IN THE MATTER OF AN ARBITRATION UNDER THE 1965 CONVENTION FOR THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES

PURSUANT TO THE 1992 TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF KAZAKHSTAN CONCERNING THE RECIPROCAL ENCOURAGEMENT AND PROTECTION OF INVESTMENTS

ICSID CASE NO. ARB/08/12

B E T W E E N:

CARATUBE INTERNATIONAL OIL COMPANY LLP

Claimant

v.

THE REPUBLIC OF KAZAKHSTAN

Respondent

CARATUBE INTERNATIONAL OIL COMPANY LLP MEMORIAL

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14 May 2009

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1. INTRODUCTION

1. This Memorial on the Merits (the **Memorial**) is produced by the Claimant, Caratube International Oil Company LLP (**CIOC**) pursuant to the timetable agreed during the First Session with the Arbitral Tribunal (the **Tribunal**) on 16 April 2009.

2. The Memorial expands upon the merits of CIOC's independent sets of claims, as initially put forward in the Request for Arbitration submitted by CIOC on 16 June 2008 (the **Request**), that the Respondent, the Republic of Kazakhstan (**Kazakhstan**) has violated its legal obligations under:

(1) the Treaty between the United States of America and the Republic of Kazakhstan concerning the Reciprocal Encouragement and Protection of Investments dated 19 May 1992 and in force since 12 January 1994 (the **Treaty** or the **BIT**);[1] and

(2) the Contract for Exploration and Production of Hydrocarbons within Blocks XXIV-20-C (partially); XXIV-21-A (partially), including Karatube Field (oversalt) in Baiganin District of Aktobe Oblast of the Republic of Kazakhstan with the Ministry of Energy and Mineral Resources (the **Contract**).[2]

1.1 Witness Statements, Expert Reports and supporting documents

3. The Memorial is accompanied by two Witness Statements, which are located in the first file of the bundle accompanying this submission, as follows:

Tab A	Witness Statement dated 8 May 2009 of Mr Devincci Hourani, a United States national and majority owner of CIOC (the **Devincci Hourani Statement**); and
Tab B	Witness Statement dated 13 May 2009 of Mr Omar Antar, a Russian national and Vice-Director of Operations and Production for CIOC (the **Omar Antar Statement**).

4. The Memorial is also supported by three Expert Reports, issued by the following independent experts:

Separate Bundle	Independent Report dated 14 May 2009 on Compliance with Work Programmes by Mr Sven Tiefenthal (the **Compliance Report**);
Separate Bundle	Independent Report dated 14 May 2009 on Oil Field Reserves and Resources by Mr Sven Tiefenthal (the **Reserves Report**); and

[1] **Exhibit C-1.**

[2] **Exhibit C-4.** The original party to the Contract, Consolidated Contractors (Oil and Gas) Company S.A.L. (**CCC**), assigned its interest in the Contract to CIOC on 8 August 2002 under a Transfer Agreement Regarding the Right of Subsoil Use: **Exhibit C-53**). The assignment is discussed in more detail at paragraphs 93 to 94, below.

Separate Bundle	Report dated 14 May 2009 on the Quantum of Damages Suffered by Caratube International Oil Company as a Result of the Alleged Expropriation of its Investment by the Republic of Kazakhstan, by Mr Tim Giles (the **Quantum Report**);

5. The Memorial and witness statements are accompanied by 75 exhibits and 67 legal authorities. References to CIOC's exhibits are numbered consecutively, following on from the Amended Request for Provisional Measures dated 29 April 2009, in the range from Exhibit C-53 to Exhibit C-137. References to legal authorities are also numbered consecutively, commencing at Authority C-9 and ending with Authority C-76.

1.2 Structure of this Memorial

6. The Memorial is structured into chapters, as follows:

Section 2 is an Executive Summary summarising the nature of this dispute.

Section 3 addresses the Tribunal's jurisdiction.

Section 4 sets out the factual background to the dispute. In order for the Tribunal to understand what lies at the heart of this dispute, Section 4 begins by explaining the open state of hostility that arose between Kazakhstan's President Nazarbayev and his former son-in-law turned arch political enemy, Mr Rakhat Aliyev. The relevance of the fallout between these two men to this dispute is readily apparent from two facts: (1) the majority owner of CIOC has a family relationship with Mr Rakhat Aliyev; and (2) President Nazarbayev has sworn to seek out and punish all of Mr Aliyev's friends, family and business associates in Kazakhstan. Having set the context for the dispute, Section 4 contains an appraisal of CIOC's contractual performance, with reference to Mr Tiefenthal's Compliance Report, including the parties' agreement to extend the term of the contract by two years shortly before the campaign to terminate the Contract began. The evidence establishes that there was no factual basis that would warrant termination of the Contract. Section 4 concludes with an update on the outrageous events that occurred in April 2009 at the oilfield and at CIOC's premises in Aktobe and Almaty, which was described in CIOC's Amended Request for Provisional Measures.

Section 5 sets out the general principles and applicable law to CIOC's claims under the BIT and the Contract respectively. A brief confirmation of applicable principles of attribution and state responsibility is followed by an explanation of Kazakhstan's violations of the BIT and then Kazakhstan's breaches of the Contract.

Section 6 then sets out the legal principles governing CIOC's entitlement to compensation and damages, both in respect of Kazakhstan's international responsibility for violations of the Treaty and its liability for its repudiatory breach of the Contract. The quantum of CIOC's

claim rests upon an independent appraisal of the existing hydrocarbon reserves at the oilfield, prepared by Mr Tiefenthal. The certified reserves are briefly explained, with reference to the Reserves Report. Lastly, there is a summary of the methodology and calculation of CIOC's claim to compensation and damages, drawing upon Mr Giles' Quantum Report.

2. EXECUTIVE SUMMARY

7. In this Memorial, CIOC sets out what is a substantial claim against Kazakhstan, currently estimated in the Quantum Report to be **USD 1,121.4 million**, for damages and compensation (including interest) arising out of the expropriation of its investment, a significant oil field in an oil rich area of the country.

8. Not only had CIOC invested millions of dollars in the exploration of the oil field and its development, it was also entitled to an exclusive 25-year commercial production licence since it had a commercial discovery. These rights, of which CIOC has been deprived, underpin CIOC's claim for damages and compensation, but CIOC also claims non-material damages in respect of the moral harm that CIOC, its majority owner, senior management and employees have suffered at the hands of Kazakhstan.

9. For five years CIOC had successfully, and without any serious controversy, pursued its investment. New oil wells were drilled and Soviet-era ones were reopened, extensive geological testing and exploration work was carried out, infrastructure was installed at the field and pilot production commenced. Suddenly in mid 2007, the political landscape changed. A political rivalry that had developed between President Nazarbayev and his powerful son-in-law, Rakhat Aliyev flared into open hostility. In Kazakhstan's campaign to persecute Rakhat Aliyev that followed, it seems it became no longer politically convenient for Kazakhstan to allow CIOC to continue its business since the brother of Devincci Hourani, CIOC's majority owner, is Rakhat Aliyev's brother-in-law. A reasonable person might have thought that CIOC was sufficiently far removed from the dispute between the President and Rakhat Aliyev however, in Kazakhstan, "*politics is a family affair*".[3] Family, business partners and associates of Rakhat Aliyev have all been victimised in the course of the fall out between the President and Mr Aliyev.

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

11. Kazakh officials concocted unsubstantiated allegations that CIOC was in breach of its contractual obligations as a pretext for what was no more than a politically-motivated campaign against the company and its owner. CIOC's answers to these allegations went unheard and unanswered. In its

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[3] As reported by BBC News, see **Exhibit C-21** to the Request for Arbitration.

haste to purport to terminate the Contract, Kazakhstan also failed to follow the stipulated legal procedures.

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

3. JURISDICTION

13. It is clear that the Tribunal has jurisdiction and is competent to determine the present dispute. As set out in Section G of the Request for Arbitration, the preconditions of Article 25(1) of the ICSID Convention for establishing jurisdiction are satisfied:

(1) Kazakhstan and the United States of America have ratified the ICSID Convention;

(2) CIOC and Kazakhstan have a legal dispute;

(3) The dispute arises directly out of CIOC's investment;

(4) CIOC is a juridical person established in Kazakhstan but which, because of foreign control, the parties have agreed should be treated as a "*national of another Contracting State*" for the purposes of the Convention; and

(5) the parties to the dispute have consented in writing to submit their dispute to ICSID.

14. Each component of jurisdiction is addressed in turn below.

3.1 Kazakhstan and the United States of America have ratified the ICSID Convention

15. Kazakhstan and the United States of America have both signed and ratified the ICSID Convention and are therefore Contracting States within the meaning of Article 25(1) of the Convention. Kazakhstan signed the ICSID Convention on 23 July 1992 and deposited instruments of ratification on 21 September 2000. The ICSID Convention entered into force in Kazakhstan on 21 October 2000. The United States of America signed the ICSID Convention on 27 August 1965 and deposited instruments of ratification on 10 June 1966. The ICSID Convention entered into force in the United States of America on 14 October 1966.

3.2 CIOC and Kazakhstan have a legal dispute

16. The matters at issue amount to a "*legal*" dispute within the meaning of Article 25(1) of the Convention, as they involve the consideration of CIOC's legal rights that have been violated by Kazakhstan under the Treaty and the Contract, as well as under relevant Kazakh and international law.

3.3 The dispute arises directly out of CIOC's investment

17. The dispute arises directly out of an investment, held by CIOC. As is well documented in the drafting history to the ICSID Convention, a conscious decision was made by the drafters not to define the term "*investment*" as it is used in Article 25(1).[4] Given that consent is the "*cornerstone*" of ICSID

[4] *Documents Concerning the Origin and Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Vol. II (Washington D.C.: ICSID, 1968) p. 821: **Authority C-9.**

arbitration proceedings, the Contracting States were content to allow the disputing parties to adopt their own understanding of the meaning of investment. This was confirmed expressly in paragraph 27 of the *Report of the Executive Directors* on the Convention, where it was recorded that:

> "No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4))".

18. Thus, subject only to certain undefined "*outer limits*", if the disputing parties have agreed to treat a transaction as an investment, it will almost invariably fall within Article 25(1) of the Convention and the jurisdiction of the Centre.

19. In the present case, the disputing parties have indeed agreed a common understanding as to the meaning of investment. This is set out in Article I(1) of the Treaty, which defines "*investment*" broadly in relevant part to mean:

> "...every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:
>
> (i) tangible and intangible property, including movable and immovable property, as well as rights, such as mortgages, liens and pledges;
>
> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
>
> (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
>
> ... and
>
> (v) any right conferred by law or contract, and any licenses and permits pursuant to law".

20. By Article I(1) of the Treaty it is agreed that "*every kind of investment*" is protected, including "*tangible*" property or assets, but also intangible assets such as "*a claim to money or a claim to performance having economic value, and associated with an investment*" and "*any right conferred by law or contract, and any licenses and permits pursuant to law*". It cannot be disputed that CIOC's assets, including its rights under the Contract, constitute an asset amounting to an investment as defined in Article I(1). CIOC made substantial investments in consideration of those long-term rights embodied in the Contract (including the exclusive right to carry out commercial production for a period of at least 25 years).

21. Turning to the Convention, separately from the disputing parties' agreement on the meaning of investment, in the practice of ICSID arbitral tribunals it is possible to identify certain features that are typical of most transactions that have been accepted to be investments as that term is used in Article

25(1). Whilst it is not correct that these features together constitute a legal test,[5] nor that every feature needs to be in existence in every case, it is nevertheless the case that CIOC's rights under the Contract and its capital investments and operations thereto satisfy all of these characteristics.

22. The first characteristic is that the project or transaction in question has a certain *duration*. This is true of the Contract, which had a duration of five years plus two potential extensions of two years each, followed by guaranteed rights to a 25-year production licence. Secondly, investments typically exhibit a certain *regularity of profit and return*. Again this is true of the Contract and CIOC's operations thereto, by which CIOC expected to receive substantial profits. The expectation of return is clearly present. The third feature commonly found is the assumption of *risk* usually by both sides. This is again present (indeed inherent) in an exploration and production agreement such as the Contract. CIOC expended substantial resources in carrying out geological and drilling works to locate and establish commercially-viable oil deposits. The fourth typical feature is that the commitment is *substantial*. CIOC made substantial investments in Kazakhstan amounting to tens of millions of US dollars (see for example, paragraph 146, below). Specifically, CIOC invested in the exploration of the Contract Area, which included completing a comprehensive and expensive drilling programme, geological works, test production and establishing infrastructure at the site. Lastly, the fifth feature sometimes raised is the operation's significance for the host State's *development*. This is not necessarily characteristic of investments in general, but is evident in the case of the Contract and CIOC's operations. CIOC invested in the development of the local workforce and in the facilities required to support that workforce. CIOC's investments also provided significant and lasting benefits to Kazakhstan and the Kazakh national economy. These benefits include, among other things:

(1) the successful exploration undertaken by CIOC which led to the discovery of commercially exploitable reserves officially recognised by the MEMR;

(2) CIOC's contributions to various Kazakh development funds pursuant to the Contract; and

(3) putting in place infrastructure at the Contract Area.

23. In addition, Kazakhstan would have received substantial royalties and taxes from CIOC once the commercial exploitation of the discovered reserves had commenced.

24. Whilst the above features are not necessarily to be understood as jurisdictional requirements, but merely as typical characteristics of investments under the Convention, it is clear that CIOC's rights under the Contract and its operations thereto satisfies each of them.

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[5] Albeit that they are frequently described as the "*Salini* test", in recognition of the contribution of the Tribunal in *Salini* v. *Morocco*, Decision on Jurisdiction, 23 July 2001, paras. 52-58: **Authority C-10**. For the avoidance of doubt, CIOC does not accept (and the arbitral practice does not support) any assertion that these elements constitute a "test" for the establishment of jurisdiction.

3.4 The dispute is between a Contracting State and a national of another Contracting State

25. The parties to the dispute are a Contracting State, Kazakhstan, and a Kazakh company, CIOC,[6] albeit that, because of foreign control, the parties have agreed (as set out in paragraph 40, below) that CIOC should be treated as a "*national of another Contracting State*". CIOC therefore has standing to claim by virtue of Article 25(2)(b) of the ICSID Convention, which provides that a "*national of another Contracting State*" includes:

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

26. The cumulative requirements of this passage are addressed in the following sub-sections. First, evidence is set out that confirms that Devincci Hourani owns and controls CIOC. Secondly, it is confirmed that Devincci Hourani has been a US national since 16 July 2001, with a summary of the relevant evidence and applicable law which establishes this fact. Lastly, there is an explanation of the manner and existence of the parties' agreement to treat CIOC as a "*national of another Contracting State*" because it is foreign controlled.

(a) Confirmation that CIOC is majority owned and controlled by Devincci Hourani

27. CIOC is majority owned and controlled directly by a US national, Devincci Hourani. Devincci Hourani acquired a majority interest (85%) in CIOC on 17 May 2004[7] and increased his stake to 92% on 8 April 2005,[8] which remains his interest in CIOC today. Kazakhstan has itself from time to time formally confirmed that Devincci Hourani owns 92% of CIOC.[9] In addition to being the majority owner of CIOC, Devincci Hourani himself also acted as Director of CIOC from 15 August 2006 to 18 June 2007.[10] As indicated in his witness statement, Devincci Hourani has involved himself in appointing senior management,[11] and received regular reports from his managers on the affairs of the business.[12] Devincci Hourani confirms that throughout the period he has "*taken an active interest in the affairs of the company*", and that together with his managers he has "*been able to discuss and agree the necessary steps to be taken on behalf of CIOC*".[13] None of the evidence sought by Kazakhstan in its 31 March 2009 document request is relevant to the question of control, beyond the documents already provided herein. That request was properly rejected both on the Tribunal's stated ground that it

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6 CIOC was established in Kazakhstan on 29 July 2002: **Exhibit C-54.**

7 **Exhibit C-55**; and see Devincci Hourani Statement, para. 3.

8 **Exhibit C-56**; and see Devincci Hourani Statement, para. 3.

9 See for example Item 1, "Legal Status " in the September 2007 report of the Almaty prosecutor, Mr Yerimbet, noting that Devincci Hourani is the 92% owner of the company: **Exhibit C-57**

10 **Exhibit C-58.**

11 Devincci Hourani Statement, para. 11.

12 *Ibid.*

13 Devincci Hourani Statement, para. 18.

was premature but it could also have been rejected due to lack of relevance. The evidence set out here shows that Devincci Hourani both owns the majority stake in CIOC and exercises controls over it, consistent with that ownership interest.

(b) Confirmation that Devincci Hourani is a US national

28. Devincci Hourani is today and was at all relevant times for the purposes of jurisdiction and the determination of this dispute, a national of the United States of America. Ample proof exists of Devincci Hourani's US nationality, in the form of:

(1) Devincci Hourani's Certificate of Naturalisation, by which he acquired US nationality on 16 July 2001;[14]

(2) Devincci Hourani's current US passport, issued on 14 November 2007, a copy of which was submitted together with the Request for Arbitration;[15] and

(3) the evidence in Devincci Hourani's witness statement, in which he explains at paragraph 5:

> "I was married in 1992 to an American, and moved to the United States in 1995. I have lived in the United States from 1995 until the present although for many years I have travelled back and forth to a number of Central Asian countries including Kazakhstan. I became a permanent US resident in 1995 and received my certificate of naturalisation on 16 July 2001 (Exhibit C-59). I have therefore been a United States national since 2001 and I can confirm that I do not hold any other nationality or citizenship. Although I was born in Lebanon, I was a Palestinian refugee and not a Lebanese citizen. Prior to acquiring my United States nationality and passport I had a 'laissez-passer' travel document issued by Lebanon which enabled me to travel as a Palestinian refugee but it did not confer nationality or citizenship upon me. Since acquiring United States nationality I have only ever travelled using my a United States passport, and I possess no other passports".

29. As a matter of international law, including in ICSID proceedings generally, nationality is within the "reserved domain" of the State,[16] so it is primarily by reference to the laws of the US that the Tribunal should confirm Devincci Hourani's nationality.

30. US law recognises both the legal concept of a "*national*", in the sense that it is used in public international law generally and in the Treaty, and a narrower category of "*citizen*". Under the Immigration and Nationality Act of 1952[17] (the **INA**) a "*national of the United States*" means:

> "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States".[18]

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14 **Exhibit C-59.**

15 Excerpt from the US passport of Devincci Hourani: **Exhibit C-2.** CIOC also furnished copies of previous US passports held by Devincci Hourani, upon the request of the ICSID Secretariat, prior to the registration of the Request for Arbitration

16 *Nationality Decrees in Tunis and Morocco* (1923) PCIJ Ser. B., No. 4, 24: **Authority C-11**; Convention Concerning Certain Questions relating to the Conflict of Nationality Laws of 12 April 1930, Article 1, 179 *L.N.T.S.* 89: **Authority C-12**; R Y Jennings and A. Watts (eds.), *Oppenheim's International Law – Vol. 1 Peace* (9th edn., Harlow: Longman, 1992) 852: **Authority C-13.**

17 Codified in Title 8 of the United States Code (USC): **Authority C-14.**

18 8 USC § 1101 (a) (21) and (22): **Authority C-14.**

31. In other words a citizen is necessarily a national but the converse is not true. This is consistent with the letter of transmittal sent by the US Secretary of State to the US Senate in relation to the Treaty:

> "Under U.S. law the term 'national' is more inclusive than the term 'citizen'; for example, a native of American Samoa is a national of the United States, but not a citizen".[19]

32. Both the Treaty (in Article I) and the ICSID Convention (in Article 25) use the term national. As explained next, CIOC has provided proof that Devincci Hourani is and has been a US citizen since his naturalisation on 16 July 2001. *A fortiori*, CIOC has demonstrated that Devincci Hourani is a US national as referred to in the Treaty and the ICSID Convention.

33. In relation to Devincci Hourani's certificate of naturalisation, it should be first noted that naturalisation is a sovereign act by which nationality is *conferred* upon a natural person. As a matter of US law a certificate of naturalisation constitutes proof of US citizenship conferred in this manner.[20] In fact, the certificate of naturalisation is "*the best evidence of naturalization*".[21] The INA provides that "[a] *person admitted to citizenship in conformity with the provisions of this subchapter shall be entitled upon such admission to receive from the Attorney General a certificate of naturalization...*".[22] A US certificate of naturalisation contains the following information:

> "number of application for naturalization; number of certificate of naturalization; date of naturalization; name, signature, place of residence, autographed photograph, and personal description of the naturalized person, including age, sex, marital status, and country of former nationality; location of the district office of the Service in which the application was filed and the title, authority, and location of the official or court administering the oath of allegiance; statement that the Attorney General, having found that the applicant had complied in all respects with all of the applicable provisions of the naturalization laws of the US, and was entitled to be admitted a citizen of the US, thereupon ordered that the applicant be admitted as a citizen of the US; attestation of an immigration officer; and the seal of the Department of Justice".[23]

34. Devincci Hourani's certificate of naturalisation is regular in form, and constitutes proof of his US citizenship.

35. Turning next to Devincci Hourani's US passport, this also identifies the holder as a citizen of the US. Indeed, the passport is in practice one of the documents most commonly invoked as evidence of US citizenship. US passports are only issued to persons who owe permanent allegiance to the US, that is, citizens and non-citizen nationals. As a matter of US law:

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19 **Exhibit C-1** at p. 4

20 *Judulang* v. *Gonzales*, 2007 WL 2733726, No. 06-70986 (C.A. 9 Sept. 17, 2007) (*"Only completion of the naturalization process, and obtaining a certificate of naturalization confers citizenship on an alien"*) (citation omitted): **Authority C-15**; *Krish* v. *G.R. Balasubramaniam*, 2007 WL 1219281, No. 1:06-CV-01030, * 4 (E.D.Cal. Apr. 25, 2007) (noting that plaintiff had *"provided evidence of his Certificate of Naturalization, evidencing that he has been a United States citizen since 2002"*): **Authority C-16**; *Abdel-Whab* v. *Orthopedic Assoc of Dutchess*, 415 F.Supp.2d 293 (S.D.N.Y 2006) (*"If an individual is unable to prove his United States citizenship through typical means such as a birth certificate or certificate of naturalization, he is required to produce, among other things, proof that there is no official record of his birth".*): **Authority C-17**.

21 *People ex. rel. Malawer* v. *Bd. of Elections*, 51 N.Y.S 2d 216, 218 (N Y. Sup. Ct. 1944): **Authority C-18**.

22 8 U.S.C. § 1449. **Authority C-19**

23 *Ibid.* See also 3A Corpus Juris Secundum Aliens § 1924 (Certificate of Naturalization-Contents; signing): **Authority C-20**.

> "Every application for a passport must be accompanied by evidence of the applicant's US nationality... The burden of proof is on the applicant, and the Department of State may require additional evidence beyond that normally specified".[24]

36. Since 1982 a passport has the same force and effect, for the purposes of proof of citizenship, as a certificate of naturalisation.[25] Indeed, 22 U.S.C. § 2705 provides that "[a] *passport, during its period of validity (if such period is the maximum period authorized by law), issued by the Secretary of State to a citizen of the US*" shall have "*the same force and effect as proof of US citizenship as certificates of naturalization*". Devincci Hourani's passport therefore also proves his US citizenship.[26]

37. CIOC accepts that it bears the burden of proof that Devincci Hourani is a US national, for the purposes of establishing this Tribunal's jurisdiction. This burden has been discharged by the documentary evidence on the record, including Devincci Hourani's certificate of naturalisation and his US passport.

