para. 203.

⁴²⁷ Decision of the Aktau City Court dated 18 September 2009, p.24 (**Exhibit C-117**).

III. Recovery was sought from KPM

- 243 Kazakh law uncontestedly provides for the recovery of income obtained by means of illegal activity. Such recovery is necessary to address unjust enrichment obtained by criminal means. As KPM had earned income from its general managers criminal behaviour, the illegal operation of a main pipeline without a license, it was the natural consequence that the court ordered the recovery of this income.
- 244 With its Rejoinder on Jurisdiction and Liability, the Republic submitted an Expert Report by Professor Kogamov. Claimants have not submitted a Rebuttal Expert Report by their expert, Professor Malinovsky. Professor Kogamov's expertise thus stands unrebutted.
- 245 With regard to the recovery order against KPM, Claimants have advanced three arguments in their First Post-hearing Brief and their Closing Submission: that recovery could never be ordered against KPM as legal persons are not subject to criminal liability,⁴²⁸ that the procedure pursued for the recovery was improper⁴²⁹ and that the amount recovered was disproportional.⁴³⁰ As the Republic demonstrated in its First Post-hearing Brief and in earlier submissions, all three arguments are incorrect:⁴³¹

1. Recovery from corporate entities

- 246 Kazakh law foresees the recovery of illegal income from a company. The Republic has presented several cases to that effect⁴³² and Claimants have in fact conceded that in these cases, recovery was ordered against corporate entities.⁴³³ Professor Kogamov, the Republic's expert, concurs. As Professor Kogamov notes, it would be entirely nonsensical not to allow the recovery of illegal income from a company, as this would mean that companies could forever remain unjustly enriched from the crimes of their managers.⁴³⁴

⁴²⁸ Claimants' First Post-hearing Brief, para. 191.

⁴²⁹ Claimants' First Post-hearing Brief, para. 192 et seqq.

⁴³⁰ Claimants' Closing Submission, Final Hearing, Transcript Day 1, p.145, lines 8-20.

⁴³¹ Respondent's First Post-hearing Brief, paras. 286 et seqq.; Respondent's Rejoinder on Jurisdiction and Liability, paras. 592 et seqq.

⁴³² Case No. 1-122, Judgement of 22 September 2010 (**Exhibit R-248**); Case No. 1-829, Judgement of 25 June 2010 (**Exhibit R-249**); Case No. 1-771, Judgement of 9 July 2010 (**Exhibit R-250**); Case No. 1-947, Judgement of 24 August 2010 (**Exhibit R-251**).

⁴³³ Claimants' First Post-hearing Brief, para. 195.

⁴³⁴ Expert Report of Professor Kogamov, p.7.

2. No requirement to bring a civil claim

247 Moreover, Claimants are incorrect when they contend that it is necessary to pursue the recovery in a civil claim as part of criminal proceedings. A 2005 Regulatory Resolution of the Kazakh Supreme Court clearly allows recovery orders even without formal civil proceedings.⁴³⁵ Relying on this Regulatory Case, Professor Kogamov explained in his First Expert Report:

*“It is important to note that when deciding on the matters related to the verdict, the court has the right to decide on compensation of damages caused to the state also in cases when there is no civil claim brought under the criminal proceedings, but the circumstances related to the infliction of damages have been fully studied in the court hearing.”*⁴³⁶

248 Claimants have not responded at all to the contents of the 2005 Supreme Court Regulatory Case. They have also not provided any rebuttal expert report in response to the views voiced by Professor Kogamov. Instead, in plain view of the 2005 Regulatory Case, they simply contend that the Republic had not provided evidence that Kazakh law foresees the recovery against a corporate entity without civil proceedings.⁴³⁷ Their contention is based on disingenuous ignorance of arguments made and evidence provided.

249 Instead of addressing the 2005 Regulatory Case, Claimants suggest that the lower court judgements provided by the Republic as examples of recovery orders would not support the Republic’s position.⁴³⁸ This contention is false.

250 First of all, it is irrelevant that three of the decisions referenced concern tax evasion (Article 222 of the Kazakh Criminal Code) rather than Illegal Entrepreneurial Activity (Article 190 of the Kazakh Criminal Code).⁴³⁹

251 To begin with, both Article 190 and Article 222 of the Kazakh Criminal Code are included in Chapter 7 of the Code which deals with the crimes in the sphere of economic activities. Section 19 of the Regulatory Case of the Republic of Kazakhstan Supreme Court of June 18, 2004 No. 2 “On some questions concerning the qualification of crimes in economic activity” applies equally to both crimes. This

⁴³⁵ Regulatory Resolution of the Supreme Court of RK of 20 June 2005 No 1 “On consideration of a civil claim in criminal proceedings”, para. 27 (**Exhibit 4 to the First Expert Report of Professor Kogamov**).

⁴³⁶ Expert Report of Professor Kogamov, p.8.

⁴³⁷ Claimants’ First Post-hearing Brief, para. 193.

⁴³⁸ Claimants’ First Post-hearing Brief, paras. 194 et seq.

⁴³⁹ Claimants’ First Post-hearing Brief, para. 195.

section provides that “[i]ncome derived from crime in the sphere of economic activity envisaged in **Chapter 7 of the Criminal Code** shall be recovered from a guilty person and referred to the revenue of the state as a result of unjust enrichment, acquired by criminal means.”⁴⁴⁰ Therefore, the analogy drawn by the Republic between the said cases and the Judgement of the Aktau City Court dated 18 September 2009⁴⁴¹ is correct.

252 Secondly, pursuant to Section 19 of the 2004 Regulatory Case, the amount of illegal income received in the course of illegal entrepreneurial activity constitutes an unjust enrichment. However, unpaid taxes under Article 222 of the Kazakh Criminal Code equally constitute unjust enrichment. Therefore, in either case, the court orders the recovery of the amounts which the relevant company “lawfully owe[s]” because of the unjust enrichment.

253 Thirdly, the analogy was drawn specifically for the purpose of demonstrating that, as a matter of Kazakh law, the recovery of the proceeds of economic crimes from a non-party to the criminal case is possible and, moreover, is applied in practice. Therefore, the natural differences between the crime of tax evasion and the crime of illegal entrepreneurial activity do not frustrate the purpose of the analogy.

254 Claimants further state that “unlike the case of KPM, civil claims were brought in connection with at least two of those other criminal cases.”⁴⁴² With this statement, Claimants seek to misrepresent the facts of the cases they refer to.

255 Specifically, in the Case No. 1-829, Judgment of 25 June 2010,⁴⁴³ the civil claim was indeed brought against Y.V Ordenarcev – the defendant in the criminal case.⁴⁴⁴ Yet the illegal income was recovered from the company Starbrost LLP, which was not a party to the criminal proceedings, or the defendant under the civil claim. Claimants have not proven otherwise, as they have only shown that the civil claim was brought against the defendant, not that it was brought against the company.⁴⁴⁵

⁴⁴⁰ Resolution of the Supreme Court of the Republic of Kazakhstan “On some issues of qualification of crimes in the sphere of economic activity” of 18 June 2004, No. 2 (emphasis provided) (**Exhibit R-144**).

⁴⁴¹ Decision of the Aktau City Court dated 18 September 2009 (**Exhibit C-117**).

⁴⁴² Claimants’ First Post-hearing Brief, para. 195.

⁴⁴³ Cf. Case No. 1-829, Judgement, 25 June 2010 (**Exhibit R-249**); Judgment # 1-829-2010 and Case Minutes of Aktobe City Court #2, 25 June 2010 (**Exhibit C-728**).

⁴⁴⁴ Case Minutes of Aktobe City Court #2, 25 June 2010, p.2 of the English translation (**Exhibit C-728**).

⁴⁴⁵ Ibid.

- 256 The same is true with respect to the Case No. 1-771, Judgement of 9 July 2010,⁴⁴⁶ where the civil claim was brought against K.B. Urinbaev – the defendant in the criminal case.⁴⁴⁷ Again, the illegal income was recovered from the company Balarama LLP, which was not a party to the criminal proceedings, or the defendant under the civil claim. Claimants have not proven otherwise, as they have only shown that the civil claim was brought against the defendant, not that it was brought against the company.⁴⁴⁸
- 257 Finally, in the Case No. 1-947, Judgement of 25 August 2010,⁴⁴⁹ no civil claim was brought, while the illegal income was nevertheless recovered from the company TranskomServis-K LLP, which again was not a party to the proceedings.⁴⁵⁰ This is uncontested by the Claimants.
- 258 Lastly, insofar as Claimants refer to Case No. 1-122-2010 of the Taraza City Court, their contentions are equally untenable. In fact, the translation provided by Claimants themselves⁴⁵¹ illustrates perfectly well the Republic’s argument based on the Kazakh Supreme Court’s 2005 Regulatory Case. The Taraza City Court found that in the trial, it had examined only in part certain actions of the defendant regarding certain plants owned by the companies Taraz LLP and BM LLP. Consequently, the court ordered only a partial recovery and not the full recovery of all of the property listed in the indictment submitted by the prosecution.⁴⁵² For the remaining property listed in the indictment, the court stated that the matter would have to be resolved in a civil proceeding.⁴⁵³
- 259 This is perfectly in line with the 2005 Regulatory Case of the Kazakh Supreme Court according to which a court has the right to decide on recovery also when there

⁴⁴⁶ Case No. 1-771, Judgement, 9 July 2010 (**Exhibit R-250**); Judgment # 1-771-2010 and Case Minutes of Aktobe City Court #2, 9 July 2010 (**Exhibit C-729**).

⁴⁴⁷ Case Minutes of Aktobe City Court #2, 9 July 2010, p.1 et seq. of the English translation (**Exhibit C-729**).

⁴⁴⁸ Ibid.

⁴⁴⁹ Case No. 1-947, Judgement, 24 August 2010 (**Exhibit R-251**); Judgment # 1-947-2010 and Case Minutes of Aktobe City Court #2, 25 August 2010 (**Exhibit C-730**).

⁴⁵⁰ Case No. 1-947, Judgement, 24 August 2010 (**Exhibit R-251**).

⁴⁵¹ Judgment #1-122-2010 and Case Minutes of Taraza City Court #2, 22 September 2010 (**Exhibit C-727**)

⁴⁵² Specifically, the court ordered the recovery of “*the economic complex and monetary funds of LLP Taraz and monetary funds and the plant BRU-3 as a unit from LLP BM*”. However, the court refrained from ordering the recovery of other property, in particular, it did not order the recovery of “*another part of economic complex of LLP BM*”.

⁴⁵³ Judgment #1-122-2010 and Case Minutes of Taraza City Court #2, 22 September 2010 (**Exhibit C-727**)

is no civil claim brought under the criminal proceedings but the circumstances related to the infliction of damages have been fully studied in the court hearing.⁴⁵⁴

260 It speaks volumes about Claimants' case on the recovery order that Claimants have not presented any expert analysis of the cases submitted by the Republic but instead take the simple approach of making incorrect, baseless and unqualified arguments of their own. Apparently, Professor Malinovsky, who had submitted an opinion for Claimant's Reply on Jurisdiction and Liability, did not want to have anything to do with Claimants' frivolous misrepresentation of the cases submitted by the Republic.

261 Finally, the Republic refutes Claimants' allegation that KPM could not adequately defend itself in the case because it was not aware of the fact that a recovery order could be rendered against it.⁴⁵⁵ That argument is pure fiction. Contemporaneous evidence proves that it was perfectly clear to anyone knowledgeable of the law that the proceedings could lead to a recovery order. Specifically, the Squire Sanders Due Diligence stated:

“If [the Financial Police] proves its case in the Criminal Proceedings, then, according to the applicable laws of Kazakhstan, Article 121.3.4 of the Code of Criminal Procedure of Kazakhstan and Article 19 of Statutory Regulation No. 2 of the Supreme Court of Kazakhstan “On Certain Issues Inherent in the Classification of Offenses in the Sphere of Economic Activity” dated 18 June 2004 may apply, whereby moneys and valuables earned illegally shall be collected in favour of the state under a court verdict.”⁴⁵⁶

3. Proportionality is not at issue

262 Insofar as Claimants' suggest that the amount of recovery ordered was disproportionate,⁴⁵⁷ their criticism misses the mark. As was held in the Kazakh Supreme Court's 2004 Regulatory Case, the purpose of a recovery order is to address an unjust enrichment as the result of a crime,⁴⁵⁸ not to punish for a crime. Claimants are hence incorrect when they repeatedly speak of a “penalty” instead of a

⁴⁵⁴ Regulatory Resolution of the Supreme Court of RK of 20 June 2005 No 1 “On consideration of a civil claim in criminal proceedings”, para. 27 (**Exhibit 4 to the First Expert Report of Professor Kogamov**). Cf. also Expert Report of Professor Kogamov, p.8.

⁴⁵⁵ Claimants' First Post-hearing Brief, para. 198.

⁴⁵⁶ Squire Sanders Legal Due Diligence Report, p.113 (emphasis in the original) (**Exhibit R-364**).

⁴⁵⁷ Claimants' Closing Submission, Final Hearing, Transcript Day 1, p.145, lines 8-20.

⁴⁵⁸ Resolution of the Supreme Court of the Republic of Kazakhstan “On some issues of qualification of crimes in the sphere of economic activity” of 18 June 2004, No. 2 (emphasis provided) (**Exhibit R-144**).

recovery order. This term is obviously intended to convey a false impression of the purpose of the recovery order and it should not be used as a matter of proper legal terminology.

263 Considering the true purpose of a recovery order, it is apparent that the amount recovered is not dependent on the severity of the crime but on the extent of enrichment. It is thus irrelevant whether Claimants consider the crime to be not severe. The extent of enrichment is decisive.

264 Regarding the extent of enrichment, it is noteworthy that Claimants have still not provided any support or even a coherent reasoning for their theory that the unjust enrichment is limited to the hypothetical income for providing crude oil transportation services.⁴⁵⁹ This is in stark contrast to the contemporaneous evidence provided by the Republic. In particular, the Squire Sanders Due Diligence assessed the amount potentially subject to recovery and found a recovery order exceeding USD 80,000,000 to be reasonable.⁴⁶⁰ This is perfectly in line with the amount ultimately stated in the recovery order and at the same time demonstrates that the dismal amounts stated by Claimants⁴⁶¹ cannot be correct. Against this background, any claim of disproportionality must fail.

IV. Both Mr. Cornegruta and KPM failed to appeal and wrongly opted for international arbitration instead, leapfrogging domestic remedies

265 The Republic's submissions as to the Claimants' failure to appeal have been set out in previous submissions.⁴⁶²

266 The decision against Mr. Cornegruta was issued on 18 September 2009.⁴⁶³ Mr. Cornegruta appealed the decision and an appeal court considered the issues and agreed with the decision against Mr. Cornegruta.⁴⁶⁴ Mr. Cornegruta could have but did not appeal to the Supreme Court if it had disagreed with the decision against it.⁴⁶⁵ Claimants have never addressed Mr. Cornegruta's appeal options.

⁴⁵⁹ Claimants' Reply on Jurisdiction and Liability, para. 329.

⁴⁶⁰ Squire Sanders Legal Due Diligence Report, p.113 (**Exhibit R-364**).

⁴⁶¹ In their Reply on Jurisdiction and Liability, Claimants suggested amounts such as USD 30,000 and USD 13,000, cf. paras. 329, 331.

⁴⁶² Rejoinder on Jurisdiction and Liability, paras. 644-650; Respondent's First Post-hearing Brief, paras. 302-316.

⁴⁶³ Decision of the Aktau City Court dated 18 September 2009 (**Exhibit C-117**).

⁴⁶⁴ Decision on Appeal, 12 November 2009 (**Exhibit C-565**).

⁴⁶⁵ Respondent's Rejoinder on Jurisdiction and Liability, para. 638.

267 The implications of the guilty finding were that recovery of amounts from KPM was necessary.⁴⁶⁶ KPM, through its legal advisers⁴⁶⁷ and Mr. Cornegruta, were fully aware of the charges against Mr. Cornegruta and the imminent recovery of assets from KPM procured illegally. Mr. Cornegruta already had a copy of the decision against him. As such, KPM, the company of which he was the most senior representative,⁴⁶⁸ could have appealed the decision against it. As Mr. Kravchenko highlighted in oral testimony:

*“It would be ridiculous to think that Mr. Cornegruta, who was heading the company, could not share his copy of the judgment with the company that he was the head of.”*⁴⁶⁹

268 KPM filed an appeal on 25 January 2010.⁴⁷⁰ Under Article 399 of the Criminal Procedural Code, the appeal had to be filed within 15 days from the announcement of the verdict, i.e. on 4 October 2009. It was out of time.⁴⁷¹ As Mr. Kravchenko stated in oral testimony, there was nothing unfair; nothing that would prejudice KPM from applying within the time limit of 4 October 2009. He speculated that if KPM had challenged the decision not to provide a copy of the hearing of the transcript to KPM, then in this circumstance, it may have been unfair to reject KPM’s appeal.⁴⁷² However, since KPM had not made such a challenge, there is no reason for a complaint.

269 Claimants now say that this argument is disingenuous since they argue that Claimants did challenge the courts’ refusal to provide a copy of the court judgment.⁴⁷³ However, it is evident from the face of the document provided to support this assertion,⁴⁷⁴ that the alleged request made by Claimants was not one that could ever have properly been taken into account. This was signed by the “*Acting General Director of KPM Oskolkov V.V.*”⁴⁷⁵ Claimants have provided no evidence that Mr. Oskolkov was properly appointed and authorised to make the application.

⁴⁶⁶ Respondent’s Rejoinder on Jurisdiction and Liability, para. 615.

⁴⁶⁷ Testimony of Mr. Stati, Hearing on Jurisdiction and Liability, Transcript Day 2, p.36, line 8 and p.37, line 5.

⁴⁶⁸ Messrs. Cojin, Spasov and Salagor had already left Kazakhstan, Second Witness Statement of Mr. Rakhimov, para. 7.3.

⁴⁶⁹ Testimony of Mr. Kravchenko, Hearing on Jurisdiction and Liability, Transcript Day 4, p.107, lines 19-22.

⁴⁷⁰ KPM’s Appeal (**Exhibit C-481**). Testimony of Mr. Kravchenko, Hearing on Jurisdiction and Liability, Transcript Day 4, p.106, line 22 - p.107, line 4.

⁴⁷¹ Respondent’s Rejoinder on Jurisdiction and Liability, para. 645; Judgment of the City Court of Aktau, 29 January 2010, Witness Statement of Mr. Kravchenko (**Exhibit 4**).

⁴⁷² Testimony of Mr. Kravchenko, Hearing on Jurisdiction and Liability, Transcript Day 4, p.106, line 17 - p.107, line 4.

⁴⁷³ Challenge of court’s refusal to reinstate a term for a claim of appeal, 8 February 2010 (**Exhibit C-637**).

⁴⁷⁴ Letter from KPM to the Aktau City Court, 22 September 2009 (**Exhibit C-705**).

⁴⁷⁵ Letter from KPM to the Aktau City Court, 22 September 2009 (**Exhibit C-705**).

According to paragraph 11.9 of KPM's Articles of Incorporation, documents issued by KPM and transactions where KPM is involved in, are only valid, if there is a signature of the Director-General.⁴⁷⁶ Mr. Oskolkov's request was made outside his authority. In any case, there is no evidence that this letter was received by the court nor does it change the fact that Mr. Cornegruta always had a copy of the judgment and could have appealed on behalf of KPM in good time. There is also no reason to assume that Claimants could not have replaced Mr. Cornegruta as the head of KPM if they found that due to the imprisonment, he was not properly capable of appealing the recovery order.

270 In any case, Mr. Stati's preference was to seek redress for his alleged grievances through international arbitration. The elevation to the international plane of the issues he faced in Kazakhstan was, as he himself has testified: deliberate, premeditated and premature.⁴⁷⁷

271 Claimants should have fully pursued their rights under domestic law: The enforcement and the KPM Pipeline decision against Mr. Cornegruta could have and should have been appealed to the Supreme Court in Kazakhstan.⁴⁷⁸ As a matter of both international and Kazakh law, Mr. Stati was wrong to pay so little attention to the appeal procedure.

⁴⁷⁶ Articles of Association of Limited Liability Partnership "Kazpolmunay" (**Exhibit C-36**).

⁴⁷⁷ Testimony of Mr. Stati, Hearing on Jurisdiction and Liability, Transcript Day 2, p.21, lines 15-19, p.38, lines 8-10.

⁴⁷⁸ Respondent's Rejoinder on Jurisdiction and Liability, Section C.VIII.9, paras 635 - 650.

E. Facts related to pre-emptive rights waiver

272 Claimants allege that the Republic “manufactured” its case on the “pre-emptive rights waiver”.⁴⁷⁹ However, they do so by completely distorting the facts and position under Kazakh law.⁴⁸⁰ Claimants effectively continue with this approach in their First Post-hearing Brief. In particular, they continue to divorce the legitimate jurisdictional issues the Republic has raised, arising out of Claimants’ own failure to obtain consent from the relevant authorities when purchasing and transferring TNG,⁴⁸¹ from their own spurious allegations that the Republic was trying to “cloud title” to TNG.⁴⁸² Furthermore, Claimants not only misrepresent the position under Kazakh law in order to deny that they had made their investment illegally, but also neglect to mention key facts which led to the Republic having concerns as to Claimants’ ownership of TNG as well as the applicability of its pre-emptive right. The points Claimants have raised on Kazakh law are dealt with in the section where it is shown that the Tribunal has no jurisdiction because the “investments” were illegal.⁴⁸³ However, we respond here to the key factual assertions Claimants have made in their First Post-hearing Brief, as well as draw to the Tribunal’s attention the facts which Claimants’ intentionally omit to mention.

273 The Republic has repeatedly pointed out that Claimants failed to obtain prior consent from the Licensing Authority and Competent Authority for any of the transfers it was involved in with respect to TNG.⁴⁸⁴ There were 8 transfers in total that Claimants’ companies were involved in, either through purchasing or selling shareholdings in TNG.⁴⁸⁵ Claimants conveniently neglect to comment on these facts. Consents were required from both the Competent Authority and Licensing Authority pursuant to Article 53(1) of the 1995 Law on Oil for the reasons already stated by the Republic⁴⁸⁶ and as further set out below.⁴⁸⁷ As such, Claimants’ excuses for not following that law can only be seen as an attempt to evade liability.

⁴⁷⁹ Claimants’ First Post-hearing Brief, para. 214.

⁴⁸⁰ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 150-180; Respondent’s Statement of Defence, paras. 13.22-13.23, 13.27-13.29 and 13.43-13.47; Respondent’s First Post-hearing Brief, paras. 468-476.

⁴⁸¹ Claimants’ First Post-hearing Brief, paras. 95-110.

⁴⁸² Claimants’ First Post-hearing Brief, paras. 214-220.

⁴⁸³ See section below at Part III, A.II.

⁴⁸⁴ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 158-163; Respondent’s Statement of Defence, paras. 13.27-13.29; Respondent’s First Post-hearing Brief, paras. 471-472.

⁴⁸⁵ Register of operations of JSC Registrar Zerda for TNG dated 16 January 2009 (**Exhibit R-18**).

⁴⁸⁶ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 152-157; Respondent’s Statement of Defence, paras. 13.16-13.20; Respondent’s First Post-hearing Brief, paras. 468-470.

274 The consequence of these failures was that none of the transfers in TNG involving Claimants' companies were completed.⁴⁸⁸ As such, Claimants have no basis for asserting in their First Post-hearing Brief that the very last transfer of shares of TNG from Gheso to Terra Raf was "*validly registered in accordance with Kazakh law.*"⁴⁸⁹ The transfer legally could not have been concluded and as a consequence validly registered under Kazakh law without consent being obtained under Article 53(1).⁴⁹⁰

275 Despite this, Claimants persist with arguing that they were led to believe that they did not require such consent by the Republic and as a result the Republic should be "estopped" from raising this issue.⁴⁹¹ This is misleading and wrong:

(a) As to Claimants' continued reference to correspondence between KPM and the Agency of Investments in relation to Ascom's purchase of a shareholding in KPM in 1999,⁴⁹² attempts to obtain consent in relation to their purchase of shares in KPM are completely irrelevant to the issue of Claimants' obtaining consent to purchase and later transfer shares in TNG: KPM and TNG are two separate entities.⁴⁹³ Claimants simply have no basis for contending that they could rely on such correspondence when acquiring and transferring shares in TNG.

(b) Even if Claimants' interpretation were correct and they could rely on alleged statements by the Agency of Investments (which is not admitted), on Claimants' own case all that the Agency of Investments said was that consent was only required from the Competent Authority (as opposed to both the Competent Authority and Licensing Authority) when transferring shares in KPM.⁴⁹⁴ Claimants therefore still clearly needed consent from the Competent Authority. At the very least, the same was the case when purchasing and transferring shares in TNG. Claimants were never informed otherwise and Claimants do not have any contemporaneous evidence to show that they did not require consent from the Competent Authority. However, Claimants failed to obtain such consents

⁴⁸⁷ See section Part III, A.II.

⁴⁸⁸ Respondent's Rejoinder on Jurisdiction and Liability, paras. 152-157; Respondent's Statement of Defence, paras. 13.16-13.20; Respondent's First Post-hearing Brief, paras. 468-470.

⁴⁸⁹ Claimants' First Post-hearing Brief, paras. 95 and 214.

⁴⁹⁰ Second Expert Report of Professor Ilyassova, paras. 90-98.

⁴⁹¹ Claimants' First Post-hearing Brief, para. 95.

⁴⁹² Claimants' First Post-hearing Brief, paras. 100-104; Letter from the Agency of the Republic of Kazakhstan on Investments to KPM No. 3-3016 dated 19 November 1999 (**Exhibit C-47**).

⁴⁹³ Respondent's First Post-hearing Brief, para. 472(a).

⁴⁹⁴ Letter from the Agency of the Republic of Kazakhstan on Investments to KPM No. 3-3016 dated 19 November 1999 (**Exhibit C-47**); Letter No. 3-199 from the Agency on Investment to KPM dated 18 January 2000 (**Exhibit C-420**) and Minutes of Governmental Meeting No. 17-23/1-404 dated 14 May 2002 (**Exhibit C-421**).

from the Competent Authority when purchasing and transferring shares in TNG on 8 occasions.⁴⁹⁵ This is fatal to their claim that they acted in accordance with Kazakh law when making their investment.

- (c) As to the issue of Claimants alleged reliance on “*interpretations of Kazakh law by the relevant State authorities*,”⁴⁹⁶ Claimants provide no evidence that they actually did rely on the aforementioned statements from the Agency of Investments when acquiring and selling shares in TNG.⁴⁹⁷ To the contrary, the evidence points to Claimants completely disregarding the Agency of Investments as they failed to approach the Competent Authority when transferring shareholdings in TNG. In any event, Claimants had no basis for relying on such interpretations. As Professor Ilyasova points out, Articles 44 and 45 of the Law of the Republic of Kazakhstan “On Laws and Regulations” make clear that “*the official interpretation of the provisions of the Law on Oil and the Law on Subsoil with regard to the licence renewal, which has a binding effect, cannot be given either by the competent authority or by the Government of the Republic of Kazakhstan.*”⁴⁹⁸

276 Claimants also continue to rely on the one belated consent to transfer they obtained some 4 years after the date they say the very last share transfer in TNG (from Gheso to Terra Raf) allegedly took place.⁴⁹⁹ However, as already stated in the Rejoinder Memorial on Jurisdiction and Liability and the Respondent’s First Post-hearing Brief, Claimants cannot rely on this one authorisation to heal their failures to obtain consent for each of the preceding transfers in TNG their group companies were involved in.⁵⁰⁰ Claimants only actually requested consent after being prompted to do so by the MEMR and in any event failed to provide the MEMR with pertinent information,⁵⁰¹ particularly in relation to their failure to obtain consent for not only the transfer of TNG from Gheso to Terra Raf but the 7 preceding transfers. In their First Post-hearing Brief, Claimants repeat their assertion that they “*disagreed such*

⁴⁹⁵ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 158-163; Respondent’s Statement of Defence, paras. 13.27 -13.29; Respondent’s First Post-hearing Brief, paras. 471-472.

⁴⁹⁶ Claimants’ First Post-hearing Brief, para. 104. Claimants have never previously asserted such reliance.

⁴⁹⁷ Claimants have no basis for asserting that it could rely on such interpretations with respect to its failure to obtain consent from the Competent Authority when acquiring shares in TNG.

⁴⁹⁸ Third Expert Report of Professor Ilyasova, paras. 93-96.

⁴⁹⁹ Claimants’ First Post-hearing Brief, para. 107.

⁵⁰⁰ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 158-163; Respondent’s First Post-hearing Brief, para. 472.

⁵⁰¹ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 164-167; Respondent’s First Post-hearing Brief, para. 474; First Witness Statement of Mr. Ongarbaev, paras. 5.5-5.8.

consent was required”,⁵⁰² yet fail to give any reasons as to why they disagreed at the time.

277 In the circumstances, the Republic was not only entitled but fully justified in querying the position with Claimants. As to the transfer of TNG from Gheso to Terra Raf specifically, there were irregularities which compelled the Republic to consider, in particular, whether its pre-emptive right applied under Article 71 of the 1996 Law on Subsoil Use as amended on 8 December 2004.⁵⁰³ These irregularities have already been set out in some detail in the Rejoinder Memorial on Jurisdiction and Liability and the Respondent’s First Post-hearing Brief.⁵⁰⁴ To repeat in summary:

- (a) The Republic had legitimate reasons to believe that Terra Raf was only registered as a shareholder of TNG in 2005, hence suggesting that its pre-emptive right was applicable.⁵⁰⁵ Claimants therefore have no basis for alleging that this was a deliberate “misunderstanding”;⁵⁰⁶
- (b) Claimants informed the MEMR that the Republic’s pre-emptive right did not apply in February 2007, notwithstanding that it did, given that each of their acquisitions and transfers in TNG were never completed as a result of their failures to obtain consents from the relevant authorities.⁵⁰⁷ Claimants therefore misstate the relevance of the Republic’s pre-emptive not having “retroactive value”⁵⁰⁸ as each of the transfers in TNG had not been completed prior to December 2004 (when the law came into force) as a result of the failure to obtain consents. As such the Republic’s pre-emptive right clearly applied to the transfers Claimants were involved in with TNG. There is no question of it being applied retrospectively; and
- (c) Claimants have produced documents which indicate that the ownership of TNG was at least ambiguous.⁵⁰⁹ In particular, they have produced a document which refers to Ascom as the owner of TNG in September 2004. However, by this point, on Claimants’ case TNG was apparently owned by Terra Raf.

⁵⁰² Claimants’ First Post-hearing Brief, para. 107.

⁵⁰³ See First Expert Report of Professor Ilyassova, paras. 8(a)-8(b).

⁵⁰⁴ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 164-177; Respondent’s First Post-hearing Brief, para. 474 .

⁵⁰⁵ Respondent’s Rejoinder on Jurisdiction and Liability, para. 167; Witness Statement of Mr. Ongarbaev, para. 5.7; Letter from MEMR to TNG dated 13 February 2007 (**Exhibit C-132**).

⁵⁰⁶ Claimants’ First Post-hearing Brief, para. 109.

⁵⁰⁷ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 168-169; Witness Statement of Mr. Ongarbaev, para. 5.6, 5.8; Letter from TNG to MEMR dated 19 February 2007 (**Exhibit C-424**).

⁵⁰⁸ Claimant’s First Post-hearing Brief, para.107.

⁵⁰⁹ Respondent’s Rejoinder on Jurisdiction and Liability, para. 173.

Ascom was not even the previous owner of TNG as Terra Raf purchased TNG from Gheso.⁵¹⁰

278 Claimants fail to acknowledge that they created these irregularities in title. They further completely misstate the Republic's case in their First Post-hearing Brief by asserting that Kazakhstan's argument is that "*the pre-emptive rights law applied to the transfer of shares in TNG from Gheso to Terra Raf because that transfer was not "completed" until May 15, 2005.*"⁵¹¹ The Republic's case is actually that Claimants' failure to obtain consents meant that each of the transfer of shares in TNG they were involved in never completed. At earliest, Claimants can contend that they acquired TNG in February 2007 (which is denied) when they allegedly obtained "retroactive consent" (albeit that they completely misrepresented the position on their historical ownership). However, at this date the Republic clearly had a pre-emptive right as the law came into force from 8 December 2004.⁵¹² Claimants misleadingly denied that the Republic had a pre-emptive right at the time.⁵¹³

279 The Claimants therefore have no case for contending that the Republic's pre-emptive right did not apply as the transfer of TNG from Gheso to Terra Raf was completed on 28 May 2003.⁵¹⁴ This was clearly not the case. Furthermore, Claimants depiction that Squire Sanders "*did not raise any concerns*" with regard to the pre-emptive rights waiver⁵¹⁵ is completely misleading. Squire did state that they considered it unlikely that the MEMR would terminate Contracts No. 210 and 302 because of this issue.⁵¹⁶ However, Squire Sanders stated explicitly that Claimants had indeed breached Article 71 because TNG did not apply for the necessary preemptive rights waiver:

*"Based on the information made available to us, there is a significant risk related to the **breach of requirements in Article 71 of the Subsoil Law, related to transfer by GHESO of its shares in TNG to Terra Raf in breach of the government's first refusal***

⁵¹⁰ GazImpex Explanatory Note Regarding Purchase of a Share Quota in TNG dated 15 September 2004 (**Exhibit C-514**).

⁵¹¹ Claimants' First Post-hearing Brief, para. 108.

⁵¹² Respondent's Rejoinder on Jurisdiction and Liability, para. 169; First Expert Report of Professor Ilyasova, para. 8(a).

⁵¹³ Letter from TNG to MEMR dated 19 February 2007 (**Exhibit C-424**).

⁵¹⁴ To clarify, in para. 108 of Claimants' First Post-hearing Brief, Claimants misstate the importance of Mr. Ongarbaev's testimony on this issue. Mr. Ongarbaev is not a Kazakh lawyer and would not know the legal requirements for what is required to complete a share transfer.

⁵¹⁵ Claimants' First Post-hearing Brief, para. 110.

⁵¹⁶ Squire Sanders Legal Due Diligence Report dated 30 July 2009, p.166 (**Exhibit C-725**).

right which may result in the suspension or termination of Subsoil Use Contracts No. 210 and No. 302.”⁵¹⁷(emphasis added)

280 Claimants’ counsel admitted this in their closing submissions and actually sought to use this to imply that the Republic had caused Claimants’ demise.⁵¹⁸ Again, Claimants want to have it both ways. In their Closing Presentation at the Final Hearing, Claimants alleged that Squire Sanders’ comments regarding the pre-emptive rights issue demonstrated that Claimants were prevented from selling TNG,⁵¹⁹ in their First Post-hearing Brief they state that Squire Sanders “*did not raise any concerns*”.⁵²⁰ These two statements are contradictory and both are wrong.

281 In view of the above, the Republic maintains its case that Claimants have acted in clear breach of Kazakh law as a result of both its violation of the requirement to obtain consent for the various transfers in TNG and as a result of numerous derogations with respect to the Republic’s pre-emptive rights. The Republic’s actions with respect to this issue both before and after 18 December 2008 (when the Republic allegedly revoked its consent to the transfer)⁵²¹ were therefore fully justified. Claimants have sought to confuse what is an issue concerning the legality of its “investment” with the alleged “harassment campaign” they have concocted. However, as explained above, there are no grounds for them arguing that the “pre-emptive rights” issue evidences harassment by the Republic.

⁵¹⁷ Squire Sanders Legal Due Diligence Report dated 30 July 2009, p.167 (**Exhibit C-725**).

⁵¹⁸ Claimants’ Closing Presentation, p. 32 and Closing Submissions, Final Hearing, Transcript Day 1, p.171, lines 3-12.

⁵¹⁹ Claimants’ Closing Submission, Final Hearing, Transcript Day 1, p.170, line 21 - p.171, line 16.

⁵²⁰ Claimants’ First Post-hearing Brief, para. 110.

⁵²¹ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 170-180; Respondent’s Statement of Defence, paras. 13.43-13.47; Respondent’s First Post-hearing Brief, paras. 475-476.

F. TNG's Contract No. 302 expired on 30 March 2009

282 TNG's Contract No. 302 expired on 30 March 2009, the Republic never granted an extension and the Republic was never under any obligation to extend the exploration period to 30 March 2011.

283 Claimants' position on Contract 302 is exemplary of their endeavour to have the cake and eat it. Claimants allege that in autumn of 2008 the Republic initiated a harassment campaign aimed at expropriating their assets; at the same time they allege that in April 2009 the MEMR would voluntarily decide to extend the exploration period of TNG's Contract No. 302 after the contract had already expired and the Republic would therefore have been free to take possession of the area at its will. Further, Claimants allege that the construction of the LPG Plant was stopped because no one in his right mind would have invested in the Plant "*knowing full well that essentially at that point it is a sitting duck, and that (...) it's likely to be lost to the state*"⁵²² and at exactly the same time TNG was allegedly "*poised to commence that exploration*"⁵²³ and invest more than USD 24 million⁵²⁴ in the course of this exploration. These allegations do not add up.

284 It is clear after five submissions and three hearings that Claimants have no argument and thus do not even allege that the Republic had been under a general obligation to extend Contract No. 302. Claimants therefore "only" base their claim with regard to Contract No. 302 on an alleged bad faith refusal to execute a commitment allegedly made by letter of 9 April 2009 to extend the exploration period under the contract.⁵²⁵

285 Disregarding that this argument is wrong for just a second, this has three grave implications. First, any alleged breach could therefore only have occurred after 9 April 2009 and thus about half a year after Claimants' chosen valuation date and after the contract term had already expired. Second, it is highly contradictory to

⁵²² Claimants' Rebuttal Closing Submission, Final Hearing, Day 2, p. 35, lines 19-25.

⁵²³ Claimants' First Post-hearing Brief, para. 230.

⁵²⁴ This is the amount which TNG would have been obliged to spend according to the working programmes submitted with Claimants' application of 14 October 2008 (**Exhibit C-67**) and the Draft addendum submitted on 30 April 2009 (**Exhibit C-168**).

⁵²⁵ This became once again in the Final Hearing, when Claimants stated: "Contrary to the suggestion made in the Respondent's post-hearing submission, it is not Claimants' case that Respondent had unfettered discretion to execute the addendum to contract 302, **once it provided TNG notice in writing that the MEMR had in fact approved the extension request**. Instead, having had TNG's extension request for a period of six months from October 2008 to March of 2009, and then advising TNG in writing, in April 2009, that the extension had been approved by the MEMR, Respondent **breached its Energy Charter Treaty obligations by then refusing** unreasonably, without excuse, and in bad faith, to execute the required addendum so that TNG could promptly continue its exploration activities." (emphasis added), Final Hearing, Day 1, p.8, line 20 - p.9, line 8.

Claimants' own case that the Republic would voluntarily commit itself to extend TNG's contract in April 2009 when allegedly it had initiated a scheme for nationalising Claimants' assets as early as 2008. Third, any compensation can therefore only be such money that Claimants invested after 9 April 2009 allegedly relying on an extension of the exploration period. Claimants have not proven any of such investments.

286 In essence, there are two remaining controversial issues related to the non-extension of Contract No. 302.

287 One issue has already been resolved. In their earlier submissions, Claimants at least insinuated that the Republic had been under an obligation to extend the exploration period beyond 30 March 2009 **before** the MEMR's letter of 9 April and therefore Claimants may have legitimately expected an extension. In line with the unequivocal wording of the contract, Claimants then admitted that this is not the case and therefore both Parties now agree that there was no such obligation and hence that TNG could not have legitimately expected an extension of the exploration prior to the 9 April 2009 letter.⁵²⁶

288 The first remaining controversial issue is that Claimants allege that the MEMR by letter of 9 April 2009 **decided** to extend the exploration period until 30 March 2011.

289 Secondly, Claimants allege that the 9 April 2009 letter from the MEMR entailed a legal obligation of the MEMR to enter into an addendum to Contract No. 302.

290 Both allegations are wrong.

I. The MEMR did not decide to extend the exploration period

291 Contrary to Claimants' allegations, the MEMR did not decide to extend Contract No. 302 and it did not undertake to execute the extension.

292 In their First Post-hearing Brief, Claimants now largely rely on the opinion of Professor Suleymenov to justify their position. They only submitted this "expert opinion" with their First Post-Hearing Brief after they had apparently noticed that their argument was unpersuasive. Before this, i.e. at the appropriate time with their

⁵²⁶ The Claimants' admission that there was no general obligation of the Republic to extend the exploration period is discussed in some more detail in Respondent's First Post-hearing Brief, paras. 335-344 and is explicitly stated in Claimants' Reply on Jurisdiction and Liability, para. 242.

Statement of Claim or even with their Reply on Jurisdiction and Liability,⁵²⁷ they did not provide any expert opinion but now belatedly chose to turn their expert on pipeline issues, Professor Suleymenov, into their expert on the question of the non-extension of Contract No. 302. In addition, Claimants “new” expert fails to provide any support for his statements. He seldom makes references to laws and regulations and even when he does so, he fails to exhibit any of them. This introduction of material new evidence with the First Post-hearing Brief is a futile act of desperation.

- 293 Professor Suleymenov’s last minute expert submission cannot support Claimants’ unfounded allegation that the MEMR agreed to extend Contract No. 302 and to execute an extension.
- 294 Professor Ilyassova already explained in her Second Expert Report⁵²⁸ and she further elaborates in opposition to Professor Suleymenov’s opinion in her Third Expert Report⁵²⁹ that the Expert Commission is not a Competent Body with the authority to act on behalf of the state. Hence, as even Professor Suleymenov acknowledges, the decision of the Expert Commission to recommend the extension is merely a part of the Competent Authority’s **internal** process.⁵³⁰ Therefore, again as acknowledged by Professor Suleymenov,⁵³¹ the decision by the Expert Commission to recommend the extension cannot be equated with the decision by the Competent Authority to actually extend.
- 295 Such a decision was never taken. As Professor Ilyassova highlighted in her Second Expert Report, according to the Regulation of the MEMR, the Ministry makes decisions within its competence as defined by legislation, formalised by orders of the Minister, and the letter of 9 April 2009 was not such an order by the Minister.⁵³²

⁵²⁷ Contrary to good practice in international arbitration, Claimants submitted several new expert reports with their Reply on Jurisdiction and Liability even though they had had every opportunity to do so with their Statement of Claim.

⁵²⁸ Second Expert Report of Professor Ilyassova, paras. 162-165.

⁵²⁹ Third Expert Report of Professor Ilyassova, paras. 11-12.

⁵³⁰ Second Expert Report of Professor Suleymenov, para. 56.

⁵³¹ Professor Suleymenov states at para. 57 of his Second Expert Report: “The fact that the MEMR refers in its notice to the Decision of the Expert Commission to evidence the MEMR’s resolution to authorize the extension of the exploration period demonstrates that the MEMR itself considers the Decision of the Expert Commission as the sole and legitimate evidence and ground of the decision taken by the Competent Authority.” This clearly shows that Professor Suleymenov acknowledges that there are two decisions; the decision by the Expert Commission to recommend the extension which is then the basis for the decision to be taken by the competent authority, see Third Expert Report of Professor Ilyassova, para. 13.

⁵³² Second Expert Report of Professor Ilyassova, paras. 162-163.

II. The 9 April 2009 letter did not oblige the MEMR to enter into an addendum for Contract No. 302

- 296 Claimants grossly misstate Professor Ilyassova's Expert Report, when they allege that both Parties' experts agreed that the MEMR had been under an obligation to enter into the addendum to extend Contract No. 302.⁵³³
- 297 Claimants refer to a section on Professor Ilyassova's report where she cites Art. 26 (4) of the Law on Oil which stipulates that upon the positive decision of the competent body, the corresponding amendments are introduced in the contract.⁵³⁴ However, in this case, as demonstrated above, there never was such a decision of the competent body.
- 298 In addition, it would have been the task of TNG to seek an amendment of the licence. Before the implementation of the corresponding amendment to the licence there was no basis for negotiations on the extension terms⁵³⁵ as the extension of the subsoil use contract would not even be allowed without a renewal of the licence.⁵³⁶
- 299 Professor Suleymenov appears to agree that amendments to the licence were necessary but alleges - yet again without any reference or authority and also without any discussion of Professor Ilyassova's discussion of the licensing system in her First Report - that in case of dispute, amendments to the subsoil use contract triggered automatic amendments to the licence because the MEMR was both competent authority and licensing authority.⁵³⁷
- 300 As explained by Professor Ilyassova, Professor Suleymenov's completely unsupported statement does not withstand a closer look at the law:

*“The subsoil use contract and the license for the subsoil use are different documents of absolutely different nature, and according to the established standards the amendments are primarily introduced to the license, and secondly - to the contract, and not vice versa. The established mechanisms for introducing amendments to the subsoil use contract and to the license are different.”*⁵³⁸

⁵³³ Claimants' First Post-hearing Brief, para. 224.

⁵³⁴ Expert Report of Professor Ilyassova, p. 28.

⁵³⁵ Third Expert Report of Professor Ilyassova, para. 24.

⁵³⁶ Expert Report of Professor Ilyassova, p. 37.

⁵³⁷ Second Expert Report of Professor Suleymenov, para. 64.

⁵³⁸ Third Expert Report of Professor Ilyassova, para. 27.

- 301 Therefore, in order to introduce amendments to the licence, TNG would have needed to submit an appropriate application to the MEMR,⁵³⁹ which it never did. The fact that the MEMR became both competent authority and licensing body neither abolished the need to amend existing licences nor did it change the respective procedure for such amendments, which is different to the procedure for amendments to the contract. This was explained by Professor Ilyassova in detail in her First Expert Report⁵⁴⁰ and was not challenged by Professor Suleymenov.
- 302 Furthermore, as explained in detail in the Republic's Rejoinder on Jurisdiction and Liability, Mr. Ongarbaev's witness statement and as testified by Minister Mynbaev and Mr. Ongarbaev in the Hearing on Jurisdiction and Liability,⁵⁴¹ the decision of the Expert Commission to recommend the extension and the submission of this information to the subsoil user is only an intermediary of several steps to extend a subsoil use contract.
- 303 Claimants are also wrong to allege that Respondent's witnesses Messrs. Mynbaev and Ongarbaev supported Claimants' interpretation of the MEMR's letter of 9 April 2009.
- 304 When Minister Mynbaev explained that the decision of the Export Commission had only recommendatory character, he was translated to have said that it gave recommendations as to whether the subsoil user may *count on* the extension or not.⁵⁴² However, the Russian verb «рассчитывать на» translated into English as “count on” was used by the witness in the ordinary meaning of «надеяться на», or English “hope for”. And certainly, a decision of recommendatory nature may raise hopes but it cannot give rise to legitimate expectations.
- 305 Similarly, Mr. Ongarbaev never testified that the MEMR had decided to extend Contract No. 302. He merely said that “it was decided” to allow the extension and given the fact that he himself was a member of the Expert Commission which made the decision to recommend to extend,⁵⁴³ it appears much more likely that this is the

⁵³⁹ Professor Ilyassova points out that regardless of which authority is the licencing authority and whether it is the same as the competent body as in this case, it is upon the subsoil user to file this application in addition to the application to extend the contract term at para. 25 of her Third Expert Report.

⁵⁴⁰ Expert Report of Professor Ilyassova, p. 34 et seqq.

⁵⁴¹ Rejoinder on Jurisdiction and Liability, paras. 413-425; Witness Statement Mr. Ongarbaev, para. 7.2; Testimony of Mr. Mynbaev, Hearing on Jurisdiction and Liability, Transcript Day 3, p.114, line 8 - p.115, line 21; Testimony of Mr. Ongarbaev, Hearing on Jurisdiction and Liability, Transcript Day 6, p.47, line 17 - p.49, line 4 and p.67, line 22 - p.68, line 11.

⁵⁴² Testimony of Mr. Mynbaev, Hearing on Jurisdiction and Liability, Transcript Day 3, p.113, lines 21-23.

⁵⁴³ Report № 7 of the Expert Commission (**Exhibit R-163.2**).

decision he referred to or - not being a lawyer but a geologist - that he did not refer to “decision” in the legal sense.

- 306 In their First Post-hearing Brief, Claimants also allege that it was “entirely implausible that KMG would have engaged in **extensive diligence relating to Contract No. 302** throughout the spring and summer of 2009 if it had not been satisfied that the MEMR had agreed to extend TNG’s exploration rights to the block, and that the extension addendum was a mere formality.”⁵⁴⁴ This allegation is ridiculous. Claimants do not mention which allegedly “extensive diligence” they are referring to. As Mr. Suleimenov stated, the Contract No. 302 was worthless in KMG EP’s opinion.⁵⁴⁵ This is why RBS did not even value the Contract No. 302 properties.⁵⁴⁶ In the RBS report, essentially one of 89 slides provides a very brief overview of the Taby1 block, i.e. the Contract No. 302 area, and no valuation of these properties was conducted.⁵⁴⁷
- 307 Claimants are also wrong to argue that the KMG EP valuations and due diligence documents confirmed that Contract No. 302 would be extended.⁵⁴⁸
- 308 Rather RBS for example assumed that the licence expired in March 2011;⁵⁴⁹ a position not at all in line with Claimants’ allegation that an extension was agreed to but that the contract term had **not** been effectively extended. It is noteworthy, that RBS, even though they assumed an extension of the exploration period, did not attribute any value to the Contract No. 302 properties.
- 309 The PwC statement that TNG had received an approval to extend was accompanied by express stipulation that this should be discussed with legal advisors, which PwC obviously are not.⁵⁵⁰
- 310 The Squire Sanders due diligence does not support Claimants position either. Claimants allege that because the addendum was not signed, they were prevented from further exploration. Squire Sanders on the other hand noted that TNG’s had stopped exploration work in the Contract No. 302 area and that this “*may lead to significant breaches related to non-fulfilment of the targets set forth in the Work Programme for 2009, delays in drilling schedule and well commissioning schedule,*

⁵⁴⁴ Claimants’ First Post-hearing Brief, para. 227 (emphasis added).

⁵⁴⁵ Witness Statement of Mr. Suleymenov, para. 2.14.

⁵⁴⁶ Deloitte Second Supplemental Expert Report, paras. 180-183.

⁵⁴⁷ RBS Valuation Report dated 31 July 2009, p.8 (**Exhibit R-374**).

⁵⁴⁸ Claimants’ First Post-hearing Brief, para. 228.

⁵⁴⁹ RBS Valuation Report dated 31 July 2009, p.8 (**Exhibit R-374**).

⁵⁵⁰ PwC Due Diligence Report, p. 31 (**Exhibit R-359**).

*and in a general breach of terms and conditions under Contract No. 302.”*⁵⁵¹ This is in blatant opposition to Claimants’ position and yet another proof for Claimants selective use of the evidence. In addition, Squire Sanders opinion that the contract would be extended was to a large extent based on oral statements from Claimants’ personnel, e.g. Mr. Paskaryuk and Ms. Bran.⁵⁵²

III. Claimants failed to prove that TNG did and could legitimately expect that Contract No. 302 would be extended

311 As has already been established and as is now uncontroversial, TNG had no reason to expect that the exploration period would be extended prior to the MEMR’s letter of 9 April 2009. This letter, even if it were assumed for the sake of argument that it was a decision by the MEMR to extend the exploration could not give rise to the legitimate expectation that the contract would be extended either.

312 The Republic has demonstrated in detail that the procedure of extending subsoil use contracts is a lengthy administrative process in which not only the MEMR/MOG is involved but also several other Ministries.

313 Mr. Ongarbaev stated that for various reasons

*“[i]n practice of the competent authority there are cases of rejection of an application for an extension of the exploration period by the competent authority. I know of about 30 such cases in 2009 alone.”*⁵⁵³

314 Mr. Ongarbaev also highlighted that there have been cases when an additional agreement to extend the contract for subsoil use was not concluded after the expert commission had already decided to recommend the extension and this decision has already been brought to the attention of the subsoil user by the letter from the competent authority.⁵⁵⁴

315 This statement stands un rebutted.

316 Claimants disingenuously continue to allege that they were “*dragged along in the issue*” of the extension of the exploration period.⁵⁵⁵ In its Rejoinder Memorial on

⁵⁵¹ Squire Sanders Legal Due Diligence Report, p. 153 (**Exhibit R-364**).

⁵⁵² *Ibid.*

⁵⁵³ Witness Statement Mr. Ongarbaev, para. 7.3.

⁵⁵⁴ *Ibid.* para. 7.4.

⁵⁵⁵ Claimants’ First Post-hearing Brief, para. 230.

Jurisdiction and Liability, the Republic already pointed out that there is no evidence to support this allegation⁵⁵⁶ and Claimants still fail to provide any.

317 Further, Claimants allegation that they did not proceed to the appraisal stage for the Munaibay Main area because they relied on the MEMR's letter of 9 April 2009 is meritless. As describe further below⁵⁵⁷ at the time of the MEMR's letter, the Contract had already expired and TNG had therefore already **lost** any opportunity to appraise this area.

318 Finally, Claimants have not even alleged in how far they actually relied on the alleged agreement to extend the exploration period. They did not specify a single action they undertook **in reliance** on the alleged commitment communicated by letter of 9 April 2009.

IV. In any event, TNG would have been bound by the working programmes it submitted

319 Finally, Claimants allegation that the Republic had argued that Kazakhstan could have extended the exploration period for only two of the Contract No. 302 properties⁵⁵⁸ is wrong.

320 The Republic never argued this. Rather, the Republic argued and does argue that even if the exploration period had been extended, which it was not, TNG would have been bound by the respective working programme.⁵⁵⁹ In its application of 14 October 2008, TNG submitted a draft working programme that only contained exploratory work on Munaibay and Bahyt and for example no exploratory work on the Interoil Reef.⁵⁶⁰ The same is true for the working programme that TNG submitted with the draft addendum on 30 April 2009.⁵⁶¹ Both did not stipulate any action related to the supposed Interoil Reef and are therefore illustrative for TNG's unwillingness to explore the Reef in October 2008 when the 3D seismic data was still being collected as well as in April 2009 when the 3D data had already been acquired and processed.

⁵⁵⁶ Respondent's Rejoinder on Jurisdiction and Liability, para. 430.

⁵⁵⁷ See below Part IV, D.

⁵⁵⁸ Claimants' First Post-hearing Brief, para. 222.

⁵⁵⁹ Respondent's Rejoinder on Quantum, para. 57.

⁵⁶⁰ See Application from TNG to the MEMR of 14 October 2008 (**Exhibit C-67**); Respondent's Rejoinder on Quantum, paras. 56-59.

⁵⁶¹ See Draft Addendum No. 9 to Contract No. 302 (**Exhibit C-168**); Respondent's First Post-hearing Brief, paras. 726-730.

- 321 Claimants' allegation that TNG would not have been bound by these working programmes - if agreed⁵⁶² - is highly disingenuous. This allegation is contrary to the testimony of their own witnesses⁵⁶³ and it is even contrary to Claimants' Opening Presentation on Quantum, in which they expressly acknowledged that the working programme would need to be amended to allow Claimants to drill the allegedly planned Munaibay No. 3 well.⁵⁶⁴
- 322 Claimants seek to justify their baseless allegation on the assertion that the working programmes submitted with the 14 October 2008 application and the 30 April 2009 draft addendum were **minimum** working programmes and could therefore be exceeded without approval.⁵⁶⁵ Unsurprisingly, Claimants did not ask their new expert on Contract No. 302, Professor Suleymenov to comment on this issue.
- 323 In reality, these working programmes were not **minimum** working programmes but working programmes.
- 324 Claimants fail to notice that according to Addendum No.5 to Contract 302, Article 3.3 of the contract which establishes the procedure for the extension of the exploration period was amended to state:

*“The Exploration period shall be extended due to Force-Majeure circumstances until 30.02.2009. The exploration period can be extended for not more than two years upon the mutual agreement of the Parties and in accordance with legislation, provided that the Contractor submits a new Work Program to the Competent authority.”*⁵⁶⁶ (emphasis added).

- 325 Once again, Claimants mistranslated this document. The translation submitted by Claimants inexplicably contains the word “**minimum**” even though the Russian original does not contain the word «МИНИМАЛЬНАЯ» and thus stipulates the submission of a working programme, not a minimum working programme.

⁵⁶² Claimants' First Post-hearing Brief, para. 235.

⁵⁶³ Contrary to Claimants' allegations, Mr. Cojin did not state that TNG had routinely conducted activities beyond the working programme but he acknowledged that the working programme would need to be changed, Hearing on Quantum, Day 2, p.65, lines 5-11.

⁵⁶⁴ In their opening presentation, Claimants stated: “In fact TNG absolutely intended to explore the Interoil Reef and **the extension request expressly references amending the work programme to drill a deep well** after obtaining the final results from the wells that were still being drilled at the time. Work programmes obligate a contractor to perform the works (...), Hearing on Quantum, Day 1, p.107, lines 8-16.

⁵⁶⁵ Claimants' First Post-hearing Brief, footnote 366.

⁵⁶⁶ Addendum No.5 to Contract 302 dated 7 February 2007 (**Exhibit C-53**).

- 326 In addition neither the application letter from TNG to the MEMR nor a draft of the working programme attached to this letter contain the word «минимальная» i.e. “minimum” next to the words “work program.”⁵⁶⁷
- 327 In fact, at the time of Claimants application for an extension of the exploration period, the concept of a “minimum” working programme had already been abolished.⁵⁶⁸
- 328 Therefore, Professor Ilyassova concludes that according to the relevant provisions of the Law on Oil and the Subsoil Law as in force during the period from October 2008 to 30 March 2011, and the terms of the Contract No. 302, it is necessary to make changes to the work programme if the subsoil user intends to go beyond the agreed working programme.⁵⁶⁹
- 329 In conclusion of their discussion of the non-extension of Contract No. 302, Claimants finally claim that the Republic’s alleged refusal to execute the extension interfered with Claimants’ ability to use and dispose of **their investments**.⁵⁷⁰
- 330 What Claimants fail to understand is that the subsoil belongs to the state who may decide to transfer the right to explore and exploit to subsoil users for a certain period of time. Claimants’ right to do so and thus Claimants’ investment ceased to exist when the contract term ended on 30 March 2009. At this point in time, Claimants lost all rights to the Contract No. 302 area and everything they may have invested in the exploration and they were obliged to return the contract area to the state (which they failed to do). They lost these rights and thus “**their investments**” not because the Republic allegedly failed to execute a commitment. At the time of the alleged commitment they had already lost these rights because they had failed to declare a **commercial** discovery according to section 8 of Contract No. 302 within the prescribed exploration period and thus failed to acquire a right to develop the area.

⁵⁶⁷ Neither the letter of TNG nor the title of the attached draft of the work program, have the Russian word «минимальная» next to the words «Рабочая программа». Application from TNG to the MEMR dated 14 October 2008 (**Exhibit C-168**).

⁵⁶⁸ Third Expert Report of Professor Ilyassova, para. 125

⁵⁶⁹ Third Expert Report of Professor Ilyassova, para. 135

⁵⁷⁰ Claimants’ First Post-hearing Brief, para. 237.

G. Termination of Contracts 210 and 305

- 331 The Republic has shown that the termination of Contracts 210 and 305 and subsequent transfer into trust management was justified, legal and necessary.⁵⁷¹ Put simply, the Republic could no longer allow the status quo to continue given the breaches Claimants had committed, the conditions Claimants had created, and their overall treatment of the Republic's subsoil and their own investment.⁵⁷²
- 332 Claimants have tried to contest the basis for the termination of Contracts 210 and 305. However, they have consistently failed to address the majority of the key issues surrounding termination at any stage in this arbitration.⁵⁷³ Even where they have sought to address the substantive grounds for termination, Claimants have not made their case credibly.⁵⁷⁴
- 333 To mask the deficiencies in their case, Claimants have continuously changed the focus of their arguments at different stages in these proceedings. In summary:
- 334 In the Statement of Claim, Claimants sought to portray the actions of the Republic as emanating from a last minute inspection "blitz" conducted with the intention of seeking out unjustified breaches of the contracts that it could use a pretext for illegally seizing Claimants' assets, in order to effect an alleged act of "direct expropriation".⁵⁷⁵
- 335 When the Republic substantively responded to each of the allegations made by Claimants in its Statement of Defence and demonstrated that Claimants were in clear violation of the contracts, therefore justifying termination,⁵⁷⁶ Claimants changed their tact. In the Reply Memorial on Jurisdiction and Liability, Claimants effectively ignored the substantive issues raised by the Republic in its Statement of Defence, particularly with respect to the numerous breaches they had committed leading up to the termination. Instead, Claimants focused on providing no more than unjustified

⁵⁷¹ Respondent's Statement of Defence, paras. 31.87-31.178; Respondent's Rejoinder on Jurisdiction and Liability, paras. 651-721; Respondent's First Post-hearing Brief, paras. 349-370.

⁵⁷² Ibid.

⁵⁷³ Respondent's Rejoinder on Jurisdiction and Liability, paras. 651- 655; Respondent's First Post-hearing Brief, paras. 349-351; Respondent's Statement of Defence, paras. 31.87-31.89.

⁵⁷⁴ Ibid.

⁵⁷⁵ Claimants' Statement of Claim, paras. 196-238.

⁵⁷⁶ Respondent's Statement of Defence, paras. 31.87-31.178.

and unreasonable procedural reasons as to why the Republic may have been incorrect in the application of its own laws.⁵⁷⁷

- 336 When the Republic responded to each of these issues in its Rejoinder Memorial on Jurisdiction and Liability,⁵⁷⁸ Claimants again changed their focus during the Hearing on Jurisdiction and Liability, in their First Post-hearing Brief and the Closing Hearing.⁵⁷⁹ In particular, Claimants now revert to focusing on irrelevant inspections in January 2010, which took place some 6 months before Contracts 210 and 305 were terminated.⁵⁸⁰ Furthermore, they return to the Notices of Breach the MEMR sent on 14 July 2010 and consider the merits of each breach identified by the Republic in those notices.⁵⁸¹ However, they completely neglect to respond to the reasoning the Republic provided in the Statement of Defence as to why Claimants had violated the contracts on the grounds set out in the Notices of Breach⁵⁸² as well as the reasons why their responses on 19 July 2010 were inadequate.⁵⁸³
- 337 Put simply, Claimants have continuously reframed their case to detract away from the substantive issues and portray the Republic's actions as unjustified. Clearly, the Republic had no option but to terminate Contracts 210 and 305. As such Claimants' approach is no more than another attempt to deceive the Tribunal.
- 338 As set out above, Claimants have made a final attempt to reframe their case in their First Post-hearing Brief and during the Closing Submissions. However, for the reasons set out below, Claimants still fail to make out their case credibly. Claimants simply do not have grounds for contesting the legitimacy of the termination of Contracts 210 and 305 and subsequent transfer into trust management.

⁵⁷⁷ Claimants' Reply on Jurisdiction and Liability, paras. 338-360.

⁵⁷⁸ Respondent's Rejoinder on Jurisdiction and Liability, paras. 651-721.

⁵⁷⁹ See, in particular, Claimants' First Post-hearing Brief, paras. 272-305, which summarises their position.

⁵⁸⁰ See, for example, Claimants' Closing Submissions, Final Hearing, Transcript Day 1, p.164, lines 3-8.

⁵⁸¹ Claimants' First Post-hearing Brief, paras. 280-288.

⁵⁸² Notice of infringement of obligations under the Borankol Subsoil Use Contract No. 305 from MOG to KPM dated 14 July 2010 (**Exhibit C-2**) and Notice of infringement of obligations under the Tolkyln Subsoil Use Contract No. 210 from MOG to TNG dated 14 July 2010 (**Exhibit C-6**).

⁵⁸³ Respondent's Statement of Defence, paras. 31.120- 31.126. See also Answer to the notification on infringement of obligations under Contract No. 305 to MOG from KPM dated 19 July 2010 (**Exhibit C-24**) and Answer to the notification on infringement of obligations under Contract No. 210 to MOG from TNG dated 19 July 2010 (**Exhibit C-26**).

I. Claimants were in continuing and serious breach of Contracts 210 and 305

339 The Republic has proven that Claimants were in continuing and serious breach of Contracts 210 and 305 for a considerable period of time,⁵⁸⁴ particularly as a result of:

- (a) their operating of a main pipeline without a license;⁵⁸⁵
- (b) their breaches of various tax laws;⁵⁸⁶
- (c) their failure to comply with KPM's and TNG's minimum working programmes;⁵⁸⁷ and
- (d) various other contractual violations revealed in inspections spanning the period 2001 to 2010.⁵⁸⁸

340 Furthermore, the Republic has referred to various witness testimony highlighting the poor management of the fields by Claimants, such that their treatment of the fields can only have been described as 'barbaric'.⁵⁸⁹ The contract violations and abysmal conditions had existed for a considerable period of time.

341 Notwithstanding this, in their First Post-hearing Brief and Closing Submissions, Claimants sought to undermine the significance of the pre-existing violations by reference to a Letter from MEMR to the Ministry of Industry and Trade.⁵⁹⁰ However, this letter was written in September 2009 and thus prior to the January 2010 inspection where the MEMR detected the failure to comply with the working programme.

⁵⁸⁴ Respondent's Rejoinder on Jurisdiction and Liability, paras. 657-662; Respondent's Statement of Defence, paras. 31.90-31.94; Respondent's First Post-hearing Brief, paras. 352-356.

⁵⁸⁵ See Part II, C and D.

⁵⁸⁶ See Part IV, K.IV.3.

⁵⁸⁷ Respondent's First Post-hearing Brief, paras. 352-356; Respondent's Rejoinder on Jurisdiction and Liability, para. 659; Respondent's Statement of Defence, para. 31.93.

⁵⁸⁸ Note on the breach of contracts by the Claimant discovered as a result of audit of TNG and KPM (**Exhibit R-33**). This is allegedly a "sleeper" statement. Claimants however chose not to cross examine the author Mr. Aldashev and it can only therefore be assumed that they do not challenge the contents of this exhibit.

⁵⁸⁹ Testimony of Mr. Ongarbaev, Hearing on Jurisdiction and Liability, Transcript Day 6, p.76, lines 3-21; Testimony of Mr. Mynbaev, Hearing on Jurisdiction and Liability, Transcript Day 3, p.148, lines 6-25. See also Testimony of Mr. Ongarbaev, Hearing on Jurisdiction and Liability, Transcript Day 6, p.49, line 6 - p.50, line 6.

⁵⁹⁰ Claimants' First Post-hearing Brief, paras. 272.

342 Furthermore, Claimants have sought to refer to inspections in January 2010, which allegedly gave KPM and TNG a “clean bill of health”.⁵⁹¹ However, the Republic has shown unequivocally that this was not the case.⁵⁹²

343 First, the Republic has already produced evidence showing that Claimants were not in compliance with their working programs in the form of:

- (a) Witness testimony of Claimants’ own witness Mr. Artur Lungu who stated “As it is known already, we did not do in full the capital investment programme that we had for both KPM and TNG in 2009 [...]”;⁵⁹³
- (b) The PwC Due Diligence Report, which goes further in stating that TNG had not met its targets for the drilling of new wells since 2008;⁵⁹⁴ and
- (c) The First FTI Report which states that the Minimum Work Program in the KPM Contract indicated plans to drill eleven new wells in 2009, yet no wells were drilled. Similarly, in relation to the TNG Contract, the Minimum Work Program agreed to by TNG envisaged four new wells, yet again no wells were drilled.⁵⁹⁵

344 Second, Claimants’ only basis for making this argument is their alleged financial investment in KPM and TNG.⁵⁹⁶ However, this is irrelevant to the question of compliance with respect to actual “work” carried out, particularly the drilling of wells.⁵⁹⁷ It is clear that the relevant works had not been carried out as explained above.

345 In any event, as to financial investment, the Republic clearly established at the Closing Submissions that TNG had not invested sufficient funds between 2007 and 2009. Claimants produced an incomplete translation of the relevant January 2010 inspection report for TNG⁵⁹⁸ which allegedly gave the company an “*unqualified green-light clean bill of health*”.⁵⁹⁹ Claimants’ translation somewhat conveniently omitted the parts of the report which demonstrated that Claimants were actually not

⁵⁹¹ Claimants’ Closing Submissions, Final Hearing, Transcript Day 2, p.38, lines 20-24.

⁵⁹² Respondent’s First Post-hearing Brief, paras. 352-354; Respondent’s Rejoinder on Jurisdiction and Liability, paras. 670-674; Respondent’s Statement of Defence, paras. 31.95-31.96.

⁵⁹³ Testimony of Mr. Lungu, Hearing on Quantum, Transcript Day 1, p.186, lines 10-18.

⁵⁹⁴ PwC Due Diligence Report, p.25 (**Exhibit R-359**).

⁵⁹⁵ FTI Consulting Expert Report, para. 8.13.

⁵⁹⁶ Claimants’ First Post-hearing Brief, paras. 272-274.

⁵⁹⁷ Respondent’s First Post-hearing Brief, paras. 354; Testimony of Mr. Mynbyaev, Hearing on Jurisdiction and Liability, Transcript Day 3, p.136, line 19 - p.137, line 8.

⁵⁹⁸ Reports of the MEMR for TNG 25 January - 5 February 2010 (**Exhibit C-386**).

⁵⁹⁹ Claimants’ Closing Submissions, Final Hearing, Transcript Day 1, p.164, lines 3-8.

complying with their working programs. Specifically, Claimants failed to meet their financial obligations from the years 2007 to 2009. This is ironic given Claimants whole case is that they complied with their working programmes purely because of the money they allegedly invested in KPM and TNG. There is therefore simply no case for Claimants contending they were issued a “*clean bill of health*”.⁶⁰⁰

346 Third, Claimants take a quote from Mr. Mynbayev completely out of context in order to allege that he admitted that KPM and TNG were in compliance with their contractual obligations.⁶⁰¹ In particular, they refer to one response Mr. Mynbayev gave to a question on this issue during cross examination but neglect to mention the very next response he gave to the following question on the same issue. This second question and response made clear that Mr. Mynbayev was not admitting Claimants’ were not in violation of their contracts as at January/February 2010:

“Q. So four months prior to the unscheduled inspections that you initiated in the summer of 2010, your agency had done a thorough and complete unscheduled inspection of my clients, and in fact had found no material contract violations; correct?”

A. In this respect, these very substantial decisions which are made by the minister, it is clear that the tax issues, the issues related to the trunk pipeline, they did not get regulated in the winter. And in fact the ministry, and me personally, impersonated by me, resisted -- I don't know what other word to use -- I did not want to terminate these contracts. I did not want to. It seemed that the investor must find a way to resolve his issues. And it is my right to decide whether I follow the recommendations of the inspections or not.

So this is not a legal or formalistic decision any longer; this is a decision on the merits.

*In fact, in July the situation was no longer tolerable, and a substantive decision at the level of a person who carried out the ministerial duties -- and here I make no difference between myself or my deputy -- it's a decision on the merits. **Something needed to***

⁶⁰⁰ See Respondent’s Rebuttal Closing Presentation, p.10-11 and Closing Submissions, Final Hearing, Transcript Day 2, p.48, line 8 - p.49, line 20.

⁶⁰¹ Claimants’ First Post-hearing Brief, para. 273.

be undertaken because the situation could no longer remain as it was in July."⁶⁰² (emphasis added)

347 It is noteworthy that Claimants continued to press Mr. Mynbayev on this issue and he consistently made clear that Claimants were in breach, particularly as they had failed to comply with the minimum working programs for KPM and TNG as, inter alia, they failed to drill the correct number of wells.⁶⁰³ As such, Claimants were in clear violation of their contractual obligations.

