

Limán Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan  
(ICSID Case No. ARB/07/14)

Excerpts of Award dated June 22, 2010 made pursuant to Rule 48(4) of the  
ICSID Arbitration Rules of 2006

Claimants

Limán Caspian Oil BV (“LCO” or Claimant No. 1”) and NCL Dutch Investment BV (“NCL” or  
“Claimant No. 2”) (companies incorporated under the laws of the Netherlands)

Respondent

Republic of Kazakhstan (“ROK”)

Tribunal

Karl-Heinz Böckstiegel (President; German), appointed by the party-appointed arbitrators

Kaj Hobér (Swedish), appointed by the Claimants

James Crawford (Australian), appointed by the Respondent

Award

Award of June 22, 2010 in English

Instrument relied on for consent to ICSID arbitration

Energy Charter Treaty (“ECT”)

Licence for the Exploration and Extraction of Hydrocarbons (alternative and subsidiary consent to ICSID  
arbitration)

Procedure

*Applicable Arbitration Rules:* ICSID Arbitration Rules of 2006

*Place of Proceedings:* Washington, D.C., sessions held in London, U.K.

*Procedural Language:* English

*Full procedural details:* Available at  
[https://icsid.worldbank.org/ICSID/FrontServlet?requestType=SearchRH  
&actionVal=SearchSite&SearchItem=liman](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=SearchRH&actionVal=SearchSite&SearchItem=liman)

Factual Background

In 2000, the Investment Agency of the ROK granted to a company incorporated in Kazakhstan, (“X”), a licence to explore and extract hydrocarbons in the Limán Block in Western Kazakhstan (the “Licence”). In October 2002, X assigned the rights and obligations under the Licence to LCO, Claimant No. 1 (the “Assignment Agreement”). At the time of the assignment, the majority of the shares in X (99.9%) were held by a UK company (“Y”) and the remaining shares were held by two persons (“P” and “Q”).

P and Q subsequently filed claims in ROK courts to have the Assignment Agreement invalidated, claiming that the Licence had been transferred without their knowledge or consent and in breach of the Kazakhstani law of July 10, 1998 No. 281-1 on Joint-Stock Companies (the “JSC Law”). In 2004, a ROK court declared the Assignment Agreement invalid, and LCO was ordered to restore the Licence to X. By

that time, X was controlled by another company, (“M”), which had joined the ROK court proceedings and also claimed that the Assignment Agreement should be invalidated.

LCO’s appeal and counterclaim against the shareholders of X to reclaim the consideration for the transfer of the Licence were dismissed. Accordingly, in May 2005, X was reinstated as the licence holder and subsequently transferred the Licence to another company.

NCL, Claimant No. 2, owned 90% of the shares in LCO and was in turn wholly owned by a Canadian company, (“Z”), in which the controlling interest, according to the Claimants, was indirectly held by a Swiss national. The remaining 10% of the shares in LCO was held by Y, the original majority shareholder of X. The corporate structure of the Claimants was established by Z and Y for the purpose of the transfer of the Licence.

The Claimants claimed that the actions of the ROK courts amounted to a denial of justice and that the ROK had therefore violated the investment protection provisions of the ECT. They also claimed that the Respondent had breached the Licence.

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# EXCERPTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
WASHINGTON, D.C.

IN THE ARBITRATION PROCEEDING BETWEEN

**LIMAN CASPIAN OIL BV AND NCL DUTCH INVESTMENT BV**

CLAIMANTS

AND

**THE REPUBLIC OF KAZAKHSTAN**

RESPONDENT

(ICSID CASE NO. ARB/07/14)

## AWARD

### **Members of the Tribunal:**

Professor Karl-Heinz Böckstiegel, President  
Professor Dr. Kaj Hobér, Arbitrator  
Professor James Crawford SC, Arbitrator

### **Secretary of the Tribunal:**

Ms Eloïse Obadia

### **Administrative Assistant of the Tribunal:**

Ms Helene Bubrowski

### *Representing Claimants:*

Mr Audley Sheppard,  
Mr Alexandros Panayides,  
Mr Gareth Kenny,  
Ms Christina Schuetz  
CLIFFORD CHANCE LLP

### *Representing Respondent:*

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Ms Belinda Paisley,  
Ms Chloe Carswell,  
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*Date of dispatch to the Parties: 22 June 2010*

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## A. The Parties

### **Claimants**

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### **Respondent**

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## **B. The Tribunal**

Professor Dr. Karl-Heinz Böckstiegel, President  
[...]

Professor Dr. Kaj Hobér  
[...]

Professor James Crawford SC  
[...]

## **C. Short Identification of the Case**

### **C.I. Claimants' Perspective**

[...]

### **C.II. Respondent's Perspective**

[...]

## **D. Procedural History**

3. On **16 July 2007**, the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) registered a **Request for Arbitration** (CRfA) dated **18 June 2007** under the ICSID Convention on the basis of the ICSID clause contained in Article 26 of the Energy Charter Treaty (ECT), submitted by Liman Caspian Oil BV and NCL Dutch Investment BV against the Republic of Kazakhstan (ROK).

4. Claimants appointed Professor Kaj Hobér as arbitrator and Respondent appointed Professor James Crawford as arbitrator.
5. By letters of **3 December 2007**, ICSID informed the Parties and Professor Karl-Heinz Böckstiegel that the party-appointed arbitrators had appointed Professor Böckstiegel as President of the Tribunal.
6. By letter of **24 January 2008**, ICSID informed the Parties that all three arbitrators had accepted their appointments and that the Tribunal was deemed to have been constituted and the proceedings to have begun on 24 January 2008.
7. By letter of **28 January 2008**, ICSID informed the Parties that the President of the Tribunal invited the Parties to hold the First Session in London on Wednesday, 2 April 2008. Claimants agreed on the date by letter of 30 January 2008. Respondent agreed by letter of 1 February 2008. The Parties were provided with a Provisional Agenda for the session and were invited to confer and jointly advise the Tribunal of any points of the agenda on which they are able to reach agreement.
8. By letter of **29 February 2008**, the Parties submitted a joint advice of the points on which they reached agreement. The Parties also informed ICSID about the respective participants of the First Session.
9. The **First Session of the Arbitral Tribunal** was held at the IDRC in London on **2 April 2008**. Its results are recorded in the Minutes approved after consultation with the Parties.
10. Present at the session were:
  - Members of the Tribunal:*
    1. *Professor Karl-Heinz Böckstiegel, President*
    2. *Professor Kaj Hobér, Arbitrator*
    3. *Professor James Crawford, Arbitrator*

*ICSID Secretariat:*

4. *Mr Tomás Solís, Secretary of the Tribunal*

*Attending on behalf of the Claimants:*

5. *Mr Audley Sheppard, Clifford Chance LLP*
6. *Mr Ignacio Suarez Anzorena, Clifford Chance LLP*
7. *Mr Gareth Kenny, Clifford Chance LLP*
8. *Mr Marco Mahler, Liman Caspian Oil BV and NCL Dutch Investment BV*
9. *Mr Walter Remmerswaal, a financial and legal adviser to Liman Caspian Oil BV and NCL Dutch Investment BV*

*Attending on behalf of the Respondent:*

10. *Mr Ali Malek QC*
11. *Mr David Warne, Reed Smith Richards Butler LLP*
12. *Ms Belinda Paisley, Reed Smith Richards Butler LLP*
13. *Mr Paul Skeet, Reed Smith Richards Butler LLP*

11. The following issues were discussed during the First Session and summarised in the **Minutes** which were sent to the Parties by letter of **1 May 2008**.