38. In his classic work on the international law of evidence, Sandifer stated that "*...a naturalization certificate constitutes prima facie evidence of citizenship*".[27] Given the solemn nature of the act of naturalisation and the scrutiny it implies, Sandifer rightly held up a certificate of naturalisation as even stronger presumptive evidence of nationality than, for example, a certificate of nationality issued by a consular official. A passport also constitutes *prima facie* evidence of nationality as a matter of international law, and in domestic law States may even make the possession of a particular passport conclusive proof that the holder has the nationality of the State that issued it.[28] *Oppenheim* states that "*the issue of a passport can establish as against other States that the person to whom it is issued has the nationality of the issuing State*".[29] Such documents are routinely accepted in international proceedings as evidence of nationality where access to a particular forum turns on the existence of a particular nationality. For example, the Iran-United States Claims Tribunal regularly accepted US certificates of naturalisation and US passports as sufficient proof of the existence of US nationality for the period subsequent to the date of the document.[30] In relation to ICSID practice, Schreuer confirms that indicia of nationality, such as a certificate of nationality or passport (*a fortiori* a certificate of naturalisation) form part of the regular set of documents or *prima facie* evidence to be examined in cases brought by natural persons in order for ICSID tribunals to satisfy themselves as to their jurisdiction. They should be given their "*appropriate weight*".[31]

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24 59 Am. Jur. 2d Passports § 37: **Authority C-21** See also 22 Code of Federal Regulations § 51.43 (To obtain a passport, a person born outside of the United States may submit a certificate of naturalization as documentary evidence of citizenship), **Authority C-22.**

25 Prior to the introduction of 22 U.S.C § 2705 in 1982, a US passport was only prima facie evidence of US citizenship.

26 Copies of Devincci Hourani's previous US passports already produced confirm the same for corresponding earlier periods.

27 D.V. Sandifer, *Evidence before International Tribunals* (Revised edn., Charlottesville: University Press of Virginia, 1975) 145: **Authority C-23.**

28 *Dawood Ali Arif v. Deputy Commissioner of Police* (1958-II) 26 ILR 364, 366 (holding that "[a] *passport by itself is not conclusive proof of nationality. But it is accepted as proof of the fact, by international agreement and the comity of nations*"): **Authority C-24.**

29 *Oppenheim*, 855: **Authority C-13.**

30 See e.g. *Esphahanian v. Bank of Tejerat*, Award No. 31-137-2, 29 March 1983, 2 Iran-US C.T.R 157: **Authority C-25**, *Golpira v Iran*, Award No. 32-211-2, 29 March 1983, 2 Iran-US C.T.R. 171: **Authority C-26.**

31 C. Schreuer, *The ICSID Convention – A Commentary* (Cambridge CUP, 2001) Article 25, para. 433: **Authority C-27.**

39. In its Summary Reply to the Request for Arbitration dated 31 March 2009, Kazakhstan made a broad and sweeping request for documents relating to Devincci Hourani's personal affairs, including a large number of documents that might relate to Devincci Hourani's US citizenship. The requested documents are not relevant to this dispute as they do not constitute evidence (one way or another) as to the question of nationality as a matter of US law. The Tribunal was right to deny the request for early disclosure and should not hesitate in denying the request again should Kazakhstan seek to resurrect it at a later stage. On the other hand, the evidence that CIOC has put forward does establish that Devincci Hourani is indeed a US national.

(c) Confirmation that the parties have agreed to treat CIOC as a "national of another Contracting State"

40. The parties have agreed to treat CIOC as a "*national of another Contracting State*" by operation of Article VI(8) of the Treaty, which defines a US investor to include a Kazakh company "*that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of*" US nationals or companies. By the offer to submit disputes to arbitration in Article VI of the Treaty, and CIOC's acceptance of that offer in filing its Request for Arbitration,[32] the parties have agreed to treat CIOC as a "*national of another Contracting State*" for the purposes of Article 25(2)(b) of the ICSID Convention. Article VI(8) of the Treaty provides that:

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

41. Pursuant to Article I(1)(c) of the Treaty, a national of a party means "*a natural person who is the national of a Party under its applicable law*".

42. It has been established at paragraph 27, above that Devincci Hourani has been the majority owner and has controlled CIOC since 2004. It has also been established at paragraphs 28 to 37 above that Devincci Hourani is a national of the US and has been since 16 July 2001. As at 16 June 2008, when CIOC submitted its Request for Arbitration, CIOC was therefore a Kazakh company that was an investment of a US national, Devincci Hourani. This was also true on the date "*immediately before the occurrence of the event or events giving rise to the dispute*" for the purposes of Article VI(8) of the Treaty, i.e. 31 January 2008, being the day immediately before the notice of termination which completed the expropriation, or even earlier, in 2007 when Kazakh authorities suddenly made unfounded allegations with regard to CIOC's performance of the Contract and started to harass and intimidate Devincci Hourani and his family, as well as CIOC's senior management and employees. It is therefore clear that the requirements of Article VI(8) of the Treaty, and thus Article 25(2)(b) of the ICSID Convention, are satisfied.

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[32] Request for Arbitration, para. 65.

3.5 CIOC and Kazakhstan have consented to submit this dispute to ICSID for arbitration

43. CIOC and Kazakhstan have consented to submit this dispute to ICSID for arbitration by agreement formed by Kazakhstan's standing offer as contained in Article VI(3) and (4) of the Treaty and CIOC's acceptance and choice of ICSID arbitration pursuant to Article VI(3)(a)(i) as expressed in its Request for Arbitration.[33] The requirements for the application of the Treaty are met. It is in force and binding upon both Kazakhstan and the United States.[34] It has been established at paragraphs 40 to 42, above that CIOC is a "*company of the other Party*" by reason "*that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of*" a US national, Devincci Hourani. It has also been established in paragraphs 17 to 24, above that the dispute concerns an "*investment*". The dispute is also an "*investment dispute*" for the purposes of Article VI(1) of the Treaty, as the dispute is:

> "a dispute between a Party [Kazakhstan] and a national or company of the other Party [United States of America] arising out of or relating to (a) an *investment agreement* between that Party and such national or company;... or (c) an *alleged breach of any right conferred or created by this Treaty* with respect to an investment".

44. CIOC's claims in respect of breaches of the Contract are claims "*arising out of or relating to... an investment agreement*". CIOC's claims for violation of the Treaty are claims "*arising out of or relating to... an alleged breach of any right conferred or created by this Treaty with respect to an investment*". CIOC's claims under the Treaty are brought under these separate jurisdictional bases.

45. Consent to submit disputes to arbitration in this manner is well-established, such that there can be no doubt that the parties have consented to submit this dispute to the jurisdiction of ICSID.

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[33] *Ibid.*

[34] The Treaty was signed on 19 May 1992, and entered into force on 12 January 1994, and remains in force today in accordance with its Article XIII: **Exhibit C-1.**

4. STATEMENT OF FACTS

46. The central issue in this case is the intimidation and harassment that CIOC, its owners and employees have been subjected to by various governmental authorities in Kazakhstan since the middle of 2007. Kazakhstan seeks to portray the wrongful termination of the Contract as a matter of contractual performance but in reality it is politically motivated and designed to further President Nazarbayev's interests in a political feud, in which CIOC and Devincci Hourani have inadvertently and unjustly found themselves caught up. The witness statements of Devincci Hourani and Mr Omar Antar provide a detailed description of this intimidation and harassment, which is also summarised in Section 4.1 below.

47. As described in Section 4.6 below, CIOC's performance under the Contract has been good and CIOC has done nothing to warrant termination. The wrongful termination of the Contract has simply been a convenient method by which Kazakhstan has been able further to harass CIOC and its owners in order to shut down their businesses and drive them out of Kazakhstan.

4.1 Persecution of CIOC, its owner and employees

(a) Political background

48. The political background to this claim stems from the well publicised political conflict, which started in April 2007, between the President of Kazakhstan, President Nazarbayev, and his then son in law Rakhat Aliyev. This conflict is described in more detail in paragraphs 22 to 24 of Devincci Hourani's witness statement and in the media reports to which he refers. In summary, when President Nazarbayev introduced an amendment to the Kazakhstan Constitution designed to enable him to be President for life, Mr Aliyev criticised the amendment and announced his intention to run for president in the next Kazakhstan presidential elections in 2012. As a result of this announcement, a fierce political power struggle developed between the two men, which has been widely reported in the international press.[35]

49. The media reports suggest that the power struggle spread, with President Nazarbayev using his political power to attack not only Mr Aliyev but also those connected to him.[36] Politics and family are seen to be closely inter-linked in Kazakhstan with members of President Nazarbayev's family holding many key positions within the Government. Devincci Hourani's brother, Issam Hourani, is Mr Aliyev's brother in law. Both Devincci Hourani and Mr Antar state in their witness statements that they believe that the Hourani family, CIOC, and its employees, have been persecuted by the Kazakhstan authorities as a result of Mr Nazarbayev's power struggle against Mr Aliyev, and those connected to him, and the Kazakh authorities have clearly intimidated as much in their interrogations and investigations.

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35 *"Kazakhstan seeks envoy's arrest"*, BBC News, 28 May 2007: **Exhibit C-21**.

36 *"Kazakhstan Senate Speaker to be replaced by Asana*[sic] *mayor"*, BBC News, 7 November 2008: **Exhibit C-60**; *"Political exile fears wrath of Kazakhstan leader"*, Washington Times, 3 December 2008: **Exhibit C-61**.

(b) Harassment of Devincci Hourani, his family, and CIOC's employees

50. The first rumours of the forthcoming harassment began in May 2007, shortly after the political feud between President Nazarbayev and Mr Aliyev had started. Devincci Hourani, at paragraph 26 of his witness statement, recalls that at that time there was a fear in Kazakhstan that anyone with connections to Mr Aliyev was in danger of getting caught up in this bitter political dispute and becoming a target of President Nazarbayev, and consequently the authorities in Kazakhstan. These rumours developed and grew during May and June 2007 and there were a number of incidents of unusual governmental interest in the Hourani family and businesses. One such example was the attempted extortion by Mayra Nazarbayev, President Nazarbayev's sister in law, when she tried to take a majority stake in another of the Hourani family's businesses, Ruby Rose Agrikol, at no cost, in return for her protection against potential problems with the Kazakhstan Government ministries and agencies. This was seen by Devincci Hourani as a clear indication that his family and businesses were going to be targeted by those close to the President.[37]

51. Despite attempts by Devincci Hourani to distance his family from the political dispute through discussions with Dariga Nazarbayev, the President's daughter and Mr Aliyev's wife, further warnings reached him, from sources that he trusted, that secret service agents from the Kazakhstan National Security Committee (known as the **KNB**) and the police were trying to gather information on the Hourani family and their businesses to try to fabricate criminal charges against them in the hope that this would put pressure on Mr Aliyev. Devincci Hourani says:

> "Taken together, these pieces of information, from sources that I trust, made it clear to me that my family, including me and my brother Issam in particular, was being targeted by the Kazakhstan authorities, apparently because of the family connection with Mr Aliyev. I had done business in Kazakhstan for many years and neither I nor anyone else in my family had ever had any difficulties with the authorities. However I began to fear the lengths that the authorities might go to because of the apparent intensity of the dispute between President Nazarbayev and Mr Aliyev".[38]

52. On 27 June 2007, armed police led by a Colonel Alexander Sergeivich Kim raided 92a Palezhayeva Street, a building in which CIOC and a number of other of the Hourani family's businesses have offices.[39] All entrances and exits to the building were sealed by the police, trapping over 200 employees of various of the Hourani family's businesses within the building. The raid was unexpected and a frightening experience for those present in the building. Devincci Hourani, together with Hussam Hourani, Kassem Omar, Bassem Warrie, and Mr Antar were detained within one of the offices and shown a warrant to search the offices based upon a criminal investigation against Issam Hourani. They were told to attend the police station for questioning the following day without their lawyers. The police then searched the entire building taking computers, servers, stamps and seals, copies of all legal

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37 Devincci Hourani Statement, para. 27.

38 Devincci Hourani Statement, para. 32.

39 Devincci Hourani Statement, para. 33; Omar Antar Statement, para. 128(a).

ownership documents, details of bank accounts, together with the names, addresses and contact numbers of all directors and owners.

53. Devincci Hourani went to the police station on 28 June 2007 to be questioned by Colonel Kim. At paragraph 38 of his witness statement, Devincci Hourani says that the questions concentrated upon Issam Hourani, his whereabouts, how he had met his wife Gulshat Aliyev, how he had developed a relationship with Rakhat Aliyev and the nature of that relationship. There were very few questions about CIOC. Devincci Hourani states:

> "It was quite clear to me that the questioning was aimed at finding out information about the connection between Mr Aliyev and Issam, rather than any alleged wrongdoing by me or by any of my family's businesses. The interview with Colonel Kim took the form of an interrogation and the aggressive way in which it was conducted left me with the firm impression that there was extreme hostility towards me and my family".[40]

54. Following the raid, an officer of the Internal Police Department of Almaty, Major Igor, visited the offices at 92a Palezhayeva Street on a daily basis until mid July 2007. Each day he interrogated various employees, as well as seizing more documents. A number of the employees were also asked to present themselves at the Almaty offices of the Kazakhstan Ministry of Interior for further interrogation. Devincci Hourani states that "*these interrogations had a significant impact on the morale of our staff and created a terrifying atmosphere*" as well causing the "*obvious disruption to the conduct of our businesses*".[41]

55. The political nature of these attacks on CIOC was confirmed to Devincci Hourani by Dariga Nazarbayev during a meeting in early July 2007 when he again sought to distance the Hourani family from the political dispute.[42] However, Dariga Nazarbayev told him that according to Kazakh tradition if you are connected to someone by family ties then you are also connected to them politically. She confirmed that President Nazarbayev was focused on seizing all the Hourani family's businesses and assets in Kazakhstan as soon as possible solely as a result of their perceived connection to Mr Aliyev. Devincci Hourani was left with the clear impression that ultimately he and his family would lose their businesses in Kazakhstan.

56. At the same meeting Dariga Nazarbayev also told Devincci Hourani that there were ongoing efforts within the Kazakhstan security services to put together a criminal case against Issam Hourani based on allegations of terrorism. Devincci Hourani states that he was appalled by this since he knew there was no way that his brother was involved in terrorism, but he feared that tensions were so high that the authorities might fabricate evidence. In the second week of July 2007, Devincci Hourani was told by a senior federal investigator that an arrest warrant, issued against Issam and Rakhat Aliyev along with 15 other individuals based on allegations of organised crime, had been sent by the Interpol department of

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40 Devincci Hourani Statement, para. 38.

41 Devincci Hourani Statement, para. 40.

42 Devincci Hourani Statement, para 42.

the Ministry of the Interior in Kazakhstan to its Lebanese counterpart. Devincci Hourani was "*deeply shocked*"[43] to learn that the Kazakhstan authorities had gone so far as to create this arrest warrant linking Issam Hourani with Rakhat Aliyev in relation to allegations which he believed to be completely untrue.

57. From early July 2007, the Hourani family, and CIOC's senior management, were placed under surveillance by the Kazakhstan authorities. First, Devincci Hourani was informed by a contact that his mere presence in Kazakhstan was viewed as a provocation by certain elements within the Kazakhstan Government and his phone, together with those of the senior management of the Hourani family businesses, were being monitored.[44] Then, later that month security personnel employed by CIOC discovered listening devices at the 92a Palezhayeva Street offices.[45] Around the same time, Devincci Hourani became aware that he was being followed by plain clothes police or KNB personnel. In particular, between 14 July and 22 July 2007, he was followed by the same few cars, which waited outside while he was at home or in the office. Occupants of those cars even followed him into restaurants and cafés and sat at surrounding tables waiting for him to leave. It was clear that the authorities wanted to intimidate Devincci Hourani by making it obvious that he was being followed.[46]

58. There were further attempts at extortion in early August 2007 when Devincci Hourani was passed a message from two senior officials of the Kazakhstan Ministry of the Interior saying that if the Hourani family were to pay USD 10 million to both officials, they would guarantee immunity to the Hourani family and all their businesses, including CIOC, from any form of harassment by the Kazakh authorities. This proposition was of course rejected. Devincci Hourani subsequently contacted Dariga Nazarbayev to try to find out whether President Nazarbayev was involved in this extortion but she refused to answer his questions. However, she did say that "*they*" were planning to confiscate all the Hourani family's businesses[47] and added that "*they*" were going after everything owned by Mr Aliyev or any of his relatives, friends and associates. Dariga Nazarbayev would not elaborate who "*they*" were, save to say that prosecutors would be used to give any confiscation attempts a legal cover.

59. The harassment and intimidation of Devincci Hourani intensified through August and into September 2007. The surveillance appeared constant and on at least three occasions Devincci Hourani was stopped by police officers in the street who would search him and his car, with each search lasting up to an hour. Other troubling incidents around this time included several anonymous telephone calls to Devincci Hourani's home in which the caller suggested that "*they*" would plant arms or drugs in his house and then bring a criminal case against him. All this was so frightening for Devincci Hourani and

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43 Devincci Hourani Statement, para 44.

44 Devincci Hourani Statement, para. 45.

45 Devincci Hourani Statement, para. 46.

46 Devincci Hourani Statement, para. 47.

47 CIOC is just one of many businesses that were owned and operated by members of the Hourani family in Kazakhstan. Although they will be the subject of separate claims where possible, it should be noted that every one of those businesses has been effectively confiscated by the Kazakhstan authorities, including for example, Kulandy: see **Exhibit C-62**, the media group of companies, and numerous others.

his family that he sent his 9 month old daughter and her mother to live with her parents, while he himself moved to Hussam Hourani's house so that he would not be on his own and had witnesses in case he was physically attacked. At paragraph 52 of his witness statement, Devincci Hourani states:

> "I felt under a lot of pressure and believed that the authorities were trying to scare me and my family, in order to force us to abandon our interests in Kazakhstan and leave the country for good".

60. Also in August and September 2007, the harassment of employees by the Kazakhstan authorities increased in severity. Devincci Hourani's secretary was aggressively questioned by members of the Kazakhstan Prosecution Service culminating in an accusation that she had had an affair with Devincci Hourani. This was not true and upset her deeply. The questions asked of her revolved around Mr Aliyev, rather than any enquiries about wrongdoing on the part of CIOC or its owners.[48]

61. Another employee, Omran Mohamed Omran, had his house raided by members of the Kazakhstan Ministry of the Interior in the early hours of the morning.[49] He said he was taken to the Kazakhstan Ministry of the Interior and on the way attempts were made to bribe him with an apartment of his own if he cooperated with them. Once at the Ministry, he was asked whether he would testify that Issam Hourani had physically beaten him. When Mr Omran refused to cooperate threats were made that his residency permit in Kazakhstan would be terminated and he would be deported back to Syria. Mr Omran continued to refuse to falsely testify against Issam Hourani and eventually he was released but warned of "*severe consequences*" if he were to mention what had happened in the Ministry. Mr Omran made a statement of complaint to the Prosecutor General's office[50] but did not include all the details described above due to his fear of the "*severe consequences*". Mr Omran showed Devincci Hourani a letter he received in reply from the Prosecutor General's office which stated that Mr Omran had been interrogated in connection with an investigation into the disappearance of two former managers of Nurbank (a Kazakh bank formerly controlled by Mr Aliyev). This is the investigation in which Mr Aliyev is accused of kidnapping two senior bankers. Clearly, the interrogation and attempted bribery of Mr Omran is yet another demonstration of the authorities' determination to link the Hourani family to Mr Aliyev and the lengths they would go to achieve that aim.[51]

62. Then, in the early hours of 1 September 2007, a group of about eight armed men in civilian clothes raided Hussam Hourani's house in the Diplomatic District on the outskirts of Almaty. There were a number of members of the Hourani family, including young children, asleep in the house at the time. The raiders did not show any form of identification when asked, but claimed to be from the KNB and said that they were looking for any evidence that suggested Kazakhstan's national security was or could be compromised. The search lasted approximately 40 to 45 minutes after which Devincci Hourani was

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48 Devincci Hourani Statement, para. 53.

49 Devincci Hourani Statement, para. 54.

50 **Exhibit C-63.**

51 Devincci Hourani Statement, para. 55.

led outside by armed guards and taken to a secret destination in Almaty. Devincci Hourani was "*very frightened*" and thought that he "*was going to be physically abused*".[52] Once at the secret destination Devincci Hourani was interrogated with the questions again focusing on any relationship or contact with Mr Aliyev. There were no questions about CIOC nor were any grounds alleged that would suggest CIOC was in breach of the Contract. This raid and subsequent interrogation was a traumatic experience and Devincci Hourani states that he had "*real concerns about my personal safety as well as that of my family as the levels of intimidation and harassment were intolerable*".[53] In light of all that had happened Devincci Hourani fled Kazakhstan for London on 4 September 2007 and did not return to Kazakhstan until mid January 2008 when he visited his young daughter. The entire episode was very upsetting for Devincci Hourani who, in March 2008, began to experience headaches, stress-related anxiety attacks, and an inability to sleep properly. Devincci Hourani was diagnosed by his doctor with severe depression, believed to be associated with the harassment and intimidation to which he was subjected by the Kazakh authorities.[54]

63. In September 2007, President Nazarbayev visited New York to attend the United Nations General Assembly. Devincci Hourani was in New York at this time and instructed his United States lawyers to send a letter to President Nazarbayev at his hotel.[55] Devincci Hourani tried several times during the President's visit to arrange a meeting with him through the Kazakhstan Ambassador to the United States, Mr Idrissov, and a presidential aide for foreign affairs (who is now the Kazakh ambassador to Austria) Mr Erjan Yergal. However he was unable to arrange a meeting. Mr Yergal, accompanied by Mr Idrissov, told him that he had spoken to President Nazarbayev who he said was aware of the harassment about which Devincci Hourani complained but was unwilling to meet him.

64. In March 2008, Hussam Hourani received a call from an acquaintance, Malek, who works for the KNB, requesting a meeting with Devincci and Hussam Hourani. At the meeting, which took place on 20 March 2008 in the Lighthouse coffee house in Almaty, Malek told them he was passing on a request from the Kazakhstan Secret Service for the Hourani family to exercise its influence over Mr Aliyev to get him to cancel the publication of a book he had written. It was suggested that this book would expose corruption within the Kazakhstan Government, and involved allegations against President Nazarbayev personally. When Hussam and Devincci Hourani refused to get drawn into the political conflict, and protested that they had no influence over Mr Aliyev in any event, Malek threatened them and said that if they did not cooperate Hussam Hourani would find himself facing criminal charges for rape or for drugs offences.

65. Later that day Devincci Hourani went to the US Embassy in Almaty to seek their help. He had been keeping the US Embassy regularly informed by telephone of the harassment and intimidation to which

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52 Devincci Hourani Statement, para. 57

53 Devincci Hourani Statement, para. 60.

54 **Exhibit C-76.**

55 **Exhibit C-64.**

he was being subjected and had previously visited the US Embassy on 6 March 2008. Their consistent advice was that he should leave the country as soon as possible for his own safety.

66. Consequently, in light of all that had happened, including the latest threats against Hussam from Malek, Devincci Hourani, Hussam Hourani, and Mr Antar, all left Kazakhstan on 22 March 2008 and have not been back since.

(c) Harassment of CIOC

67. In addition to the personal harassment and intimidation suffered by Devincci Hourani, his family, and CIOC's employees, CIOC also found itself under attack from June 2007 onwards by way of investigations, audits and complaints from various oil and gas, tax, employment, healthy and safety, and environmental authorities. These are summarised by Mr Antar at paragraphs 125 to 128 of his witness statement. Mr Antar explains that:

> "[t]here were so many of them it was not believable, dealing with sc many issues, including: geological and oilfield standards; ecological laws and regulations; environmental, health and safety standards; customs regulations; civil defence laws; labour standards; and land use rights".[56]

68. In Aktobe, CIOC faced the following harassment:

(1) in August 2007, an unscheduled audit of CIOC's branch office by the Customs Control Committee for the Aktobe Oblast;[57]

(2) in September 2007, an inspection of CIOC's compliance with environmental laws by the Aktobe Ecology Department,[58] even though these inspections were only intended to occur every two or three years and the previous inspection had occurred only the year before;

(3) in September 2007, an order issued by the Aktobe Oblast Department of the Committee of State Emergency Situations and Industrial Safety Control of the MEMR concluding that CIOC had violated safety rules relating to its oil tanks,[59] with a fine levied against a CIOC employee, Mr Rakymzhan Turzhanov;

(4) in October 2007, a further complaint from the Aktobe Regional Department of Land Resources Management resolving that CIOC had violated land use laws in respect of four of its wells and a warehouse, and issuing a fine against the Deputy Director of CIOC, Mr Rashid Badran;[60]

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56 Omar Antar Statement, para. 125.