348 Claimants also neglect to mention or respond to the fact that Mr. Kravchenko has put into evidence that KPM and TNG were in violation of labour laws in early 2010.⁶⁰⁴ One can only assume that is therefore admitted by Claimants.

349 Thus, Claimants have no case for arguing that they were not in serious breach of Contracts 210 and 305, well before the inspection in June and July 2010. They were certainly in breach in early 2010. Any suggestion otherwise by Claimants is a fallacy.

II. The Republic was entitled and obliged to carry out inspections in June/July 2010 which revealed further violations

350 Given the nature and extent to which Claimants were in breach and the poor conditions of the fields generally, the Republic was clearly not only entitled but also obliged to carry out inspections of KPM and TNG in June and July 2010.⁶⁰⁵ In particular, the Republic has shown that inspections were completely necessary given:

- (a) There were serious allegations in relation to breaches of environmental law and subsoil law by KPM and TNG;
- (b) The Republic also had concerns arising out of Claimants' failure to pay employee salaries and reports of mass employee dismissals;
- (c) Complaints had been made in relation to loss of deposits leading to poor levels of production; and

⁶⁰² Testimony of Mr. Mynbayev, Hearing on Jurisdiction and Liability, Transcript Day 3, p.131, line 16 - p.132, line 15.

⁶⁰³ Testimony of Mr. Mynbayev, Hearing on Jurisdiction and Liability, Transcript Day 3, p.131, line 21 - p.139, line 22.

⁶⁰⁴ Second Witness statement of Mr. Kravchenko, paras 3.1-3.6.

⁶⁰⁵ Respondent's Rejoinder on Jurisdiction and Liability, paras. 675-677; Respondent's Statement of Defence, paras. 31.97-31.102; Respondent's First Post-hearing Brief, paras. 357-359.

(d) It was becoming more and more evident that the problems with the companies were only going to get worse.⁶⁰⁶

351 In any event, the Republic is and was fully entitled to inspect KPM and TNG to ensure compliance with subsoil legislation and Kazakh laws.⁶⁰⁷ Claimants fail at any point to credibly respond to this. Claimants therefore have no grounds in their First Post-hearing Brief to state that “*there was no reason to re-inspect the companies in June 2010,*”⁶⁰⁸ when there clearly was. Similarly Claimants have no grounds for further alleging that this was a “pretext” for Kazakhstan to manufacture a planned expropriation.⁶⁰⁹

352 The inspections conducted in June and July 2010 did reveal additional serious violations of Contracts 210 and 305 by KPM and TNG.⁶¹⁰ Claimants fail at any point to address this very fact. It also became apparent that that production was poor, Claimants were also mistreating the fields and Claimants’ actions were having a serious social impact.⁶¹¹ In the circumstances, Claimants have no basis for challenging the conduct of those inspections.

III. The Republic had no option but to terminate Contracts 210 and 305

1. Claimants had clear grounds to terminate the contracts

353 The Republic has shown consistently in these proceedings that Claimants were in serious breach of Contracts 210 and 305.⁶¹² In the circumstances, the Republic had no option but to take action and serve notices of breach.⁶¹³ It had already given Claimants considerable opportunity to remedy the various violations yet Claimants

⁶⁰⁶ Respondent’s Rejoinder on Jurisdiction and Liability, para. 676. See also Witness Statement of Mr. Ongarbayev, para. 2.5 and Second Witness Statement of Mr. Kravchenko, paras. 7.1-7.7.

⁶⁰⁷ Respondent’s Statement of Defence, paras. 31.99-31.102; Respondent’s Rejoinder on Jurisdiction and Liability, para. 675; Second Witness statement of Mr. Kravchenko, para 3.6.

⁶⁰⁸ Claimants’ First Post-hearing Brief, paras. 275.

⁶⁰⁹ Ibid.

⁶¹⁰ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 679-691. See also Second Witness Statement of Kravchenko, paras. 7.9-7.30 elaborating on the severity of the breaches identified by each state entity involved.

⁶¹¹ Ibid.

⁶¹² It should be noted that Professor Suleymenov’s comments that the violations needed to be measured by materiality thresholds under the relevant laws as opposed to the contracts are wrong (Second Expert Report of Professor Suleymenov, para. 70). As explained by Professor Ilyassova, certain laws, such as taxation laws, do not even give definitions of material or non-material breaches. In any event, this question is irrelevant in the context of termination under Article 72 of Subsoil law 2010 which does not require consideration of materiality (Third Expert Report of Professor Ilyassova, paras. 53-61).

⁶¹³ Respondent’s Statement of Defence, paras. 31.103-31.108; Respondent’s Rejoinder on Jurisdiction and Liability, paras. 678-682, Respondent’s First Post-hearing Brief, paras. 360-365.

failed to do so. Claimants' assertion that the contract violations related to "minor issues" and/or "utter fabrications" is therefore completely disingenuous.⁶¹⁴

354 The Republic set out in detail in its Statement of Defence as to why each of the violations referred to in the Notices of Breaches dated 14 July 2010 for Contracts 210 and 305⁶¹⁵ were contract breaches and further why KPM's and TNG's responses on 19 July 2010 were wholly inadequate.⁶¹⁶ Claimants failed to respond to these points in their Reply Memorial on Jurisdiction and Liability, instead focusing on misguided procedural reasons for challenging the termination.⁶¹⁷ Claimants now however belatedly repeat their initial case on this matter yet still fail to address the substantive points made by the Republic in response in the Statement of Defence.⁶¹⁸ This is no more than a backdoor attempt to portray the Republic's actions as unjustified.

355 First, Claimants repeat their excuse concerning the failure to make payments relating to (i) KPM's and TNG's historic costs, (ii) KPM's contributions to the Kazakh liquidation fund and (iii) KPM's taxes obligations, on the grounds that their accounts had been frozen.⁶¹⁹ Claimants framed this as an event of "force majeure" in their responses of 19 July 2010.⁶²⁰ However:

(a) It is simply nonsensical for them to regard the execution orders on their accounts as giving rise to force majeure. The execution orders only came about as a result of a recovery order legitimately being imposed on the companies as a result of Claimants' operation of a main pipeline without a license and the failure to comply with the court order by repaying this order. This is not force majeure.⁶²¹ It is telling that these executions orders did not prevent Claimants from allegedly paying employees (for which it is denied by the Republic) as they stated in their Closing Submissions.⁶²² It is difficult to understand how

⁶¹⁴ Claimants' First Post-hearing Brief, para. 280.

⁶¹⁵ Answer to the notification on infringement of obligations under Contract No. 305 to MOG from KPM dated 19 July 2010 (**Exhibit C-24**) and Answer to the notification on infringement of obligations under Contract No. 210 to MOG from TNG dated 19 July 2010 (**Exhibit C-26**).

⁶¹⁶ Respondent's Statement of Defence, paras. 31.104-31.106 and paras. 31.120-31.126.

⁶¹⁷ Respondent's Rejoinder on Jurisdiction and Liability, paras. 678-696.

⁶¹⁸ Claimants' First Post-hearing Brief, paras. 281-294.

⁶¹⁹ Claimants' First Post-hearing Brief, paras. 281-284.

⁶²⁰ Answer to the notification on infringement of obligations under Contract No. 305 to MOG from KPM dated 19 July 2010 (**Exhibit C-24**) and Answer to the notification on infringement of obligations under Contract No. 210 to MOG from TNG dated 19 July 2010 (**Exhibit C-26**).

⁶²¹ Professor Ilyassova makes clear that there would be no basis under Kazakh law for execution orders on KPM's accounts being considered as entitling KPM and TNG to claim forced majeure (Third Expert Report of Professor Ilyassova, paras. 97-110).

⁶²² Claimants' Closing Submissions, Final Hearing, Transcript Day 2, p.39, lines 10-15.

Claimants can distinguish these two sets of payments. Claimants therefore cannot justify their violation of Contracts 210 and 305 on these grounds.

- (b) Claimants wildly allege that Kazakhstan “completely misrepresented” the issues concerning KPM’s failure to pay historic costs during the Hearing on Jurisdiction and Liability,⁶²³ simply because there was confusion as to the amount KPM owed, as a result of Claimants’ own poor translation of the Notice of Breach for Contract 305.⁶²⁴ Clearly the Republic was not making any misrepresentations. It is also noteworthy that the Squire Sanders Report actually raised the issue of payment of historical costs by KPM and TNG in its report in June 2009, making their excuses on the failure to pay these amounts on time seem derisory at best.⁶²⁵
- (c) Claimants also have no basis for alleging that the claim relating to KPM’s failure to pay “*certain taxes and other obligatory payments to the budget*” is completely unsupported.⁶²⁶ The Republic has demonstrated on numerous occasions that KPM had breached tax laws in various ways.⁶²⁷

356 Claimants’ then move on to the violation concerning both KPM’s and TNG’s non-fulfilment of its obligations relating to the instruction and training of Kazakh specialists.⁶²⁸ They refer to funding allocated for training *all* their employees (as they did in the Statement of Claim), which is irrelevant to the breach committed which concerns the instruction and training of *Kazakh specialists*. This has already been explained in the Statement of Defence.⁶²⁹

357 Claimants also refer to their obligations regarding the acquisition of goods, works and services⁶³⁰ and it is noteworthy here that the Squire Sanders Report again refers to KPM’s historical non-compliance with this obligation.⁶³¹ Similarly, Claimants choose to ignore the very fact that both KPM and TNG failed to comply with their minimum working programme in numerous respects, which has clearly been evidenced.⁶³²

⁶²³ Claimants’ First Post-hearing Brief, para. 282.

⁶²⁴ Letters of the MEMR to KPM and TNG dated 14 July 2010 (**Exhibit C-2**).

⁶²⁵ Squire Sanders Legal Due Diligence Report dated 30 July 2009, p. 88-89 and 145-146 (**Exhibit C-725**).

⁶²⁶ Claimants’ First Post-hearing Brief, para. 284.

⁶²⁷ See Part IV, K.IV.3 below.

⁶²⁸ Claimants’ First Post-hearing Brief, paras. 285-288.

⁶²⁹ Respondent’s Statement of Defence, para. 31.122(a).

⁶³⁰ Claimants’ First Post-hearing Brief, para. 286.

⁶³¹ Squire Sanders Legal Due Diligence Report dated 30 July 2009, p.85 (**Exhibit C-725**).

⁶³² See Part II, G.I above.

358 Finally, Claimants deny they were in breach as a result of their operation of a main pipeline without a license as set out in the Notices of Breach. The Republic has demonstrated that this was unquestionably the case and Claimants have no grounds for disputing this serious violation.⁶³³

2. Claimants were neglecting and mistreating their investment

359 In addition to the various breaches identified in the Notices of Breach and the pre-existing serious and continuing breaches, Claimants were clearly neglecting and mistreating their investment.⁶³⁴ Claimants had effectively abandoned their investment.⁶³⁵ Furthermore, there were reports of employees' salaries not being paid, complaints concerning their treatment of the fields and production having practically stopped. All of this has been set out in both witness evidence from the Republic and in various witness testimony.⁶³⁶

360 Claimants now try to frame these issues as "post hoc" justifications for the "termination and seizure" and claim that there is a lack of evidence to support the Republic's position.⁶³⁷ However, Claimants actually provide no documentary evidence to the contrary. Nor do they give credible reasons as to why the Tribunal should not believe the evidence the Republic has produced in the form of sworn testimonies and witness statements (including from the Minister of Oil and Gas, Mr. Mynbayev and the Deputy General Prosecutor, Mr. Kravchenko)⁶³⁸ as well as an actual complaint received from locals in the region who were there at the time and experienced the situation.⁶³⁹

361 Instead, Claimants take two quotes from Mr. Mynbayev and Mr. Kravchenko out of context to suggest that they are simply alluding to potential "social tension" and about something that "could" happen.⁶⁴⁰ However, both of these witnesses have testified that the situation was far worse than that. There clearly were problems at

⁶³³ See Part II, C and D above.

⁶³⁴ Respondent's First Post-hearing Brief, paras. 362-365; Respondent's Rejoinder on Jurisdiction and Liability, paras. 692-694.

⁶³⁵ Respondent's First Post-hearing Brief, para. 363; Testimony of Mr. Mynbayev, Hearing on Jurisdiction and Liability, Transcript Day 3, p.141, line 12 - p.142, line 4; Second Witness Statement of Mr. Kravchenko, para. 7.23.

⁶³⁶ See Respondent's First Post-hearing Brief, paras. 362-365, Respondent's Rejoinder on Jurisdiction and Liability, paras. 692-694 and references therein.

⁶³⁷ Claimants' First Post-hearing Brief, paras. 295-305.

⁶³⁸ See Respondent's First Post-hearing Brief, paras. 362-365; Respondent's Rejoinder on Jurisdiction and Liability, paras. 692-694 and references therein.

⁶³⁹ Complaint concerning KPM and TNG from Sadyrbaev and others dated 28 June 2010 (**Kravchenko Second Witness Statement, Exhibit 1**).

⁶⁴⁰ Claimants' First Post-hearing Brief, paras. 296 and 297.

the very time and the social problems and issues were ever present and were experienced by both of them in both June and July 2010. As Mr. Mynbayev testified in relation to such problems:

“Q: What is your evidence, if any, that my clients had failed to pay wages and that the social unrest in the regions of Borankol and Tolkyn had anything to do with my clients?”

*A. I met the people there, and they asked when one would put an end to this. There was no one to speak to at TNG; if I remember correctly, there was only one person. At the time of our visit, TNG was represented by just one person, and one has to speak to someone. People, the workers, must have a chance to speak to someone. What were we expected to do?”*⁶⁴¹

362 As to the social tension, Mr. Mynbayev also explained:

*“It is a known fact. And even within the framework of his visit to the region, the Prime Minister had not planned to visit the facilities of KPM; he was forced to visit them in order to calm down the population, which in one way or another was involved at the territories when KPM facilities were situated.”*⁶⁴²

363 Claimants then refer to Mr. Calancea’s testimony (their own witness), as he apparently had *“direct knowledge of the operations of KPM and TNG.”*⁶⁴³ However, Mr. Calancea stating that the companies complied with their social duties and commitments and paid wages and salaries does not seem credible in light of not only what Mr. Mynbayev and Mr. Kravchenko have testified but also all of the evidence concerning the termination of the contracts in July 2010 as well as the written complaints.⁶⁴⁴ It should be noted that Mr. Kravchenko directly testified that:

*“[t]he fact that the salaries were delayed, I know it for sure, and I am absolutely sure in this. There were delays in early 2009, there were delays probably in July/August 2009, and also in February/March 2010.”*⁶⁴⁵

⁶⁴¹ Testimony of Mr. Mynbayev, Hearing on Jurisdiction and Liability, Transcript Day 3, p.143, line 22 - p.144, line 7.

⁶⁴² Testimony of Mr. Mynbayev, Hearing on Jurisdiction and Liability, Transcript Day 3, p.142, lines 19-24.

⁶⁴³ Claimants’ First Post-hearing Brief, para. 299.

⁶⁴⁴ Complaint concerning KPM and TNG from Sadyrbaev and others dated 28 June 2010 (**Kravchenko Second Witness Statement, Exhibit 1**). See also this section above.

⁶⁴⁵ Testimony of Mr. Kravchenko, Hearing on Jurisdiction and Liability, Transcript Day 4, p.110, lines 3-6.

364 Claimants’ also refer to Mr. Ongarbaev allegedly confirming that there was “*no risk of the hundreds of local Kazakh residents who worked for KPM and TNG leaving their jobs*”⁶⁴⁶ as they would be re-employed under the trust management system. Firstly, this is beside the point. Secondly, Mr.Ongarbaev clearly did not state that; Claimants have effectively completely misrepresented the position. In fact, all Mr. Ongarbaev was pointing to was that the Republic would swiftly take action to remedy the situation once the fields were transferred into trust management.

365 Finally, Claimants try to deny that they were mistreating the fields and again repeat that they were complying with their obligations.⁶⁴⁷ The Republic has already set out extensively that this was not the case.⁶⁴⁸ Claimants refer to a quote from GCA which allegedly shows that the fields were in good condition.⁶⁴⁹ However, Mr Wood of GCA only stated that the “*facilities*” were “*adequate for the region*”.⁶⁵⁰ Thus, GCA were only referring to the state of the equipment and were not considering how this equipment was used, i.e. by overproducing and thus causing water production and the flooding of wells. Claimants’ “*barbaric*” treatment of the fields led to serious flooding of the wells particularly in the Tolkyn field.⁶⁵¹

366 In the circumstances and given Claimants’ failure to take responsibility and attempt to suggest how they would cure not only the breaches but remedy the situation on the ground as whole, the Republic simply had no option to terminate Contract 210 and 305 for breach and invoke the relevant provisions of the Subsoil Law 2010.⁶⁵²

3. Republic terminated in accordance with the law

367 In their First Post-hearing Brief, Claimants persist with their misguided attempt to challenge procedural issues surrounding termination. This is no more than an attempt to detract away from the substantive reasons behind the termination of the contracts – the fact that Claimants were in clear breach of their contracts and for all intents and purposes had abandoned their investment.

368 Claimants again refer to alleged violations of the Law of Private Business 2009 during inspections of KPM and TNG in June and July 2010. They then try to relate

⁶⁴⁶ Claimants’ First Post-hearing Brief, para. 300.

⁶⁴⁷ Claimants’ First Post-hearing Brief, paras. 301-305.

⁶⁴⁸ Respondent’s First Post-hearing Brief, paras. 356 and 368-370 and see Part II, G.I above.

⁶⁴⁹ Claimants’ First Post-hearing Brief, para. 302.

⁶⁵⁰ Testimony of Mr. Wood of GCA, Quantum Hearing, Transcript Day 4, p.33, line 19 - p.34, line 14.

⁶⁵¹ Respondent’s First Post-hearing Brief, para. 356; Testimony of Mr. Ongarbaev, Hearing on Jurisdiction and Liability, Transcript Day 6, p.49, line 6 - p.50, line 6.

⁶⁵² Respondent’s Statement of Defence, paras. 31.127-31.135.

these alleged violations to the termination of Contracts 210 and 305 under Subsoil Law 2010.⁶⁵³ However:

- (a) First, the Republic fully complied with the Law of Private Business and specifically Section 38 when conducting those inspections.⁶⁵⁴ Claimants effectively admitted as such during the Hearing on Jurisdiction and Liability when Mr. Calancea testified that the Acts of Inspection were dated 15 July 2010 and notwithstanding this they did not appeal the Acts within 3 days as they could have done pursuant to the Law of Private Business 2009.⁶⁵⁵ Claimants therefore have no grounds for alleging that they were denied the “*right to appeal the inspections reports.*”⁶⁵⁶ For the avoidance of doubt, Claimants’ attempts to contest the very different Notices of Breach served under Subsoil Law 2010 cannot be said to be an appeal of the Acts of Inspection sent pursuant to the Law of Private Business 2009.
- (b) Second, and in any event, Claimants have no basis for claiming that this resulted in a breach of Article 72 of Subsoil Law 2010,⁶⁵⁷ the relevant law under which Contracts 210 and 305 were terminated.⁶⁵⁸ As the Republic has repeatedly stated, Subsoil Law 2010 and Law of Private Business 2009 are two very different laws.⁶⁵⁹ Claimants fail to provide any evidence to suggest that they are connected and that any alleged breach of Law of Private Business 2009 (which, for the avoidance of doubt, is denied) would constitute a breach of Article 72 of Subsoil Law 2010. As Professor Ilyassova has already explained, the two laws (and the corresponding rights to inspect and monitor KPM and TNG) are different and, in any event, there were clear grounds for termination arising from the continuous monitoring of KPM and TNG as well as the inspections in June and July 2010.⁶⁶⁰

369 Claimants then to try to discredit the Subsoil Law 2010 by reference to their expert’s, Professor Suleymenov’s, opinion that the new provisions on contract termination in that law constituted “corruption” provisions.⁶⁶¹ Mr. Suleymenov’s

⁶⁵³ Claimants’ First Post-hearing Brief, paras. 275-277.

⁶⁵⁴ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 668-669.

⁶⁵⁵ Testimony of Mr. Calancea, Hearing on Jurisdiction and Liability, Transcript Day 3, p.50, line 15 – p.51, line 4.

⁶⁵⁶ Claimants’ First Post-hearing Brief, para. 275.

⁶⁵⁷ Claimants’ First Post-hearing Brief, para. 276.

⁶⁵⁸ Respondent’s Rejoinder on Jurisdiction and Liability, para. 663-667; Respondent’s Statement of Defence, paras. 31.109-31.119.

⁶⁵⁹ Respondent’s First Post-hearing Brief, para. 360; Second Expert Report of Professor Ilyassova, paras. 110-152; Respondent’s Rejoinder Memorial on Jurisdiction and Liability, paras. 668-689.

⁶⁶⁰ Second Expert Report of Professor Ilyassova, paras.110-152.

⁶⁶¹ Claimants’ First Post-hearing Brief, paras. 278-279; Second Expert Report of Professor Suleymenov, para. 68.

opinion on the merits of a law which took almost two years to pass and was debated and considered extensively by parliament⁶⁶² is quite simply irrelevant to this arbitration. The Republic effectively considered the relevant law at the time and terminated Contracts 210 and 305 pursuant to that law. Claimants can create no conspiracy behind the timing of the termination and the date Subsoil Law 2010 was passed.

370 As to their claim that Professor Ilyassova stated that “*allegations of contract violations needed to be made in “good faith”*”,⁶⁶³ Claimants have completely misconstrued what Professor Ilyassova stated, which concerned general principles of Kazakh law under its constitution.⁶⁶⁴ In any event, the Republic did at all times act in good faith, reasonably and fairly.⁶⁶⁵ As to termination specifically, Claimants’ own expert, Mr. Suleymenov, accepts that all that is required is a “[f]ailure to eliminate any two, even non-material, breaches within the term specified in the notice.”⁶⁶⁶ As to Claimants assertion that the allegations of breach were, in any event, not “substantial”, this is quite simply ludicrous when taking into account the violations considered above⁶⁶⁷ and the condition of KPM and TNG and the fields generally at the time.⁶⁶⁸

371 Next, Claimants try to contest the amount of time they were allegedly given to cure the breaches after service of the Notices of Breach.⁶⁶⁹ As Claimants readily admit, there is no set cure period under Subsoil Law 2010 and therefore they cannot state that the Republic has not acted in accordance with its own laws.⁶⁷⁰ Furthermore, Claimants were given enough time to respond to the Notices of Breach.⁶⁷¹ It is deceiving for them to state they were only given “three days” to cure all breaches, for the following reasons:

- (a) Claimants were well aware of many of the breaches set out in the notices including the operation of a main pipeline without a license and the breach of

⁶⁶² Respondent’s Rejoinder on Jurisdiction and Liability, paras. 663-664; Law of RK № 213-I “On normative legal acts” dated 24 March 1998 (**Exhibit C-412**); Resolution on the draft of the Law of the Republic of Kazakhstan “On Mineral Resources and Subsoil Use” dated 31 October 2008 (**Exhibit R-256**); Article 130 of Law on Subsoil and Subsoil Use 2010 (**Exhibit R-257**) and Witness Statement of Minister Mynbayev, para. 7.3.

⁶⁶³ Claimants’ First Post-hearing Brief, para. 278.

⁶⁶⁴ First Expert Report of Professor Ilyassova, para. 2.

⁶⁶⁵ Ibid.

⁶⁶⁶ Second Expert Report of Professor Suleymenov, para. 69.

⁶⁶⁷ See Part II, G.I above.

⁶⁶⁸ See Part II, G.III.2 above.

⁶⁶⁹ Claimants’ First Post-hearing Brief, paras. 293-295.

⁶⁷⁰ Claimants’ Reply on Jurisdiction and Liability, para. 342.

⁶⁷¹ Respondent’s Rejoinder on Jurisdiction and Liability, para. 690-695.

tax obligations. Claimants themselves admit that such violations had been raised before⁶⁷² and have gone as far as objecting to and – to some extent – appealing these violations to the Kazakh courts. Furthermore, in relation to all other breaches, Claimants actively partook in the July 2010 audit and were regularly notified by the state entities involved of their findings, including if a contractual breach was identified. As this was all being done at the time of the audit, the formal results should have come as so no surprise to them;⁶⁷³

- (b) In addition, as some of these breaches concerned monetary obligations and the requirement to provide information, a limited time to respond was certainly reasonable and would in any event have been in accordance with Kazakh legal principles;⁶⁷⁴
- (c) In any event, Claimants made no attempt to seek an extension to this deadline on the basis that it was too short. It is therefore specious for Claimants to state that they only had three days to cure the violations;
- (d) Furthermore, the breaches were serious and the Republic was entitled to act quickly in the circumstances. As has already been stated, given production activities had virtually stopped, there was little chance of employees being paid and senior management had left country, the Republic simply had no option but to deal with situation without any further delay.⁶⁷⁵ The consequences of production being stopped could have been serious social unrest as Mr. Suleimenov has explained;⁶⁷⁶ and
- (e) Finally, and in any event, Claimants have still failed to credibly explain whether it suffered any prejudice by any alleged lack of notice that might have occurred (which is in any event denied). It is noteworthy that Claimants did, in fact, respond to the Notices of Breach, albeit that the responses were wholly inadequate.⁶⁷⁷

372 In summary, Claimants have no basis for challenging the termination of Contracts 210 and 305, both in substance and procedurally.

⁶⁷² Claimants' Reply Memorial on Jurisdiction and Liability, para. 347.

⁶⁷³ Witness Statement of Mr. Ongarbaev, paras. 2.6 and 2.8.

⁶⁷⁴ First Expert Report of Professor Ilyassova, para 2(a); Third Expert Report of Professor Ilyassova, paras. 62-66.

⁶⁷⁵ Witness Statement of Mr. Kravchenko, para. 7.23; Witness Statement of Minister Mynbayev, para 5.4.

⁶⁷⁶ Witness Statement of Mr. Suleimenov, para. 2.29.

⁶⁷⁷ See Part II, G.III. above.

IV. The transfer into trust management was legitimate and necessary

373 Following termination, Claimants' assets were taken into a specific trust arrangement which ensured that the assets were protected and monies held in escrow. This position will remain the same until new subsoil user is found (which has been difficult in the circumstances). It was essential that this took place swiftly in order to prevent any damage to the fields. Claimants fail to contest this in their First Post-hearing Brief and in this regard, the Republic repeats its own case.⁶⁷⁸

374 Claimants could have sought to resolve the problems amicably with the Republic. Furthermore, Claimants could have utilised the dispute resolution mechanisms under Contracts 210 and 305 and/or Subsoil Law 2010. Instead, Claimants sidestepped these mechanisms and filed substantive proceedings against the Republic in an international forum only five days after the terminations.⁶⁷⁹ This is self-evidently fatal to their expropriation claim.

⁶⁷⁸ Respondent's First Post-hearing Brief, paras. 366-370; Respondent's Rejoinder on Jurisdiction and Liability, paras. 697-717; Respondent's Statement of Defence, paras. 31.144-31.166.

⁶⁷⁹ Respondent's Rejoinder on Jurisdiction and Liability, paras. 718-721; Respondent's Statement of Defence, paras. 31.167-31.178.

H. No Harassment Campaign

375 In its previous submissions, the Republic has already explained extensively that Claimants' allegations of a state harassment campaign against them are wrong, unproven and in fact utterly baseless. In particular, the Republic has demonstrated the following:

- (a) The inspections of KPM's and TNG's business were initiated as a reaction to a letter by Moldovan President Voronin that accused Mr. Anatoli Stati of criminal behaviour.⁶⁸⁰ The letter was not requested by President Nazarbayev and any of Claimants' accusations to that effect are both unsupported by the evidence presented by Claimants⁶⁸¹ and are inadequate as a matter of logic.⁶⁸²
- (b) President Nazarbayev forwarded President Voronin's letter for thorough checking of the accusations made therein. Not doing so would have been an affront from a foreign policy perspective. The testimony of Mr. Rakhimov demonstrated that the Financial Police conducted the inspections independently and that Mr. Rakhimov did not consider President Nazarbayev's note as an instruction to conduct the inspections one way or another.⁶⁸³
- (c) Claimants have not demonstrated a credible motive for the alleged government harassment. Motives of Kazakh politics are simply not at issue. Furthermore, financial motives are equally non-existent. Claimants have not proven that any company controlled by Timur Kulibayev attempted to purchase KPM and TNG. Equally, their arguments that government entities were attempting to take over KPM and TNG fail. Internal government correspondence demonstrates that government officials were merely taking action because they were worried about the social situation in the region.⁶⁸⁴
- (d) The "Blagovest letter" does not support Claimants' arguments as it is a letter written by the president of a private entity, Mr. Zakharov, upon Mr.

⁶⁸⁰ Respondent's First Post-hearing Brief, paras. 374 et seqq.

⁶⁸¹ Claimants base their entire claim to that effect on the transcript of an interview with President Voronin on Moldovan television (**Exhibit C-78**). The wording of that interview however clearly shows that President Nazarbayev simply asked for information on Mr. Stati. In no way did President Nazarbayev indicate that he wished for a letter accusing Mr. Stati of any wrongdoing.

⁶⁸² Cf. also Testimony of Minister Mynbayev, Hearing on Jurisdiction and Liability, Transcript Day 3, p.101, lines 10-23.

⁶⁸³ Respondent's First Post-hearing Brief, paras. 377 et seqq.

⁶⁸⁴ Respondent's First Post-hearing Brief, paras. 383 et seqq.

Zakharov's own initiative.⁶⁸⁵ Minister Mynbayev described Mr. Zakharov as "a person far removed from the facts of real life".⁶⁸⁶

(e) Claimants' "Playbook" theory is baseless as the Financial Police and the Kazakh judiciary are independent from political influence.⁶⁸⁷

376 With their First Post-hearing Brief, Claimants' arguments on the alleged harassment campaign, set out in paragraphs 306-341 therein, have become ever more confusing and contradictory. The Republic denies any and all of these baseless accusations.

377 Specifically, Claimants have presented in their First Post-hearing Brief an entirely new and unproven theory according to which all Kazakh authorities conspired against Claimants – apart from the MEMR, which supposedly tried to defend KPM and TNG from the evil doings of the other authorities.⁶⁸⁸ With this theory, Claimants have finally given up on logic and have proven to be willing to allege anything if they feel it suits their case. That is because their theory is in direct contradiction to another central pillar of their case: The (equally baseless) allegation that the MEMR fabricated the pre-emptive rights waiver issue in December of 2008 in an attempt to harass TNG. Quite clearly, the MEMR cannot be Claimants' defender and at the same time the harasser. Claimants harassment case is simply illogical and should be disregarded entirely for this reason alone.

378 In addition, some of the issues Claimants stay silent on in their First Post-hearing brief are also quite interesting: This pertains in particular to the issue of motive for the alleged harassment. The Republic has argued consistently throughout these proceedings that no motive for harassment exists. In particular, the Republic has shown that Claimants have not provided a shred of evidence for their contention that Timur Kulibayev was interested in purchasing KPM and TNG.⁶⁸⁹ Claimants' complete non-responsiveness to the Republic's arguments can only be understood as them giving up on their earlier arguments.

379 Many of the issues that Claimants did indeed raise in their First Post-hearing Brief have been addressed by the Republic already. However, for the sake of completeness, some additional comments on new and particular outlandish arguments by Claimants are warranted.

⁶⁸⁵ Respondent's First Post-hearing Brief, paras. 404 et seqq.

⁶⁸⁶ Testimony of Minister Mynbayev, Hearing on Jurisdiction and Liability, Transcript Day 3, p.169, lines 12-13.

⁶⁸⁷ Respondent's First Post-hearing Brief, paras. 409 et seqq.

⁶⁸⁸ Claimants' First Post-hearing Brief, paras. 319 et seq.

⁶⁸⁹ Respondent's Rejoinder on Jurisdiction and Liability, paras. 338 et seqq. Cf. also Respondent's First Post-hearing Brief, paras. 383 et seqq.

380 To begin with, some of the arguments Claimants make in their First Post-hearing Brief are based on alleged statements of Minister Mynbayev that the Minister simply never gave:

- (a) Claimants' suggestion that Minister Mynbayev confirmed that the inspections and investigations were the result of an "order" by President Nazarbayev is incorrect.⁶⁹⁰ The section of Minister Mynbayev's testimony Claimants' refer to simply does not contain any such statement.⁶⁹¹
- (b) Contrary to Claimants' allegation, Minister Mynbayev never testified that the MEMR had defended KPM and TNG "*against the other Kazakh authorities involved, in an effort to protect from a unilateral takeover.*"⁶⁹² Neither the citations referred to by Claimants⁶⁹³ nor any other part of the transcript contain such testimony.
- (c) Contrary to Claimants' suggestions, Minister Mynbayev never testified that President Nazarbayev's instruction of November 2009⁶⁹⁴ was a starting point for the MEMR's "work" to terminate KPM's and TNG's subsoil use contracts.⁶⁹⁵ The testimony referenced by Claimants⁶⁹⁶ does not support this fairly ridiculous contention in any way.

381 Where Claimants do not outright misstate the given testimony, Claimants nonetheless submit numerous incorrect arguments:

- (a) Claimants are incorrect in arguing that the accusations contained in President Voronin's letter were not investigated.⁶⁹⁷ As a simple reading of the letter demonstrates, the letter contained accusations of a variety of criminal actions, *inter alia* of concealing profits from state authorities.⁶⁹⁸ In light of these severe accusations, the Kazakh authorities were perfectly entitled to conduct a broad inspection, including audits by the tax and geology committees.

⁶⁹⁰ Claimants' First Post-hearing Brief, para. 312.

⁶⁹¹ Testimony of Minister Mynbayev, Hearing on Jurisdiction and Liability, Transcript Day 3, p.87, lines 14-24.

⁶⁹² Claimants' First Post-hearing Brief, para. 319.

⁶⁹³ Testimony of Minister Mynbayev, Hearing on Jurisdiction and Liability, Transcript Day 3, p.132, lines 1-4 and p.161, lines 12-18.

⁶⁹⁴ Attachment to the Letter from Blagovest President to MEMR dated 7 February 2010 (**Exhibit C-23**).

⁶⁹⁵ Claimants' First Post-hearing Brief, paras. 333 et seq.

⁶⁹⁶ Testimony of Minister Mynbayev, Hearing on Jurisdiction and Liability, Transcript Day 3, p.173, lines 8-14.

⁶⁹⁷ Claimants' First Post-hearing Brief, para. 312.

⁶⁹⁸ Cf. President Voronin's letter with President Nazarbayev's note (**Exhibit C-8**): "*Concealing his profits from the previous activity conducted in Romania and Turkmenistan in offshore international areas, he is now presenting himself as a foreign investor in Kazakhstan.*"

- (b) Claimants repeatedly allege that the Republic has not produced certain government instructions in the present proceedings.⁶⁹⁹ This allegation is misleading as Claimants have never requested the production of these instructions and have never alluded to these instructions in their written submissions. If Claimants for the first time in their First Post-hearing Brief make any arguments based on the non-production of these instructions, this cannot be held against the Republic. Rather, the Republic invites the Tribunal to draw the appropriate inferences regarding the seriousness of Claimants' arguments.
- (c) Contrary to Claimants' allegations, the fact that "on August 27, 2009, a working session for discussion of issues related to the operations of Tolkyneftegaz LLP and Kazpolmunay LLP took place"⁷⁰⁰ is no indication of a planned government taking. This meeting merely confirms that government officials were concerned about the state of the companies and potential social consequences.⁷⁰¹ As Claimants themselves have confirmed, the state of the companies was particularly dire in the Summer of 2009,⁷⁰² so that it is no surprise that such meeting would be held. On the other hand, Claimants have not presented a shred of evidence for their absurd contention that there was "no doubt" a "working group" discussing ways to "finish off the planned taking".⁷⁰³
- (d) Claimants further argue that the state was aiming for a free of charge take over because KMG EP offered only USD 50 million despite RBS having found an enterprise value of USD 612 million.⁷⁰⁴ This argument is frankly an insult to any readers' intelligence. At the time, KPM and TNG were liable for Tristan note debt in the amount of USD 531.1 million and were facing other liabilities as well. Against this background, any alleged offer to buy the companies, the occurrence of which the Republic denies, could never be in the range of the enterprise value estimate of USD 612 million but had to be much lower.
- (e) Claimants are wrong to suggest that it was the Republic that obscured the circumstances that led to the coming into existence of the Blagovest letter. Under Claimants' own case, Mr. Zakharov of the Blagovest fund wrote this

⁶⁹⁹ Cf. e.g. Claimants' First Post-hearing Brief, paras. 316, 321.

⁷⁰⁰ Letter from MEMR to the Ministry of Industry and Trade of the Republic of Kazakhstan dated 28 September 2009 (**Exhibit C-294**).

⁷⁰¹ Cf. already Respondent's First Post-hearing Brief, paras. 398 et seqq.

⁷⁰² Claimants' First Post-hearing Brief, para. 407.

⁷⁰³ Claimants' First Post-hearing Brief, para. 326.

⁷⁰⁴ Claimants' First Post-hearing Brief, para. 327.

letter upon the initiative of Mr. Andreyev, the then general director of KPM.⁷⁰⁵ Claimants themselves submit that Mr. Zakharov aided Mr. Andreyev in communicating with the MEMR.⁷⁰⁶ Consequentially, Claimants cannot deny that the obscure circumstances surrounding this letter stem from the obscure action of KPM's general director at the time. It is thus Claimants alone who are responsible for any obscurity regarding that letter.

- (f) For the sake of completeness, it should also be noted that the Republic did not refuse to present Mr. Zakharov for oral testimony.⁷⁰⁷ Rather, Mr. Zakharov had himself decided not to testify, as the Republic had explained prior to the Hearing on Jurisdiction and Liability⁷⁰⁸ and as had not been questioned by Claimants at this or any other Hearing. Being "*a person far removed from the facts of real life*",⁷⁰⁹ Mr. Zakharov apparently wanted to spare himself the embarrassment of a cross-examination. Against this background, any alleged inconsistency between statements of Mr. Zakharov and the testimony of Minister Mynbayev⁷¹⁰ can only be resolved in the way that the testimony of the Minister, who testified in front of the Tribunal in an honest and forthright manner, must be deemed correct.

382 Lastly, it should be noted that Claimants are wrong in arguing that they are not required to demonstrate that there was a government scheme or plan aimed at Claimants' expropriation.⁷¹¹ That is because Claimants themselves have introduced an (incorrect) legal theory according to which their improperly early valuation date is justified based on the alleged existence of state intention to expropriate.⁷¹² Since, as demonstrated, Claimants have not been able to establish such state intention as of their valuation date of 14 October 2008 (or as of any other date), their valuation date is utterly untenable. Moreover, many of Mr. Stati's business decisions in the time after Claimants' valuation date were allegedly based on his conviction that the state had turned against him.⁷¹³ As this was not the case, his business decisions, such as the decision to stop the LPG Plant construction, were incorrect and must be held against him as a matter of causation and damage calculation.

⁷⁰⁵ Claimants' First Post-hearing Brief, para. 336.

⁷⁰⁶ Ibid.

⁷⁰⁷ Claimants' First Post-hearing Brief, para. 338.

⁷⁰⁸ Respondent's Letter to the Tribunal dated 27 September 2013, p.2.

⁷⁰⁹ Testimony of Mr. Mynbaev, Hearing on Jurisdiction and Liability, Transcript Day 3, p.169, lines 12-13.

⁷¹⁰ Claimants' First Post-hearing Brief, para. 337.

⁷¹¹ Claimants' First Post-hearing Brief, para. 307.

⁷¹² Claimants' Opening Presentation, Hearing on Quantum, Day 1, p. 18 et seq.

⁷¹³ See Part II, A.V.3-V.5 above.

PART III: LEGAL ANALYSIS

A. No Jurisdiction

383 Claimants' claims fail for a lack of jurisdiction alone. The Republic herewith reiterates its jurisdictional objections as raised in its previous submissions.⁷¹⁴ As Claimants have not presented many new arguments on the issue and the Republic has mostly addressed the relevant points in its First Post-hearing Brief already, not all arguments to this effect will be repeated in the following. Only those issues which need further clarification will be expanded on.

I. No investments

384 Claimants have not made investments within the meaning of the ECT. The Republic has iterated its position fully in the submissions and relies fully on these submissions which are summarised below.⁷¹⁵

385 As set out in previous submissions, the Republic's position is that the term "investment" in the ECT has an inherent meaning beyond the literal definition of Article 1(6) ECT. This includes compliance with both international law standards such as good faith as well as national laws.⁷¹⁶ The Republic has demonstrated in detail that for an investment to qualify as a protected investment under the ECT, it is not sufficient to just meet one of the listed items in Article 1(6) ECT.⁷¹⁷ This is because the "term "investment" has a meaning in itself that cannot be ignored"⁷¹⁸. This analysis is supported by dicta in *Romak S.A. v. Uzbekistan*.⁷¹⁹

386 Further As Professor Tietje notes, in accordance with Article 26(6) of the ECT, the tribunal must decide issues both in accordance with the Treaty and applicable rules and principles of international law. Thus, he stated that:

⁷¹⁴ Respondent's Statement of Defence, Sections 5-11; Respondent's Rejoinder on Jurisdiction and Liability, paras. 10 et seqq.; Respondent's First Post-hearing Brief, paras. 414 et seqq.

⁷¹⁵ Respondent's Statement of Defence, Section 9; Respondent's Rejoinder on Jurisdiction and Liability, paras. 73-215; Respondent's First Post-hearing Brief, paras. 445-481.

⁷¹⁶ Respondent's Rejoinder on Jurisdiction and Liability, paras. 76-82.

⁷¹⁷ Respondent's Rejoinder on Jurisdiction and Liability, Section B.III; Respondent's Statement of Defence Part 2, Section 9.

⁷¹⁸ *Romak S.A. v. Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, para. 180 (**Exhibit R-224**).

⁷¹⁹ *Romak S.A. v. Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, para. 180 (Exhibit R-224).

“[a]t the minimum, principles of public international law should be applied in the interpretation of the treaty, but this also implies that the ECT has to be interpreted in the context of the whole body of applicable international law rules.”⁷²⁰

387 Moreover, since there are gaps in the definition of “investment” in the ECT it is perfectly justified to refer to sources beyond the ECT.⁷²¹

388 While the Republic further explained this in the Hearing on Jurisdiction and Liability,⁷²² Claimants continues to disregard these legal arguments.⁷²³

389 The Republic’s position is that *Salini*⁷²⁴ characteristics are the applicable indicators against which to judge whether there has been an investment in this case by the Claimants.

390 It is the Claimants’ burden of proof to demonstrate that these five characteristics have been exhibited on this case: (i) a contribution of money or other assets of economic value, (ii) a certain duration, (iii) an element of risk, and (iv) a contribution to the host state’s development. In addition, the investments must be (v) made in accordance with the laws of the host state⁷²⁵ and (vi) in good faith in accordance with general principles of international law.⁷²⁶ These standards have not been met on the facts of this case as presented by Claimants.

391 Despite Claimants’ continued assertions that they made substantial investments,⁷²⁷ the financial contribution of Claimants at the outset was smaller than they allege.⁷²⁸ Claimants have been coy about evidencing the financial contribution to KPM, providing only an obscure brokerage agreement between Ascom and a company

⁷²⁰ Expert Report of Professor Tietje, para. 4.

⁷²¹ Expert Report of Professor Tietje, para. 6.

⁷²² Respondent’s Opening Presentation, Hearing on Jurisdiction and Liability, Transcript Day 1, p.22-26.

⁷²³ Claimants’ Opening Presentation, Hearing on Jurisdiction and Liability, Transcript Day 1, p.44, lines 7-21; Claimants’ Opening Presentation, Final Hearing, p.129, lines 12-25 - p.131, lines 1-23. Claimants’ First Post-hearing Brief, paras. 59-67.

⁷²⁴ *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 16 July 2001, para. 52 (**Exhibit R-223**).

⁷²⁵ *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paras. 138 et seq (**Exhibit C-400**).

⁷²⁶ For the last two criteria see *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paras. 100 et seqq (**Exhibit R-31**).

⁷²⁷ Claimants’ First Post-hearing Brief, paras. 63-80.

⁷²⁸ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 114-120.

called Telwin that provides no insight into the purchase price for Ascom, nor evidences KPM's payment of such a purchase price.⁷²⁹

392 For the purchase of shares in TNG, Mr. Pisica alleged that the price for 75% of the shares in TNG was a total of USD 463,000⁷³⁰ and for the remaining 25% of USD 154,333 thus a total of USD 617,333 for 100% of the shares in TNG.⁷³¹ Incomplete evidence of this has been provided.⁷³²

393 Following acquisition, Claimants assert that they contributed considerable amounts.⁷³³ The Republic challenged this in its Rejoinder Memorial on Jurisdiction and Liability.⁷³⁴

394 Claimants have taken little risk in Kazakhstan itself. Instead, they have protected themselves from the liability of the companies by creating the Tristan Oil structure and by overexposing KPM and TNG to debt from the beginning.⁷³⁵

395 Claimants have also no demonstrated any significant contribution to the development of the Kazakh economy during their 10 years in Kazakhstan.⁷³⁶ Claimants have failed to pay some of the taxes they owed (in particular their corporate back taxes) and diverted money away from the Republic.⁷³⁷ Moreover, Claimants systematically failed to fulfil their obligation to train Kazakh specialists.⁷³⁸

II. Illegality of the “investments”

396 The Republic has demonstrated in these proceedings that Claimants committed multiple breaches of Kazakh law when making their investment in the Republic, such that they should not be entitled to the protection afforded under the ECT.⁷³⁹ It should be noted that, contrary to what Claimants assert, the requirement for an

⁷²⁹ Claimants' Statement of Claim, paras. 42-51. Brokerage Agreement between Ascom and Telwin Ltd dated 1 September 1999 (**Exhibit C-393**). Claimants' Reply on Jurisdiction and Liability, para. 121.

⁷³⁰ Second Witness Statement of Mr. Pisica, para. 23.

⁷³¹ Ibid. para. 25.

⁷³² Respondent's Rejoinder on Jurisdiction and Liability, paras. 116-120.

⁷³³ Claimants' Statement of Claim, Section I.III.B.

⁷³⁴ Respondent's Rejoinder on Jurisdiction and Liability, Section IV.1(b).

⁷³⁵ Respondent's Rejoinder on Jurisdiction and Liability, Section B.4.2.

⁷³⁶ Respondent's Rejoinder on Jurisdiction and Liability, Section B.4.3.

⁷³⁷ Respondent's Rejoinder on Jurisdiction and Liability, paras. 135 et seqq.; Squire Sanders Legal Due Diligence Report, p.64 (**Exhibit R-364**).

⁷³⁸ As identified during inspections on April 2003, March 2006, May 2007, July 2008 and February 2010.

⁷³⁹ See Respondent's Statement of Defence, Section 13; Respondent's Rejoinder on Jurisdiction and Liability, paras. 146-204 and Respondent's First Post Hearing Brief, paras. 465-469.

investment to be made in accordance with domestic law and in good faith should not be limited to instances of misconduct amounting to fraud. This is supported by statements in both *Plama Consortium Limited v Republic of Bulgaria* and *Inceysa Vallisoletana S.L. v. Republic of El Salvador*.⁷⁴⁰

397 Claimants continue to refer to their own breaches as “minor clerical errors”, when they were actually serious violations of Kazakh law.⁷⁴¹ The Republic repeats that this is indicative of Claimants’ behaviour throughout its time in Kazakhstan; wherein it repeatedly acted outside the law and disobeyed state authorities.⁷⁴² Claimants have no grounds for denying this.

398 The Republic does not intend to repeat the points it made in its previous submissions, which deal extensively with each of Claimants’ violations when making their investment and respond substantively to Claimants attempts to deny liability for those breaches.⁷⁴³ However, there are a number of incorrect and misleading assertions in Claimants’ First Post-hearing Brief which are now rebutted below.

1. Claimants failure to obtain the required consent in relation to the transfer of TNG and circumvention of the Republic’s pre-emptive right

399 As explained in the section pre-emptive rights above⁷⁴⁴ the Republic has demonstrated conclusively that Claimants failed to not only obtain consent from the Competent Authority and Licensing Authority in relation to the transfer of TNG from Gheso to Terra Raf but also a total of 8 transfers involving its companies.

400 Claimants continue to argue that they did not violate the relevant legal provision in force at the time,⁷⁴⁵ which was Article 53(1) of the 1995 Law on Oil. This law clearly provided that Claimants needed such consent from both the Competent Authority and the Licensing Authority prior to purchasing and transferring TNG.⁷⁴⁶

⁷⁴⁰ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 100-108. See in particular, the consideration of these principles in *Plama Consortium Limited v Republic of Bulgaria*, Decision on Jurisdiction, ICSID Case No. ARB/03/24, 8 February 2005, para. 144. (**Exhibit R-32.1**) and *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, para. 230 (**Exhibit R-226**).

⁷⁴¹ Claimants First Post Hearing Brief, paras. 86 and 87.

⁷⁴² Respondent’s Rejoinder on Jurisdiction and Liability paras. 146-149 and Respondent’s First Post Hearing Brief, paras. 465-467.

⁷⁴³ See Respondent’s Statement of Defence, Section 13; Respondent’s Rejoinder on Jurisdiction and Liability, paras. 146-204 and Respondent’s First Post Hearing Brief, paras. 465-469.

⁷⁴⁴ See Part II, E.

⁷⁴⁵ Claimants’ First Post-hearing Brief, paras. 95-99.

⁷⁴⁶ Article 53 of Decree No. 2350 of the President of the Republic of Kazakhstan having the force of Law on Oil of June 28, 1995 (**Exhibit C-411.1**).

As such, their arguments are wrong on a number of counts, which have been pleaded extensively by the Republic,⁷⁴⁷ and are now summarised again below.

401 First, Claimants persist with their claim that another law, Article 14(1) of 1996 Subsoil Law (as amended), took precedence over Article 53 of the 1995 Law on Oil due to the “*hierarchy of statutory acts according to which provisions of a later acts shall prevail*”.⁷⁴⁸ As such, they claim that they did not need to comply with Article 53(1) of the 1995 Law on Oil. However, as Professor Ilyassova has already explained, pursuant to both Article 14(1) of the 1996 Subsoil Law and Article 2 of the 1995 Law on Oil, the 1995 Law on Oil actually took precedence over the 1996 Subsoil Law in the event of any inconsistency.⁷⁴⁹ Therefore, Claimants clearly did need to comply with the 1995 Law on Oil and Article 53(1) specifically when purchasing and transferring TNG.

402 Second, and in any event, these are two distinct laws which have a different scope of application – one concerning oil and the other subsoil use.⁷⁵⁰ Clearly a company operating in both these fields would be required to comply with both of them.

403 Third, if the Republic wanted to amend or remove the requirements to obtain consents from the Competent Authority and Licensing Authority when purchasing and transferring shareholdings, as required by Article 53(1) of the 1995 Law on Oil, it would have done so when it actually made other amendments to that law on 11 August 1999. This was the same date that the Republic amended Article 14(1) of the 1996 Subsoil Law. The Republic therefore clearly had the opportunity to amend Article 53(1). However, self-evidently it chose not to. Indeed, the law remained in force, subsequently only being amended in December 2004.⁷⁵¹

404 Fourth, even if Claimants are correct that they only need to comply with Article 14(1) of the 1996 Law on Subsoil Use (which, for the avoidance of doubt, is denied) and further that they did not need consent from the Competent Authority pursuant to that law (notwithstanding the express wording which suggests the

⁷⁴⁷ Respondent’ Rejoinder on Jurisdiction and Liability, paras. 152-157, Respondent’s First Post Hearing Brief, paras. 468-470 and Respondent’s Statement of Defence, paras. 13.16-13.20.

⁷⁴⁸ Claimants’ First Post-hearing Brief, para. 99

⁷⁴⁹ First Expert Report of Professor Ilyassova, para. 6, and Respondent’s Rejoinder on Jurisdiction and Liability, para. 156.

⁷⁵⁰ Respondent’s Rejoinder Memorial on Jurisdiction and Liability, para. 154.

⁷⁵¹ Decree No. 2350 of the President of the Republic of Kazakhstan having the force of Law on Oil of June 28, 1995 (Exhibit C-411.3) and Law of the Republic of Kazakhstan “On Making Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Matters of Subsoil Use and Conduct of Oil Operations in the Republic of Kazakhstan” of December 1, 2004, No. 2-III (Exhibit C-414). As Professor Ilyassova notes, the law was again amended on 18 October 2005 (First Expert Report of Professor Ilyassova, para. 6).

contrary),⁷⁵² this did not stop Claimants from making an application for “retroactive consent” to the transfer of TNG from Gheso to Terra Raf in its letter of 19 February 2007.⁷⁵³ It is telling that in this letter, Claimants failed to even mention the 1996 Law on Subsoil Use, and instead primarily tried to excuse their failures to obtain consents on the basis that there was no time limit for obtaining consents under Article 53(1) of the 1995 Law on Oil.⁷⁵⁴ Clearly Claimants did not believe the 1996 Law on Oil applied at the time. To quote from that letter in which Claimants requested consent, Claimants were clearly aware they needed to comply with Article 53(1) of the 1995 Law on Oil:

*“[i]n line with Art. 53 of the Law, in force at the time of the Agreement signature, we kindly ask You to issue the appropriate permit.”*⁷⁵⁵

405 In the circumstances, Article 53 of the 1995 Law on Oil clearly did apply and Claimants have no grounds for contesting that it did not or that they did not believe it did. Claimants are simply seeking to mislead the Tribunal, once again misrepresenting the legal position,⁷⁵⁶ by referring to the 1996 Subsoil Law and arguing that it somehow applied instead or took precedence over the applicable and in force 1995 Law on Oil.

406 As Professor Ilyassova has explained, such consent from the Competent and Licensing Authorities was required (including in relation to Terra Raf’s acquisition of TNG from Gheso) for any contract transferring TNG to be considered concluded and therefore valid.⁷⁵⁷ As such, the consequence of Claimants failures to obtain such consents was that all of the 8 transfers of TNG involving Claimants were invalid.⁷⁵⁸

407 Given this was the case, clearly the Republic had a pre-emptive right to purchase TNG pursuant to Article 71 of the 1996 Law on Subsoil Use as amended on 8 December 2004,⁷⁵⁹ when the MEMR wrote to TNG on 13 February 2007 concerning its failure to obtain consent for the transfer of TNG from Gheso to Terra

⁷⁵² Claimants First Post Hearing Brief, paras. 97-98

⁷⁵³ Letter from TNG to the MEMR dated 19 February 2007 (**Exhibit C-424**)

⁷⁵⁴ Ibid.

⁷⁵⁵ Ibid.

⁷⁵⁶ Claimants’ First Post-hearing Brief, para. 99.

⁷⁵⁷ Second Expert Report of Professor Ilyassova, paras. 90-98.

⁷⁵⁸ Second Expert Report of Professor Ilyassova, paras. 100-109.

⁷⁵⁹ Law of the Republic of Kazakhstan “On introduction of amendments and additions to some legislative acts of the Republic of Kazakhstan concerning subsoil use and performance of oil operations in the Republic of Kazakhstan” No. 2-III, Article 1 dated 1 December 2004 (**Exhibit R-19**).

Raf.⁷⁶⁰ That last transfer had not been completed prior to December 2004 (as a result of the failure to obtain consents) and therefore Claimants needed both the consents and a waiver of the Republic's pre-emptive right. The same was the case at each of the various times it wrote to TNG on this issue.⁷⁶¹ Contrary to what Claimants say, no share transfer occurred prior to December 2004.⁷⁶² Therefore Claimants committed the double violation of failing to obtain consent to the various transfers it was involved in and then failing to request a waiver to the Republic's pre-emptive right.

2. KPM's share registration

408 In addition, there were clearly defects with respect to the issuance of KPM's shares and the purported registration of those shares.⁷⁶³ Claimants admit that this was the case and that KPM's initial share issuance had not been registered as it should have been.⁷⁶⁴ However, Claimants persist with trying to deny liability and argue that the Republic's comments on Claimants' own failures with respect to the issuance and registration of KPM's shares are simply a "*post hoc attempt to create an issue.*"⁷⁶⁵ Yet Claimants fail to credibly respond to the Republic's case that it only discovered many of the problems with KPM's shares after this arbitration had commenced.⁷⁶⁶ This defeats their argument and also continued reliance on limitation periods,⁷⁶⁷ which are irrelevant given the issues had not come to light until after Claimants had commenced these proceedings.⁷⁶⁸

409 Claimants particularly refer to the alleged application of Article 16 of the Law on Securities Market by claiming that the Republic needed to commence court proceedings in order to invalidate the share issue.⁷⁶⁹ This is based on Professor Maggs' first expert report and is apparently supported by his view that "*there is no concept of transaction void ab initio under Kazakhstan law.*"⁷⁷⁰ However, as explained by Professor Ilyassova in her second expert report:

⁷⁶⁰ Letter from MEMR to TNG on 13 February 2007 (**Exhibit C-132**).

⁷⁶¹ Respondent's Rejoinder on Jurisdiction and Liability, paras. 164-177 and Respondent's Statement of Defence, para. 13.47.

⁷⁶² Claimants' First Post-hearing Brief, para. 106.

⁷⁶³ Respondent's Rejoinder on Jurisdiction and Liability, paras. 183-199.

⁷⁶⁴ Claimants First Post Hearing Brief, para. 88.

⁷⁶⁵ Claimants' First Post-hearing Brief, para. 89 to 94.

⁷⁶⁶ Respondent's Rejoinder on Jurisdiction and Liability, paras. 181-182.

⁷⁶⁷ Claimants' First Post-hearing Brief, para. 94.

⁷⁶⁸ Respondent's Rejoinder on Jurisdiction and Liability, para. 199

⁷⁶⁹ Claimants' First Post-hearing Brief, para. 90.

⁷⁷⁰ Claimants' Opening Presentation, Hearing on Jurisdiction and Liability, Transcript Day 1, p.54, lines 12-17.

- (a) First, the filing of an application to register shares and the subsequent actions of the authorised body for state registration of the issue of shares is not a “transaction” under Kazakh law.⁷⁷¹ Given that Professor Maggs’ position is premised on the registration being a “*transaction*” and there not being a concept of “*transaction void ab initio*” under Kazakh law, the very basis of Professor Maggs’ position is flawed;
- (b) Second, and in any event, it is clear that under Kazakh law transactions can be considered invalid without a court or other order, and therefore Professor Maggs’ *void ab initio* argument is fundamentally incorrect. Professor Ilyassova has provided various examples of transactions which are invalid without requiring a court order;⁷⁷² and
- (c) Third, pursuant to Article 17 of the Securities Market Law, the consequence of failures relating to the registration of shares is that the share issuance itself “*shall be deemed invalid.*”⁷⁷³ Therefore, as a result of the failure to register KPM’s shares, the share issue was invalid from the beginning.

410 Claimants then try to argue that they “cured” the defect with registration by later re-registering KPM’s shares.⁷⁷⁴ However, as Professor Ilyassova explains, legally it would have been impossible to transfer the shares given they were never validly formed (in the “primary market”) and as such it would not have been possible under Kazakh law to register the share transfer (an event on the “secondary market”).⁷⁷⁵

411 In the circumstances, Claimants assertion that they have acted in accordance with Kazakh law when investing in KPM is again flawed. Their reliance on the Squire Sanders Report as evidence in this regard is equally flawed,⁷⁷⁶ as all that this report states is that Claimants did not have sufficient information on the issue of the share registration of KPM.⁷⁷⁷

⁷⁷¹ Second Expert Report of Professor Ilyassova, paras. 9-21.

⁷⁷² Second Expert Report of Professor Ilyassova, paras. 22-34, First Expert Report of Professor Ilyasove, para. 7; Respondent’s Rejoinder on Jurisdiction and Liability, paras. 187-188.

⁷⁷³ Law of the Republic of Kazakhstan “On Securities Market” No. 77-1, Articles 2, 16, 17 and 18 dated 6 March 1997 (**Exhibit R-7**)

⁷⁷⁴ Claimants’ First Post-hearing Brief, paras. 91 and 92.

⁷⁷⁵ Second Expert Report of Professor Ilyassova, paras. 35-86.

⁷⁷⁶ Claimants’ First Post-hearing Brief, para. 93.

⁷⁷⁷ Squire Sanders Legal Due Diligence Report dated 30 July 2009, p.64 (**Exhibit C-725**)

III. No good faith

412 As set out in the Republic’s pleadings,⁷⁷⁸ there are clear indications that Claimants have not acted in good faith in relation to their investments in Kazakhstan. In particular:

- (a) Claimants have acted illegally in various ways breaching Kazakh law when making their investment and during the course of their investment;⁷⁷⁹
- (b) Both Anatolie Stati’s and Gabriel Stati’s standards in investment fall well below what might be expected of a normal commercial investor, particularly given that (i) there are indications that they have engaged in criminal and terrorist activities, (ii) the fact they have concealed who is behind their investment and (iii) they have been using their investment in the Republic to fund and advance their political goals in Moldova;⁷⁸⁰ and
- (c) Claimants have corrupted officials: Claimants held internal government documents and effectively admitted their involvement in the obtaining of stolen documents.⁷⁸¹

413 Claimants’ challenges of some of these allegations, for example those at (b) above, centre around attempts to discredit Professor Olcott’s report which evidences number of these allegations.⁷⁸² They argue that the evidence that Professor Olcott relies on is “internet gossip” imploring the Tribunal to give no weight to such allegations.⁷⁸³ Yet in their First Post-hearing Brief, they choose to quote Professor Olcott when criticising quality of the rule of law in the Republic.⁷⁸⁴ The selective use of Professor Olcott’s evidence suggests that their criticisms of Professor Olcott are superficial, and not accepted by the Claimants themselves.

⁷⁷⁸ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 205-215; Respondent’s Statement of Defence, paras. 9.36-9.87, Respondent’s First Post-hearing Brief, paras. 480-481.

⁷⁷⁹ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 205-209.

⁷⁸⁰ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 210-212.

⁷⁸¹ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 212-215.; Respondent’s First Post-hearing Brief, Part V.A.

⁷⁸² Expert Report of Martha Brill Olcott dated August 8, 2012.

⁷⁸³ Claimants’ First Post-hearing Brief, para. 48.

⁷⁸⁴ Expert Report of Martha Brill Olcott dated August 8, 2012.

B. The Republic acted in accordance with the ECT at all times

I. The Republic has not committed any breach of the ECT

414 The Republic has demonstrated in detail in the previous submissions that the Republic's actions were at all times fair and equitable,⁷⁸⁵ non-expropriatory,⁷⁸⁶ reasonable and non-discriminatory,⁷⁸⁷ they did not violate the standards of most constant protection and security,⁷⁸⁸ effective means⁷⁸⁹ and employment of key personnel⁷⁹⁰ and they did not breach the umbrella clause.⁷⁹¹ In its First Post-hearing Brief, the Republic also extensively analysed and explained why there was no denial of justice in the trial against KPM's General Director, Mr. Cornegruta.⁷⁹² The Republic stands by those submissions and does not find it necessary to repeat them here.

II. No expropriation in July 2010

415 As the question from a member of the Tribunal at the Final Hearing in May 2013 may have implied that an expropriation took place in July 2010,⁷⁹³ the Republic reiterates - for the avoidance of doubt - that it by no means expropriated Claimants' assets. At the Final Hearing one of the Members of Tribunal put the following question to the Republic's counsel:

*“MR HAIGH: Well, perhaps I could just ask a supplemental question. The either/or that I think I was attempting to ask about is first of all, to take the last bookend, **there's no question that the***

⁷⁸⁵ Respondent's Rejoinder on Jurisdiction and Liability, paras. 990 et seqq.; Respondent's Statement of Defence, paras. 37.1 et seqq.

⁷⁸⁶ Respondent's Rejoinder on Jurisdiction and Liability, paras. 864 et seqq.; Respondent's Statement of Defence, paras. 33.1 et seqq.

⁷⁸⁷ Respondent's Rejoinder on Jurisdiction and Liability, paras. 1009 et seqq.; Respondent's Statement of Defence, paras. 38.1 et seqq.

⁷⁸⁸ Respondent's Rejoinder on Jurisdiction and Liability, paras. 957 et seqq.; Respondent's Statement of Defence, paras. 36.1 et seqq.

⁷⁸⁹ Respondent's Rejoinder on Jurisdiction and Liability, paras. 1107 et seqq.; Respondent's Statement of Defence, paras. 40.1 et seqq.

⁷⁹⁰ Respondent's Rejoinder on Jurisdiction and Liability, paras. 1145 et seqq.

⁷⁹¹ Respondent's Rejoinder on Jurisdiction and Liability, paras. 1053 et seqq.; Respondent's Statement of Defence, paras. 39.1 et seqq.

⁷⁹² Respondent's First Post-hearing Brief, paras. 484 et seqq.

⁷⁹³ Final Hearing, Transcript Day 2, p.93, lines 13-18.

Republic says it expropriated whatever the assets were in July 2010, right?⁷⁹⁴

416 The Republic has demonstrated in its previous submissions that it **at no point in time** expropriated Claimants' assets and it fully refers to these submissions.⁷⁹⁵ With regard to July 2010, the Republic explained that given Claimants' numerous serious violations of the subsoil use contracts, the Republic had no choice but to terminate them and to transfer the contractual territory of KPM and TNG into **trust management**.⁷⁹⁶ The proceeds from the operation of the fields in trust management do not flow to the state but are held on an escrow account. The trust management was effected by a temporary transfer of KPM's and TNG's property, as it was necessary to continue the production flow and preserve and maintain the territories. This **temporary transfer** was indeed a necessary and legitimate regulatory act and it did not constitute a direct expropriation for the reason alone that no transfer of title occurred.⁷⁹⁷

417 The Republic's counsel when answering the question put by the member of the Tribunal summarised the Republic's position:

“DR NACIMIENTO: It is not the Republic's case that the assets were expropriated. In July 2010, the assets were taken into trust management, and that's a clear date referring to a clear action of the Republic.

MR HAIGH: Taken into trust but not expropriated, is that the position?

DR NACIMIENTO: That's right.

MR HAIGH: No compensation is owed for that taking?

*DR NACIMIENTO: This is our whole case, our whole position, and we have submitted sufficient evidence to this. **The assets are currently held in trust management. Anything deriving from***

⁷⁹⁴ Final Hearing, Day 2, p. 93, lines 13-18.

⁷⁹⁵ Respondent's Rejoinder on Jurisdiction and Liability, paras. 864-956; Respondent's Statement of Defence, paras. 33.1-35.23.

⁷⁹⁶ Respondent's Rejoinder on Jurisdiction and Liability, paras. 697 et seqq.

⁷⁹⁷ Respondent's Rejoinder on Jurisdiction and Liability, paras. 879 et seqq.

those assets is being put in an escrow account, and it's the Republic's case that this is not an expropriation."⁷⁹⁸

418 It should be reiterated that with regard to the LPG Plant it is even more obvious that there was no expropriation. TNG still owns the plant and the unfinished plant was not transferred into trust management.⁷⁹⁹ Claimants simply halted the construction of the plant in pring 2009 due to lack of financial means and fully abandoned the construction site in July 2010.

III. Claimants' claims of alleged treaty breaches are arbitrary and unsubstantiated

419 In these proceedings, Claimants have taken the approach to declare every action of the Republic a breach of the ECT. With regard to expropriation, for example, they effectively allege to have been expropriated indirectly for several times and then directly in July 2010. In their First Post-hearing Brief, Claimants completely disregard their burden of proof to show that their assets were expropriated and simply complain of alleged "*20 months of indirect expropriation*".⁸⁰⁰

420 What Claimants should have done is point to individual acts of the Republic and show how these acts could have amounted to expropriation. It appears, Claimants are not even sure what their position on expropriation is. First, in their Statement of Claim, Claimants argued that allegedly,

*"Kazakhstan's measures of indirect expropriation were extraordinary in severity, number, and variety. This is not a case of "creeping" expropriation, in which a series of fairly minor regulatory acts cumulatively amount to an "indirect" expropriation. Kazakhstan's measures were extreme, and any number of them individually constitute an act of "indirect" expropriation under international law."*⁸⁰¹ (emphasis added)

421 Later on, in their Reply on Jurisdiction and Liability, Claimants reversed their opinion that the Republic's actions taken separately had a significant impact on Claimants' business and stated:

⁷⁹⁸ Questions from the Tribunal, Final Hearing, Transcript Day 2, p.93, line 20 - p.94, line 8.

⁷⁹⁹ Witness Statement Mr. Khalelov, para. 4.1.

⁸⁰⁰ Claimants' First Post-hearing Brief, para. 20.

⁸⁰¹ Claimants' Statement of Claim, para. 285.

*“Claimants do not contend that each particular event in Kazakhstan’s harassment campaign caused the entirety of Claimants’ losses. Rather, the combined effect of Kazakhstan’s conduct caused Claimants to lose control over their investments, deprived them of the rights of autonomous stewardship and free alienability associated with ownership (...).”*⁸⁰² (emphasis added)

422 Whatever Claimants final position may be, it is unclear.

423 In essence, Claimants wildly juggle with treaty breaches and thus have no credibility on the issue. For example, they never argued that the Republic’s gas market breached the ECT until in their Opening Submission at the Hearing on Quantum, they alleged that the Republic’s gas market breached *“the ECT’s protections under the umbrella clause, and the fair and equitable treatment and impairment provisions of the Energy Charter Treaty.”*⁸⁰³ Obviously, Claimants do not feel satisfied with just one treaty breach, for the better sound of it they argue the breach of three treaty standards.

424 Naturally, even though completely unsubstantiated, unfounded and belated, this very serious allegation prompted the Republic to respond.⁸⁰⁴ However, like many of Claimants’ allegations, as if made in a fit, they leave just as fast as they appear. The allegation that the Republic’s gas market violated the ECT cannot be found in Claimants’ First Post-hearing Brief and it was not made in the Final Hearing; Claimants, after the belated introduction, simply dropped it clandestinely.

425 Claimants also made other unsubstantiated allegations. For example, they stated that the non-extension of Contract No. 302 constituted a breach of the umbrella clause under ECT.⁸⁰⁵ In their First Post-Hearing Brief, Claimants again argue that the Republic’s refusal to honour its alleged commitment to extend Contract No. 302 constituted such a breach⁸⁰⁶. However, in none of those submissions did Claimants anyhow substantiate their claim or provide any legal analysis from investment treaty law perspective as to why the alleged promise to extend and the subsequent non-extension should constitute the breach of the umbrella clause under the ECT.

426 It is certainly Claimants who bear the burden of proof with regard to all of their claims – and they obviously failed to prove their claim related to Contract 302.

⁸⁰² Claimants’ Reply on Jurisdiction and Liability, para. 585.

⁸⁰³ Claimants’ Opening Presentation, Hearing on Quantum, Transcript Day 1, p.94, lines 16-21.

⁸⁰⁴ Respondent’s Post-hearing Brief, paras. 698-700.

⁸⁰⁵ Claimants’ Statement of Claim, para. 371; Claimants’ Reply on Jurisdiction and Liability, para. 546.

⁸⁰⁶ Claimants’ First Post-hearing Brief, paras. 221 et seqq.

