

# International Centre for Settlement of Investment Disputes

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KT Asia Investment Group B.V.

Claimant

v.

Republic of Kazakhstan

Respondent

ICSID Case No. ARB/09/8

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## AWARD

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### **Arbitral Tribunal:**

Prof. Gabrielle Kaufmann-Kohler, President

Ian Glick, Q.C., Arbitrator

Christopher Thomas, Q.C., Arbitrator

Secretary of the Tribunal:

Martina Polasek

Assistant to the Tribunal:

Eva Kalnina

*Date of Dispatch to the Parties: 17 October 2013*

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## ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT	Bilateral Investment Treaty, specifically the Agreement on encouragement and reciprocal protection of investments between the Republic of Kazakhstan and the Kingdom of the Netherlands of 1 August 2007
BTA	BTA Bank
CMoM	KT Asia's Memorial on the Merits of 13 December 2010
CMoJ	KT Asia's Counter-Memorial on Jurisdiction of 20 June 2011
C-	Claimant [KT Asia]'s Exhibits
CL-	Claimant [KT Asia]'s Legal Exhibits
Duma	Duma Corporate Services B.V.
FSA	Agency of the Republic of Kazakhstan on Regulation and Supervision of Financial Market and Financial Institutions
ICSID	International Centre for Settlement of Investment Disputes
(ICSID) Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
KT Asia	KT Asia Investment Group B.V.
KASE	Kazakhstan Stock Exchange
MoJ	Respondent's Memorial on Jurisdiction of 18 March 2011
R-	Respondent [Kazakhstan]'s Exhibits
Refgen	Refgen Technologies Inc.
Request	KT Asia's Request for Arbitration of 24 April 2009
Rejoinder	KT Asia's Rejoinder on Jurisdiction of 12 December 2011
Reply	Respondent's Reply on Jurisdiction of 16 September 2011
RL-	Respondent [Kazakhstan]'s Legal Exhibits
Samruk-Kazyna	National Welfare Fund Samruk-Kazyna
Torland	Torland Productions Inc.
Tr. day/page/line	Transcript of the hearing on jurisdiction of 1-3 February 2012
VCLT/Vienna Convention	Vienna Convention on the Law of Treaties
WS	Witness Statement

## **I. INTRODUCTION**

### **A. THE CLAIMANT**

1. The Claimant, KT Asia Investment Group B.V. ("KT Asia"), is a company incorporated in the Netherlands with its registered office at De Boelelaan 7, 1083 HJ, Amsterdam, Netherlands.
2. Since 23 May 2012, the Claimant has been represented in these proceedings by ADDLESHAW GODDARD LLP, Millon Gate, 60 Chiswell Street, London EC1Y 4AG. Until 24 February 2012, the Claimant was represented by STEPHENSON HARWOOD and Mr. Zachary Douglas and Ms. Michelle Butler of MATRIX CHAMBERS. At the beginning of these proceedings, the Claimant was also briefly represented by CLYDE & CO until it retained STEPHENSON HARWOOD on 17 March 2010.

### **B. THE RESPONDENT**

3. The Respondent is the Republic of Kazakhstan ("Kazakhstan" or the "Respondent").
4. The Respondent is represented in this arbitration by REED SMITH LLP, the Broadgate Tower, 20 Primrose Street, London EC2A 2RS, and Messrs. Ali Malek QC and Christopher Harris of 3 VERULAM BUILDINGS.

## **II. THE FACTS**

5. This Section summarizes the facts of this dispute insofar as they bear relevance to ruling on the Respondent's objections to jurisdiction.
6. The core of the present dispute concerns the Claimant's allegations of a forced nationalization by the Respondent of its minority interest in the BTA Bank ("BTA"). BTA has its origins in two Soviet-era banks, Prombank (founded in 1925) and Vnesheconombank (established in 1990), and it is the result of a series of consolidations, mergers, and privatisations (CMoM, § 38 ff.; Abyazov 1 WS, § 104 ff.). BTA is one of the four systemic banks of Kazakhstan (the others being Halyk Bank, Kazkommertzbank and Alliance Bank) and it is listed on the Kazakhstan Stock Exchange ("KASE"; R-3).

7. As will be discussed in further detail below, it is undisputed that the ultimate beneficial owner of the Claimant is Mr. Mukhtar Ablyazov (“Mr. Ablyazov”), a private businessman and Kazakh national.
8. By way of background, it is noted that Mr. Ablyazov began his career in business in 1991 and soon became a prominent private investor and businessman with interests in a variety of sectors and commercial projects, primarily in Kazakhstan (CMoJ, § 116). He had significant interests in the banking and media sectors, as well as in the sugar industry, among others. Between 1997 and 1998, Mr. Ablyazov was the head of the Kazakhstan State Power Grid Operator and, between 1998 and 1999, he was the Minister of Energy, Industry and Trade of Kazakhstan (Ablyazov 1 WS, § 27). Whilst in this last office, he drafted Kazakhstan’s New Industrial Policy, which he describes as “a programme for the improvement and diversification of the country’s economy” (Ablyazov 1 WS, § 28).
9. According to Mr. Ablyazov, he, together with a consortium of investors, purchased BTA (at that time called Bank TuranAlem) for US\$72 million in 1998, which was “a record for the privatisation of a state company at the time” (Ablyazov 1 WS, §§ 106-107). Mr. Ablyazov has also stated that, despite the Kazakh Government’s injections of capital and debt write-off, Bank TuranAlem remained a “distressed asset”, which “was not of interest to the President or his circle” (Ablyazov 1 WS, § 106).
10. In November 2001, Mr. Ablyazov co-founded a political opposition party, the Democratic Choice of Kazakhstan, and became increasingly involved in Kazakh politics (Ablyazov 1 WS, § 35). In the Claimant’s submission, it was due to Mr. Ablyazov’s engagement in politics that his relationship with the Kazakh political elite, and particularly with President Nursultan Nazarbayev (“President Nazarbayev”), began to deteriorate and eventually resulted in his arrest at the end of March 2002.
11. Mr. Ablyazov considers that the charges brought against him were fabricated (Ablyazov 1 WS, § 43) and observes that a number of Western governments and human rights organizations condemned his trial and conviction as politically motivated and conducted in gross violation of due process.<sup>1</sup> He also argues that it was only as a result of the pressure exercised on the Kazakh government by Amnesty International, the European

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<sup>1</sup> Human Rights Watch, “Political Freedoms in Kazakhstan”, April 2004, Vol. 16, No. 3 (“International and local observers at Ablyazov’s June-July 2002 trial told Human Rights Watch that numerous procedural violations, a lack of credible evidence, and inconsistent witness testimony reflected a political motivation behind the case.”; C-23). Amnesty International (Report on “Concerns in Europe”, 1 September 2002; C-4) and the Organization for Security and Cooperation in Europe (“OSCE”; C-28) came to similar conclusions.

Parliament, various Western Governments, the OSCE and human rights NGOs that he was released from prison after 14 months, even though he had been sentenced to six years (Ablyazov 1 WS, § 72).

12. In his witness statement, Mr. Ablyazov provides a detailed account on physical and mental abuse that he says he suffered while in prison (Ablyazov 1 WS, § 51). He explains that after his release from prison, he was forced to move to Moscow in May 2003 “in order to escape constant intimidation through close surveillance, and the monitoring of all my activities and those of my friends and family” by the Kazakh secret services. He stayed in Moscow until May 2005 but remained politically active during that time (Ablyazov 1 WS, § 81, § 89).
13. Upon his return to Kazakhstan in May 2005, Mr. Ablyazov became the Chairman of the Board of Directors of BTA, following the death in a hunting accident of Mr. Yerzhan Tatishev (“Mr. Tatishev”), then Chairman of BTA, which left the Bank without a leader (Ablyazov 1 WS, § 111 ff.). In this context, it is pertinent to note that the extent and structure of Mr. Ablyazov’s ownership of the shares in BTA varied over time. It seems undisputed that Mr. Ablyazov considered that it was not in his interest to disclose his ownership of BTA to the general public and to the Kazakh banking authorities (Ablyazov 1 WS, § 69; § 123 “[...] if I had publicly disclosed the way in which my interest was held, this would have increased the risk of Nazarbayev taking my shares from me”). In this regard, the documentary evidence also indicates that his ultimate beneficial ownership of 75.18% was not disclosed in BTA’s written communications with Western banks such as ING and Deutsche Bank.<sup>2</sup>
14. The evidence is that Mr. Ablyazov ultimately controlled 75.18% of BTA (acquired in stages, as will be further described below)<sup>3</sup> through a series of separate companies incorporated in different jurisdictions under the direction of trusted associates.<sup>4</sup> Given the position of trust between Mr. Ablyazov and his associates, the latter would implement any decision of the former by way of instructions to the nominee director of the relevant company.<sup>5</sup> Each of the companies ultimately beneficially owned by Mr. Ablyazov held less than 10% of the shares of BTA Bank.<sup>6</sup>

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<sup>2</sup> Tr. D1/187 ff. Mr. Ablyazov testified that he communicated his ultimate beneficial shareholding in the Bank to Western financial institutions orally, but not in writing.

<sup>3</sup> See § 15, § 22, fn. 15, fn. 16 of this Award.

<sup>4</sup> Tr. D1/111.

<sup>5</sup> Tr. D1/106-108.

<sup>6</sup> Tr. D1/139-140. For example, KT Asia owned 9.96% of the voting shares of BTA Bank.

15. In the same vein, Mr. Ablyazov testified that, at the time of his arrest in March 2002, he and his colleague Mr. Tatishev held about 75% of the shares in BTA. They had agreed that 60% of those shares belonged to Mr. Ablyazov and 40% to Mr. Tatishev. Once he was sent to prison, they agreed that Mr. Tatishev would hold Mr. Ablyazov's shares on the latter's behalf, to prevent a seizure by President Nazarbayev. For this reason, Mr. Tatishev allegedly made a public announcement that Mr. Ablyazov no longer had any shares in BTA (Ablyazov 1 WS, § 69).
16. It is also undisputed that the Kazakh authorities, and in particular the Agency of the Republic of Kazakhstan on Regulation and Supervision of Financial Market and Financial Institutions (the "FSA"), which is the competent authority in matters of regulation and supervision of the Kazakh financial sector, sought to obtain information about the ultimate beneficial owners of BTA. The Kazakh authorities considered the holding of shares in BTA by separate companies under the same ownership or control, each owning less than 10%, to be of significance because ownership in excess of 10% was subject to the FSA's approval.<sup>7</sup> For his part, Mr. Ablyazov testified that he wished to protect his 75% interest in BTA from expropriation by President Nazarbayev by holding it through different companies situated outside of Kazakhstan.<sup>8</sup>
17. The FSA made requests for information about the ultimate owners in particular in a letter of 14 June 2007 to BTA's management (R-18). In a response of 10 July 2007, BTA disclosed to the FSA the names of corporate and individual shareholders who were the legal owners of the companies that held the shares in BTA. BTA's management did not, however, disclose the ultimate beneficial owners of those companies (R-19). Further exchanges of letters between the FSA and BTA followed, in which the FSA continued to seek information on the beneficial owners of BTA (R-20). On 10 September 2007, BTA replied that additional information about affiliated persons could not be demanded from minority shareholders and that therefore this information would not be provided (R-21). The FSA never reacted to this letter.
18. On 1 August 2007, the Agreement on encouragement and reciprocal protection of investments between the Republic of Kazakhstan and the Kingdom of the Netherlands (the "BIT" or the "Treaty"; C-1) entered into force.

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<sup>7</sup> Tr. D3/95-96.

<sup>8</sup> Tr. D1/169-170.



19. The Claimant was incorporated in Rotterdam on 12 December 2007<sup>9</sup>. On 14 December 2007, it purchased 808,321 shares in BTA from two BVI companies, Refgen Technologies Inc. (“Refgen”) and Torland Productions Inc. (“Torland”). These shares represented a 9.96% interest in BTA (C-39; R-34; R-35). As clarified by Mr. Ablyazov at the hearing<sup>10</sup>, the Claimant was a shell company set up to hold Mr. Ablyazov’s shares in BTA pending a private placement with third party investors.
20. Pursuant to the agreements providing for the management of KT Asia (the “Management Agreements”, R-29 and R-30), the management of KT Asia was in the hands of a nominee director which was bound to act in accordance with Mr. Ablyazov’s instructions. The first such nominee director, Equity Trust, was paid slightly under €4000 annually for its services.<sup>11</sup> Duma Corporate Services B.V. (“Duma”), a Netherlands corporate services company, which succeeded Equity Trust, charged an annual fixed fee of €2100<sup>12</sup> (R-30, Schedule 1). Mr. Ablyazov could not personally recall whether the fees to these companies were ever actually paid but argued that the people in charge of the operational activities would have made all the payments necessary to ensure that the companies “could continue carrying on business”.<sup>13</sup>
21. It is undisputed that as the ultimate beneficial owner of KT Asia, Mr. Ablyazov is funding the present arbitration and that KT Asia has never had any assets other than the shares in BTA and a bank account with a balance of approximately €18,000.<sup>14</sup>
22. It also emerged during the course of this arbitration that Torland and Refgen, the companies from which the Claimant acquired its shares in BTA, were initially controlled by Mrs. Anara Tatischeva, the widow of Mr. Tatischev, the late Chairman of BTA’s Management Board.<sup>15</sup> However, Mr. Ablyazov testified that he gradually acquired control over these companies as well.<sup>16</sup> According to him, the transfer of control over

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<sup>9</sup> KT Asia Deed of Incorporation, 12 December 2007 (C-36).

<sup>10</sup> Mr. Ablyazov testified on this issue as follows: “[...] there was a special structure – i.e. KT Asia -- that was being put in place and it was anticipated that it would be sold on to the investors in case the private placement was a success. Now, whether it was put in place on a temporary or not on a temporary basis was really dependent on how successful we would be within the framework of that private placement. At the end of the day it became a fixture really” (Tr. D1/163).

<sup>11</sup> Tr. D1/150/10 ff.

<sup>12</sup> R-30, Schedule 1. The Agreement also indicated that the total yearly charges (legal, accounting, fiscal, management and domiciliation) would range from €6500-€8000).

<sup>13</sup> Tr. D1/150/17-24.

<sup>14</sup> Tr. D1/117/3-5; Tr. D1/141/2-8.

<sup>15</sup> In the words of the Claimant, following Mr. Tatischev’s sudden death, “virtually all the shares Mr. Tatischev had been controlling, including those held as nominee for Mr. Ablyazov, passed into the control of his wife, Anara Tatischeva” (CMoM, § 42).

<sup>16</sup> Mr. Ablyazov describes the acquisition of the companies Refgen and Torland in the following terms: “When I returned to Kazakhstan from Moscow in 2005 as BTA’s Chairman, I started to control

the shares from Mrs. Tatischeva to him was completed by April 2008 and from then he was “in overall control of the Bank” (Abyazov 1 WS, § 242).

23. The evidence thus is that by the time of the transfer of the shares from Refgen and Torland to KT Asia, the former were also indirectly owned and controlled by Mr. Abyazov. At the hearing, Mr. Abyazov acknowledged that “at the end of the day Torland and Refgen were my companies and KT Asia was also my company” (Tr. D1/159/8-12). When asked about the exact timing of his acquisition of beneficial ownership of Torland and Refgen, Mr. Abyazov responded as follows:

“Abyazov: At the beginning, when we were just launching this process and when we were discussing, holding discussions with JP Morgan, I believe that Mrs Tatischeva was the beneficial owner.

Now, afterwards, when it was all restructured by using KT Asia, at the end of the day I became the owner and Torland and Refgen were wound up because there was no use for those. So instead of those two owners, KT Asia stepped in. I just need to confirm the dates.

Q: [...] So if I formulate my question: at this stage, before the shares were transferred to -- acquired by KT Asia, i.e. from the BVI companies, you were the beneficial owner of those companies; that's right, isn't it?