***I. Procedural Matters***

*The President invited the parties to confirm their agreements reached as contained in their amended Joint Draft Agenda, as follows:*

***1. Constitution of the Tribunal and Tribunal Members' Declarations (Arbitration Rule 6).***

*The President noted that the Tribunal had been constituted on January 24, 2008, and that it had been properly constituted in accordance with the ICSID Convention and the applicable ICSID Arbitration Rules (the Rules). Further copies of the Tribunal Members' Declarations are attached to these Minutes as Annex 3.*

*The parties confirmed their agreement that the Tribunal had been properly constituted and that they had no objections to its Members.*

***2. Representation of the Parties (Arbitration Rule 18).***

*The Claimants' representatives and their contact information are as follows:*

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**3. Apportionment of Costs and Advance Payments to the Centre (Convention Article 61; Administrative and Financial Regulation 14; Arbitration Rule 28).**

*The parties agreed that ICSID Convention Article 61 and ICSID Administrative and Financial Regulation 14 shall apply to the proceeding, the parties therefore would defray the expenses of the proceeding in equal parts, without prejudice to the right of the Tribunal to allocate costs in accordance with ICSID Arbitration Rule 28, or the rights of the parties to request such an allocation as the facts may justify.*

*It was noted that the Centre had, under cover of a letter of January 30, 2008, requested that each party pay a sum of US\$100,000.00 (one thousand United States dollars) to defray the costs of the proceeding during its first three to six months. Payment has been received from both parties.*

**4. Fees and Expenses of the Tribunal Members (Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees).**

*The parties agreed that the fees and expenses of the Tribunal Members shall be determined and paid in accordance with the current ICSID Schedule of Fees and the Memorandum on Fees and Expenses of ICSID Arbitrators.*

*The parties agreed that the Members of the Tribunal shall be entitled to receive the fees, per diem subsistence allowances, travel and other expense reimbursements referred to in Administrative and Financial Regulation 14(1). Such payments are to be calculated in accordance with the Memorandum on Fees and Expenses of ICSID Arbitrators. In accordance with the ICSID Schedule of Fees, each Member of the Tribunal shall receive:*

- (a) a fee of US\$3,000 (three thousand US dollars), or such other fee as may be set forth from time to time in the Centre's Schedule of Fees, for each day of meetings or each eight hours of other work performed in connection with the proceeding or pro rata; and*
- (b) subsistence allowances and reimbursement of travel and other expenses within limits set forth in ICSID Administrative and Financial Regulation 14.*

*It was noted that by letters of January 11 and January 18, 2008, from counsel for the Respondent and counsel for the Claimants, respectively, the parties agreed that the Chairman of the Tribunal can claim as expenses in addition to his fees the VAT of 19% which the Chairman has to pay to the German tax authorities on all his fees. The parties' letters are attached to these Minutes as Annex 4.*



**5. Applicable Arbitration Rules (Convention Article 44).**

*In accordance with Article 44 of the Convention, the parties agreed that the proceeding shall be conducted in accordance with ICSID Arbitration Rules in force as at 10 April 2006 (but not any amendments thereto).*

**6. Place of Proceeding (Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3)).**

*The parties agreed that the legal seat of proceedings shall be Washington, D.C. as provided for in Article 62 of the Convention. In accordance with Article 63 of the Convention and Arbitration Rule 13(3), without prejudice to any requests for individual sessions to be held at other convenient locations, the parties agreed that the proceedings shall be held in London at an appropriate institution with which the Centre may make arrangements for that purpose. The Tribunal may meet without the parties at any place convenient to its Members.*

**7. Procedural Language (Arbitration Rules 20(1)(b) and 22).**

*The parties agreed that the procedural language shall be English.*

*In relation to witness and expert evidence, the parties agreed that:*

*(a) the evidence of witnesses or experts shall be given either in English or in the principal language of the witness or expert, at the option of such witness or expert;*

*(b) witness or expert statements may be submitted in the principal language of the witness or expert, but shall be accompanied by an English translation;*

*(c) witnesses or experts called to testify at any hearing before the Tribunal may give their evidence in English or in their principal language; and*

*(d) in the event that the witness or expert testifies in his or her principal language which is not English, the parties shall agree arrangements, in consultation with ICSID (but failing agreement ICSID shall arrange on behalf of the parties) for independent, professional interpreters to provide either simultaneous or consecutive interpretation, as agreed by the parties at a later stage before the hearing, of counsel and Tribunal's questions and the witness or expert's responses.*

*In relation to documents, the parties agreed that the party who relies on a document written in a language other than English shall be obliged to provide, in addition to a complete version of the original document, an English translation of that document or of the part of the document relied upon (including a translation of sufficient portion of the document to provide for reasonable context for the part relied upon). Each party reserves its right to: (i) challenge the accuracy of the English translation submitted by the other; and (ii) submit additional translated parts of any document not translated in its entirety. The parties further agreed that the*

*translations of documents or portions thereof need not be certified, unless the translation submitted in the first instance proves controversial.*

**8. Records of Hearings (Arbitration Rule 20(1)(g)).**

*The parties agreed that sound recordings and verbatim transcripts be made of each day's proceedings during any hearing (not including the First Session or any pre-hearing procedural conference unless otherwise directed by the Tribunal) and that the parties will share equally the cost of sound recordings and transcript production, subject to any later costs award. The parties further agreed that:*

- (a) transcripts be prepared by a professional service selected by the parties in consultation with ICSID (or failing agreement by ICSID);*
- (b) provisional transcripts be provided to the parties at the email addresses set out above, and to the Tribunal, in electronic form on the same day as the proceedings they record;*
- (c) there should be an opportunity to suggest corrections to the transcripts as first presented, with the Tribunal to consider (in the event of disagreement between the parties) whether or not such corrections are to be adopted;*
- (d) final edited and corrected transcripts of each day's proceedings during any hearing shall follow within two weeks of the close of such hearing; and*

**9. Means of Communication and Copies of Instruments (Arbitration Rules 20(1)(d) and 23; Administrative and Financial Regulations 24 and 30).**

*Except as provided below, the parties agreed that all communications and written instruments shall be introduced into the proceeding by sending them to the Secretary of the Tribunal at ICSID in Washington, D.C.*

*The parties further agreed that:*

- (a) routine administrative or procedural correspondence be emailed (in MS Word format) to the Secretary of the Tribunal with a copy to counsel for the other party;*
- (b) pursuant to ICSID Administrative and Financial Regulation 24, the Secretariat is the official channel of communication between the Tribunal and the parties. Only in urgent situations, the parties may send copies of procedural communications, in addition to the Secretary of the Tribunal, directly to the Tribunal; and;*
- (c) each party shall send an original and five copies of any written submission to the Secretary of the Tribunal in A-5 format for their distribution to the Tribunal. Counsel should, at the same time, courier two additional copies of any written instrument to opposing counsel directly;*
- (d) in order to facilitate that parts can be taken out and copies can be made, submissions of all documents including statements of witnesses and experts shall be submitted separated from the memorials, unbound in ring binders and preceded by a list of such documents consecutively numbered*