57 Exhibit C-65.

58 Exhibit C-66.

59 Exhibit C-67.

60 Exhibit C-68.

(5) in November 2007, an order from the Aktobe Oblast Department of State Monitoring of Emergency Situations and Industrial Safety of the Ministry of Emergency Situations informing CIOC that inspections had found that it was in violation of the Law on Civil Defence,[61] and requiring it to take a host of corrective measures by 28 December 2007;[62]

(6) an audit into CIOC's compliance with environmental protection legislation in the context of subsoil use by the Aktobe Prosecutor for Environmental Protection.[63] The prosecutor who carried out the audit, Mr Kustanov, never visited the Contract Area, nor did he seek CIOC's comments or access to its own ecological studies before filing his report; and

(7) legal proceedings against CIOC and Hussam Hourani,[64] initiated by the environmental protection prosecutor and based on the conclusions of Mr Kustanov's "investigation".[65]

69. Throughout the same period, at CIOC's headquarters in Almaty, harassment of CIOC included the following:

(1) on 27 June 2007, a raid, described in paragraph 52 above, at the building on 92a Palezhayeva Street, Almaty;

(2) inspections on an almost daily basis, from 29 June 2007 until mid July 2007, described in paragraph 54 above;

(3) in late July and August 2007, an audit by the State Labour Inspector of the Almaty Department of the Ministry of Labour and Social Services,[66] finding that CIOC was guilty of a number of violations of the Labour Code including failing to pay salaries on time;

(4) an audit led by the Senior Public Prosecutor of the Department for Supervision over Legality and the Activity of State Prosecution Authorities in the city of Almaty, Mr Y. Yerimbet, culminating in a report issued on 20 September 2007 alleging that CIOC had violated many laws.[67] Mr Yerimbet conducted a very aggressive on-site inspection at CIOC's offices over many weeks.[68] He demanded a meeting room, computer and telephone, and a large number of documents. He required employees to remain late on many occasions to answer questions. But, after all of this, the violations he said existed were not justified or significant.[69] For

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61 **Exhibit C-69.**

62 **Exhibit C-70.**

63 **Exhibit C-71.**

64 Omar Antar Statement, para. 127.

65 **Exhibit C-72.**

66 **Exhibit C-73.**

67 **Exhibit C-57.**

68 Omar Antar Statement, para. 128(d)

69 *Ibid.*

example, he found that CIOC was guilty of "*severe violations*" of labour laws, by depriving four employees of their "*constitutional rights of citizens to rest and leisure*", when in fact these employees had not taken enough of their holiday leave. Mr Yerimbet was also involved in confiscating KZT 114,995,093 (around USD 895,949.77)[70] from CIOC's bank accounts at Nurbank JSC, based on a tax ruling against CIOC in 2005, whilst completely ignoring the fact that CIOC had overturned that tax ruling on appeal. The tax authorities accepted that it was incorrect to take CIOC's money, but CIOC never received it back; and

(5) in October 2007, an order from the Investigations Unit of the Almaty City Department of Internal Affairs, declaring that CIOC's "*legal and accounting documents*" should be seized.[71]

70. These raids and investigations severely hampered CIOC's business operations since they required CIOC to hand over many of its legal, regulatory, technical and financial documents, as well as taking up valuable time and manpower in preparing responses to all the investigations. It was extremely unusual for a company to be subjected to so many investigations in such a short period of time. It is clear that these investigations were simply used by the Kazakhstan authorities as a means to put further pressure on Devincci Hourani and his family.

(d) Harassment since leaving Kazakhstan

71. Since Devincci Hourani, Hussam Hourani, and Mr Antar, all left Kazakhstan on 22 March 2008 there have been a number of approaches made to members of the Hourani family by various individuals, supposedly representing Kazakhstan. Although suggesting resolution of the dispute these approaches have frequently been accompanied by further threats against Devincci Hourani and his family if the terms proposed are not accepted.

72. The harassment and intimidation of CIOC and its employees has also continued.[72] There have been many instances of this including raids by the tax police and secret service on CIOC's offices, and the attachment of funds in CIOC's bank accounts, but perhaps the most striking are the events that occurred at CIOC's premises in Almaty, Aktobe and in the field on 16 April 2009, the same day that the Tribunal convened its First Session in these proceedings.

73. Some 30 KNB officers, led by a Lieutenant Zhanatuli, raided CIOC's main Almaty office at 92a Palezhayeva Street on 16 April 2009.[73] CIOC's employees were ordered to stay in the office until the raid concluded. They were told that the raid was based on a search warrant issued by the General-Prosecutor of Almaty, but no copy of the search warrant was provided to any CIOC employee for

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70 Based on the prevailing exchange rate as at 20 August 2007 of USD 1 = KZT 128.349933.

71 Exhibit C-74.

72 Devincci Hourani wrote to President Nazarbayev personally on 4 March 2008 to request his assistance in resolving matters so CIOC could continue to run its operations: Exhibit C-75.

73 See report by CIOC's employees: Exhibit C-78.

review, despite repeated requests. CIOC's employees were told that they would only receive a copy of the official report of the raid.

74. An official report of the Almaty raid was provided to CIOC's chief of security, Mr Kozlyakov,[74] which confirms the fact of the raid and that it was led by Lieutenant Zhanatuli, together with Captain Shaikov, but it does not mention that the raid was also carried out by around 30 officers in total. The report confirms that Messrs Kim and Borodin were also present, as well as CIOC's employees Ms Stybaeva, Ms Adilbekova and Mr Kozlyakov. The report also confirms that a large number of documents and files were seized but the report materially understates the volume of files confiscated. The documents seized included financial, technical, geophysical, seismic and contractual documentation and correspondence. CIOC's computer hard drives were confiscated, on which were stored key oil well data and other critical geological and seismic information about the Caratube oil field. This continued harassment and seizure of documentation by the Kazakhstan authorities is not only highly upsetting for CIOC's employees but has also effectively stopped CIOC from doing any further business and has severely hampered CIOC's ability to participate in these proceedings. CIOC's employees were advised that the Kazakh officials intended to "*finish*" this arbitration, and that CIOC's employees should not expect to be carrying on any further work.[75]

75. Officers of the KNB, led by Lieutenant-Colonel Tusov, also raided CIOC's premises in Aktobe on 16 April 2009.[76] They detained CIOC's employees, seized their passports and mobile phones, and told them not to contact Devincci Hourani, Kassem Omar, or Omar Antar. The KNB officers told CIOC's employees to hand over all corporate documents containing information concerning the ownership of CIOC, all financial and technical documents, and corporate registration documentation. The officers took these documents and many others, including CIOC's corporate seal, which is essential to execute numerous formal documents under Kazakh law, and CIOC's computer disks and hard drives. They then sealed CIOC's offices and archive. During the raid the KNB officers interrogated Mr Rashid Badran, CIOC's oil field manager who was present in the office at the time, as well as a CIOC consultant Mr Moussa Abdelghani. Both Mr Badran and Mr Abdelghani have subsequently told Devincci Hourani that the KNB officers disclosed during their interrogations that they were briefed to establish that Devincci Hourani does not own CIOC and, accordingly, they were seeking information or documents to establish that this is the case.[77]

76. Mr Bayzhaunov, CIOC's engineer, was provided with an official report of the Aktobe raid later in the day on 16 April 2009.[78] Not every detail recorded is accurate but the report does confirm the fact of the raid, those present, and that a large number of documents and files were seized, although the report

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74 **Exhibit C-52.**

75 **Exhibit C-78.**

76 See the report of the raid in Aktobe prepared by CIOC employees: **Exhibit C-77.**

77 Devincci Hourani Statement, para. 69.

78 **Exhibit C-51.**

again materially understates the volume of documents, files and other materials taken. The next day the KNB officers returned to CIOC's Aktobe office and again demanded all documents concerning CIOC's ownership. The passports and mobile phones confiscated the previous day were not returned, and employees were instructed not to leave the premises. Around five employees were detained in the building, which has accommodation as well as office space, by an armed guard installed at the premises. The guard has been present at the premises each day since the raid, holding CIOC's employees under house arrest, whilst the investigations in Aktobe are apparently ongoing.

77. On 16 April 2009, KNB officers also raided the Caratube oilfield, located some 265 kilometres from Aktobe.[79] CIOC's employees were ordered to close all wells immediately without heed of oilfield best practices and without taking necessary precautions. CIOC's employees were also ordered to shut down machinery and other activities at the site. Four KNB officers remained at the field after 16 April 2009, with a further seven officers in military uniform, some of whom were armed, joining them on 25 April 2009.[80]

78. CIOC employees have complained that the KNB officers have attempted to pressure them into signing false documents. One CIOC representative was threatened by the KNB officers that they would "*kill him and bury him in the earth where nobody would find him*".[81] KNB officers remain at the field holding CIOC's employees under house arrest.

(e) Summary of the connection between President Nazarbayev's dispute with Mr Rakhat Aliyev and the expropriation of CIOC's investment

79. There is, unfortunately, a very clear and direct link between the political dispute between President Nazarbayev and the victimisation of Devincci Hourani and the eventual expropriation of CIOC's investment. In his witness statement, Devincci Hourani describes some of the incidents of harassment and persecution which he personally suffered and the fate that eventually befell CIOC's investment. Omar Antar is not related to the Hourani family or Mr Rakhat Aliyev, so he was not personally subject to the same sort of personal harassment as that endured by Devincci Hourani. But Mr Antar is able to confirm that sustained victimisation of CIOC and its employees coincided with or followed shortly after the dispute arising between President Nazarbayev and Mr Aliyev, as the focus of retribution broadened from Mr Aliyev himself to his family and associates:

> "Before the problems arose between the President and Rakhat Aliyev, CIOC operated its business lawfully and without major incident. It paid taxes, employed and trained a large number of Kazakh nationals and generally performed its works reasonably and properly in accordance with applicable laws and regulations. Nor, until mid 2007, did Devincci Hourani or his other businesses experience any of the harassment or persecution that would follow.

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79 See a summary from CIOC's employees describing the raid on the field and also at CIOC's branch office in Aktobe: **Exhibit C-77.**

80 In the Amended Request for Provisional Measures it was incorrectly stated that these officers returned on 26 April.

81 **Exhibit C-77**; Devincci Hourani Statement, para. 76; Omar Antar Statement, para. 229.

> After the conflict arose between the President and Rakhat Aliyev, the attacks on CIOC and the Hourani family's businesses began... These included extraordinary investigations, audits, demands for interviews or the seizure of documents, not just on single occasions, but repeatedly and in waves, day after day. I was personally questioned by authorities on many occasions. In June 2007, I was questioned by Kazakh police for around three hours in a row. I was mostly asked about my relationship and work with Devincci Hourani and his family, their businesses and their activities, which came as a great surprise to me. Questions about CIOC or my work were secondary. Allegations about CIOC's performance seemed only to be a tactic to apply pressure on Devincci Hourani. I did not think such questions were even necessary since CIOC had regularly provided all relevant reports and updates on its activities and performance to the competent governmental agencies responsible for monitoring the activities of oil companies. In fact Kazakh officials who questioned me from time to time did not seem to be very interested in my answers. I felt that the repeated questioning was intended to apply pressure on me in the hope that I would give information about Devincci Hourani and his family.
>
> Later, in August and September 2007, I was questioned repeatedly by prosecutors about CIOC's activities. This interrogation was slanted towards finding that CIOC had breached *any* Kazakh law. In fact, throughout this period I strongly felt that the Government officials who questioned me simply wanted to find *any* mistake or violation which they could use against Devincci Hourani and his company, CIOC".[82]

80. According to Mr Antar, who oversaw CIOC's operations and performance of the tasks set out in the work programmes:

> "The termination of CIOC's contractual exploration licence, according to my knowledge and belief, was not based on any shortfall or breach by CIOC in our implementation of CIOC's contractual obligations, failure to meet commitments in any of the applicable work programmes, or any other defect in our performance... I believe termination of CIOC's contract was politically motivated. In particular, I believe that the Government was intent on persecuting the owner of CIOC and his family".[83]

81. According to Devincci Hourani himself:

> "The relevance of this political dispute to CIOC and to my family is that my brother Issam Hourani is Mr Aliyev's brother in law. However, neither I nor any other member of my family has any other links to Mr Aliyev and neither I nor any member of my family have been involved in Kazakhstan politics or the political dispute between President Nazarbayev and Mr Aliyev. Despite that, I firmly believe that I, my family and the employees of CIOC have been persecuted by the Kazakhstan authorities as part of the personal campaign against Mr Aliyev and those connected to him".[84]

82. With that context in mind, it is now possible to turn to CIOC's business, history of operations, and its eventual expropriation in February 2008.

4.2 The Contract

83. The central component of CIOC's investment is its contractual rights to explore for and develop hydrocarbons at an oilfield in the Aktobe *Oblast* (region) of Kazakhstan. The Contract was originally

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82 Omar Antar Statement, paras. 18-20

83 Omar Antar Statement, para. 13.

84 Devincci Hourani Statement, para. 25.

entered into by a Greek-registered construction company, Consolidated Contractors (Oil and Gas) Company S.A.L. (CCC), on 27 May 2002.[85] The Contract and its attachments, including the minimum work programme (described below), were primarily prepared by an Almaty-based oil and gas industry consulting company, Gorny Economic Consulting. Gorny Economic Consulting was an experienced company, so CCC retained them as a consultant and relied on their expertise to advise on technical issues, including usual and acceptable practice in Kazakhstan. PriceWaterhouseCoopers was retained to review Clause 16 of the Contract, which contains technical tax and financial provisions. Denton Wilde Sapte was retained by CCC as international counsel to review the legal drafting of the documents. Mr Omar Antar, who later joined CIOC, assisted CCC as a consultant.

(a) The Contract Area

84. The Contract conferred upon CCC the exclusive right to carry out exploration of hydrocarbons within a specified area (the **Contract Area**) for a five-year period from May 2002. The Contract Area is a small pentagon-shaped geological allotment, defined in Annex 2-1 to the Contract,[86] having an area of around 50 square kilometres. Within the pentagon-shaped area, a particular territory is identified (being a geological "slice" or "layer" between certain subsoil depths only spanning the so-called "cornice" or "overhang" formation[87]) and designated the Caratube South oil field, which is excluded from the Contract Area.

85. The Contract Area is located in the Aktyubinsk region of Kazakhstan, around 265 kilometres from the main regional centre of Aktobe. The Contract Area is just one part of a larger oilfield first discovered in the course of test drilling by the Soviet entity Zharkamysskaya during the 1950s through to the 1970s. No commercial development or production was ever carried out in the Contract Area during this period, but in 1969 the USSR State Reserves Committee had concluded from testing that the Contract Area contained 16,407 thousand tonnes of in-place reserves, 7319 thousand tonnes of recoverable reserves, and 722 thousand tonnes of off-balance reserves.[88] Further geological work was done by Caspian Energy Research, a company retained by CIOC to prepare a reserves report during the duration of the Contract. Caspian Energy Research's reserves report (the **Caspian Energy Research Reserves Report**), which has been approved by Kazakhstan,[89] indicates a total of around C1 reserves in the order of 11,277 thousand ton geologic and 4,248 thousand tonnes recoverable, and C2 reserves of 18,997 thousand tonnes and 5,647 thousand tonnes.[90]

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[85] **Exhibit C-4**

[86] **Exhibit C-79.**

[87] This term refers to reservoirs adjacent to, or partly underneath the salt dome. The salt dome is a large structure of salt present in the Contract Area (and the surrounding region) pushing its way towards the surface.

[88] As recorded in Minutes #5709 dated 25 June 1969, and confirmed on many occasions including, for example at page 2 in: **Exhibit C-80.** See also supporting extracts from a Soviet-era Reserves Report. **Exhibit C-81.**

[89] Expert Opinion dated 29 February 2008 of Geology Committee: **Exhibit C-9.**

[90] The Caspian Energy Research reserves report is annexed to Mr Tiefenthal's Reserves Report at Annex C.

86. Further studies have also been carried out by an independent reserves auditor, Mr Sven Tiefenthal, retained by CIOC to provide an independent expert opinion for the purposes of this arbitration. In his Reserves Report, Mr Tiefenthal concludes that the Contract Area holds approximately 11.17 million barrels risked volumes, comprising reserves, contingent resources and prospective resources.

87. The certified reserves and production profile are described in more detail in Mr Tiefenthal's Reserves Report and briefly noted in Section 6.4 below, but in summary the Contract Area holds proven reserves and capacity for commercial production, as acknowledged by the competent agencies of the Government of Kazakhstan. The existence of proven reserves is the reason why the Contract covers not only exploration, but also granted rights in respect of commercial production.

(b) **Exploration rights under the Contract**

88. The Contract granted the Contractor, among other things, the exclusive right to conduct operations connected with prospecting and exploration for petroleum and its extraction onto the surface.[91]

The exploration period was initially fixed at five years pursuant to Clause 3.2 of the Contract and later formally extended for another two years on 27 July 2007 (see further paragraph 96, below).

(c) **Commercial production rights under the Contract**

90. In the event of a discovery of hydrocarbons economically suitable for commercial production (a **Commercial Discovery**) during the Exploration Period, the contractor was given the exclusive right under Clause 10.5 of the Contract to proceed to the commercial production stage (the **Production period**). Pursuant to Clause 3.2 of the Contract the Production period was at least 25 years from the date of Commercial Production for each deposit.[92] Commercial production licences may be granted in respect of different parts of the Contract Area, and at different times.[93]

(3) **Overview of the regulatory framework**

91. The Ministry of Energy and Mineral Resources (the **MEMR**) entered into the Contract as the representative of the Republic of Kazakhstan. The MEMR is itself divided into different departments, which perform supervisory and regulatory functions in relation to the activities of oil companies such as CIOC. These are described in more detail in paragraphs 22 to 28 of Omar Antar's witness statement. One important division of the MEMR is the Committee on Geology and Subsoil Resources Management (the **Geology Committee**), which reviews and approves projects for the exploration and development of oilfields. It is the key decision-making body within the regulatory framework. The Geology Committee has regional sub committees including the Western Kazakhstan Territorial Administration of Geology and Subsoil Use (**TU Zapkaznedra**). TU Zapkaznedra is the regional

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and 7.1.1 of the Contract: **Exhibit C-4.**

In the event of commercial Production, the Contractor has the right to extend the term of the Contract "*for such period as the contractor requires to use the full commercial Production of the Deposits*", see Clause 3.5 of the Contract: **Exhibit C-4.**

subdivision of the MEMR's Geology Committee and is authorised to exercise executive, monitoring and supervisory functions over CIOC's activities in relation to exploration, management and use of subsoil resources. TU Zapkaznedra was CIOC's main contact point for all reporting and performance issues in relation to the Contract.

92. CIOC also had dealings with other bodies created by the MEMR. One was the Central Committee on Mineral Reserves of the MEMR (the **Central Reserves Committee** or **GKZ** in Russian). The Central Reserves Committee is comprised of the different heads of departments within the MEMR, and is responsible for approving oilfield reserves. Another was the Central Committee on Development of Deposits of the MEMR (the **Central Development Committee**, abbreviated as **CDC**, or **CKR** in Russian). The Central Development Committee is responsible for approving minimum work programmes, and projects such as for development or exploration of oilfields. Its role is to consider proposals or projects, technical models, and proposed changes to oil licences or contracts.

4.4 Amendments to the Contract

(a) The assignment of the rights under the Contract from CCC to CIOC

93. Under Clause 25 of the Contract, the Contractor is entitled to assign its rights under the Contract to a third party. CCC assigned its interest in the Contract to CIOC on 8 August 2002 by way of the Transfer Agreement Regarding the Right of Subsoil Use.[94] In consideration for this transfer, CCC was reimbursed the approximately USD 9.4 million that it had incurred in acquiring the concession, including USD 5 million in respect of a payment to the Astana Development Fund made pursuant to Clause 7.2.13 of the Contract.

94. The assignment was approved by an Expert Committee of the MEMR for Consideration of Subsoil Users' Appeals as Regards Changing of Licences and Contracts on 7 November 2002. It took effect on 26 December 2002, upon approval by the Ministry of the corresponding amendments to the Contract. That approval is embodied in the Agreement on Amendments and Additions to the Contract (**Amendment 1**).[95]

(b) Tax changes

95. On 11 July 2006, the parties varied the Contract a second time (**Amendment 2**).[96] Amendment 2 was required because the Contract as originally drafted contained a tax stabilisation clause. When the Government enacted a general change in the VAT regime in Kazakhstan, reducing VAT from 16% to 15% for all taxpayers, the Government wished to avail itself of the stabilisation provision in the

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93 Clause 10.1 of the Contract, and definition of "*Commercial Discovery*": **Exhibit C-4**.

94 **Exhibit C-53**.

95 **Exhibit C-5**.

96 **Exhibit C-82**.

Contract to offset this change and so it insisted on increasing its royalty rate. Thus, Amendment 2 reduced the VAT payable to 15%, but at the same time, increased the royalty rate from 3% to 3.05%.

(c) The two-year extension of the Contract

96. The Contract was amended a third time, on 27 July 2007, to extend the exploration period under the Contract by a further two years (**Amendment 3**).[97] Pursuant to Clause 3.2 of the Contract, the exploration period as originally agreed expired on 27 May 2007. However, Clause 9.1 provided that CIOC had the right to extend the exploration period twice, by up to two years each time, in accordance with the Kazakh Law "On Subsoil and Subsoil Use" (the **Subsoil Law**). Amendment 3 was concluded at the request of CIOC, as first raised in a letter dated 27 November 2006,[98] in which CIOC duly requested such an extension pursuant to Article 43 of the Subsoil Law. As CIOC explained, the extension was required for:

> "completion of the works on follow-up exploration of persalt, subcornice and subsalt deposits of Caratube field and neighboring territories of the license area; required volumes of drilling and logging, pre-testing and laboratory surveys and a set of other works required for fulfilment of the Caratube field production stage".[99]

97. On 20 January 2007, CIOC wrote to the MEMR outlining an estimated USD 18 million programme of work it proposed to complete in the extension period.[100] Following a period of inquiries and scrutiny, in accordance with the procedures of all competent bodies within the MEMR and the Government,[101] on 16 February 2007 the MEMR Expert Committee decided to extend the exploration period for two years. On 21 February 2007, Minister Ismukhambetov wrote to CIOC on behalf of the MEMR, referring to the minutes of the 16 February 2007 meeting and confirming that the Expert Committee of the MEMR had considered CIOC's application for an extension and informing CIOC that a resolution has been passed to extend the prospecting period by 2 years, until 27 May 2009.[102]

98. At a meeting on 23 April 2007 of the Technical Committee of TU Zapkaznedra, the Technical Committee considered the requested extension and proposed revised work programme for the additional two years, and decided to "*approve and recommend for final approval*" the proposed amendment to the Contract and revised work programme.[103] Finally, a "working group" of the MEMR approved the requested amendment to the Contract at a meeting on 6 June 2007 and recommended it for signing by the MEMR subject to the inclusion of minor drafting amendments and the completion of

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97 **Exhibit C-8.**

98 **Exhibit C-83.**

99 *Ibid.*

100 **Exhibit C-84.**

101 The steps are summarised in the Explanatory Note to the 2008 Annual Work Programme: **Exhibit C-85.**

102 **Exhibit C-7.**

103 Minutes #193/2007: **Exhibit C-86.**

a study by the Committee of Geology and Subsoil Use of the MEMR.[104] The Contract was amended accordingly on 27 July 2007. Devincci Hourani executed that amendment on behalf of CIOC.[105]

4.5 Work programmes

(a) The Five-Year Work Programme

99. At the time the Contract was concluded, a five-year minimum work programme was also agreed (the **Five-Year Work Programme**).[106] The terms of the Five-Year Work Programme were prepared by Gorny Economic Consulting, overseen by its head Mr Ural Akshulakov. The Five-Year Work Programme set out a programme of work for the contractor to achieve in the first five years of development, and a forecast for the expenditure estimated to be needed to complete each activity. The work streams and targets contained in the Five-Year Work Programme are set out in detail in paragraphs 57 to 60 of Omar Antar's witness statement, but in general terms, the key elements of the Five-Year Work Programme were:

(1) to re-enter existing old wells and to drill new wells in the shallower, supra-salt[107] (or post-salt) formations;

(2) to carry out a pilot production testing in the supra-salt zone;

(3) to carry out geophysical studies, including a 3D seismic survey, and to prepare a report as to the available reserves; and

(4) to drill two wells in the deeper sub-salt[108] formation.

