ARBITRATION INSTITUTE OF THE

STOCKHOLM CHAMBER OF COMMERCE

ANATOLIE STATI, GABRIEL STATI, ASCOM GROUP S.A.,

AND TERRA RAF TRANS TRAIDING LTD.,

Claimants

v.

REPUBLIC OF KAZAKHSTAN,

Respondent

CLAIMANTS' SECOND POST-HEARING BRIEF

June 3, 2013

KING & SPALDING

Counsel for Claimants

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1. Anatolie Stati, Gabriel Stati, Ascom Group S.A. ("Ascom"), and Terra Raf Trans Traiding ("Terra Raf") (collectively, "Claimants") respectfully submit their Second Post-Hearing Brief in this arbitration proceeding against the Republic of Kazakhstan ("Kazakhstan" or "Respondent") under the Energy Charter Treaty ("ECT" or "Treaty").[1]

I. PRELIMINARY STATEMENT

2. Following two rounds of fulsome written submissions by each side, two evidentiary hearings, a first round of post-hearing briefs, and two days of oral closing arguments, the evidentiary record in this case is now complete. That record demonstrates that: (1) the Tribunal has jurisdiction over this matter; (2) Kazakhstan committed numerous breaches of the ECT; (3) those breaches caused substantial injury to Claimants' investments; and (4) Claimants are entitled to an award of damages equating to the enterprise value of their operating assets (Borankol and Tolkyn) on October 14, 2008, the investment value and a portion of the potential prospective value for the assets that were not completely developed when Kazakhstan seized them (the LPG Plant and 302 Properties), as well as moral damages and compound interest.

3. Kazakhstan does not have — and never did have — any credible jurisdictional objections. Claimants are indisputably "Investors" who made qualifying "Investments" protected by the ECT. Claimants have demonstrated time and again that Kazakhstan's jurisdictional objections are meritless, and no significant new evidence or arguments have emerged on jurisdictional issues since Claimants submitted their First Post-Hearing Brief. Accordingly, Claimants address jurisdictional issues in summary fashion in Section II of this final submission, and refer the Tribunal to their prior submissions on jurisdiction.

4. The evidence regarding Kazakhstan's numerous violations of the ECT is both voluminous and compelling. As with jurisdictional issues, the evidence and arguments regarding Kazakhstan's liability have been in clear focus for some time, and have not changed materially since Claimants submitted their First Post-Hearing Brief. Rather than simply rehashing those issues, Claimants have endeavored in Section III of this final

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[1] Unless otherwise specified, all defined terms in this Post-Hearing Brief should be understood to have the same meaning as in Statement of Claim, Reply on Jurisdiction and Liability, Reply on Quantum, and Claimants' First Post-Hearing Brief. The Hearing on Jurisdiction and Liability that took place from October 1-8, 2012, is referred to herein as the "October 2012 Hearing," the Hearing on Quantum that took place from January 28-31, 2013, is referred to herein as the "January 2013 Hearing," and the Final Hearing that took place on May 2-3, 2013, is referred to as the "May 2013 Hearing."

submission to present timelines and a summary of the key evidence and arguments that support each of their liability claims. Claimants hope that the Tribunal will find this format useful in considering the evidence and arriving at its award.

5. No doubt recognizing the fatal weaknesses in its case on jurisdiction and liability, Kazakhstan has made causation and quantum the focus of its defense for some time now. Moreover, it has done so through repeated, deliberate violations of the Tribunal's procedural orders, most notably by presenting an entirely new damages case with its Rejoinder on Quantum and producing four critical valuation and diligence documents just three weeks before Claimants filed their First Post-Hearing Brief. Consequently, the causation and quantum issues in this case have evolved considerably, with new arguments and issues emerging as recently as May 2013 Hearing. Thus, causation and quantum once again are a significant focus in this second and final post-hearing submission. Section IV addresses causation, and Section V addresses quantum.

6. Finally, in its First Post-Hearing Brief, Kazakhstan resorted to the worst form of character assassination in what is transparently a desperate, last-gasp effort to avoid a substantial award against it in this case. Kazakhstan seizes upon every arguable inconsistency in the voluminous record — and many "inconsistencies" that Kazakhstan simply manufactures — as evidence that Claimants and their witnesses are untruthful, that Claimants' experts lack independence, and that Claimants submitted forged documents in the case.

7. Unfortunately, those accusations are not merely wrong; in most instances, Kazakhstan deliberately mischaracterizes the evidence. Claimants attempt to respond to the most material of those issues in this Second Post-Hearing Brief and include an Annex devoted to the subject. Claimants also respectfully urge the Tribunal to carefully review all of Kazakhstan's source materials, because very little of what it says can be accepted at face value.

8. For the avoidance of doubt, Claimants continue to rely upon each of their previous written and oral submissions in this case.

II. FINAL REMARKS ON JURISDICTION

9. The Tribunal has jurisdiction to decide this dispute pursuant to Article 26 of the ECT. Throughout this proceeding, Kazakhstan has attempted to skirt its international

responsibility by raising frivolous objections to jurisdiction.[2] However, contrary to Kazakhstan's unsupported allegations, Claimants have conclusively demonstrated that they are "Investors" under the ECT who made "Investments" protected by the Treaty. Kazakhstan's jurisdictional objections are meritless, as Claimants have maintained in previous submissions and conclude below.

A. Claimants Are "Investors" Protected under the ECT

10. Claimants have demonstrated that both Anatolie and Gabriel Stati fall squarely within the definition of "Investor" pursuant to Article 1(7) of the ECT.[3] Kazakhstan no longer disputes that Messrs. Stati are each "natural persons having the citizenship or nationality"[4] of Contracting Parties to the ECT, namely Moldova and Romania.[5] In reality, that is the end of the analysis, because Messrs. Anatolie and Gabriel Stati, qualified "Investors" under the ECT, indirectly owned their investments in Kazakhstan through Terra Raf and Ascom, and those investments are protected pursuant to Article 1(7) of the ECT.

11. Nevertheless, Claimants Terra Raf and Ascom are clearly also "Investors" under Article 1(6) of the ECT. Kazakhstan erroneously contends that Terra Raf is not entitled to protection under the ECT.[6] However, as the *Petrobart v. Kyrgyzstan* tribunal held,[7] the ECT applies provisionally to Gibraltar (where Terra Raf is incorporated)[8] pursuant to Article 45(1) of the Treaty.[9] Furthermore, Gibraltar considers itself bound by the ECT, as

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2 Kazakhstan has abandoned two of its most outlandish objections to jurisdiction pertaining to sovereignty over natural resources under Article 18 of the ECT (*see* Statement of Defense Section 11; *cf.* Rejoinder on Jurisdiction and Liability) and to the alleged "pathological reference" to the Stockholm Chamber of Commerce in the ECT (*see* Statement of Defense, Section 6; Rejoinder on Jurisdiction and Liability, ¶¶ 241-243; *cf.* Kazakhstan's First Post-Hearing Brief; *see also* Reply on Jurisdiction and Liability, Section II.A; Amkhan Opinion, Section 5.3).

3 ECT art. 1(7), **C-1**. *See* Amkhan Opinion ¶¶ 70-86; Claimants' First Hearing Brief ¶¶ 47-49.

4 Anatolie Stati's Moldovan and Romanian identification cards and passports, **C-29**; Gabriel Stati's Moldovan and Romanian identification cards, **C-30**; Gabriel Stati's Moldovan and Romanian passports, **C-365**.

5 Date of the ECT's entry into force for Moldova, Romania, and Kazakhstan, **C-28**.

6 Statement of Defense §8; Rejoinder on Jurisdiction and Liability ¶¶ 62-72; Tietje Opinion §II; Slide 8 of Kazakhstan's Opening Presentation on Jurisdiction; Kazakhstan's First Post-Hearing Brief ¶¶ 440-44.

7 *See Petrobart Limited v. Kyrgyz Republic,* SCC Arb. No. 126/2003, Award, March 29, 2005 (hereinafter "*Petrobart* Award") at 62-3, **C-204**; *Petrobart Limited v. Kyrgyz Republic,* Case No. T 3739-03, Svea Court of Appeal, April 13, 2006, 13 ICSID REP. 369 (2008) at 376, **C-369**.

8 Terra Raf's Certificates of Incorporation, March 1, 1999, November 22, 2007, and July 5, 2011, **C-32**, **C-396**, and **C-367**.

9 ECT art. 45(1), **C-1**. United Kingdom's declaration under Article 45(1) of the ECT, December 17, 1994, **C-34**. United Kingdom's instrument of ratification, December 13, 1996, **C-370**; United Kingdom's Note Verbale No. 2004/184 addressed to the Depository of the ECT, July 27, 2004, **R-51**. Reply on Jurisdiction and Liability ¶¶ 96-112; Amkhan Opinion ¶¶ 235-260; Claimants' First Post-Hearing Brief ¶¶ 53-5.

it is part of the European Union, which is a Contracting Party to the ECT.[10] Therefore, Terra Raf is a qualified "Investor" under the ECT.

12. Regarding Ascom, Kazakhstan asserts that the Tribunal should deny the benefits of the ECT in accordance with Article 17(1) because Ascom, a Moldovan company, allegedly has no substantial business activities in Moldova and is controlled by Anatolie Stati, a national of Romania, allegedly a "third state."[11] Those assertions are frivolous. Ascom conducts substantial business activities in Moldova,[12] including managing its operational subsidiaries.[13] Kazakhstan's allegation that Romania, a contracting member of the ECT, is a "third state" for purposes of Article 17(1) is nonsensical, and in any event irrelevant because Mr. Stati is also a national of Moldova.[14]

13. Claimants Anatolie and Gabriel Stati, Terra Raf, and Ascom are indisputably protected "Investors" pursuant to Article 1(6) of the ECT.

B. Claimants Made "Investments" Protected by the ECT

1. Claimants Made Substantial Investments in Kazakhstan

14. Claimants' investments in Kazakhstan clearly fall within the definition of "Investment" under the ECT. Article 1(6) of the ECT provides a broad definition of the term "Investment:" "every kind of asset, owned or controlled directly or indirectly by an Investor," including tangible and intangible assets, a company or business enterprise, shares,

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[10] Energy Charter, Charter Members and Observers, European Community (now part of the EU) and Euratom, **C-373**; Question and Answer No. 1094 of 2008, Gibraltar Hansards of Questions, at 562, **C-374**. Reply on Jurisdiction and Liability ¶¶ 108-12; Amkhan Opinion ¶¶ 250-9; Claimants' First Post-Hearing Brief ¶ 56.

[11] Statement of Defense §8; Rejoinder on Jurisdiction and Liability ¶¶ 47-61; Kazakhstan's Opening Presentation on Jurisdiction, slide 8; Kazakhstan's First Post-Hearing Brief ¶¶ 432-439.

[12] Ascom is incorporated under the laws of Moldova. Ascom's Certificate of Incorporation, Exhibit **C-31**; *See also* Lists of Ascom's Shareholders as at September 2, 2002, October 15, 2008, and February 15, 2010, **C-391**, **C-35**, and **C-392**. Lists of Ascom's Shareholders as at September 2, 2002, October 15, 2008, and February 15, 2010, **C-391**, **C-35**, and **C-392**. Anatolie Stati's Moldovan and Romanian identification cards and passports, **C-29**. Stati Testimony, Tr. October 2012 Hearing, Day 2, 3:25-4:8. *See also* Letter from B. Paritov, Financial Police, to R. Ibraimov, Financial Police, **C-366**. Date of the ECT's entry into force for Moldova, Romania, and Kazakhstan, **C-28**.

[13] Ascom currently has 111 employees in Chisinau (compared to 380 before Kazakhstan's misconduct). Stati Testimony, Tr. October 2012 Hearing, Day 2, 3:25-4:8.

[14] Contrary to Kazakhstan's allegations, there is no need for Claimants to "address this [issue] to the drafters of the ECT." Kazakhstan's First Post-Hearing Brief ¶ 436. *See* Reply on Jurisdiction and Liability ¶¶ 85-95. Amkhan Opinion ¶¶ 160-85. Claimants' First Post-Hearing Brief ¶¶ 50-2. *See Plama Consortium Limited v Republic of Bulgaria,* ICSID Case No. ARB/03/24, Decision on Jurisdiction, February 8, 2005 ¶¶ 146-51, 155, 158, 162, 164, 170, **R-32**; *Yukos Universal Ltd. (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, November 30, 2009 ¶¶ 441, 456, 458-9, 538, 542, 546, **C-360**.

equity participation, debt, claims to money or to performance, returns, and any rights conferred by law or contract.[15]

15. Kazakhstan continues to incorrectly argue that Claimants' investments are not protected by the ECT because they do not satisfy an "inherent meaning" of the term "investment" as articulated by the *Salini* tribunal.[16] Claimants maintain their position that Kazakhstan's purported standard simply does not apply to this case, as the ECT — unlike the ICSID Convention — specifically defines the term "investment."[17] Nevertheless, that is beside the point, because Claimants' massive, long-term investments in Kazakhstan easily satisfy the *Salini* criteria: (1) Claimants' investments were substantial, long-term contributions that entailed considerable risk; and (2) Claimants' investments substantially contributed to Kazakhstan's economy.[18]

16. Claimants initially invested in Kazakhstan by paying over US $12 million to acquire 100 percent of the shares of KPM and TNG.[19] Claimants have submitted direct evidence of those payments, and Squire Sanders also acknowledges them.[20] Claimants also made very significant post-acquisition investments — exceeding US $1.1 billion — as recognized by the MEMR in February 2010.[21] Claimants reinvested almost all of KPM's and TNG's earnings into the companies,[22] rather than exercising their right to take dividends.[23]

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15 ECT art. 1(6), **C-1**.

16 Statement of Defense Section 9; Rejoinder on Jurisdiction and Liability ¶¶ 73-108; Tietje Opinion Section I; Respondent's Opening Presentation on Jurisdiction, slides 10-13; Kazakhstan's First Post-Hearing Brief ¶¶ 446-464.

17 Reply on Jurisdiction and Liability ¶¶ 114-129; Claimants' First Post-Hearing Brief ¶¶ 59-62. *See Ambiente Ufficio S.P.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, February 8, 2013, ¶ 479, 481, **C-726**.

18 *See* Claimants' First Post-Hearing Brief ¶¶ 63-110.

19 Sale and Purchase Agreements between Gheso and Kainar, Dobro, and Anavi, April 30 and May 3, 2002, **C-56** to **C-58**; Wire transfers from Ascom to Telwin Limited, Testep Enterprises, and Maraday Business, October 28, 1999 to July 18, 2000, **C-379**; Wire transfers from Ascom to Camestix, November 26 and December 14, 2004, **C-382**; and Wire transfers from Ascom to TNG and Kaihar, May 31, 2000, **C-383**. In its Rejoinder on Jurisdiction and Liability, Kazakhstan admitted that Claimants paid US $10.5 million in respect of the shares in KPM and US $1.56 million in respect of the shares of TNG. Rejoinder on Jurisdiction and Liability ¶¶ 117-118.

20 *Id*.; Squire Sanders Legal Due Diligence Report, July 30, 2009, at 65 and 119-20, **C-725**.

21 Report of the MEMR on Unscheduled Inspection for KPM, February 6, 2010, Section VII, **C-385** and Report of the MEMR on Unscheduled Inspection for TNG, February 5, 2010, Section 9, **C-386**.

22 Financial Statements of KPM and TNG, at F-44 and F-78 (2003-2005), **C-707**; Financial Statements of KPM and TNG, at F-77 and F-100 (2006), **C-706**; Financial and Operating Data attached to 2007 Tristan Annual Report, at F-73, F-109 (2007), **R-37.4**; Financial and Operating Data attached to 2008 Tristan Annual Report, at F-69-70, F-105-06 (2008), **R-37.5**.

23 That right is guaranteed by Article 14(1) of the ECT. **C-1**.

Consequently, by the end of 2008, KPM and TNG had nearly US $400 million in retained earnings on their balance sheets.[24]

17. Like most major oil and gas investments, Claimants' investments involved considerable risks in terms of exploration, market conditions, and — as demonstrated by the events of this case — the political whims of the host state. Nevertheless, Claimants made substantial contributions of their own funds in terms of initial share purchases as well as retained and reinvested earnings. Additionally, to ensure that KPM and TNG were sufficiently capitalized, Claimants extended shareholder loans,[25] another "Investment" protected under the ECT.[26] Furthermore, Claimants financed KPM and TNG in part by third-party loans, initially from a Kazakh bank, Kazcommerzbank, until the end of 2006.[27] Claimants then refinanced that third-party debt through the Tristan note offering for US $300 million in December 2006 and an additional US $120 million in June 2007,[28] under which Claimants pledged their entire equity interests in KPM and TNG.[29] Those pledges are also "Investments" protected by the ECT.[30]

18. Claimants' investments also satisfied the *Salini* criteria of benefit to the local economy. Claimants transformed KPM and TNG into assets of "strategic importance" for the region.[31] Additionally, Claimants' investments contributed US $300 million in taxes to the

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[24] Financial and Operating Data attached to 2008 Tristan Annual Report, at F-70 and F-106, **R-37.5**.

[25] A. Stati Testimony, Tr. October 2012 Hearing, Day 2, 7:3-8:1.

[26] ECT art. 1(6), **C-1**; *Nykomb Synergetics Technology Holding AB v. Latvia*, SCC (ECT), Award, December 16, 2003 ¶ 2.1, **C-281**; *Link-Trading Joint Stock Co. v. Moldova*, UNCITRAL, Award on Jurisdiction, February 16, 2001, at 8, **C-339**; *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award, September 28, 2007 ¶¶ 214-15, **C-265**.

[27] Audited Financial Statements of KPM and TNG, at F-124, **C-706**.

[28] Lungu Testimony, Tr. October 2012 Hearing, Day 1, 195:9-197:11; Expert report of Klepikova regarding the bonds, November 18, 2011, **R-37.2**.

[29] *See* Ascom and Terra Raf Pledge Agreements § 6, **C-585**.

[30] ECT art. 1(6), **C-1**; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007 ¶ 392, **C-263**.

[31] Statement of Defense ¶¶ 31.52, 31.59(c), and 31.129; Rejoinder on Jurisdiction and Liability ¶¶ 328, 360, and 694; Bloomberg, "Kazakhstan Gas Production to Increase 12 Percent This Year," March 15, 2011, **C-712;** "Kazakhstan Plans to Increase Gas Production," March 15, 2011, **C-713**.

Kazakh treasury;[32] they employed over 900 Kazakh citizens as a permanent workforce;[33] and they employed nearly 3,000 workers on a contract basis.[34]

19. In short, while the *Salini* test is irrelevant to an ECT dispute, Claimants' investments in KPM and TNG easily satisfy the *Salini* criteria.

2. Claimants' Investments Were Legal

20. Kazakhstan's allegations of minute breaches of Kazakh law during the acquisition, registration, and transfer of KPM and TNG, which supposedly rendered Claimants' investments "illegal,"[35] are contrived and meritless. Kazakhstan never challenged the legality of Claimants' investments before filing its Statement of Defense in this case.

21. To the contrary, Kazakhstan awarded Subsoil Use Contracts to KPM and TNG; it monitored, audited, and approved KPM's and TNG's corporate documents and operations for over a decade; it accepted hundreds of millions of dollars in taxes and royalties; and it benefited from the employment of over 900 of its citizens on a permanent basis (and many more on a contract basis). The findings of the *Saluka* tribunal can be applied directly to the present case:

> [T]hroughout the events giving rise to this arbitration, the Czech authorities . . . never questioned either the legality of the original transaction by which Nomura acquired the IPB shares, or the legality of Saluka's subsequent ownership of them; on the contrary, the Czech authorities took many steps explicitly acknowledging Saluka's status as properly the owner of those shares.[36]

22. Having derived substantial benefits from Claimants' investments for years and never having questioned their legality prior to this arbitration, Kazakhstan is barred from

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[32] Report of the MEMR on Unscheduled Inspection for KPM, February 6, 2010, Table 2, **C-385;** Report of the MEMR on Unscheduled Inspection for TNG, February 5, 2010, Annex 1, **C-386**.

[33] Report of the MEMR on Unscheduled Inspection for KPM, February 6, 2010, Section XII, **C-385;** Report of the MEMR on Unscheduled Inspection for TNG, February 5, 2010, Conclusion, Point 3.5, **C-386**. *See* First Condorachi Statement ¶ 50.

[34] Stati Testimony, Tr. October 2012 Hearing, Day 2, 43:23-24.

[35] Statement of Defense Section 9; Rejoinder on Jurisdiction and Liability ¶¶ 146-204; Respondent's Opening Presentation on Jurisdiction, slides 21-23; Kazakhstan's First Post-Hearing Brief ¶¶ 465-479; Respondent's Closing Submission, slides 26-27; Respondent's Rebuttal Closing Submission, slides 24-25.

[36] *Saluka Investments B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, March 17, 2006 ¶ 217, **C-259**.

raising its allegations of "illegality" now.[37] Even if it were not, Kazakhstan would bear the burden of proving its allegations of illegality, and it has failed to do so.[38] Furthermore, Kazakhstan's claims are simply irrelevant to the Tribunal's jurisdiction under the ECT. In the words of the *Tokios Tokeles v. Ukraine* tribunal, even if Claimants had committed minor technical errors under Kazakh law (which they did not), "to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty."[39]

23. Claimants have clearly demonstrated that Kazakhstan's claims of "illegalities" are wrong. Claimants completed the registration of KPM's initial share issuance (and therefore "cured" any defects the previous shareholders may have created)[40] after they acquired KPM's shares and with the full blessing and acknowledgment of the relevant Kazakh authorities.[41] Squire Sanders (assisted by the Kazakh law firm Olympex) confirmed that KPM's share issuance was valid. It stated:

> KPM's registration documents meet the requirements of the laws of Kazakhstan and bear the stamps of the competent governmental authorities of Kazakhstan. Considering that the re-registration of a legal entity in Kazakhstan must be effected by virtue of a resolution of the subject company's shareholders and information on the preceding registration of KPM, we believe that risks inherent in the legality of the procedure for KPM's original establishment and subsequent registration are minimal.[42]

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[37] *See*, for instance, *Desert Line Projects LLC v. Republic of Yemen,* ICSID Case No. ARB/05/17, Award, February 6, 2008 ¶¶ 116-120, **C-136**.

[38] *See*, *e.g.*, *Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award, July 14, 2010 ¶ 129, **C-377**; *Siag v. Egypt*, ICSID Case No. ARB/05/15, Award, June 1, 2009 ¶¶ 317-8, 320, **C-217**.

[39] *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, April 29, 2004, ¶¶ 85-86, **C-401**.

[40] In any event, minor clerical failings by former shareholders cannot impact Claimants' standing or the validity of their investments in the present arbitration. *Saluka Investments B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, March 17, 2006 ¶¶ 217-8, **C-259**.

[41] Reply on Jurisdiction and Liability ¶¶ 142-5; Claimants' First Post-Hearing Brief ¶¶ 88-92; First Maggs Report ¶¶ 32-40; Third Maggs Report ¶¶ 4-20, 24-5; *see* Certificate of State Registration of KPM dated December 13, 1999, **R-12**; Letter from KPM to the Agency on Investments dated December 23, 1999, **C-49**; Letter from the Kazakh National Securities Commission to KPM dated January 24, 2000, **C-406**; Notification of approval of report on the results of KPM's shares issue and placement dated April 9, 2003, **Exhibit 7** to First Maggs Report; KPM's Certificate of Registration as a Limited Liability Partnership dated May 13, 2005, **C-37**.

[42] Squire Sanders Legal Due Diligence Report, July 30, 2009, at 64, **C-725**. Squire Sanders also noted that "[a]s at the date of this Report [July 30, 2009], KPM's foundation agreement is no longer relevant owing to the absence of a participant in KPM other than Ascom." *Id*. at 63.

24. Additionally, Claimants have established that KPM and TNG did not lack any required consent for the transfer of shares to Ascom and Terra Raf.[43] The relevant Kazakh authorities confirmed to Claimants at the time that no consent was required.[44] Kazakhstan now claims — but fails to establish — that those contemporaneous interpretations of Kazakh law by its own authorities were wrong. Kazakhstan cannot credibly seek to negate — *ex post facto* and for purposes of arbitration — contemporaneous interpretations of Kazakh law by its own authorities upon which Claimants reasonably relied.

25. Claimants have also demonstrated that Terra Raf legally acquired TNG's shares from Gheso on May 12, 2003, seven months before Kazakhstan acquired a pre-emptive right to acquire shares in subsoil users under its domestic law.[45] Furthermore, in February 2007, Kazakhstan confirmed to Claimants that it could not exercise its pre-emptive right retroactively to the transaction and expressly approved the 2003 transfer of shares from Gheso to Terra Raf.[46] In its May 2013 closing arguments, Kazakhstan attempted to bolster its change in position by selectively quoting the Squire Sanders Due Diligence Report, where the report stated:[47]

> 2. The documents provided to us do not include any information on the performance by Terra Raf of its obligations to purchase shares in TNG from the former owner of TNG, *i.e.*, GHESO, or any resolution by the former shareholders of TNG

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[43] Reply on Jurisdiction and Liability ¶¶ 156-168; Claimants' First Post-Hearing Brief ¶¶ 95-104; First Maggs Report ¶¶ 41-59.

[44] Letter No. 01-37 from the Agency on Investment to KPM, November 19, 1999, **C-47**; Letter No. 3-199 from the Agency on Investment to KPM dated January 18, 2000, **C-420**; Minutes of Governmental Meeting No. 17-23/1-404 dated May 14, 2002, **C-421**; Letter from the MEMR to the Financial Police, December 4, 2008, **C-422**; *see also* Squire Sanders Legal Due Diligence Report, July 30, 2009, **C-725**; M. Suleimenov Testimony, Tr. October 2012 Hearing, Day 3, 162:7-163:4.

[45] Reply on Jurisdiction and Liability ¶¶ 183-189; Claimants' First Post-Hearing Brief ¶¶ 105-110; Stamp from TNG's registrar Invest-Service with handwritten note "28.05.03" on the Russian original of the Sale and Purchase Agreement between Gheso and Terra Raf dated May 12, 2003, **C-60**; Register of Operations for TNG by its Registrar at various point in time attached to letter from Registrar Zerde to TNG dated January 16, 2009, **R-18**; Data on the value of shares of TNG from the register of transfers, Zerde, dated January 16, 2009, **R-39**; Extract from the register of shareholders of TNG dated May 28, 2003, **C-418**; Law No. 2-III 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," December 1, 2004, **R-19**; *see* Ongarbaev Testimony, Tr. October 2012 Hearing, Day 6, 62:19-63:20; *see also* Pisica Testimony, Tr. October 2012 Hearing, Day 2, 60:25-61:21.

[46] Letter from the MEMR to TNG, February 13, 2007, **C-132**; Letter from the MEMR to TNG attaching the Minutes of Meeting of the Appraisal Commission dated February 21, 2007 and Minutes of the Appraisal Commission dated February 20, 2007, **C-415** and **C-134**.

[47] Respondent's Rebuttal Closing Submission, slides 24-25.

> to sell shares held by them to new shareholders for the relevant periods.[48]

26. In the following paragraphs, however, Squire Sanders noted its conclusions from its analysis of the documents at its disposal:[49]

> 3. In accordance with the laws of Kazakhstan, the rights to securities shall be registered by virtue of a shareholder's order to replace the owner of such shares which is only issued as soon as accomplished payment has been verified. Information on changes in the register of TNG's shareholders is set forth in the formal records maintained by the registrar of TNG securities which were provided by AO Registrar Zerde operating under License 0406200451 dated 24 January 2006. This means that risks inherent in operations in relation to shares in TNG which were undertaken previously are minimal.
>
> 4. No information was made available on any operations in relation to a participatory interest in TNG for 2004-2009, *i.e.* the entire period since the transformation of TNG into a limited liability partnership. Considering that Terra Raf was the sole participant in TNG in May 2003 and June 2009, we believe that, in all likelihood, there were no such operations.

While it is obvious why Kazakhstan omitted that language in its closing argument, that omission was a blatant mischaracterization of the evidence. Squire Sanders clearly considered that Terra Raf's ownership of TNG was proper and legal. Kazakhstan's resurrection of an unfounded claim of a pre-emptive right over the Gheso transfer was contrived as part of the harassment campaign that began in October 2008. That issue, and Squire Sanders' conclusions regarding Kazakhstan's use of those claims to threaten Claimants, are addressed in Section III.F below.

C. Kazakhstan's Other Objections Are Meritless

27. As with its frivolous objections to jurisdiction pertaining to the definitions of "Investment" and "Investor" under the ECT, Kazakhstan's other objections — which relate to issues of procedure, rather than jurisdiction — do not withstand scrutiny. Kazakhstan unconvincingly maintains that Claimants did not satisfy the ECT's three-month "cooling off" period. Claimants have established that the parties complied with that requirement by

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[48] Squire Sanders Legal Due Diligence Report, July 30, 2009, at 120, **C-725**.

[49] Squire Sanders Legal Due Diligence Report, July 30, 2009, at 120-1 (emphasis added), **C-725**.

suspending this proceeding for three months, at Kazakhstan's request, for that express purpose.[50]

28. Kazakhstan also alleges, in an attempt to deflect attention from its own procedural misconduct in this arbitration, that Claimants committed procedural violations regarding the submission of documents in this proceeding.[51] Kazakhstan's contention that Claimants knowingly submitted intentionally mistranslated documents in order to "commit an attempted procedural fraud" is utterly false.[52] It is also disingenuous, given that Kazakhstan (with infinite Russian speakers at its disposal) submitted materially erroneous translations.[53] Claimants have thoroughly rebutted Kazakhstan's allegations on this point, as well as its unsupported and offensive allegations that Claimants submitted forged documents,[54] in their First Post-Hearing Brief.[55] Those allegations do not deserve further response.

29. Kazakhstan has also accused Claimants of having "in fact corrupted Kazakh officials" in order to obtain internal government documents in violation of Kazakh law.[56] Claimants were forthright in explaining how they obtained the seven internal documents that Kazakhstan did not want the Tribunal to see.[57] No further explanation is required, as there was nothing improper in how Claimants obtained the documents.

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50 Reply on Jurisdiction and Liability ¶¶ 53-75; Claimants' First Post-Hearing Brief ¶ 44.

51 Respondent's Opening Presentation on Jurisdiction, October 2012 Hearing, slides 25-46; Kazakhstan's First Post-Hearing Brief ¶¶ 1120-1175.

52 Respondent's Opening Presentation on Jurisdiction, October 2012 Hearing, slide 45; Kazakhstan's First Post-Hearing Brief ¶¶ 1161-1172; Kazakhstan's Rebuttal Closing Submission, slides 10-11. Claimants responded to those allegations in their First Post-Hearing Brief at ¶¶ 112-114. In any event, Kazakhstan would bear the "heavy" burden of proving any allegation of impropriety. *See Saba Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award, July 14, 2010 ¶ 131, **C-377**.

53 *See, e.g.*, Witness Statement of Mirbulat Zarifovich Ongarbaev dated August 2, 2012, Amended translation, **C-720**; Updated Translation of Witness Statement of Mirbulat Zarifovich Ongarbaev submitted by Kazakhstan on December 1, 2012; *see also* Section III. E., *infra*, discussing Kazakhstan's misleading translation of Article 371 of the Criminal Procedure Code, Exhibit 1 to the Kogamov Report. Additionally, with its First Post-Hearing Brief, Kazakhstan submitted a "revised version of the English translation" of Professor Didenko's First Report correcting "certain inaccuracies" with Professor Didenko's Second Report. Kazakhstan failed to identify the corrections made to that 50-page report, despite Claimants request that it do so. Nevertheless, it appears that an entire paragraph on page 38 of the English translation of Professor Didenko's First Report does not exist in the Russian original.

54 Respondent's Opening Presentation on Jurisdiction, slide 43; Kazakhstan's First Post-Hearing Brief ¶¶ 1139-1160; Kazakhstan's Rebuttal Closing Submission, slide 9.

55 *See* Claimants' First Post-Hearing Brief ¶ 115.

56 Rejoinder on Jurisdiction and Liability ¶¶ 213-4; Respondent's Opening Presentation on Jurisdiction, slide 30; Kazakhstan's First Post-Hearing Brief ¶¶ 1120-38; Respondent's Rebuttal Closing Submission, slide 9.

57 *See* Claimants' First Post-Hearing Brief ¶¶ 116-120; *see also* Claimants' Opening Statement, Tr. October 2012 Hearing, Day 1, 64:11 – 66:15.

30. Finally, Kazakhstan has resorted to a desperate smear campaign and unabashedly accused Claimants' witnesses, experts, and counsel of lying.[58] Because those baseless accusations are not worthy of a detailed response, Claimants have addressed them in summary fashion in Annex 1 to this brief.[59]

III. KAZAKHSTAN BREACHED THE ECT AND INTERNATIONAL LAW

31. The misconduct of Kazakhstan at issue in this case was brazen and deplorable and leaves no doubt that Kazakhstan is liable to Claimants under the ECT and international law. Kazakhstan violated nearly every single one of the principal protections afforded foreign investors under the ECT and international law.

32. Indeed, it is fairly uncommon for an investment treaty arbitration to involve the breadth, severity, and sheer number of acts of misconduct at issue here. As the distinguished members of this Tribunal will appreciate, it is not every treaty arbitration that involves a head of state's personal instruction to "thoroughly check" a claimant's investment; repeated investigative onslaughts by numerous national agencies coordinated by a "financial police" force answerable directly to the executive; a trumped-up criminal allegation that results in the sequestration of all of a claimant's assets and shares in its operating companies, a criminal conviction and jail sentence imposed on an in-country manager, and a debilitating fine against a non-party; multiple denials of justice at the investigation, prosecution, trial, and appeal stages of a criminal proceeding; a "death-penalty" fine of $145 million against a non-party for failure to procure an $80 license, in relation to an activity that the state routinely monitored and that harmed no one; state misconduct that is so inconsistent and contradictory that the State is forced to argue in the arbitration that its own regulatory regime is so unclear that the investor was supposed to ask a public prosecutor or a court about an oil pipeline license; trumped-up tax assessments, audits, inspections, interrogations, and other forms of state harassment; a spurious claim to a "pre-emptive" right of the State and unfounded allegations of fraud and forgery that are leaked by the State to an international newswire; an agreement to extend an exploration contract that is then reneged upon; and an outright,

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[58] Rejoinder on Jurisdiction and Liability ¶¶ 24-46; First Olcott Report ¶¶ 93-161; Respondent's Opening Presentation on Jurisdiction, October 2012 Hearing, slides 4-7; Respondent's Opening Presentation, Tr. October 2012 Hearing, Day 1, 18:12-18; 21:20-24; Kazakhstan's First Hearing Brief ¶¶ 107-184 and 421-431; Third Olcott Report ¶¶ 50-61; Respondent's Rebuttal Closing Submission, May 2013 Hearing, slides 3-6.

[59] Claimants address Kazakhstan's accusations against their experts in Section V below and in the Fourth Ryder Scott Report.

unjustified, illegal expropriation once a claimant had suffered all of the previous measures for a period of nearly two years.

33. That is this case. As a result of the overwhelming evidence of its misconduct, Kazakhstan's liability under the ECT and international law has always bordered on a foregone conclusion. Nevertheless, in their previous submissions, Claimants have painstakingly described each act of misconduct they suffered at the hands of Kazakhstan between October of 2008 and July of 2010. Claimants have also submitted hundreds of contemporaneous documents to prove their claims, in addition to the testimony of witnesses. The vast majority of that record has not been rebutted by Kazakhstan with credible evidence. In particular, the documentary evidence on liability is staggering.

34. Claimants do not propose to repeat their entire case on liability in this final brief. Rather, in an effort to summarize and "streamline" a case involving a veritable avalanche of state misconduct (and evidence thereof), Claimants set forth below their ten primary claims regarding Kazakhstan's breaches of the ECT and international law. The first nine claims relate to the extraordinary campaign of indirect expropriation, harassment, and coercion suffered by Claimants and their investments between Nazarbayev's order of October 14, 2008, and Kazakhstan's final, direct expropriation of Claimants' investments on July 21-22, 2010. The tenth and final claim relates to the direct expropriation itself.

35. For each of the ten claims below, Claimants provide a brief "synopsis;" a timeline of relevant events, including citations to relevant exhibits in the record; a list of additional evidence supporting the claim, including evidence submitted by witnesses in the form of written statements or oral examination; citations to discussion of the claim in Claimants' previous written and oral submissions; the standards of the ECT and international law relevant to the Tribunal's consideration of the claim; and brief, final remarks about the claim.

36. In the real world, of course, Kazakhstan's campaign of misconduct did not divide up so neatly. In particular, Claimants and their investments suffered from many of the acts comprising the first nine claims more or less concurrently during the period between October 2008 and July 2010. While the impacts of those individual acts were immediate and substantial, they also combined to produce a "spiral" effect. While Claimants do not believe there is any doubt that the nine claims, considered individually, breached the relevant standards of the ECT and international law, the Tribunal should ultimately view them in a

consolidated manner in determining whether Kazakhstan's campaign of October 2008 to July 2010 breached the relevant legal standards — because Claimants and their investments suffered damage from that campaign as a whole. Nevertheless, the claims are set forth individually below to enable specific discussion of the facts, timing, evidence, and arguments relating to each.

A. Claim No. 1: Kazakhstan Carried Out a Campaign of Indirect Expropriation, Severe Harassment, and Coercion Against Claimants' Investments

Synopsis

37. On October 14, 2008 — after Claimants had (i) transformed Borankol and Tolkyn into successful oil and gas production operations; (ii) made significant discoveries in the Contract 302 Properties; and (iii) received indicative offers to purchase their assets ranging from US $550 million to US $1.5 billion — President Nazarbayev personally issued an instruction to the highest levels of his administration to "thoroughly check" Mr. Stati and his companies, KPM and TNG. More than seven different Kazakh agencies carried out those instructions through an unprecedented harassment campaign orchestrated by the Financial Police. That campaign consisted of targeting Claimants' personnel and operations; inundating KPM and TNG with audits, document requests, and seizure orders; commencing fabricated criminal investigations; raising baseless claims regarding TNG's ownership; and assessing tens of millions of dollars in spurious tax assessments.

38. Kazakhstan's campaign unquestionably interfered with Claimants' "incidents of ownership" of their investments, including Claimants' ability to use, manage, and control KPM and TNG (and their assets) as they otherwise would have, their ability to derive the economic benefits they otherwise would have, and their ability to sell or dispose of their investments. Kazakhstan's campaign therefore clearly amounted to an "indirect expropriation." It likewise breached the ECT's "treatment" standards — most notably, the standard of fair and equitable treatment, the ECT's impairment clause, and the Treaty's "most constant protection and security" provision.

Timeline

• October 14, 2008	**President Nazarbayev orders an investigation of Mr. Stati, KPM, and TNG (C-8).**
• October 16, 2008	**Deputy Prime Minister Umirzak Shukeyev issues a corresponding order, No. 6497, to the Financial Police (*see, e.g.*, C-9, C-10).**
• October 18, 2008	Financial Police write the Customs Committee regarding Mr. Stati's travel to Kazakhstan (C-11).
• October 20, 2008	Financial Police write the Kazakh MEMR and officials in Moldova requesting various information on Mr. Stati, KPM, & TNG (C-9 and C-444).
• October 24, 2008	**Financial Police order "comprehensive tax inspections" of KPM & TNG (C-10).**
• October 24, 2008	Mr. Turganbayev requests prolongation of the inspection term until mid-December 2008 (C-430).
• October 24, 2008	MEMR responds to Financial Police request for corporate documents on the shareholders of KPM and TNG (C-432).
• October 28, 2008	**Financial Police order the Geology Committee, the Ecology Committee, the National Bank of Kazakhstan, the Tax Committee, and the Ministry for Emergency Situations to carry out inspections of KPM and TNG and insist that Financial Police be permitted to participate (C-12; C-13; C-15; C-433; C-434; C-435; C-436; C-437; and C-447).**
• October 30, 2008	Financial Police report that Mr. Stati himself is not a registered businessman in Kazakhstan but that he carries out business through Ascom (C-366).
• October 30, 2008	Financial Police report on KPM's and TNG's activities, noting specific items to inspect, but finding that KPM and TNG are compliant with all investment obligations (C-438).
• November 1, 2008	Financial Police report to Deputy Prime Minister confirming the ownership of KPM and TNG and informing him that inspections are being carried out (C-600).
• November 4-15, 2008	Inspection regarding compliance with legislation on industrial safety is carried out (C-14; C-439).
• November 7, 2008	Mr. Stati sends a letter to President Nazarbayev assuring him that there is no reason to investigate KPM and TNG (C-700).

• November 7, 2008	Financial Police order inspection of KPM and TNG regarding compliance with payment of transfer prices (*see* C-38).
• November 7, 2008	Financial Police order Customs Committee to inspect KPM and TNG for compliance with payment of export duties (C-440).
• November 10, 2008	Tax Committee begins audit of KPM and TNG for the period 2005-2007 (C-149; C-150).
• November 4-11, 2008	Geology Committee of the MEMR carries out inspection of KPM and TNG with Financial Police involvement (C-86; C-87).
• November 12, 2008	Financial Police order Customs Committee to inspect KPM's and TNG's import/export volumes (C-442).
• November 13, 2008	**Tax Committee notes that inclusion of Financial Police in inspections would be illegal and proposes that a working group be established instead to review inspection results (C-38). National Bank of Kazakhstan also notes the illegality of Financial Police participation in inspections (C-15).**
• November 14, 2008	MEMR reports to Financial Police on KPM's and TNG's export volumes (C-443).
• November 17, 2008	**Financial Police order Tax Committee to calculate the illegal profit for KPM operating a "main" pipeline without a license (C-89).**
➔ At this point, as Kazakhstan concedes, no authority had suggested — much less concluded — that KPM's pipeline was a "main" pipeline. That "conclusion" only comes with Mr. Baymaganbetov's report three months later and is never reached by any authority knowledgeable of pipelines.	
• November 18, 2008	Financial Police issue resolution for inspection of any unpaid customs taxes by TNG (C-446).
• November 19, 2008	**Ministry for Emergency Situations confirms that KPM's and TNG's pipelines are not "main" (C-90; C-91).**
• November 21, 2008	**Financial Police order the Ministry of Emergency Situations to withdraw its letters confirming that KPM's and TNG's pipelines are not "main," on the basis that the MES is not competent to provide that conclusion (C-92).**
• November 25, 2008	Financial Police write to Ministry of Finance inquiring into why the Customs Committee "exonerated" KPM from oil export duties, given that KPM had provisionally paid the disputed duties (C-162). Custom Committee had, in fact, properly found that KPM was not contractually obliged to pay the export duty.

➔ Despite a November 19, 2008, court ruling in KPM's favor on the export duty, the Financial Police and Customs Committee challenge the ruling, embroil KPM in litigation, and raise new claims against KPM (and TNG) until March 31, 2010, when the Customs Committee concedes that neither KPM nor TNG are obliged to pay export duties. (C-161; C-130).	
• December 2, 2008	Financial Police send internal report affirming that KPM operates a "main" pipeline without a license and has gained illegal income of over 41 billion Tenge (C-85). No competent authority had reached such a conclusion by this point (and none ever did).
• December 10, 2008	Financial Police report to Deputy Prime Minister, noting that criminal case cannot move forward until a competent authority concludes that KPM's pipeline is "main" (C-448).
• December 15, 2008	**Financial Police formally open a criminal investigation against KPM for the alleged operation of a "main" pipeline without a license (C-632).**
• December 18, 2008	**MEMR notifies TNG of purported irregularities in the 2003 Gheso transfer and potential violation of the State's pre-emptive right; it leaks the claim to INTERFAX and falsely accuses Claimants of fraud and forgery (C-140; C-141; C-625).**
➔ Credit Suisse is immediately alarmed by this news, requests an explanation, and when the issue is not resolved, informs Claimants that it will not conclude their pending financing arrangement for US $150-175 million (C-625 and C-521).	
• December 20, 2008	Financial Police begin repeated interrogations of company employees (*see* C-46; C-96; C-620; C-621; C-622; C-623; C-624: C-626; C-627).
• December 24, 2008	Financial Police seek information from KPM and TNG on their gas and condensate outputs (C-94).
• December 24, 2008	Financial Police issue a summons for Mr. Stati, Mr. Cojin, Mr. Salagor, and Mr. Cornegruta (C-654).
• December 26, 2008	Financial Police order the seizure of company documents regarding contracts with third parties and construction of pipelines (C-605 and C-606).
• December 30, 2008	Financial Police conduct an "on site" investigation of KPM and TNG (C-95).
• January 14, 2009	Financial Police issue a "resolution" appointing three investigators to the criminal investigation (C-453).

• January 14, 2009	**Fitch places Tristan debt on Ratings Watch Negative as a direct result of Kazakhstan's criminal investigation of KPM and pre-emptive right claim concerning TNG (C-590).**
• January 15, 2009	**Moody's reports a downgrade review, also as a direct result of Kazakhstan's criminal investigation of KPM and the pre-emptive right claim concerning TNG (C-744).**
• January-February 2009	KPM and TNG submit various complaints regarding the illegality of the Financial Police's searches and seizures of documents and forward reports confirming that their pipelines are not "main" (*see* C-46; C-96; C-620; C-621; C-622; C-623; C-624; C-626; C-627; C-628; C-629; C-630).
• January 22, 2009	Financial Police request corporate documents from KPM (C-607).
• January 23, 2009	Financial Police request corporate documents from TNG (C-608).
• February 2, 2009	**Financial Police inform TNG that on January 20, 2009, they had formally opened a criminal investigation against TNG for the alleged operation of "main" pipelines without a license (C-98).**
• February 4, 2009	**MEMR writes a letter to Financial Police confirming that KPM's pipeline is part of its gathering system, and thus, is not "main" (C-719).**
• February 9, 2009	Financial Police order Ministry of Justice to appoint an "expert" to classify KPM's pipeline (C-109).
• February 10, 2009	**Mr. Turganbayev meets with the MOJ "expert," Mr. Bamaganbetov, and gives him four documents on which to base his report (R-246). Three days later, Mr. "B" issues his report, without having reviewed any other documents or visited KPM's pipeline (C-110).**
• February 10, 2009	Tax Committee claims that KPM and TNG owe US $62 million in corporate back taxes for allegedly improperly deducting drilling expenses (Exhibits 3, 4, 5, and 6 to Second Maggs Report; C-155).
➔ The corporate tax dispute embroils KPM and TNG in litigation until June 22, 2010, when the Kazakh Court of Cassation dismisses the baseless claim (Exhibit 11 to Second Maggs Report).	
• February 18, 2009	**Moody's downgrades the Tristan debt due to the "amplified regulatory and operational risk" posed by the unresolved criminal investigation of KPM and the pre-emptive right claim concerning TNG (C-744).**

• February 24, 2009	Financial Police seize KPM's corporate documents (C-609).
• February 27, 2009	MEMR formally claims that TNG is in breach of Contracts 210 and 302 for failing to comply with Kazakhstan's pre-emptive right when Gheso transferred TNG to Terra Raf (C-146).
• March 3-4, 2009	Financial Police seize KPM's and TNG's corporate documents (C-610; C-611; C-612).
• March 5, 2009	**Moody's downgrades the Tristan debt again, based on the worsening treatment of KPM and TNG by Kazakhstan, and in particular, the opening of a formal criminal investigation against TNG (C-744).**
• March 18, 2009	KPM and TNG complain to General Prosecutor's Office regarding the criminal investigations (C-154).
• March 19, 2009	Claimants meet with MEMR regarding the criminal investigations; "main" pipeline issue; false claim of pre-emptive right; outstanding request to extend Contract 302; and other issues. MEMR confirms that all issues will be resolved in Claimants' favor (C-42; C-111).
• March 27, 2009	Financial Police order KPM and TNG to submit originals of their corporate documents (C-614; *see* C-615).
• March 30, 2009	KPM responds to Financial Police request for documents and requests copy of criminal investigation order (C-615).
• March 30, 3009	Financial Police order TNG to submit additional original company documents (C-616).
• April 6, 2009	Financial Police request information on TNG's costs for oil and condensate in relation to the criminal case against KPM (C-618).
• April 22, 2009	Financial Police order additional company documents from KPM (C-617).
• April 25, 2009	Financial Police arrest Mr. Cornegruta (*see* C-117).
• April 30, 2009	**Financial Police order the sequestration of Claimants' shares in KPM and TNG, as well as the companies' Subsoil Use Contracts and other assets (C-486; C-487; C-490; C-491; C-492; C-494; C-496; C-497; *see also* C-488; C-489; C-493; C-495; C-498).**
• May 6-7, 2009	Financial Police conduct an overnight raid of KPM's and TNG's offices (C-114).

• May 7, 2009	Mr. Stati, Ascom, and Terra Raf send complaint letter to President Nazarbayev and other executives, putting them on notice of international arbitration (C-43).
➔ About this time, with Kazakhstan's intentions clear, Mr. Stati decides to pause construction on the LPG Plant and reduce planned development efforts at Tolkyn and Borankol.	
• May 15, 2009	Financial Police request additional documents from KPM and notify KPM and TNG of limitations on sequestered property (C-668 and C-485).
• May 19, 2009	Financial Police request valuation of sequestered property from KPM (C-500).
➔ By June 2009, the Prime Minister, the MEMR, the Ministry of Justice, the Ministry of Finance, and Samruk-Kazyna have all contemplated a "buyout" of KPM and TNG and/or "termination" of their Subsoil Use Contracts (C-293).	
• June 17, 2009	Financial police issue press release and media reports the criminal investigations, potential 147 billion Tenge fine, and sequestration of company assets (C-118).
• June 27, 2009	Kazakhstan indicts Mr. Cornegruta (C-454); Regional Prosecutor's Office writes Ascom and Terra Raf noting the international search underway for Mr. Cojin (C-183).
➔ On July 31, 2009, RBS values KPM and TNG (without Contract 302) at between US $855 million and US $1 billion as of October 1, 2009 (First Post-Hearing Brief ¶ 516).	
• July 2, 2009	MEMR fails to fulfill its commitment to execute the extension of the exploration period of Contract No. 302 (*see* R-163.1).
• July 30 – Sept. 14, 2009	Mr. Cornegruta's trial takes place (C-704).
• **September 18, 2009**	**Aktau City Court finds Mr. Cornegruta guilty of "illegal entrepreneurial activity in an especially large amount" for operating a "main" pipeline without a license and orders recovery of US $145 million from non-party KPM (C-117).**
• September 21, 2009	Nazarbayev's Head of Administration issues an order regarding "free of charge transfer of [Claimants'] assets" (C-294).
• September 30, 2009	Financial Police order a new audit of KPM regarding alleged failure to pay export taxes (Condorachi WS ¶ 34).
• October 22, 2009	Financial Police question Mr. Condorachi regarding KPM's alleged obligation to pay export taxes (Condorachi WS ¶ 35).

• November 3, 2009	Financial Police interrogate Mr. Cornegruta in jail regarding KPM's alleged obligation to pay export taxes (Condorachi WS ¶¶ 36-37).
• November 12, 2009	Appeal court upholds criminal judgment of Aktau City Court finding Mr. Cornegruta guilty of illegal entrepreneurial activity in an especially large amount and ordering recovery of US $145 million from KPM (C-565).
➔ Cliffson affiliate Grand Petroleum offers to buy KPM and TNG and values the companies' assets at US $1.15 billion. Stati Testimony, Tr. January 2013 Hearing, Day 2, 91:23-92:24	
• **November 19, 2009**	**President Nazarbayev issues instruction to the Prime Minister, Minister Mynbaev, and Timur Kulibayev to look into and "resolve" issues with respect to KPM & TNG (C-23).**
• December 29, 2009	Writ of Enforcement issued against KPM for US $145 million (C-119).
• December 29, 2009	Tax Committee concludes audit of transfer pricing and claims that KPM and TNG owe approximately 700 million Tenge (US $5 million) in unpaid transfer prices and penalties (C-137; C-138).
➔ KPM and TNG commence legal action challenging transfer pricing claim, which was still pending as of the State's July 21-22, 2010, unlawful direct expropriation.	
• January 10, 2010	Kazakhstan freezes the bank accounts of KPM to satisfy the US $145 million judgment against it (C-121).
• January – June 2010	Kazakh enforcement officers take repeated measures to recover funds from KPM to satisfy criminal judgment (*see* C-501; C-122; C-123; C-124; C-125; C-298; C-79; C-502; C-503; C-504; C-505; C-506; C-507; C-199; C-201).
➔ By mid-March 2010, Kazakhstan's court administrators had seized nearly every asset of KPM, including key oil production equipment, and they had prevented KPM from importing equipment and exporting oil. Nevertheless, Claimants continue to pay the salaries of KPM's workers through TNG's accounts.	
• January 25 – February 6, 2010	MEMR carries out unscheduled inspection of KPM and TNG regarding historical compliance with Subsoil Use Contracts and Kazakh law (C-171; C-385; C-386; C-599).
• January 26, 2010	Ministry of Finance begins bankruptcy proceedings against KPM (*see* C-157).
• February 17, 2010	President of Kazakh social fund "Blagovest" writes Minister Mynbaev to make a suggestion to "resolve the question of nationalization of the assets posed in 2008" (C-23).