427 The Republic on the other hand demonstrated in its previous submissions that the scope of umbrella clause is limited to contractual obligations.⁸⁰⁷ The tribunal in ICSID Case *Siemens v. Argentina* correctly explained the nature of those obligations:

*“[t]o the extent that the obligations assumed by the State party are of a contractual nature, such obligations must originate in a contract between the State party to the Treaty and the foreign investor.”*⁸⁰⁸

428 The Republic has repeatedly emphasised that at the time of the alleged promise to extend Contract No. 302, the contract had already expired and thus ceased to exist.⁸⁰⁹ It is denied that the letter of 9 April 2009 constituted a decision to agree to extend Contract No. 302. However, even assuming for the sake of argument that it did, then this was only a unilateral act, not a contract. Such a unilateral act is not covered by the umbrella clause and Claimants have not even attempted to prove otherwise.

429 The Republic has also already explained in detail that even if one were to also disregard that there was no contract from which an obligation could originate, the letter of 9 April 2009 - the alleged commitment - did not create an obligation of the Republic to extend the contract.⁸¹⁰ Hence, even if the Republic had promised to extend Contract No. 302, which it did not, the subsequent non-extension would not constitute a breach of Kazakh law.

430 Finally, the Republic has demonstrated in its Rejoinder on Jurisdiction and Liability that in any case, the umbrella clause does not cover the breach of statutory and regulatory obligations.⁸¹¹

⁸⁰⁷ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 1054 et seqq.; Respondent’s Statement of Defence, paras. 39.2 et seqq.

⁸⁰⁸ *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, para. 205 (**Exhibit C-232**).

⁸⁰⁹ See Part II, F. above.

⁸¹⁰ See Part II, F.II above.

⁸¹¹ Respondent’s Rejoinder on Jurisdiction and Liability, paras. 1053 et seqq.

PART IV: NO DAMAGES

A. Claimants' damages experts are unreliable

431 In its First Post-hearing Brief, the Republic presented a wide variety of reasons why Claimants' damages experts Ryder Scott and FTI are wholly unreliable.⁸¹² The Republic also explained how Claimants have in fact not presented any expert testimony for the issues of development planning and development costs for their Contract No. 302 claim. Rather, Claimants introduced their own views and hopes through the backdoor and masked as their experts' views.⁸¹³

432 The following is to update and, where appropriate, expand on the Republic's observations.

I. Ryder Scott have proven to be partisan instruments of Claimants

433 Any and all expert testimonies given by Ryder Scott in these proceedings are tainted because Ryder Scott have proven to be partisan instruments of Claimants rather than independent experts. This became most notable from two facts revealed at the Hearing on Quantum: Ryder Scott's complicitness in Claimants' procedural ambush and their willingness to uncritically take over Claimants' findings as their own.

1. Ryder Scott were complicit in Claimants' procedural ambush

434 At the Hearing on Quantum, Claimants introduced a wholly new "Interoil Reef" case by way of Ryder Scott's direct testimony.⁸¹⁴ The new case was based on 3D seismic data which Claimants and Ryder Scott had failed to bring on the record for more than one and a half years.⁸¹⁵ Ryder Scott's testimony was thus designed to help Claimants overcome their own procedural mess up and to surprise the Republic in a

⁸¹² Respondent's First Post-hearing Brief, paras. 521 et seqq.

⁸¹³ Respondent's First Post-hearing Brief, paras. 547 et seqq.

⁸¹⁴ Testimony of Mr. Nowicki of Ryder Scott, Hearing on Quantum, Transcript Day 3, p.102, line 23 - p.104, line 4.

⁸¹⁵ The 1st Ryder Scott Report was submitted together with Claimants' Statement of Claim on 18 May 2011. There is no reason why this report could not have already been based on and accompanied by the existing 3D seismic data and why findings based on 3D seismic data were only introduced during the Hearing on Quantum on 30 January 2013.

way that hindered conducting any meaningful examination of Ryder Scott and providing any meaningful response at the Hearing on Quantum.

435 Ryder Scott were fully complicit in the procedural ambush. Not only did they participate in the direct examination, they also deliberately concealed the change to their GCoS estimate allegedly resulting from the use of 3D seismic data. In the discussions of the joint issue list of the experts prior to the Hearing on Quantum, Ryder Scott signed off to the statement that there was “general agreement” on the GCoS estimates for the Contract 302 Area.⁸¹⁶ Naturally, this seemed to be an uncontentious point at the time, as GCA had estimated a GCoS of 4% and Ryder Scott had estimated a GCoS of 5% for the “Interoil Reef”.⁸¹⁷ What GCA did not know was that Ryder Scott were looking at the 3D data while the joint issue list was being discussed. Ryder Scott deliberately chose to not inform GCA of their review despite being in discussions about the matter of GCoS and other “Interoil Reef” issues.⁸¹⁸ Ryder Scott then even changed their opinion and increased their GCoS to more than double the one assumed by GCA at the Hearing on Quantum. Again, they did not inform GCA prior to the Hearing and did not suggest an update of the joint issue list. In addition, they did not inform the Tribunal – which had already been provided with the final version of the joint issue list – of their departure from the “general agreement” on the GCoS.⁸¹⁹ Only at the Hearing on Quantum, during their direct testimony, did Ryder Scott introduce the findings based on 3D seismic data. Ryder Scott thus did everything in order not to endanger Claimants’ procedural ambush.

436 Such behaviour does not meet the standards for an independent party-appointed expert in international arbitration. It rather proves that Ryder Scott are willing to engage in partisan manoeuvres and act not with the aim of assisting the Tribunal in finding the truth but to assist in advancing their client’s case no matter what.

⁸¹⁶ Joint Issue List of Ryder Scott and GCA; Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.57, lines 18-22.

⁸¹⁷ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.58, lines 1-14; GCA Technical Report, Appendix III, Table AIII.2; 1st Ryder Scott Report, Exhibit No. 4, p.9.

⁸¹⁸ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.61, lines 14-19.

⁸¹⁹ It appears Ryder Scott revised their GCoS estimate only after the joint issue list was submitted to the Tribunal. This is indicated by Mr. Nowicki’s statement that he revised his GCoS estimate on the Monday of the week of the Hearing on Quantum, cf. Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.58, lines 23 - p.59, line 3. Regardless of the exact date, it is clear that Mr. Nowicki would have been required to inform the Tribunal, GCA and the Republic immediately of the fact that he had unilaterally stepped back from the “general agreement” on GCoS expressed in the joint issue list. He did not do so.

2. Ryder Scott uncritically presented Claimants' findings as their own

437 In its First Post-hearing Brief, the Republic already pointed out that Ryder Scott's procedural ambush testimony was non-credible.⁸²⁰ It was simply impossible for Ryder Scott to make the statements presented at the Hearing based on any independent assessment of the 3D data. That is because there was insufficient time for such assessment. Instead, what happened was that Ryder Scott simply took over the findings contained in the "Project Munaibay 3D" presentation⁸²¹ prepared by Claimants themselves, and presented them as Ryder Scott's own findings.

438 The testimony of Mr. Nowicki of Ryder Scott on 2 May 2013 confirmed this fact. Under cross-examination, Mr. Nowicki had to step back from one central statement made as part of his procedural ambush testimony at the Hearing on Quantum. Mr. Nowicki had alleged that the Munaibay-1 well, if drilled to its target depth of 6,000m, would have reached the "Interoil Reef".

"Q. If the Munaibay 1 well was drilled deeper, would it reach the reef structure?"

*A. (By MR NOWICKI) Yes, it would. My understanding is that the proposed depth of that well was 6,000 metres, and I believe that that is going to be within the depth range that one would expect to encounter the reef."*⁸²²

439 This statement mirrors precisely the depth estimate contained in the "Project Munaibay 3D" presentation,⁸²³ which Ryder Scott received prior to their procedural ambush testimony at the Hearing on Quantum.⁸²⁴ Mr. Nowicki made no qualification to that statement whatsoever, giving the Tribunal every reason to believe that this was his own sincere opinion based on thorough analysis.⁸²⁵

⁸²⁰ Respondent's First Post-hearing Brief, paras. 525 et seqq.

⁸²¹ "Project Munaibay 3D" Presentation (**Exhibit R-375**).

⁸²² Testimony of Mr. Nowicki of Ryder Scott, Hearing on Quantum, Transcript Day 3, p.103, line 24 - p.104, line 4.

⁸²³ "Project Munaibay 3D" Presentation, p.48 (**Exhibit R-375**).

⁸²⁴ Ryder Scott must have received the "Project Munaibay 3D" presentation either on 18 or 22 January 2013. According to Claimants, Ryder Scott received on these dates the same data that GCA received on 4 February 2013, cf. Claimants' Submission re Draft Procedural Order No.10 dated 16 February 2013, para. 22. On 4 February 2013, the Republic (and thus GCA) received the "Project Munaibay 3D" presentation in an e-mail sent by Claimants' counsel Mr. Ric Toher. The Tribunal was copied on this e-mail.

⁸²⁵ Mr. Nowicki admitted at the Final Hearing that he did not indicate anywhere during his procedural ambush testimony at the Hearing on Quantum that his findings were of an indicative nature, cf. Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.62, lines 17-20.

440 However, at the Hearing on 2 May 2013, Ryder Scott completely reversed their position. After actually having conducted a depth analysis,⁸²⁶ Mr. Nowicki now had to state that the depth conversion method that he had selected out of several conversion methods⁸²⁷ and that he considered to be best supported by the data did not support his statement at the Hearing on Quantum:

“Q. So in other words, using this depth conversion method, which you consider the best supported by the data, the M1 well would not have reached the Interoil Reef?”

*A. That's correct.”*⁸²⁸

441 With this statement, it became abundantly clear that Ryder Scott's procedural ambush testimony at the Hearing on Quantum was not the result of any independent analysis, but rather an example of Ryder Scott uncritically presenting Claimants' analysis as their own. Apparently, Ryder Scott had expected that there would not be another expert report dealing with 3D interpretation and that they would not be subjected to cross-examination on the matter, so that their procedural ambush testimony would go unchallenged. Luckily, their expectation turned out incorrect.

442 Against this background, any and all testimony of Ryder Scott must be considered to be partisan and potentially influenced by Claimants and, therefore, are simply non-credible.

II. Further circumstances undermine Ryder Scott's credibility

443 Apart from the facts, there are further circumstances which indicate the lack of credibility that undermines Ryder Scott's work.

444 To begin with, the Republic has already pointed out⁸²⁹ that Ryder Scott made entirely incorrect statements at the Hearing on Quantum by alleging that they saw nothing in the GCA reports that led them to believe that GCA did independent geological, petrophysical or seismic analysis.⁸³⁰ As a matter of fact, GCA provided GCoS sheets,⁸³¹ crystal ball sheets⁸³² and numerous other supporting documents as

⁸²⁶ 3rd Ryder Scott Report, paras. 12 et seqq.

⁸²⁷ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.50, lines 10-12.

⁸²⁸ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.51, lines 22-25.

⁸²⁹ Respondent's First Post-hearing Brief, paras. 535 et seqq.

⁸³⁰ Testimony of Mr. Nowicki of Ryder Scott, Hearing on Quantum, Transcript Day 3, p.112, lines 11-16.

⁸³¹ Cf. e.g. GCA's Prospect Risk Assessment for the Tabyl West Prospect (**Exhibit R-370**).

⁸³² Cf. e.g. GCA's Crystal Ball Sheet for the Munaibay Triassic (**Exhibit R-371**).

well as detailed descriptions in their reports which establish beyond doubt the work done by GCA. Ryder Scott's incorrect allegations strongly undermine their credibility.

445 In addition, it should be mentioned that Mr. Nowicki of Ryder Scott also had to admit to making further incorrect statements at the Final Hearing at the beginning of May 2013. While stating in his CV that he had “[p]rovided expert witness testimony [...] for various arbitration hearings”,⁸³³ Mr. Nowicki corrected himself at the Final Hearing, stating that the present arbitration is the first in which he gave testimony.⁸³⁴ Again, Ryder Scott have proven to be non-credible.

446 There are further circumstances adding to the lack of credibility tainting Ryder Scott's expert testimony. As the Republic has pointed out, Ryder Scott made misleading statements, as they tried to create the impression that their review of the 3D seismic data had merely led to an update of the earlier 2D interpretation.⁸³⁵ However, what had happened in fact was that Ryder Scott postulated a wholly new structure several kilometres to the south.⁸³⁶ The fact that this new 3D based structure partially overlaps the old 2D based structure⁸³⁷ does not make any difference in this regard. There is no dispute that several square kilometres of the new structure as interpreted by Ryder Scott do not overlap with their old structure. As Dr. Wright of GCA explained, this is not a minor adjustment but a significant shift indicating that the old 2D structure is completely disproven.⁸³⁸

447 In addition, Ryder Scott's testimony is also non-credible because of their tendency to simply ignore issues undermining their clients' position in the hope of ultimately not having to address them at all. For example, Ryder Scott completely ignored the issue of H₂S in the supposed “Interoil Reef” gas for their first two expert reports, only to admit at the Final Hearing that there is a 50% chance that there is more than 1% H₂S in the gas.⁸³⁹ Likewise, Ryder Scott did not mention the potential faulting at the crest of the “Interoil Reef” structure in any way in their Third Report, but admitted to this risk when asked at the Final Hearing.⁸⁴⁰ This lack of forthrightness demonstrates that Ryder Scott are not interested in providing a full, independent and correct assessment, but rather seek to advance their clients' case only. It can be

⁸³³ 1st Ryder Scott Report, Exhibit No. 3, p. 4.

⁸³⁴ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.68, lines 17-18.

⁸³⁵ Cf. Respondent's First Post-hearing Brief, paras. 522 et seq.

⁸³⁶ Respondent's First Post-hearing Brief, para. 523.

⁸³⁷ Cf. Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.36, lines 24-25.

⁸³⁸ Testimony of Dr. Wright of GCA, Final Hearing, Transcript Day 1, p.76, line 13 - p.77, line 2.

⁸³⁹ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.52, lines 20-22.

⁸⁴⁰ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.49, line 3 - p.50, line 3.

assumed that if there were further reports, Ryder Scott would make further admissions of issues previously ignored.

448 Ryder Scott’s identification with their client even goes so far that they ignore the lack of evidence that they themselves have admitted earlier. In their Third Expert Report, Ryder Scott had stated that there is only “some indication” of the position of the reef to the west of the Contract 302 Area.⁸⁴¹ This was a carefully measured statement showing that Ryder Scott cannot prove closure in that area. At the Final Hearing, however, Mr. Nowicki of Ryder Scott suddenly alleged that there was conclusive proof for the existence of closure at that position.⁸⁴² Mr. Nowicki attempted to override his earlier statement simply by saying that “[i]n my mind, I know that there has to be more to that reef. It doesn't just end where the data ends.”⁸⁴³ With this statement, Mr. Nowicki ultimately proved to be a partisan supporter of his client working on the basis of wishful thinking rather than an independent expert trying to assist the Tribunal in fact finding.

III. Ryder Scott’s work is riddled with methodological flaws

449 The Republic already demonstrated in its First Post-hearing Brief the numerous instances in which Ryder Scott’s work reflects serious methodological flaws.⁸⁴⁴ Further instances of methodological mistakes can be observed in Ryder Scott’s Third Expert Report. In particular,

- (a) Ryder Scott based its volumetric estimates for the “Interoil Reef” on gas columns of extremely unlikely and world record beating size, without demonstrating or mapping closure to support these gas columns;⁸⁴⁵
- (b) Ryder Scott do not take proper account of potential faulting;⁸⁴⁶

⁸⁴¹ 3rd Ryder Scott Report, para. 11.

⁸⁴² Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.48, lines 20-22.

⁸⁴³ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.48, line 25 - p.49, line 2.

⁸⁴⁴ Respondent’s First Post-hearing Brief, paras. 530 et seqq.

⁸⁴⁵ See Part IV, D.I.1 below.

⁸⁴⁶ See Part IV, D.I.2 below.

IV. FTI's analysis is methodologically flawed and based on clearly wrong factual presumptions

450 The list of serious methodological mistakes made by FTI in these proceedings is extremely long. It may be unprecedented in international arbitration that a party claiming billions of dollars presents valuation expertise of such low quality that, in the Republic's view, this expertise must be disregarded entirely.

451 In its First Post-hearing Brief, the Republic already pointed out *inter alia* the following methodological flaws in FTI's work:

- (a) FTI incorrectly mixed the nominal and the real terms approach.⁸⁴⁷ FTI had to concede this severe and obvious methodological mistake and as a result, had to correct their overall value estimate by a stunning USD 379 million.⁸⁴⁸
- (b) FTI ignored known and quantified risks in their Contract No. 302 valuation, thus concealing valuable information from the Tribunal and violating good valuation practice.⁸⁴⁹ Deloitte GmbH have calculated that if GCoS and ECoS had been applied by FTI, the value of Contract No. 302 would be reduced in the order of 90%.⁸⁵⁰ FTI's "prospective valuation" is nothing but an attempt to "anchor" a high value with the Tribunal and it is not aimed at providing any useful expertise.
- (c) FTI arbitrarily reduced its inflation rate assumptions from one report to another, with the clear intention to inflate asset values.⁸⁵¹
- (d) FTI added almost USD 50 million to Claimants' claim by way of arbitrary rounding.⁸⁵²
- (e) FTI arbitrarily reduced its country risk premium, even though KPM's and TNG's financial statements explicitly mentioned country risk.⁸⁵³ FTI thus minimised their discount rate and overstated values.
- (f) FTI created a 63.8% overstatement of their estimated market value for the Munaibay oil discovery through a series of severe calculation mistakes.⁸⁵⁴

⁸⁴⁷ Respondent's First Post-hearing Brief, paras. 571 et seqq.

⁸⁴⁸ FTI Update Memo dated 25 January 2013, para. 14.

⁸⁴⁹ Respondent's First Post-hearing Brief, paras. 566 et seqq.

⁸⁵⁰ Deloitte & Touche Second Supplemental Expert Report, paras. 145 et seqq.

⁸⁵¹ Respondent's First Post-hearing Brief, paras. 573 et seqq.

⁸⁵² Respondent's First Post-hearing Brief, paras. 576 et seq.

⁸⁵³ Deloitte & Touche Expert Report, paras. 128 et seqq. Cf. also Deloitte & Touche Second Supplemental Expert Report, paras. 157 et seqq.

- (g) FTI applied the same discount rate for their “prospective valuation” of the LPG Plant as for their other valuations. This is inconsistent as FTI applied different taxes to the LPG Plant.⁸⁵⁵
- (h) FTI admittedly assumed incorrect administration costs with regard to the Contract 302 Development.⁸⁵⁶
- (i) FTI underestimated the variable distribution costs for KPM, thus overstating Borankol’s value by a further USD 3.3 million.⁸⁵⁷ The same mistake occurred in the EMV calculation for Munaibay Oil and in the “prospective valuation” of the Contract 302 Properties.⁸⁵⁸
- (j) FTI based its gas price assumptions on an unsigned draft contract which they interpreted against its wording. Thus, FTI applied prices that were never agreed upon to Contract No. 302 gas volumes that very likely do not exist.⁸⁵⁹
- (k) FTI made serious mistakes in their comparable companies and comparable transactions analysis, such as using transactions that closed prior to the financial crisis without adjusting for the effects thereof.⁸⁶⁰
- (l) FTI conducted an entirely unrecognised, illogical and empirically disproved valuation method for its “Implied Market Value of Debt” analysis.⁸⁶¹

452 With FTI’s Third Report, further methodological mistakes, as well as the reliance on several incorrect factual assumptions, became apparent. These will be addressed in the following.

1. FTI provide a laughable explanation of the LPG Plant cost explosion

453 At the Hearing on Quantum, the Republic demonstrated that both the costs and the length of development of the LPG Plant exploded. Mr. Lungu had tried to hide this fact from the Tribunal and his own auditors – however, the facts were too clear to be

⁸⁵⁴ Respondent’s First Post-hearing Brief, paras. 578 et seq.

⁸⁵⁵ Respondent’s First Post-hearing Brief, para. 580.

⁸⁵⁶ Respondent’s First Post-hearing Brief, para. 581.

⁸⁵⁷ Respondent’s First Post-hearing Brief, para. 580.

⁸⁵⁸ Deloitte & Touche Supplemental Expert Report, paras. 103, 110 et seqq..

⁸⁵⁹ Respondent’s First Post-hearing Brief, paras. 582 et seqq.

⁸⁶⁰ Respondent’s First Post-hearing Brief, paras. 588 et seqq.

⁸⁶¹ Respondent’s First Post-hearing Brief, paras. 591 and 1032 et seqq.

seriously disputed.⁸⁶² The LPG Plant can hence only be seen as an entirely failed project.⁸⁶³

454 In their Third Report, FTI attempt to explain the LPG Plant cost explosion by alleging that the price increase for the LPG Plant could be explained by reference to the inflation in Kazakhstan.⁸⁶⁴ However, their argument is seriously flawed:

455 First of all, it is entirely disingenuous for FTI to refer to Kazakh inflation to explain the cost development. In their “prospective valuation” of the LPG Plant, FTI themselves apply US inflation of 1.6% to forecast the costs of the LPG Plant construction.⁸⁶⁵ FTI cannot on the one hand apply a low inflation to costs when it serves inflating their “prospective valuation” and refer to Kazakh inflation when they need to explain the cost explosion.⁸⁶⁶

456 Moreover, FTI are only able to bring the cost development and Kazakh inflation rates somewhat in line by arbitrarily disregarding data points. Specifically, FTI disregard the initial USD 105 million estimate, arguing that it was provided in the Ascom LPG Business Plan⁸⁶⁷ which was allegedly prepared by Vitol.⁸⁶⁸ However, FTI themselves had relied on this document before and had provided it as part of its scope of review for their First Report.⁸⁶⁹ To rely on the document for one purpose but to disregard it as unreliable for another reflects clearly FTI’s “finger in the wind” approach.⁸⁷⁰

457 Further, FTI also disregard the ultimate estimate of USD 281 million provided in the witness statement of Mr. Broscaru.⁸⁷¹ In one of the more surprising passages of their report, FTI state as a reason for disregarding this estimate that it was provided to Mr. Broscaru by Mr. Lungu.⁸⁷² If FTI are asking the Tribunal to take them seriously in this instance, the gist of their testimony is that one should not trust the statements of Mr. Lungu. While the Republic in general agrees with this view, there is, for a change, sufficient contemporary evidence supporting Mr. Lungu’s estimate. In

⁸⁶² Respondent’s First Post-hearing Brief, paras. 821 et seqq.

⁸⁶³ See also Part IV, E.I. below

⁸⁶⁴ FTI Consulting Third Expert Report, paras. 5.13 et seqq.

⁸⁶⁵ Deloitte & Touche Second Supplemental Expert Report, para. 177.

⁸⁶⁶ Cf. Deloitte & Touche Second Supplemental Expert Report, para. 178.

⁸⁶⁷ Ascom LPG Plant Business Plan (**Exhibit R-333**).

⁸⁶⁸ FTI Consulting Third Expert Report, para. 5.19.

⁸⁶⁹ FTI Consulting Expert Report, paras. 6.22 and 6.24.

⁸⁷⁰ Deloitte concur with this view, cf. Deloitte & Touche Second Supplemental Expert Report, para. 172.

⁸⁷¹ Witness Statement of Mr. Broscaru, para. 14.

⁸⁷² FTI Consulting Third Expert Report, para. 5.22.

particular the PwC Due Diligence Report indicates that the USD 281 million cost estimate was correct.⁸⁷³

458 As a result, FTI assume a cost increase of 53.5% (from USD 151.5 million to USD 232.6 million)⁸⁷⁴ instead of the correct 168% (from USD 105 million to USD 281 million).⁸⁷⁵ The correct 168% increase can however clearly not be explained by reference to the inflation development of 67.9% in 2007 and 2008 cited by FTI.⁸⁷⁶

2. FTI's updated "prospective valuation" of Contract No. 302 is riddled with mistakes

459 With their Third Report, FTI provided an update of their Contract No. 302 "prospective valuation" based on the new input data from Ryder Scott (for production estimates) and Claimants (for development scheduling and development costs). FTI's work is again riddled with mistakes:

- (a) FTI again apply arbitrary rounding to their discount rate in order to inflate values. This inflates their valuation by USD 44 million.⁸⁷⁷
- (b) FTI again understate variable distribution costs. This inflates their valuation by USD 9 million.⁸⁷⁸
- (c) FTI did not incorporate an assumption for net working capital in their Contract 302 Properties valuation (although they did so for their valuation of Borankol and Tolkyn). This inflates their valuation by USD 55 million.⁸⁷⁹

460 Taking into account GCoS and ECoS as well, which is mandatory as a matter of good valuation practice,⁸⁸⁰ the value assumed by FTI would have to be reduced to USD 136 million, i.e. less than one tenth of FTI's original "prospective value".⁸⁸¹ The value of the "Interoil Reef" would even disappear entirely.⁸⁸² Importantly, none of this has even taken into account the massive understatement of development costs and the entirely unrealistic development schedule provided by Claimants.

⁸⁷³ Deloitte & Touche Second Supplemental Expert Report, para. 173.

⁸⁷⁴ FTI Consulting Third Expert Report, para. 5.22.

⁸⁷⁵ Deloitte & Touche Second Supplemental Expert Report, para. 173.

⁸⁷⁶ Deloitte & Touche Second Supplemental Expert Report, para. 174.

⁸⁷⁷ Deloitte & Touche Second Supplemental Expert Report, paras. 136 et seq.

⁸⁷⁸ Deloitte & Touche Second Supplemental Expert Report, paras. 138 et seq.

⁸⁷⁹ Deloitte & Touche Second Supplemental Expert Report, paras. 140 et seqq.

⁸⁸⁰ Deloitte & Touche Expert Report, paras. 108 et seqq.

⁸⁸¹ Deloitte & Touche Second Supplemental Expert Report, para. 152.

⁸⁸² Deloitte & Touche Second Supplemental Expert Report, para. 152.

3. FTI base their valuation on wrong or entirely unproven factual contentions

461 FTI base their valuation in several instances on alleged facts which are either demonstrably incorrect or entirely unproven:

- (a) In support of their application of the Draft Tripartite Agreement in the determination of gas prices, FTI allege that KazTransGas was substituted by KMG NC as a party to the negotiations of the agreement prior to their valuation date of 14 October 2008.⁸⁸³ This statement is obviously incorrect. Gazprom refused to accept KazTransGaz as the exporter only by letter of 27 October 2008,⁸⁸⁴ and the substitution only happened thereafter.
- (b) FTI contend that in their valuation, Deloitte GmbH did not take into account the tax stabilisation clauses in the subsoil use contracts.⁸⁸⁵ This contention is based on the fact that Deloitte GmbH had applied the 2009 tax regime. Deloitte GmbH had explained this approach by reference to the 2009 financial statements of KPM and TNG which stated that the 2009 tax regime was applied to the companies.⁸⁸⁶ In order to counter this fact, FTI state that “*the Claimants lodged objections with Kazakhstan’s Tax Committee against the application of the 2009 tax regime, but paid taxes under the regime as there was a risk that non-payment would lead to the revocation of their oil export rights.*”⁸⁸⁷ However, FTI provide no proof and no reference for this contention and equally, Claimants have not provided a shred of evidence that any objection against the application of the 2009 tax regime was lodged. In addition, no such objection is mentioned in the financial statements of the companies even though this would have been required as a matter of auditing.⁸⁸⁸ The Republic denies that any such objection was ever raised.
- (c) FTI alleged for the first time in their January 2013 update note, i.e. more than one and a half years after their First Report, that that gas sold by Tolkyn was distributed on an “ex-works” basis, meaning that the distributor provided TNG with gas pricing consistent with netback prices. Hence, suggested FTI, no additional transportation costs should be applied to the sales of gas.⁸⁸⁹ FTI

⁸⁸³ FTI Consulting Third Expert Report, para. 7.16.

⁸⁸⁴ Letter from Gazprom to KazMunaiGaz dated 27 October 2008 (**Exhibit R-343**).

⁸⁸⁵ FTI Consulting Third Expert Report, paras. 8.45 et seqq.

⁸⁸⁶ Deloitte & Touche Expert Report, para. 90.

⁸⁸⁷ FTI Consulting Third Expert Report, para. 8.46.

⁸⁸⁸ Deloitte & Touche Second Supplemental Expert Report, para. 302.

⁸⁸⁹ FTI Update Memo dated 25 January 2013, para. 21.

based their contention on a “*discussion with the Claimant*”,⁸⁹⁰ the gist of which was summarised in an e-mail by Mr. Comanici, Ascom’s Head of Economic and Financial Department.⁸⁹¹ This unreliable statement by one of Claimants’ representatives is disproved by the contemporaneous evidence of the 2008 Vendor Due Diligence and the financial statements of the companies.⁸⁹²

462 Notably, FTI’s reliance on Mr. Comanici’s e-mail resembles the submission of what Claimants used to call a “sleeper statement”. Claimants used to vehemently oppose the submission of such “sleeper statements”, called them “manifestly improper”, alleged that their authors were shielded from cross-examination and sought to have the statements struck from the record.⁸⁹³ In the present instance, the Republic need not apply the same rhetoric and need not make the same hyperbolic applications, as the statement of Mr. Comanici is clearly disproved by the evidence on record.

V. The values calculated by FTI oscillate wildly from one report to the next

463 The countless mistakes in FTI’s work have forced them to repeated corrections of the asset values suggested by them. Effectively, the values suggested by FTI have oscillated wildly throughout these proceedings. The following table illustrates the constant changes:⁸⁹⁴

	Statement of Claim (million USD)	Δ	Reply on Quantum (million USD)	Δ	Hearing on Quantum (million USD)	Δ	1st PHB (million USD)
Borankol Field	193	+ 38.5	231.5	- 33.49	197.01		197.013
Tolkyn Field	561	- 52.6	508.4	- 29.47	478.93		478.927
LPG Plant (cost)	208.5	+ 36.5	245		245		245
Contract 302 (prospective)	1,766	- 186	1,580	- 132	1,448	+ 188.9	1,636.9
LPG Plant (prospective)	344	+ 64.3	408.3	- 79.2	329.1		329.1

464 Adding all amendments together, FTI made overall corrections in the amount of USD 841 million to its value estimates. Even disregarding the latest update of the

⁸⁹⁰ FTI Update Memo dated 25 January 2013, para. 21.

⁸⁹¹ Deloitte & Touche Second Supplemental Expert Report, para. 307.

⁸⁹² Cf. Deloitte & Touche Second Supplemental Expert Report, para. 307 with further references.

⁸⁹³ Claimants’ Letter to the Tribunal dated 5 January 2012, p.8.

⁸⁹⁴ The values stated in the table are taken from the following sources: Claimants’ Statement of Claim, para. 465; Claimants’ Reply on Quantum, para. 79; FTI Update Memo dated 25 January 2013, para. 25; Claimants’ First Post-hearing Brief, para. 664; FTI Consulting Third Expert Report, para. 12.19.

Contract No. 302 valuation, which was not due to FTI's mistakes, but due to Claimants' belated introduction of the 3D seismic data, the overall oscillations amount to USD 652 million.

465 Ironically, Claimants stated with regard to the differences between the Deloitte TCF valuation and the Deloitte GmbH valuation that a difference of approximately USD 530 million between the valuation work of these two experts renders both of their reports "*completely unreliable*".⁸⁹⁵ If Claimants took their own words seriously, they would have to find even stronger words than "*completely unreliable*" to describe the work of their own expert FTI.

VI. Claimants were effectively their own experts for development schedules and the costs of development on the Contract 302 Area

466 In its First Post-hearing Brief and at the Final Hearing, the Republic demonstrated that Claimants were effectively their own experts for development schedules and the costs of development on the Contract 302 Area.⁸⁹⁶ This fundamentally undermines the reliability of the Contract 302 "prospective" valuation and the credibility of Claimants' experts FTI and Ryder Scott in general.

467 In particular, the Republic demonstrated the following:

- (a) The development schedules for the Contract 302 Area were nothing but a collection of intentions by Claimants, entirely ignoring the factual and legal framework of exploration and development within the Republic.⁸⁹⁷ Ryder Scott gave Claimants' intentions the appearance of legitimacy by presenting them as Ryder Scott's own expert findings. The spectacular delays that occurred when Claimants tried to construct their LPG Plant show more than clearly that Claimants cannot be believed when it comes to the scheduling of a development.
- (b) For larger parts of these proceedings, FTI hid that the estimates for the Contract 302 well costs were not provided by FTI but by Claimants.⁸⁹⁸ In their First Expert Report, FTI had pretended that they had made their own cost estimates for well drilling on the Contract 302 Area. By using expressions such as "*we applied*" and "*we have assumed*", FTI made it abundantly clear that the

⁸⁹⁵ Claimants' First Post-hearing Brief, para. 511.

⁸⁹⁶ Respondent's First Post-hearing Brief, paras. 547 et seqq.

⁸⁹⁷ Respondent's First Post-hearing Brief, paras. 549 et seqq.

⁸⁹⁸ Respondent's Closing Submission of 2 May 2013, Slides 62 et seq.

drilling cost estimates had been provided by them.⁸⁹⁹ However, at the Hearing on Quantum, upon being confronted with major flaws in the well cost estimates, Mr. Rosen of FTI admitted that these had been provided by Claimants.⁹⁰⁰ This is now also stated explicitly in the Third FTI Expert Report.⁹⁰¹

- (c) Equally, FTI hid that the infrastructure cost estimates used by them for the Contract 302 Area had been provided by Claimants.⁹⁰² As the Republic pointed out at the Hearing on Quantum, FTI had not provided any kind of explanation or breakdown of the infrastructure costs for the Contract 302 Area in either their first or second expert reports.⁹⁰³ Naturally, FTI had thus also not stated that these costs had been estimated by Claimants and not by FTI. It was however the Republic's suspicion that this was the case.⁹⁰⁴ This suspicion now proved correct with FTI's third report, in which they admit to this fact.⁹⁰⁵

468 At the Final Hearing in May 2013, Claimants responded to the Republic's arguments in a most unconvincing fashion. To begin with, Claimants offered no explanation whatsoever for the fact that Ryder Scott simply drew up a development plan based on Claimants' wishes. It thus remains an unchallenged fact that Claimants have not provided independent expert testimony supporting the scheduling of the Contract 302 development. Notably, this is now also supported by Ryder Scott's third expert report. Therein, Ryder Scott do not claim that the well drilling schedule provided in the report is their own. They use the passive, stating that "[a] total of twenty-five (25) wells **are scheduled**" or that "a two-rig schedule **was implemented**".⁹⁰⁶ Ryder Scott thus do not claim authorship for this schedule. Based on their earlier testimony, this can only mean that the schedule was provided by Claimants.

469 Additionally, at the Final Hearing, Claimants also did not respond to the Republic's argument that FTI had hidden that it had taken over infrastructure cost estimates from Claimants. This fact thus stands equally unchallenged. Claimants will also have a hard time responding to this fact, given that FTI had not explained any of their infrastructure costs in either their first or their second report.

⁸⁹⁹ FTI Consulting Expert Report, para. 15.11.

⁹⁰⁰ Testimony of Mr. Rosen of FTI, Hearing on Quantum, Transcript Day 4, p.82, lines 1-2.

⁹⁰¹ FTI Consulting Post-hearing Expert Report, para. 12.15.

⁹⁰² Respondent's Closing Submission of 2 May 2013, Slide 64.

⁹⁰³ Testimony of Mr. Rosen of FTI, Hearing on Quantum, Transcript Day 4, p.71, line 20 - p.72, line 19.

⁹⁰⁴ Respondent's First Post-hearing Brief, para. 565.

⁹⁰⁵ FTI Consulting Post-hearing Expert Report, para. 12.8.

⁹⁰⁶ 3rd Ryder Scott Report, para. 37 (emphasis provided).

470 Finally, the one explanation Claimants did try to provide at the Final Hearing is frankly saddening. Claimants argued that the fact that the well costs had been provided by Claimants was apparent from a footnote in the First FTI Report.⁹⁰⁷ First of all, Claimants thus did not even deny that the well cost estimates used for the Contract 302 valuation were not based on independent expertise. Moreover, the footnote Claimants refer to did not make this fact apparent at all. The footnote states:

*“We have discussed with Ryder Scott what a reasonable estimate for capital costs for wells drilled in the different depths/structures would be based on a review of Company's historical capital expenditure costs for wells with adjustments made for varying depths.”*⁹⁰⁸

471 Claimants seriously contend that based on this footnote, it was clear that the well cost estimate had been provided by Claimants rather than by FTI. This is self-evidently not true. Based on the above cited footnote, it appears that FTI had been provided by Claimants with historical costs for various wells drilled on Borankol and Tolkyn, that FTI had analysed which of these wells are comparable to the ones needed on the Contract 302 Area, that FTI had calculated the average cost of comparable wells and that FTI had then made an adjustment for the greater depths of the Contract 302 Area wells.

472 As became apparent at the Hearing on Quantum only, this is however precisely not the case. As Mr. Rosen of FTI admitted at that Hearing, neither he himself nor Ms. Hardin nor anyone else of his team went through these steps. Instead, the drilling costs were simply provided by Claimants’ *“technical people”*.⁹⁰⁹ Accordingly, in FTI’s Third Expert Report, it is now stated that *“Claimants provided the following estimates for wells at depths of 7,000 meters and 7,500 meters.”*⁹¹⁰ FTI do not even purport to have done any analysis on whether these well costs are reasonable.

473 Against this background, Claimants’ last minute attempts to save FTI’s credibility fail completely. Apparently, what Claimants try to suggest is that using the historical capital expenditure on other fields is synonymous with using well cost estimates provided by Claimants.⁹¹¹ That is however not the case. Taking a historical approach still means that the expert has to do a thorough analysis and calculation, as described

⁹⁰⁷ Claimants’ Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.13, line 14 - p.16, line 22.

⁹⁰⁸ FTI Consulting Expert Report, fn. 235.

⁹⁰⁹ Testimony of Mr. Rosen of FTI, Hearing on Quantum, Transcript Day 4, p.82, lines 1-2.

⁹¹⁰ FTI Consulting Post-hearing Expert Report, para. 12.15.

⁹¹¹ Claimants’ Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.14, lines 9-14.

above.⁹¹² FTI initially gave the appearance that this is what they had done. It now turns out that this was not the case.

474 In point of fact, it is rather insulting that Claimants think so little of their audience's intelligence that they believe they can wiggle their way out of this issue with such ridiculous arguments.

⁹¹² Cf. Part IV, A.V paras. 411-412 above.

B. The Republic’s damages experts are reliable

475 Claimants have attacked the Republic’s damage experts GCA and Deloitte GmbH with an onslaught of invalid and hyperbolic criticisms. However, taking a thorough look at the contentions made, no serious objections remain. GCA and Deloitte GmbH have provided solid work that remains intact and reliable and can and should be used by this Tribunal for the purposes of damage determination.

476 The Republic will mainly take the approach to address Claimants’ arguments throughout this submission when dealing with the specific assets in question. Moreover, some assertions have also been dealt with in the respective experts’ reports and will not be repeated in the following. However, some general remarks are warranted about the “scatter gun” approach taken by Claimants and their experts. Moreover, some of the more general criticisms will also be picked up in the following.

I. Claimants and their experts base their criticism on complete ignorance of explanations given and documents provided by GCA and Deloitte GmbH

477 In many instances, Claimants and their experts voice criticism by way of pure ignorance of the explanations given and documents provided by GCA and Deloitte GmbH.

1. Assertions regarding the work done by GCA

478 The most notable example thereof is Ryder Scott’s assertion, parroted by Claimants,⁹¹³ that GCA’s reports did not contain any supporting documents evidencing that GCA did any independent geological, petrophysical or seismic analysis.⁹¹⁴ These assertions are entirely wrong and they are based on simple ignorance of the documentation provided.

479 The Republic addressed Claimants’ and Ryder Scott’s incorrect assertions at length in its First Post-hearing Brief.⁹¹⁵ GCA explained in their Third Expert Report that

⁹¹³ Claimants’ First Post-hearing Brief, para. 441; Claimants’ Opening Presentation, Hearing on Quantum, Transcript Day 1, p.77, line 23 - p.78, line 3.

⁹¹⁴ Testimony of Mr. Nowicki of Ryder Scott, Hearing on Quantum, Transcript Day 3, p.112, lines 11-16.

⁹¹⁵ Respondent’s First Post-hearing Brief, paras. 535 et seqq.

they had provided supporting documents⁹¹⁶ and has now submitted with its Fourth Expert Report a list of the documents in question.⁹¹⁷ The fact that Claimants and Ryder Scott would go as far as simply asserting entirely untrue facts about GCA's supporting documentation speaks volumes about their credibility.

480 Hence, the Republic denies entirely the hyperbolic assertions contained in paragraph 449 of Claimants' First Post-hearing Brief. Since the only references for these assertions come from the untruthful direct examination of Ryder Scott, these assertions are clearly incorrect. GCA conducted their own independent analysis, which consisted in a thorough review of the work done by Ryder Scott and the contents of Field Development and Monitoring Reports as well as the derivation of the appropriate conclusions there from.⁹¹⁸ This is perfectly appropriate for estimating fair market value and has been GCA's approach on many occasions in the last 50 years when they provided reserves estimates for a fair market valuation.⁹¹⁹ In fact, it is Ryder Scott's approach that does not live up to the standards necessary for a fair market valuation, as Ryder Scott consistently ignored available data to inflate reserves estimates.⁹²⁰

481 Moreover, Claimants suggest that the First and Second GCA Expert Reports are "*markedly different*".⁹²¹ According to Claimants, there are "*wild swings*" in GCA's assumptions.⁹²² Again, Claimants can only make such statement by completely ignoring the testimony given by GCA. As is clear from a simple review of the appendices to GCA's reports,⁹²³ the amendments made to the forecasts are generally very minor.⁹²⁴ The only significant change occurred with regard to the Munaibay Oil estimate. This amendment – as all the other amendments – was however explained by GCA at the time and also repeatedly in further reports and at the Hearing on Quantum.⁹²⁵ Claimants' criticism on this issue is thus based entirely on ignorance of the explanations given.

⁹¹⁶ GCA Third Expert Report, para. 31.

⁹¹⁷ GCA Fourth Expert Report, Appendix II.

⁹¹⁸ GCA Third Expert Report, para. 229; Testimony of Mr. Goodearl, Hearing on Quantum, Transcript Day 3, p.187, lines 10-18.

⁹¹⁹ GCA Third Expert Report, para. 229.

⁹²⁰ GCA Fourth Expert Report, para. 8.

⁹²¹ Claimants' First Post-hearing Brief, para. 439.

⁹²² Claimants' First Post-hearing Brief, para. 442.

⁹²³ GCA Expert Report, Appendix III; GCA Supplemental Expert Report, Appendix II.

⁹²⁴ For example, the gas production estimate for Tolkyin is raised from 5.68 Bcm in the First Expert Report to 5.81 Bcm in the Second Expert Report. As another example, the oil and condensate production estimate for Tolkyin is raised from 4.48 MMBbl to 4.59 MMBbl. The gas production estimate for Borankol remained entirely unchanged.

⁹²⁵ See Part IV, D.II.7 below.

482 Insofar as Claimants allege that GCA's cost estimates are opaque and unsupported,⁹²⁶ this is particularly ironic. GCA have provided detailed cost estimates whereas FTI hid from the Tribunal that the estimates it used for Contract No. 302 were in fact provided by Claimants and did not provide any breakdown of the infrastructure capex assumed for the Contract No. 302 exploration and development.⁹²⁷ Claimants' hypocrisy is apparent.

483 Lastly, Claimants are wrong when they contend that the approach taken by GCA in auditing the available data was insufficient for the purposes of estimating fair market value and thus for providing values in this arbitration. As GCA explain:

*"[...] GCA performed an independent audit of the available data, which involved checks on all of the data provided. GCA also integrated the dynamic performance data with the volumetric estimates of oil and gas in place. This process is perfectly appropriate for the purposes of estimating fair market value [...]"*⁹²⁸

484 Given the many apparent mistakes in Ryder Scott's work and Ryder Scott's constant disregard of available data,⁹²⁹ GCA's work is vindicated beyond doubt.

485 In any event, it should be noted that with regard to the most important issue in the present case, the remaining volume of recoverable reserves from the Borankol and Tolkyln fields, Ryder Scott and GCA are not separated by all that much. As of 21 July 2010, Ryder Scott assume recoverable volumes to be 66.76 MMBoe. GCA estimate recoverable volumes of 50.3 MMBoe as of the same date.⁹³⁰ Claimants thus hugely exaggerate the relevance of their criticism of GCA.

2. Assertions regarding the work done by Deloitte GmbH

486 In an apparent attempt to distract from the many mistakes in their reports, FTI have directed some criticism against the work done by Deloitte GmbH. This criticism is entirely baseless and can in many instances only be explained with FTI being completely ignorant of the explanations given by Deloitte GmbH.

487 Some examples are presented in the following:

⁹²⁶ Claimants' First Post-hearing Brief, para. 446.

⁹²⁷ See Part IV, A.VI above.

⁹²⁸ GCA Fourth Expert Report, para. 27.

⁹²⁹ See Part IV, F.I. below.

⁹³⁰ Deloitte & Touche Supplemental Expert Report, fn. 117.

- (a) FTI insinuated that Deloitte GmbH could have double counted administration expenses by stating that it was not clear whether GCA had included administration expenses in its OPEX estimates.⁹³¹ However, GCA had already explained in its Second Expert Report in detail that administration expenses were not included in the OPEX estimates.⁹³²
- (b) FTI alleged that Deloitte GmbH did not provide an explanation for their administration cost forecast for Borankol and Tolkin.⁹³³ This contention is entirely baseless because Deloitte GmbH have done just that in their Expert Report.⁹³⁴
- (c) FTI contend that the Deloitte GmbH Expert Report states that “*its conclusions were prepared on a pre-tax basis*”. In fact, the Report does not. Rather, it sets out clearly in its explanations and exhibits that all relevant taxes were taken into account.⁹³⁵
- (d) FTI seriously criticise Deloitte GmbH for providing a valuation model that is allegedly “*unduly complicated*” and “*unduly complex and difficult to validate*”.⁹³⁶ This remark can hardly be taken seriously, given the fact that it is rather FTI’s inflexible “real term” valuation model that does not allow them to assume different inflation rates for costs and prices.⁹³⁷ FTI themselves basically acknowledge that such different inflation assumptions are necessary when they present their explanation of the LPG Plant cost explosion.⁹³⁸ They thus have to admit that it is their model which is unduly simplified, not Deloitte GmbH’s model which is unduly complicated.

488 The fact that FTI had to admit to many mistakes already whereas Deloitte GmbH’s analysis remains unaffected by FTI’s baseless criticism is further proof for the fact that Deloitte GmbH’s work is of far better quality and far more reliable than FTI’s.

⁹³¹ FTI Consulting Third Expert Report, para. 8.20.

⁹³² Cf. GCA Supplemental Expert Report, para. 15: “*This GCA OPEX estimate does not include corporate overheads and administration, license fees, legal fees or headquarters (international) support, or contributions to the abandonment fund, all of which are addressed separately by Deloitte in its cash flow evaluation.*”

⁹³³ FTI Consulting Third Expert Report, para. 8.28.

⁹³⁴ Cf. Deloitte & Touche Expert Report, para. 284: “*Administrative expenses were forecasted by applying the Kazakh inflation rates to the 2009 adjusted administrative expenses of KPM of USD 6.4 mln. The 2010 values were considered proportionally to adjust for the Valuation Date assuming equal distribution throughout the year.*” Cf. also Deloitte & Touche Expert Report, para. 307.

⁹³⁵ Deloitte & Touche Second Supplemental Expert Report, para. 304.

⁹³⁶ FTI Consulting Third Expert Report, para. 8.33.

⁹³⁷ Deloitte & Touche Second Supplemental Expert Report, para. 298.

⁹³⁸ Deloitte & Touche Second Supplemental Expert Report, paras. 176 et seqq.

II. Differences between the Deloitte GmbH and Deloitte TCF valuations

489 Claimants try to call into question the reliability of Deloitte GmbH's work by pretending that no explanations were provided for the differences between the Deloitte GmbH and the Deloitte TCF valuation.⁹³⁹ Again, Claimants are only able to make these comments by ignoring the explanations given.

490 First, Claimants contend that Deloitte GmbH had not explained why they applied different gas pricing assumptions than Deloitte TCF.⁹⁴⁰ This allegation is frankly ludicrous. Deloitte GmbH explained their analysis of the Kazakh gas market and the conclusions they drew therefrom on six full pages.⁹⁴¹

491 Second, Claimants allege that an explanation is missing as to why Deloitte GmbH were not able to calculate a scrap value, as had been done by Deloitte TCF.⁹⁴² However, on the same page that they state this criticism, Claimants provide the explanation that they allege to be lacking. As Mr. Gruhn of Deloitte GmbH explained at the Hearing on Quantum, he had not received any working files from Deloitte TCF.⁹⁴³ This explains perfectly clearly why Deloitte GmbH could not calculate the scrap value even though Deloitte TCF could. In any event, it should be noted that the burden of proof is on Claimants to show that the LPG Plant has any scrap value in the first place.

492 Third, Claimants refer to differences in the valuation of Munaibay Oil.⁹⁴⁴ In this instance, their complaints are entirely hypocritical, as they themselves have correctly explained these differences by reference to the amendments to GCA's resource and cost estimates.⁹⁴⁵

493 For the avoidance of doubt, the Republic refutes any allegation⁹⁴⁶ of bad faith in the submission of the Deloitte TCF valuation report.

⁹³⁹ Claimants' First Post-hearing Brief, paras. 505 et seqq.

⁹⁴⁰ Claimants' First Post-hearing Brief, para. 507.

⁹⁴¹ Deloitte & Touche Expert Report, paras. 68 et seqq.

⁹⁴² Claimants' First Post-hearing Brief, para. 508.

⁹⁴³ Testimony of Mr. Gruhn of Deloitte GmbH, Hearing on Quantum, Transcript Day 4, p.126, lines 7-16.

⁹⁴⁴ Claimants' First Post-hearing Brief, para. 509.

⁹⁴⁵ Claimants' First Post-hearing Brief, paras. 479 et seqq.

⁹⁴⁶ Claimants' First Post-hearing Brief, para. 506.

C. Claimants' valuations are inflated for wrong assumptions regarding achievable gas prices

494 Claimants' valuations were and remain to be inflated for wrong assumptions regarding achievable gas prices.

495 FTI who obviously were instructed to apply export prices no matter what, are wrong to assume that TNG and KPM could have been expected to export gas (**I.**). FTI then aggravate this mistake by applying export prices that no gas producer could ever hope to achieve (**II.**). In essence Claimants' new case on gas pricing therefore boils down to unsupported accusations against Respondent's experts (**III.**).

I. TNG and KPM could not have been expected to be exporting gas

496 What has become obvious is that FTI's and Claimants reliance on the so called Tripartite Agreements has fallen into pieces and Claimants have effectively abandoned this argument (**1.**). Claimants meagre other supporting material fares no better (**2.**).

1. Tripartite Agreements could not lead any potential investor to expect that TNG or KPM would be exporting gas

497 In its prior submissions, Respondent has demonstrated in detail why the negotiations regarding the so called Tripartite Agreements could not have given rise to an expectation that TNG or KPM would be exporting gas.

498 In particular in the Rejoinder in Quantum⁹⁴⁷ and in the Hearing on Quantum, Respondent provided a very detailed explanation of why FTI's anchor for assuming export gas prices, a Tripartite Agreement which FTI misperceived to be signed by representatives of all three parties, could not have given rise to such an expectation. Claimants' reaction to this has been hardly surprising: silence. In fact, Claimants' are unresponsive to such an extent that it appears that they do no longer seriously maintain their reliance on the Tripartite Agreements.

⁹⁴⁷ Respondent's Rejoinder on Quantum, paras. 267-365; Respondent's Opening Submission, Hearing on Quantum, Transcript Day 1, p.154, line 17 - p.159, line 9.

499 Thus, Claimants failed to even make an attempt to disprove or downplay the following facts regarding the Tripartite Agreements, which frankly are devastating for FTI's and Claimants' assumption of gas export:

- (a) Claimants and FTI fail to provide any explanation for their application of the Tripartite Agreement to their prospective valuation of the Contract No. 302 properties and their valuation of the Borankol field. This is despite the fact that - as pointed out by the Republic⁹⁴⁸ - both Tripartite Agreements specifically only pertain to gas from the dedicated field, i.e. Tolkyn.
- (b) Claimants and FTI simply ignore that neither of the Agreements was ever signed by representatives of all Parties.⁹⁴⁹ In the introduction of their First Post-hearing Brief, they claim that allegedly "*KMG NC and TNG signed the export deal in November 2008.*"⁹⁵⁰ Not even speaking about the fact that this was more than one month after Claimants' valuation date, it is also a disingenuous statement because - as already pointed out by Respondent numerous times⁹⁵¹ - there never was a separate deal on export. TNG would have been given support in exporting gas **in return** for providing gas to a strategically important project. This means, no fertiliser plant, no preferential treatment to export, it is as simple as that.
- (c) Claimants and FTI do not address at all the fact that TNG could never have supplied the volumes owed under the Tripartite Agreements and that in all likelihood the contract - even if signed by all three parties - would not have survived the first year because either KazTransGaz/KazMunaiGaz or KazAzot would have exercised their unilateral contractual right to terminate the Agreement under section 10.1 of the Tripartite Agreements due to non-fulfilment of the contract.⁹⁵²
- (d) Claimants and FTI ignore that the 17 November 2008 Agreement was signed by KazMunaiGaz and TNG almost one month after their valuation date. FTI in their Third Expert report apparently sought to justify their reliance on this Agreement by alleging that KazTransGaz was replaced by KazMunaiGaz **prior** to Claimants' valuation date of 14 October 2008. Unsurprisingly, FTI

⁹⁴⁸ Respondent's First Post-hearing Brief, paras. 654 et seq; Respondent's Opening Submission, Hearing on Quantum, Transcript Day 1, p.156, line 18 - p.157, line 2.

⁹⁴⁹ Undated 2008 Agreement (**Exhibit C-302** and **Exhibit R-389**) and 17 November 2008 Agreement (**Exhibit C-97** and **Exhibit R-393**).

⁹⁵⁰ Claimants' First Post-hearing Brief, para. 130.

⁹⁵¹ Respondent's Rejoinder on Quantum, paras. 297-309; Respondent's First Post-hearing Brief, paras. 642-646.

⁹⁵² Respondent's Rejoinder on Quantum, paras. 320 et seqq; Respondent's Opening Submission, Hearing on Quantum, Transcript Day 1, p.156, line 15 - p.157, line 17.

make this statement without providing a shred of evidence.⁹⁵³ Again, this lack of evidence can easily be explained by the fact that the opposite is true. Gazprom refused to accept KazTransGaz as the exporter only by letter of 27 October 2008⁹⁵⁴ and thus **after** Claimants' valuation date. Equally baseless, FTI allege that as at Claimants valuation date the Tripartite Agreement was actively pursued by all three parties. The "proof" that FTI provides for this is a reference to two pages in Claimants' Reply on Quantum.⁹⁵⁵ On these two pages Claimants mainly explain FTI's assumptions regarding export of gas, so FTI appear to cross-reference themselves. But even disregarding that, two pages in Claimants' submission can hardly be the evidence, these two pages do not even mention the alleged active pursuit of all parties.⁹⁵⁶

- (e) Claimants totally and utterly ignore the conditions stipulated in the Tripartite Agreement under section 2.2 of the Agreements. The Republic demonstrated that conditions were unattainable and would therefore have prevented the Undated 2008 Agreement from ever becoming effective.⁹⁵⁷
- (f) Claimants ignore that they themselves assumed that export would be impossible as highlighted by prices instructions for Miller & Lents, which clearly reflect the expectation that TNG would continue to sell gas domestically.⁹⁵⁸
- (g) Claimants simply refused to identify the one and only gas sales contract that Claimants at the time considered so important that Tristan Oil mentioned it in the summary of their Annual Report for the Year 2009 and they continue to withhold this evidence; it can only be inferred that this contract would undermine Claimants assumptions and allegations regarding achievable gas prices.⁹⁵⁹
- (h) Claimants fail to address the dramatically dropping prices for Urea which would have prevented KazAzot from signing the Tripartite Agreement.⁹⁶⁰

⁹⁵³ FTI Post-hearing Expert Report, para. 7.16.

⁹⁵⁴ Letter from Gazprom to KazMunaiGaz dated 27 October 2008 (**Exhibit R-343**).

⁹⁵⁵ FTI Post-hearing Expert Report, para. 7.17.

⁹⁵⁶ Claimants' Reply on Quantum, p. 6,7.

⁹⁵⁷ Respondent's Rejoinder on Quantum, paras. 291 - 296.

⁹⁵⁸ Respondent's Rejoinder on Quantum, paras. 355 - 365.

⁹⁵⁹ Respondent's First Post-hearing Brief, paras. 672 - 684; Testimony of Mr. Lungu, Hearing on Quantum, Transcript Day 1, p.215, line 22 - p.216, line 20; Testimony of Mr. Cojin, Hearing on Quantum, Transcript Day 2, p.73, line 18 - p.75, line 25.

⁹⁶⁰ Respondent's Rejoinder on Quantum, paras. 310 - 319.

500 All of these aspects are discussed in detail in Respondent's First Post-hearing Brief but they have been in these proceedings for a long time and Claimants have not only failed to adequately address them, they have failed to address them at all.

501 It is therefore obvious that Claimants have now finally apparently taken Mr. Stati's viewpoint on the Tripartite Agreements: *"I'm sorry, it's not signed. It's not signed by anyone. Why should we look into it?"*⁹⁶¹

2. Claimants' other arguments for the assumptions of export are equally unconvincing

502 Claimants' further arguments for their assumption that TNG and KPM could be expected to export gas are based on TNG's contractual right to export gas, assumptions of export allegedly reflected in the indicative offers received for the Tolwyn field in phase 1 of Project Zenith, an allegedly dramatically changing gas market and finally, the only argument Claimants appear to seriously pursue, the RBS valuation.⁹⁶²

503 With regard to TNG's right to export under its subsoil use contract, there is no dispute that such a right exists. Claimants, however, want to understand this **right** as a **guarantee** or even an obligation of the state to assist TNG in exporting gas.⁹⁶³ Professor Olcott explained that this right only meant that the state could not bar the sale of gas but it neither obliged Gazprom nor the Republic to buy the gas or to assist in the export of gas.⁹⁶⁴ Claimants have provided no evidentiary support for their interpretation and there is no such support.

504 With regard to the indicative offers from interested companies in phase 1 of Project Zenith, Claimants' argumentation once again approaches the realm of absurdity. If bidders assumed export of gas, this was not because they themselves assumed that TNG would be exporting gas. It was because Claimants had told them in their information memorandum that TNG would be able to export gas.⁹⁶⁵

⁹⁶¹ Testimony of Mr. Stati, Hearing on Quantum, Transcript Day 2, p.98, lines 5-6.

⁹⁶² Claimants' First Post-hearing Brief, paras. 492 - 500.

⁹⁶³ Testimony of Mr. Stati, Hearing on Quantum, Transcript Day 2, p.96, lines 10-19.

⁹⁶⁴ Testimony of Professor Olcott, Hearing on Quantum, Transcript Day 3, p.47, line 25 - p.48, line 16; Third Expert Report of Professor Olcott, paras. 16 et seq.

⁹⁶⁵ Project Zenith Confidential Information Memorandum p. 10, 24 (**Exhibit C-70**).

505 Naturally, a bidder would take this invitation to make a high bid in order to gain access to the data room. Mr. Seitinger of OMV explained this very poignantly:

*“ It was -- I said very clear also in this witness statement that we did not have a detailed business case for it because, with the limited information in the information memorandum, we said, "Okay, there is a justification and a need to price it higher, otherwise we will not be in the range of the competitors." But on the other hand, this was for us the key information that we would have looked into in the due diligence before submitting a detailed bid, a firm bid.”*⁹⁶⁶

506 KNOC for example even specifically mentioned in its indicative offer that before submitting a definite and binding offer, it would need to conduct a due diligence of the natural gas sales contract.⁹⁶⁷ At latest at this point in time, any interested bidder would have detected that the Tripartite Agreement was not a viable prospect.

507 Claimants’ support for an allegedly dramatically changing gas market is an academic article from Mr. Yenikeeff. Claimants again and again insinuate that the same quote from this article which they included in their Opening submission on Quantum and in their First Post-hearing Brief contained any support that more subsoil users in Kazakhstan would be able to export gas.

508 The truth is that the article by Mr. Yenikeeff does not even contain such an allegation. He discusses unsupported assumptions regarding prices but he does not indicate that the volumes allowed by Gazprom to be exported would increase.⁹⁶⁸

509 Claimants, in the view of their losing, or rather long lost case on this issue now seek to find new reliance on the RBS valuation in their First Post-hearing Brief. RBS does indeed assume a scenario of 80% export and 20% domestic sales. Leaving aside for a moment that Claimants rely on the RBS report very selectively by jumping on the export scenario but disregarding that RBS assumed export prices that are far below the USD 180 assumed by FTI: Claimants completely fail to explain why the assumptions effectively made by KMG EP should be applicable for TNG.

510 KMG EP is a major producer of gas in Kazakhstan. They may have a completely different bargaining power in relation to Gazprom than a small subsoil user like

⁹⁶⁶ Testimony of Mr. Seitinger, Hearing on Quantum Day4, p. 193, lines 10 - 18.

⁹⁶⁷ Indicative Proposal for Project Zenith from Korea National Oil Corporation (**Exhibit C-18**).

⁹⁶⁸ See Respondent’s First Post-hearing Brief, paras. 669 - 671.

TNG. In addition, they may also have chosen to fulfill existing obligations of delivery of gas to KazRosGaz with gas from Tolkyn instead of gas from other fields.

511 This was fully acknowledged by RBS. In their report, they explicitly state that on a stand-alone basis, KPM and TNG could only sell gas at domestic prices. Slides 40 and 41 contain the unequivocal statement:

*“Stand-alone EV is Base Case Scenario based on 100% domestic gas sales”*⁹⁶⁹

512 RBS only - as a second step - assumed an export portion of 80% based on the assumption that KMG EP would buy the assets and thus would benefit from the synergy effects of a major oil and gas producer in Kazakhstan.⁹⁷⁰

II. FTI aggravate their mistake by applying wrong export gas prices

513 FTI do not stop short of applying export prices when there is no prospect that TNG or KPM would be exporting gas, but aggravate this mistake by assuming export prices that are not supported by the realities of gas sales in Kazakhstan.

514 Claimants' new main source of reliance, the RBS valuation, assumes gas prices that are far below that applied by FTI. In fact, the export prices RBS applied in their base case are less than half of what FTI assume to be the prevailing export price. RBS assumed an export price of USD 85 per 1000 cm for the year 2009 inflated with EIU US inflation (CPI) going forward.⁹⁷¹

515 The price of USD 85 per 1000 cm as applied by RBS for the export scenario is also in line with the prices paid by Gazprom to KazRosGaz, which was USD 110 for 1000 cm in the year 2008.⁹⁷²

III. Claimants' case on gas pricing is reduced to unsupported accusations against Respondent's experts

516 In their First Post-hearing Brief Claimants' discussion on gas pricing disregards the vitally important aspects like the missing viability of the Tripartite Agreement and the restrictions to export due to Gazprom.

⁹⁶⁹ RBS Valuation Report dated 31 July 2009, p.40, 41 (**Exhibit R-374**).

⁹⁷⁰ *Ibid.*

⁹⁷¹ RBS Valuation Report dated 31 July 2009, p.72 (**Exhibit R-374**).

⁹⁷² Gazprom Financial Report 2009, p. 87 (**Exhibit 9 to Third Expert Report of Professor Olcott**).

517 Claimants therefore chose to make unsupported accusations against Deloitte GmbH, Professor Olcott and the Republic.

518 With regard to Deloitte GmbH, Claimants allege that Deloitte GmbH had changed its weighting of different sales scenarios upon instruction of the Republic. This allegation is baseless and has been rebutted by Mr. Gruhn in the Hearing on Quantum⁹⁷³, which Claimants simply ignore.

519 In their Second Supplemental Expert Report, Deloitte GmbH reiterate:

“Deloitte has analysed the Draft RBS Report but, for good professional reasons, did not base its own valuation assumptions on the Draft RBS Report (cf. section 2.1).

We absolutely refute the allegation⁶² that Deloitte received any instructions by our client or the Republic in this respect. It was our professional judgment not to base our valuation in whole or in part on the Draft RBS Report due to several reasons mentioned in this report (cf. section 2.10).”⁹⁷⁴

520 Claimants do not address or rebut the statements made by Professor Olcott in her Supplemental Expert Report, which again are fatal for Claimants’ assumptions regarding gas pricing. Their only justification for this is that allegedly, the Republic’s experts had no credibility on the issue of gas pricing. It appears that Claimants base this assertion on the assumptions in the RBS valuation. Claimants therefore seem to indicate that the expert report of a renowned political expert, with vast experience in the politics and realities of gas sales in Central Asia, should be discarded because a bank **agreed** with her assumptions for a valuation on a stand-alone basis but applied other assumptions for KMG EP. This argumentation is ridiculous on its face.

⁹⁷³ Testimony of Mr. Gruhn of Deloitte GmbH, Hearing on Quantum, Transcript Day 4, p.124, lines 14-20.

⁹⁷⁴ Deloitte GmbH Second Supplemental Report, para. 42.

D. Claimants have suffered no damages because of the non-extension of Contract No. 302

521 The Republic demonstrated in detail in its First Post-hearing Brief and at the Final Hearing that Claimants cannot claim any damages because of the non-extension of Contract No. 302.⁹⁷⁵ The list of alternative reasons as to why Claimants' claim fails is impressive and is presented in a summary fashion in the following:

- (a) Under Claimants' own liability case, Claimants can only claim compensation for reliance damage, namely obsolete expenditure made in reliance on the alleged April 2009 promise by the MEMR to extend Contract No. 302.⁹⁷⁶ That is because Claimants complain about an alleged "bad faith refusal" to extend the contract, not even about a breach of a state's obligation to extend the contract. Such obligation has never been alleged by Claimants. Since Claimants have neither alleged nor demonstrated any damage incurred because of the reliance on the extension, their damage claim regarding Contract No. 302 amounts to zero.
- (b) For the same reason, the principle of loss of opportunity does not apply: Claimants' complaint does not relate to the actual loss of opportunity but to not being granted an opportunity they had allegedly relied on.⁹⁷⁷
- (c) Moreover, the principle of loss of opportunity is not a commonly recognised legal concept and has found little acceptance in arbitral practice. Insofar as it has been applied, this only happened in situations in which there was a "*harm whose existence cannot be disputed*".⁹⁷⁸ Presently, all the evidence points to the conclusion that the Contract 302 Properties had no value and that thus no harm occurred.⁹⁷⁹
- (d) What is more, in the cases referred to by Claimants, in particular the *Sapphire* case, the compensation for the loss of opportunity was awarded in an amount substantially below the potential (unrisky) profit that could have been earned

⁹⁷⁵ Respondent's First Post-hearing Brief, paras. 701 et seqq.

⁹⁷⁶ Respondent's First Post-hearing Brief, paras. 702 et seqq.

⁹⁷⁷ Respondent's Ten Minute Opening Presentation, Final Hearing, Transcript Day 1, p.14, line 8 - p.15, line 7.

⁹⁷⁸ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, PCA Case No. 34877, Partial Award, 30 March 2010, para. 328 (**Exhibit C-285**).

⁹⁷⁹ Respondent's Ten Minute Opening Presentation, Final Hearing, Transcript Day 1, p.16, line 19 - p.17, line 9.

by the claimant.⁹⁸⁰ Thus, these cases do not support the spectacular unrisks claims suggested by Claimants.

- (e) The supposed “Interoil Reef” was no opportunity because Claimants could not have discovered it before the contract expired on 30 March 2009 or even before the end of the hypothetical extended contract term on 30 March 2011.⁹⁸¹
- (f) The supposed “Interoil Reef” was no opportunity because at the time of the alleged extension promise, Claimants had no intention to explore the “Interoil Reef.”⁹⁸²
- (g) The supposed “Interoil Reef” was no opportunity because the Geological Chance of Success (GCoS) was dismal.⁹⁸³
- (h) The supposed “Interoil Reef” was no opportunity because its development was non-viable even disregarding risk.⁹⁸⁴ Unavoidable development challenges, such as depth of burial,⁹⁸⁵ a prolonged time of development⁹⁸⁶ and significant amounts of H₂S in the supposed “Interoil Reef” gas,⁹⁸⁷ render the prospect entirely non-commercial.

I. Claimants’ Contract No. 302 case is seriously flawed

522 With their First Post-hearing Brief and the Third Expert Reports of Ryder Scott and FTI, Claimants have presented a new “Interoil Reef” case. The new arguments and calculations presented therein give further reason for criticism.

1. Ryder Scott’s 3D seismic interpretation of the “Interoil Reef” does not demonstrate closure

523 With their Third Report, Ryder Scott have provided a fundamentally flawed 3D seismic interpretation of the “Interoil Reef”. That is because they have neither demonstrated closure to all sides of the structure nor provided a map of the “Interoil

⁹⁸⁰ Respondent’s Ten Minute Opening Presentation, Final Hearing, Transcript Day 1, p.17, line 10 - p.18, line 8.

⁹⁸¹ See Part II, A.V.5 above and Respondent’s First Post-hearing Brief, paras. 708 et seqq.

⁹⁸² See Part II, A.V.5 above and Respondent’s First Post-hearing Brief, paras. 726 et seqq.

⁹⁸³ Respondent’s First Post-hearing Brief, paras. 777 et seqq. and paras. 786 et seqq.

⁹⁸⁴ Respondent’s First Post-hearing Brief, paras. 779, 798.

⁹⁸⁵ Respondent’s First Post-hearing Brief, paras. 751 et seqq.

⁹⁸⁶ Respondent’s First Post-hearing Brief, paras. 774 et seqq.

⁹⁸⁷ Respondent’s First Post-hearing Brief, paras. 756 et seqq.

Reef” showing such closure.⁹⁸⁸ Closure is however crucial to the assumption that there is a valid trap containing hydrocarbons.⁹⁸⁹ Without closure, there is no proof that any hydrocarbons that may have been generated in source rocks have not migrated to the surface.

524 Specifically, as can be seen on the maps that Ryder Scott did provide with their Third Report,⁹⁹⁰ Ryder Scott did not demonstrate or map closure to the southwest of the structure. Instead, Ryder Scott rely on a single 2D seismic line in the vicinity which they suggest gives “*some indication*” of the position of the reef structure in that area.⁹⁹¹ This approach is seriously flawed for a number of reasons:

- (a) As GCA explained, both GCA and Ryder Scott never relied on this 2D line when interpreting the “Interoil Reef” on the basis of 2D data alone.⁹⁹² For Ryder Scott to assert that this line gives indication of the reef’s position when it did not locate the reef on this line earlier is entirely non-credible and only demonstrates Ryder Scott’s selective use of the data for whatever position they consider favourable to their client in a given moment.
- (b) As GCA note, “[d]ata quality on the 2D line is poor and it is not possible to make a definitive interpretation of the ‘Top InterOil Reef’ pick from this 2D line.”⁹⁹³
- (c) In any event, a single 2D line can provide information only for a very limited geographic location. It does not say anything about the geological conditions in its surroundings but only about the conditions strictly on this line. Thus, even if the single 2D line gave indication of closure on that very line, there is no reason to assume that the structure does not open up on a hypothetical 2D line next to the actual one.⁹⁹⁴

525 Confronted with his choice of relying on a single 2D line at the Final Hearing, Mr. Nowicki of Ryder Scott memorably stated that “[i]n my mind, I know that there has to be more to that reef. It doesn't just end where the data ends,”⁹⁹⁵ but could otherwise not justify the assumption of closure to the southwest. This demonstrates

⁹⁸⁸ GCA Fourth Expert Report, para. 63.