(b) The 2007-2009 Work Programme

100. When Amendment 3 to the Contract was concluded, extending the end of the exploration period from 27 May 2007 to 27 May 2009,[109] CIOC and the MEMR also agreed a new work programme for those years and a revised annual work programme for the remainder of 2007. The new work programme for 2007 to 2009 was approved by the Technical Committee of TU Zapkaznedra on 23 April 2007.[110] On 24 June 2007, the Geology Committee of the MEMR also approved the work programme for the extension period upon condition that minor drafting amendments would be made.[111] As the term of the

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104 **Exhibit C-87.**

105 **Exhibit C-8.**

106 **Exhibit C-88.**

107 This term refers to the geologic layer *above* the salt dome. Further explanation of geological terms used in this Memorial can be found in the glossary to Mr Tiefenthal's Reserves Report.

108 This term refers to the geologic layer *below* the salt dome.

109 **Exhibit C-8.**

110 Minutes #193/2007: **Exhibit C-86**

111 Letter #16-05-1945. **Exhibit C-89**

Five-Year Work Programme had run its course, the work programme for the extension period as finally agreed (the **2007-2009 Work Programme**)[112] replaced the previous framework.[113]

101. Again, Omar Antar sets out the detail of the 2007-2009 Work Programme in paragraphs 61 to 64 of his witness statement, but in summary the work covered by the 2007-2009 Work Programme focused on follow up exploration, especially in the overhang and sub-salt areas. The work was estimated to involve an additional USD 18 million in investments by CIOC in the development of the field.[114]

(c) The relevant Annual Work Programmes

102. Each year, CIOC would review and sign-off on its performance in the preceding year and agree with the authorities a more detailed programme of work and investment for the coming year (**Annual Work Programmes**). Each Annual Work Programme would be loosely based on the Five-Year Work Programme (or 2007-2009 Work Programme, in the extension period), and were cumulatively intended to achieve the requirements in the Five-Year Work Programme (or 2007-2009 Work Programme), with some variations from year-to-year. The Annual Work Programmes also contain a summary of the work completed and the money spent in the previous year. In reviewing and approving an Annual Work Programme, officials would also review and approve the previous year's results.

103. As shall be discussed below, the MEMR unilaterally decided to terminate the Contract, on 30 January 2008, and issued a notice of termination on 1 February 2008, alleging non-compliance with the work programmes. This was a procedurally and substantively flawed decision, intended only as a disguise for an outright expropriation of CIOC's investment. In order to understand the errors in the termination notice, it is essential to be clear as to which was the applicable work programme at the time of termination, and what obligations it contained.

104. The applicable annual work programme as at the date of the wrongful termination (1 February 2008) was, of course, the 2008 Annual Work Programme. It is not clear how it could be alleged that CIOC was in breach of any obligations which it still had 11 of 12 months remaining to complete. However, given that the MEMR's allegations arose earlier, in 2007, it is also necessary to be clear what was the applicable work programme at that time as well.

105. In the normal course of CIOC's activities, in December 2006, CIOC had concluded an Annual Work Programme for work to be carried out in 2007 (the **2007 Annual Work Programme**).[115] When Amendment 3 was concluded to extend the Contract,[116] both a new work programme to cover the period from 27 May 2007 to 27 May 2009 was concluded (the 2007-2009 Work Programme, as just

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112 **Exhibit C-90.**

113 See page 2 of Minutes of the Work Group of the MEMR dated 6 June 2007 stating that "*the work agreement shall be replaced with Addendum #3*": **Exhibit C-87.**

114 See page 6 of the 2007-2009 Work Programme: **Exhibit C-90.**

115 **Exhibit C-91.**

116 **Exhibit C-8.**

mentioned), but also a change to the 2007 Annual Work Programme. Transitional arrangements were agreed during the period of negotiations for the extension,[117] noting in the remaining part of 2007, CIOC would complete the drilling of one further well in the supra-salt layer to a depth of approximately 1,100 metres.[118] When Amendment 3 was finally concluded, the 2007 Annual Work Programme was replaced with an amended programme for the year, which noted both work already completed and work still to be done from the date of the extension to the end of the calendar year (the **Revised 2007 Annual Work Programme**).[119] Thus, the Revised 2007 Annual Work Programme stated that CIOC would drill two supra-salt wells, each to a depth of approximately 1,100 metres,[120] whereas by that time CIOC had already completed the drilling of one of these wells. The second well was added by agreement when the extension was concluded.[121] Thus, from the time of Amendment 3 to the Contract, the major work remaining to be done in 2007 was to drill one 1,100 metre well. As shall be elaborated below, drilling of this well and the corresponding logging was completed in the third quarter of 2007, so there could be no basis for the MEMR to complain about CIOC's performance in 2007.

106. It is also the case that the Technical Committee of TU Zapkaznedra met on 29 December 2007,[122] and considered and approved CIOC's proposal for the 2008 Annual Work Programme.[123] In doing so, as is its practice, TU Zapkaznedra first considered CIOC's performance of the 2007 Annual Work Programme, and approved those results. In other words, the competent Kazakh authority officially approved CIOC's performance in 2007. Omar Antar has addressed the work agreed for 2008 at paragraphs 73 to 75 of his witness statement, but in summary it involved CIOC carrying out an estimated USD 10.6 million in drilling works out of a total financial commitment for the year of USD 19.26 million. The drilling works included three supra salt wells, one of the deep sub-salt wells that had been deferred to the extension period, and an additional well in the overhang or subcornice formations.[124] This work was consistent with the 2007-2009 Work Programme for the two-year extension period. CIOC had detailed plans in place for the completion of this work when the Contract was wrongfully terminated. The foregoing explanation of the different minimum and Annual Work Programmes is important, as shall be seen below, because the MEMR has unjustifiably alleged that CIOC was in violation of its obligations under the Contract and the applicable work programmes, whilst failing to identify the correct work programmes let alone furnishing evidence of any material breach. The MEMR's wrongful termination also followed swiftly after it concluded a two-year

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117 Minutes #193/2007: **Exhibit C-86.**

118 *Ibid.*

119 See page 18, "Addendum to Annual Work Program" at: **Exhibit C-92**

120 *Ibid*, page. 19

121 **Exhibit C-8.** This had also already been foreseen in the transitional revision to the 2007 Annual Work Programme agreed on 23 April 2007: **Exhibit C-86.**

122 Minutes #167/2008: **Exhibit C-93.**

123 *Ibid*, page 4.

124 As agreed in Amendment 3: **Exhibit C-8.**

extension to the Contract and, in doing so, the MEMR *necessarily* approved (or waived any concern about) CIOC's performance under the Contract to that date. Article 43(1) of the Subsoil Law in force in 2002 (and today) states that contractors "*shall have the right to extend the contract term, provided the contractor meets its obligations defined in the contract and relevant work programmes*".[125] The termination was a sham, or veil, intended to hide the fact that the Contract was not terminated for any valid or objectively supported performance issues, but rather that "*CIOC's rights and interests were expropriated as part of a political campaign against, among others, Devincci Hourani and his family*".[126]

4.6 CIOC's performance

107. An independent assessment of CIOC's compliance with its work streams under the applicable work programmes is contained in Mr Tiefenthal's Compliance Report, produced together with this Memorial. Mr Tiefenthal has not, in his independent judgment, identified any significant shortfall in CIOC's performance against the work programmes applicable at the date of termination.[127]

108. CIOC's performance of its obligations in the five and a half years of the Contract is set out in more detail in Omar Antar's witness statement, and summarised briefly below. Objectively assessed, CIOC's performance was good. There is no evidence of any material breach justifying the wrongful termination of the Contract on 1 February 2008.

(a) Infrastructure

109. As Omar Antar explains, CIOC developed the site from a state in 2002 which he describes as an "*abandoned patch of desert*" with "*nothing at all to see*" to a thriving work camp accommodating up to 120 employees.[128] CIOC also inherited wells drilled decades earlier that were invariably in a very poor technical and physical condition.[129] Omar Antar describes the state of the wells in 2002 in these terms:

> "There was no serviceable infrastructure for the old existing wells. Many of the wells had been sealed with concrete blocks and permanently closed. Some wells were in a very poor condition, and had caused extensive oil saturation and high levels of contamination to the environment to some distance around the wells. In some cases, large pools of oil surrounded wells. Other wells had been sealed with cement bridges for long-term preservation, but this had been done poorly. With regard to the other, preserved wells, there were no well-heads or anything for that matter visible above ground. The wells, and the site in general, were in a poor state".[130]

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125 **Authority C-28.** The version in force today says that contractors "*shall have the right to extend the contract term, provided the contractor meets its obligations defined in the contract, work programme and annual work programmes*".

126 Omar Antar Statement, para. 76.

127 Compliance Report, paras. 33-34, 123-124

128 Omar Antar Statement, para. 46.

129 See Report of the Interdepartmental Committee for Transfer and Acceptance of the Plugged and Abandoned Wells' **Exhibit C-94.**

130 Omar Antar Statement, para. 47

110. CIOC began operations in the Contract Area only in early 2003, following the formal hand-over of the wells by TU Zapkaznedra.[131] From that time onwards, CIOC spent substantial funds to develop the Contract Area, including for the installation of key infrastructure. Nowhere in the Contract or the minimum work programmes is the required infrastructure listed in specific terms, but to develop the field and prepare for commercial operations CIOC successfully installed: a processing plant; water wells to supply both technical requirements in the wells and human consumption; 22,000 metres of in-field pipelines (80% of which was complete at the date of the expropriation); roads within the Contract Area and emergency access to wells; living quarters, a duty mess and a clinic; and well infrastructure such as "christmas trees" and necessary fencing.[132] CIOC also set up its own electricity supply and built office space, a medical clinic, living quarters and a duty mess for CIOC's workforce. CIOC also purchased equipment including heavy trucks, generators, and storage tanks for benzene and diesel. CIOC built an extendable processing plant for the treatment of 1,500 tonnes of crude oil per day and installed storage tanks with a capacity of 5,000 tonnes (36,500 barrels).

111. CIOC also successfully completed an evaluation of the water reserves in the Contract Area, with the assistance of a contractor, Aktobegidrogeologiya OJSC (**Aktobegidrogeologiya**).[133] Aktobegidrogeologiya drilled in total 16 wells, which was two more than required, finding ample water reserves.[134] Aktobegidrogeologiya's report on its operations was approved by TU Zapkaznedra on 28 March 2006.[135]

(b) Drilling, re-entry and development of supra-salt wells

112. The Five-Year Work Programme specifies that CIOC should develop 30 wells in the supra-salt formations in the Contract Area. CIOC's drilling programme is summarised in more detail in paragraphs 83 to 89 of Omar Antar's witness statement, but in summary, between 2003 and the date of the wrongful termination, CIOC drilled 24 new supra-salt wells and re-entered 10 old wells (which was in total more wells than required).[136] Logging surveys of the wells were also successfully completed in accordance with the Five-Year Minimum Work Programme. By the end of 2007, CIOC had more producing wells than required in the Five Year Work Programme and Revised 2007 Annual Work Programme. Also, in drilling or re-entering these wells, CIOC had drilled a total of 22,627 metres, which was again in excess its drilling obligations under the Five-Year Work Programme. Moreover, Omar Antar notes that "[o]*ur careful approach was justified because all of our wells were drilled into oil bearing deposits*".[137]

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131 See Report of the Interdepartmental Committee for Transfer and Acceptance of the Plugged and Abandoned Wells: **Exhibit C-94**.

132 Omar Antar Statement, para 78.

133 See Contract for Preliminary Studies dated 26 August 2002· **Exhibit C-95**. Also see the subsequent Aktobegidrogeologiya Contract dated 17 June 2004 and Annexes (Plan of Operations, Contract Price Negotiation Memorandum and Work Schedule)· **Exhibit C-96**.

134 See Aktobegidrogeologiya Report on Results of Exploration of Groundwater Reserves as of 1 June 2005: **Exhibit C-97**.

135 See summary pages 11-12 of the 2007 Annual Work Programme: **Exhibit C-91**.

136 See a table prepared by CIOC entitled Information about Condition of Karatyube Oil Field Wells: **Exhibit C-98**

137 Omar Antar Statement, para. 89.

(c) Pilot Production Programme

113. CIOC also successfully completed a pilot production programme to test the production capacity and characteristics of wells in the Contract Area (the **Pilot Production Programme**). The parameters of the Pilot Production Programme were prepared, again, by Gorny Economic Consulting,[138] and were approved by TU Zapkaznedra on 28 February 2003,[139] and by the Central Development Committee of the MEMR on 26 June 2003.[140] During the course of the testing, production levels were readjusted to reflect actual conditions that CIOC discovered, the scope of the project was expanded to include nine additional wells in order to obtain more data, and the duration of the programme was extended, by agreement, to allow more time for studies of other zones.[141]

114. At the conclusion of the pilot production testing phase, an audit was conducted by Gorny Economic Consulting, submitted to the MEMR and successfully defended. The audit confirmed that the Pilot Production Programme had successfully achieved all necessary technical targets.[142] The Pilot Production Programme was a crucial preparatory stage prior to taking the field to commercial production, since it confirmed the appropriate future production levels that CIOC could expect and intended to commit to achieving when it took a commercial production licence. The data from the Pilot Production Programme put CIOC in a confident position to proceed with commercial production.

(d) Geophysical studies including 3D seismic survey and Caspian Energy Research Reserves Report

115. The Five-Year Work Programme anticipated that CIOC would conduct a 3D seismic exploration of a 50 square kilometre area in the second year of operation. This was both over-ambitious, since the work could not be done in the specified sequence or time frame, and inadequate in scope. It was not possible for CIOC to be ready to do the 3D study in only the second year of its operations. It was also necessary to carry out the study over an area wider than CIOC's 50 square kilometre allotment in order to ensure more detail could be captured of the overhang and sub-salt zones. CIOC informed TU Zapkaznedra and the MEMR of the reasons for not completing this work in the sequence set out in the Five-Year Work Programme, and this explanation was accepted.[143]

116. The work was in fact carried out in 2006 and completed in 2007. First, a company called Kazpromgeofizika was retained to carry out a "vertical seismic profile" of well number 305. Then, a contractor Saratovneftegeofizika OJSC (**Saratovneftegeofizika**), was retained to carry out the seismic

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138 See Expert Opinion on the Pilot Production Programme prepared by Gorny Economic Consulting at page 4: **Exhibit C-80**

139 See Opinion No. 7/2003 of Aktyubinsk Inspectorate for Subsurface Conservation and Use (Zapkaznedra): **Exhibit C-99.**

140 See Minutes No. 23 dated 26 June 2003: **Exhibit C-100,** and Letter #09-01273: **Exhibit C-101.**

141 See page 5 of the Minutes #94/2006 of the Meeting dated 21 December 2005 of the Technical Committee of TU Zapkaznedra: **Exhibit C-102;** and Letter 09-02/1365 dated 22 November 2006 from CDC to CIOC: **Exhibit C-103** enclosing extract from Minutes #39 of CDC Meeting held on 20 October 2006. **Exhibit C-104.**

142 See the specific objectives set out at page 6: **Exhibit C-85,** as also set out in Omar Antar Statement, para. 97.

143 As demonstrated in, for example, TU Zapkaznedra's approval, at item 5, of the 2005 Annual Work Programme: **Exhibit C-105.**

survey, which was conducted across an approximately 75 square kilometre area during June 2006.[144] Saratovneftegeofizika completed the processing of the seismic data that had been acquired from the seismic survey by May 2007. Interpretation of the 3D data, which involves preparation of an entire geologic model of the field to pinpoint the location of future wells, was completed by Saratovneftegeofizika in the third quarter of 2007. The report on the results of the 3D survey was subsequently approved by TU Zapkaznedra.[145]

117. CIOC also contracted an independent Kazakh company, Caspian Energy Research, to prepare a calculation of the estimated reserves in the supra-salt and certain overhang formations in the Contract Area. This report was prepared and completed in early 2008. Caspian Energy Research submitted the Reserves Report to the MEMR for approval and together with CIOC representatives, attended a meeting with the Geology Committee on 27-28 February 2008 to discuss and approve the report's conclusions. The Caspian Energy Research Reserves Report was approved, with the Geology Committee sending CIOC the conclusions of its expert opinion on the oil reserves in the Contract Area on 29 February 2008.[146] The Geology Committee confirmed that the supra-salt and the overhang formations studied held 11,277 thousand tonnes of C1 (geologic) and 4,248 thousand tonnes (recoverable) reserves and 18,997 thousand tonnes C2 (geologic) and 5,647 thousand tonnes (recoverable) reserves.

(e) Sub-salt exploration wells

118. By May 2007, when the Five-Year Work Programme came to an end, CIOC had been unable to drill two exploratory deep wells in the sub-salt layer. However, by this stage CIOC had already agreed with the MEMR that this work would be carried out subsequently, under the 2007-2009 Work Programme. The MEMR had readily agreed to defer the construction of these two wells since it was understood that CIOC needed the 3D seismic study to be completed to be sure to hit the overhang and sub-salt formations. The geological studies CIOC had undertaken both based on previous data and also at the site indicated that the field was more structurally complex than previously thought, comprising not just two (sub-salt and supra-salt) but in fact three (sub-salt, overhang and supra-salt) structures. The geological complexity of the field explained CIOC's delay in completing the sub-salt wells during the first five years of the Contract, and why the MEMR agreed that CIOC could have two more years to do this work. By 1 February 2008, when the MEMR wrongfully terminated the Contract, CIOC had already taken a series of firm steps to complete the drilling of the deep wells by May 2009 as agreed.

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144 See summary in pages 10-11 of the 2007 Annual Work Programme: **Exhibit C-91**.

145 See Minutes 246/2007 of TU Zapkaznedra Scientific and Technical Council: **Exhibit C-106**.

146 **Exhibit C-9**.

4.7 The Field Development Plan and the commercial production phase

119. Caspian Energy Research was also retained[147] to prepare a field development plan for commercial exploitation of the supra-salt zones and the booked C1 reserves in the overhang formations (the **Field Development Plan**).[148] The Five-Year Work Programme anticipated that the Field Development Plan would be prepared in the second year of the exploration licence but this was not realistic since it could not be prepared without first completing the three-year Pilot Production Programme and carrying out the 3D seismic studies.

120. Upon making a commercial discovery, Clause 10.1 of the Contract guarantees CIOC a 25-year commercial production licence. This is an important difference from a typical exploration contract. The Contract confirmed this difference, specifying even in its title that it is not just an exploration contract, it is an exploration *and production* contract. CIOC had made a commercial discovery in the supra-salt formation and, by the end of 2007, CIOC was just a matter of a few months away from obtaining a commercial production licence from the Central Reserves Committee to exploit it commercially. The Field Development Plan was the key document containing CIOC's requirements, forecasts and a plan of activities for that commercial production phase.

121. First, the Field Development Plan set out CIOC's plan for the technical development of the supra-salt and the overhang formations studied. This included detailed analysis of the number of production wells CIOC would operate, including how many further wells needed to be drilled and their depths. It also set out CIOC's strategy for oil production from these wells, including the pressures and expected flow rates from each well, so as to maximise production but not to damage the oil-bearing structures. It also set out the plan for use of water injection wells to maintain pressure in the production zones. Secondly, the Field Development Plan contained a financial model for CIOC's capital expenditures and expected cash flows. CIOC was to provide the finance for the development of the field. Assumptions were made in respect of the selling price of oil produced, capital expenditure and operating costs. The third component of the Field Development Plan was an ecological and health and safety assessment of the proposed activities.

122. The Field Development Plan addressed the development of the supra-salt and certain overhang oil-bearing formations but not the sub-salt since at the time the study was prepared CIOC had not completed the sub-salt exploration work as set out in the 2007-2009 Work Programme. However, Omar Antar clarifies that:

> "In order to develop the sub-salt, we would drill the two sub-salt wells specified in the 2007-2009 Work Programme (we had already re-entered one deep well). Depending on the data we recovered from these wells in pilot testing, we had anticipated that we may need to drill one or

147 **Exhibit C-107**

148 **Exhibit C-108.**

possibly two further wells, before finalising a field development plan for the sub-salt and proceeding to the commercial phase".[149]

123. Caspian Energy Research finalised the Field Development Plan in March 2008 and its director, Mr Arman Jamikishov, contacted the CDC for an appointment in mid April to present its findings for approval.[150] However, the CDC refused to receive the Field Development Plan because the Contract had been (wrongfully) terminated. The Field Development Plan was the final step prior to obtaining a commercial licence, yet, the wrongful termination of the Contract cut CIOC down at the finishing line.

4.8 Notices alleging CIOC was in breach of the Contract

124. The Contract was wrongfully terminated for alleged non-performance by a notice dated 1 February 2008 addressed to CIOC (the **February 2008 Notice**).[151] At the date of the wrongful termination, CIOC was a successful business, contractually entitled to a 25-year production licence. CIOC had grown to a company that employed around 140 employees, of which 26 were assigned to the head office, with the rest working in the field or in the branch office in Aktobe.[152] In the five and a half years that CIOC had operated the field, it had developed it from a desert-like condition to it being ready to operate as a commercially productive oilfield. There was no basis for termination of the Contract. With the extension of the Contract in mid 2007, CIOC's performance to that date had necessarily been approved or at least any concerns about it had been waived. There was no material non-compliance at all with the Revised 2007 Annual Work Programme, or 2007-2009 Work Programme, and CIOC logically could not be in breach of the 2008 Annual Work Programme just one month into the year.

125. With the field ready for commercial production, the MEMR's decision to terminate the Contract was clearly not based on performance issues and can hardly have been taken in good faith. Far from there being any grievance about its performance, given the work achieved in reaching this phase, CIOC was the victim of a politically motivated expropriation. The events leading to the wrongful termination of the Contract cannot be understood without understanding the extraordinary steps the Government was taking during the latter half of 2007 to persecute the Hourani family including Devincci Hourani and CIOC. The harassment of CIOC and eventual wrongful termination coincided with the spread of President Nazarbayev's campaign against Rakhat Aliyev to his friends and associates, including Devincci Hourani and his family. Moreover, as is often the case with fabrications, the wrongful termination was in fact both procedurally and substantively flawed, as shall be explained below.

(a) March 2007 Notice

126. Before addressing the notice of termination issued in February 2008, a brief mention should be made of the letter dated 25 March 2007 addressed to CIOC from the MEMR and entitled a "Notice of Breach of

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149 Omar Antar Statement, para. 111.