➔ Cliffson decreases its offered purchase price for KPM and TNG to US $920 million taking into account the criminal judgment Kazakhstan is enforcing against KPM.	
• February 24, 2010	Customs Committee informs both KPM and TNG that they are liable for unpaid export taxes (C-44 and C-479); one month later, on March 31, 2010, the Customs Committee retracts that claim and concedes that the Subsoil Use Contracts exempt KPM and TNG from export taxes (C-130).
➔ After it served the purpose of harassing and extorting US $10 million as provisional payment from KPM, Kazakhstan drops the export tax claim but never reimburses KPM.	
• April 30, 2010	MOG informs KPM and TNG that a sale to Cliffson is not possible because the companies' shares are sequestered / arrested (C-528 & C-529).
• June 25-29, 2010	**On the order of the Prime Minister and with the involvement of the Financial Police, the General Prosecutor's Office orders unscheduled inspections of KPM and TNG from no fewer than 7 different Kazakh agencies (C-711; C-174; C-175; C-185; C-182; C-647; C-648; C-649; C-650; C-687; C-180; C-181; C-315; C-651; C-689; C-177; C-178; C-688).**
➔ While inspections are underway, TNG is notified that the Prime Minister plans to visit the facilities and the LPG Plant. TNG is instructed to make preparations for his visit (C-186 and C-299).	
• July 21-22, 2010	The Prime Minister and the Minister of Oil and Gas publicly declare the takeover and abrogation of Claimants' Subsoil Use Contracts; they seize the assets of KPM and TNG and transfer them to KazMunaiGas, which later appoints its subsidiary KazMunaiTeniz as "trust manager" for the companies (C-3; C-4; C-5; C-189; C-190).

Relevant Witness Evidence

Horton Report

First Stati Statement ¶¶ 21-30

Second Stati Statement ¶¶ 7-46

First Lungu Statement ¶¶ 35-52, 66

Second Lungu Statement ¶¶ 7-13

First Pisica Statement ¶¶ 9-31, 41-59

First Cojin Statement ¶¶ 6-24

Second Cojin Statement ¶¶ 11-17

First Condorachi Statement ¶¶ 7, 11-23, 27-49

First Romanosov Statement ¶¶ 24-27, 30, 34-35

Second Romanosov Statement ¶¶ 4-7

Stejar Statement ¶¶ 5-29

Calancea Statement ¶¶ 2-11

Calancea Testimony, Tr. October 2012 Hearing, Day 3, 67:20-68:10

Condorachi Testimony, Tr. October 2012 Hearing, Day 2, 122:1-5, 122:16-22, 149:3-152:2

A. Rakhimov Testimony, Tr. October 2012 Hearing, Day 5, 81:24-82:6, 82:15-24

Mynbaev Testimony, Tr. October 2012 Hearing, Day 3, 87:10-24, 98:19-25, 99:15-19, 173:8-14

Kravchenko Testimony, Tr. October 2012 Hearing, Day 4, 108:24-114:2

Previous Submissions by Claimants

Written Submissions:

Statement of Claim ¶¶ 74-78, 88-97, 107-39, 145-48, 156-95, 199-236, 238-317, 329-36, 350-51, 352-62

Reply on Jurisdiction and Liability ¶¶ 210-47, 292-310, 324-25, 338-52, 356, 361-422, 469-80, 485, 491-96, 501-16, 524, 530-35, 546-52, 555

Claimants' First Post-Hearing Brief ¶¶ 132-49, 211-23, 238-41, 264-94, 306-41

Oral Submissions:

Claimants' Opening Presentation on the Merits, slides 24-45

Claimants' Opening Statement, Tr. October 2012 Hearing, Day 1, 93:8-137:7

Relevant ECT and International Law Standards

- Unlawful indirect expropriation – ECT art. 13(1), C-1
- Fair and equitable treatment – ECT art. 10(1), C-1
- Impairment by unreasonable or discriminatory measures – ECT art. 10(1), C-1
- Most constant protection and security – ECT art. 10(1), C-1

- Right to employ key personnel – ECT art. 11(2), C-1

Final Remarks Regarding Claim No. 1

39. The timeline and evidence set forth above conclusively demonstrate that on the heels of President Nazarbayev's October 14, 2008, directive, the Kazakh Financial Police, the MEMR, and a half-dozen other Kazakh governmental agencies launched a campaign of harassment against Claimants' investments, the impacts of which were almost immediate and lasted more than twenty months. The campaign was replete with unfair treatment of Claimants' investments and personnel; it impaired Claimants' ability to operate their businesses normally; it deprived Claimants of their "incidents of ownership" of KPM, TNG, and the companies' assets; and it constituted a gross, intentional failure to provide Claimants' investments with the "most constant protection and security."

40. Claimants have submitted abundant evidence demonstrating that President Nazarbayev's order was intended to produce the harm it caused.[60] Claimants are hardly the first foreign investors to suffer from the "Kazakhstan playbook," which typically commences with an executive-mandated, investigative onslaught and ends with a fire-sale of assets to the State or an outright seizure.[61]

41. Beyond the direct evidence of intent, however, it is particularly telling that all of the significant legal and regulatory problems that KPM and TNG faced — which are the subject of this arbitration — arose in the context of the investigations launched in the fall of 2008 and had never been experienced prior to Nazarbayev's order. It is simply no coincidence that, immediately following that order, a multitude of harmful events befell KPM and TNG: (i) the Financial Police engaged in full-scale harassment of KPM and TNG,

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[60] In their First Post-Hearing Brief, Claimants detailed the direct evidence that corroborates their claim of an intended taking as from October 2008. Claimants' First Post-Hearing Brief ¶¶ 310-341. Among that evidence are a second personal instruction from President Nazarbayev, ordering the Prime Minister, Minister Mynbaev, Timur Kulibayev, and others in his administration to resolve the "issues" of KPM and TNG (*see* attachment to **C-23**), and the letter from the Blagovest President offering to Minister Mynbaev a proposed "solution" to the "question of nationalization posed in 2008." Letter from Blagovest President to MEMR, February 17, 2010, **C-23**. Claimants have also demonstrated that President Nazarbayev in fact asked President Voronin to send him allegations against Mr. Stati, so that he would have political "cover" to pursue Mr. Stati and his companies. Interview of former President Voronin during the television program "In Depth" on PROTV Chisinau, January 24, 2011, **C-78**. While Kazakhstan disputes that claim (Kazakhstan's First Post-Hearing Brief ¶¶ 371-82), it has provided no evidence to rebut President Voronin's very words, other than speculative statements from Professor Olcott and Minister Mynbaev, who admittedly do not have personal knowledge of President Nazarbayev's request to Voronin or his intentions regarding Claimants.

[61] Reply on Jurisdiction and Liability ¶¶ 344-73; Second Malinovsky Report at 8-11.

directing the investigative onslaught that substantially interfered with the companies' operations; (ii) the Financial Police "discovered" that KPM and TNG operated "main" pipelines without licenses — a fact that apparently had been missed by competent agencies for years — then conjured a devastating penalty to be imposed against KPM, and arrested and jailed KPM's General Manager; (iii) the MEMR retracted its 2007 consent to the 2003 Gheso-to-Terra Raf transfer of TNG and raised a false claim of a State pre-emptive right; (iv) the MEMR unreasonably delayed responding to TNG's request for an extension of Contract 302, stringing Claimants along by ignoring the request for five months, finally promising to extend the exploration term as Claimants expected, and then never following through with that promise; and (v) the Kazakh tax authorities reversed their position on the manner in which drilling expenses could be deducted, thereby assessing tens of millions of dollars in baseless back corporate taxes against the companies, in addition to embroiling Claimants in litigation regarding two other groundless tax disputes.

42. Kazakhstan's suggestion that each of those issues was coincidentally "discovered" for the first time in the fall of 2008 is simply not credible.[62] Either multiple Kazakh regulatory bodies abjectly failed to carry out their duties and, despite constant monitoring and reporting, "missed" a multitude of serious infractions for nearly a decade — by neglecting to uncover the "crime" of operating "main" pipelines without licenses; by consenting, apparently mistakenly, in 2007 to the 2003 transfer of TNG from Gheso to Terra Raf; by extending the exploration term of Contract 302 on two previous occasions; by confirming that KPM's and TNG's historical tax filings, payments, and deductions were proper — either numerous Kazakh agencies were grossly negligent and incompetent for years, or all of the issues that arose in the context of the October 2008 inspections were the result of President Nazarbayev's order and the influence of his Financial Police.

43. The Tribunal is not required to check its common sense at the door in considering the evidence. It is beyond obvious that the events of this case were not an extraordinary coincidence; rather, they were part of a concerted effort to divest Claimants of their investments — an exercise in which the Kazakh Financial Police, who report directly to the President, specialize. This case is not unlike (although it is a much more stark example of) the facts in *Vivendi v. Argentina*, where the tribunal determined that an unexplained,

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[62] *See*, *e.g.*, Kazakhstan's First Post-Hearing Brief ¶ 188.

governmental "about-face" regarding policies affecting the investment was convincing evidence that the change in governmental conduct was "politically motivated."[63]

44. Claimants do not bear the burden of proving intent in order for the Tribunal to find that Kazakhstan violated the standards of protection contained in the ECT: intent is not an element of any of the standards. For example, as stated by the tribunal in *CMS*, determination of a breach of the "fair and equitable treatment" standard is "unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question. Of course, such intention and bad faith can aggravate the situation but are not an essential element of the standard."[64] Thus, in order to find that Kazakhstan breached the ECT and owes compensation to Claimants, the Tribunal need only be satisfied that the acts complained of — either individually or taken as a whole — were unlawful and harmed Claimants' investments.

45. That being said, intent is not irrelevant to the Tribunal's analysis. The overwhelming evidence of Kazakhstan's intention to devalue, impair, and harm Claimants' investments from October 2008 onward is an important factor for the Tribunal to consider when determining the proper valuation date. In that respect, the words of Reisman and Sloane are worth recalling:

> Even though a state's responsibility to pay compensation for expropriation does not, in any event, 'depend on proof that the expropriation was intentional,' the manifestation of that intent at some level of the state's government generally furnishes a tribunal with a useful demarcation. It enables a decision-maker not only to confirm that an expropriation has taken place, but to set, based on relatively objective evidence, the moment of valuation — typically, a point in time before the host state's conduct occasioned the depreciation in the value of the foreign investment.[65]

46. Furthermore, while Claimants believe the intent of Kazakhstan's senior leadership to harm Claimants' investments has been established,[66] it is at least clear that such

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[63] *Compañía de Aguas del Aconquija and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007 ¶ 7.4.22, **C-253**.

[64] *CMS Gas Transportation Co. v. Argentina*, ICSID Case No. ARB/01/8, Award of May 12, 2005, ¶ 280, **C-65**.

[65] Reisman & Sloane, "Indirect Expropriation and Its Valuation in the BIT Generation," 74 Brit. Y.B. Int'l L. at 130-1, **C-230**.

[66] Kazakhstan itself admits that the regional Governor, Mr. Kusherbayev, "was thinking about expropriation at the time" but it claims (unconvincingly) that he "did not find support among those in the decisive

an intent drove the Financial Police and other agencies that responded with zeal to Nazarbayev's order. Under international law, Kazakhstan is as liable for the conduct of those State actors as it is for the conduct of its senior leaders.

47. Kazakhstan simply cannot refute the overwhelming evidence that the acts of its Financial Police and other agencies entailed severe harassment and coercion. They were threatening, highly disruptive, illegal, and gave rise to multiple, baseless claims against KPM and TNG that impaired Claimants' investments and incidents of ownership over the twenty month period prior to the July 2010 direct expropriation.

48. The Financial Police's dogged pursuit of its contrived criminal allegation against KPM is a poignant example of the severity of Kazakhstan's campaign. It is uncontested that the Financial Police initiated criminal proceedings against KPM on December 15, 2008. Claimants have shown that the Financial Police interfered in the inspection process to "reverse-engineer" a false criminal claim.[67] Then, beginning on December 20, 2008, the Financial Police routinely called Claimants' employees for questioning with respect to the criminal investigation.[68] On December 24, 2008, the Financial Police issued a summons to interrogate Mr. Stati, Mr. Cojin, Mr. Cornegruta, and Mr. Salagor.[69] The Financial Police stated that the men would be "subject to the forced delivery before the investigators" if they failed to appear voluntarily without justification.[70] Mr. Cojin explained that, during his trip to Astana to meet with the Financial Police, he "realized that [his] phone conversations were being recorded and … that suspicious persons were following [him] and inquiring about [his] travel plans and hotel location."[71] Mr. Cojin

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positions." Kazakhstan's First Post-Hearing Brief ¶ 401 (referring to Letter from MEMR to Ministry of Industry and Trade of September 28, 2009, **C-294**). The evidence does not support the latter point: Mr. Kusherbayev did not direct the Financial Police to inspect KPM and TNG; rather, the President and Prime Minister ordered those inspections. President Nazarbayev's October 14, 2008, directive was included in Mr. Cornegruta's case file and is referenced in many documents of the Financial Police. Additionally, the inspections ordered in October 2008 repeatedly reference Order No. 6497 from the Prime Minister of October 16, 2008. *See, e.g.*, **C-9** and **C-10**. Kazakhstan has refused to produce the Prime Minister's order, which in all likelihood confirms Claimants' position regarding the purpose and intent of those inspections.

67 The manufactured nature of the criminal process is discussed in more detail in the following section. Investment treaty jurisprudence supports the view that a mere threat of criminal proceedings, much less actual proceedings based on false claims, are sufficient to breach the fair and equitable treatment standard. *See* UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements at 51 (United Nations 1999), **C-276**.

68 *See*, *e.g.*, Letter from Claimants to Republic of Kazakhstan, May 7, 2009, **C-43**.

69 Financial Police Summons for Witnesses, December 24, 2008, **C-654**.

70 Financial Police Summons for Witnesses, December 24, 2008, **C-654**.

71 First Cojin Witness Statement ¶ 15.

stated that those events gave him "the impression that special intelligence services may also be involved."[72] Mr. Stejar has described his own intimidating interrogation with the Financial Police in December 2008.[73] Kazakhstan has put forward no evidence contesting that testimony from Mr. Stejar and Mr. Cojin.

49. Mr. Cojin and Mr. Stejar also described different instances of the Financial Police coercing them into signing reports. Mr. Cojin explained that the Financial Police forced him to sign the November 2008 Geology Committee inspection report under threat of shutting down the companies' operations.[74] Mr. Stejar testified that he signed the protocol of the May 2009 raid because he "did not want to find out what would happen if [he] refused."[75]

50. Furthermore, the court transcript from Mr. Cornegruta's trial shows that the Financial Police followed Mr. Cornegruta's wife and his lawyers outside of court and made efforts to intimidate the defense during the proceedings.[76] For his part, Mr. Condorachi explained that the mere presence of the Financial Police at KPM's and TNG's Aktau offices in July 2010 convinced Claimants that he should leave the country out of fear that he, like Mr. Cornegruta, would be arrested on a manufactured charge.[77]

51. Acts of intimidation, coercion, and threats by a host State constitute violations of the standards of protection found in investment treaties. Indeed, tribunals have found those standards to have been breached by far less egregious facts than those in the present case. In *Pope & Talbot v. Canada*, for example, a Canadian regulatory body had indicated that the failure of an investor to cooperate with an audit process could result in the ministry refusing to grant future export quotas to its investment. The tribunal held that was a "threat" sufficient to violate the standards of "fair and equitable treatment" and "full protection and

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72 First Cojin Witness Statement ¶ 15.

73 *See* Stejar Witness Statement ¶¶ 5-9 (stating that he "did not want to provoke them"). Moreover, the same officers that summoned Mr. Stejar in December 2008 conducted an overnight raid on KPM's and TNG's offices in May 2009. Mr. Stejar explained that the officers arrived "in plain clothes and were carrying pistols," and that he and others felt "intimidated" and scared by their threats and "aggressive manner." Stejar Witness Statement ¶¶ 14-20,

74 *See* First Cojin Witness Statement ¶ 5; Cojin Testimony, Tr. October 2012 Hearing, Day 3, 26:8-27:16. Kazakhstan complains that "we only have Mr. Cojin's word for this," but that is because Kazakhstan presented no evidence rebutting Mr. Cojin's testimony, nor corresponding testimony from any Financial Police officer who was present during the Geology Committee inspection or the meetings with Mr. Cojin.

75 Stejar Witness Statement ¶ 20.

76 Claimants' First Post-Hearing Brief ¶¶ 203-204 (citing Hearing Minutes at 24-27, where the Financial Police inform the defense that the case is under its "control," **C-704**).

77 First Condorachi Witness Statement ¶¶ 44-45; *see also* Condorachi Testimony, Tr. October 2012 Hearing, Day 2, 122:1-5, 16-22.

security."[78] In the present case, the Financial Police initiated baseless criminal investigations, threatened Claimants' employees through acts of intimidation, arrested and jailed one General Manager and issued international search warrants for three others, and coerced managers into signing reports on the threat of shutting down company operations. Those acts clearly entailed harassment and coercion that violated the ECT.

52. In addition to the threats and harassment of the Financial Police, the inspections they ordered in October 2008 — as well as the consequences of those inspections in terms of further audits, document seizures, interrogations, and extensive litigation — were highly disruptive to Claimants' operations. Kazakhstan has attempted to downplay its interference with Claimants' operations by quoting Mr. Cojin completely out of context and suggesting that he misstated the facts. Kazakhstan repeatedly quotes one, selective portion of Mr. Cojin's testimony, in which he stated 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," as purported "proof" that the Financial Police did not disrupt or interfere with Claimants' operations.[79] That is not an accurate portrayal of what Mr. Cojin stated. Mr. Cojin was describing one specific inspection — the November 2008 Geology Committee inspection — which lasted for more than seven days.[80] He explained that he met with the Financial Police "from time to time" during the course of that inspection[81] and that he specifically met with them "at the final stage of the inspection" when they demanded that he sign the inspection report.[82] That testimony is not at all inconsistent with Mr. Cojin's written testimony, where he explained:

> [F]rom the time of that report [*i.e.*, the November 2008 Geology Committee Inspection Report] forward, I have

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78 *See Pope & Talbot Inc. v. The Government of Canada,* NAFTA, Interim Award, June 26, 2000, ¶¶ 163-165, 173-174, 181, **C-244**.

79 *See, e.g.*, Kazakhstan's First Post-Hearing Brief ¶¶ 72, 148, 232.

80 *See* Cojin Testimony, Tr. October 2012 Hearing, Day 3, 30:11-31:16; *see also* Geology Committee Inspection Report, November 4-11, 2008 (signed on November 14, 2008), **C-86** and **C-87**.

81 *See* Cojin Testimony, Tr. October 2012 Hearing, Day 3, 30:24–31:16 ("Q… were you present in the KPM/TNG offices in Aktau during the course of this inspection [*i.e.*, the November 4-11, 2008 Geology Committee inspection]? A. Yes, I was present there at this moment. I was in the office. Q. And did you personally have the meetings and discussions that you mentioned during your cross-examination testimony with representatives from the financial police? A. Yes. The representatives from 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 — and they would put some questions.… I very well remember this particular line of discussion that we do not have the licence for exploration — this particular sentence on — the licence for using the main pipeline.").

82 Cojin Testimony, Tr. October 2012 Hearing, Day 3, 26:8-27:3.

> witnessed KPM and TNG transformed from working, fully operative and functional oil and gas production companies to two bodies that exist to answer requests from various Government officials and write reports. This process began around November 2008 and continued for nearly two years. While the Government eventually took physical control of our offices and physical assets in July of 2010, they had already been interfering with and severely impeding our ability to operate, manage, and sell our businesses since late 2008.[83]

53. Nor is Mr. Cojin's comment inconsistent with his testimony 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" and that "their requests and inspections completely undermined the management's ability to run the companies normally."[84] In any event, the fact that Mr. Cojin, General Manager of TNG and Deputy General Manager of KPM, had to remain outside of Kazakhstan from April 2009 onward because he was being hunted by the Financial Police rather puts an end to Kazakhstan's attempts to misconstrue his testimony about impacts on the business.

54. Other witnesses also gave detailed testimony about how the inspections, audits, and ensuing document seizures and litigation interfered with daily operations.[85] But ultimately the matter is put beyond doubt by the voluminous documentary record on this point. The Tribunal only needs to review the timeline set forth above and the relevant exhibits cited therein to appreciate the severe impact of Kazakhstan's campaign of harassment and coercion on KPM and TNG. Kazakhstan's attempts to misleadingly "spin" the testimonies of Claimants' witnesses is unavailing in the face of the voluminous evidentiary record.

55. It has never been Claimants' case — nor are they required to show, as Kazakhstan suggests — that Kazakhstan's investigative onslaught and its aftermath totally shut down the companies or altogether stopped oil and gas production.[86] Again, the case of *Pope & Talbot* places this matter in perspective: there, the tribunal found that a regulatory body's insistence that the investor ship "reams and reams" of shipping documents from

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83 First Cojin Witness Statement ¶ 6.

84 Second Cojin Witness Statement ¶¶ 11-14.

85 *See, e.g.*, First Condorachi Statement ¶¶ 6-7; 12-16; Stejar Statement ¶¶ 5-29.

86 *See* Kazakhstan's First Post-Hearing Brief ¶¶ 232, 237-238.

Portland, Oregon, to Canada for them to be audited — instead of agreeing to hold the verification process in Portland — was a sufficient burden on the investment's business to breach the fair and equitable treatment and full protection and security standards.[87] In the present case, Claimants struggled to contend with the many consequences of Kazakhstan's investigative onslaught up until the final, direct expropriation of July 2010. There is no "penalty" for Claimants having done so; if anything, Claimants should be credited for the extraordinary lengths to which they went to mitigate damages and keep their businesses afloat.

56. But the fact that Claimants were able to maintain production at some level does not mean that Kazakhstan's investigations, document seizures, tax assessments, litigation, and so on did not have severe impacts upon KPM and TNG. Claimants' businesses were not able to function normally: their top managers were being prosecuted or hunted; vast amounts of time and effort were spent responding to the assault and contending with litigation; Claimants could not sell their companies; Claimants rationally decided not to renew the Kemikal contract without a guarantee; Mr. Stati was forced to pause construction on the LPG plant and limit further investments in Borankol and Tolkyn; and Claimants were not able to pursue further exploration in Contract 302 without the expected (and promised) contractual addendum. The simple fact that production was maintained at some level does not detract from those serious consequences.

57. The contemporaneous record demonstrates Claimants' repeated complaints to Kazakhstan's authorities about the impacts of the investigative onslaught and its aftermath on Claimants' businesses. By March 2009 — over a month before Kazakhstan actually arrested KPM's and TNG's shares and assets — it was clear to Claimants that they could no longer continue operating normally. They complained to the General Prosecutor's Office: "The working activity of the company is paralyzed and the proficiency of our top-managers and mid-tier staff is decreasing because of improper legal circumstances created around our company [and] because of illegal acts of the financial police and permanent investigations and inquiries."[88] Ironically, President Nazarbayev shared Claimants' view. In November 2009, the President personally complained to the highest levels of his administration that "as a result of inspections by law enforcement … it took place a full stop of trades (oil and gas

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[87] *See Pope & Talbot Inc. v. The Government of Canada*, NAFTA, Interim Award, June 26, 2000, ¶¶ 159, 172-73, **C-244**.

[88] Letter to the General Prosecutor's Office, March 18, 2009, **C-154**.

extraction) and the construction of the Gas Refining Factory, compressor stations and gas gathering units."[89] There could hardly be more persuasive evidence of the impact of Kazakhstan's harassment and coercion on Claimants' businesses.

58. UNCTAD has described abusive conduct that violates the "fair and equitable treatment" standard in the following terms:

> Abusive conduct includes coercion, duress and harassment that involve unwarranted and improper pressure, abuse of power, persecution, threats, intimidation and use of force. Abusive conduct can potentially take many forms, such as arresting or jailing of executives or personnel; threats of or initiation of criminal proceedings; deliberate imposition of unfounded tax assessments, criminal or other fines; arresting or seizing of physical assets, bank accounts and equity; interfering with, obstructing or preventing daily business operations; and deportation from the host State or refusal to extend documents that allow a foreigner to live and work in the host State.[90]

59. Kazakhstan's campaign of harassment and coercion involved every single one of the elements listed by UNCTAD. It is beyond question that Kazakhstan's campaign violated the fair and equitable treatment and impairment standards contained in the ECT; constituted illegal "indirect expropriation" by depriving Claimants of their "incidents of ownership" of KPM and TNG; and constituted an intentional, gross failure to provide Claimants and their investments with "the most constant protection and security."

B. Claim No. 2: Kazakhstan's Financial Police Reverse-Engineered the "Crime" of Operating "Main" Pipelines Without a License and Initiated Criminal Investigations Based on that Fabrication

Synopsis

60. The evidence in this case conclusively demonstrates that the Financial Police's "main pipeline" allegations against KPM and TNG were fabrications. Throughout many years of inspections, no competent or knowledgeable authority had ever suggested that any portion of KPM's or TNG's in-field, gathering systems were "main." Once the Financial Police became involved, even they could not obtain such a conclusion from any competent or knowledgeable authority. The Financial Police ultimately had to rely upon a hand-picked "expert" from the Ministry of Justice to endorse their conclusion, and they manipulated his

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89 Letter from Blagovest President to MEMR, February 17, 2010, **C-23**.

90 UNCTAD, Fair and Equitable Treatment: A Sequel, UNCTAD Series on Issues in International Investment Agreements II (United Nations 2012), at 82, **C-571**.

cursory review by cherry-picking the few documents he considered and failing to provide him with conclusive contrary evidence.

61. Ultimately, the Tribunal can have no doubt that the "main pipeline" charges were fabrications, because the charges were reverse-engineered. The process the Financial Police followed in pursuing the "crime" was backward. The Financial Police did not go about investigating a crime in the normal, proper sequence, by first ascertaining that KPM or TNG operated main pipelines, then determining that the companies did not have licenses to do so, then bringing charges, and in the context of either bringing charges or prosecuting, determining the penalty to which the State was entitled. Rather, the sequence of events was exactly the opposite: The Financial Police first came up with an allegation they could use by determining that KPM and TNG did not have main pipeline licenses. Next, they confirmed that they could impose a devastating penalty for the allegation they were considering. They then — and only then — sought out a competent authority to opine that KPM and TNG in fact operated main pipelines. All the competent authorities told the Financial Police the pipelines in question were not "main," so the Financial Police eventually — three months after they had settled upon their allegation — resorted to their own hand-picked "expert" to give them the conclusion they wanted.

Timeline

• October 14, 2008	President Nazarbayev orders investigation of Mr. Stati, KPM, and TNG (C-8).
• October 28, 2008	Financial Police order the Geology Committee of the MEMR to conduct an inspection of KPM and TNG and insist that the Financial Police be included in the inspection (C-12; C-435).
• November 4-11, 2008	**Geology Committee of the MEMR carries out inspection of KPM and TNG and finds no violations (C-86 and C-87).**
• November 12, 2008	**Financial Police write to ARNM to confirm whether KPM and TNG hold licenses to operate "main" pipelines (C-441).**
• November 14, 2008	**ARNM responds that KPM and TNG do not hold licenses to operate "main" pipelines (*see* C-88).**

• November 14, 2008	**Financial Police insist that Mr. Cojin and Mr. Cornegruta sign inspection reports "admitting" that KPM and TNG do not hold licenses to operate "main" pipelines (*see* C-86; C-87; First Cojin Statement ¶¶ 4-5; Cojin Testimony, Tr. October 2012 Hearing, Day 3 at 26:8-27:16).**
• November 17, 2008	**Financial Police order Tax Committee to calculate illegal profits earned by KPM and TNG from operating "main" pipelines without licenses (C-89).**
• November 19, 2008	Tax Committee issues calculation that KPM earned over 41 billion Tenge in illegal profit and that TNG earned over 37 billion Tenge (C-450 and C-202).
• November 19, 2008	**Ministry for Emergency Situations confirms that KPM's and TNG's pipelines are not "main" (C-90; C-91).**
• November 21, 2008	**Financial Police instruct MES to withdraw its conclusions on the ground that it is not a "competent" authority (C-92).**
• December 2, 2008	Financial Police report that KPM operates a main pipeline without a license and has gained income of over 41 billion Tenge (C-85).
• December 10, 2008	Financial Police admit to the Deputy Prime Minister of Kazakhstan that no authority has determined that KPM's and TNG's pipelines are "main" pipelines (C-448).
• December 15, 2008	**Financial Police formally open criminal investigation against KPM for operating a "main" pipeline (C-632).**
➔ As Kazakhstan concedes, the Financial Police pursue the criminal charge without having obtained a determination by any competent or knowledgeable authority that KPM's pipeline is "main," and despite the conclusion from MES that the pipeline is not "main."	
• January 5, 2009	**Financial Police write to MEMR asking whether KPM's and TNG's pipelines are "main" (C-718).**
• January 5, 2009	Kazakh Institute of Oil and Gas of KMG NC confirms that KPM's and TNG's pipelines are not "main" (C-99 and C-100).
• January 8, 2009	Scientific and Research Centre of MES confirm that KPM's and TNG's pipelines are not "main" (C-103 and C-104).
• January 9, 2009	NIPI Neftegaz confirms that KPM's and TNG's pipelines are not "main" (C-101 and C-102).

• February 2, 2009	Financial Police inform TNG that on January 20, 2009, they had formally opened a criminal investigation against TNG for operating "main" pipelines, despite the fact that no authority had concluded that TNG's pipelines are "main" (C-98).
➔ Criminal investigations against KPM and TNG lead to sequestration of their shares and assets on April 30, 2009; however, unlike KPM, no general manager of TNG is arrested, and thus, no criminal case involving TNG is brought. In Kazakhstan, criminal cases can only be brought against natural persons. Kazakhstan was able to arrest KPM's General Manager, Mr. Cornegruta, but TNG's General Manger, Mr. Cojin, was out of the country at the time and never returned. So there was no one to prosecute from TNG. Nevertheless, TNG's shares and assets remain frozen as a result of the "pending" criminal investigation.	
• February 4, 2009	**MEMR confirms that KPM's pipeline is part of its gathering system, and thus, is not a "main" pipeline (C-719).**
• February 9, 2009	**Having failed to obtain the conclusion it needed from the MES or MEMR, the Financial Police order the Ministry of Justice to appoint an "expert" to determine whether KPM's pipeline is "main" (C-109).**
• February 10, 2009	**Mr. Turganbayev of the Financial Police meets with Ministry of Justice "expert," Mr. Baymaganbetov, and gives him the only materials he uses in preparing his report; Mr. Turganbayev does not provide Mr. Baymaganbetov with any of the evidence establishing that KPM's pipeline is not "main" (R-246).**
• February 13, 2009	Mr. Baymaganbetov issues his opinion that KPM's pipeline is a "main" pipeline (C-110).
➔ Mr. Baymaganbetov is the first and only "authority" to support the Financial Police's criminal charge by concluding that KPM's pipeline is "main."	
• April 13, 2009	Russian design and construction institute confirms that KPM's & TNG's pipelines are not "main" (C-105 and C-106).
• April 25, 2009	Financial Police arrest Mr. Cornegruta and charge him with the crime of "illegal entrepreneurial activity in an especially large amount" for operating a "main" pipeline without a license (*see* C-117).
• April 30, 2009	**Financial Police order the sequestration of the shares in KPM & TNG, as well as the companies' Subsoil Use Contracts and other assets (C-486; C-487; C-490; C-491; C-492; C-494; C-496; C-497; *see also* C-488; C-489; C-493; C-495; C-498).**

➔ The sequestration of shares and assets legally prevents Claimants from selling KPM and TNG, their subsoil use rights, or their other assets (*see* C-488; C-489; C-725).	
• July 2, 2009	Professor Suleymenov, author of Kazakhstan's Law on Oil (and Claimants' expert), issues expert legal opinion that KPM's pipeline is not "main" (C-108).
• August 25, 2009	Russian joint stock company VNIIST concludes that KPM's pipeline is not "main" (C-107).
• July 30 – Sept. 14, 2009	Mr. Cornegruta's trial takes place (C-704).
➔ KPM is not charged or named in the criminal proceeding because, in Kazakshtan, only a natural person is subject to criminal conviction. Kazakhstan may or may not have been able to assert a civil claim against KPM in conjunction with the criminal case, but it does not even attempt do so (likely because it is separately pursuing administrative actions against KPM at the time for operating a "main" pipeline). As a result, KPM is not a party to Mr. Cornegruta's criminal case and is not represented by counsel.	
• September 18, 2009	Aktau City Court finds Mr. Cornegruta guilty of "illegal entrepreneurial activity in an especially large amount" for operating a "main" pipeline without a license and orders recovery of US $145 million from non-party KPM (C-117).
• January 25 – February 6, 2010	MEMR issues inspection reports clearly concluding that KPM's and TNG's reclassified pipelines are part of a "single technological process" and, thus, are not main pipelines (C-385 and C-386).

Relevant Witness Evidence

First Suleymenov Report

Second Suleymenov Report ¶¶ 4-51

Third Suleymenov Report ¶¶ 4-18

First Pisica Statement ¶¶ 12-18

First Cojin Statement ¶¶ 3-5

Second Cojin Statement ¶¶ 17-19

First Romanosov Statement ¶¶ 32-33

Second Stati Statement ¶ 12

Cojin Testimony, Tr. October 2012 Hearing, Day 3, 26:8-22, 28:15-22

Rakhimov Testimony, Tr. October 2012 Hearing, Day 5, 20:11-21:1, 49:25-51:2, 57:25-59:24, 60:10-64:2, 71:4-71:18

Turganbayev Testimony, Tr. October 2012 Hearing, Day 5, 93:7-96:4, 106:17-23

Baymaganbetov Testimony, Tr. October 2012 Hearing, Day 6, 88:11-17, 89:8-17, 103:16-18

Previous Submissions by Claimants

Written Submissions:

Statement of Claim ¶¶ 61, 79-120, 132, 329-33, 351(a), 361-2, 371

Reply on Jurisdiction and Liability ¶¶ 218-22, 246-91, 480, 493, 504-07, 524, 534, 546, 555

First Post-Hearing Brief ¶¶ 150-57, 168-87, 211-4

Oral Submissions:

Claimants' Opening Presentation on the Merits, slide 33

Claimants' Opening Statement, Tr. October 2012 Hearing, Day 1, 100:8-104:20, 111:12-116:10, 122:10-124:18

Claimants' Closing Presentation, slide 7

Claimants' Closing Statement, Tr. May 2013 Hearing, Day 1, 138:2-142:25

Relevant ECT and International Law Standards

- Fair and equitable treatment – ECT art. 10(1), C-1
- Impairment by unreasonable and discriminatory measures – ECT art. 10(1), C-1
- Most constant protection and security – ECT art. 10(1), C-1
- Unlawful indirect expropriation – ECT art. 13(1), C-1
- Right to employ key personnel – ECT art. 11, C-1

Final Remarks Regarding Claim No. 2

62. A brief review of the sequence of events in November 2008 demonstrates that the Financial Police took over the Geology Committee's inspection of KPM and TNG and used it to manufacture the basis for criminal investigations of the companies, which ultimately led to the prosecution of Mr. Cornegruta and the verdict against non-party KPM.

63. The November 4-11, 2008, Geology Committee inspection found no violation with regard to KPM's or TNG's business activities.[91] Nevertheless, determined to find some "ground" on which to prosecute, on November 12, 2008, the Financial Police wrote to the Agency for Regulation of Natural Monopolies to confirm that KPM and TNG did not hold licenses to operate "main" pipelines.[92] After receiving that confirmation on November 14, 2008, the Financial Police insisted on adding language to the Geology Committee inspection reports stating that KPM and TNG did not hold "main" pipeline licenses. The Financial Police insisted that KPM's and TNG's managers sign the reports as amended, under threat of shutting down the companies' operations.[93]

64. Armed with that "finding" regarding the lack of "main" pipeline licenses, on November 17, 2008, the Financial Police ordered the calculation of "illegal profits" the companies allegedly generated by operating "main" pipelines without licenses,[94] even though no authority had ever suggested that KPM's and TNG's pipelines were "main." The Financial Police received its calculation two days later.[95]

65. On November 19, 2008, KPM and TNG informed the Financial Police of the conclusions of the Ministry for Emergency Situations — the Ministry tasked with ensuring the safety of pipeline operations, for both "main" and field pipelines — which stated unequivocally that KPM's and TNG's pipelines were not "main."[96] Rather than consider that conclusion from an authoritative body, the Financial Police instructed the MES, on

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91 *See generally* Reports on the results of unscheduled audit of performance of the legislation of the Republic of Kazakhstan on oil, subsoil and subsoil use, and contractual obligations of KPM and TNG, November 4-11, 2008, **C-86** and **C-87**.

92 Letter from Financial Police to Agency for Regulation of Natural Monopolies, November 12, 2008, **C-441**; *see* Letter from the Agency for Regulation of Natural Monopolies to the Financial Police, November 18, 2008, **C-88**.

93 *See* signature pages to Reports on the results of unscheduled audit of performance of the legislation of the Republic of Kazakhstan on oil, subsoil and subsoil use, and contractual obligations of KPM and TNG, November 14, 2008, **C-86** and **C-87**; *see also* First Cojin Statement ¶¶ 4-5; Cojin Testimony, Tr. October 2012 Hearing, Day 3, 26:8-27:16.

94 Order from the Financial Police to the Tax Committee, November 17, 2008, **C-89**; Statement determining the income received as a result of transportation and further sale of oil for KPM and TNG, November 19, 2008, **C-450**; Report from the Tax Committee to the Financial Police regarding TNG, November 19, 2008, **C-202**.

95 Statement determining the income received as a result of transportation and further sale of oil for KPM and TNG, November 19, 2008, **C-450**; Report from the Tax Committee to the Financial Police regarding TNG, November 19, 2008, **C-202**. As discussed in section III.D, *infra*, the calculation itself was, at the instruction of the Financial Police, arbitrarily inflated and, thus, not an accurate statement of any alleged "illegal profits."

96 Letter from the Ministry for Emergency Situations to KPM, November 19, 2008, **C-90**; Letter from the Ministry for Emergency Situations to TNG, November 19, 2008, **C-91**.

November 21, 2008, to withdraw its conclusions on the ground that it was not a "competent" authority.[97]

66. Kazakhstan's First Post-Hearing Brief confirms the Financial Police's reserve-engineering of the "crime." Kazakhstan states that Financial Police officer Turganbayev reported a "potential breach of criminal law" to the Prime Minister on December 10, 2008,[98] but concedes that and at that time, the "investigations and enquiries were not complete [and] no decision had been reached as to whether or not the pipelines were trunk at this point."[99] What was known by that point, however, was the amount of money Kazakhstan could potentially recover — some 41 billion Tenge (approximately US $350 million) — if the Financial Police could find some authority to state that KPM's pipeline was "main."[100] That is why the Financial Police rejected all the conclusions of knowledgeable industry experts and regulatory bodies, and instead, tightly controlled the analysis of an "expert" from the Ministry of Justice so that he would reach the conclusion the Financial Police needed.

67. Mr. Baymaganbetov delivered his report in February 2009, some three months after the Financial Police had settled upon the allegation they would use. Mr. Baymaganbetov's report was the first and only time any "authority" (other than the court, which simply adopted his opinion) determined that KPM's pipeline was "main." Claimants have detailed the numerous problems with Mr. Baymaganbetov's report and will not repeat them here.[101] In short, his report is a farce, because he relied only on the information the Financial Police provided to him and failed to consider conclusive evidence that KPM's

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97 Letter from the Financial Police to the Ministry of Emergency Situations, November 21, 2008, **C-92**.

98 Kazakhstan's First Post-Hearing Brief ¶ 197. Additionally, on December 2, 2008, the Financial Police had reported, unequivocally: "It has been ascertained that Kazpolmunay LLP has on its balance a trunk pipeline of 18 km long, for the operation of which there is no state license" and "the amount of the illegal profit gained by Kazpolmunay LLP as a result of operation of the oil pipeline within the period of 2005-2007, amounts to 41,8 billion tenge." Internal report to the first Deputy Chairman of the Financial Police, December 2, 2008, **C-85** In that respect, it is worth noting that the Financial Police deliberately misstated the facts to its Deputy Chairman. The *Pope & Talbot* tribunal found that a "lack of forthrightness [in] internal communications [to a] minister" was "troubling" and that "serious misstatements and omissions" in internal government reports led it to conclude that Canada had breached the obligation to accord claimants fair and equitable treatment and full protection and security. *See Pope & Talbot Inc. v. The Government of Canada*, NAFTA, Award on the Merits of Phase II, April 10, 2001, ¶¶ 177-79, 181, **C-312**. The present tribunal should reach the same conclusion here.

99 Kazakhstan's First Post-Hearing Brief ¶ 197 (emphasis in original).

100 In the criminal prosecution against Mr. Cornegruta, that amount was eventually reduced to correspond to the "illegal profit" allegedly generated during the time Mr. Cornegruta served as General Manager of KPM. The Financial Police hunted the other General Managers of KPM and TNG in order to bring charges against them all and recover the full amount first calculated by the Tax Committee.

101 *See, e.g.*, Claimants' First Post-Hearing Brief ¶¶ 181-187.

pipeline was not "main." Further, Mr. Baymaganbetov issued his report in only two days, without visiting KPM's pipeline. Prior to this case, Mr. Baymaganbetov had never before considered the issue of pipeline classification, and he had never issued an opinion on whether a pipeline was "main" or not.[102]

68. It is thus no surprise that Mr. Baymaganbetov's report is the lone outlier in a sea of authoritative reports concluding that KPM's pipeline was not "main." In addition to the conclusions of two competent Kazakh Ministries, the MES and the MEMR, KPM and TNG provided the Financial Police with reports from the Kazakh Institute of Oil and Gas of KazMunaiGas;[103] the Scientific and Research Centre of the MES;[104] the industrial specialists NIPI Neftegas;[105] the State design and construction institute for oil and gas in Russia;[106] Professor Suleymenov (who authored Kazakhstan's Law on Oil);[107] and the Russian oil and gas engineering company VNIIST[108] — each of which independently concluded that KPM's and TNG's pipelines were not "main." The Financial Police ignored every single one of those reports and did not provide any of them to Mr. Baymaganbetov.

69. Fabrication of a criminal charge, particularly one that results in the imprisonment of an in-country director and a debilitating fine against the investment company, clearly breaches the ECT. As the *EDF v. Romania* tribunal held, a measure is unreasonable and arbitrary when it (i) "inflicts damage on the foreign investor without serving any apparent legitimate purpose;" (ii) "is not based on legal standards but on

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[102] *See* Baymaganbetov Testimony, Tr. October 2012 Hearing, Day 6, 86:2-15.

[103] Letter from the Kazakh Institute of Oil and Gas of the National Oil Company KazMunaiGas to KPM, January 5, 2009, **C-99**; Letter from the Kazakh Institute of Oil and Gas of the National Oil Company KazMunaiGas to TNG, January 5, 2009, **C-100**.

[104] Report from the National Scientific and Research Center on Industrial Safety Issues of the Ministry of Emergency Situations for Kazakhstan to KPM, January 8, 2009, **C-103**; Report from the National Scientific and Research Center on Industrial Safety Issues of the Ministry of Emergency Situations for Kazakhstan to TNG, January 8, 2009, **C-104**.

[105] Letter from the Kazakh Scientific, Research, and Design Institute of Oil and Gas of NIPI Neftegaz to KPM, January 9, 2009, **C-101**; Letter from the Kazakh Scientific, Research, and Design Institute of Oil and Gas of NIPI Neftegaz to TNG, January 9, 2009, **C-102**.

[106] Expert report from the Russian Science and Research Institute for the Construction and Operation of Pipelines and Energy Facilities to KPM, April 13, 2009, **C-105**; Expert report from the Russian Science and Research Institute for the Construction and Operation of Pipelines and Energy Facilities to TNG, April 13, 2009, **C-106**.

[107] Legal Opinion of Professor Suleymenov, July 2, 2009, **C-108**. Professor Suleymenov has authored a final expert report in this case, responding to the arguments put forward by Kazakhstan's expert, Professor Didenko, and concluding that "the use by Professor Didenko of his four criteria to classify a pipeline as a trunk pipeline is simply legal casuistry." *See* Third Suleymenov Report ¶¶ 4-18.

[108] Letter and Advice Note from the National Scientific and Research Center on Industrial Safety Issues of the Ministry for Emergency Situations of Kazakhstan to KPM, August 25, 2009, **C-107**.

discretion, prejudice or personal preference;" (iii) is "taken for reasons that are different from those put forward by the decision maker;" or (iv) is "taken in willful disregard of due process and proper procedure."[109] Kazakhstan's reverse-engineering of the criminal conviction in this case meets every single one of those alternative definitions of a measure that violates the "fair and equitable treatment" and "impairment" standards.[110]

70. Equally, Kazakhstan's sequestration of all the shares and assets of KPM and TNG, including their Subsoil Use Contracts, on the basis of its false criminal allegations entailed an illegal "indirect" expropriation, because it substantially interfered with Claimants' "incidents of ownership" — in particular, their fundamental right of ownership to dispose of, or sell, their investments.[111] The same is true of the eventual judgment against KPM and the enforcement measures carried out against the company. Kazakhstan's sequestrations and its judgment and enforcement against KPM also clearly entailed deliberate, gross violations of the ECT's "most constant protection and security" provision.[112] Finally, the criminal prosecution and conviction of Mr. Cornegruta — and the impact on the companies' other senior personnel, who fled the country — violated the ECT's guarantee regarding an investor's right to employ key personnel.[113]

C. Claim No. 3: Kazakhstan Failed to Provide a Transparent, Consistent Regulatory or Legal Framework in Relation to Main Pipeline Licensing

Synopsis

71. The evidence conclusively establishes that neither KPM nor TNG operated "main" pipelines. In light of the overwhelming evidence on that point — and for the reasons discussed elsewhere in this brief — the Tribunal should not give any deference to the Kazakh court's judgment against KPM, which relied exclusively on the report of Mr. Baymaganbetov and also entailed an egregious denial of justice.

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109 *EDF (Services) Ltd. v. Romania,* ICSID Case No. ARB/05/13, Award, October 8, 2009 ¶ 303, **C-576**.

110 *See also* UNCTAD, Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements at 51 (United Nations 1999) (mere threats of criminal proceedings and the imposition of unfounded criminal fines are "abusive conduct" contrary to the obligation to accord investments fair and equitable treatment), **C-276**.

111 *Reinhard Unglaube v. Costa Rica*, ICSID Case No. ARB/09/20, Award, May 16, 2012 ¶ 316, **R-276**; *see also* Statement of Claim ¶¶ 258 *et seq*.; Reply on Jurisdiction and Liability ¶¶ 469 *et seq*.

112 *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008 ¶ 729, (failure to provide a "guarantee of stability in a secure environment, both physical, commercial and legal"), **C-270**.

113 *See* Reply on Jurisdiction and Liability ¶¶ 553-55.

72. Nevertheless, Claimants note that even assuming, purely for the sake of argument, that Mr. Baymaganbetov were correct or that the Kazakh court's ruling were entitled to a degree of deference, it would make no difference to Kazakhstan's ultimate liability to Claimants under the ECT. That is because even under Kazakhstan's best case, it woefully failed — by its own admission — to provide a transparent, consistent regulatory or legal framework in relation to main pipeline licensing.

73. In this case, Kazakhstan and its experts have had to resort to mental and linguistical gymnastics to explain their ever-evolving position on what constitutes a "main" pipeline under Kazakh law (and thereby defend the conclusions of the Financial Police, Mr. Baymaganbetov, and the court). Since its Financial Police rejected the conclusions of the competent, authoritative bodies at the time, Kazakhstan has been reduced to arguing that Claimants needed to approach the General Prosecutor or the court for a determination as to whether their pipelines were "main."

74. In short, Kazakhstan has been forced to argue that its legal and regulatory regime was inconsistent and totally lacking in transparency. Kazakhstan has simply argued itself into a box, because a legal and regulatory regime wholly lacking in consistency and transparency is every bit as anathema to the fair and equitable treatment standard as a denial of justice or a false prosecution.

Timeline

• 2001	NIPI Neftegaz issues the Borankol Raw Materials Base Project, a design of KPM's gathering and treatment facility as a single technological process (C-465).
• April 25, 2001	State Expert Review of Projects approves construction of KPM's pipelines, including the 18 km pipeline that Kazakhstan later re-classified as "main" (C-470).
• March 4, 2002	The State Inspectors for Emergency Situations, the Fire Safety Supervising Agency, the State Sanitary Surveillance Department, the Ministry of Environmental Protection for the Mangystau Region, the State Inspection for Architecture and Construction, and NIPI Neftegaz approve the commissioning of KPM's 18-km pipeline (C-469).
• September 26, 2002	MEMR, as licensing authority, issues the requisite licenses to KPM and TNG for their production, treatment, and transportation activities (C-81 and C-82).

• August 5, 2005	MEMR, as licensing authority, re-issues the requisite licenses to KPM and TNG following their reorganization into LLPs (C-83 and C-84).
• January 11, 2007	Kazakhstan enacts a new Law on Licensing pursuant to which the MEMR remains the licensing authority for production activities and operation of pipelines other than "main" pipelines (R-366).
• June 19, 2007	ARNM is given the authority for licensing of "main" pipelines, but (according to Kazakhstan) is not competent to determine whether a pipeline is a "main" pipeline (R-128; Rejoinder on Liability ¶ 590).
• May 26, 2008	MEMR directs KPM to inquire with ARNM for "issuance or re-issuance" of licenses it may need pursuant to ARNM's new authority (C-545).
• May 29, 2008	MEMR, as licensing authority, re-issues licenses to KPM and TNG for various operations, including "oil, gas, and oil products production" (C-472 and C-473).
• June 13, 2008	Following MEMR's instruction, KPM writes to ARNM inquiring whether it needs its license "re-issued" by the ARNM in light of the changes in the new Law on Licensing (C-115).
➔ Kazakhstan's Financial Police later contend that the June 13, 2008, letter was Mr. Cornegruta's "confession" to operating a "main" pipeline without a license.	
• July 14, 2008	ARNM responds by informing KPM that the type of activities listed in KPM's 2005 license do not require separate licensing from ARNM (C-480).
• September 18, 2009	Following the criminal investigation the Financial Police initiated in December 2008, the Aktau City Court concludes that KPM's 18 km pipeline is a "main" pipeline (C-117).
• January 25 – February 6, 2010	MEMR issues inspection reports clearly concluding that KPM's and TNG's reclassified pipelines are part of a "single technological process" and, thus, are not "main" pipelines (C-385 and C-386).
• July 14, 2010	MOG issues notices of alleged contract violations by KPM and TNG, including operation of "main" pipelines without a license (C-2; C-6; and C-7).
• July 22, 2010	KazMunaiGas takes possession of KPM's and TNG's operations and pipelines (C-190) and later transfers them into "trust management" by its subsidiary, KazMunaiTeniz.

• April 29, 2011 — Nine months after it takes possession and this arbitration has commenced, KazMunaiTeniz obtains a license to operate main pipelines, including KPM's reclassified 18 km pipeline (R-136).

Relevant Witness Evidence

First Condorachi Statement ¶¶ 10, 26

Mynbaev Testimony, Tr. October 2012 Hearing, Day 3, 89:12-22, 95:11-22, 108:11-16

Akhmetov Testimony, Tr. October 2012 Hearing, Day 6, 39:2-16, 42:12-20, 44:4-8, 44:12-16

Previous Submissions by Claimants

Written Submissions:

Statement of Claim ¶¶ 79-106, 115-20, 329-32, 351 (a, b, and d), 361-2, 371

Reply on Jurisdiction and Liability ¶¶ 248-91, 310-8, 493, 504-11, 524, 528

Claimants' First Post-Hearing Brief ¶¶ 169-80

Oral Submissions:

Claimants' Opening Presentation on the Merits, slides 34-38

Claimants' Opening Statement, Tr. October 2012 Hearing, Day 1, 112:24-124:18

Claimants' Closing Presentation, slide 9

Claimants' Closing Statement, Tr. May 2013 Hearing, Day 1, 142:16-143:15

Relevant ECT and International Law Standards

- Fair and equitable treatment – ECT art. 10(1), C-1

Final Remarks Regarding Claim No. 3

75. This is an "alternative" claim that Claimants do not believe the Tribunal will ever need to reach. Put simply, the evidence that neither KPM nor TNG operated "main" oil and gas pipelines is overwhelming. Most of it is contemporaneous, and much of it comes from Kazakhstan's own authorities, including every authority that was knowledgeable or authoritative on the topic. Furthermore, the Aktau City Court's ruling is not entitled to any

deference, because as discussed in Section III.E, it was a substantive as well as a procedural denial of justice.