*with consecutive numbering in later submissions (C-1, C-2, etc. for the Claimants; R-1, R-2- etc. for the Respondent). Longer submissions shall be preceded by a Table of Contents;*

*(e) all documents (including texts and translations into English of all substantive law provisions, cases and authorities) considered relevant by the parties shall be submitted with their memorials, as established in the Procedural Timetable agreed to below (the Timetable);*

*(f) electronic versions of all such filings, excluding documentary evidence, should be sent to opposing counsel and the Secretary of the Tribunal on the stipulated filing date or the date actually filed with ICSID, whichever is sooner;*

*(g) while allowing some flexibility in this respect, for the avoidance of unfair surprise, new factual allegations or evidence shall not be any more permitted after the respective dates for the rebuttal memorials indicated in the Timetable, unless agreed between the parties or expressly authorized by the Tribunal;*

*In addition, each party shall send six CD-ROM copies, which shall contain the entire submission (pleadings, statements and any documentary evidence), to the Secretary of the Tribunal. Counsel shall further courier two additional CD-ROM copies of the entire submission (pleadings, statements and any documentary evidence) to opposing counsel directly.*

*The parties further agreed that a written submission should be considered to have been submitted in a timely fashion if, on or before the applicable due date: (i) the submission (excluding exhibits if voluminous) is transmitted in electronic form; and (ii) dispatched in hard form by courier for delivery to ICSID and to counsel in accordance with the provisions set out above.*

***10. Presence and Quorum (Arbitration Rules 14(2) and 20(1)(a)).***

*The parties agreed that the presence of all three Members of the Tribunal be required at its sessions.*

***11. Decisions of the Tribunal by Correspondence (Arbitration Rule 16(2)).***

*The parties agreed that in accordance with Arbitration Rule 16(2), the Tribunal may take any decision by correspondence by majority among all its Members, or by any other appropriate means of communication, provided that all Members take part in the decision-making process.*

***12. Delegation of Power to Fix Time Limits (Arbitration Rule 26(1)).***

*The parties note that under ICSID Arbitration Rule 26(1), the Tribunal may delegate its power to fix time limits to its President.*

*Short extensions may be agreed between the parties as long as they do not affect later dates in the Timetable and the Tribunal is informed before the original due date.*

*Extensions of deadlines shall only be granted by the Tribunal on exceptional grounds and provided that a request is submitted immediately after an event has occurred which prevents a party from complying with the deadline.*

*The Tribunal indicated to the parties, and the parties took note thereof, that in view of travels and other commitments of the Arbitrators, it might sometimes take a certain period of time for the Tribunal to respond to submissions of the parties and decide on them.*

***13. Written and Oral Procedures (Arbitration Rules 20(1)(e) and 29).***

*The parties agreed that pursuant to Arbitration Rule 29, the proceeding should consist of both a written phase and an oral phase.*

***14. Number and Sequence of Pleadings, Time Limits, Supporting Documentation (Arbitration Rules 20(1)(c) and 31).***

*Without prejudice to the Respondent's right to raise jurisdictional objections howsoever arising and any procedures related to such objections, the parties agreed that the question of whether or not there should be bifurcation of liability and remedies should be deferred until after the Respondent has served its counter-memorial.*

*The parties further agreed that, whilst the Claimants shall be required to particularise their alleged heads of loss in their Memorial, the detailed quantification of Claimants' monetary claim shall be deferred until the submission of expert evidence on quantum.*

*It was agreed that the written phase of the proceedings shall, subject to the Tribunal's further order on the questions of (a) dealing with any issue relating to jurisdiction as a preliminary issue and (b) the bifurcation of issues of liability and remedies, consist of two rounds of briefing: a memorial to be submitted by the Claimants, a counter-memorial to be submitted by the Respondent; a reply by the Claimants, and a rejoinder by the Respondent. The first round of briefing shall be submitted as follows:*

*The Claimants shall file their Memorial, together with any documentary evidence on which the Claimants intend to rely, by no later than May 19, 2008. For the avoidance of doubt, witness statements of fact and expert reports are to be served after the completion of the first round of memorials and not to be served with those memorials;*

*The Respondent shall file its Counter-Memorial, together with any documentary evidence on which the Respondent intends to rely, by no later than August 4, 2008;*

*The Respondent shall submit on August 4, 2008, together with its Counter-Memorial, and the Claimants shall submit on August 20, 2008, their respective positions on the issues of:*

- 1. whether any issue relating to jurisdiction shall be treated as a preliminary issue;*
- 2. whether there shall be a bifurcation of the issues of (a) liability and (b) remedies; and*
- 3. the procedural timetable for the remainder of the arbitration and, in particular, the timing of the filing of:*
  - (a) an agreed List of Issues arising for determination in the arbitration;*
  - (b) a joint submission by the parties requesting the production of documents (see also item no. 18);*
  - (c) the Claimants' reply;*
  - (d) the Respondent's rejoinder;*
  - (e) witness statements of fact;*
  - (f) expert reports (including disciplines; the number of experts and whether reports should be exchanged or given on a sequential basis);*
  - (g) the timing of any pre-hearing conference (see also item no. 16); and*
  - (h) the exchange of skeleton submissions (limited to 25 pages).*

*The Respondent shall reply to the Claimants' submission of August 20, 2008, by September 3, 2008.*

*On September 23, 2008, the Tribunal shall hold a telephone conference with the parties, or a meeting in London if necessary, to hear the parties' position on the issues listed above.*

***15. Witnesses and Experts; Written Statements and Reports (Arbitration Rules 35 and 36).***

*The parties agreed that:*

- (a) without prejudice to the power of the Tribunal to request or allow the parties to produce further evidence at any stage of the proceedings, any signed witness statements and expert reports shall be submitted together with copies of (or reference to if already submitted) the written instruments which they support and shall be sufficiently detailed so as to constitute the evidence-in-chief of each factual or expert witness;*
- (b) a witness shall testify at a hearing unless given notice by the other party or by the Tribunal that he/she is not required to attend; and*
- (c) the issue of whether witness statements and expert reports should be submitted together with the Reply and Rejoinder, respectively, or whether there should be a separate phase for exchange of such statements/reports, shall be revisited by the parties after the first exchange (round) of pleadings.*

***16. Pre-Hearing Conference (Arbitration Rule 21).***

*The parties acknowledge that ICSID Arbitration Rule 21 shall apply to this proceeding and suggest that, in the event such a conference does take*

*place, it may be conducted by telephone or video conference unless otherwise directed by the Tribunal.*

**17. Dates of Subsequent Sessions (Arbitration Rule 13(2)).**

*The parties agreed that the scheduling of any subsequent sessions beyond September 23, 2008 is premature and acknowledge that ICSID Arbitration Rule 13(2) shall apply to this proceeding.*

**18. Production of Evidence (Convention Article 43; Arbitration Rules 24 and 33-37).**

*The parties acknowledge that ICSID Convention Article 43 and ICSID Arbitration Rules 24, 33-37 shall apply to this proceeding. The parties and the Tribunal may be guided by the IBA Rules on the Taking of Evidence in International Commercial Arbitration.*