Abyazov: By the time of the transfer from Torland to KT Asia I was owner of those shares, yes.” (Tr. D1/159-160)

24. It is thus undisputed that the ultimate beneficial ownership of the BTA shares did not change as a result of the transfer from Torland and Refgen to KT Asia (Tr. D1/160/15-17). Or, in the Claimant's words, “the ultimate seller (behind Torland and Refgen) and the ultimate buyer (behind the Claimant) were the same individual” (Rejoinder, § 280).
25. Mr. Abyazov described the purpose of the incorporation of the Claimant as follows: “The Claimant is a special purpose vehicle and was conceived by my financial and legal advisors [...] as an optimal structure to hold some of the shares in BTA until the interest in them could be sold on to unrelated third parties in a private placement of shares” (Abyazov 2 WS, § 6).
26. The Claimant has characterised KT Asia's incorporation and its subsequent acquisition of BTA's shares as part of an “internal corporate restructuring”, the so-called Project

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BTA's activities, including its development strategy. Tatischeva moved to Austria in the spring of 2005. She was unwilling for me to resume control of my shares without also selling me her own shares. Accordingly, we also agreed that we would negotiate the sale of her interest to me on a gradual basis. From that point onwards, the shares were progressively brought under my control by various methods, including by transfer between nominees, and by individuals formerly acting on Tatischeva's instructions being told to act henceforth in accordance with my instructions. The transfer of overall control of BTA to me pursuant to our agreement took some time, and I cannot remember the detailed timings of the process” (Abyazov 1 WS, § 112).

Aquila (C-382), conceived by Mr. Ablyazov's advisors in order to achieve two objectives: first, to facilitate the private placement of a portion of BTA's shares beneficially owned by Mr. Ablyazov and, second, to achieve optimal tax efficiency across the group of holding companies for the Bank's shares. Mr. Ablyazov testified that he preferred a private placement of shares as opposed to an IPO on the basis that it would allow him to sell the shares at minimal risk of confiscation by President Nazarbayev, given that the pre-sale negotiations could be conducted on short notice and in private.<sup>17</sup> The Claimant adds that the restructuring was planned and implemented by leading firms of consultants and lawyers in various jurisdictions (CMoJ, § 22 ff.; C-383 to C-392, and particularly C-383; C-388; C-390).

27. In the Respondent's view, the transfer of shares to the Claimant was undertaken in an unnecessarily complex manner and constituted a mere "internal rearrangement of the holding of his shares by Mr. Ablyazov" (MoJ, § 96). The Respondent describes in detail the series of transfers of the BTA shares between different companies and the split between the legal and the beneficial ownership of the Claimant (MoJ, § 98 ff.; App. 1). It underlines that despite these numerous transfers of the BTA shares between different companies, in reality "nothing changed at all, as Mr. Ablyazov continued to own and control the BTA Shares that were nominally [...] held by the Claimant" (MoJ, § 100).
28. The Respondent further submits that the overriding objective of the transaction was (i) to transfer the nominal holding of the BTA shares from BVI companies which did not benefit from investment treaty protection, to a Dutch company which did benefit from the BIT which had entered into force only four months earlier, and (ii) to conceal the identity of the real owner of these shares in BTA from the Kazakh authorities in breach of Kazakh law (MoJ, §§ 89-108; App. 1-5 to MoJ).
29. As to the specifics of the transaction by which KT Asia acquired the BTA shares, the Tribunal notes that while KT Asia acquired 808,321 shares in BTA for approximately US\$66,803,388, no cash was transferred as consideration for the shares (R-61; MoJ, §§ 121-123. Instead, Project Aquila envisaged that (as occurred) KT Asia would be granted two unsecured loans by Torland and Refgen (R-37; R-38), and that it would repay the loans, together with interest, with the proceeds of the private placement (i.e., the sale of the BTA shares to third party investors; C-382, step 17). In the Claimant's

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<sup>17</sup> Ablyazov 2 WS, §§ 11-16 ("It was crucial to me to bring international investors on board without President Nazarbayev finding out before the transaction was completed. An influx of investors in this way would have significantly eased the pressure that I was under at that time from the President.")

words, “[t]here was no need to provide security for these loans because the ultimate beneficial owner of the related companies was Mr. Abylazov and it had always been envisaged in the Project Aquila Steps Plan that once the private placement had been undertaken these loans would be repaid in full with the proceeds of the sale” (Rejoinder, § 281).

30. The Claimant did not pay interest on the loans when it became due, and the loans themselves were never repaid. Instead, they were written off and Torland and Refgen were liquidated in 2009, as, in Mr. Abylazov’s words, “there was no use for [them]” (Tr. D1/160/1); Rejoinder, § 282). Mr. Abylazov testified on these facts as follows:

“Q: Refgen and Torland did not receive anything from KT Asia for the shares or the loans; in fact, those companies were wound up. Is that something that you know?

Abylazov: Yes, I know that those companies were wound up.

Q: And it’s also right that KT Asia did not make any payments of interest in relation to the loans?

Abylazov: Well, it was the same owner. So at the end of the day Torland and Refgen were my companies and KT Asia was also my company, so on a technical basis no payments were made, most probably, but it does not change the nature of the ownership in any way.” (Tr. D1/159)

31. Several months after KT Asia’s acquisition of BTA’s shares, a meeting was held between the FSA and BTA Bank’s management in order to discuss the development strategy of BTA. During that meeting, Mr. Abylazov stated that BTA had made all the necessary disclosures and that he personally was planning to acquire only up to 8.5% of the capital of BTA (R-22).
32. During the world financial crisis commencing in 2008, Kazakhstan’s banking sector was negatively affected by the worldwide shortage of credit and BTA experienced difficulties in obtaining financing on the international markets (Abylazov 1 WS, §§ 163-167).
33. On 16 January 2009, the FSA asked Mr. Abylazov to state whether he indirectly owned ten percent or more of the outstanding shares in BTA and whether he had voting rights for ten percent or more, or was in a position to exert influence on the decisions made by the Bank by virtue of an agreement or in any other way. The letter did not refer to any applicable disclosure requirements under Kazakh law (R-23). On 19 January 2009, Mr. Abylazov replied to the FSA’s letter in the negative and stated: “I do not own, either directly or indirectly, ten or more percent of the outstanding shares [...] and I do not have the ability to vote directly or indirectly using ten or more percent of the voting shares of the bank” (R-24).

34. It is the Claimant's submission that during January and February of 2009, the FSA and the Kazakh government adopted a series of measures aimed at removing control over BTA from its shareholders, which eventually culminated in the forced nationalization of the Bank. For instance, the Claimant notes that on 29 January 2009 the FSA required BTA's management to double BTA's loan reserves within two days (C-187).
35. The Respondent denies that any forced nationalization has taken place. In its submission, on 2 February 2009, the Government acquired 75.1% of the shares of BTA through the National Welfare Fund Samruk-Kazyna ("Samruk-Kazyna") in return for an injection of approximately US\$1.4 billion and a compulsory share issue (C-206). On 1 September 2010, Samruk-Kazyna's shareholding was increased to 81.48% (R-2). The Respondent also notes that following its acquisition of shares in BTA in February 2009, Samruk-Kazyna discovered financial irregularities on a large scale in the Bank's management and in particular a large deficit of assets versus liabilities (MoJ, § 44).
36. In the Claimant's view, this alleged "acquisition" by way of a compulsory issue of shares amounted to an expropriation of its shareholding in BTA. The Respondent contends that this was a prudential measure taken to protect the interests of deposit holders following the "looting" of the Bank by Mr. Ablyazov.
37. Mr. Ablyazov has noted that prior to the "forced nationalization" of BTA in February 2009, he owned or controlled some 75.18% of the shares in BTA. According to Mr. Ablyazov, his interest has been "massively and deliberately diluted (to almost nothing, since Samruk-Kazyna and the Bank's creditors together now hold 99.98% of its shares)" (Ablyazov 1 WS, § 113). Mr. Ablyazov was no longer residing in Kazakhstan at the time of the alleged nationalization (Ablyazov 1 WS, § 583). He eventually sought and obtained political asylum in the United Kingdom (Rejoinder, §§ 15-16).
38. On 24 April 2009, KT Asia filed a Request for Arbitration (the "Request") with the International Centre for Settlement of Investment Disputes ("ICSID") pursuant to Article 36 of the ICSID Convention and the BIT.
39. On 31 August 2010, BTA completed the restructuring of its debt. As a result, the former minority shareholders were left with only 0.02% of the Bank's capital, of which KT Asia held 0.00182% (C-329; Ablyazov 1 WS, § 610).
40. It is also important to note that this arbitration was not the only set of proceedings initiated following the Respondent's acquisition of a majority stake in BTA. In August 2009, BTA commenced litigation against Mr. Ablyazov in the High Court in England,

where he was then residing. During the course of this arbitration, both Parties have, from time to time, referred to these English proceedings. Although the English proceedings and their outcome are not relevant to the decision of this jurisdictional challenge, aspects of the English proceedings have delayed the progress of this arbitration. Accordingly the Tribunal will briefly mention these proceedings here.

41. The English proceedings ultimately consisted of eleven actions against Mr. Ablyazov (and others) alleging that he had defrauded BTA of up to US\$6 billion, allegations that Mr. Ablyazov denied.
42. At the outset of the English litigation, the bank obtained a freezing order against Mr. Ablyazov and his business associates which, as confirmed in November 2009 and amended from time to time thereafter, restricted his right to dispose of, deal with, or diminish the value of his assets, up to the value of £451,130,000. Mr. Ablyazov was ordered not to dispose of, deal with or diminish the value of the shares in 637 companies listed in Schedules B, C and D to the freezing order. Most of these companies were incorporated in Cyprus, the BVI, the Seychelles and Luxembourg. The order, however, permitted Mr. Ablyazov to spend a reasonable amount on legal advice and representation, but required him to give advance notice of such expenditure to the bank's legal representatives.
43. Mr. Ablyazov was also ordered to provide certain information about his assets. As a result, he made disclosure about his assets in writing and was subsequently cross-examined in front of a judge. In May 2011, BTA applied to the court to commit Mr. Ablyazov for contempt for, in particular, allegedly failing to disclose assets, lying during his cross-examination, and dealing with assets in breach of the freezing order.
44. On 16 February 2012 (shortly after the hearing on jurisdiction in this arbitration), Mr. Justice Teare found those three allegations proved and, amongst other things, sentenced Mr. Ablyazov to 22 months in custody. However, before the judgment was handed down, Mr. Ablyazov evidently fled the jurisdiction.
45. On 6 November 2012, the English Court of Appeal rejected Mr. Ablyazov's appeal against Justice Teare's decision.<sup>18</sup>
46. During the course of the English proceedings, questions arose whether Mr. Ablyazov was in breach of the freezing order by borrowing sums from third parties to fund the litigation and whether the persons from whom he borrowed were independent third

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<sup>18</sup> [2012] EWCA Civ. 1411.

party lenders or were really Mr. Ablyazov himself in another guise. The lenders in question were initially Wintop Services Limited ("Wintop") and Fitcherly Holdings Limited ("Fitcherly") and subsequently Green Life International SA.

47. In April 2012, the English court was asked to decide whether (on the assumption that the agreements in question were not shams) the rights under the loan agreements between Mr. Ablyazov and Wintop, and Mr. Ablyazov and Fitcherly, to borrow large sums of money and direct that they be paid by the lender to third parties (in particular, Mr. Ablyazov's lawyers) constituted assets of Mr. Ablyazov for the purposes of the freezing order. In a judgment given on 4 July 2012, Mr. Justice Christopher Clarke held that such rights were not assets for these purposes, and that exercising them did not constitute disposing of or dealing with an asset.<sup>19</sup>
48. On 23 March and 23 April 2012, before that judgment was given and some weeks after the hearing on jurisdiction in this arbitration, in response to a request from ICSID for further advance payments the Respondent wrote to the Tribunal to indicate its concern that the Claimant was funding the arbitration and making advance payments in breach of the freezing order.
49. The Tribunal was naturally concerned that the funding of the arbitration should not be in breach of a court order and accordingly made enquiries of the Claimant. Between May and September 2012, there was correspondence on this topic between the Tribunal and the Parties. In this context, the Claimant stated that it had been funded (originally by Wintop and Fitcherly and subsequently by Green Life) in the same way that Mr. Ablyazov had been funded in the English proceedings. The Claimant, however, drew attention to the decision of Mr. Justice Christopher Clarke of 4 July 2012 that rights under loan agreements with third party funders were not assets within the meaning of the freezing order and thus that it was not a breach of the order to fund the arbitration in this way. In addition, Addleshaw Goddard represented that, after complying with their own "know your client" procedure, they had no reason to believe that the funds advanced by Green Life were not independent of Mr. Ablyazov.
50. After considering the correspondence, on 21 September 2012 the Tribunal wrote to the Parties indicating that it would take no action in respect of the provenance of the funds used to finance the arbitration, but invited the Parties to update it on any relevant developments in the English proceedings.

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<sup>19</sup> [2012] EWCA Civ. 1411.

51. On 5 April 2013, the Respondent notified the Tribunal that Mr. Justice Christopher Clarke's judgment was to be appealed, and that this "may impact on Mr. Ablyazov's ability to fund these proceedings and the propriety of the funding he has utilised to date".
52. On 22 April 2013, the Claimant replied that Mr. Justice Clarke's judgment was still in effect and that there was thus no need for the Tribunal to reconsider the conclusions set out in its letter of 21 September 2012. The Claimant also emphasised that BTA's appeal did not "relate to the funding of the proceedings brought by the Bank against Mr. Ablyazov by his current funder, but by two companies that ceased funding Mr. Ablyazov in May 2011".
53. It is a matter of public record that, in July 2013, the English Court of Appeal upheld Mr. Justice Christopher Clarke's decision that Mr. Ablyazov's rights under the loan agreements with Wintop and Fitcherly were not assets for the purposes of the freezing order.<sup>20</sup>

### III. PROCEDURAL HISTORY

#### A. INITIAL PHASE

54. In the Request, the Claimant set forth the following prayers for relief:

"7.3 Compensation for breach of the BIT and/or relevant obligations under national and international law. The Claimant will particularise the valuation of its claim for compensation in due course, and if necessary will adduce expert evidence in this regard.

For indicative purposes only, losses suffered by the Claimant during the relevant period and occasioned by the Respondent's unlawful actions, by way of diminution of value and share dilution, are in the range of US \$500 million (United States Dollars five hundred million) - US \$1.5 billion (United States Dollars one and one-half billion.)

The Claimant's claims for compensation include, *inter alia*:

7.3.1 Compensation for reduction in value of the Claimant's shareholding in BTA, including loss of dividends and other rights/financial benefits and opportunities accorded to shareholders.

7.3.2 Consequential damages arising out of the Respondent's breaches and its ongoing mismanagement of the investment,

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<sup>20</sup> [2013] EWCA Civ. 928.



including *inter alia*, administrative costs and damage to (BTA's) reputation.

7.3.3 Compound interest on all sums found due from the relevant due dates up until the date of payment.

7.3.4 An order requiring the Respondent to reimburse all costs and/or expenses incurred by the Claimant in these proceedings including, *inter alia*, the fees of the Arbitrators, ICSID, legal counsel, experts, consultants and the costs of the time expended by the Claimant's own employees.

7.3.5 Declarations as to breaches of the BIT and Kazakhstan law by the Respondent.

7.3.6 Any other relief the Tribunal may consider appropriate.

7.3.7 This request for relief will be amplified and further particularised in due course." (Request, Section 7)

55. On 20 July 2009, the Claimant requested that the Arbitral Tribunal be constituted in accordance with Article 37(2)(b) of the ICSID Convention. Mr. Ian Glick QC, a British national, and Mr. Christopher Thomas QC, a Canadian national, were appointed as arbitrators by the Claimant and the Respondent respectively. Both arbitrators accepted their appointments. In accordance with Article 37(2)(a) of the ICSID Convention, the Parties subsequently agreed that the party-appointed arbitrators would appoint the President of the Tribunal by 17 March 2010. Accordingly, Messrs. Glick and Thomas appointed Prof. Gabrielle Kaufmann-Kohler as President of the Tribunal, and she accepted her appointment on 17 March 2010. The Centre designated Ms. Martina Polasek as Secretary of the Tribunal. Ms. Eva Kalnina was subsequently appointed as the Assistant to the Tribunal with the consent of the Parties. The Arbitral Tribunal was constituted and the proceedings commenced on 18 March 2010.
56. On 7 May 2010, the Tribunal and the Parties held a first procedural session at the IDRC in London, during which the Parties and the Tribunal discussed and agreed a number of procedural issues. The Parties in particular confirmed their agreement with the constitution and composition of the Tribunal. On 18 June 2010, the Tribunal issued the final minutes of the first session (the "Minutes"), including a timetable for the proceedings, which was subsequently extended on numerous occasions upon the Parties' request.