150 Omar Antar Statement, para. 115.

151 **Exhibit C-18.**

152 **Exhibit C-57.**

Obligations" (the **March 2007 Notice**).[153] CIOC first received the March 2007 Notice only in September 2007. Nobody at CIOC saw it previously or knew it existed. None of the officials in TU Zapkaznedra, the Geology Committee, or the MEMR or its departments with whom CIOC were in regular contact throughout the second and third quarters of 2007 ever mentioned it at the time to Omar Antar or his colleagues until they eventually learned of it in September. None of the MEMR officials, nor the Minister for that matter, raised it when CIOC negotiated the extension of the Contract and the revised work programme. As Omar Antar explains:

> "the March 2007 Notice came into our possession only when it was provided to us by TU Zapkaznedra as an attachment to TU Zapkaznedra's letter dated 24 September 2007 (**Exhibit C-12**). That letter contains mistakes on its face, for instance it suggests that CIOC should provide evidence that we had fixed our violations by 21 September, which was already three days in the past. Notably, the March 2007 Notice also bears an incoming stamp indicating that TU Zapkaznedra received it only on 21 September 2007 and registered the letter as No. 2-459. This is consistent with the fax header recording a transmission on 21 September 2007 at 11:19am. The incoming stamp indicates that this document was also only received by TU Zapkaznedra in September, and not in March notwithstanding the date of the document. ...
>
> The March 2007 Notice also did not make sense. On 21 February 2007, CIOC had been notified by Minister Izmukhhambetov that the MEMR had decided to grant us an extension of the Contract until 27 May 2009 (**Exhibit C-7**). It is not logical to think that only a month later, in March 2007, that we could be in breach of the Contract or its revised work programme. It is also not possible to believe that we could have been under notice of termination since March 2007, during the time we negotiated the terms of the extension of the Contract and the 2007-2009 Work Programme, but nobody from the Government even mentioned it. CIOC had of course not responded in any way to the March 2007 Notice, since we were not even aware of its existence. When I first saw the March 2007 Notice, in September, it was less than two months after we had finally completed and signed the extension of the Contract for a further two years. The MEMR clearly had approved our performance otherwise they would not have extended the Contract. Likewise, the MEMR clearly understood the technical reasons for any shortfall in our performance, and accepted that the works could be deferred.
>
> For these reasons, I was very surprised by the March 2007 Notice when I first saw it in September. In fact I cannot be sure it was really written in March 2007, or whether it was in fact only written later, in September 2007, for example. In any case, it seems to bear no relation to reality or our actual performance but fits perfectly into the timing and pattern of harassment that I have described above".[154]

127. More interesting still, on 28 September 2007, CIOC received from TU Zapkaznedra a "Prescriptive Order" based on the results of a verification process into CIOC's operations and its fulfilment of terms in the Contract (the **September 2007 Prescriptive Order**).[155] Along with setting out a number of baseless allegations, refuted in the correspondence and again in paragraphs 137 to 139 of Omar Antar's witness statement, the September 2007 Prescriptive Order lists the contractual and regulatory documents made available to TU Zapkaznedra for the purposes of its audit, but nowhere is the 25 March 2007 Notice listed.

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153 **Exhibit C-109**. This document was originally produced as Exhibit C-11 to the Request for Arbitration. It is reproduced here, with a corrected translation.

154 Omar Antar Statement, paras 133, 135-6.

155 **Exhibit C-110**.

128. CIOC cannot discount that a legitimate explanation exists to explain these anomalies. However, the circumstances in which the March 2007 Notice was issued, in the light of events that followed, are certainly unusual, raise questions as to authenticity of the document. In any event, the March 2007 Notice is not an operative or legally relevant to the wrongful termination given the extension of the Contract that post-dated it and the approval that it entailed of CIOC's performance.

(b) October 2007 Notice

129. On 1 October 2007, the MEMR issued a further notice of termination of the Contract and suspension of operations, signed by Vice Minister Kiyinov (the **October 2007 Notice**).[156] The October 2007 Notice referred to the March 2007 Notice, which CIOC had only seen a week earlier (not on 28 March 2007 as alleged), and stated that CIOC had failed to meet timeframes "*to fulfil the contractual obligations*" and had not provided "*appropriate information and the documents confirming remediation of the violations*". The October 2007 Notice therefore requested "*immediate termination of operations*" under the Contract "*pending decision on unilateral termination of the contract*".

130. The allegations contained in the October 2007 Notice and the reasons why they were not correct are set out in the letter CIOC sent to Vice Minister Kiyinov on 3 October 2007,[157] and paragraphs 142 to 145 of Omar Antar's statement. In its letter, CIOC pointed out that it was nonsensical to think that during the period in which the Contract was extended, CIOC had been under notice to cure shortcomings in its performance. Moreover, the extension of the Contract implied that any shortcomings were waived or not material. CIOC insisted in its letter that the MEMR had no basis to terminate the Contract since CIOC was not in any material breach. Moreover, the previous notices were obsolete since they did "*not take into account all of processes as described above and completed by the Company as part of implementation of the work program*". CIOC went on to explain that CIOC's work was "*at the finishing stretch*", with the CDC having confirmed that from 1 November 2007 CIOC was ready to proceed to the estimate of reserves stage. In the light of the facts presented, CIOC requested that the MEMR reconsider its decision and allow CIOC to fulfil its obligations in "*a normal business environment*".

(c) November 2007 Notice

131. CIOC's efforts in October 2007 to demonstrate that there were no grounds to terminate the Contract were partially successful since, on 27 November 2007, the MEMR issued a formal notice to CIOC stating that CIOC was entitled to resume operations under the Contract (the **November 2007 Notice**).[158] However, the November 2007 Notice went on to state that CIOC had just one month to rectify further alleged violations of the Contract and to supply all the necessary documents to demonstrate that it had eliminated the so-called violations and taken steps to ensure no further breaches. The November 2007 Notice listed three violations of the Contract:

1. a failure to comply with physical and financial obligations in the work programme;
2. a failure to transfer funds to the decommissioning fund comprising 3% of annual capital expenditure; and

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156 **Exhibit C-10.**

157 **Exhibit C-13.**

158 **Exhibit C-14.**

3. a lack of plans for subcontracting works in 2007, or subcontracts for materials, equipment and services, or list of potential subcontractors.

132. By this time CIOC's owners and senior management were only too well aware that they were being squeezed by a campaign of regulatory (and other) harassment. Omar Antar's view of the November 2007 Notice is that:

> "The alleged further breaches demonstrated to me clearly that the MEMR was not interested in the real situation since, as I shall explain, the items the MEMR raised were not breaches at all. It seemed that the MEMR was set to try to destroy CIOC's business".[159]

133. CIOC's response is set out in more detail in paragraphs 159 to 161 of Omar Antar's witness statement, but in summary it is clear that as at the date of the November 2007 Notice CIOC was in full compliance with the Revised 2007 Annual Work Programme and the 2007-2009 Work Programme. CIOC had already completed the additional well it was obliged to drill in 2007. There was no breach of either work programme, whether financial or physical.

(d) December 2007 Notice

134. Just six days later, on 3 December 2007, the MEMR wrote to CIOC again to give notice of further demands (the **December 2007 Notice**).[160] This time, the December 2007 Notice pointed to data contained in a statutory filing (called a form #2-LKU report) from October 2007 which set out CIOC's expenditure on operations and physical works for the third quarter of 2007.[161] The MEMR alleged that the #2-LKU report confirmed that CIOC was in violation of its obligations under the Contract. The December 2007 Notice demanded that CIOC "*within one month of receipt of the present notice, remedy the failure to fulfil the obligations under the Contract*" and "*submit all the required documents to confirm such remediation*". Omar Antar thought at the time that the December 2007 Notice was unusual, as he explains in his witness statement:

> "Until this notice, CIOC never had received any complaint or comment from the Department for Direct Investments, which supervised #2-LKU reports, or any complaint based on the contents of one of its #2-LKU reports. But this complaint was not even signed by a member of the Department for Direct Investments, but by the Executive Director of the MEMR, Mr Batalov. The circumstances of the December 2007 Notice were peculiar to me. The #2-LKU report had also been filed on 16 October 2007, so when the MEMR had written to CIOC on 27 November 2008 and confirmed that we could resume operations, the MEMR had a copy of the #2-LKU form available to it. The November 2007 Notice did not mention any problem arising from the #2-LKU Report. Moreover, the #2-LKU Report could not confirm a breach of the Contract, as it only concerned the third quarter of 2007, from July to the end of September. With three months left in the year, this report could not show that we were in breach of the 2007 Annual Work Programme, or the 2007-2009 Work Programme. Therefore, the December 2007 Notice was not based on complete and timely data. In any event, the December 2007 Notice did not actually identify what problems were evident from our form #2-LKU Report".[162]

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159 Omar Antar Statement, para. 158

160 **Exhibit C-15.**

161 **Exhibit C-111.**

162 Omar Antar Statement, para. 164.

135. CIOC responded to the MEMR on 13 December 2007, within the time specified in the December 2007 Notice.[163] CIOC reiterated the information already provided to TU Zapkaznedra in its 1 October 2007 letter, a copy of which it produced again. CIOC explained again that there was no violation of any work programme since CIOC had completed its drilling obligations for 2007. CIOC's activities were in compliance with the Revised 2007 Annual Work Programme and the 2007-2009 Work Programme. CIOC also responded to other allegations, pointing out that it had made substantial contributions to the decommissioning fund and had paid the full balance due.

136. CIOC also enclosed other evidence and documents as requested to prove that the company had no delinquent debts and was performing all of its obligations under the Contract, including in relation to the social field and regional infrastructure, and meeting its obligations to train Kazakh nationals and sub-contract works to Kazakh subcontractors. CIOC also pointed out that Caspian Energy Research was near to the completion of the Caspian Energy Reserves Report and the Field Development Plan. CIOC concluded by noting that it was not in breach of the Contract or the work programmes:

> "Therefore, dear Askar Bulatovich, as seen from the above-stated, our Company does not demonstrate any backlog in implementation of the 2007 Work Program (*the program has been completed in its entirety*) or in other aspects of operation (see Annexes). Furthermore, our Company has seriously prepared with regard to implementation of works in 2008-2009 (bidding proposals and required technical programs)" (emphasis added).[164]

4.9 Approval of CIOC's 2008 Annual Work Programme

137. CIOC did not receive a response to its detailed 13 December letter and annexes, and continued business as normally as possible, sending its summary of work completed in 2007 and the 2008 Annual Work Programme to TU Zapkaznedra for approval. TU Zapkaznedra approved the 2008 Annual Work Programme on 29 December 2007,[165] in CIOC's mind confirming that its performance to date was indeed satisfactory.

138. On 10 January 2008, CIOC sent its usual operational report for December 2007 to the Department for Direct Investments in Subsoil Use.[166] On 10 January 2008, CIOC also delivered its monthly report to TU Zapkaznedra.[167] Neither report attracted any specific or negative response.

4.10 The February 2008 Notice and the wrongful termination of the Contract

139. On 30 January 2008, the Ministry issued an ordinance ordering the termination of the Contract (the **Termination Ordinance**).[168] In the Termination Ordinance, Minister Mynbaev ordered the

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163 Exhibit C-16.

164 *Ibid.*

165 Minutes No. 167/2008; Exhibit C-93.

166 Exhibit C-112.

167 Exhibit C-113.

168 Exhibit C-17.

termination of the Contract "*due to failure of completion of notice requirements within the specified period*". The Termination Ordinance was followed by a notice dated 1 February 2008, addressed to CIOC, wrongfully terminating the Contract (the **February 2008 Notice**).[169] CIOC's branch office in Aktobe received a copy of the February 2008 Notice on 5 February 2008, but CIOC did not receive an original from the MEMR in its Almaty head office (as required by the notice provisions in Clause 31.2 of the Contract) until 11 February 2008.

(a) Allegations in the February 2008 Notice

140. The February Notice was based on "*Article 45-2, clause 1, subclause 2*" of the Subsoil Law and the Termination Ordinance itself. It stated that the Contract "*is hereby unilaterally terminated for a failure to fulfil the requirements stated in the notice within the prescribed timeframe*". CIOC was given two months to complete certain tasks, return the geological information CIOC had acquired and give up possession of the Contract Area.

(b) CIOC's Response to the February 2008 Notice

141. Nothing in the February 2008 Notice explains how "*Article 45-2, clause 1, subclause 2*" is relevant or what was the relevant notice to which it refers. Article 45-2 of the Subsoil Law, clause 1, subclause 2 states that the competent authority shall have the unilateral right to terminate the Contract "*if the Subsoil Users fail to take the measures as specified in Article 70 of this Law*".[170]

142. However, Clause 28 of the Contract prohibits application to the Contract of amendments to local law which deteriorate the position of CIOC, and the version of Article 70 of the Subsoil Law as at the date of the February 2008 Notice had been amended since the Contract was signed. As at the date of the Contract, the competent authority was entitled to send notices of breaches under Article 70 only when the subsoil user: (i) violated the deadlines for commencing exploration or production; or (ii) carried out production at a level which was inadequate to the geological potential of the deposit.[171] Amendments in December 2004 expanded the competent body's supervisory function to allow it to issue notices to contractors in respect of failures to comply with the terms and conditions of contracts. The notices CIOC received did not fall within the scope of the applicable version of Article 70 and any failure to respond to them did not form the basis of a ground for termination of the Contract.

143. The previous notice (the December 2007 Notice[172]) was also flawed, as expla ned above, since it had alleged that CIOC's third quarter #2-LKU report showed that CIOC was in breach of commitments to be completed in 2007. It was not possible that a report only for the third quarter could show this, and in any event, CIOC was objectively not in breach of any commitments for 2007. The MEMR was also most probably mistaken as to the relevant work programmes. With the conclusion of Amendment 3 to

169 **Exhibit C-18.**

170 Article 45-2, clause 1, subclause 2 of the Subsoil Law (current version): **Authority C-28.**

171 Article 70 of the Subsoil Law (version as at date of the Contract): **Authority C-59.**

the Contract and the 2007-2009 Work Programme, the 2007 Annual Work Programme had been revised, as explained in paragraph 106, above. As at the dates of the Termination Ordinance and February 2008 Notice, the applicable work programme was by then the 2008 Annual Work Programme. CIOC could not be in breach of the 2008 Annual Work Programme, as it was only one month into 2008 and, moreover, these obligations were to be observed in the context of the 2007-2009 Work Programme, which allowed CIOC until 27 May 2009 to complete the necessary works.

144. The MEMR's attempt to terminate the Contract was therefore flawed and unjustified. It was also completely inconsistent with the MEMR's other conduct and commitments. In particular, the MEMR had: (i) extended the Contract for two years in July 2007; (ii) approved a new minimum work programme for work to be completed by 27 May 2009 (the 2007-2009 Work Programme), which extended the Five-Year Work Programme; and (iii) just one month earlier, acknowledged CIOC's performance in 2007 and agreed the 2008 Annual Work Programme.

145. CIOC responded to the February 2008 Notice on 12 February 2008.[173] In that letter, CIOC immediately complained that "*the departments preparing these letters never familiarize themselves with the content of the documents we send in response*". CIOC pointed out it had received no response to its 13 December 2007 letter,[174] and the supporting materials that had accompanied it. CIOC also pointed out that in the interval between the December 2007 Notice and the February 2008 Notice, the 2008 Annual Work Programme had been approved.

146. In any event, CIOC pointed out the steps it had already taken to achieve the objectives in the 2008 Annual Work Programme, concluding that "*over the course of implementation of contract works, the Caratube International Oil has already spent US$ 34 mln 244* [USD 34.244 million]", and committed to invest almost another USD 20 million by May 2009. The MEMR did not respond to this letter.

147. CIOC wrote to the MEMR again on 6 March 2008.[175] CIOC referred to its 3 October 2007 letter and attachments, which provided a detailed account of CIOC's contractual performance. CIOC also set out in detail why the earlier notices also did not establish any violations of the Contract. CIOC noted that its contractual performance had been approved by TU Zapkaznedra on 23 April 2007, that the Contract had been extended for two years in July 2007, and that on 29 December 2007 the 2008 Annual Work Programme had also been adopted and approved. CIOC also noted that the Geology and Central Reserves Committees had approved the Caspian Energy Research Reserves Report on 29 February 2008 (as described in paragraph 117, above) and that the Field Development Plan was also pending the MEMR's approval. CIOC requested a meeting with Mr Batalov, the Executive Director of the MEMR, the next day to try to resolve the dispute by negotiation. Failing that, CIOC emphasised that Clauses

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172 Exhibit C-15.

173 Exhibit C-26

174 Exhibit C-16.

175 Exhibit C-27.

27.1 and 27.2 of the Contract require the parties to resolve all disputes and disagreements by international arbitration.

148. Omar Antar explains in his witness statement how that day he visited the MEMR and apparently shocked an MEMR official with the prospect that CIOC would fight the termination in international arbitration proceedings.[176] A meeting was scheduled for 11 March 2008 with Mr Batalov. On 11 March 2008, prior to the scheduled meeting, CIOC submitted a further letter to the MEMR.[177] In the letter, CIOC offered data and explanations to establish that CIOC had performed consistently with the Contract and minimum work programmes. To the allegation that CIOC had "*refused to rectify*" alleged causes justifying the termination of the Contract, CIOC remarked:

> "unfortunately, we have to state that your employees likely neither read nor analyse incoming mail in which detailed explanations are provided in response to all claims and complaints expressed by you, submitted along with all documents which may serve as proof of our fulfilment of contractual terms and provisions or elimination of the established issues".

149. CIOC again pointed out that there was no material breach of the Contract or work programmes, especially since the key obligation to drill the sub-salt exploratory wells had been transferred to the period 2007-2009 by mutual agreement when Amendment 3 had been concluded. With no other even potentially relevant categories of breach, CIOC concluded that there was no ground at all to terminate the Contract. In its letter, CIOC sought amicable resolution of the dispute, but CIOC also emphasised that the Contract contained a procedure for termination, which the MEMR had ignored, and which gave CIOC the right to submit the dispute to ICSID for resolution by international arbitration.

150. Mr Batalov in fact refused to meet with CIOC's representatives but offered a meeting with an expert group on 13-14 March 2008 to whom CIOC could address its complaints. It was explained that Mr Batalov would listen to the report of the experts, following that meeting, and he would then decide whether or not to meet again with CIOC's management to discuss the dispute.

4.11 Meeting of representatives of the MEMR and CIOC

151. Omar Antar has described in paragraphs 184 to 190 of his witness statement how, on 13-14 March 2008, he represented CIOC in discussions with the expert group at the MEMR together with Mr Nikolai Kamensky, a respected energy consultant, Mr Hussam Hourani and Professor Nikolai Davydov of CIOC. He explains that he prepared a set of minutes following the meeting, drafted as conservatively and neutrally as possible, but the Government representatives refused to sign anything "*even though I am confident that we persuaded them that we were right*".[178]

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176 Omar Antar Statement, para. 177.

177 **Exhibit C-6**. CIOC sent the same letter also to Mr Rashid Tusupbekov, the Prosecutor General: **Exhibit C-28**.

178 Omar Antar Statement, para. 184. See also **Exhibit C-22**. CIOC also sent those minutes to Mr Batalov after the meeting: Letter No. 21-22-165: **Exhibit C-114**.

152. The MEMR experts apparently stated that claims of CIOC's breaches of the Contract were governed by Article 45-2 of the Subsoil Law, to which CIOC explained again that Clause 28 of the Contract prohibits application to the Contract of amendments to local law which deteriorate the position of CIOC, and the version of Article 70 of the Subsoil Law as at the date of the February 2008 Notice had been amended since the Contract was signed. CIOC repeated its point that the notices it had received did not fall within the scope of the applicable version of Article 70 and thus any failure to respond to them (which it denied) could not constitute a ground for termination of the Contract.

153. CIOC also complained about the MEMR's inconsistency, namely that CIOC was on the brink of commercial production when the MEMR decided to terminate the Contract. Omar Antar states that:

> "I recall Professor Davydov saying quite vividly that in effect CIOC had '*baked a good cake, but when it was ready to eat, the Government had decided to take it away*'. In other words, CIOC had done all the necessary preparatory work to proceed to the lucrative commercial stage and now the MEMR was taking the field away from us".[179]

154. Whilst the MEMR experts refused to sign any protocol or minutes of the meeting, the chairman Mr Ongarbaev said he would prepare a report for Mr Batalov following the meeting and respond to CIOC in writing by 21 March 2008.[180] CIOC never received a reply or copy of that report, despite requesting it, leading to the inference that the experts' report has not been produced because it does not support the MEMR's decision to terminate the Contract.

4.12 Events after the wrongful termination of the Contract

155. Both Devincci Hourani and Omar Antar have explained in their witness statements the intimidation and fear for their personal safety and wellbeing that caused them to flee Kazakhstan on 22 March 2008 and not return since.[181] These events need not be repeated, nor do the events that precipitated first the filing in these proceedings of the Request for Provisional Measures on 14 April 2009, and the Amended Request for Provisional Measures on 29 April 2009 following the first of the armed raids on CIOC's premises in Almaty, Aktobe and at the field. Those submissions and the documents to which they refer should be read together with this Memorial. In their witness statements Devincci Hourani and Omar Antar both provide updates on events that have occurred since the Amended Request for Provisional Measures. As outlined briefly in paragraphs 73 to 78 above, KNB officers remained on site after 25 April 2009 to interrogate CIOC employees and to guard the equipment and wells. During the raids, one CIOC representative was threatened that he would be killed and buried "*in the earth where nobody would find him*" if he does not cooperate.[182]

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179 Omar Antar Statement, para. 185

180 Omar Antar Statement, para. 190.

181 Devincci Hourani Statement, para. 60; Omar Antar Statement, para. 192.

182 Exhibit C-77; Devincci Hourani Statement, para. 76; Omar Antar Statement, para. 229.

5. MERITS OF THE CLAIMS

5.1 Overview of claims and general principles

156. As explained in Section F.1 of the Request for Arbitration and in paragraphs 43 to 44 above, CIOC invokes the heads of jurisdiction set out in Article VI(1) of the Treaty to advance claims in respect of Kazakhstan's "*breach of any right conferred or created by this Treaty with respect to an investment*", and "*arising out of or relating to... an investment agreement*" concluded between Kazakhstan and CIOC. These claims are addressed in turn, in Sections 5.2 and 5.3, below. First, there is a brief confirmation of the laws applicable to CIOC's claims and secondly, applicable principles of responsibility and attribution.

(a) Applicable laws

157. The law applicable to CIOC's claims for breach of the Treaty (set out in Section 5.2, below) is public international law, as a matter of consent formed by CIOC's acceptance of Kazakhstan's offer to arbitrate disputes arising under the Treaty (see paragraph 43, above) and necessarily so, given that the claims involve the interpretation and application of provisions in a treaty.

158. Under Clause 26.1 of the Contract, the law applicable to CIOC's claims arising out of or relating to an investment agreement (i.e. the Contract) (set out in Section 5.3, below) is agreed to be as follows:

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

(b) Attribution

159. Kazakhstan's international responsibility for its breaches of the Treaty is engaged through the internationally wrongful acts or omissions of organs, entities or persons that are attributable to it as a matter of international law. The applicable rules of attribution are set out in the International Law Commission's *Articles on Responsibility of States for Internationally Wrongful Acts* (the **ILC Articles**).[183]

160. Article 2 of the ILC Articles expressly confirms that Kazakhstan's international responsibility may be engaged by "*conduct consisting of an action or omission*". Under international law, Kazakhstan is legally responsible for the acts and omissions of:

(1) its organs;[184]

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[183] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, acopted in the Annual Report of the International Law Commission (ILC) on its Fifty-third Session (23 April 1 June and 2 July 10 August 2001), A/56/10, ch. IV, and endorsed by the UN General Assembly by Resolution 56/83 of 12 December 2001. The principles of attribution contained therein (Articles 4-11) are generally accepted to be a codification of customary international law applicable to the present dispute and are helpfully set out, together with the ILC's Commentary, in J. Crawford, The International Law Commission's Articles on State Responsibility (Cambridge: Cambridge University Press, 2002): **Authority C-29.**

[184] ILC Articles, Article 4· **Authority C-29.**

(2) entities or persons exercising elements of delegated governmental authority;[185] and

(3) entities or persons that act in accordance with its instructions, or which it directs or controls.[186]

161. Dealing with these categories in turn, first, as Article 4 of the ILC Articles confirms, Kazakhstan is responsible for the conduct of its organs. Article 4 provides:

> "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State".

162. Kazakhstan's organs include, but are not limited to, entities or persons that constitute part of its organisation and have that status in accordance with Kazakh law. It is beyond doubt that these include the MEMR and its sub-departments and committees including the Geology Committee, the Ecology Committee and their regional subdivisions. Kazakhstan's international responsibility also extends to the conduct of officers of its prosecutors' offices, police forces, and national security agencies including the KNB.

163. Under international law principles, it is also confirmed that Kazakhstan's international responsibility is engaged by the wrongful conduct of its organs and agencies acting on its behalf, whatever their status in Kazakh law. In fact, an entity or person may be found to be an organ of Kazakhstan, notwithstanding that it has another status under the Kazakh law if, for example, it conducts governmental functions or exercises public powers.

164. Secondly, Article 5 of the ILC Articles on State Responsibility provides that the activities of entities (including State-owned corporations, semi-public entities, public agencies and even private companies) exercising elements of delegated governmental authority are attributable to their State, even if such entities do not qualify as a State organ. Article 5 provides that:

> "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance".