*It was agreed that the appropriate procedure and timetable for the production of documents shall be discussed and agreed upon during the telephone conference call, or meeting if applicable, between the parties and the Tribunal of September 23, 2008.*

**19. Time Limit for the Preparation of the Award (Arbitration Rule 46).**

*The parties acknowledge that ICSID Arbitration Rule 46 shall apply to this proceeding.*

**20. Publication of Decisions and Award (Arbitration Rule 48(4)).**

*The parties are currently considering whether they will consent to the publication of Decisions and Awards of the Tribunal and will revert to the Tribunal in this regard later in the proceeding.*

**II. Other Matters**

*The parties stated they did not have any other matters to discuss.*

*Closing of the session*

12. By letter of **5 May 2008**, ICSID informed the Parties that the date set for a possible meeting in London or telephone conference was moved from 23 September 2008 to 29 September 2008.
13. Claimants filed a **Statement of Claim** (C I) dated **19 May 2008**, which was received by ICSID on 21 May 2008. A copy was sent to counsel for Respondent by counsel for Claimants.

14. Respondent filed a **Counter-Memorial (R I)** dated **4 August 2008**, which was received by ICSID on the same date. A copy was sent to counsel for Claimants by counsel for Respondent.
15. By letter of **5 August 2008**, counsel for Respondent notified its propositions in relation to bifurcation of jurisdiction, bifurcation of issues of liability and remedies and the procedural timetable to counsel for Claimants.
16. Counsel for Claimants presented its position by letter of **20 August 2008** on bifurcation of jurisdiction, bifurcation of issues of liability and remedies and the procedural timetable.
17. By letter of **3 September 2008**, counsel for Respondent replied to the letter of Claimants' counsel setting out proposals on the same matters.
18. By letter of **4 September 2008**, ICSID informed the Parties that the Tribunal considered that given the number and complexity of the issues regarding the further procedure, the meeting on 29 September should be done in person and invited them to attend the meeting at the International Disputed Resolution Centre (IDRC) in London on 29 September 2008 in order to discuss the further procedure.
19. By letter of **22 September 2008**, counsel for Claimants filed a Parties' **joint proposal of the further procedure**, including a timetable with dates. The only item on which the Parties did not reach an agreement was the discipline of experts as referred to at section 14(3)(f) of the Minutes of the First Session.
20. By letter of **23 September 2008**, ICSID informed the Parties about the Tribunal's decision that because of the Parties' agreement, the meeting scheduled for 29 September 2008 was no longer necessary and was therefore cancelled.

21. By letter of **6 October 2008**, a **draft Procedural Order No. 1** regarding the further procedure was sent to the Parties. Parties were invited to comment on the draft no later than 13 October 2008.
  
22. By letter of **13 October 2008**, counsel for Respondent and counsel for Claimants submitted comments on the draft Procedural Order No. 1. The Parties had discussed the draft and agreed on several amendments.
  
23. Taking in account the Parties' comments, the Tribunal issued the following **Procedural Order No 1 (PO-1)** by letter of **15 October 2008**.

**A. *Earlier Rulings***

*The Tribunal recalls the earlier rulings in the **Minutes of First Session** of the Parties and the Arbitral Tribunal held in London on Wednesday, 2 April 2008. These earlier rulings remain valid unless changed expressly.*

**B. *Further Procedure***

*Based on the Parties' Joint Proposal for the Procedural Timetable for the Remainder of the Arbitration dated 22 September 2008:*

1. *The parties have agreed that the Tribunal should consider **jurisdictional issues** with the merits.*
  
2. *The parties have agreed to **bifurcation** of liability and quantum/relief. Accordingly, the procedure established hereafter shall only deal with issues of jurisdiction and liability and not with issues of quantum/relief. Regarding the latter, should the Tribunal find that there is liability, a further phase of the procedure shall be established in consultation with the Parties.*
  
3. *Production of documents*
  - 3.1. *The parties have agreed to the use of a Redfern Schedule in the form attached to their joint proposal.*
  - 3.2. *As agreed at the First Session, the parties and the Tribunal may be guided by the IBA Rules on the Taking of Evidence in International Commercial Arbitration.*
  - 3.3. *Timetable for production of documents*

<b><i>Step</i></b>	<b><i>Date</i></b>
<i>Requests to produce documents</i>	<i>24 October 2008</i>



<i>Production or objection</i>	<i>10 November 2008</i>
<i>Reply to objection</i>	<i>24 November 2008</i>
<i>Tribunal orders production</i>	<i>By 19 December 2008, Tribunal to decide and order date for production (should be before date for submission of Reply)</i>
<i>Documents produced</i>	<i>Since it will be difficult to obtain documents from Kazakhstan in short order, documents shall be produced within 21 days of the Tribunal's order.</i>

3.4. *It is agreed that a further round of document disclosure after service of Claimants' Reply and Respondent's Rejoinder is unnecessary. The parties agree that, subject to maintaining the timetable up to the hearing, either party may make a further specific document request in respect of any new issue, which if opposed may be referred to the Tribunal for determination.*

4. *Further pleadings/witness statements and expert reports*

<i>Step</i>	<i>Date</i>
<i>Claimants to serve Reply</i>	<i>23 January 2009 (together with all further documents, witness statements and expert reports they wish to rely on)</i>
<i>Respondent to serve Rejoinder</i>	<i>31 March 2009 (together with all further documents, witness statements and expert reports it wishes to rely on))</i>

5. *Discipline of experts*  
*By 30 April 2008, Claimants shall have the right to submit a short memorial with expert reply evidence on any expert evidence submitted by the Respondent in its Rejoinder that goes beyond the expert evidence, in terms of discipline of experts, submitted by the Claimants in their Reply, and by 29 May 2008, Respondent shall have the right to submit a short memorial with expert evidence in response to any such reply expert evidence served by Claimants, limited to those matters addressed by such reply expert evidence.*

6. *Thereafter, no new evidence may be submitted, unless agreed between the Parties or expressly authorized by the Tribunal.*
7. *By a date at least six weeks before the date set for the hearing, the Parties shall submit:*
  - 7.1. ***notifications of the witnesses and experts** presented by themselves or by the other Party whom they wish to examine at the Hearing,*
  - 7.2. *a **List of Issues** arising for determination should such a list be agreed between the parties.*
8. *Pre-Hearing Conference*
  - 8.1. *By a date at least four weeks before the hearing, a **telephone Pre-Hearing Conference** between the Parties and the Tribunal, if considered necessary by the Tribunal.*
  - 8.2. *As soon as possible thereafter, the Tribunal issues a **Procedural Order** regarding further details of the Hearing, if considered necessary.*
9. *Trial Bundle*
  - 9.1. *By a date at least six weeks before the starting date set for the hearing, the Parties shall agree on a chronological **Core Bundle**, containing the key documents that each party intends to rely upon during the hearing.*
  - 9.2. *By a date at least six weeks before the starting date set for the hearing, the Parties shall agree on a **Kazakh law bundle**, containing the key extracts of Kazakh law that each party intends to rely upon during the hearing.*
  - 9.3. *At the beginning of the hearing, the Parties shall provide a copy of the Core Bundle and Kazakh Law Bundle for each member of the Tribunal and the Tribunal Secretary and for use by the witnesses and experts during the hearing.*
  - 9.4. *At the beginning of the hearing, the Parties shall provide to the Tribunal one single set of all pleadings, documents, witness statements and expert reports submitted in this arbitration.*
10. *Pre-hearing briefs*