## **B. WRITTEN PHASE ON JURISDICTION**

57. In the course of this arbitration, the Parties filed a number of written pleadings and requests and the Tribunal provided directions on such requests. Some of the Parties' submissions and of the Tribunal's orders are noted below:

- On 15 July 2010, the Tribunal issued Procedural Order No. 1, deciding the Parties' initial requests for document production, which were submitted in accordance with the timetable provided in the Minutes;
- On 24 August 2010, the Tribunal gave instructions on the confidentiality of certain documents, as briefed in the Parties' letters of 16, 17 and 20 August 2010. On 7 October 2010, the Tribunal provided further instructions on this issue;
- On 17 November 2010, the Tribunal decided, among others, the Claimant's request to inspect the originals of certain documents disclosed by the Respondent as well as the Respondent's request for the production of the unredacted versions of certain documents;
- On 13 December 2010, the Claimant filed its Memorial on the Merits, including exhibits, witness statements and expert reports;
- On 10 January 2011, the Tribunal issued Procedural Order No. 2 regarding the production of certain redacted information. The Tribunal provided further directions on this issue in its letters of 15 January and 1 and 23 February 2011;
- On 18 March 2011, the Respondent filed its Memorial on Jurisdiction, including exhibits and expert reports;
- On 26 May 2011, the President of the Tribunal made a disclosure concerning the involvement of Prof. Douglas in the University of Geneva's LLM program in international dispute settlement (MIDS) of which she is the Director. She then gave more detailed information on 15 June to respond to questions from the Respondent. On 1 December 2011, she followed up with some further information on the same topic;
- On 20 June 2011, the Claimant filed its Counter-Memorial on Jurisdiction, including exhibits, witness statements and expert reports;
- On 7 July 2011, the Tribunal issued Procedural Order No. 3 deciding to bifurcate the proceedings and thus limiting the present phase of this arbitration to the issue of jurisdiction;
- On 12 September 2011, the Respondent filed its Reply on Jurisdiction, including exhibits, witness statements and expert reports;

- On 12 December 2011, the Claimant filed its Rejoinder on Jurisdiction, including exhibits, witness statements and expert reports;
- On 20 December 2011, the Tribunal and the Parties held a pre-hearing telephone conference. On 23 December 2011, the Tribunal issued Procedural Order No. 4, which contained directions on the organization of the hearing on jurisdiction.

### **C. HEARING ON JURISDICTION**

58. From 1 to 3 February 2012, the Arbitral Tribunal held a hearing on jurisdiction in London. In attendance at the hearing were the members of the Arbitral Tribunal, the Secretary and the Assistant, as well as the following party representatives, witnesses and experts:

(i) On behalf of the Claimant:

- Prof. Zachary Douglas, Ms. Michelle Butler (Matrix Chambers)
- Mr. Louis Flannery, Ms. Tatiana Minaeva, Mr. Benjamin Garel (Stephenson Harwood LLP, London)

Claimant's Fact Witnesses:

- Mr. Abylazov
- Mr. Roman Solodchenko

Claimant's Experts:

- Prof. Peter Maggs
- Prof. A. J. A. Stevens
- Prof. J.B. Huizink

(ii) On behalf of the Respondent:

- Mr. Ali Malek, Q.C., Dr. Christopher Harris (3 Verlum Buildings)
- Ms. Belinda Paisley, Ms. Chloe Carswell, Ms. Suzie Savage, Ms. Dina Nazargalina, Ms. Dinara Jarmukhanova, Ms. Caroline Ovink, Mr. Jorge Klein (Reed Smith LLP, London)

Respondent's Fact Witness:

- Mr. Kuat Kozakhmetov

Respondent's Experts:

- Prof. Maidan Suleimenov
- Mr. Marnix Leijten
- Dr. Veijo Heiskanen

59. Prof. Zachary Douglas presented oral arguments on behalf of the Claimant; Mr. Ali Malek, Q.C. and Dr. Christopher Harris presented oral arguments on behalf of the Respondent. The Tribunal heard the witnesses and experts just listed.
60. The hearing was sound recorded. A *verbatim* transcript of the hearing on jurisdiction was produced and distributed to the Parties.

#### **D. POST- HEARING PHASE**

61. As noted above, on 21 February 2012, the Respondent's Counsel informed the Tribunal that, in its judgment of 16 February 2012, Justice Teare of the English High Court had found Mr. Ablyazov guilty of contempt of Court for lying under oath and failing to disclose some of his assets. The Respondent's Counsel also suggested that Mr. Ablyazov may have fled the United Kingdom to avoid his prison sentence and, in light of these developments, requested the Claimant's Counsel to confirm that the present arbitration was to be pursued.
62. On 24 February 2012, the Claimant's Counsel, Stephenson Harwood, announced that they no longer represented the Claimant in this matter. It was subsequently clarified that the termination of the retainer applied also to Prof. Douglas and Ms. Butler of Matrix Chambers.
63. On 16 March 2012, the Tribunal received a letter from the Claimant's managing director, Duma, stating that KPMG LLP had recently informed it that KT Asia fell within the scope of a receivership order. Duma made clear that it was thus not in a position to act upon instructions of or enter into any dealings with KT Asia.
64. On 16 March 2012, the Respondent submitted its Statement of Costs. The Claimant's Statement of Costs was submitted by Duma on 13 April 2012. On 24 April 2012, Duma informed ICSID that it had resigned with immediate effect as the managing director of KT Asia.
65. On 23 May 2012, Addleshaw Goddard confirmed that they had been authorized to represent the Claimant in the present proceedings.
66. On 10 April 2013, the Respondent wrote to ICSID in order to draw the Tribunal's attention to certain passages from the recent ICSID award in *Caratube International Oil*

*Company LLP v. Republic of Kazakhstan*.<sup>21</sup> The Respondent filed a copy of the award, explaining that it was “relevant to the analysis which the Tribunal must undertake in relation to jurisdiction in this case”.

67. On 7 May 2013, the Claimant provided its comments on the Respondent’s letter of 10 April, arguing that *Caratube* was irrelevant to the present case and that it did not represent a trend in the jurisprudence. In support of its argument, the Claimant referred to a number of other recent awards.<sup>22</sup>
68. To the extent necessary for reaching its decision on jurisdiction, the Tribunal has considered in its analysis the arguments and legal authorities invoked by the Parties in the most recent correspondence of April and May 2013.
69. The proceedings were closed on the date of dispatch of this Award.

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70. The Tribunal, having deliberated and considered the evidence and arguments presented by the Parties in their written and oral submissions, will first briefly summarize the positions of the Parties (IV), then analyze the evidence and arguments in support of these positions (V), and finally render a decision (VII).

#### **IV. POSITIONS OF THE PARTIES**

##### **A. THE RESPONDENT'S POSITION AND REQUEST FOR RELIEF**

71. In its written and oral submissions, the Respondent has presented numerous jurisdictional objections which it has grouped in the following three categories: (i) lack of an “investor”; (ii) lack of an “investment”; and (iii) abuses of the Treaty (Reply, §§ 17 - 19).

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<sup>21</sup> *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case ARB/08/12), Award, 5 June 2012 (hereinafter “*Caratube*”).

<sup>22</sup> E.g., *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award, 31 October 2012 (hereinafter “*Deutsche Bank*”); *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/04/6), Award, 16 January 2013; *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Decision on Jurisdiction, 27 September 2012 (hereinafter “*Quiborax*”).

## **1. No “Investor”**

72. The Respondent argues that the Claimant cannot be considered an “investor” if the BIT and the ICSID Convention are interpreted in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties (the “VCLT” or “Vienna Convention”), which requires the Tribunal to take into account the treaty’s object and purpose. In the Respondent’s view, it is manifest that the Claimant falls outside the intended scope of both the BIT and the ICSID Convention, since it is merely “an ephemeral corporation of convenience, wholly owned and controlled by a single Kazakh national, Mr. Ablyazov, and established as part of a strategy to deceive the host State regulatory authorities as to serious violations of important legal requirements in the Kazakh banking sector” (Reply, § 17.1).
73. In addition, the Respondent points out that the term “investor” must be interpreted in accordance with Article 31(3)(c) of the Vienna Convention, which requires one to take into account general principles of law applicable in the relations between the parties, such as the principle of “real and effective nationality” as between a claimant and a respondent (host) State. The Respondent emphasizes that “[i]t is beyond question that the Claimant’s real and effective nationality is Kazakh, such that its nominal Dutch nationality is not opposable to the Respondent” (Reply, § 17.2).

## **2. No “Investment”**

74. The Respondent further observes that the Claimant is unable to satisfy the requirements of the BIT and the ICSID Convention in relation to its alleged “investment” for the following four main reasons:
- First, the Claimant’s alleged investment was unlawful and is thus not protected by the BIT or the ICSID Convention. The Respondent adds that this objection can be viewed both as a matter of jurisdiction and of admissibility of the claim.
  - Second, the Claimant’s alleged investment does not satisfy any of the criteria for investments under the ICSID Convention because it had an extremely limited duration with no anticipated regularity of profit and return. Moreover, “the gratuitous transfer of the shares does not amount to a contribution”, let alone to the development or prosperity of Kazakhstan; nor did this “one-way bet” involve any risk to the Claimant (Reply, § 18.2).

- Third, the Claimant never transferred ownership or control of the shares, nor intended to do so, as it never had any control over the shares. It was a mere shell with the sole purpose of holding Mr. Ablyazov's shares pending their sale.
- Fourth, the Respondent argues that the Claimant has made no investment in the territory of Kazakhstan, which is an important requirement limiting the Respondent's consent to arbitrate disputes pursuant to Article 9 of the BIT (Reply, § 18.4).

### 3. Abuse of the ICSID Convention and the BIT

75. Finally, the Respondent contends that, even if the Claimant was able to satisfy the requirements of an "investor" and an "investment", the Tribunal does not have (or should not exercise) jurisdiction because of the Claimant's abuses of the BIT and the ICSID Convention. It argues that the nature of the Claimant and the circumstances in which it received "the gratuitous transfer of the Shares justifies the Tribunal lifting the Claimant's corporate veil to reveal Mr. Ablyazov as the real party in interest" (Reply, § 19.1), particularly considering that the Claimant has no separate existence from Mr. Ablyazov. According to the Respondent, the Claimant "has no business, no premises, no employees and no power to direct its own affairs, but instead is bound by the Management Agreement to follow Mr. Ablyazov's instructions" (Reply, § 19.1).
76. The Respondent adds that the Claimant is being used as an instrument for abusive treaty shopping and that "the creation of the Claimant was directed at securing treaty **jurisdiction** over a dispute which Mr. Ablyazov specifically foresaw, not to obtain treaty **protection** in relation to unascertained disputes" (Reply, § 19.2, emphasis in the original).
77. For all of these reasons, the Respondent requests the following relief:
- 361.1 an order declaring that the Tribunal and the Centre lack jurisdiction in respect of this dispute; or
  - 361.2 if the Tribunal finds that it does have jurisdiction, an order declaring that the claims are inadmissible and that the Tribunal lacks competence to determine them;
- and in any event:
- 361.3 an order that the Claimant (and/or Mr. Ablyazov) pay all costs incurred in connection with these arbitration proceedings including their own costs, the costs of the arbitrators and ICSID, as well as the legal and

other expenses incurred by the Respondent including the fees of its legal counsel, experts and consultants, as well as the Respondent's own officials and employees on a full indemnity basis, plus interest thereon at a reasonable rate and

361.4 such other relief as the Tribunal, in its discretion, considers appropriate." (Reply, § 361)

## **B. THE CLAIMANT'S POSITION AND REQUEST FOR RELIEF**

78. In its written and oral submissions, the Claimant has replied to the Respondent's objections with the following eight arguments:

- First, KT Asia is an "investor" under the BIT and the ICSID Convention and the Respondent's approach to treaty interpretation is impermissible (Rejoinder, § 32 ff.).
- Second, the Respondent must recognize KT Asia's undisputed Dutch nationality under Article 1 of the BIT. Apart from the fact that no less than nineteen tribunals have denied that the nationality of claims rule governing in diplomatic protection applies to investment treaty arbitration, the Respondent has specifically accepted in the BIT that the nationality of Dutch corporate entities be determined by the place of incorporation (Rejoinder, § 47 ff.).
- Third, the illegality of the investment alleged by the Respondent cannot provide the foundation for a jurisdictional objection, as the BIT contains no requirement with respect to the legality of the investment. Moreover, the alleged illegality does not engage any international public policy and hence the leading cases on illegality in investment arbitration are easily distinguishable. Finally, as a matter of Kazakh law, the alleged illegality does not void the acquisition of shares *ab initio* (Rejoinder, § 128 ff.).
- Fourth, Article 1 of the BIT supplies the test for an investment and the lack of definition of an investment in the ICSID Convention cannot supplant it. The *Salini*<sup>23</sup> criteria should not be applied as rigid jurisdictional preconditions. In any event, the Claimant's investment meets the *Salini* test (CMoJ, § 288 ff.).
- Fifth, the Respondent's objection based on the alleged lack of intention to transfer the Bank's shares to the Claimant seeks to challenge the relevance of KT Asia's

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<sup>23</sup> *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (ICSID Case No. ARB/00/4), Decision on Jurisdiction, 23 July 2001 (hereinafter "*Salini*").



undisputed legal title over the shares in BTA. The Respondent has not cited a single authority for the proposition that legal title over an asset is not a sufficient interest in that asset to constitute an investment. There is certainly no support for such a revolutionary doctrine in the text of the BIT itself (CMoJ, § 279).

- Sixth, the Respondent's argument that the ownership of shares in a commercial bank incorporated in Kazakhstan is not an investment in the territory of Kazakhstan is nonsensical (CMoJ, § 306).
- Seventh, the Respondent has not been able to point to a single case where an international tribunal has pierced the corporate veil of a corporate claimant and declined jurisdiction on that basis. It has also failed to produce any positive evidence whatsoever to show that KT Asia was established to perpetrate some kind of fraud (Rejoinder, § 225 ff.).
- Finally, as to the Respondent's allegations of abusive treaty shopping, the Claimant stresses that there is nothing wrong in law with planning or restructuring an investment to benefit from an applicable investment treaty or the ICSID Convention. It is only inadmissible to restructure an investment after a dispute has arisen in order to vest an international tribunal with jurisdiction, which is not the case here (Rejoinder, § 245 ff.).

79. For all the reasons just summarized, the Claimant requests the following relief:

“(a) an order declaring that the Tribunal has jurisdiction over the dispute and that the Claimant's claims are admissible;

(b) an order that the Respondent pay all costs incurred in connection with this preliminary phase of the arbitration proceedings including its own costs, the costs of the arbitrators and ICSID, as well as the legal and other expenses incurred by the Claimant including the fees of its legal counsel, experts and consultants, on a full indemnity basis, plus interest thereon at a reasonable rate; and,

(c) such other relief as the Tribunal, in its discretion, considers appropriate.” (C's Rejoinder, § 313)

## **V. ANALYSIS**

### **A. PRELIMINARY MATTERS**

80. Prior to considering the merits of the Parties' positions, the Tribunal will address the following matters: the scope of this award (1); the relevance of previous decisions or awards (2); the law applicable to the jurisdiction of the Tribunal (3); the undisputed facts (4) and the test for establishing jurisdiction (5).

#### **1. Scope of this Award**

81. The present proceedings were bifurcated between jurisdiction and merits in PO3. In the course of this jurisdictional phase, the Respondent has also raised objections to admissibility, which the Parties have debated without the Claimant objecting that matters of admissibility fall outside the scope of this initial phase of the proceedings as defined by PO3. The Tribunal will thus address both types of preliminary objections to the extent necessary and appropriate.