⁹⁸⁹ Testimony of Dr. Wright of GCA, Final Hearing, Transcript Day 1, p.72, lines 8-22.

⁹⁹⁰ Ryder Scott Third Expert Report, Exhibit No. 13.

⁹⁹¹ Ryder Scott Third Expert Report, para. 11.

⁹⁹² GCA Fourth Expert Report, para. 62.

⁹⁹³ GCA Fourth Expert Report, para. 61.

⁹⁹⁴ Cf. Testimony of Dr. Wright of GCA, Final Hearing, Transcript Day 1, p.80, lines 3-16.

⁹⁹⁵ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.48, line 25 - p.49, line 2.

fairly well Ryder Scott's wishful thinking approach in their 3D seismic interpretation and the lack of reliable work provided by them.

526 Not only Ryder Scott's conclusions regarding the existence of closure to the southwest are untenable. Ryder Scott's assumptions regarding the size of the overall closure are equally untenable. Ryder Scott based its estimates of the gas volumes in the "Interoil Reef" on extremely large gas columns. Ryder Scott's high case is based on a gas column of 2,000m,⁹⁹⁶ meaning that from the crest of the reef structure downward, the supposed reef is filled with gas over an interval of 2,000m. The best case provides for a gas column of 1,250m and the low case provides for a gas column of 500m.⁹⁹⁷

527 Irrespective of the specifics of the "Interoil Reef", all of these estimates are unrealistic from the start. As GCA note,

*"[t]he gas columns used by RSC in their Prospective Resource estimates are very long. The longest recorded gas column known to GCA is 1,450 metres (from the Karachaganak Field, Kazakhstan) and columns greater than 500 m are rare. Figure 4.3 shows a graph of the longest gas columns for 500 gas fields in the world (taken from an IHS dataset). [...] the gas columns used by RSC in their assessment would be 'world beaters'. It is difficult to see how such long column heights can be used as most-likely estimates [...]"*⁹⁹⁸

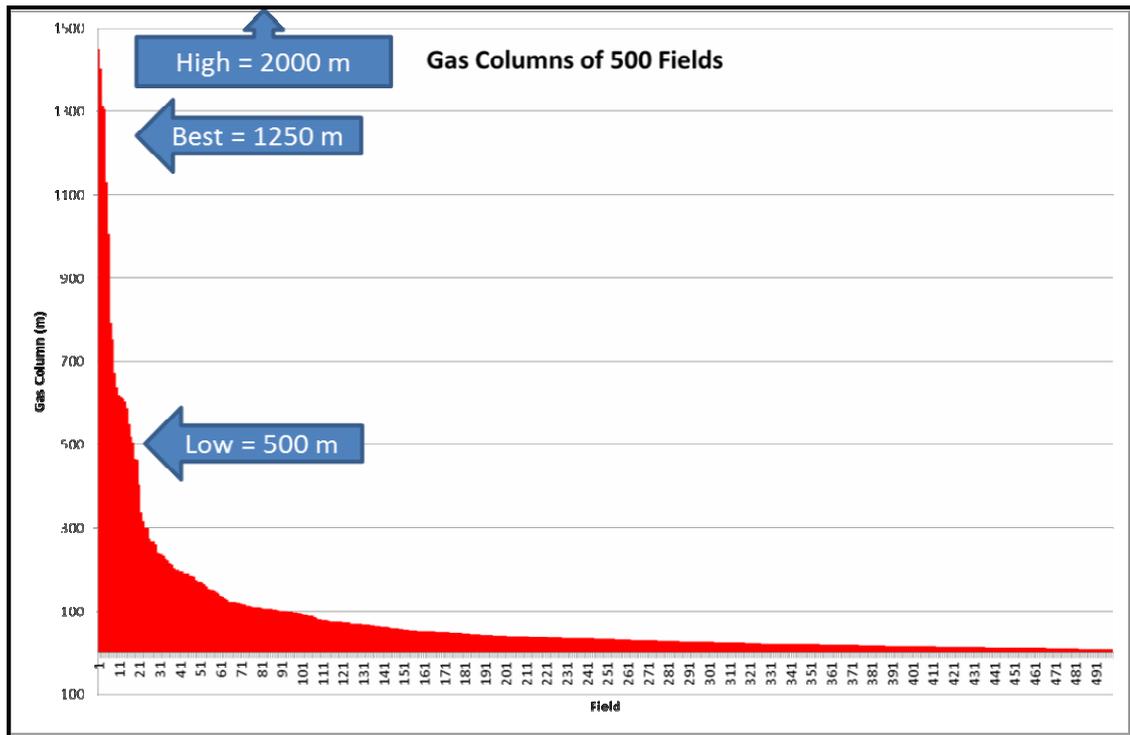
528 GCA have visualised the rarity of the gas columns assumed by Ryder Scott in the following chart which depicts the length of gas columns for 500 gas columns in the world.⁹⁹⁹

⁹⁹⁶ Ryder Scott Third Expert Report, para. 25.

⁹⁹⁷ Ryder Scott Third Expert Report, para. 25.

⁹⁹⁸ GCA Fourth Expert Report, para. 67.

⁹⁹⁹ GCA Fourth Expert Report, para. 70, Figure 4.3.



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530 As is apparent, Ryder Scott’s high case has never been observed in any gas field in the world, their best case is extremely rare and even their low case can be observed only on about 5% of all fields included.

531 Taking into account that Ryder Scott have not demonstrated and mapped a full closure to all sides of the reef, their gas column estimates appear even more unrealistic. As GCA note, the maps provided by Ryder Scott do not support the gas columns assumed:

“It can be clearly seen that there is no mapped closure associated with [the contour for the 2,000 meters gas column]. There is also no evidence to support a shorter column of 1,250 meters. Even the RSC low estimate of 500 meters is difficult to support using the mapping provided by RSC.”¹⁰⁰⁰

2. Ryder Scott do not take proper account of potential faulting

532 At the Hearing on Quantum, it became apparent that with its Third Report, Ryder Scott had tried to hide from the Tribunal the severe risk of faulting in the “Interoil Reef” structure. Ryder Scott’s Third Report does not contain the word faulting at all.¹⁰⁰¹ It does not expressly acknowledge the risk of faulting and instead

¹⁰⁰⁰ GCA Fourth Expert Report, para. 66.

¹⁰⁰¹ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.49, lines 23-25.

euphemistically mentions in a half-sentence “*questions regarding the top seal*”.¹⁰⁰² Apparently, Ryder Scott considered this phrase sufficient to inform the Tribunal about the potential for faulting and the severe consequences such faulting could have, namely that the trap could become invalid and that hydrocarbons could migrate to the surface.¹⁰⁰³ For an expert that is supposed to help the Tribunal in finding the relevant facts, this is not the proper way to address this issue.

533 Notably, both GCA¹⁰⁰⁴ and TOTAL E&P¹⁰⁰⁵ addressed expressly the clearly visible and potentially devastating faulting at the “Interoil Reef” interval.

3. Claimants’ “Interoil Reef” development schedule remains completely unrealistic

534 The Republic already set out in its earlier submissions how Claimants’ development schedule for the 2D “Interoil Reef” was unrealistically short because it ignored the time needed for, *inter alia*, appraisal, development planning, preparation of an Environmental Impact Assessment, approval processes and design and construction of pipelines and facilities.¹⁰⁰⁶ Claimants’ development schedule for their new “Interoil Reef” based on 3D data is basically unchanged, so that the same criticism applies. GCA have expanded on these points of criticism in more detail with their Fourth Report.¹⁰⁰⁷

535 One new point of criticism that the Republic would like to highlight relates to the new 3D structure advocated by Ryder Scott. This structure extends beyond the boundaries of the Contract 302 Area onto the block of another subsoil user.¹⁰⁰⁸ The consequences of this can be substantial.¹⁰⁰⁹ TNG and the adjacent subsoil user would have to agree on the basis of unitisation and would have to find an agreement on how to share the estimated volumes. This would require an estimate of the volumes of hydrocarbons on the adjacent block which, in turn, could require that additional 3D seismic is shot there. Naturally, the negotiations on how to share the volumes can be highly contentious. In addition, the subsoil users would also have to

¹⁰⁰² Ryder Scott Third Expert Report, para. 29.

¹⁰⁰³ These potential consequences were admitted by Ryder Scott at the Final Hearing, cf. Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.49, lines 3-6.

¹⁰⁰⁴ GCA Third Expert Report, paras. 137, 151.

¹⁰⁰⁵ E-mail from TOTAL E&P to Ascom dated 16 June 2009 (**Exhibit C-710**); E-mail by Mr. Mallard to TOTAL E&P colleagues dated 15 July 2009 (**Exhibit R-360**).

¹⁰⁰⁶ Respondent’s First Post-hearing Brief, paras. 774 et seqq. Cf. also GCA Third Expert Report, paras. 205 et seqq.

¹⁰⁰⁷ GCA Fourth Expert Report, paras. 98 et seqq.

¹⁰⁰⁸ Ryder Scott Third Expert Report, para. 25.

¹⁰⁰⁹ GCA Fourth Expert Report, paras. 105 et seq.

agree on a joint operating agreement for development. All of this would need to be approved by the authorities. It is apparent that this would add substantial time to the development. Claimants have however ignored the need for unitisation completely in their development schedule.¹⁰¹⁰

536 Given all the shortcomings of Claimants' development schedule, and the fact that it was likely not prepared by Ryder Scott but by Claimants themselves,¹⁰¹¹ the Republic submits that their schedule must be disregarded entirely.

4. Claimants' development cost estimates remain completely unrealistic

537 It is explained above how Claimants were their own experts for development costs. Claimants masked this fact for long periods in these proceedings but had FTI essentially admit to it in their Third Expert Report.¹⁰¹² Apart from this fact, which fundamentally undermines the credibility of Claimants' development cost estimates, there are a number of severe flaws in the estimates now provided with FTI's Third Report.¹⁰¹³ These flaws must fully exclude Claimants' estimates from any serious consideration as a basis for measuring damages or even assessing the alleged loss of opportunity.¹⁰¹⁴

a) Well cost estimates

538 Regarding Claimants' well cost estimates, two observations are warranted.

539 Firstly, Claimants have silently amended their well cost estimates so that they now reflect in all instances increasing costs per meter drilled the deeper a well is drilled.¹⁰¹⁵ This is remarkable, as Claimants old well cost estimates had actually provided for a decrease in costs per meter with the increase of wells' depth.¹⁰¹⁶ Such decrease was entirely illogical, for well drilling operations get gradually more

¹⁰¹⁰ GCA Fourth Expert Report, para. 106.

¹⁰¹¹ See Part IV, A.VI above.

¹⁰¹² See Part IV, A.VI above.

¹⁰¹³ FTI Consulting Third Report, paras. 12.8 et seqq.

¹⁰¹⁴ For the Republic's criticism of the Claimants' earlier well cost estimates cf. Respondent's First Post-hearing Brief, paras. 555 et seqq.

¹⁰¹⁵ FTI Consulting Third Report, para. 12.15. The costs per meter for development wells according to Claimants are now 1,486 USD/m (3,700m well), 1,585 USD/m (4,100m well), 1,702 USD/m (4,700m well), 2,257 USD/m (7,000m well) and 2,347 USD/m (7,500m well).

¹⁰¹⁶ FTI Consulting Report, para. 15.12. The costs per meter for development wells according to Claimants were 1,486 USD/m (3,700m well), 1,585 USD/m (4,100m well), 1,702 USD/m (4,700m well), 2,750 USD/m (6,000m well), 2,250 USD/m (8,000m well), 2,000 USD/m (10,000m well). Cf. also Testimony of Mr. Rosen of FTI, Hearing on Quantum, Transcript Day 4, p.81, lines 1-19.

complicated the deeper a well is drilled, due to increases in temperature and pressure.¹⁰¹⁷

540 At the Hearing on Quantum, Mr. Rosen had still defended Claimants' well cost estimates and the decrease in costs per meter with flimsy arguments.¹⁰¹⁸ The amendment of Claimants' cost estimates as stated in FTI's Third Report shows however that Claimants have now admitted their mistake, overriding the unqualified statements of Mr. Rosen.

541 Secondly, also in FTI's Third Report, Claimants continue to claim that an exploratory well to the depth of 4,700 meters would cost USD 10 million.¹⁰¹⁹ This claim is clearly belied by FTI's own analysis.¹⁰²⁰ FTI have calculated themselves that the Munaibay-1 exploration well, which ultimately reached a depth of 4,700 meters, cost USD 18 million.¹⁰²¹ If Claimants took the historical approach seriously, they would have to rely on this data point and would have to increase their well drilling costs accordingly. The fact that they have not done so demonstrates just how unreliable their estimates are.

b) Infrastructure cost estimates

542 Up until FTI's Third Report, Claimants had never stated what infrastructure costs they had assumed for the development of the Contract 302 Area. In order to find out at least about the overall infrastructure costs assumed by Claimants, GCA had to derive the costs by calculation from the exhibits of FTI's DCF analysis.¹⁰²² Naturally, in so doing, GCA could not discern any information as to the specific infrastructure foreseen. Only with FTI's Third Report, in which Claimants provided an update of the infrastructure costs, did Claimants start to give glimpses of explanation for the infrastructure costs assumed. That is because the Third Report for the first time contains some limited breakdown in different items, such as pipelines, gathering units, etc.¹⁰²³

¹⁰¹⁷ FTI Consulting Report, para. 15.10.

¹⁰¹⁸ Testimony of Mr. Rosen of FTI, Hearing on Quantum, Transcript Day 4, p.81, line 20 - p.82, line 18.

¹⁰¹⁹ FTI Consulting Third Report, para. 12.15.

¹⁰²⁰ See already Respondent's First Post-hearing Brief, para. 560.

¹⁰²¹ Historical Munaibay Capex, provided as document no. 12 in the Scope of Review of FTI's Supplemental Expert Report (**Exhibit R-394**).

¹⁰²² GCA Third Expert Report, para. 199. FTI has now confirmed that the cost calculated by GCA, in the order of USD 108.2 million, was indeed correct, cf. FTI Consulting Third Report, para. 2.6.

¹⁰²³ FTI Consulting Third Report, para. 12.10.

543 However, this breakdown remains far behind the detail provided by GCA regarding their cost estimates, making it difficult to analyse it fully.¹⁰²⁴ Nonetheless, it is clear from a review of this breakdown that Claimants’ infrastructure cost estimates are riddled with mistakes:

- (a) Costs for gas flowlines (connecting the wells to a gathering manifold in the field) are understated by the factor 20. Claimants assume flowline costs of USD 50,000 per well where costs would actually be in the order of USD 1 million per well.¹⁰²⁵
- (b) Claimants’ estimate foresees the construction of a gas pipeline and a condensate pipeline in 2010. Given the timing, it has to be assumed that these pipelines are supposed to transport gas and condensate from the “Interoil Reef”. Curiously, Claimants’ estimate does not foresee the construction of any in-field facility – either in 2010 or at any other time – for separating the gas and the condensate before they are sent through these pipelines. This is a significant oversight leading to an understatement of costs.¹⁰²⁶
- (c) Claimants assume that the gas pipeline from the “Interoil Reef” will be only 34 kilometres long. This indicates that the pipeline is supposed to connect the reef with Tolwyn and that the gas will then be sent from Tolwyn through existing pipelines to Borankol and then to the CAC pipeline. While it may seem reasonable to use existing pipelines on the first sight, this approach overlooks two factors which render the concept completely unfeasible: Firstly, the pipeline connecting Tolwyn and Borankol is not adequately sized to transport “Interoil Reef” gas. The assumed production volumes from the “Interoil Reef” exceed the production volumes for which the Tolwyn-Borankol pipeline was designed for.¹⁰²⁷ Second, the gas stream from the “Interoil Reef” is supposed to be of a different pressure than the gas stream from Tolwyn. It is however not possible to mix gas streams of different pressure. The only way to combine the gas from the two fields would be to lower the pressure of the “Interoil Reef” gas. This would however be uneconomical as pressure is valuable.¹⁰²⁸ As a result, the only feasible approach is to construct a pipeline

¹⁰²⁴ GCA Fourth Expert Report, paras. 12, 113 et seqq.

¹⁰²⁵ GCA Fourth Expert Report, para. 116.

¹⁰²⁶ GCA Fourth Expert Report, para. 118.

¹⁰²⁷ GCA Fourth Expert Report, para. 118.

¹⁰²⁸ GCA Fourth Expert Report, para. 118.

from the “Interoil Reef” directly to Borankol. This entails higher costs as the distance between the fields is greater.¹⁰²⁹

- (d) Claimants’ infrastructure costs do not contain any estimates for treatment facilities.¹⁰³⁰ Since treatment is uncontestedly necessary (even if no H₂S were assumed), Claimants’ estimates must hence be based on the assumption that the hydrocarbons from the Contract 302 Area and in particular from the “Interoil Reef” are treated at the existing facilities at Borankol.¹⁰³¹ This is however impossible (even if no H₂S were assumed). That is because the peak production of gas assumed by Ryder Scott exceeds the capacity of the existing gas treatment facility used for the Tolkyn gas. In fact, Ryder Scott assume peak gas production of 14 MMcm per day from the reef while the existing gas treatment facilities have a capacity of only 7 MMcm per day.¹⁰³² Equally, the peak condensate production from the reef according to Ryder Scott is 24,000 Bbl per day, while the existing facilities for the processing of liquids is only 15,000 Bbl per day.¹⁰³³ Consequently, the construction of further facilities is unavoidable. GCA estimate that the cost of such additional facilities is in the order of USD 200 million, even if no H₂S were assumed.¹⁰³⁴
- (e) Claimants fail to provide for facilities for the removal of H₂S even though H₂S has to be expected in the “Interoil Reef” gas¹⁰³⁵ and even though Ryder Scott admit to a 50% probability of there being 1% of H₂S in the gas stream –¹⁰³⁶ which Ryder Scott assume to be the dividing line after which treatment costs become very high.¹⁰³⁷ Assuming 1% H₂S, the necessary gas sweetening facility would cost approximately USD 200 million.¹⁰³⁸ If 10% H₂S are expected, the cost rises to USD 260 million.¹⁰³⁹

¹⁰²⁹ GCA Fourth Expert Report, para. 118.

¹⁰³⁰ FTI Consulting Fourth Expert Report, para. 12.10; GCA Fourth Expert Report, para. 119.

¹⁰³¹ GCA Fourth Expert Report, para. 119.

¹⁰³² GCA Fourth Expert Report, para. 119.1.

¹⁰³³ GCA Fourth Expert Report, para. 119.2.

¹⁰³⁴ GCA Fourth Expert Report, para. 119.3.

¹⁰³⁵ GCA Supplemental Expert Report, para. 108.

¹⁰³⁶ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.52, lines 20-24.

¹⁰³⁷ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.52, line 25 - p.53, line 8.

¹⁰³⁸ GCA Fourth Expert Report, para. 121.

¹⁰³⁹ GCA Fourth Expert Report, para. 123.

(f) The FTI breakdown provides for an item called “Changing the extraction system”. This is not a recognised industry term and it is not possible to ascertain what it stands for.¹⁰⁴⁰

5. Ryder Scott’s new 3D structure is a completely new structure compared to their old 2D structure

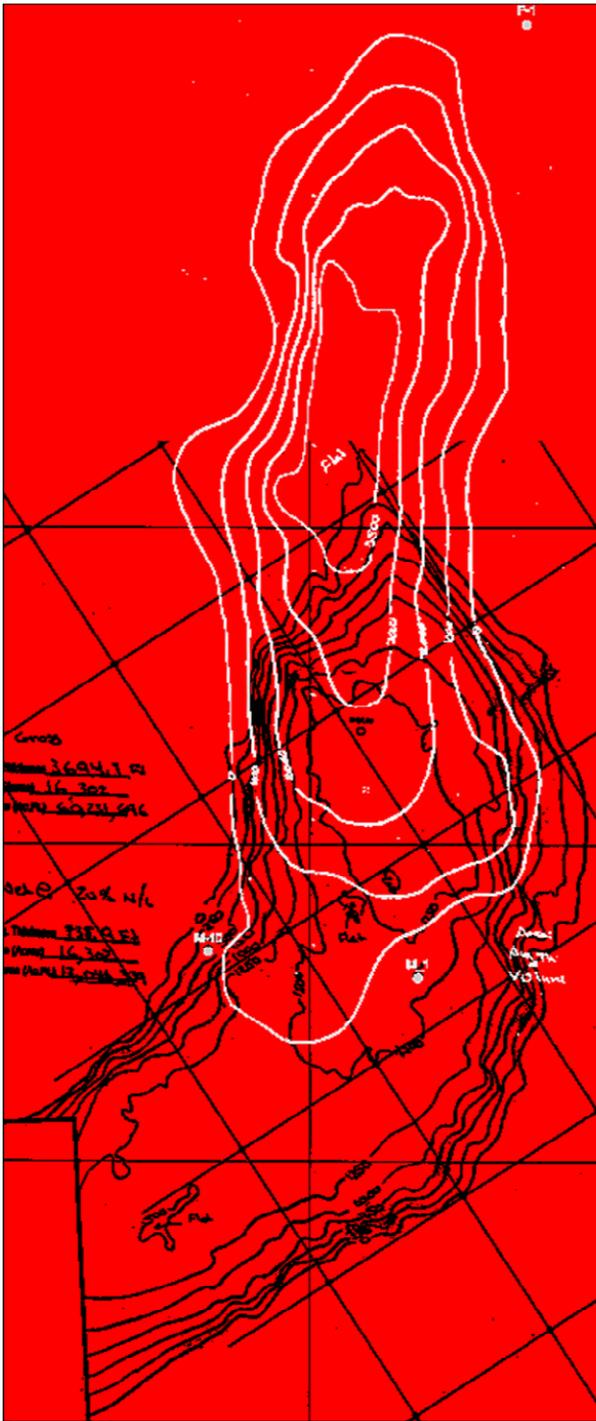
544 The Republic maintains that the supposed reef, as now identified by Ryder Scott and GCA, is an entirely new structure compared to the earlier structure identified on the 2D dataset.¹⁰⁴¹ The work done by Ryder Scott illustrates this fact very well. Ryder Scott have provided maps both for their 2D and for their 3D interpretation.¹⁰⁴² If laid on top of each other, it is apparent that these interpretations are extremely different:¹⁰⁴³

¹⁰⁴⁰ GCA Fourth Expert Report, para. 117.

¹⁰⁴¹ Respondent’s First Post-hearing Brief, paras. 736 et seqq.. Cf. also GCA Third Expert Report, paras. 72, 81.

¹⁰⁴² For the map of their 2D interpretation, cf. Ryder Scott 2D “Interoil Reef” Map (**Exhibit R-391**). For the map of their 3D interpretation, cf. Ryder Scott’s supporting documents to their Third Expert Report, RSC Doc Production 4-2013\Interoil Interpretation\RSC Interpretation\Maps\Isochores.pdf.

¹⁰⁴³ Please note that the old 2D structure is depicted in white whereas the new 3D structure is depicted in black. For both structures, Ryder Scott’s map of the high case was selected.



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546 As can be seen, the old 2D interpretation extends 6.5 kilometres to the north of the new 3D interpretation. At the same time, the new 3D interpretation stretches at least 6.9 kilometres further to the southwest (it is not possible to say how much further, as Ryder Scott's mapping stops at the Contract No. 302 boundary).

547 Moreover, at the north end of the 3D interpretation, where the reef falls from the crest towards its low point, the 2D interpretation sees the reef actually rise towards its crest. The 2D data thus indicated completely different geological events happening compared to the 3D data.

548 This demonstrates perfectly clearly that the 3D seismic data has not led to an update but to the interpretation of an entirely new structure. It also demonstrates that the old 2D data was of extremely bad quality, making any reliance thereon, in particular for constraining the new 3D interpretation to the southwest as done by Ryder Scott, entirely inappropriate.¹⁰⁴⁴

6. FTI's Munaibay Oil claim is massively overstated

549 As already explained in the First Post-hearing Brief, Claimants' Munaibay Oil claim is massively overstated.¹⁰⁴⁵ This is not only due to incorrect assumptions regarding recoverable reserves and the necessary capital expenditure,¹⁰⁴⁶ but also due to a series of severe calculation mistakes by FTI. Overall, FTI on their own and without "help" from Ryder Scott created a 63.8% overstatement of the estimated market value for the Munaibay Oil.¹⁰⁴⁷ In absolute terms, this means that FTI added USD 37.7 million¹⁰⁴⁸ to Claimants' claim simply by being incompetent.

II. Claimants' and Ryder Scott's criticism of the Republic's Contract No. 302 case is incorrect

1. Limitation to reliance damage

550 At the Final Hearing, Claimants objected briefly to the Republic's argument that compensation for the alleged violations with regard to Contract No. 302 must be limited to reliance damage.¹⁰⁴⁹ This objection is baseless.

551 Claimants' only argument for the Republic's alleged liability with regard to Contract No. 302 has always been the allegation that the Republic gave a promise to extend the contract¹⁰⁵⁰ but then refused "in bad faith" to actually extend it.¹⁰⁵¹ Importantly, Claimants have always accepted¹⁰⁵² and continue to accept¹⁰⁵³ that as such, without any promise given, Claimants were under no obligation to extend Contract No. 302.

¹⁰⁴⁴ See Part IV, D.I.1.

¹⁰⁴⁵ Respondent's First Post-hearing Brief, paras. 578 et seq.

¹⁰⁴⁶ See Part IV, D.II.7.

¹⁰⁴⁷ Deloitte & Touche Supplemental Expert Report, paras. 105 et seqq.

¹⁰⁴⁸ Deloitte & Touche Supplemental Expert Report, paras. 117 et seq.

¹⁰⁴⁹ Claimants' Ten Minute Opening Presentation, Final Hearing, Transcript Day 1, p.9, lines 9-14.

¹⁰⁵⁰ Namely the Letter from the MEMR to TNG dated 9 April 2009 (**Exhibit C-27**).

¹⁰⁵¹ Claimants' Reply on Jurisdiction and Liability, para. 242.

¹⁰⁵² Claimants' Reply on Jurisdiction and Liability, para. 242.

552 Hence, Claimants cannot deny that their claim is not based on the breach of a contract or, more in the abstract, the violation of a rights that had already been awarded to Claimants. Rather, Claimants' claim is based on the breach of an alleged pre-contractual undertaking. In other words, the breach of the ECT that Claimants allege consists of two acts: Firstly, that the Republic supposedly promised to extend the contract and secondly, that it did not do so in the following. The alleged promise to extend is the premise and integral part of the breach as alleged by Claimants. The existence of such a promise is crucial because there was no original obligation to extend the contract, as Claimants have admitted.

553 Under international law, such claim can only be for the compensation of reliance damage. If any damage could even theoretically be suffered, then it would be for reliance interest, i.e. the monies spent in reliance on the alleged undertaking of 9 April 2009¹⁰⁵⁴ that the contract would be extended.

554 Claimants have accepted and in fact frequently alluded to¹⁰⁵⁵ the *Chorzów* principle of damage compensation, according to which compensation should “*wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.*”¹⁰⁵⁶ Applying this principle to the breach that Claimants allege with regard to the non-extension of Contract No. 302, the disconnect between Claimants' liability and damage cases becomes apparent: Assuming that the alleged breach, that is, the promise to extend and the subsequent failure to extend, had not occurred, Claimants would still not have had a claim to the development of the Contract 302 Area. In this but-for-scenario, there would never be a promise to extend and there would also never have been an original obligation to extend. Thus, the contract would simply have terminated on 30 March 2009. Consequently, Claimants would have had no rights to develop the Contract 302 Area. Hence, if one compares the but-for-scenario with actual reality, Claimants have not lost any right to the development of the Contract 302 Area.

¹⁰⁵³ Claimants' Ten Minute Opening Presentation, Final Hearing, Transcript Day 1, p.8, lines 20-25: “[...] *it is not Claimants' case that Respondent had unfettered discretion to execute the addendum to contract 302, once it provided TNG notice in writing that the MEMR had in fact approved the extension request.*” – Claimants thus continue to accept that there was discretion as long as there was no approval of the extension request.

¹⁰⁵⁴ Letter from the MEMR to TNG dated 9 April 2009 (**Exhibit C-27**).

¹⁰⁵⁵ Cf. *inter alia* Claimants' Reply on Jurisdiction and Liability, para. 609; Claimants' Closing Submission, Final Hearing, Transcript Day 1, p.167, lines 19-22.

¹⁰⁵⁶ *Factory at Chorzów (Germany v. Poland)*, Judgment, 1928 PCIJ Rep Series A No. 13, para. 125 (**Exhibit C-165**).

- 555 Thus, the only damage that could be compensated under the but-for-logic of the *Chorzów* principle are expenses incurred in reliance on the alleged extension promise. Claimants have however never alleged or proven such damage.¹⁰⁵⁷
- 556 Claimants have not referred to any international case law or doctrinal writing according to which the damage for breach of a promise to conclude or extend a contract could be calculated based on the full value of the concluded contract. The Republic is not aware of any authority to this effect either. This comes as no surprise, as it would be plainly illogical for anyone to take such position: If the mere promise to sign a contract would entail that the other party can claim the full value of the contract, the specific act of signing the contract would become entirely meaningless. Moreover, the party that receives the promise that the contract will be signed could claim for the full value of the contract without ever assuming the corresponding liabilities itself. Thus, the promise to sign a contract would be equal to a gift without any corresponding obligation. Clearly, this cannot be correct. It is for this reason that domestic legal systems have long since recognised that breaches of pre-contractual commitments can only lead to compensation of the reliance interest.
- 557 Notably, in their First Post-hearing Brief, Claimants have for the first time presented an alternative foundation for their Contract No. 302 claim which would indeed justify a different approach. Specifically, Claimants suggested that “*but for Kazakhstan’s actions, it is possible that TNG would have penetrated the Reef with the Munaibay No. 1 well before Contract 302 was set to expire on March 30, 2009.*”¹⁰⁵⁸ This would have allowed Claimants to enter into the appraisal stage, to potentially declare a commercial discovery and to potentially enter into the development phase.¹⁰⁵⁹ Claimants’ argument is based on the contention that because of the Republic’s alleged harassment campaign it was reasonable for Mr. Stati to decide not to go ahead with the exploration activity,¹⁰⁶⁰ which entailed that all the subsequent steps could be gone through before the contract expired.
- 558 Admittedly, based under this theory, Claimants could indeed argue that they are entitled to more than reliance damage. If the relevant alleged breach is not the

¹⁰⁵⁷ While it is correct that Claimants do claim for approximately USD 31 million allegedly spent on the exploration of the Contract No. 302 area (excluding the exploration of Munaibay), these funds were not spent in reliance on the alleged 9 April 2009 “promise” to extend the contract. Rather, these funds were spent during the runtime of the contract, i.e. prior to 30 March 2009, in the hope that TNG would discover hydrocarbons and therefore have a right to produce once declared commercial, cf. Claimants’ First Post-hearing Brief, para. 554.

¹⁰⁵⁸ Claimants’ First Post-hearing Brief, para. 375.

¹⁰⁵⁹ Claimants’ First Post-hearing Brief, para. 375.

¹⁰⁶⁰ Claimants’ First Post-hearing Brief, para. 374.

supposed giving and breaking of a promise but the supposed harassment, it is conceivable that in the but-for-scenario, the relevant damage is not related to the reliance interest but to the positive interest to develop the contract area. However, as demonstrated above,¹⁰⁶¹ Claimants' alternative Contract No. 302 case is simply incorrect from a factual point of view because the Munaibay-1 well could have never reached the "Interoil Reef", as is uncontested between the experts.¹⁰⁶²

2. Inappropriateness of the loss of opportunity principle

559 Even if one looked past the limitation of Claimants' claim to reliance damage, it would still be bound to fail. That is for the simple reason that the principle of loss of opportunity is not a generally accepted principle of international law. Importantly, this applies both with regard to Claimants' actual loss of opportunity claim and with regard to their claim for compensation of "out-of-pocket expenses".

560 Curiously, it took Claimants two and a half years – from the filing of their Request for Arbitration until the Hearing on Quantum, until they argued, for the first time, that they "*are entitled at a minimum, [in their view], to receive as damages these out-of-pocket expenses with respect to the contract 302 properties...*"¹⁰⁶³ Apparently, two and a half years after the beginning of these proceedings, Claimants finally realised that their claim for loss of opportunity fell apart and therefore they rushed to add this second element to their claim.

561 To support their loss of opportunity claim and their new out-of-pocket expenses claim Claimants mainly rely¹⁰⁶⁴ on the cases *Gemplus v. Mexico*¹⁰⁶⁵, *Sapphire International v. NIOC*¹⁰⁶⁶, *AIG Capital Partners v. Kazakhstan*¹⁰⁶⁷ and *SPP v. Egypt*¹⁰⁶⁸. Claimants stated at the Final Hearing that in those cases the tribunals typically awarded both "*out-of-pocket expenses or sunk costs in connection with the*

¹⁰⁶¹ See Part II, A.V.5 above.

¹⁰⁶² GCA Third Expert Report, para. 105; Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.51, lines 22-25.

¹⁰⁶³ Claimants' Opening Presentation, Hearing in Quantum, Transcript Day 1, p.105, lines 3-6.

¹⁰⁶⁴ Claimants' Closing Submission, Final Hearing, Transcript Day 1, p.10, lines 1-19.

¹⁰⁶⁵ *Gemplus S.A. and Talsud S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/04/4, Award dated 16 June 2010 (hereinafter "Gemplus Award") (**Exhibit C-309**)

¹⁰⁶⁶ *Sapphire Int'l Petrol. Ltd. v. Nat'l Iranian Oil Co.*, Award dated 15 March 1963, 35 I.L.R. 136, 190 (hereinafter "Sapphire Award") (**Exhibit C-308**).

¹⁰⁶⁷ *AIG Capital Partners, Inc. and CJSC Tema Real Estate Co. v. Kazakhstan*, ICSID Case No. ARB/01/6, Award dated 7 October 2003 (hereinafter "AIG Award") (**Exhibit C-737**).

¹⁰⁶⁸ *Southern Pacific Properties (Middle East) Ltd. v. Egypt*, ICSID Case No. ARB/84/3, Award dated 20 May 1992 (hereinafter "SPP Award") (**Exhibit C-550**).

opportunity” and “*an additional amount set in the discretion of the tribunal for the loss of ... ‘the opportunity of making a commercial success of the project’*”.¹⁰⁶⁹

562 Given the hopelessness of their position, Claimants limit their argumentation either to the baseless attacks on the Republic’s legal reasoning or to the intentionally misleading and erroneous analyses of the legal authorities. The Republic will address these arguments in the following and will show, that it is actually Claimants who misstate, overstate und wrongfully apply the legal authority related to the awarding of compensation for the loss of opportunity and out-of-pocket expenses.

563 The Republic will analyse below these cases and show that they all are either distinguishable from the present case or simply do not support the Claimants’ claim for loss of opportunities, nor their claim for compensation of out-of pocket expenses.

a) Claim for loss of opportunity

aa) Gemplus v. Mexico

564 Claimants heavily rely on the ICSID Case *Gemplus v. Mexico* to support their claim for lost opportunity. At the Final Hearing, Claimants even asked the Tribunal “*to closely examine the Gemplus award for a thorough survey, articulation and application of an approach taken by that Tribunal under international law in evaluating loss-of-opportunity claims such as that relating to the Interoil Reef*”.¹⁰⁷⁰

565 However, any such close examination shows that this award was completely misstated by Claimants and does not support their claim at all.

566 In the *Gemplus* case, the claimants (Gemplus and Talsud) were the minority shareholders (49 %) of the Concessionaire which in 1999 had concluded a Concession Agreement.¹⁰⁷¹ The purpose of the Concession Agreement was the operation of the National Registry of Motor Vehicles.¹⁰⁷² The duration of the Concession was initially limited to ten years (with a possibility to extend to another ten years) and was to expire on 14 September 2009.¹⁰⁷³ In 2001, by decree, the state ordered the “requisition” of the Concessionaire’s operations on grounds of national security.¹⁰⁷⁴ In effect, the state appointed a general administrator and took over the

¹⁰⁶⁹ Claimants’ Closing Submission, Final Hearing, Transcript Day 1, p.10, lines 5-12.

¹⁰⁷⁰ Claimants’ Closing Submission, Final Hearing, Transcript Day 1, p.11, lines 6-11.

¹⁰⁷¹ Gemplus Award, para. 4–38 (**Exhibit C-309**).

¹⁰⁷² Gemplus Award, para. 4–44 (**Exhibit C-309**).

¹⁰⁷³ Gemplus Award, para. 4–48 (**Exhibit C-309**).

¹⁰⁷⁴ Gemplus Award, para. 4–177 (**Exhibit C-309**).

operation of the Concession, thereby displacing the Concessionaire.¹⁰⁷⁵ In 2002, the Concession Agreement was even revoked.¹⁰⁷⁶ As at 13 December 2002, the Concession had registered 2.2 million new vehicles.

567 The tribunal noted that as a business concern, the Concession could be regarded as profitable¹⁰⁷⁷ and added that:

*“Although the project never achieved the level of profitability contemplated in the Concessionaire’s Business Plan, it still retained a reasonable opportunity to make significant future profits until the Respondent’s unlawful conduct on 25 June 2001, with the Requisition.”*¹⁰⁷⁸

568 The tribunal further explained its opinion in the following way:

*“[E]ven if the Respondent had committed no breach of the BITs on and after 25 June 2001, the several problems with the Concessionaire, the Concession Agreement, the Mexican states, the amparos and, particularly, Mexican vehicle-owners and the Mexican public generally, would have made it very difficult for the Concessionaire (with the Secretariat) to restore the whole project. On the other hand, Mexico still needed a comprehensive national vehicle registry in June 2001, perhaps more than ever before; and that national registry was to occur much later in 2004. In June 2001, the Concessionaire, but for the Respondent’s unlawful conduct, remained the logical candidate to operate that registry, with at least a possibility [...] to re-new its activities for both used and new vehicles with the support of the Respondent, acting lawfully under the two BITs.”*¹⁰⁷⁹

569 Based on this reasoning, the tribunal came to the conclusion that on the valuation date chosen by the tribunal, there was

¹⁰⁷⁵ Gemplus Award, paras. 4–179, 4–181 (**Exhibit C-309**).

¹⁰⁷⁶ Gemplus Award, para. 4–184 (**Exhibit C-309**).

¹⁰⁷⁷ Gemplus Award, para. 4–188 (**Exhibit C-309**).

¹⁰⁷⁸ Gemplus Award, para. 13–64 (**Exhibit C-309**).

¹⁰⁷⁹ Gemplus Award, para. 13–97 (emphasis provided) (**Exhibit C-309**).

*“no certainty or realistic expectation of this project's profitability as originally envisaged, **but there was nonetheless a reasonable opportunity.**”*¹⁰⁸⁰

570 The significant difference between the facts underlying *Gemplus* Award and the facts established in the current proceedings is obvious.

571 In *Gemplus* the Concessionaire, of which the claimants were minority shareholders, started operation and had already proved itself to be a profitable business concern, as it was correctly noted by the tribunal. If the state had not ordered the “requisition”, the Concessionaire would have had the right to operate the Registry for another eight years and, as established by the tribunal, there was a reasonable opportunity that the Concession would have been highly profitable.

572 In the present case, in stark contrast to the *Gemplus* case, no profitable operation of Contract No. 302 ever occurred. TNG entered into Contract No. 302 on 31 July 2008¹⁰⁸¹ and the contract expired on 30 March 2009. TNG thus had almost 11 years to explore the Contract 302 Area, make a commercial discovery and start an operation, but failed to do so. This in itself shows that the level of opportunity observed in the *Gemplus* case simply did not exist.

573 Moreover, as outlined above, there was in particular no opportunity for Claimants to make a discovery on the “Interoil Reef” either within in the original contract term or in an extended contract term until 30 March 2011. Claimants could have never reached the “Interoil Reef” with the Munaibay-1 well because this well was not deep enough.¹⁰⁸² To put it quite simply: The Republic is not obliged under the *Gemplus* standard to compensate Claimants for the doomed to failure attempts to find commercially exploitable reserves, or in other words, for the non-loss of a non-existing opportunity.

574 Notably, the tribunal in *Gemplus* also stated that

*“Under international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation. **If that loss is found to be too uncertain or***

¹⁰⁸⁰ Gemplus Award, para. 13–98 (emphasis provided) (**Exhibit C-309**).

¹⁰⁸¹ Contract No. 302 dated 31 July 1998, issued pursuant to the License for the right to use subsoil, series NG No. 243-D (**Exhibit C-53**).

¹⁰⁸² See Part II, A.V.5 above.

speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent.”¹⁰⁸³

575 This clearly supports the Republic’s position that the Tribunal must reject Claimants’ claim for loss of opportunity in its entirety, as the losses they claim to suffer are highly speculative, uncertain and were not proved by Claimants.

576 In fact, in the *Gemplus* case, the tribunal was only able to overcome the speculative nature of the lost opportunity because of very specific circumstances – which are clearly not given in the present case. In particular, contrary to what Claimants allege,¹⁰⁸⁴ the tribunal in *Gemplus*, when determining the amount of damages to award for the lost opportunity, did not base its decision solely on its own discretion. Rather, the tribunal, after having rejected the claimants’ DCF method as well as the respondent’s non-DCF method, used a modified form of the income-based approach. In so doing, the tribunal made use of much of the claimants’ expert’s underlying data, albeit not using its DCF method.¹⁰⁸⁵ The tribunal could take this approach because the respondent’s expert had accepted this data to be accurate.¹⁰⁸⁶

577 Contrary to the situation in *Gemplus*, there has never been any material consensus either between Ryder Scott and GCA or between FTI and Deloitte GmbH, which is evident from a simple look at all Joint Issue Lists which were exchanged between the parties’ experts in the course of these proceedings. Thus, the *Gemplus* does not support Claimants’ case in any way.

bb) *Sapphire International v. NIOC*

578 *Sapphire* is another case on which Claimants heavily relied to support their loss of opportunity claim.¹⁰⁸⁷ Claimants argue that the approach taken by the tribunal in *Sapphire* closely corresponds “to Claimants’ approach of seeking damages for their out-of-pocket expenses plus a portion of the prospective value” regarding the Contract 302 Area.¹⁰⁸⁸

579 This statement is misleading and wrong.

¹⁰⁸³ Gemplus Award, para. 12–56 (emphasis provided) (**Exhibit C-309**).

¹⁰⁸⁴ Claimants’ First Post-hearing Brief, para. 544.

¹⁰⁸⁵ Gemplus Award, para. 13–75 (**Exhibit C-309**).

¹⁰⁸⁶ Gemplus Award, para. 13–74 (**Exhibit C-309**).

¹⁰⁸⁷ Claimants’ Statement of Claim, paras. 424-427; Claimants’ Reply on Quantum, para. 58; Claimants’ First Post-hearing Brief, paras. 535-538.

¹⁰⁸⁸ Claimants’ First Post-hearing Brief, para. 536.

580 In *Sapphire*, Sapphire’s own expert assessed that Sapphire would have earned USD 46 million in net profits from the investment if everything had gone as well as possible.¹⁰⁸⁹ However, the actual claim for the loss of profit was only USD 5 million¹⁰⁹⁰, i.e. approximately 11% of the investor’s total potential profit. Ultimately, the arbitrator awarded only USD 2 million for lost potential profits (in addition to expenses incurred), i.e. 4.35% of the investor’s total potential profit. This is in stark contrast to Claimants’ approach of demanding initially the complete “prospective value”¹⁰⁹¹ and now (only) a substantial portion thereof.¹⁰⁹²

581 Importantly, *Sapphire* also does not support Claimants’ suggestion¹⁰⁹³ that all risk and uncertainty should be resolved against the Republic. That is because in *Sapphire*, after having taken note of the amount of potential profit, valued by claimants’ expert, the arbitrator, when assessing the amount of lost profits, took into account

“[...] *all the risks inherent in an operation in a desolate region, to which it is difficult to gain access and which has an unfavourable climate [and] the troubles [...] which could affect the operation during the several decades [...] during which the agreement was to last.*”¹⁰⁹⁴

582 The arbitrator thus clearly rejected giving the claimant the free pass that the Claimants demand in this arbitration.

583 Further, the Republic maintains that the decision in *Sapphire* is in any event not comparable as the arbitrator decided based on his power to decide *ex aequo et bono*.¹⁰⁹⁵ While Claimants object to this argument,¹⁰⁹⁶ the only counter-argument they present is a reference to the *Gemplus* award. This is however plainly ridiculous as the Tribunal in *Gemplus*, when referring to the *Sapphire* case, explicitly stated that

¹⁰⁸⁹ Sapphire Award, p.161 (**Exhibit C-308**).

¹⁰⁹⁰ Sapphire Award, p.187 (**Exhibit C-308**).

¹⁰⁹¹ Claimants’ Statement of Claim, para. 438.

¹⁰⁹² Claimants’ Opening, Hearing on Quantum, Transcript Day 1, p.105, lines 3-10.

¹⁰⁹³ Claimants’ Statement of Claim, para. 438.

¹⁰⁹⁴ Sapphire Award, p.189 (emphasis provided) (**Exhibit C-308**).

¹⁰⁹⁵ Sapphire Award, p.189 (**Exhibit C-308**).

¹⁰⁹⁶ Claimants’ First Post-hearing Brief, para. 536.

*“the arbitrator, in this case, fixed the amount of compensation by reference to his powers ‘ex aequo et bono’.”*¹⁰⁹⁷

584 It is undisputed that in the present arbitration proceedings, the parties have not agreed to vest the Tribunal with the power to decide “*ex aequo et bono*” regarding the existence and the amount of damages claimed by Claimants.

585 Finally, Claimants suggest that “Kazakhstan also attempts to portray Sapphire as ‘the singular cases’ [sic] in which tribunals have awarded damages for loss of opportunity”.¹⁰⁹⁸ This allegation is baseless as well. In its Rejoinder on Quantum, the Republic explicitly stated that

*“[t]he few tribunals which did not reject the concept of loss of opportunity were prudent enough to award comparably minor amounts of compensation.”*¹⁰⁹⁹

586 However it was and remains the Republic’s firm view, that even though some tribunals awarded damages for loss of opportunity, in general, this concept is not widely accepted by tribunals in investment treaty arbitrations, as was for example clarified by the *Chevron* tribunal.¹¹⁰⁰

cc) SPP v. Egypt

587 Claimants allege that *SPP v. Egypt* is another illustrative case in which the tribunal awarded damages consisting of out-of-pocket expenses and an additional amount to compensate the loss of opportunity of making a commercial success of the project.¹¹⁰¹ Apparently, Claimants either overlooked or decided to intentionally misrepresent the actual reasoning of the tribunal. That is because the facts in *SPP v. Egypt* are markedly different from the present case.

588 When explaining why it considered compensation for a lost opportunity appropriate, the *SPP* tribunal expressed very clearly that it had no doubts about the significant potential of the claimant’s investment.

“As the Tribunal has already observed, the evidence shows that during the period February 1977 to May 1978, ETDC’s actual

¹⁰⁹⁷ Gemplus Award, para. 13–85 (**Exhibit C-309**).

¹⁰⁹⁸ Claimants’ First Post-hearing Brief, para. 538.

¹⁰⁹⁹ Respondent’s Rejoinder on Quantum, para. 109.

¹¹⁰⁰ *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, UNCITRAL, Partial Award dated 30 March 2010, para. 382 (**Exhibit C-285**).

¹¹⁰¹ Claimant’s First Post-hearing Brief, para. 540.

sales of villa and multi-family sites amounted to US \$10,211,000. The lots involved - 383 villa sites and 3 multi-family sites - represented only 6 percent of the villa sites and less than 1 percent of the multifamily sites with respect to which ETDC held rights. It is clear, therefore, that the remaining lots were a potential source of very substantial revenues.”¹¹⁰²

589 Based on these facts, tribunal decided, that it “cannot accept that the project did not have a value in excess of the Claimants’ out-of-pocket expenses”.¹¹⁰³

590 In the present case, the factual situation differs significantly from the one in the *SPP* case. As set out above,¹¹⁰⁴ TNG had not managed to make any profitable development on the Contract 302 Area in nearly 11 years. Moreover, there is no basis to assume that TNG would have made such profitable development in the future, as there were only dismal chances of success for the “Interoil Reef” which could in any event not have been discovered in time prior to the expiration of Contract No. 302.

dd) *AIG Capital Partners v. Kazakhstan*

591 Another case which Claimants use to support their loss of opportunity claim is the case of *AIG vs. Kazakhstan*.¹¹⁰⁵ Claimants’ reliance on this case is entirely misplaced. The *AIG* award is scarcely reasoned when it comes to the issue of loss of opportunities. Moreover, where the award provides explanations, these are difficult to reconcile with the text of the applicable US/Kazakh BIT.

592 The claimants’ request for relief in *AIG vs. Kazakhstan* consisted of 3 elements: compensation for tangible assets, for intangible assets and for rights conferred by law and contract.¹¹⁰⁶ In their submissions, the claimants described the third element of their claim in the following way: “*rights conferred by law and contract: opportunity to make a commercial success of the project*”.¹¹⁰⁷

593 In its reasoning, the tribunal in *AIG vs. Kazakhstan* followed this description without further analysis. It limited its explanation as to why there has to be compensation for a loss of opportunity to the following very brief statement:

¹¹⁰² SPP Award, para. 216 (**Exhibit C-550**).

¹¹⁰³ SPP Award, para. 214 (**Exhibit C-550**).

¹¹⁰⁴ See Part IV, D.II.2.

¹¹⁰⁵ *AIG Capital Partners, Inc. and CJSC Tema Real Estate Co. v. Kazakhstan*, ICSID Case No. ARB/01/6, Award dated 7 October 2003 (hereinafter “*AIG Award*”) (**Exhibit C-737**).

¹¹⁰⁶ *AIG Award*, para. 12.1.7 (**Exhibit C-737**).

¹¹⁰⁷ *AIG Award*, para. 12.1.7 (**Exhibit C-737**).

*“[T]he opportunity to make a commercial success of the project (the third head of claim in the Claimants’ Memorial) must be compensated for since it is included in the wide definition of ‘investment’ in the BIT.”*¹¹⁰⁸

594 This reasoning is curious because the “investment” definition in the US/Kazakh BIT does not explicitly refer to an “opportunity to make a commercial success”. Thus, it could have been expected that the tribunal at least explain to some extent how it came to its conclusion. However, no such explanation was given. Moreover, it seems very questionable to consider the “opportunity to make a commercial success” as an investment. This would potentially open the floodgates for all sorts of contractual and other claims which were never intended to be referred to the jurisdiction of an investment arbitration tribunal.

595 Hence, in the Republic’s view, the *AIG* Award should not serve as guidance in this case.

ee) *SOABI v Senegal*

596 Moreover, Claimants’ attempt to seek the support for their loss of opportunity claim¹¹⁰⁹ from the decision in *SOABI v. Senegal*¹¹¹⁰ case is equally doomed to fail.

597 To begin with, Claimants themselves acknowledge that the basis of the claim in the *SOABI* case was a termination of the parties’ relationship which caused the claimant not to be able to pursue an opportunity.¹¹¹¹ In contrast to *SOABI v. Senegal*, in the present case, there was no relationship in place at the time when alleged breach occurred. As Claimants allege, the breach in the present case consists in the April 2009 promise to extend Contract No. 302 and in the subsequent non-extension. However, at that time, Contract No. 302 had already expired. To put it in simple terms: Whereas *SOABI* deals with the actual loss of an existing opportunity from an existing relationship, the present case deals with the non-granting of an opportunity to which Claimants were not entitled in any way. Or, with the words of the *SOABI* tribunal, Claimants’ claims pertain to a “hypothetical damage, the occurrence of

¹¹⁰⁸ AIG Award, para. 12.1.9 (**Exhibit C-737**).

¹¹⁰⁹ Claimant’s First Post-hearing Brief, para.547.

¹¹¹⁰ *Société Ouest Africaine des Bétons Industriels (SOABI) v Senegal*, ICSID Case No. ARB/82/1, Award dated 25 February 1988 (hereinafter “*SOABI Award*”) (**Exhibit C-738**).

¹¹¹¹ Claimant’s First Post-hearing Brief, para.547.

which is purely conjectural” and which cannot be awarded as compensation for a lost opportunity.¹¹¹²

598 Moreover, even though the tribunal in *SOABI v. Senegal* indeed awarded damages for loss of opportunity, the awarded amount was limited to 2,7 % of the amount claimed as lost profits.¹¹¹³ The award thus clearly does not support the application of Claimants’ and FTI’s unreasonable “prospective valuation”.

b) Claim for compensation for out-of-pocket expenses

599 Claimants’ claim for compensation of out-of-pocket expenses simply has no legal basis, neither from a viewpoint of the provisions of Contract No. 302 nor with a view to the cases referred to by Claimants.

600 Section 8.9 of Contract No. 302 states:

*“If following the conduct of Exploration Operations the Contractor shall not declare a Commercial Discovery on terms established in item 8.4 of this Contract, the latter shall have no right to reimbursement of its expenses incurred during the Exploration and/or Production Testing and shall lose all its rights to the Field. Such a Field shall be subject to relinquishment to the Republic.”*¹¹¹⁴

601 As explained above,¹¹¹⁵ Claimants never declared a commercial discovery for Contract No. 302 until the contract expired on 30 March 2009¹¹¹⁶ and would have never declared one irrespective of the Republic’s allegedly illegal actions in a hypothetical extended contract period. Thus, because of Section 8.9, Claimants would have never been entitled to reimbursement of its exploration expenses. Nothing else can apply in this investment arbitration.

602 Importantly, the alleged breach Claimants refer to (the “promise to extend” and the alleged subsequential breach of this promise) happened in April 2009¹¹¹⁷ and therefore after Contract No. 302 had already expired. It is an undisputed fact that

¹¹¹² *SOABI* Award, para.6.18 (**Exhibit C-738**).

¹¹¹³ *SOABI* Award, para.7.11 (**Exhibit C-738**).

¹¹¹⁴ Contract No. 302 dated 31 July 1998, issued pursuant to the License for the right to use subsoil, series NG No. 243-D, Section 8.9 (**Exhibit C-53**).

¹¹¹⁵ See Part II, F.IV above.

¹¹¹⁶ Most notably, Claimants cannot counter this by referring to their discovery declarations for Munaibay and Bahyt. These declarations pertained to the making of a discovery, not to the making of a commercial discovery. The declaration of a commercial discovery is however what Section 8.9 of Contract No. 302 requires.

¹¹¹⁷ Letter from the MEMR to TNG dated 9 April 2009 (**Exhibit R-163.1**).

Claimants failed to declare any commercial discovery on the Contract 302 Area until this time. That means that before the alleged breach occurred, Claimants already knew that according to Section 8.9 of Contract No. 302, they were not entitled to reimbursement of any expenses incurred during the exploration and/or production testing.

603 Nothing else follows from the cases Claimants refer to.

604 Claimants stated that *Gemplus* is one of the four cases in which the tribunal awarded two components of damages for loss of opportunity, namely out-of-pocket expenses and an additional amount set in the discretion of the tribunal for the loss of “the opportunity of making a commercial success of the project”.¹¹¹⁸

605 As the Republic has already shown, the *Gemplus* case cannot be used as guidance with regard to the valuation of Claimants’ loss of opportunity claim, as the facts are not comparable.¹¹¹⁹

606 Moreover, it is exactly the *Gemplus* case which does not support Claimants’ claim for out-of-pocket expenses. The tribunal in *Gemplus* **did not award any out-of-pocket expenses**. The tribunal’s award, along with interest and costs for arbitration proceedings, was limited only to the compensation for the lost opportunity.¹¹²⁰

607 Even though the tribunal in *Sapphire* indeed awarded out-of-pocket expenses in the amount of USD 650,874,¹¹²¹ it should be noted that the award lacks any explanation as to why the tribunal came to this decision, except for the following statement:

*“These are expenses incurred in performing the contract, in other words the loss sustained by the plaintiff in carrying out the contract. They are entitled to them in principle.”*¹¹²²

608 As it was explained above, according to the Section 8.9 of Contract No. 302, if a commercial discovery is not declared – which it was not – Claimants are not entitled to the reimbursement of the expenses incurred while carrying out the contract. Thus, Claimants are not entitled to out-of-pocket expenses as a matter of principle, as it may have been the case in the *Sapphire* case.

¹¹¹⁸ Claimants’ Closing Submission, Final Hearing, Transcript Day 1, p.10, lines 5-12.

¹¹¹⁹ See Part IV, D.II.2 above.

¹¹²⁰ *Gemplus* Award, paras. 13-95-13-101 (**Exhibit C-309**).

¹¹²¹ *Sapphire* Award, p.187 (**Exhibit C-308**).

¹¹²² *Sapphire* Award, p.187 (**Exhibit C-308**).

609 In *SPP v. Egypt* case the tribunal indeed awarded out-of-pocket expenses. The reason why the tribunal found that it was reasonable and legitimate to take these losses into expenses was the tribunal’s view that

*“[b]ecause the project was cancelled, the Claimants could not recoup these expenses with future profits, and the expenses thus became irrecoverable losses.”*¹¹²³

610 In the present case, even if the alleged breach – the alleged promise to extend Contract 302 and its further non-extension – had not occurred, it would still not have been possible for Claimants to recoup their out-of-pocket expenses. Again, since a commercial discovery was not declared, Claimants were, according to Section 8.9 of Contract No. 302, not entitled to the reimbursement of the expenses incurred while carrying out the contract.

611 Even though in *AIG vs. Kazakhstan* the tribunal indeed took a decision to award out-of-pocket expenses, it failed again – exactly as with its decision to award claim for loss of opportunity – to provide sufficient reasoning of its decision. The tribunal found it sufficient to declare that

*“[i]n addition, the entire sum of USD 3.56 million which was actually spent up to June 2000 and was a totally lost investment has to be compensated for in the opinion of the Tribunal.”*¹¹²⁴

612 The Republic considers this reasoning insufficient as an authority that could be relied on.

3. 3D seismic analysis

613 At the Final Hearing, Ryder Scott voiced criticism regarding GCA’s 3D seismic interpretation and GCA’s presentation of two “Interoil Reef” cases with different GCoS.¹¹²⁵ This criticism is baseless, as has been demonstrated in GCA’s Fourth Expert Report.¹¹²⁶

¹¹²³ SPP Award, para. 202 (**Exhibit C-550**).

¹¹²⁴ AIG Award, para. 12.3.2 (**Exhibit C-737**).

¹¹²⁵ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.29, line 22 - p.35, line 25.

¹¹²⁶ GCA Fourth Expert Report, paras. 77 et seq.

4. H₂S contamination and condensate yield at the “Interoil Reef”

614 Claimants also criticise the Republic’s “Interoil Reef” valuation with a view to the findings made by GCA in relation to the contamination of the supposed gas from the reef with highly toxic H₂S.¹¹²⁷ As the Tribunal will be well aware, GCA evaluated the “Interoil Reef” on the basis that 10% of the supposed gas stream will consist of H₂S (and CO₂).¹¹²⁸

615 The timing of this criticism is noteworthy: GCA has argued from the very beginning that significant volumes of H₂S have to be expected in the supposed “Interoil Reef” gas.¹¹²⁹ Claimants and Ryder Scott have chosen to stay silent on this issue, both in Ryder Scott’s Second Report and at the Hearing on Quantum. In fact, at the Hearing on Quantum, Mr. Latham of Ryder Scott stated with regard to the risk of H₂S occurring in the gas stream that he did not know “*how small or large that risk might be.*”¹¹³⁰ Claimants’ delayed response demonstrates that Claimants are not in a position to provide any kind of meaningful criticism of GCA’s assumptions. Apparently, Claimants tried to keep the issue as small as possible and attempted to limit the Republic’s and GCA’s possibility to respond to Ryder Scott’s arguments. This fact as such indicates that Ryder Scott’s arguments have limited credibility.

616 Specifically, Claimants present three arguments on the H₂S issue, each of which is entirely wrong.

a) Choice of analogs

617 Claimants argue that GCA was wrong to rely on the H₂S-rich¹¹³¹ Tengiz and Kashagan fields as analogs.¹¹³² Allegedly, these fields are less appropriate than the Artinskian Dolomite at the Tolkyn field (which has an H₂S content of 0.3%) because these fields are more distant.¹¹³³

618 Claimants are only able to make this argument by ignoring many of the arguments they themselves and their experts are pleading. First of all, the distance argument is apparent nonsense. Claimants themselves state that the Tengiz field is located

¹¹²⁷ Claimants’ First Post-hearing Brief, para. 487.

¹¹²⁸ GCA Expert Report, Appendix III.

¹¹²⁹ GCA Expert Report, paras. 120 et seq. and Appendices III and IV; GCA Supplemental Expert Report, paras. 102, 107, 108, 110, 111 and 114.

¹¹³⁰ Testimony of Mr. Latham of Ryder Scott, Hearing on Quantum, Transcript Day 3, p.147, line 16 - p.148, line 6.

¹¹³¹ Gas produced from the Tengiz field contains up to 18% H₂S, gas produced from the Kashagan field contains approximately 16% H₂S, cf. GCA Third Expert Report, paras. 168 et seq.

¹¹³² Claimants’ First Post-hearing Brief, para. 488.

¹¹³³ Claimants’ First Post-hearing Brief, para. 488.

45 kilometres from the “*Interoil Reef*” prospect¹¹³⁴ whereas Tolkyin is located 34 kilometres from there.¹¹³⁵ The suggestion that Tolkyin would be a more appropriate analogue just because it is located a mere 11 kilometres closer is transparently absurd.

619 This is all the more the case given the fact that Tolkyin is millions of years younger than the “*Interoil Reef*”¹¹³⁶ whereas at least some of the older Tengiz reservoirs are age equivalent to it.¹¹³⁷ A location 11 kilometres closer distancewise certainly does not outweigh millions of years in age difference. In that regard, it is important to note that Claimants show a severe misunderstanding of geological processes when they suggest that “*it is difficult to understand how the gas from the Artinskian Dolomite at Tolkyin could have escaped H₂S contamination if a significant H₂S source was nearby.*”¹¹³⁸ As GCA have explained, H₂S contamination does not simply happen if a source rock containing sulphur is located nearby. Rather, H₂S contamination occurs at specific temperatures and pressures in a process called “thermochemical sulphate reduction”:

*“H₂S is generated by the thermochemical sulphate reduction of petroleum, and is expected to occur at the depths and temperatures of the ‘InterOil Reef’. If hydrocarbons are absent then only small volumes of H₂S may be generated, in addition if only Methane (CH₄, dry gas) is present then low percentages of H₂S may be expected. Therefore, in the presence of gas-condensate (as modelled by both RSC and GCA) at the depths and temperatures of the ‘InterOil Reef’ high levels of H₂S are expected.”*¹¹³⁹

620 Thus, geographic vicinity plays only a marginal role compared to geological age and thus the depth of burial.

621 Moreover, at the Final Hearing, Ryder Scott themselves admitted that there is a 50% chance of at least 1% H₂S in the supposed “*Interoil Reef*” gas –¹¹⁴⁰ which is a level

¹¹³⁴ Claimants’ First Post-hearing Brief, para. 488.

¹¹³⁵ The 34 kilometres distance can be derived from the assumptions by Claimants regarding infrastructure capital expenditure on the Contract 302 Area, cf. FTI Consulting Third Report, para. 12.10. Claimants’ estimates provide for 34 km pipelines which must be interpreted as pipelines from the Contract 302 Area to Tolkyin, cf. GCA Fourth Expert Report, para. 115.

¹¹³⁶ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.47, lines 2-9.

¹¹³⁷ Cf. GCA Third Expert Report, para. 155, Figure 6.11, which shows that the deeper reservoirs at Tengiz and the supposed reef reservoir are both of mid- to late-Devonian age.

¹¹³⁸ Claimants’ First Post-hearing Brief, para. 488.

¹¹³⁹ GCA Fourth Expert Report, para. 79.

¹¹⁴⁰ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.52, lines 20-24.

which Ryder Scott admit would require special treatment facilities.¹¹⁴¹ Thus, if Claimants suggest that GCA's opinion on the likely presence of contaminants is "highly suspect",¹¹⁴² they will have to accept that they consider the views of their own experts as "highly suspect" as well.

b) Condensate yield

622 Claimants – relying on their partisan instrument Ryder Scott –¹¹⁴³ suggest that if Tengiz and Kashagan are picked as analogs, it is necessary to assume a high condensate yield, which in turn entails increased profits and value.¹¹⁴⁴ Based on the contentions by Ryder Scott, FTI prepared an alternative calculation of the "Interoil Reef" value, suggesting that the value calculated by Deloitte GmbH would increase by USD 368.4 million if a higher condensate yield (125 Bbl/MMcf instead of 60 Bbl/MMcf applied by GCA) is assumed,¹¹⁴⁵ and by USD 1,016.2 million if in addition, the start of production is moved seven years ahead to 2012.¹¹⁴⁶

623 Again, Claimants raise this argument for the first in their First Post-hearing Brief, one and a half years after the Republic and GCA have presented the argument that significant amounts of H₂S have to be expected in the supposed "Interoil Reef" gas. Their transparent attempt to save in the last second the unacceptable non-consideration of H₂S is bound to fail.

aa) No relationship between contaminants level and condensate yield

624 Claimants contend that there is "no rational, geologic basis" for using Tengiz and Kashagan as analogs with regard to H₂S levels but not with regard to the condensate yield.¹¹⁴⁷ This is incorrect. The geological processes that determine H₂S levels and that determine the condensate yield are unrelated and there is no causal relationship between one phenomenon and the other. Apparently, Ryder Scott either chose to not explain to Claimants the basics of these geological process or Claimants chose not to listen.

¹¹⁴¹ Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.52, line 25 - p.53, line 8.

¹¹⁴² Claimants' First Post-hearing Brief, para. 488.

¹¹⁴³ Ryder Scott Third Expert Report, para. 36.

¹¹⁴⁴ Claimants' First Post-hearing Brief, para. 489.

¹¹⁴⁵ FTI Consulting Third Report, para. 8.14.

¹¹⁴⁶ FTI Consulting Third Report, para. 8.16.

¹¹⁴⁷ Claimants' First Post-hearing Brief, para. 489.

- 625 As GCA explain, hydrocarbons are generated from the thermal maturation of deep-lying source rocks.¹¹⁴⁸ This means that at elevated temperatures, organic matter contained in the source rocks turns into hydrocarbons. These hydrocarbons migrate out of the source rock through carrier beds to shallower reservoirs. The hydrocarbons will remain in such shallower reservoirs if there is a valid trap. If not, the hydrocarbons migrate further and eventually to the surface.
- 626 Whether such hydrocarbons consist predominantly of oil, condensate or gas depends primarily on the conditions within the source rock, in particular on the temperature.¹¹⁴⁹ With increasing temperature, lighter oils and a higher proportion of gases are expelled, until at elevated temperatures wet gas and finally dry gas is expelled.¹¹⁵⁰ Temperatures in the source rock can generally be expected to be higher the deeper a source rock is located.¹¹⁵¹ The conditions in the source rock thus also set the basis for the condensate-gas-ratio in the reservoir to which the hydrocarbons ultimately migrate.¹¹⁵²
- 627 Conversely, the level of contamination with H₂S does not depend on geological processes in the source rock but in the reservoir itself.¹¹⁵³ The so-called thermochemical sulphate reduction of hydrocarbons is a chemical process in which sulphates within the reservoir react and H₂S is created as a byproduct. Whether thermochemical sulphate reduction occurs depends largely on reservoir temperature and bears no relation to source rock temperature.¹¹⁵⁴ The connection between the two, as claimed by Ryder Scott and Claimants, is thus fictional.
- 628 GCA have conducted a thorough analysis of both contaminants level and condensate-gas-ratio. Regarding contaminants, GCA have found that because of the depth of burial of the reservoir and the geothermal gradient of the area, a reservoir temperature of 160-180° C can be expected. This is a temperature range in which thermochemical sulphate reduction occurs.¹¹⁵⁵

¹¹⁴⁸ GCA Fourth Expert Report, para. 85.

¹¹⁴⁹ GCA Fourth Expert Report, paras. 85, 88.

¹¹⁵⁰ GCA Fourth Expert Report, paras. 85, 88.

¹¹⁵¹ GCA Fourth Expert Report, para. 86.

¹¹⁵² Geological conditions in the reservoir also have an influence on the condensate-gas-ratio but the principal constraint is the composition of the hydrocarbons as they migrate from the source rock into the trap, cf. GCA Fourth Expert Report, para. 88.

¹¹⁵³ GCA Fourth Expert Report, paras. 79 et seq., 88.

¹¹⁵⁴ GCA Fourth Expert Report, paras. 79 et seq., 88.

¹¹⁵⁵ GCA Fourth Expert Report, para. 82.

629 Regarding the condensate-gas-ratio, GCA considered a wide range of analogs.¹¹⁵⁶ In so doing, GCA considered in particular the greater depth of burial of the “Interoil Reef” compared to fields such as Tengiz and Kashagan. As explained, the greater depth entails higher temperatures which in turn entails less oil and condensate and more gas in a reservoir.¹¹⁵⁷ As a result, the condensate yield estimated by GCA is perfectly proper.¹¹⁵⁸

630 Importantly, Ryder Scott have little credibility if they try to contest GCA’s approach. Ryder Scott themselves prepared a report for an exploration block of the company Max Petroleum located in the Caspian Basin.¹¹⁵⁹ The basic assumption regarding the larger group of exploration prospects (the so-called “Type II prospects”) was that these prospects were analogous to Karachaganak, Tengiz and Kashagan.¹¹⁶⁰ Consequently, Ryder Scott agreed that significant amounts of H₂S and a total contaminants level of 25% had to be expected in any gas stream from the Type II prospects.¹¹⁶¹ At the same time, Ryder Scott did not apply condensate yields from Karachaganak, Tengiz and Kashagan but instead adjusted down the condensate yield “to account for greater depth of targets compared to analogous fields”.¹¹⁶² As a result, Ryder Scott arrived at condensate-gas-ratios of approximately 63-65 Bbl/MMcf.¹¹⁶³ This is reasonably close to the condensate-gas-ratio of approximately 50 Bbl/MMcf assumed by GCA in its Third Expert Report¹¹⁶⁴ and far detached from the 125 Bbl/MMcf that Ryder Scott considered to be appropriate.¹¹⁶⁵

¹¹⁵⁶ GCA Fourth Expert Report, para. 90.

¹¹⁵⁷ GCA Fourth Expert Report, paras. 85, 88.

¹¹⁵⁸ The Republic does not ignore that in the internal e-mails of TOTAL E&P, a higher potential condensate-gas-ratio of 120 Bbl/MMcf is mentioned, cf. E-mail by Mr. Mallard to TOTAL E&P colleagues dated 15 July 2009 (**Exhibit R-360**). However, the e-mail expressly states that TOTAL E&P’s calculations are only indicative. Moreover, it needs to be borne in mind that ultimately, TOTAL E&P decided against going through with the purchase. This indicates that they were in any event not happy with the characteristics of the reservoir, despite higher assumptions regarding the condensate-gas-ratio.