165. Thirdly, Article 8 extends Kazakhstan's international responsibility to entities acting in accordance with its instructions, or acting under the direction or control of Kazakhstan. Article 8 provides that:

> "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct".

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185 *Ibid*, Article 5: **Authority C-29.**

186 *Ibid*, Article 8: **Authority C-29.**

166. There is no doubt that Kazakhstan is responsible for all of the legally relevant acts (and omissions) upon which CIOC relies in asserting its claims. The merits of these claims are addressed next.

5.2 CIOC's claims for breaches of rights conferred or created by the Treaty

167. Kazakhstan, through the persecution and harassment of CIOC's majority owner, Devincci Hourani, CIOC's senior management and employees, and a campaign of abusive and arbitrary investigations of CIOC's operations culminating in the wrongful termination of the Contract has violated multiple provisions of the Treaty. These provisions are:

(1) the obligation not to expropriate or nationalize investments either directly or indirectly through measures tantamount to expropriation or nationalization except for a public purpose; in a non-discriminatory manner; upon payment of prompt adequate and effective compensation; and in accordance with due process of law (Article III(1));

(2) the obligation to ensure the fair and equitable treatment of investments (Article II(2)(a));

(3) the obligation to ensure that investments shall enjoy full protection and security (Article II(2)(a));

(4) the obligation not to impair investments by unreasonable or discriminatory measures (Article II(2)(b));

(5) the obligation to observe obligations entered into with investors (Article II(2)(c)); and

(6) the obligation to ensure that investments shall not be accorded treatment less than that required by international law (Article II(2)(a)).

168. Kazakhstan's violations of these obligations are discussed in turn below, with reference to selected arbitral practice to illustrate the features and application of these standards to the facts of the present case.

(a) Expropriation

169. Article III of the Treaty provides that:

> "[i]nvestments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ('expropriation') except for: public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2)".

170. The entirety of CIOC's investment in Kazakhstan, which it had diligently pursued since 2002, has been expropriated including, most fundamentally, the package of long-term rights which it enjoyed under the Contract to explore for and commercially develop hydrocarbons.

171. As already noted, Article I(1)(a) of the Treaty defines "*investment*" broadly, and includes both "*a claim to money or a claim to performance having economic value, and associated with an investment*", and "*any right conferred by law or contract, and any licenses and permits pursuant to law*". In other words, the Treaty confirms that the investments entitled to protection under the Treaty, including protection from unlawful or uncompensated expropriation, include contractual rights such as those CIOC enjoyed under the Contract.

172. This is consistent with long-established international law, since at least the 1922 award concerning the *Norwegian Shipowners' Claims*,[187] that an investor's contractual rights are capable of being expropriated. In the modern era, arbitral tribunals have repeatedly recognised and applied the principle that it is not only rights *in rem* that may be expropriated but intangible rights, including contractual rights can also be expropriated,[188] or effectively expropriated.[189]

173. Several decisions of the Iran-United States Claims Tribunal confirm that the rights in a contract can constitute property capable of being expropriated. For example, in the *Tippetts* case expropriation was said in one case to occur when "*the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral*".[190] *Starrett Housing Corp.* v. *Government of the Islamic Republic of Iran* also invoked a discussion of authorities in which "*rights of a contractual nature closely related to the physical property*" were held to have been expropriated.[191] The Tribunal confirmed that:

> "...the property interest taken by the Government of Iran must be deemed to comprise the physical property as well as the right to manage the Project and to complete the construction in accordance with the Basic Project Agreement and related agreements, and to deliver the apartments and collect the proceeds of the sales as provided in the Apartment Purchase Agreements".[192]

174. In *Amoco International Finance Corp.* v. *Islamic Republic of Iran*, the Tribunal also confirmed that "*expropriation... may extend to any right which can be the object of a commercial transaction*".[193] By way of final example, in *Phillips Petroleum Company Iran* v. *The Islamic Republic of Iran* it was held

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187 *Norwegian Shipowners' Claims* (*Norway* v. *USA*), Award, 13 October 1922 **Authority C-30.**

188 e.g., *Southern Pacific Properties (Middle East) Ltd* v. *Arab Republic of Egypt*, Award, 20 May 1992: **Authority C-31**; *Amoco International Finance Corp.* v. *The Government of the Islamic Republic of Iran et al.*, Award, 14 July 1987, 15 Iran-US C.T.R. 189, para. 108: **Authority C-32**, and for a survey of the cases, S.M. Schwebel, *Justice in International Law* (Cambridge: Grotius/Cambridge University Press, 1994) 425: **Authority C-33.**

189 e.g., *Biloune and Marine Drive Complex Ltd.* v *Ghana Investments Centre and the Government of Ghana*, Award on Jurisdiction and Liability, 27 October 1989: **Authority C-34**; *Middle East Cement Shipping and Handling Co. S.A.* v. *Arab Republic of Egypt*, Award, 12 April 2002, paras. 127, 128, 178: **Authority C-35.**

190 *Tippetts, Abbett, McCarthy, Stratton* v. *TAMS-AFFA Consulting Engineers of Iran and Others*, Award, 29 June 1984, 6 Iran-US C.T.R. 219, 225: **Authority C-36.**

191 *Starrett Housing Corp.* v. *Government of the Islamic Republic of Iran*, Award, 19 December 1983, 4 Iran-US C.T.R. 122, 156-157: **Authority C-37.**

192 *Ibid.*

193 *Amoco* v. *Iran*, para. 108: **Authority C-32.**

that expropriation could occur "*whether the property is tangible, such as real estate or a factory, or intangible, such as the contractual rights involved in the present case*".[194]

175. Since the earliest cases under the ICSID Convention, ICSID arbitral tribunals have also recognised that contractual rights may comprise assets falling within the definition of "*investment*" for the purposes of the Convention and that such rights may be expropriated. For example, in *Letco* v. *Liberia*, Liberia's unilateral redrawing of a concession's geographic area, and then the eventual termination of the concession contract, could amount to not only a breach of contract but also a nationalisation in violation of international law.[195] In *Southern Pacific Properties (Middle East) Ltd* v. *Arab Republic of Egypt*,[196] the ICSID Tribunal rejected "the argument that the term 'expropriation' applies only to *jus in rem*",[197] declaring that:

> "contract rights are entitled to the protection of international law and that *the taking of such rights* involves an obligation to make compensation therefore. ...it has long been recognized that contractual rights may be indirectly expropriated...
>
> ...there is considerable authority for the proposition that contract rights are entitled to the protection of international law and that the taking of such rights involves an obligation to make compensation therefore" (emphasis added).[198]

176. The *Southern Pacific Properties* Tribunal was emphatic that it was not effectively deciding "contractual claims" or a contractual dispute, but a question of expropriation, and the claimants had pleaded it as such.[199]

177. ICSID tribunals seized of investment treaty disputes have maintained the same basic position. In *Wena Hotels* v. *Arab Republic of Egypt*, the Tribunal observed that "[i]*t is also well established that an expropriation is not limited to tangible property rights*".[200] The ICSID Tribunal went on to find that the investor's investment in a hotel complex had been expropriated, irrespective of the question whether or not the hotel lease agreements in question had been breached under the law applicable to them.[201] In *Middle East Cement* v. *Arab Republic of Egypt*, the parties concurred that the investor's rights under a License Agreement had been unilaterally suspended by the Government for a period. The Tribunal held without apparent difficulty that this effectively amounted to an expropriation of that investment.[202]

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194 *Phillips Petroleum Company Iran* v. *The Islamic Republic of Iran*, Award, 29 June 1989, 21 Iran-U.S. C.T R 79, para. 76: **Authority C-38**.

195 *Liberian Eastern Timber Corp* v. *Republic of Liberia*, Award, 31 March 1986, pp. 366-67: **Authority C-39**; also for example, *Amco Asia Corporation and others* v. *Republic of Indonesia*, Award, 20 November 1984, p. 454 *et seq*: **Authority C-40**.

196 **Authority C-31.**

197 *Ibid*, paras. 164-165.

198 *Ibid.*

199 *Ibid*, para 182.

200 *Wena Hotels Ltd.* v. *Arab Republic of Egypt*, Award, 8 December 2000, para. 98: **Authority C-41.**

201 *Ibid*, paras. 78, 108, 118; and *Wena Hotels Ltd.* v. *Arab Republic of Egypt*, Decision on Annulment, 5 February 2002, para. 86: **Authority C-42.**

202 *Middle East Cement* v. *Egypt*, paras. 107, 127-128: **Authority C-35**

178. Other *ad hoc* arbitral tribunals confirm the same position. In *Biloune and Marine Drive Complex Ltd.* v. *Ghana Investments Centre and the Government of Ghana*, a UNCITRAL Tribunal also confirmed that the indirect expropriation of a hotel and leisure complex under construction also amounted to a "*constructive expropriation of* [the investor's] *contractual rights in the project...*".[203] Summarising the state of the international law on the subject, the Tribunal in *Eureko B.V.* v. *Poland* held that:

> "there is an amplitude of authority for the proposition that when a State deprives an investor of the benefit of its contractual rights, directly or indirectly, it may be tantamount to a deprivation in violation of the type of provision contained in Article 5 of the Treaty. The deprivation of contractual rights may be expropriatory in substance and in effect" (footnote omitted).[204]

179. Further examples could be adduced to supplement this selection from arbitral practice, but it ought not to be necessary to do so. There can be no doubt that rights embodied in a state contract, such as CIOC's rights in the Contract, may be expropriated. That is what has occurred. CIOC's long-term rights under the Contract, as described in Section 4.2 above, as well as all of its other investments (both tangible and intangible) made in the furtherance of those rights, are protected by Article III of the Treaty against uncompensated expropriation. Yet, by the February 2008 Notice,[205] which wrongfully terminated the Contract, CIOC's investment has been expropriated.[206] CIOC has been deprived of its long-term rights to continue with the exploration and production of hydrocarbons in the Contract Area, as it was entitled to do under the Contract. CIOC's entitlement to receive the revenue stream resulting from its commercial exploitation of its Commercial Discovery was the principal return on its operations in Kazakhstan and this has been taken.

180. Moreover, Kazakhstan's expropriation of CIOC's investment has been an *unlawful* or *illegal* expropriation, in breach of Article III of the Treaty and applicable customary international law.[207] Kazakhstan has failed to comply with the following requirements of Article III:

(1) Kazakhstan has not acted for a legitimate "*public purpose*";

(2) Kazakhstan has failed to act "*on a non-discriminatory basis*"; and

(3) Kazakhstan has failed to pay to CIOC "*prompt, adequate and effective compensation*".

181. The conditions for the lawfulness of an expropriation are listed cumulatively, and the absence of any of the requirements listed in Article III makes the expropriation unlawful. For the following reasons it is

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203 *Biloune* v. *Ghana*, p. 209: **Authority C-34.**

204 *Eureko B.V.* v. *The Republic of Poland*, Partial Award, 19 August 2005, para. 241: **Authority C-43.**

205 **Exhibit C-18.**

206 Alternatively, CIOC's investment has been effectively expropriated. Interference with or wrongful repudiation of a contract may also lead to an indirect expropriation of a wider investment (or "*measures tantamount to expropriation*"), which if uncompensated is also proscribed by Article III of the Treaty. Whether the expropriation is direct or indirect, its effect has been the same: CIOC has been "*radically deprived of the economical use and enjoyment of its investments*" to use the words of the Tribunal in *Técnicas Medicambientales Tecmed S.A.* v *The United Mexican States*, Award, 29 May 2003: **Authority C-44.**

207 Article II(2)(a) of the Treaty provides that an investment "*shall in no case be accorded treatment less than that required by international law*".

clear that Kazakhstan has unlawfully expropriated CIOC's investment. Since June 2007, CIOC has suffered a campaign of persecution and victimisation at the hands of the Kazakh authorities, which led up to and culminated in the wrongful termination of the Contract on 1 February 2008. The expropriation was *discriminatory*: it was motivated by and targeted at CIOC because of Devincci Hourani's family connections with a political enemy of the Kazakh President. A successful business has been destroyed, to the detriment of the Kazakh Treasury, since it is not receiving the taxation revenue and royalties it would have done had CIOC been left to pursue the commercial production of the deposits. Such conduct is *arbitrary* and cannot be said to be for a public purpose. It also violated *specific contractual undertakings* made to CIOC. As shall be explained in more detail in Section 5.3 below, the wrongful termination of the Contract also disregarded the basic principle *pacta sunt servanda*:

(1) by ignoring the contractual termination measures;

(2) by seeking to overturn a contractual stabilisation provision; and

(3) by virtue of its manifest lack of substantiation and obvious political motive.

182. The failure by Kazakhstan to comply with the requirements of Article III places Kazakhstan in breach of Article III, thus invoking its international responsibility and, in principle, entitling CIOC to seek full *restitutio in integrum* or its monetary equivalent. The relevant legal principles concerning the remedies that flow from a finding of lawful or unlawful expropriation are addressed in Section 6, below.

(b) Violation of the obligation to accord CIOC's investment fair and equitable treatment

183. Kazakhstan has also breached Article II(2)(a) of the Treaty by failing to accord at all times to CIOC's investment "*fair and equitable treatment*".

184. It is clear, giving the words of Article II(2)(a) of the Treaty their ordinary meaning, in good faith, and in the light of the object and purpose of the Treaty, that the obligation to accord fair and equitable treatment is an autonomous standard, additional to general international law. Article II(2)(a) contains two separate standards, differentiating between the fair and equitable treatment obligation itself and the requirement that investments "*shall in no case be accorded treatment less than that required by international law*". Logic dictates that the two standards cannot be identical.[208] Arbitral practice confirms the same result.

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[208] See also, for example, *Tecmed* v. *Mexico*, paras. 155, 156, in which it was explained, that "[t]*he Arbitral Tribunal understands that the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement described above is that resulting from an autonomous interpretation, ... If the above were not its intended scope, Article 4(1) of the Agreement would be deprived of any semantic content or practical utility of its own*": **Authority C-44.**

185. In *Azurix* v. *Argentina*,[209] the Tribunal interpreted a clause in the Argentina-United States BIT similar to that contained in the present Treaty. The Tribunal confirmed that fair and equitable treatment was a standard that is separate and higher than the one under international law:

> "361. Turning now to Article II.2(a), this paragraph provides: 'Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than required by international law'. The paragraph consists of three full statements, each listing in sequence a standard of treatment to be accorded to investments: fair and equitable, full protection and security, not less than required by international law. Fair and equitable treatment is listed separately. The last sentence ensures that, whichever content is attributed to the other two standards, the treatment accorded to investment, will be no less than required by international law. The clause, as drafted, permits to interpret fair and equitable treatment and full protection and security as higher standards than required by international law. The purpose of the third sentence is to set a floor, not a ceiling, in order to avoid a possible interpretation of these standards below what is required by international law".[210]

186. Fair and equitable treatment therefore has a specific legal meaning, which is discerned by the normal process of treaty interpretation as elaborated in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.[211] This includes reference to the ordinary meaning of the treaty's terms, their context and the object and purpose of the treaty. In finding the object and purpose of a treaty its preamble is of particular importance.[212]

187. For example, in the *Azurix* case cited above, the Tribunal adopted just such an approach in interpreting a fair and equitable treatment obligation in the Argentina-US BIT.[213] The Tribunal identified the following meaning in the obligation to provide fair and equitable treatment:

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209 *Azurix Corp* v. *The Argentine Republic*. Award, 14 July 2006: **Authority C-45**.

210 *Ibid*, para. 361.

211 "Article 31: General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty

3. There shall be taken into account, together with the context:

   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation

   (c) any relevant rules of international law applicable in the relations between the parties

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

   (a) leaves the meaning ambiguous or obscure; or

   (b) leads to a result which is manifestly absurd or unreasonable".

212 *Tecmed* v. *Mexico*, paras. 155-156: **Authority C-44**.

213 *Azurix* v. *Argentina* **Authority C-44**.

> "360. In their ordinary meaning, the terms 'fair' and 'equitable'... mean 'just', 'even-handed', 'unbiased', 'legitimate.' As regards the purpose and object of the BIT, in its Preamble, the parties state their desire to promote greater cooperation with respect to investment, recognise that 'agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties', and agree that 'fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources.' It follows from the ordinary meaning of the terms fair and equitable and the purpose and object of the BIT that fair and equitable should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment. The text of the BIT reflects a positive attitude towards investment with words such as 'promote' and 'stimulate'. Furthermore, the parties to the BIT recognise the role that fair and equitable treatment plays in maintaining a stable framework for investment and maximum effective use of economic resources" (footnote omitted).[214]

188. Arbitral tribunals applying the requirement to accord fair and equitable treatment to investors have focused on the importance of protecting investors from State action which affects the stability of the legal and business framework, including contractual obligations, upon which the investor reasonably relied, and protection of the investor's legitimate expectations. Such legitimate expectations are based on the legal framework at the time of the investment and on any undertakings and representations made explicitly or implicitly by the host State. The legal framework on which the investor is entitled to rely will consist of legislation and treaties, of assurances contained in decrees, licenses and similar executive assurances as well as in contractual undertakings, such as those extended to CIOC in the form of the Contract. A reversal of assurances by the host State that have led to legitimate expectations will violate the principle of fair and equitable treatment.

189. Tribunal practice in this respect is extensive, with a consensus emerging as to the core features of the standard. In *CME* v. *Czech Republic*, the Tribunal held that the investor's entitlement to fair and equitable treatment was breached by the Czech Republic's actions which eroded the legal security of the contract rights underpinning the claimant's investment: "[t]*he Media Council breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest*".[215]

190. Another leading statement on the legal standard is contained in *Tecmed* v. *Mexico*,[216] which concerned the replacement of an unlimited license by a license of limited duration for the operation of a landfill. The Tribunal applied a provision in the BIT between Mexico and Spain guaranteeing fair and equitable treatment. The Tribunal found that this provision required transparency and protection of the investor's basic expectations. It said:

> "154. The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to

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214 *Ibid*, para. 360

215 *CME Czech Republic B.V. (The Netherlands)* v *Czech Republic*, Partial Award, 13 September 2001, para 611; **Authority C-46** Although the UNCITRAL tribunal in the related case *Lauder (Ronald S)* v. *Czech Republic*, Final Award, 3 September 2001 did not find the Czech Republic to have breached Article 3 of the treaty, its decision was based on a different view of the facts and not any different interpretation of the relevant legal principles· **Authority C-47**.

216 *Tecmed* v. *Mexico*; **Authority C-44**.

> international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investments and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation".[217]

191. By way of a further example, *Eureko B.V. v. Poland*,[218] concerned a share purchase agreement between the investor and the Polish State under which the investor acquired a minority participation in a Polish company. A related agreement guaranteed the investor the right to acquire further shares that would have given it control over the company. Subsequently, Poland changed its privatization policy and withdrew its consent to the acquisition of further shares by the investor. The Tribunal found it abundantly clear that Eureko had been treated unfairly and inequitably by Poland. The Respondent's organs had consciously and overtly breached Eureko's basic expectations.[219] Therefore, the Tribunal had no hesitation in concluding that the fair and equitable provision of the Treaty had been violated by the Respondent.[220] The Tribunal quoted a passage from *Tecmed* that emphasized the protection of the investor's basic expectations.[221]

192. Leading commentators also confirm the alteration of an investor's contractual rights by State action may violate the obligation to provide fair and equitable treatment. As stated by Schreuer:

> "...a wilful refusal by a government authority to abide by its contractual obligations, abuse of government authority to evade agreements with foreign investors and action in bad faith in the course of contractual performance may well lead to a finding that the standard of fair and equitable treatment has been breached".[222]

193. Fair and equitable treatment also includes the requirement of transparency. Transparency means that the legal framework for the investor's operations is readily apparent and that any decisions affecting the investor can be traced to that legal framework. The Tribunal in *Waste Management, Inc* v. *United Mexican States (No. 2)*, held the fair and equitable treatment standard found in Article 1105 of NAFTA

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217 *Ibid*, para. 154

218 *Eureko* v. *Poland*: **Authority C-43**

219 *Ibid*, paras. 231, 232

220 *Ibid*, para. 234.

221 *Ibid*, para. 235.

222 C. Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (2005) 6 *The Journal of World Investment & Trade* 357, 380: **Authority C-48.**

included the obligation to ensure, amongst other things, due process and transparency in the administrative process. The *Waste Management (No. 2)* Tribunal stated that:

> "the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, *or involves a lack of due process* leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete *lack of transparency and candour in an administrative process*. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant" (emphasis added).[223]

194. In *Saluka*, the tribunal reiterated the investor's entitlement to fair and equitable treatment consistent with principles of good faith, due process and non-discrimination:

> "the expectations of foreign investors certainly include the observation by the host State of such well-established fundamental standards as *good faith, due process and non-discrimination*. ...
>
> The Czech Republic, without undermining its legitimate right to take measures for the protection of the public interest, has therefore assumed an obligation to treat a foreign investor's investment in a way that does not frustrate the investor's underlying legitimate and reasonable expectations. A foreign investor whose interests are protected under the Treaty is entitled to expect that the Czech Republic will not act in a way that is manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy), or discriminatory (*i.e.*, based on unjustifiable distinctions)" (emphasis added).[224]

195. The judgment as to what constitutes a breach of the obligation to provide fair and equitable treatment "*cannot be reached in the abstract; it must depend on the facts of the particular case*".[225] It is clear, however, from the arbitral practice and scholarly commentary discussed above, that the content of the obligation to provide fair and equitable treatment contains certain elements, including, *inter alia* requirements:

(1) to provide a stable legal and business framework for investments made by foreign investors;

(2) to act in good faith in respecting the legitimate expectations of foreign investors;

(3) to act in a consistent, transparent and non-discriminatory manner; and

(4) to act in accordance with due process and procedural propriety.

196. Kazakhstan failed to meet any of these aspects in its treatment of CIOC's investment from mid 2007, and is in clear breach of the fair and equitable treatment standard.

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223 *Waste Management, Inc. v. United Mexican States (No. 2)*, Award, 30 April 2004, para. 98: **Authority C-49.**

224 *Saluka Investments B.V. v. Czech Republic*, Partial Award, 16 March 2006, paras. 303, 309: **Authority C-50.**

225 *Ibid*, para. 285.

197. Kazakhstan failed to provide a stable legal and business framework,[226] by *inter alia*:

(1) subjecting CIOC to numerous, untimely and irregular inspections and demands. For example, in September 2007, an inspection of CIOC's compliance with environmental laws took place despite the fact that these inspections were only intended to occur every two or three years and the last inspection had only taken place in the previous year;[227]

(2) subjecting CIOC to abusive, multiple and overlapping inspections, searches, investigations and audits, often at short notice;[228] and

(3) severely disrupting, if not effectively shutting down, CIOC as a company by the seizure of documents, records, computer hard-drives and company seals. As detailed in the witness statements of Devincci Hourani[229] and Omar Antar,[230] the inspection and scrutiny by the authorities was unprecedented and had drastic implications on staff morale and CIOC's ability to continue its business.

198. The fair and equitable treatment standard demands that a State should act in an "*even-handed and just*" manner.[231] Not only did Kazakhstan wrongfully terminate the Contract on baseless grounds, it also failed to respond to CIOC's representations and evidence that no breach was established.[232]

199. Kazakhstan has also failed to act in good faith in respecting the legitimate expectations of CIOC. Kazakhstan violated CIOC's legitimate expectations by *inter alia*:

(1) causing CIOC legitimately to expect, by the conduct of the Kazakh authorities in the light of the applicable law in extending the Contract in July 2007, that it would be entitled to continue with its operations pursuant to the Contract, including to exploit hydrocarbons commercially pursuant to the commercial production licence to which it was contractually entitled, yet alleging CIOC was in breach even whilst the extension was granted and wrongfully terminating the Contract just a few months later; and

(2) causing CIOC legitimately to expect, by approving the 2008 Annual Work Programme in December 2007, that it would be entitled to continue with its operations pursuant to the Contract, including to exploit hydrocarbons commercially pursuant to the commercial

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226 CIOC notes more generally that Kazakhstan has a poor record in terms of standards of good governance and high corruption levels, which compromise economic freedom. (Global Competitiveness Report 2008-2009 and Index of Economic Freedom 2008, online at www heritage.org).