#### **2. The Relevance of Previous Decisions or Awards**

82. Both Parties have relied on previous decisions or awards in support of their positions, either to conclude that the same solution should be adopted in the present case, or in an effort to explain why this Tribunal should depart from that solution.

83. The Tribunal considers that it is not bound by previous decisions. At the same time, in its judgement it must pay due consideration to earlier decisions of international tribunals. Specifically, it believes that, subject to compelling contrary grounds, it has a duty to adopt principles established in a series of consistent cases. It further believes that, subject always to the specific text of the Treaty and to the Convention, and with due regard to the circumstances of each particular case, it has a duty to contribute to the harmonious development of investment law, with a view to meeting the legitimate expectations of the community of States and investors towards the certainty of the rule of law.

#### **3. Law Applicable to the Jurisdiction of the Tribunal**

84. It is not in dispute that the Tribunal's jurisdiction is governed by the ICSID Convention and the BIT (C-1).

85. Article 41(1) of the ICSID Convention expressly grants the Tribunal authority to decide on its own jurisdiction. It is common ground, and rightly so, that Article 42(1) of the

ICSID Convention only applies to the merits of the dispute and does not govern the tribunal's jurisdiction under Article 25.<sup>24</sup> Thus the law the Tribunal must apply in deciding whether jurisdiction has been conferred upon it by the ICSID Convention and the BIT is international law.

86. Similarly, it is also common ground that the interpretation of the ICSID Convention and the Treaty is governed by customary international law as codified in the Vienna Convention.

87. Jurisdiction under the ICSID Convention is governed by Article 25(1), which reads as follows:

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

88. In accordance with the terms of Article 9 of the BIT, if a dispute arises between a Contracting Party and an investor of the other Contracting Party, the following dispute settlement mechanism shall apply:

"Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to the International Centre for Settlement of Investment Disputes for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965. A legal person which is a national of one Contracting Party and which before such a dispute arises is controlled by nationals of the other Contracting Party shall, in accordance with Article 25 (2) (b) of the Convention, for the purpose of the Convention be treated as a national of the other Contracting Party."

89. The terms "investment" and "national" used in Article 9 are defined in Article 1 as follows:

"For purposes of this Agreement:

(a) the term "investments" means every kind of asset and more particularly, though not exclusively:

[...]

(i) movable and immovable property as well as any other rights in rem in respect of every kind of asset;

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<sup>24</sup> MoJ, § 170; Tr. D3/185/14 ff.

- (ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
  - (iii) claims to money, to other assets or to any performance having an economic value;
  - (iv) rights in the field of intellectual property, technical processes, goodwill and know-how;
  - (v) rights granted under public law or under contract, including rights to prospect, explore, extract and win natural resources.
- (b) the term "nationals" shall comprise with regard to either Contracting Party:
- (i) natural persons having the nationality of that Contracting Party;
  - (ii) legal persons constituted under the law of that Contracting Party;
  - (iii) legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii).
- [...]"

#### 4. Undisputed Facts

90. The following facts are undisputed: (i) the Claimant was incorporated in Rotterdam on 12 December 2007<sup>25</sup>; (ii) the Claimant has no assets of its own and is a shell company set up to hold Mr. Ablyazov's shareholding in BTA for the purposes of a private placement<sup>26</sup>; (iii) it purchased, by means of two unsecured loans from the vendors, 808,321 shares in BTA from two BVI registered companies, Torland and Refgen, representing a 9.96% interest in BTA<sup>27</sup>; (iv) the ultimate beneficial owner of Torland and Refgen and KT Asia is Mr. Ablyazov<sup>28</sup>; (v) the Claimant did not repay the principal nor pay interest on the loans owed to Torland and Refgen; (vi) Torland and Refgen were wound up in 2009; and (vii) Mr. Ablyazov is funding the present arbitration<sup>29</sup>.

#### 5. Test for Establishing Jurisdiction

91. At the jurisdictional stage, the Claimant must establish (i) that the jurisdictional requirements of Article 25 of the ICSID Convention and of the Treaty are met, which includes proving the facts necessary to meet these requirements, and (ii) that it has a *prima facie* cause of action under the Treaty, that is that the facts which it alleges are susceptible of constituting a treaty breach *if* they are ultimately proved to be true.<sup>30</sup>

<sup>25</sup> KT Asia Deed on Incorporation, 12 December 2007 (C-36).

<sup>26</sup> Tr. D1/163-164.

<sup>27</sup> Extract from KT Asia's securities account, 24 January 2008 (C-39).

<sup>28</sup> CMoM, § 47.

<sup>29</sup> Tr. D1/117/3-5.

<sup>30</sup> On the *prima facie* test of treaty breach for purposes of jurisdiction, see among others *United Parcel Services (UPS) Inc. v. Government of Canada*, UNCITRAL (NAFTA), Award on Jurisdiction, 22 November 2002, §§ 33-37; *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8),

## B. OBJECTIONS TO JURISDICTION AND ADMISSIBILITY

92. As was set forth above, the Respondent objects to the jurisdiction of the Tribunal on the following grounds:
- (i) The Tribunal lacks jurisdiction *ratione personae* because the Claimant is not an investor;
  - (ii) The Tribunal lacks jurisdiction *ratione materiae* because the Claimant has no investment;
  - (iii) In the alternative, the Tribunal lacks jurisdiction because the Claimant has abused the Convention and/or the BIT.
93. Alternatively, the Respondent argues that the claims are inadmissible as a result of KT Asia's real and effective nationality and the beneficial ownership of the claims.
94. There is no dispute between the Parties regarding the other requirements for jurisdiction under the ICSID Convention and the BIT. Specifically, it is not disputed that there is a legal dispute, that Kazakhstan was an ICSID Contracting State at the relevant time and that the Claimant was incorporated in the Netherlands, another ICSID Contracting State. Likewise, there is no dispute that Kazakhstan consented to submit to arbitration disputes falling within the scope of the BIT. The Tribunal agrees that these requirements are met, and will now examine those requirements which are disputed.

### 1. Objections *Ratione Personae*: No Investor

95. The Respondent submits that on a proper interpretation of Articles 1(b)(ii) of the BIT and 25(1) of the ICSID Convention, the Claimant is not an “investor”. First, the Respondent contends that the Claimant’s real and effective nationality is Kazakh, with the effect that its nominal Dutch nationality is not opposable to the Respondent in this arbitration (MoJ, § 240 ff.). Second, it submits that the claim is not admissible by reason of the Claimant’s real and effective nationality and the beneficial ownership of

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Decision on Jurisdiction, 3 August 2004, § 180; *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction, 8 February 2005 (hereinafter “*Plama*”), §§ 118-120, 132; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), §§ 185-200, Decision on Jurisdiction, 14 November 2005; *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Decision on Jurisdiction, 27 April 2006, §§ 40-45, 109; *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Decision on Jurisdiction, 16 June 2006 (hereinafter “*Jan de Nul*”), §§ 69-71; *Telenor Mobile Communications AS v. Republic of Hungary* (ICSID Case No. ARB/04/15), Award, 13 September 2006, §§ 34, 53, 68, 80; *Phoenix Action Ltd v. Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009 (hereinafter “*Phoenix*”), §§ 60-64.

its claim (MoJ, § 331). Third, in its Reply, the Respondent further argues that KT Asia cannot be considered an investor under the BIT or the Convention in light of the object and purpose of the BIT and the ICSID Convention (Reply, § 39 ff.). Finally, it submits that the Claimant's corporate veil should be lifted to reveal the real party in interest, Mr. Abyazov, who is not entitled to bring a claim under the BIT (MoJ, § 183 ff.).<sup>31</sup> The Claimant argues that all of these objections are ill-founded (Rejoinder, § 47 ff.).

96. The Tribunal begins by recalling that the nationality of the Claimant must be established under both the ICSID Convention and the BIT. More specifically, Article 25(1) of the ICSID Convention requires that disputes submitted to arbitration be between a Contracting State and a national of another Contracting State. The BIT uses the same language. It defines "nationals" of a Contracting Party *inter alia* as "legal persons constituted under the law of that Contracting Party". The Respondent does not dispute that KT Asia is a legal person constituted under the laws of the Netherlands. Rather, it argues that the Claimant is not a genuine entity of the Netherlands and that it should be considered to be a national of Kazakhstan.

#### **1.1. The Respondent's position**

97. The first line of the Respondent's argument is based on the allegation that the Claimant's nominal Dutch nationality is not opposable to it as a result of the principle of real and effective nationality, which permits a tribunal to determine whether diversity of nationality exists between a claimant and a respondent State. In the Respondent's view, this principle applies in investment arbitration in the same way as it applies in the field of diplomatic protection (MoJ, §§ 240-311; Reply, §§ 58-127).
98. More specifically, the Respondent says that principle must be taken into account when interpreting Article 1(b)(ii) of the BIT and requires the consideration of the Claimant's links with Kazakhstan. The Respondent disputes the Claimant's assertion that there is a *jurisprudence constante* in investment arbitration according to which the real and effective nationality principle does not apply to investment treaty disputes.
99. Besides its place of incorporation, the Claimant has no connection with the Netherlands. It has no genuine business, no employees, no place of business there; no decisions are taken in relation to its business in the Netherlands; it has no

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<sup>31</sup> In the Reply, the Respondent had addressed this argument in the context of its allegation that the Claimant has abused the BIT and the Convention, and not in the context of objections *ratione personae*. The Tribunal will thus follow the Respondent's structure on this point and address the argument about the piercing of the corporate veil at the end of the analysis.

substantial funds in the Netherlands, nor any means of generating funds (Reply, § 104 ff.).

100. It is undisputed that KT Asia's nominee director has no decision-making power. Under the terms of the Management Agreement (R-29), such power rests exclusively with Mr. Abyazov, a Kazakh national. That agreement provides that the director, and therefore the Claimant itself, must act at all times in accordance with Mr. Abyazov's instructions. By contrast, the Claimant's connections with Kazakhstan are manifest.
101. The second line of the Respondent's argument concentrates on the lack of "foreignness" of the investment and is linked to the object and purpose of the ICSID Convention and the BIT, which is to encourage and protect foreign investments (Reply, §§ 39-57; §§ 103-127).<sup>32</sup> Both the BIT and the Convention are concerned with international flows of capital or technology and are based on the fundamental presumption of diversity of nationality. The Respondent argues that "domestically owned investments structured through a shell company in the other State would not lead to an international flow of capital or technology, [nor] advance the economic development of the host State" (Reply, § 48). The situation is analogous as regards the ICSID Convention, the purpose of which is to facilitate the settlement of disputes between States and foreign investors. The ICSID Convention is not meant to offer a forum for the resolution of a politicised dispute between a State and one of its own nationals (Reply, § 51).
102. In the present case, the Claimant is a shell company with no business, no premises, no employees and no genuine separate existence from its ultimate beneficial owner, Mr. Abyazov, who is a Kazakh national (Reply, § 54). The Respondent thus concludes that "[i]t is simply untenable to contend that either of the State parties to the BIT intended that their own nationals should be able to (ab)use the treaty in order to bring international claims against them simply by the device of incorporating a shell company in the other State" (Reply, § 56).

## **1.2. The Claimant's position**

103. In the Claimant's submission, the Respondent's reliance upon the principle of real and effective nationality in diplomatic protection is misplaced. Article 1(b)(ii) of the BIT supplies the test for corporate nationality of investors to which both State parties to the BIT have consented. The BIT confers no residual power upon Kazakhstan to deny the

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<sup>32</sup> The Respondent phrased this argument as a free-standing objection to jurisdiction for the first time in the Reply (Reply, § 39 ff.).

benefits of treaty protection to investors who qualify as nationals of the Netherlands under the treaty's test.

104. Consequently, the Respondent attempts in vain to add what is a controversial requirement for the invocation of diplomatic protection in customary international law to the express test for nationality of corporations set out in the Treaty and the ICSID Convention. The Claimant points out that this is the twentieth known instance in which a respondent State has sought to undermine the test of nationality in an investment treaty by reference to the rules of diplomatic protection, a strategy which has failed in all but one instance (CMoJ, § 123).
105. The Claimant also points out that, besides the reference to *Loewen*<sup>33</sup>, the Respondent has cited no precedent from any international tribunal that has applied the principle of real and effective nationality in respect of a corporation beneficially owned by a national of the respondent State. Indeed, it would be “plainly wrong to transplant such a principle to investment treaty arbitration” (Rejoinder, § 51). Similarly, none of the cases cited by the Respondent or its expert Dr. Heiskanen support the assertion that there is a special rule of real and effective nationality that comes into play when the beneficial owner of the claimant has special ties to the respondent host State.
106. The Claimant adds that, given that all the links between Mr. Abylazov and Kazakhstan have been severed, as the UK authorities recognized when they granted Mr. Abylazov asylum, it would be “extraordinary for an international tribunal to conclude that Kazakhstan is the real and effective nationality of a company incorporated in The Netherlands but beneficially owned by a refugee who is resident in the United Kingdom” (Rejoinder, § 55).
107. The Claimant also submits that the Respondent’s argument about the object and purpose of the BIT and the ICSID Convention cannot replace the plain meaning of the treaty provisions. The fact that some commentators have described the purpose of BITs as the promotion of “foreign” investment does not change this fact (Rejoinder, § 32 ff.).
108. The distinction between *foreign* and *domestic* investment is not mentioned in any investment treaty. Therefore, the only way to differentiate between *foreign* and *domestic* investments would be to trace the origin of the capital, which would be at odds with the policy of economic liberalisation that underlies investment treaties. In the

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<sup>33</sup> *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award, 26 June 2003 (hereinafter “*Loewen*”).



globalized economic system of today, “capital has no nationality” (Rejoinder, §§ 37-41).

109. According to the Claimant, the Respondent makes no attempt at defining “foreign” investment. It is evident that the degree of “foreignness” can only be answered by reference to the treaty text. The Claimant concludes that whether or not it is possible to conceive of an investment that has a higher degree of “foreignness” than the investment of KT Asia is besides the point (Rejoinder, §§ 43-45).

### 1.3. Analysis

110. To substantiate its first objection, the Respondent relies on two main arguments. While these arguments have been rephrased several times, the Tribunal understands that in essence the first one deals with the lack of foreignness of the *investor* (“opposability of nationality”) and the second one with the lack of foreignness of the *investment*, even if the Respondent’s conclusion in both scenarios is that the Claimant does not qualify as an *investor*. The second argument became a free-standing objection for the first time in the Respondent’s Reply. Since the two arguments overlap, the Tribunal will merge them in the analysis (1.3.1). Thereafter, following the structure of the Respondent’s submissions, the Tribunal will address the third argument about admissibility (1.3.2).

#### 1.3.1. Is the Claimant's Dutch nationality opposable to the Respondent?

111. The Tribunal must determine whether KT Asia is an “investor” within the meaning of the ICSID Convention and the BIT. To make this determination, the Tribunal must ascertain whether KT Asia should be held to be of Dutch nationality, as assessed by the Claimant, or of Kazakh nationality, as argued by the Respondent.
112. Article 25(2)(b) of the ICSID Convention provides the following definition of the term “national of another Contracting State”:

“(i) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration, and,

(ii) any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.”

113. It is common ground that the ICSID Convention does not impose any particular test for the nationality of juridical persons not having the nationality of the host State, be it the

place of incorporation, or the effective seat, or control.<sup>34</sup> This leaves broad discretion to Contracting States to define nationality, and particularly corporate nationality, under the relevant BIT. Kazakhstan and the Netherlands have used that discretion by agreeing on the following definition of a “national” in Article 1 of the BIT:

"For purposes of this Agreement:

[...]

(b) the term 'nationals'" shall comprise with regard to either Contracting Party:

(i) natural persons having the nationality of that Contracting Party;

(ii) legal persons constituted under the law of that Contracting Party;

(iii) legal persons not constituted under the law of that Contracting Party but controlled, directly or indirectly, by natural persons as defined in (i) or by legal persons as defined in (ii)."