*The parties agree that skeleton submissions (limited to 25 pages without any new documents) shall be submitted two weeks before the starting date set for the hearing.*
11. *Hearing*
  - 11.1. *The hearing shall be in London for a period of one week (5 days) from 1 to 5 September 2009.*
  - 11.2. *In order to make most efficient use of time at the Hearing, the Witness Statements and Expert Reports shall come in lieu of direct examination of fact witnesses and experts at the hearing. The Party calling a fact witness or an expert will be deemed to have submitted that witness's or expert's direct testimony in his or her Statement or Report. Thus, absent leave of the Tribunal for reasonable cause, the direct examination of a fact witness*

*or an expert at the hearing shall be limited to confirming his or her written testimony, a short introduction of up to 10 minutes, and comments on any new developments that have occurred after the Statement or Report was made.*

- 11.3. *Taking into account the time available during the period provided for the Hearing in the Timetable, the Tribunal intends to establish equal maximum time periods both for the Claimants and for the Respondent which the Parties shall have available. Changes to that principle may be applied for at the latest at the time set for the Pre-Hearing Conference. The equal time periods during the hearing shall be set in the last procedural order before the hearing.*
- 11.4. *No new documents may be presented at the Hearing. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.*
- 11.5. *At the end of the Hearing, the Tribunal will consult with the Parties whether Post-Hearing Briefs may be appropriate and regarding which issues they should be directed.*
- 11.6. *After its decision on liability, the Tribunal will issue any directions it considers necessary at that time.*

24. Counsel for Respondent filed Respondent's **Request for Documents** in form of a **Redfern Schedule** on **24 November 2008**, including Claimants' Comments and Objections and Respondent's Replies.

25. Counsel for Claimants filed Claimants' **Request for Documents** in the form of a **Redfern Schedule** on **24 November 2008**, including Respondent's Comments and Objections and Claimants' Replies.

26. The Tribunal issued the following **Procedural Order No. 2 (PO-2)** by letter of **12 December 2008** with the annexed Redfern Schedules which had been submitted by the Parties.

1. *Introduction*

- 1.1. *The Tribunal has taken note of the submissions of the Parties regarding the issues of document production on which they cannot agree.*
- 1.2. *Reference is made to Art. 43 of the ICSID Convention and Art. 24 and 34 of the ICSID Arbitration Rules. As provided in section 18 of the Minutes of the 1<sup>st</sup> Session, the "IBA Rules on the Taking of Evidence in International Commercial Arbitration" can be considered as a guideline giving*

*indications regarding the relevant criteria for what documents may be requested and ordered to be produced.*

- 1.3. *In its decisions, the Tribunal takes into account that, according to the timetable for the further procedure agreed between the Parties and recorded in section 3.4. of PO-1, the Parties have considered a further round of document disclosure as unnecessary, only subject to specific document requests in respect of any new issue. Subject to that latter exception, therefore, requests should be granted now and not only after the further Memorials of the Parties.*
- 1.4. *The Tribunal recognizes that, on one hand, requests and orders regarding the production of documents are today a regular feature of international arbitration, but, on the other hand, the present arbitration is a case also involving parties of a Civil Law country where production of documents is used far less than in Common Law countries.*
- 1.5. *The Tribunal further recognizes that, on one hand, ordering the production of documents can be helpful for a party to present its case and in the Tribunal's task of establishing the facts of the case relevant for the issues to be decided, but, on the other hand, (1) the process of discovery and disclosure may be time consuming, excessively burdensome and even oppressive and that unless carefully limited, the burden may be disproportionate to the value of the result, and (2) Parties may have a legitimate interest of confidentiality.*
- 1.6. *Finally the Tribunal notes that, insofar as a Party has the burden of proof, it is sufficient for the other Party to deny what the respective Party has alleged and then respond to and rebut the evidence provided by that respective Party to comply with its burden of proof.*

## 2. *Documents to be produced*

*As provided in section 3.3. of PO-1, all documents identified as to be "ordered" in the Tribunal's Decisions in the Redfern Schedules attached to this Order shall be produced within 21 days of the date of this Order to the other Parties in this procedure, but not yet to the Tribunal, subject to the further qualifications and limitations in this Order. The receiving Party may then decide in how far it wishes to rely on such documents in its further submissions to the Tribunal and may submit the respective documents with its next Memorial.*

## 3. *Qualifications and Limitations of Document Production*

- 3.1. *All documents produced under this Order may be utilized by the other Parties only in direct connection with the present arbitration procedure.*
- 3.2. *Insofar as a Party requests the production of "all" documents of a certain category, the requested Party is only required to produce those documents which can reasonably be considered as relevant and material for the other Parties to present their case and for the Tribunal to decide on the claims raised in this procedure taking into account the factual allegations and legal arguments presented by the Parties.*

- 3.3. *Of the documents ordered by the Tribunal, the following documents or categories of documents need not be produced, but the reason for the non-production must be identified. If they:*  
*do not exist or do not yet exist,*  
*or are not in the possession, custody or control of a Party,*  
*or have already been sent or copied to the requesting Party,*  
*or are of special political sensitivity or have been classified as secret or privileged by law or by orders of the government,*  
*or include information regarding third parties for which the ordered Party has an obligation of confidentiality,*  
*or are subject to attorney-client privilege under the legal or ethical rules by which Counsel of the Parties are bound in their respective jurisdictions, or which reflect the seeking or rendering of a legal opinion by internal or external counsel.*
- 3.4. *If a document or category of documents ordered by the Tribunal only contains some information or sections which do not have to be produced according to Section 3.3 above, the respective document may be redacted in such a way that those sections are excluded from the production. But the reason for non-production or redaction and the extent of such redaction must be indicated in a separate note or in the document.*
- 3.5. *“Documents” should be understood to include permanent records in any form, including on paper and electronic.*

4. *Adverse Inference*  
*Insofar as documents ordered are not produced or not produced as ruled in this Order, the Tribunal may take this into account in its evaluation of the respective factual allegations and evidence including an inference against the Party refusing production.*

5. *Annexed Redfern Schedules*  
*According to Section 2 above, the following Redfern Schedules submitted by the Parties are annexed in which the respective decisions of the Tribunal are added in the last column:*

*Annex 1: Tribunal Decisions on Claimants’ Request*

*Annex 2: Tribunal Decisions on Respondent’s Request to Claimant*

27. In accordance with Section 4 of PO-1 and an extension agreed by the Parties, Claimants filed Claimants’ **Reply (C II)** on **26 January 2009** which was received by ICSID on the same date. A copy of the submission was sent directly by counsel for Claimants to counsel for Respondent.