76. Nevertheless, it bears noting that Kazakhstan's attempts to buttress the "outlier" conclusion of its Financial Police, Mr. Baymaganbetov, and the Aktau City Court that Claimants pipelines were "main" are hopelessly confused and contradictory. That is because the pipelines were not "main," and nobody ever treated them as such.[114] Two of the competent and authoritative regulatory bodies with knowledge of the issue — the MEMR and the MES — concluded that KPM's pipeline was not "main," but the Financial Police rejected their conclusions.[115] A slew of other authorities and experts likewise concluded that the pipelines were not "main." Kazakhstan conveniently declared them all "incompetent" to issue conclusions on the matter.[116]

77. A third agency with knowledge of the issue — the ARNM — was also declared "incompetent" by Kazakhstan. The example of the ARNM demonstrates the absurdity of Kazakhstan's position. In 2007, Kazakhstan divided the authority for issuing licenses to subsoil users between two agencies: the MEMR remained the authority for issuing licenses in relation to general oil and gas activities, while the Agency for Regulation of Natural Monopolies ("ARNM") became the exclusive agency to issue "main" pipeline licenses.[117] Kazakhstan contends that, as of that change, the ARNM held the authority to issue "main" pipeline licenses, but it was not competent to indicate to a subsoil user whether or not it in fact operated a "main" pipeline.[118] That contention is ludicrous on its face. But

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[114] From when it was designed and constructed in 2001, to when it was commissioned in 2002, and throughout six years of routine inspections, all Kazakh authorities approved KPM's use of its pipeline and never suggested that it was operating that pipeline under an incorrect license. *See* Second Romanosov Statement ¶¶ 12-13; *see also* Borankol Raw Materials Base Project prepared by NIPI Neftegaz, 2001, **C-465**; Report from the State Expert Review of Projects, April 25, 2001, **C-470**; Decision of the Working Group on the commissioning of KPM's pipeline, March 4, 2002, **C-469**. Further, KPM and TNG were diligent in ensuring that they held proper licenses. *See* License issued to KPM, September 26, 2002, **C-81**; License issued to TNG, September 26, 2002, **C-82**; License issued to KPM, August 5, 2005, **C-83**; License issued to TNG, August 5, 2005, **C-84**; License issued to KPM, May 29, 2008, **C-472**; License issued to TNG, May 29, 2008, **C-473**.

[115] *See* Section III.B, *supra*.

[116] *Id*.

[117] *See* Decree of the President of the Republic of Kazakhstan "On further improvement of the system of state administration of the Republic of Kazakhstan" No. 346, June 19, 2007, **R-128**; *see also* Letter from D. Ismagulov of the MEMR to KPM, May 26, 2008, **C-545**.

[118] Kazakhstan's First Post-Hearing Brief ¶ 201.

the overriding point is that even if it were correct, that is precisely the type of unclear regulatory system that violates the "fair and equitable treatment" standard.[119]

78. Because it rejected the opinions of all the competent authorities, in this case Kazakhstan has been reduced to arguing that if Claimants had wanted to inquire as to whether they needed a "main" pipeline license, they should have written to the General Prosecutor's Office, which has the authority to interpret laws.[120] That is fanciful. Putting aside the fact that the General Prosecutor criminally pursued Claimants based on the "main" pipeline allegation, the General Prosecutor has no knowledge or expertise regarding the various types of pipelines used in the oil and gas industry. Even if every authoritative body and expert had not assured Claimants that KPM's pipeline was not "main" — as in fact occurred — there is no way Claimants could have been reasonably expected to put the question to the General Prosecutor.

79. In sum, Kazakhstan has essentially defended the wrongful and unwarranted "main pipeline" conclusions of its Financial Police, Mr. Baymaganbetov, and the Aktau City Court by arguing that its regulatory regime in relation to main pipeline licensing was so lacking in transparency that only the country's prosecutor could provide the correct answer. Even if Kazakhstan's argument were credible — which it is obviously not — it would do Kazakhstan no good in terms of escaping liability under the ECT. The ECT's "fair and equitable treatment" standard requires a consistent, transparent regulatory framework every bit as much as it precludes arbitrary prosecutions and denials of justice.

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[119] *See* UNCTAD, Fair and Equitable Treatment: A Sequel, UNCTAD Series on Issues in International Investment Agreements II (United Nations 2012) (stating *inter alia* that a host State must inform investors of policies affecting its investment), **C-571**; *see also MTD Equity Sdn Bhd. v. Chile*, ICSID Case No. ARB/01/7, Award of May 25, 2004, (a host State's duty to act consistently toward investors means that it "has an obligation to act coherently and applies its policies consistently, regardless of how diligent an investor is"), **C-258**. Kazakhstan's position that KPM's pipeline was always a "main" pipeline means that Kazakhstan breached its duty to inform KPM of that fact when the pipeline was commissioned, so that Claimants could, in the words of the *Tecmed* tribunal, "know beforehand any and all rules and regulations that will govern its investments… to be able to plan its investment and comply with such regulations." *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003 ¶ 154, **C-587.**

[120] *See* Kazakhstan's First Post-Hearing Brief ¶¶ 213-216.

D. Claim No. 4: Kazakhstan's Financial Police Manufactured the US $145 Million Penalty Assessed Against KPM, Resulting in a Sanction Grossly Disproportionate to the Alleged "Crime"

Synopsis

80. Beyond the fact that KPM never operated a "main" pipeline, the criminal allegation was malicious and contrived in a second, material respect. The specific crime used to convict Mr. Cornegruta and KPM was "illegal entrepreneurial activity in an especially large amount." The Financial Police contrived the alleged operation of a "main" pipeline without a license to satisfy the "illegal entrepreneurial activity" element of the crime. The Financial Police also contrived the second element of the crime — "in an especially large amount" — by manipulating the instructions given to the Tax Committee in November 2008.

81. Per the Financial Police's instructions, the Tax Committee calculated KPM's "illegal profits" by including both the transport fee KPM earned from TNG for use of the pipeline — *i.e.*, the sum KPM actually earned from "operating" the alleged "main pipeline" — as well as KPM's entire revenues for onward sales of oil. That exceedingly crude calculation — exceeding 41 billion Tenge for KPM — was designed to satisfy the "in an especially large amount" element of the crime. It also provided the basis for the devastating fine of US $145 million eventually levied against KPM, which was grossly disproportionate to the alleged "crime." Those sanctions were clearly disproportionate, particularly when compared to the US $80 fee required to obtain a main pipeline license or the US $12,000 - $13,000 in actual profits KPM earned from operating its pipeline.

Timeline

- November 17, 2008 — Financial Police instruct Tax Committee to calculate the "illegal profits" generated by operation of a "main" pipeline without a license by including both the transport fees TNG paid KPM as well as KPM's entire revenue for onward sales of oil (C-89).

➔ The only sums KPM actually earned from operating the alleged "main" pipeline were the modest transport fees received from TNG. KPM did not pay itself to transport its own oil, and onward sales bear no relationship to the fees earned by a real "main pipeline" operator.

• November 19, 2008	Tax Committee issues calculations of "illegal profits" for KPM & TNG for the period 2005-2007. It finds that KPM's "illegal profits" exceed 41 billion Tenge (which includes income from both sales of oil and earned transport fees) and that TNG's "illegal profits" exceed 37 billion Tenge (which also includes sales of end product) (C-450; C-202).
• November 20, 2008	Financial Police order an economics "expert" from the Ministry of Justice to confirm Tax Committee calculations, again instructing that the calculation include both transport fees received from TNG and KPM's revenues from sales of oil (C-451).
• November 28, 2008	Ministry of Justice economics "expert" confirms Tax Committee's calculation and concludes that KPM's "illegal profits" exceed 41 billion Tenge (income from both sales of oil and transport fees) (C-452).
➔ As a result of the enormous calculation, the Financial Police are able to satisfy the element of the "crime" requiring proof of "illegal profits" "in an especially large amount," which enables them to sequester KPM & TNG's shares, contracts, and other property (*see* C-485, C-486; C-487; C-490; C-491; C-492; C-494; C-496; C-497; *see also* C-488; C-489; C-493; C-495; C-498).	
• September 18, 2009	Aktau City Court issues guilty verdict against Mr. Cornegruta and orders recovery of his "portion" of the alleged "illegal profits" from non-party KPM, in the amount of US $145 million (C-117).
• December 29, 2009	Writ of Enforcement is issued against KPM for recovery of US $145 million (C-119).
• January – June 2010	Kazakh enforcement officers take repeated measures to recover funds from KPM to satisfy criminal judgment, including by freezing its bank accounts and assets (*see* C-501; C-121; C-122; C-123; C-124; C-125; C-298; C-79; C-502; C-503; C-504; C-505; C-506; C-507; C-199; C-201).

Additional Relevant Evidence

Exhibits not included above:

Kazakh Criminal Code, art 190(2)(b) (crime of "illegal entrepreneurial activity in an especially large amount"), R-58

Governmental Resolution No. 610, July 19, 2007 (method of calculation of license fee for main pipeline), C-667

Kazakh Law on Budgets, 2008, 2009-2011 (setting the monthly calculation index), C-484

Expert Report No. 1537 of the Ministry of Justice, May 18, 2009 (calculating KPM's revenues for oil sales and earned transport fees), C-184

KazTransOil Annual Report 2008 (to indicate the relationship between KPM's alleged "illegal profits" and the profits of the actual operator of the "main" pipeline), C-708

Witness Testimony:

First Malinovsky Opinion at 9-18

Second Malinovsky Opinion at 2-8

First Cojin Statement ¶ 7, 20-21

First Condorachi Statement ¶¶ 27-28

Second Condorachi Statement ¶¶ 8-15

First Lungu Statement ¶ 51

First Pisica Statement ¶ 19-21, 49

First Stati Statement ¶ 30

Kravchenko Testimony, Tr. October 2012 Hearing, Day 4, 101:13-19, 102:1-12

Turganbayev Testimony, Tr. October 2012 Hearing, Day 5, 93:7-96:4, 97:22-98:1, 101:14-22

Previous Submissions by Claimants

Written Submissions:

Statement of Claim ¶¶ 92-94, 119-39, 258-317, 351 (a, b, d, and e), 361-2, 371

Reply on Jurisdiction and Liability ¶¶ 221-2, 324-37, 480, 493, 508-11, 528, 534, 546

Claimants' First Post-Hearing Brief ¶¶ 158-67, 211-4

Oral Submissions:

Claimants' Opening Presentation on the Merits, slide 41

Claimants' Opening Statement, Tr. October 2012 Hearing, Day 1, 103:17-104:20, 125:4-21, 127:15-129:14

Claimants' Closing Presentation, slides 8, 11

Claimants' Closing Statement, Tr. May 2013 Hearing, Day 1, 143:23-145:20

Relevant ECT and International Law Standards

- Fair and equitable treatment – ECT art. 10(1), C-1
- Impairment by unreasonable measures – ECT art. 10(1), C-1
- Most constant protection and security – ECT art. 10(1), C-1

Final Remarks Regarding Claim No. 4

82. Kazakhstan's Financial Police deliberately inflated the calculation of alleged "illegal profit" by instructing the Tax Committee to calculate KPM's entire revenue for onward sales of oil, and adding that figure to the modest service fee KPM earned for transporting TNG's oil through the pipeline (the only actual "revenue" KPM earned from operating the alleged "main pipeline," as KPM did not pay itself to transport its own oil).[121] There was no legitimate basis for the rigged calculation, which was patently designed to satisfy one element of the serious criminal charge ("in an especially large amount") and to deliver a crippling financial blow to KPM.

83. The receipt of income "in an especially large amount" was an element the Financial Police had to establish in order for Mr. Cornegruta to be found guilty under Article 190(2)(b) of the Kazakh Criminal Code.[122] Without that element, Mr. Cornegruta could not have been charged with a serious crime. Deputy Prosecutor General Kravchenko conceded on cross-examination that the criminal prosecution, arrest, trial and conviction of Mr. Cornegruta could not have occurred as they did if the actual "profit" KPM earned from operation of the pipeline was much smaller — which was, in fact, the case.[123] The transport fee KPM earned for operating the pipeline during Mr. Cornegruta's tenure was less than US $13,000, and the threshold for prosecuting a crime of "illegal entrepreneurial activity in an especially large amount" was approximately US $17,000 (2.3 million Tenge) at the relevant time.[124] Therefore, the Financial Police needed a larger number to convict Mr. Cornegruta of the alleged crime, and they obviously needed a vastly larger number to cripple KPM.

84. Kazakhstan claims that including KPM's entire revenue in the calculation of the "illegal profit" for operating the pipeline was proper because "the transport of oil through

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[121] *See, e.g.*, Reply on Jurisdiction and Liability ¶¶ 324-37; Claimants' First Post-Hearing Brief ¶¶ 158-67.

[122] Kazakh Criminal Code, art. 190(2)(b), **R-58**.

[123] *See* Kravchenko Testimony, Tr. October 2012 Hearing, Day 4 101:13-19 and 102:1-12.

[124] Reply on Jurisdiction and Liability ¶¶ 329-35.

the main pipeline was *conditio sine qua non* (necessary requirement) for KPM to make profits."[125] Kazakhstan's self-serving reasoning is unpersuasive. Main pipeline operators generate revenue from transport fees. KPM did not pay itself to transport its own oil, and the revenues it generated from onward sales bear no relationship to the modest revenues it earned for transporting TNG's oil. Indeed, Claimants have demonstrated that the ultimate sanction imposed on KPM by using onward sales as the calculation — and then only for the period during which Mr. Cornegruta served as General Director — was so overwhelming that it exceeded the total profits earned by KazTransOil, Kazakhstan's largest main oil pipeline operator with thousands of kilometers of pipes, during the years 2007 and 2008.[126]

85. KPM could have transported oil over the 17.9 kilometers from its processing facility to its storage tanks by other means, including by tank trunk, without using the pipeline in question.[127] In fact, had KPM known that transporting oil through its pipeline would subject its manager to criminal conviction and result in a criminal fine of US $145 million, KPM would have avoided use of that segment and transported oil another way. Thus, it is not the case that the pipeline was indispensable to KPM's ability to sell oil, as Kazakhstan alleges.

86. More fundamentally, Kazakhstan's claim is wrong as a matter of Kazakh law. Kazakh law only provides for the recovery of income that was derived from a crime committed by a guilty person as a result of unjust enrichment. Kazakhstan's counsel explained in closing argument that "the amount recovered is … dependent upon … the extent of enrichment."[128] But there is nothing in Kazakh law that enables "unjust enrichment" of an individual to be calculated on the basis of all revenues generated by the company for which the individual works.[129] The Kazakh Supreme Court's Regulatory Case No. 2, upon which Kazakhstan relies, confirms that the penalty calculated and assessed against KPM violates Kazakh law. It states that:

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125 *See* Kazakhstan's First Post-Hearing Brief ¶ 296 (citing Rejoinder on Jurisdiction and Liability ¶ 622).

126 Claimants' Opening Presentation on the Merits, October 2012 Hearing, slide 41.

127 As Professor Suleymenov notes, it would have been possible and practical for KPM to use tank trucks to transport its oil, if it could not lawfully use the pipeline. *See* First Suleymenov Report ¶ 60; Third Suleymenov Report 10.

128 Kazakhstan's closing arguments, Tr. May 2013 Hearing, Day 2, 68:5-12.

129 *See* Second Malinovsky Report at 2-3 (explaining that "Mr. Kogamov's assertion that 'the actual holder of illegal revenues is irrelevant for a lawmaker…they must be in any case forfeited to the state' has no support in any laws of Kazakhstan.").

> income derived from a 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.[130]

From the clear language of that provision, only income received "as a result of unjust enrichment" may be recovered, and it may only be recovered "from the guilty person." Thus, only income that unjustly enriched Mr. Cornegruta could have been properly recovered (which by definition limited the recovery to profits, rather than income) and it could only have been recovered from him personally, not from KPM.[131] Unsurprisingly, Kazakhstan has identified no provision of Kazakh law supporting the notion that Mr. Cornegruta's purported unjust enrichment somehow amounted to all of KPM's revenues.

87. Moreover, Kazakh law requires that income obtained from the lawful aspects of otherwise illegal entrepreneurial activity be deducted in order to properly calculate "illegal profit."[132] Kazakhstan ignored that requirement as well when it calculated the "illegal profits" earned by Mr. Cornegruta as simply all of KPM's revenues during the time period in which he served as General Director.

88. Tribunals have repeatedly held that measures carried out without a legitimate purpose, capriciously, in bad faith, or in willful disregard of the law violate the "fair and equitable treatment" and "impairment" standards contained in investment treaties.[133] The Financial Police's deliberate rigging of the $145 million fine against KPM and the use of that fine in a criminal case against an individual — in ways that clearly violated domestic law — violate the ECT's "fair and equitable treatment," "impairment," and "most constant protection and security" provisions.[134]

89. Moreover, even if Kazakhstan were correct that its Financial Police properly calculated the devastating penalty against KPM — which Claimants deny — that penalty would still amount to a clear violation of international law, because it was grossly

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130 *See* Kazakhstan's First Post-Hearing Brief 298 (citing **R-144**).

131 Second Malinovsky Opinion at 2-3.

132 Reply on Jurisdiction and Liability ¶ 329 (citing First Malinovsky Report at 10).

133 *See*, *e.g.*, *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006 ¶ 392, **C-245**. Because there is no logic or reason supporting the assessment of the penalty, and because Kazakhstan enforced the penalty by freezing KPM's bank accounts and seizing its assets, Kazakhstan breached its duty to refrain from impairing investments by unreasonable measures. *See*, *e.g.*, Statement of Claim ¶¶ 352-62 (citing, *inter alia*, *Saluka* Partial Award ¶ 460, **C-259** (a state's conduct must bear "a reasonable relationship to some rational policy")).

134 *See* Statement of Claim at 122-44; Reply on Jurisdiction and Liability at 193-213.

disproportionate to the alleged "crime."[135] That point is fundamental and another reason why the judgment of the Aktau City Court is not entitled to any deference.

90. Under international law, a penalty imposed by a host state upon a claimant's investment must bear some reasonable relationship to the wrong it purports to address. The state must demonstrate that the harm resulting from the wrongful conduct is rationally related to the penalty or that the penalty is warranted to deter potentially harmful conduct.[136] Penalties that are disproportionate to the alleged wrong violate a state's obligations under the "fair and equitable treatment" and "impairment" standards.

91. In the present case, absolutely no harm resulted from KPM's operation of the pipeline in question, allegedly without the proper license. Indeed, KPM had operated the pipeline in question for years without any complaint or concern raised by any State authority. At most, Kazakhstan was deprived of a US $80 main pipeline license fee.[137] Moreover, Kazakhstan only granted the "right" license to KazMunaiTeniz in April 2011,[138] almost a year after it took over KPM's operations and well after this case began. The possession of such a license in KPM's case obviously was not material to anything, much less a legitimate need of the State.[139] There is simply no justification for imposing a fatal US $145 million fine against KPM for its alleged failure to procure an $80 license for an activity that presented no risk to anyone.

92. The *Vivendi II* case provides guidance on the types of measures that give rise to international liability by virtue of their disproportionality. In that case, the tribunal found that Argentina's imposition of "101 separate charges and … 78 fines of US $1 million" for alleged regulatory breaches was disproportionate in light of evidence that the issues could

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[135] Kazakhstan's claim that the amount is not disproportionate because Squire Sanders "estimated" and "assumed illegal income" in excess of US $80 million is wrong and (yet another) blatant mischaracterization of the evidence. Squire Sanders does not state that it calculated or assumed any amount of allegedly illegal income, although it does reference the Financial Police's "view" of what the illegal income was. Squire Sanders Due Diligence Report, July 30, 2009, at 113, **C-725**. In any event, Squire Sanders' report of what the penalty could have been is altogether irrelevant from an assessment of whether the penalty actually imposed was disproportionate.

[136] *See Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador,* ICSID Case No. ARB/06/11, Award, October 5, 2012, **R-355**.

[137] Reply on Jurisdiction and Liability ¶ 336. Kazakhstan has not disputed the fact that, had KPM been operating a main pipeline, it could have obtained the license at issue in this case for less than US $80.

[138] License to operate a main pipeline issued to KazMunaiTeniz, April 29, 2011, **R-136**.

[139] Furthermore, Kazakhstan admitted during its May 2013 closing arguments that "the amount recovered is … not dependent upon the severity of the crime." Kazakhstan's Closing Statement, Tr. May 2013 Hearing, Day 2, 68:5-12.

have been resolved through good faith discussions.[140] According to that standard, the imposition of a US $145 million criminal fine against KPM for failing to obtain an US $80 license is clearly disproportionate.

93. The tribunal in *Occidental v. Ecuador* — a case that Kazakhstan relies upon — recently confirmed that "any penalty the State chooses to impose must bear a proportionate relationship to the violation which is being addressed and its consequences."[141] The *Occidental* tribunal found that the "total loss of an investment worth many hundreds of millions of dollars" was out of proportion with any state goal of deterrence.[142]

94. While Kazakhstan has made vague and unsupported assertions as to why obtaining a license to operate a "main" pipeline is important — including the alleged need "to provide for national security, law enforcement, environmental protection, and safeguarding of the property life and health of citizens"[143] — it has not even attempted to explain those assertions in the context of this case. Kazakhstan has not identified any danger posed by KPM's operation of the pipeline or explained how — if there were such a danger — its agencies' repeated inspections over the years failed to notice it.

95. Indeed, KPM held the requisite licenses to carry out all other oil and gas exploration, production, treatment, and transport processes.[144] Its 17.9 kilometer pipeline clearly posed no risk above and beyond that presented by the other parts of KPM's extensive gathering system or its many other "properly licensed" activities.

96. In sum, the fatal $145 million penalty imposed on KPM was so grossly disproportionate to any conceivable "wrong" that it simply cannot be squared with Kazakhstan's obligations under the ECT and international law. Even if the Financial Police

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140 *See Compañía de Aguas del Aconquija and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007, ¶¶ 7.4.24-7.4.26, **C-253**.

141 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador,* ICSID Case No. ARB/06/11, Award, October 5, 2012, ¶ 416, **R-355**.

142 *Id.*, **R-355**.

143 Akmetov Witness Statement, August 10, 2012, ¶ 2.5; Kazakhstan's Rebuttal Closing presentation, slide 28.

144 License issued to KPM, September 26, 2002, **C-81**; License issued to KPM, August 5, 2005, **C-83**; License issued to KPM, May 29, 2008, **C-472**. Notably, Kazakhstan never raised any allegation that KPM carried out any other part of its oil production activities without the requisite license. While in its closing arguments Kazakhstan suggested (without support) that KPM did not hold licenses for trunk or "non-trunk" pipelines, the evidence demonstrates the KPM held all requisite licenses for oil production, treatment, and transport, including the operations of pipelines under pressure. *See, e.g.*, Statement determining the income received as a result of transportation and further sale of oil for KPM and TNG, November 19, 2008, **C-450** (stating the various licenses KPM and TNG held); *see also* Report of the MEMR on Unscheduled Inspection for KPM, February 6, 2010, **C-385** (noting that KPM's production and treatment facilities form part of a "single technological process").

and the Aktau City Court "got it right" in terms of the $145 million fine as a matter of Kazakh law — which Claimants vehemently deny — the Tribunal must still conclude that the imposition of a grossly disproportionate penalty breached the "fair and equitable treatment" and "impairment" standards in the ECT.

E. Claim No. 5: Kazakhstan Committed Egregious Denials of Justice in Relation to the Prosecution and Trial of Mr. Cornegruta and the Verdict and Enforcement Against KPM

Synopsis

97. The September 18, 2009, judgment sentencing Mr. Cornegruta to four years in prison and ordering the recovery of US $145 million from KPM — which was not a party to Mr. Cornegruta's case — constituted an egregious denial of justice under international law and a breach of Article 10(1) of the ECT. Not only was the prosecution and trial process riddled with violations of Mr. Cornegruta's due process rights, the substantive finding by the trial court judge that he generated income "in an especially large amount" by operating a "main" pipeline without a license was a shocking conclusion that no reasonable or impartial judge could have possibly reached.

98. Additionally, by imposing Mr. Cornegruta's purported criminal penalty on the non-party KPM, Kazakhstan committed a fundamental denial of justice toward KPM. KPM was not named in the proceeding. KPM was therefore not represented by counsel, and it did not participate in the trial process that led to the devastating judgment against it. Kazakhstan further denied justice to KPM by undermining KPM's efforts to challenge both the judgment and the enforcement proceedings that Kazakhstan carried out in the wake of the verdict.

Timeline

• November 19, 2008	Ministry for Emergency Situations confirms that KPM's & TNG's pipelines are not "main" (C-90 and C-91).
• November 21, 2008	Financial Police instruct MES to withdraw its conclusions on the ground that it is not a "competent" authority (C-92).
• January 5, 2009	Kazakh Institute of Oil and Gas of KMG NC confirms that KPM's & TNG's pipelines are not "main" (C-99 and C-100).
• January 8, 2009	Scientific and Research Centre of MES confirms that KPM's & TNG's pipelines are not "main" (C-103 and C-104).

• January 9, 2009	NIPI Neftegaz confirms that KPM's & TNG's pipelines are not "main" (C-101 and C-102).
• February 4, 2009	MEMR confirms that KPM's pipeline is part of its gathering system, and thus, not a "main" pipeline (C-719).
• February 13, 2009	Ministry of Justice "expert," Mr. Baymaganbetov, issues opinion that KPM's pipeline is a "main" pipeline (C-110).
• April 13, 2009	Russian design and construction institute confirms that KPM's & TNG's pipelines are not "main" (C-105 and C-106).
➔ In May 2009, the Financial Police declare the reports from the KMG institute, the MES research center, NIPI Neftegas, and the Russian institute inadmissible in the criminal proceeding. Without making her own independent assessment, the judge also declares them inadmissible, in violation of Kazakh law (*see* C-117; First Malinovsky Opinion § 3.7).	
• July 2, 2009	Professor Suleymenov, author of Kazakhstan's Law on Oil, issues expert legal opinion that KPM's pipeline is not "main" (C-108).
• August 25, 2009	Russian oil and gas engineering company VNIIST concludes that KPM's pipeline is not "main" (C-107).
• July 30 – Sept. 14, 2009	Mr. Cornegruta's trial, in which KPM is not a party and does not participate, takes place (C-704).
➔ The judge refuses to extend the trial period for one week so that Professor Suleymenov and a representative from VNIIST can testify, and then declares their reports inadmissible because they did not appear in court, even though their reports satisfied admissibility requirements under Kazakh law (C-704; C-117; *see* First Malinovsky Opinion at 24-26).	
• September 18, 2009	Aktau City Court finds Mr. Cornegruta guilty of "illegal entrepreneurial activity in an especially large amount" for operating a "main" pipeline without a license; court orders recovery of US $145 million penalty from non-party KPM (C-117).
• September 22, 2009	KPM requests a copy of the judgment against it from Aktau City Court so that it can file an appeal (C-705); court does not respond.
• October 1, 2009	Mr. Cornegruta appeals criminal judgment of Aktau City Court (C-659 and C-660).
➔ Deadline for filing an appeal passes without the court providing a copy of the judgment as KPM requested.	
• November 12, 2009	Appeal court upholds judgment of Aktau City Court (C-565).

• December 29, 2009	Writ of Enforcement issued against KPM for US $145 million (C-119).
➔ Kazakhstan freezes KPM's bank accounts and carries out multiple enforcement measures to recover the penalty of US $145 million from KPM (C-121 and C-122).	
• January 14, 2010	KPM submits second request for copy of Aktau City Court judgment so that it can appeal (C-566); KPM is finally given a copy (*see* C-481).
• January 21, 2010	KPM challenges court decisions dismissing its complaints against enforcement (C-567 and C-635).
• January 22, 2010	KPM submits new complaint against enforcement orders (C-636).
• January 25, 2010	KPM submits Claim of Appeal against Aktau City Court judgment of September 18, 2009 (C-481).
• February 8, 2010	KPM challenges the appeal court's refusal to reinstate time period for appeal of September 18, 2009, judgment (C-637).
• February 16, 2010	KPM submits claim to suspend enforcement measures (C-638).
• February 25, 2010	KPM appeals decision dismissing claim to suspend enforcement measures (C-640).
• February 26, 2010	Court dismisses KPM's challenge to writ of enforcement (C-568).
• March 5, 2010	KPM appeals decision dismissing its challenge to writ of enforcement (C-568).
• March 5, 2010	KPM submits complaint regarding enforcement measures (C-641).
• March 26, 2010	KPM appeals criminal judgment to the Cassation Court (C-670).
• April 9, 2010	KPM submits new complaint regarding enforcement measures (C-569).
• May 11, 2010	KPM appeals decision regarding enforcement to the Cassation Court (C-642).
• June 9, 2010	Enforcement officers order sale of KPM's property (C-199).
• June 18, 2010	KPM challenges valuation of its property and actions of state executors (C-643 and C-644).
• June 25, 2010	KPM submits complaint of June 9, 2010 enforcement order (C-570).
➔ Kazakhstan terminates KPM's Subsoil Use Contract, seizes its assets, and takes over its operations less than one month later	

Relevant Witness Evidence

First Malinovskiy Expert Report

Second Malinovskiy Expert Report

First Suleymenov Report

Second Suleymenov Report ¶¶ 4-51

Third Suleymenov Report ¶¶ 4-18

First Stati Statement ¶¶ 26, 29-30

Second Stati Statement ¶¶ 13-14, 17

First Pisica Statement ¶¶ 15-23, 41-55

Stejar Statement ¶¶ 12-13

First Cojin Statement ¶¶ 8-12

First Condorachi Statement ¶¶ 8-31

Second Condorachi Statement ¶¶ 1-15

First Romanosov Statement ¶¶ 4-23, 28-33

Second Romanosov Statement ¶¶ 8-17

Condorachi Testimony, Tr. October 2012 Hearing, Day 2, 137:7-11, 138:5-11

A. Rakhimov Testimony, Tr. October 2012 Hearing, Day 5, 71:14-20

Kravchenko Testimony, Tr. October 2012 Hearing, Day 4, 66:9-23, 104:15-17, 105:2-21, 107:24-108:7

Previous Submissions by Claimants

Written Submissions:

Statement of Claim ¶¶ 79-87, 91, 94-95, 98-120, 258-317, 330-332, 351 (a, b, d, and e), 361-62, 371, 377-79

Reply on Jurisdiction and Liability ¶¶ 218-22, 246-337, 477, 480-85, 493-96, 504-11, 524-28, 534, 546, 551

Claimants' First Post-Hearing Brief ¶¶ 188-214

Oral Submissions:

Claimants Opening Presentation on the Merits, slides 36-40

Claimants' Opening Statement, Tr. October 2012 Hearing, Day 1, 124:19-129:14

Claimants' Closing Presentation, slides 10, 31

Claimants' Closing Statement, Tr. May 2013 Hearing, Day 1, 143:16-145:20

Relevant ECT and International Law Standards

- Fair and equitable treatment – ECT art. 10(1), C-1
- Impairment by unreasonable measures – ECT art. 10(1), C-1
- Most constant protection and security – ECT art. 10(1), C-1
- Unlawful indirect expropriation – ECT art. 13(1), C-1
- Effective means to assert claims and enforce rights, ECT art. 10(12), C-1

Final Remarks Regarding Claim No. 5

99. The prosecution and trial of Mr. Cornegruta, as well as the judgment ordering recovery of US $145 million from non-party KPM and the denial of KPM's appeals, constitute substantive and procedural denials of justice under international law and violate the ECT.[145]

100. Substantively, for all of the reasons discussed in the preceding sections regarding the fabricated claims that KPM's pipeline was "main" and that Mr. Cornegruta earned "illegal profits" in an amount corresponding to all of KPM's revenues during his tenure as General Director, there is simply no way an impartial, independent fact finder, who accorded all due process rights to Mr. Cornegruta (including by fairly weighing all the evidence), could have reached the conclusion that he was guilty of the crime charged. The only way the judge in Mr. Cornegruta's case was able to reach that conclusion was by ceding her authority to the Financial Police in declaring evidence "inadmissible;"[146] relying exclusively on the Financial Police's hand-picked "expert," Mr. Baymaganbetov, to reach her conclusion; refusing to hear testimony from Professor Suleymenov, who drafted the Law on Oil (which contains the legal definition of "main" pipeline); and ignoring the obvious fact that the "illegal profits" allegedly earned by Mr. Cornegruta were not profits (they were

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[145] Statement of Claim ¶¶ 351(b); Reply on Jurisdiction and Liability ¶¶ 497-511. Additionally, Claimants' expert Professor Malinovsky has submitted a final opinion responding to Kazakhstan's position on this matter. *See* Second Malinosvky Report.

[146] *See* First Malinovsky Opinion § 3.7.

revenues), were not earned by him (they were earned by KPM), and did not correspond to sums earned through operation of a pipeline (they were simply total revenues earned by KPM, over 99% of which corresponded to onward sales of oil).[147]

101. There is a material distinction between domestic court judgments that "get the facts or law wrong" and those that are so obviously contrived that they constitute a substantive denial of justice. The Aktau City Court's judgment falls into the latter category. The judge did not merely "get it wrong;" rather, she willfully ignored facts, evidence, law and logic to such a degree that one can only conclude that the verdict she rendered was contrived from beginning to end. While "substantive" (as opposed to "procedural") denials of justice are fairly uncommon in treaty practice, the trial court's judgment here was a substantive denial of justice.

102. Kazakhstan urges the Tribunal not to review the decision of the Kazakh judge. But the Tribunal is not required, under international law, to blindly accept the domestic court's ruling, simply by virtue of the domestic court's (limited) jurisdiction or sovereignty. In fact, the Tribunal is bound to reject domestic court decisions that entail breaches of international law because they are "substantively unfair" or "manifestly unjust."[148] The trial court's decision in Mr. Cornegruta's case was "substantively unfair" because there was literally no credible evidence to support it, and it obviously violated Kazakh law and common sense.[149] The judge's reliance on Mr. Baymaganbetov alone was "manifestly unjust" in light of his utter lack of qualification on the issue and the numerous contrary conclusions from knowledgeable authorities that the judge never bothered to consider.

103. In any event, the procedural denial of justice suffered by KPM is undeniable. Most of the case law regarding procedural — rather than substantive — denials of justice concerns violations of the right to be heard.[150] Kazakhstan indisputably denied justice to KPM by failing to name it as a party, with the result that KPM was not permitted any

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147 Judgment of Aktau City Court, September 18, 2009, **C-117**; *see* First Malinovsky Opinion at 24-6; *see* Minutes of Mr. Cornegruta's trial, **C-704**; Second Malinovsky Opinion at 2-5.

148 *See Vivendi* Award ¶ 80, **C-253**; *see generally* Dolzer & Schreuer, **C-219**.

149 Second Malinovsky Opinion at 2-5.

150 Dolzer & Schreuer, **C-219**.

opportunity to be heard or represented in a case that resulted in a devastating fine of US $145 million against the company.[151]

104. Kazakhstan originally contended, with the support of its original criminal law expert, Mr. Maulenov, that it was entirely proper under Kazakh law to seek to recover a financial penalty for a crime committed by Mr. Cornegruta from non-party KPM under a theory of "quasi-criminal" liability. That argument quickly fell apart, because there is no such theory under Kazakh law.[152] In order to properly recover funds from a company in relation to alleged criminal conduct, Kazakhstan could have pursued a sanction under administrative law (a process Kazakhstan began against KPM but later abandoned). Kazakhstan may have also had the possibility to file a civil claim against KPM in the criminal trial against Mr. Cornegruta, but it failed to do so.[153] What Kazakhstan could not do under Kazakh (or international) law, however, was precisely what it did: namely, file a criminal case against Mr. Cornegruta alone, deny KPM's right to be heard, and then issue a verdict imposing a criminal fine on non-party KPM.

105. To try to explain how it could have lawfully imposed a penalty against KPM, Kazakhstan and its second criminal law expert, Professor Kogamov, developed a new theory, which is no more persuasive than the de-bunked theory of "quasi-criminal liability." Kazakhstan and Professor Kogamov rely on two provisions of Kazakh law — clause 27 of the Regulatory Decree of the Supreme Court of June 20, 2005, "On hearing of a civil action in criminal proceedings" and Article 371, section 1(10) of the Criminal Procedure Code — to claim that Kazakh law permits recovery of damage caused to the State even in criminal cases where no civil action has been brought.[154] However, those provisions do not support Kazakhstan's claim,[155] and Kazakhstan has blatantly misconstrued them in order to mislead the Tribunal.

106. Clause 27 of the Regulatory Decree states:

> … Enforcement of a judgment in the civil claim is made in accordance with the legislation on enforcement proceedings. …

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[151] Additionally, Claimants have demonstrated that the Financial Police directly interfered in the trial process. First Post-Hearing Brief ¶ 203 (citing Hearing Minutes at 24-7, **C-704**).

[152] First Malinovsky Opinion; Second Malinovsky Opinion at 2.

[153] Second Malinovsky Opinion at 2-4.

[154] Kazakhstan's First Post-Hearing Brief ¶ 288; Second Kogamov Opinion at 10.

[155] Second Malinovsky Opinion at 3-5 (stating that "both provisions are quite obviously irrelevant to the case under review").

> Subject to the requirements of paragraph 10) of first part of Section 371 of the CPC, the court verdict must also decide whether compensation is [due] subject to property damage, if the civil suit was not brought. In such cases the court takes a corresponding decision only if a full investigation of the circumstances was made in the court hearing connected to the infliction of property damage.[156]

107. It is not at all clear, from the wording of that provision, how it applies to Kazakhstan's claim that "a court is entitled to take decisions on compensating any damage caused to the state and also in cases where no civil action was launched in relation to a criminal case."[157] The only mention in that provision of instances where a "civil suit was not brought" is a reference to deciding "whether compensation is [due] subject to property damage." There was no issue, and thus no finding, of "property damage" in Mr. Cornegruta's case.[158]

108. Article 371 of the CPC, referenced in that provision, provides no further support for Kazakhstan's position. A proper English translation of that provision reads:

> Article 371. Questions to be decided by the Court in course of rendering a judgment
>
> 1. In the course of rendering a judgment the court considers in the deliberations room the following questions: …
>
> 10) whether a civil claim shall be satisfied, to whose benefit and in what amount, as well as whether ***property*** damage shall be compensated when a civil claim has not been brought;…

The translation Kazakhstan submitted omits the reference to "property damage" and, in order to mislead the Tribunal, only includes the term "damages." The proper translation demonstrates that Kazakhstan's argument is wrong, because only compensation for "property damage" may be awarded in cases, like Mr. Cornegruta's, where no civil action was filed.[159]

109. At most, Kazakhstan has demonstrated that compensation for "property damage" may be awarded in cases where no civil action was filed. That it totally inapposite to Mr. Cornegruta's case, in which there was no issue of property damage. Kazakhstan has

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156 Regulatory Decree of the Supreme Court, June 20, 2005, No. 1 (attached to First Kogamov Opinion).

157 Kazakhstan's First Post-Hearing Brief ¶ 288; Second Kogamov Opinion at 10.

158 Second Malinovsky Opinion ¶¶ 1.2-1.4 ("as follows from the court sentence, neither S. Cornegruta nor Kazpolmunay caused any property damage to the state and consequently no circumstances of causing such property damage were ever inquired into in the court hearing").

159 *See id.*

utterly failed to demonstrate that Kazakh law permits imposing a criminal penalty against a company that is not a party, in any capacity, to a criminal case.[160] And even if Kazakh law permitted such a thing, international law most certainly does not.

110. Kazakhstan also maintains its frivolous contention that KPM's due process rights were respected because KPM was "well aware" of the ongoing criminal proceeding.[161] Kazakhstan suggests that KPM somehow vicariously "participated" in the trial, through the participation and representation of Mr. Cornegruta. Obviously that is not a proper application of the principle of due process or the rule of law.[162]

111. KPM was not named in the case, in any capacity.[163] It was not represented by counsel. It did not — and could not — present evidence, witnesses, or experts. In fact, during the time of Mr. Cornegruta's trial, KPM and TNG were involved in administrative actions against them for the same "offense" — both of which were dropped after the criminal judgment was rendered.[164] Thus, neither KPM nor TNG had any reason to think that they could incur liability in Mr. Cornegruta's case. Claimants and KPM were shocked when the verdict in the case ordered recovery of a US $145 million penalty from KPM.

112. In a final attempt to escape liability, Kazakhstan has claimed that KPM did not diligently pursue an appeal. As an initial matter, this argument is dubious as a matter of international law. International law does not require a claimant to pursue an appeal or exhaust domestic remedies where doing so would amount to an exercise in futility.[165] Here, everything about the court's judgment — and the fact that it was issued against non-party KPM — was so obviously contrived that KPM was under no obligation to file an appeal. That is particularly true insofar as outside the courtroom, the entire Kazakh state apparatus had been persecuting KPM for nearly a full year by the time the verdict was rendered. Everything pointed toward an appeal being an exercise in futility.

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[160] It clearly does not. *See generally* Second Malinovsky Opinion at 2-5 ("the various arguments of the respondent regarding the court sentence ordering Kazpolmunay to pay 21,675,854,578 tenge to the state are obviously all designed as an attempt to legalize a clearly illegal sentence"). Additionally; the Kazakh court judgments that Respondent claimed supported assessing a criminal penalty against a non-party company (**R-248**; **C-727**; **R-249**; **C-728**; **R-250**; **C-729**; **R-251**; and **C-730**), do not support that position at all. Second Malinovsky Opinion ¶¶ 3.1-3.2.

[161] *See* Slide 41 from Kazakhstan's Closing Presentation, May 2013 Hearing; *see also* Kazakhstan's First Post-Hearing Brief ¶¶ 292-294 and 307-309.

[162] *See generally* Dolzer & Schreuer, at 143-49, **C-219**; First Malinovsky Opinion.

[163] Claimants' First Post-Hearing Brief ¶¶ 196-99.

[164] First Condorachi Statement ¶ 30.

[165] Reply on Jurisdiction and Liability ¶¶ 498-500.

113. Nevertheless, KPM did pursue an appeal. Kazakhstan's argument is simply wrong on the facts. As the timeline above clearly indicates, KPM diligently sought a copy of the judgment from the court — precisely so that it could file an appeal — before the appeal deadline expired.[166] The court refused to provide KPM with a copy of the judgment. Once it finally received a copy of the judgment, KPM filed an appeal, which was rejected on the basis that it was "untimely."[167] That underscores the futility of the entire exercise.[168] KPM also filed numerous challenges to the enforcement actions launched against it, all to no avail.[169]

114. Kazakhstan's denials of justice in relation to the prosecution and trial of Mr. Cornegruta and the verdict and enforcement against KPM clearly violate the ECT's "fair and equitable treatment" standard.[170] They also violate the ECT's "impairment" and "most constant protection and security" provisions.[171] Kazakhstan's conduct in relation to the trial and the appeal violate its obligation under the ECT to provide effective means to assert claims and enforce rights.[172] Finally, Kazakhstan's enforcement of the wrongful verdict against KPM and its assets was a measure of "indirect expropriation," as the enforcement destroyed what little remained of Claimants' "incidents of ownership" over KPM by that time.[173]

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166 Letter from KPM to Aktau City Court, September 22, 2009, **C-705**.

167 KPM's second request for copy of court decision, January 14, 2010, **C-566**; KPM's claim of appeal, January 25, 2010, **C-481**.

168 Nevertheless, KPM pursued the matter, challenging the judgment up to the cassation level. KPM's challenge to decision rejecting appeal, February 8, 2010, **C-637**; KPM's cassation claim, March 26, 2010, **C-670**. Thus, Kazakhstan's claim that Claimants "leapfrogged" the courts in Kazakhstan in favor of arbitration could not be further from the truth.

169 KPM's complaint regarding challenge of court decision, January 21, 2010, **C-567**; Complaint regarding execution proceedings, January 21, 2010, **C-635**; KPM's challenge of enforcement order, January 22, 2010, **C-636**; KPM's appeal, February 25, 2010, **C-640**; KPM's appeal regarding challenge of court decision and enforcement order, March 5, 2010, **C-568**; KPM's complaint regarding actions of enforcement officers, March 5, 2010, **C-641**; KPM's complaint regarding enforcement procedures, April 9, 2010, **C-569**; KPM's claim of cassation, May 11, 2010, **C-642**; KPM's challenge to valuation reports of its property, June 18, 2010, **C-643**; KPM's complaint regarding actions of state executors, June 18, 2010, **C-644**; KPM's complaint regarding decision on the public sale of its property, June 25, 2010, **C-570**.

170 *See* Statement of Claim at 136-37; Reply on Jurisdiction and Liability ¶¶ 498-511.

171 *See* Statement of Claim ¶¶ 352-62; Reply on Jurisdiction and Liability ¶¶ 517-47.

172 *See* Statement of Claim ¶¶ 373-83; Reply on Jurisdiction and Liability ¶¶ 548-52.

173 *See* Statement of Claim ¶¶ 258-96; Reply on Jurisdiction and Liability ¶¶ 469-80.

F. Claim No. 6: Kazakhstan Publicly Defamed Claimants and Raised a False "Pre-emptive Right" Claim to Cloud Title to TNG

Synopsis

115. Two months after President Nazarbayev's October 14, 2008, instruction to "thoroughly check" KPM and TNG, the MEMR retracted its prior, express consent to Terra Raf's 2003 acquisition of TNG from Gheso. On December 18, 2008, the MEMR informed TNG of alleged "irregularities" in the 2003 transfer and claimed that TNG did not obtain waiver of the State's pre-emptive right with respect to that transfer. On the same day, the MEMR leaked that false claim to the press, including unfounded (and never pursued) allegations that Claimants committed forgery and fraud.

116. International observers, including Credit Suisse and two ratings agencies, Fitch and Moody's, immediately picked up on the press release. Credit Suisse promptly backed out of a $150-175 million credit facility that it was in the process of finalizing with Claimants, which had significant financial and operational consequences to Claimants' investments and operations during the course of 2009. Fitch and Moody's, meanwhile, began a process of raising alerts and downgrading Tristan's debt on the basis of the MEMR's pre-emptive right claim over TNG as well as the criminal investigation of KPM. With title to TNG publicly clouded, Claimants were effectively prevented from selling the company or its assets well before they were legally prevented from doing so as a result of Kazakhstan's sequestration of TNG's (and KPM's) shares and assets on April 30, 2009.

117. In February 2009, the MEMR formally informed TNG that it was in breach of Contracts 210 and 302 for its alleged failure to honor the State's pre-emptive right. However, Kazakhstan never took any further action on the matter. Claimants endeavored to have the MEMR withdraw the notice and retract its public statements, but the MEMR never did so, allowing the accusations to hang as a cloud over Claimants' reputation and title to TNG indefinitely.

Timeline

• May 12, 2003	Gheso transfers TNG to Terra Raf (C-60).
• May 28, 2003	TNG's share registrar, Zerde, registers the Gheso-Terra Raf share transfer, which concludes the transfer process under Kazakh law (R-18; R-39; C-418).
➔ As of May 28, 2003, Terra Raf is the 100% legal owner of TNG.	
• December 1, 2004	Kazakhstan passes a law giving the State a pre-emptive right over certain transfers of subsoil users (R-19).
• May 16, 2005	Terra Raf reorganizes TNG into an LLP (C-40).
• October 2006	TNG confirms to MEMR that Terra Raf has been the sole interest holder in TNG since May 2003 (C-131).
• February 2007	**Kazakhstan grants retroactive "permission" for the 2003 transfer, indicating that the transfer was proper and that its pre-emptive right was not applicable (C-132; C-133; C-134; C-415; C-424; and C-425).**
• December 2007	Kazakhstan waives its pre-emptive right to purchase KPM and TNG in connection with Claimants' planned IPO on the London Stock Exchange (C-135; C-423; and C-139).
• October 14, 2008	**President Nazarbayev issues order to investigate Mr. Stati, KPM, and TNG (C-8).**
• October 24, 2008	MEMR responds to Financial Police request for KPM's & TNG's corporate documents showing their shareholdings, etc. (C-432).
• December 18, 2008	MEMR notifies TNG of purported irregularities in Gheso transfer and potential violation of the State's pre-emptive right (C-140).
• December 18, 2008	**MEMR leaks its false pre-emptive right claim to INTERFAX newswire and falsely claims that Claimants committed fraud and forgery (C-141 and C-625).**
• December 18, 2008	**Credit Suisse writes A. Lungu regarding INTERFAX report; shortly thereafter, Credit Suisse informs Claimants that it will not conclude the US $150-175 million loan facility (C-625 and C-521).**
• December 22, 2008	TNG objects to Kazakhstan's claims and reversal of its prior, explicit consent to the 2003 transfer (C-142).
• December 29, 2008	MEMR requests documents regarding the 2003 transfer so that pre-emptive right issue can be confirmed (C-144).

• January 14, 2009	**Fitch places Tristan debt on Ratings Watch Negative as a direct result of Kazakhstan's pre-emptive right claim and the criminal investigation that formally commenced against KPM on December 15, 2008 (C-590).**
• January 15, 2009	**Moody's reports a downgrade review, also as a direct result of the pre-emptive right claim concerning TNG and criminal investigation of KPM (C-744).**
• January 19, 2009	TNG responds to MEMR's December 29 request by explaining that the transfer occurred in 2003, before Kazakhstan had a pre-emptive right, but nevertheless complies with MEMR's request for documents (C-145).
• February 16, 2009	TNG provides the May 12, 2003, SPA between Gheso and Terra Raf to the MEMR (C-166).
• February 18, 2009	**Moody's downgrades the Tristan debt due to the "amplified regulatory and operational risk" posed by the unresolved pre-emptive right claim concerning TNG and criminal investigation of KPM (C-744).**
• February 24, 2009	TNG complains to MEMR regarding the negative effects of the December 2008 publication on its business and reputation (C-619).
• February 27, 2009	MEMR formally advises TNG that it is in breach of Contracts 210 and 302 for failure to comply with the State's pre-emptive right (C-146).
➔ The MEMR never takes any further action in respect to the pre-emptive right claim.	
• March 18, 2009	TNG responds with three proposals to resolve the issue: (i) by the State retracting its baseless claim; (ii) by the State purchasing TNG for the fair price of US $1.347 billion; or (iii) by submitting the claim to international arbitration (C-41).
• March 19, 2009	**Claimants attend a meeting with the MEMR in which the MEMR assures them that the pre-emptive right claim will be resolved in Claimants' favor (C-42; *see also* C-147).**
➔ Despite its assurances, MEMR never takes any action to clear Claimants' title to TNG; pre-emptive right claim hangs over TNG indefinitely.	
• June 11, 2009	Claimants are forced to seek a loan from the Laren "loan sharks" (C-733; C-734; C-743; C-744), which would not have been necessary if the Credit Suisse loan had closed.

• June 30, 2009	**Squire Sanders confirms that the 2003 transfer to Terra Raf was valid, but in light of the MEMR's claim of violation, recommends that waiver of the State's pre-emptive right regarding the 2003 transfer be a condition precedent to a sale (C-725 at 40, 119-21; 166-67).**
• July 21-22, 2010	MOG abrogates Contracts 210 and 302, on grounds other than violation of the State's pre-emptive right (C-6; C-7; C-4; C-5).

Relevant Witness Evidence

First Maggs Report ¶¶ 41-66

Third Maggs Report ¶¶ 21-23

Second Stati Statement ¶¶ 16, 37-38

First Lungu Statement ¶¶ 37-46

Second Lungu Statement ¶¶ 7-10

First Pisica Statement ¶¶ 26-31, 34, 38-39

Second Pisica Statement ¶¶ 21-36

Pisica Testimony, Tr. October 2012 Hearing, Day 2, 60:25-61:21

Lungu Testimony, Tr. January 2013 Hearing, Day 1, 179:23-180:7

Stati Testimony, Tr. January 2013 Hearing, Day 2, 83:1-14

M. Suleimenov Testimony, Tr. October 2012 Hearing, Day 4, 140:15-22; 157:1-16

Ongarbaev Testimony, Tr. October 2012 Hearing, Day 6, 62:19-63:20

Previous Submissions by Claimants

Written Submissions:

Statement of Claim ¶¶ 49-51, 140-55, 258-317, 332, 334, 351 (d-f), 362, 371

Reply Memorial on Jurisdiction and Liability ¶¶ 183-90, 228-30, 478-79, 495, 514, 524, 531, 546

Claimants' First Post-Hearing Brief ¶¶ 105-10, 214-20, 346-57

Hearing Submissions:

Claimants' Opening Presentation on Jurisdiction, slides 26-29

Claimants' Opening Presentation on the Merits, slides 31-32

Claimants' Opening Statement, Tr. October 2012 Hearing, Day 1, 59:1-61:17, 105:19-111:8

Claimants' Opening Presentation on Quantum, slide 6

Claimants' Opening Statement, Tr. January 2013 Hearing, Day 1, 14:9-16:15, 18:3-8, 19:13-19

Claimants' Closing Presentation, slides 6, 15-17, 30

Claimants' Closing Statement, Tr. May 2013 Hearing, Day 1, 148:7-150:17; 159:2-18; 171:3-16

Claimants' Rebuttal Closing Statement, Tr. May 2013 Hearing, Day 2, 30:12-25

Relevant ECT and International Law Standards

- Unlawful expropriation – ECT art. 13(1), C-1
- Fair and equitable treatment – ECT art. 10(1), C-1
- Impairment by unreasonable or discriminatory measures – ECT art. 10(1), C-1
- Most constant protection and security – ECT art. 10(1), C-1
- Umbrella clause – ECT art. 10(1), C-1

Final Remarks Regarding Claim No. 6

118. It is now common ground that Kazakhstan did not have a pre-emptive right in 2003, when Gheso transferred TNG to Terra Raf.[174] Nevertheless, Kazakhstan attempts to justify its false claim of a pre-emptive right with ever-shifting theories regarding how such a right supposedly existed. Kazakhstan first argued that the transfer from Gheso to Terra Raf was not "complete" until the share transfer was registered, which it claimed occurred in 2005. After Claimants demonstrated that the share transfer was actually registered in May 2003, Kazakhstan changed its theory, arguing that the 2003 transfer was not "complete" until the relevant Kazakh authorities consented to it, and that consent did not occur until after the law granting the State a pre-emptive right was enacted.[175]

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[174] Kazakhstan concedes that its pre-emptive right did not arise until December 2004. **R-19**.