114. Accordingly, simply reading this provision, a legal entity incorporated in a Contracting State is deemed a national of that State. Faced with this definition, the Respondent argues that the principle of real and effective nationality sets requirements that go beyond this definition. The Tribunal cannot follow this argument for the following reasons.

115. Pursuant to Article 31(1) of the VCLT, a treaty must 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".

116. In the present case, the ordinary meaning of the words is clear. In conformity with the general method for determining corporate nationality in international law in Article 1(b)(ii) of the Treaty, the Contracting Parties agreed that the place of incorporation would establish the nationality of legal persons. Hence, a legal person constituted under the law of a Contracting Party is a national of that State. KT Asia is a legal person constituted under the law of the Netherlands. As a result, it is a Dutch national under the nationality test of the BIT.

117. The *Saluka* tribunal, for instance, held similarly that it could not add requirements for nationality which the Contracting States had not provided:

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<sup>34</sup> *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction, 10 June 2010 (hereinafter "*Mobil*"), §§ 155-157; *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008 (hereinafter "*Rompetrol*"), §§ 81-83; § 93.

“The parties had complete freedom of choice in this matter, and they chose to limit entitled ‘investors’ to those satisfying the definition set out in Article 1 of the Treaty. The Tribunal cannot in effect impose upon the parties a definition of ‘investor’ other than that which they themselves agreed. That agreed definition required only that the claimant-investor should be constituted under the laws of (in the present case) The Netherlands, and it is not open to the Tribunal to add other requirements which the parties could themselves have added but which they omitted to add.”<sup>35</sup>

118. The context of the provision defining nationality reinforces the Tribunal's understanding. In Article 1(b)(iii), the Contracting Parties expressly agreed to extend treaty protection to legal entities "not constituted under the law of that Contracting party but controlled" by individuals who are nationals of that Contracting State or legal entities incorporated in that Contracting State. By providing for this extension, the provision confirms the rule pursuant to which incorporation is a sufficient test of nationality under the treaty.
119. The object and purpose of the treaty which the Tribunal must also take into account by virtue of Article 31 of the VCLT does not change the Tribunal's conclusion as to the meaning of Article 1(b)(iii) of the BIT.
120. The crux of the Respondent's argument in this connection is that the fundamental object and purpose of the BIT and the ICSID Convention is to encourage and protect *foreign* investment. Although the BIT does not expressly state so, its Preamble stresses the Contracting Parties' desire to "extend and intensify the economic relations between them, particularly with respect to investments by the nationals of one Contracting Party in the territory of the other Contracting Party" and their recognition that "agreement on the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties...". The BIT is thus premised on the making of investments by the nationals of one Party in the territory of the other with the consequent stimulation of the flow of capital and technology.<sup>36</sup> Yet, this says nothing about the definition of nationals, which is precisely the subject of Article 1(b).
121. In connection with the object and purpose of the ICSID Convention, the dissenting opinion of Prosper Weil in *Tokios Tokelés v. Ukraine* comes to mind. Based on the ICSID Convention's Preamble and on the Report of the Executive Directors, Professor Weil expressed the opinion that the ICSID mechanism only applies to the settlement of disputes arising out of an international investment, that is an investment "implying a

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<sup>35</sup> *Saluka Investments B.V. v. Czech Republic*, Partial Award, 17 March 2006, UNCITRAL/PCA (hereinafter "*Saluka*"), § 241.

<sup>36</sup> The Tribunal's view is confirmed by the tribunal in *Bayview Irrigation District et al v. United Mexican States* (ICSID Case No. ARB(AF)/05/1), Award, 19 June 2007, § 96 ff.

transborder flux of capital"; it does not apply to the resolution of disputes between a State and its national.<sup>37</sup> Professor Weil then goes on to consider that the ICSID Convention thereby sets limitations which the States cannot alter by agreeing a definition of investor or nationality in a BIT that ignores the control or ownership of a legal entity incorporated in a given State. Like the majority in *Tokios Tokelès*, this is a leap that this Tribunal is not prepared to take. Indeed, while the ICSID Convention sets objective outer limits to jurisdiction by requiring nationality, it does not specify the test for nationality (except in respect of Article 25(2)(b) second part, which is of no relevance here). Hence, the Contracting States are free to set the parameters of nationality within these outer limits.<sup>38</sup>

122. Pursuant to Article 32 of the VCLT, supplementary means of interpretation can be used in particular to confirm the meaning resulting from the application of Article 31. These include treaties which one of the Contracting States entered into with third states if they deal with the same subject matter.<sup>39</sup>

123. In this vein, the Tribunal's reading of the treaty language is further strengthened if one bears in mind that in twenty-four Kazakh BITs the Respondent has agreed to the same test as in the present one, the place of incorporation, while in ten other BITs it has added a requirement that the *siège social* or place of business be placed or "real economic activities" be conducted there (CMoJ, §§ 142-143; Appendix 2 to CMoJ). When negotiating this BIT, Kazakhstan could have insisted on a more demanding wording of Article 1(b)(ii) of the BIT. For example, it could have required additional links to the State of incorporation or insisted on the inclusion of a "denial of benefits" clause. It did not. Kazakhstan has therefore accepted that the nationality of Dutch legal persons be determined by their place of incorporation.

124. The Tribunal accordingly agrees with the Claimant's observation that if it were for instance to require KT Asia to conduct its activities in the Netherlands, it would erode

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<sup>37</sup> *Tokios Tokelès v. Ukraine* (ICSID Case No. ARB/02/18), Dissenting Opinion (Attached to the Decision on Jurisdiction), 29 April 2004 (hereinafter "*Tokios Tokelès Dissent*"), § 19.

<sup>38</sup> Prof. Weil's dissent has not had much influence on later decisions and scholarly writings in light of the clear wording of the BITs and Article 25 of the ICSID Convention. For example, in Prof. Schreuer's view, while the dissent "reflects a particular appreciation of the ICSID Convention's object and purpose, [...] it is not supported by the text of Article 25" (Schreuer, C.H., *The ICSID Convention: A Commentary*, 2009 (2ed), page 290 (CL-119)). As also acknowledged by McLachlan, Shore and Weiniger (McLachlan, C., Shore, I., and Weiniger, M., *International Investment Arbitration* (2008), p. 148 (CL-121)), on whose treatise the Respondent has relied in other contexts, Prof. Weil's dissent "has become emblematic of a minority position that, although forcibly and in many respects persuasively presented, shows no signs of becoming the foundation of an emerging majority".

<sup>39</sup> See e.g. A. Aust, *Modern Treaty Law and Practice* (2007), page 248.

the difference between the various corporate nationality tests in BITs concluded by the Respondent. Further, by suggesting that KT Asia must demonstrate further connections with the Netherlands, the Respondent is effectively asking the Tribunal to apply a different nationality test to the one embodied in this BIT, a test that it has included in some of its BITs, but not in the present one.

125. The Respondent seeks to rely on Article 31(3)(c) of the VCLT, arguing that the principle of real and effective nationality forms part of the "relevant rules of international law applicable in the relations between the parties" (MoJ, § 268). The Tribunal cannot share this view.
126. The fundamental question is whether this Tribunal should disregard the Dutch nationality of KT Asia dictated by a plain reading of the Treaty and focus instead on the Kazakh nationality of Mr. Abyazov, its ultimate beneficial owner. Cases have addressed issues such as the present one under different labels or principles, including real and effective nationality, piercing the corporate veil, or reliance on the object and purpose of the ICSID Convention and investment treaties.
127. The principle of real and effective nationality is applied in the context of diplomatic protection of claimants who hold dual nationality. It enables a determination to be made as to the State with which the claimant has the most real and tangible connection and which can therefore espouse the claimant's claim under international law against another State.<sup>40</sup>
128. This Tribunal sees no basis for applying a rule of diplomatic protection that would trump the specific regime created by the Treaty. In this respect, the Tribunal agrees with the Claimant that the nationality of a corporation is a legal construct and that in the absence of any obligatory test for the nationality of corporations in international law, it falls to the Contracting States of the relevant investment treaty to define the nationality of a corporation as they see fit (CMoJ, § 126).
129. This observation is confirmed by a review of relevant decisions. Indeed, attempts by respondents to substitute or supplement the test of nationality in a BIT with rules of diplomatic protection have failed in an overwhelming number of cases.<sup>41</sup> The Tribunal

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<sup>40</sup> *Nottebohm Case (Liechtenstein v. Guatemala) (Second Phase)*, Judgment of 6 April 1955, 1955 ICJ Reports, page 4.

<sup>41</sup> See, among others, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004, § 85; *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. Arb. V079/2005, Final Award, 12 September 2010, §§ 322-333; *Rompetrol*, § 83; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* (ICSID Case No.

concurr with the wide consensus that emerges from case law according to which rules of customary international law applicable in the context of diplomatic protection do not apply where they have been varied by the *lex specialis* of an investment treaty.

130. To substantiate its argument that the real and effective nationality test should in particular prevail when the nationality at issue is that of the host State and not that of a third country, the Respondent stresses that five awards (i.e., *Tokios Tokelés*<sup>42</sup>, *Rompetrol*, *Yukos*<sup>43</sup>, *Loewen* and *TSA Spectrum*<sup>44</sup>) have addressed the issue and two of them have resorted to the real and effective nationality (MoJ, §§ 283 – 302; Heiskanen, 2 ER, § 13 ff.). These are *TSA Spectrum* and *Loewen*.
131. The Tribunal in *Rompetrol* rejected the application of the real and effective nationality principle to jurisdiction under a BIT and the ICSID Convention in clear terms:

“[T]he Tribunal cannot find any trace of justification for an argument that international law deprives the States concluding a particular treaty – whether a multilateral Convention like ICSID or a bilateral arrangement like a BIT – of the power to allow, or indeed to prescribe, the place and law of incorporation as the definitive element in determining corporate nationality for the purposes of their treaty.

In the light of these conclusions, the Tribunal is clear in its mind that there is simply no room for an argument that a supposed rule of ‘real and effective nationality’ should override either the permissive terms of Article 25 of the ICSID Convention or the prescriptive definitions incorporated in the BIT.”<sup>45</sup>

132. *TSA Spectrum* dealt with foreign control under Article 25(2)(b) of the ICSID Convention. It considered that the requirement of foreign control in the ICSID Convention was an objective limit to the Centre's jurisdiction that could not be altered by the BIT language.<sup>46</sup> It also emphasized that “the question as to whether, or to what extent, the corporate veil should be pierced or lifted in application of Article 25(2)(b) of the ICSID Convention presents itself in a different light and can lead to different solutions,

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ARB/03/16), Award, 2 October 2006 (hereinafter “ADC”), §§ 357-359; *Saluka*, §§ 240-241, *Tokios Tokelés v. Ukraine* (ICSID Case No. 02/18), Decision on Jurisdiction, 29 April 2004 (hereinafter “*Tokios Tokelés Majority*”), §§ 77, 81-82 and 86, *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008 (hereinafter “*Rumeli*”), § 326; *Československa obchodní banka, a.s. v. Slovak Republic* (ICSID Case No. ARB/97/4), Decision on Jurisdiction, 24 May 1999, § 32; *Saba Fakes v. Republic of Turkey* (ICSID Case No. ARB/07/20), Award, 14 July 2010 (hereinafter “*Saba Fakes*”), § 69.

<sup>42</sup> *Tokios Tokelés Majority*, §§ 77, 81-82 and 86.

<sup>43</sup> *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, Interim Award on Jurisdiction and Admissibility, 30 November 2009, PCA Case No. AA 227, UNCITRAL (hereinafter “*Yukos*”).

<sup>44</sup> *TSA Spectrum de Argentina, S.A. v. Argentine Republic* (ICSID Case No. ARB/05/5), Award, 19 December 2008 (hereinafter “*TSA Spectrum*”).

<sup>45</sup> *Rompetrol*, §§ 92-93; See also CMoJ, § 163.

<sup>46</sup> *TSA Spectrum*, § 156.

depending on whether the case falls under the first or the second clause of this provision".<sup>47</sup> The present case falls under the first limb of Article 25(2)(b) which merely speaks of nationality, without defining it and without referring to control. Under these circumstances, *TSA Spectrum* is of little assistance for present purposes.

133. By contrast, *Loewen*, which was a NAFTA/ICSID Additional Facility case, not a BIT/ICSID Convention case, seemed to pierce the corporate veil (although the tribunal disclaimed any need to do so<sup>48</sup>) in the course of finding that NAFTA had not varied the continuous nationality requirement of customary law.<sup>49</sup> Given this treaty-specific analysis and in the presence of a majority of cases reaching contrary conclusions, *Loewen* is of no assistance for the purposes of this case.
134. Relying primarily on *Barcelona Traction*, certain cases, including *ADC*, *Rumeli* and *Tokios Tokelès*, have indeed acknowledged the possibility of piercing the corporate veil to "prevent the misuse of the privileges of legal personality"<sup>50</sup> or where the "real beneficiary of the business misused corporate formalities in order to disguise its true identity and to avoid liability".<sup>51</sup> Assuming for the sake of argument that one were to follow that line, it would require a showing of abuse of the corporate form, which is not present here.
135. In *Tokios Tokelès*, the tribunal was faced with the question whether jurisdiction *ratione personae* existed under the ICSID Convention when the claimant corporation was owned and predominantly controlled by citizens of the host State. Professor Weil dissented from what he called "the philosophy of the Decision" largely on the basis of an overall interpretation of the ICSID Convention and its object and purpose.<sup>52</sup>
136. On the other hand, the majority found that Article 25 of the ICSID Convention left the task of defining the nationality of juridical entities to "the reasonable discretion of the Contracting Parties".<sup>53</sup> Accordingly, the majority went on to examine the BIT and concluded that the only requirement set forth in the BIT was that the entity must be "established in the territory of the Republic of Lithuania in conformity with its laws and regulations",<sup>54</sup> which requirement was met. While not ruling out the possibility of piercing the corporate veil in principle, the majority nonetheless refused to apply the

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<sup>47</sup> *Id.*, § 143.

<sup>48</sup> *Loewen*, § 237.

<sup>49</sup> *Id.*, § 220 ff.

<sup>50</sup> *Barcelona Traction, Light and Power Company Limited*, Judgment, I.C.J. Reports 1970, § 56.

<sup>51</sup> *ADC*, § 359. See also *Rumeli*, § 206, and *Tokios Tokelès Majority*, §§ 54-56.

<sup>52</sup> *Tokios Tokelès Dissent*, §§ 1, 19 -20 (VH-51).

<sup>53</sup> *Tokios Tokelès Majority*, § 24.

<sup>54</sup> *Id.*, § 28.

principle of real and effective nationality, even though it was not disputed that the claimant company was owned and controlled by nationals of the respondent State.

137. While it has not been entirely uncontroversial, the majority decision in *Tokios Tokelès* has been cited with approval by subsequent cases, including the *Yukos* joint cases<sup>55</sup> and *Rompetrol*<sup>56</sup>.
138. Finally, in carrying out its task of assessing all the specific facts before it, the Tribunal has asked itself whether there may be reasons to adopt a different approach in this case. It finds no such reasons. The Respondent has sought to distinguish the present facts from the factual matrix in *Tokios Tokelès* (MoJ, §§ 287-288), but none of these differences undermine the rationale of the Tribunal's reasoning.
139. In conclusion, KT Asia must be deemed a Dutch national for the purposes of jurisdiction and its Dutch nationality is opposable to Kazakhstan.

1.3.2. Is the claim inadmissible in light of Mr. Abyazov's alleged beneficial ownership?

140. In the context of its objections *ratione personae*, the Respondent has also argued that even if the Tribunal were to deny the objection to jurisdiction brought on the basis of the principle of real and effective nationality, it should nonetheless declare the claim inadmissible as a result of the beneficial ownership of the claim itself (MoJ, §§ 331 – 345).<sup>57</sup>
141. The Respondent submits that the authorities addressed in the context of the Claimant's real and effective nationality equally apply to the nationality of the claim. The Respondent's legal expert has sought to clarify the distinction between the two as follows:

“[...] the legal limitations governing the function of international courts and tribunals in matters concerning nationality may be stated both in terms of the nationality of the claimant and in terms of the nationality of the claim. While legal scholarship and arbitral jurisprudence has not consistently distinguished between these two approaches, they are conceptually distinct and lead to a different legal characterization of the problem: while the former approach states the issue in terms of jurisdiction, the latter states it in terms of admissibility.” (Heiskanen, 1 ER § 66)

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<sup>55</sup> *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228, UNCITRAL; *Yukos*, §§ 415-416.