¹¹⁵⁹ Exploration Portfolio Review Blocks A and E prepared for Max Petroleum PLC dated July 2010 (**Exhibit R-326**).

¹¹⁶⁰ Exploration Portfolio Review Blocks A and E prepared for Max Petroleum PLC dated July 2010, p.29 (**Exhibit R-326**).

¹¹⁶¹ “Paleozoic carbonate reservoirs in Kazakhstan, and elsewhere, are known to produce significant quantities of sour gas. [The subsoil user] estimates a 25 percent volume of non-hydrocarbon gas from the targets in their portfolio. [Ryder Scott] concurs that this is necessary economic consideration for the [...] prospects.”, cf. Exploration Portfolio Review Blocks A and E prepared for Max Petroleum PLC dated July 2010, p.37 (**Exhibit R-326**).

¹¹⁶² Exploration Portfolio Review Blocks A and E prepared for Max Petroleum PLC dated July 2010, p.38 (**Exhibit R-326**).

¹¹⁶³ GCA Fourth Expert Report, para. 92 and Exploration Portfolio Review Blocks A and E prepared for Max Petroleum PLC dated July 2010, pp.86-97 (**Exhibit R-326**). The condensate-gas-ratios of the various prospects in Bbl/MMcf can be calculated by dividing for each prospect the mean condensate estimated ultimate recovery (EUR) on the right side of the table (stated in MMBbl) by the mean gas estimated ultimate recovery (EUR) on the right side of the table (stated in Bcf) and multiplying the value with 1,000. For example, the condensate-gas-ratio for the “AKATKOL A CARB” prospect at the top of p.86 is 19 MMBbl / 300 Bcf * 1,000 = 63.3 BBL / MMcf.

¹¹⁶⁴ GCA Fourth Expert Report, para. 92.

¹¹⁶⁵ Ryder Scott Third Expert Report, para. 36; FTI Consulting Third Report, para. 8.12.

631 Apparently, if Ryder Scott are not acting as partisan instruments in an arbitration, they have no problem in recognising that a reservoir can be modeled as an analog to Tengiz and Kashagan but nonetheless yield comparatively low condensate volumes, if said reservoir is buried more deeply. GCA have done precisely the same in their “Interoil Reef” analysis as Ryder Scott did in their analysis for Max Petroleum.

bb) FTI’s calculations are incorrect and misleading

632 FTI’s calculations based on a higher condensate yield are misleading, seriously flawed and prove again just how unreliable the work done by FTI is. The most severe mistakes in FTI’s calculations are listed in the following:

- (a) A production start in 2012 is not possible. As GCA have explained in detail, the need for additional 3D seismic, exploration and appraisal drilling, approval, design and construction of pipelines, gathering units and facilities as well as the development drilling mean that assuming a production start prior to 2018 is entirely improper.¹¹⁶⁶
- (b) FTI assume that gas and condensate prices realisable in 2019 are also realisable in 2012 for their purposes of their early production start scenario.¹¹⁶⁷ This ignores seven years of inflation and leads to a significant overstatement of values.
- (c) FTI ignores increases in the costs of production, insinuating that such increases might not occur.¹¹⁶⁸ However, cost increases for extraction and distribution are a logical consequence in case of substantial production increases.¹¹⁶⁹ Moreover, the high condensate levels at Tengiz and Kashagan are only realised and maintained through the process of gas reinjection, which leads to increased costs.¹¹⁷⁰ FTI have not made provision for this.
- (d) Taxes are entirely disregarded in FTI’s calculation, leading to a further overstatement of the alleged increase in value.¹¹⁷¹
- (e) As usual, FTI’s calculation also disregards GCoS and ECoS, causing even more overstatement of value.¹¹⁷²

¹¹⁶⁶ GCA Third Expert Report, paras. 171 et seqq. and 183 et seqq.

¹¹⁶⁷ Deloitte & Touche Second Supplemental Report, para. 269.

¹¹⁶⁸ FTI Consulting Third Report, para. 8.17.

¹¹⁶⁹ Deloitte & Touche Second Supplemental Report, para. 269.

¹¹⁷⁰ GCA Fourth Expert Report, paras. 93 et seq.

¹¹⁷¹ Deloitte & Touche Second Supplemental Report, para. 269.

633 In order to address all of these shortcomings, Deloitte GmbH have provided proper illustrative calculations with a higher condensate yield. They found that even assuming the higher condensate yield as suggested by Ryder Scott, the value of the “Interoil Reef” remains negative – irrespective of whether GCoS and ECoS are applied and irrespective of whether production starts at 2012 or 2019.¹¹⁷³ This demonstrates that ultimately, Claimants’ criticism of GCA’s contaminants and condensate assumptions are irrelevant. Even assuming a higher condensate yield, the value of the “Interoil Reef” would always remain negative.

c) No necessity to use different models

634 Lastly, Claimants contend that since GCA allegedly only considered H₂S contamination likely, GCA and Deloitte GmbH should have provided several differently weighted scenarios.¹¹⁷⁴ GCA have addressed this incorrect contention at the Final Hearing:

“Q. Mr Wood, in that context, Claimants have argued that you should have provided different cost estimates: one assuming significant quantities of H₂S, and one not assuming such significant quantities. What is your view on that?”

A. (By MR WOOD) It was our view on analysis that there was only probably a 5% chance that the reef structure would hold low levels of hydrogen sulphide. We could have looked at a scenario with that, with H₂S levels of perhaps 1%; but to counter that, we would have also had to look at the alternative case, which, based on analogues, could have predicted H₂S levels as high as 20%. And in analysis, the two cases would have cancelled each other out. So we felt comfortable going with just our base case scenario, of a mid-case assessment of around about 10% H₂S.”¹¹⁷⁵

5. Length of development of the “Interoil Reef”

635 In their First Post-hearing Brief, Claimants argue that GCA assumed an unreasonably long exploration schedule.¹¹⁷⁶ The main point of criticism from

¹¹⁷² Deloitte & Touche Second Supplemental Report, para. 269.

¹¹⁷³ Deloitte & Touche Second Supplemental Report, paras. 274 et seq.

¹¹⁷⁴ Claimants’ First Post-hearing Brief, para. 490.

¹¹⁷⁵ Testimony of Mr. Wood of GCA, Final Hearing, Day 1, p.79, line 12 - p.80, line 2.

¹¹⁷⁶ Claimants’ First Post-hearing Brief, paras. 485 et seq.

Claimants' viewpoint is the need for the acquisition of additional 3D seismic which Claimants deem unreasonable. To that effect, Claimants allege apodictically that "TNG already had a good 3D seismic survey".¹¹⁷⁷ This statement is wrong. As GCA have explained, data quality at the depths of the "Interoil Reef" is only moderate¹¹⁷⁸ and there are considerable areas of poor seismic quality to the north and southwest of the supposed feature.¹¹⁷⁹ In these areas, the flanks of the reef cannot be mapped with any confidence.¹¹⁸⁰ It is for this reason that GCA consider that a prudent operator would acquire, process and interpret additional 3D seismic to the north and southwest prior to committing another well to the structure.¹¹⁸¹ This would be much less costly than actually committing a well to the structure and could change the GCoS to a number that would allow a much more firm decision on whether or not to actually invest the funds necessary for a well.¹¹⁸²

636 Claimants' contention that TNG already had a good 3D seismic survey is in fact belied by the work done by Ryder Scott. That is because Ryder Scott have presented a reef interpretation that extends beyond the area covered by the 3D seismic survey. They assume that the structure closes to the southwest by relying on a single 2D seismic line.¹¹⁸³ In other words: Ryder Scott themselves found that the 3D survey was not sufficient for them to define the structure. Moreover, as outlined above,¹¹⁸⁴ Ryder Scott's reliance on the single 2D line is misplaced, as this 2D line is of poor quality¹¹⁸⁵ and provides seismic information only for a very limited area rather than for the full area necessary to define a closure to the southwest. Proper information could only have been obtained by means of an additional 3D seismic survey in the area in question.

637 In any event, what Claimants scarcely address is the fact that the additional 3D seismic survey would add only one year to the time for the development of the reef structure. However, Claimants have not provided any comment on the length of the further development activity, such as the necessary approvals and design processes,

¹¹⁷⁷ Claimants' First Post-hearing Brief, para. 485.

¹¹⁷⁸ GCA Third Expert Report, para. 88.

¹¹⁷⁹ GCA Third Expert Report, para. 141.

¹¹⁸⁰ GCA Third Expert Report, para. 144.

¹¹⁸¹ GCA Third Expert Report, para. 178.

¹¹⁸² Testimony of Dr. Wright of GCA, Final Hearing, Transcript Day 1, p.109, line 14 - p.110, line 15. Notably, Claimants are wrong when they insinuate that GCA recommends additional 3D seismic in order to find out more about the makeup of the gas in the reef, cf. Claimants' First Post-hearing Brief, para. 485. Rather, as clearly expressed, it is GCA's position that in light of the various risks connected with the reef, such as low GCoS and the high potential for contaminants, a prudent operator would try to minimise all risks as much as possible, e.g. by conducting additional 3D seismic to obtain a more firm GCoS estimate.

¹¹⁸³ Ryder Scott Third Expert Report, para. 11.

¹¹⁸⁴ See Part IV, D.I.1. above.

¹¹⁸⁵ GCA Fourth Expert Report, para. 61.

facilities constructions and development drilling.¹¹⁸⁶ It is mainly these activities which lead to the late start of commercial production from the supposed reef.¹¹⁸⁷ As outlined above, Claimants have fully ignored these elements in their entirely unrealistic development schedule.¹¹⁸⁸

6. Claimants are not entitled to benefit from the doubts

638 Throughout these proceedings, Claimants have frequently suggested that whichever argument the Republic raises against their “Interoil Reef” claim, the Tribunal should disregard it. Claimants purport to be of the view that any and all uncertainty regarding the potential of the “Interoil Reef” should be ignored since it was allegedly the Republic that hindered Claimants from proving the potential of the reef.¹¹⁸⁹ This argument is completely unacceptable as a matter of logic and with a view to the actual facts of this case. Even assuming the Republic somehow breached the ECT, it is clear that it was Claimants themselves that are responsible a substantial part of the uncertainty surrounding the “Interoil Reef”.

639 First of all, this follows from their procedural decisions in these proceedings. Claimants chose to introduce the 3D seismic data into these proceedings at a very late stage, namely in the direct examination of their experts Ryder Scott at the Hearing on Quantum.¹¹⁹⁰ They thus forced the experts to analyse the 3D seismic data in a very short time frame. However, with more time, the experts could have provided a more thorough analysis which could have led to more clear results.¹¹⁹¹

640 Moreover, Claimants also failed to take the necessary measures to explore the reef at the time of events. Both their drilling activity and their seismic analysis were completely inadequate for a proper exploration.

641 First of all, TNG had concluded Contract No. 302 in July 1998 already.¹¹⁹² 2D seismic data on the Munaibay area was shot in 2000 and 2001.¹¹⁹³ However, still by

¹¹⁸⁶ GCA Third Expert Report, paras. 171 et seqq. and 183 et seqq.

¹¹⁸⁷ Notably, Ryder Scott criticise GCA for providing a schedule in which well drilling is concluded in 2015 and production starts only in 2018, cf. Ryder Scott Third Expert Report, para. 39. GCA have demonstrated that this criticism is baseless, as it is entirely normal in field development practice and in fact commercially more sensible to drill the necessary wells “in one go” so as to later have available a “well stock” to produce from, cf. GCA Fourth Expert Report, para. 110.

¹¹⁸⁸ See Part IV, D.I.4. above.

¹¹⁸⁹ Claimants’ First Post-hearing Brief, paras. 555 et seq.; Claimants’ Statement of Claim, para. 438.

¹¹⁹⁰ Testimony of Mr. Nowicki of Ryder Scott, Hearing on Quantum, Transcript Day 3, p.102, line 23 - p.104, line 4.

¹¹⁹¹ Testimony of Dr. Wright of GCA, Final Hearing, Transcript Day 1, p.73, line 25 - p.74, line 7 and p.75, lines 9-11.

¹¹⁹² Contract No. 302 dated 31 July 1998, issued pursuant to the License for the right to use subsoil, series NG No. 243-D (**Exhibit C-53**).

¹¹⁹³ Reports of the MEMR for TNG dated January/February 2010, p.7 of the English translation (**Exhibit C-386**).

the beginning of 2008, TNG had not taken a single step directed at seriously exploring the “Interoil Reef”. Only in February 2008 did they start drilling the Munaibay-1 well,¹¹⁹⁴ which Claimants now allege to have been directed at the exploration of the “Interoil Reef”.¹¹⁹⁵ This delay in exploration activity was crucial, given that the contract was set to expire in March 2009. Thus, if TNG had not started their efforts belatedly already, it is clear that at least, any unexpected delay in the exploration activity could have entailed that no discovery could be made before expiration of the contract term.

642 Importantly, Claimants made several mistakes which caused exactly such delays. For one, Claimants chose to start drilling the Munaibay-1 well prior to having acquired 3D seismic data.¹¹⁹⁶ As a result, Claimants were unable to pick the best possible location for the well.¹¹⁹⁷ Because Claimants did not have any clear picture of the reef, they chose a location at which, as the experts agree after having reviewed the 3D seismic data, the well’s target depth of 6,000m would not have been sufficient to reach the “Interoil Reef”.¹¹⁹⁸ Thus, Claimants would have in any event needed an additional well at another location.

643 In addition, Claimants chose an inadequate drilling rig for drilling the Munaibay-1 well, as is evidenced by the fact that the well broke down at 4,700m when high pressures were encountered.¹¹⁹⁹ Such high pressures had to be expected given that the nearby Munaibay-10 well had been abandoned nearly 20 years earlier because of high pressures as well.¹²⁰⁰ What is more, the alleged Georgian drilling rig, the existence of which remains entirely unproven in these proceedings, would very likely not have been able to deal with the expected pressures either.¹²⁰¹ Claimants thus could not have gathered additional information about the reef even if the supposed Georgian drilling rig had magically appeared on site and ready to drill.

644 Claimants’ drilling efforts were thus completely inadequate for gathering sufficient information about the potential of the “Interoil Reef”. Sadly, their efforts at

¹¹⁹⁴ Tristan Oil Ltd., Annual Report For the Year Ended December 31, 2008, p.4 (**Exhibit R-37.5**).

¹¹⁹⁵ Claimants’ First Post-hearing Brief, para. 375.

¹¹⁹⁶ The drilling of the Munaibay-1 well started in February 2008, cf. Tristan Oil Ltd., Annual Report For the Year Ended December 31, 2008, p.4 (**Exhibit R-37.5**). Interpretation of the 3D seismic data was purportedly finalised in early 2009, cf. Testimony of Mr. Stati, Hearing on Quantum, Transcript Day 2, p.86, lines 10-12.

¹¹⁹⁷ As GCA note, the Munaibay-1 well was “poorly located” to assess the potential of the “Interoil Reef”, cf. GCA Third Expert Report, para. 89

¹¹⁹⁸ GCA Third Expert Report, para. 105; Testimony of Mr. Nowicki of Ryder Scott, Final Hearing, Transcript Day 1, p.51, lines 22-25.

¹¹⁹⁹ Testimony of Mr. Cojin, Hearing on Quantum, Transcript Day 2, p.67, line 22 - p.68, line 10.

¹²⁰⁰ GCA Third Expert Report, para. 98.

¹²⁰¹ GCA Third Expert Report, para. 209.

obtaining 3D seismic data fare no better. Claimants commissioned an inadequate 3D seismic survey which, according to their own experts of Ryder Scott, did not cover the complete reef.¹²⁰² This is very revealing, given that Ryder Scott (now) consider that a 2D seismic line outside of the 3D area shows a section of the reef.¹²⁰³ If Ryder Scott were indeed correct with that statement, it could be expected that TNG, which sat on that 2D line since at least 2001,¹²⁰⁴ would have extended the 3D survey to this area as well, in order to make sure that the supposed reef is fully covered. They did not.¹²⁰⁵

645 Moreover, the 3D seismic data actually acquired shows serious deficiencies regarding data quality. In particular, to the northern and southern end of the survey, data quality is poor, making an interpretation very difficult.¹²⁰⁶

646 Claimants thus only have themselves to blame when it comes to the lack of information regarding the potential of the “Interoil Reef”. They cannot be granted any benefit of the doubt.

7. Recoverable resources and capital expenditure at Munaibay

647 Claimants also criticise GCA’s resource and capital expenditure estimates for the Munaibay discovery, going as far as accusing GCA of “manipulating” these numbers to drive the value of Munaibay down.¹²⁰⁷ Claimants’ suggestions are based on the contention that GCA did not explain and document changes to its estimate that occurred between the first and second reports.¹²⁰⁸ This is entirely incorrect. GCA have explained in detail the reasons for the changes to their estimates and these reasons are perfectly valid. Claimants’ only basis for voicing their criticism is ignoring the explanations given by GCA.

648 The downward correction of recoverable resources occurred with GCA’s Supplemental Report and reflected the results of the Munaibay-1 well which had not

¹²⁰² Ryder Scott Third Expert Report, para. 11.

¹²⁰³ Ryder Scott Third Expert Report, para. 11.

¹²⁰⁴ Reports of the MEMR for TNG dated January/February 2010, p.7 of the English translation (**Exhibit C-386**).

¹²⁰⁵ Claimants might try to counter this conclusion by reference to the fact that the area in question is outside of the Contract No. 302 Area. However, this is irrelevant, given that an agreement with the adjacent subsoil user for the shooting of 3D seismic data could in all likelihood have been found. Such agreement would at some point have become necessary in any event, as the two subsoil users would have had to determine how the hydrocarbons from the supposed reef would have been shared. Such unitisation agreement requires proper volumetric estimates, which can only be made based on proper and full seismic coverage.

¹²⁰⁶ GCA Third Expert Report, paras. 75, 141, 143.

¹²⁰⁷ Claimants’ First Post-hearing Brief, para. 484.

¹²⁰⁸ Claimants’ First Post-hearing Brief, paras. 479 et seqq.

been reflected in GCA's First Report.¹²⁰⁹ It was also based on a later analysis of the results of the drilling on age-equivalent reservoirs in the Tolwyn field.¹²¹⁰ Conversely, the upward correction in the number of development wells was a reaction to the work done by Ryder Scott and mirrors the well count estimate by Ryder Scott.¹²¹¹ It also reflects the results of the Munaibay-1 well test.¹²¹²

649 In summary, GCA note:

*“[Ryder Scott] continues to avoid acknowledging that the well test on Munaibay 1 indicated a very tight reservoir with resulting poor well performance and a reduced recovery, clearly indicating that an increased number of wells would be needed to deplete the field, and that the recovery factor (the percentage of the oil and gas in the reservoir which can be recovered) would be lower than initially expected.”*¹²¹³

650 Importantly, Claimants are incorrect when they allege that no documentation or data supporting the Munaibay projections in the First and Second GCA Reports were provided.¹²¹⁴ Chrystal ball sheets as well as cost estimates were provided.¹²¹⁵

651 Insofar as Claimants criticise a minor error in the phasing of the capital expenditure on Munaibay,¹²¹⁶ this has been admitted by GCA and has been corrected with GCA's Third Report.¹²¹⁷ Further analysis by Deloitte GmbH has shown that the value of the Munaibay discovery remains negative (USD -223.7 million) despite the change.¹²¹⁸

¹²⁰⁹ GCA Supplemental Expert Report, para. 123; GCA Third Expert Report, para. 224; GCA Fourth Expert Report, para. 126.

¹²¹⁰ GCA Fourth Expert Report, para. 127.

¹²¹¹ GCA Supplemental Expert Report, para. 123; GCA Third Expert Report, para. 224.

¹²¹² GCA Fourth Expert Report, para. 131.

¹²¹³ GCA Fourth Expert Report, para. 131.

¹²¹⁴ Claimants' First Post-hearing Brief, para. 481.

¹²¹⁵ GCA Fourth Expert Report, Appendix II. Cf. also GCA Third Expert Report, para. 224.

¹²¹⁶ Claimants' First Post-hearing Brief, paras. 482 et seq.

¹²¹⁷ GCA Third Expert Report, paras. 225 et seq.

¹²¹⁸ Deloitte & Touche Supplemental Expert Report, para. 250.

E. The LPG Plant is worthless

652 Claimants' unfinished LPG Plant construction is worthless. In fact, Deloitte GmbH calculate a negative value based on the DCF method in the amount of minus USD 89.8 million.

653 In their First Post-hearing Brief, Claimants ask for damages in the amount of the alleged investment costs and some portion for the alleged lost opportunity to make a commercial success of the project. It is unclear whether Claimants even maintain this demand. Other than repeating this demand, all that Claimants had to say about the LPG Plant in their closing submission for the Final Hearing was that RBS had assumed third party gas supply.¹²¹⁹ The Republic on the other hand provided a detailed description of the failure of the LPG Plant Project and why the value was negative by minus USD 89.8 million.¹²²⁰ It is telling that Claimants had nothing to respond to this in their **rebuttal** closing submission. Claimants did not rebut any of the evidence regarding the failure of the LPG Plant, they failed to address this completely.

654 While it is therefore doubtful that Claimants even uphold their allegations regarding the LPG Plant, the Republic will shortly address the arguments brought forward in Claimants' First Post-hearing Brief nonetheless.

655 There is no basis for either of the demands. Both demands are methodologically flawed. But even if Claimants' flawed methodology were applied, they would still not be entitled to damages for the LPG Plant because both demands are based on wrong assumptions and Claimants have provided no credible piece of evidence to support their assumptions.

656 In addition, even if the Tribunal were to attribute any value to the LPG Plant, it could not award more than 50% of this assumed value to Claimants.

I. The LPG Plant is a failed project

657 The Republic has demonstrated in its First Post-hearing Brief that as fully transpired in the Hearing on Quantum, the LPG Plant was a completely failed project.¹²²¹

¹²¹⁹ Claimants Closing Submission, Final Hearing, Transcript Day 1, p.184, lines 6-8.

¹²²⁰ Respondent's Closing Submission, Final Hearing, Transcript Day 1, p.238, line 22 - p.241, line 8.

¹²²¹ Respondent's First Post-hearing Brief, paras. 821-882.

Claimants have not provided a single piece of evidence that would rebut the fact that projected costs increased from USD 105 million to USD 281 million, the completion date was moved by almost two years and that the decision to build the LPG Plant was made thinking that up to 62.3 Bcm of gas would be available when in fact there would only have been less than 10 Bcm according to Claimants own experts. In addition, Claimants intended to invest only USD 20 million of their own money but eventually - according to new allegations submitted with their First Post-hearing Brief - injected USD 179 million, i.e. about 800% of the anticipated amount.

658 Because even Claimants cannot deny these facts, they try to play them down. What they completely ignore is the fact that one of their key witnesses and Mr. Stati's right hand, Mr. Lungu, demonstrably lied to the Tribunal when he described this project in his written witness statement.¹²²² In his witness statement he described as the original plan what in fact was a newly revised plan after several delays and budget overruns. In the Hearing on Quantum, he admitted that the original plan had been the so called Ascom LPG Plant, which envisaged costs of USD 105 million and a start-up date of October 2007,¹²²³ and hence Claimants attempts to describe this document as a draft with no value¹²²⁴ are in vain; they are contradicted by their own witness.

659 Claimants attempts to "explain" that they did not lie to KPMG when they told them for the purpose of drafting the Vendor Due Diligence that "*there has been no delay and plant is expected to be completed on time and within the budget*"¹²²⁵ is absurd. The sentence "*there has been no delay*" alleges that the timing of the project is as originally planned and the sentence "*the plant is expected to be completed within the budget*" at least insinuates that the plant will be completed within the budget as originally planned. Both statements are completely false as the originally planned start-up date of October 2007 had already been exceeded by almost one year and the original budget of USD 105 million had already been exceeded by almost USD 100 million¹²²⁶ when Claimants "informed" KMPG that there had been no delays and that the plant was expected to be completed within the budget.

¹²²² Respondent's First Post-hearing Brief, paras. 827-841.

¹²²³ Testimony of Mr. Lungu, Hearing on Quantum, Transcript Day 1, p.209, lines 4-8; Ascom LPG Plant Business Plan (**Exhibit R-333**).

¹²²⁴ Claimants' First Post-hearing Brief, para. 574 fn 853.

¹²²⁵ Claimants' First Post-hearing Brief, para. 578.

¹²²⁶ According to Tristan Oil Annual Report, Claimants had spent USD 208.5 million as of 30 September 2008, therefore a conservative assumption would be that as of the date of the Vendor Due Diligence of 29 August 2008, an amount at least close to USD 200 million had been spent.

- 660 Claimants now find a willing accomplice in trying to undo what cannot be undone, the failure of their LPG Plant project: FTI. A striking example for this is that in their Post-hearing Expert Report in the section in which FTI discuss and defend their cost approach valuation of the LPG Plant, they rely heavily on the witness statement of Mr. Broscaru. One of the key elements of Mr. Broscaru’s witness statement which they cite with no caveat whatsoever is that TNG’s analysis of the economics of the LPG Plant concluded that the net present value of the LPG Plant would reach approximately USD 450 million.¹²²⁷
- 661 38 pages later, FTI then suddenly provide a calculation in which they test the alleged value of USD 450 million provided by Mr. Broscaru in his witness statement or rather by Mr. Lungu through Mr. Broscaru’s witness statement¹²²⁸ and come to the conclusion that the allegedly calculated value of USD 450 million was completely wrong and that with their own assumptions, TNG should have arrived at a value of USD 7 million or USD 92 depending on the run-time of the plant.¹²²⁹ This does explain why Claimants chose to insert these numbers into Mr. Broscaru’s witness statement and apparently instructed him to refuse to answer any questions regarding these assumptions rather than inserting them into Mr. Lungu’s witness statement who could not simply have shielded himself from uncomfortable questions with reference to his ignorance in the field of finance and economics as Mr. Broscaru did.¹²³⁰
- 662 In any case, FTI present as material evidence for their valuation of the LPG Plant, which they admit to be at best a gross **miscalculation by at least USD 358 million**, 38 pages later.
- 663 Unsurprisingly, the “value” of USD 7 million or USD 92 million that FTI claims TNG should have arrived at with according to their own assumptions is still highly overstated. Deloitte GmbH scrutinised FTI’s calculation and concluded that **with their own assumptions**, TNG should have arrived at a net present value of the LPG Plant of **minus USD 51.2 million** even assuming a run-time of 20 years.¹²³¹ This is because FTI understates the discount rate, they do not consider tax and they disregard administrative costs. In fact, the value would be even lower because Mr.

¹²²⁷ FTI Post-hearing Report, para. 5.4.

¹²²⁸ It should be noted that Mr. Broscaru testified that these numbers were given to him by Mr. Lungu and that he subsequently wrote them down in his witness statement, hoping that they were not wrong, Testimony of Mr. Broscaru, Hearing on Quantum, Transcript Day 2, p.35, lines 12-19.

¹²²⁹ FTI Post-hearing Report, paras. 8.37-8.44.

¹²³⁰ See Respondent’s First Post-hearing Brief, paras. 847 - 852.

¹²³¹ Deloitte & Touche Second Supplemental Expert Report, paras. 160-169.

Broscaru's, i.e. Mr. Lungu's assumption, included the availability of third party gas for which there is no evidence whatsoever.¹²³²

664 Another example of how FTI desperately try to help Claimants in making that claim that LPG Plant Project was not a complete failure is how they calculate the budget overrun. They arrive at a budget overrun of only 53.5%¹²³³ and their "reasoning" is interesting to note. In order to arrive at this percentage, they simply disregard the lowest budget, the USD 105 million as specified in the Ascom LPG Plant Business Plan and they disregard the USD 281 million "final budget" provided in Mr. Broscaru's witness statement.

665 FTI disregard the USD 105 million by alleging that the Ascom LPG Plant Business Plan "*did not necessarily present the views of the Claimants.*"¹²³⁴ This assertion is clearly proven wrong by Mr. Lungu's testimony that this business plan constituted the "*original plan*" for the project. Even if it had been drafted by Vitol, it certainly was the business plan that both parties accepted as the initial plan as Mr. Lungu fully acknowledged during his testimony.¹²³⁵

666 Even more interestingly, FTI chose to disregard the budget of USD 281 million because Mr. Broscaru testified that this estimate was provided to him by Mr. Lungu.¹²³⁶

667 With regard to statements by Mr. Lungu, the Republic certainly agrees that due to demonstrable lies, Mr. Lungu's testimony has little evidentiary value if any value at all.

668 With regard to Mr. Broscaru's witness statement, the Republic also agrees with FTI that witness statements that contain the statements of another witness and thus serve to include allegations without enabling the opposing counsel to test these allegations

¹²³² Deloitte & Touche Third Expert Report, paras. 160-169.

¹²³³ FTI Post-hearing Report, paras. 5.18-5.22.

¹²³⁴ FTI Post-hearing Report, para. 5.19.

¹²³⁵ See Testimony of Mr. Lungu, Hearing on Quantum, Transcript Day 1, p.204, lines 20-23 and the following excerpt from the cross-examination of Mr. Lungu, Hearing on Quantum, Transcript Day 1, p.208, lines 23 - p. 209, line 8:

"A. Well, any project starts with a plan, with certain numbers being put on paper; but depending, throughout the implementation of the project, the condition might change.

Q. What was the original plan then here?

A. Excuse me?

Q. What was the original plan?

A. The business plan that you have seen and you have on record.

Q. That was the original plan?

A. That was the original plan that we have on record."

¹²³⁶ FTI Post-Hearing Report, para. 5.21.

should be disregarded. However, FTI cannot have it both ways. They should not be allowed to, on the one hand, use this obvious unreliability to downplay the budget overrun, which in fact was 167.6%,¹²³⁷ but on the other hand, to still rely on such a witness statement as the central piece of evidence for its valuation of the LPG Plant. Rather, as now even accepted by FTI, Mr. Broscaru's witness statement needs to be disregarded.

669 In addition, it is completely illogical that FTI ignore the USD 281 million from Mr. Broscaru and then use the budget of USD 232.6 million to calculate the budget overrun. They state that the investment value as at May 2009 was already USD 245 million with the plant still unfinished, so calculating the budget overrun by using USD 232.6 million as the final costs is misleading to say the least.

670 The budget overrun of at least 167.6% cannot be downplayed by looking at the inflation as FTI have now chosen to do.

671 After having artificially and unjustifiably driven down the cost explosion of 167.6% to an alleged increase by 53.3%, FTI then seek to explain this budget overrun with the alleged impact of price inflation.¹²³⁸ FTI's habit to choose and pick as it pleases becomes once again obvious in this argumentation. For their "prospective" valuation of the LPG Plant, FTI applied US inflation with a rate of 1.6% annually to drive the capital expenditure down and thus to increase the "prospective" value of the LPG Plant; on the other hand, they apply the significantly higher Kazakh inflation in their endeavour to explain the cost explosion.¹²³⁹ Either FTI must admit that their prospective valuation is highly overstated because they applied an inflation rate that is far too low, or they must accept that they cannot even explain the artificially and inexplicably driven down budget overrun. FTI and Claimants cannot have it both ways.

II. Investment cost basis is not an appropriate standard of valuation for the LPG Plant

672 Investment cost basis *per se* is not an appropriate standard of valuation. The Republic has demonstrated in its First Post-hearing Brief that the cost basis approach is an inappropriate standard because as explained by Deloitte GmbH, "*potential buyers would always look at the future income potential of an asset; therefore, cost*

¹²³⁷ Deloitte & Touche Third Expert Report, paras. 170-175.

¹²³⁸ FTI Post-hearing Report, paras. 5.23 et seqq.

¹²³⁹ Deloitte & Touche Third Expert Report, paras. 176-178.

*valuations disregarding the future in any case obviously violate the prerequisite of any fair market transaction being the price a buyer would be willing to pay to an equally willing seller.*¹²⁴⁰ Claimants and FTI provide no explanation for their deviation from common valuation standards other than stating why they allegedly were unable to make a DCF calculation.¹²⁴¹ It is striking that for example RBS - on whom Claimants now seek to rely - Deloitte GmbH and several of the bidders in Project Zenith apparently did not face these problems in applying the DCF method.

673 Mr. Rosen's admission that he did not have enough information to look at the LPG Plant on a cash flow basis¹²⁴² is in fact an admission of his lack of expertise to value such an asset located in Kazakhstan.

674 In addition, Claimants appear to misunderstand what their experts FTI did when they conducted their valuation on a cost basis. Claimants allege that the Republic prevented them from "*developing the evidence needed to value the plant on a fair market value basis.*"¹²⁴³ Mr. Rosen, however, claims that he did just this: He stated that he arrived at the fair market value by valuating the LPG Plant on a cost basis.¹²⁴⁴

675 Claimants' allegation that the Republic's opposition to a cost basis approach was wrong because KMG EP used cost basis to value the LPG Plant is highly misleading. What Claimants omit to say is that while KMG EP applied a combination of a comparative analysis and a cost-based approach, for their **indicative offer**, they highlighted in their presentation of September 2008 that in the 2nd round, i.e. for the formation of a **binding offer**, the DCF method would need to be applied:

*"[The] 2nd round of assessment would require using DCF as the main method and considering the business unit together with basic model of production assets."*¹²⁴⁵

676 KMG EP thus made it very clear that a cost basis approach may be appropriate for the formation of a non-binding, indicative offer; however, to seriously value an asset, the DCF method needs to be applied.

¹²⁴⁰ Deloitte & Touche Expert Report, para. 233.

¹²⁴¹ FTI Post-hearing Report, para. 5.2.

¹²⁴² Testimony of Mr. Rosen of FTI, Hearing on Quantum, Transcript Day 4, p.46, lines 20-24.

¹²⁴³ Claimants' First Post-hearing Brief, para. 558.

¹²⁴⁴ Testimony of Mr. Rosen of FTI, Hearing on Quantum, Transcript Day 4, p.91, lines 19-20.

¹²⁴⁵ KMG EP 2008 Presentation, p.15 (**Exhibit C-722**).

677 Should the Tribunal decide to award damages, this would have nothing in common with an indicative offer but it would be a binding obligation to make a payment. Making a binding offer simply based on the costs of a project is something that no reasonable business man would do and in fact it is something that none of the bidders for Project Zenith would have done. As Deloitte GmbH state after having observed all indicative offers for Project Zenith:

“[A]ll bidders, who participated in the indicative offer phase and whose valuation basis is known, used already or would have used a DCF valuation in the next phase. None of them would have solely relied on a cost approach valuation.”¹²⁴⁶

III. The LPG Plant never was a “going concern”

678 Even if one were to disregard the fact that a cost basis valuation is inappropriate for the determination of the fair market value, Claimants would still not be entitled to the investment costs because the LPG Plant never was a going concern, i.e. it would have been un-commercial to complete and operate the plant.

679 In the Hearing on Quantum, Mr. Rosen explained his assumption that the LPG Plant would be a going concern by stating that in addition to gas from Tolkynd and Borankol, he considered that gas from the Contract No. 302 properties would be available, gas from third parties could be processed and gas from the CAC pipeline could be processed.¹²⁴⁷

680 Regarding gas from Tolkynd and Borankol, Deloitte GmbH and FTI are in agreement, that the LPG Plant could not have existed from this gas alone.¹²⁴⁸ Mr. Rosen’s other three assumptions are therefore vital to prove that the LPG Plant would have been a going concern.

681 The Republic had demonstrated in its First Post-hearing Brief that all of these assumptions are unproven, vague and highly speculative.¹²⁴⁹

682 In summary, assuming that gas from the Contract No. 302 properties would be available ignores the fact that Contract No. 302 expired, that there is a minimal chance that the Contract No. 302 area contains significant amounts of gas, that the

¹²⁴⁶ Deloitte & Touche Third Expert Report, para. 183.

¹²⁴⁷ Testimony of Mr. Rosen of FTI, Hearing on Quantum, Transcript Day 4, p.47, line 25 - p.48, line 16.

¹²⁴⁸ Testimony of Mr. Rosen of FTI, Hearing on Quantum, Transcript Day 4, p.83, lines 18-20 and p. 94, lines 6-11; Testimony of Mr. Gruhn of Deloitte GmbH, Hearing on Quantum, Transcript Day 4, p.141, line 22 - p.142, line 1.

¹²⁴⁹ Respondent’s First Post-hearing Brief, paras. 870-882.

chance of making a commercial discovery of this gas even within an extended exploration period are even lower and that no prudent operator would develop the “Interoil Reef” even if it existed and could be discovered because this would be un-commercial, just to name a few of the obstacles.¹²⁵⁰

683 Regarding gas from the CAC pipeline, it is obvious from Claimants’ First Post-hearing Brief, that Claimants and FTI have finally abandoned their completely unfounded argument that gas from the pipeline could have been processed in the LPG Plant. Claimants never provided a shred of evidence to support this allegation other than the reference to geological proximity, they half-heartedly maintained this argument in their Reply Memorial on Quantum but now finally bury this argument by not mentioning it once. FTI take the same path and abstain from relying on gas from the CAC pipeline in their Post-hearing Expert Report.

684 And finally with regard to gas supply from third parties; Claimants have provided no evidence of fields or producers that could have supplied gas to the LPG Plant¹²⁵¹ or that would be willing to supply gas to the LPG Plant, they did not mention any negotiations and they did not mention what the financial terms could have been. They failed to do so in the Request for Arbitration, they failed to do so in their Statement of Claim, they failed to do so in their Reply Memorial on Quantum and they failed to do so in their First Post-hearing Brief. Vague references to “*fields in the vicinity*” apparently were enough for Mr. Rosen, he admittedly did not even verify this statement,¹²⁵² but it certainly cannot be enough for the Tribunal in these proceedings.

685 And this is it; FTI’s suggestion that the LPG Plan was a going concern is nothing more than a combination of unproven, vague and highly speculative assumptions.

686 Therefore, in their First Post-hearing Brief, instead of providing any credible evidence for Mr. Rosen’s underlying assumptions and thus at least attempting to prove their claim, Claimants simply criticise the Republic’s valuation by asserting that the Republic wrongly assumed completion cost of USD 100 million,¹²⁵³ that it understated the amount of gas available from Tolkyin and Borankol¹²⁵⁴ and that it

¹²⁵⁰ This has not changed in view of the examination of the 3D data of Munaibay.

¹²⁵¹ Other than one vague reference to a single field in Mr. Broscaru’s witness statement without any indication of the output of this field.

¹²⁵² Testimony of Mr. Rosen of FTI, Hearing on Quantum, Transcript Day 4, p.95, lines 22-25.

¹²⁵³ Claimants’ First Post-hearing Brief, para. 562.

¹²⁵⁴ Claimants’ First Post-hearing Brief, paras. 563-564.

failed to take into account potential loading of the plant with gas from third-party sources.¹²⁵⁵

687 Claimants' attacks on the Republic's valuation are mistaken. What Claimants would have needed to do, is prove that the LPG Plant was indeed a going concern, i.e. that it could be operated economically. Claimants have failed to do so.

1. USD 100 million are necessary to complete the construction of the LPG Plant

688 The Republic has demonstrated in detail, why capital expenditure in the amount of USD 100 million needs to be assumed for the completion of the LPG Plant. GCA provided a detailed breakdown of the necessary steps and the associated costs.¹²⁵⁶ A portion of these costs in the amount of USD 32 million is associated with the fact that Claimants mothballed the equipment. This can be seen from the breakdown provided by GCA, in which the first seven items are related to the halt of the construction.¹²⁵⁷ These USD 32 million need to be taken into account because Claimants solely decided to abandon the project due to cash constraints unrelated to any actions by the Republic.¹²⁵⁸

689 As explained in the Republic's First Post-hearing Brief, the assumption of capital expenditure in the amount of USD 100 million is further corroborated even by Claimants' own assumptions of costs of up to USD 60 million.¹²⁵⁹ This amount was also applied by RBS.¹²⁶⁰ Given TNG's history of exceeding estimated costs by 167.6% even much higher costs than USD 100 million seem probable.

690 In addition, while Claimants complain about GCA's cost assessment, all their experts FTI did was the deduction of the money already spent from the total costs projected at a given time.¹²⁶¹ This may have been a feasible approach for a company that manages to stay within a budget but it certainly is not for TNG. As shown by the Republic, FTI would have needed to arrive at the absurd result that TNG should **be paid** USD 12.4 million for the completion of the plant had they stringently applied

¹²⁵⁵ Claimants' First Post-hearing Brief, paras. 565-572.

¹²⁵⁶ GCA Third Expert Report, Table 5.1, p.22.

¹²⁵⁷ In the Hearing on Quantum, Mr. Wood stated that it would be an approximation that USD 50 million may be the capital expenditure if one assumed that the construction had never halted, Hearing on Quantum, Transcript Day 3, p.248 line 23 - p.249 line 1.

¹²⁵⁸ See Part II, A.V.3.

¹²⁵⁹ Respondent's First Post-hearing Brief, paras. 925 - 928; PwC Due Diligence report, p.24 (**Exhibit R-359**).

¹²⁶⁰ RBS Valuation Report dated 31 July 2009, p.66 (**Exhibit R-374**).

¹²⁶¹ FTI Consulting Expert Report, para. 16.6.

their approach in their Supplemental Report in which they increased the cost value to USD 245 million.¹²⁶²

691 What makes FTI's assumption of USD 24.1 million even more unreliable (if this is possible) is the fact that the Tristan Oil Annual Report for the year 2009 mentions that allegedly sometime in 2010 Claimants cancelled the delivery of equipment for the LPG Plant and a company called Perkwood Investments Ltd. returned the advance paid in the amount of USD 36,800,212.¹²⁶³ This means that according to TNG's plans further equipment for the LPG Plant worth almost USD 37 million would have needed to be built into the LPG Plant. Hence, the equipment alone would have cost USD 13 million more than the meagre USD 24.1 million assumed by FTI.

692 This effectively leaves Claimants with no proof or even a position on costs for the completion of the LPG Plant at all.

2. The Republic does not understate the amount of gas available from Tolkyn and Borankol

693 The Republic does not understate the amount of gas available from Tolkyn and Borankol. FTI in their valuation correctly assumed a start-up date in 2011. In fact, this has little to do with the different valuation dates but rather with the fact the Claimants abandoned the construction of the LPG Plant in March or May 2009 - Claimants witnesses disagree on the date - due to cash constraints that are unrelated to actions by the Republic.¹²⁶⁴

694 While Claimants allege that it was "*unrebutted evidence*" that the Republic illegally began interfering with the construction of the LPG Plant in November 2008,¹²⁶⁵ this is of course not the true.

695 What Claimants appear to be referring to is Mr. Broscaru's allegation that non-Kazakh workers on the project were unable to renew their work permits in November/December 2008.¹²⁶⁶ Claimants now for the first time adopted this allegation in their First Post-hearing Brief.¹²⁶⁷

¹²⁶² Respondent's First Post-hearing Brief, paras. 917-924.

¹²⁶³ Respondent's First Post Hearing Report, para. 1043.

¹²⁶⁴ See Part II, A.V.3 above

¹²⁶⁵ Claimants' First Post-hearing Brief, para. 564.

¹²⁶⁶ Witness Statement Mr. Broscaru, para. 25.

¹²⁶⁷ Claimants' First Post-hearing Brief, para. 358.

696 This allegation is denied. In fact, the allegation that non-Kazakh workers were unable to renew their work permits is such a vague statement that it is doubtful how the Republic could even have addressed this issue. Had Mr. Broscaru cared to at least mention specific persons who were unable to renew their work permits, the Republic could have investigated this issue. What is more, as Claimants themselves acknowledge, the LPG Plant was primarily constructed by CasCo.¹²⁶⁸ Mr. Broscaru therefore appears to refer to workers employed by CasCo and not by TNG. Finally, Mr. Broscaru's allegation is completely implausible. Most of Claimants' witnesses - including Mr. Broscaru himself - were non-Kazakh workers in Kazakhstan at the time. All of them have made several complaints but none of them has even alluded that they were prevented from working in Kazakhstan because they could not extend their work permits.

697 That is all that Claimants had submitted to allege that the Republic interfered with the construction of the LPG Plant. Deloitte GmbH's assumption of a start-up date in 2011 is therefore very favourable for Claimants because it assumes that the completion would have been initiated right after Respondent's valuation date of 21 July 2010.

698 In addition, Deloitte GmbH's start-up date in 2011 is further corroborated by the RBS valuation, which equally assumes a start up date in 2011.¹²⁶⁹

699 Finally, it is obvious from the value of **minus USD 89.8 million** that even taking into account processing gas from June 2009 until mid 2011, the value of the plant would still be negative. For example, Deloitte GmbH showed that FTI's valuation of the LPG Plant would only be 7% lower if gas production between 14 October 2008 and 21 July 2010 were disregarded.¹²⁷⁰

3. Claimants have failed to prove that third party gas would be available

700 What Claimants argument therefore boils down to is that the LPG Plant could have processed gas from third party suppliers. Again, Claimants and FTI have one central "piece of evidence" for this allegation: Mr. Broscaru's witness statement.

701 It would be laughable, if it were not so serious that Claimants still rely on Mr. Broscaru's witness statement as their primary piece of evidence and cite three whole paragraphs from the chapter in Mr. Broscaru's witness statement that bears the

¹²⁶⁸ Testimony of Mr. Broscaru, Hearing on Quantum, Transcript Day2, p.39, lines 8-11.

¹²⁶⁹ RBS Valuation Report dated 31 July 2009, p.64 (**Exhibit R-374**).

¹²⁷⁰ Deloitte & Touche Expert Report, para. 199.

heading “*Design and Economic Rationale of the LPG Plant*”.¹²⁷¹ It should not be forgotten that we are still talking about Mr. Broscaru who refused to answer questions regarding the economic rationale of the LPG Plant and made the remarkable statement:

*“I’m very sorry, but I cannot answer to such questions (...). I’m not a specialist in financial – in finance and economics. I cannot confirm anything in this subject.”*¹²⁷²

702 Even disregarding that Mr. Broscaru’s allegations lack any credibility because they can obviously not stem from him as he could not confirm anything in finance and economics and could not answer any questions other than to technical aspects of the Plant itself because he had “*never done anything else but be the manager of that location and monitor the constructions,*”¹²⁷³ they are certainly not unrebutted as Claimants allege. However, counter-evidence is only necessitated and in fact only possible if an allegation is specific enough. The very general allegation that “*the Kazakh government pressured TNG to build the LPG Plant*”¹²⁷⁴ does not meet the threshold of such sufficient specificity.¹²⁷⁵

703 FTI rely on a statement by Mr. Broscaru that “the LPG Plant was designed with the ability to process gas from third party sources, **of which there are numerous in the vicinity of the LPG Plant.**”¹²⁷⁶ As already mentioned above, of these allegedly **numerous** fields in the vicinity, Mr. Broscaru only mentioned one single field and he did so without even indicating how much gas this field produced. If numerous fields existed, it would have been the easiest task for Claimants who operated in the area for about 10 years to identify these field. They failed to do so. But in order to make a serious claim that third party gas could be assumed to be processed, they would not only have needed to identify specific fields, they would also have needed to provide evidence that these fields produce gas in sufficient amounts to feed the plant, that the operators of these fields would be willing to deliver the gas at commercial terms and that it would be commercial to build pipelines from these fields to the LPG Plant. Claimants have done nothing in this regard.

¹²⁷¹ Claimants’ First Post-hearing Brief, para. 358.

¹²⁷² Testimony of Mr. Broscaru, Hearing on Quantum, Transcript Day 2, p.36, lines 1-20.

¹²⁷³ Testimony of Mr. Broscaru, Hearing on Quantum, Transcript Day 2, p.45, lines 12-14.

¹²⁷⁴ Witness Statement Mr. Broscaru, para. 18.

¹²⁷⁵ As with Mr. Broscaru’s vague allusion to “fields in the vicinity”, his statements only raise questions but provide no answers: Who exactly pressured TNG to build an LPG Plant? Was it the local government or the central government? What was the name of the person? How did he pressure TNG? etc.

¹²⁷⁶ FTI Post-hearing Report, para. 5.5.

704 With regard to gas from the CAC pipeline, Claimants did not even state anything more than that it was geographically proximate. At the same time, they criticise GCA for allegedly not providing support for their statement that the gas in the CAC pipeline in average was only half as rich as gas from Tolkyn.¹²⁷⁷ However, it would have been upon Claimants to substantiate their claim and prove that the gas in the CAC pipeline could technically be processed in the LPG Plant, that it would be sufficiently rich so that sufficient amounts of LPGs could be extracted, that it would be commercial to build a pipeline to transport the gas from the CAC pipeline to the LPG Plant, that the producers in Turkmenistan and the ultimate buyer, usually Gazprom, would agree to the offtake of the LPGs and at what commercial terms. Again, Claimants' have not even alleged the existence of any of the above information.

705 All that is left to Claimants and all they now seem to rely on is that RBS upon instruction from KMG EP assumed that gas from third parties could be processed in the plant. However, it is of little significance what KMG EP, one of the three biggest oil and gas producers in Kazakhstan may have been able to obtain third party gas, which may for example be gas from other subsidiaries of KMG EP. The RBS report is silent on why RBS assumed third party gas but the reason may well be that it may have been economical to transport gas from KMG EP's own fields for longer distances while it would be uneconomical to do so if the field is operated by an unrelated party that also wants to make a profit. In addition, the RBS report even taking third party gas into account only arrives at a value of USD 67 million in the average base case, which was the scenario that RBS - as even FTI point out in their Post-hearing Report¹²⁷⁸ - used as its primary valuation conclusion.

4. Impairment of the LPG Plant

706 FTI in choosing the cost basis approach also ignored that the authors of the Tristan Oil Annual Report for 2009 mentioned an impairment of the LPG Plant. As explained by Deloitte GmbH in their Supplemental Report this indicates that the book value of an asset requires a downward adjustment because its carrying amount exceeds its recoverable amount.¹²⁷⁹

¹²⁷⁷ In the Hearing on Quantum, Mr. Wood explained that he received this information from KMG and from producers in Turkmenistan, Hearing on Quantum, Transcript Day 3, p.245, lines 18-24.

¹²⁷⁸ FTI Post-hearing Report, para. 3.14.

¹²⁷⁹ Deloitte & Touche Supplemental Expert Report, paras. 236-238. See also Respondent's First Post-hearing Brief, paras. 905-906.

IV. Claimants are not entitled to a portion of an alleged “prospective value” of the LPG Plant

- 707 The Republic has already pointed out the many defects in the concept of a prospective value,¹²⁸⁰ in particular that it neglects uncertainties and risks even if these are known and Claimants’ claim for a portion of the “prospective value” is bound to fail for this reason alone.
- 708 The only justification that Claimants provide for their demand of a “substantial portion of the prospective value” is that Claimants could allegedly have realised a higher value from the processing of gas from Contract No. 302 than the investment costs of USD 245 million. This argument is already defied by the impairment implications identified in the Tristan Oil Annual Report 2009, which indicate the exact opposite, namely that a downward adjustment of the book value may be necessary.¹²⁸¹
- 709 While FTI and Claimants initially based their “prospective value” on the assumption that gas from third parties and gas from the Contract No. 302 properties had been processed, they now solely provide this prospective value to “compensate” them for the hypothetical situation that the “Interoil Reef” existed, that Claimants had been able to discover it and that they had been able to produce gas from the Reef in the amounts anticipated by Ryder Scott.¹²⁸²
- 710 As described in more detail above,¹²⁸³ in addition to the uncertainties and risks acknowledged by Claimants, an award for a portion of the “prospective value” would also need to disregard, that Contract No. 302 had expired even prior to Claimants halt of the construction of the LPG Plant, Claimants would not have been able to make a commercial discovery of the Reef even within an extended exploration period and no prudent operator would have chosen to develop the Interoil Reef even if discovered because this would be highly uncommercial.
- 711 Claimants “prospective valuation” is also highly flawed even under the assumption that gas from Contract No. 302 had been available which again, is a completely untenable assumption.

¹²⁸⁰ Respondent’s Opening Presentation, Hearing on Quantum, Transcript Day 1, p.133, line 9 - p.137, line 6; Respondent’s First Post-hearing Brief, paras. 566-569; Deloitte & Touche Supplemental Expert Report, paras. 229 et seq.

¹²⁸¹ Tristan Oil Ltd., Annual Report For the Year Ended December 31, 2009, p.F-33 (**Exhibit R-37.6**) and see Deloitte & Touche Supplemental Expert Report, paras. 236-238.

¹²⁸² Claimants’ Closing Presentation, Final Hearing, Transcript Day 1, p.186, lines 8-15.

¹²⁸³ See above Part IV, D.

712 FTI already had to adjust their “prospective value” from USD 408 million to USD 329 million based on criticism from Deloitte GmbH.¹²⁸⁴ In their Supplemental Expert Report, Deloitte GmbH detected further mistakes in FTI’s assumptions which drive FTI’s calculation down to USD 308.7 million.¹²⁸⁵

713 The extent of the absurdity of FTI’s calculation becomes obvious when compared to the USD 67 million which RBS arrived at - also under the assumption that the LPG Plant would work at its full capacity over a period of 20 years. Claimants cannot explain this disconnect.

V. Any award of damages for the LPG Plant could only be for 50% of the assumed value

714 Claimants are not entitled to an award for damages because the LPG Plant was never taken away from Claimants. They first abandoned the construction of the plant in March or May 2009 and then completely abandoned the plant when they left the country in July 2010. The Republic has not put the plant into operation and it has no plans to do so.¹²⁸⁶ Claimants have not challenged Mr. Khalelov’s testimony which thus stands un rebutted.

715 In addition, even if liability were assumed, Claimants would still not be entitled to damages because the value of the LPG Plant is negative.

716 If the Tribunal nonetheless were to assume liability and to assume a positive value of the LPG Plant (there is no basis for both of these assumptions), the Tribunal could only award 50% of the assumed value to Claimants.

717 What Claimants seek is compensation for the loss of the LPG Plant. And in the Final Hearing they reiterated that the Tribunal should provide compensation that would “*wipe out all of the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if [the treaty-breaching conduct] had not been committed.*”¹²⁸⁷

718 It is undisputed that Vitol, Ascom, TNG and Terra Raf entered into a Joint Operating Agreement on 27 June 2006, which regulated the respective parties’ rights and

¹²⁸⁴ FTI Amendments to Expert Report of 25 January 2013, p.6.

¹²⁸⁵ Deloitte & Touche Supplemental Expert Report, paras. 96-97.

¹²⁸⁶ Witness Statement of Mr. Khalelov, paras. 4.1-4.2; Testimony of Mr. Khalelov, Hearing on Quantum, Transcript Day 2, p.143, line 15 - p.144, line 12.

¹²⁸⁷ Claimants’ Closing Presentation, Final Hearing, Transcript Day 1, p.167, lines 19-22.

obligations with regard to the LPG Plant.¹²⁸⁸ It was stipulated that Ascom and Vitol should establish a joint venture company, which would buy the LPG from TNG and subsequently market the LPG; the Joint Venture company was supposed to be “*the main profit centre handling the majority of revenues and expenses of the project.*”¹²⁸⁹ The relevant sections of the Joint Operating Agreement read as follows:

“5.1 Parties hereby agree that as from the Effective Date [i.e. 27 June 2006], they will cooperate through the joint ownership of the JV Company. VITOL (or its nominated Affiliate) and ASCOM (or its nominated Affiliate) shall each be allotted 50% of the Shares in the JV Company.

5.2 The purpose of the cooperation between the Parties under this Agreement and under the JV Company (“Purpose”) shall be jointly engage in Products trading and Products export from Kazakhstan and to arrange for the necessary logistic and commercial support.

5.3 The JV Company shall act as active trader and will perform all activities that are relevant or required thereto within the framework of the Agreement. The JV Company will be the main profit centre handling the majority of revenues and expenses for this project (...).”¹²⁹⁰

719 Hence, the bulk of the profit of the plant would not have been generated by TNG but by the Joint Venture Company¹²⁹¹ and Ascom would only own 50% of the shares in this company and the other 50% would be held by Vitol. According to section 8.1 of the Joint Operating Agreement, Vitol would also have been entitled to 50% of the Net Profit which is defined as the profit of the plant according to certain accounting principles.

720 If Claimants now demand damages for the LPG Plant and seek to be placed in the situation which would have existed if the alleged treaty breach had not been committed, they can only demand at maximum 50% of the asset value. This is because neither TNG nor Ascom would ever have received more than 50% of the profits of the plant. Had the plant been put into operation, the bulk of the profits

¹²⁸⁸ LPG Joint Operating Agreement, First FTI Scope of Review No. 44.

¹²⁸⁹ LPG Joint Operating Agreement, section. 5.3, First FTI Scope of Review No. 44 (emphasis added).

¹²⁹⁰ LPG Joint Operating Agreement, First FTI Scope of Review No. 44.

¹²⁹¹ It is impossible to state which exact percentage of the profits would have been generated by the JV company. However, as discussed below, the Republic already raised this issue in its Rejoinder on Quantum and put Claimants to prove to show that they would have earned more than half of the profits of the plant. Claimants failed to do this.

would have been generated by a company of which Claimants, i.e. Ascom only held 50% of the shares and which would have forwarded the remaining 50% of the profit to Vitol.

721 For the “prospective value”, it is obvious that any prospective value needs to be halved. This is because Claimants’ prospective valuation is based on the DCF method and thus based on future cash-flow. This valuation would therefore have needed to take into account that according to the Joint Venture Agreement, the bulk of the cash flow would have been generated by the Joint Venture Company and that this company would have forwarded a maximum of 50% of the profit to Vitol and thus Ascom would only have received 50% of the positive cash flow.

722 The same, however, applies for FTI’s cost basis valuation. Mr. Rosen explicitly stated that he used the cost basis approach to determine the fair market value of the plant,¹²⁹² i.e. he assumed that the profits from the operation of the plant would equal the investment costs. Hence, 50% of the alleged value of USD 245 million would also need to be deducted because neither of Claimants would ever have received more than 50% of the profits from the operation of the LPG Plant (even if any were generated).

723 Naturally, the same would apply if the Tribunal were consider the amount of USD 67 million as valued by RBS or any other value attributed to the LPG Plant.

724 Claimants are wrong to allege that this was a question of obligations towards Vitol and that the Tribunal should not consider such obligations because they were for Vitol and Ascom to settle.¹²⁹³ Claimants seek to blur that the profits would not be generated by TNG and then further distributed to Vitol, in which case it may be correct to speak about “obligations”. The Joint Operating Agreement, however, specifically stipulates that the bulk of the profits would be generated by the 50/50 Joint Venture between Ascom and Vitol as this company would have marketed the LPG products once the plant had been put into operation.

725 Hence, the profit would have been made by the Joint Venture Company, which would then have further distributed the profits. There would have been an obligation of this Joint Venture Company to distribute the profits but this obligation is not an obligation of Claimants towards Vitol.

¹²⁹² Testimony of Mr. Rosen of FTI, Hearing on Quantum, Transcript Day 4, p.46, lines 8-24 and p.91, lines 19-20.

¹²⁹³ Claimants’ First Post-hearing Brief, paras. 642-645.

726 The question simply is, what would Claimants have received if the LPG Plant had indeed been put into operation and had actually been able to generate profits (both propositions are refuted) and the Joint Operating Agreement provides the clear answer that Claimants would have received a maximum of 50% of the profits which would mostly have been generated by the Joint Venture Company. Anything more would amount to unjust enrichment.

727 In its Rejoinder Memorial on Quantum, the Republic already highlighted that this agreement on the equal sharing of profits existed and put Claimants to proof to show that they could have earned more than half of the asset value they are claiming:

*“At the same time, due to the limited amount of information on the record about the specifics of the Vitol Joint Venture, the Republic cannot assess itself to what extent the agreement would decrease a potential damages claim regarding the LPG Plant. In such circumstances, Claimants are put to proof that the proceeds they could have earned operating the LPG Plant under the Joint Venture Agreement are more than half of whichever asset value they are claiming.”*¹²⁹⁴

728 Claimants have failed to present this proof. As explained above, Claimants confused explanation regarding “obligations to Vitol”¹²⁹⁵ is wrong because the bulk of the profits would not have been generated by TNG or any of the Claimant companies.

729 However, Claimants have apparently taken this as an invitation to introduce new information regarding the contribution of Vitol. They did so for the first time in these proceedings and again by surprise in the Hearing on Quantum through the direct examination of Mr. Lungu. Mr. Lungu stated and Claimants adopted this allegation, that Vitol’s total contribution to the LPG Plant “*as of today*” had been USD 66 million.¹²⁹⁶ This means that Claimants admit that of the USD 245 million in damages for investment costs that they now demand, at least USD 66 million have not been contributed by TNG, but rather by Vitol.

730 TNG’s alleged investment costs are therefore in any event not USD 245 million but at best only USD 179 million.¹²⁹⁷ It is the Republic’s position that the USD 66 million allegedly invested by Vitol provide the very floor of what needs to be

¹²⁹⁴ Respondent’s Rejoinder on Quantum, para. 211.

¹²⁹⁵ Claimants’ First Post-hearing Brief, paras. 642-645.

¹²⁹⁶ Testimony of Mr. Lungu, Hearing on Quantum, Transcript Day 1, p.248, lines 13-20.

¹²⁹⁷ Contrary to Claimants misrepresentation at para. 574, the Republic never argued that TNG had only invested USD 20 million but it argued and Claimants now confirm, that they intended to only invest USD 20 million.

deducted from any award the Tribunal may consider to award to Claimants for the LPG Plant.

F. Borankol valuation

731 In its previous submissions, the Republic already explained the relevant considerations regarding its Borankol valuation.¹²⁹⁸ As was demonstrated by the work of GCA¹²⁹⁹ and Deloitte GmbH,¹³⁰⁰ the value of the Borankol fields as of 21 July 2010 amounted to USD 62.8 million. This value is supported by alternative valuation approaches such as comparable companies and comparable transaction analyses.¹³⁰¹ In fact, it appears to be on the high side of possible valuation results, given that the RBS valuation in the summer of 2009 concluded that the Borankol field had a value of USD 19 million only.¹³⁰²

732 The work done by Deloitte GmbH with regard to the Borankol field is basically unchallenged by Claimants and their expert FTI. The only point of criticism raised pertains to the work of GCA. Over the course of numerous pages of their First Post-hearing Brief, Claimants obsess about alleged methodological shortcomings in GCA's Borankol assessment.¹³⁰³ In fact, it is all smoke and mirrors. GCA did a thorough assessment of Borankol. Actual shortcomings with regard to Borankol can only be found in the work of Ryder Scott.

I. Ryder Scott inflate reserves at Borankol by constantly ignoring data disproving the results they wish for

733 In its First Post-hearing Brief, the Republic already explained that Ryder Scott based its Borankol reserves estimates on repeated ignorance of the available data as well as general field development practice. Ryder Scott thus constantly make overoptimistic assumptions regarding the potential for recompletions.¹³⁰⁴ Some of the instances of such clear methodological oversights will be collected in the following:

734 To begin with, with regard to the J-IA reservoir, Ryder Scott presented significantly inflated oil-in-place and expected ultimate recovery estimates. They achieved this by

¹²⁹⁸ Respondent's First Post-hearing Brief, paras. 929 et seqq.; Respondent's Rejoinder on Quantum, para. 212.

¹²⁹⁹ GCA Expert Report, paras. 43 et seqq.; GCA Supplemental Expert Report, paras. 53 et seqq.; GCA Third Expert Report, paras. 45 et seqq.; GCA Fourth Expert Report, paras. 26 et seqq.

¹³⁰⁰ Deloitte & Touche Expert Report, paras. 279 et seqq.

¹³⁰¹ See Part IV, I. below.

¹³⁰² Cf. RBS Valuation Report dated 31 July 2009, p.36 (**Exhibit R-374**).

¹³⁰³ Claimants' First Post-hearing Brief, paras. 453 et seqq.

¹³⁰⁴ Respondent's First Post-hearing Brief, paras. 932 et seqq.

assuming comparatively deep oilwater contacts.¹³⁰⁵ The oil-water contact describes the elevation above which oil rather than water can be found in the pores of a rock. Since the oil in a reservoir is always located above the water, a deeper oil-water contact means that a reservoir contains more oil and less water.¹³⁰⁶

735 As GCA have noted,

*“GCA has checked the well logs for a number of key wells to which RSC had attributed volumes of behind pipe oil. For some of the wells the logs indicated shallower oil water contacts; for others (B58 and B76) the entire sand is interpreted as wet by both NIPINefteGaz and GCA. One of RSC’s recompletion candidates, B78, is also logged wet across the J-I sand.”*¹³⁰⁷

736 In other words: Ryder Scott assumed comparatively deep oil-water contacts which are empirically disproven by the well data available. Quite simply, the potential for behind-pipe oil is diminished if the wells clearly tell the operator that large spaces are taken up by water. In such cases, oil can only be trapped in shallower intervals and in smaller volumes, limiting the potential for recompletions.

737 Ryder Scott in fact have to turn more than one blind eye in order to be able to come to its estimates for the J-IA reservoir. Indeed, Ryder Scott have to look past their own interpretations of water saturation. Specifically for well 78 in the J-IA reservoir, Ryder Scott provided an interpretation of water saturation and interpreted a specific interval as 100% water saturated. Astoundingly, Ryder Scott placed the oil-water contact – which is the very basis for their reserves estimates – in the middle of this interval. In other words: For the purposes of their reserves estimates, Ryder Scott assumed that the top of the interval was oil bearing even though they had themselves determined that the whole interval was 100% water saturated.¹³⁰⁸ This is a severe methodological mistake.

738 Importantly, the J-IA reservoir is a quite significant reservoir since it is the second largest in the Borankol field, at least according to Ryder Scott.¹³⁰⁹ Specifically,

¹³⁰⁵ GCA Third Expert Report, para. 52.

¹³⁰⁶ Respondent’s First Post-hearing Brief, para. 935.

¹³⁰⁷ GCA Third Expert Report, para. 52.

¹³⁰⁸ GCA Fourth Expert Report, para. 35.

¹³⁰⁹ Cf. GCA Third Expert Report, para. 51.

Ryder Scott expect 4.17 MMBbl¹³¹⁰ of its total 18.6 MMBbl estimate of recoverable reserves¹³¹¹ to be produced from the J-IA reservoir.

739 Moreover, Ryder Scott also overstate the potential for recompletions from the J-IC reservoir. In this case, the key mistake is not the assumption of a too deep oil-water contact but the assumption of a too shallow gas-oil contact, again based on the ignorance of available well data.

740 Since gas floats above oil, one of the key questions in assessing the composition of a reservoir is the depth of the gas-oil contact. Comparatively deeper gas-oil contacts entail that a reservoir is filled with more gas and less oil. Given that gas is less profitable to sell, a shallower gas-oil contact is what any operator would hope for.

741 With regard to the J-IC reservoir, Ryder Scott again ignore available well data in order to arrive at their wished for shallower gas-oil contact. For example, Ryder Scott failed to mention that the B13 well penetrating the J-IC reservoir produced for only seven months in 2005 and at a very high gas-oil ratio.¹³¹² This indicates that the well was producing from near the gas-oil-contact. Moreover, well B54 started producing at high gas-oil ratios already in 2004.¹³¹³ The operator has in fact addressed this problem, either by drilling wells to the parts of the reservoir that are significantly down dip and thus in “safe oil territory”.¹³¹⁴ Against this background, it is apparent that any recompletion potential in the reservoir is limited to gas which is however much less valuable.¹³¹⁵

742 Furthermore, Ryder Scott also shy away from checking their estimates against reality when they assess the potential of the J-IB reservoir. For this reservoir, data for the wells 31 and 52 is available and for both wells, only gas and condensate production has been recorded.¹³¹⁶ Nonetheless, Ryder Scott assume 1.5 MMBbl of oil production (nearly 10% of its total assumed oil production for Borankol) from this reservoir.¹³¹⁷ GCA are charitable when they call Ryder Scott’s estimate “*highly optimistic*”.¹³¹⁸

¹³¹⁰ Cf. GCA Third Expert Report, para. 51.

¹³¹¹ Ryder Scott Expert Report, Exhibit 5.

¹³¹² GCA Third Expert Report, para. 50.

¹³¹³ GCA Third Expert Report, para. 50.

¹³¹⁴ Cf. GCA Third Expert Report, para. 50.

¹³¹⁵ Cf. also GCA Fourth Expert Report, paras. 36 et seq.

¹³¹⁶ GCA Fourth Expert Report, para. 34.

¹³¹⁷ GCA Fourth Expert Report, para. 34.

¹³¹⁸ GCA Fourth Expert Report, para. 34.

743 Notably, in total, Ryder Scott estimate a recovery of 838 Mtonne of oil from the J-I reservoir.¹³¹⁹ This is astounding given that until July 2010, this reservoir has only produced 110 Mtonne.¹³²⁰ In other words: Ryder Scott believe that the 19 wells¹³²¹ that have been drilled into the J-I reservoir have largely been drilled too deep and that if recompleted, a much larger potential would be available. This assumption is either an apparent invention for the purposes of this arbitration or the admission that the operator KPM and Ryder Scott themselves, who provided the reservoir engineering work for Borankol until 2007,¹³²² were incompetent in targeting the better parts of the reservoir in the first place. Either way, the conclusion can only be that Ryder Scott's analysis is unreliable.

744 Incidentally, this conclusion is not least supported by the fact that there is nothing in the Ryder Scott documentation that would explain how the exact well-by-well predictions made by Ryder Scott were derived.¹³²³ As GCA note:

*“There was no evidence presented in any of the 3 DVDs to suggest that RSC had done anything more than estimate in-place volumes for each reservoir unit, and then apply an unsubstantiated recovery factor to them. From this, RSC then attributed behind pipe and undeveloped Reserves to individual wells with no apparent justification for these volumes, resulting in oil recoveries per completion that exceeded what an average well has historically produced.”*¹³²⁴

745 As a conclusion, there can be no doubt that the work performed by Ryder Scott is unreliable and not adequate to form the basis of a fair market value assessment. It is largely based on fictional recompletion potential that is not supported by the well data or production history.

“In summary, RSC depends very much on the results of its ‘independent geological and petrophysical studies’ on Borankol, which are based on a biased, and sometimes flawed, interpretation of the data, as demonstrated by GCA. GCA has not seen any example where RSC has made a conservative interpretation of the data; RSC has consistently over-estimated the oil in place by

¹³¹⁹ GCA Fourth Expert Report, para. 31.

¹³²⁰ GCA Fourth Expert Report, para. 31.

¹³²¹ Cf. GCA Fourth Expert Report, para. 31, Table 3.1.

¹³²² Project Zenith – Vendor Due Diligence by KPMG dated 29 August 2008, p.32 (**Exhibit C-69**).

¹³²³ GCA Fourth Expert Report, para. 32.

¹³²⁴ GCA Third Expert Report, para. 231.

applying hydrocarbon limits that favour oil over gas or water. RSC also appears to completely disregard the results of the well performance in assigning recoverable volumes to individual wells. The RSC forecasts cannot be considered fit for the purpose of estimating fair market value."¹³²⁵ (emphasis added)

II. Claimants' hyperbolic criticism of GCA's work is fully detached from reality

746 GCA's analysis for the Borankol field is methodologically correct and perfectly adequate for assessing the fair market value of the field. Claimants' criticism of GCA's work is factually incorrect, hyperbolic and nothing but a transparent attempt to divert attention from the shortcomings of Ryder Scott's estimates.