28. By letter of **29 January 2009**, counsel for Claimants informed ICSID that Respondent had failed to comply with PO-2 with respect to Claimants' Requests for Documents 1 and 5.
29. By letter of **2 February 2009**, ICSID informed the Parties that the Tribunal considered that a production of Document 1 was not any more required according to Section 3.3. of PO-2. Regarding Document 5, the Tribunal decided that Respondent had to continue its search and produce the documents as soon as possible and in any case no later than 27 February 2009.
30. By letter of **5 March 2009**, counsel for Respondent asked for an extension of the deadline to submit Respondent's Rejoinder to 3 April 2009 and noted that Respondent was so far unable to locate the Document 5.
31. By letter of **17 April 2009**, counsel for Respondent asked for a further extension of the deadline to submit the Rejoinder to 24 April 2009. Claimants agreed by letter of 17 April 2009; the Tribunal's agreement was notified to Respondent by letter of 21 April 2009 by ICSID.
32. On **28 April 2009**, the Tribunal and the Parties agreed to postpone the Hearing in London to 8 to 12 December 2009.
33. In accordance with Section 4 of PO-1 and two agreed extensions, Respondent filed Respondent's **Rejoinder (R II)** on **24 April 2009** with ICSID.

[...]

45. On **9 October 2009**, counsel for Claimants sent an agreed **List of Issues** to ICSID on which both parties agreed for the most part. Counsel for Claimants and counsel for Respondent also notified to ICSID the respective witnesses and experts they wish to examine during the Hearing.

46. On **28 October 2009**, a **draft Procedural Order No. 4** regarding further details of the Hearing in London on 8 to 12 December 2009 was sent to the Parties. Parties were invited to comment on the draft no later than 9 November 2008.
47. Taking into account the Parties' comments, the Tribunal issued the following **Procedural Order No. 4 (PO-4)** regarding further details of the Hearing by letter of **11 November 2009**.

*Instead of the option of a pre-hearing conference, provided for in section 8.1. of PO No.1, a draft of this PO was communicated to the Parties, who were invited to submit their comments by 9 November 2009. Taking into account the comments received, the Tribunal hereby issues the PO in its final form.*

**1. Introduction**

- 1.1. *This Order recalls the **earlier agreements and rulings** of the Tribunal and particularly takes into account the recent submissions and letters of the Parties.*
- 1.2. *In particular, **sections 8 to 11 of PO No. 1** are recalled and hereby confirmed. Regarding the preparation and conduct of the hearing. The Parties are invited to assure that these provisions are complied with.*
- 1.3. **By 24 November 2009**, the Parties:
- *shall submit notifications of the persons who will be attending the hearing on their respective sides;*
  - *may submit a notification if they do not intend to examine any of the witnesses so far notified. If a Party does not call a witness for cross-examination at the hearing, this will not be considered as an acceptance of that witness' testimony;*
  - *may submit a notification on any agreement they have reached regarding the order for the examination of witnesses and experts during the hearing.*

**2. Time and Place of Hearing**

- 2.1. *The Hearing shall be held at*  
*IDRC*  
*70 Fleet Street*  
*London,*  
*EC4Y 1EU*

- 2.2. *As agreed, five days are blocked from Tuesday 8 to Saturday 12 December 2009.*
- 2.3. *To give sufficient time to the Parties and the Arbitrators to prepare for and evaluate each part of the Hearings, the daily sessions shall not go beyond the period between 9:30 a.m. and 5:30 p.m. However, the Tribunal, in consultation with the Parties, may change the timing during the course of the Hearings.*

### **3. Conduct of the Hearing**

- 3.1. *In addition to the provisions of **section 11 of PO No.1**, the following shall apply:*
- 3.2. *In view of the examination of witnesses and experts, the following **Agenda** is established for the Hearing:*

1. *Introduction by the Chairman of the Tribunal.*
2. *Opening Statements of not more than one hour each for the Claimants and for the Respondent.*
3. *Unless otherwise agreed by the Parties:*  
*Examination of Claimants' witnesses and experts:*
  - a) *Affirmation of witness or expert to tell the truth.*
  - b) *Short introduction by Claimants (This may include a short direct examination on new developments after the last written statement of the witness or expert).*
  - c) *Cross-examination by Respondent.*
  - d) *Re-direct examination by Claimants, but only on issues raised in cross-examination.*
  - e) *Re-cross examination by Respondent but only on issues raised in redirect examination.*
  - f) *Remaining questions by members of the Tribunal, but they may raise questions at any time.*
4. *Examination of Respondent's witnesses and experts (as under item 3 a) through f) above).*
5. *Any witness or expert may only be recalled for rebuttal examination by a Party or the members of the Tribunal, if such intention is announced in time to assure the availability of the witness and expert during the time of the Hearing.*
6. *If agreed by the Parties or if, after consultation with the Parties, authorized by the Tribunal: closing arguments of up to 2 hours each for the Claimants and for the Respondent.*
7. *Remaining questions by the members of the Tribunal, if any.*
8. *Discussion regarding the timing and details of post-hearing submissions and other procedural issues.*



3.3. *Examination of witnesses and experts shall take place in the order agreed by the Parties. If no such agreement has been reached, unless the Tribunal decides otherwise, Claimants' witnesses and experts shall be heard first in the order decided by Claimants, and then Respondent's witnesses and experts shall be heard in the order decided by Respondent.*

3.4. *Unless otherwise agreed between the Parties or ruled by the Tribunal, witnesses and experts may be present in the Hearing room during the testimony of other witnesses and experts.*

3.5. *For convenience, the following sections of **PO No. 1** are recalled:*

*11.2. In order to make most efficient use of time at the Hearing, the Witness Statements and Expert Reports shall come in lieu of direct examination of fact witnesses and experts at the hearing. The Party calling a fact witness or an expert will be deemed to have submitted that witness's or expert's direct testimony in his or her Statement or Report. Thus, absent leave of the Tribunal for reasonable cause, the direct examination of a fact witness or an expert at the hearing shall be limited to confirming his or her written testimony, a short introduction of up to 10 minutes, and comments on any new developments that have occurred after the Statement or Report was made.*

*11.3. Taking into account the time available during the period provided for the Hearing in the Timetable, the Tribunal intends to establish equal maximum time periods both for the Claimants and for the Respondent which the Parties shall have available. Changes to that principle may be applied for at the latest at the time set for the Pre-Hearing Conference. The equal time periods during the hearing shall be set in the last procedural order before the hearing. 11.4. No new documents may be presented at the Hearing. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the Timetable.*

3.6. *In accordance with section 11.3. of PO No. 1, the Tribunal establishes the following maximum time periods which the Parties shall have available for their presentations and examination and cross-examination of all witnesses and experts. Taking into account the Calculation of Hearing Time attached to this Order, the total maximum time available for the Parties (including their opening statements and closing arguments, if any) shall be as follows:*

*13 hours for Claimants  
13 hours for Respondent*

*It is left to the Parties how much of their allotted total time they want to spend on the Agenda items 2, 3, 4, and 6, as long as the total time period allotted to them is maintained.*

- 3.7. *The Parties shall prepare their presentations and examinations at the Hearing on the basis of the time limits established.*
- 3.8. *If a witness whose statement has been submitted by a Party and whose examination at the Hearing has been requested by the other Party, does not appear at the Hearing, his statement will not be taken into account by the Tribunal. A Party may apply with reasons for an exception from that rule.*
- 3.9. *In so far as the Parties request oral examination of an expert, the same rules and procedure shall apply as for witnesses.*

#### **4. Other Matters**

- 4.1. *ICSID has confirmed the availability of the court reporter. ICSID is in the process of finding available Russian-English-Russian interpreters.*
- 4.2. *The Tribunal may change any of the rulings in this Order, after consultation with the Parties, if considered appropriate under the circumstances.*

48. On **30 November 2009**, Claimants and Respondent filed their respective **Skeleton Submissions** in accordance with section 10 of PO-1.