<sup>56</sup> *Rompetrol*, § 85.

<sup>57</sup> This argument was made in the MoJ, §§ 331-345, was not elaborated upon in the Reply (fn. 84), and then reintroduced again in the closing statement.



142. The Claimant replies that if the Respondent's rule of admissibility of claims were adopted, it would necessitate the investigation of the ultimate beneficial ownership of every corporate entity asserting a claim as an investor. It stresses that no investment tribunal has embarked upon such an exercise (CMoJ, § 211). More generally, it submits that there is simply no basis for the Respondent's contention that the rule on the nationality of claims existing in diplomatic protection might be transplanted to the investment treaty context as a rule of admissibility. In diplomatic protection there is a triangular relationship between the State of the foreign national (the claimant State), the foreign national who has suffered an injury, and the host State allegedly responsible for the injury (the respondent State). Therefore, "the bond of nationality that provides the foundation of the nationality of claims rule supplies the link between the claimant State and the injured foreign national" (CMoJ, § 205). Conversely, there is no triangular relationship in investment treaty arbitration, where the claimant investor asserts its own claim against the respondent State. As a result, there is no basis to introduce a rule of admissibility to require a bond of nationality between the claimant and its claim (CMoJ, §§ 202-206).
143. There is no doubt that it is the investor which asserts its claim in investment arbitration, which distinguishes the latter from diplomatic protection. Yet, that does not mean that there is no bond of nationality in investor-state arbitration. There is a bond defined by the investment treaty. But for that bond, the investor would have no right to bring a claim against the other state. In that sense, there is a triangular relationship in investment treaty arbitration that is different from the one which exists in matters of diplomatic protection under customary international law. The existence of a triangular relationship where the bond of nationality is defined by the treaty is another reason why the treaty rule should prevail. The Tribunal also notes that the Respondent has not referred to any convincing legal authority in support of a rule of admissibility of the claim based on nationality in investment arbitration. Indeed, the authorities on which the Respondent relies are those invoked in respect of the nationality of the Claimant (MoJ, § 333).
144. As a consequence, the Tribunal concludes that the objection based on the inadmissibility of the claim must fail.

## 2. Objections *Ratione Materiae*: No Investment

### 2.1. The Respondent's position

145. The Respondent begins by observing that, in order for the Tribunal to have jurisdiction, the Claimant must establish that it has made an investment that is protected by both the BIT and the ICSID Convention. If the Claimant's interests constitute an "investment" under one treaty but not under the other, then the Tribunal lacks jurisdiction.
146. The definitions in the BIT and the Convention can be construed as complementary. Article 1(a) of the BIT emphasises the fruits and assets resulting from the investment, which must be protected, whereas the definitions generally used in relation to Article 25 of the ICSID Convention lay stress on the contributions that have produced such fruits and assets. It can be inferred that assets cannot be protected unless they result from contributions, and contributions cannot be protected unless they have produced the assets of which the investor claims to have been deprived.
147. The Respondent underlines that the Claimant has not even alleged that it has made any active economic contribution (Reply, § 133). It argues that the extent of the Claimant's involvement is that it received a transfer of nominal title to the shares, without giving any consideration, in order to hold the shares for and in accordance with the instructions of Mr. Ablyazov. This is not an investment for the purposes of the ICSID Convention or the BIT.
148. The Respondent further argues that the Claimant's investment does not meet the so-called *Salini* test, which test requires: (i) a contribution; (ii) an expectation and regularity of profit and return; (iii) a duration; (iv) a risk; and (v) a contribution to the Respondent's development or prosperity (MoJ, §§ 470-519; Reply, §§ 207-236).
149. First, the Claimant's nominal acquisition of the BTA shares for no consideration cannot represent a "contribution", as the Claimant acquired the shares in BTA "via a series of sham transactions for which no contribution (substantial or otherwise) was given" (Reply, § 218).
150. Second, the temporary nominal holding of shares prior to their sale to third parties does not reflect or create an expectation of any regularity of return. It does not create an expectation of return from the investment into Kazakhstan either; the only return contemplated is the one from the sale of the shares themselves (Reply, §§ 224-225).

151. Third, the requirement for a certain duration is not met either. The Claimant's alleged "investment" was made on 13 December 2007. Its request for arbitration was issued less than sixteen months thereafter. More importantly, the Claimant itself admits that its ownership of the shares was to last only as long as it took for the shares to be sold to third parties. In the Respondent's view, the meaning of an "investment" under the Convention does not envision this kind of duration (Reply, §§ 226-227). In its view, no matter how long the duration is in practice, it must exist with the expectation of some long-term relationship. This Claimant had no such intention.
152. Fourth, the only "risk" that the Claimant assumed was that the value of the BTA shares might fall. In view of the fact that the Claimant acquired the shares for nothing, it is a one-way bet not involving any risk at all. In other words, in the absence of a contribution of any economic value, there can be no assumption of risk (Reply, § 228 ff.).
153. Fifth and last, the Claimant's acquisition of the BTA shares for the sole purpose of bringing international arbitration against the Respondent cannot amount to a contribution to the development of the Respondent or to its economic prosperity.

## **2.2. The Claimant's position**

154. First of all, the Claimant contests the Respondent's reliance upon the *Salini* criteria as if these were "jurisdictional requirements engraved onto the text of Article 25 of the ICSID Convention or Article 1 of the BIT" (Rejoinder, § 210). Instead, the *Salini* criteria are mere *indicia*; a "judicial invention in a system without a principle of *stare decisis*" where "the merits of each criterion must be established before being adopted by any tribunal" (Rejoinder, § 210).
155. Turning first to the requirement of contribution under the *Salini* test as argued by the Respondent, the Claimant disputes the Respondent's suggestion that no new injection of capital into Kazakhstan emanated from the Claimant when it acquired the Bank's shares as part of what it describes as an internal corporate restructuring. The Claimant can only partially agree with the Respondent's statement that "[w]hilst investment treaties are not preoccupied with the question of the origin of capital invested in the host State, there must nonetheless be some such capital (or thing of value) invested" (CMoJ, § 299 referring to MoJ, § 498). The Claimant accepts that the origin of capital is irrelevant, but emphasizes that so is the timing of the injection of capital since "otherwise an internal corporate restructuring would never result in the acquisition of investment treaty protection" (CMoJ, § 300).

156. Second, in connection with the requirement of regularity of returns, the Claimant insists that KT Asia was incorporated to facilitate a private placement of the BTA shares along the road to an IPO, namely “a sale of the interests in the Claimant (in an optimally designed corporate structure) which held shares in BTA for a profit to a pool of international investors” (CMoJ, § 301). Depending on the investment strategy of each individual investor, the investor would either receive a capital gain upon the sale of its interest in the future or continue to hold its interest and receive dividends from BTA. These facts dispose of the Respondent’s objection on the ground of an alleged lack of regularity of returns.
157. Third, according to the Claimant, the Respondent’s argument on the duration of the investment is also ill-founded. The Claimant emphasizes that an investment cannot lose investment protection only because the host State expropriates it soon after the investor has acquired it. This would create a rather “perverse incentive” for host States (CMoJ, § 302). Fourth, the Respondent’s allegation about the lack of risk is equally unfounded (CMoJ, § 303).
158. Finally, the Claimant notes that, out of all *Salini* criteria, the requirement for a contribution to the host State’s economy is “the one that has been rejected most emphatically by the recent cases” (CMoJ, § 304). In any event, it is evident that a stake in Kazakhstan’s largest commercial bank, which was responsible for supplying credit to significant businesses across many sectors of the Kazakh economy, contributed to the economic development of Kazakhstan.
159. The Claimant concludes that, while it does not endorse the *Salini* criteria, there can be no doubt that the Claimant’s shares in BTA constitute an investment under Article 1 of the BIT and within the meaning of Article 25 of the ICSID Convention.

### 2.3. Analysis

160. In order for the Tribunal to have jurisdiction over this dispute, the Claimant must establish that it has made an investment which is protected under the BIT and the ICSID Convention.<sup>58</sup> The Tribunal will first identify the elements of an investment

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<sup>58</sup> As noted in *Malicorp Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/08/18), Award, 7 February 2011 (hereinafter “*Malicorp*”), § 107: “[...] in order for a proceeding based on breach of the treaty to be admissible, the investment to which the dispute relates must pass a double test (aka the ‘double keyhole approach’ or ‘double-barrelled test’.” See also, *Jan de Nul*, § 90, *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon* (ICSID Case No. ARB/07/12), Decision on Jurisdiction, 11 September 2009, §§ 66-68, *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Award, 31 October 2011, § 142.

(2.3.1). It will then assess whether the Claimant's alleged investment meets such test (2.3.2).

### 2.3.1. Elements of investment

161. It is common ground that while Article 25(1) of the ICSID Convention limits the disputes which can be referred to ICSID arbitration to those arising directly "out of an investment", it does not define the term "investment".

162. By contrast, Article 1(1) of the BIT defines the term investment as follows:

"For purposes of this Agreement:

(a) the term "investments" means every kind of asset and more particularly, though not exclusively:

[...]

(ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures;

(iii) claims to money, to other assets or to any performance having an economic value;

[...]"

163. The Respondent has observed that the term "investment" as it is used in Article 1 of the BIT has an inherent meaning which cannot be ignored when construing that provision (MoJ, § 485). In considering that meaning in the context of both the BIT and the ICSID Convention, the Respondent turns to the *Salini* criteria. In other words, although disputing that the Claimant has made an "investment" within the meaning of Article 1(1) of the BIT and under Article 25(1) of the ICSID Convention, the Respondent places most emphasis on the *Salini* criteria.

164. The Claimant, too, has concentrated its analysis on the *Salini* criteria (CMoJ, § 288 ff.; Rejoinder, § 210 ff.). Nonetheless, the Claimant adds, with reference to the annulment decision in *Malaysia Historical Salvors v Malaysia*<sup>59</sup>, that it is "controversial as to whether it is permissible to refer to the so-called *Salini* criteria at all in cases where the instrument of consent to arbitration is a BIT because a BIT typically (as in this case) supplies a definition of an investment" (Rejoinder, § 211). However, it has not argued that the mere fact of holding an asset which falls within the scope of Article 1(1)(a) of the BIT is sufficient to conclude that a person has made an investment under the BIT. Nor has it challenged the Respondent's argument that it is inherent in the ICSID Convention that there is an objective definition of investment.

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<sup>59</sup> *Malaysian Historical Salvors, SDN, BHD v. Malaysia* (ICSID Case No. ARB/05/10), Decision on the Application for Annulment, 16 April 2009.

165. In the Tribunal's view, the Claimant was right not to raise these counter-arguments. The absence of a definition of "investment" under the ICSID Convention implies that the Contracting States intended to give to the term its ordinary meaning under Article 31(1) of the VCLT as opposed to a special meaning under Article 31(4) of the same treaty.<sup>60</sup> This ordinary meaning is an objective one, as was confirmed *inter alia* in *Saba Fakes*<sup>61</sup> and *Quiborax*<sup>62</sup>. It is inherent to the word "investment", irrespective of the application of the ICSID Convention. This understanding is in particular supported by the tribunal in *Romak*,<sup>63</sup> an arbitration conducted under the UNCITRAL Rules:

"The term 'investment' has a meaning in itself that cannot be ignored when considering the list contained in Article 1(2) of the BIT. . . . The Arbitral Tribunal therefore considers that the term 'investments' under the BIT has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a contribution that extends over a certain period of time and that involves some risk [...]. By their nature, asset types enumerated in the BIT's non-exhaustive list may exhibit these hallmarks. But if an asset does not correspond to the inherent definition of 'investment', the fact that it falls within one of the categories listed in Article 1 does not transform it into an 'investment'".<sup>64</sup>

166. As stated by the *Romak* tribunal, the inherent meaning of investment is also present in the BIT. The assets listed in Article 1(1)(a) of the BIT are the result of the act of investing. They presuppose an investment in the sense of a commitment of resources. Without such a commitment of resources, the asset belonging to the claimant cannot constitute an investment within the meaning of the ICSID Convention and the BIT. Since the BIT does not add further requirements to the inherent meaning of investment as it arises from the objective definition, the decisive test for the existence of an investment is the same under the BIT and the ICSID Convention. In fact, the Parties have not argued otherwise.

167. This said, it is true that the focus of the two treaties is different as was well emphasized in *Malicorp*. The tribunal in that case commented that the BIT's definition of investment "does not so much stress the contributions made by the party acting, as the rights and assets that such contributions have generated for it".<sup>65</sup> Having then adverted to the

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<sup>60</sup> "A special meaning shall be given to a term if it is established that the parties so intended."

<sup>61</sup> The *Saba Fakes* tribunal reached the following conclusion: "The Tribunal believes that an *objective definition* of the notion of investment was contemplated within the framework of the ICSID Convention [...]" (emphasis added), *Saba Fakes*, § 108.

<sup>62</sup> *Quiborax*, § 212.

<sup>63</sup> *Romak S.A. (Switzerland) v. The Republic of Uzbekistan, UNCITRAL, PCA Case No. AA280* (hereinafter "*Romak*").

<sup>64</sup> *Romak*, § 207.

<sup>65</sup> *Malicorp*, § 108.

various tests that ICSID tribunals have applied, including the *Salini* test, the tribunal stated:

“At first blush, the two definitions [the BIT and the Convention’s objective meaning definition] do not overlap, since they come from different perspectives. In the opinion of the Arbitral Tribunal these two aspects are in reality complementary.

[...]

Clearly Article 1(a) of the Agreement emphasises the fruits and assets resulting from the investment, which must be protected, whereas the definitions generally used in relation to Article 25 of the ICSID Convention lay stress on the contributions that have created such fruits and assets. It can be inferred from this that assets cannot be protected unless they result from contributions, and contributions will not be protected unless they have actually produced the assets of which the investor claims to have been deprived”.<sup>66</sup>

168. Consequently, the Claimant must show that it has made an "investment" under the objective definition developed in the framework of the ICSID Convention in order to establish that the Tribunal has *ratione materiae* jurisdiction over the present dispute. The Tribunal agrees with the Respondent that these elements are found in ICSID cases interpreting Article 25(1) of the ICSID Convention.
169. In the Respondent’s view, an investment (i) involves a contribution; (ii) a certain duration; (iii) a risk assumed by the investor; (iv) a contribution to the host State’s economic development; and (v) regularity of profit and return. According to the Claimant, the *Salini* criteria on which the Respondent relies are not jurisdictional requirements but mere *indicia* (Rejoinder, § 210).
170. The Tribunal agrees with the Parties that a contribution of money or assets (that is, a commitment of resources), duration and risk form part of the objective definition of the term “investment”. The expectation of a commercial return is sometimes viewed as a separate component. This Tribunal is rather of the opinion that such expectation is part of the risk element. Be this as it may, an investor commits resources with a view to generating profits, which necessarily implies a risk.
171. The Respondent also cites the contribution to the host State’s development or prosperity as a requirement for an investment. In the Tribunal’s opinion, such a contribution may well be the consequence of a successful investment. However, if the investment fails, and thus makes no contribution at all to the host State’s economy, that

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<sup>66</sup> *Id.*, § 110, subsequently cited for this point by the majority in *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011, § 349, fn 139.

cannot mean that there has been no investment. As the Claimant points out, this is the one criteria that has been “rejected most emphatically by the recent cases” (CMoJ, § 304). For example, the tribunal in *Phoenix* highlighted the difficulties stemming from the subjectivity of this requirement:

"[T]he contribution of an international investment to the *development* of the host State is impossible to ascertain [...]. A less ambitious approach should therefore be adopted, centered on the contribution of an international investment to the *economy* of the host State, which is indeed normally *inherent in the mere concept of investment as shaped by elements of contribution/duration/risk*, and should therefore in principle be presumed".<sup>67</sup> (emphasis in original)

172. The tribunal in *Saba Fakes* also held that the element of contribution to the economic development of the host State was not part of the definition of investment pursuant to the ICSID Convention:

"[T]he present Tribunal considers that the criteria of (i) a contribution, (ii) a certain duration, and (iii) an element of risk, are both [sic] necessary and sufficient to define an investment within the framework of the ICSID Convention [...]. The Tribunal is not convinced, on the other hand, that a contribution to the host State's economic development constitutes a criterion of an investment within the framework of the ICSID Convention [...] [W]hile the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an investment".<sup>68</sup> (emphasis added)

173. The Tribunal thus concludes that the objective definition of investment under the ICSID Convention and the BIT comprises the elements of a contribution or allocation of resources, duration, and risk, which includes the expectation (albeit not necessarily fulfilled) of a commercial return.<sup>69</sup>

### 2.3.2. Does the Claimant's investment meet the objective test?

174. The next question is whether the Claimant meets the definition of investment just set out. The Claimant asserts that it meets all five elements of this definition as put forward by the Respondent. The Respondent denies that the Claimant meets any of them. The Tribunal will address in turn each of the three elements – contribution (2.3.2.2), duration (2.3.2.3), risk (2.3.2.4) – which it has found to constitute part of the objective definition of investment and which applies equally under the BIT and the ICSID

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<sup>67</sup> *Phoenix*, § 85. To the same effect, *Quiborax*, § 223.