[175] Kazakhstan's First Post-Hearing Brief ¶¶ 474-5.

119. While Claimants have shown that Kazakh law did not require consent from the relevant authorities to "complete" the transaction in 2003,[176] the Competent Authority (the MEMR),[177] actually did consent to the transfer, in February 2007, and, at the same time, it expressly confirmed that that the State's pre-emptive right did not apply to the 2003 transfer.[178] In other words, consent was not necessary, but the MEMR gave it anyway. Subsequently, the MEMR also acknowledged Terra Raf's rightful ownership of TNG when it waived the State's pre-emptive right in conjunction with Claimants' planned IPO on the London Stock Exchange, without raising any question about ownership.[179]

120. Furthermore, two independent law firms — Squire Sanders and the local Kazakh firm Olympex — concluded, in the course of advising KazMunaiGas, that the 2003 Gheso transfer conformed with Kazakh law.[180] Their conclusion confirms that Claimants' position in this arbitration (which is also supported by Professor Maggs) — as well as the MEMR's position prior to Nazarbayev's order — is the correct position as a matter of Kazakh law. Indeed, Claimants' position was the MEMR's position prior to Nazarbayev's order.

121. After President Nazarbayev's order, however, and with the intervention of the Financial Police, the MEMR completely reversed its position. Notwithstanding its prior approvals, the MEMR spuriously claimed that Kazakhstan possessed a pre-emptive right over the five-year old transfer and simultaneously made false public claims of fraud and forgery.[181] Those acts immediately clouded title to TNG. Credit Suisse backed out of an

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176 Reply on Jurisdiction and Liability ¶¶ 156-168; Claimants' First Post-Hearing Brief ¶¶ 95-104; First Maggs Report ¶¶ 41-59.

177 "Sleeper" witness statement of Ms. V.I. Lebed, "Information about the license and competent authorities of the Republic of Kazakhstan in period from 1997 to present," at 4-5, **R-17.**

178 Letter from the MEMR to TNG attaching the Minutes of Meeting of the Appraisal Commission, February 21, 2007, **C-415;** Minutes of the Appraisal Commission dated February 20, 2007, (deciding to allow the transfer of shares of TNG from Gheso to Terra Raf), **C-134**. Kazakhstan argues now that Claimants misled the MEMR regarding the applicability of the pre-emptive right by "inform[ing] the MEMR that the pre-emptive right did not apply in February 2007, notwithstanding that it did, given that the transfer had not been completed until consents from authorities were obtained." *See* Kazakhstan's First Post-Hearing Brief, ¶ 474(b). The MEMR, however, was fully aware of the status of consent for the transfer from Gheso to Terra Raf, because the very issue it considered in February 2007 was whether consent could be granted retroactively. It decided that issue affirmatively, and decided in the very same act that the pre-emptive right did not apply because the transaction predated its existence. Terra Raf's assertion of a legal position that the MEMR agreed with, based on facts that the MEMR knew, is not misleading in any way.

179 Letters from KPM and TNG to the MEMR, December 6, 2007, **C-134** and **C-423**; Letter from the MEMR to KPM and TNG, December 29, 2007, **C-139**.

180 Squire Sanders Legal Due Diligence Report, July 30, 2009, at 120-1, **C-725**.

181 Press release circulated on INTERFAX from the MEMR attached to email from Credit Suisse to A. Lungu, December 18, 2008, **C-625**; Notice letter from the MEMR to TNG, December 18, 2008, **C-140.**

important loan that had been offered on commercial terms.[182] International ratings agencies picked up on the story and began raising alerts and downgrading Tristan's debt on the basis of the MEMR's pre-emptive right claim as well as the criminal investigation of KPM (which had formally commenced on December 15, 2008, three days before the MEMR's leak to the INTERFAX newswire).[183] Claimants vehemently protested the MEMR's claims and complained about the impact on TNG, but the MEMR never did anything to clear title to the company.

122. Kazakhstan's conduct on this issue clearly violates the ECT in multiple respects. To begin with, it entailed indirect expropriation, as it destroyed a fundamental right of Claimants' ownership over TNG — the ability to sell the company.[184] As a result of the MEMR's public assertion of a pre-emptive right, Claimants lost the ability to sell TNG well before Kazakhstan sequestered KPM's and TNG's shares and assets on April 30, 2009, on the basis of the "main pipeline" criminal allegations.[185]

123. Kazakhstan's conduct was equally a violation of the ECT's "fair and equitable treatment" and "impairment" provisions. Kazakhstan's complete reversal of its previous position that it had no pre-emptive right over TNG is markedly inconsistent treatment of an investment that violates the "fair and equitable treatment" standard. The manner in which the state publicly asserted its reversal of position was also unfair and unreasonable and clearly impaired Claimants' ownership of TNG.[186]

124. The spurious, unfounded nature of the MEMR's claim is noteworthy. In the words of the *Pope & Talbot* tribunal, the MEMR's "refus[al] to provide any kind of legal justification, relying instead on naked assertions of authority and on threats that the

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[182] *See* Email from Credit Suisse to A. Lungu, December 18, 2008, **C-625**.

[183] *Fitch Places Tristan Oil on Rating Watch Negative*, DOW JONES NEWSWIRES, January 14, 2009, **C-590**; Moody's Ratings Reports, January 15, 2009, **C-744**.

[184] *See Reinhard Unglaube v. Costa Rica*, ICSID Case No. ARB/09/20, Award, May 16, 2012 ¶ 316, **R-276**

[185] The leak also did no favors to Claimants' ability to dispose of KPM. While KPM was embroiled in its own distinct problems at the time — namely, the criminal investigation over the "main pipeline" issue that was formally launched on December 15, 2008 — the INTERFAX leak caused international ratings agencies to take a closer look at both companies, and they immediately picked up on the criminal investigation of KPM. In other words, the leak effectively "internationalized" the criminal investigation of KPM, with obvious consequences in the international market.

[186] Kazakhstan's conduct is all the more egregious because Kazakhstan did not just raise a baseless claim that could have been resolved between the parties without international damage to Claimants. Instead, Kazakhstan publicly defamed Claimants, which had immediate and severe impacts on an international scale that Kazakhstan never bothered to remedy.

Investment's [rights] could be cancelled, reduced or suspended for failure to accept verification" alone amounts to a breach of the duty to accord fair and equitable treatment.[187]

125. Kazakhstan's express, written commitments in 2007 — both its express consent to the 2003 transfer of TNG to Terra Raf and its express assurance that the state's pre-emptive right did not apply to that transfer — as well as its conduct in relation to the London IPO, also gave rise to legitimate expectations that Terra Raf rightfully owned TNG, that the State did not have a pre-emptive right, and that the State would not assert such a right. Kazakhstan's violations of those legitimate expectations of Claimants is another obvious transgression of the fair and equitable treatment standard.[188]

126. The 2007 commitments are also undertakings that were breached in violation of the ECT's umbrella clause.[189] Finally, Kazakhstan's abrupt reversal of position obliterated "the agreed and approved security and protection" of Terra Raf's legal ownership of TNG, breaching Kazakhstan's duty to ensure "the most constant protection and security" to Claimants' investments.[190]

G. Claim No. 7: Kazakhstan Harassed KPM and TNG with Groundless Tax Assessments

Synopsis

127. As part of its campaign of harassment that commenced on October 14, 2008, described in detail above as Claim No. 1, Kazakhstan launched three different tax claims against KPM and TNG, each of which subjected the companies to millions of dollars in potential back taxes and penalties. The claims were unfounded, but they caused Claimants to devote substantial management time, effort, and resources to audits and litigation throughout the following 20-month period. Groundless tax claims are part and parcel of the "Kazakhstan playbook" for harassing foreign investors, and they were used against Claimants with particular zeal.

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187 *Pope & Talbot Inc. v. The Government of Canada*, NAFTA, Award, April 10, 2001, ¶ 174, **C-312**.

188 *CME Czech Republic B.V. (Netherlands) v. The Czech Republic*, UNCITRAL Partial Award, September 13, 2001 ¶ 611, (finding that the host state's reversal of a prior approval leading to the "evisceration of the arrangements in reliance upon which the foreign investor was induced to invest" breached the fair and equitable treatment provision), **C-229**.

189 *See* Statement of Claim ¶¶ 367-71.

190 *See CME Czech Republic B.V. (Netherlands) v. The Czech Republic*, UNCITRAL Partial Award, September 13, 2001, **C-229**; Statement of Claim ¶¶ 318-34.

128. The claims included spurious assessments in excess of US $10 million in export duties ("ED"); US $62 million in corporate income taxes ("CIT"); and US $5 million in transfer pricing taxes ("TP"). Prior to Nazarbayev's order, KPM and TNG had no significant tax disputes with the government that they were not able to resolve in a good faith, cooperative manner.[191] That changed abruptly in the days following the President's order. Kazakhstan's groundless tax claims embroiled KPM and TNG in debilitating litigation that lasted many months and further hampered Claimants' ability to normally manage or readily dispose of their investments.

Timeline		Tax Claim
• October 14, 2008	President Nazarbayev orders investigation of Mr. Stati, KPM, and TNG (C-8)	ALL
• October 16, 2008	Deputy Prime Minister Umirzak Shukeyev issues a corresponding order, No. 6497 to the Financial Police (*see, e.g.*, C-9, C-10)	ALL
• October 24, 2008	**Financial Police order "comprehensive tax inspections" of KPM & TNG (C-10)**	**ALL**
• October 28, 2008	Financial Police order the Tax Committee to carry out inspections of KPM and TNG and insist that Financial Police be permitted to participate (C-447)	ALL
• November 7, 2008	Financial Police order inspection of KPM & TNG regarding compliance with payment of transfer prices (*see* C-38)	TP
• November 7, 2008	Financial Police order Customs Committee to inspect KPM's & TNG's compliance with payment of export duties (C-440)	ED
• November 10, 2008	Tax Committee begins comprehensive tax audit of KPM & TNG (*see* C-149; C-150; C-155)	ALL

[191] Prior to Kazakhstan's harassment campaign, KPM had disputed export duties that the Customs Committee claimed were owed on 2008 oil exports. Although KPM contended that its Subsoil Use Contract exempted it from paying export duties, it made provisional payments throughout 2008 while the issue was under consideration and before it was resolved. On October 2, 2008, the Customs Committee determined that KPM was correct, and it began refunding the provisional payments KPM had made. Only US $2.6 million was refunded before the Financial Police intervened and insisted that the previously-assessed export duties were due. Thus, the Financial Police ensured that approximately US $10 million that KPM paid under protest would not be re-paid to KPM. *See* Statement of Claim ¶¶ 161-71; Reply on Jurisdiction and Liability ¶¶ 231-32, 234-36.

• November 13, 2008	Tax Committee notes that inclusion of Financial Police in inspections would be illegal, but proposes that a working group be established to discuss the inspection results (C-38)	ALL
• November 18, 2008	Financial Police issue resolution for inspection of any unpaid customs taxes by TNG (C-446)	ED
• November 25, 2008	Financial Police write to Ministry of Finance inquiring why, on October 2, 2008, the Customs Committee had "exonerated" KPM from oil export duties, given that KPM had provisionally paid the disputed duties (C-162). They later challenge a previous court decision in KPM's favor on this issue (*see* C-161).	ED
• December 23, 2008	Board of Appeal of Mangystau Regional Court overturns the November 19, 2008, decision of court of first instance on export tax, finding that KPM should pay export duties because oil is not a "good" (C-161)	ED
➔ KPM's provisionally paid export duties for 2008 are not reimbursed despite the previous (and future) decisions from the Customs Committee that export duties do not apply to KPM. In 2009, a "Rent Tax" replaces the export tax, but that does not stop the Financial Police from re-auditing KPM in September 2009 regarding alleged failure to pay 2008 export taxes.		ED
• December 30, 2008	Tax Committee issues Act of Inspection, claiming that TNG cannot deduct 100% of drilling expenses the year they are incurred for corporate income tax purposes (Exhibit 2 to Second Maggs Report)	CIT
• February 10, 2009	Tax Committee issues Acts of Inspection for KPM & TNG and claims that US $62 million is owed in corporate back taxes for improperly deducting drilling expenses (Exhibits 3, 4, 5, and 6 to Second Maggs Report; C-155)	CIT
• February 27, 2009	KPM & TNG submit complaints against imposition of alleged corporate back taxes (*see* C-156)	CIT
• March 3, 2009	NIPI Neftegaz and the Kazakh research and design institute of KazMunaiGas confirm to TNG that drilling of wells amounts to construction (Exhibits 18 and 19 to Second Maggs Report); thus, drilling expenses can be deducted 100% in the year incurred as expenses for own-account construction	CIT
• March 11, 2009	MEMR confirms to KPM that the drilling of wells amounts to construction (Exhibit 16 to Second Maggs Report); thus, drilling expenses can be deducted 100% in the year incurred as expenses for own-account	CIT

	construction	
• September 8, 2009	Specialized Interdistrict Economic Court (court of first instance) issues decision rejecting TNG's challenge to corporate back taxes (Exhibit 7 to Second Maggs Report)	CIT
• September 9, 2009	Specialized Interdistrict Economic Court (court of first instance) issues decision rejecting KPM's challenge to corporate back taxes (Exhibit 8 to Second Maggs Report)	CIT
• September 30, 2009	Financial Police order a new audit of KPM regarding alleged failure to pay 2008 export taxes (Condorachi WS ¶ 34)	ED
• October 22, 2009	Financial Police interrogate Mr. Condorachi regarding KPM's alleged obligation to pay 2008 export taxes (Condorachi WS ¶ 35)	ED
• October 28, 2009	Astana appellate court reverses and remands decisions on corporate back taxes of September 8 & 9, 2009, to the Specialized Interdistrict Economic Court (Second Maggs Report)	CIT
• November 3, 2009	Financial Police interrogate Mr. Cornegruta in jail regarding KPM's alleged obligation to pay 2008 export taxes (Condorachi WS ¶¶ 36-37)	ED
• December 25, 2009	Specialized Interdistrict Economic Court issues consolidated decision, again rejecting KPM's & TNG's challenges to corporate back taxes (Exhibit 9 to Second Maggs Report)	CIT
• December 29, 2009	Tax Committee concludes audit of transfer pricing and claims that KPM & TNG owe approximately 700 million Tenge (US $5 million) in unpaid transfer prices and penalties (C-137; C-138)	TP
➔ KPM & TNG commence legal action challenging transfer pricing claim, which was still pending as of the State's July 21-22, 2010, unlawful direct expropriation.		TP
• January 2010	KPM commences new legal proceedings challenging the Financial Police's claim that it owes 2008 export taxes on oil exports (Condorachi WS ¶ 36)	ED
• January 26, 2010	Kazakh Ministry of Finance commences bankruptcy monitoring of KPM, primarily as a result of allegedly-owed (although still disputed) back taxes (C-157)	ALL
• February 24, 2010	Customs Committee claims that both KPM and TNG are liable for unpaid oil export taxes (C-44; C-479)	ED

• March 31, 2010	Customs Committee retracts its February 24, 2010, claim and concedes that the Subsoil Use Contracts exempt KPM & TNG from export taxes (C-130)	ED
➔ After it served the purpose of harassing and extorting US $10 million as provisional payment from KPM, Kazakhstan effectively drops the oil export tax issue.		ED
• April 23, 2010	Astana appellate court reverses December 25, 2009, decision on corporate back taxes, and finds that KPM & TNG properly deducted drilling expenses (Exhibit 10 to Second Maggs Report)	CIT
• June 22, 2010	Kazakh Court of Cassation affirms appellate court decision on corporate back taxes, in favor of KPM & TNG (Exhibit 11 to Second Maggs Report)	CIT
➔ By July 2010, the June 22, 2010, decision from the Court of Cassation, which concluded that KPM and TNG did not owe back corporate income taxes, had entered into force. Thus, as of July 21-22, 2010, when Kazakhstan carries out its unlawful, direct expropriation of Claimants' investments, no corporate income taxes are due.		CIT
• July 21-22, 2010	Kazakhstan terminates KPM's and TNG's Subsoil Use Contracts without claiming that KPM and TNG owe outstanding corporate income taxes, transfer pricing taxes, or export duties.	ALL
• November 3, 2010	Months after the final expropriation, the Supreme Court of Kazakhstan issues supervisory decision, reinstating trial court's findings that corporate income tax assessment was proper (Exhibit 13 to Second Maggs Report; Balco opinion). Claimants had no notice of that proceeding and did not participate in it.	CIT
➔ At the January 2013 hearings, current trust manager at KazMunaiTeniz, Mr. Khalelov, confirms that no attempts have been made to recover allegedly outstanding taxes from KPM or TNG.		ALL

Additional Relevant Evidence

Exhibits not included above:

PwC Due Diligence Report, June 30, 2009, at 80, 161, C-724

Witness Testimony:

Second Maggs Report ¶¶ 6-33

Third FTI Report ¶ 6.109-6.112

Horton Report ¶ 62

First Condorachi Statement ¶¶ 32-37, 40-41

First Pisica Statement ¶ 54

Condorachi Testimony, Tr. October 2012 Hearing, Day 3, 5:25-6:25, 7:4-25, 8:3-5

Balco Testimony, Tr. January 2013 Hearing, Day 3, 57:20-24, 63:3-12, 84:7-17

Khalelov Testimony, Tr. January 2013 Hearing, Day 2, 151:3-19

Previous Submissions by Claimants

Statement of Claim ¶¶ 156-74, 258-317, 332-34, 351(d-f), 362, 371

Reply on Jurisdiction and Liability ¶¶ 231-39, 491-96, 512-5, 514, 524, 528, 532, 546

First Post-Hearing Brief ¶¶ 139-46, 238-61, 648-9

Oral Submissions:

Claimants' Opening Presentation on Quantum, slides 36, 52

Claimants' Opening Statement, Tr. January 2013 Hearing, Day 1, 67:15-69:18

Claimants' Closing Presentation, slides 6, 12

Relevant ECT and International Law Standards

- Fair and equitable treatment – ECT art. 10(1), C-1
- Impairment by unreasonable measures – ECT art. 10(1), C-1
- Umbrella clause – ECT art. 10(1), C-1

Final Remarks Regarding Claim No. 7

129. As the timeline above indicates, spurious tax claims are "Chapter One" of the "Kazakhstan playbook" for harassing foreign investors.[192] Upon receipt of President

[192] *See* Expert Report of Scott Horton, May 7, 2012, ¶¶ 62-7. Initiating baseless tax disputes against foreign investors that have fallen out of favor of the Government or that control strategic assets is a common tactic of some States that wish to shroud their expropriation efforts with an indication of legitimacy. The U.S. State Department has noted Kazakhstan's specific use of such a tactic (*see id.*), and the tribunal in the RosInvest case found that Russia used such a tactic to expropriate Yukos. *RosInvest v. Russia*, SCC Case No. Arb. V 79/2005, Final Award of September 12, 2010, **C-151**. The three different tax disputes that Kazakhstan raised against Claimants in the present case are no different, and indeed, a former Kazakh Supreme Court judge also acknowledged the practice. *See* Second Malinovsky Report at 10-11 (quoting

Nazarbeyev's order, the Financial Police — as if on cue — immediately ordered comprehensive tax "inspections" of KPM and TNG. The Financial Police did so on October 24, 2008, as the opening salvo of their campaign of harassment and coercion, and they actively "managed" the process until the Tax and Customs Committees dutifully produced "claims" to pursue.

130. Claimants have always maintained that three baseless tax disputes — concerning assessments of back corporate income taxes, transfer pricing, and oil export duties — formed part of Kazakhstan's onslaught of harassment that commenced immediately after October 14, 2008.[193] Kazakhstan has only focused on one of the three claims in its recent submissions — the corporate income tax dispute — because it seeks to use that dispute as a counterclaim or damages offset. However, that was only one of three distinct tax disputes that embroiled Claimants in lengthy audits, complaint processes, and litigation for the better part of two years.

131. Kazakh tax officials combed through all of KPM's and TNG's company records as part of the "comprehensive tax audit" that the Financial Police ordered in October 2008.[194] Those audits and inspections gave rise to no valid complaint regarding the companies' tax payments or filings. So at the urging of the Financial Police, the Tax and Customs Committees simply created baseless claims.[195] First, in November 2008, the Customs Committee claimed that a previous, disputed assessment of oil export duties, in an amount exceeding US $10 million, should be paid, despite both an initial court ruling and a previous concession from the Customs Committee that the companies were contractually exempt from such duties.[196] Second, in February 2009, the Tax Committee claimed that KPM and TNG owed US $62 million in corporate back taxes for failing to properly deduct

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Judge Tashenova who explained that as part of Kazakhstan's schemes of "corporate raiding," "any company, big or small, may be subjected to multiple checks and inspections by … tax authorities [and others] with each authority finding fault with the company").

193 Statement of Claim ¶¶ 19 c-d, 156, 161, 172; Reply on Jurisdiction and Liability ¶¶ 231-9; First Post-Hearing Brief ¶¶ 145-46.

194 Order from the Financial Police to the Tax Committee, October 24, 2008, **C-10**.

195 Statement of Claim ¶¶ 156-171; *see* Letter from Tax Committee to the Financial Police, November 13, 2008, **C-38** (where the Tax Committee states that the Financial Police cannot participate in audits, but proposes to establish a "working group" with them so that inspection results can be discussed).

196 Decision of the Board of Appeal of the Mangystau Regional Court, December 23, 2008, **C-161**; Letter from the Financial Police to the Executive Secretary of the Ministry of Finance, November 25, 2008, **C-162**.

drilling expenses.[197] Third, in December 2009, it claimed that KPM and TNG owed US $5 million in back transfer pricing taxes.[198]

132. Claimants have conclusively demonstrated that none of the three claims had any merit.[199] They were spurious assessments whose only purpose was to harass Claimants and, presumably, put pressure on Claimants to sell the assets of KPM and TNG to the State at fire-sale prices. While Claimants did not bow to that coercion, the tax claims embroiled KPM and TNG in many months of expensive, complex litigation, which consumed voluminous amounts of management time and made the companies even less attractive to potential purchasers.

133. In its recent submissions, Kazakhstan has exclusively focused on the corporate income tax dispute. Kazakhstan claims that the Tribunal should reduce any compensation it owes Claimants for breaching the ECT by the amount that KPM and TNG allegedly owe in corporate back taxes, which Kazakhstan claims (without any proof) is some US $81.2 million.[200] Thus, Kazakhstan has raised this issue as a counterclaim;[201] it has done so belatedly and solely to try to reduce the compensation it knows it owes Claimants.

134. Kazakhstan's treatment of this issue as a counterclaim means that, if the Tribunal were inclined to consider it, despite its untimeliness, Kazakhstan bears the burden of proving that its legal position is correct (*e.g.*, that the taxes are lawfully owed) as well as the amount of taxes owed. Kazakhstan has proved neither. Claimants explained in their First Post-Hearing Brief that the corporate income tax dispute is a cash-flow issue that exclusively

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197 Notices No. 28 and No. 29 to KPM and TNG from the Tax Committee, February 10, 2009, **C-155**; Act of Inspection of KPM for 2005-2007, February 10, 2009, **Exhibit 3** to Second Maggs Report; and Act of Inspection of TNG for 2005-2007, February 10, 2009, **Exhibit 4** to Second Maggs Report; Notice No. 28 to KPM from the Tax Committee dated February 10, 2009, **Exhibit 5** to Second Maggs Report; Notice No. 29 to TNG from the Tax Committee dated February 10, 2009, **Exhibit 6** to Second Maggs Report.

198 Notifications by the Tax Committee to KPM, December 29, 2009, **C-137**; Notifications by the Tax Committee to TNG, December 29, 2009, **C-138**.

199 *See* Timeline for Claim No. 7, *supra*; *see also* Statement of Claim ¶¶ 156-74; Reply on Jurisdiction and Liability ¶¶ 231-45.

200 Kazakhstan's First Post-Hearing Brief ¶¶ 1051, 1057-1062. When Kazakhstan first raised this claim, it contended that US $62 million was owed. Rejoinder on Quantum ¶¶ 13(e), 366-67. Kazakhstan has now increased its claim, based solely on an unsubstantiated statement in the PwC report. *See* Kazakhstan's First Post-Hearing Brief ¶ 1057 (citing PwC Due Diligence Report at 81, **R-359**). Kazakhstan has produced no underlying evidence demonstrating whether that figure is correct or how it was calculated.

201 Kazakhstan contended, in its Rejoinder on Jurisdiction and Liability, that KPM and TNG "suffered no detriment" as a result of the corporate back tax issue and therefore those taxes "cannot form the basis of any claim under the ECT." Rejoinder on Jurisdiction and Liability ¶ 368(a). It was only on December 1, 2012, in its Rejoinder on Quantum that Kazakhstan that Kazakhstan asserted that because the taxes are owed they should be deducted from any compensation awarded to Claimants. The untimeliness of that "counterclaim" is reason alone for the Tribunal to reject it.

concerns the timing of deductions for drilling expenses.[202] Thus, even if Kazakhstan's position on this issue were correct — which it is not — it is highly unlikely that KPM and TNG would owe more than a small fraction of the sum claimed by Kazakhstan, because KPM and TNG could have deducted all (or nearly all) of those drilling expenses by today.[203] Kazakhstan has not established that it would still be owed a single dollar as of today, much less proven its purported entitlement to US $81.2 million.

135. Kazakhstan's position on the substance of the issue is equally meritless. To begin with, as of Kazakhstan's valuation date — July 21, 2010 — the Kazakh courts had resolved the corporate back tax dispute and ruled that KPM and TNG owed no such taxes. Thus, Kazakhstan's assertion in its First Post-Hearing Brief that this claim continued to increase "until the valuation date of 21 July 2010" is patently wrong.[204] To the contrary, as of July 21, 2010, KPM's and TNG's corporate back tax liability was zero.

136. Kazakhstan "revived" the matter after the July 2010 direct expropriation, in bad faith, thus ensuring that Claimants would have no ability to defend their position before the Kazakh Supreme Court.[205] Additionally, and as Professor Maggs explains, the Kazakh Supreme Court's decision in November 2010 was substantively incorrect.[206] The Tribunal need only compare the "pre October 2008" world with the "post October 2008" world to confirm Professor Maggs' conclusion.

137. Before President Nazarbayev's directive, the Kazakh tax authorities had approved the manner in which KPM and TNG amortized their drilling expenses, and the Kazakh Supreme Court had approved the same deductions for other oil and gas companies.[207] It was only after Nazarbayev's order that the Tax Committee (under influence from the Financial Police) and later the Supreme Court changed positions on the proper timing of such deductions. While Kazakhstan claims it has since obtained a "blessing" from the Supreme Court for its position, it is telling that the State has made no effort to recoup the taxes from

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202 Claimants' First Post-Hearing Brief ¶¶ 251, 649.

203 FTI explained that the timing of the deductions means that the back taxes owed would equalize over time. Third FTI Report ¶¶ 6.109-6.111. PwC also noted this point in its due diligence report. *See* PwC Due Diligence Report, June 30, 2009, at 80, **C-724**.

204 Kazakhstan's First Post-Hearing Brief ¶ 1057.

205 Claimants' First Post-Hearing Brief ¶¶ 257-61.

206 Second Maggs Report ¶¶ 9-10, 24, 32.

207 Second Maggs Report ¶¶ 11-12.

KPM's and TNG's purported "trust" managers (who control the companies), even though the Kazakh Supreme Court allegedly ordered them due in November 2010.[208]

138. Placing the spurious corporate income tax assessment back into the proper context, the only rational conclusion is that it, along with the export duties and transfer pricing claims, were additional moves in Kazakhstan's coordinated attack against Claimants' investments. Along with Kazakhstan's other acts of harassment and coercion, the tax assessments were measures that, in the words of the *RosInvest* tribunal, were "linked to the strategic objective of returning petroleum assets to the control of the [State] and to an effort to suppress [an investor]."[209] Because that tribunal found that the State's measures were "structured in such a way to remove [the investment company's] assets from the control of [the investors]," it concluded that the State had committed an illegal, indirect expropriation.[210] The Tribunal should not hesitate to reach the same conclusion here.

139. Additionally, since the tax disputes were designed to harass Claimants, entangle them in frivolous litigation, and interfere with their operations, they amount to breaches of the ECT's "fair and equitable treatment" and "impairment" provisions.[211] Kazakhstan's spurious tax assessments also violated the terms of the subsoil use contracts, so they violate the ECT's umbrella clause as well.[212]

H. Claim No. 8: Kazakhstan Ignored Claimants' Repeated Pleas About the Mistreatment of Their Investments and Personnel

Synopsis

140. As soon as it became clear to Claimants that Kazakhstan had launched an unjustified campaign of harassment and coercion, they and their employees appealed to all levels of the Kazakh state for relief from the barrage they were experiencing. They continued to do so over the entire 20-month campaign. Claimants repeatedly appealed to senior officials (including President Nazarbayev), provincial officials (including the Governor of the

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208 When questioned about this at the January hearing, the companies' trust manager, Mr. Khalelov, had no knowledge of the claimed amounts and confirmed that no such amounts had been paid. Tr. January 2013 Hearing, Day 2, 151:3-19.

209 *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arb. V079/2005, Final Award, September 12, 2010, ¶ 617, **C-151**.

210 *Id*. ¶ 621, **C-151**.

211 *See* Section III. A, *supra*, regarding Claim No. 1; *see also* Statement of Claim ¶¶ 337-62; Reply on Jurisdiction and Liability ¶¶ 497-535.

212 *See* Statement of Claim ¶¶ 363-72; Reply on Jurisdiction and Liability ¶¶ 536-47.

Mangystau region), the General Prosecutor's Office, and multiple other agencies and authorities. Specifically, Claimants, KPM, and TNG complained about the illegal actions of the Financial Police, the baseless tax assessments lodged against them, the seizure of official corporate documents, the interrogation of employees, and the arrest, detention, and prosecution of Mr. Cornegruta.

141. Claimants' pleas for assistance were ignored — either outright or through bureaucratic "passing of the buck" — and never resulted in a meaningful response. In a case with no much deplorable state conduct, Kazakhstan's utter refusal to acknowledge or respond to Claimants' complaints and pleas stands out as noteworthy and chilling. It is abundantly clear that every level and agency of the Kazakh state apparatus "knew the score" in relation to the campaign that was being waged against Claimants' investments and personnel, and nobody saw fit to intercede on Claimants' behalf. KPM and TNG were "marked," and everyone knew it.

142. Kazakhstan's abject failure to respond or intervene in the face of manifestly wrongful, harmful treatment of Claimants' investments and personnel is yet another breach of the ECT's "fair and equitable treatment" and "most constant protection and security" standards. It also puts the final nail in the coffin of Kazakhstan's claim that the campaign of harassment and coercion was not coordinated and understood by all of the state actors involved.

Timeline

• November 7, 2008	Mr. Stati submits letter to President Nazarbayev in response to onslaught of inspections, assuring him that his companies always complied with Kazakh law (C-700).
• January 19, 2009	KPM and TNG submit complaints to the Financial Police, the General Prosecutor's office, the Ministry of Justice, and the MEMR describing the illegal actions of the Financial Police and the fact that their pipelines are not "main" pipelines (C-46; C-622; C-620; C-621; C-96; C-623; C-624).
• January 20, 2009	KPM and TNG submit complaints to the Transport prosecutor for Mangystau region, describing the illegal actions of the Financial Police and the fact that their pipelines are not "main" pipelines (C-626 and C-627).
• January 21, 2009	Transport prosecutor of Mangystau region forwards KPM's and TNG's complaints to prosecutor for Western Region (C-628).

• January 22-23, 2009	General Prosecutor's Office forwards KPM's and TNG's complaints to Regional prosecutor (*see* C-629).
• January 27, 2009	Transport prosecutor forwards KPM's and TNG's complaints to prosecutor for the Western Region (*see* C-629).
• January 29, 2009	KPM and TNG send complaints to Financial Police regarding seizure orders and again request a copy of the order serving as the basis for the criminal investigation (C-629 and C-630).
• January 30, 2009	Deputy transport prosecutor for the Western Region informs KPM and TNG that complaints are under investigation pending responses from the Financial Police (C-629 and C-630).
• February 2, 2009	Financial Police respond to KPM & TNG stating that actions are legal and rejecting their request for criminal investigation order on the grounds that no person is the subject of the investigation (C-629 and C-630).
• February 4, 2009	KPM and TNG write the Agency for Regulation of Natural Monopolies asking to be included in any analysis underway regarding classification of their pipelines (C-629 and C-630).
• February 4, 2009	General Prosecutor's Office forwards complaints of KPM and TNG to the Transport Prosecutor of Mangystau region (C-629 and C-630).
• February 5, 2009	KPM and TNG write to the MEMR asking to be included in any analysis underway regarding classification of their pipelines (C-629 and C-630).
• February 5, 2009	Transport Prosecutor of Mangystau region forwards complaints of KPM and TNG to First Deputy Transport Prosecutor of the Western Region (C-629 and C-630).
• February 13, 2009	MEMR writes KPM and TNG, stating that it is not competent to resolve their complaints and suggesting they write to the prosecutor's office (C-629 and C-630).
• February 27, 2009	KPM & TNG submit complaints to Tax Committee regarding claim of alleged US $62 million in corporate back taxes (C-156).
• March 18, 2009	KPM & TNG submit a new complaint to the General Prosecutor's Office regarding the baseless criminal claims (C-154; *see also* C-96).
• March 24, 2009	KPM & TNG send a complaint to President Nazarbayev (C-631).
• March 30, 2009	Western Regional transport prosecutor sends a letter to KPM and TNG stating that complaints are under investigation and notes that it has received nothing from the Financial Police in response to inquiries (C-629 and C-630).

• May 7, 2009	Mr. Stati, Ascom, and Terra Raf submit complaint to President Nazarbayev and other executives, putting them on notice of international arbitration (C-43).
• May 20, 2009	Lawyers for Mr. Cornegruta submit complaint to Regional Prosecutor's office regarding his illegal arrest (C-658).
• June 15, 2009	Mr. Cornegruta submits petition to stop the criminal proceedings against him (C-478).
• June 30, 2009	Mr. Cornegruta submits motion to court to stop criminal proceedings, which is rejected the following day (C-601; *see also* C-602).
• February 23, 2010	Following separate complaints sent by Ascom, Terra Raf, and KPM, Mr. Stati writes to the Akim of Mangystau Region seeking his assistance in resolving the companies' legal problems (C-664).
• February 25, 2010	Mr. Stati submits a second letter to the Akim of Mangystau Region, seeking his assistance (C-666).

Relevant Witness Evidence

First Pisica Statement ¶¶ 23, 30, 42, 45-46, 54, 60

First Condorachi Statement ¶¶ 13, 19-20, 23, 40

First Romanosov Statement ¶ 31

First Stati Statement ¶ 25, 28

Second Stati Statement ¶¶ 11, 37, 39

Condorachi Testimony, Tr. October 2012 Hearing, Day 2, 132:1-133:4

Lungu Testimony, Tr. October 2012 Hearing, Day 2, 12:24-13:23

Kravchenko Testimony, Tr. October 2012 Hearing, Day 4, 44:3-13, 104:15-17, 105:2-21

Rakhimov Testimony, Tr. October 2012 Hearing, Day 5, 84:11-14, 85:19-86:12

Previous Submissions by Claimants

Written Submissions:

Statement of Claim ¶¶ 96-97, 109-110, 113, 122, 135, 234, 332-33, 350-51

Reply on Jurisdiction and Liability ¶¶ 221, 322, 494, 511

Claimants' First Post-Hearing Brief ¶¶ 205-10

Oral Submissions:

Claimants' Opening Presentation on the Merits, slide 27

Claimants' Opening Statement, Tr. October 2012 Hearing, Day 1, 99:11-18

Relevant ECT and International Law Standards

- Most constant protection and security – ECT art. 10(1), C-1
- Fair and equitable treatment – ECT art. 10(1), C-1

Final Remarks Regarding Claim No. 8

143. The timeline above summarizes the dozens of complaints submitted by Claimants to various Kazakh authorities about the various forms of mistreatment they were suffering. Claimants, KPM, and TNG complained to the President, the General Prosecutor's Office, the Financial Police, the Ministry of Justice, and numerous other authorities regarding the illegal actions of the Financial Police, the fabrication of the criminal charges lodged against them, the targeting of their employees, the seizures of their documents, the spurious tax claims, and the harms suffered by their businesses as a result of the Government's acts. Claimants repeatedly asked that, if nothing else, they be kept informed of the measures being taken against them, be allowed to understand the legal and factual bases for those measures, and be permitted to comment on the various charges and allegations.

144. Every single one of those pleas fell upon deaf ears. Kazakhstan has not pointed to a single meaningful step it took in response to Claimants' pleas and complaints. Nor has it identified any measure it took to assist Claimants — or even simply make the situation slightly more tolerable — between October 2008 and July 2010. Rather than providing an environment in which KPM and TNG enjoyed "the most constant protection and security," as mandated by the ECT, that period of time consisted entirely of attacks and willful "turning a blind eye" from every level of the Kazakh state apparatus.

145. It is clearly established in treaty jurisprudence that the "full protection and security" obligation common to many BITs establishes a minimum standard of "diligence" that host States must provide in relation to the physical and legal protection of investors and their investments.[213] The corresponding duty of "most constant protection and security"

[213] Statement of Claim ¶ 320.

found in the ECT is a more stringent standard. Here, the distinction is academic. Even under the "lower" standard of "diligence," Kazakhstan abjectly failed to provide any meaningful measure of physical or legal protection. Rather, its officials either participated in the harassment or sat back and watched as their counterparts in the government waged a relentless campaign against Claimants' investments and personnel.

146. In *Siag v. Egypt*, the tribunal found that Egypt carried out its illegal activities in breach of the relevant investment treaty "in opposition to explicit pleas for protection" from claimants. Egypt's failure to respond to the investors' repeated requests for assistance led the *Siag* tribunal to conclude that Egypt's conduct "fell well below the standard of treatment that the Claimants could reasonably have expected" and breached its duty to provide "full protection and security." That case drew on the findings in *Wena Hotels v. Egypt*. In *Wena*, the tribunal considered that Egypt's failure to take any action to prevent illegal actions by state authorities constituted a breach of both the "full protection and security" and "fair and equitable treatment" standards.[214]

147. Kazakhstan's conduct in the present case clearly violates the ECT's "most constant protection and security" and "fair and equitable treatment" standards. The best indication of Kazakhstan's attitude toward Claimants during the relevant time period is to compare its utter lack of response to Claimants' dozens of complaints over many months with its amazingly swift, same-day response to the hand-written complaint of four unknown residents of the Mangystau region in July 2010. The Tribunal will recall that, allegedly upon receipt of that two-page complaint, the General Prosecutor's Office in Astana immediately unleashed no fewer than seven different agencies to travel to Mangystau and assess the "dire" situation at KPM and TNG alleged in the letter.

148. Kazakhstan can apparently respond to complaints with uncommon efficiency when it wants to do so. It simply never did so in response to Claimants' complaints, for obvious reasons.

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[214] *Wena Hotels, Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000 ¶ 84, **C-216**. In that respect, it is also worth noting the finding in *Saluka v. Czech Republic*, where the tribunal concluded that the State's failure to respond to claimants "in any constructive way" amounted to a breach of the fair and equitable treatment provision. *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, **C-259**.

I. Claim No. 9: Kazakhstan Strung Claimants Along in Relation to the Extension of Contract No. 302 and then Failed, in Bad Faith, to Execute the Agreed Extension

Synopsis

149. On October 14, 2008, Claimants requested that Kazakhstan extend the exploration period of Contract No. 302 for two years, or until March 30, 2011. Claimants reasonably relied on their historical, cooperative and good faith relationship with Kazakhstan in expecting that Contract No. 302 would be extended past March 2009. As of the date of TNG's application in October 2008, Claimants had no reason to suspect that Kazakhstan would refuse the extension (and, indeed, Kazakhstan had no reason to refuse it). Claimants likewise legitimately expected that their request would be dealt with promptly and efficiently, and that if for some reason it were not granted, they would move to declare a commercial discovery on their Munaibay property (where they had already discovered reserves).

150. Kazakhstan unreasonably failed to respond for five months. Finally, in both March and April 2009, Kazakhstan gave Claimants the answer they expected, specifically assuring them that the extension request was granted. At that point, Claimants understood that the extension had been agreed, and they legitimately expected that the necessary addendum to the contract would be executed. Indeed, the evidence shows that Kazakhstan (as well as three different third-party advisors to KMG E&P) also considered Contract No. 302 in force, until Kazakhstan unilaterally terminated the contract in July 2010.

151. However, after having unreasonably strung Claimants along and then having agreed to the extension, Kazakhstan failed to fulfill its commitment to extend the exploration term in Contract 302, thus depriving Claimants of both the opportunity to prove the full reserves in the Contract 302 Properties through further exploration and of their right to exploit their discoveries in the Munaibay and Bahyt fields.

Timeline

• July 24, 2008	**TNG notifies MEMR of a significant discovery at the Munaibay No. 1 well and its intention to appraise that discovery (C-20).**
• August 11, 2008	TNG files application for appraisal phase for Munaibay No. 1 (C-21).
• October 10, 2008	TNG retracts the appraisal application in favor of continuing exploration throughout the entirety of the Contract 302 Properties (C-66).

• October 14, 2008	**TNG files application to extend the exploration period of Contract No. 302 (C-67).**
• March 9, 2009	**TNG notifies MEMR of a second discovery at Munaibay and a discovery at Bahyt and, because there has been no response on its extension request, declares its intention to appraise those discoveries (C-167).**
• March 19, 2009	**Claimants attend a meeting with MEMR regarding their outstanding extension request, during which the MEMR assures Claimants that the extension will be granted (C-42 and C-111).**
• April 2, 2009	**Expert Commission of the MEMR issues a resolution to "permit the extension of the exploration period for two years" and amend Contract 302 accordingly (R-163.2).**
• April 9, 2009	**MEMR notifies TNG of its agreement to extend Contract 302 and undertakes to execute the amendment by July 2, 2009 (R-163.1 and C-27).**
• April 30, 2009	TNG submits draft Addendum No. 9 to the MEMR to sign in order to formally amend Contract No. 302 (C-168).
• July 2, 2009	MEMR's self-imposed deadline to extend Contract No. 302 passes with no action from MEMR (*see* R-163.1).
• September 17, 2009	TNG writes MEMR regarding the promised Contract 302 extension and requesting execution of Addendum No. 9 (C-169).
• December 28, 2009	TNG writes MEMR again requesting execution of Addendum No. 9 (C-170).
• January 14, 2010	MEMR invites KPM and TNG to a working group meeting to discuss the amendment, to take place on January 21, 2010 (C-461).
• January 21, 2010	KPM and TNG are informed upon arrival at the MEMR's office that the working group meeting has been cancelled due to the need to conduct an unscheduled inspection of their operations (*see* C-462).
• January 25-February 5, 2010	MEMR notes that it is still considering draft Addendum No. 9 to Contract 302 (C-386).
• January 25-February 5, 2010	MEMR inspection team notes that Kazakhstan has delayed providing necessary protocols to KPM & TNG because of its failure to execute the extension (C-599).
• May 6, 2010	MEMR writes TNG asking why its Contract 302 working conditions are not fulfilled (C-172).
• May 7, 2010	MEMR writes TNG again asking why its Contract 302 working conditions are not fulfilled (C-173).

• July 14, 2010	MOG sends a notice of alleged contract violations, which treats Contract No. 302 as still in force (C-7).
• July 22, 2010	MOG sends TNG a notice of termination of Contract 302 alleging, for the first time, that Contract 302 had expired in March 2009, but failing to explain how a contract that had already expired could be terminated (C-5; *see* C-190).

Additional Relevant Evidence

Exhibits not listed above:

Squire Sanders Legal Due Diligence Report noting that the MEMR had agreed to extend Contract No. 302, July 30, 2009, at 152, 161 (C-725)

PwC Due Diligence Report noting that the MEMR had agreed to extend Contract No. 302, June 30, 2009, at 31 (C-724)

RBS 2009 Asset Valuation noting that the MEMR had agreed to extend Contract No. 302, July 31, 2009, slide 8 (C-723)

Witness Testimony:

Second Suleymenov Report ¶¶ 53-65

Third Suleymenov Report ¶¶ 19-24

First Stati Statement ¶¶ 14-15, 32

First Lungu Statement ¶¶ 35-36, 47-50

First Pisica Statement ¶¶ 24-25, 33, 40

Stati Testimony, Tr. January 2013 Hearing, Day 2, 84:11-19, 114:25-115:15

Lungu Testimony, Tr. January 2013 Hearing, Day 1, 250:22-25

Cojin Testimony, Tr. January 2013 Hearing, Day 2, 64:7-19, 65:1-11

Romanosov Testimony, Tr. January 2013 Hearing, Day 2, 67:1-68:17

Mynbaev Testimony, Tr. October 2012 Hearing, Day 3, 113:19-23, 115:13-18, 126:15-20; 127:5-10

Ongarbaev Testimony, Tr. October 2012 Hearing, Day 6, 68:11-69:2; 69:6-7

Previous Submissions by Claimants

Statement of Claim ¶¶ 66-68, 175-79, 197-98, 208, 215, 217, 224, 258-317, 351(c, f), 332, 335, 362, 371

Reply Memorial on Jurisdiction and Liability ¶¶ 240-45, 478-79, 514-16, 524, 533, 546

Claimants' First Post-Hearing Brief ¶¶ 221-37, 289-91, 369-77

Oral Submissions:

Claimants' Opening Presentation on the Merits, slides 42-43

Claimants' Opening Statement, Tr. October 2012 Hearing, Day 1, 129:19-130:25

Claimants' Opening Statement, Tr. January 2013 Hearing, Day 1, 10:13-16

Claimants' Closing Presentation, slides 2, 6, 13-14, 18

Claimants' Closing Statement, Tr. May 2013 Hearing, Day 1, 8:13-13:22, 146:1-147:20

Claimants' Rebuttal Closing Presentation, slide 6

Relevant ECT and International Law Standards

- Unlawful expropriation – ECT art. 13(1), C-1
- Fair and equitable treatment – ECT art. 10(1), C-1
- Impairment by unreasonable measures – ECT art. 10(1), C-1
- Umbrella clause – ECT art. 10(1), C-1

Final Remarks Regarding Claim No. 9

152. A review of Claimants' and Kazakhstan's historical course of dealing with respect to Contract 302 demonstrates that Claimants, at the time they requested a further extension of the exploration period in October 2008, reasonably and legitimately expected Kazakhstan to grant the extension.

153. Kazakhstan and TNG entered into Contract No. 302 in 1998. Under the terms of that agreement, TNG undertook to make certain minimum investments in exploration operations for an initial period of six years.[215] Contract No. 302 also envisaged the possibility of extending the exploration term twice, for two-year periods each, which would allow TNG to continue exploration operations beyond the original six year term in exchange for continuing to make investments in the contract area.[216] In other words, TNG and

[215] Contract No. 302, cl. 3.1, **C-53**.
[216] Contract No. 302, cl. 3.3, **C-53**.

Kazakhstan could agree to extend the exploration period twice, on the condition that TNG make additional investments in exploration beyond the original, minimum requirements.

154. In the event that TNG at any time made a commercial discovery of hydrocarbons, Contract No. 302 gave TNG the exclusive right to enter into a production contract to exploit that discovery.[217] The contract defined "commercial discovery" as a discovery of one or more fields that the contractor (*i.e.*, TNG) deemed worthy of being developed commercially.[218] If TNG made no commercial discovery, it was required to relinquish the Contract Area upon termination of the contract and would not be entitled to reimbursement of its exploration expenses.[219]

155. Claimants knew that the Contract 302 Properties held significant potential reserves and were committed to discovering and producing those reserves. However, TNG was not able to do so in the original six year term of the Contract, which was set to expire in July 2004. Thus, in December 2003, in good faith and in a timely fashion, Kazakhstan granted TNG's first extension request in exchange for TNG undertaking to make significant additional investments, which extended the exploration period for two years, or until July 2006.[220]

156. Before the extended exploration period even began, however, in January 2004, the Caspian Sea flooded the Munaibay prospect, which made further exploration temporarily impossible. The July 2006 term passed without any additional, formal amendment to Contract No. 302, but neither Claimants nor Kazakhstan considered the Contract terminated as a result. Rather than raise any claim of non-fulfillment of TNG's investment obligations or deem the contract terminated, Kazakhstan instead (and once again) negotiated with TNG in good faith and, in January 2007, extended the term of exploration to account for the *force majeure* circumstance resulting from the flood.[221] The parties agreed to extend the exploration period of Contract No. 302 until March 30, 2009, and they also agreed that this additional extension would not count as TNG's "second" two-year extension available under the original terms of the contract.[222] That is an example of the cooperative relationship and

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[217] Contract No. 302, cl. 6.1.2 and 8.7, **C-53**.

[218] Contract No. 302, cl. 1.10, **C-53**.

[219] Contract No. 302, cl. 8.9, **C-53**.

[220] Contract No. 302, Supplement No. 3 of December 19, 2003, **C-53**.

[221] Contract No. 302, Supplement No. 5 of February 7, 2007, **C-53**.

[222] *Id*.

course of dealing that Claimants enjoyed with Kazakhstan prior to President Nazarbayev's October 14, 2008, order.

157. In July 2008, TNG made its first significant discovery in the Contract 302 Properties, specifically at the Munaibay prospect.[223] TNG initially submitted its application and work program to appraise that finding (the first step in determining whether TNG would declare a commercial discovery on that prospect), but retracted that application in October 2008, after determining that Contract 302 held even greater reserves.[224] TNG committed to continue exploration, which meant continuing to invest millions of dollars developing the Contract 302 Properties. On October 14, 2008, TNG applied for its second, two-year extension to Contract 302, fully expecting Kazakhstan to continue cooperating with it in good faith and grant the extension.[225]

158. Claimants invested in excess of US $50 million in exploration works on the Contract 302 Properties pursuant to their exploration contract and in full compliance with all the pertinent requirements of Kazakh law.[226] In light of the parties' past course of dealing, and because Kazakhstan stood to benefit from Claimants' continued investment and thorough exploration work in the Contract Area, TNG reasonably expected that the application procedure was merely a formality. Thus, it is not the case, as Kazakhstan argues, that as of October 14, 2008, Claimants had no legitimate expectation that Contract No. 302 would be extended.[227] On the contrary, Claimants most certainly had a legitimate expectation that Kazakhstan would behave in good faith and grant the final extension in a timely and efficient manner, as it had done on two prior occasions.[228]

159. Indeed, if Claimants had not fully and legitimately expected the MEMR to grant the second extension to Contract No. 302, they would have appraised either the July

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223 Letter from TNG to the Geology and Subsoil Use Committee of the MEMR, July 24, 2008, **C-20.**

224 Letter from TNG to the MEMR, October 10, 2008, **C-66**.

225 Application from TNG to the MEMR, October 14, 2008, **C-67**.

226 First FTI Report, Scope of Review, Document No. 37.

227 Respondent's Closing Submission, slide 33.

228 The parties' past course of dealing and, in particular, the "circumstances surrounding" Claimants' investments can give rise to legitimate expectations that Kazakhstan must honor. *See Parkerings Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, September 11, 2007 ¶ 331, **R-1**. The Parkerings tribunal developed a three-part test to determine whether host State conduct gave rise to an investor's expectations are legitimate: (i) whether the state gave the investor an explicit promise or guarantee; (ii) whether the state gave implicit promises or guarantees that the investor relied upon in making its investment; or (iii) in the absence of those assurances or representations, whether the surrounding circumstances gave rise to the investor's expectation. *Id*.

2008 discovery at Munaibay or the March 2009 discoveries at Munaibay and Bahyt (or all three) and declared commercial discoveries, which would have given them the exclusive right to produce oil and gas from those fields.[229] Notably, a commercial discovery on Munaibay would have included a substantial portion of the Interoil Reef, which is a deep-lying reservoir in the Munaibay field.[230]

160. In making their extension request, Claimants not only legitimately expected that it would be dealt with fairly and reasonably, but also promptly and efficiently. If there were some unforeseeable reason for the MEMR not to grant the request, Claimants expected the MEMR to make that decision promptly and notify them accordingly. That would have enabled Claimants to understand where they stood on their request and shift gears toward undertaking their appraisal work and declaring commercial discoveries at Munaibay and (subsequently) Bahyt.[231]

161. However, instead of timely responding to TNG's October 14, 2008, extension request — either by extending the contract in good faith as it had done on two previous occasions or by informing Claimants of (what would have been an entirely unexpected) decision not to grant the extension — Kazakhstan strung Claimants along by failing to respond. Kazakhstan ignored TNG's request until March 2009, on the eve of the end of the exploration term. Then, on March 19, 2009 — before the exploration term ended — senior MEMR representatives assured Claimants that the extension would be granted. On that day, the MEMR Executive Secretary met with representatives of Claimants to discuss the State's

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[229] In addition to the explicit contractual right to exclusive production on commercial discoveries, the Kazakh Law on Oil, art. 26(4), also enshrines that right of TNG. It states: "In case of discovering oil, the contractor has right to extend the duration of the contract for the period required for appraisal of the commercial discovery." **Exhibit 4f** to Ilyassova Report.