49. The **Hearing** was held at the IDRC in London from 8 to 12 December 2009. The Parties agreed with the Tribunal on a few changes of the agenda regarding the schedule of the daily sessions and the end of the Hearing in accordance with section 2.3. of PO-4. The Hearing on Jurisdiction was recorded and a transcript (Tr) was to be made available to the Parties.

The Hearing was attended by:

*Members of the Tribunal:*

*1. Professor Karl-Heinz Böckstiegel, President*

2. *Professor Kaj Hobér, Arbitrator*
3. *Professor James Crawford, Arbitrator*

*Assistants to the Tribunal:*

4. *Mr Tomás Solís, ICSID*
5. *Ms Helene Bubrowski, Administrative Assistant*

*Attending on behalf of the Claimants:*

6. *Mr Audley Sheppard, Clifford Chance LLP*
7. *Mr Gareth Kenny, Clifford Chance LLP*
8. *Ms Christina Schuetz, Clifford Chance LLP*
9. *Mr Christopher Gray, Clifford Chance LLP*
10. *Mr Anirudh Krishnan, Clifford Chance LLP*
11. *Mr Marco Mahler, Liman Caspian Oil BV and NCL Dutch Investment BV*
12. *Mr Giovanni Mahler*
13. *Mr Mirko Wojcik*
14. *Mr Walter Remmerswaal, a financial and legal adviser to Liman Caspian Oil BV and NCL Dutch Investment BV*
15. *Mr Alexey Bukhtiyarov*

*Attending on behalf of the Respondent:*

16. *Mr Ali Malek QC*
17. *Mr Christopher Harris*
18. *Ms Belinda Paisley, Reed Smith Richards Butler LLP*
19. *Mr David Warne, Reed Smith Richards Butler LLP*
20. *Ms Chloe Carswell, Reed Smith Richards Butler LLP*
21. *Ms Dina Nazargalina, Reed Smith Richards Butler LLP*
22. *Mr Ruslan Irgaliev*
23. *Dr Rinat Mukhamedshin*
24. *Mr Beken Turganaliev, Steiger & Zingermann*
25. *Professor Peter Maggs*

50. Regarding the details of the Hearing, reference is made to the transcript and to Procedural Order No. 5 recorded in the next paragraph. It should be noted that during the Hearing the Tribunal issued the following ruling on Ruling on Mr [...]’s and [...]’s witness statements (*Tr 288/3-21*):

*3 THE CHAIRMAN: Can we restart again.*

*4 I take it that our next witness will be*

5 Mr [...]. Before we come to him, there are  
6 a couple of things we would like to tell the  
7 parties. The first of the two is that the witnesses  
8 with so-called disputed evidence, we feel we should  
9 tell you how we come out on that before we start on  
10 this. We have discussed that matter and our  
11 conclusion is that we should admit the evidence of  
12 both Mr [...] and Mr [...], however, with  
13 the caveat that we will take into account in the  
14 evaluation of the evidence the circumstances of  
15 their testimony, that they have been in the law firm  
16 formally advising the Claimant and so on and with  
17 regard to Mr [...], as I told you already at the  
18 beginning of the hearing, we can't see him in person  
19 but only by videolink so that would be taken into  
20 account. But the evidence as such would be admitted  
21 to the file.

In addition, the following section from the transcript of the last day (*Tr 681/6-13*) of the Hearing should be noted:

*CHAIRMAN: My usual and final question in this context is do the parties have any objection to the procedure that the Tribunal has applied up to this point?*

*MR SHEPPARD: There is no objection from the Claimants.*

*MR MALEK: There is no objection from the Respondent.*

51. By letter of **15 December 2009**, the Tribunal issued the following **Procedural Order No. 5 (PO-5)** regarding the further procedure after the Hearing in London:

*Taking into account the discussion and the agreements reached with the Parties at the Hearing held in London from 8 to 12 December, 2009, the Tribunal issues this Procedural Order No. 5 as follows:*

**1. Post-Hearing Briefs**

**1.1. *By 15 January 2010, the Parties shall simultaneously submit Post-Hearing Briefs, limited to a maximum of 45 pages (double-spaced) in length, containing the following:***

**1.1.1. *Any comments they have regarding issues raised at the Hearing;***

- 1.1.2. *Separate sections responding in particular to the questions and issues mentioned in section 3 below.*
- 1.2. *The sections of the Post-Hearing Briefs requested under 1.1.1 and 1.1.2 above shall include short references to all sections in the Party's earlier submissions, as well as to exhibits (including legal authorities, witness statements, and expert statements) and to the sections of the hearing transcript on which the Party relies regarding the respective issue.*
- 1.3. *Except for the agreed bundle of documents handed out during the hearing, no new documents shall be attached to the Post-Hearing Briefs unless expressly authorized in advance by the Tribunal.*
- 1.4. *The Briefs shall be sent by the Parties to ICSID as usual, but the electronic versions of these Briefs also at the same time by the Parties directly by e-mail to each member of the Tribunal and to the Administrative Assistant of the Tribunal Helene Bubrowski:  
Khboeckstiegel@aol.com  
kho@msa.se  
jrc1000@hermes.cam.ac.uk  
jrc3000@aol.com  
helene.bubrowski@gmx.de.*

## **2. Cost Claims**

- 2.1. ***By 28 January 2010**, the Parties shall simultaneously submit Cost Claims, briefly setting out the costs incurred by each side. Such Cost Claims need not include supporting documentation for the costs claimed.*
- 2.2. ***By 4 February 2010**, the Parties shall simultaneously submit any comments on the Cost Claims submitted by the other side.*

## **3. Questions**

*The Parties are particularly requested to address the following questions and issues separately in the Post-Hearing Briefs:*

- 3.1. *Following the List of Issues submitted by the Parties before the Hearing, for each of these issues, what are the conclusions from the oral testimony given at the hearing regarding the disputed facts and legal arguments relevant for this case?*
- 3.2. *Which Party has the burden of proof for which of these disputed facts?*
- 3.3. *How should the Tribunal evaluate the testimony of Mr. [...]?*

- 3.4. *Any additional comments on the concept of ownership and control in application of Art. 17 ECT and how the facts in this case relate thereto.*
- 3.5. *Any additional comments regarding the relation between the concepts of denial of justice and fair and equitable treatment as relevant for this case.*

52. On **15 January 2010**, Claimants and Respondent filed their respective Post-Hearing Briefs in accordance with section 1 of PO-5. Respondent filed its cost claim on **28 January 2010** in accordance with section 2 of PO-5. Claimants' cost claim was filed one day later. On **4 February 2010**, the Parties submitted their respective comments on the cost claim submitted by the other side. This Award constitutes the closure of the proceeding pursuant to ICSID Arbitration Rule 38.

## **E. The Principal Relevant Legal Provisions**

The following legal provisions from international and Kazakh law are referred to by the Parties and taken into account by the Tribunal.