<sup>68</sup> *Saba Fakes*, §§110-111. To the same effect, *Quiborax* § 224.

<sup>69</sup> After the Tribunal had deliberated and agreed on the content of this section 2.3.1, on 13 September 2013, the Institut de droit international issued a Resolution on the definition of investment that appears to call for more weight being given to the contribution to the host State's development. Because the Parties have not expressed themselves on this text, the Tribunal merely notes its existence here for the sake of completeness, without revisiting its opinion.



Convention. Beforehand, it will set forth the key facts relevant for the existence of an investment (2.3.2.1).

#### 2.3.2.1. Key facts

175. Given that the factual matrix of the present case will be relevant for the assessment of all three elements, the Tribunal finds it appropriate to begin its analysis by reviewing certain key facts in order to gain a better understanding of the nature and intricacies of the transactions that the Claimant calls an “internal corporate restructuring” and as a result of which it acquired its alleged investment (CMoJ, § 290).
176. First, it is undisputed that the ultimate beneficial owner of the Claimant is Mr. Ablyazov.<sup>70</sup> In accordance with the Management Agreements (R-29; R-30), the managing director of KT Asia<sup>71</sup> and therefore KT Asia itself must follow Mr. Ablyazov’s instructions at all times. The Claimant’s alleged investment has always been and continues to be fully controlled by Mr. Ablyazov. There is overwhelming evidence on record in support of these facts, which were also admitted by Mr. Ablyazov himself in his oral and written witness testimony (see paragraph 22 above). At the hearing Mr. Ablyazov accepted that he was the “true owner” of the shares:

“Q: So it was your understanding that you had a beneficial interest in the shares; that's right, isn't it?

Ablyazov: Yes.

Q: And by “beneficial interest”, what you had in mind is that you were the true owner, the person who had the economic interest in the shares, and that you could vote and exercise the rights of an owner in relation to those shares; that's right, isn't it?

Ablyazov: Yes, that's correct.” (Tr. D1/114/4-12)

177. Mr. Ablyazov, whom the Tribunal found to be an open and straightforward witness, also testified that he was financing this arbitration:

“Q: And would I be right in saying that it is you that finances this arbitration?

Ablyazov: Yes, I do.

Q: And it's right to say that the objective of these proceedings is to recover damages for your personal benefit?

Ablyazov: Ultimately, yes. Well, first it's the company who gets the damages, and then me as the owner of the company.

Q. Does anyone else have any financial interest in KT Asia apart from you?

Ablyazov: No, none.” (Tr. D1/117/3-13)

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<sup>70</sup> Tr. D1/159/8-12.

<sup>71</sup> Its managing director, Duma, resigned from this position in April 2012.

178. Second, the Claimant was a shell company set up to temporarily hold Mr. Abylazov's shares in BTA for the purposes of a private placement which, according to the Claimant, was to precede the eventual IPO of BTA's shares (Abylazov 2 WS, §§ 27-28). As already noted above, Mr. Abylazov had acquired a majority share in BTA, together with a consortium of investors, for US\$ 72 million in 1998 (Abylazov 1 WS, § 107).
179. The Claimant itself never had funds of any significance. As was established through the disclosure process in these proceedings, the Claimant only ever had €18,000 in its bank account, which sum was used to pay the administration fees of its corporate managing director and various corporate services expenses. As of 20 April 2010, only the sum of €5,252.39 remained in the account (Respondent's letter of 23 March 2012). In its letter of 13 April 2012, Duma, the managing director of KT Asia, admitted that "[f]ollowing our information, KT Asia Investment Group B.V. never had any significant funds". As noted above, KT Asia is currently in receivership.
180. The only purpose for the incorporation of the Claimant was to hold some of the shares in BTA. It had no activity before it acquired the shares nor has it undertaken any activity since the time it acquired the BTA shares, with the exception of commencing the present arbitration.
181. Third, the Claimant acquired the shares in BTA from Refgen and Torland, which were also owned and controlled by Mr. Abylazov ("Torland and Refgen were my companies and KT Asia was also my company", Tr. D1/159/8-12). As explained in detail by the Respondent and not rebutted by the Claimant, the arrangements for KT Asia's legal and beneficial ownership of the shares also involved a series of complex transactions relating to the ownership of KT Asia itself,<sup>72</sup> which the Claimant argues were necessary to avoid Kazakh tax consequences on the transfer of the shares (Rejoinder, § 279).

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<sup>72</sup> According to the Respondent, the transfer of shares to the Claimant involved the following transactions: "The nominal ownership of the Claimant was tinkered with at this time and the legal and beneficial ownership split. [...] the beneficial or 'economic' interest in the Claimant's shares passed to a newly formed Dutch limited partnership, KT Asia C.V., and the partnership interest in KT Asia C.V. passed through various nominee companies, which are ultimately beneficially owned and controlled by Mr. Abylazov, and ended with Tollo Holdings S.a.r.l. ('Tollo') as to 0.01% and Tanna Holding S.a.r.l. ('Tanna') as to 99.9%.<sup>116</sup> Both Tollo and Tanna are Luxembourg entities. Tollo is also the General Partner in KT Asia C.V. The legal ownership of the 180 shares in the Claimant was transferred by Kalistone to Tollo and on 29 April 2009 Tollo transferred one share to Talego Holding B.V. ('Talego'). So, by 13 December 2007, the legal interest in the 180 shares in the Claimant was with Tollo, and the beneficial interest in the shares, held by KT Asia C.V., was with Tollo (0.01%) and Tanna (99.9%). [...] In reality, however, nothing changed at all, as Mr. Abylazov continued to own and control the BTA Shares that were nominally now held by the Claimant" (MoJ, §§ 98-100; footnotes omitted).

182. Fourth, the price that the Claimant paid for the BTA shares was significantly less than the market value of the shares. The Respondent alleged, and the Claimant did not dispute, that KT Asia acquired 808,321 shares in BTA for a consideration of approximately US\$66,803,388, while, according to the KASE index (R-61), the minimum value of those shares at the time was US\$480,510,410, i.e., almost eight times as much (MoJ, §§ 121-123). Thus the Claimant did not pay an arms' length price for the shares. The shares were sold by Torland and Refgen to the Claimant at cost, so that the sellers would not realize a gain taxable under Kazakh law (C-387 and Ablyazov 2 WS, § 31).

183. Fifth, KT Asia never actually paid even this price for the BTA shares. It bought the shares on credit. When questioned at the hearing, Mr. Ablyazov did not recall whether KT Asia had made any payment at all for the shares it acquired:

“Q. We've got all the documents that you've given and I can tell you that KT Asia did not make any payment for the shares it acquired. Does that surprise you?

Ablyazov: I do not recollect how the shares were transferred from Torland and Refgen to KT Asia.” (Tr. D1/162/3-7)

184. In fact, by the Claimant's own admission, the payment of the BTA shares was financed through loans made by Refgen and Torland, the vendors, to KT Asia, the purchaser. The Claimant explains that

“in light of the fact that the ultimate seller (behind Torland and Refgen) and the ultimate buyer (behind the Claimant) were the same individual, it would not make commercial sense to transfer cash between related vendor and purchaser companies. The more advantageous commercial solution was to provide this consideration by way of loans between the corporate vendors and the corporate purchaser” (Rejoinder, § 280).

185. No security was provided for the loans. The Claimant suggests that there was no need to provide security for the loans because “the ultimate beneficial owner of the related companies was Mr. Ablyazov” (Rejoinder, § 281). In the Claimant's own words, “to a large extent the transfer to KT Asia was an accounting exercise” (Tr. D3/153/21-23). Nor did the Claimant pay any interest on the loans, even though the loan agreements provided for interest at LIBOR plus two percent and at an increased rate in case of late payment.<sup>73</sup> Mr. Ablyazov confirmed the absence of interest payments in the following terms:

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<sup>73</sup> Clause 3 of the two loan agreements (R-37, R-38) provided as follows:

“Q: And it's also right that KT Asia did not make any payments of interest in relation to the loans?”

Abylazov: Well, it was the same owner. So at the end of the day Torland and Refgen were my companies and KT Asia was also my company, so on a technical basis no payments were made, most probably, but it does not change the nature of the ownership in any way.” (Tr. D1/159/6-12)

186. Moreover, the Claimant never repaid the loans to Torland and Refgen, although the Project Aquila Step Plan provided that “KT Asia repays its debt due to Torland and Refgen” (C-382, Step 17). Instead, the loans were written off and Torland and Refgen were liquidated. In the words of Mr. Abylazov:

“Abylazov: [...] Now, afterwards, when it was all restructured by using KT Asia, at the end of the day I became the owner and Torland and Refgen were wound up because there was no use for those.” (Tr. D1/159-160; Rejoinder, § 281)

187. With these key facts in mind, the Tribunal will now analyze whether the requirements for an investment as specified above are fulfilled.

#### 2.3.2.2. Contribution

188. According to the Respondent, the Claimant has made no contribution because its involvement was limited to receiving a transfer of nominal title to the shares, for no consideration, in order to hold the shares for a few weeks in accordance with Mr. Abylazov’s instructions before their placement with private investors.

189. The Claimant has not refuted this argument in any detail. It has only devoted a few paragraphs to the contribution aspect of the *Salini* test (CMoJ, §§ 299-300; § 291). The Claimant sees the contribution element through the prism of the origin of capital, which, it claims, is irrelevant. It goes on to argue that, just like the origin of capital, “the timing of the injection of capital” is also irrelevant since “otherwise an internal corporate restructuring would never result in the acquisition of investment treaty protection” (CMoJ, § 300).

190. The Tribunal will first assess the nature of the claimed corporate restructuring based on the facts of the present case, which have been outlined in the previous section. In light

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“3.1 Interest shall accrue for each Interest Period and be calculated on the principal amount of the Loan from day to day, on the basis of the number of days elapsed and a year of 365 days, at a rate equal to LIBOR plus two percent (2%).

3.2 The Borrower shall pay interest accrued on the loan in arrear not later than 11.00 a.m. London time on each anniversary of the date of Completion throughout the subsistence of the loan.

3.3 If the Borrower fails to pay any sum due under this Agreement on the due date, interest shall accrue on that sum (both before and after judgment) at the rate specified in, and calculated in accordance with, Clause 3.1, plus *one* (1) percent per annum.”

of these facts, the first question is whether the Claimant has made any injection of capital or any other original or subsequent contribution during or after the acquisition of the BTA shares.

191. As to the original contribution, it is undisputed that Mr. Abylazov was the one who made the first contribution at the time when through nominees he acquired the BTA shares with the consortium of investors (Abylazov 1 WS, § 24, § 107, § 111; 2 WS, § 6, § 15). However, there exists no paper trail of this acquisition, nor has the Tribunal been presented with any evidence establishing the original contribution made by Mr. Abylazov. The Claimant's position on this point is that a party cannot be requested to "lay before any Tribunal precisely how much was originally paid for a particular asset" in order to be permitted to pursue its claim, and that this cannot constitute a jurisdictional requirement (Tr. D3/160/15-20).
192. Irrespective of the necessity for proof of the original acquisition, the real issue is whether KT Asia can at all rely on Mr. Abylazov's original contribution in support of the argument that it itself made an investment. In other words, the question is whether the Claimant must itself have made a contribution or whether it can benefit from a contribution made by someone else, here its ultimate beneficial owner. On this point, the Respondent insists that the contribution behind the BTA shares was made long ago by entities other than and unrelated to the Claimant, which did not contribute anything upon acquiring or while holding these shares.
193. The Claimant does not dispute that it made no injection of fresh capital, but emphasizes that an internal group restructuring by definition does not result in a new injection of capital for the acquisition of an asset in the host State. It relies on *Mobil*<sup>74</sup> and *Saluka* in support of this argument.<sup>75</sup> That argument contains the implied assertion that Torland, Refgen and KT Asia were all part of a group of companies.
194. Assuming for the sake of discussion that no new contribution is required when an investment is transferred from one group affiliate to another, the obvious question is whether in the present case there exists a corporate group as this concept is generally

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<sup>74</sup> CMoJ, § 292.

<sup>75</sup> For completeness, the Tribunal notes that the Claimant has also referred to *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5), Decision on Jurisdiction, 27 September 2001 and *Aguas del Tunari S.A. v Republic of Bolivia* (ICSID Case No. ARB/02/3), Decision on Respondent's Objections to Jurisdiction, 21 October 2005 (hereinafter "*Aguas del Tunari*") in a footnote, without however discussing how these cases would provide support for the Claimant's case. The Tribunal finds that they do not, particularly in light of the factual differences concerning the respective corporate restructurings.

understood in corporate and tax law as well as under accounting and financial reporting standards.

195. It is common knowledge that a group of companies – such as Exxon Mobil in the first case invoked by the Claimant or Nomura in the second – exists when two or more corporations are under common corporate ownership or control. Ordinarily, companies owned or controlled by one individual do not qualify as a corporate group though sometimes national legislation may so treat them. Although composed of separate legal entities, which must comply with the legal and regulatory requirements applicable to them, groups generally operate as a single economic entity with a common objective and strategy and a group management. In such a case, the group may report its financial results on a consolidated basis; its group status may be taken into account for tax purposes (subject to dealing at arms' length); and national law may impose certain liabilities to sanction any misuse of the group structure.
196. In the present case, Mr. Abylazov beneficially owned and controlled many companies through nominees and individuals whom he trusted and who (directly or indirectly) owned or controlled the shares. These nominees and other individuals acted on Mr. Abylazov's instructions and were required not to disclose that they held or controlled the shares for his benefit. Mr. Abylazov was never himself a shareholder in any of the companies. Indeed, it is the Tribunal's understanding that there was no single person (whether corporate or individual) who had legal title to the shares in the companies held for the ultimate benefit of Mr. Abylazov.
197. Consequently, there was no holding company and no single individual shareholder directly or indirectly connecting all the companies of which Mr. Abylazov was the beneficial owner.<sup>76</sup> Neither was there a single economic unity, not to speak of consolidation for financial reporting or tax purposes. This aggregation of assets in the form of a myriad of companies is in reality the antithesis of a group. To treat Mr. Abylazov's ultimate beneficial ownership of all the various companies via nominees and trusted agents as a sufficient connecting factor to create a group would be nonsensical. Indeed, the whole purpose of the structure was to conceal Mr. Abylazov's interest and make it look as if the different entities that held blocks of shares in BTA were

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<sup>76</sup> Looking only at Torland, Refgen and KT Asia, the shares in these companies were never legally owned, directly or indirectly, by the same person. When BTA shares were acquired, KT Asia's shares were owned by a Cypriot company named Kalistone (R-26; R-51). Similarly, the shares in Torland and Refgen were directly or indirectly owned by persons whom Mr. Abylazov trusted to obey his instructions (R-19).

independent of him and of each other. Mr. Abylazov confirmed this in his letters to the FSA (R-24).