[230] Under Contract 302, the Contractor's rights to enter the Appraisal Stage and to declare a Commercial Discovery apply to a Field, not to particular reservoirs within a Field. *See* Contract No. 302, §§ 3.4, 8.4, 8.9, **C-53**. Likewise, the duty to relinquish the Contract Area at contract expiration expressly excepts "the territory of Commercial Discovery and Appraisal area." *Id*., § 4.2. Thus, if TNG had entered the Appraisal Stage and/or declared a Commercial Discovery on the Munaibay field, it would not have relinquished that area at contract expiration, and would have been entitled to produce all hydrocarbons at any depth from the area it retained. Slide 23 of Respondent's Opening Submission on Quantum shows the location of the reef prospect (based on the 2D data) having a significant overlap with the Munaibay and North Munaibay fields. The 3D seismic data shows that the reef prospect is smaller in area and located further south than on the 2D data, having even greater overlap with the Munaibay and North Munaibay fields. *See* Third GCA Report, Figure 6.1.

[231] *See Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, March 17, 2006 ¶¶ 303, 307-8, **C-259**; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003 ¶¶ 154, 173-4, **C-587**.

unfair refusal to even respond to Claimants' application. The minutes of that meeting state, in relevant part:

> Lungu A. took the floor, underlining the importance of the extension of the exploration term according to Contract no. 302 of July 31, 1998, because the contractual term expires on March 30, 2009 and there is a little time left. Special importance has also been assigned to the fact that according with this contract "Tolkynneftegaz" LLP declared the discovery of the oil and gas deposits on [Munaibay] platform on July 20th, 2008 and on March 8th, 2009, as well as on Bahyt platform on March 6th, 2009, and notified MEMR on July 24th, 2008 and March 16th, 2009. According to these circumstances, "Tolkynneftegaz" LLP holds the exclusive right to perform the exploration and extraction works on the discovered oil and gas Deposits. Mr. Batalov A.B. ensured the persons present that MEMR will issue a positive decision regarding this technical issue no later than March 20, 2009.[232]

162. At the March 19, 2009, meeting, Claimants understood that the extension had been agreed and that a "positive decision" would be forthcoming, as reflected in the minutes. March 20, 2009, passed without any action by the MEMR. However, on April 9, 2009, the MEMR issued the "positive decision" that it promised on March 19.[233] That letter was the MEMR's second express undertaking to Claimants to extend the exploration period of Contract No. 302. Thus, as of April 9, 2009, Claimants' understanding that the extension was agreed had been confirmed, and Claimants legitimately expected the necessary addendum to be executed by the MEMR's self-imposed deadline of July 2, 2009.

163. In its closing arguments, Kazakhstan emphasized its new contention that the MEMR's decision to grant the extension in April 2009 occurred after Contract No. 302 allegedly expired on its own terms, thus rendering this issue a "pre-contractual" dispute.[234] That is not correct. First, as stated above, Kazakhstan expressly undertook to extend the exploration period first on March 19, 2009, before the end of the contract term. Second, even

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[232] Draft Minutes of Meeting between the MEMR and Claimants, March 19, 2009 (emphasis added), **C-42**; *see also* Pisica Statement ¶ 34.

[233] Letter from the MEMR to TNG, April 9, 2009, **R-163.1**. Kazakhstan contends that this decision cannot constitute an extension because "Why would the MEMR commit itself to extend when at this time [the] 'harassment campaign' allegedly was in full swing?" Respondent's Closing Submission, slide 30. Although Claimants can only speculate on the reasons behind the MEMR's decision, one possible explanation is that if Kazakhstan exercised its (inapplicable) pre-emptive right over TNG, then it would benefit from both Contract No. 210 and Contract No. 302. In any event, Claimants are not required to establish (much less explain) Kazakhstan's motive.

[234] Respondent's Closing Submission, slide 29.

if the decision to grant the extension occurred after the exploration period expired (which Claimants deny) the parties' prior course of dealing under Contract No. 302 demonstrates that it would not have mattered: Kazakhstan granted the *force majeure* extension six months after the previous exploration period had passed, with no consequence to the validity of the Contract. Third, the contemporaneous facts undermine Kazakhstan's claim that Contract 302 simply expired on March 30, 2009, on its own terms, because multiple entities (including the MEMR and the Financial Police) treated the Contract as remaining in force.[235]

164. Notably, on April 30, 2009 — after the Contract allegedly "expired" — the Financial Police ordered the sequestration of Contract No. 302.[236] No mention was made of any claim that the Contract was expired; rather, the Financial Police sequestered it as part of their plan to enforce an unlawful penalty against Claimants for KPM and TNG operating "main" pipelines without licenses.

165. Additionally, throughout 2010, the MEMR acted as though Contract 302 was still in force. For example, on January 14, 2010, in a (belated) response to repeated inquiries from TNG regarding the status of the extension addendum, the MEMR invited KPM and TNG to a working group meeting to discuss the matter.[237] Next, after inspecting KPM and TNG again at the end of January and beginning of February 2010, the MEMR noted that it was still analyzing TNG's draft addendum.[238] Then, on two occasions in May 2010, the MEMR (which by then had become the Ministry of Oil and Gas ("MOG")) wrote TNG asking why various work requirements under Contract 302 had not been fulfilled.[239] And again, on July 14, 2010, the MOG raised a number of (baseless) allegations claiming that TNG was in violation of Contract 302, without ever claiming that Contract 302 had expired

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235 Kazakhstan disputes the contention that it treated Contract 302 as if it had been extended (Kazakhstan's First Post-Hearing Brief ¶¶ 345-8), but the overwhelming contemporaneous evidence supports Claimants' position.

236 Order to arrest TNG's Contract Nos. 210 and 302, April 30, 2009, **C-491**.

237 Letter from the MEMR to KPM and TNG, January 14, 2010, **C-461**. However, upon arrival at the meeting, KPM and TNG were informed that it had been cancelled due to the need to once again inspect KPM's and TNG's operations. *See* Letter from TNG to MEMR, February 16, 2010, **C-462**.

238 Reports of the MEMR for TNG, January 25-February 5, 2010, **C-386**. "Minutes on the results of the extraordinary verification of the fulfillment of the contractual and licensing obligations by TOO Tolkynneftegaz," ("Information concerning the Gas Processing Plant"), January 25-February 5, 2010, **C-599**.

239 Notice from the Committee for Geology and Subsoil Use to TNG, May 6, 2010, **C-172**; Letter from the MOG to TNG, May 7, 2010, **C-173**.

in March 2009.[240] That notice clearly reads as if Kazakhstan believed the Contract was still in force. It states:

> … you [TNG] are obliged within 5 (five) days from the date of receipt of this Notice, i.e. until 19th July 2010, to provide explanations on reasons of non-execution of the contract terms [stated herein] and to provide all the necessary documents confirming the remedy of the above-mentioned violations, as well as to inform us on measures taken in order to avoid the breach of contract terms.
>
> In case of failure to comply with the request set forth in this Notice within the above-indicated time period, the competent body has the right to terminate the Contract pursuant to par. 3 of Article 72 of LRK.[241]

That Notice clearly indicates that the Contract had not simply expired on its own; rather, the MOG considered that it could terminate the Contract due to allegedly unfulfilled contractual requirements.

166. On July 22, 2010, Kazakhstan actually terminated Contract No. 302.[242] Although Kazakhstan now claims that it was merely informing Claimants (sixteen months after the fact) that Contract No. 302 had expired on its own terms in March 2009, it provides no explanation for all of its post-March 2009 conduct treating the Contract as still in force. Moreover, there were a number of steps that TNG, as subsoil user, needed to take when the Contract term actually ended, which the MOG only requested TNG to carry out on July 22, 2010, when it terminated Contract No. 302. The MOG stated:

> [Y]ou shall submit to the Competent Body within one month the following documents and materials:
>
> 1. Contract No. 302 of July 31, 1998 (original);
>
> 2. A summary report on operations of the company with respect to fulfillment of contract obligations, as well as a note on actual financial expenses incurred for carrying out subsoil use operations from the moment of issuance of the Contract;
>
> 3. An act on return of geological information (article 80 of the Law of RK "On Subsoil and Subsoil Use");

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[240] Notice of infringement of obligations under the Tolkyn Subsoil Use Contract No. 302 from MOG to TNG (emphasis added), July 14, 2010, **C-7**.

[241] *Id*.

[242] Notification No. 14-05-5182 from MOG to TNG terminating Subsoil Use Contract No. 302, July 22, 2010, **C-5**.

4. An act on return of contract territory.[243]

Thus, if the MEMR had considered that Contract No. 302 terminated in March 2009, it would have taken the necessary action to ensure a proper return of the Properties. It did not do so until July 2010, because it always considered Contract No. 302 in force.

167. The MEMR was not the only body that held that view. As of June and July 2009, the State-owned oil company KazMunaiGas and its independent advisors also considered that Contract No. 302 was in force and would expire in March 2011. RBS clearly determined that "TNG holds [an] exploration license [for] the Tabyl block" which "expires on 30 March 2011."[244] Similarly, PwC noted that "TNG has already received an approval from MEMR to extend the exploration period until 30 March 2011."[245] Squire Sanders also confirmed that "TNG is engaged in the exploration period in accordance with the MEMR permit until 30 March 2011" and "the expected expiry date of Contract No. 302 is 30 March 2011."[246] Thus, Kazakhstan's contentions that the Contract 302 expired on March 30, 2009, is clearly without merit.

168. Kazakhstan maintains its incorrect claim that this matter is a "pre-contractual" dispute solely to try to decrease the damages it owes Claimants for failure to permit them to either declare a commercial discovery at Munaibay or Bayht (or both) or to prove all of the existing reserves in the Contract 302 Properties through further exploration. However, Kazakhstan's factual premise is wrong. This is not a "pre-contractual" dispute, because Kazakhstan clearly understood that it had agreed to the extension and considered Contract No. 302 in force. Therefore, Kazakhstan's claim that Claimants are limited to recovering only the funds they expended in reliance on the April 9, 2009, promise[247] is also wrong.

169. More fundamentally, even if Kazakhstan were correct on the facts (which it is not), Claimants would not be limited to "reliance" damages, because Claimants' claim is not for breach of contract or for reliance on a pre-contractual commitment. Rather, it is a two-part claim under the relevant standards in the ECT.

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243 Notification No. 14-05-5182 from MOG to TNG terminating Subsoil Use Contract No. 302, July 22, 2010, **C-5**.

244 RBS 2009 Asset Valuation, July 31, 2009, slide 8, **C-723**.

245 PwC Due Diligence Report, June 30, 2009, at 31, **C-724**.

246 Squire Sanders Legal Due Diligence Report, July 30, 2009, at 161 (*see also* at 152), **C-725**.

247 Kazakhstan's First Post-Hearing Brief ¶¶ 702-07.

170. First, Kazakhstan violated Claimants' legitimate expectation as of October 2008 that their extension request would be dealt with fairly and either: a) granted, consistent with the parties' previous course of dealing in relation to extensions of the exploration term for Contract No. 302; or b) refused for a legitimate reason in a timely, efficient manner, in which case Claimants would have shifted gears and focused on the appraisal of their discoveries at Munaibay and (subsequently) Bahyt. Kazakhstan violated Claimants' legitimate expectation by failing to do either. It failed to act consistently, transparently, reasonably, and in good faith, in clear violation of the ECT's "fair and equitable treatment" and "impairment" standards.[248] In doing so, Kazakhstan also effectively expropriated Claimants' rights under Contract No. 302.[249]

171. Second, Kazakhstan violated Claimants' understanding as of March 19, 2009, (reconfirmed on April 9, 2009) that the extension had been agreed, as well as Claimants' legitimate expectation — and Kazakhstan's express undertaking — that the necessary addendum would be executed. The MEMR's failure to execute the addendum, after agreeing to do so, was also inconsistent and in bad faith. Kazakhstan's failure to respect its undertakings of March and April 2009 violated the ECT's "fair and equitable treatment" and "impairment" standards, as well as the treaty's umbrella clause.[250] It also amounted to a further indirect expropriation of Claimants' rights under Contract 302.[251]

172. While Contract No. 302 may have granted Kazakhstan discretion over whether to grant an extension, the ECT required Kazakhstan to exercise that discretion in good faith, fairly and equitably, consistently, and in accordance with Claimants' legitimate expectations. If Kazakhstan had complied with those commitments, it would have timely granted the extension as a matter of course (or at least refused the extension for a legitimate reason in a timely, transparent manner), and it certainly would have honored the express commitments it made to grant the extension after Claimants pressed the issue in March 2009. Claimants' injury stems from Kazakhstan's failure to comply with its obligations under the ECT, which resulted in Claimants neither being able to continue exploration of the Contract No. 302 properties nor being able to move forward on their discoveries at Munaibay and Bahyt. The

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[248] Statement of Claim ¶¶ 314-17, 353-54, 362; Reply on Jurisdiction and Liability ¶¶ 529-35, 586-87.

[249] Statement of Claim ¶¶ 20-24, 332; Reply on Jurisdiction and Liability ¶¶ 211, 245, 533.

[250] Statement of Claim ¶¶ 353-54, 362-72; Reply on Jurisdiction and Liability ¶¶ 242-43, 529-47, 586-87.

[251] Statement of Claim ¶¶ 8-19, 24, 247, 258-85; Reply on Jurisdiction and Liability ¶¶ 469-80.

domestic law theory of "pre-contract" reliance damages is simply inapposite to Claimants' Treaty claims.[252]

173. In summary, Kazakhstan's conduct in relation to the extension of Contract No. 302 clearly violated the ECT. Therefore, Kazakhstan is obliged to compensate Claimants for the discovered resources at Munaibay No. 1 and for the lost opportunity to explore and develop the remaining Contract 302 prospects (including the Interoil Reef). If Kazakhstan had not strung Claimants along and if it had acted in good faith in extending the Contract, there is no question that Claimants would have exploited the discovered resources and would have explored the viability of the remaining Contract 302 prospects. Kazakhstan thus unfairly deprived Claimants of their right to further explore and develop the Contract 302 Properties.

174. By unduly delaying — without justification and in bad faith — the execution of the promised extension, Kazakhstan effectively expropriated Claimants' exploration and production rights under Contract 302.[253] Both the express terms of the Contract and the parties' historical performance under the Contract demonstrate that Claimants had the right to explore and develop the prospects, as well as the legitimate expectation that Kazakhstan would act in good faith to execute the second extension of Contract No. 302 (which was mutually beneficial to Claimants and Kazakhstan). Because Kazakhstan actually undertook to do so, and then failed to follow through despite Claimants' repeated requests,[254] its conduct clearly breached the "fair and equitable treatment" and "impairment" standards in the ECT.[255]

175. Not only was there no justification for Kazakhstan's delay and ultimate failure to fulfill its commitment, in violation of Claimants' legitimate expectation that it would do so, but its conduct completely undermined Claimants' ability to properly plan and carry out operations in the Contract 302 Properties. Claimants did not know whether they should

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[252] Even if Claimants' claim were limited to their reliance on Kazakhstan's commitments to grant the extension — which it is not — Claimants' injury would not be limited to only the monetary amounts expended in reliance on that commitment. Their reliance also included forebearing TNG's contractual rights to appraise and declare Commercial Discoveries as to the Munaibay and Bahyt areas (including the Interoil Reef within the Munaibay area).

[253] American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987), Section 712 cmnt (g), **C-243**.

[254] *See, e.g.*, Letters from TNG to the MEMR, September 17 and December 28, 2009, **C-169** and **C-170**.

[255] The MEMR's failure to "respond in a constructive way" breaches the fair and equitable treatment standard according to the *Saluka* tribunal. *Saluka Investments B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, March 17, 2006 ¶ 423, **C-259**; *see also Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶ 162, **C-209**.

continue exploring or carry out appraisals of already-discovered resources. Thus, Kazakhstan's conduct was, in the words of the *Tecmed* tribunal, "characterized by its ambiguity and uncertainty which [were] prejudicial to the investor in terms of its advance assessment of the legal situation surrounding its investment and the planning of its business activity and its adjustment to preserve its rights."[256]

176. Furthermore, Kazakhstan's commitment to extend Contract 302 until March 2011, which it expressed in the March 19, 2009, meeting and through its April 9, 2009, letter, amounts to an "obligation" that Kazakhstan undertook with respect to Claimants' investments. It was an express undertaking, which gives rise to a treaty obligation under the ECT's umbrella clause, as well as a legal obligation under Kazakh law, to formalize the extension.[257] Because Kazakhstan did not do so, it breached the ECT's umbrella clause as well.

* * *

177. The foregoing discussion of Claims 1 through 9 provides a final summary of Claimants' case and evidence in relation to the extraordinary campaign of indirect expropriation and extreme harassment and coercion that commenced with President Nazarbayev's order of October 14, 2008. The Financial Police and multiple other agencies of the Kazakh state carried out that campaign for nearly two years. Individually, the nine claims above comprise breaches of nearly every meaningful protection that Kazakhstan undertook to provide foreign investors like Claimants when it entered into the ECT. Considered collectively — as Claimants and their investments actually experienced them — Kazakhstan's acts were a veritable avalanche of illegal conduct for which Kazakhstan is indisputably liable to Claimants under the ECT and international law.

J. Claim No. 10: Kazakhstan Directly Expropriated Claimants' Investments Illegally and Without Justification or Compensation

Synopsis

178. On July 21-22, 2010, with another barrage of unscheduled inspections of KPM and TNG ordered by the Prime Minister still underway, Kazakhstan unlawfully and

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[256] *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 ¶ 172, **C-209**.

[257] *See Eureko B.V. v. Poland*, Partial Award, August 19, 2005 ¶¶ 244, 246, **C-260**; *see also* Second Suleymenov Report ¶¶ 55-60; Third Suleymenov Report ¶¶ 19-24.

unilaterally abrogated Claimants' Subsoil Use Contracts and expropriated the entirety of Claimants' investments in Kazakhstan. After a public display in which it announced its takeover, Kazakhstan transferred KPM's and TNG's assets and operations to KazMunaiGas, which allegedly placed them under the "trust management" of its subsidiary, KazMunaiTeniz. Kazakhstan's purported justification for its outright expropriation was its contention that KPM and TNG had failed to cure a series of baseless allegations of contract violations, which the MOG had notified to KPM and TNG less than one week before. While Kazakhstan carried out the July 21-22, 2010, direct expropriation of Claimants' investments under "cover" of an alleged handwritten complaint from four unknown residents of the Mangystau region, in reality it was a pre-meditated, unlawful taking that served as the final act in Kazakhstan's campaign to divest Claimants of their investments.

Timeline

• June 28, 2010	General Prosecutor of Kazakhstan in Astana allegedly receives a two-page, handwritten complaint from four unknown local residents of Mangystau region and on the very same day directs no fewer than 7 national agencies to carry out unscheduled inspections of KPM and TNG (Exhibit 1 to Kravchenko Statement).
• June 29, 2010	General Prosecutor's Office notifies KPM & TNG that an unscheduled inspection will commence covering the entire life of the companies' operations (C-174 and C-175).
• June 29, 2010	Ministry of Oil and Gas ("MOG") sends KPM & TNG its notice of unscheduled inspection (C-185).
• June 30, 2010	Ecology Committee begins its unscheduled inspection of KPM & TNG (C-182).
• June-July 2010	Department for Emergency Situations carries out unscheduled inspections of KPM & TNG (C-647 and C-648).
• June 30 – July 15, 2010	MOG carries out its unscheduled inspections of KPM & TNG (C-649, C-650, and C-687).
• June 30 – July 16, 2010	Geology and Subsoil Use Committee of the Ministry of Industry and New Technology carries out its unscheduled inspection of KPM & TNG (C-180, C-181, C-315, C-651 and C-689).
• June 30 – July 29, 2010	Labor Department carries out its unscheduled inspections of KPM & TNG (C-177).

• July 1 – July 29, 2010	Immigration police carry out their unscheduled inspections of KPM & TNG (C-178 and 179).
• July 3, 2010	Ecology department issues act of inspection for its environmental audit of KPM & TNG (C-688).
➔ Financial Police arrive at KPM's and TNG's offices seeking geological information and human resource records. Their presence prompts Claimants to pull additional managers out of the country (First Condorachi Statement ¶¶ 44-46).	
• July 9, 2010	TNG is notified that Prime Minister Massimov plans to visit the facilities and the LPG plant on July 20-21, 2010, and is instructed to construct helipads and prepare a building for the Prime Minister's arrival (C-186).
• July 9, 2010	Financial Police officer S. Rakhimov reports to Chief of Financial Police referencing ongoing inspections, demonstrating the Financial Police's involvement in the process (C-711).
• July 12, 2010	TNG receives request to have motor vehicles and drivers arranged for the Prime Minister's visit (C-299).
• July 14, 2010	MOG sends notices of alleged violations of all three of Claimants' Subsoil Use Contracts, which are received two days later (C-2, C-6, and C-7).
➔ The notices of alleged violations are sent before the inspections are even completed and before the Acts of Inspection are reviewed and signed, which is a violation of Kazakh law and a denial of the companies' procedural rights to review and contest the inspecting agencies' conclusions.	
• July 19, 2010	KPM and TNG respond to notices of alleged violations, fully explaining that no infringements of law or contract exist (C-24, C-25, C-26, and C-519).
• July 20, 2010	Ministry of Industry and New Technologies issues its acts of inspections for the unscheduled inspections of KPM & TNG (C-652 and C-653).
• July 21-22, 2010	MOG delivers notices of unilateral termination of all three of Claimants' Subsoil Use Contracts (C-3, C-4, and C-5).
• July 21, 2010	The Minister of Oil and Gas and Acting Prime Minister issue an order on and publicly announce termination of Subsoil Use Contracts 305 and 210 and on transfer of KPM and TNG and their assets under trust of KazMunaiGas (C-189). They take the position, the following day, that Contract 302 expired on its own terms in March 2009 (C-5).

• July 22, 2010	Eduard Calancea, on behalf of Claimants, attends a conference call with Kazakhstan representatives regarding the termination, takeover, and "trust management" (C-190).

Relevant Witness Evidence

Second Suleymenov Report ¶¶ 66-73

Third Suleymenov Report ¶¶ 25-36

First Stati Statement ¶¶ 41-43

First Pisica Statement ¶¶ 56-60

First Condorachi Statement ¶¶ 42-53

First Romanosov Statement ¶¶ 36-40

Calancea Statement ¶¶ 4-11

Calancea Testimony, Tr. October 2012 Hearing, Day 3, 49:9-13, 50:5-16, 55:23-57:7, 57:17-23, 68:2-4

Pisica Testimony, Tr. October 2012 Hearing, Day 2, 77:13-79:4, 81:7-83:7

Condorachi Testimony, Tr. October 2012 Hearing, Day 2, 120:16-122:9

Kravchenko Testimony, Tr. October 2012 Hearing, Day 4, 108:24-114:2, 114:14-20, 120:17-21

Mynbaev Testimony, Tr. October 2012 Hearing, Day 3, 126:15-20, 127:5-10, 131:3-15, 140:19-141:18

S. Rakhimov Testimony, Tr. October 2012 Hearing, Day 6, 31:6-32:23

Ongarbaev Testimony, Tr. October 2012 Hearing, Day 6, 70:20-71:3

Previous Submissions by Claimants

Statement of Claim ¶¶ 199-238, 243-57, 286-317, 331-32, 335, 351(f), 353, 362, 371

Reply on Jurisdiction and Liability ¶¶ 338-60, 449-68, 485, 524, 528, 546

Claimants' First Post-Hearing Brief ¶¶ 262-305

Oral Submissions:

Claimants' Opening Presentation on the Merits, slide 45

Claimants' Opening Statement, Tr. October 2012 Hearing, Day 1, 134:10-136:19

Claimants' Rebuttal Closing Presentation, slide 9

Claimants' Rebuttal Closing Statement, Tr. May 2013 Hearing, Day 2, 36:23-40:20

Relevant ECT and International Law Standards

- Unlawful (direct) expropriation – ECT art. 13(1), C-1
- Fair and equitable treatment – ECT art. 10(1), C-1
- Most constant protection and security – ECT art. 10(1), C-1
- Impairment by unreasonable or discriminatory measures – ECT art. 10(1), C-1
- Umbrella clause – ECT art. 10(1), C-1

Final Remarks Regarding Claim No. 10

179. Kazakhstan's unilateral repudiation of Claimants' Subsoil Use Contracts and its outright seizure of Claimants' investments in Kazakhstan are indisputably acts of illegal expropriation under the ECT and international law.[258]

180. In its recent submissions, Kazakhstan has continued to try to justify its direct expropriation of Claimants' investments with allegations that it never made contemporaneously and that clearly played no role in Kazakhstan's repudiation of Claimants' Subsoil Use Contracts.[259] It is especially telling that in the nine pages of its Post-Hearing Brief that Kazakhstan devotes to trying to justify its direct expropriation, there is not a single reference to a contemporaneous document supporting its position.[260] Rather, Kazakhstan's justifications are based entirely on snippets of its witnesses' testimony (which are contradicted by the contemporaneous evidence) and its own self-serving pleadings. As Kazakhstan's case on this point is so clearly contrived and has been thoroughly rebutted in Claimants' previous submissions, Claimants will only briefly respond to the various allegations here.

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[258] *See, e.g.*, Claimants' First Post-Hearing Brief ¶¶ 272-305.

[259] *Compare* Kazakhstan's First Post-Hearing Brief ¶¶ 349-370 with the Notices of alleged Contract Violations (**C-2**, **C-6**, and **C-7**) and the Notices of Contract Termination (**C-3**, **C-4**, and **C-5**).

[260] *See* Kazakhstan's First Post-Hearing Brief ¶¶ 349-370.

181. First, Kazakhstan claims that termination was justified because "Claimants were in continuing and serious breach of Contracts 210 and 305" and that "Claimants were also mistreating the fields."[261] The evidence demonstrates exactly the opposite.

182. As a preliminary matter, in the context of the October 2008 inspections, no Kazakh body found any issues with Claimants' compliance with their subsoil use contracts or their minimum work obligations. The Financial Police themselves even concluded, as early as October 30, 2008, that Claimants were in full compliance with their investment obligations.[262] The MEMR expressly confirmed those findings again in February 2010, when new inspections concluded that KPM and TNG had greatly exceeded their investment obligations. Neither the MEMR nor any other Kazakh authority found any material violation of Claimants' Subsoil Use Contracts prior to Kazakhstan's direct expropriation.

183. The MEMR's inspection reports from the January-February 2010 inspections are conclusive on this point. Those inspections audited KPM's and TNG's compliance with Kazakh legislation on subsoil use and the companies' contractual obligations throughout the life of the companies' operations (*i.e.*, the MEMR audited performance and compliance of KPM from 1999 to 2009 and of TNG from 1998 to 2009).[263] Regarding KPM, the MEMR concluded that "the requirements under the Minimum work program were significantly over-fulfilled, and all the annual programs were exceeded both from the point of view of the overall investment value and from the point of view of the overall financial obligations."[264] The MEMR concluded: "The quality of conformance of the actual state of Borankol field development with the projected one is sufficiently high with respect to all its key figures."[265]

184. Similarly, in February 2010, the MEMR noted that TNG had exceeded its contractual obligations by 3.4 times and, as with KPM, gave it a glowing report.[266] At the May 2013 hearing, Kazakhstan suggested that Claimants had misrepresented TNG's

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[261] Kazakhstan's First Post-Hearing Brief ¶ 349 (a) and (b).

[262] Financial Police Report, October 30, 2008, at 2 ("Currently, the compliance with the investment obligations assumed by "Kazpolmunay" LLC and "Tolkynneftegaz" LLC is established by years."), **C-438**.

[263] *See* Report of the MEMR on Unscheduled Inspection for KPM, February 6, 2010, **C-385** and Report of the MEMR on Unscheduled Inspection for TNG, February 5, 2010, **C-386**. That fact undermines Kazakhstan's claim that some "problems" in the field were not apparent until after KPM's and TNG's operations were transferred to the State. See Kazakhstan's First Post-Hearing Brief ¶ 356. The inspection reports show that the MEMR had full and complete access to the companies' operations and their fields.

[264] Report of the MEMR on Unscheduled Inspection for KPM, February 6, 2010, at 10, **C-385**.

[265] Report of the MEMR on Unscheduled Inspection for KPM, February 6, 2010, at 33, **C-385**.

[266] Report of the MEMR on Unscheduled Inspection for TNG, February 5, 2010, **C-386**.

inspection results by omitting portions of "Table 1-p" in the English version of the report. Kazakhstan contended that the omitted portions showed underperformance in terms of expenditures in exploration and production work, which demonstrates that Claimants' were "mismanaging their business."[267]

185. Those allegations are false. Any omissions in the English version were obviously unintentional: it is clear from the English version that Table 1-p was cut off in printing and, in any event, the complete table is contained in the original, Russian version of the exhibit (which even a non-Russian speaker can understand because only years and numbers are missing from the English translation). More to the point, Table 1-p does not provide any evidence of non-compliance with contract obligations or Kazakh law,[268] and the MEMR's written conclusions in the same report expressly contradict Kazakhstan's suggestion. In fact, the MEMR's statement that TNG had exceeded its obligations by 3.4 times was a conclusion drawn from that very table.[269] As it had concluded with respect to KPM, the MEMR concluded that TNG's "minimum work programs were significantly exceeded, and the annual work programs were exceeded both as regards to the investment amounts, and the overall financial obligations. Any non-compliance with the obligations accruing to certain years were compensated by significant exceeding [in years] before or after."[270]

186. Additionally, the MEMR concluded that TNG's "exploitation of gas, condensate [and] oil deposit[s] is performed in strict compliance with the design documents approved by the Central Commission for Reserves and the MEMR" and "the production capacities installed for hydrocarbon production (stock of wells, infield production system, associated gas recovery…), facilities for treatment of [hydrocarbons], gas transportation (gas and oil pipelines), storage [etc.] are in full compliance with, and certain of them [gas treatment facilities and the oil and gas pipelines] in excess of, those required for the current

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267 Respondent's Closing Rebuttal Statements, Tr. May 2013 Hearing, Day 2, 49:8-20.

268 As it is titled, the chart is concerned with "compliance with the conditions provided for in the working schedules." *Id*.

269 *Id*. § 9.1, **C-386**. It states: "The obligations concerning the minimum [work program] in the period from 1999 to 2009 represented USD 187,720 thousand, while, in fact, the obligations were complied with for the amount of USD 640,836.8 thousand, i.e., **3.4 times more than the contractual obligations**. The comparison between the effectively complied with obligations according to the annual [work program] for the period between 1999 and 2009 is shown in appendices — table to this report (Table 1-p)."

270 Report of the MEMR on Unscheduled Inspection for TNG, February 5, 2010, at PDF page 27, **C-386.**

volumes of extraction."[271] Those inspection results can only be described as a clean bill of health.

187. Kazakhstan's reliance on a selective passage from the PwC due diligence report to claim that TNG had not drilled enough wells is also unavailing. That report merely states that, as of November 2008, TNG had not yet met the drilling targets in its own annual work program for 2008 and that, as of June 2009, TNG was behind in fulfilling its own 2009 work program.[272] The companies' aspirational annual work programs are not the same as their minimum work obligations, as the MEMR noted in its own reports.[273]

188. In a final attempt to buttress its baseless allegations regarding field development and conditions, Kazakhstan claims — incorrectly — that Mr. Lungu "admitted [that] Claimants were in breach of their minimum work programmes."[274] Mr. Lungu said nothing of the sort. Instead, he merely acknowledged that Claimants "did not do the capital investment programme that we had [*i.e.*, that Claimants had planned] for both KPM and TNG in 2009."[275] Mr. Lungu was not referring to the companies' minimum work obligations, but rather to the companies' own, more aggressive annual work programs. Mr. Lungu's testimony is consistent with the fact that Claimants had historically over-fulfilled their minimum work requirements, but that, in 2009, Claimants did not meet their own (higher) goals, due to the financial and market impacts of the State's campaign and obvious concerns about pouring extra money into investments threatened by the State.

189. It is true that by the summer of 2009, TNG had reduced gas production in the Tolkyn field. In the course of its January-February 2010 inspections, the MEMR noted that fact and explained it as follows:

> As observed, in 2009, the reduction to half of the gas extraction occurred. Cause: inexistence with TOO "Tolkynneftegaz" of the export contracts and dependence of the gas sale market on

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271 Report of the MEMR on Unscheduled Inspection for TNG, February 5, 2010, **C-386**.

272 *See* PwC Due Diligence Report, June 30, 2009, at 25, **C-724**.

273 Hence the conclusion that "the requirements under the Minimum work program were significantly over-fulfilled, and all the annual programs were exceeded both from the point of view of the overall investment value and from the point of view of the overall financial obligations." Report of the MEMR on Unscheduled Inspection for KPM, February 6, 2010, **C-385**; *see also* Report of the MEMR on Unscheduled Inspection for TNG, February 5, 2010, **C-386.**

274 Kazakhstan's First Post-Hearing Brief ¶ 353; Closing remarks by counsel for Respondent, Tr. May 2013 Hearing, Day 1, 216:19-20.

275 Lungu Testimony, Tr. January 2013 Hearing, Day 1, 186:10-18 (emphasis added); Kazakhstan's First Post-Hearing Brief ¶ 353 (emphasis in original).

> the consumption in the domestic sector of Mangistau region. The seasonal difference recorded in the gas consumption is high, and in summer, the gas consumption dropped 3 to 5 times as compared to the cold season.[276]

Notably, the MEMR did not find that the reduction in gas production amounted to any type of violation, whether contractual or legal.

190. As discussed in more detail in Section IV, *infra*, the reason gas production was temporarily reduced in the summer of 2009 was because, due to Kazakhstan's harassment campaign, TNG had lost its contracting partner Kemikal and was unable to find a replacement. Furthermore, had Claimants been able to complete the LPG Plant by this time as planned, the lack of a gas contract would not have impacted TNG's operations. And in any event, as the MEMR notes, the reduction in gas production was temporary: TNG's production and sale of gas increased dramatically during the winter of 2009, when local demand for gas was higher.

191. In sum, there is simply no evidence that Claimants breached the subsoil use contracts, minimum work requirements, or Kazakh law in any respect. Nor is there any evidence, as Kazakhstan has also claimed, of "barbaric" treatment of the fields.[277] And there is certainly no credible evidence that either consideration motivated Kazakhstan's conduct in July 2010.

192. Furthermore, even if there had been any non-compliance with minimum work obligations in 2009 — which Kazakhstan has not established and Claimants vehemently deny — it would be immaterial for at least three reasons: (i) the MEMR expressly stated that there were no problems in the field as of February 2010 and that "any falldown [or non-compliance] for certain years is compensated by the significant exceedings registered in the next or previous years;"[278] (ii) any failure to meet minimum work obligations would have

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[276] Minutes on the results of the MEMR's unscheduled inspection of TNG (LPG Plant), January 25-February 5, 2010, **C-599**.

[277] This claim is based solely on Mr. Ongarbaev's unsupported speculation. *See* Kazakhstan's First Post-Hearing Brief ¶ 368.

[278] **C-385**. Note that there could not have been any non-compliance with 2010 work obligations, because Kazakhstan terminated the contracts well before the end of 2010. It is also important to note that the MEMR's position is what one would expect from a reasonable regulator. If an oil and gas company temporarily scales down drilling or workovers during a market downturn when prices are low, the regulator would understand that decision as prudent and even beneficial, since it is better to produce and sell more hydrocarbons after prices rebound. As long as the fields are maintained, there is no cause for concern. Thus, the results from the January – February 2010 inspection are not a "pass" from the MEMR; instead they are what a producer would expect from a regulator.

been solely as a result of Kazakhstan's harassment and interference with Claimants' normal business operations; and (iii) any minimal "falldown" that may have existed was not sufficient to terminate the contracts, because it was not a reason the MOG gave for contract termination in July 2010.[279]

193. The last point bears repeating: it is simply not credible for Kazakhstan to suggest that there were concerns about work obligations that were never mentioned by the MOG (or anyone else) in the context of cancelling the Subsoil Use Contracts. Kazakhstan's cancellation notices alleged far more minute violations than a failure to fulfill work obligations (the alleged violations were groundless, but at least they were made contemporaneously). Kazakhstan's argument that Claimants failed to meet their work obligations is obviously a *post hoc* invention for the purpose of this proceeding.

194. Kazakhstan has also alleged that "employees were not being paid their salaries and mass employee dismissals [were] a serious concern," and that there was a risk of "social tension."[280] Kazakhstan has provided no contemporaneous evidence to support those allegations either,[281] and there is abundant evidence disproving them.[282] The testimonies of Mr. Calancea, Mr. Condorachi, and Mr. Ongarbayev all confirm that KPM's and TNG's were paid their salaries – indeed, TNG paid the salaries of KPM's workers once KPM's accounts were frozen – and that upon the State's takeover, the nearly 900 employees of KPM and TNG simply went to work for the State.[283] In fact, KPM and TNG wrote to their employees,

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279 Notice of infringement of obligations under the Borankol Subsoil Use Contract No. 305 from MOG to KPM, July 14, 2010, **C-2**; Notification No. 20-05-5150 from the MOG to KPM terminating the Borankol Subsoil Use Contract No. 305, July 21, 2010, **C-3**; Notification No. 20-05-5151 from MOG to TNG terminating the Tolkyn Subsoil Use Contract No. 210, July 21, 2010, **C-4**; Notification No. 14-05-5182 from MOG to TNG terminating Subsoil Use Contract No. 302, July 22, 2010, **C-5**; Notice of infringement of obligations under the Tolkyn Subsoil Use Contract No. 210 from MOG to TNG, July 14, 2010, **C-6**; Notice of infringement of obligations under Subsoil Use Contract No. 302 from MOG to TNG, July 14, 2010, **C-7**.

280 Kazakhstan's First Post-Hearing Brief ¶¶ 349 (b), 360 *et seq*. Claimants note — and do not deny — that approximately 3,000 working contracts were ended in May 2009 when they decided to stop construction of the LPG plant. However, that loss did not give rise to social tension, because KPM and TNG employed them elsewhere in servicing company operations. In any event, Claimants had no obligation to construct — much less employ 3,000 workers in constructing — the LPG Plant, so dismissals could not have been (and were not stated as) a reason for terminating their subsoil use contracts in July 2010.

281 Kazakhstan relies solely on the testimony of Mr. Kravchenko. Kazakhstan's First Post-Hearing Brief ¶ 358. If his contentions were true, as Deputy General Prosecutor, he would have access to complaints, investigations, or lawsuits substantiating the claim. Kazakhstan has produced none.

282 In addition to the evidence cited herein, *see* Claimants' First Post-Hearing Brief ¶¶ 295-300.

283 Calancea Testimony, Tr. October 2012 Hearing, Day 3, 55:17-23 and 68:2-4; Condorachi Witness Statement ¶ 50; Ongarbayev Testimony, Tr. October 2012 Hearing, Day 6, 70:20 – 71:3; *see also, e.g.*, Order from TNG Regarding Staff and Samples of Employee Resignation Letters, July 21, 2010, **C-188**.

apologizing for Kazakhstan's actions, and urging them to calmly transfer their positions to the new operator, KazMunaiGas.[284]

195. Lastly, Kazakhstan claims that Claimants were unwilling to cooperate with the State to cure the alleged contract breaches and that they "sidestepped" the opportunity to resolve the issue in accordance with the Contracts or the Kazakh Subsoil Use law by filing the present arbitration five days after contract termination.[285] That argument is particularly misleading, given that Kazakhstan afforded Claimants a mere three days to cure the alleged breaches before it unlawfully terminated the Contracts.[286] Regardless, as discussed in the context of Claim No. 8 above, by the time of Kazakhstan's direct expropriation, Claimants had been appealing to multiple Government agencies since late 2008, to no avail.[287] Any further attempts to amicably resolve the issues with the Government obviously would have been futile. In particular, Claimants had already put Kazakhstan on notice of their intentions to seek international arbitration as a result of Kazakhstan's ongoing harassment of their investments.[288] Therefore, the submission of this case to international arbitration shortly after the July 2010 direct expropriation came as no surprise to Kazakhstan.

196. In conclusion, Kazakhstan unequivocally carried out an illegal, direct expropriation of Claimants' investments on July 21-22, 2010, in violation of the ECT and international law. Kazakhstan's *post hoc* attempts to justify its illegal expropriation are unavailing.

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284 Letter from KPM to Personnel, July 24, 2010, **C-195**; Letter from TNG to Personnel, July 24, 2010, **C-196**.

285 Kazakhstan's First Post-Hearing Brief ¶ 349 (c) through (g).

286 *See* Claimants' First Post-Hearing Brief ¶¶ 292-294 (citing Pisica Testimony, October 2012 Hearing, Day 2, 77:13:79:4 and Notifications of alleged contract violations, **C-2**, **C-6**, and **C-7**); *see also* Notice of Termination of the Subsoil Use Contracts, **C-3**, **C-4**, and **C-5**. Similarly, Kazakhstan's claim that Claimants could have "resolved this issue amicably by invoking one of the mechanisms in the Contracts or [the 2010 Subsoil Law]" is disingenuous, because Kazakhstan itself breached the Contracts' 90 day early termination requirement and the 2010 Subsoil Law, which stated, in line with the Contracts' legal stability provisions, that it did not apply retroactively to existing Subsoil Use Contracts. Additionally, all three Subsoil Use Contracts required that disputes be resolved in international arbitration proceedings before the Stockholm Chamber of Commerce. *See* Claimants' Reply on Jurisdiction and Liability ¶ 456 (citing Contract No. 305, art. 28.2, **C-45**; Contracts No. 210 and 302, art. 23.2, **C-52** and **C-53**); Maiden Suleymenov, "Kazakh Oil and Gas Legislation and the Energy Charter Treaty," in OIL AND GAS LAW IN KAZAKHSTAN, Kluwer Law International (2004), **C-336**. Instead of terminating the contracts unlawfully, if the alleged breaches had any merit, Kazakhstan should have raised claims of breach in an arbitration before the Stockholm Chamber of Commerce. Claimants were not required to bring breach of contract claims in arbitration before bringing a claim for breach of the ECT, particularly when their claims of breach of contract are subsumed within their claims for breach of the ECT's umbrella clause.

287 *See* Section III.H regarding Claim No. 8, *supra*.

288 Letter from Claimants to the President of Kazakhstan, May 7, 2009, **C-43**.

IV. KAZAKHSTAN CAUSED HARM TO CLAIMANTS' INVESTMENTS

197. Kazakhstan's treaty-breaching misconduct caused Claimants' loss of the entire value of their investments in KPM and TNG.

198. Kazakhstan asserts that its actions, even if they violated international law, caused no injury to Claimants. Rather, according to Kazakhstan, all of Claimants' injuries resulted from mismanagement and market factors outside its control, which led Claimants to abandon their investments. Kazakhstan's arguments are wrong as a matter of fact and law.

A. Applicable Legal Principles

199. Claimants agree that as a general principle of international law they bear the burden of demonstrating that the claimed quantum of compensation flows from the host State's conduct. Articles 36 and 39 of the ILC Articles on State Responsibility reflect this general principle, providing that "[t]he State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby," and "[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."[289] Beyond these broad principles, however, tribunals are left to determine in their own discretion what principles guide the evaluation of causation in a particular case.

200. The manner in which other investment dispute tribunals have addressed the question of causation provides helpful guidance. For instance, the award in *Lemire v. Ukraine* contains a thorough discussion of the principles of causation generally applied in international arbitration.[290] As that tribunal explained, the element of causation requires the aggrieved party to "prove that an uninterrupted and proximate logical chain leads from the initial cause … to the final effect."[291] Likewise, a State can break the chain of causation by showing that the injury was caused "not by the wrongful acts, but rather by intervening causes, such as factors attributable to the victim, to a third party or for which no one can be made responsible (like *force majeure*)."[292] Thus, while Claimants bear the initial burden of proof to demonstrate a causal link between the State's wrongful acts and the claimed

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289 ILC Articles on State Responsibility, arts. 36 and 39, **C-160**.

290 *Lemire v Ukraine*, ICSID Case No. ARB/06/18, Award, at 48-53, **C-61**.

291 *Id.* ¶ 163, **C-61**.

292 *Id.*, **C-61**.

compensation, the burden shifts to Kazakhstan to prove that some intervening cause attributable to Claimants or a third party (*e.g.*, market forces) broke the causal chain.

201. Another broadly-recognized principle is that the causal link need not be direct. As the *Lemire* tribunal explained:

> causal links can be divided into pure or transitive. Pure causal links exist when the damage derives directly from the wrongful act, without intermediary elements. In practice, this situation is rare, because it is difficult to prove that a certain factor is the immediate and unique cause of a result. Normally, the link between wrong and damage is more complex, and additional elements intervene to form a chain of events.[293]

Thus, it is common for claimants to establish causation through a chain of connected events.

202. The primary limitation on the principle of transitive causation is that the chain of events must be "neither too remote nor too aleatory."[294] As the *Lemire* tribunal explained, quoting the "classic definition" of this principle set out in Administrative Decision No. 2 of the US-German Mixed Commission (of November 1, 1923):

> It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no breach in the chain and the loss can be clearly, unmistakably and definitely traced, link by link, to Germany's act… All indirect losses are covered provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed.[295]

Furthermore, this requirement of "proximate" cause is closely related to the foreseeability of the injury. "Proximity and foreseeability are related concepts: a chain of causality must be deemed proximate, if the wrongdoer could have foreseen that through successive links the irregular acts finally would lead to the damage."[296] Moreover, "whether State organs deliberately caused the harm in question" is a relevant factor in assessing proximate causation.[297]

203. Additionally, a State is responsible for all of the harm that proximately flows from its wrongful actions even if concurrent causes also contributed to the harm. The

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[293] *Id.* ¶ 164, **C-61**.

[294] *Id.* ¶ 166, **C-61**.

[295] *Id.*, **C-61**.

[296] *Id.* ¶ 170, **C-61**.

[297] *CME Czech Republic B.V. (Netherlands) v. The Czech Republic*, UNCITRAL Partial Award ¶ 584, **C-229**.

Tribunal in *CME v. Czech Republic*, citing the U.N. International Law Commission, explained:

> The U.N. International Law Commission observed that sometimes several factors combine to cause damage. The Commission in its Commentary referred to various cases, in which the injury was effectively caused by a combination of factors, only one of which was to be ascribed to the responsible State. International practice and the decisions of international tribunals do not support the reduction or attenuation of reparation of concurrent causes, except in cases of contributory fault.
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> * * *
>
> It is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible.[298]

Thus, in order for Kazakhstan to escape liability for the injuries that flowed naturally from its misconduct, it must prove that an intervening cause ***completely superseded*** the effects of its actions into a severable injury, and not merely that other concurrent events contributed to or amplified the Claimants' injury.

204. Finally, assessing causation often involves some uncertainty about what would have happened but for the State's wrongful actions. For example, the claimant in *Lemire* claimed that it would have obtained certain radio licenses but for the State's wrongful conduct, which was complicated by the fact that the licenses were awarded through public tenders that other third parties may have won despite the State's misconduct. As that Tribunal concluded, it was not possible for the claimant to prove with certainty what would have happened but for the State's wrongful actions, and it was sufficient for the claimant to prove that it was "probable" it would have obtained the licenses but for the State's actions.[299]

B. Claimants Have Proven Causation

205. Kazakhstan's campaign of harassment and coercion that began in October 2008, and that it broadly publicized no later than December 2008, initiated a chain of events that seriously and irreparably impaired Claimants' investments. Kazakhstan's wrongful

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[298] *Id.* ¶ 583, **C-229**.

[299] *Lemire v Ukraine*, ICSID Case No. ARB/06/18, Award ¶ 169, **C-61**.

actions thus prevented Claimants from fully developing or alienating their investments from that time forward.

1. Kazakhstan's Criminal Investigations and Pre-emptive Rights Announcement Injured Claimants' Reputation and Prevented Them from Raising Capital

206. No later than December 18, 2008, Kazakhstan's actions had a direct and profound impact on Claimants' reputation in the capital markets. On that day, the INTERFAX news agency published an article reporting the MEMR's decision to revoke its approval of Claimant Terra Raf's acquisition of TNG.[300] Moreover, the article extensively quoted the MEMR's accusations that Claimants had forged documents in order to defraud the State of its pre-emptive right to purchase TNG, that Claimants' ownership of TNG was illegal, and that "violations" regarding TNG's organization and registration "infringe upon the interests of the country."[301] As discussed above, those allegations were false, and Kazakhstan's conduct in both revoking its approval of Terra Raf's ownership of TNG and publicizing its accusations of forgery and fraud violated the ECT.

207. Around the same time, on December 15, 2008, Kazakhstan formally initiated a criminal investigation of KPM regarding its alleged operation of a main pipeline.[302] Claimants learned of that investigation shortly thereafter, as did the public financial markets.[303] As discussed above, the unwarranted and bad faith initiation of that investigation violated the ECT.

208. Those two events unquestionably had a profound negative impact on the reputation of Claimants and the value ascribed to their investments in the capital markets. On January 14, 2009, the Fitch ratings agency placed Tristan's long term default rating and senior unsecured rating of 'B+' on Rating Watch Negative, based solely on the issues raised in the December 18, 2008, INTERFAX article and Kazakhstan's criminal investigation of

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300 INTERFAX News Article, December 18, 2008, **C-625**.

301 *Id*.

302 *See* Order Initiating Criminal Proceedings, December 15, 2008, **C-632**.

303 *See* Letter from the Financial Police to KPM and TNG, December 24, 2008, **C-94**, and Summons to Witnesses, December 24, 2008, **C-654**. Claimants disclosed that investigation to investors as required by the Tristan Indenture. *See* Tristan Indenture, December 20, 2006, § 4.03, **C-584**. Claimants do not recall precisely when that disclosure occurred, but it unquestionably occurred before January 14, 2009, when Fitch based its negative ratings watch notice in part on that investigation. *See Fitch Places Tristan Oil Ltd. on Rating Watch Negative*, DOW JONES NEWSWIRES, January 14, 2009, **C-590**.

KPM.[304] Fitch warned potential investors that the MEMR's cancellation of its "pre-emptive rights waiver" could result in the termination of TNG's subsoil use contract, and that "a negative resolution of either of the authorities' actions will have a significant negative impact on Tristan's operational and financial profile, and is thus likely to result in a multi-notch rating downgrade."[305]

209. The following day, Moody's placed Tristan's B2 rating on review for possible downgrade, again based solely on the MEMR's actions related to Terra Raf's ownership of TNG and the Financial Police's criminal investigation of KPM.[306] Moody's warned:

> In Moody's view both developments are alarming. The events are particularly surprising given the length of time the company has been operating both assets and the fact that none of the issues had been brought up until recently. A potential loss of the license to the Tolkyn field, or/and a sizable fine with respect to KPM operations, would jeopardise the company's current and future ability to service its debt obligations in relation to the USD420 million Eurobond rated by Moody's, and would have a profound negative impact on the company's ratings.[307]

These actions by Fitch and Moody's clearly demonstrate that Kazakhstan's wrongful acts had a profound impact on the value of Claimants' investments no later than January 14, 2009. They also confirm that the injuries that flowed from Kazakhstan's actions were readily foreseeable.

210. Moreover, the INTERFAX article on December 18, 2009, directly interfered with a specific financing transaction that Claimants were negotiating at the time with Credit Suisse. On December 5, 2008, Credit Suisse sent Claimants a term sheet for a US $150-175 million bridge loan facility, and indicated that it was nearly ready for execution.[308] On December 18, 2008, however, Mr. Antanas Petrosius of Credit Suisse sent Mr. Lungu the INTERFAX article accusing Terra Raf of forgery and fraud, and stated that he "[w]ould appreciate some colour on the [State's accusations]."[309] In follow-up discussions, Credit

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304 *See Fitch Places Tristan Oil Ltd. on Rating Watch Negative*, DOW JONES NEWSWIRES, January 14, 2009, **C-590**.

305 *See id*., **C-590**.

306 Moody's Rating Actions, January 15, 2009, at 1, **C-744**.

307 *Id*., **C-744**.

308 Second Lungu Statement ¶ 7; Indicative Term Sheet from Credit Suisse, December 5, 2008, **C-521**.

309 Second Lungu Statement ¶ 7; Email from Antanas Petrosius to Artur Lungu, December 18, 2008, **C-625**.

Suisse said it would not provide the bridge loan until Claimants resolved their disputes with the Kazakhstan government.[310]

211. Kazakhstan's argument that Claimants have not sufficiently proven that the MEMR's actions caused the Credit Suisse loan to fall through is not persuasive. The MEMR's actions and accusations reported in the INTERFAX article on December 18, 2008, posed a serious threat to Claimants' investments in Kazakhstan. This is confirmed by the response of Fitch and Moody's less than a month later, who clearly viewed the MEMR's action against TNG and the criminal investigation of KPM as substantial threats to the companies' ability to service their existing debt. Under those circumstances, it would have been surprising if Credit Suisse (or any lender) had gone forward with US $150-175 million of new financing before Claimants resolved their issues with the Kazakh authorities.