227 Omar Antar Statement, para. 126(b).

228 Devincci Hourani Statement, para. 41; Omar Antar Statement, para. 129.

229 Devincci Hourani Statement, para. 40.

230 See Omar Antar's witness statement, paragraphs 126-132.

231 *Azurix*, para. 360; **Authority C-45.**

232 See, for example, paragraphs 131, 145 and 148, above.

production licence to which it was contractually entitled, yet just one month later unilaterally and wrongfully terminating the Contract.

200. CIOC entered into the Contract with Kazakhstan in the legitimate expectation that its terms would be upheld and that it would be entitled to proceed to commercial production, as the Contract provides. However, Kazakhstan's wrongful termination of the Contract violated these expectations and constitutes a violation of the fair and equitable treatment standard.

201. Kazakhstan failed to act in a consistent, transparent and non-discriminatory manner by *inter alia*:

(1) approving the extension of the Contract in July 2007, yet subsequently alleging that CIOC was in material breach of the Contract at that time;

(2) approving the 2008 Annual Work Programme at the end of 29 December 2007 yet terminating the Contract on 1 February 2008;

(3) acting arbitrarily,[233] failing to produce any cogent explanation or evidence that CIOC was in breach of the Contract and, as explained in Omar Antar's witness statement, apparently investigating CIOC and interrogating its employees in the hope of finding "*any* mistake or violation" by which to attack the company.[234]

202. Kazakhstan also failed to treat CIOC with due process and procedural propriety. CIOC was denied its right under the Treaty to manage and enjoy its investment in accordance with law, free from coercion and harassment from Kazakhstan and its instruments and agencies, by *inter alia*:

(1) failing to provide evidence of CIOC's alleged breaches of the Contract and declining or refusing to respond to CIOC's representations and evidence that no breach was established;[235]

(2) subjecting CIOC, its majority owner, senior management and employees to wholly unsubstantiated allegations of wrong-doing, unwarranted threats of criminal proceedings, and coercive or threatening behaviour to procure statements or evidence,[236] both before and after 1 February 2008;[237]

(3) threatening or placing at risk the personal safety, well-being and freedom of movement of CIOC's majority owner, senior management and employees, both before and after 1 February 2008;[238]

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233 Omar Antar Statement, para. 164.

234 Omar Antar Statement, para. 20, and see paragraphs 141 to 149, above.

235 See, for example, paragraphs 131, 145 and 148, above.

236 Omar Antar Statement, paras. 192, 231.

237 *e.g., Pope and Talbot, Inc* v. *Government of Canada*, Award, 10 April 2001, paras 156-181. Authority C-51

238 See for example Omar Antar Statement, paras. 19, 58, 227, and Devinci Hourani Statement, paras 40, 56, 68.

(4) conducting repeated and abusive searches, without establishing a lawful right to do so. Kazakh authorities interrogated CIOC's personnel on many occasions without providing copies of search warrants or other evidence of due process and the lawfulness of their conduct.[239]

(5) victimising and harassing CIOC, its majority owner, senior management and employees both before and after the wrongful termination of the Contract on 1 February 2008, including subjecting them to almost daily interrogations[240] (as well as interrogation by force[241]) and holding CIOC employees under house arrest.

(c) Violation of the obligation to ensure that CIOC's investment shall enjoy full protection and security

203. The second part of Article II(2)(a) of the Treaty provides that investments shall at all times "*enjoy full protection and security*". Kazakhstan has failed to meet this obligation to CIOC.

204. The obligation to ensure "*full protection and security*" primarily creates an obligation upon the host State to protect investments from physical harm or violations. The Tribunal in *Saluka B.V.* v. *Czech Republic*, for example, commented that:

> "the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force".[242]

205. The obligation to provide full protection and security is not merely an obligation of due diligence in respect of the conduct of third parties, but also entails positive obligations. By its own conduct, Kazakhstan has not only failed to safeguard the physical integrity of CIOC's investment "*against interference by use of force*", but by its acts it has perpetrated its own breach of this standard. Such conduct includes:

(1) Kazakhstan's continued harassment of CIOC, its majority owner, senior management and employees, as described in the witness statements of Devincci Hourani[243] and Omar Antar;[244]

(2) illegal detentions and interrogation, as vividly described in his witness statement by Devincci Hourani,[245] as well as by Omar Antar;[246]

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239 Devincci Hourani Statement, paras. 70, 73.

240 See paragraphs 54 and 69, above.

241 Devincci Hourani Statement, paras. 56-60 and paragraph 62, above

242 *Saluka* v *Czech Republic*, para. 483: **Authority C-50**

243 Devincci Hourani Statement, para. 33 *et seq*

244 Omar Antar Statement, paras. 124-131.

245 Devincci Hourani Statement, paras. 34-36, 50, 56-59, 72 and 77.

246 Omar Antar Statement, para. 131-2.

(3) repeated and abusive raids, searches, and audits by multiple and overlapping agencies of the Government, all as part of a campaign to persecute CIOC and its majority owner, as described at some length by both Devincci Hourani,[247] and Omar Antar;[248]

(4) false allegations of criminal conduct[249] and attempted extortion;[250] and

(5) threats to the personal safety and well-being of CIOC's majority owner, senior management and employees, as described by Devincci Hourani,[251] and briefly noted in paragraph 78, above.

206. The obligation to provide full protection and security does not only cover the physical security of an investment but can also extend to *legal security* and *protection*. Indeed, leading commentators such as Redfern and Hunter (with Blackaby and Partasides) confirm that "[w]*hilst this standard has normally been applied in situations of physical protection of real and tangible property, its scope has been extended to other circumstances*".[252] Dolzer and Stevens' review of investment treaties leads them to conclude that since the issue of physical protection of investments is dealt with elsewhere in modern treaties (Article II(1)(e) of the present Treaty), "*it may be assumed that this provision* [full protection and security] *in some measure serves to amplify the obligations that the parties have otherwise taken upon themselves*".[253] Arbitral practice supports this interpretation. As the Tribunal in *CME Czech Republic B.V. (The Netherlands)* v. *The Czech Republic* commented:

> "the host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued".[254]

207. The Treaty therefore imposes a duty on Kazakhstan to provide full protection and security in relation to the legal arrangements underpinning CIOC's investment, which Kazakhstan breached when it failed to ensure the legal security of those investments and in particular, to protect CIOC from the abusive conduct of State officials culminating in the wrongful termination of the Contract.

(d) Violation of the obligation not to impair CIOC's investment by unreasonable or discriminatory measures

208. Article II(2)(b) of the Treaty provides that neither Party shall in any way "*impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments*".

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247 Devincci Hourani Statement, paras. 20, 33-39, and 41.

248 Omar Antar Statement, para. 129.

249 Amended Request for Provisional Measures, paras. 21-24; Devincci Hourani Statement, paras. 51, 65, Omar Antar Statement, para. 206;

250 Devincci Hourani Statement, paras. 27 and 48 and see paragraphs 50 and 58, above.

251 Devincci Hourani Statement, paras. 40, 56-60, 68, 76; see also Omar Antar Statement, para. 229

252 A. Redfern and M. Hunter with N. Blackaby and C. Partasides, *Law and Practice of International Commercial Arbitration* (4th edn., London: Sweet & Maxwell, 2004) 492 para. 11-29: **Authority C-52.**

253 R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (The Hague: Martinus Nijhoff, 1995) 61: **Authority C-53.**

254 *CME* v. *Czech Republic*, Partial Award, 13 September 2001, para. 613: **Authority C-46.**

209. Kazakhstan's actions, including its harassment of CIOC, its majority owner, senior management and employees have been arbitrary and discriminatory and have impaired the "*the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of* [CIOC's] *investments*" thereby constituting a breach of the Treaty.

210. In *Saluka*, the Tribunal explained that "*impairment*" of an investment means "*any negative impact or effect caused by 'measures'*" taken by the host State.[255] The impairment of CIOC's investment is obvious:. the wrongful termination of the Contract has denied CIOC its contractual rights and the economic benefit of its efforts.

211. As to the meaning of "*arbitrary*" measures, the Tribunal in *Lander* v. *The Czech Republic*[256] said:

> "The Treaty does not define an arbitrary measure. According to Black's Law Dictionary, arbitrary means *'depending on individual discretion; (...) founded on prejudice or preference rather than on reason or fact'* (Black's Law Dictionary 100 (7th ed. 1999))" (emphasis original).[257]

212. According to learned commentators:

> "it is not enough that a governmental measure adversely affecting foreign investment is formally justified on the basis of the applicable law; one must also consider whether it bears any rational relationship to a legitimate government policy. If it lacks such a relationship to an extent that it creates the effect of 'shock' or 'surprise', or at least a substantial dissatisfaction, a breach of the standard will likely have been established".[258]

213. Kazakhstan's actions in the present case were arbitrary in the sense of Article II(2) of the Treaty. The measures affecting CIOC's position were not based on rational decision-making or the rule of law, but were motivated by political purpose. The overlapping and extensive searches, inspections and audits of CIOC, described in paragraphs 67 to 70 are sufficient to cause both "*shock*" and "*surprise*". According to Omar Antar, "[t]*here were so many of them it was not believable, dealing with so many issues*",[259] and substantially interfering with CIOC's business.

214. Kazakhstan's conduct was also arbitrary in alleging that CIOC was under notice of breach since the March 2007 Notice, even whilst an extension to the Contract was negotiated and formally approved. Further evidence of arbitrary conduct is the October 2007 Notice, which alleges a breach of Contract less than three months after having agreed the extension, and the December 2007 Notice which alleges a failure to comply with obligations to be completed by the end of 2007 based on evidence only concerning the third quarter of that year. The approval of the 2008 Annual Work Programme on 29

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255 *Saluka* v. *Czech Republic*, para. 458: **Authority C-50**.

256 *Lauder* v. *Czech Republic*: **Authority C-47**.

257 *Ibid*, para. 221. Other tribunals have noted the use of this definition with approval: *Occidental Exploration and Production Co.* v. *Ecuador*, Award, 1 July 2004, para. 162. **Authority C-54**, and *CMS Gas Transmission Company* v. *Republic of Argentina*, Award, 12 May 2005, para 291: **Authority C-55**.

258 V. Heiskanen, 'Unreasonable or discriminatory measures as a cause of action under the Energy Charter Treaty' (2007) *International Arbitration Law Review* 104, 110: **Authority C-56**.

259 Omar Antar Statement, para. 125.

December 2007, followed by the termination of the Contract just over a month later was also wrongful and arbitrary.[260]

215. The unfortunate truth is that there was no factual justification for the termination of the Contract, nor did it bear any rational relationship to a legitimate government policy. Rather, Kazakhstan's actions were manifestly "*founded on prejudice or preference rather than on reason or fact*".[261] The wrongful termination was the pinnacle of the persecution and campaign of harassment against CIOC, its majority owner, senior management and employees, motivated by a an apparent desire to victimise alleged associates of Rakhat Aliyev.[262] Such conduct was also "*discriminatory*" because it was targeted at a particular investor, CIOC, since it is majority owned by Devincci Hourani and because he has family connections with Rakhat Aliyev, the President's rival.

(c) Violation of the obligation to observe obligations entered into with investors

216. The obligation created in Article II(2)(c) of the Treaty requires that Kazakhstan "*observe any obligation it may have entered into with regard to investments*". The effect of this provision, commonly referred to as an "umbrella" clause, is both mandatory and clear. Article II(2)(c) is a treaty obligation requiring Kazakhstan to observe obligations with regard to investments of protected investors, such as those contained in the Contract to which it and CIOC are party. As a matter of treaty interpretation, Article II(2)(c) is a distinct and self-evidently mandatory treaty obligation, breach of which is a breach of the Treaty. The category of "*obligation*" referred to within Article II(2)(c) is not limited in scope or type, nor is there any qualification on the directive that States shall "*observe*" such obligation. The weight of arbitral practice and scholarly commentary supports the conclusion that a violation of a contract entered into between an investor and a State, either itself constituting or otherwise relating to an investment, may also be a violation of a clause such as Article II(2)(c).

217. In the *SGS Société Générale de Surveillance S.A.* v. *The Republic of the Philippines* case,[263] an ICSID Tribunal interpreting a similar provision to Article II(2)(c) of the present Treaty (Article X(2) of the Swiss-Philippines BIT) emphasised the value to investors of an international law remedy in respect of obligations that may be governed by the internal law of the host State, and expressed the view that this was at least one aspect of the intended effect of the provision:

> "It is a conceivable function of a provision such as Article X(2) of the Swiss-Philippines BIT to provide assurances to foreign investors with regard to the performance of obligations assumed by the host State under its own law with regard to specific investments – in effect, to help secure the rule of law in relation to investment protection. In the Tribunal's view, this is the proper interpretation of Article X(2)".[264]

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260 Omar Antar Statement, para. 175.

261 **Authority C-47.**

262 Devincci Hourani Statement, paras. 17-19, 124, Omar Antar Statement, paras. 21, 25, 32.

263 *SGS Société Générale de Surveillance S A.* v. *The Republic of the Philippines*, Decision on Jurisdiction, 29 January 2004: **Authority C-57.**

264 *Ibid*, para. 126.

218. Considering the application in that case of Article X(2) to a contract between the investor and the host State, the *SGS* v. *Philippines* Tribunal went on to express the view that:

> "Article X(2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments".[265]

219. In similarly concrete terms, the Tribunal in *Noble Ventures, Inc.* v. *Romania*[266] explained that the provision is:

> "to be understood as protecting investors also with regard to contracts with the host State generally in so far as the contract was entered into with regard to an investment".[267]

220. The Tribunal confirmed that a clause such as Article II(2)(c) is intended to encompass contracts concluded directly between a qualifying investor and a host State, such as the present Contract. Although the claim failed in that case, the Tribunal was also apparently of the firm view that breach of a contract may also be a violation of an umbrella clause, as a matter of international law, engaging the host State's international responsibility:

> "...the host state may incur international responsibility by reason of a breach of its contractual obligations towards the private investor of the other Party, the breach of contract being thus 'internationalized', i.e. assimilated to a breach of a treaty. In such a case, an international tribunal will be bound to seek to give a useful effect to the provision that the parties have adopted".[268]

221. By way of final example, the Tribunal in *Eureko B.V.* v. *Republic of Poland*,[269] upheld a violation of Article 3.5 of the Netherlands-Poland BIT, this being also an umbrella clause cast in similar terms to Article II(2)(c) of the present Treaty. The Tribunal held that a simple breach of contractual obligations entered into between the investor and the host State may amount to a violation of the umbrella clause:

> "...insofar as the Government of Poland has entered into obligations vis-à-vis Eureko with regard to the latter's investments, and insofar as the Tribunal has found that the Respondent has acted in breach of those obligations, it stands, *prima facie*, in violation of Article 3.5 of the Treaty".[270]

222. As established in Section 5.3, below, Kazakhstan has failed to comply with the obligations which it freely assumed under the Contract. Kazakhstan breached the Contract, *inter alia*, by unilaterally and wrongfully terminating it without cause and requiring CIOC to cease performance prior to the determination by an arbitral tribunal, contrary to the express terms of Article 29.6 of the Contract. Kazakhstan also effectively denied CIOC its entitlement to the reimbursement of its Exploration costs

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265 *Ibid*, para. 128.

266 *Noble Ventures, Inc.* v. *Romania*, Award, 12 October 2005: **Authority C-58.**

267 *Ibid*, para. 52.

268 *Ibid.*, para. 54.

269 *Eureko* v *Poland*: **Authority C-43.**

270 *Ibid*, para. 244.

and in paragraphs 133 to 190 of Omar Antar's witness statement, CIOC contested the alleged breaches of the Contract on several occasions by letter and in person, both on the basis that such breaches had not occurred or, if they did exist, that they were not material.

227. The first allegations of breach of the Contract came on 24 September 2007 when CIOC received a copy of a notice dated 25 March 2007 (which it had not previously seen) which threatened termination of the Contract unless violations were remedied within one month.[272] Receipt of this notice was less than two months after CIOC had completed and signed the extension of the Contract for two years.[273] It is extraordinary that if, in March 2007, the MEMR believed that CIOC was in breach of its contractual obligations it would have granted an extension of the Contract to CIOC. CIOC's has grave concerns about the March 2007 Notice both in form and substance, as set out in paragraphs 126 to 128, above.

228. It is also important to note that the Subsoil Law specifically stipulates that a subsoil use contract may only be extended in the event that the subsoil user complies with its obligations under the contract, minimum and annual work programmes.[274] Therefore, the fact that the MEMR extended the Contract by means of Amendment 3[275] could only have been on the basis that CIOC was in compliance with its obligations as at 27 July 2007. There exists an inherent contradiction that if the violations listed in the March 2007 Notice were valid, an extension of the Contract in July 2007 would not have been granted under the Subsoil Law. Of course, the Contract *was* extended.

229. Kazakhstan's termination of the Contract on the basis that CIOC was in breach of its contractual obligations is further undermined by the events of late November and December 2007. Having previously stated that CIOC was in breach of the Contract in the September 2007 Prescriptive Notice, as described in Section 4.8 above, Kazakhstan then sent CIOC a "*Notification of Resumed Operations*" on 27 November 2007, apparently happy for CIOC to continue with its operations. Kazakhstan did raise additional alleged violations and, only just days later, issued a further notice alleging that CIOC was in violation of its obligations according to the data contained in CIOC's form #2-LKU report for the third quarter of 2007. This was extraordinary since the #2-LKU report had been filed on 16 October 2007, yet the MEMR had not mentioned any problems it brought to light when it had sent the November "*Notification of Resumed Operations*". Moreover the #2-LKU report could not confirm a breach of the Contract as it only confirmed the third quarter of 2007, from July to the end of September.[276] Then, at the end of December the 2008 Annual Work Programme was approved by TU Zapkaznedra. However, just over a month later, the MEMR terminated the Contract. As detailed in Section 3 and in more detail in Omar Antar's witness statement, there is no rationale or supported basis

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272 **Exhibit C-109.**

273 Amendment 3: **Exhibit C-8.**

274 See Article 43(1) of the Subsoil Law: **Authority C-28.**

275 Amendment 3 **Exhibit C-8.**

276 Omar Antar Statement, para. 164.

for Kazakhstan's assertions that CIOC was in breach of the Contract, except that such allegations were consistent with the ongoing persecution against CIOC and Devincci Hourani.

230. In the event that the contractor contests whether it is in breach of its obligations, or whether a breach is material, Clause 29.6 provides that "*no termination shall occur unless an unremedied material breach shall have been judged by the final award of arbitration in accordance with Article 27 of this Contract*".[277] Kazakhstan therefore breached the Contract, since it wrongfully terminated the Contract on 1 February 2008, before the prescribed arbitral procedures had even been initiated. In addition, Kazakhstan was contractually obliged to continue with the performance of its obligations until a judgment by an arbitral tribunal and to ensure performance and termination of the Contract was in accordance with the Contract.[278]

231. By the time of the expropriation, CIOC had established a basis for the procedure outlined in Clause 10 of the Contract for confirming a Commercial Discovery and, on 29 February 2008, it in fact received a state evaluation of the reserves under Clause 10.3 of the Contract.[279] Under Clause 10.5 of the Contract, a Commercial Discovery gave CIOC the exclusive right to proceed to the Production stage of the Contract. However, Kazakhstan's conduct, in breach of these contractual obligations, has deprived CIOC of this opportunity.

232. As CIOC noted at the time, the purported termination was also not in compliance with the Subsoil Law. According to the February 2008 Notice Kazakhstan terminated the Contract pursuant to Article 45-2, clause 1, subclause 2 of the Subsoil Law. This Article states that the competent authority shall have the unilateral right to terminate the Contract "*if the Subsoil Users fail to take the measures as specified in Article 70 of this Law*".[280] As detailed above, Kazakhstan had previously sent notices to CIOC under Article 70 of the Subsoil Law stating that CIOC had violated its contractual obligations and that failure to remedy such violations would result in termination of the Contract. However, these notices, sent to CIOC, did not fall within the scope of the applicable version of Article 70 of the Subsoil Law and thus constituted no ground for termination of the Contract.

233. Clause 28.2 of the Contract states that:

> "Changes and additions of the Legislation of the Republic of Kazakhstan that deteriorate the position of the Contractor, made after the conclusion of the Contract shall not apply to the Contract".[281]

234. This is a "stabilisation" clause protecting the Contractor from adverse changes in the laws of Kazakhstan, after the conclusion of the Contract. Article 70 of the Subsoil Law was amended on 1

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277 Clause 29.6 of the Contract· **Exhibit C-4.**

278 Clauses 27.10 and 7.3.1· **Exhibit C-4.**

279 **Exhibit C-4.**

280 Article 45-2, clause 1, sub-clause 2 of the Subsoil Law (current version): **Authority C-28.**

281 Clause 28.2 **Exhibit C-4.**

December 2004.[282] The amendments made to Article 70 meant that the scope of the clause was broadened, effectively to the detriment of the Contractor's position. It was the previous conditions in which an Article 70 notice may be issued that were applicable, in the light of Clause 28.2 cited above, and not Article 70 as amended after the date of the Contract. CIOC did not fall into either of the criteria contained in the Subsoil Law in force as at the date of the Contract (nor any other bases for termination) and therefore the notices sent by Kazakhstan to CIOC were not in compliance with the Contract or the law. Accordingly, any failure by CIOC to comply with the notices would not constitute a breach of the Contract under subclause 2 of clause 1 of Article 45-2 of the Subsoil Law and, thus, would not provide a valid ground for termination.[283]

235. In addition, Article 45-2, clause 1, subclause 4 of the Subsoil Law stipulates that the Contract may be terminated in the event of a material breach of the contractual terms. As mentioned above, the Contract also contains such materiality wording stating that termination shall only happen in the event of a substantial violation (Clause 29.5) or "*material breach*" (Clause 29.6) of the Contract. CIOC does not accept that even if there were breaches of the Contract (which is denied) they were significant enough to fall within the termination provisions within the Contract (or the Subsoil Law, for that matter). In any event, Kazakhstan did not invoke material breach of the Contract in the February 2008 Notice.

236. In order for a violation of contractual terms to be properly established so that the competent authority can terminate the Contract, the State bodies should refer to specific examples of violations and documents or data which describe those violations.[284] Without such evidence, any termination by the State body will not be reasoned and thus may be unlawful. Kazakhstan has failed to produce evidence of the contractual violations on which the February 2008 Notice was based. At the time of the termination, CIOC sent a letter complaining that the officials at the department never seemed to look at the documents that CIOC produced as evidence of its compliance with all of its obligations.[285] Additionally, under Kazakh civil law, there is a general principle that a person must act in good faith, reasonably and fairly when exercising its rights.[286] CIOC submits that such principle should also apply to Kazakhstan's actions under the subsoil contracts, including in the situation in which Kazakhstan purports to terminate a contract under the Subsoil Law. This principle of good faith, fairness and reasonableness of actions implies that the State should only use a radical remedy, such as unilateral termination of the Contract, in circumstances when it is appropriate and as a result of the gross violations of the Contract by the subsoil user. If the violations of the Contract are not material and the subsoil user is performing all necessary actions to eliminate such violations (if there are any), it may be argued that termination of the contract is not in good faith, reasonable or fair.

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282 Article 70 of the Subsoil Law (current version): **Authority C-28.**

283 Article 45-2 (1)(2) of the Subsoil Law provides the basis for termination of the Contract if there is incompliance with only those notices which are sent under and fall within the scope of Article 70 of the Subsoil Law, **Authority C-28.**

284 See Regulation on Performance of Monitoring and Control over Compliance with the Provisions of Subsoil Use Contracts, approved by the Resolution of the Government No. 863-1 dated October 1, 2007: **Authority C-60.**

285 **Exhibit C-26.**

286 Article 8(4) of the Civil Code (General Part): **Authority C-61.**

237. It is also an implied term of the Subsoil Law that when a time limit is set for remedying contractual violations such period shall be sufficient or reasonable enough for the subsoil user in fact to be able to remedy the breaches. Kazakhstan failed to act reasonably, in compliance with these implied terms by, for example, demanding that CIOC completed its drilling programme in just three months despite having agreed in the extension of the Contract a period of one and a half more years in which to do so as at 1 February 2008.[287] The failure to produce evidence or examples of the contractual violations and Kazakhstan's failure to act reasonably in terminating the Contract means that such termination was unlawful.