747 To begin with, Claimants allege that GCA underestimate the total recoverable reserves in Borankol by "10.2 MBbls".¹³²⁶ Before dealing with this number in substance, it is important to note that Claimants seem to have gotten their units wrong. Presumably, Claimants want to allege an understatement of 10.2 MMBbl, which is indeed approximately the difference between the estimates of Ryder Scott¹³²⁷ and GCA.¹³²⁸ In fact, throughout their criticism of GCA's work on Borankol, Claimants make this mistake and constantly refer to "MBbl" where "MMBbl" would be correct.¹³²⁹ The Tribunal should be mindful of this when reading Claimants' submission.

748 In substance, Claimants allegation is highly misleading. That is because it compares reserves estimates made for different valuation dates. Claimants' statement simply blames GCA for a difference of 10.2 MMBbl where in fact, part of the alleged "understatement" is simply due to the production that occurred between the valuation dates. Moreover, GCA naturally could take account of well data until their valuation date of 21 July 2010 whereas Ryder Scott could not. This can equally have

¹³²⁵ GCA Fourth Expert Report, para. 38.

¹³²⁶ Claimants' First Post-hearing Brief, para. 457 (emphasis provided).

¹³²⁷ Ryder Scott estimate recoverable reserves in the amount of 18.6 MMBbl as of 14 October 2008, cf. Ryder Scott Expert Report, Exhibit 5.

¹³²⁸ GCA estimate recoverable reserves in the amount of 8.6 MMBbl as of 21 July 2010, cf. GCA Supplemental Expert Report, Appendix II, Table AII.2.

¹³²⁹ Cf. Claimants' First Post-hearing Brief, para. 453, where Claimants incorrectly define "MBbls" to mean "million barrels". In fact, "MBbls" refers to "thousand barrels" and "MMBbls" refers to "million barrels".

an influence on the estimate made.¹³³⁰ Claimants disingenuously neglect to mention these facts.

749 Quite apart from their overall misleading allegation, the specific criticisms voiced by Claimants are equally misplaced. First of all, Claimants again complain about an alleged complete lack of documentation. In so doing, Claimants blatantly misstate the facts.¹³³¹ In particular with regard to Borankol, Claimants allege that “*the entirety of GCA’s analysis regarding its Borankol forecast in its first report is contained in four narrative paragraphs and one summary table [...]*”.¹³³² However, GCA had in fact also submitted supporting documentation with their First Expert Report, in particular two detailed spreadsheets both on estimated oil and on estimated gas production.¹³³³

750 Further, Claimants try to create an argument from the fact that GCA revised their Borankol estimate in their Supplemental Expert Report.¹³³⁴ These attempts are nonsensical. GCA explained in spades the changes it made in its methodology¹³³⁵ and the reasons for these changes.¹³³⁶ Importantly, these changes were entirely in Claimants’ favour, as the reserves were increased in the Supplemental Expert Report.¹³³⁷ When their own expert FTI had to adjust its valuation results downward, Claimants praise FTI for their changes and state that FTI “acknowledged and corrected” its errors.¹³³⁸ Claimants cannot apply another standard to GCA.

751 Further, the Republic refutes Claimants insinuation that GCA had not taken into account recompletions in their First Expert Report.¹³³⁹ GCA explained clearly that they had expected 34 recompletions in the analysis of their First Expert Report.¹³⁴⁰ This is also apparent from the fact that GCA had based their initial production profile on the Field Development Plan,¹³⁴¹ which of course provided for recompletions.¹³⁴² Moreover, Claimants had acknowledged themselves at the Hearing on Quantum that GCA had taken into account behind pipe potential in their

¹³³⁰ Testimony of Dr. Wright of GCA, Hearing on Quantum, Transcript Day 4, p.38, line 15-20.

¹³³¹ See Part IV, B.I.1 above.

¹³³² Claimants’ First Post-hearing Brief, para. 454.

¹³³³ GCA Fourth Expert Report, Appendix II.

¹³³⁴ Claimants’ First Post-hearing Brief, para. 456.

¹³³⁵ GCA Supplemental Expert Report, para. 70.

¹³³⁶ GCA Supplemental Expert Report, paras. 53 et seqq.

¹³³⁷ GCA Supplemental Expert Report, para. 71.

¹³³⁸ Claimants’ First Post-hearing Brief, para. 526.

¹³³⁹ Claimants’ First Post-hearing Brief, para. 456.

¹³⁴⁰ GCA Supplemental Expert Report, para. 70.

¹³⁴¹ GCA Expert Report, para. 47.

¹³⁴² GCA Supplemental Expert Report, para. 65.

First Expert Report.¹³⁴³ For them to insinuate anything else now is entirely disingenuous.

752 On substance, Claimants and Ryder Scott's allegations fare no better.

753 Claimants main allegation on substance is that Ryder Scott's alleged well-by-well analysis is more thorough than the type well approach applied by GCA. According to Claimants, the type well approach is too strongly dependent on historical production data which may be skewed.¹³⁴⁴ Conversely, the well-by-well approach allegedly is better able to maximise recovery.¹³⁴⁵

754 This contention is first of all untenable for the simple reason that Ryder Scott's purported well-by-well analysis ignores available well data and is therefore unsupportably optimistic. Any given method can only be as good as the input data that is chosen for it. If Ryder Scott choose to not use all available data but to turn a blind eye to well data speaking against its analysis, their results cannot be used irrespective of the method they applied.

755 Moreover, Claimants' criticism misses the mark in any event because Claimants cannot point to any specific facts that would indicate that the use of historical production would be inappropriate and would not reflect the potential of the field. The only argument Claimants present in this regard is the contention that after their valuation date, field completion and workover operations were reduced in 2009 and 2010, allegedly as a reaction to the state's purported harassment campaign.¹³⁴⁶

756 Quite apart from the fact that no such harassment campaign existed and that the state did not cause the observed reduction in the work on the field, the Republic refutes the suggestion that the reduction in any way skews the analysis based on historical production applied by GCA. As GCA explained during the expert conferencing at the Hearing on Quantum:

“But what we do believe, from our review of the individual well performance on Borankol, is that there is no indication on a well-by-well basis that after the July 2008 effective date, there was any noticeable change in the overall decline rate or performance of those wells. Because it was important for us to satisfy ourselves

¹³⁴³ Cf. Slide from Claimants' Opening Presentation at the Hearing on Quantum, depicted at Claimants' First Post-hearing Brief, para. 457.

¹³⁴⁴ Claimants' First Post-hearing Brief, paras. 459 et seqq.

¹³⁴⁵ Claimants' First Post-hearing Brief, para. 467.

¹³⁴⁶ Claimants' First Post-hearing Brief, paras. 460 et seqq.

that, working with the effective date that we did, the performance of both fields between the two effective dates was not being influenced by the actions that had been taken beyond the field development and performance of the fields themselves."¹³⁴⁷

757 In their Fourth Expert Report, GCA have expanded on this issue:

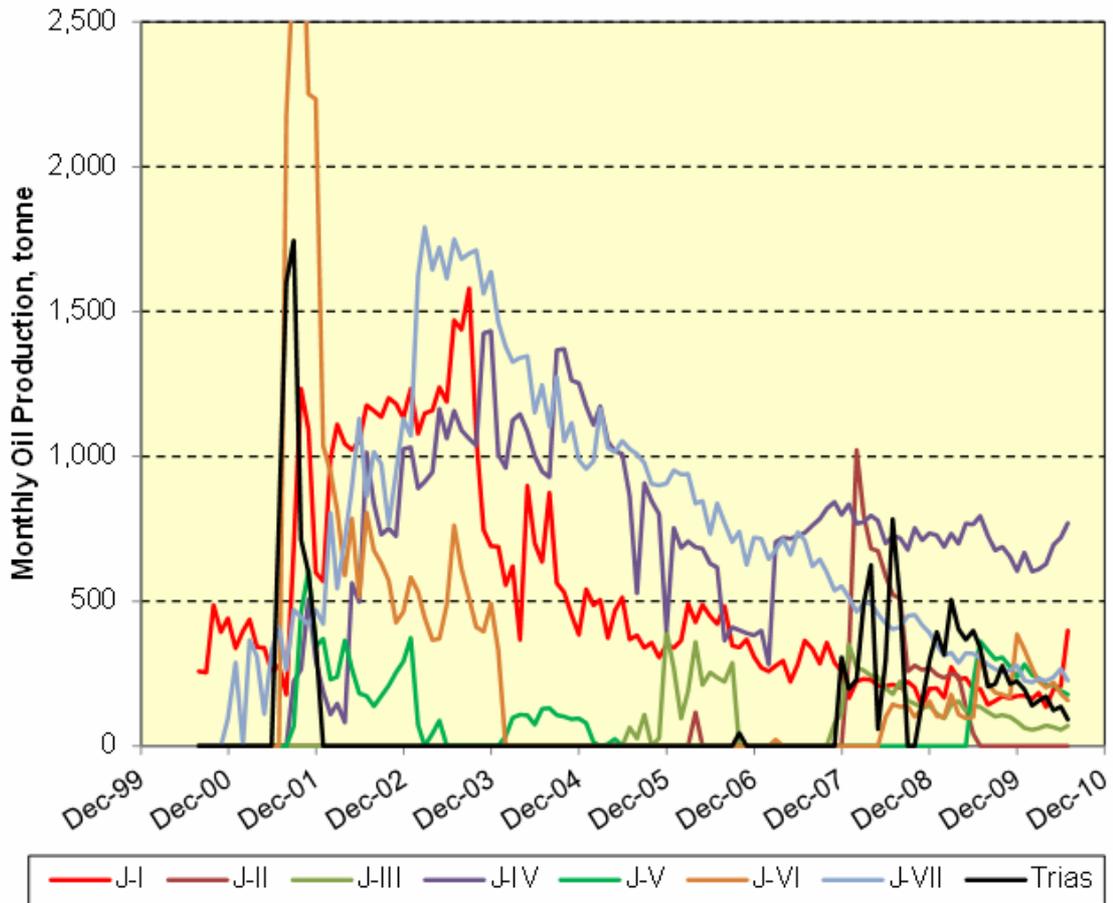
"It is normal for field production to decline following reduced drilling and recompletion activity, this is unavoidable. RSC is trying to imply that field production somehow deteriorated as a result of the reduction in drilling and recompletions. This is not the case and again demonstrates RSC's focus on selected data to attack the GCA analysis."¹³⁴⁸

758 GCA have prepared a chart showing the average well performance for each reservoir. While this chart naturally demonstrates the overall decline in average well performance with time, it also clearly shows that there is no adverse change in the decline rate after October of 2008 for any of the reservoirs. The decline simply does not get any stronger despite the curtailing in expenditure.¹³⁴⁹

¹³⁴⁷ Testimony of Mr. Goodearl of GCA, Hearing on Quantum, Transcript Day 4, p.37, line 18 - p.38, line 3. Mr. Goodearl misspoke when he referred to a July 2008 effective date. It is apparent from the context that he was referring to Claimants' October 2008 valuation date.

¹³⁴⁸ GCA Fourth Expert Report, para. 49.

¹³⁴⁹ GCA Fourth Expert Report, para. 50.



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760 There is hence no basis for Claimants to contend that average well productivity was in any way affected by a reduction of the work done on the field.¹³⁵⁰ GCA’s reliance on historical production data as of their 21 July 2010 valuation was perfectly proper. It was certainly more appropriate than Ryder Scott’s ignorance of well data that formed the basis for their fictional behind pipe potential.

761 Lastly, Claimants also voice criticism with regard to the specifics of GCA’s type well calculation, alleging, based on “analysis” by Ryder Scott, that GCA used an oil cut versus cumulative production methodology and in so doing applied the wrong water density.¹³⁵¹ According to Claimants and Ryder Scott, application of the correct water density should have led GCA to calculate a total ultimate recovery 15% higher than what GCA actually calculated.¹³⁵² This allegation is incorrect.

762 First, GCA never used the oil cut versus cumulative production method in forecasting production for Borankol.¹³⁵³ GCA had never alleged to have done so in

¹³⁵⁰ GCA Fourth Expert Report, para. 50.

¹³⁵¹ Claimants’ First Post-hearing Brief, para. 464; Ryder Scott Third Expert Report, para. 48.

¹³⁵² Claimants’ First Post-hearing Brief, para. 464; Ryder Scott Third Expert Report, para. 48.

¹³⁵³ GCA Fourth Expert Report, para. 41.

its reports or at any hearing.¹³⁵⁴ The oil-cut calculation Ryder Scott refer to was not prepared for a oil cut versus cumulative production calculation but made as part of the overall assessment of the field and included as such in GCA's working documents submitted with its reports.¹³⁵⁵

763 Moreover, Ryder Scott not only had to have a rich fantasy to assume that GCA had used the method, they in fact had to turn a blind eye to GCA's actual results. Otherwise, Ryder Scott would not have been able to criticise GCA. That is because Ryder Scott allege that if GCA had applied the calculation correctly, the total ultimate recovery¹³⁵⁶ from the Borankol field would have had to be 2.9 million tonnes instead of 2.7 million tonnes.¹³⁵⁷ However, GCA had themselves stated with their Supplemental Expert Report that the total ultimate recovery was 3.1 million tonnes.¹³⁵⁸ This proves perfectly clearly that (i) GCA have not applied the oil cut versus cumulative production methodology and (ii) that GCA made a higher ultimate recovery estimate than what Ryder Scott think GCA's estimate should be corrected to.

764 Interestingly, Ryder Scott have now provided calculations based on the oil cut versus cumulative production methodology both assuming an effective date in April 2006 and in October 2008.¹³⁵⁹ These calculations lead to a range of results of estimated ultimate recovery and GCA's estimate of 3.1 million tonnes sits comfortably in the middle thereof.¹³⁶⁰

765 In summary, Claimants' and Ryder Scott's attacks on GCA are entirely unfounded and must be disregarded as hyperbolic rhetoric rather than sound analysis.

¹³⁵⁴ GCA Fourth Expert Report, para. 41.

¹³⁵⁵ GCA Fourth Expert Report, para. 41.

¹³⁵⁶ Please note that total ultimate recovery includes actual production until the valuation date as well as estimated production thereafter.

¹³⁵⁷ Ryder Scott Third Expert Report, para. 48.

¹³⁵⁸ Ryder Scott Third Expert Report, para. 48. The total ultimate recovery assumed by GCA can be derived from the fact that as of 21 July 2010, 1.9 million tonnes of oil had been produced (GCA Expert Report, para. 44) and that GCA expected a further production of 1.2 million tonnes (GCA Supplemental Expert Report, Appendix II, Table AII.2).

¹³⁵⁹ Ryder Scott Third Expert Report, para. 49.

¹³⁶⁰ GCA Fourth Expert Report, para. 47.

G. Tolkyn valuation

766 The Tolkyn field has a value of USD 123.2 million and Claimants have not proven otherwise.

I. Claimants' arguments have already been rebutted in the Republic's First Post-hearing Brief

767 All of the arguments brought forward by Claimants in their First Post-hearing Brief have already been rebutted by the Republic in its First Post-hearing Brief and the Republic therefore fully refers to its discussion of the Tolkyn field there.¹³⁶¹

768 Claimants' valuation is primarily overstated for the assumption of completely unrealistic gas prices¹³⁶² and the unjustifiably early valuation date.¹³⁶³ In their discussion of the Tolkyn field, Claimants focus on the capital expenditure which is the third pillar of Claimants' overstatement of the value of the Tolkyn field. In summary, Claimants allege that GCA had included a "*front-loaded*" capital expenditure for compression "*based primarily*" on the fact that the field development plan (FDP) contemplated the installation for compression in 2012 and that the FDP had become obsolete.¹³⁶⁴

769 Claimants' argumentation is typically unfounded. They allege that GCA had based its assumption "*primarily*" on the FDP - apparently because they think this is an argument that they can rebut - but GCA never stated that it based its assumption primarily on the FDP. The bulk of Claimants' discussion of the Tolkyn field, their discussion as to why the FDP had become obsolete and why GCA was allegedly "*cherry picking*"¹³⁶⁵ is therefore nothing but shadow boxing. It is irrelevant.

770 What Claimants cannot rebut is GCA's true argument that they primarily assumed that compression would be necessary due to the decline of the flowing well head pressures on many of the wells. GCA never made a secret of the reasons for the need for compression. If Claimants thought that GCA had based their opinion merely on the FDP, they appear to have failed to listen to Mr. Goodearl's testimony at the

¹³⁶¹ Respondent's First Post-hearing Brief, paras. 940-972.

¹³⁶² See Part IV, C. above.

¹³⁶³ See Part IV, M.I..

¹³⁶⁴ Claimants' First Post-hearing Brief, para. 472-474.

¹³⁶⁵ Claimants' First Post-hearing Brief, para. 472-474.

Hearing on Quantum¹³⁶⁶ and they have failed to read GCA's Supplemental Expert Report, which expressly states:

*"...the need for compression is required due to the declining flowing well head pressures on many of the wells..."*¹³⁶⁷

771 Claimants then disingenuously state that GCA's "fall back-position" was that "some compression will be required at some point in time."¹³⁶⁸ This is completely false and unsurprisingly Claimants provide no reference for this allegation. Rather, GCA have been very firm on the point that in order to maintain the projected production, compression would need to be installed by 2011/2012.¹³⁶⁹ Again, Claimants criticise GCA for statements they have never made.

772 Finally, in order to whitewash their lack of arguments, Claimants allege that GCA "conceded" in the Quantum Hearing that one would not install compression because the most productive wells allegedly did not need any pressure support.¹³⁷⁰ Of course, GCA did not concede any of this.

773 Mr. Goodearl simply stated that he agreed with Mr. Latham that as at July 2010 "there were relatively fewer of those which were approaching the wellhead pressure limits."¹³⁷¹ This does not at all imply that compression was not necessary. Ryder Scott's and Claimants' principal flaw is that they look at the well head pressure from a static, not a dynamic point of view. They therefore fail to or do not want to understand the need for the installation for compression as GCA highlight:

"RSC focuses on only a single point in time (in this instance May, 2010), without looking at the trends in rates and pressures. This approach is in line with RSC's selective use of the data, as observed in other instances, but it is certainly not sound methodology. This issue is much better addressed by GCA in Figure 3.1 (para 35) of its Third Report, which is unequivocal and demonstrates the decline in flowing wellhead pressures on all wells in Tolwyn, up to the GCA effective date of July, 2010. Pressure and production data beyond this effective date confirm this continuing decline. These data also confirm that, based on

¹³⁶⁶ Testimony of Mr. Goodearl of GCA, Hearing on Quantum, Transcript Day 3, p.250, line 22 - p.251, line 5.

¹³⁶⁷ GCA Supplemental Technical Report, para. 26.

¹³⁶⁸ Claimants' First Post-hearing Brief, para. 475.

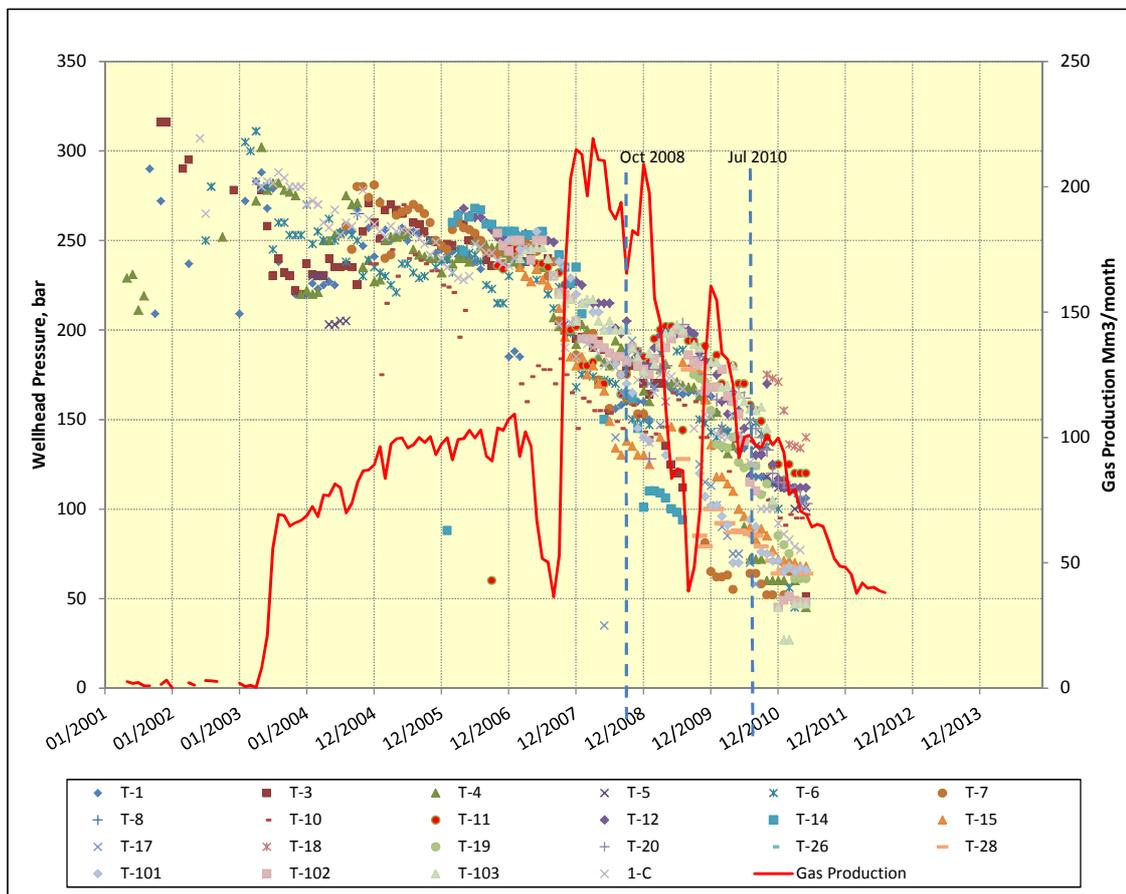
¹³⁶⁹ Testimony of Mr. Goodearl, Hearing on Quantum, Day 4, p. 7, lines 14-19.

¹³⁷⁰ Claimants' First Post-hearing Brief, para. 475-476.

¹³⁷¹ Testimony of Mr. Goodearl, Hearing on Quantum, Day 4, p. 6, line 23 - p. 7, line 3.

historical gas rates, none of the wells would have been able to sustain the necessary flowing wellhead pressures beyond the end of 2013 without compression. It is clearly misleading to look at the pressures and rates only at a single point in time, as RSC has done. **The situation is dynamic, not static.**¹³⁷² (emphasis added)

774 Ryder Scott assert that the fact that no compression was installed on the Tolkyne field supported their position that compression was not necessary.¹³⁷³ The opposite is true.¹³⁷⁴ The actual development of the production **without** compression clearly indicates that it would have been necessary to install compression. Without compression, “the gas production has declined far below the levels forecasted by both GCA and RSC.”¹³⁷⁵ The decline of the flowing well head pressure as well as the decline of the production is depicted in the following figure:¹³⁷⁶



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¹³⁷² GCA Fourth Expert Report, para. 17.
¹³⁷³ Ryder Scott Third Expert Report, para. 45.
¹³⁷⁴ See also Respondent’s First Post-hearing Brief, paras. 970-971.
¹³⁷⁵ GCA Fourth Expert Report, para. 21.
¹³⁷⁶ GCA Fourth Expert Report, Figure 2.1, p.4.

- 776 The plot also leaves no doubt that the need for compression was already foreseeable at Claimants' valuation date.¹³⁷⁷
- 777 The Republic also explained the decline in the flowing well head pressures and why this necessitates the installation of compression in some detail at the Final Hearing.¹³⁷⁸ Unsurprisingly, Claimants had nothing to respond to this in their Rebuttal Closing Presentation.
- 778 Further, Claimants remain to provide no own opinion on what the costs for the compression would be. In Ryder Scott typical fashion, they simply allege that GCA had not provided any support for the assumption of USD 40 million.¹³⁷⁹
- 779 Given Ryder Scott's failure to address the costs for the compression in their first two reports and their refusal to answer questions regarding the costs for compression in the Hearing on Quantum,¹³⁸⁰ it is surprising for Ryder Scott to address costs at all. It is their only comment, and indeed Claimants' only comment regarding the costs for compression in these proceedings, and it is wrong. Already in support of their First Expert Report, GCA provided a detailed cost estimate.¹³⁸¹ Again, Claimants' and Ryder Scott's attempt to avoid discussions on the substance by alleging again and again that GCA had not provided supporting documents is futile.¹³⁸²
- 780 Finally, Claimants' opposition to the installation of compression is highly contradictory because they themselves assumed that infrastructure capital expenditure, not in the amount of USD 40 million but even in the amount of about USD 65 million over the years from 2010 until 2012 would be necessary for the Tolwyn field.¹³⁸³ It appears highly likely that these USD 65 million were intended for the installation of compression but at the end of the day, it hardly matters.
- 781 Claimants themselves assumed USD 65 million in infrastructure capital expenditure for the Tolwyn field during the years 2010 - 2012 when they were still operating the

¹³⁷⁷ See also Respondent's First Post-hearing Brief, paras. 962-964.

¹³⁷⁸ Respondent's Closing Presentation, Final Hearing, Day 1, p. 242, line 14 - p. 243, line 17.

¹³⁷⁹ Ryder Scott Third Expert Report, para. 45.

¹³⁸⁰ When asked to comment on Mr. Wood's answer to Profesor Lebedev's question regarding the quantification of the compression, Mr. Latham delved into a lengthy answer that did not address the costs at all, Testimony of Mr. Latham of Ryder Scott, Hearing on Quantum, Transcript Day 4, p.5, line 6 - p.6, line 17; see also Respondent's First Post-hearing Brief, para. 972.

¹³⁸¹ See GCA Fourth Expert Report, paras. 22-23.

¹³⁸² The same is true for Ryder Scott's allegation that GCA had provided no support for their production estimates, Third Report, para. 41. In Appendix II to their Fourth Report, GCA specify the documents that they provided in support of their production estimates.

¹³⁸³ Miller & Lents in their 2009 report Attachment 5 applied capital expenditure in the amount of USD 65 million and at p. 5 of the report they explicitly state that the forecasts for the infrastructure ws provided by Tristan, Miller Lents Report 2009 (**Exhibit R-349**); See also Respondent's First Post-hearing Brief, paras. 964-969.

fields but now fiercely oppose USD 40 million of capital expenditure as assumed by GCA and subsequently Deloitte GmbH. They failed to provide **any** justification for why they ask their experts in these proceedings to apply zero costs for infrastructure for the Tolwyn field¹³⁸⁴ but as the operator of the fields still assumed infrastructure costs in the amount of USD 65 million.

II. The RBS valuation supports Deloitte GmbH's valuation of USD 123.2 million

782 When Claimants endorse the RBS valuation, they look at the total value assumed by RBS but they fail to look at the individual values attributed to the individual assets¹³⁸⁵ and it is obvious why: The only asset that brings the RBS valuation anywhere near the FTI valuation is RBS' valuation of the Tolwyn field. However, at a closer look even RBS' valuation of the Tolwyn field does not support the FTI valuation.

783 In their First Post-hearing Brief and in their presentations at the Final Hearing, Claimants again and again purported that the Republic's arguments should not be considered¹³⁸⁶ and that the Republic should not even be able to comment¹³⁸⁷ or speak¹³⁸⁸ on the RBS report. Claimants do not want the Republic to comment on this report because they are afraid. They are afraid of a discussion that does not just look at the total value attributed to the assets by RBS - which Claimants appear to like - but that looks at what RBS actually did in arriving at the individual values.

784 Upon a closer look, it is revealed that even the RBS valuation of the Tolwyn field supports Deloitte GmbH's assessment, rather than FTI's one.

785 In the so called "KMG EP Base Case scenario", RBS assumed a value of USD 327 million for the Tolwyn field to which it added USD 200 million for 80% export

¹³⁸⁴ The fact that FTI assumed zero infrastructure capital expenditure for Tolwyn can be deducted from the exhibits FTI provided as backup for its DCF valuation of the field. These show that FTI assumed capital expenditure of USD 6.3 million in 2008 and USD 12.6 million in 2009; no further capital expenditure was foreseen in the following years, cf. FTI Consulting Supplementan Expert Report, Exhibit 3. It can be concluded that this capital expenditure was entirely for well drilling, as FTI assume the cost of deep Tolwyn wells to be USD 6.3 million, cf. FTI Consulting Expert Report, para. 12.8. FTI thus assumed one deep well to be drilled in 2008 and two deep wells to be drilled in 2009, with no infrastructure being foreseen.

¹³⁸⁵ Claimants' First Post-hearing Brief, para. 515; Claimants' Closing Presentation, Final Hearing, Day 1, p. 184, line 9 - p. 185, line 8.

¹³⁸⁶ Claimants' First Post-hearing Brief, para. 585

¹³⁸⁷ Claimants' Closing Presentation, Final Hearing, Day 1, p. 183, lines 17-23.

¹³⁸⁸ Claimants' Rebuttal Closing Presentation, Final Hearing, Day 2, p. 11, lines 2-3.

sales.¹³⁸⁹ This can be seen in the following table from the Second Supplemental GmbH Report¹³⁹⁰:

Valuation of the individual Assets

Value in US\$ mln	RBS	FTI	Deloitte
Borankol ^(a)	19	197	63
Tolkyn ^(a)	327	479	123
80% export sales (for Borankol and Tolkyn)	200	n/a	n/a
LPG Plant	67	245	-
Working Capital	(1)	-	-
Subtotal	612	921	186
Contract 302	n/a	1,639	-
Total Value	612	2,560	186

(a) The values of RBS for the Borankol and Tolkyn fields are based on domestic gas sales only.

786 Source: RBS Report, FTI Update Note, Third FTI Report, Deloitte Supplemental Report

787 Therefore, there are two pivotal questions: How does RBS arrive at the value of USD 327 million? And why does it add USD 200 million for the export of gas?

1. RBS' assessment of the value of USD 327 million is based on highly overstated liquids production estimates from Miller & Lents

788 It is undisputed and acknowledged by both FTI and Deloitte GmbH that RBS applied the production estimates from the Miller & Lents 2009 report to arrive at its asset value.¹³⁹¹

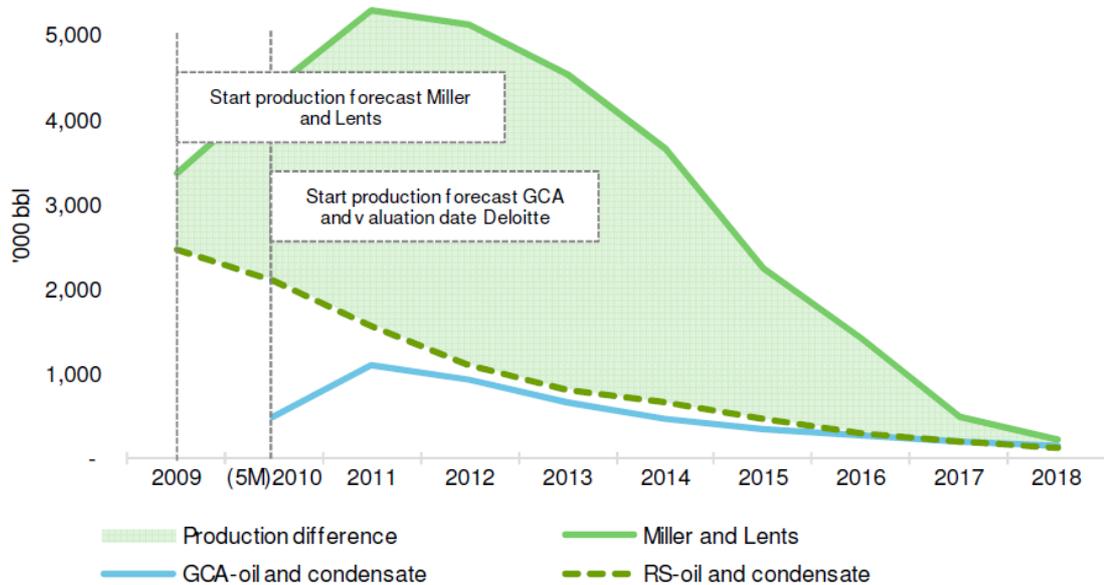
789 The Miller & Lents Report differs significantly from both Ryder Scott's and GCA's reports in one decisive aspect: It assumes an aggregate oil and condensate production that dramatically exceeds both experts' assumptions. The following chart graphically displays this decisive difference:

¹³⁸⁹ The amount of USD 200 million includes income from the sale of gas from Borankol. The amount of gas from Borankol, however is not material and can therefore be neglected for this illustrative calculation.

¹³⁹⁰ Deloitte & Touche Second Supplemental Report, Table 2, p. 25.

¹³⁹¹ FTI Third Expert Report, para. 3.4; Deloitte & Touche Second Supplemental Report, paras. 61 et seqq.

Tolkyn oil and condensate production



Source: Miller and Lents, GCA, Ryder Scott

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791 Naturally, the estimate of recoverable liquids has a huge impact on the valuation of a field that is mainly gas bearing as liquids are sold at much higher prices than gas.¹³⁹² Because the RBS Report does not include sources and reasoning and it does not contain sufficiently detailed exhibits which would allow verifying the reported results, Deloitte GmbH could not rebuild RBS model and insert Ryder Scott's or GCA's estimates into RBS' model to exactly quantify the impact of the overstated liquids estimates.¹³⁹³

792 To assess the impact of these grossly overstated liquids assumptions, Deloitte GmbH did however recalculate its own DCF model with the higher production projection from Miller & Lents. Had Deloitte GmbH assumed Miller & Lents' production projection instead of GCA's one, it would have arrived at an asset value of USD 326.2 million instead of USD 123.2 million. This means that the overstated production estimates from Miller & Lents account for **a difference of USD 203 million**. Had Deloitte GmbH also used RBS' valuation date, its calculated asset value would even have been USD 369.5 million. This is depicted in the following table:¹³⁹⁴

¹³⁹² See also Respondent's First Post-hearing Brief, para. 994.

¹³⁹³ Deloitte & Touche Second Supplemental Report, para. 49 and para. 68.

¹³⁹⁴ Deloitte & Touche Second Supplemental Report, Table 4, p.27.

Tolkyn field - Asset Value in US\$ mln

	Production		Variance
	Deloitte based on GCA	RBS based on Miller and Lents	
Deloitte valuation date	123.2	326.2	203.0
RBS valuation date		369.5	
Variance		43.3	246.3

793 Source: Deloitte analysis.

794 The table shows the following: If Deloitte GmbH had applied the Miller & Lents production estimate and RBS' valuation date, its asset value would have been USD 246.3 million higher than the true asset value of USD 123.2 million as at 21 July 2010 and even USD 43.3 million higher than the asset value calculated by RBS.

795 Hence, it can be assumed that if RBS had applied the production estimates of GCA, they would have arrived at a value of the Tolkyn field below the USD 123.2 million as calculated by Deloitte GmbH.

796 Similarly, had RBS applied Ryder Scott's production estimates, the value would be expected to fall materially below FTI's Tolkyn value.¹³⁹⁵

797 This demonstrates how great the impact of Miller & Lents' wrong liquids estimates is. And it should be reiterated that it is undisputed that Miller & Lents' liquids estimates are highly overstated because they are even three times higher than the Ryder Scott estimates.¹³⁹⁶

2. RBS "uplift" by USD 200 million is based on synergy effect

798 As explained above, RBS add USD 200 million to the Tolkyn value for the assumption that 80% of the gas would be exported. However, it is obvious from the RBS report that RBS did not assume that TNG and KPM themselves would have been able to export 80% of the gas.

799 The Republic has explained in detail why TNG and KPM at Claimants' valuation date and later could not be expect to be exporting gas.¹³⁹⁷ RBS agree with this. The report explicitly states that on a stand-alone basis, KPM and TNG could only sell gas at domestic prices. Slides 40 and 41 contain the unequivocal statement:

¹³⁹⁵ Deloitte & Touche Second Supplemental Report, para. 68.

¹³⁹⁶ See Respondent's First Post-hearing Brief, para. 993-994.

¹³⁹⁷ See Part IV, C. above,

*“Stand-alone EV is Base Case Scenario based on 100% domestic gas sales.”*¹³⁹⁸

800 RBS only assumed - as a second step - an export portion of 80% based on the assumption that KMG EP would buy the assets and thus would benefit from the synergy effects of a major oil and gas producer in Kazakhstan.¹³⁹⁹

801 Deloitte GmbH explain this with the following words:

“As it is stated on slides 40 and 41 of the Draft RBS Report, RBS included synergy effects that appear to result primarily from the possibility of exporting natural gas at certain export prices. RBS specifically states that on a stand-alone basis, KPM and TNG could only sell gas at lower domestic prices.

Thus, RBS did not value the Assets (excluding the Contract 302 Properties) from the perspective of the Claimants, who intend to demonstrate what that they have lost through alleged actions of the republic to substantiate their claim for damages.

*Instead, RBS valued the Assets including earnings potentials which are not inherent to KPM and TNG on a stand-alone basis. They might be created by KMG when integrating KPM and TNG into the KMG group and potentially restructure the business.”*¹⁴⁰⁰

802 This shows that when valuating the Tolkyn field for Claimants, one must not assume the export of gas¹⁴⁰¹ and therefore RBS would not have added USD 200 million for the export of gas. What remains is the stand-alone value of USD 327 million that is overstated by roughly USD 200 million due to overstated estimates of available liquids.

¹³⁹⁸ RBS Valuation Report dated 31 July 2009, p.40, 41 (**Exhibit R-374**).

¹³⁹⁹ *Ibid.*

¹⁴⁰⁰ Deloitte & Touche Second Supplemental Report, paras. 52-54.

¹⁴⁰¹ If Claimants had seriously wanted to apply export prices, they would have needed to demonstrate that as at their valuation date there was a buyer who would have been able to export gas, who would have been willing to also increase his price accordingly, who had been determined to buy the assets but was deterred by the Republic. Claimants have not even attempted to prove this and any such proof would have been impossible because such a situation did not exist.

H. Third-party assessments of KPM's and TNG's value

803 In the present case, there are numerous instances of third parties opining on the value of KPM and TNG. Notably, the available third-party assessments are mostly supportive of the Republic's valuation. Where some assessments are less supportive, there are numerous facts which demonstrate that these assessments are entirely unreliable.

I. Indicative bids during the first phase of Project Zenith

804 In its earlier submissions,¹⁴⁰² the Republic has already demonstrated that the indicative bids during the first phase of Project Zenith in the fall of 2008

- (a) were overstated for various reasons; and
- (b) do not support Claimants' and FTI's valuation suggestions even if taken at face value.

805 The overstatement stems from a combination of factors, in particular that

- (a) strategic considerations led the bidders to bid more than they considered adequate to the actual value;¹⁴⁰³
- (b) Renaissance Capital pushed the bids upwards by threatening to deny access to the data room;¹⁴⁰⁴ and
- (c) the bidders relied on a statement in the Information Memorandum that there were negotiations with KazAzot and KazTransGas for higher netback prices without independently assessing the viability of these negotiations;¹⁴⁰⁵

806 In addition, it should be noted that the indicative bids were based on the reserves estimates in the 2008 Miller & Lents Report which were massively overstated compared to the estimates provided by both Ryder Scott and GCA in this

¹⁴⁰² Respondent's First Post-hearing Brief, paras. 976 et seqq.; Respondent's Rejoinder on Quantum, paras. 448 et seqq.; Respondent's Rejoinder on Jurisdiction and Liability, paras. 778 et seqq.

¹⁴⁰³ Respondent's First Post-hearing Brief, paras. 976 et seq., 983; Respondent's Rejoinder on Jurisdiction and Liability, para. 780.

¹⁴⁰⁴ Respondent's First Post-hearing Brief, paras. 978 et seq., 983; Respondent's Rejoinder on Jurisdiction and Liability, para. 781; Respondent's Rejoinder on Quantum, para. 468 et seqq.

¹⁴⁰⁵ Respondent's First Post-hearing Brief, paras. 980 et seq., 983; Respondent's Rejoinder on Quantum, para. 463 et seqq.

arbitration.¹⁴⁰⁶ The 2008 Miller & Lents Report provided for 2P reserves of 141.3 mmboe.¹⁴⁰⁷ Even Ryder Scott estimated 2P reserves of only 97.7 mmboe as of their valuation date.¹⁴⁰⁸ Assuming the highly overstated Ryder Scott estimates were correct, the indicative bids would thus still be based on a reserves report which overstated 2P reserves by further 40%. Importantly, the overstatement related primarily to the estimates for valuable liquids production from the Tolkyne field.¹⁴⁰⁹

807 Moreover, the fact that even taken at face value, the bids do not support Claimants' and FTI's valuation suggestions, can be demonstrated from a simple look at the average of the bids. For both the LPG Plant and the Borankol field, it can be demonstrated easily that the average of the already overstated bids was significantly below the values suggested by FTI and now claimed by Claimants.¹⁴¹⁰

808 In their First Post-hearing Brief¹⁴¹¹ and at the Hearing on 2 May 2013,¹⁴¹² Claimants continued to allude to the indicative bids without addressing the facts outlined above. This non-responsiveness to Respondent's arguments speaks volumes about how serious Claimants' reliance on the indicative bids can be taken.

II. The KMG EP Due Diligence

809 A valuation of which Claimants make much ado is the KMG EP and RBS valuation. They call it an "*elephant in the room*"¹⁴¹³ or "*devastating -- devastating --*".¹⁴¹⁴ At closer sight, it is simply another valuation that supports Deloitte GmbH's work.

810 Before looking at the details of this valuation and how it corroborates Deloitte GmbH's reports, a few explanations on its background are necessary. Notably, there are several important differences compared to Deloitte GmbH's (and FTI's) reports which need to be kept in mind. First of all, the KMG EP and RBS valuation is only a draft report. Moreover, it focuses on what the assets would be worth if added to KMG EP's portfolio, not if owned by Claimants. It contains neither sources,

¹⁴⁰⁶ Respondent's Rebuttal Closing Submission dated 3 May 2013, Slide 34.

¹⁴⁰⁷ KMG EP Presentation of September 2008, p.5, 7 (**Exhibit C-722**).

¹⁴⁰⁸ Deloitte & Touche Supplemental Expert Report, fn. 38.

¹⁴⁰⁹ The 2008 Miller & Lents Report provided for 26.046 MMBbl of remaining 2P liquids production on the Tolkyne field as of 1 January 2008 cf. Miller Lents Report 2008 (**Exhibit R-348**). The Ryder Scott Report foresees only 10.283 MMBbl of liquids production on the Tolkyne field as of 14 October 2008, cf. Ryder Scott Expert Report, Exhibit 7.

¹⁴¹⁰ Respondent's First Post-hearing Brief, para. 984.

¹⁴¹¹ Claimants' First Post-hearing Brief, paras. 519, 522.

¹⁴¹² Claimants' Closing Submission, Final Hearing, Transcript Day 1, p.131, lines 6-14.

¹⁴¹³ Claimants' Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.8, lines 11-13.

¹⁴¹⁴ Claimants' Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.9, lines 6-9.

reasoning nor sufficiently detailed exhibits. It is based on a valuation date that does not correspond to the legal considerations that apply in this arbitration. It is based on a reserves report that in material aspects is grossly overstated both in comparison to GCA's and Ryder Scott's¹⁴¹⁵ reports. Finally, numerous inconsistencies can be found in the RBS Report.¹⁴¹⁶ Provided that these caveats are observed, the RBS Report may serve the Tribunal to verify Deloitte GmbH's valuation work.

1. The RBS valuation includes synergy effects

811 A crucial aspect that needs to be observed is that the RBS valuation includes synergy effect. This becomes apparent when looking at RBS' assumption regarding gas sales. As explained above, RBS in a first step determined the value of Tolkyn and Borankol by assuming that 100% of the gas would be sold domestically.¹⁴¹⁷ They state unequivocally:

*“Stand-alone EV is Base Case Scenario based on 100% domestic gas sales.”*¹⁴¹⁸

812 This stand-alone enterprise value can be considered to be the inherent value of that the assets, i.e. the value they would have had for Claimants as the operators of only two single fields in Kazakhstan.

813 Only in a second step, RBS introduced an export portion of 80% to account for the synergy effects that would exist if the assets had been added to KMG EP's large portfolio of assets in Kazakhstan.¹⁴¹⁹

814 This is an approach that – correctly – neither Deloitte GmbH nor FTI took for the purposes of the valuation in these proceedings. They both looked at the inherent value of the assets, not the potential synergy effects that may or may not occur if the assets had been merged into the portfolio of one of the biggest oil and gas producers in Kazakhstan.

815 The following table¹⁴²⁰ contains RBS' stand-alone enterprise value, i.e. the value that the assets would have had for Claimants as at 1 October 2009 and how they compare to FTI's and Deloitte GmbH's numbers:

¹⁴¹⁵ See Part IV, G.I. above.

¹⁴¹⁶ See Deloitte & Touche Second Supplemental Expert Report, paras. 49-50.

¹⁴¹⁷ See Part IV, G.II. above.

¹⁴¹⁸ RBS Valuation Report dated 31 July 2009, p.40, 41 (**Exhibit R-374**).

¹⁴¹⁹ See Deloitte & Touche Second Supplemental Expert Report, paras. 51-53 and Part IV.G.II.2 above.

¹⁴²⁰ Deloitte & Touche Second Supplemental Expert Report, Table 3, p.26.

Valuation of the individual Assets

Value in US\$ mln	RBS ^(a)	FTI	Deloitte
Borankol	19	197	63
Tolkyn	327	479	123
LPG Plant	37	245	-
Working Capital	(1)	-	-
Unexplained difference	3	-	-
Subtotal	415	921	186
Contract 302	n/a	1,639	-
Total Value	415	2,560	186

(a) Value of KPM and TNG on a stand-alone basis. The aggregated value of the individual assets deviates from the total stand-alone Enterprise value by US\$ 3 mln which is added to the total value.

816

817 It is obvious that even disregarding the Contract No. 302 valuation for a moment, the figure that is comparable to FTI's and Deloitte GmbH's valuation, i.e. the stand-alone value, is less than half the value attributed to the assets by FTI.

818 As explained in some detail above,¹⁴²¹ the stand-alone value of USD 415 million would still be incomparable to the USD 921 million (without Contract No. 302) or the USD 2,560 million (with Contract No. 302) as assumed by FTI. This is because RBS hugely overstated the value of the Tolkyn field due to the wrong underlying data from Miller & Lents. This data assumed recoverable liquids that exceed the assumptions of both Ryder Scott and GCA many times over.

819 The Republic highlighted that this wrong assumption is likely to account for a very substantial difference. If Deloitte GmbH had assumed Miller & Lents' numbers – which again are undisputedly overstated – their valuation of the Tolkyn field would have been higher by about USD 200 million.¹⁴²²

820 Hence, the RBS' stand-alone valuation if adjusted for the wrong assumptions by Miller & Lents can be assumed to be in the order of roughly USD 200 million.

2. RBS' individual values support Deloitte GmbH's work

821 In their discussion of the RBS' valuation, Claimants look at the total value assumed by RBS. Naturally, they simply endorse the aggregated values that RBS calculated for KMG EP instead of even mentioning the stand-alone values. Focussing on the values which include synergy effects may have been appropriate for KMG EP when

¹⁴²¹ See Part IV.G.II.1.

¹⁴²² See Part IV.G.II.1 and Deloitte & Touche Second Supplemental Expert Report, para. 62.

it considered a potential take-over but it is not appropriate for a valuation in this case.

822 What Claimants completely fail to do is to look at the values attributed to the individual assets.¹⁴²³ It is obvious why:

823 The only asset value which Claimants like is RBS' valuation of the Tolwyn field. As has been demonstrated above, even the stand-alone value of Tolwyn of USD 327 million (which already is USD 150 million less than FTI's value) is hugely overstated in the region of USD 200 million because it is based on liquids estimates, which according to both Ryder Scott and GCA are simply wrong.¹⁴²⁴ Had RBS assumed GCA's production estimates they would therefore most likely have arrived at an asset value very close to the USD 123.2 million assumed by Deloitte GmbH. Claimants should not be allowed to ignore this vital point by focussing on the aggregated asset values.

824 With regard to Borankol, Claimants simply state that it was "*fairly evident that the RBS valuation erred on the low side*" because even Deloitte GmbH assumed a higher value for the field.¹⁴²⁵ And this is all Claimants have to say about why the Tribunal should rather believe their own inflated valuation of USD 197 million instead of RBS' valuation of USD 19 million. Claimants' selective use of the RBS' valuation could not have been made more obvious.

825 With regard to the LPG Plant, Claimants stress that RBS' assumption of third party gas allegedly destroyed one of the pillars of Deloitte GmbH's valuation.¹⁴²⁶ As highlighted above, Claimants have failed to provide evidence of **any** third party supplier that could have contributed substantial amounts of gas to avoid the shut-down of the plant after only four years of operation.¹⁴²⁷

826 When RBS assume the availability of third party gas, this may have been due to a number of reasons, none of which are indicated in the RBS report. The RBS report also does not mention any specific field that could have served as a third party gas source. As stated above,¹⁴²⁸ it may have been that KMG EP had fields of their own in further distance that it considered as potential sources because it may be

¹⁴²³ Claimants' First Post-hearing Brief, para. 515; Claimants' Closing Presentation, Final Hearing, Transcript Day 1, p.184, line 9 - p.185, line 8.

¹⁴²⁴ See Part IV, G. above.

¹⁴²⁵ Claimants' First Post-hearing Brief, para. 516.

¹⁴²⁶ Claimants' First Post-hearing Brief, para. 514.

¹⁴²⁷ See Part IV, E.III.3.

¹⁴²⁸ See Part IV, E.III.3.

economical to transport gas from KMG EP’s own fields for longer distances while it may be uneconomical to do so if the field is operated by an unrelated party that also wants to make a profit. On the other hand, it is also possible that KMG EP simply were interested in the **potential** value of the LPG Plant if one were to assume full utilization.

827 What is however obvious from the RBS report are the values that RBS attributed even under the assumption that third party gas was available. These values are nowhere near the costs that TNG allegedly incurred for constructing the plant and they are even further from FTI’s “prospective value”. RBS’ values for the LPG Plant are summarised in the following table:¹⁴²⁹

Table 5

Overview of the LPG Plant valuation in the RBS Report

LPG Plant US\$ mln	KMG EP Base Case Scenario			KMG EP Base Case Scenario (Special Case)		
	Bottom	Top	Average	Bottom	Top	Average
Low Case	11	51	31	(26)	10	(8)
Base Case	47	86	67	(22)	15	(4)
High Case	107	146	127	5	24	15

828 Source: RBS Report, pages 34 and 35.

829 FTI state that RBS used the average of the base set in each case as its primary valuation conclusion.¹⁴³⁰

830 In its average base case, RBS attributed a value of USD 67 million to the LPG Plant and in its average special case scenario, the value was even negative by USD 4 million. The reason is that the special cases assume high gas prices and it would therefore be uneconomical to even subtract the LPG from the gas.

831 Hence, RBS even when taking third party gas into account only arrives at a value of **minus USD 4 million** to **USD 67 million** for the LPG Plant. RBS therefore also support the Republic’s assumption that by deciding to construct an LPG Plant, Claimants made a fatally wrong decision. Applying RBS’ values, Claimants invested USD 245 million to create an asset that either had negative value or a value of only USD 67 million so that they would have lost between USD 245 million and USD 178 million as a result of their decision to build an LPG Plant.

832 Claimants’ reliance on the RBS report on the one hand and their opposition to the depiction of the LPG Plant as a failed project on the other hand is therefore highly disingenuous.

¹⁴²⁹ Deloitte & Touche Second Supplemental Expert Report, Table 5, p.28.

¹⁴³⁰ FTI Third Expert Report, para. 3.14.

833 With regard to the Contract No. 302 Properties, the Republic has already pointed out that the RBS Report does not provide any value for any of the Contract 302 Properties even though it describes the Tabyl Block, i.e. the Contract No. 302 area, as one of TNG’s assets.¹⁴³¹ This is in line with the statement by Mr. Suleimenov of KMG EP who explained that KMG EP

“[n]ever thought that Tabyl was worth more than zero.”¹⁴³²

834 In short, RBS did not even consider it worthwhile valuing the properties for which Claimants demand about USD 1.5 billion in damages due to loss of opportunity and KMG EP assumed that they did not have any value.

3. Claimants cannot explain the difference in valuation of RBS and FTI with different market conditions and actions of the Republic

835 At the Final Hearing, Claimants sought to convince the Tribunal that the RBS report was “*devastating -- devastating*” for the Republic because it allegedly “*fully accounted for*

- (a) *the impact of all of the market factors that are outlined in the PricewaterhouseCoopers report (...)*
- (b) *All of the effects of the global financial collapse.*
- (c) *The effect of a year of additional production from the fields of KPM and TNG.*
- (d) *The effect of the watering of the fields (...)*
- (e) *The effect of the additional cost of compression that would have to be required, again according to Gaffney Cline.*
- (f) *The effect of the lower reserves estimates in the Miller Lents report that was dated April 2009.”¹⁴³³*

836 This, it appears, is supposed to explain the differences in value between RBS and FTI. To put this into proportion, the actual difference is that RBS in its average base case scenario on a stand-alone basis assumed a total asset value of USD 415 million and if the overstated liquids assumption were corrected, the value would be in the range of USD 200 million. FTI on the other hand assumed a total value of

¹⁴³¹ Respondent’s First Post-hearing Brief, paras. 988-989.

¹⁴³² Witness Statement of Mr. Suleimenov, para. 2.14.

¹⁴³³ Claimants’ Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.10 lines 1-15.

USD 921 million excluding the Contract No. 302 Properties and USD 2,560 million including the Contract No. 302 Properties.

837 In addition none of the factors mentioned by counsel for Claimants seriously depressed RBS' valuation, to the contrary:

- (a) The PwC report identified the delay of settlement for oil and condensate sales receivables from KPM's and TNG's affiliate Montvale and to a lesser extent declining demand for gas as the reasons for Claimants' cash deficits.¹⁴³⁴ It is not apparent how any of this should have affected RBS' valuation. RBS simply applied the production estimates from Miller & Lents irrespective of whether there was a market for the hydrocarbons. Neither could Montvale's late payment have affected RBS' valuation.
- (b) By "*all of the effects of the global financial crisis*", counsel for Claimants may have meant the drop of prices and increasing cost of acquiring capital. However, the drop in prices from 14 October 2008 to 31 July 2009 was rather insignificant. The Brent crude oil price decreased by 6% and the Urals crude oil price by 2% only.¹⁴³⁵ Regarding the costs of capital, RBS applied a Weighted Average Cost of Capital (WACC) of 15% which is even **lower** than that applied by FTI.¹⁴³⁶
- (c) Effects of one additional year of production cannot serve to downplay differences in value between RBS and FTI either. RBS based its valuation on 2P reserves in the total amount of 105 mmboe,¹⁴³⁷ while FTI based its valuation on 2P reserves in the total amount of 97.7 mmboe.¹⁴³⁸ The reserves used by RBS were therefore larger, not smaller than those used by FTI. In addition, as explained above,¹⁴³⁹ the Miller & Lents reserves estimates assumed an unjustifiably high liquids content which led to a hugely inflated value for Tolkyn.
- (d) Counsel for Claimants' reference to the effect of the "*watering of the fields*" is another red herring. As cannot be repeated too often, RBS applied the reserves estimates from Miller & Lents. These do not state whether they took into

¹⁴³⁴ PwC Due Diligence Report, p.17 (**Exhibit R-359**).

¹⁴³⁵ Deloitte & Touche Second Supplemental Expert Report, para. 101.

¹⁴³⁶ See Deloitte & Touche Second Supplemental Expert Report, paras. 72-73. The WACC applied by RBS also supports Deloitte's discount rate of 15.4-17.0%.

¹⁴³⁷ RBS Valuation Report dated 31 July 2009, p.34 (**Exhibit R-374**).

¹⁴³⁸ FTI First Expert Report, para. 14.9.

¹⁴³⁹ See Part IV, G.II.1.

account the increasing water production. In any event, this is irrelevant for a comparison between the RBS and the FTI valuation. Miller & Lents assumed higher 2P reserves than Ryder Scott and thus the Miller & Lents reserves lead to higher values, not lower ones. Hence the increasing water production cannot serve Claimants to explain or downplay the lower values of RBS.

- (e) The cost for compression is unrelated to whether the valuation date is 14 October 2008 or October 2009. It would have needed to be taken into account.¹⁴⁴⁰ FTI failed to do so while RBS do not specify whether they assumed capital expenditure for the installation of compression.¹⁴⁴¹
- (f) Counsel for Claimants' allegation that the RBS values are lower than the FTI values because the Miller & Lents Report was dated April 2009 is highly misleading. As demonstrated above, irrespective of the date of the Miller & Lents report, its reserves estimates were higher than Ryder Scott's and its liquids ratio was astronomic. This only demonstrates that the RBS values were overstated.

838 In summary, Claimants' depiction of the RBS values is not devastating for the Republic, it is devastating for Claimants' own and FTI's credibility. None of the factors mentioned by Claimants can help Claimants explain why the RBS values are considerably lower than the FTI values. In fact most of the factors mentioned by Claimants only highlight that the RBS values, in particular the Tolkyn value, are highly overstated, not understated. Given Claimants' unsubstantiated arguments which were apparently intended to dazzle the Tribunal, it is unsurprising how often they reiterated that the Republic should not be allowed to even comment on the RBS' report.

4. Claimants' attempt to inflate the RBS' valuation with contingent liabilities is unfounded

839 Because neither the values that RBS attributed to the individual assets nor the aggregated value support FTI's inflated values, Claimants – in a final attempt of narrowing the gap between RBS and FTI – wish to add USD 243.5 million to the

¹⁴⁴⁰ See Part IV, G.I.

¹⁴⁴¹ It is the Republic's position that the Miller & Lents 2009 report on which the RBS valuation is based provided for capital expenditure for the installation of compression because Claimants asked Miller & Lents to install this compression, see Respondent's First Post-hearing Brief, paras. 964-967. Claimants so far have not responded to this. Should they now claim that the Miller & Lents 2009 report did not provide for compression, they are estopped from claiming that the RBS value were depressed due to their assumption of compression. Claimants cannot have it both ways.

total enterprise value for the allegedly incorrect inclusion of contingent liabilities in the working capital.¹⁴⁴²

840 It is the Respondent’s position that there is no justification for such an addition of USD 243.5 million because **the RBS valuation obviously did not include contingent liabilities in the working capital.**

841 The RBS report contains a table in which it provides an overview of contingent liabilities that were identified by PwC. This table is reproduced by Deloitte GmbH.¹⁴⁴³

Overview of Contingent Liabilities identified by PwC

Items	US\$ '000	Unweighted total	Risk weights (%) (4)	Weighted total
Tax Risks – high (1)		28,377	75%	21,283
Tax Risks – medium (2)		14,188	50%	47,695
Annual Work Program underfulfilment in FY08		9,000	50%	4,500
Commitments under Minimum Work Plans in FY09-12		231,899	50%	81,515
Guarantee to Montvale (3)		120,000	50%	47,750
Guarantee to Laren		69,406	50%	34,703
Potentially unlawful revenues		970,938*	-	-
Guarantee for the full amount of Notes		531,000*	-	-
Total		1,974,808		243,529

* It is assumed to be zero based on the fact that it will be dealt with in the SPA

(1): KPM and TNG may be required to pay export customs duty on crude oil for 2008

(2): CIT and EPT liabilities, mineral extraction tax (in light of the fact that the tax authorities may apply different mineral extraction tax rate in respect of TNG), deductions made in respect of management and consulting fees paid by KPM and TNG to Ascom

(3): Guarantee issued in favour of Montvale to secure its obligations to Vitol

(4): It remains unclear why the weighted amounts do not always equal the unweighted amount multiplied by the risk weights.

842 Source: RBS Report, page 62; PwC Due Diligence Report, page 27.

843 What FTI and Claimants make of this table can be called creative, if one elects to be charitable. Otherwise, it can only be called outrageous.

844 FTI note that in their DCF valuation, RBS deducted USD 1 million from the aggregated asset value in the Base Case Scenario and USD 20 million in the Special Case Scenario to reflect changes in the working capital.¹⁴⁴⁴ Up to this point, FTI are correct. As Deloitte GmbH put it:

“Conventionally, changes in working capital are an integral part of a DCF valuation of assets or a company. RBS, however, made a deduction from the aggregated Asset Values (or Enterprise Value) explicitly stated to reflect changes in working capital of US\$ -1 mln

¹⁴⁴² Claimants’ First-post Hearing Brief, para. 516.

¹⁴⁴³ See Deloitte & Touche Second Supplemental Expert Report, Table 7, p.33.

¹⁴⁴⁴ FTI Fourth Expert Report, para. 3.18.

*in the “KMG EP Base Case Scenario” and US\$ -20 mln in the “KMG EP Base Case Scenario (Special Case)”, respectively, as a separate item. This implies that the cash flow is reduced due to a requirement to fund an increase in working capital.”*¹⁴⁴⁵

845 FTI’s next step however, is completely unjustified and an apparent attempt to move the RBS valuation closer to their own valuation: FTI assume that the risk weighted contingent liabilities in the amount of USD 243.5 million had been **included** in the calculation of the working capital that RBS deducted from the enterprise value.¹⁴⁴⁶

846 FTI then explain that such an inclusion would be incorrect. They assert that as some of the contingent liabilities related to actions of the Republic the inclusion of contingent liabilities would be incorrect and therefore “*an upward adjustment may be appropriate.*”¹⁴⁴⁷ In addition, FTI state that the contingent liabilities also included the item commitments under the Minimum Working Programme, which typically are incorporated into a DCF model as capital expenditure. They allege that this “*raises the possibility*” that double-counting may have occurred.¹⁴⁴⁸ FTI acknowledge that “*it is impossible to know with certainty how the contingent liabilities identified by PwC affected RBS’s conclusions*”¹⁴⁴⁹ but that it would be “*reasonable to infer*” that a valuation that disregards actions by the state and avoided double-counting would have arrived at a “*substantially higher value*” than RBS.¹⁴⁵⁰

847 The disclaimers of “*may*”, “*possibility*”, “*impossible to know*” and “*substantially higher*” are quickly forgotten by counsel for Claimants who simply allege that the RBS report incorrectly deducted contingent liabilities in the amount of USD 244 million and that therefore this amount should be added back to the fair market valuation.¹⁴⁵¹

848 This statement can hardly be reconciled even with FTI and both FTI and Claimants are wrong. There is no basis to assume that RBS included contingent liabilities in the working capital and it can be excluded that RBS double-counted capital expenditure.

¹⁴⁴⁵ Deloitte & Touche Second Supplemental Expert Report, para. 82.

¹⁴⁴⁶ FTI Fourth Expert Report, para. 3.19.

¹⁴⁴⁷ FTI Fourth Expert Report, para. 3.22.

¹⁴⁴⁸ FTI Fourth Expert Report, para. 3.22.

¹⁴⁴⁹ FTI Fourth Expert Report, para. 3.23.

¹⁴⁵⁰ FTI Fourth Expert Report, para. 3.23.

¹⁴⁵¹ Claimants’ Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.9, lines 15-23.

- a) No basis to assume that RBS included contingent liabilities in the working capital
- 849 There is absolutely no basis to assume that RBS included contingent liabilities in the working capital.
- 850 To start with, none the items which are listed as contingent liabilities in the RBS' Report would conventionally be considered working capital items. Rather, if included, these would be financial debt or debt-like items.¹⁴⁵²
- 851 Even more important, the amounts of discounted changes in the net working capital of minus USD 1 million and minus USD 20 million respectively are far below a level from which contingent liabilities in the amount of USD 243.5 million could possibly have been deducted.¹⁴⁵³
- 852 It is important to understand what RBS did when they deducted USD 1 million and USD 20 million respectively from the aggregated asset value. As even FTI acknowledge, these amounts constitute working capital reductions. This means that these amounts “*represent present values of the expected future changes in working capital over the lifetime of the Assets.*”¹⁴⁵⁴ Hence, when RBS deducted USD 1 million from the aggregate asset value in their base case, they did so because they assumed that over the lifetime of the assets, the required working capital would increase by 1 million (discounted). To put this into proportion, FTI assumed the changes in net working capital to amount to USD 23.7 million and Deloitte GmbH assumed these changes to amount to USD 10.3 million.¹⁴⁵⁵ This means that FTI assumed that the required working capital would decrease by USD 23.7 million and Deloitte GmbH assumed that it would decrease by USD 10.3 million.
- 853 Deloitte GmbH conducted a hypothetical case in which they test Claimants' allegations:

“For the sake of the argument, we assume for a moment that the contingent liabilities of approx. US\$ 243.5 mln have indeed been deducted by RBS in the Working Capital adjustment as is insinuated by Claimants' Counsel and FTI.

In this hypothetical case, the amounts of US\$ -1 mln or US\$ -20 mln would represent the balance of the present value of changes in

¹⁴⁵² Deloitte & Touche Second Supplemental Expert Report, para. 85.

¹⁴⁵³ Deloitte & Touche Second Supplemental Expert Report, para. 85.

¹⁴⁵⁴ Deloitte & Touche Second Supplemental Expert Report, para. 87.

¹⁴⁵⁵ Deloitte & Touche Second Supplemental Expert Report, Chart 3, p.35.

required working capital minus the contingent liabilities. Consequently, RBS would assume that the present value of changes in required working capital amounts to US\$ 242.5 mln or US\$ 223.5 mln, respectively. Consequently, this would mean that RBS would have assumed a gradual decrease in required working capital from year to year resulting - if discounted – in an increase of the aggregate Asset Values of US\$ 242.5 mln or US\$ 223.5 mln, respectively.”¹⁴⁵⁶

854 This hypothetical case puts the lie to the work of FTI. If Claimants’ and FTI’s allegations were true, then RBS had assumed that the present value of the changes in required working capital amounted to USD 242.5 million or USD 223.5 million. This means, RBS would have assumed that the required working capital would decrease by USD 242.5 million or USD 223.5 million over the lifetime of the assets.

855 However, this is simply impossible. The combined working capital of KPM and TNG as of 31 March 2009 only amounted to USD 157 million.¹⁴⁵⁷ Hence, there was logically no possibility for the working capital to decrease by USD 223.5 million or even USD 242.5 million.

856 Deloitte GmbH state it with the following words:

“Consequently, even if the working capital could be reduced to zero, a maximum cash flow of US\$ 157 mln could be realised. If done immediately after the valuation date, this reduction in working capital would create a net present value of the same amount (US\$ 157 mln). However, this is far less than the alleged net present value of US\$ 223.5 mln or US\$ 242.5 mln, respectively, implied by FTI’s allegation that contingent liabilities had been deducted from working capital by RBS in the process of calculating the aggregated Asset Values (or Enterprise Value). There was just not enough working capital available to potentially create the effect implied by FTI’s allegation.”¹⁴⁵⁸

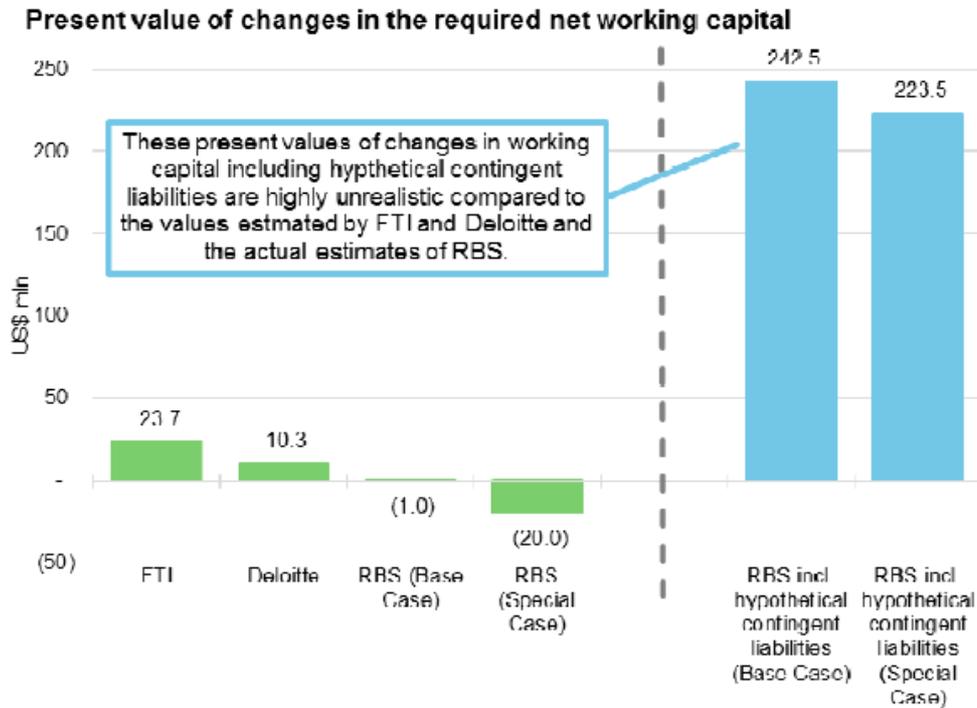
857 The absurdity of the implications of Claimants’ allegation is well depicted by a graphical comparison of the present values of changes in the required net working

¹⁴⁵⁶ Deloitte & Touche Second Supplemental Expert Report, para. 88.

¹⁴⁵⁷ Deloitte & Touche Second Supplemental Expert Report, para. 89.

¹⁴⁵⁸ Deloitte & Touche Second Supplemental Expert Report, para. 89.

capital as assumed by FTI, Deloitte, RBS and as Claimants want to understand RBS.¹⁴⁵⁹



858 Source: Deloitte GmbH Report, F II Update Note, Deloitte analysis.

b) No basis to assume that projected capital expenditure may contain contingent liabilities

859 There is no basis to assume that contingent liabilities may have been included in the projected capital expenditure. Claimants' absurd allegations have necessitated Deloitte GmbH to check the figures in the RBS report against the figures in the Miller & Lents 2009 report and the PwC Due Diligence Report on which RBS based its capital expenditure estimates.¹⁴⁶⁰ If RBS had factored any contingent liabilities into the capital expenditure, the RBS figures would be different from the Miller & Lents and PwC figures.

860 As the following table shows: They are not.¹⁴⁶¹

¹⁴⁵⁹ Deloitte & Touche Second Supplemental Expert Report, Chart 3, p.35.

¹⁴⁶⁰ RBS Valuation Report dated 31 July 2009, p.64 (**Exhibit R-374**).

¹⁴⁶¹ Deloitte & Touche Second Supplemental Expert Report, Table 8, p.36.

Capital expenditure according to Miller and Lents and PwC compared to RBS' figures

US\$ '000	2009	2010	2011	2012	2013
Inflated capex from Miller and Lents for Borankol and Tolkyk	104,604	148,791	133,752	89,153	24,618
and inflated capex from PwC for the LPG Plant compared to capex from Draft RBS Report, page 68	30,300	30,603	-	-	-
results in a marginal unexplained difference:	104	(6)	(48)	(47)	18

Source: PwC Due Diligence Report, page 24, Draft RBS Report page 68, Miller and Lents Report 2009, Exhibit No. 8, 13, 15 and 20.