212. Similarly, Kazakhstan's speculation (during its closing argument at the May 2013 Hearing) that Credit Suisse would not have closed the transaction regardless of the State's actions due to the global financial crisis is belied by the contemporaneous evidence.[311] Credit Suisse stated on December 5, 2008 – long after the global financial crisis fully erupted in September 2008, and after negotiating the term sheet for several months – that it aimed to execute the term sheet the following week.[312] Kazakhstan's argument that the only evidence sufficient to prove this element of causation is a witness statement from Credit Suisse stating unequivocally that it would have closed the financing but for Kazakhstan's actions seeks to hold Claimants to a standard of proof, both evidentiary and substantive, that is impossibly high and plainly wrong. The evidence before the Tribunal – including the credible testimony of Mr. Lungu, the corroborating contemporaneous emails with Credit Suisse, and the ratings agency actions a few weeks later – amply demonstrates that Kazakhstan's wrongful actions caused Claimants to lose the Credit Suisse financing.

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[310] Second Lungu Statement ¶ 7.

[311] Kazakhstan's argument during its rebuttal closing at the May hearing that Credit Suisse never would have closed the loan because the interest rate was below the yield implied by the trading price of the Tristan notes at the time (45.609%) is unsupported and wrong. *See* Respondent's Rebuttal Closing, slide 22. Credit Suisse is a sophisticated bank, and the trading price of the Tristan notes was public. It borders on fatuous for Kazakhstan to suggest that Credit Suisse did not know what it was doing when it negotiated the terms of the loan. As Kazakhstan acknowledged, the proposed Credit Suisse loan had a much shorter duration (seven months) than the remaining duration on the Tristan notes (36 months). Also, Kazakhstan is simply wrong that the security for the Credit Suisse loan was limited to subordinated guarantees from KPM and TNG. Rather, it included a "[f]irst ranking pledge over 100% Borrower shares," and the Borrowers were Ascom and Terra Raf. *See* Email from A. Petrosius to A. Lungu, with attachment of Indicative Term Sheet from Credit Suisse, at 1 and 4 of Term Sheet, **C-521**. Thus, the loan security included all of Claimants' investments in Iraq and South Sudan, in addition to subordinated guarantees from KPM and TNG.

[312] Email from Antanas Petrosius to Artur Lungu, December 5, 2008, **C-521**.

213. Claimants' inability to obtain that financing had serious consequences. Most significantly, as Kazakhstan admits, Claimants would not have needed to enter into the Laren transaction in June 2009 if they had obtained the Credit Suisse financing.[313] The Laren facility required Tristan to issue an additional US $111 million in notes, on top of a US $60 million promissory note, in order to raise US $60 million in financing needed to pay tax and interest obligations. Although that transaction was a necessary and prudent step to save Claimants' investments from debt and tax default, the onerous terms and complicated structure of that transaction caused the Moody's and Fitch ratings agencies to further downgrade Tristan's debt rating to the C level.[314] This is a plain demonstration of the spiraling effect on the Claimants' investments that Kazakhstan set in motion with its actions that began in October 2008, and became public no later than December 18, 2008.

214. Kazakhstan's argument at the May 2013 hearing that the "Credit Suisse loan would not have helped avoid the Laren loan" is both speculative and nonsensical.[315] Kazakhstan argues that because the term of the Credit Suisse loan was only seven months, "Claimants would have needed to turn to the 'Laren loan sharks'" anyway to refinance the Credit Suisse loan when it expired in August 2009. This argument ignores that Kazakhstan's actions, and the ratings agency downgrades that followed, were the reasons that Claimants had to turn to the "Laren loan sharks" at all. If Claimants had needed to refinance the Credit Suisse loan in August 2009 (which Claimants dispute),[316] but for the State's actions, they would have refinanced with Credit Suisse or another bank on ordinary commercial terms. If Credit Suisse had been willing to extend the loan in January, there is no reason to speculate that it (or another bank) would not have refinanced the loan in August, after oil prices and credit markets had dramatically improved, on the same or better terms. This illogical

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313 *See* Respondent's Closing Submission, slide 19 (noting that if the Credit Suisse loan had closed in January 2009, "the funds from the Credit Suisse loan would have been available for addressing the cash needs in June 2009").

314 *See* Moody's Ratings Action, June 30, 2009, **C-744**; Fitch Ratings Action, July 10, 2009, **C-743**.

315 *See* Respondent's Closing Submission, slide 19.

316 The Credit Suisse loan was structured as a bridge loan in contemplation of a sale of KPM and TNG, and would have given Credit Suisse the right to take control of the sale process if Claimants did not close a sale within six months. See Term Sheet attached to email from A. Petronas to A. Lungu, C-521, p. 4, Also, Kazakhstan's speculation that Claimants would have needed to refinance the Credit Suisse loan in August 2009 ignores the fact that but for Kazakhstan's actions, Claimants would have had continued access to the revolving credit under the prepayment terms of the Vitol COMSAs, would not have curtailed gas production by terminating the Kemikal contract, would have begun producing LPG in June 2009, and might have sold the companies. Kazakhstan's focus on each causal element in isolation, rather than examining the cumulative effect of its actions on Claimants' investments, is one of the fundamental flaws in its case on causation.

argument shows just how desperate Kazakhstan is to ignore the irrefutable fact that its actions in December 2008 had a devastating, spiraling impact on the financial fortunes of Claimants' investments, as evidenced by the public reports of two independent ratings agencies

2. Kazakhstan's Wrongful Actions Hindered Completion of the LPG Plant

215. Kazakhstan's wrongful actions also hindered TNG's completion of the LPG Plant, in several different ways.

216. First, in November-December 2008, shortly after President Nazarbayev issued his investigation order, construction on the LPG Plant slowed significantly because the non-Kazakh workers on the project were unable to renew their work permits.[317] That had never occurred prior to President Nazarbayev's order in October 2008.[318] Kazakhstan does not rebut or deny this evidence.

217. Moreover, in the spring of 2009, Kazakhstan's illegal actions forced Claimants to suspend construction of the LPG Plant indefinitely. Kazakhstan's interference with the Credit Suisse transaction put TNG in a position where it needed to conserve cash to meet current obligations. Additionally, as Mr. Stati explained, Kazakhstan's actions changed the investment environment to the point where it was simply too risky to invest additional capital in a fixed asset that Kazakhstan could seize.[319] Mr. Stati's decision to pause construction of the LPG Plant until the situation with the government improved or the assets were sold to a new owner was a prudent response to Kazakhstan's actions, which by that time included the public disparagement of TNG, over US $60 million in unfounded tax assessments, the malicious criminal investigations of KPM and TNG on the basis of the spurious charge of operating "main" pipelines without licenses, and the sequestration of Claimant's participation interests in both KPM and TNG (as well as their subsoil use contracts and other assets).

218. Indeed, there can be no dispute that Kazakhstan's actions caused the delay in construction of the LPG Plant. President Nazarbayev himself acknowledged this fact in his instruction on November 19, 2009, stating that according to Akim Kusherbayev, construction

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317 Broscaru Statement ¶¶ 25-26.

318 *Id*.

319 Second Stati Statement ¶ 40.

on the LPG Plant halted "as a result of inspections by law enforcement."[320] The MEMR also acknowledged that fact in the report on its January 2010 inspections:

> Taking into consideration the sequestration of the subsoil exploitation agreements and the participation quota to the registered share capital, the funding of the construction works was stopped, and the construction entered into conservation. The commissioning [of the LPG Plant] was delayed until further notice.[321]

219. Moreover, in February 2010, the Akim of the Mangystau Region — clearly anxious to have the LPG Plant completed — approached TNG with a proposal for TNG to borrow funds from State agencies to complete the facility. Mr. Stati responded that the reasons for the delay were not intrinsic to the project, but in fact resulted from the State's baseless legal actions, which precluded Claimants from raising or investing additional funds in the LPG Plant:

> In this regard, we would like to emphasize that shrink and subsequent suspension of funding and construction of [LPG Plant] in March 2009, represented a coercive measure, directed towards protection by investors of their contributions and investments. Between 2009-2010, we, along with the top management of LLP "Tolkynneftegaz" and LLP "Kazpolmunay", repeatedly notified the Akimat of the Mangystau Region about actions undertaken by various bodies of the RK intended to create artificial, illegal mechanisms for seizure of assets from LLP "Tolkynneftegaz" and LLP "Kazpolmunay", as well as to bring to justice companies' top managers and recover unfounded fabulous amounts from them.
>
> In order not to allow full suspension of works, the top management of the companies made several tentative steps to raise funds from the local banking market, but making reference to the well-known issues and claims lodged against the companies — they were refused in funding.
>
> The said issues, claims and measures on seizure of assets from LLP "Tolkynneftegaz" and LLP "Kazpolmunay" and confinement of their former managers have not been terminated yet, this serving as continuing reasons of refusal for funding. In our turn, we, the participants in the above-mentioned companies, do not find rational and appropriate to worsen the companies condition, allowing them to slide deeper into the debt pit, being completely aware that the raised means will be

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[320] *See* Instruction from President Nazarbayev (attached to Blagovest Letter), November 19, 2009, **C-23**.

[321] MEMR Minutes on Inspections of TNG, January 25 – February 5, 2010, at 23, **C-599**.

> spent not to complete and commission the [LPG Plant], but to cover directly the exorbitant amounts of claims to the State.[322]

The Mangystau Akim then wrote Prime Minister Massimov the very next day, acknowledging that construction on the LPG Plant had stopped "[d]ue to financial and legal problems of the company," and urging the Prime Minister to dismiss the legal actions against KPM and TNG so that construction might resume.[323]

220. Claimants' decision to suspend construction, while prudent under the circumstances, had significant negative consequences. TNG had invested a substantial amount of capital in the LPG Plant, which subsequently sat idle. But for Kazakhstan's actions, the LPG Plant would have gone online in June of 2009,[324] providing a valuable uplift on the revenue earned from the Tolkyn gas at a critical time. Moreover, the delay in construction of the LPG Plant increased the ultimate cost of completing the plant (by US $50 million in the opinion of Kazakhstan's own expert, GCA).[325]

221. Additionally, the conditions that caused Mr. Stati to pause his investment in the LPG Plant also caused Vitol to retract a substantial part of its debt financing for the project. As Mr. Lungu explained, Vitol had agreed to pay half the construction cost through prepayments for TNG condensate that worked like a revolving line of credit.[326] Beginning in June of 2009, however, Vitol began to draw down that line of credit because of the risky investment environment created by Kazakhstan.[327] Vitol ultimately reduced the amount of its total financing for the project to US $66 million.[328]

3. Interference With Development of Tolkyn and Borankol

222. As with the LPG Plant, the extremely hostile investment environment created by Kazakhstan, combined with the liquidity shortage due to the absence of the Credit Suisse financing, also forced Claimants to reduce development efforts in the Tolkyn and Borankol

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322 Letter from Terra Raf to the Akim of Mangystau Region, February 23, 2010, **C-664**.

323 Letter from the Akim of Mangystau Region to the Prime Minister of Kazakhstan, February 24, 2010, **C-665**.

324 Broscaru Statement ¶ 28.

325 First GCA Report ¶ 63; Tr. January 2013 Hearing, Day 4, 15:1-12.

326 Tr. January 2013 Hearing, Day 1, 183:25-184:18.

327 Tr. October 2012 Hearing, Day 2, 43:1-43:8; Tr. January 2013 Hearing, Day 1, 185:13-185:21.

328 Tr. January 2013 Hearing, Day 1, 248:13-248:20.

fields. That included the decision not to drill (or recomplete) thirteen wells at Borankol and Tolkyn in 2009-2010.[329] This injured Claimants in at least three ways:

- First, KPM and TNG lost the revenue they would have earned from their planned production during 2009 and 2010;

- Second, that gap in development efforts artificially depressed the production "curve" at Tolkyn and Borankol. As discussed at length in Claimants' First Post-Hearing Brief, that is another of the many reasons why Kazakhstan's valuation date and approach to valuation are wrong.[330] The production at July 2010 that forms the basis for GCA's decline curve analysis is significantly lower than it would have been if Claimants had been able to develop the fields without interference by Kazakhstan.[331]

- Third, Claimants were unable to respond promptly to the watering issues at the Tolkyn field. Although Kazakhstan greatly exaggerates the magnitude of the watering problem, it bears responsibility for preventing Claimants from implementing normal field management practices to address it in 2009 and 2010.[332]

4. Kazakhstan's Actions Interfered With TNG's Sales

223. Local consumer demand can absorb only a portion of TNG's natural gas production, particularly in summer months when heating demand declines. TNG historically sold its excess gas production to exporters like Kemikal.[333] In 2008, TNG sold more than 62 percent of its gas to Kemikal, accounting for more than US $77 million in revenue.[334]

224. In late 2008, following the Nazarbayev investigation order, Kemikal inexplicably refused to post bank guarantees that were required by its credit terms.[335] Kemikal was owned by Samruk-Kazyna, the Kazakh sovereign welfare fund that was controlled by Timur Kulibayev, President Nazarbayev's son-in-law, at the time.[336] After

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329 Second Stati Statement ¶ 44.

330 *See* Claimants' First Post-Hearing Brief ¶¶ 365-368, 459-63.

331 Tr. January 2013 Hearing, Day 3, 35:2-20.

332 Tr. January 2013 Hearing, Day 3, 24:11-22.

333 TNG also reduced production in the summer of 2007, but that was a voluntary step in order to negotiate a higher price with Kemikal. *See* Second Lungu Statement ¶¶ 3-5. TNG had never before encountered a situation in which no exporter would take its gas at any price.

334 Tristan Oil 2008 Annual Report, Ex. 67 to First FTI Scope of Review at 4.

335 Second Lungu Statement ¶ 6.

336 Tr. January 2013 Hearing, Day 3, 49:14-19 (testimony of Professor Olcott that Samruk-Kazyna owned Kemikal); Tr. October 2012 Hearing, Day 3, 173:18-19 (testimony of Minister Mynbaev that Kulibayev was the head of Samruk-Kazyna); M. Olcott, *Kazakhstan: Unfulfilled Promise?* at 266, Exhibit 1 to First

learning of President Nazarbayev's investigation order, and the aggressive and hostile investigations that followed, Claimants inferred that Kemikal's sudden refusal to post credit guarantees was part of the campaign to put pressure on TNG.[337] But whether or not it was part of such the campaign (which Claimants cannot know with certainty), the sudden government hostility that followed President Nazarbaev's investigation order made continued sales to a State-owned company on open credit too risky. Consequently, TNG did not renew the contract with Kemikal when it expired at the end of 2008, as it would have (even on open credit terms) had its investments not been targeted by the State.

225. TNG attempted to find replacement buyers for its gas in the summer of 2009, but Kazakhstan's actions frustrated those efforts in two ways. First, Kazakhstan effectively precluded TNG from selling any of its gas on the export markets. Kazakhstan controlled all access to the CAC pipeline, which was the only route for TNG to export its gas. Kazakhstan, however, required producers to sell through "designated purchase agents" that were affiliated with the Kazakh government, such as KazRosGaz or Kemikal.[338] Kemikal was a non-option for the reasons discussed. Moreover, when TNG attempted to sell its excess gas to KazRosGaz, it received no response, which had never been an issue prior to October 2008.[339]

226. Second, following the arrest of Mr. Cornegruta on April 25, 2009, a majority of the senior management of KPM and TNG wisely decided to leave Kazakhstan. TNG's general director, Mr. Cojin, was out of the country at the time and wisely decided not to return.[340] Moreover, both before and after Mr. Cornegruta's arrest, the management of TNG had to devote much of its time to responding to the State's various harassment actions, rather than the day-to-day management of the company. Thus, when TNG needed its senior management to devote its time and energies to locating additional gas buyers, its general director was not in the country, and its remaining management was occupied responding to Kazakhstan's harassment and coercion.[341]

Olcott Report (book authored by Professor Olcott stating that Kulibayev had a long-standing and influential position in Samruk-Kazyna).

337 *See, e.g.*, Tr., October 2012 Hearing, Day 1, pp. 201:5 – 202:12.

338 Second Olcott Report ¶ 25; Tr. January 2013 Hearing Day 3, 48:25–50:14.

339 Second Lungu Statement ¶ 8.

340 Second Stati Statement ¶ 28; First Cojin Statement ¶ 22.

341 TNG did locate one potential new buyer, which resulted in execution of a gas sales contract that was scheduled to go into effect in June 2009 "[a]ssuming certain conditions are satisfied by the other party to the contract." *See* Tristan Oil 2008 Annual Report, Ex. 67 to First FTI Scope of Review at 16. The buyer never satisfied those conditions, and thus the contract never went into effect. *See* Tristan Oil 2009 Annual

227. As a result of being forced not to renew the Kemikal contract, and being unable to replace that contract, TNG had to shut in production by 30-50 percent during March through July of 2009, and by 100 percent during two weeks in August 2009.[342] Consequently, TNG produced 17 BCF of gas and 311,000 barrels of condensate less than the targets in its own 2009 work program (which was 27 and 19 percent of those targets, respectively).[343]

5. Interference With Exploration of the Contract 302 Area

228. On October 10, 2008, TNG informed the MEMR that it no longer wished to enter the appraisal phase in relation to Munaibay, and instead intended to exercise the clause enabling a two-year extension of the entire exploration Contract No. 302. As it explained in that letter, TNG based that decision on its belief that the 302 area had significant potential in "more deep-lying raw hydrocarbon reservoirs on Munaibay area," and its desire to "fully and thoroughly explore the contractual territory."[344] On October 14, 2008, TNG submitted a formal extension request and proposed work program, which reiterated TNG's intent to complete the Munaibay 1 well to its planned depth of 6,000 meters and, based on the results of that well, to drill a second ultra-deep well to explore a "deeply submerged reef field" in the subsalt horizon.[345] These documents unquestionably confirm TNG's intent to explore the entire Contract 302 area, including the Interoil Reef. Kazakhstan's argument that the omission of the second ultra-deep well in the proposed work program submitted on October 14, 2008, meant that TNG had no intent or legal ability to explore the reef, is not persuasive. Work programs are routinely amended, and it is logical that TNG wanted to complete the Munaibay-1 well before deciding whether to commit to drill a second ultra-deep well.[346]

229. Moreover, TNG could have penetrated the reef structure by deepening the Munaibay-1 well rather than drilling a second exploration well. TNG's original plan to drill

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Report, at 17, R-37.6. Kazakhstan's argument that Mr. Lungu was "evasive" about this agreement at the Quantum Hearing illustrates how Kazakhstan misrepresents testimony in its efforts to discredit Claimants' witnesses. *See* Respondent's First Post-Hearing Brief ¶¶ 144-145. Kazakhstan asserts that Mr. Lungu testified that the Annual Report does "not refer to any contract," when he clearly testified that the Annual Report "does not name a contract, therefore I don't know to which one actually it refers." Tr. Quantum Hearing Day 1, 216:6-7. It is hardly surprising that Mr. Lungu would not remember the details of a four-year-old agreement that he did not negotiate and that never went into effect.

342 Tristan Oil 2009 Annual Report, at 17, R-37.6.

343 Minutes on the MEMR unscheduled inspection of TNG, January 25-February 5, 2010, Table 5, **C-599**.

344 TNG Letter to MEMR of October 10, 2008, **C-66**.

345 TNG Application to Extend Contract 302, October 14, 2008, **C-67**.

346 First GCA Report ¶ 106; Cojin Testimony, Tr. January 2013 Hearing, Day 2, 64:13-19.

Munaibay-1 to 6,000 meters, and then to drill a second well in a different location to explore the reef structure, was premised on the 2D seismic data, which indicated that the Munaibay-1 well was not in a good location to explore the reef.[347] The 3D seismic data, however, showed that the Munaibay-1 well was in a very good location to explore the reef (near the crest of the formation), although it also confirmed that the top of the formation was somewhat deeper than the original planned depth of the Munaibay-1 well (around 6,750 meters in Ryder Scott's view, and 6,300 meters according to GCA).[348] After TNG analyzed the 3D data in early 2009, it could have decided to explore the reef by deepening the Munaibay-1 well (which was already at 4,700 meters, and would penetrate the reef at a depth somewhat below 6,750 meters), rather than drilling an entirely new well to explore the reef.[349]

230. Additionally, TNG had the capability to explore the entire Contract 302 area, including the reef. Kazakhstan's argument that TNG's failure to complete the Munaibay-1 well to its planned depth of 6,000 meters demonstrates that it lacked the technical ability to explore the reef is wrong. TNG stopped drilling that well at 4,700 meters because it encountered pressures that required a heavier drilling rig.[350] Claimants acquired a heavier drilling rig in Georgia that was ready to transport to Kazakhstan in January 2009.[351] That

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[347] The Munaibay-1 well's primary target was the Munaibay Oil structure (which tested positive around 4,700 meters). Based on the 2D seismic data, the Munaibay-1 well appeared to be near the flank of the reef structure, making it a poor location to test that structure. Nonetheless, TNG planned to drill that well to 6,000 meters, and its only target in doing so would have been to explore the Interoil Reef. It is common for an operator to design a well with one formation as a primary target and another as a secondary target -- even if it is not in an ideal location to explore the secondary target – because it can provide valuable information about the target at relatively little additional cost. Here, because the 2D data provided a fairly unclear image of the depth of the reef, it was reasonable for TNG to conclude that the Munaibay-1 well could penetrate the reef around 6,000 meters, or at the very least provide valuable velocity and geological data that would have assisted in planning the Munaibay-3 well. *See* Fourth Ryder Scott Report ¶¶ 61-67.

[348] Contrary to Kazakhstan's argument in its rebuttal closing at the May Hearing (*see* Respondent's Rebuttal Closing of May 3, 2013, slide 13), Mr. Nowicki has not "retracted" his opinion that the Munaibay-1 well could penetrate the reef structure. At the January Hearing, Mr. Nowicki had not completed his depth conversion analysis of the 3D seismic data, and thus testified accurately that 6,000 meters was within the range at which one might encounter the reef based on the uncertain 2D data. At the May hearing, after fully analyzing the 3D data, Mr. Nowicki testified that the Munaibay-1 well ***would*** penetrate the reef, but at a depth "probably a little bit deeper" than 6,750 meters, rather than its original proposed depth of 6,000 meters. *See* Tr. May 2013 Hearing, Day 1, 51:15-25. Thus, he did not retract his view that the Munaibay-1 well would penetrate the reef; he merely refined his view of the depth at which it would hit the reef based on the more precise 3D data. Kazakhstan's argument to the contrary is based on an egregious, selective mischaracterization of his testimony. *See* Fourth Ryder Scott Report ¶¶ 61-67.

[349] Fourth Ryder Scott Report ¶¶ 61-67.

[350] Romanosov Testimony, Tr. January 2013 Hearing, Day 2, 67:1-68:17.

[351] Tr. January 2013 Hearing, Day 2, 84:11-19, 114:25-115:15.

drilling rig had a designed depth capacity of 7,000 meters, which would have been adequate to drill an exploration well to test the reef structure.[352]

231. Claimants, however, decided not to move the heavier drilling rig to Kazakhstan after the State commenced its harassment campaign, including, most notably, the MEMR's actions challenging Claimants ownership of TNG on December 18, 2008.[353] It would have been imprudent to move an additional valuable asset into Kazakhstan, and commit additional resources, in order to develop an investment that the MEMR had declared Claimants had no legal right to own (TNG). Instead, Claimants reasonably endeavored to resolve the disputes with the MEMR, up to and including a meeting with the Executive Secretary of the MEMR on March 19, 2009.[354] The MEMR, however, never withdrew its challenge to Claimants' ownership of TNG, and thus TNG was never in a position to prudently continue investment in the Contract 302 area.

232. Moreover, Kazakhstan's refusal to execute the formal extension of Contract 302 clearly prevented TNG from conducting further exploration work on the area. Although the MEMR had extended Contract 302 (and was obligated to extend the contract under its duty to act fairly, equitably, and in good faith), its failure to execute the formal amendment prevented TNG from conducting further exploration activity. Thus, Kazakhstan's violations injured Claimants by preventing them from proving the full extent and recoverability of the resources in the Contract 302 Properties

6. Interference With Ability to Sell the Investments

233. Kazakhstan's illegal conduct also significantly interfered with Claimants' ability to sell their investments in KPM and TNG. The evidence of this interference is overwhelming.

234. First, the MEMR's leak to the financial press on December 18, 2008, clouded Claimants' title to TNG, and impugned the character of Claimants with allegations of forgery and fraud. The Moody's rating agency publicly described this development, along with the

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352 *See* Fourth Ryder Scott Report ¶ 68.

353 Tr. January 2013 Hearing, Day 2, 84:11-19, 114:25-115:15.

354 First Lungu Statement ¶ 43.

criminal investigation of KPM, as "alarming," and both Moody's and Fitch warned investors that a negative outcome would threaten the companies' existence as going concerns.[355]

235. Second, in connection with the criminal investigation of KPM and the parallel investigation of TNG over the "main pipeline" allegations, Kazakhstan sequestered Claimants' shares in KPM and TNG on April 30, 2009, which expressly prohibited Claimants from taking "any actions related to the alienation or transfer of [their] 100% share ownership in the statutory capital … to third parties."[356] On the same day, the MEMR also sequestered KPM's and TNG's Subsoil Use Contracts, pipelines, and vehicles.[357] Thereafter, Claimants were legally prohibited from selling their investments, whether through a sale of shares or assets.

236. Third, the advisors to KMG E&P, the State-controlled oil company, confirmed that the State's actions were material impediments to any acquisition of KPM and TNG. For instance, Squire Sanders observed:

> (1) that the State sought to collect as much as US $1 billion from KPM and TNG in connection with the criminal prosecution of Mr. Cornegruta;
>
> (2) that the State had physically seized many of the companies' documents; and
>
> (3) that under the sequestration orders, "the execution and closing of the potential Transaction remains an open issue until the orders in question are revoked."[358]

Squire Sanders recommended that KMG E&P make the return of the companies' documents, and the "[t]ermination of the Criminal Proceedings and attachment orders," a "condition to any transaction."[359] It is unclear whether KMG E&P had the political clout to terminate the

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355 Moody's Rating Actions, January 15, 2009, at 1, **C-744**; Fitch Places Tristan Oil Ltd. On Rating Watch Negative, Dow Jones Newsiwre, **C-590**.

356 *See* Order to arrest all shares of KPM, April 30, 2009, **C-486**; Order to arrest all shares of TNG, April 30, 2009, **C-487**; Minutes of the arrest of KPM's shares, May 13, 2009, **C-488**; Minutes of the arrest of TNG's shares, May 13, 2009, **C-489**.

357 Order to arrest KPM's Contract No. 305, **C-490**; Order to arrest TNG's Contracts No. 210 and No. 302, **C-491**; Order to arrest KPM's pipeline, April 30, 2009, **C-492**; Minutes of the arrest of KPM's pipeline, May 13, 2009, **C-493**; Order to arrest TNG's gas pipeline, April 30, 2009, **C-494**; Minutes of the arrest of TNG's pipeline, May 13, 2009, **C-495**; Order to arrest TNG's condensate pipeline, April 30, 2009, **C-496**; Order to arrest KPM's motor vehicles, April 30, 2009, **C-497**; Minutes of the arrest of KPM's motor vehicles, May 13, 2009, **C-498**.

358 Squire Sanders Legal Due Diligence Report, July 30, 2009, at 114, 182, **C-725**.

359 Squire Sanders Legal Due Diligence Report, July 30, 2009, at 114, 182, **C-725**.

criminal actions, but it is certain that other potential buyers would not. Thus, those actions posed an insurmountable obstacle to any sale of KPM and TNG to buyers other than KMG E&P, and possibly even to KMG E&P itself.

237. Similarly, PwC identified numerous financial and tax issues that were directly attributable to Kazakhstan's wrongful actions as impediments to a purchase by KMG E&P, or at the very least, issues to be considered in valuing KPM and TNG. For instance:

> (1) PwC noted the criminal prosecution of Mr. Cornegruta, and the resulting share and asset sequestrations, and advised KMG E&P to "incorporate this major legal issue in your assessment of TNG's and KPM's viability;"[360]
>
> (2) PwC noted that KPM and TNG faced potential liability for tax penalties and interest based on the corporate back tax assessment (which was then in litigation), and advised that KMG E&P include "relevant protections" in any purchase agreement regarding those liabilities;[361]
>
> (3) PwC noted that KPM and TNG had guaranteed the Laren loan facility, and recommended that KMG E&P make revocation of that guarantee a condition precedent to any purchase;[362]
>
> (4) PwC noted TNG's slowdown in production due to the inability to sell to Kemikal or KazRosGaz, as well as the delay in LPG Plant construction, and advised KMG E&P to "include all necessary gas revenue limitations in your valuation of TNG";[363] and
>
> (5) PwC observed that KPM and TNG collectively had failed to fund US $67 million in field development activities in 2009, and recommended that KMG E&P include indemnities for this in any purchase agreement.[364]

These comments clearly demonstrate how the State's actions dampened any third-party's interest in purchasing Claimants' investments.

238. RBS's valuation also confirmed how the State's action would affect a potential purchaser's views of the Claimants' investments. For example, RBS included US

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[360] PwC Due Diligence Report, June 30, 2009, at 30, **C-724**.

[361] PwC Due Diligence Report, June 30, 2009, at 79-80, **C-724**.

[362] PwC Due Diligence Report, June 30, 2009, at 21, **C-724**.

[363] PwC Due Diligence Report, June 30, 2009, at 19, **C-724**.

[364] PwC Due Diligence Report, June 30, 2009, at 25-26, **C-724**.

$243.5 million in contingent liabilities identified by PwC in its enterprise value model, most of which are attributable to Kazakhstan.[365] It disregarded the potential exposure for up to US $1 billion in criminal fines, but only based on the telling assumption that they would be "dealt with in the SPA" — something that no purchaser other than (perhaps) KMG E&P could accomplish.[366] RBS also included the US $111 million in Tristan notes issued with the Laren transaction in its assessment of the debt that would have to be satisfied to close an acquisition.[367] Medet Suleimenov testified that KMG E&P valued the companies' equity in the range of negative US $50-100 million after deducting all of the Tristan debt and contingent liabilities.[368] The Tristan debt alone, however, would have been US $111 million smaller but for Kazakhstan's actions, in which case KMG E&P's equity valuation unquestionably would have been positive (before even considering the contingent liabilities that RBS and KMG E&P included in their valuations).

239. Medet Suleimenov also testified that the market price of the Tristan notes — which he stated was only "25-28 cents to the dollar," but in fact was double that at US $.525 per dollar on the date of the RBS Valuation (July 31, 2009) -- further discouraged KMG E&P's interest in buying the companies.[369] The market price of that debt, however, was negatively affected by Kazakhstan's illegal actions. By July 2009, Moody's had downgraded Tristan's debt from B2 to Caa3, and Fitch had downgraded the debt from B+ to C, based on the State's criminal claims against KPM and TNG, the MEMR's preemptive rights claim against TNG, and the Laren transaction.[370] As Mr. Suleimenov acknowledged, the trading price of the Tristan notes no doubt incorporated the effect of Kazakhstan's illegal actions.[371] FTI also has analyzed the trading history of the Tristan notes in 2009 and 2010, and concludes that the market price factored in significant government risk.[372] This simply

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365 RBS 2009 Asset Valuation, July 31, 2009, at 29, 62, **C-723**. These contingent liabilities are discussed further in Sections V.B.3 and V.D.3.a, *infra*.

366 RBS 2009 Asset Valuation, July 31, 2009, at 62, **C-723**.

367 RBS 2009 Asset Valuation, July 31, 2009, at 40-41 (including the "new notes" of face value US $111.1 million in RBS's two acquisition scenarios), **C-723**.

368 Tr. October 2012 Hearing, Day 3, 151:16–153:20.

369 Medet Suleimenov Statement ¶ 2.18. The trading history of the Tristan Notes is located in Exhibit E to the First FTI Report.

370 *See* Moody's Ratings Actions, February 18, 2009, March 5, 2009, and June 30, 2009, **C-744**; Fitch Ratings Action, July 10, 2009, **C-743**.

371 Tr. October 2012 Hearing, Day 4, 157:14-16 ("any kind of information that became public — or not even public — any kind of information may affect the price or does affect the price" of the debt).

372 *See* Fourth FTI Report ¶¶ 2.73-2.76.

confirms the obvious — that any investor considering an acquisition of KPM and TNG viewed them as much riskier investments because of the Government's wrongful actions.

240. Finally, when Claimants submitted the Cliffson transaction to the MOG for approval in 2010, the MOG directly confirmed that it would not approve the sale until KPM and TNG satisfied all the legal obligations imposed by the State, and the various sequestration orders were released.[373] The Aussabayevs had represented that they were well-connected insiders, and could resolve the troubles with the government to clear the way for a sale. That turned out not to be the case.

241. Thus, the evidence overwhelmingly demonstrates that Kazakhstan's wrongful conduct erected obstacles to purchasing Claimants' investments that would have destroyed any buyer's appetite for purchasing the companies or their assets no later than December 18, 2008, and in fact made any sale legally impossible from April 30, 2009 onward. That is more than sufficient to prove causation.

242. Kazakhstan's argument that Claimants have not shown that State action was the sole cause that a particular buyer walked away from purchasing Claimants' investments both misstates the evidence and overstates the burden of proof.

243. First, Claimants have proven that Kazakhstan's actions were the primary reason that KMG E&P did not buy KPM and TNG (assuming, as Kazakhstan contends, that KMG E&P in fact was acting as a good faith purchaser and not in furtherance of the State's harassment campaign). Mr. Suleimenov stated that KMG E&P did not pursue an acquisition because its equity valuation of the companies was negative,[374] but his testimony on cross-examination and the RBS Valuation both demonstrate that KMG E&P's equity valuation would have been significantly positive but for the State's actions. Particularly with the benefit of the Squire Sanders Report, the PwC Report, and RBS Valuation, there can be little doubt that Kazakhstan's wrongful actions had an enormous negative impact on the way KMG E&P viewed that transaction.

244. For the other potential buyers that provided evidence, Kazakhstan also overstates the evidence regarding the reasons why they did not consummate a purchase of Claimants' investments. Mr. Chagnoux's explanation for why Total lost interest in Borankol

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373 *See* Letters from Ministry of Oil and Gas to KPM and TNG, April 30, 2010, at 2, **C-528** and **C-529**.

374 Tr. October 2012 Hearing, Day 4, 128:15-23 ("the outcome of the due diligence and this valuation showed us that the price of the assets would be negative, so it made no sense to make further offers").

and Tolkyn conflicted with his prior letter to the Minister of Oil and Gas, which was limited to Borankol (and which accounted for less than 20 percent of Total's original US $900 million indicative offer).[375] Moreover, Mr. Chagnoux admitted that Total would have been interested in the Contract 302 block if Claimants had been able to provide additional data on the reef structure, which Claimants were not able to provide because Kazakhstan precluded Claimants from completing an exploration well.[376] Dr. Kim of KNOC testified that TNG's inability to export gas was the principal reason that KNOC decided not to complete a purchase of KPM and TNG, but TNG's inability to export gas was directly attributable to Kazakhstan's illegal actions.[377] And while Mr. Seitinger testified that OMV decided not to pursue a transaction for market-related reasons, he also emphasized that its decision was not due to any reevaluation of the business of KPM and TNG.[378]

245. Moreover, Kazakhstan applies the wrong legal and evidentiary standard. Claimants are not required to show that State action was the sole reason that no one purchased their Kazakh investments. As explained above, when injury is caused by a combination of factors, only one or some of which are ascribed to the responsible State, international law nonetheless holds the State responsible for the entire loss. It is simply beyond serious doubt that KPM and TNG became unattractive assets to market after:

- The MEMR challenged Claimants' title to TNG and accused Claimants of forgery and fraud;
- The Financial Police began investigating KPM and TNG for a made-up crime;
- Two major ratings agencies called these actions alarming, and warned investors that they threatened the

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375 *See* Claimants' First Post-Hearing Brief ¶ 392.

376 Tr. October 2012 Hearing, Day 4, 33:3-13, 39:8-23.

377 *See* Section IV.B.4 *supra*.

378 Tr. January 2013 Hearing, Day 3, 20-25. Claimants have no reason to dispute Mr. Seitinger's testimony as to OMV, but Kazakhstan overstates its significance. Mr. Seitinger testified that OMV did not want to make a large capital investment "in order to avoid a liquidity problem" during the low-price environment of late 2008. *Id*. Kazakhstan cites his testimony in support of speculation that other potential buyers also lost interest in buying Claimants' investments because of capital constraints due to the financial crisis. *See* Respondent's First Post-Hearing Brief ¶ 83. OMV, however, was one of the only Project Zenith bidders who planned to finance the acquisition using bank facilities. *See* Indicative Offer for Project Zenith from OMV, September 26, 2008, ¶ (e), **C-76**; Overview of Project Zenith Non-Binding Offers, September 27, 2008, at 5-6, **C-17**. While the financial crisis no doubt affected the appetite of some companies for capital transactions — particularly companies with liquidity concerns or who intended to finance a transaction with credit — that cannot be generalized to the entire market. For other companies who had excess cash, the financial crisis represented a buying opportunity.

ability of the companies to meet their existing debt obligations;

- The Tax Committee issued new and unfounded back tax assessments for over US $60 million;

- TNG halted sales to its largest gas customer, who was owned by the State and mysteriously refused to post credit at the same time that the State's harassment began;

- The Financial Police arrested and imprisoned KPM's general director, causing other senior management of both companies to leave the country;

- The General Prosecutor sought a massive criminal penalty for a non-existent crime — a penalty that observers like Squire Sanders believed could be as high as US $1 billion;

- The State sequestered Claimants' shares in the companies, the companies' Subsoil Use Contracts, and other assets;

- KPM and TNG halted ordinary development work and construction of the LPG Plant because Claimants were unable to raise additional financing on ordinary terms, and Claimants in any event were unwilling to invest more capital in fixed assets that Kazakhstan could seize;

- Vitol backed out of its obligation to fund half the LPG Plant construction;

- Claimants were forced to borrow money on extremely onerous and complicated terms to forestall default on debt and tax obligations, leading to another debt downgrade and increasing the outstanding debt to be covered in a sale by US $111.1 million (over and above the amount actually borrowed); and

- Kazakhstan sentenced KPM's general director to a four-year prison term, and imposed a penalty of US $145 million against KPM, for a non-existent crime.

Even if other events (such as the global financial crisis) also made it harder to sell oil and gas companies in 2009, Kazakhstan is responsible for all of the injury to which its actions contributed. Any suggestion that its many acts did not substantially contribute to Claimants' inability to sell their investments is simply not credible

7. Total Loss of the Investments in July 2010

246. As discussed above in Section III.J, Kazakhstan's abrogation of the Subsoil Use Contracts and outright seizure of all the assets of KPM and TNG in July 2010 were illegal expropriations that violated the ECT and international law. This violation caused direct and egregious injury to Claimants, who thereby lost any remaining ability to sell the assets, to use the assets productively, and to direct the cash flows from those assets to the creditors of the companies and to the Claimants as dividends. As shown in the preceding sections, Claimants had lost meaningful control over their investments long before the final seizure. The seizure was merely the final move in a series of illegal acts from late 2008 onward, each of which seriously impacted Claimants' ability to profitably and successfully operate, manage, control, and dispose of their investments.

C. Kazakhstan Has Not Proven an Intervening Cause

247. Kazakhstan's case on causation is that regardless of its actions, Claimants would have lost their investments anyway because of events that are not attributable to the State. As it put the argument in its Rejoinder on Jurisdiction and Liability, "[e]xternal circumstances and Claimants' own actions led to a deterioration of value of KPM and TNG and their abandonment by the alleged investors."[379] In support of this argument, Kazakhstan alleges that the Tristan debt structure, the financial crisis, the drop in oil prices, and the "constant withdrawal of cash from the companies" led to "a severe underfunding of KPM and TNG and subsequently, to the companies no longer complying with their obligations under the Subsoil Use Contracts and Kazakh law. The eventual termination of the contracts was a logical consequence."[380]

248. As the tribunal in *Lemire* explained, when a State argues that an injury resulted from acts of the victim or the market, rather than its own wrongful acts, the burden is on the State to demonstrate such an intervening cause. Kazakhstan has not met that burden. Kazakhstan overstates the impact of the financial crisis on Claimants' investments. While KPM and TNG did experience a short-term liquidity shortage in the first half of 2009, that problem was magnified by Kazakhstan's actions, and in any event did not lead to the failure of the companies. There never were any lawful grounds for terminating the subsoil use

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[379] Rejoinder on Jurisdiction and Liability § X.

[380] Rejoinder on Jurisdiction and Liability ¶¶ 724-25.

contracts of KPM and TNG, or seizing their assets. And Claimants never abandoned their investments.

1. The Financial Crisis and Claimants' Alleged Financial Mismanagement Did Not Cause Claimants' Injuries

249. The crux of Kazakhstan's causation argument is that KPM and TNG were overleveraged prior to any actions of the State, which doomed them to fail when oil prices dropped during the global financial crisis. No credible evidence supports this argument, and it is belied by all objective facts. While KPM and TNG experienced a liquidity shortage in the first half of 2009, that problem was temporary and surmountable. Moreover, Kazakhstan itself contributed significantly to that problem.

a) KPM and TNG Were Not Insolvent or Overleveraged Prior to October 14, 2008

250. Kazakhstan presents no credible evidence that KPM and TNG were overleveraged prior to October 14, 2008. Kazakhstan simply calculates the annual interest payment on the Tristan notes, and then asserts with no support that "[i]t stands to reason that such a continuous and heavy financial burden had a negative impact on KPM's and TNG's operations."[381] Its principal expert on this issue is Professor Martha Brill Olcott, a political scientist who is not qualified to perform financial analysis. Moreover, she in fact has performed no ratio tests or other standard financial analysis of the companies' ability to service their debt. She simply asserted without analysis that Claimants "had over-financed Tristan Oil."[382] Such advocacy masquerading as expert opinion is not credible.

251. With its First Post-Hearing Brief, Kazakhstan for the first time submitted some analysis from an actual financial expert, Thomas Gruhn of Deloitte, that purported to analyze the implications of the Tristan debt trading price on October 14, 2008.[383] Like Olcott, Deloitte does not perform any direct analysis of the ability of KPM and TNG to service their debt. Deloitte, however, does argue that based on the trading price of those notes, "the Tristan Bond investors regarded Tristan as a company in financial distress as they expected with a material likelihood that the bond principal and interest would only partly be repaid."[384]

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381 Rejoinder on Jurisdiction and Liability ¶¶ 734-735.

382 First Olcott Report ¶ 166.

383 Supplemental Report of Deloitte GmbH, at 67-77.

384 Supplemental Report of Deloitte GmbH ¶ 192.

252. Deloitte is wrong. As Howard Rosen of FTI has explained, prior to the bankruptcy of Lehman Brothers on September 15, 2008, the Tristan notes were trading close to their US $100 face value (US $95). The day immediately after the Lehman bankruptcy, the trading price of the notes declined to US $84.50, and continued declining to around US $65 on October 14, 2008. That decline, however, did not represent the market's view of whether these companies would repay their notes when they came due in 2012, because markets at that time were not trading on fundamentals. Rather, in the midst of the financial crisis, investors sold securities across the board for a variety of reasons, including the need to raise cash to meet investor calls, a desire to reduce risk, or simple panic.[385]

253. Moreover, FTI has analyzed the finances of KPM and TNG, and concludes that they were in good financial condition prior to October 2008. On September 30, 2008, KPM and TNG had "current ratios" of 3.1 and 3.0, respectively.[386] Under this common liquidity-measuring financial ratio, which compares current assets to current liabilities, a company is generally deemed to be liquid when the ratio is above 1.[387] The companies also had combined retained earnings in excess of US $365 million on September 30, 2008, up from approximately US $200 million at the end of 2007.[388]

b) KPM and TNG Experienced a Liquidity Problem in 2009 That Kazakhstan Partly Caused and Greatly Exacerbated

254. In support of its argument that KPM and TNG were financially unsound, Kazakhstan focuses on the fact that they had only US $9 million in cash on hand at the end of September 2008. Kazakhstan ignores, however, that KPM and TNG also held US $22 million in inventory and US $296 million in trade receivables at the end of September 2008.[389] In total, the companies' net working capital (short-term assets minus short-term liabilities) was US $222 million on that date.[390] Thus, the companies had a substantial working capital "cushion" built up from past operations to meet their ongoing obligations, in addition to the substantial equity in the companies' fixed assets and subsoil use agreements (which had the ability to generate hundreds of millions of dollars in future cash flows). They were a very long way from insolvent.

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385 *See* Third FTI Report ¶¶ 10.1-10.6; Fourth FTI Report ¶¶ 2.69-2.78.

386 Third FTI Report ¶ 11.10.

387 Third FTI Report ¶ 11.10.

388 Third FTI Report ¶ 11.11.

389 Third FTI Report ¶ 11.8.

390 Third FTI Report ¶ 11.8.

255. The fact that the companies' working capital was primarily in receivables rather than cash, however, did create the possibility for a liquidity problem. In the ordinary course of business, KPM and TNG could use the prepayment provisions of the Vitol COMSA agreements as a revolving line of credit to manage cash flow requirements. But in the first half of 2009, a number of factors combined to produce a liquidity crunch, including:

- Low oil prices and slow payments by customers;
- Reduction in gas and condensate sales after nonrenewal of the Kemikal contract; and
- Vitol's decision to stop funding construction of the LPG Plant, and to reduce the credit line under the prepayment terms of the COMSA agreements from US $120 million to US $40 million effective at the end of June, 2009.[391]

256. At the end of 2008, Claimants prudently anticipated that cash flow might be an issue in the prevailing low price environment (although they did not yet fully appreciate the extent to which Kazakhstan's actions would exacerbate the cash flow situation). This led Claimants to seek the Credit Suisse loan in order, as Mr. Lungu explained, "to make our company guaranteed in case this downfall in prices should continue."[392] Claimants' decision to seek bridge financing to meet liquidity needs does not show, as Kazakhstan argues, that KPM and TNG were in serious financial trouble prior to October 14, 2008. Moreover, the fact that the companies were able to attract a US $150-175 million bridge loan from Credit Suisse in the midst of the financial crisis — that is, until the MEMR's defamation in the financial press scared Credit Suisse away — confirms that KPM and TNG were solvent, valuable companies prior to the impacts of the State's harassment campaign.[393]

257. The cash flow problem came to a head in June 2009, when two large cash payments came due — the US $22 million coupon payment on the Tristan notes and an excess profits tax payment of around US $25 million. Failure to make those payments would have jeopardized the existence of KPM and TNG, which led Claimants to the difficult but necessary decision to enter into the Laren transaction in order to save their investments.

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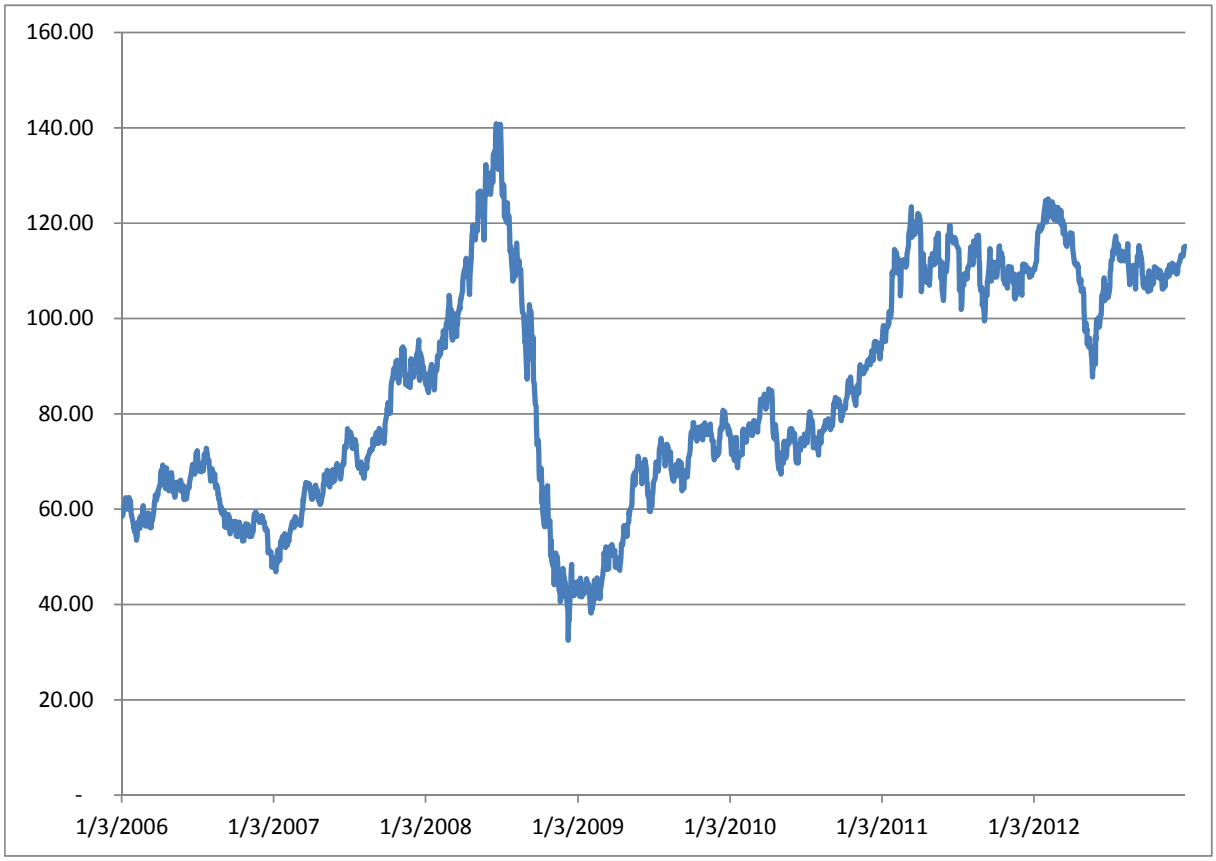
391 *See* 2009 Tristan Annual Report at 5, **R-37.6**.

392 Tr. October 2012 Hearing, Day 1, 200:2-200:9.

393 Third FTI Report ¶ 11.12.

258. Moreover, the causes of the liquidity crisis that KPM and TNG encountered in June 2009 — at least, the market causes not attributable to Kazakhstan — were temporary. The primary factor, the low oil price environment, was over by the fourth quarter of 2009. Kazakhstan exaggerates both the size and duration of the decline in oil prices by focusing only on 2008 and 2009. The year 2008, however, was itself an anomaly because oil prices climbed to unprecedented highs. The following chart of Urals Mediterranean oil prices shows this:[394]



259. In 2006 and 2007, when investors saw KPM and TNG as attractive enough to loan US $420 million through the Tristan notes, oil prices were in the US $60-80 range, even dropping into the US $50s for some time. Beginning in October 2007, however, prices climbed quickly and dramatically to an all-time high of around US $140 per barrel in June 2008. As a result of the global financial crisis and recession, prices then plummeted just as quickly, bottoming out below US $32 per barrel in December 2008. The trough was short-lived, however, with prices returning to US $50 per barrel by March 2009, US $60 by May 2009, and US $70 per barrel by June 2009. Using US $70 as a benchmark for the "pre-

[394] *See* Third FTI Report, Exhibit 1.

bubble" prices when the Tristan notes were issued in 2006-2007, prices were only consistently below that level for 9.5 months.[395] Prices were only below US $60 per barrel for less than seven months.[396] While prices did not return to 2008 "bubble" levels (*e.g.*, US $120+) for another year or more, KPM and TNG did not need prices to remain at 2008 levels to be highly profitable.[397]

260. Moreover, gas prices did not decline significantly at all. The companies' average realized price for gas declined only 14.2 percent from 2008 to 2009 (from US $1.36/mcf to US $1.17/mcf).[398] The 52.1 percent decline in the companies' gas sales revenue from 2008 to 2009 thus was due primarily to reduced sales volumes, which as discussed above, was attributable to Kazakhstan's wrongful conduct. Moreover, that situation was temporary, as demand returned with cooler weather beginning in September 2009.[399]

261. Consequently, KPM and TNG endured the liquidity problem that came to a head in June 2009 (although at a very high cost due to the actions of the State). Tristan made the US $28 million coupon payment in December 2009.[400] Claimants paid interest and over US $8 million in principal on the Laren debt.[401] KPM and TNG continued producing oil and gas through July of 2010, and continued to pay their employees. In short, the companies survived the temporary cash flow crisis, and but for the actions of Kazakhstan, would have been well-positioned to rebound as oil prices climbed back toward historic highs (US $100-120 per barrel) in the second half of 2010.[402]

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395 See Third FTI Report, Ex. 1 (from October 15, 2008 through July 31, 2009).

396 See Third FTI Report, Ex. 1 (from November 6, 2008 through May 25, 2009).

397 This is evidenced by the fact that prices were in the US $60-80 range when the Tristan was issued, and the fact that KPM and TNG recorded a combined net profit of US $81.5 million in 2007, when prices averaged less than US $70. 2007 Annual Report of Tristan Oil and attached Audited Financial Statements at 6, F-73, and F-109, **R-37.4**.