238. It is clear that in accordance with the grounds for termination cited by Kazakhstan and the terms of the Contract, Kazakhstan's termination of the Contract was unlawful on a number of bases. Kazakhstan has further breached its contractual obligations by requiring CIOC to cease performance of its obligations prior to the decision of an arbitral tribunal, thereby expropriating CIOC's investment and causing CIOC substantial loss and damage.

[287] Exhibit C-110.

243. Under Article 35 of the ILC Articles, Kazakhstan is under an obligation to make restitution, that is "*to re-establish the situation which existed before the wrongful act was committed*" to the extent that this is possible or proportionate. As has been made clear above and in previous correspondence with the Tribunal in relation to the Request for Provisional Measures, CIOC has accepted that restitution of the field and its Contract rights is not possible.[296] Therefore, under Article 36, Kazakhstan is under an obligation to compensate CIOC for the damage caused. Such compensation is to cover "*any financially assessable damage including loss of profits insofar as it is established*".[297]

(b) Compensation

244. Should the Tribunal determine that the expropriation was in fact lawful (or at least fail to conclude that the expropriation was unlawful) CIOC claims compensation for lawful expropriation. The measure of compensation for lawful expropriation is provided for by the *lex specialis* established by the United States and Kazakhstan. Article III(1) of the Treaty states as follows:

> "Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be calculated in a freely useable currency on the basis of the prevailing market rate of exchange at that time; be paid with out delay; include interests at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable'.

245. The fair market value of CIOC's investment has been calculated by Mr Tim Giles based on the set out in the Treaty. The Tribunal is respectfully referred to Mr Giles' Quantum Report, produced together with this Memorial, for a detailed explanation and methodology as to how the compensation or damages due to CIOC have been calculated and the results of those calculations.

(c) Damages

246. In the event that the Tribunal finds that there has been an unlawful expropriation, or violation of the obligations in Article II of the Treaty, the standard of damages is not provided for in the Treaty but is determined by customary international law as reflected in the ILC Articles. In relation to expropriation, it is well established that the compensation available in the event of unlawful expropriation is (or can be) higher than in the case of lawful expropriation. The Tribunal in *Siemens* v. *Argentina* expressed this in the following terms:

> "352. The key differences between compensation under the Draft Articles and the *Factory at Chorzów* case formula, and Article 4(2) of the Treaty [dealing with compensation for expropriation] is that under the former, compensation must take into account 'all financially assessable damage' or 'wipe out all the consequences of the illegal act' as opposed to compensation 'equivalent to the value of the expropriated investment" under the Treaty. Under customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages".[298]

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296 **Exhibit C-50.**

297 Article 36: **Authority C-29.**

298 *Siemens A.G.* v. *Argentina*, Award, 6 February 2007,: **Authority C-65.**

247. At the outset it should be noted that CIOC has not quantified a claim in respect of unlawful expropriation but reserves the right to do so during the course of these proceedings and to claim: (i) any increase in the fair market value of the business prior to the Tribunal issuing an Award; and (ii) consequential damages (including, without limitation, all costs associated with pursuing the claim such as legal costs and management expenses).

248. CIOC has only presented, at this stage of the proceedings, a calculation of the quantum of its claim based on the existence of an expropriation. Again, CIOC has not separately quantified the damages due to it for violation of the separate obligations in Article II of the Treaty, since the damage done to CIOC by these violations is in a sense subsumed in the losses caused to CIOC by the expropriation. The same might be said for Kazakhstan's violation of the Contract. Nevertheless, CIOC reserves the right separately to quantify the damages due to it for such violations in the course of these proceedings.

(d) Moral damages

249. CIOC does bring a claim for moral damages, on the basis of the well established principle of international law that financially assessable damage includes compensation for moral damage (or non-material damage as it is also categorised).[299] Such compensation will form part of the full reparation due for the damage caused by Kazakhstan's internationally wrongful acts. The availability of moral damages in forming part of the full reparation due was clearly set out in the *Lusitania* case:

> "That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor [*sic*] as compensatory damages, but not as a penalty". [300]

250. Such moral damage is generally understood to encompass also loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life.[301]

251. Further, international case law makes it clear that moral damages can be awarded to either a legal person or a natural person. Most recently in *Desert Line* v. *Yemen* the Tribunal awarded the legal entity, Desert Line, moral damages on the basis that not only had it suffered harm (loss of reputation) but that the physical health of its executives had been affected.[302]

252. The Tribunal in the earlier case of *Benvenuti et Bonfant* v. *Congo* also awarded moral damages to the legal entity as compensation for the measures to which the Claimant had been subject (which included

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299 See, for example commentary in S Ripinsky and K Williams, *Damages in International Investment Law* (London: BIICL, 2008) 307: **Authority C-66.**

300 *Opinion in the Lusitania Cases*, 1 November 1923 (1923) VII RIAA 32, 40: **Authority C-67.**

301 Article 36(2) para. 16: **Authority C-29.**

302 *Desert Line Projects LLC* v. *The Republic of Yemen*, Award, 6 February 2008: **Authority C-68.**

expropriation and the fixing of prices which resulted in a loss for the Claimant) and for the instigation of criminal proceedings against Mr Bonfant, as agent of the investment company.[303]

253. It is, therefore, accepted that injury or damage to the executives or shareholders of a legal entity constitutes damage to the legal entity itself as those individuals are prevented from doing their jobs properly or, indeed, at all.

254. CIOC has suffered non-material damage through the persistent harassment and intimidation of itself, its majority owner, senior management and employees. CIOC claims such monetary sums as the Tribunal shall deem appropriate in respect of moral damages for this campaign of harassment and intimidation.

6.2 Kazakhstan's liability for breach of the Contract

255. In respect of CIOC's claim arising out of or relating to an "*investment agreement*", CIOC submits that Kazakhstan has breached its obligations under the Contract having wrongfully terminated it without cause, failed to comply with requirements as to the lawful termination, and by requiring CIOC to cease performance prior to the determination that termination was warranted by an international arbitral tribunal. The Contract states that it shall be governed by Kazakh law unless stated otherwise by the international treaties to which the State is a party.[304]

256. Under Kazakh law, the wronged party to an unlawful termination of a contract can request one of two major remedies. First, the party may claim for a declaration of the termination to be unlawful and that the contract shall be restored plus possibly claiming damages incurred within the period when the unlawful termination occurred and until the contract is restored or, secondly, the party may claim for compensation of damages suffered by it as a result of the unlawful termination of the contract by the other party.[305] If a party opts for damages only, it accepts termination of the Contract as a fact however, this does not mean that the party accepts that the termination is lawful. Restoration of the Contract is not possible and therefore only the second option above would be applicable to CIOC's claim against Kazakhstan. As a result, CIOC is entitled to claim compensation for damages suffered by it as a result of the unlawful termination of the Contract by Kazakhstan.

257. Damages, under Kazakh law, include all real damages and consequential damages incurred as a result of the unlawful termination of a contract. [306] Real damages consist of the value of lost or damaged assets, as well as expenditure which is incurred or must be incurred by a wronged party as a result of the unlawful termination of a contract. Consequential damages include the net value of the lost anticipated profits which a wronged party would have received under the normal conditions of the turnover should a contract have not been unlawfully terminated. When determining the amount of lost

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303 *Benvenuti et Bonfant srl* v. *The Government of the People's Republic of the Congo*, Award, 8 August 1980 **Authority C-69**

304 Clause 26.1 of the Contract, **Exhibit C-4**.

305 Article 9(1) of the Civil Code (General Part): **Authority C-61**.

306 *Ibid*, Article 9(4).

anticipated profits, the measures and preparations undertaken by the wronged party with the aim to receive such profits should be taken into account.[307]

258. The compensation of damages should aim to put the wronged party in position it would have been in if a contract was properly performed by the other party. As a general rule, when determining the amount of damages suffered as a result of breach of contract, one should take into account the prices which existed at the place where the contract had to be performed at the time when the party at fault voluntarily satisfied the claim of the wronged party or, if there was no voluntary satisfaction, at the time of filing of the lawsuit by the wronged party. However, depending on the circumstances, the court may award damages calculated at the prices as of the award date or the date of actual compensation of damages.[308] The latter possibility is applied in order to ensure compensation of inflation damages to the wronged party.

259. Kazakh law expressly provides that damages caused by the unlawful actions of the State body shall be compensated by the State.[309] Therefore, Kazakhstan shall compensate CIOC for all damages suffered by the latter as a result of unlawful termination of the Contract.

260. CIOC reserves its right to quantify the damages due to it in accordance with the above principles.

6.3 The certified reserves

261. Oil and gas resources are physically located in reservoirs deep underground and cannot be visually inspected or counted, and so the amount of oil or gas in a reservoir cannot be measured with absolute precision. As a result, it is common for industry professionals to use their experience and professional judgment to estimate the volume of oil and gas present from the geological, petrophysical and seismic data available.

262. Therefore, CIOC has instructed Mr Sven Tiefenthal,[310] an oil and gas industry consultant and certified reserves auditor, to produce an independent assessment of the estimated reserves in the Contract Area. Mr Tiefenthal's assessment takes the form of the separate Reserves Report, submitted with this Memorial. Mr Tiefenthal's conclusions as to the reserves are set out in the following table:

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307 *Ibid*, Article 350(4).

308 *Ibid*, Article 350(3).

309 *Ibid*, Article 9(6).

310 Mr Tiefenthal's credentials and experience are contained at Annex A to the Reserves Report.

SPE-PRMS Class	Group	Formation	Unrisked Volumes, mln. tons	Risk factor	Risked Volumes, mln. tons
Reserves	Supra-salt	Ju	3.633	1	3.633
	"	Tr	1.059	1	1.059
	"	P2	0.642	1	0.642
	Salt overhang	P2-OH1	0.636	1	0.636
Sub-total			5.969		5.969
Contingent Resources	Supra-salt	K1	0.332	0.5	0.166
	Salt overhang	P2-OH1	1.175	0.7	0.822
	"	P2-OH2	1.284	0.5	0.642
	Sub-salt	Art+Sak	10.249	0.2	2.050
Sub-total			13.040		3.680
Prospective Resources	Salt overhang	P2-OH3	1.828	0.56	1.024
	Sub-salt	Asselian	2.891	0.1	0.289
	"	U Carb. limestone	3.430	0.06	0.206
Sub-total			8.149		1.519
Total					11.168

263. In summary, Mr Tiefenthal concludes that the Contract Area holds approximately 11.168 million tonnes risked volumes, comprising reserves, contingent resources and prospective resources.

6.4 Quantum

264. As stated by Article III(1) of the Treaty, the compensation payable for lawful expropriation "*shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier*".[311] "*Fair market value*" is the standard of compensation commonly applied in cases of direct or indirect expropriation,[312] including under bilateral and multilateral investment treaties.[313]

(a) The appropriate valuation methodology

265. The discounted cash flow (**DCF**) method of valuation is the most appropriate method to determine the "*fair market value*" of CIOC's investment in this case. The DCF method has been used widely for valuations of various expropriated assets in other international arbitrations and the appropriateness of the DCF method has also been confirmed by the practice of the United Nations Compensation Commission.[314] The DCF method estimates the future free cash flows that would be generated by an

311 Article III (1) of the Treaty: **Exhibit C-1.**

312 M.A. Abdala and P.T. Spiller, "Damage Valuation of Indirect Expropriation in International Arbitration Cases" (2003) 14 *American Review of International Arbitration* 451: **Authority C-70.**

313 Redfern and Hunter, 593 **Authority C-52.**

314 See, for example, UNCC, *Report and Recommendations Made by the Panel of Commissioners Concerning the Second Instalment of 'E1' Claims*, S/AC.26/1999/10, 24 June 1999, para 439: **Authority C-71.**

income-earning asset and then discounts those cash flows using a "discount rate" to identify its net present value. The discount rate is necessarily a variable which entails the exercise of judgment. Nevertheless, the DCF method is the most widely-used valuation tool for valuing both going concerns and greenfield investments.

266. One instance of the DCF method being used (and one which has similarities to this case) was in *Phillips Petroleum* v. *Iran*.[315] The claimant's contractual rights to extract oil in Iran's territorial waters were found to have been expropriated when Iran refused to allow the claimant to lift the oil it was entitled to under the contract. The contractual rights constituted a going concern and the claimant was entitled to the "*fair market value*" based on the DCF method. The Tribunal noted that where there is no:

> "active and free market for comparable assets at the date of taking, a tribunal must, of necessity, resort to various analytical methods to assist it in deciding the price a reasonable buyer could be expected to have been willing to pay for the asset in a free market transaction, had such a transaction been possible at the date the property was taken".[316]

267. The Tribunal then stated that the DCF method is one means of valuation:

> "...the Tribunal does not understand the Claimant's calculations of anticipated revenues from the JSA as a request to be awarded lost future profits, but rather as a relevant factor to be considered in the determination of the fair market value of its property interest at the date of taking. The Tribunal recognizes that a prospective buyer of the asset would almost certainly undertake such DCF analysis to help it determine the price it would be willing to pay and that DCF calculations are, therefore, evidence the Tribunal is justified in considering in reaching its decision on value".[317]

268. In *Starrett* v. *Iran*,[318] the Tribunal held that an expropriation had occurred and instructed an independent expert to give an opinion on the issue of valuation. The expert based his valuation on the DCF method which the Tribunal accepted, stating that the claimant was entitled to "just compensation" which "shall represent the full equivalent of the property taken", as summarised by Lieblich.[319] Lieblich follows by setting out the strengths of the DCF method in that it:

> "enables the parties and the tribunal to focus on each of the issues bearing on the property's value. The goal of the method is to arrive at the most reasonable possible projections of revenues and expenses, based on the best available information".

269. In *ADC* v. *Hungary*,[320] the investor was awarded rights to construct, renovate and participate in the operation of two airport terminals in Hungary. The State then terminated the 12-year contract after only two years, thereby expropriating the contract. The Tribunal found that the expropriation was

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315 *Phillips Petroleum* v. *Iran*: **Authority C-38.**

316 *Ibid*, para 85.

317 *Ibid*, para 112.

318 *Starrett Housing Corporation* v. *Iran*, Award, 14 August 1987, 16 Iran-US C.T.R. 112: **Authority C-72.**

319 W Lieblich, "Determinations by International Tribunals of the Economic Value of Expropriated Enterprises" (1990) 7(1) *Journal of International Arbitration* 69: **Authority C-73.**

unlawful and, on the basis of customary international law, ruled that the fair market value of the investment should be calculated using the DCF method as of the date of the award to restore the claimant to the position it would have been in by accounting for increases in value of the investment from the date of the expropriation.[321]

270. In the event that the Tribunal finds that an expropriation has not occurred but that there is a breach of another standard of the Treaty (for example, the fair and equitable treatment standard), CIOC submits that it would still be entitled to damages calculated on the basis of a DCF valuation. In *CME* v. *Czech Republic* the Tribunal found that there was no expropriation but that the claimant was still entitled to the fair market value of its investment valued according to the DCF method as a result of the Tribunal's finding that other standards of the BIT had been breached.[322]

271. CIOC submits that the use of the DCF method is appropriate on the facts of this case. In particular there is sufficient information on which to base the calculations involved in the DCF valuation in that the Reserves Report provides an independent estimation of oil reserves, and the successful completion of the Pilot Production Programme, confirmed the appropriate future production levels that CIOC could expect. CIOC was also contractually entitled to a commercial production licence of at least 25 years' duration.[323]

272. In order to value an enterprise by the DCF method, one has to calculate the cash receipts realistically expected from an enterprise in each future year of its economic life (or contractual life, if there are arrangements for its transfer at certain point in time) and then subtract the amount of anticipated expenditures in each corresponding year in order to obtain the net free cash flow of the enterprise for that period. The net free cash flow then has to be discounted with a discount rate that reflects: (i) the time value of the money; (ii) expected inflation; and (iii) the risk associated with such cash flow under realistic circumstances.[324] The discount rate is calculated by examining the expected rate of return demanded by investors in the market on investments of comparable risk.[325]

273. In order to quantify the fair market value of CIOC's investment as at the date prior to expropriation (31 January 2008), CIOC have instructed an independent valuation expert, Mr Tim Giles, to produce the Quantum Report which supports this Memorial.

274. In addition to the assumption that CIOC are entitled to the fair market value of their investment immediately prior to the date of expropriation, the Quantum Report is produced on the basis that CIOC

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320 *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Hungary*, Award, 2 October 2006: **Authority C-74.**

321 *Ibid*, para. 502.

322 *CME Czech Republic B.V.* v. *Czech Republic*, Final Award, 14 March 2003, para 508: **Authority C-75.**

323 Clause 10.5 of the Contract: **Exhibit C-4.**

324 Ripinsky and Williams, 197: **Authority C-66.**

325 *Ibid.*

had the rights to exploit hydrocarbon resources, as set out in the Contract, and that the total and economically extractable reserves in the Contract Area were as set out in the Reserves Report.[326]

275. As described in Section 3 of the Quantum Report, the process to estimate the fair market value of the investment based on the DCF methodology involves the estimation of:

(1) expected prices to be paid for the oil;

(2) expected sale volumes of the oil. This figure is estimated on the basis of the reserves estimates and production profiles produced in the Reserves Report. Mr Giles explains in paragraphs 3.5 and 3.6 of the Quantum Report that he has taken a risked oil reserves number of 11.17 million tonnes, classified according to the 2P measures of reserves, the internationally acceptable classification system prescribed by the Society of Petroleum Engineers;

(3) expected transportation costs involved in getting the oil to market;

(4) expected capital expenditure, specific to the field;

(5) expected operating expenditure, specific to production;

(6) expected taxation and royalties (in line with those set out in the Contract); and

(7) the appropriate discount rate.

276. In the DCF calculation, the appropriate discount rate (as detailed in Annex D of the Quantum Report) is applied to the free cash flows predicted for the 36 years from 31 January 2008. This yields the figure of USD 1,005.7 million as the value of CIOC's investment, excluding the interest to which CIOC is legally entitled from the date of expropriation. (Interest is addressed in Section 6.5 below.) Mr Giles notes, in paragraph 4.5 of the Quantum Report that this valuation is likely to be conservative.

277. Although it is implicit that the projections of future free cash flows are not exact, the discounting of those cash flows by an appropriate discount rate makes the necessary adjustment for inherent risk. This method of valuation is how any rational investor would approach the valuation of an investment asset, and is in fact, the foundation for all other valuation methods. However, if the Tribunal decides that the DCF method of assessment is not appropriate to this case, CIOC reserves its right to rely on different methods of assessment for valuing its loss.

(b) Relief in respect of moral harm

278. CIOC is entitled to be awarded damages for moral harm suffered as a result of the persecution and harassment it has endured at the hands of Kazakhstan. Compensation has been awarded for personal injury through the deprivation of liberty and for other non-material damage such as mental anguish,

[326] See Section 2 of the Quantum Report.

humiliation and loss of enjoyment of life. These are, naturally, difficult to assess however various tribunals have attempted to do so. Certainly, in the context of human rights violation, tribunals have put a value on certain damage. In addition, in the sphere of international arbitral tribunals, certain internationally wrongful acts, such as wrongful imprisonment have been given a value. In other circumstances the damages awarded has been on the basis of an equitable assessment.

279. Most recently, the Tribunal in *Desert Line* v. *Yemen* awarded USD 1 million to the claimant having agreed with the claimant that its prejudice was substantial since it affected the physical health of the claimant's executives and the claimant's credit and reputation. The Tribunal offered no indication as to how they had reached such a valuation except to say that the sum awarded was "*modest in proportion to the vastness of the project*".[327] In the earlier case of *Benvenuti & Bonfant* v. *Congo* the Tribunal awarded damages on an equitable basis, again providing little reasoning for the amount.[328]

280. CIOC submits, therefore, that the Tribunal should take into consideration the substantial harm caused to CIOC and its employees, directors and shareholder as a result of the harassment by Kazakhstan and for which moral damages would be adequate and suitable compensation. As Devincci Hourani states in his witness statement the constant interrogations and harassment "*had a significant impact on the morale of our staff*" and "*obvious disruption to the conduct of our business*".[329] CIOC were required to hand over many of its legal, regulatory, technical and financial documents and, subsequently, on 16 and 17 April 2009, have had the majority of their documents seized by the authorities. KNB officers have taken the corporate seals of CIOC along with computer hard drives and large numbers of documents and files which have effectively prevented CIOC from continuing its business. In addition, the shareholders, directors and employees of CIOC have also been subjected to unwarranted harassment and intimidation. For example, Devincci Hourani was taken from his brother's house in the early hours of 1 September 2007 and interrogated at a secret location. He subsequently fled Kazakhstan and has since been diagnosed with severe depression, believed to be associated with the intimidation and harassment of him and CIOC by the Kazakh authorities.[330] Meanwhile, Omar Antar and Hussam Hourani have also left Kazakhstan leaving CIOC without a director and its Vice-Director of Operations and Production.

281. The Tribunal is requested to assess the moral damage done to CIOC and its majority owner, senior management and employees, and to award CIOC such monetary damages as it considers reasonable in all the circumstances. In the assessment of such damages, CIOC respectfully submits that the Tribunal should take into account the malicious nature of Kazakhstan's conduct in line with the approach taken by the Tribunal in *Desert Line*.[331]

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327 *Desert Line* v. *Yemen*, para. 290: **Authority C-68.**

328 *Benvenuti* v *Congo*, **Authority C-68.**

329 Devincci Hourani Statement para. 40.

330 Devincci Hourani Statement, para. 68.

331 *Desert Line* v. *Yemen*, para. 290: **Authority C-68.**

6.5 Interest

282. CIOC seeks an award of interest on sums owing to it on the following basis. Article III of the Treaty specifically states that "[c]*ompensation shall be equivalent to the fair market value of the expropriated investment...*", and shall "*...include interest at a commercially reasonable rate from the date of expropriation...*". It follows that in the event that CIOC is successful in proving that it is entitled to damages or compensation under the Treaty, it shall also be entitled to commercial interest on such sums as the Tribunal may award to it. Indeed, applying the terms of the Treaty, the Tribunal is mandated and obliged to award such interest.

283. As to the applicable rate of interest, CIOC submits that the appropriate rate of interest to be applied should reflect the average rate CIOC would have avoided or earned on such sums awarded to it, had they been utilised to pay off debt (if any) or placed into a bank account. CIOC submits that this is a reasonable approach to determining a "*commercially reasonable rate*" of interest for a company such as CIOC. CIOC further submits that the Tribunal should apply a recognised rate, such as LIBOR plus 2%, as applied for example in the award of the UNCITRAL Tribunal in *National Grid plc* v. *Argentina*.[332]

284. In the Quantum Report, Mr Giles has estimated the interest on the damages or compensation owing to CIOC since 31 January 2008 at an average of 3.7% per annum between the valuation date and the date of the final hearing. On that basis, the damages or compensation for expropriation including interest to the date of the hearing is estimated to be USD 1,121.4 million.

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[332] *National Grid plc* v. *Argentine Republic*, Award, 3 November 2008, para. 294: **Authority C-76**.

PRAYER FOR RELIEF

285. For the foregoing reasons, CIOC hereby requests:

(1) orders adjudging and declaring:

(a) that Kazakhstan has violated Article II(2)(a) of the Treaty, by failing to accord to CIOC's investment "*fair and equitable treatment*";

(b) that Kazakhstan has violated Article II(2)(a) of the Treaty, by failing to ensure that CIOC's investment "*shall enjoy full protection and security*";

(c) that Kazakhstan has violated Article II(2)(a) of the Treaty, by failing to ensure that CIOC's investment shall not be accorded "*treatment less than that required by international law*";

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

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

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

(i) without public purpose;

(ii) in a discriminatory manner; or

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

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

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

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

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

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

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

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

Respectfully submitted.

14 May 2009

Allen & Overy LLP

Signed .....

Allen & Overy LLP
Counsel to the Claimant, Caratube International Oil Company LLP