198. These observations would suffice to show that the factual matrix of this case cannot be compared with the ones in *Mobil* or *Saluka*. In addition, the Tribunal notes that the *Mobil* affiliates to which the assets in Venezuela had been transferred not only benefitted from their predecessor's contributions but made substantial subsequent contributions after acquiring the investment.<sup>77</sup> Similarly, although *Saluka* does not permit us to draw any significant parallels with the present case as there is insufficient information about the facts of the internal restructuring, it appears that the claimant's obligation to repay the debt and honour the promissory notes in that case was kept in place.<sup>78</sup>
199. Furthermore, the facts in *Aguas del Tunari*, to which the Claimant has briefly referred<sup>79</sup>, must also be distinguished as the case dealt with the issue of foreign control under Article 25(2)(b) of the ICSID Convention in the context of nationality planning. The tribunal, by a majority, held that the BIT's nationality requirements were met as, *inter alia*, the controlling Dutch companies were not mere corporate shells established in order to obtain jurisdiction over the dispute.<sup>80</sup>
200. In this context, the Tribunal also finds that Torland and Refgen sold the shares to KT Asia at far less than their true value, i.e., at about one-eighth of their value on the KASE, to ensure that the sellers did not realize a gain which would have been taxable under Kazakh law.<sup>81</sup> Several arbitral tribunals have recently questioned the existence of an investment where the asset was acquired merely for a nominal price. For example, the *Phoenix* tribunal made the following observation:

“The Tribunal considers that the existence of a nominal price for the acquisition of an investment raises necessarily some doubts about the existence of an “investment” and requires an in depth inquiry into the circumstances of the transaction at stake.”<sup>82</sup>

201. The *Saba Fakes* tribunal, while noting that the ICSID Convention and the BIT did not exclude bare legal title from their scope of protection<sup>83</sup>, went on to hold that the

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<sup>77</sup> *Mobil*, §§ 193-197.

<sup>78</sup> *Saluka*, §§ 71-72.

<sup>79</sup> See fn. 75 above.

<sup>80</sup> *Aguas del Tunari*, §§ 72 and 208 and fn 220, recounting the respondent's submissions that two Dutch companies were "mere shells" that did not "control" the claimant and §§ 320-323, where the tribunal, by a majority, rejected that submission.

<sup>81</sup> C-387 and Abylazov 2 WS, § 31.

<sup>82</sup> *Phoenix*, § 119; Reply, § 222.

<sup>83</sup> *Saba Fakes*, § 134, Claimant's letter of 7 May 2013.

payment of a mere nominal price could not be reconciled with the significance of the underlying business as expressed in the claimant's valuation of the alleged investment.<sup>84</sup>

202. In *Caratube*, the tribunal made a similar statement:

“payment of only a nominal price and lack of any other contribution by the purported investor must be seen as an indication that the investment was not an economic arrangement, is not covered by the term ‘investment’ as used in the BIT, and thus is an arrangement not protected by the BIT.”<sup>85</sup>

203. The Tribunal has noted the Claimant's argument<sup>86</sup> that the factual circumstances in *Caratube* were different from the present ones. Indeed, a payment of a nominal price for a shareholding is but one aspect out of a number of factors that may assist in ascertaining the existence of an investment. However, in the factual reality of this case, the Claimant agreed to pay a fraction of their value to buy the BTA shares and ultimately paid nothing at all for their acquisition: the consideration was covered by a loan of which neither the capital nor the interest was ever paid.<sup>87</sup>

204. On this basis, the Tribunal comes to the conclusion that KT Asia agreed to buy the BTA shares at an undervalue, and in the event paid nothing for those shares and that the lack of payment cannot be explained – assuming this may be a sufficient explanation, an issue which the Tribunal leaves open – by the fact that it acquired BTA's share in a group restructuring. Indeed, no group of companies existed, as this structure is generally understood. Here, there was a number of entities all owned by nominees of Mr. Ablyazov, who disposed of the companies and their assets as of his own without regard to their separate legal personalities. The freezing order in the English proceedings which listed hundreds of companies gives an idea of the scale of such practice. In fact, Mr. Ablyazov used the companies as his “pockets” shifting assets from one to the other solely to suit his own purposes. This is well illustrated by the way Mr. Ablyazov liquidated Torland and Refgen to do away with the debt arising out of the loan to KT Asia.

205. The Tribunal's purpose is not to pass judgment on the legality of these practices. There may be nothing unlawful in Mr. Ablyazov treating the assets of companies

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<sup>84</sup> *Saba Fakes*, § 121, 147.

<sup>85</sup> *Caratube*, § 435. In the context of its analysis of the existence of a contribution, the tribunal also made reference to the BIT's preamble, §§ 350-352.

<sup>86</sup> Claimant's letter of 7 May 2013.

<sup>87</sup> The Tribunal's assessment finds further confirmation in *Quiborax*, where the tribunal also denied jurisdiction over one of the claimants who was found not to have made any original or subsequent contribution of money or assets (§§ 232-233).



formally owned by other persons as his personal property. However, he cannot do so and at the same time argue that the companies should be treated as a conventional commercial group when it comes to claiming treaty protection. In a sense, by seeking credit for Mr. Abylazov's initial contribution, the Claimant disavows the separate personality which it invoked previously for purposes of nationality

206. In conclusion, the Tribunal considers that KT Asia has made no contribution with respect to its alleged investment, nor is there any evidence on record that it had the intention or the ability to do so in the future. As a consequence, the Claimant has not demonstrated the existence of an investment under Article 25(1) of the ICSID Convention and under the BIT. This suffices to rule out jurisdiction over the present dispute. For the sake of completeness and because the Parties have briefed these matters, the Tribunal will now briefly examine the other elements of an investment, i.e. duration and risk.

#### 2.3.2.3. Duration

207. An allocation of resources cannot be deemed an investment unless it is made for a certain duration. The element of duration is inherent in the meaning of an investment. It is also evident from the object and purpose of investment treaties generally and of the Treaty in particular. As noted above, the BIT's preamble speaks about intensifying the economic relations and stimulating the flow of capital and technology between the Contracting States.

208. Neither the ICSID Convention nor the BIT specify the duration required for an allocation of resources to qualify as an investment. While during the elaboration of the ICSID Convention, a period of five years was suggested, the matter was eventually left to the decision of tribunals.<sup>88</sup> Cases have held that projects with a minimum duration between two and five years satisfied the duration element.<sup>89</sup> Like other tribunals, this one considers that “[d]uration is to be analysed in light of all the circumstances, and of the investor’s overall commitment”.<sup>90</sup>

209. When assessing the duration in light of the circumstances, the question arises about the weight to be given to the investor's intentions or expectations in terms of duration. Like the tribunals in *Deutsche Bank* and in *L.E.S.I.*, this one is of the opinion that “it is

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<sup>88</sup> History of the Convention, Volume I, Z 12 (September 11, 1964), Draft Convention: Working Paper for the Legal Committee, Article 30; see also the letters from the Republic of Vietnam and the United States of America, Volume II, pp. 668 and 837, respectively.

<sup>89</sup> Schreuer, *A Commentary*, at p. 130, § 162.

<sup>90</sup> *Romak*, § 225; *Deutsche Bank*, § 303.

the intended duration period that should be considered to determine whether the criterion is satisfied".<sup>91</sup> As Prof. Schreuer writes "[despite] some break down at an early stage, the expectation of a long-term relationship is clearly there".<sup>92</sup> The contrary could produce nonsensical results. It is indeed obvious that a long term project does not cease to meet the definition of investment solely because it is expropriated two months after its establishment.

210. In the present case, the investment was supposed to last a very short period of time. In accordance with the Project Aquila Step Plan, KT Asia was to hold the shares of BTA for a period of weeks ("at least 3/4") before they were sold on to investors in a private placement. Step 15 of that plan reads as follows: "In order to strengthen the Dutch tax position re the applicability of the participation exemption, the shares will be held for at least a 3 / 4 week period prior to Step 16" (C-382).

211. Mr. Abyazov confirmed the intent of a very short duration and explained that the Claimant was created as a vehicle "to hold some of the shares in BTA until the interest in them could be sold on to unrelated third parties" (Abyazov 2 WS, § 6, § 27). At the hearing, he further specified that the duration would depend on the success of the private placement:

"Q: [...] The point I am asking you to accept is that the receipt of shares by KT Asia was intended to be temporary, as you indicate here in paragraph 6 of your second statement.

Abyazov: Well, what it means here is that there was a special structure – i.e. KT Asia -- that was being put in place and it was anticipated that it would be sold on to the investors in case the private placement was a success.

Now, whether it was put in place on a temporary or not on a temporary basis was really dependent on how successful we would be within the framework of that private placement. At the end of the day it became a fixture really." (Tr. D1/-163)

212. Thus, on its own case, the Claimant's "investment" was meant to have a limited duration. It was a mere vehicle for the sale of the shares. The financial crisis then hit and hindered the placement. As a result, a duration that was planned to be very short became somewhat longer. Yet, this does not change the fact that the transaction at

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<sup>91</sup> *Deutsche Bank*, § 304, with reference to *LESI v. Algeria* ("the fact that the contract was suspended and then terminated prematurely changes nothing; in order to judge the importance of the contribution, it is necessary to focus on the duration that was agreed in the contract, which determines the nature of the contribution"; *LESI S.p.A. and Astaldi S.p.A. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/05/3), Decision on Jurisdiction, 12 July 2006, § 73 (ii)).

<sup>92</sup> Schreuer, *A Commentary*, at p. 128, § 153.

issue was never intended to involve a longer term allocation of resources, as required to fall within the scope of the definition of investment.

213. On the unusual facts of the present case, therefore, in the Tribunal's view the transfer of the ownership of shares in a company to KT Asia on an intended short-term basis in order to then sell it on to a third party does not support the finding that KT Asia had any intention to hold an investment in BTA Bank for any material time. KT Asia, it seems to the Tribunal, was simply a convenient staging point in the movement of shares on for ultimate sale. A planned short term project does not suddenly meet the duration element in the definition of investment because onward sale does not materialize within the intended time frame due to external forces unrelated to the project author's intent or expectations.
214. Even if for the sake of discussion one were to assume that the intended short duration is irrelevant *quod non*, the time from the acquisition of the BTA shares on 14 December 2007 until the date of the Request for Arbitration on 24 April 2009 (which appears the relevant time to assess the facts relevant for jurisdiction), would only be 16 months, which is a very short time if one remembers the five years tentatively put forward in the course of the elaboration of the ICSID Convention.
215. Tellingly, the Claimant has not attempted to demonstrate that its investment meets the duration requirement of the *Salini* test and addresses this issue in just one paragraph in its written pleadings (CMoJ, § 302). Nor has the Claimant rebutted the Respondent's argument, which the Tribunal finds convincing, that no matter how long the duration is in practice, the investment must be held with the expectation of some long-term relationship (Reply, § 226).
216. The Tribunal has thus no hesitation to conclude that the Claimant's alleged investment did not involve the kind of duration envisaged within the meaning of an "investment" under the ICSID Convention and the BIT.

#### 2.3.2.4. Risk

217. To qualify as an investment, an allocation of resources must finally involve a level of risk, a requirement to which the Tribunal turns now out of an abundance of caution.
218. As a general matter, an investment through the acquisition of equity in a corporation entails the risk that the value of the equity decreases or is even completely lost. Such a risk certainly qualifies as an investment risk for purposes of the definition of investment under the ICSID Convention and the BIT.

219. The difficulty here is that KT Asia has made no contribution and, having made no contribution, incurred no risk of losing such (inexistent) contribution. As was discussed above, KT Asia was not capitalized; had no resources; financed the acquisition through a loan; and had no means of repaying such loan unless it received the proceeds of the resale of the shares. The Tribunal agrees with the Respondent's argument that in the absence of any contribution of some economic value it is difficult to identify an investment risk (Reply, § 228 ff.).
220. Moreover, not only did the Claimant not make any contribution, nor was it meant to absorb any financial losses. It indeed appears from the record that, in the absence of a successful sale of the BTA shares to private investors, KT Asia - or rather its beneficial owner - never intended to discharge its reimbursement obligations vis-à-vis Torland and Refgen. In the Tribunal's assessment, it seems clear that Mr. Ablyazov used the corporate structures involved in the transaction so as to shield the Claimant from any investment risk. In fact, that is precisely what happened after Refgen and Torland were wound up.
221. In light of these factual circumstances, the Tribunal comes to the conclusion that the risk element of an investment is lacking as well.

#### **2.4. Conclusion**

222. For the foregoing reasons, the Tribunal comes to the conclusion that the Claimant did not hold an investment that meets the definition of the term investment under Article 25(1) of the ICSID Convention and Article 1(a) of the BIT. As a consequence, the Tribunal lacks jurisdiction *ratione materiae*.
223. In view of this conclusion, the Tribunal can dispense with addressing the Respondent's remaining objections to jurisdiction, concerning the alleged lack of an intention of the Claimant to transfer ownership and control; the alleged lack of an investment in the territory of Kazakhstan; the alleged unlawfulness of the investment, as well as alleged abuses of the BIT and the ICSID Convention due to an alleged tax fraud and treaty shopping.

## **VI. COSTS**

224. Each Party has requested an order that the other pay all costs and fees of this arbitration. In particular, the Respondent notes that despite the financial situation of the Claimant, if the Tribunal finds it has no jurisdiction to hear this Arbitration, it is

appropriate that an order for costs be made in the Respondent's favour against the Claimant, given that this claim "should never have been brought" (Respondent's letter of 26 March 2012).

225. In its cost submission of 13 April 2012, the Claimant states that its legal costs amount to US\$2,184,456.31. The Claimant has not included the amount of ICSID fees in this calculation, noting that these would be "claimed when appropriate". In its cost submission of 16 March 2012, the Respondent claims that it has incurred costs in the total amount of US\$5,902,042.39, which amount includes ICSID fees of US\$300,000 as of that date.

226. The Tribunal must accordingly allocate the ICSID arbitration costs, including the fees and expenses of the Tribunal, and the Parties' legal costs. Article 61(2) of the ICSID Convention provides that the determination and allocation of costs is within the discretion of the arbitral tribunal, unless the parties expressly agree otherwise:

"In the case of arbitration proceedings the Tribunal shall, except as the parties agree otherwise, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."

227. Two approaches may be distinguished in awarding costs in ICSID arbitrations. Some tribunals apportion ICSID costs equally and rule that each party should bear its own costs. Others apply the principle "costs follow the event", making the losing party bear all or part of the costs of the proceedings, including those of the prevailing party.<sup>93</sup>

228. In the exercise of its discretion, the Tribunal finds it appropriate that each Party bear one half of the ICSID costs and bear its own legal and other costs. Such approach seems fair and reasonable considering all the circumstances of the case, including the Parties' conduct in pursuing their claims and defenses. Specifically, while the Respondent has prevailed on jurisdiction, the issues involved were complex and the Claimant's case was certainly not brought lightly. The complexity of the issues is clear in relation to the objections concerning "investor" and "investment", which the Tribunal has analyzed above. Moreover, although the Tribunal has dispensed with reviewing the merits of the other objections referred to in paragraph 223 above in light of its conclusions on the previous defenses, the Tribunal has considered them for costs purposes and has found them to be equally complex.

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<sup>93</sup> See for instance, *Plama*, § 307 ff.

## VII. DECISION

229. For the reasons set forth above, the Arbitral Tribunal makes the following decisions:

- (i) The Tribunal lacks jurisdiction over the present dispute;
- (ii) Each Party shall bear 50% of the Tribunal's fees and expenses (including ICSID's fees) as notified by ICSID;
- (iii) Each Party shall bear its own costs.

[Signed]

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Ian Glick, Q.C.  
Arbitrator

Date: [11 October 2013]

[Signed]

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Christopher Thomas, Q.C.  
Arbitrator

Date: [9 October 2013]

[Signed]

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Prof. Gabrielle Kaufmann-Kohler  
President of the Tribunal

Date: [14 October 2013]