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c) No basis to assume that operating expenses or tax expenses may contain contingent liabilities

862 Similarly, there is no basis to assume that operating expenses or tax expenses may contain contingent liabilities. First, these items do not fit under the items which RBS lists as contingent liabilities. Second, RBS did not subtract taxes from enterprise value but from the equity value. This can be seen from the fact that RBS expressly states that taxes were deducted in a second step after the calculation of the Enterprise value.¹⁴⁶²

d) Double counting of capital expenditure can be excluded

863 FTI's allusion to a possible double counting of capital expenditure is equally baseless. There is no evidence that capital expenditure may have been deducted both in the DCF and in the working capital. Capital expenditure is conventionally not part of the working capital and as can be seen from the table above, there are no unexplained differences between the capital expenditure estimates as foreseen by Miller & Lents and PwC and as applied by RBS.¹⁴⁶³

864 In summary, as counsel for Claimants stated in the Final Hearing, "*the report stands for what it is.*"¹⁴⁶⁴ Claimants' attempts to transform it into something that it is not, i.e. a report that supports FTI's valuation, have proven to be completely unfounded and absurd.

III. The Cliffson SPA

865 In its First Post-hearing Brief, the Republic has already shown that the 13 February 2010 Cliffson SPA is no reliable indicator of value. For one, Claimants' story of the Cliffson SPA is entirely non-credible because:

¹⁴⁶² RBS Valuation Report dated 31 July 2009, p.29 (**Exhibit R-374**); see also Deloitte & Touche Second Supplemental Expert Report, para. 95.

¹⁴⁶³ Deloitte & Touche Second Supplemental Expert Report, para. 97-98.

¹⁴⁶⁴ Claimants' Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.13, lines 5-6.

- (a) Claimants have never been forthright about the circumstances of the transaction and have introduced ever more unsupported allegations in response to inconsistencies pointed out by the Republic;¹⁴⁶⁵
- (b) Claimants base their story of the Cliffson SPA on the testimony of Mr. Stati and Mr. Lungu, who both misstated the truth in these proceedings on numerous occasions;¹⁴⁶⁶
- (c) the testimony of Mr. Stati on the Cliffson SPA contradicts Mr. Lungu's testimony and vice-versa;¹⁴⁶⁷
- (d) both Mr. Stati's and Mr. Lungu's oral testimony contradicts Mr. Stati's earlier written testimony;¹⁴⁶⁸ and
- (e) both Mr. Stati's and Mr. Lungu's oral testimony is inconsistent with common sense and with documentary evidence on the record.¹⁴⁶⁹

866 Moreover, even if one takes the latest version of Claimants' made for arbitration story at face value, the Cliffson SPA is still not a reliable indicator of value. That is because in Claimants' latest version of the story, the Assaubayevs as the family behind Cliffson agreed on a purchase price without conducting any independent due diligence of Claimants' data room.¹⁴⁷⁰ The SPA was thus not concluded on a "reasonable information basis" and is not the expression of a "fair market transaction". Hence, it cannot be used as an indicator of value in any way. From the evidence on record, it appears that the Assaubayev's themselves noticed their mistake and tried to back out of the transaction.¹⁴⁷¹

867 At the Final Hearing on 2/3 May 2013, Claimants barely referred to the Cliffson transaction, did not bring forward any arguments defending their latest account of the deal and did not challenge any of the Republic's arguments made in its First Post-hearing Brief. The Republic will thus only briefly comment on Claimants' submissions in their First Post-hearing Brief.

868 First, the Cliffson saga remains a source of neverending contradictions for Claimants. Claimants' now allege that the discussions with "the principals of

¹⁴⁶⁵ Respondent's First Post-hearing Brief, paras. 999 et seqq.
¹⁴⁶⁶ Respondent's First Post-hearing Brief, paras. 111 et seqq.
¹⁴⁶⁷ Respondent's First Post-hearing Brief, para. 1010.
¹⁴⁶⁸ Respondent's First Post-hearing Brief, para. 1011.
¹⁴⁶⁹ Respondent's First Post-hearing Brief, paras. 1012 et seqq.
¹⁴⁷⁰ Respondent's First Post-hearing Brief, paras. 1016 et seqq.
¹⁴⁷¹ Respondent's First Post-hearing Brief, para. 1020.

Cliffson”, i.e. the Assaubayev family, began in November 2009.¹⁴⁷² This is in direct contradiction to the oral testimony of Mr. Stati himself, who had stated repeatedly at the Hearing on Quantum that negotiations had started in September 2009.¹⁴⁷³ The Republic reiterates that the continued inconsistencies in Claimants’ account of the deal fundamentally undermine the credibility of any of Claimants’ arguments based thereon.

869 Second, Claimants’ latest account of the Cliffson transaction is not only contradictory, it is also unsupported by documentary evidence. Claimants now allege that a preliminary Memorandum of Understanding (“MOU”) with the Assaubayev controlled company Grand Petroleum was executed in November 2009, providing already for a purchase price that was not supposed to be subject to any further changes.¹⁴⁷⁴ However, Claimants have not provided any documentary evidence of this MOU whatsoever – despite the fact that under the Tribunal’s Procedural Order No. 10, they would have been entitled to submit such evidence with their First Post-hearing Brief.¹⁴⁷⁵ Instead, Claimants only refer to the unreliable evidence of Mr. Stati and Mr. Lungu. Again, Claimants’ arguments are utterly non-credible.

870 Third, it is noteworthy that Claimants now no longer allege that the state directly hindered the Cliffson SPA from closing. Claimants admit that Cliffson may have backed out of the transaction because “*they had financial troubles of their own, and were unable to perform the transaction*”.¹⁴⁷⁶ Any argument Claimants had raised earlier according to which the state blocked the sale to Cliffson¹⁴⁷⁷ is thus no longer relevant.

871 Fourth, it should also be noted that Claimants’ arguments based on Mr. Stati’s letter to Cliffson dated 9 March 2010¹⁴⁷⁸ mischaracterise the evidence. As the Republic pointed out, this letter shows that Claimants themselves were accusing Cliffson of not taking the necessary steps for the implementation of the SPA.¹⁴⁷⁹ It is thus an indication of Cliffson backing out of the transaction. Insofar as Claimants allege that the letter of 9 March 2010 only complained that Cliffson had not implemented what it had agreed to in the *Side Letter* to the SPA,¹⁴⁸⁰ this is not correct. The letter

¹⁴⁷² Claimants’ First Post-hearing Brief, para. 590.

¹⁴⁷³ Testimony of Mr. Stati, Hearing on Quantum, Transcript Day 2, p.91, line 13, p.92, lines 22-25, p.93, lines 8-13.

¹⁴⁷⁴ Claimants’ First Post-hearing Brief, para. 591.

¹⁴⁷⁵ Tribunal’s Procedural Order No. 10, para. 3.1, third bullet point, third asterisk.

¹⁴⁷⁶ Claimants’ First Post-hearing Brief, para. 595.

¹⁴⁷⁷ Claimants’ Statement of Claim, paras. 193 et seq.; Claimants’ Reply on Jurisdiction and Liability, para. 421.

¹⁴⁷⁸ Letter of Ascom and Terra Raf to Cliffson dated 9 March 2010 (**Exhibit C-701.1**).

¹⁴⁷⁹ Respondent’s First Post-hearing Brief, para. 1014.

¹⁴⁸⁰ Claimants’ First Post-hearing Brief, para. 594.

clearly references a lack of progress in the implementation of both the SPA and the Side Letter.¹⁴⁸¹ It thus clearly shows that Claimants themselves had fears at the time that Cliffson was backing out of the transaction.

872 Fifth, it is denied that under the SPA, Cliffson was under an “*obligation to work the back channels to obtain government approval of the sale transaction*”.¹⁴⁸² Quite apart from the fact that such obligation would have been entirely unenforceable, neither the SPA nor the sideletter thereto¹⁴⁸³ provide for such obligation and Claimants have not proven that it was ever agreed between the parties to the SPA.

873 Sixth, the Republic objects to Claimants’ suggestion that the Tribunal should exercise “*discretion*” to increase an amount of damages based on the Cliffson SPA. For one, this suggestion is irrelevant, as the Cliffson SPA is no reliable indicator of value in the first place. Moreover, Claimants have not shown, and there does not exist any basis under international law for a discretionary increase of damages.

¹⁴⁸¹ Letter of Ascom and Terra Raf to Cliffson dated 9 March 2010 (**Exhibit C-701.1**).

¹⁴⁸² Claimants’ First Post-hearing Brief, para. 594.

¹⁴⁸³ Cliffson SPA dated 13 February 2010 (**Exhibit C-540**) and Side Letter of the same day (**Exhibit C-534**).

I. Alternative valuation methods support the Republic's position

874 In its First Post-hearing Brief, the Republic has demonstrated that Deloitte GmbH's valuation for the Borankol and Tolkyng fields as of 21 July 2010 is supported by various alternative valuation methods.¹⁴⁸⁴ In addition, the Republic has also demonstrated that FTI's valuation as of 14 October 2008 is in fact the outlier among a range of such alternative valuation methods.¹⁴⁸⁵

875 These facts can also be demonstrated by way of charts. As can be seen in the following, even assuming the overstated reserves as provided by Ryder Scott, the FTI valuation¹⁴⁸⁶ is far outside a range of comparable companies and comparable transactions analyses based on multiples calculated both by Claimants' own investment bank Renaissance Capital¹⁴⁸⁷ and by Deloitte GmbH.¹⁴⁸⁸ The FTI valuation also leads to a far higher result than Deloitte's methodologically correct and thorough value of debt analysis:¹⁴⁸⁹

¹⁴⁸⁴ Respondent's First Post-hearing Brief, paras. 1022 et seqq., 1037.

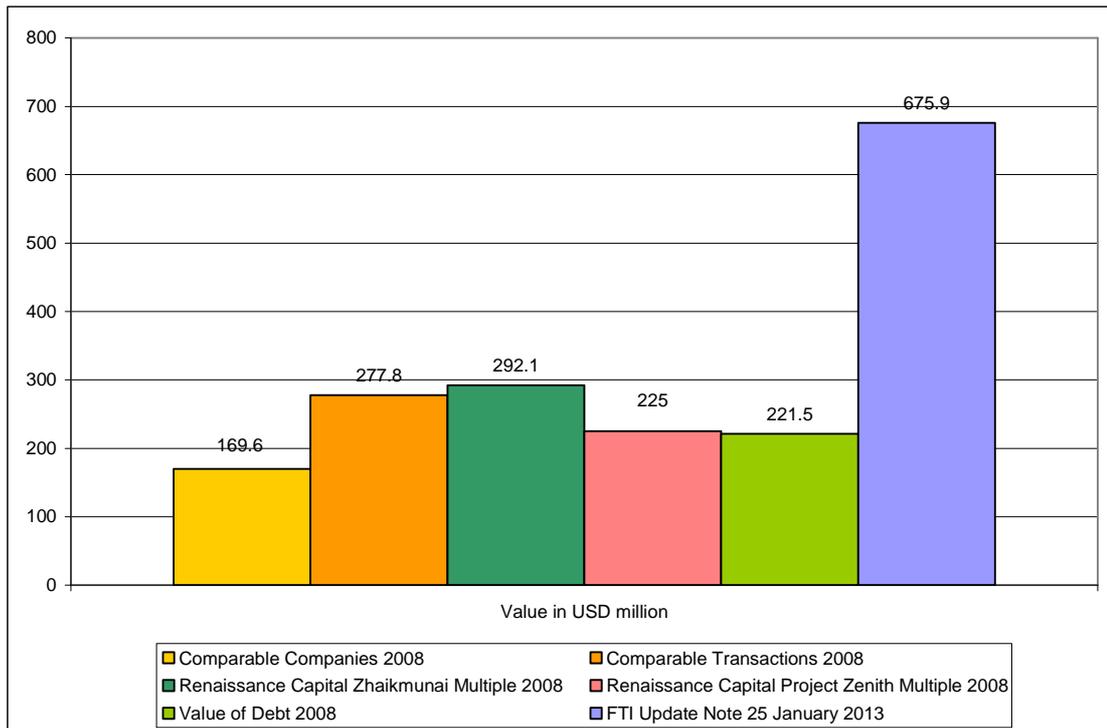
¹⁴⁸⁵ Respondent's First Post-hearing Brief, paras. 1027 et seqq., 1036.

¹⁴⁸⁶ FTI Update Memo dated 25 January 2013, para. 25.

¹⁴⁸⁷ For the calculation based on the Renaissance Capital Zhaikmunai multiple 2008, cf. Deloitte & Touche Supplemental Expert Report, para. 179. The calculation of the Renaissance Capital Project Zenith Multiple 2008 was based on the multiple provided in the "Project Zenith – Overview of Non-Binding Offers" dated 27 September 2008 (**Exhibit C-17**) at p.16 and the 2P reserves assumed by FTI based on the input of Ryder Scott, cf. Deloitte & Touche Supplemental Expert Report, fn. 38.

¹⁴⁸⁸ Deloitte & Touche Supplemental Expert Report, paras. 144, 171.

¹⁴⁸⁹ Deloitte & Touche Supplemental Expert Report, para. 218. Please note that the value of debt analysis leads to a value including the LPG Plant and the Contract 302 Area.



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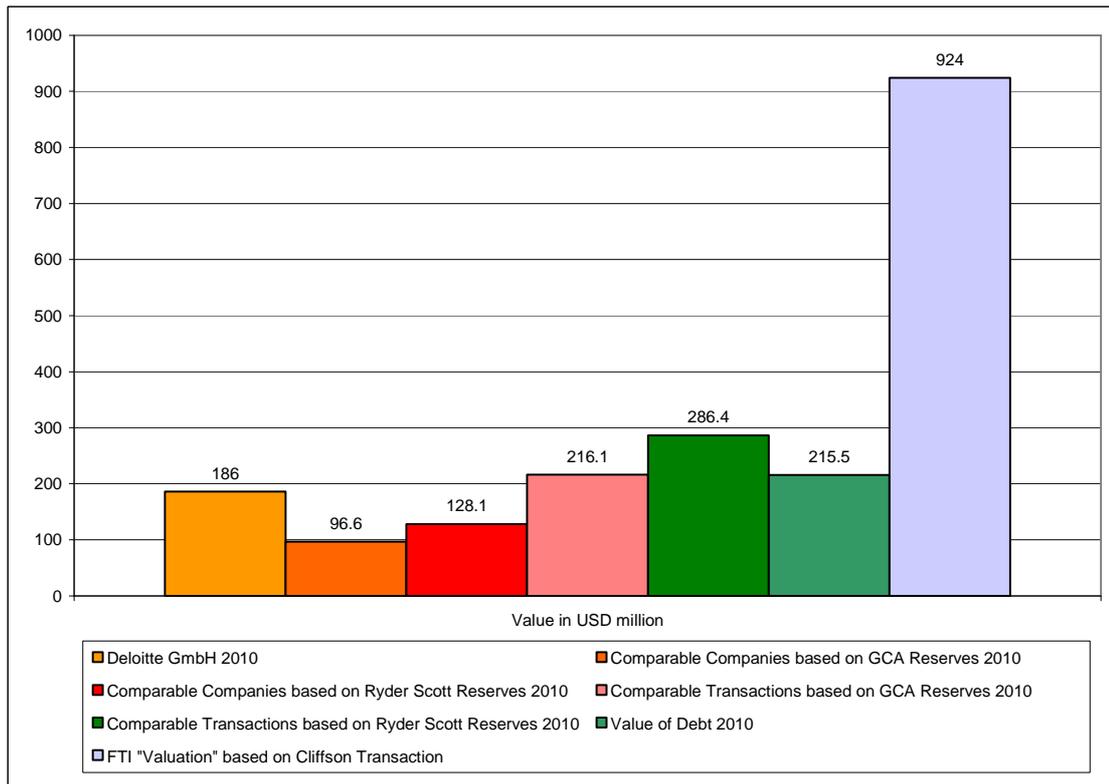
877 Conversely, Deloitte GmbH’s valuation as of 21 July 2010¹⁴⁹⁰ is well within a range of comparable companies and comparable transaction analyses – regardless of whether one uses the reserves estimates provided by GCA or those provided by Ryder Scott.¹⁴⁹¹ The Deloitte GmbH valuation is also supported by Deloitte GmbH’s methodologically correct and thorough value of debt analysis.¹⁴⁹² The FTI “valuation” based on the unreliable Cliffson transaction¹⁴⁹³ is on the other hand far outside the range of these additional valuation methods.

¹⁴⁹⁰ Deloitte & Touche Supplemental Expert Report, para. 36.

¹⁴⁹¹ Deloitte & Touche Supplemental Expert Report, paras. 286 and 293. The Comparable Transactions analysis based on the Ryder Scott reserves 2010 is based on the multiple stated at para. 293 and the reserves stated at fn. 117.

¹⁴⁹² Deloitte & Touche Supplemental Expert Report, para. 313. Please note that the value of debt analysis leads to a value including the LPG Plant and the Contract 302 Area.

¹⁴⁹³ FTI Consulting Supplemental Expert Report, para. 3.12.



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879 At the Final Hearing, Claimants’ main response to the variety of supportive valuation work done by Deloitte GmbH was the suggestion that the additional work conducted by Deloitte GmbH should be struck from the record.¹⁴⁹⁴ According to Claimants, the submission with Deloitte GmbH’s Second Expert Report shielded Mr. Gruhn of Deloitte GmbH from cross-examination.¹⁴⁹⁵ This contention is seriously flawed. That is foremost because Claimants have undertaken no steps whatsoever to obtain a further chance at cross-examination of Mr. Gruhn. The Final Hearing in the beginning of May 2013 could have provided an opportunity for such cross-examination but Claimants simply never asked for it. Against this background, any complaint about a lack of opportunity for cross-examination is ill-founded.¹⁴⁹⁶

880 Claimants’ complaint is a continuation of Claimants’ constant attempts to exclude on procedural grounds what they cannot rebut on substance. Their inability to provide substantive rebuttal became clear from the scarce remarks they did provide on the additional indicators of value referenced in the charts above. For one, Claimants did

¹⁴⁹⁴ Claimants’ Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.16, line 23 - p.19, line 9.

¹⁴⁹⁵ Claimants’ Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.17, lines 13-15.

¹⁴⁹⁶ In any event, it should be noted that Claimants wasted so much time at the Hearing on Quantum that they only had approximately 30 minutes left when Mr. Gruhn was called to testify. Considering this fact, Claimants’ argument that Mr. Gruhn was “shielded” from cross-examination on his additional valuation work rings especially hollow. Claimants would not have sufficient time for cross-examination in any event.

in no way respond to the multiples analysis of their own investment bank Renaissance Capital. This speaks volumes about the quality of their arguments.

881 Moreover, Claimants simply alleged that “RBS used multiples for comparable companies of 8.6; that's five times what Deloitte used. They used comparable transaction multiples of 5.2, almost two times what Deloitte used.”¹⁴⁹⁷ That contention however ignores the severe inconsistencies in the multiples provided by RBS. For example, RBS included companies that were still at the exploration stage as comparable companies for valuing Borankol and Tolkyne even though Borankol and Tolkyne have almost exclusively 2P reserves.¹⁴⁹⁸ Claimants’ own investment bank Renaissance Capital found such approach to be inappropriate.¹⁴⁹⁹ Moreover, RBS overstated the multiple for the comparable company BMB Munai by applying an incorrect volume of 2P reserves to the value of BMB Munai.¹⁵⁰⁰ Finally, RBS based its comparable transactions analysis on transactions spanning from 2005 to 2009, thus including numerous transactions long prior to the financial crisis.¹⁵⁰¹ However, RBS did not make any adjustments for addressing the effects of the crisis; this is entirely improper.¹⁵⁰²

882 Interestingly, if one applies the three transactions quoted by RBS that are most relevant for Claimants’ valuation date (as they were concluded within one and a half months from Claimants’ valuation date), one arrives at an average multiple of 2.17,¹⁵⁰³ which is less than one third of FTI’s average comparable transaction multiple of 6.83.¹⁵⁰⁴ Applying the average multiple of 2.17 to the 2P reserves assumed by Ryder Scott as of 14 October 2008,¹⁵⁰⁵ one arrives at a value of USD 212 million for Borankol and Tolkyne. This is less than one third the value FTI allege, based on their DCF analysis.¹⁵⁰⁶

¹⁴⁹⁷ Claimants’ Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.18, lines 17-21.

¹⁴⁹⁸ Deloitte & Touche Second Supplemental Expert Report, paras. 107 et seq.

¹⁴⁹⁹ Deloitte & Touche Second Supplemental Expert Report, paras. 107, 109.

¹⁵⁰⁰ Deloitte & Touche Second Supplemental Expert Report, para. 110.

¹⁵⁰¹ RBS Valuation Report dated 31 July 2009, p.83 (**Exhibit R-374**).

¹⁵⁰² Deloitte & Touche Second Supplemental Expert Report, para. 112.

¹⁵⁰³ Deloitte & Touche Second Supplemental Expert Report, para. 112.

¹⁵⁰⁴ FTI Consulting Expert Report, para. 14.17.

¹⁵⁰⁵ Ryder Scott assumed 2P reserves of 97.7 MMboe as of 14 October 2008, cf. FTI Consulting Expert Report, para. 14.18, Table 33.

¹⁵⁰⁶ FTI currently claim that the value of Borankol and Tolkyne based on their DCF analysis amounts to USD 676 million, cf. Claimants’ First Post-hearing Brief, para. 664.

J. Claimants claim damages for monies already pocketed

883 Claimants continue to claim damages for monies they have already pocketed. Claimants diverted receivables generated after 14 October 2008 to Ascom and other companies belonging to the Stati Group. Hence, the asset values of Tolkyn and Borankol are overstated by these amounts.

884 As identified in the Republic's Rejoinder Memorial on Jurisdiction and Liability,¹⁵⁰⁷ Rejoinder Memorial on Quantum,¹⁵⁰⁸ the expert report by Professor Olcott,¹⁵⁰⁹ the Deloitte GmbH Supplemental Report¹⁵¹⁰ and as discussed at the Hearing on Quantum,¹⁵¹¹ there were substantial cash outflows from KPM and TNG in the period in which Claimants continued to operate their assets after their chosen valuation date. Or rather, to be more precise, the Claimants diverted the cash flow that KPM and TNG should have received to themselves or other related companies.

885 The discernible cash outflows were the following:

- (a) In 2010, KPM distributed dividends amounting to USD 71.9 million, which were paid by assigning trade receivables to Ascom;¹⁵¹² and
- (b) KPM and TNG the extended the due date of accounts receivables due from Stadoil Ltd. and General Affinity Ltd. (companies belonging to the Stati group) in the aggregated amount of approx. USD 143.4 million¹⁵¹³ and from Claimants' recent submissions it can be concluded that this money was never paid.

886 As highlighted in the Republic's First Post-hearing Brief, there may have been other significant cash outflows which could not be detected due to Claimants' opaque financing structure.¹⁵¹⁴ In addition, as even FTI acknowledge, Claimants did not

¹⁵⁰⁷ Respondent's Rejoinder on Jurisdiction and Liability, paras. 767-771.

¹⁵⁰⁸ Respondent's Rejoinder on Quantum, paras. 442-446.

¹⁵⁰⁹ First Expert Report of Professor Olcott, paras. 167-170.

¹⁵¹⁰ Deloitte & Touche Supplemental Report, paras. 336 et seqq.

¹⁵¹¹ Respondent's Opening Presentation, Hearing on Quantum, Day 1, p.116, line 16 - p.117, line 10.

¹⁵¹² Claimants admit that the distribution of the dividends was effected by assigning trade receivables in their First Post-hearing Brief, para. 418.

¹⁵¹³ Deloitte & Touche Second Supplemental Report, para. 216.

¹⁵¹⁴ Respondent's First Post-hearing Brief, paras. 1044-1047; see also Deloitte & Touche Supplemental Report, para. 83.

prepare financial statements for the year 2010,¹⁵¹⁵ so that additional significant cash-outflow may have occurred but would be completely insulated from scrutiny.

887 In its First Post-hearing Brief, the Republic also pointed to the fact that the Tristan Oil Annual Report for the year 2009 mentions that allegedly sometime in 2010 Claimants cancelled the delivery of equipment for the LPG Plant and a company called Perkwood Investments Ltd. returned the advance paid in the amount of USD 36,800,212.¹⁵¹⁶ While it is certain that Claimants did not allow this money to be paid to TNG, it is unclear who received this money.

888 Contrary to Claimants allegations,¹⁵¹⁷ the Republic never argued that Claimants had indeed made profits in the amount of USD 226.6 million after their valuation date that would need to be deducted. What the Republic highlighted was that FTI assumed that TNG's and KPM's production in the time between 14 October 2008 and 21 July 2010 would have amounted to a value of USD 226.6 million¹⁵¹⁸ or rather USD 302.3 as clarified in Deloitte GmbH's Additional Note.¹⁵¹⁹ This strongly suggests that according to their own experts, Claimants should have made some profits in this time period.

I. The dividend distribution in the amount of USD 71.9 million would need to be deducted from any eventual award

889 Claimants admit that KMP paid a dividend to Ascom in the amount of USD 71.9 million by assigning trade receivables in late 2009 and 2010¹⁵²⁰ but they refuse to shed any more light on these payments. Claimants do not specify which exact receivables were assigned and they do not specify when exactly this was done. This speaks volumes about Claimants' endeavour to keep the transactions with other companies of the Stati Group as clandestine and intransparent as possible.

890 Claimants only provide two arguments why these dividends should not be deducted from an eventual award. They claim that "*much of these distributions*" were

¹⁵¹⁵ FTI Post-hearing Report, para. 7.35.

¹⁵¹⁶ Respondent's First Post-hearing Brief, para. 1043.

¹⁵¹⁷ Claimants' First Post-hearing Brief, para. 432.

¹⁵¹⁸ Respondent's Rejoinder on Quantum, para. 446.

¹⁵¹⁹ Deloitte Additional Note to Expert Report, para. 1.

¹⁵²⁰ Claimants' First Post-hearing Brief, para. 418.

reinvested and they claim that these funds “*represented profits that KPM and TNG has earned prior to October 14, 2008.*”¹⁵²¹

891 Both claims are submitted without any evidence or even specification.

1. Alleged reinvestment of dividends is unsubstantiated, unproven and contradictory

892 Claimants do not point to a single transaction in which Ascom would have reinvested any of the money it received due to the assignment of the trade receivables. The one and only payment that Claimants point to is a coupon payment made by **Tristan** in the amount of **USD 28 million**¹⁵²² but this does not at all relate to the distribution of dividends in the amount of **USD 71.9 million** to **Ascom**. In addition, the reinvestment of the dividends would be contrary to Claimants own allegation that they wilfully took out the money because they “*tried to protect what they could.*”¹⁵²³

2. Allegation that dividend paid from profits made before 14 October 2008 is unsubstantiated, unproven and illogical

893 Claimants’ allegation that the dividends represented funds that KPM and TNG had earned prior to 14 October 2008 fares no better.

894 First, to explain the Republic’s argument, it necessary to bear in mind that both Deloitte GmbH and FTI valued Tolkyng and Borankol by using the DCF method. Deloitte GmbH explain the correlation between the asset value and the cash flow with the following words:

“It is important to note that certain aggregated Asset Values (or a certain Enterprise Value) require a corresponding amount of working capital over time. The relation between Asset Value (or Enterprise Value), cash flow and working capital can be described as follows:

- *The aggregated Asset Values (or the Enterprise Value) represent the net present value of the expected future cash flow generated by*

¹⁵²¹ Claimants’ First Post-hearing Brief, para. 435.

¹⁵²² Claimants’ First Post-hearing Brief, para. 419.

¹⁵²³ Claimants’ First Post-hearing Brief, para. 418.

the operating business/assets of a company, the “future operating cash flow”.

- *The future operating cash flow, in turn, consists of various net cash inflows over time.*

- *Such a net cash inflow will happen at a certain point in time if and to the extent that net trade receivables (i.e. the excess of trade receivables over trade payables) exist which become due and are actually paid at that very point in time.*

- *In other words, a certain future net cash inflow requires a corresponding amount of working capital, comprising trade receivables plus inventories minus trade payables (this definition is also used by FTI). Please note that the level of working capital, by and large, fluctuates with revenues.”¹⁵²⁴*

895 This means that the asset value is calculated based on the estimated future cash flow. FTI valued the assets as of 14 October 2008, i.e. based on the estimated cash flow to be generated by the assets after 14 October 2008.

896 Consequently, if some of this “future” cash flow did not flow to the asset but was diverted to Claimants, then the asset value is too high. It is too high by the amount that was diverted to Claimants because the cash flow was then wrongly assumed by FTI to be generated by the asset.

897 What Claimants would have needed to prove would have been that the dividends were paid from “additional assets, the earnings and cash flows of which have not been included in the discounted cash flow valuation of the Assets.”¹⁵²⁵

898 In absence of such assets,

“[a]ny transfer of assets such as trade receivables, causes higher investments in (or lower divestments of) working capital and, thus, tends to dent into the future operating cash flows, thus, directly reducing the aggregated Asset Values (or enterprise Value).”¹⁵²⁶

899 Claimants in their First Post-hearing Brief for the first time do allege that the dividends had been paid out of profits made before 14 October 2008 and thus did not

¹⁵²⁴ Deloitte & Touche Second Supplemental Report, para. 80.

¹⁵²⁵ Deloitte & Touche Second Supplemental Report, para. 223.

¹⁵²⁶ Deloitte & Touche Second Supplemental Report, para. 231.

affect the future cash flow.¹⁵²⁷ However, this allegation is completely unsubstantiated and unproven.¹⁵²⁸

900 With regard to the FTI reports, Deloitte GmbH observe that FTI never indicated that there had been such additional assets:

*“It depends on FTI’s specific assumptions as to the amount of working capital required (which we do not accept as appropriate), whether or not excess working capital may have existed on 14 October 2008 that might represent additional assets. However, there is no hint in any of FTI’s reports submitted so far or other information provided by Claimants that such additional assets might exist (not to speak of the amount of such potential additional assets).”*¹⁵²⁹

901 Claimants themselves admit that the dividends were distributed by assigning trade receivables. Therefore, it would have been the easiest task for Claimants to indicate the exact receivable that was assigned. However, Claimants did not do so. They only state that at the end of September 2008 KPM and TNG combined had USD 221.5 million in net working capital but this does not at all mean that KPM assigned receivables it had earned prior to 14 October 2008. Rather the fact that the dividend distribution occurred at 31 December 2009 and later strongly suggests that the receivables that were assigned had accrued after 14 October 2008. Had these receivables indeed already existed at 14 October 2008, this would mean that for more than 1 year and 2 months, the obligations towards KPM and TNG had not been fulfilled. This would have raised serious impairment implications and appears highly unlikely.

902 The development of the actual working capital further suggests that there was no such additional working capital:

“The fact that the actual working capital was reduced significantly after FTI’s valuation date suggests that the additional liquidity resulting from the decrease in working capital was used to keep up

¹⁵²⁷ Claimants’ First Post-hearing Brief, para. 435.

¹⁵²⁸ FTI in their Post-hearing Report at para 11.18 simply state that the dividends represented equity that existed prior to the 2008 valuation date. They do not provide any evidence whatsoever to substantiate this claim. In an equally foolish way, FTI state that the Respondent’s allegations that the payment of the dividend was improper were unsupported. The Republic highlighted and not even Claimants object that the payment of the dividends was a violation of the terms of the Indenture pursuant to which Tristan Oil issued its notes, i.a. Respondent’s Rejoinder on Jurisdiction and Liability, para.142 and Tristan Oil Ltd., Annual Report For the Year Ended December 31, 2009, p.4 and p.18 (**Exhibit R-37.6**).

¹⁵²⁹ Deloitte & Touche Second Supplemental Report, para. 227 (emphasis added).

operations of KPM and TNG. This indicates that no additional assets existed at FTI's valuation date.

Moreover, KPM had practically no receivables after the dividend distribution in the form of a transfer of receivables of US\$ 71.9 mln in early 2010. This indicates that no sufficient working capital was left to operate the company and the Borankol field as assumed by FTI, strongly suggesting that the dividend payment dents into the expected future operating cash flow and reduces the Asset Value calculated by FTI.”¹⁵³⁰

903 Claimants' statement that at the end of September 2008, KPM and TNG combined had USD 221.5 million in net working capital is irrelevant. The reason is that a DCF valuation does not start with the assumption that no working capital exists. Rather, also *“FTI calculated the future cash flows based on the **assumption that a certain initial working capital - including accounts receivable - exists at the valuation date.**”¹⁵³¹*

904 Therefore, in summary, the receivables that were diverted from KPM to Ascom as dividends need to be deducted from the asset value and thus from an eventual award if it were to be based on values provided by FTI:

“Consequently, in the absence of additional assets, the aggregated Asset Values represent the full Enterprise Value of KPM and TNG taking into account the entire operating cash flow generated by the Assets.

From this follows that any payments or transfers of assets to the Claimants or other entities of the Stati group affected after FTI's valuation date were made using parts of the operating cash flow constituting the aggregated Asset Values.

Thus, with affecting such payments or transfers of assets, a certain part of the aggregated Asset Values has already been received by the Claimants or the Stati group, respectively. This portion needs to be deducted from the damage amount to avoid double compensation of the alleged damage.”¹⁵³²

¹⁵³⁰ Deloitte & Touche Second Supplemental Report, paras. 228-229 (emphasis added).

¹⁵³¹ Deloitte & Touche Second Supplemental Report, para. 230 (emphasis added).

¹⁵³² Deloitte & Touche Second Supplemental Report, paras. 209-211

II. USD 143.4 million due from Stadoil Ltd. and General Affinity Ltd. would need to be deducted from an eventual award

- 905 In addition, USD 143.4 million which still appear to be due from two companies belonging to the Stati Group, Stadoil Ltd. and General Affinity, would need to be deducted from an eventual award.
- 906 In its Rejoinder Memorial on Jurisdiction and Liability, the Republic highlighted that in 2009, KPM and TNG extended the due date of accounts receivables due from Stadoil Ltd. and General Affinity Ltd. in the aggregated amount of approx. USD 143.4 million.¹⁵³³
- 907 KPM's and TNG's auditors KPMG stated that the extended settlement terms of 325 days "*significantly exceed normal credit terms in the industry.*"¹⁵³⁴
- 908 Claimants' reaction to this is very telling.
- 909 In their First Post-hearing Brief, Claimants only address the extension of the due date of accounts receivables due from Stadoil Ltd. and General Affinity Ltd. in the aggregated amount of approx. USD 143.4 million by stating that this had been a reasonable decision because "*slow payments and defaults cascaded through the industry.*"¹⁵³⁵ Claimants further add that they fully acknowledge that slow payments by "*buyers*" contributed to the tight liquidity situation in the middle of 2009 but that they would certainly have rather collected receivables from their "*customers*" than enter into the Laren transaction.¹⁵³⁶
- 910 What Claimants choose to omit is that they are not talking about any "buyer" or "customer" but they are talking about Stadoil and General Affinity which both belong to the Stati Group, i.e. they are also owned by Mr. Stati. KPMG in their Vendor Due Diligence describe their role with the following words:

*"The Group's export sales are channelled entirely via related parties General Affinity and Stadoil who in turn sell to another related party, Montvale, that resells to the ultimate third party customer, Vitol, a Swiss energy trader. **The procedure allows the Group to better manage its cash position.**"*¹⁵³⁷ (emphasis added)

¹⁵³³ Respondent's Rejoinder on Jurisdiction and Liability, para. 768.

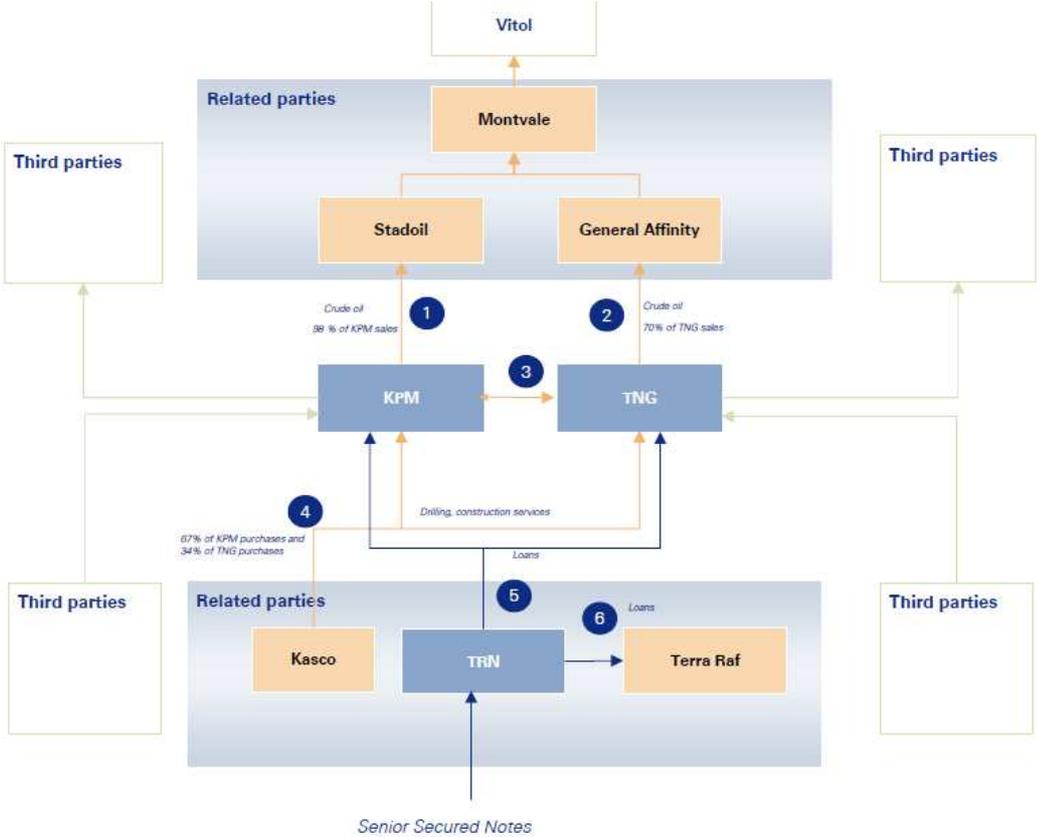
¹⁵³⁴ Tristan Oil Ltd. Annual Report FY 2009, p. F-164 (**Exhibit R-37.6**).

¹⁵³⁵ Claimants' First Post-hearing Brief, para. 417.

¹⁵³⁶ *Ibid.*

¹⁵³⁷ Project Zenith – Vendor Due Diligence by KPMG dated 29 August 2008, p.6 (**Exhibit C-69**).

911 The role of Stadoil and General Affinity is further depicted in the following chart from the KPMG Vendor Due Diligence:¹⁵³⁸



912 Hence, it were not just any buyers or customers who were allegedly slow with their payments but it was the two related parties, which had been installed as intermediate buyers between KPM/TNG and Vitol to allow “the [Stati] Group to better manage its cash position.”¹⁵³⁹

913 This suggests that the extension of the due date may not at all have been an involuntary act but a decision by Claimants to leave money with other subsidiaries rather than transfer it to KPM and TNG to better manage the cash position of Mr. Stati’s group of companies, i.e. in order to avoid having to satisfy the recovery order.

914 In their Supplemental Report, Deloitte GmbH stated that the “extension of payment date beyond industry standard payment periods is equivalent to receiving the trade receivable according to conventional terms and, at the same instant, granting a financial loan to Stadoil and General Affinity.”¹⁵⁴⁰

¹⁵³⁸ Project Zenith – Vendor Due Diligence by KPMG dated 29 August 2008, p.6 (Exhibit C-69).

¹⁵³⁹ Project Zenith – Vendor Due Diligence by KPMG dated 29 August 2008, p.6 (Exhibit C-69).

¹⁵⁴⁰ Deloitte & Touche Supplemental Report, para. 336.

- 915 Until this day, Claimants have never even alleged that these receivables whose due date was extended were ever paid to KPM and TNG and there is nothing that would suggest that they were eventually paid. This means that the earnings from the sales of KPM's and TNG's crude oil were not forwarded to KPM and TNG but stayed with other companies owned by Mr. Stati or in the words of Deloitte GmbH, the loans were never repaid by Stadoil and General Affinity
- 916 Even more importantly, while Claimants alleged that the dividend in the amount of USD 71.9 million represented profits that had been earned prior to 14 October 2008, they do not even make this allegation regarding the receivables from Stadoil and General Affinity.
- 917 The only conclusion that one can draw from this is that the receivables had not been earned prior to 14 October 2008 and they were never paid to KPM and TNG but remained with other related companies.
- 918 This is a text book example of profits that need to be deducted from any eventual award. The receivables from Stadoil and General Affinity as proceeds from the crude oil sales were certainly taken into account by FTI as future cash flow. And if this cash flow in the amount of USD 143.3 million was diverted to other companies belonging to the Stati Group, then the asset value calculated by FTI is overstated by this amount because a certain part of the aggregated asset values has already been received by Claimants.

III. Claimants found other ways to siphon money off and to decrease tax exposure

- 919 In addition, Claimants found other ways to siphon money off and to decrease the tax exposure of their Kazakh companies so that there is very little substance to their complaint of an alleged character assassination.¹⁵⁴¹
- 920 Not only Squire Sanders pointed to the service agreements with Ascom that are typical of contracts that are used as means to transfer money between two related companies without any actual services being performed.¹⁵⁴² Even Claimants' own auditors KPMG highlighted that

“[s]ince 2005, KPM [and TNG] [have] been purchasing various services from Ascom JSC, a nonresident. We have reviewed the

¹⁵⁴¹ Claimants' First Post-hearing Brief, para. 438.

¹⁵⁴² Squire Sanders Legal Due Diligence Report, p.64 (**Exhibit R-364**).

reports that Ascom provided to KPM [and TNG]. We believe there is a risk that the tax authorities might argue that Ascom's services do not relate to KPM's subsoil use operations under Contract 305 [and TNG's subsoil use operations under the Contracts]

*The tax authorities might disallow a tax deduction for the service fees that KPM paid to Ascom. **The potential tax liability, including fines and penalties, could be approximately USD900,000 [for KPM and USD823,000 for TNG]**”¹⁵⁴³ (emphasis added)*

921 Other ways to divert money from KPM and TNG to other related companies were the completely overpriced service agreements with CasCo. Mr. Khalelov emphasised that the prices paid to CasCo often doubled the market rate¹⁵⁴⁴ and this testimony stands unrebutted.

922 In fact, the following statement in the Ascom LPG Plant Business Plan, is exemplary for Claimants' creativity in their endeavour to decrease their exposure to tax:

“Ascom are trying to minimize their tax commitments (Excess Profits Tax and Dividend tax) through reinvestment and take money out through internal transfer pricing and external funding from Vitol.”¹⁵⁴⁵

¹⁵⁴³ Project Zenith – Vendor Due Diligence by KPMG dated 29 August 2008, p.21 (**Exhibit C-69**).

¹⁵⁴⁴ Witness Statement Mr. Khalelov, para. 4.3 and Annex 2.

¹⁵⁴⁵ Ascom LPG Plant Business Plan, p.3 (**Exhibit R-333**).

K. Claimants incorrectly gross-up their claim with debt

923 In its First Post-hearing Brief¹⁵⁴⁶ and in earlier submissions,¹⁵⁴⁷ the Republic already demonstrated that by claiming the alleged enterprise value of KPM and TNG, Claimants gross-up the claim they could theoretically be entitled to with debt of third parties, most notably the debt to the Tristan noteholders. In particular, the Republic showed the following:

- (a) As at the correct valuation date of 21 July 2010, KPM and TNG were liable for Tristan noteholder debt in the amount of USD 559 million,¹⁵⁴⁸ tax debt of more than USD 81.2 million¹⁵⁴⁹ and other debt of at least USD 119 million.¹⁵⁵⁰
- (b) Claimants have not even tried to demonstrate that any of the Claimants personally remained liable for the tax debt or other debt.¹⁵⁵¹ Including this debt in their claim is thus entirely inappropriate.
- (c) Claimants have not remained liable for the Tristan noteholder debt because the pledge agreements between Ascom and Terra Raf and the noteholders do not provide for such liability.¹⁵⁵² Including this debt in their claim is thus entirely inappropriate.
- (d) Even assuming Claimants had remained liable for the Tristan noteholder debt, the debt should not be included in Claimants' claim. That is because as at the valuation date of 21 July 2010, KPM and TNG had an equity value of zero so that Claimants suffered zero damage.¹⁵⁵³
- (e) A debt gross-up is contrary to international law because it would allow the noteholders to circumvent the jurisdictional and substantive hurdles of their own potential claims.¹⁵⁵⁴
- (f) A debt gross-up has to be rejected because it would unjustly enrich Claimants.¹⁵⁵⁵

¹⁵⁴⁶ Respondent's First Post-hearing Brief, paras. 1050 et seqq.

¹⁵⁴⁷ Respondent's Opening Presentation at the Hearing on Quantum, Slides 55 et seqq.

¹⁵⁴⁸ Respondent's First Post-hearing Brief, para. 1056(e).

¹⁵⁴⁹ Respondent's First Post-hearing Brief, para. 1057.

¹⁵⁵⁰ Respondent's First Post-hearing Brief, para. 1067.

¹⁵⁵¹ Respondent's First Post-hearing Brief, paras. 1073 et seqq.

¹⁵⁵² Respondent's First Post-hearing Brief, paras. 1075 et seqq.

¹⁵⁵³ Respondent's First Post-hearing Brief, paras. 1078 et seqq.

¹⁵⁵⁴ Respondent's First Post-hearing Brief, paras. 1085 et seqq.

924 In the following, the Republic will respond to the arguments made with regard to this issue in Claimants’ First Post-hearing Brief and at the Final Hearing in the beginning of May 2013.

I. A debt gross-up is contrary to international law

925 Claimants have based their claim for enterprise value basically on two arguments: First that the investment definition of the ECT requires compensation of the enterprise value and that *Ripinsky* and *Williams* stated so in their book “*Damages in International Law*”¹⁵⁵⁶ and second that there is international practice supporting an award based on enterprise value.¹⁵⁵⁷ Both suppositions are wrong.

1. Investment definition of the ECT

926 Claimants’ argument with regard to the ECT is based on the investment definition in Article 1(6) ECT, which reads:

*“Investment’ means every kind of asset, owned or controlled directly or indirectly by an Investor and includes [...] a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise [...]”*¹⁵⁵⁸

927 According to Claimants, it follows from this definition that their investments are not only the shares in KPM and TNG but also the business enterprise as such and the assets of KPM and TNG which Claimants allege to “indirectly” own or control. In conjunction with Article 13(1) ECT, Claimants conclude that they are entitled to compensation for the loss of this investment which they equate with the enterprise value of KPM and TNG. Claimants then also go on to claim that this proposition is supported by the work of *Ripinsky* and *Williams*.

928 As a matter of fact, Claimants’ argument is logically flawed and, if thought to its conclusion, would have unacceptable consequences. It is also not supported by *Ripinsky* and *Williams*.

¹⁵⁵⁵ Respondent’s First Post-hearing Brief, paras. 1099 et seqq.

¹⁵⁵⁶ Claimants’ First Post-hearing Brief, paras. 606 et seqq.; Claimants’ Closing Submission, Final Hearing, Transcript Day 1, p.179, line 12 - p.180, line 14; Claimants’ Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.2, line 2 - p.4, line 20.

¹⁵⁵⁷ Claimants’ First Post-hearing Brief, paras. 614 et seqq.; Claimants’ Closing Submission, Final Hearing, Transcript Day 1, p.176, lines 3-5;

¹⁵⁵⁸ Article 1(6) ECT (**Exhibit C-1**).

929 Claimants' argument is logically flawed because it ignores the fact that KPM and TNG had pledged for the entire Tristan debt with all of their assets and their entire business enterprise.¹⁵⁵⁹ Thus, even if one assumed that the investments are the assets and the business enterprise of KPM and TNG, the Tristan debt must be deducted from the value of those assets and this business enterprise. As Tristan had no operative business of its own, KPM and TNG were practically liable for the Tristan debt themselves, meaning that all of their assets were subject to potential enforcement measures by the noteholders. This directly undercuts the value of these assets. Thus, even assuming that Claimants' investment were the assets and the business enterprise of KPM and TNG, debt would still need to be deducted and equity value would still be the correct measure of damages.

930 Moreover, if thought to its conclusion, Claimants' argument would have unacceptable consequences because it would mean that an investor could claim the enterprise value even if it had not remained liable for any of the investment vehicle's debt. If Claimants were indeed right, enterprise value would be the measure of damages no matter whether the investor had assumed the investment vehicle's debt or not. As a result, an investor could claim compensation for the value of all assets of a local subsidiary without having to forward any of the compensation to debtholders. This would allow for spectacular enrichment of the investor. Claimants' argument based on the investment definition of the ECT does not allow any differentiation between situations in which the investor remained liable and situations in which he did not. This undermines the argument completely, in particular since Claimants themselves admit that the decisive premise of their enterprise value claim is the allegation that they remained liable under the pledge agreements.¹⁵⁶⁰

931 Against this background, it comes as no surprise that the scholarly writings of *Ripinsky* and *Williams* do not support Claimants' conclusions. While these authors do refer to the investment definition of the ECT and state that under said definition, the investment can also consist of the local assets and business enterprise, they do not conclude that this would allow for an investor to claim the enterprise value of his local holdings.¹⁵⁶¹ *Ripinsky* and *Williams* in fact do not address this issue at all and do not take the side of either enterprise or equity value. This is simply one of many instances in which Claimants purport to have authority where in fact there is none.

¹⁵⁵⁹ Claimants' Reply on Jurisdiction and Liability, para. 571. Cf. also Tristan Note Indenture, Section 11.01 (**Exhibit C-584**).

¹⁵⁶⁰ Claimants' Reply on Jurisdiction and Liability, para. 570.

¹⁵⁶¹ *Ripinsky/Williams*, *Damages in International Investment Law* (BIICL 2008), p.151 (**Exhibit C-740**).

2. International practice

- 932 Contrary to Claimants’ allegations, there is no “uncontroversial principle of international law” that the enterprise value can be claimed if the investor remained liable for the investments’ debt.¹⁵⁶² In fact, such principle does not exist at all and it does not come into existence or become “uncontroversial” by Claimants simply inventing it.
- 933 To begin with, it should be noted that Claimants have pointed to no case whatsoever in which a tribunal awarded the enterprise value of a business to a claimant who remained liable for debt of the investment. This demonstrates most clearly the absurdity of Claimants’ claim of an “uncontroversial principle”.
- 934 In fact, the only international law principle that has come into existence is the principle that debt must be deducted from the enterprise or asset values in question. This is required because otherwise, it would become possible that an investor with standing brings a claim on behalf of another person without standing, allowing the latter person to circumvent jurisdictional and substantive requirements of their own claim. This was explained very clearly in the cases of *Impregilo v. Pakistan*¹⁵⁶³ and *PSEG v. Turkey*¹⁵⁶⁴ to which the Republic has already referred in earlier submissions.¹⁵⁶⁵
- 935 Claimants tried to distinguish these cases by alleging that in these cases, the investors were not 100% shareholders in the local subsidiary.¹⁵⁶⁶ While this is correct, there is nothing in these cases that would suggest that this makes a difference. Claimants have also never tried to explain how it would make a difference. If the *Impregilo* tribunal does not allow one shareholder to bring a claim on behalf of the other when the former shareholder is liable toward the latter, it stands to reason that the *Impregilo* tribunal would equally not allow a shareholder to bring claims on behalf of those debtholders toward the shareholder remains liable. The following statement of the *Impregilo* tribunal applies irrespective of whether the case involves potential claims by several shareholders or potential claims by one shareholder and several debtholders:

¹⁵⁶² Claimants’ Closing Submission, Final Hearing, Transcript Day 1, p.176, lines 6-7.

¹⁵⁶³ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction dated 22 April 2005 (**Exhibit R-365**).

¹⁵⁶⁴ *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award dated 19 January 2007 (**Exhibit C-261**).

¹⁵⁶⁵ Respondent’s First Post-hearing Brief, paras. 1089 et seqq. Cf. also *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Dissenting Opinion of Professor Brigitte Stern dated 5 October 2012 (**Exhibit R-379**)

¹⁵⁶⁶ Claimants’ Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.5, lines 10-19.

*“Equally, the fact that Impregilo may be obliged to account to its partners in respect of any damages obtained in these proceedings is also an internal GBC matter, which has no bearing on Pakistan’s agreed exposure under the BIT. If this were not so, any party would be at liberty to conclude a variety of private contracts with third parties, and thereby unilaterally expand the ambit of a BIT.”*¹⁵⁶⁷

936 A further observation by the Impregilo tribunal is equally noteworthy, namely that “a tribunal has no means of compelling a successful Claimant to pass on the appropriate share of damages to other shareholders or participants”.¹⁵⁶⁸ First of all, this observation applies to the present case as well. The Tribunal will have no means to ensure that the noteholders will indeed receive the proceeds under an award and the Sharing Agreement does not constitute a sufficient guarantee of payment, in particular because it does not provide for guarantees for the alleged debts. Moreover, the above quoted observation is noteworthy because it does not only refer to the passing on of damages to other shareholders but also to the passing on of damages to other “participants”, thus clarifying that the Impregilo reasoning applies to other participants than shareholders, such as for example debtholders.

937 Conversely, of the cases referred to by Claimants, none support Claimants’ contention of an “uncontroversial principle”. To begin with, Claimants’ reference to the *Enron* case¹⁵⁶⁹ is designed to confuse and to simulate the existence of authority where there is none. Quite simply, the issue discussed in the *Enron* case was completely different from the question at hand. The paragraph of the *Enron* award that Claimants rely on¹⁵⁷⁰ simply does not deal with the value of the local company but rather with a determination of the percentage of shares in that company that belonged to *Enron*.¹⁵⁷¹ This is an entirely different issue and Claimants’ reliance on this case is based on severe misquoting. The Republic can only invite the Tribunal to read the entire passage¹⁵⁷² instead of only the paragraph referenced by Claimants.

¹⁵⁶⁷ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction dated 22 April 2005, para. 151 (**Exhibit R-365**).

¹⁵⁶⁸ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction dated 22 April 2005, para. 152 (**Exhibit R-365**).

¹⁵⁶⁹ Claimants’ First Post-hearing Brief, paras. 79, 615; Claimants’ Closing Submission, Final Hearing, Transcript Day 2, p.176, line 4; Claimants’ Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.7, line 9.

¹⁵⁷⁰ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award dated 22 May 2007, para. 392 (**Exhibit C-263**).

¹⁵⁷¹ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award dated 22 May 2007, para. 391 (**Exhibit C-263**).

¹⁵⁷² *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award dated 22 May 2007, paras. 391 et seqq. (**Exhibit C-263**).

The case thus has no impact on the debate on whether to apply equity or enterprise value.

- 938 Likewise, the *Occidental* case does not help Claimants.¹⁵⁷³ Again, the issue in *Occidental* was the extent of participation and not the value of that participation. The *Occidental* tribunal had to determine whether the claimant was still the unlimited owner of the investment or whether the claimant had transferred 40% of the investment to a third company. The tribunal found that the transfer was invalid and therefore calculated the damages on the basis that the claimant was still a 100% shareholder.¹⁵⁷⁴ Presently, the question is a fundamentally different one. Unlike in *Occidental*, the present case relates to the value of the shareholding, as there is considerable debt as of the valuation date, which, in the view of the Republic, needs to be deducted and thus renders the equity value negative. Claimants' reference to the *Occidental* case is hence irrelevant.
- 939 Furthermore, Claimants' reference¹⁵⁷⁵ to the *Chorzów* case¹⁵⁷⁶ is equally misplaced. In *Chorzów*, the PCIJ did not have to deal with a situation in which one person was effectively bringing claims on behalf of debtholders. The case played out in the pre-BIT area, with no possibility that debtholders were circumventing the requirements of their own claim – quite simply because the law of diplomatic protection did not foresee the bringing of claims by the debtholders or by states on behalf of them. The PCIJ thus did not have to deal with this delicate question and consequently, its findings do not relate to the present day BIT era.
- 940 Claimants' more general reference¹⁵⁷⁷ to the *Chorzów* standard of restitution as such also misses the mark. Claimants allege that since the *Chorzów* case requires wiping out “*all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed*”,¹⁵⁷⁸ Claimants must be put into a position in which they hold the cash flows created by

¹⁵⁷³ Claimants refer to the *Occidental* case at Claimants' First Post-hearing Brief, para. 639; Claimants' Closing Submission, Final Hearing, Transcript Day 2, p.176, line 4; Claimants' Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.6, lines 2-21.

¹⁵⁷⁴ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award dated 5 October 2012, paras. 649 et seq. (**Exhibit R-355**).

¹⁵⁷⁵ Claimants' First Post-hearing Brief, para. 638; Claimants' Closing Submission, Final Hearing, Transcript Day 2, p.176, line 3; Claimants' Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.7, line 8.

¹⁵⁷⁶ *Factory at Chorzów (Germany v. Poland)*, Judgment, 1928 PCIJ Rep Series A No. 13 (**Exhibit C-165**).

¹⁵⁷⁷ Claimants' First Post-hearing Brief, para. 614; Claimants' Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.3, line 8 - p.4, line 20.

¹⁵⁷⁸ *Factory at Chorzów (Germany v. Poland)*, Judgment, 1928 PCIJ Rep Series A No. 13, para. 125 (**Exhibit C-165**).

KPM and TNG and in which they can direct these cash flows to the Tristan noteholders.¹⁵⁷⁹

941 First of all, this suggestion is flawed because Claimants read consequences into the *Chorzów* standard which it does not state at all. The brief description of the standard in the *Chorzów* ruling does not provide for any rule as to how precisely the consequences of an illegal act should be wiped out and Claimants have not pointed to specific wording in the *Chorzów* ruling supporting their supposition.

942 More importantly, Claimants' suggestion is flawed from a factual point of view. That is because the repayment of the Tristan note debt was practically not to be conducted through the Claimants Anatoli Stati, Gabriel Stati, Ascom or Terra Raf. Rather, the repayment from Tristan to the noteholders was to be realised from the proceeds of loans that KPM and TNG had entered into with Tristan.¹⁵⁸⁰ It is thus not the case that Claimants had been supposed to hold the cash flows created by KPM and TNG and that Claimants were to forward these cash flows to the noteholders. Rather, the repayment was supposed to go through Tristan which is not a claimant in this case. Consequentially, it would not recreate the hypothetical situation without the alleged breach if all hypothetical cash flows of KPM and TNG were directly awarded to the Claimants.

943 On the second day of the Final Hearing, Claimants suddenly also referenced the *Azurix* case¹⁵⁸¹ in support of their view, without providing further explanation or even a reference to a specific section of the award.¹⁵⁸² Upon review, the Republic does not see any basis upon which Claimants could invoke the *Azurix* case. This case simply does not deal with the question at hand. Without explanation by Claimants, no further comment is currently required.

944 Lastly, it should be clarified that the Republic is not suggesting that Claimants are actively acting on behalf of the Tristan noteholders and as a front for the actual noteholder claim.¹⁵⁸³ The Republic will not speculate about the motives for

¹⁵⁷⁹ Claimants' First Post-hearing Brief, para. 614; Claimants' Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.4, lines 5-14.

¹⁵⁸⁰ As can be seen from Tristan's Financial Statement For the Year Ended December 31, 2008, p.F-65 (**Exhibit R-37.5**), Tristan had loaned a total of USD 325 million to KPM and TNG. These amounts carried interest between 16% and 17.65% (p.F-93 and p.F-129) and thus served to ensure the repayment of interest and ultimately the principal of the Tristan notes. For the sake of completeness, it should also be mentioned that Tristan had also loaned USD 75.3 million to Terra Raf (p.F-65). However, there is no information on the repayment schedule of this loan and whether it was supposed to serve as a source for repayment of the Tristan noteholders.

¹⁵⁸¹ *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award dated 14 July 2006 (**Exhibit C-245**).

¹⁵⁸² Claimants' Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.7, line 9.

¹⁵⁸³ This addresses the question posed by Mr. Haigh at the Final Hearing, Transcript Day 2, p.84, lines 9-18 and responds to Claimants' contentions at the Final Hearing Transcript Day 2, p.4, line 21 - p.5, line 9.

Claimants' claim, as these are irrelevant for the question at hand. What is relevant is that a claim by Claimants, if successful, practically has the consequence that Claimants serve for the noteholders to realise the noteholders' claim. This may or may not be legally qualified as acting on behalf of the noteholders, it has however the same effect which is the salient point under the *Impregilo* and *PSEG* cases cited by the Republic. In these cases, it was equally not argued by the Tribunals that the claimants were formally representing their creditors. Nonetheless, the tribunals declined to compensate the claimants for the amounts they owed to their creditors.

II. Claimants did not remain liable for the Tristan noteholder debt

945 Claimants try to confuse everyone by arguing that they remained liable for the Tristan noteholder debt. According to Claimants, this renders the “*enterprise versus equity value debate*” under international law moot.¹⁵⁸⁴ In point of fact, nothing could be further from the truth. Neither did Claimants remain liable for the Tristan noteholder debt nor would such continuing liability render the arguments on international law moot.

946 Claimants' theory of continuing liability is constructed on Section 6 of the Terra Raf and Ascom Pledge Agreements.¹⁵⁸⁵ According to Claimants, Ascom and Terra Raf remain liable towards the noteholders with any proceeds from this arbitration because such proceeds would be “payments” in the meaning of Section 6(b) of the Pledge Agreements.¹⁵⁸⁶ The Republic has already explained in its First Post-hearing Brief that this is not the case:¹⁵⁸⁷ Section 6(b) clearly refers to “dividends” and “distributions”, thus limiting the scope of the provision to payments by KPM and TNG to its shareholders. Hypothetical awards against the Republic of Kazakhstan are not covered.

947 This result is also confirmed by the analysis of Professor Ilyassova:¹⁵⁸⁸

- (a) As Professor Ilyassova notes, the pledge agreements have to be interpreted in view of the provisions of the applicable Kazakh law,¹⁵⁸⁹ in particular Article 309 of the Kazakh Civil Code.¹⁵⁹⁰ This article establishes that “[t]he

¹⁵⁸⁴ Claimants' Closing Submission, Final Hearing, Transcript Day 1, p.176, lines 7-11.

¹⁵⁸⁵ Ascom and Terra Raf Pledge Agreements dated 20 December 2006 (**Exhibit C-585**).

¹⁵⁸⁶ Claimants' First Post-hearing Brief, paras. 622, 624.

¹⁵⁸⁷ Respondent's First Post-hearing Brief, para. 1076.

¹⁵⁸⁸ Third Expert Report of Professor Ilyassova, paras. 67 et seqq.

¹⁵⁸⁹ The pledge agreements are governed by Kazakh law, cf. Section 11 of the Pledge Agreements (**Exhibit C-585**).

¹⁵⁹⁰ Third Expert Report of Professor Ilyassova, paras. 69 et seq., 74.

right of pledge shall extend over separable results, products and revenues, generated as a result of use of the property under pledge, in cases envisaged by an agreement or by legislation.”¹⁵⁹¹ Kazakh law thus provides for the extension of pledges to revenues generated from the property pledged, but only if there is an agreement to that effect.

- (b) The pledge agreements contain several sections in which the rights subject to the pledge are defined. In particular, Section 1 defines the “*Collateral*” as “*the Participatory Interest [i.e. the shares in KPM/TNG] and all dividends and other distributions connected to the Participatory Interest*”. Moreover, Section 4.1 states that “*Until the occurrence of an Event of Default, the Pledgor shall be entitled to exercise all rights attaching to the Collateral [...] and also to receive all income from use of the Collateral [...].*” As Professor Ilyassova explains, it follows from these provisions that the pledge “*extends over the revenues generated as a result of use of the property under pledge connected with the participatory interest.*”¹⁵⁹²
- (c) Importantly, this understanding of the pledges applies irrespective of whether an event of default has occurred or not. The pledges extend to the same rights, namely the rights to the revenues generated, irrespective of the existence of an event default.¹⁵⁹³ Importantly, Section 6 of the pledge agreements cannot be understood to create more extensive rights than Sections 1 and 4.1. **That is because Section 6 is headed “Grounds for enforcement of collateral” and thus clearly does not purport to define the collateral.**¹⁵⁹⁴
- (d) As both KPM and TNG are LLPs and subject to the Kazakh LLP law, the rights to the revenues generated are defined by said law. Accordingly, it is the income generated through the activity of the LLP that is subject to the pledges.¹⁵⁹⁵ Any potential award against the Republic is hence not covered by the pledges.¹⁵⁹⁶

948 In their First Post-hearing Brief, Claimants for the first time suggest that the “key purpose” of Section 6(b) “was to ensure that the noteholders received the benefit of any payments from Kazakhstan in respect of Ascom and Terra Raf’s Participation

¹⁵⁹¹ Excerpts from the Kazakh Civil Code (**Exhibit 2 to the Third Expert Report of Professor Ilyassova**).

¹⁵⁹² Third Expert Report of Professor Ilyassova, para. 77.

¹⁵⁹³ Third Expert Report of Professor Ilyassova, para. 82.

¹⁵⁹⁴ Third Expert Report of Professor Ilyassova, para. 83.

¹⁵⁹⁵ Cf. Third Expert Report of Professor Ilyassova, paras. 86 et seqq. with references to the relevant provisions of the LLP law.

¹⁵⁹⁶ Third Expert Report of Professor Ilyassova, para. 92.

Interest in KPM and TNG”.¹⁵⁹⁷ That suggestion is unsupported and quite simply ludicrous. A reference to payments from Kazakhstan, for example for the exercise of a pre-emptive right, could have been included in the provision quite easily. However, it was not. Quite contrary to Claimants’ allegations, this demonstrates that Section 6(b) was not to cover payments by Kazakhstan. The fact that the parties to the pledges knew about the possibility of a payment by Kazakhstan in case of an exercise of a pre-emptive right and the fact that nonetheless, no reference to payments by Kazakhstan was included, speak quite clearly in that regard.¹⁵⁹⁸

949 Interestingly, in their First Post-hearing Brief, Claimants also suggest that they are not obliged to defend themselves against potential noteholder claims.¹⁵⁹⁹ According to Claimants, they can simply accept such claims and need not have the matter decided by an ICC arbitral tribunal (that would be competent to decide on the matter under the pledge agreements)¹⁶⁰⁰. The Republic does not in principle disagree with that statement. Of course, Claimants are free to accept any and all claims against them as they see fit. However, if Claimants accept such claims where no liability exists, they cannot simply recover their losses from the Republic. As long as no liability has been determined by the competent ICC tribunal, Claimants’ argument that the Republic has to compensate Claimants for such liability is simply ludicrous.

950 It is equally ludicrous for Claimants to effectively vest this Tribunal with jurisdiction to decide on the interpretation of the pledge agreements, even though they have agreed in the pledges that an ICC tribunal will have jurisdiction and even though the Republic never agreed to extend the Tribunal’s jurisdiction over the interpretation of the pledge agreements. The Republic’s general offer to arbitrate contained in the ECT certainly does not entail an offer to have matters regarding the interpretation of private contracts of the alleged investor to be arbitrated as well.

951 Regarding the Sharing Agreement, the Republic takes note of Claimants’ statement in their First Post-hearing Brief that they do not rely on the liability created by the Sharing Agreement in arguing that Enterprise Value should be awarded, but instead

¹⁵⁹⁷ Claimants’ First Post-hearing Brief, paras. 625.

¹⁵⁹⁸ Notably, the Joint Operating Agreement with Vitol regarding the LPG Plant expressly contains a reference to the exercise of state pre-emptive rights, cf. LPG Joint Operating Agreement, Section 11.4 (**FTI First Scope of Review, No. 44**). The Joint Operating Agreement was concluded even prior to the pledges, so that it can be assumed that at least Claimants were perfectly aware of the issue when the pledges were concluded. Nonetheless, Claimants did not include a reference to payments made by the Republic in the pledges. This conscious decision cannot be belatedly reverted in these arbitral proceedings.

¹⁵⁹⁹ Claimants’ First Post-hearing Brief, para. 626.

¹⁶⁰⁰ Section 12 of the Pledge Agreements (**Exhibit C-585**).

rely on the alleged initial liability under the Pledge Agreements.¹⁶⁰¹ Anything else would indeed have not made any sense whatsoever.

952 Lastly, it is important to note that Claimants get it the wrong way around when they suggest that because of the alleged continuing liability of the Claimants, the discussion of international law becomes irrelevant. Rather, continuing liability is the basic premise for any potential claim for enterprise value. Only if Claimants did remain liable could it even theoretically be argued that enterprise value could be awarded. Conversely, even if Claimants did remain liable, there is a persuasive argument under international law – which the Republic has set out above – that nonetheless, only equity value can be awarded. Importantly, Claimants are wrong when they suggest that the Republic admitted the opposite.¹⁶⁰² The statement Claimants’ reference contains no admission whatsoever.¹⁶⁰³

III. Awarding enterprise value would unjustly enrich Claimants

953 The Republic has already explained that awarding the correct enterprise value of USD 186 million, as calculated by Deloitte GmbH, would lead to unjust enrichment of Claimants. Specifically, due to the effects of the Sharing Agreement, Claimants would receive USD 65.4 million without never having suffered damages.¹⁶⁰⁴

954 In their First Post-hearing Brief, Claimants suggest that such outcome would be acceptable because it is the result of a “voluntary renegotiation of the priority of claims between Claimants and the noteholders that the noteholders voluntarily accepted”.¹⁶⁰⁵ This is an unsupported allegation that appears highly unlikely from any conceivable common sense point of view. Claimants have not presented any sensible reason as to why the noteholders would have voluntarily accepted such readjustment of the priority of claims. Rather, it must be assumed that Claimants negotiated a 30% share of the claims for themselves by threatening not to forward any of the proceeds from a potential award to the noteholders. Thus, in negotiations with the noteholders, Claimants initially did not accept the liability towards the noteholders that they now allege to have always accepted. Against this background, it is entirely in bad faith for Claimants to allege that the unjust USD 65.4 million

¹⁶⁰¹ Claimants’ First Post-hearing Brief, para. 632.

¹⁶⁰² Claimants’ First Post-hearing Brief, paras. 603 et seqq.

¹⁶⁰³ Respondent’s Rejoinder on Quantum, para. 383.

¹⁶⁰⁴ Respondent’s First Post-hearing Brief, para. 1101.

¹⁶⁰⁵ Claimants’ First Post-hearing Brief, para. 637.

enrichment they would receive from an award based on enterprise value was a result of voluntary renegotiation.¹⁶⁰⁶

955 Conversely, there is no risk of unjust enrichment if an award is based on equity value.¹⁶⁰⁷ In this case, Claimants would receive precisely the value of their shareholding (which amounts to zero) and would thus not be enriched. In addition, the noteholders could bring their own claims under applicable BITs. Insofar as they would obtain an award against the Republic, there would again be no enrichment. Insofar as the noteholders' claims would fail, e.g. for lack of jurisdiction *ratione personae*, this does equally not lead to unjust enrichment but is merely the result of the currently applicable Kazakh BITs and the fact that the Republic has only agreed to arbitrate disputes with certain investors but not with others.¹⁶⁰⁸

IV. Other debt

956 In their First Post-hearing Brief, Claimants have given only very limited and confused responses with regard to debt other than the Tristan note debt. Thus, it remains the case that Claimants have not provided a proper valuation corresponding to their own case. The complete lack of breakdown of debt means that Claimants have not proven the existence of damages and that their claim must fail for this reason alone.¹⁶⁰⁹

957 Moreover, Claimants have not responded in any way to the Republic's argument that debt under the Reachcom Facility Agreement, the Limozen Facility Agreement and the Reachcom Receivables Purchase Agreement needs to be deducted. This debt was already referenced in the Republic's Rejoinder Memorial on Quantum,¹⁶¹⁰ meaning that Claimants' non-responsiveness can only be understood as an admission that this debt needs to be deducted from any of their claims.