398 2009 Annual Report of Tristan Oil, at 10, **R-37.6**.

399 2009 Annual Report of Tristan Oil, at 17, **R-37.6**. There is no reason to suspect that TNG would have been unable to obtain export or industrial buyers for its gas in future years, but for interference from the State. As Respondent's own gas industry expert (Professor Olcott) opines, domestic demand for gas was expected to rise as Kazakhstan completed its project of domestic gasification. *See* Second Olcott Report ¶¶ 77-87.

400 *See* 2009 Audited Financial Statements of Tristan Oil attached to 2009 Annual Report of Tristan Oil, F-73, **R-37.6**.

401 *See* Laren Settlement Agreement, December 2011 at 2, **C-745**. This settlement agreement memorializes the final resolution of the Laren transaction. Claimants paid US $61.5 million (in addition to amounts already paid), and the Laren Lenders kept the US $111.1 million in new notes. *Id*. at 4 and § 12.2. The Whereas clauses in the agreement reflect the payment of interest and more than US $8 million of principal in 2009.

402 It should also be noted that the collectability of accounts receivable was not a significant factor in Claimants' inability to sell their investments. The liquidity position of KPM and TNG was specific to those companies. A potential buyer would inject its own cash, and thus there would be no liquidity problem after

2. Claimants Did Not Abandon Their Investments

262. Kazakhstan also asserts that Claimants' abandonment of their investments was an intervening cause of their injuries. The Claimants, however, did not abandon their investments. In fact, clear evidence shows the contrary.

263. First, Kazakhstan's argument that Claimants' stripped KPM and TNG of cash in preparation to abandon them is unsupported and wrong. Kazakhstan points primarily to the non-cash dividends that KPM declared, and paid in the form of an assignment of receivables, in late 2009 and 2010. KPM paid those dividends, however, to avoid unlawful seizure of its funds, not to prepare for voluntary abandonment. By that time, it was apparent that any money that flowed into KPM's bank accounts was at risk of immediate seizure to satisfy the illegal US $145 million criminal penalty that Kazakhstan had imposed against KPM on September 18, 2009.[403]

264. Moreover, declaration of those dividends was a reasonable effort to mitigate the harm caused by Kazakhstan's actions. Tristan Oil owed a substantial coupon payment (of around US $28 million) to the noteholders on December 31, 2009.[404] The assignment of receivables allowed Tristan to collect funds that otherwise may have been frozen in KPM's bank accounts, and Tristan made the coupon payment in full.[405] If that had not occurred, Tristan would have defaulted on the notes.

265. Kazakhstan also argues that the failure to collect certain intercompany receivables earlier in 2009 was part of an effort to strip money from KPM and TNG in preparation for abandonment. Kazakhstan has no evidence, however, that the inability to collect those receivables was driven by factors outside the ordinary course of business. Kazakhstan relies on a statement in the PwC report that KPM and TNG had not collected US $170 million in receivables from Montvale "because it invested funds received from Vitol in certain non-liquid assets."[406] Claimants dispute that assertion, which Kazakhstan produced

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a sale. Put another way, a buyer would value the assets of KPM and TNG based on their ability to produce future profits, and the cash flow position of KPM and TNG is irrelevant to the future profitability of the assets in the hands of a new owner. This is confirmed by the fact that there is no discussion of the collectability of receivables in the RBS Valuation. Assuming for the sake of argument that those receivables were entirely worthless (and they were not), that would have no impact on the value of the operating assets to a new owner who would sell to its own customers and collect its own receivables.

403 Lungu Testimony, Tr. October 2012 Hearing, Day 1, 202-20-202:6.

404 Audited Financial Statements Attached to 2009 Annual Report of Tristan Oil at F-73, **R-37.6**.

405 Audited Financial Statements Attached to 2009 Annual Report of Tristan Oil at F-70, F-73, **R-37.6**.

406 PwC Report at 17, **C-724**.

and relied on too late in the proceedings for Claimants to rebut. But in any event, taking the statement on face value, it in no way shows that the failure of KPM and TNG to collect those receivables was part of a voluntary plan to prepare for abandoning the companies.

266. Finally, Kazakhstan's abandonment thesis is flatly contradicted by the objective evidence of the great lengths to which Claimants went to protect their investments. KPM's assignment of receivables was part of an effort to protect Claimants' investments by preventing a default on the Tristan notes. The uncontradicted evidence also shows that Claimants went to great lengths to continue paying KPM's employees after its accounts were frozen in 2010, including having TNG pay those employees from its accounts. Most significantly, Claimants entered into the highly unattractive Laren transaction, secured by a personal guarantee from Mr. Stati and a pledge by Ascom of its assets in Iraq, in order to raise funds needed to keep the companies alive.[407] Far from abandoning their investments, Claimants made every effort to protect them, right up until Kazakhstan ultimately seized them in July 2010.

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267. In summary, Claimants have amply demonstrated that Kazakhstan's actions caused myriad serious injuries to Claimants' investments beginning shortly after President Nazarbayev issued his investigation order on October 14, 2008, continuing over the next 20 months, and ending with the final seizure of the assets of KPM and TNG in July 2010. Kazakhstan's theory that the woes of KPM and TNG result solely from Claimants' management or market conditions outside the State's control is bogus, unsupported, and a clear attempt to distract attention from its own deplorable misconduct.

V. QUANTUM

A. The Tribunal Has Discretion In Setting Full Compensation

268. It is beyond dispute that Kazakhstan's violations of the ECT injured Claimants' investments in Kazakhstan. The task for this Tribunal is to approximate the amount of monetary damages required to fully compensate Claimants for those injuries. That

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[407] *See* Laren Facility Agreement, at 12-13, **C-733**. In its rebuttal closing at the May hearing, Kazakhstan argued that Mr. Stati's personal guarantee in the Laren transaction was inconsistent with his assertion that the situation in Kazakhstan was too unstable to risk increasing his investment there. *See* Respondent's Rebuttal Closing Submission, slide 17. That argument is nonsensical. There is an enormous difference between taking on additional risk to private parties in order to save existing billion-dollar investments in hope of selling them, and unnecessarily increasing capital investment in fixed assets in Kazakhstan.

task ultimately is an exercise of the Tribunal's broad discretion based on all the evidence before it, and international law provides some guidelines to assist in the process.

269. The ECT provides that in cases of lawful expropriation, a State must pay "prompt, adequate, and effective compensation," and that:

> Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").[408]

The Treaty, however, contains no *lex specialis* governing the standard of compensation for unlawful expropriation or other violations of the treaty. For that, the Tribunal must turn to customary international law.

270. The foremost principle of customary international law on quantum is that a Tribunal should award ***full reparation*** for the harm that results from the State's illegal actions. Innumerable tribunals have followed that principle in assessing damages in the years since the *Chorzow Factory* case espoused this basic principle of international law.

271. Moreover, when it is impossible to put Claimants in the position they would have occupied but for the State's wrongful conduct through restitution in kind, the Tribunal's job is to estimate the amount of money corresponding to that value. This task necessarily involves uncertainty, because it involves assumptions about how events might have developed differently but for the State's actions, and how events will unfold in the years to come. As the tribunal in *CMS v. Argentina* described it, "[t]he word 'estimates' is quite appropriate in trying to establish value loss in a case involving a license valid until 2027."[409] Similarly, the tribunal in *Vivendi v. Argentina* explained:

> [I]t is well settled that the fact that damages cannot be fixed with certainty is no reason not to award damages when a loss has been incurred. In such cases, approximations are inevitable; the settling of damages is not an exact science.[410]

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408 ECT art. 13(1), **C-1**.

409 *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005 ¶ 419, **C-65**.

410 *Compañía de Aguas del Aconquija and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007 ¶ 8.3.16, **C-253**.

272. Because of the amount of uncertainty inherent in assessing damages once injury is established, tribunals have broad discretion to establish the appropriate quantum of compensation. As the annulment committee in *Rumeli v. Kazakhstan* put it in rejecting Kazakhstan's challenge to the quantum determination in that case:

> [T]ribunals are generally allowed a considerable measure of discretion in determining issues of quantum. . . . This is not a matter to be resolved simply on the basis of the burden of proof. To be sure, the tribunal must be satisfied that the claimant has suffered some damage under the relevant head as a result of the respondent's breach. But once it is satisfied of this, the determination of the precise amount of this damage is a matter for the tribunal's informed estimation in light of all the evidence available to it.[411]

273. Finally, the same standard of compensation applies to all of Kazakhstan's violations of the ECT because those violations in combination led to a single injury, the impairment and taking of Claimants' investments. Numerous tribunals have "borrowed" the fair market value standard typically applied in expropriation cases to determine damages for other violations of investment treaties. For example, in *CMS v. Argentina*, the tribunal concluded that fair market value is the correct standard on a claim not involving expropriation when "the cumulative nature of the breaches . . . results in important long-term losses."[412] Likewise, in *GemPlus v. Mexico*, the tribunal considered the decision in *CMS*, as well as similar decisions in *Vivendi v. Argentina*, *Azurix v. Argentina*, and *M.T.D. v. Chile*, and concluded that it need not "distinguish between compensation for unlawful expropriation and compensation for breach of the FET standards."[413] Here, the cumulative effect of Kazakhstan's numerous breaches of its obligations under the ECT caused serious long-term losses, and thus fair market value of the assets of KPM and TNG is the appropriate measure of damages for all of Claimants' claims

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411 *Kazakhstan v. Rumeli*, ICSID Case No ARB/05/16, Decision of Ad Hoc Committee on Annulment, March 25, 2010 ¶¶ 146-47, **C-735**.

412 *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005 ¶ 410, **C-65**.

413 *Gemplus S.A. and Talsud S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/04/4, Award, June 16, 2010 ¶ 12-52, **C-309**.

B. Valuation Date

1. October 14, 2008, Is The Correct Valuation Date

274. A valuation date of October 14, 2008, is necessary to fully compensate Claimants for the injuries caused by Kazakhstan's violations of the ECT and international law. Abundant evidence shows that Kazakhstan decided in the fall of 2008 to expropriate Claimants' investments and initiated the campaign to do so on October 14, 2008. The campaign upon which Kazakhstan embarked on that date and in the weeks immediately following Nazarbayev's directive was not only a campaign of indirect expropriation, but also was markedly unfair and inequitable, a material impairment of Claimants' investments by unreasonable measures, and an abject failure to provide Claimants' investments with "the most constant protection and security" required by the ECT.

275. Over the course of the next twenty months, Kazakhstan took a number of actions aimed at devaluing Claimants' investments to pressure Claimants to sell at a coerced price or to create a pretext for seizing the investments. Those actions substantially impaired the value of Claimants' investments in innumerable ways that are not susceptible to individuation and quantification. In order to fully eliminate the value-depressing effects of the State's actions in the quantification of damages, it is therefore necessary to value Claimants' investments before the State's illegal campaign commenced.

276. Kazakhstan's valuation date of July 22, 2010, does not take into account any of the value-depressing effects of the State's actions. By simply calculating the alleged value of KPM's and TNG's assets at that date, Kazakhstan would afford no compensation for:

- The crippling diminution in value and alienability of KPM and TNG caused by the bogus allegation that they were criminally liable for operating main pipelines without a license;
- The extraordinary interference with normal business operations from the other elements of the State's campaign of harassment and coercion, such as protracted audits and litigation over spurious tax assessments;
- The denial of Claimants' ability to sell KPM and TNG by freezing their shares, Subsoil Use Contracts, and property;
- The impairment of production by KPM and TNG resulting from the interference in normal field development efforts;

- The impairment of TNG's revenues, and the increase in completion cost, resulting from the non-completion of the LPG Plant;

- The impairment of TNG's revenues resulting from interference with TNG's normal gas sales efforts;

- The cost to Claimants of borrowing money from the loan shark Laren Lenders rather than Credit Suisse; and

- The lost opportunity to sell their investments free from the State's defamatory accusations and cloud on the title of TNG.

For this reason, Kazakhstan's valuation date is wrong as a matter of both fact and law. It seeks to avoid liability for clearly harmful conduct and would not compensate Claimants for multiple serious injuries caused by Kazakhstan well before the final, outright seizure in July 2010.

277. Of course, this is not the first case in which a State's wrongful actions impaired the value of an investment long before the State actually dispossessed the investor of the assets. The decisions of other tribunals confronting similar facts support Claimants' valuation date.

278. For example, in *Santa Elena v. Costa Rica*, the state adopted a decree on May 5, 1978, to expropriate the claimant's property, which the claimant had intended to develop into a residential and tourist resort. The claimant, however, continued to possess the property for the next twenty years. The tribunal adopted May 5, 1978 as the valuation date, even though that date marked only the beginning of the expropriation, and the claimant retained possession of the property for years to come. The tribunal explained:

> As is well known, there is a wide spectrum of measures that a state may take in asserting control over property, extending from limited regulation of its use to a complete and formal deprivation of the owner's legal title. Likewise, the period of time involved in the process may vary — from an immediate and comprehensive taking to one that only gradually and by small steps reaches a condition in which it can be said that the owner has truly lost all the attributes of ownership. It is clear, however, that a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title. What has to be identified is the extent to which the measures taken have deprived the owner of the normal control of his property. A decree which heralds a process of administrative and judicial consideration of the issue

> in a manner that effectively freezes or blights the possibility for the owner reasonably to exploit the economic potential of the property, can, if the process thus triggered is not carried out within a reasonable time, properly be identified as the actual act of taking. . . .
>
> Stated differently, international law does not lay down any precise or automatic criterion such as the date of the transfer of ownership or the date on which the expropriation has been 'consummated' by agreed or judicial determination of the amount of compensation or by payment of compensation. The expropriated property is to be evaluated as of the date on which the governmental 'interference' has deprived the owner of his rights or has made those rights practically useless. This is a matter of fact for the Tribunal to assess in the light of the circumstances of the case. . . .[414]

279. As the *Santa Elena* case makes clear, a taking can occur for purposes of valuing damages under international law long before an investor is dispossessed of the property, and without any formal transfer of title. The paramount question is when the state's conduct "blights the possibility for the owner reasonably to exploit the economic potential of the property," thus making its rights "practically useless." In that case, the tribunal determined that date to be when the state announced the expropriation, even though it did not consummate an expropriation or take possession of the property for years to come. The logic of that decision was plain and compelling: once the State announced its plan to take the property, the investor obviously could not and would not develop the property as it had intended, even though it retained possession of the property for twenty more years.

280. Thus, Kazakhstan's argument that a state's intent to expropriate is irrelevant to the determination of valuation date is wrong. It could not be more important, because after a state signals its intention to expropriate, the investor's ability to develop its investment as it planned is fundamentally and irretrievably lost. No rational investor would continue to develop investments that it knew the state intended to take for itself.

281. Kazakhstan's argument that it did not express an intent to expropriate Claimants' investments on October 14, 2008, is also not persuasive. To be sure, President Nazarbayev's order did not expressly instruct his agents to seize Claimants' companies. Sovereigns have become more nuanced at achieving objectives that violate international

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[414] *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, February 17, 2000, 39 I.L.M. 1317 (2000) ¶¶ 76, 78, **C-213**.

obligations under the apparent color of lawful action. But the evidence, discussed above in Section III and in Claimants' prior submissions, establishes a clear intent at the highest levels of the Kazakh government to deprive Claimants of their investments in 2008. At a minimum, that was the clear and immediate intent of the Financial Police and other agencies that zealously embarked on the State's campaign in the weeks following President Nazarbayev's order.

282. Additionally, in this context, the reasonable perception of the investor is as important as the intent of the State. Kazakhstan's suggestion that President Nazarbayev's investigation order should be viewed as nothing more than a routine administrative function is wishful thinking. In a country with a strong rule of law and an accountable executive, that may be so. But in Kazakhstan, Mr. Stati realized that an order from the President to "thoroughly check" his companies -- followed by a round of intense, abnormal inspections by multiple agencies orchestrated by the Financial Police, and extraordinary and aggressive criminal charges and challenges to his ownership of his investments – would end only one way. And that perception was reasonable, as subsequent events confirmed. Thus, President Nazarbayev's order on October 14, 2008 was for all meaningful purposes equivalent to a decree of the State's plan to take Claimants' investments.

283. Another award that plainly supports Claimants' valuation date is *Kardassopoulos v. Georgia*.[415] In that case, the claimants invested in a company that obtained a long-term concession in 1993 to operate Georgia's oil pipeline system. On November 11, 1995, however, Georgia adopted a decree that established a national oil company, and charged that company with rehabilitation and operation of the State's oil pipelines.[416] The decree also indicated that other companies would be invited to participate in the new NOC, which created uncertainty about how the decree would affect the investors' concession.[417] The investors met with various government officials over the ensuing months to discuss how their company might be incorporated into the new framework.[418] On January 30, 1996, Georgia created a commission to examine all the contracts related to the oil industry in the State and make recommendations to the President in the spirit of

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[415] *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, March 3, 2010, **C-205**.

[416] *Id*. ¶ 147, **C-205**.

[417] *Id.* ¶ 149, **C-205**.

[418] *Id.* ¶ 151, **C-205**.

"safeguarding the national interests of Georgia."[419] On February 20, 1996, Georgia adopted a decree formally assigning all rights to the State-owned pipelines to the new NOC, and cancelling the concession held by the claimants' company.[420]

284. Based on those facts, the *Kardassopoulos* tribunal adopted a valuation date of November 10, 1995, explaining:

> The Tribunal therefore finds that the appropriate standard of compensation from which to approach the calculation of the damage sustained by Mr. Kardassopoulos is the FMV of the early oil rights (including export rights) as of 10 November 1995. Whilst this predates the expropriation effected by [the decree cancelling the concession], the Tribunal considers that the circumstances of this case require it to value Mr. Kardassopoulos' investment as of the day before passage of Decree No. 477 precisely to ensure full reparation and to avoid any diminution of value attributable to the State's conduct leading up to the expropriation. This compensation is, in effect, the amount that Mr. Kardassopoulos should have been paid as a result of the compensation process which the Respondent was obliged to put in place promptly after the taking of the Claimants' investment.[421]

Thus, the tribunal premised its valuation date on the decree that merely cast doubt on the validity of the investors' concession, rather than the subsequent decree that formally and irreversibly cancelled the concession. Moreover, it expressly did so in order to avoid "any diminution of value attributable to the State's conduct leading up to the expropriation."

285. This Tribunal should follow the approach adopted in *Kardassopoulos*. President Nazarbayev's investigation order and the extraordinary State harassment that followed on its heels cast enormous doubt on the continued viability of the Claimants' investments, and proved to be the beginning of the process that led to the ultimate seizure of the investments. The Tribunal thus should value the investments on the date of President Nazarbayev's order to exclude any diminution of value attributable to the State's conduct leading up to the final taking.

286. Furthermore, as indicated in the last sentence of the passage from *Kardassopoulos* quoted above, this measure of compensation equates to what Kazakhstan

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[419] *Id.* ¶ 153, **C-205**.

[420] *Id.* ¶¶ 155-57, **C-205**.

[421] *Id.* ¶ 517, **C-205**.

should have paid if it had been forthright in observance of its international obligations. The State desired to take Claimants' investments in 2008, but delayed outright seizure while it attempted to coerce a sale or manufacture a legal cover for a taking. Kazakhstan should not be rewarded for its chicanery.

287. Scholarly commentary also supports Claimants' valuation date. For instance, Professors Reisman and Sloane make the following observation about the role of intent in setting a valuation date:

> Even though a state's responsibility to pay compensation for expropriation does not, in any event, 'depend on proof that the expropriation was intentional,' the manifestation of that intent at some level of the state's government generally furnishes a tribunal with a useful demarcation. It enables a decision-maker not only to confirm that an expropriation has taken place, but to set, based on relatively objective evidence, the moment of valuation — typically, a point in time before the host state's conduct occasioned the depreciation in the value of the foreign investment.[422]

2. Claimants' Valuation Date Does Not Claim Compensation for Profit That Claimants Already Pocketed

288. Kazakhstan erroneously asserts that because Claimants continued to operate the assets after October 14, 2008, they generated profits from those assets that they then "pocketed" in the form of dividends and loans through the assignment of accounts receivable.[423] This argument is wrong because, while KPM and TNG did distribute profits through assignment of accounts receivable after Claimants' valuation date, the companies earned those profits before October 14, 2008. Moreover, Claimants have asserted no claim for damages related to any cash, accounts receivable, or other profits earned prior to that date.

289. Kazakhstan first made this argument in its Rejoinder on Quantum, asserting that Claimants "chose an improperly early valuation date in 14 October 2008, instructed their valuation expert to value the Borankol and Tolkyn fields as of this date, without then later deducing [sic] income created between this date and 21 July 2010."[424] After FTI pointed out at the January 2013 hearing that KPM and TNG did not create significant income after

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422 Reisman & Sloane, Indirect Expropriation and Its Valuation in the BIT Generation, 74 Brit. Y.B. Int'l L. (2004) at 130-1, **C-230.**

423 *See* Rejoinder on Quantum ¶¶ 443-444.

424 Rejoinder on Quantum ¶ 444.

October 14, 2008,[425] Kazakhstan revised its argument to focus more clearly on distributions after the 2008 valuation date. In its First Post-Hearing Brief, Kazakhstan argues that at the Quantum Hearing, "Mr. Lungu had to concede under cross-examination that Claimants had treated themselves to dividends in the total amount of at least USD 72 million in 2009 and 2010."[426] Kazakhstan also asserts that KPM and TNG effectively distributed US $143.4 million to Claimants by failing to collect other accounts receivable.[427]

290. To begin with, Mr. Lungu did not "concede" at the Quantum Hearing that KPM had paid US $72 million in dividends in 2009 and 2010, because that fact was never disputed or concealed.[428] That fact is not damaging to Claimants in any way, and indeed, is simply not relevant to any issue in this case, including the assessment of quantum.

291. The pertinent facts are straightforward. After realizing Kazakhstan's wrongful intentions, and particularly after Kazakhstan imposed the unlawful US $145 million criminal penalty in September 2009, Claimants prudently attempted to prevent cash from flowing unnecessarily into KPM and TNG, where it could be seized by the government. They did this first by having KPM assign US $72 million in accounts receivable to affiliates, which they accounted for as a dividend. They also had KPM and TNG stop collecting accounts receivable beyond the extent necessary to obtain cash to fund ongoing operations. Naturally, after Kazakhstan seized the companies in July 2010, Claimants' affiliates made no further payments into Kazakhstan on any receivables.

292. Nothing about this is improper. Claimants have the right under the ECT and their subsoil use agreements to retain the profits from their investments.[429] Moreover, Claimants are not claiming any damages in this case in respect of such profits. Claimants' damages claim for Borankol and Tolkyn is based solely on the value of the operating assets on October 14, 2008, which is based on the future profit potential of those assets. Claimants have asserted no claims for any cash or accounts receivable of KPM and TNG, precisely because they were relatively successful at preventing Kazakhstan from seizing any.

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425 Tr. January 2013 Hearing, Day 4, 62:7-22.

426 Respondent's First Post-Hearing Brief ¶ 1039.

427 Respondent's First Post-Hearing Brief ¶ 1042.

428 In fact, Mr. Lungu testified about the distributions on ***direct examination*** at the October 2012 Hearing. Tr. October 2012 Hearing, Day 1, p. 202:17 – 203:6

429 ECT art. 14(1), **C-1**; Contract No. 305, March 30, 1999, § 7.1.19, **C-45**; Contract No. 201, August 12, 1998, § 11.3, **C-52**.

293. Furthermore, the US $72 million in receivables that KPM distributed as dividends, and the US $143.4 million in receivables that Kazakhstan claims KPM and TNG never collected, were generated prior to October 14, 2008. The companies had US $222.6 million of net working capital on September 30, 2008, more than the combined total of dividends and "loans" that Kazakhstan complains about.[430] As FTI explains, Claimants were entitled to retain that working capital on top of the enterprise value of the assets for which they claim damages in this case:

> [I]if the Claimants had sold the companies at the 2008 Valuation Date in an asset sale, they would have received an amount on account of the value of the assets of the companies (equating to the enterprise value calculated in FTI's prior reports). In such an asset sale, KPM and TNG would have retained all of the financial assets and debts of the companies, including all of the companies' net working capital, which would then have been available to distribute to the Claimants.…
>
> Claimants' damage claim is based solely on the enterprise value of the operating assets of KPM and TNG on the valuation date, with no positive adjustment for the companies' net working capital. Paying out the dividend and any assignment of accounts receivable from KPM and TNG to the Claimants negated the need to further adjust the value of the companies to account for existing working capital. A negative adjustment is inappropriate and would undercompensate Claimants to the extent of any such adjustment.
>
> If the Claimants had not paid out the dividends, the valuation conclusions reached by Deloitte and FTI would have to be increased by the amount of the additional assets that would have been held by the companies at the Valuation Date. There can be no disagreement on this point and I fail to see any logic to the position put forward by Respondent.[431]

294. The only thing noteworthy about this issue is Kazakhstan's telling statement that Claimants "treated themselves to dividends."[432] This is emblematic of Kazakhstan's groundless disparagement campaign and reveals its indignation that Claimants managed to keep some of their profits out of the State's reach.

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[430] Third FTI Report at 73, Figure 26.

[431] Fourth FTI Report ¶¶ 5.1-5.7.

[432] Respondent's First Post-Hearing Brief ¶ 1039.

3. Claimants Have Proven Damage Even if the Tribunal Were to Select an Alternative Valuation Date

295. At the May 2013 hearing, the Tribunal asked the parties to address what the proper result should be if the Tribunal disagreed with both parties' valuation dates. Kazakhstan argued that the Tribunal then must reject Claimants' claims outright for failure to meet their burden of proof regarding the existence and extent of damages.[433] Kazakhstan also made this same argument in its First Post-Hearing Submission.[434] Notably, Kazakhstan cites no authority for this remarkable proposition, and to Claimants' knowledge, none exists.

296. To the contrary, it is quite common for tribunals to award damages in investment treaty disputes in which they choose not to adopt either of the parties' valuation dates or damages cases outright. For instance, in *Gemplus and Talsud v. Mexico*, the tribunal disagreed with numerous aspects of the damages cases presented by both parties, including their proposed valuation dates. The tribunal nonetheless awarded damages, describing its role as follows:

> As indicated above, the Tribunal has experienced considerable difficulties in deciding certain quantum issues in these arbitration proceedings. It is not the Tribunal's function, as an arbitration tribunal, to make a simplistic binary choice between the very different cases advanced by the two sides. Moreover, given these issues' dependence on multiple findings of fact by the Tribunal, it would not even be possible to do so in the present case, even if this Tribunal were willing to do so (which it is not). Ultimately, the Tribunal must exercise its own arbitral discretion in assessing compensation by reference to the applicable legal principles and the particular facts, as determined by the Tribunal.[435]

297. Similarly, in *Santa Elena v. Costa Rica*, the tribunal awarded damages using a valuation date in 1978 even though the claimant only submitted an expert valuation of the property as of the date of the arbitration (*i.e.*, 1998).[436] The tribunal based its award on its own assessment of two contemporaneous valuations that the claimant and respondent had prepared in 1978 in connection with early negotiations over the amount of compensation due.

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433 Tr. May 2013 Hearing, Day 2, 92:4-93:12.

434 Respondent's First Post-Hearing Brief ¶¶ 1112-1113.

435 *Gemplus S.A. and Talsud S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/04/4, Award, June 16, 2010 ¶¶ 12-45, 12-57, **C-309**.

436 *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 39 I.L.M. 1317 (2000) ¶¶ 29, 88, **C-213**.

As the award explained, the tribunal "proceeded by means of a process of approximation based on the appraisals effected by the parties in 1978…."[437]

298. Tribunals in innumerable other cases have followed an approach like that in *Gemplus* and *Santa Elena*, assessing damages based on their own assessment of the valuation evidence presented by the parties. While far from an exhaustive list, the awards in the following cases all support this approach:

- In *Tecmed v. Mexico*, the tribunal rejected the Claimants' damages claim based on a DCF model, and awarded damages based on its assessment of other evidence of value in the record;[438]
- In *CMS v. Argentina*, the tribunal concluded that the valuations submitted by all experts (including tribunal-appointed experts) required "some adjustments," and made "its own estimates of the value loss suffered by the Claimant" based on adjustments to the assumptions in the valuation experts' work;[439]
- In *Siemens v. Argentina*, the tribunal rejected the valuations submitted by both parties, and conducted its own assessment of value based on audited financial statements;[440] and
- In *Azurix v. Argentina*, the tribunal rejected the Claimants' valuation date and damages calculation, and awarded damages based on adjustments to the damages evidence submitted by the parties.[441]

299. The legal foundation for this approach lies in the tribunal's broad discretion to assess the quantum of damages after it has determined that the claimant suffered an injury. While it is certainly true that a tribunal should reject a claim if the claimant has not met its burden to prove an ***injury*** caused by the state's wrongful actions, once an injury is proven, the fact that a tribunal disagrees with aspects of the Claimant's valuation of that injury is no basis to deny relief altogether.

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[437] *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, February 17, 2000 ¶ 90, **C-213**.

[438] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003 ¶¶ 183-195, **C-587**.

[439] *CMS Gas Transmission Co. v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 22, 2005 ¶¶ 418-420, **C-65**.

[440] *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/08, Award, February 6, 2007 ¶ 368, **C-232**.

[441] *Azurix Corp. v. The Argentine Republic*, ICSID Case No., ARB/01/12, Award, July 14, 2006, ¶¶ 415-429, **C-245**.

300. Practically speaking, this must be so. The valuation of damages, including the selection of a valuation date, is a complicated exercise that involves a significant degree of judgment. Reasonable minds can disagree on any number of points. Kazakhstan's argument would require a Claimant to anticipate every possible valuation date that a tribunal might select and present a damages case for each one, at the peril of losing its entire case even after it has proven that it suffered loss. That ridiculous proposition is not the law.

301. In this case, Claimants firmly believe that their valuation date of October 14, 2008, is the appropriate valuation date for the reasons explained above and in Claimants' prior submissions and arguments on this issue. If the Tribunal disagrees, however, there are several other dates the Tribunal might select, and extensive evidence on which to base value on those dates. Three possible alternative dates suggest themselves:

- December 18, 2008: the date of the MEMR's challenge to Claimants' ownership of TNG, and three days after the Financial Police formally launched the criminal investigation of KPM;
- April 30, 2009: the date on which Kazakhstan sequestered Claimants' shares in KPM and TNG and all of the companies' assets (including their Subsoil Use Contracts); or
- September 18, 2009: the date on which the Aktau court imposed judgment against Mr. Cornegruta and the devastating criminal penalty on KPM.

302. For any of those dates, the RBS valuation provides substantial evidence on which the Tribunal could base its assessment of damages. That valuation was issued on July 31, 2009, and it employed a valuation date of October 1, 2009.[442] Thus, the RBS Valuation post-dated essentially all of the allegedly non-governmental factors that Kazakhstan argues confound the FTI valuation, including the worst of the financial crisis and decline in oil prices, the supposed field watering problem at Tolkyn, the 2009 Miller & Lents reserves report, the companies' liquidity problems, the Laren transaction, and the slowdown in Tolkyn gas production. It thus cannot be said that the RBS Valuation in any way overstates Claimants' damages by failure to consider non-governmental market events. If anything, that valuation understates Claimants' damages because it does not attempt to adjust for the

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[442] 2009 RBS Valuation at 35, **C-723**. While the RBS Report does not go into detail, presumably its use of a future valuation date means that RBS projected what the oil and gas reserves and other economic inputs would be as of that date.

significant value-depressing effect of governmental actions over the previous ten months. The valuation findings of the RBS Valuation are discussed further in Section V.D.3.a.

303. Finally, even if the Tribunal were to adopt Kazakhstan's valuation date — which Claimants reiterate would be wholly inappropriate, but will address simply for the sake of argument — such a finding would not mandate using Kazakhstan's valuation. That valuation still would be unreliable for all of the reasons other than valuation date identified herein and in prior submissions and arguments. The terms of the Cliffson transaction, discussed below in Section V.D.3.b, provide more reliable evidence of the value of the investments in 2010 than Deloitte's valuation. Moreover, Kazakhstan's valuation also would be invalid because it does not attempt to value the assets on a "but for" basis (*i.e.*, what the assets would have been worth but for the State's wrongful acts). It thus runs afoul of the principle, stated clearly in the *Azurix* case, that when a valuation postdates value-depressing actions of the State, it must be constructed on a hypothetical "but for" basis.[443]

C. No Deduction of Debt from Enterprise Value is Appropriate

304. Claimants seek an award of damages based on the value of the assets that Kazakhstan impaired and seized, the operating businesses or "enterprises" of KPM and TNG. That is the correct measure of damages under the ECT and customary international law, and Kazakhstan's argument that debts must be deducted from that amount would both undercompensate Claimants and unjustly enrich Kazakhstan.

1. Enterprise Value Is the Correct Measure of Damages Under the ECT and Customary International Law

305. To begin with, Kazakhstan misframes this issue as whether the Tribunal should "add" debts to Claimants' damages (*i.e.*, what Kazakhstan calls a "debt gross-up"). Claimants do not seek to add the value of any debts to their damages claim. Rather, the issue is whether the Tribunal should deduct the value of debts from the value of the assets that Kazakhstan impaired and then took.[444] This distinction may be somewhat semantic, but it illuminates the conceptual error in Kazakhstan's argument.

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[443] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006 ¶ 417 (emphasis added), **C-245**.

[444] Kazakhstan at one point shared this view, because its argument on this issue in its Rejoinder on Quantum was that "[d]ebt under the Tristan notes and other debts needs to be deducted from the values calculated for the assets." *See* Rejoinder on Quantum at 103. At the Quantum Hearing, and in its Post-Hearing Brief, Kazakhstan reframed the issue, arguing that "Claimants incorrectly gross-up their claim with alleged

306. Under the full reparation principle in international law, the correct measure of damages "must as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[445] In other words, damages should mirror the value of restitution in kind, plus damages for any loss that would not be covered by restitution in kind.[446] Kazakhstan does not dispute this standard, but it misapplies it.

307. Here, the situation that would have existed but for Kazakhstan's illegal acts is that KPM and TNG would have continued operating their businesses, generating a stream of cash flows into KPM and TNG.[447] Claimants, as the 100 percent owners of KPM and TNG, would have been entitled to direct those cash flows to pay off the debts of KPM, TNG, and Tristan (under the KPM and TNG guarantees), and reinvest or distribute any remaining cash flows to the Claimants as dividends. Kazakhstan made that impossible when it impaired and then seized the businesses of KPM and TNG.

308. One way to re-establish the situation that would have existed but for Kazakhstan's actions would be for Kazakhstan to restore Claimants' control over KPM and TNG, pay the value of the assets it took to KPM and TNG, and then allow Claimants to direct those cash flows to creditors and themselves without further interference. Of course, that is not possible because the Tribunal cannot compel Kazakhstan to take those actions.

309. Thus, the Tribunal's award to Claimants should include all of the future cash flows of the assets that Kazakhstan took, without deducting debts, in order to mirror restitution as closely as possible, and wipe out ***all*** the consequences of Kazakhstan's actions. A deduction of debts would give no compensation for Claimants' loss of their right, as 100 percent owners of KPM and TNG, to direct those cash flows to repay creditors of KPM, TNG, and Tristan before distributing dividends to themselves.

310. Kazakhstan's argument that an award of enterprise value would improperly compensate Claimants for injuries suffered by third parties (*i.e.*, Tristan) is incorrect.[448]

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noteholder claims." *See* Respondent's First Post-Hearing Brief at 284; Respondent's Opening Submission on Quantum, slide 59 ("Claimants are not entitled to a 'debt gross-up'").

445 *Factory at Chorzow (Germany v. Poland)*, Judgment, 1928 PCIJ Rep Series A No. 13, ¶ 125, **C-165**.

446 *Id.*

447 Alternatively, Claimants might have sold the businesses, in which case the buyer would have paid a lump sum for the stream of future cash flows. The result economically would be the same to Claimants.

448 Kazakhstan actually argues that Claimants seek damages for injuries suffered by the Tristan noteholders, conveniently ignoring Tristan itself, which is wholly owned by Mr. Stati.

Claimants seek damages on their own behalf only, including damages for the loss of their ability to use the cash flows of KPM and TNG to pay debts of Tristan (which KPM and TNG guaranteed). That is plainly not a claim by Tristan or its noteholders.

311. Moreover, the fact that an affiliate who is not a party to an arbitration was involved in the financing of the investment is not grounds for limiting compensation to the equity owner of the investment. As the tribunal in *Wena Hotels* explained:

> The Tribunal is not persuaded by the relevance of the Respondent's contention that much of the Egyptian investment came from affiliates of Wena rather than from Wena. Instead the panel takes the view that whether the investments were made by Wena or by one of its affiliates, as long as those investments went into the Egyptian hotel venture, they should be recognized as appropriate investments. The panel was persuaded from the testimony it received that it is a widely established practice for hotel enterprises to adopt allocation measures, which spread the profits form [sic] the group operations into various jurisdictions where there are tax advantages to the group as a whole.[449]

312. This Tribunal likewise has received persuasive evidence that the Claimants financed KPM and TNG through Tristan for legitimate business reasons, namely, to present the combined assets of KPM and TNG to the debt markets in a single transaction.[450] Mr. Stati, as the sole owner of Tristan and an indirect owner of KPM and TNG, had a legitimate right to direct the returns from his investments in KPM and TNG to repay the debts of Tristan, as all the parties to that transaction expected and intended.[451] Kazakhstan deprived him of that right, and must pay compensation in the form of the full stream of future cash flows from the assets it took.

313. Because Claimants have a legitimate interest in directing the cash flows of KPM and TNG to pay debts of affiliates, which Kazakhstan wrongly denied, enterprise value is the correct measure of damages in this case regardless of whether the Claimants are themselves directly liable for the debts. The ECT itself plainly authorizes this result. Article 13 provides that in cases of lawful expropriation, the State must pay compensation amounting

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[449] *Wena Hotels, Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, December 8, 2000 ¶ 126, **C-216**.

[450] Testimony of Mr. Lungu, Tr. October 2012 Hearing, Day 1, 195:18 – 196:7.

[451] *See* Listing Particulars for Tristan Oil Note Offering at 5 (noting that Tristan was formed solely to issue the notes and has no business operations of its own), **R-358**.

to "the fair market value of the Investment expropriated…."[452] While the ECT does not specify the measure of damages for unlawful expropriation, it is well-settled that the "full reparation" standard in customary international law should be at least as broad as the measure of damages for lawful expropriation.[453]

314. Here, the "Investments" that Kazakhstan seized were the operating businesses of KPM and TNG – *i.e.*, the subsoil use agreements, wells, pipelines, and other assets that KPM and TNG could use to generate cash flows. It did not seize only the equity in KPM and TNG, because it did not assume or extinguish their debts. The ECT defines a covered "Investment" broadly to mean "every kind of asset, owned or controlled directly or indirectly by an Investor," and specifically includes:

> a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise….[454]

315. The use of the disjunctive "or" in this definition clearly provides that an "Investment" is not limited to an Investor's shareholding in a company or business enterprise, but in fact can include the company or business enterprise itself, and the assets of the company or business enterprise that the Investor indirectly owns. That is the Investment that Kazakhstan impaired and then seized, and that is the Investment for which it must pay compensation.

316. Scholarly commentary also supports this approach. For instance, in their well-known treatise Damages in International Investment Law, Ripinsky and Williams point specifically to the ECT as an example of a treaty whose definition of "investment" supports viewing damages from the perspective of the underlying business unit operating in the host State rather than the shareholding.[455] They also point out that "[t]he decision to treat the underlying business unit as the protected investment of a claimant-shareholder can be reached with greater comfort where the investment is entirely (albeit indirectly) owned and controlled by the claimant, particularly where the treaty specifically provides protections for

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[452] ECT art. 13(1), **C-1**.

[453] *See Amoco Int'l Fin. Corp. v. Iran*, Iran-U.S. Cl. Trib., Partial Award No. 310-56-3, 27 I.L.M. 1314 (1988), ¶ 193 (citing Chorzow Factory for the principle that damages for lawful expropriration is limited to fair compensation, while damages for unlawful expropriation full reparation of all injury), **C-247**.

[454] ECT art. 1(6)(b), **C-1**.

[455] Ripinsky & Williams, *Damages in International Investment Law* 2008, at 151, **C-740**.

investments indirectly owned and controlled."[456] That is precisely the case here because Claimants own 100 percent of the shares of KPM and TNG, and the ECT contains the requisite language regarding indirect ownership and control.

317. The two cases that Kazakhstan relies on are inapposite. In *Impregilo v. Pakistan*, the claimant sought to advance claims on behalf of other equity owners of the local joint venture who were not nationals of parties to the BIT.[457] The claimant in that case argued that it could assert claims on behalf of its joint venture partners because the joint venture agreement empowered it, as the "leader" of the joint venture, to advance claims on behalf of the other equity owners.[458] The tribunal concluded that the claimant could not bring claims on behalf of other equity owners, and was limited to recovering in proportion to its percentage ownership in the local company. In this case, however, Claimants are the 100 percent owners of KPM and TNG, and are not asserting claims on behalf of any other parties.

318. Likewise, *PSEG v. Turkey* has no application here. The investment in that case was a concession contract between claimant PSEG and Turkey, not a locally-incorporated company that PSEG owned and Turkey expropriated.[459] The tribunal awarded damages to PSEG for the out-of-pocket expenses it incurred pursuant to the concession contract.[460] Another party in that case, NACC, also expended money in furtherance of the concession, but the tribunal concluded that NACC lacked standing to bring a claim because it never signed the concession contract.[461] PSEG then claimed damages for the amounts that NACC had expended, and the tribunal held simply that PSEG could not recover for expenses incurred by another party.[462] That case did not involve the assets of companies that the Claimants wholly owned, and intended to use to repay debts of affiliates. It is simply inapposite to the central question presented here.

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456 *Id.*, at 152, **C-740**.

457 *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005 ¶¶ 149-152, **R-365**.

458 *Id*.

459 *PSEG Global et al. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007 ¶¶ 302, 329, **C-261**.

460 *Id.* at 82-87, **C-261**.

461 *Id.* ¶ 324, **C-261**.

462 *Id.* ¶ 325, **C-261**.

2. Enterprise Value Is the Correct Measure of Damages Because Claimants Remain Liable for the Tristan Debt

319. While Claimants have demonstrated that enterprise value is the correct measure of damage in this case regardless of whether Claimants are directly liable for the Tristan debt, that question is largely academic because Claimants Ascom and Terra Raf are directly responsible to repay the Tristan debt out of the proceeds of any award in this case. Kazakhstan agrees that insofar as Claimants remain responsible for those debts, enterprise value is the correct measure of damages. In its Rejoinder on Quantum, Kazakhstan very plainly stated:

> By not deducting the debt under the Tristan notes from the asset values calculated by their expert, Claimants are essentially claiming damages that only the noteholders could allege to have suffered. ***Such approach would be correct if Claimants were themselves liable to the noteholders for such alleged damage***. However, as set out above, due to the peculiarities of the securing mechanisms implemented, Claimants can practically no longer be liable.[463]

320. Kazakhstan tried to retreat from that statement at the May 2013 hearing, asserting that "[t]he Republic does not agree that enterprise value would be the correct measure of damage if Claimants remained liable toward the noteholders."[464] Kazakhstan, however, made no attempt to reconcile its prior unambiguous (and correct) statement to the contrary.

321. Likewise, Kazakhstan's argument that Ascom and Terra Raf are not liable to repay the noteholders under their Pledge Agreements is wrong. As Claimants have shown repeatedly, Section 6 of those Pledge Agreements provides that upon an event of default, "the Pledgeholder is entitled to receive and apply any and all dividend and other payment or distributions of any kind relating to the Participatory Interest as if the Pledgeholder were the holder of the Participatory Interest in and towards discharge of the Secured Obligations until such time as the Secured Obligations are fully discharged…."[465] The underlined language plainly obligates Ascom and Terra Raf to satisfy the claims of the Tristan noteholders out of any payments they receive relating to their Participatory Interests in KPM and TNG, which would include any payments they receive through an award in this arbitration.

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463 Rejoinder on Quantum ¶ 383 (emphasis added).

464 Respondent's Closing Submission, slide 85.

465 *See* Ascom and Terra Raf Pledge Agreements § 6(b) (emphasis added), **C-585**.

322. Kazakhstan simply ignores the plain language in Section 6(b), or worse – distorts it beyond all recognition. At the May 2013 hearing, Kazakhstan's counsel argued:

> Section 6 on which the Claimants rely does not include an award in Claimants' favour among the items that the noteholders can receive. Claimants' ill-conceived argument that an award would be a dividend payment or other distribution under the shares in KPM and TNG is unsupported as a matter of wording already. The provision refers to payments of KPM and TNG alone.[466]

Section 6(b), however, is not limited to dividend payments or other distributions by KPM and TNG alone. It plainly refers to payments of any kind relating to the Participatory Interests, and does not refer to KPM and TNG at all.

3. Deduction of Debts Would Unjustly Enrich Kazakhstan and Undercompensate Claimants

323. Claimants amply demonstrated in their First Post-Hearing Brief that the deduction of debts from the enterprise value of the assets Kazakhstan took would unjustly enrich Kazakhstan and undercompensate Claimants.[467] Claimants refer the Tribunal to that submission, and will not repeat the argument here.

324. Claimants note, however, that Kazakhstan has not responded to the fact that deducting debts from enterprise value would unjustly enrich the State. Kazakhstan did not address this in its First Post-Hearing Brief, or in closing arguments at the May 2013 Hearing. It is simply beyond dispute that Kazakhstan took assets but did not assume or extinguish the debts, and thus would be unjustly enriched if it were required to pay compensation only for the value of the assets minus debts.

325. To divert attention from this fact, Kazakhstan argues that Claimants would be unjustly enriched by an award of enterprise value. That argument, however, is based entirely on the Sharing Agreement, and assumes that the enterprise value is less than or close to the value of the debt. In such a scenario, because the Sharing Agreement reorders the priority of the noteholders and the Claimants to receive proceeds of an award in this case until the noteholders are fully repaid, Claimants ultimately would retain more of an award than they would have retained under the Pledge Agreements. Kazakhstan argues that such a result

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[466] Tr. May 2013 Hearing, Day 1, 246:23 – 247:4.

[467] Claimants' First Post-Hearing Brief, at 248-250.

would unjustly enrich Claimants, and that "ultimately, Claimants cannot keep more than the equity value of their holdings in KPM and TNG."[468]

326. This argument is wrong. The Sharing Agreement is a private agreement between Claimants and the noteholders that the noteholders freely accepted. Moreover, that agreement came into being long after the events giving rise to Kazakhstan's liability. Any benefit that Claimants may obtain through that agreement is not unjust in any way. Moreover, the reasons why the noteholders accepted the Sharing Agreement — enthusiastically, with 99.8 percent of noteholders participating — are irrelevant.[469] That agreement is a private matter between Claimants and the noteholders, and it has no bearing on Kazakhstan at all.

327. Moreover, even if the Sharing Agreement could somehow be construed as an unjust enrichment of the Claimants — which it cannot — it pales in comparison to the unjust enrichment that would accrue to Kazakhstan from an award of equity value. This issue is very much like that confronted by the tribunal in *Occidental v. Ecuador*. The claimant in that case, OEPC, had farmed out 40 percent of its stake in the local operating company to a third party, AEC. The Tribunal determined that the farmout assignment was invalid, and thus that OEPC could recover 100 percent of the value of the investment. Ecuador, however, argued that the award nonetheless needed to be reduced by 40 percent because AEC had paid OEPC for the farmout assignment, and thus an award of 100 percent of the value of the investment would overcompensate OEPC. The tribunal rejected that argument, and awarded 100 percent of the value of the investment to OEPC, because OEPC had entered an agreement undertaking to pay AEC out of any compensation in that case, and because the rights that AEC ultimately had against OEPC were a private matter between them to be resolved in another forum. The tribunal concluded that these facts weighed "heavily against any unjust enrichment arguments raised in respect to" OEPC, and that "[i]n this respect, by far the greater risk of unjust enrichment lies at the door of Ecuador. Ecuador would be unjustly enriched if only obliged to compensate for 60% of a 100% unlawful taking."[470]

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468 Respondent's Closing Submission, slide 84.

469 Tristan Oil Ltd. Press Release, "Completion of Offer to Exchange and Consent Solicitation," February 19, 2013, **C-741**.

470 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, October 5, 2012 ¶¶ 654-56, **R-355**.

328. As in *Occidental*, Claimants have clearly demonstrated their commitment to honor their obligations to the noteholders. To the extent there is any ethereal notion that Claimants' will be enriched by the Sharing Agreement that the noteholders overwhelmingly embraced, that is vastly outweighed by the unjust enrichment that would accrue to Kazakhstan if it were obliged to compensate only for the equity value of the assets it took.

4. Enterprise Value Damages Likewise Should Not Be Reduced by the Vitol, Tax, and Other Alleged Debts

329. The parties' main focus naturally has been on the Tristan debt, which is by far the largest debt at issue. Regarding the tax, Vitol, and other debts that Kazakhstan argues should be deducted from Claimants' damages, Claimants respectfully refer the Tribunal to the discussion in Claimants' First Post-Hearing Brief.[471]

D. The Valuation Presented by FTI and Ryder Scott Is Far More Reliable and Accurate Than the Valuation Presented by Deloitte and GCA

1. Kazakhstan Has Not Cured the Deep Methodological Flaws That Make the Valuation Presented by Deloitte and GCA Unreliable

330. In their First Post-Hearing Brief, Claimants recounted in detail the numerous, deep methodological flaws that mar the work of GCA and Deloitte beyond repair.[472] Kazakhstan obviously was aware after the January 2013 Hearing that its valuation experts' work was unusable, because it attempted with its First Post-Hearing Brief to rehabilitate their work. That attempt has failed, however, and the valuation work of GCA and Deloitte remains utterly unreliable.

a) GCA

331. In its First Post-Hearing Brief, Kazakhstan asserts that Claimants and Ryder Scott sought to mislead the Tribunal regarding the extent of the work performed by GCA. While the Tribunal no doubt recalls GCA's damning admissions at the January 2013 hearing regarding the laxness of its analysis, Respondent tried to minimize these flaws as GCA merely "miss[ing] out on disclosing a few of its working documents…."[473] This is an egregious mischaracterization of the extensive methodological weaknesses in GCA's analysis. While GCA did fail to disclose workpapers underlying most of its conclusions, that

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471 Claimants' First Post-Hearing Brief, at 252-55.

472 *Id.*, at 166-204.

473 Respondent's First Post-Hearing Brief ¶ 546.

was because no such work papers exist. Very nearly all of the documents and data that GCA produced as backup for its analysis consists of work created by someone else (*e.g.*, Ryder Scott or State institutes). Ryder Scott has re-examined GCA's production, and only 20 megabytes of the 20,810 megabytes of data that GCA produced was GCA's own independent work product (and most of that was produced with Kazakhstan's First Post-Hearing Brief).[474] In contrast, Ryder Scott produced 6,510 megabytes of original, independent work product.[475]

332. Kazakhstan attempts to obfuscate the deficiencies in GCA's analysis with vague and unsupported assertions that GCA conducted detailed analyses, and by referring interchangeably to GCA's work on reserve estimates for Borankol/Tolkyn, the prospective resource estimates for Contract 302, and cost projections. For instance, one of Ryder Scott's primary criticisms is that GCA conducted no independent volumetric analysis of Borankol and Tolkyn. Kazakhstan vaguely asserts that "GCA prepared detailed geological assessments of the various leads, prospects, discoveries and reserves," and "provided detailed breakdowns of how they arrived at their estimates for recoverable volumes of hydrocarbons."[476] This vague assertion is clearly intended to leave the impression that GCA conducted independent analysis of all of the assets, but the two documents it offers as proof that GCA did this work relate solely to the estimation of prospective resources on Contract 302 (the Prospect Risk Assessment at R-370 and Crystal Ball Sheet at R-371). The fact remains that GCA conducted no volumetric assessment or other independent mapping or analysis of Borankol and Tolkyn, and Kazakhstan's failure to point to evidence that it did so is damning.

333. Indeed, GCA admits that fact. In a telling admission at the very end of its Third Report, GCA states:

> GCA explained at the January Hearing that whilst not performing its own independent detailed volumetric assessment, it had audited the studies, mapping, volumetric assessments and other data provided by RSC and the various Kazakh Institutes to check for consistency and reasonableness. This is in addition to performing other performance-based studies and is the same process that is valid in any Reserves assessment and asset valuation….[477]

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474 Fourth Ryder Scott Report ¶ 54.

475 *Id.* ¶ 53.

476 Respondent's First Post-Hearing Brief ¶¶ 543-44.

477 Third GCA Report ¶ 229.

To start with, the "other performance-based studies" that GCA references presumably are the field-wide decline-curve analysis and type-well analysis that Ryder Scott addressed at length in its Third Report.[478] GCA has never produced the assumptions underlying its type well, however, and its decline-curve analysis is a simplistic extrapolation from field-wide data that ignores State-caused reasons for low field performance and is an inappropriate method to estimate future production from behind-pipe reserves.[479]

334. GCA's lax analysis also allows it to lob criticisms without exposing its own assumptions and methodology to scrutiny, because it has none. This is plain from another revealing admission in GCA's Third Report:

> GCA's view is that the RSC interpretations for Borankol were optimistic, in some instances inconsistent with the data, and could not be used as a reliable basis for estimating a fair market value. Whilst the FDP volume estimates have their shortcomings, GCA considered that they were a more reasonable representation of reality.[480]

In other words, GCA makes subjective criticisms of Ryder Scott's assumptions that are not supported by, or subject to comparison against, any objectively verifiable analysis of its own. Moreover, GCA admits that the FDP (Field Development Plan) has "shortcomings," yet GCA adopts it as the basis for its opinions in place of independent analysis, without disclosing what those "shortcomings" are. In fact those "shortcomings" are monumental — most notably, the fact that KPM drilled 21 wells at Borankol after the FDP was prepared, making the FDP badly outdated.[481]

335. Kazakhstan and GCA also attempt to distract attention from the flaws in GCA's work by asserting (incorrectly) that Ryder Scott's work suffers from comparable problems. Most notably, GCA admits that Ryder Scott's methodology is "common in assessing Reserves," but vaguely argues that Ryder Scott "failed to take into consideration any reservoir heterogeneities and what the individual well and overall field performance were actually suggesting."[482] This statement is both ironic and wrong. As explained at length in Ryder Scott's Third Report, its well-by-well analysis is more thorough and reliable precisely

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478 *See* Third Ryder Scott Report ¶¶ 46-59; Claimants First Post-Hearing Brief ¶¶ 453-470.

479 *See* Third Ryder Scott Report ¶¶ 46-59.

480 Third GCA Report ¶ 230.

481 Fourth Ryder Scott Report ¶ 18.

482 Third GCA Report ¶ 231.

because it did consider the remaining behind-pipe potential of each individual well based on the characteristics of the reservoirs that had not yet been completed.[483] GCA, on the other hand, modeled the Borankol field as a homogenous reservoir to be drained by a hypothetical type well (the basis for which it never disclosed).

336. Kazakhstan and GCA follow the same strategy with regard to Tolkyn in a futile attempt to minimize their own failures. For instance, GCA argues that Ryder Scott "performed its detailed volumetrics, and then proceeded to discard the results because the Material Balance gave higher predicted recoveries," thereby choosing "the methodology for each field which results in the highest recovery."[484] That allegation of selective bias is false. Ryder Scott performed a volumetric and performance based analysis for all of the Borankol and Tolkyn reservoirs, and used the appropriate data and methodology to estimate the available reserves in the two fields. Generally, performance-based reserve estimates for producing reserves are preferred over volumetrics for mature fields such as Bornakol and Tolkyn. For behind pipe and undeveloped reserves, where there is no production data, volumetrics are generally preferred for the reserve estimates. Hence, Ryder Scott's estimate of behind pipe and undeveloped reserves in Borankol and Tolkyn were based principally on its detailed volumetric analyses. Ryder Scott's estimates for producing reserves in Borankol were based on its well-by-well performance analysis, and for the Tolkyn Artinskian Dolomite, were based on its material balance analysis as confirmed by the performance data.[485] By contrast, GCA inappropriately used a performance based type well analysis for its Borankol behind pipe estimates, inappropriately used a field wide oil cut versus cumulative production analysis for its Borankol producing estimates, and did not identify in any discernible way how it estimated either its Tolkyn behind pipe or producing reserves.[486]

337. GCA also justifies its assumption that compression will be necessary in the Tolkyn field on an illogical premise and manipulated data. GCA's Figure 3.1, which according to Kazakhstan shows a devastating decline in pressure at Tolkyn, is mistakenly based on wellhead pressure rather than bottomhole pressure. Bottomhole pressure is the natural force that drives production in the field. Wellhead pressure, on the other hand, varies based on factors such as the rate of production from the well. GCA's Figure 3.1 shows a

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483 Third Ryder Scott Report ¶¶ 57-58; *see also* Claimants' First Post-Hearing Brief ¶¶ 465-470.

484 Third GCA Report ¶¶ 232-33.

485 *See* Fourth Ryder Scott Report ¶¶ 47-51.

486 *See* Third Ryder Scott Report ¶¶ 41, 46-59.

decline in wellhead pressure resulting from the increase in production at Tolkyn in 2008, but GCA presents that decline as a natural phenomenon that would continue regardless of production rates. That is wrong. GCA's own data regarding bottomhole pressure, which is most relevant to the possible need for future compression, demonstrates that no compression should be expected prior to contract expiration in 2018. To make matters worse, GCA manipulates the wellhead pressure data in its Figure 3.1 by consistently using the low point from a range of pressure readings for every well. Claimants refer the Tribunal to Ryder Scott's Fourth Report for a thorough discussion of this issue.[487]

338. Finally, the scant original work product that GCA did produce for Contract 302 — the Prospect Risk Assessment and Crystal Ball documents — are themselves woefully deficient. Kazakhstan's argument that those documents are more thorough and revealing than Ryder Scott's "handdrawn maps of little supportive value" is laughable.[488] As Ryder Scott sums up the issue:

> These statements are factually incorrect and demonstrate profound ignorance of the prospect evaluation process. The identification and evaluation of a prospective resource is accomplished through the interpretation of seismic reflection data. Disc-2 provided as back with RSC-1 included Ryder Scott's Tolkyn SMT seismic project which contained all of the seismic interpretation files used in the Ryder Scott evaluation of the Contract 302 prospective reservoirs, as well as the penetrated reservoirs at Munaibai, Tabyl, and Tolkyn. (A separate SMT project was provided for Borankol Field on Disc-1). The information contained in this project would enable any competent professional with seismic interpretation skills to review all of the details of Ryder Scott's seismic interpretation of the Contract 302 prospective resources. Except for exact copies of the Ryder Scott seismic projects provided with GCA-1, GCA provided no seismic projects in any of their back up material. The hand drawn maps referred to by Respondent in Paragraph 544 were derived from Ryder Scott's seismic interpretations of the various prospects. They are of enormous supportive value because they show the area and thickness values used by Ryder Scott in the estimate of prospective resources for the Contract 302 prospects, and they illustrate exactly how these values were derived. If GCA had provided the maps that they relied upon in the evaluation of the prospective resources, whether those maps be their own or someone else's, one could give GCA some credit for proper

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[487] *See* Fourth Ryder Scott Report ¶¶ 33-46.

[488] *See* Respondent's First Post-Hearing Brief ¶ 544.

> documentation of their work. Instead GCA's "back-up" consisted of numbers on a piece of paper with no explanation whatsoever of where those numbers came from.[489]

339. These are only a few of the many, fatal deficiencies in the work of GCA, which remains a "black box." Claimants refer the Tribunal to the Fourth Report of Ryder Scott for a more fulsome discussion of these issues and response to GCA's criticisms of Ryder Scott's opinions.

b) Deloitte

340. As for Deloitte, Kazakhstan attempted with its First Post-Hearing Brief to backfill the gaping holes in Deloitte's prior analysis. Specifically, Kazakhstan had Deloitte respond for the first time to the secondary valuation analyses in FTI's first report (submitted in May 2011), and to prepare secondary valuations of its own. As Claimants explained in their objections to Deloitte's Supplemental Report (submitted in letters to the Tribunal on April 22 and 24, 2013), the submission of these wholly new and untestable secondary valuations "under cloak of darkness" makes a mockery of the procedural schedule and constitutes a gross procedural violation.

341. Moreover, Deloitte's new arguments clearly demonstrate the flaws in, and biased and outcome-driven nature of, its work. As FTI explains:

> A main objective of considering alternative indicators of value is to test the conclusions reached under a primary valuation approach, and if the secondary indicators are not supportive, to consider whether there may be errors or biases in the primary valuation. By issuing its valuation conclusions without considering secondary indicators, Deloitte effectively reached its opinion in a vacuum. Deloitte now purports to analyze alternative indicators of value to backfill support for its earlier calculations, but in order to do so, Deloitte makes unsupported adjustments to data in order to make these alternative indicators support its earlier conclusions and claims. FTI believes this is inappropriate, unreliable, and unprofessional.[490]

Thus, Deloitte came to its valuation opinion without conducting any secondary analysis to test its assumptions. Only after it submitted its conclusions in this case, and only after FTI criticized Deloitte for its inadequate approach, did Deloitte attempt to backfill support for the conclusions it had already reached. The problem with that approach is that Deloitte already

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[489] Fourth Ryder Scott Report ¶ 57.

[490] Fourth FTI Report ¶ 2.7.

had committed itself to the conclusions it had submitted, and thus had every incentive to employ bias in its analysis of secondary value indictors to ensure that they would appear to support its original conclusions.

342. Unfortunately, that is exactly what Deloitte did. In order to make the secondary analysis support its conclusions, Deloitte had to make a number of unsupportable judgments and adjustments to the market data that biased the outcome downward. Specifically, Deloitte:

- Disregarded two companies with high multiples (Alliance Oil and Max Petroleum) in its comparable companies analysis, even though it knew that market actors (KMG and RBS) contemporaneously considered those companies in their market analysis. That is not only strong evidence that the companies are in fact comparable, but the mere fact that market actors considered them comparable at the time makes them relevant because they had an effect on market perception. Thus, Deloitte employed selectivity bias to drive its conclusion downward;

- Utilized a median rather than mean, which discards data that it had already determined to be relevant for arbitrary reasons;

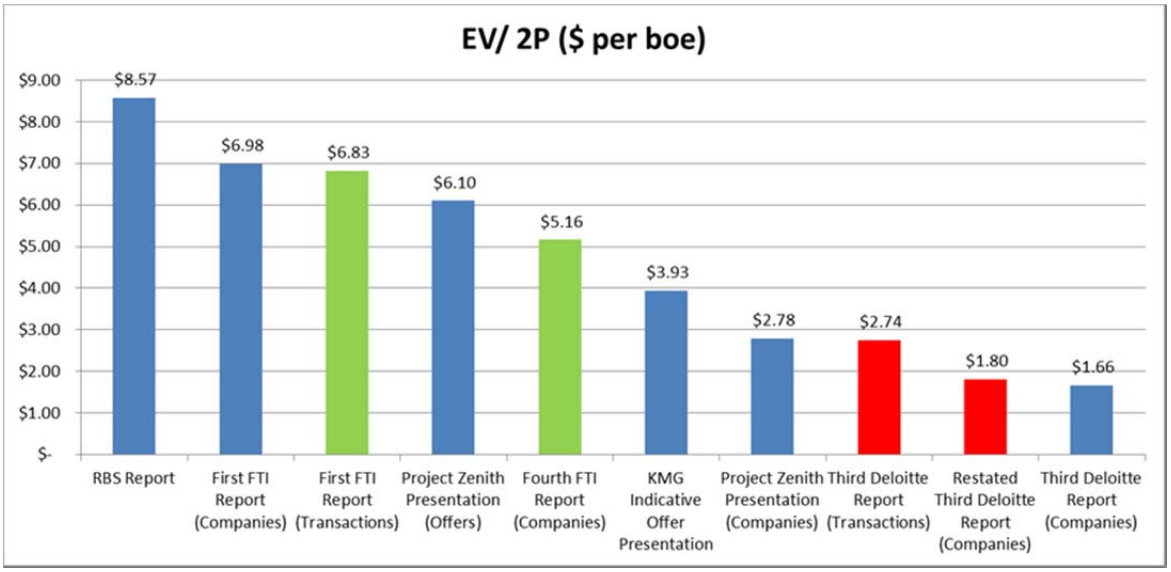
- Made an arbitrary 55 percent negative adjustment to the multiples of comparable private transactions, purportedly based on the effect of the global financial crisis on the trading price of comparable public companies. Deloitte, however, failed to consider that (1) public markets during the financial crisis incorporated substantial systemic risk that did not affect private transactions in long-lived assets, and (2) contemporaneous market actors KMG and RBS made no such adjustments in their analysis of comparable transactions; and

- Included transactions with low multiples that closed after the 2008 Valuation date in its purported analysis of comparable transactions as of that date, which employed hindsight bias to drive its conclusion downward.[491]

[491] *See* Fourth FTI Report § 2.

343. Deloitte also made several other mistakes in its market analysis that, while not apparently conscious attempts to bias the result downward, did tend to depress the conclusions of its secondary analyses. These are discussed in detail in FTI's Fourth Report.

344. The bottom line is that Deloitte had every incentive to bias its secondary valuation analysis to make it appear to support the conclusions it had already published, and that is exactly what it did. This is confirmed by the contemporaneous market analysis conclusions reached by KMG and RBS and the offers in Project Zenith:[492]



345. The contemporaneous analysis of those market actors, who had no reason to bias their conclusions one way or the other, clearly corroborate FTI's market analysis and underscore the unreliability of Deloitte's.

2. Kazakhstan's Criticisms of FTI Are Unfounded

346. Apart from valuation date, which is discussed at length above, Kazakhstan levels a number of criticisms at FTI. All of those criticism are unfounded, and upon close examination, actually reflect errors in the work of GCA and Deloitte.

a) Gas prices

347. Kazakhstan argues that FTI makes unreasonable assumptions about gas prices because there was no basis to assume on October 14, 2008, that the Tri-Partite Agreement would go into effect. This argument is wrong for several reasons.

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[492] Fourth FTI Report, Figure 4.

348. First, there was a reasonable basis on October 14, 2008, to assume that the Tri-Partite Agreement (or something materially comparable) would go into effect. All three parties to that agreement signed it, albeit in different iterations. At the valuation date, KazAzot had signed the contract, and management expected that KazMunaiGas would sign the contract imminently — which it did, on November 17, 2008.[493] This falls within the exception to the rule against consideration of events after the valuation date, because it merely confirmed management's expectations as at the valuation date.[494] Additionally, while KazAzot never signed the version that KazMunaiGas executed, its previous acceptance of a materially identical contract was a reasonable basis on which to assume that it would execute the agreement after substitution of KazMunaiGas as exporter. Finally, the fact that the State-owned oil company had executed the export portion of that agreement was a solid indicator that TNG would be able to export gas even if KazAzot did not sign the agreement.

349. Moreover, FTI's assumptions about gas pricing were not based solely on the Tri-Partite Agreement.[495] FTI evaluated expectations in the market at the time about future gas prices, as reflected in the very same scholarly literature that Deloitte cited.[496] That literature reflected an expectation that the price for Kazakhstan gas would increase in the near future based on increased access to export markets and growing competition for Kazakh gas.

350. Additionally, Kazakhstan's first valuation expert, Deloitte TCF, assumed that gas prices in Kazakhstan would "transition" to European prices in the near future.[497] Although Deloitte TCF deemed that scenario to be 100 percent likely, Deloitte GmbH assigned that scenario only a 30 percent likelihood, based solely on its own judgment and without obtaining the views of its Kazakh colleagues on the Kazakh gas market.[498]

351. Similarly, the RBS Valuation for KMG E&P confirms that FTI's gas price assumption was reasonable. RBS assumed that 80 percent of TNG's gas would be exported based on discussions with KMG management, brokers, and an energy consulting firm called

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493 *See* Tri-Partite Agreement, (executed by KazAzot and TNG), **C-302**; Tri-Partite Agreement, November 17, 2008, (executed by TNG and KazMunaiGas), **C-97**.

494 *See* Tr. January 2013 Hearing, Day 4, 144:24 – 145:10.

495 *See* First FTI Report at 38-46 and 75-77; Tr. January 2013 Hearing, Day 3, 156:25 – 157:18.

496 *See* First FTI Report ¶ 11.14 (citing Oxford Institute Study, Ex. 108 to First FTI Scope of Review).

497 *See* Deloitte TCF Report ¶ 6.11.

498 *See* Tr. January 2013 Hearing, Day 4, 128:16-22; 129:23–130:12. Mr. Gruhn testified that he had no discussions with Deloitte TCF in the preparation of Deloitte GmbH's report. *Id*. at 126:9-16.

CERA.[499] Deloitte knew that — because it had the RBS Valuation in its possession well before Claimants did — but nevertheless assigned only a 5 percent likelihood to that scenario which RBS and KMG deemed to be 100 percent likely.[500] Kazakhstan should not be permitted to disregard that view from the State-owned oil company, particularly in light of the pains that Kazakhstan took to hide that fact from the Tribunal and shield its witnesses from cross-examination on the relevant documents.

b) Cost Assumptions

352. Kazakhstan accuses FTI of simply parroting Claimants' estimates for well and infrastructure costs to develop the Contract 302 Properties, and even argues that FTI "hid that they used Claimants' cost estimates."[501] Both of these allegations are false.

353. As FTI has explained clearly, it based its cost estimates for the Contract 302 properties on information provided by the Claimants, which FTI discussed with Ryder Scott and confirmed against records of the Claimants' historical experience. FTI reviewed KPM's and TNG's actual historical drilling costs, and "used them to determine the capital expenditure costs for the Borankol and Tolkyn fields as described in the First FTI Report."[502] For Contract 302, which involved deeper wells, FTI "forecasted well costs based on discussions with the Claimants and Ryder Scott as well as extrapolation from TNG's historical well costs."[503] FTI included the schedule of the companies' historical well costs in the scope of review that it submitted with its report.[504] Regarding other infrastructure costs for Contract 302, FTI also based its projections on information provided by the Claimants,

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499 *See* 2009 RBS Valuation, at 33, 72, **C-723**. Although the RBS Valuation does not specify the identity of CERA, it seems likely that it is the international energy consulting firm IHS CERA, whose website can be viewed at http://www.ihs.com/products/cera/index.aspx (last visited June 1, 2013).

500 *See* January 2013 Hearing, Day 4, 128:9-21, 133:24–134:17.

501 Respondent's Closing Submission, slide 62. Notably, this criticism is limited to the Contract 302 assets. Apart from the disputed need for compression at Tolkyn (which the parties have discussed at length), future CAPEX is not a significant input into either party's DCF valuation for Tolkyn and Borankol. Moreover, Kazakhstan does not seem to take issue with FTI's reliance on historical costs at Tolkyn and Borankol to forecast future costs on those fields. *See* Respondent's First Post-Hearing Brief, at 158-162 (addressing cost assumptions for Contract 302 only).

502 Fourth FTI Report ¶ 3.4-3.8.

503 *See* Fourth FTI Report ¶ 3.10. Footnote 235 of the First FTI Report makes these deliberations explicit, explaining, "[w]e 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.

504 *See* First FTI Scope of Review, Ex. 37.

which it reviewed with Ryder Scott and confirmed against Claimants' historical experience, and produced source materials regarding historical costs.[505]

354. Finally, Kazakhstan also criticizes FTI's assessment of the investment value of the LPG Plant as simply relying on information provided by Claimants. That is not correct. FTI based its assessment of the book value of the LPG Plant as of October 14, 2008, on TNG's Third Quarter 2008 financial statements.[506] Those financial statements were prepared in the ordinary course of business, not for litigation, and were reviewed by KPMG.[507] In its update to the LPG Plant value to reflect investments after October 14, 2008, FTI relied on the Tristan Oil Annual Report for 2009.[508] That report likewise was prepared for investors in the ordinary course of business, and not for the purposes of litigation. Moreover, TNG's audited 2009 financial statements, which are backup to the annual report, list the net book value of the LPG Plant as US $248 million at December 31, 2009, which corroborates FTI's assessment of US $245 million.[509] Data from the Claimants' historical financial records, particularly data from audited financial statements, is perfectly reliable evidence, and is not simply FTI parroting the Claimants.

355. FTI's work in this regard must be juxtaposed with GCA's cost estimates, which disregard historical reality and are utterly unsupported.[510] As Claimants have demonstrated, and Mr. Wood himself admitted, his cost estimates are simply "black box"

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[505] Fourth FTI Report ¶ 3.13 (explaining that "FTI, Ryder Scott, and the Claimants discussed infrastructure requirements based on Ryder Scott's production schedules. Following these discussions, the Claimants produced expenditure forecasts that were based on the historical operations of KPM and TNG, Ryder Scott's development plan for the Contract 302 properties, and discussions with both FTI and Ryder Scott. FTI reviewed the historical costs provided by the Claimants' accounting system, tied them to forecasted infrastructure costs, and included the supporting documentation in its scope of review. As previously noted, KPM and TNG's accounting systems were previously audited in the process of preparing Tristan Oil's annual financial statements and as such FTI considers the financial records produced by those systems reliable.").

[506] *See* First FTI Report, n. 217.

[507] *See* Reviewed Financial Statements for Third Quarter 2008, attached to Tristan Oil Interim Report for Nine Months Ended September 30, 2008, Ex. 69 to First FTI Scope of Review. The KPMG Auditors' Report precedes the financial statements (at page 15 of the PDF file).

[508] *See* Second FTI Report, n. 37.

[509] *See* 2009 Audited Financial Statement of TNG, attached to 2009 Tristan Annual Report, F-154, **R-37.6**.

[510] In the lone instance where Mr. Wood claims to have considered historical reality, he got it wrong. He claims to have considered TNG's cost to drill the Munaibay-1 well in setting his well cost estimates. But as FTI explains, he overstated TNG's actual historical cost on that well by US $1.6 million (approximately 10%), and failed to consider evidence that the Munaibay-1 well was aberrationally costly due to complications that led to the acquisition of a larger drilling rig. The Munaibay-1 does not provide a reasonable basis for projecting future drilling costs on the Contract 302 property without a downward adjustment to reflect the cost benefits of better equipment and the information gained during the drilling of the Munaibay-1 well. *See* Fourth FTI Report ¶¶ 3.26-3.27.

estimates based on his "experience," which he presents with no documentary backup at all.[511] After the January 2013 hearing, Kazakhstan attempted to rehabilitate GCA's cost estimates by providing more detailed breakdowns in GCA's Third Report. But as FTI explains, those tables simply disaggregate GCA's black box numbers, without providing any more information about where the numbers come from or why they are reliable.[512]

c) Other Miscellaneous Criticisms of FTI

356. Kazakhstan and Deloitte also criticize FTI for several other miscellaneous "methodological errors." These criticisms likewise are baseless.

357. First, Kazakhstan's argument that FTI arbitrarily reduced its inflation assumption when it corrected it price forecasts from nominal to real in order to "limit the impact of the correction" is wrong for two reasons. First, the reduction was not arbitrary. FTI previously had used an historical inflation rate, but an historical rate is not appropriate for the adjustment of nominal price *forecasts* into real price forecasts. To make that adjustment, FTI had to use a forward-looking inflation rate, which was lower than the historical rate.[513] Precisely to avoid any possibility of selective bias, however, FTI incorporated that revised inflation assumption throughout its valuation, including in its determination of the discount rate. The revised inflation assumption raised FTI's real

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[511] *See* Tr. January 2013 Hearing, Day 3, 206:8-22.

[512] *See* Fourth FTI Report ¶¶ 3.26-3.27. FTI explains:

> The presentation of conclusory numbers without any discussion regarding the providence and reliability of these estimates is in actuality a "black box". Although the summary numbers presented in the Third GCA Report are linked to supporting schedules, the schedules themselves are merely disaggregated summary figures within GCA's proprietary format. As stated by Mr. Wood during the January 2013 hearings:
>
> "It is a cost estimate routine, as I said, I use every day; it's a one-page spreadsheet that is an intrinsic part of our business, and it's an advantage that we have over our competitors."
>
> FTI's cost estimates are based on historical costs incurred by both KPM and TNG and discussions with the Claimants. FTI also confirmed the reasonability of these estimates with Ryder Scott. The basis for FTI's cost estimates is objective verifiable evidence, corroborated by discussion with experts. In contrast, GCA estimated costs based on an undisclosed database containing data from unknown sources and presented their findings as conclusions. When creating a financial model for the purposes of quantifying damages in a contentious matter, general market data from unknown sources cannot be preferred to the actual historical operating data of the assets being modeled.

[513] *See* Fourth FTI Report § 6.B.

discount rate from 13 to 14 percent, which reduced asset prices and offset the supposedly arbitrary inflation-rate reduction on future oil prices.[514] Kazakhstan and Deloitte simply ignore the offsetting effect of the inflation-rate reduction on FTI's discount rate.

358. Second, FTI did not arbitrarily round its discount rate in order to increase asset values. As it explained in its first report, FTI rounded its discount rate to the nearest whole number in order to avoid implying false precision in the estimation of WACC.[515] Deloitte acknowledges that rounding WACC estimates is appropriate, but simply disagrees with the degree of rounding.[516] Deloitte cites no authority, however, for its assertion that rounding a WACC estimate to the next full percentage is not in line with good valuation practice.[517]

359. Third, Deloitte's various criticisms of FTI's valuation of Munaibay Oil — which, once again, Deloitte raised belatedly in Kazakhstan's First Post-Hearing Brief even though FTI's valuation of Munaibay Oil appeared in its May 2012 report — are mistaken. Claimants refer the Tribunal to FTI's responses on these issues in its Fourth Report.[518]

3. Claimants' Valuation of Borankol and Tolkyn Is Corroborated by Multiple Indicators of Value, and Deloitte's Valuation Is the Sole Outlier

a) RBS Valuation

360. RBS conducted a comprehensive valuation of the Tolkyn, Borankol, and LPG Plant assets for KMG E&P in the summer of 2009. RBS based its valuation on: (1) the 2009 reserve report prepared by Miller Lents; (2) detailed legal due diligence by Squire Sanders; (3) detailed financial, tax, and environmental due diligence by PWC; (4) discussions with management of KPM and TNG; and (5) "valuation discussions with KMG EP."[519] The valuation, dated July 31, 2009, with a valuation date of October 1, 2009, concluded that Tolkyn, Borankol, and the LPG Plant had a combined enterprise value ranging from US $612

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514 *See* Fourth FTI Report § 6.B.

515 *See* First FTI Report ¶ 11.66; *see* also Fourth FTI Report § 6.C.

516 *See* Supplemental Deloitte Report ¶ 94.

517 Moreover, Kazakhstan presents a misleading image of the magnitude of this issue, stating that it adds almost US $50 million to Claimants' claim. Most of that impact, however, is attributable to the unrisked prospective value of Contract 302. The impact on FTI's combined valuation of Tolkyn and Borankol is only US $7 million, or approximately one percent of FTI's valuation of those assets. *See* Supplemental Deloitte Report at 37, Table 3.

518 *See* Fourth FTI Report § 6.D.

519 *See* RBS 2009 Asset Valuation, July 31, 2009, slides 11-12, 35, C-**723**.

million in the Default-Base scenario up to US $760 million assuming higher gas pricing in the Special-Base scenario.[520]

361. The RBS Valuation, conducted for the State-owned oil company outside the context of a dispute, is highly corroborative of FTI's valuation.

362. Kazakhstan, however, makes a number of misstatements and manipulations to support its argument that the RBS Valuation corroborates Deloitte's valuation. First, Kazakhstan asserts misleadingly that RBS assigned zero value to the Contract 302 properties.[521] In fact, RBS did not attempt to value the Contract 302 Properties at all. This is plain from the RBS Valuation itself, which states that RBS valued the Tolkyn, Borankol, and LPG assets, but contains no valuation discussion of the 302 assets.[522] Furthermore, Medet Suleimenov testified that KMG E&P excluded Contract 302 from its valuation due to lack of sufficient data.[523] Of course, Kazakhstan's wrongful acts are the reason that Claimants did not have additional exploration data for Contract 302 to provide to KMG E&P.

363. Moreover, Kazakhstan selectively embraces parts of the RBS Valuation and disregards others to argue that the valuation should be adjusted downward. In particular, Kazakhstan fully embraces the RBS valuation of Borankol, even though Deloitte itself valued that asset at more than three times the RBS Valuation (on a valuation date almost ten months later).[524] Kazakhstan argues simultaneously, however, that the RBS valuation of Tolkyn must be adjusted downward because RBS assumed condensate volumes that are higher than Ryder Scott's projections.[525] Kazakhstan's selective use of the RBS Valuation to give a false impression that it corroborates Deloitte's conclusions is unsupported and troubling.

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520 *See* RBS 2009 Asset Valuation, July 31, 2009, slide 36-37, **C-723**.

521 Tr. May 2013 Hearing, Day 1, 221:16-21 ("the 302 properties are being mentioned in the RBS report, but no value is being assigned to them").

522 *See* RBS 2009 Asset Valuation, July 31, 2009, slide 29 (stating that RBS valued the Tolkyn and Borankol fields and LPG Plant), **C-723**. Moreover, RBS could not have valued the reef prospect, or indeed any of the 302 prospects other than Munaibay Oil, because it did not have any resource estimates for those prospects. RBS used the 2009 Miller & Lents report for its oil and gas estimates, but the only Contract 302 property that Miller & Lents assessed was Munaibay Oil. *See* 2009 Miller & Lents Report at 1, **R-349**.

523 Tr. October 2012 Hearing, Day 3, 129:10-16.

524 *Compare* RBS Valuation (valuing Borankol at US $19 million as of October 1, 2009) with First Deloitte GmbH Report, ¶ 222 (valuing Borankol at US $62.8 million as of July 21, 2010). To obscure that fact from the Tribunal, Kazakhstan left Deloitte's valuation off the slide in its closing presentation comparing the FTI and RBS valuations of Borankol. *See* Respondent's Closing Submission, slide 54.

525 *See* Respondent's Closing Submission, slide 55.

364. In fact, to the extent that any adjustments to the RBS Valuation are appropriate, it is the exact opposite of the adjustments that Kazakhstan suggests because RBS's valuation of Borankol, not Tolkyn, appears to be mistakenly low. For Borankol, RBS used volume assumptions from the 2009 Miller & Lents report that were materially higher than GCA's volume assumptions for the same asset (at a later valuation date):[526]

Borankol Production Comparison	Liquids 000s barrels	Gas 000,000s cf	Gas 000s boe	Total 000s boe
Miller and Lents	13,584	20,214	3,572	17,156
GCA	8,558	3,319	587	9,145

365. Yet for some reason, RBS's valuation of that asset as of October 1, 2009, is less than one-third of Deloitte's valuation as of July 2010 (when oil prices were higher). Because the RBS Valuation does not disclose enough detail about its model, it is difficult to know what drove that peculiar difference. Moreover, Kazakhstan's tardy production of the document prevented Claimants from examining witnesses (*i.e.*, Medet Suleimenov) to understand the assumptions and methodology employed in the valuation. Thus, the benefit of the doubt should go to Claimants in terms of Borankol's valuation.

366. For Tolkyn, Kazakhstan is simply wrong that condensate volumes are the main difference in value between the Deloitte and RBS valuations. Different assumptions about gas prices account for much of that difference.[527] As discussed above, Kazakhstan has no basis to disregard the State-owned oil company's contemporaneous assumption about future gas prices.

367. More fundamentally, Kazakhstan's selective cherry-picking of the data in the RBS report that it likes, while disregarding the data it does not, is unsupportable and wrong. As a corroborating indicator, the RBS Valuation in the aggregate supports FTI's valuation, and demonstrates that Deloitte's valuation is unreliable.

368. Finally, as discussed above, the RBS Valuation provides evidence of value as of October 2009 that the Tribunal can use as a starting point in assessing the value of Tolkyn and Borankol in the event that it rejects Claimants' valuation date.[528] RBS concluded that

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526 *See* Fourth FTI Report, Figure 9.

527 *See* Fourth Ryder Scott Report ¶¶ 4.9-4.11.

528 The RBS Valuation is not helpful in assessing damages for the Contract 302 assets and the LPG Plant because RBS did not value Contract 302, and damages for the LPG Plant should be based on investment value rather than market value as a matter of law.

Tolkyn and Borankol had a combined enterprise value ranging from US $546 million in the Default-Base scenario up to US $784 million assuming higher gas pricing in the Special-Base scenario.[529] Those amounts, in a valuation performed for the State-owned oil company, represent the absolute minimum that the Tribunal should award for the Borankol and Tolkyn assets in the event it relies upon the RBS Valuation. For the reasons discussed above, the RBS Valuation's figure for Borankol should actually be increased significantly.

369. Additionally, the Tribunal should increase any amount derived from the RBS Valuation by US $243.5 million to account for contingent liabilities attributable to Kazakhstan that RBS included in its model. During closing arguments at the May 2013 Hearing, counsel for Kazakhstan argued that there "is no statement in the RBS report that contingent liabilities have been deducted from the enterprise value."[530] To the contrary, the RBS report stated plainly:

> Contingent liabilities were extracted from PwC report and incorporated into the model
>
> To this we have applied generally accepted valuation methodologies including Discounted Cash Flows analysis.[531]

370. This is a clear statement that RBS incorporated the contingent liabilities in its DCF model, which the same slide (No. 29) also confirms was its model of enterprise value. Moreover, the RBS Valuation does not reflect any deduction of contingent liabilities from enterprise value to arrive at equity value, so those liabilities must have been incorporated in the calculation of enterprise value itself.[532] Moreover, because of Kazakhstan's untimely production of the RBS Valuation, the Tribunal should resolve any uncertainty on this point against Kazakhstan.

b) Cliffson

371. It is undisputed that Claimants concluded an agreement to sell all of the assets at issue in this arbitration to a third party, Cliffson, on February 13, 2010.[533] The terms of the Cliffson agreement were US $267 million for 100 percent of the equity interests in TNG,

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529 RBS 2009 Asset Valuation, slides 36-37, **C-723**.

530 *See* Respondent's Rebuttal Closing Submission, slide 31.

531 RBS 2009 Asset Valuation, slide 29, **C-723**.

532 *See* RBS 2009 Asset Valuation, slides 40-41 (deducting only the Tristan debt, at 101% and 85% of face value respectively, from enterprise value to arrive at equity value), **C-723**.

533 *See* Reply on Jurisdiction and Liability ¶¶ 418-422; Reply on Quantum ¶¶ 5-7.

KPM, and Tristan, with Cliffson assuming all of those companies' liabilities. This equates to an enterprise value for the assets of KPM and TNG of approximately US $924 million.[534] Kazakhstan's arguments for disregarding the Cliffson agreement as an indicator of value are not persuasive.

372. First, Kazakhstan argues that Claimants' story regarding the Cliffson negotiations is not credible because of supposed inconsistencies regarding the timeline of those negotiations. In his first witness statement, Mr. Stati stated that Claimants were contacted by Cliffson in February 2010.[535] He did not say that February 2010 was the first time that Claimants had had any discussions with the principals behind Cliffson, or indeed, go into any details about the timeline of negotiations that led up to the Cliffson SPA. Kazakhstan did not make the timeline of those negotiations an issue until its Rejoinder on Quantum submitted on December 1, 2012, when it argued for the first time that there had been insufficient time for Cliffson to conduct due diligence.[536] Thereafter, in reviewing Kazakhstan's new arguments and preparing for the January 2013 Hearing, Claimants reviewed additional documents demonstrating that negotiations with the Aussabayev family (through a company called Grand Petroleum) began in the fall of 2009. Thus, Claimants presented the timeline of those negotiations through their only remaining opportunity, direct examination at the January 2013 hearing. That does not undermine Claimants' credibility; rather, it is the normal process of facts becoming clearer as new arguments put different issues into focus.

373. Second, Kazakhstan misrepresents the evidence regarding the dealings between Cliffson and Claimants in the spring of 2010 to support its speculation that Cliffson backed out of the transaction based on a reassessment of value. Kazakhstan first cites Mr. Stati's letter to Cliffson dated March 9, 2010, suggesting that Mr. Stati complained in that letter that Cliffson had taken no action to implement the SPA.[537] In fact, that letter focused specifically on Cliffson's failure to perform its obligations in the Side Letter Agreement to bring a halt to government harassment of KPM and TNG.[538] The fact that Cliffson had not

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534 Reply on Jurisdiction and Liability ¶ 418; Second FTI Report ¶ 3.6.

535 First Stati Statement ¶ 40.

536 *See* Rejoinder on Quantum ¶¶ 399-405.

537 *See* Respondent's First Post-Hearing Brief ¶ 1014.

538 Letter to Cliffson Company, March 9, 2010, **C-701.1**.

succeeded in bringing an end to the State's harassment of KPM and TNG is not evidence that it had reevaluated its decision to purchase KPM and TNG.

374. Kazakhstan also ignores evidence of steps that Cliffson did take to implement the transaction. For instance, on April 10, 2010, Ascom and Cliffson conferred regarding the allocation among the four companies in the sale for purposes of completing government applications.[539] On May 6, 2010, Cliffson executed an amendment to the SPA extending the time for completing the transaction.[540]

375. Finally, Kazakhstan cites Claimants' letter to Cliffson dated June 15, 2010, as further evidence that Cliffson was not complying with the SPA. That letter, however, actually reflected concern that Cliffson had backed out of the transaction because Kazakh authorities were planning an auction of KPM's assets to satisfy the criminal penalty.[541] That letter in no way admits that Cliffson backed out of the transaction because it had reassessed the sale price (unless, of course, it reassessed that price because it believed it could get the assets for less in an auction that resulted from Kazakhstan's baseless criminal penalty).

376. In short, there is no basis to disregard the voluntary, arms-length transaction between Claimants and Cliffson as an indicator of the value of the assets. That evidence corroborates FTI's assessment. In the unlikely event that the Tribunal elects to use a valuation date of July 22, 2010, it should award damages equal to no less than the US $924 million enterprise value of the Cliffson transaction. In fact, because Claimants accepted that transaction under substantial duress, the Tribunal should exercise its discretion to increase the amount of damages above the value of the transaction accordingly.[542]

c) FTI's Secondary Valuations

377. In its First Report, FTI examined four market-based indicators of the value of the Borankol and Tolkyn fields as a secondary "reality check" on its primary DCF valuation: (1) comparable public companies; (2) comparable reported transactions; (3) enterprise value implied by the market value of the Tristan notes; and (4) the indicative offers in Project

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539 Email confirming Cliffson's agreement (per Assaubayev Aydar Kanatovich) to Artur Lungu's proposed allocation of equity values in the Cliffson transaction, **C-541**.

540 Amendment to Cliffson SPA, May 6, 2010, **C-701.2**.

541 Letter to Cliffson Company, June 15, 2010, **C-701.3**.

542 As Mr. Stati testified, the original term sheet for the Cliffson transaction valued the assets at US $1.15 billion, but the Aussubayevs subsequently demanded a reduction in the transaction price by the amount of the criminal penalty imposed against KPM. *See* Tr., January 2013 Hearing, Day 2, 91:23 – 92:21.

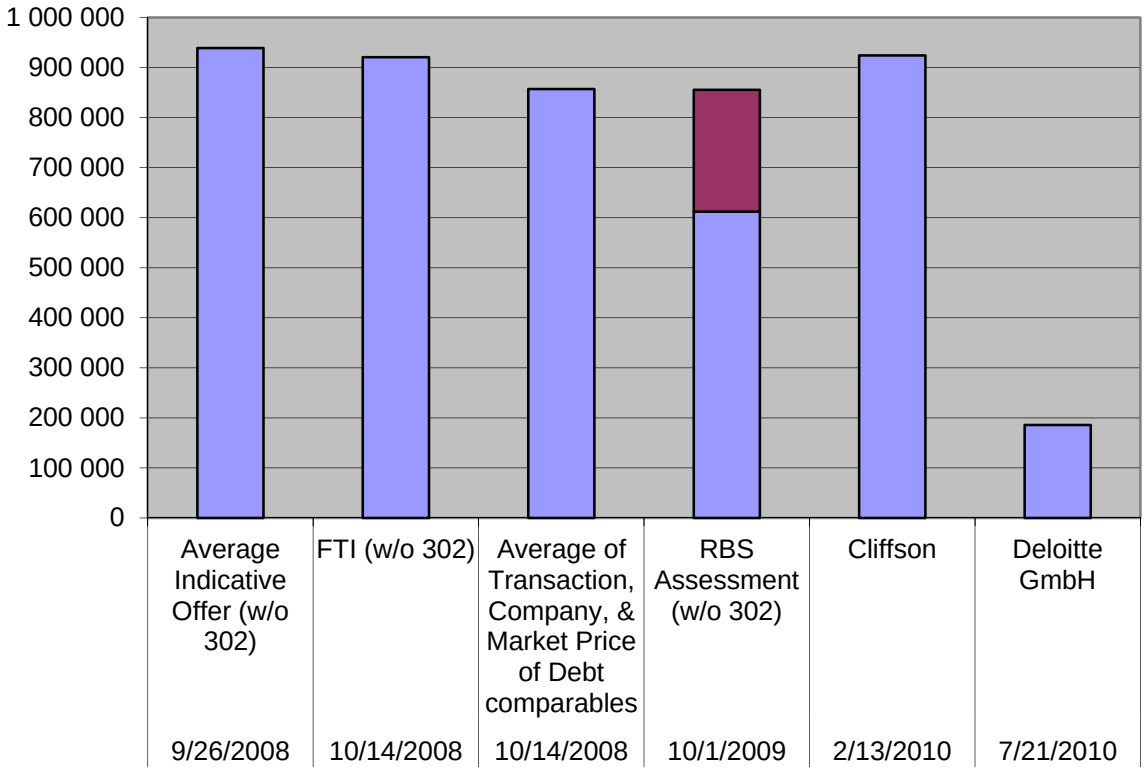
Zenith. As discussed above in Section V.D, Deloitte's belated criticism of these analyses, and competing market analyses of its own, are infected by selective bias designed to drive down the market indicators to support the conclusions that it already had presented. Deloitte's methodology is both unprofessional and unreliable, and the Tribunal should disregard it.

378. FTI has adjusted its comparable companies analysis based on a clarification of the 2P reserves of one of the selected companies and the newly-known fact that RBS considered an additional company (Zhaikmunai) it its market analysis. With that update, the four market indicators that FTI assessed continue to corroborate FTI's DCF conclusions, and to undermine Deloitte's valuations of the Tolkyn and Borankol fields:

	Combined
FTI DCF Value	US $675.9 million
Comparable Companies	US $504 million
Comparable Transactions	US $667.2 million
Value Implied by Debt	US $1.4 billion
Zenith Indicative Offer	US $595.9 million
Deloitte DCF Value	US $186 million

d) Summary of Valuation Indicators

379. In summary, as the following chart shows, numerous other indicators of value corroborate Claimants' valuation, and impeach the reliability of Kazakhstan's valuation:



E. Contract 302 Properties

380. As Claimants have explained at length in prior submissions, there is substantial authority authorizing the Tribunal to award damages for the undrilled Contract 302 Properties (*i.e.*, other than Munaibay Oil) based on: (1) their out-of-pocket investment costs; plus (2) a portion of the prospective value they could have realized if Kazakhstan had not deprived them of the opportunity to make a commercial success of the project.[543] Kazakhstan's legal arguments are unpersuasive, and Claimants see no need for further briefing on the issue.

381. In evaluating the likelihood of success of the project, the Tribunal should take account of several key facts that emerged during the exchange of expert evidence with the parties' First Post-Hearing Brief, and at the May 2013 Hearing.

382. First, GCA's articulation of two different GCOS estimates for the same prospect is nonstandard and illogical. The definition of GCOS is the likelihood that a test well will produce a sustained flow of hydrocarbons.[544] By definition, there can be only one

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[543] *See* Claimants' First Post-Hearing Brief, at 208-19.

[544] *See* Fourth Ryder Scott Report ¶ 95.

GCOS estimate for a single prospect. GCA's GCOS estimate for the reef thus **is** 10 percent, and the primary difference between GCA and Ryder Scott is the likely size of the reservoir.

383. GCA sees greater uncertainty than Ryder Scott regarding the extent of the reef, primarily on the northern side. GCA attributes this uncertainty to poor data quality in the 3D seismic. As Ryder Scott explains, however, GCA seems to be falling into an "interpretation pitfall" due to lack of rigor in its analysis.[545] Seismic waves do not reflect consistently off of a reef formation, making a reef difficult to identify (or "pick") directly. The countours of a reef formation are best identified by looking for interruptions in the stratigraphic layers around it. Ryder Scott did this (by picking three reference horizons around the reef and one above it), which provided an image of the reef with a high degree of confidence. GCA did not pick reference horizons around the reef, and simply interpreted the inconsistent seismic reflections from the reef formation as "poor data quality." In short, Ryder Scott was able to confirm with a high degree of confidence, by looking at the horizons around the reef structure, what GCA had to force or "ghost." Ryder Scott's more rigorous analysis thus is more reliable, and the potential size of the reservoir is that reflected in Ryder Scott's analysis, or GCA's slightly larger alternative case, at a 10% GCOS.

384. Furthermore, in the context of the modern petroleum industry, a 10% GCOS factor is not particularly low for a prospect of this size. As Mr. Nowicki explained at the May 2013 Hearing:

> The only other comment I would make is in the modern oil business there aren't too many very large prospects that have high GCoS numbers. I mean, that's just the way it works. The easy to find big fields have already been found. So if you want to find a big field, you're going to, in all likelihood, have to accept a fairly low GCoS number before you drill that feature.[546]

Thus, while the reef is a high-risk prospect, that is the nature of the business. It nonetheless is a highly attractive prospect because of its potential size, especially for a smaller, independent operator like the Claimants.

385. Finally, as became very clear at the May 2013 Hearing, Kazakhstan's primary objection to the economic feasibility of the reef prospect — high H_2S content — is premised

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[545] *See* Fourth Ryder Scott Report ¶ 100.

[546] Tr. May 2013 Hearing, Day 1, 111:22 – 112:4.

on GCA's selective bias. GCA chose the Tengiz field as its analog for projecting contaminants, but did not use Tengiz as its analog for projecting condensate yield. In fact, GCA could not identify its analog(s) for condensate yield, and never produced that data. GCA fumbled to explain its selectivity with vague explanations that temperature and pressure at the reef make high condensate yields unlikely, but that answer does not withstand scrutiny.[547] The bottom line is that there is no way to reliably predict the fluid composition of a reservoir. The best method (other than drilling a well) is to select an analog, but there is no defensible basis to select different analogs for different fluid properties. Ryder Scott consistently used the nearby Tolkyn/Munaibay Artinskian reservoirs as its analog for all fluid properties. GCA's selective use of Tengiz for contaminants and unknown, much-lower analogs for condensate is unsupportable, and serves only to drive costs up and revenues drastically down.

F. LPG Plant

386. As with the undrilled Contract 302 assets, the Tribunal should award damages for the LPG Plant based on: (1) Claimants' out-of-pocket investment costs of US $245 million; plus (2) a portion of the prospective additional value they could have realized if Kazakhstan had not deprived them of the opportunity to make a commercial success of the project.[548] Kazakhstan's argument that the Tribunal should award nothing for this significant capital project that the State seized without paying any compensation is incorrect for two fundamental reasons.

387. First, Kazakhstan's argument that the market value of the LPG Plant is US $-89.8 million is clearly wrong. Deloitte's valuation completely disregards any possibility of processing third-party gas in the LPG Plant. There is no basis whatsoever for that assumption. Claimants detailed the evidence supporting that assumption in their First Post-Hearing Brief, and Kazakhstan has marshaled no persuasive rebuttal. Furthermore, the RBS Valuation assumed based on discussions with KMG E&P management that the LPG Plant

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[547] As Ryder Scott explains, while the thermal history of a reservoir and source beds do impact the fluid composition of a reservoir, the present day termperature is not a good indicator of thermal history. Moreover, pressure does not have a significant impact on fluid composition. Rather, pressure primarily affects the recovery factor for gas/condensate reservoirs, and provides yet another reason why consistent use of Tengiz as an anolog would result in a material (17%) increase in recoverable reserve estimates compared to Ryder Scott's Artinskian analog.

[548] *See* Claimants' First Post-Hearing Brief at 220-229.

would be loaded primarily with third-party gas.[549] The Tribunal must reject Deloitte's market valuation of the LPG Plant because it is based on a key assumption that is totally unsupported and inconsistent with the view of the State-owned oil company.

388. Second, market value is not the correct measure of value for an asset that Claimants never had the chance to make a commercial success due to the wrongful actions of the State. There is overwhelming authority that investment value, rather than market value, is the proper measure of damages for an asset that was not yet a going concern at the time of taking. For instance, in *Metalclad v. Mexico*, the tribunal concluded with respect to a project that was not yet operative that "fair market value is best arrived at in this case by reference to Metalclad's actual investment in the project."[550] In *Vivendi v. Argentina*, the tribunal concluded with respect to a concession that had no history of profitability that the 'investment value' of the concession appears to offer the closest proxy, if only partial, for compensation sufficient to eliminate the consequences of the Province's actions."[551] Similarly, in *Wena Hotels v. Egypt*, the tribunal also found that investment value was the best measure of market value for an asset that was unfinished and had no history of profitability.[552] These are but a few of the tribunals that have applied this well-accepted principle.

389. Moreover, the law on compensation for the loss of opportunity, addressed at length in Claimants' First Post-Hearing Brief, also supports this result.[553] The tribunals in those cases also awarded investment value as a component of damages. That body of law, however, also recognizes that when a State's actions deprive an investor of the opportunity to earn a profit above return of the investment cost, the investor is entitled to receive a portion of that potential additional profit as compensation for that lost opportunity.

G. Claimants Are Entitled to Recover Compound Interest

390. Claimants have set out their position on interest in their prior submissions.[554] An award of compound interest is the standard practice in investment treaty cases today, and appropriate in this case, because compound interest is the norm in commercial financing

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549 RBS 2009 Asset Valuation, July 31, 2009, slide 47, **C-723**.

550 *Metalclad Corp. v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award ¶¶ 121-22, **C-226**.

551 *Compañía de Aguas del Aconquija and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶¶ 8.3.10 – 8.3.13, **C-253**.

552 *Wena Hotels, Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award ¶¶123-25, **C-216**.

553 *See* Claimants' First Post-Hearing Brief, at 208-219.

554 *See* Reply on Quantum, at 41-47; First Post-Hearing Brief, at 255-57.

transactions, and thus compound interest is necessary to fully compensate the Claimants for the loss of opportunity to invest the funds.[555] In its Rejoinder on Quantum, Kazakhstan does not dispute the appropriateness in general of awarding compound interest.[556]

391. Regarding the rate of interest, the "borrowing" approach is most applicable to this case because Claimants borrowed significant sums as a result of Kazakhstan's actions. As Ripinsky and Williams note (citing Professor Marboe):

> [I]f a loan was taken in order to bridge the period without the money, it is evident that the interest actually paid by the claimant becomes the measure of damages. In these circumstances, it would be appropriate to use the interest rate equal to the one charged to the claimant.[557]

392. But for Kazakhstan's actions, Claimants would not have incurred the Laren debt and would have paid off the Tristan notes upon a sale of the assets. The interest rate on the Laren loan (not including the value attributable to the US $111 million in new notes issued in connection with that loan) was 35 percent, and that loan remained outstanding until late 2011.[558] The interest rate on the Tristan notes, which remain outstanding today, is 10.5 percent. Thus, an interest rate of 10.5 percent conservatively reflects Claimants' actual borrowing costs that are attributable to Kazakhstan's misconduct.

393. In fact, 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. If Kazakhstan had not launched its campaign on that date, but instead had acquired Claimants' assets legally, Claimants would have paid off the notes and they would not have continued to accrue interest to this day. Thus, Claimants included a request for this component of damage in their Reply on Quantum.[559] The simplest way to compensate Claimants for this injury, however, is to award interest at the rate of 10.5 percent on the entire award.

394. Alternatively, even if the Tribunal elects to follow the "investment approach," Kazakhstan's proposed rate based of U.S. T-bills is not an appropriate rate. The rate should

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555 *See* Reply on Quantum ¶¶ 89-90.

556 Rejoinder on Quantum § E.I.

557 Ripinsky & Williams, DAMAGES IN INTERNATIONAL INVESTMENT LAW (BIICL 2008) at 370, **C-740**, *citing* I. Marboe, "Compensation and Damages in International Law: The Limits of Market Value," 7 *Journal of World Investment and Trade* 754 (2006).

558 *See* Laren Settlement Agreement, June 11, 2009, **C-733**.

559 Reply on Quantum § V.

be tailored to the particular investor, not the lowest-risk rate available anywhere in the world. The Tribunal in *Sylvania v. Iran* observed this concept when it held that, absent a contractual rate, it "will derive a rate of interest based approximately on the amount that the successful claimant would have been in a position to have earned if it had been paid in time and thus had the funds available to invest in a form of commercial investment in common use in its own country."[560] Thus, a rate of interest available from a commercial bank in Moldova is more appropriate than the rate on U.S. T-bills. FTI has provided the applicable interest rates in its Third Report at paragraph 13.2 and Figure 32.

H. Claimants Are Entitled to Recover Moral Damages

395. Claimants have set out their position on moral damages in prior submissions, and Kazakhstan made no further argument in its First Post-Hearing Brief. Therefore, no further comments are required. In light of the nature of the conduct in this case, and its effect on the Claimants, the Tribunal should exercise its discretion to award substantial moral damages to Claimants.

VI. REQUEST FOR RELIEF

396. For the reasons set forth herein, Claimants respectfully request an award granting them the following relief:

- A declaration that Kazakhstan has violated the ECT and international law with respect to Claimants' investments;
- Compensation to Claimants for all damages they have suffered, as set forth in Claimants' Statement of Claim and Reply on Quantum and as further updated at the January 2013 Hearing and in Claimants' First Post-Hearing Brief, corresponding to the following amounts:

[560] *Sylvania Technical Systems, Inc. v. Iran*, Iran-U.S. Cl. Trib., Award No. 180-64-1, June 27, 1985 (emphasis added), **C-742**.

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

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

Dated: June 3, 2013

Respectfully submitted,

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