¹⁶⁰⁶ Claimants have suggested that a reason for the 30% participation is to incentivise Claimants to collect an award that is significantly less than the range requested by Claimants, cf. Claimants' First Post-hearing Brief, para. 631. This claim is unproven. It is moreover unrealistic, given that under their own case, in which Claimants allege to have been liable under the pledge agreements already, Claimants would have been obliged to collect the proceeds from an award in any event, namely under Section 4.2(h) and Section 4.3 of the Pledges (**Exhibit C-585**). Thus, in light of this legal obligation, the noteholders would not have needed to grant a 30% participation in the first place.

¹⁶⁰⁷ Claimants' allegation at Claimants' First Post-hearing Brief, para. 600, is thus incorrect.

¹⁶⁰⁸ Cf. *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Dissenting Opinion of Professor Brigitte Stern dated 5 October 2012, paras. 167 et seq. (**Exhibit R-379**).

¹⁶⁰⁹ Respondent's First Post-hearing Brief, para. 1063.

¹⁶¹⁰ Respondent's Rejoinder on Quantum, para. 387, referring to FTI Consulting Expert Supplemental Report, para. 3.5.

958 Insofar as Claimants have provided some explanation of the other debt, the Republic responds as follows:

1. KPM and TNG COMSA prepayment arrangements

959 In their First Post-hearing Brief, Claimants provide some confused arguments in which they mix together the issues regarding the reduction of claims for the LPG Plant because of the profit sharing arrangement with Vitol and regarding the obligations under the KPM and TNG COMSAs.¹⁶¹¹ The Republic has already addressed above the effect of the profit sharing arrangement in the Joint Operating Agreement.¹⁶¹² Basically, the Republic's position in this regard is that the sharing of cash-flows generated by the envisaged joint venture company requires the reduction of any claims for the LPG Plant, as Claimants could never have realised its full cash flows for themselves. This is however not to be confused with the issue of debt under the COMSAs. The COMSAs relate to existing debt as of the valuation date whereas above described argument relates to the way in which the (hypothetical) cash-flows would have been shared if the LPG Plant had started operations.

960 Disregarding this confusion created by Claimants and looking for their arguments regarding the COMSA debt, it becomes clear that Claimants provide none. Claimants do not contest that the COMSA debt existed as of 21 July 2010 and they do not explain in any way why the debt under the COMSAs should not be deducted from their claims.¹⁶¹³ It is thus admitted by Claimants that this debt needs to be deducted.

2. Laren loan

961 There is no dispute that as at the valuation date of 21 July 2010, KPM and TNG were responsible for debt under the Laren loan of at least USD 54.9 million.¹⁶¹⁴ There is equally no dispute that this liability directly affected the equity value of KPM and TNG as of the valuation date. Claimants try to avoid the deduction of the Laren loan from their claim by alleging that the entry into the Laren loan was caused

¹⁶¹¹ Claimants' First Post-hearing Brief, paras. 642 et seqq.

¹⁶¹² See Part IV, E.V above

¹⁶¹³ The only debt Claimants contest is debt under the Joint Operating Agreement, cf. Claimants' First Post-hearing Brief, para. 645, not under the COMSAs.

¹⁶¹⁴ Claimants admit that the Laren loan was only repaid in March 2012, cf. Testimony of Mr. Lungu, Hearing on Quantum, Transcript Day 1, p.191, lines 18-21. As to the amount due under the Laren loan at that time, the Republic refers to the analysis done by Claimants' own experts of FTI who stated that as of 13 February 2010, USD 54.9 million were due under the loan, cf. FTI Consulting Supplemental Expert Report, para. 3.5. The Republic submits that the debt as of 21 July 2010 was at least as high, cf. Respondent's First Post-hearing Brief, para. 1066.

by the Republic.¹⁶¹⁵ This is entirely incorrect, as was demonstrated above. The entry into the Laren loan was in particular due to the economic downturn, Claimants' own mismanagement and the fact that admittedly legal tax demands became due.¹⁶¹⁶ Moreover, Claimants' allegation ignores that Claimants themselves stated that they wanted to enter into a bridge loan in the year 2009.¹⁶¹⁷ Some kind of debt financing would thus have existed no matter what and the debt was hence not caused by the Republic.

962 Further, Claimants' allege that the Laren loan has been repaid by now.¹⁶¹⁸ This allegation is unproven as it is based entirely on the unreliable evidence of Mr. Lungu, even though proof of repayment could have been provided easily in documentary form if it had occurred. Moreover, the allegation is unspecific, as Mr. Lungu did not even explain who effected the alleged repayment and under what circumstances.¹⁶¹⁹ Thus, it is unproven that the repayment caused any loss to any of the Claimants.¹⁶²⁰

3. Tax debt

963 Further, tax debt in the amount of USD 81.2 million needs to be deducted as well.¹⁶²¹

964 Claimants suggest that the tax claims against KPM and TNG are "*simply another contrived allegation stemming from Nazarbayev's October 2008 directive*".¹⁶²² Tellingly, Claimants attempt to support this unfounded allegation by submitting a second report of Professor Maggs which was prepared for the purposes of their First Post-hearing Brief. Production of an expert report on an issue which Claimants believe to be that crucial at such a late stage demonstrates *per se* the difficulties Claimants had to struggle with in setting out this implausible argument. As the Republic has demonstrated a number of times, the tax authorities were perfectly correct in imposing corporate back taxes on KPM and TNG in 2009.¹⁶²³

¹⁶¹⁵ Claimants' First Post-hearing Brief, para. 646.

¹⁶¹⁶ See Part II, A.I and III above.

¹⁶¹⁷ Testimony of Mr. Lungu, Hearing on Jurisdiction and Liability, Transcript Day 1, p.199, line 22 - p.200, line 9.

¹⁶¹⁸ Claimants' First Post-hearing Brief, para. 647.

¹⁶¹⁹ Testimony of Mr. Lungu, Hearing on Quantum, Transcript Day 1, p.191, lines 18-21

¹⁶²⁰ To that end, it is irrelevant that Claimants have presented a "Settlement Agreement" regarding the Laren debt (**Exhibit C-745**). It is unproven that the terms of this agreement were fulfilled and in particular that the payments stipulated thereunder were made.

¹⁶²¹ Respondent's First Post-hearing Brief, paras. 1057 et seqq.

¹⁶²² Claimants' First Post-hearing Brief, para. 238.

¹⁶²³ Respondent's Rejoinder on Quantum, paras. 366 et seq.; Respondent's First Post-hearing Brief, paras. 1057 et seq.

965 Claimants, as usual, have to juggle with the facts and have to speculate wildly in order to make their argument appear not as hopeless as it actually is. In response, the Republic asked Professor Tomas Balco to produce an additional expert report.¹⁶²⁴ This report puts to rest Claimants unfounded allegations regarding the tax dispute. In the following, the Republic will nevertheless comment on a few of the particularly misleading points raised by Claimants in their First Post-hearing Brief.

a) Claimants wrongfully focus on the types of activities, rather than the purpose of the expenses

966 According to Claimants' wrong assertion, "KPM and TNG included well-drilling expenses in that category [i.e. expenses for the acquisition of fixed assets and construction expenses] because (i) a well is a fixed asset and (ii) new wells are constructed (and acquired) by drilling."¹⁶²⁵ Claimants' position is based on the misunderstanding of both applicable tax legislation and the provisions of the Subsoil Use Agreements.¹⁶²⁶

967 Specifically, Claimants focus on the type of activity (own-account construction),¹⁶²⁷ whereas both the Kazakh Tax Code and the Subsoil Use Agreements focus on the purpose of the relevant activity. The teleological, historical and grammatical interpretations of the relevant provisions show that it is the latter approach which is in line with the applicable law.

968 As noted by Professor Balco,

*"[the] challenge for a such a country [rich in natural resources, like Kazakhstan] is diversification of its economy and industry and assuring that the secondary industry develops hand in hand with the primary industry and the country can benefit not only from the extractive activities taking place and exporting the raw materials, but ideally, the country will achieve development of secondary industries, which would allow the processing of this raw materials and also production of semi-finalized production and also final products."*¹⁶²⁸

¹⁶²⁴ Second Expert Report of Professor Balco dated 3 June 2013.

¹⁶²⁵ Claimants' First Post-hearing Brief, para. 242.

¹⁶²⁶ Cf. generally Second Expert Report of Professor Balco, pp. 6-24.

¹⁶²⁷ Cf. Claimants' First Post-hearing Brief, para. 242; Second Expert Report of Professor Maggs, para. 28. This is also the mistake made by both the appellate and the cassation courts, cf. Second Expert Report of Professor Balco, p.28.

¹⁶²⁸ Second Expert Report of Professor Balco, p.7.

969 Offering tax benefits to those intending to develop the secondary industry allows fostering the development of sectors relevant to the country’s economy. For this very reason, historically, the tax legislation of Kazakhstan came to offer different depreciation rates on the expenses relating to the exploration and extraction of natural resources and those relating to the processing of raw materials into semi-finalized and final products (production).¹⁶²⁹ The latter category included the expenses related to the own-account construction and acquisition of the equipment for production facilities.¹⁶³⁰

970 This distinction furthermore is demonstrated by the grammatical interpretation of the relevant contractual and legislative provisions in the original language. As noted by Professor Balco, this distinction was somewhat diminished in the translation:

“The tax measures intended for the exploratory and extractive activities, which were contained both in Article 20 and Article 23 use specific term ‘extraction’, where in the Russian language the term ‘добыча’ is used.

The tax measures intended for production/manufacturing activities in Article 20 paragraph 10 used the term ‘производственных целей’, which can be translated as ‘production purposes’ or ‘manufacturing purposes’. The version of the translation of this provision provided by Prof. Maggs uses the term ‘industrial purpose’, which in my opinion already does not exactly capture the meaning of the term ‘производственных целей’ and rather would correspond to the term ‘промышленных целей’, which however was not used in this case. But even if such term was used, I believe it would still not change the conclusion of the grammatical interpretation.”¹⁶³¹

971 Nevertheless, in the Russian versions of both the Tax Code and the Subsoil Use Agreements, the terminology is consistent and leaves no room for speculations that the production and manufacturing activities also include the exploration and extraction activities:

“However the distinct use of the term ‘exploration’ in connection with the tax rules for treatment of expenses related to exploration

¹⁶²⁹ Second Expert Report of Professor Balco, pp.7-8.

¹⁶³⁰ Second Expert Report of Professor Balco, p.12-13.

¹⁶³¹ Second Expert Report of Professor Balco, p.14.

activities [under Article 23] and the use of the term ‘extraction’ in connection with the tax rules for treatment of expenses related preparatory works (including construction) related to extractive activities [also under Article 23] and tax rules for depreciation of fixed assets used in extractive activities [under Article 20 paragraph 3] and the distinct use of the term ‘production’ in connection with the tax incentives for the production and manufacturing activities [under Article 20 paragraph 3] make it clear that these were two distinct rules applicable to investments related to different types of activities. [...]

This was made clear by the drafters of both the tax law and also the drafters of relevant Subsurface Use Agreements, where in the key provisions dealing with these rules for depreciation, they maintain the distinct use of the two terms in the original (Russian) language.”¹⁶³²

972 The expenses in question broadly referred to:

- (a) well drilling;
- (b) mobilization and demobilization;
- (c) well killing;
- (d) development;
- (e) sampling and testing; and
- (f) geophysical studies and project development.¹⁶³³

973 Obviously, none of the above operations belongs to the activities relating to production, i.e. processing of raw materials into the partially-finalized and/or final products. On this basis, Professor Balco already concluded that that KPM’s and TNG’ expenditures in question are *“expenditures for geological exploration and geological prospecting operations as well as expenditures for operations relative to development of the field with the view to extract hydrocarbons as is also dully documented in the work programs and relevant protocols. These expenditures are specifically foreseen to constitute a separate pool of capitalized expenditures to be covered by the treatment of Article 23, which permits amortization at the rate of*

¹⁶³² Second Expert Report of Professor Balco, p.15-16.

¹⁶³³ Second Expert Report of Professor Balco, p.25. Cf. Expert Report of Professor Balco, B.2.1.

25% as was correctly claimed by the Republic and not at the rate of 100% as was claimed by the Claimants.”¹⁶³⁴ This conclusion remains unchanged also after reviewing additional materials referred to by Professor Maggs.¹⁶³⁵

974 Therefore, KPM and TNG, contrary to Claimants’ assertion, were only entitled to apply 25% depreciation rate to the expenditures incurred in relation to the above mentioned activities. It must therefore be concluded that the Tax Committee’s assessment of corporate back taxes against KPM and TNG was lawful.

b) Kazakh courts confirmed the correctness of the Tax Committee’s position

975 Claimants’ further assert that the appellate and cassation court of Kazakhstan vindicated their position.¹⁶³⁶ This assertion is clearly wrong, as a simple look at the outcome of the lengthy litigation in this case confirms. Claimants speculate that “Kazakhstan is asking the Tribunal to disregard the sixteen months of litigation that Claimants pursued” but in the very next sentence suggest that “[t]he Tribunal should disregard [...] decision of the Kazakh Supreme Court [which overturned the decisions of the appellate and cassation courts].”¹⁶³⁷ This is yet another one of Claimants’ attempts to make the Tribunal consider certain facts allegedly favourable to Claimants’ position in isolation from all relevant circumstances of the case.

976 Certainly, the decision of the Supreme Court of 3 November 2010 overruling the decisions of the appellate and cassation courts demonstrates that Claimants’ position was not “vindicated” but rather rightfully determined to be groundless. Equally, Professor Balco does not consider these decisions to materially affect his views. Having reviewed the relevant decisions, Professor Balco confirmed that his opinion remained unchanged.¹⁶³⁸ Moreover, the careful review of these decisions by the expert revealed that the courts made the same mistake as Claimants made in interpreting the relevant legislative provisions:

“As I analyzed the decisions of the court decisions at each level, I identified that the issue of why the courts take different decisions is the focus on whether the geological exploration and drilling expenses constitute ‘own construction’ and therefore these costs should be subject to preferential treatment foreseen by Article 20

¹⁶³⁴ Expert Report of Professor Balco, B.2.4; Respondent’s Rejoinder Memorial on Quantum, para. 372.

¹⁶³⁵ Second Expert Report of Professor Balco, p.6.

¹⁶³⁶ Claimants’ First Post-hearing Brief, para. 253-261.

¹⁶³⁷ Ibid. para. 255.

¹⁶³⁸ Second Expert Report of Professor Balco, p.24

*paragraph 10 or whether these expenses are subject to treatment of Article 23, because of their very nature – being the exploration activities and preparatory works for extraction of natural resources.”*¹⁶³⁹

977 Claimants advanced a groundless assertion that the Supreme Court’s decision was unreasoned.¹⁶⁴⁰ Contrary to this, Professor Balco demonstrates that the decision is in fact well reasoned and based on the proper construction of the relevant legislative provisions.¹⁶⁴¹

c) Supreme Court did not change its earlier position

978 Furthermore, Claimants also rely on a statement of Professor Maggs’ that the Supreme Court’s decision of 3 November 2010 “*marked a complete change from the Supreme Court’s previous position that drilling expenses constituted ‘construction’*”¹⁶⁴² This is again incorrect.

979 As Professor Balco explains, the earlier decision of the Supreme Court dated 10 June 2008 to which Professor Maggs refers “addresses only one particular point in respect of own account construction and that is the timing of when the taxpayer may claim the tax incentive. The Court contemplates on the question, what is the moment when the taxpayer may claim the deduction for corporate income tax purposes – is it the moment when taxpayer incurs the expenditure, or is it the moment, when the taxpayers completes the construction and puts the constructed asset into commercial use.”¹⁶⁴³ Having considered this question, the court reached the “conclusion which is specifically provided for in the principles of the Article 20 – it is the moment of completing the construction and bringing the asset into operation – the asset must be used in operation and be subject to usage.”¹⁶⁴⁴ Thus, this earlier decision did not address the question of whether Article 20 or Article 23 applied to the expenses in question. Rather, it dealt with the specific consequences of the application of Article 20, namely timing of deductions, once that application was found to be appropriate.

980 The second decision Professor Maggs refers to is the decision of the Supreme Court of 11 February 2009. This decision also addresses the issue of the time at which the

¹⁶³⁹ Ibid. Cf. also Second Expert Report of Professor Maggs, para. 17.

¹⁶⁴⁰ Claimants’ First Post-hearing Brief, para. 256.

¹⁶⁴¹ Second Expert Report of Professor Balco, p.27-48.

¹⁶⁴² Second Expert Report of Professor Maggs, para. 22.

¹⁶⁴³ Second Expert Report of Professor Balco, p.31.

¹⁶⁴⁴ Ibid. p.31.

taxpayer may claim the tax incentive. The court's conclusions in this case are confusing and mutually excluding. On the one hand, the decision suggests that the taxpayer has the right to deduct the expenses incurred for own account construction at any time – even before the construction is completed and put into use.¹⁶⁴⁵ At the same time, the court ruled that “*the depreciation may only be charged on assets, which are put into use and actively used in operation.*”¹⁶⁴⁶

981 Clearly, none of the decision actually deals with the question relevant to the present dispute, i.e. whether the 100% depreciation rate could be applied to the expenditures incurred with respect to “own-account construction” (drilling) of facilities (wells) which do not serve manufacturing/production purposes. Hence, Professor Maggs’ and Claimants’ wrongful conclusions in this respect were based on misunderstanding (or misstatement) of the actual position of the Supreme Court in the earlier decisions.

982 The decision of the Supreme Court of 3 November 2010 does therefore not mark “*a complete change*” of the court’s earlier position.

d) Even if the relevant wells were fixed assets, KPM and TNG should have applied different depreciation rates

983 Nevertheless, the decisions of the Supreme Court cited above indeed provide a useful guidance as to the moment from which the relevant expenditures on “own-account construction” could be depreciated. As noted, the Supreme Court restated the provision of Article 20 paragraphs 1 and 2, which provide that Article 20 only applies to fixed assets, which are used in operations and which are liable to wear. Therefore, even if Claimants’ interpretation of tax legislation were correct (and it is not), KPM and TNG were in any event not entitled to depreciation until the relevant wells were properly put into operation. Claimants failed to demonstrate which of the “fixed assets” they refer to were used in operations and were liable to wear.

984 But even if the wells were put into operation as described above, Claimants are nevertheless wrong in asserting that KPM and TNG were entitled to deduct 100% of any expenditures relating to the construction of any of the fixed assets.¹⁶⁴⁷ As demonstrated above, only the fixed assets intended for production qualify under Article 20 paragraph 10. Professor Balco notes:

¹⁶⁴⁵ This conclusion contradicts Article 20 paragraphs 1 and 2 (cf. Second Expert Report of Professor Balco, p.32).

¹⁶⁴⁶ Second Expert Report of Professor Balco, p.32.

¹⁶⁴⁷ Claimants’ First Post-hearing Brief, para. 242.

“I am willing to accept however, that should the taxpayer choose to strictly identify costs incurred on drilling of the particular exploration well and should this particular exploration well lead to a successful identification of oil resource and this very particular well would be later developed into the development well, one could accept that as a part of the process of capitalizing these expenses incurred in different stages, the separately identifiable asset would be created in the form of the development well. Such a separately identifiable asset could be accepted for treatment under Article 20 and subject to depreciation in accordance with the rates set forth in paragraph 3. The depreciation rate, which would be applied to such an asset, would be determined in accordance with Section 4.4.7.4. of the Procedure and in absence of special depreciation rate for development wells , such a well would be classified as a structure and would be subject to depreciation at the rate of 7 %, instead of the tax treatment permitted under Article 23, which allowed for 25% depreciation.

Should the Claimants insist that the geological exploration costs and drilling costs of exploration wells are to be considered as fixed assets and subject to depreciation, one would need to identify, which of the exploration wells previously drilled were actually converted into the development wells and what was the total costs incurred. These costs would have to be excluded from the previous deductions under Article 23 and the depreciation would need to be recalculated using the 7% depreciation rate instead of the more favorable 25% depreciation rate currently applied.”¹⁶⁴⁸

985 Claimants both failed to identify which well were in fact converted into the development wells and put into operation. KPM and TNG also apparently failed to demonstrate it to either to the Tax Committee or the Kazakh courts.

e) Higher deductions in later years

986 Insofar as Claimants rely on higher deductions that KPM and TNG could have applied in later years after 2007,¹⁶⁴⁹ the Republic does not object in principle. However, Claimants have not provided any calculation of the impact of such higher

¹⁶⁴⁸ Second Expert Report of Professor Balco, p. 20-21.

¹⁶⁴⁹ Claimants' First Post-hearing Brief, para. 649.

deductions in later years. Importantly, Claimants have the burden to prove these higher deductions, given that it is their damage claim and given that they allege that there needs to be an adjustment to the claim by the tax committee. Claimants have not even attempted to discharge this burden of proof. Consequently, the amount of at least USD 81.2 million of tax debt,¹⁶⁵⁰ as calculated by PwC,¹⁶⁵¹ stands unchallenged.

f) Conclusion

987 On the basis of the above, it is clear that the corporate back taxes were lawfully imposed on KPM and TNG, while the Claimants' assertions to the contrary lack merits.

¹⁶⁵⁰ Respondent's First Post-hearing Brief, paras. 1057 et seqq.

¹⁶⁵¹ PwC Due Diligence Report, p.81 (**Exhibit R-359**).

L. Further quantum issues

988 With its Rejoinder on Quantum, the Republic had responded to several ill-founded arguments by Claimants and had shown that

- (a) contrary to Claimants' contentions,¹⁶⁵² Field Development Plans are not "state-authored" but rather drafted by state research institutes based on the instructions of the subsoil user. The subsoil user also pays for this work and thus has full influence on the draft.¹⁶⁵³
- (b) Claimants' had not provided any evidence for their contention¹⁶⁵⁴ that a "significant proportion" of the gas production from the Borankol and Tolkyn fields had been sold by TNG's customers on the export market.¹⁶⁵⁵
- (c) contrary to Claimants' contentions,¹⁶⁵⁶ there was never a tender for the Borankol, Tolkyn and Contract 302 Properties initiated by the Republic shortly after the installation of the trust management regime.¹⁶⁵⁷

989 In response to the Republic's arguments, Claimants have entirely given up on their baseless contentions. In their First Post-hearing Brief, Claimants have not provided any reply. The Republic understands this to mean that Claimants no longer pursue these contentions.

¹⁶⁵² Claimants' Reply on Quantum, paras. 34, 45.

¹⁶⁵³ Respondent's Rejoinder on Quantum, paras. 413 et seqq. Cf. also Respondent's First Post-hearing Brief, para. 45.

¹⁶⁵⁴ Claimants' Reply on Quantum, para. 8.

¹⁶⁵⁵ Respondent's Rejoinder on Quantum, paras. 416 et seqq.

¹⁶⁵⁶ Claimants' Reply on Quantum, para. 62.

¹⁶⁵⁷ Respondent's Rejoinder on Quantum paras. 419 et seqq.

M. Legal Analysis

I. 21 July 2010 is the only proper valuation date in the present case

990 The Republic demonstrated in its Rejoinder on Quantum¹⁶⁵⁸ and in its First Post-hearing Brief¹⁶⁵⁹ why the 21 July 2010 is the only acceptable and proper valuation date in the present case if one were to assume for the sake of argument that a violation of the ECT had occurred.

991 With regard to the alleged direct expropriation, according to the practice of international tribunals, the valuation date is usually identical to the date of the respective state act.¹⁶⁶⁰ In the present case, the respective State act, which Claimants allege to be a direct expropriation, i.e. the decision to terminate Contracts No. 210 and 305¹⁶⁶¹ was rendered on 21 July 2010.

992 With regard to the alleged indirect expropriation, international practice indicates that in these cases the valuation date must be identified at the moment when the deprivation of property rights has turned out to be irreversible.¹⁶⁶²

993 It is the Republic's position, that as there is no evidence in this arbitration that any of the state's actions prior to the termination of the subsoil use contracts caused Claimants to be deprived of their property rights, the only correct valuation date with regard to the alleged indirect expropriation should be 21 July 2010.

994 At the Final Hearing Claimants made a final attempt to convince the Tribunal, that they were *irreversibly deprived* of their rights prior to the 21 July 2010 and argued, that

“the notion put forward by the Respondent that there is no evidence in this arbitration of a fundamental deprivation of Claimant' rights until July 2010 is sheer nonsense.”¹⁶⁶³

¹⁶⁵⁸ Respondent's Rejoinder on Quantum, paras. 20 et seqq.

¹⁶⁵⁹ Respondent's First Post-hearing Brief, paras. 1102 et seqq.

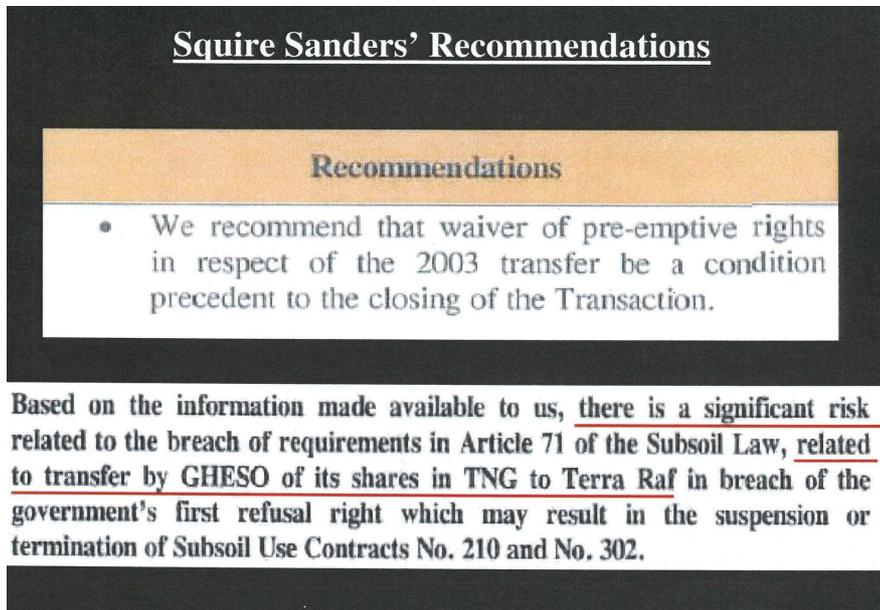
¹⁶⁶⁰ *Marboe*, Calculation of Compensation and Damages in International Investment Law, Oxford International Arbitration Series, 2009, p.127 (**Exhibit R-324**).

¹⁶⁶¹ Order No. 255 of the Ministry of Oil and Gas (**Exhibit C-189**).

¹⁶⁶² See Respondent's Rejoinder on Quantum, paras. 27-31.

¹⁶⁶³ Final Hearing, Transcript Day 1, p.173, lines 1-4.

995 One of the pieces of “evidence” with which Claimants attempted to prove that they were allegedly deprived of their right to sell their companies was a citation from the Squire Sanders Due Diligence Report, which they put on Slide 30 of their Closing Presentation:



996

997 When demonstrating this slide to the Tribunal, Claimants provided the following comment:

“It further notes that in advising its client, Squire Sanders notes there is:

‘...a significant risk related to transfer by Gheso ... to Terra Raf ...’

In other words, unless the government retracted its improper assertion of preemptive rights as to the 2003 share transfer, Terra Raf could not sell its interest in TNG. ¹⁶⁶⁴

998 Claimants obviously misinterpret the Squire Sanders Report here. The report states that there is a

*“significant risk related to the breach of requirements in Article 71 of the Subsoil Law, **related to transfer by GHESO of its shares in TNG to Terra Raf in breach of the government's first refusal right**”.* ¹⁶⁶⁵ (emphasis added)

¹⁶⁶⁴ Claimants' Closing Submission, Final Hearing, Transcript Day 1, p.171, lines 9-16.

¹⁶⁶⁵ Squire Sanders Report, at p.167 (**Exhibit C-725**).

- 999 Squire Sanders did not at all state that the Republic's assertion of its pre-emptive rights was improper. Rather, what Squire Sanders state is that the transfer of the shares in TNG from Gheso to Terra Raf was effected "*in breach of the government's first refusal right*" and therefore it sensibly recommended to include the waiver of the Republic's pre-emptive right - the existence of which Squire Sanders do not question at all - as a condition precedent.
- 1000 Even if one were to assume that the recommendation of the inclusion of such a condition precedent deprived Claimants of their rights, the only reason for that would have been Claimants' own illegal behaviour.
- 1001 Moreover, as it was shown in previous submissions¹⁶⁶⁶ Claimants could not sell KPM and TNG because the companies were unattractive targets and because of the severe deterioration in the economic environment. They have not proven that dispute about the pre-emptive rights waiver actually deterred any interested buyer.
- 1002 Therefore as Claimants failed to prove that they were *irreversibly deprived* of their rights prior to 21 July 2010 or that this "deprivation" was due to the Republic's actions, the only proper valuation date that could be theoretically applied is 21 July 2010.
- 1003 What is more, even Claimants themselves now admit that they were not fundamentally deprived of their property rights prior to July 2010. Claimants in their discussion of the Laren loan and their attempt to show that they did not abandon their investment stated the following:

*"It was a big bet, it worked, oil prices went up, local gas demand came back, and by the fourth quarter of 2009 that liquidity crisis was basically over."*¹⁶⁶⁷

- 1004 A few moments later, Claimants stated even more obviously that they continued to enjoy full property rights:

*"Well, first of all, the companies hadn't failed, due to a lack of funding or otherwise. They had a cashflow problem in the summer of 2009 which they struggled through, and emerged on the other side."*¹⁶⁶⁸

¹⁶⁶⁶ Respondent's First Post-hearing Brief, paras. 79-106.

¹⁶⁶⁷ Claimants' Closing Submission, Final Hearing, Transcript Day 1, p.162, lines 16-18.

¹⁶⁶⁸ Claimants' Closing Submission, Final Hearing, Transcript Day 1, p.162, lines 16-18.

1005 Again, Claimants cannot have it both ways. Either they continued to enjoy full property rights or they were fundamentally deprived of their property rights.

1006 With regard to the alleged breaches, other than alleged direct or indirect expropriations, Professor Marboe explains that in those cases

“as a matter of principle, the valuation date should be the date of the award. ... One important consequence of this choice is that the time of the unlawful act itself or of the occurrence of damage is not important. It only represents the starting point for the valuation which must continue to include subsequent and consequential damage. [...]

The fact that subsequent events and developments are included in the valuation may reduce the amount of damages. ... If subsequent events led to a diminution of value, the injured party would have suffered this also in the absence of the unlawful act. [...]

Only in expropriation cases, the objective value at the time of the expropriation is the guaranteed minimum to be received. In other cases of State responsibility, such as violations of BIT standards, like fair and equitable treatment or full protection and security, there is no such lower limit.” ¹⁶⁶⁹(emphasis added)

1007 It was demonstrated in previous submissions¹⁶⁷⁰ that Claimants’ lack of experience and wrong business decisions as well as a severe deterioration in the economic environment led to the demise of KPM and TNG. Therefore all these subsequent events and development have to be included in the valuation and this would only be possible when the proper valuation date is chosen, which in this arbitration could only be 21 July 2010.

1008 Mr. Gruhn of Deloitte GmbH explained why 21 July 2010 should be taken as a valuation date:

“A. (By MR GRUHN) ... The July 2010 date certainly is the date at which the two companies KPM and TNG, could no longer operate their assets, and it's a very difficult question whether in

¹⁶⁶⁹ Cf. *Marboe*, Calculation of Compensation and Damages in International Investment Law, Oxford International Arbitration Series, 2009, p.139 - 140 (**Exhibit R-395**).

¹⁶⁷⁰ Respondent’s First Post-hearing Brief, paras. 15-78.

October 2008 really the two entities were hindered in operating their assets. I can't really judge this. And I have just taken it as an assumption that it was July 2010.

[...]

THE CHAIRMAN: And then you make a plausibility test; is that right? ...

*A. (By MR GRUHN): [...] As I said, if you haven't got the licence anymore, if the contracts were terminated, you can't operate those assets. That was a plausible fact for this valuation date.*¹⁶⁷¹
(emphasis added)

1009 Moreover, contrary to what Claimants argue in their First Post-Hearing Brief, the improper valuation date of 14 October 2008 as chosen by Claimants, would indeed give them “double compensation”. This issue is addressed in detail above, in the section on monies that Claimants pocketed after their valuation date.¹⁶⁷²

II. Interest

1010 The Republic has set out its position on interest in its Rejoinder on Quantum.¹⁶⁷³ In order to address new contentions made by Claimants and in order to reiterate previous arguments, the Republic will in the following address the issues of:

- (a) the irrelevance of the Tristan Debt for the appropriate interest calculation;
- (b) the inappropriate interest rate suggested by FTI; and
- (c) potential reasonable interest rates in case liability is found.

1. The insignificance of the Tristan Debt for the appropriate interest calculation

1011 In their First Post-hearing Brief, Claimants argue that the “investment approach” taken by the Republic “is not well-suited to the facts of this case”¹⁶⁷⁴ because “if Kazakhstan had not commenced its illegal campaign in 2008, Claimants would not

¹⁶⁷¹ Testimony of Mr. Gruhn of Deloitte GmbH, Hearing on Jurisdiction and Liability, Transcript Day 4, p.174, lines 4-25.

¹⁶⁷² See Part IV, J.

¹⁶⁷³ Respondent’s Rejoinder on Quantum, paras. 476 et seqq.

¹⁶⁷⁴ Claimants’ First Post-hearing Brief, para. 652.

have incurred the Laren debt and would have paid off the Tristan notes.”¹⁶⁷⁵ Claimants further allege that because “the [interest] on the Tristan notes, which remain outstanding today, is 10.5%”, “an interest rate of 10.5% conservatively reflects Claimants’ actual borrowing costs that are attributable to Kazakhstan’s misconduct.”¹⁶⁷⁶. The Republic strongly disagrees with Claimants’ contentions.

1012 As it was shown in previous submissions,¹⁶⁷⁷ Claimants did not remain liable for any noteholder debt. Any liability towards the noteholders stems from Claimants making themselves liable towards the noteholders by signing the Sharing Agreement on 17 December 2012. The Republic cannot be held liable for such unilateral action. Hence, there is nothing that could justify the choice of the interest rate equal to that of the Tristan note , i.e. 10.5%.

1013 In addition, under the Sharing Agreement, Claimants are currently not even liable with an interest of 10.5%. As of 1 January 2012, interest under the Sharing Agreement is based on the interest awarded by the present Tribunal in a potential award.¹⁶⁷⁸ Hence, at least as of 1 January 2012, 10.5% certainly no longer reflect Claimants borrowing costs and the Tribunal need not worry about such borrowing costs as of that date. Rather, the Tribunal can determine the borrowing costs freely, as they will follow whatever interest the Tribunal determines appropriate.

1014 Claimants further allege that “if the Tribunal does not award interest equivalent at least to the borrowing rate under the Tristan notes, then it should include as a component of its award the interest that has accrued on the Tristan notes since October 14, 2008”¹⁶⁷⁹ and that “Claimants included a request for this component of damage in its Reply on Quantum.”¹⁶⁸⁰ Both statements do not hold water for the following reasons.

1015 First of all, why should the Republic compensate Claimants for something that Claimants in any event would have remained liable for? As it was in detail explained in the Republic’s Rejoinder on Quantum already:

¹⁶⁷⁵ Claimants’ First Post-hearing Brief , para. 653.

¹⁶⁷⁶ Claimants’ First Post-hearing Brief , para. 653.

¹⁶⁷⁷ Respondent’s First Post-hearing Brief , paras. 1075 et seqq.

¹⁶⁷⁸ Cf. the definitions of “Outstanding Amount” and “Special Interest” in Section 1 as well as Section 4(b) of the Sharing Agreement and Assignment of Rights dated 17 December 2012 (**Exhibit C-721**). According to Section 4(b), the Tristan noteholders participate in any award until the “Outstanding Amount” has been repaid, which in turn included the “Special Interest” accruing as of 1 January 2012. This “Special Interest” will be based on interest determined by this Tribunal. Hence, as of that date, Claimants’ liability towards the Tristan noteholders with interest will depend entirely on this Tribunal’s ruling.

¹⁶⁷⁹ Claimants’ First Post-hearing Brief , para. 654.

¹⁶⁸⁰ Claimants’ First Post-hearing Brief , para. 654.

“Yet, without the supposed breach of international law, Tristan Oil would have been equally liable for the Tristan note principal and Claimants would have equally been acting as guarantors for this debt.

The situation did thus not get any worse through the allegedly illegal actions of the Republic. This excludes any liability of the Republic for the Tristan note principal.”¹⁶⁸¹

1016 The same is true also with regard to the Tristan note interest payments. Also without the supposed breach of international law, Tristan Oil would have been liable for the Tristan note principal as well as Tristan note interest in any event.

1017 Second, it is most astounding that Claimants ask the Tribunal to include in its award the interest that has accrued on the Tristan notes since 14 October 2008.¹⁶⁸² Claimants are perfectly aware that Tristan only failed to make the interest payments for the first time on 1 July 2010.¹⁶⁸³ Claimants thus certainly did not remain liable for any interest that became due between 14 October 2008 and 1 July 2010 and any claim for such interest is entirely disingenuous.

1018 Finally, contrary to what Claimants allege, even though they included a request for this component of damage in its Reply on Quantum, Claimants have never specified the exact amount of interest that had allegedly accrued in this time period. For this reason alone, Claimants’ claims related to the Tristan note interest should be rejected in their entirety.

2. Interest rates suggested by FTI are inappropriate

1019 Claimants argue that “even if the Tribunal elects to follow the ‘investment approach’, the rate of U.S. T-bills is not an appropriate rate”¹⁶⁸⁴ and that “a rate of interest available from a commercial bank in Moldova is more appropriate than the rate on U.S. T-bills.”¹⁶⁸⁵ Claimants use the interest rates provided by FTI. FTI in turn refer to the interest rates offered by a specific Moldovan commercial bank called “Victoriabank”.

¹⁶⁸¹ Respondent’s Rejoinder on Quantum, para. 392.

¹⁶⁸² Claimants’ First Post-hearing Brief , para. 654.

¹⁶⁸³ Sharing Agreement and Assignment of Rights dated 17 December 2012, p.1, Recitals (**Exhibit C-721**).

¹⁶⁸⁴ Claimants’ First Post-hearing Brief , para. 655.

¹⁶⁸⁵ Claimants’ First Post-hearing Brief , para. 656. Claimants used the interest rates provided by FTI in their Third Report at paras. 13.2 and Figure 32.

1020 Deloitte GmbH have demonstrated that the interest rates suggested by FTI are not appropriate.¹⁶⁸⁶

- (a) Firstly, interest offered by one specific bank largely depends on the credit standing of this bank – the lower the credit standing of the bank the higher the interest offered by the bank. Referring to one specific bank is thus nothing but after the fact cherry picking. Moreover, it means that the specific high risks of a specific bank are used for claiming high interest without actually ever having to bear the risk of that bank defaulting.
- (b) Secondly, if a bank is interested in deposits denominated in a specific currency and/or of a specific duration, this bank will offer a particularly high interest rate for obtaining deposits of such currency and/or duration. Thus, interest rates offered by a specific bank depend on the individual situation and circumstances of this particular bank. These circumstances have nothing to do with the alleged actions of the Republic in the present case and can thus not play a role for interest determination.
- (c) Thirdly, the investment approach assumed by FTI (that may be summarised as: “A Moldovan company is to hold its money at one single Moldovan bank.”) appears doubtful. Prudent investors would tend to spread their investments and would avoid “putting all eggs into one and the same basket”.

3. Interest rate applicable in the present case

1021 In the present case, the Republic submits that the low-risk re-investment that the Tribunal should look at for guidance in determining the applicable interest rate are 6 months US treasury bills.¹⁶⁸⁷ In the alternative, an interbank offering rate based on various large banks could be used as the highest benchmark for the calculation of the interest.¹⁶⁸⁸

1022 When determining the appropriate interest rate, the following should be taken into account, as explained by Deloitte GmbH:¹⁶⁸⁹

¹⁶⁸⁶ Deloitte & Touche Second Supplemental Expert Report, para. 234.

¹⁶⁸⁷ Such choice would also be supported by previous tribunal practice, in particular in the cases: *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, paras. 102, 104 (**Exhibit C-314**); *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 471 (**Exhibit C-65**); *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, para. 455 (**Exhibit C-268**).

¹⁶⁸⁸ Deloitte & Touche Second Supplemental Expert Report, para. 236.

¹⁶⁸⁹ Deloitte & Touche Second Supplemental Expert Report, para. 235.

- (a) The applicable interest rate should not be picked from a single financial institution which might be influenced by poor credit standing and other company-specific factors but rather by taking into account the average of a variety of financial institutions;
- (b) The interest rates should be derived from countries and financial institutions with a particularly high credit standing; and
- (c) The time to maturity of the financial instrument should be kept to a minimum to avoid liquidity and default risks.

1023 Therefore if the Tribunal decides to award interest, the only appropriate interest rate would be “within the range between US government bonds (‘Treasury Bills 6 months’) and an interbank offering rate based on various large banks (‘Libor US\$ 6 months’),” whereby “the Libor should be considered as the limit as it is hard to see why any of these banks should offer private investors a higher interest rate for deposits than banks would need to pay for a loan from another bank.”¹⁶⁹⁰

1024 For the avoidance of doubt, contrary to what Claimants alleged,¹⁶⁹¹ the Republic never generally accepted the appropriateness of awarding compound interest. In its Rejoinder on Quantum, the Republic clarified that if the Tribunal decides to award interest and to not rely on US Treasury Bills or other short-term bonds that yield interest at their date of maturity, the Republic maintains its position established in the Statement of Defence that compound interest should not be awarded.¹⁶⁹²

III. Moral damages

1025 The Republic repeatedly stated in its submissions that Claimants are not entitled to moral damages because they did not suffer any moral harm.¹⁶⁹³ Claimants have failed to demonstrate the opposite. From submission to submission, Claimants repeat their vague and baseless claim for moral damages without substantiating it.

1026 Claimants’ First Post-hearing Brief is no different in this respect.¹⁶⁹⁴ Claimants make a generalized claim lacking any specificity as to what kind of moral harm suffered each of the four Claimants, Anatoli Stati, Gabriel Stati, Ascom and Terra

¹⁶⁹⁰ Deloitte & Touche Second Supplemental Expert Report, para. 236.

¹⁶⁹¹ Claimants’ First Post-hearing Brief, para. 650.

¹⁶⁹² Respondent’s Rejoinder on Quantum, footnote 465. Cf. Statement of Defence, paras. 56.1 et seqq.

¹⁶⁹³ Respondent’s Statement of Defence, paras. 55.2-55.3; Respondent’s Rejoinder on Quantum, paras. 499 et seqq.; Respondent’s First Post-hearing Brief, para. 1119.

¹⁶⁹⁴ Claimants’ First Post-hearing Brief, paras. 658 et seqq.

Raf, and what actions of the Republic caused the alleged moral harm in each situation.¹⁶⁹⁵

1027 Firstly, Claimants have not proven that a two-day search at KPM and TNG was in fact “*an aggressive and intimidating raid*”. This allegation is based solely on the testimony of Mr. Stejar,¹⁶⁹⁶ a reluctant and obstructive witness with a questionable credibility.¹⁶⁹⁷ Not surprisingly, his account of events contradicts the testimony of Mr. Rakhimov, the Chief Investigator of the Financial Police, who stated that the Financial Police carried out the search in full compliance with the Criminal Procedural Code of the Republic of Kazakhstan.¹⁶⁹⁸

1028 Secondly, Claimants have not proven that they suffered any moral damages as a result of the imprisonment of Mr. Cornegruta. The Republic reiterates that Mr. Cornegruta’s trial was conducted fairly and in accordance with the law. Moreover, Claimants still have not explained how Mr. Cornegruta’s alleged moral suffering is related to moral damages claimed by Anatoli Stati or Gabriel Stati, the ultimate owners of the other two Claimants Ascom and Terra Raf. Mr. Stati has not even informed Mr. Cornegruta about what is occurring in these arbitration proceedings and cannot even remember when they last spoke.¹⁶⁹⁹ Mr. Stati is apparently not interested in relations with Mr. Cornegruta.

1029 Thirdly, Claimants have not proven that they suffered “*through years of Kazakhstan’s misconduct*” and that “*KPM’s and TNG’s managers worked in Kazakhstan under threats and harassment.*” Contrary to Claimants’ allegations,¹⁷⁰⁰ the Republic has been disputing these baseless accusations throughout these arbitration proceedings and provided sufficient evidence that the harassment campaign is simply a figment of the Claimants’ imagination. The Financial Police never “*hunted*”, “*targeted*” or “*mistreated*” KPM’s and TNG’s personnel. As Mr. Rakhimov testified, the Financial Police carried out an investigation and did it in full compliance with the Kazakh law.¹⁷⁰¹

¹⁶⁹⁵ Claimants’ First Post-hearing Brief, para. 658.

¹⁶⁹⁶ Claimants’ First Post-hearing Brief, para. 660.

¹⁶⁹⁷ Respondent’s First Post-hearing Brief, paras. 175-179.

¹⁶⁹⁸ Second Witness Statement of Arman Rakhimov, paras. 4.9 to 4.20; Testimony of Mr. Rakhimov, Hearing on Jurisdiction and Liability, Transcript Day 5, p.4, lines 12-23. Respondent’s Rejoinder on Jurisdiction and Liability, paras. 301-302; Respondent’s First Post-hearing Brief, paras. 233-236.

¹⁶⁹⁹ Testimony of Mr. Stati, Transcript Day 2, p.57, line 15 - p.58, line 5.

¹⁷⁰⁰ Claimants’ First Post-hearing Brief, para. 662.

¹⁷⁰¹ Second witness statement of Mr. Rakhimov.

1030 Fourthly, Claimants have not proved that any reputational harm was caused to any of them. Claimants do not even consider it necessary to specify what harm was caused to whose reputation and by which of the Republic's actions.

1031 Against this background, it comes as no surprise that Claimants have now toned down their demands to some extent and do not insist categorically on their initial request¹⁷⁰² that 10% of the compensatory damage should be awarded as moral damage.¹⁷⁰³ Apparently, Claimants themselves have come to recognise that their claim is fanciful. In any event, Claimants admit that there is no authority under international law for awarding the extraordinary amounts of moral damages they had initially asked for.¹⁷⁰⁴

¹⁷⁰² Claimants' Reply on Quantum, para. 97.

¹⁷⁰³ Claimants' First Post-hearing Brief, para. 659.

¹⁷⁰⁴ Claimants' First Post-hearing Brief, para. 659.

PART V: PROCEDURAL ISSUES

1032 One of Claimants' continuous themes throughout these proceedings is their complaints of procedural abuses allegedly committed by the Republic. Claimants not only blow up any event out of proportion but they also conveniently pass over their own procedural actions which have led to considerable disruptions and lost efforts in this case thereby infringing on the Republic's procedural rights.

I. Claimants' Allegations of Procedural Abuse

1033 To begin with, Claimants complain about document production of April 2012.¹⁷⁰⁵ All of these complaints are unfounded. The Republic submitted the documents in question within the deadline and the amount of documents ultimately submitted is greatly exaggerated by Claimants. Most of these documents were technical documents known to Claimants and only very few were relevant for Claimants submission. Claimants apparently themselves conceded this as they strongly opposed an extension of the deadline and a change of the hearing schedule, despite the allegedly huge amount of documents.

1034 Further complaints relate to Deloitte GmbH and an allegedly completely new case on quantum.¹⁷⁰⁶

1035 As indicated above and as became clear throughout these proceedings, Claimants' quantum report submitted by FTI is so riddled with flaws that it is essentially worthless. Obviously, the Republic is entitled to address the multitude of shortcomings in FTI's work through its own experts. However, this now is what Claimants take exception to, in an apparent attempt to protect FTI from being exposed as incompetent.

1036 Claimants' complaints ring hollow given that it was Claimants who silently dropped Ms. Laura Hardin, one of the two authors – and apparently the main author – of the First and Second FTI Reports. They blow up beyond proportion the absence of Deloitte TCF for cross examination but fail to acknowledge that the true procedural failure is on their side. It was the Republic that offered the expert for the reports it relies on for cross examination while Claimants failed to do so.

¹⁷⁰⁵ Claimants' Closing Submissions, Final Hearing, Transcript Day 1, p.122, lines 15-18.

¹⁷⁰⁶ Claimants' Closing Submissions, Final Hearing, Transcript Day 1, p.123, line 8 - p.124, line 13.

- 1037 In particular the Supplemental Expert Report of Deloitte GmbH does not exceed the scope as indicated by the Tribunal and as was explained in detail in the Republic's letter dated 24 April 2013.¹⁷⁰⁷ In any event, Claimants never requested to cross examine Mr. Gruhn again, which fully undermines their belated complaints about the expert allegedly being insulated from cross examination is baseless.
- 1038 Claimants further take exception to the Republic's disclosure of the various due diligence reports prepared for KMG EP in 2009. As previously indicated, such reports were covered by confidentiality and the Republic was not allowed to disclose them.¹⁷⁰⁸ Moreover, as many times clarified by the Republic and still intentionally ignored by Claimants, KMG EP is not the state. It is an independent publicly traded company and the state cannot issue instructions to it. As indicated by counsel for the Republic, KMG EP was asked again after the Hearing on Quantum to consent to disclosure and consent was granted.¹⁷⁰⁹
- 1039 In fact, the best proof for the complete lack of procedural misconduct by the Republic are the contents of the due diligence reports. The reports contradict many of Claimants' allegations and support the Republic's position in many instances. There was simply no reason to withhold them, other than confidentiality concerns of KMG EP. This is best evidenced by the infamous "contingent liabilities" argument now advanced by Claimants. This completely made up argument shows that Claimants are so unhappy with the contents of the RBS report that they have to make up reasons why hundreds of millions of US-Dollars should be added to the values stated therein.
- 1040 Claimants' arguments that they were excluded from submitting further evidence or from cross examining witnesses in response to the due diligence reports¹⁷¹⁰ equally does not fly: Claimants never submitted a request to the Tribunal or indicated any evidence it would have liked to submit but thought it was prevented from doing so. Notably, Claimants did not hesitate to submit completely new evidence at the Hearing on Quantum. They would certainly not hesitate to submit or request leave for submission of any further evidence in their favour, if it existed.

¹⁷⁰⁷ Respondent's Letter dated 24 April 2013.

¹⁷⁰⁸ Respondent's Opening, Hearing on Quantum, Transcript Day 1, p.173, lines 2-18.

¹⁷⁰⁹ Respondent's Closing Submissions, Final Hearing, Transcript Day 1, p.192, line 20 - p.193, line 1.

¹⁷¹⁰ See below Part V, Section I.4.

II. Claimants' Procedural Abuse

1041 Given Claimants' continuous and harsh complaints about alleged procedural misconduct of the Republic, it could be expected that Claimants' procedural conduct was at all times exemplary. However, nothing could be further from the truth.

1. Change of requests and facts

1042 Claimants' continuous changes of their requests and underlying facts put the Republic in a position of disadvantage as it could not properly address all of Claimants' submissions and requests.

2. Means of evidence: Documents, Witnesses and experts

1043 The above description gives a clear picture on the lack of reliability of Claimants' evidence. This is in particular relevant where Claimants' experts are concerned as the experts are meant to be independent and assist the Tribunal.

1044 While Claimants deployed much effort to kick up dust in relation to Deloitte TCF, they silently made disappear one of the authors of their valuation report, Laura Hardin. Although the first two FTI reports were co-authored by Laura Hardin, Claimants simply refused to offer Laura Hardin for cross examination under the specious pretext that she had not been working on the matter since 20 May 2012 and that she had other commitments at the time of the Hearing on Quantum. It became evident, at that stage at the latest, that as of the beginning, Claimants had not intended to offer her for cross examination.

1045 As could be seen in the FTI testimony, Laura Hardin must have been the main author of the FTI report. In fact, it was painfully evident that Howard Rosen was not familiar with the First and Second FTI Reports and was therefore oftentimes not able to testify on its contents. For example, Mr. Rosen stated that the First FTI Report must set out infrastructure capital expenditure for the Contract 302 Properties somewhere when in fact, it did not.

1046 Outrageously, in the Third FTI Report, Mr. Rosen attempts to create the impression as if there always had been only one author, namely him. He simply and openly discards Laura Hardin:

“I have previously submitted two reports detailing the enterprise valuation of the Claimants’ Kazakhstan assets.”¹⁷¹¹

1047 FTI makes itself complicit with Claimants by actively helping them to pretend that Laura Hardin never wrote a significant part of the reports and that Howard Rosen is the only author.

1048 Given all of the above, if one were to apply Claimants’ own measures, all FTI reports would have be excluded in their entirety.

3. Unfair procedural conduct by Claimants

1049 Claimants throughout these proceedings made use of procedural tools and methods that can only be described as unfair and even abusive. These methods consisted in creating throughout these proceedings a mounting time pressure for the Republic thereby forcing the Republic to address in an extremely limited time ever increasing amounts of arguments, facts and evidence. The latter were at times introduced by surprise and outside of the agreed time table. Claimants thereby attempted to exclude the Republic from thoroughly analysing and properly defending against Claimants’ allegations. A further tool used by Claimants in these proceedings was their usual reaction to the Republic’s legitimate defence: Instead of addressing the substance, Claimants tried to exclude evidence from the proceedings, based on various spurious procedural allegations.

a) Claimants’ pattern of disruption prior to each Hearing

1050 Throughout this arbitration, Claimants established a pattern of disruptive behaviour prior to each of the three hearings held in this case. As a result, the Republic’s preparation for the hearing was each time seriously disrupted and shortened. In conjunction with Claimants’ overall strategy to create an excessive time pressure for the Republic, the in any event short time available to the Republic to prepare and state its defence was even further limited. From the overall view, with hindsight, this approach becomes obvious and must be considered to have been intentional.

1051 The following provides a short overview of Claimants’ behaviour prior to each of the hearings:

¹⁷¹¹ FTI Consulting Third Expert Report, para. 1.3.

- aa) Hearing on Jurisdiction and Liability starting on 1 October 2012
- (a) On **14 September 2012**, ten working days prior to the Hearing on Jurisdiction and Liability, Claimants requested to submit new documents; allegedly to reply to witness statements or expert statements or the Republic's arguments in the rejoinder. This request is a blatant pretext since over a month had passed since Responden's submission.
 - (b) On **20 September 2012**, six days before the Hearing on Jurisdiction and Liability, Claimants requested to submit further documents, namely exhibits C-700 to C-717. Claimants failed to advise that they were submitting approx. 400 pages of new documents, many without translation. On 22 September 2012, after spending time reviewing the documents, the Republic requested exclusion of those documents because its preparation for the hearing was seriously disrupted.
 - (c) On **28 September 2012**, the Friday before the Hearing on Jurisdiction and Liability started on the following Monday, Claimants requested to withdraw certain documents and instead introduce still new documents. The Republic was forced to interrupt its preparation for the hearing and submit briefs on 1 October 2012. The Republic was further forced to submit a new witness statement as Claimants had confusingly submitted a document allegedly prepared by Mr. S. Rakhimov which was however a different person from the Republic's witness Mr. A. Rakhimov.
- bb) Hearing on Quantum starting on 28 January 2013
- (d) On **31 December 2012**, shortly before midnight European time, in the holiday period and 3 weeks before the Quantum Hearing, Claimants submitted the Sharing Agreement thereby forcing the Republic to spend considerable time to review its factual and legal implications and relevance.
 - (e) On **2 January 2013**, Claimants submitted a "Request to compel production" containing a significant amount of new arguments and statements. It actually corresponded to a full submission out of the agreed time table with 19 supporting annexes. Claimants were forced to review and address it, in addition to the Sharing Agreement.
 - (f) On **2 January 2013** Claimants submitted a further request to the Tribunal aiming at receiving the Tribunal's instruction that the Republic is not excused from bringing Minister Mynbaev and Mr. Suleimenov to the Quantum

Hearing, although Claimants missed the deadline established by the Tribunal to designate the witnesses they intend to cross examine.¹⁷¹²

- (g) The Republic again was forced to interrupt its preparation for the hearing and deal with Claimants' submissions instead. The Republic therefore submitted on 4 January 2013 and on 9 January 2013 a request to the Tribunal to postpone the Quantum Hearing.¹⁷¹³
- (h) On **18 January 2013**, five working days before the Quantum Hearing, Claimants requested further leave to submit a significant number of new documents, including some 3D information. The Tribunal denied such request because it considered it to be a serious disruption of the preparation of the Quantum Hearing.¹⁷¹⁴
- (i) On **25 January 2013** Claimants submitted a revised calculation of FTI. Such revised expert report followed FTI's attempts to sneak in new issues, arguments and calculations as part of the Joint Issue List requested by the Tribunal.¹⁷¹⁵ The Republic was forced to reply on 26 January 2013.¹⁷¹⁶
- (j) On **27 January 2013**, Claimants submitted supporting materials for the revised FTI calculation.¹⁷¹⁷
- (k) On **Day 3 of Quantum hearing** Claimants submitted new evidence relating to 3D data in clear violation of the Tribunal's order that Claimants were excluded from introducing new issues. Claimants' action caused a significant derailment of the proceedings. Major parts of the previous expert reports became moot, significant further correspondence and submissions followed and a part of the Hearing had to be repeated. This also caused a formal procedural objection by the Republic which is being upheld.

cc) Period before the First Post-hearing Brief and the Closing Hearing

- (a) On **13 February 2013** within the deadline established by the Tribunal, the Republic submitted its response to the Tribunal's draft Procedural Order No. 10 with the following requests to the Tribunal: (i) Allow for an

¹⁷¹² This request was dismissed in the Tribunal's Procedural Order No. 8 dated 10 January 2013 because Claimants had not complied with the deadline set by the Tribunal.

¹⁷¹³ Respondent's Request for Postponement of Quantum Hearing dated 4 January 2013; Respondent's Submission dated 9 January 2013.

¹⁷¹⁴ Tribunal's Procedural Order No. 9 dated 23 January 2013.

¹⁷¹⁵ Claimants' Letter dated 25 January 2013.

¹⁷¹⁶ Respondent's Letter dated 26 January 2013.

¹⁷¹⁷ Claimant's Letter dated 27 January 2013.

opportunity to submit an expert on the new subject matter introduced by Claimant within a period of three months as of submission of the full data information and documents specified in the request; (ii) provide for a hearing with the opportunity to address the new subject matter introduced by Claimants in particular through examination of the parties' experts and witnesses; (iii) order Claimants to submit data, information and documents as specified below; (iv) allow the Republic to submit further witness and/or expert testimony relating to the new subject matter introduced by Claimants and (v) the proposed time periods for the two rounds of post hearing-briefs and the oral closing submission shall be maintained but shall commence after the hearing on the new subject matter introduced by Claimants.¹⁷¹⁸

- (b) Claimants opposed such request by their submission dated **16 February 2013**. In such submission, Claimants explicitly acknowledge that the Munaibay 3D Seismic Data which they introduced by surprise in the Quantum Hearing is (i) new evidence, (ii) material for the case, (iii) contrary to Counsel for Claimants' earlier explicit statements, its impact is not limited to GCoS but extends to the volume of potential reserves and the depth of the wells necessary to develop the alleged Reef; (iv) has an impact on the findings of all experts; (v) triggers the need for revised quantum reports and (vi) warrants a further hearing and cross examination.¹⁷¹⁹
- (c) The Republic upheld its request by submission dated **17 February 2013**.¹⁷²⁰
- (d) Claimants replied by submission dated **18 February 2013**.¹⁷²¹ Claimants' main argument was that the Republic knew about the existence of the 3D Seismic Data although Claimants had not introduced it before and that not much time was allegedly needed for the analysis of the new data.
- (e) The Republic replied by submission of **18 February 2013**¹⁷²² that Claimants failed to introduce the 3D data in their Statement of Claim dated 18 May 2011 and caused significant disruption by instead choosing to introduce with a delay of two and a half years and improperly without warning within the Hearing on Quantum only.

¹⁷¹⁸ Respondent's Letter dated 13 February 2013.

¹⁷¹⁹ Claimants' Letter dated 16 February 2013.

¹⁷²⁰ Respondent's Letter dated 17 February 2013.

¹⁷²¹ Claimants' Letter dated 18 February 2013.

¹⁷²² Respondent's Letter dated 18 February 2013.

dd) Closing Hearing starting on 2 May 2013

(a) As the Republic explained prior to¹⁷²³ and at the Final Hearing at the beginning of May 2013,¹⁷²⁴ Claimants improperly submitted supporting documents to Ryder Scott's Third Report, submitted with Claimants' First Hearing-brief on 8 April 2013, belatedly and in a clandestine manner. Notably, Claimants have failed to explain their conduct to this day. It thus stands to reason that Claimants deliberately attempted to undermine the Republic's and GCA's preparation for the Final Hearing with this clandestine submission. This is not the conduct of a party that is aiming for a fair proceeding on a level playing field. It is moreover not the conduct of a party that is raising a serious objection based on the alleged lack of supporting documents provided with the other side's experts' reports. If Claimants took their own arguments regarding the alleged lack of supporting material of GCA seriously, they would have never tried to clandestinely and belatedly submit supporting material for Ryder Scott.

(b) On **22 April 2013**, seven days before the Closing Hearing, Claimants made a further submission to the Tribunal.¹⁷²⁵ Claimants objected to the testimony of Mike Wood of GCA, the cost analyst, on the basis that Mike Wood's counterpart, Mr. Rosen of FTI, would not be present and because issues of costs allegedly are outside of the scope of the taking of evidence. Claimants further object to the Supplemental Expert Report of Deloitte GmbH and requests exclusion of all Deloitte GmbH reports. The Republic again was forced to interrupt its preparation of the Closing Hearing and address Claimants' numerous allegations.

b) Attempts to exclude and limit the Republic's legitimate defense

1052 Claimants' standard approach to the Republic's legitimate defense is an attempt at excluding it or limiting it as much as possible. It is evident that Claimants thereby try to avoid any substantive reply on the Republic's defense which confirms in turn that such defense is seen by Claimants as serious counter arguments against their allegations.

1053 Claimants main defense against the Republic's valuation experts Deloitte GmbH is to request that they be excluded based on some specious pretext. It is difficult to

¹⁷²³ Respondent's Letter dated 22 April 2013, p.2 et seq.

¹⁷²⁴ Respondent's Ten Minute Opening Presentation, Final Hearing, Transcript Day 1, p.21, line 13 - p.22, line 10.

¹⁷²⁵ Claimants' Letter dated 22 April 2013.

understand Claimants' logic when at the same time Claimants simply silently made disappear the main author of their first two valuation reports from these proceedings, probably in the hope that this would not be noticed and by trying to disguise it even explicitly through Mr. Rosen's confirmation in the Third FTI Report that he alone submitted two other reports. In Claimants' logic this means that the FTI reports should be excluded from this arbitration. Should Claimants uphold their request to exclude the Deloitte reports, Respondent requests exclusion of the FTI reports.

1054 Claimants' continuous lamentations that Mr. Gruhn has been insulated from cross-examination after submitting new evidence is nothing but that – a baseless moaning which must be ignored. First, Mr. Gruhn and the Republic explained in detail that none of its submissions in the First Post-hearing Brief exceeded the scope as indicated by the Tribunal.¹⁷²⁶ Second, if Claimants really were of the opinion that they wanted to cross examine Mr. Gruhn again, they should have simply requested it. In that event, they would have been required to submit a reasoned request to the Tribunal – this is what the Republic did when they were of the opinion that a further taking of evidence was necessary. However, when Claimants failed to request the appropriate remedy in time, they waived any right and can therefore now not be heard with that argument any more. It can be safely assumed that Claimants are well aware of this and that they would have taken recourse to any remedies had they really wanted.

1055 At times, Claimants' attempts to exclude the Republic's legitimate defense borders on the grotesque. In relation to the KMG EP Due Diligence Reports, it seems to be Claimants' position that the Tribunal shall disregard the many bad news such report spells for Claimants and that it can use only what Claimants think supports their position.¹⁷²⁷ This confirms that the RBS report by no means is "*devastating*"¹⁷²⁸ for the Republic's position and quite to the contrary severely damages Claimants' position. The Republic thus had no motive not to disclose this report and make use of its actually supporting statements for the Republic's defense. In addition, it would amount to a severe violation of fundamental procedural principles should the Tribunal selectively choose assessments of the RBS report which are exclusively supportive or Claimants' position while ignoring the many other assessments which disprove Claimants. And again, it must be repeated that Claimants did not request to hear Mr. Suleimenov again – this remedy would have been available to them if they really were of the opinion that their rights were otherwise violated. Their repeated

¹⁷²⁶ See Respondent's Letter dated 24 April 2013.

¹⁷²⁷ Claimants' Rebuttal Closing Submission, Final Hearing, Transcript Day 2, pp.11-13.

¹⁷²⁸ Claimants' Rebuttal Closing Submission, Final Hearing, Transcript Day 2, p.9, line 8.

moans about Mr. Suleimenov being insulated from further cross-examination must therefore be ignored.

1056 The same applies to the bad faith attempt to exclude Mike Wood of GCA from testimony on the new 3D evidence. Claimants were well aware that there was no counterpart for Mike Wood on Claimants' side – either with Ryder Scott or FTI. Nevertheless, they try to exclude Mike Wood from testifying on the new 3D seismic evidence with the wrong allegation that his counterpart would not be present in the hearing.¹⁷²⁹

c) Delayed filing

1057 Claimants liberal approach to the binding time table is reflected in a particular noteworthy way in their late filing of their May 2012 submission. Without any explanation, excuse or request, Claimants simply submitted their Reply Memorial on Jurisdiction and Liability a day after the deadline for submission had elapsed.

d) Complicity of Claimants' experts in Claimants' procedural conduct

1058 As described above, Claimants' experts made themselves complicit in supporting Claimants' unfair procedural strategy. The most salient examples are Ryder Scott assisting Claimants in surprising the Tribunal and the Republic with new and relevant evidence in the Hearing on Quantum and actively assisting Claimants in misleading all other participants as to the subject matter of the Quantum Hearing. This also includes Ryder Scott's help to Claimants in gaining a procedural and substantive advantage by having more time for the analysis of the 3D Seismic Data. A further striking example is Laura Hardin's silent disappearance from these proceedings as the author for the first two FTI reports.

4. Claimant's Fundamental Procedural Misconception

1059 Claimants may be victims of a fundamental procedural misconception. There is no basis for Claimants to complain that they have no opportunity to submit evidence or to cross-examine certain witnesses if they at no point in time requested leave to do so. Throughout these proceedings Claimants complain countless times in their submissions, letters and in the hearings that they were allegedly barred from submitting evidence or from cross-examining for example Mr. Suleimenov, Mr. Mynbaev or Mr. Gruhn of Deloitte GmbH. However, unlike the Republic, not once

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Respondent's Letter dated 24 April 2013; Claimants' Letter dated 22 April 2013.

do Claimants request the Tribunal to grant them leave to submit further evidence nor do they request to cross examine any of the Republic's witnesses. It is quite evident that Claimants not once seriously tried to remedy any of the alleged wrongdoings. And the reason is equally evident, namely that Claimants had and have no intention to submit further evidence or to hear further testimony. Any complaint can therefore be safely ignored. Claimants after all had no problem to bring in new and relevant evidence as part of the direct examination of their experts on Day 3 of the Hearing on Quantum by way of a spectacular ambush. Hence, it is not to be expected that they would be shy, had they really wanted to submit further evidence or hear witnesses.

III. The Republic's Procedural Objections

1060 Claimants' procedural abuses forced the Republic to submit formal procedural objections which are hereby formally upheld.

1061 As indicated above, Claimants' strategy consisted in putting the Republic under considerable time constraints and continuously disrupt its preparations of either submissions or hearings for which in any event only a very limited timeframe was granted.

1062 Therefore, consideration must be given not only to the mere number of submissions or hearings but also to the fact whether sufficient time for preparation was granted. In the event that, for example, a hearing is granted, this is only beneficial if there is sufficient time to fully prepare for such hearing.

1. The Republic's Procedural Objection of 11 January 2013

1063 The Republic hereby upholds its Procedural Objection raised in writing on 11 January 2013¹⁷³⁰ and also orally on Day 1 of the Hearing on Quantum.¹⁷³¹

2. The Republic's Procedural Objection of 6 March 2013

1064 The Republic also upholds its Procedural Objection of 6 March 2013.¹⁷³² Such objection had also been raised on Day 3 of the Hearing on Quantum.¹⁷³³

¹⁷³⁰ Respondent's Procedural Objection dated 11 January 2013.

¹⁷³¹ Hearing on Quantum, Transcript Day 1, p.167.

¹⁷³² Respondent's Procedural Objection dated 6 March 2013.

¹⁷³³ Hearing on Quantum, Transcript Day 3, p.124.

1065 The further testimony of Claimants' experts Ryder Scott confirms that the Republic's procedural objection is fully justified. In fact, only that testimony showed the full extent of Claimants' procedural abuse. It became clear through the cross-examination of Ryder Scott that they had been complicit with Claimants in misleading the Tribunal and Claimants through the Joint Issue List requested by the Tribunal and in submitting new and relevant evidence by surprise thereby considerably disrupting the proceedings. Claimants' experts either intentionally participated in such bad faith maneuver or they let themselves be used as Claimants' tools. Be as it may, such evidence must be completely disregarded and cannot be given any evidentiary value whatsoever.

1066 These actions helped Claimants by giving Ryder Scot more time to review the 3D Seismic Data, thereby gaining a procedural advantage over the Republic. The Republic's experts GCA in fact confirmed in the Closing Hearing that the time constraint had limited their scope of work:

*"Due to the time available to us, we have not been able to make an in depth and detailed analysis of this faulting. But it is clear from first examination that this upper interval is heavily faulted."*¹⁷³⁴

*"Obviously we had a limited timeframe in which to make our evaluations, prior to submitting the reports for this hearing, and further work could allow us to consider some of the scenarios of the depth conversion that was done by Ryder Scott [...]"*¹⁷³⁵

1067 GCA further confirmed that they knew only of the existence of the 3D Seismic Data but had never reviewed it:

*"As I said, we were aware of its presence, but we had not seen the data based on that."*¹⁷³⁶

¹⁷³⁴ Testimony of Dr. Wright of GCA, Final Hearing, Transcript Day 1, p.75.

¹⁷³⁵ Testimony of Dr. Wright of GCA, Final Hearing, Transcript Day 1, p.113.

¹⁷³⁶ Testimony of Dr. Wright of GCA, Final Hearing, Transcript Day 1, p. 83, line 24-25.

PART VI: REQUESTS FOR RELIEF

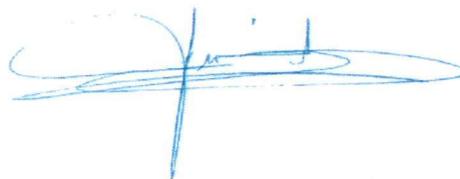
1069 Respondent requests the Arbitral Tribunal to issue:

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

Respectfully submitted on behalf of Respondent,



Norton Rose Fulbright LLP
Dr. Patricia Nacimient



Winston & Strawn LLP
Joseph Tirado