### **E.I. Energy Charter Treaty**

53. **Article 10(1):**

*Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.*

**54. Article 13(1):**

*Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as “Expropriation”) except where such Expropriation is:*

- (a) for a purpose which is in the public interest;*
- (b) not discriminatory;*
- (c) carried out under due process of law; and*
- (d) accompanied by the payment of prompt, adequate and effective compensation.*

*Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the “Valuation Date”). Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.*

**55. Article 17:**

*Each Contracting Party reserves the right to deny the advantages of this Part to:*

*(1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; or*

*(2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:*

*(a) does not maintain a diplomatic relationship; or*

*(b) adopts or maintains measures that:*

*(i) prohibit transactions with Investors of that state; or*

*(ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.*

**56. Article 26(2):**

*If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:*

*(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;*

*(b) in accordance with any applicable, previously agreed dispute settlement procedure;*

*or*

*(c) in accordance with the following paragraphs of this Article.*

**57. Article 26(6):**

*“A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this treaty and applicable rules and principles of international law.”*

## **E.II. Kazakh Law of 10 July 1998 No. 281-1 “On Joint-Stock Companies” (JSC Law)**

### **58. Rules in relation with major transactions (Art. 76 – 80 JSC Law):**

#### ***Chapter 7: Completion of Major Transactions:***

##### ***Article 76. Major transactions***

*1. For the present Law the following shall be recognised as a major transaction:*

*1) a transaction and (or) several mutually interlinked transactions in connection with the acquisition or alienation or the possibility of acquisition or alienation by a company, directly or indirectly, of a company's property whose overall balance-sheet value amounts to twenty five percent or more of the balance-sheet value of the company's assets for a company which is not a national company, or ten percent or more of the balance-sheet value of assets for a national company, with the exception of transactions completed in the course of carrying out ordinary economic activity in conformity with a company's charter;*

*2) a transaction and (or) several mutually interlinked transactions in connection with purchase or sales, including by issuing and placing company securities, amounting to twenty five or more percent of the total number of securities in a company that is not a national company, or ten percent or more for a national company.*

*2. Other transactions, in addition to those enumerated in paragraph 1 of the present article, and also certain categories of other transactions of importance for maintaining a company's financial stability which are carried out under the procedure stipulated for major transactions, may be categorised as major transactions by the company's charter or by decision of a general meeting of shareholders.*

##### ***Article 77: Cost of property which is the object of a major transaction***

*1. The cost of a company's property being alienated which is the object of a major transaction may not be lower than the existing market price for similar property at the location and on the day of the major transaction being concluded.*

*In the event it is economically expedient to complete a major transaction at other prices, company officers shall have the right, acting honestly and in the interests of the company, to enter into a transaction at prices that differ from market prices. In this case a report of the transaction must be considered at the next general meeting of shareholders.*

*2. The market price of property being acquired or alienated which is the object of a major transaction shall be determined by an auditor or independent valuer.*

##### ***Article 78: Determining the market price of property which is the object of a major transaction***

*1. The market price of property is the price at which a seller who had full information on the value of the property, and on its other characteristics which might affect its price, would agree to sell it, and a buyer who had full information on the value of the property,*



*and on its other characteristics which might affect its price, would agree to acquire the said property.*

*2. In the event that the property whose market price needs to be determined is shares or other securities negotiable on an organised market, then when the price of the said property is determined, attention must be paid to purchase prices, or buying and bid prices on the organised securities market.*

*3. In the event that the property whose market price needs to be determined is shares in a company, then to determine the market price of the said property attention may also be paid to the size of the company's ownership capital, the price which a buyer who has full information about the combined value of the company's shares agrees to pay for the shares and other factors which the person determining the market price of the property shall consider important.*

***Article 79: Procedure for taking decisions on completing a major transaction***

*1. A decision by a company to complete a major transaction shall be approved by a general meeting of shareholders.*

*A company's Council of Directors shall be obliged to provide the general meeting of shareholders with all the information in relation to major transactions that is necessary for a decision to be taken on good grounds.*

*2. All the creditors of a company must be notified in writing by the company of the completion of any major transaction by the company by means of promulgation of the relevant information in a printed publication determined by the company's charter not less than ten days before its completion.*

*3. Shareholders who have not participated in voting or have voted against a decision to complete a major transaction shall have the right to demand that the company buy the shares belonging to them under the procedure laid down in the present Law.*

***Article 80: Consequences of non-compliance with the requirements for completion of a major transaction***

*1. Non-compliance with the requirements stipulated by the present Law when a major transaction is completed shall entail the transaction being invalid, with the exception of cases when the person who entered into the transaction with a company was acting honestly and did not know or ought not wittingly to have known of the company's non-compliance with the said requirements.*

*2. A legal action for a major transaction to be recognised as invalid may be brought by any interested persons.*

*3. A person who has deliberately entered into a major transaction in breach of the requirements laid down by the present Law and the company charter shall not have the right to claim that the transaction should be recognised as invalid if such a claim arises out of mercenary motives or an intention to avoid liability.*

**59. Rules in relation to transactions with material interest (Art. 81 – 84 JSC Law):**

***Chapter 8: Material Interest in the Completion of a Transaction by a Company***

***Article 81: Material interest in the completion of a transaction by a company***

*1. A company's officers and a shareholder owning jointly with persons affiliated to them ten or more percent of the voting shares in a company that is not a national company or*

*five or more percent of the voting shares in a national company shall be recognised as persons with a material interest in the completion of a transaction by the company (hereinafter - interested persons) if the said person, the person's spouse, parents, children, brothers, sisters or persons affiliated to the person:*

- 1) are a party to the transaction or take part in it as a representative or intermediary;*
  - 2) are persons affiliated to a juridical person who is a party to the transaction or who takes part in it as a representative or intermediary, including persons owning ten or more percent of the voting shares (equity, shareholding) in such a juridical person or five or more percent of the voting shares in such a juridical person if that person is a national company.*
- 2. The provisions of the present article shall not be applied to:*
- 1) exercise by shareholders of a pre-emptive right to acquire shares in conformity with the present Law;*
  - 2) acquisition by a company of shares in a case where all the shareholders owning shares have equal rights to sell the shares belonging to them in proportion to the number of shares that belong to them;*
  - 3) reorganisation of a company carried out in conformity with the present Law.*

***Article 82: Information concerning a material interest in the completion of a transaction by the company***

*Persons referred to in paragraph 1 of article 81 of the present Law shall be bound to bring to the notice of the Council of Directors of the company, the company's internal auditing commission (auditor) and external auditor, information:*

- 1) on their being a party to a transaction or their participation in it as a representative or intermediary;*
- 2) on juridical persons to whom they are affiliated, including juridical persons in whom they own independently or jointly with persons affiliated to them ten or more percent of the voting shares (equity, shareholding) or five or more percent of the voting shares in a national company, and. on juridical persons in whose executive bodies they hold positions;*
- 3) on transactions being completed or proposed that are known to them in which they may be recognised as interested persons.*

***Article 83: Requirements of the procedure for entering into a transaction in whose completion there is a material interest***

- 1. A decision by an open company to enter into a transaction in whose completion there is a material interest shall be taken by the company's Council of Directors by a majority of the votes of members who do not have a material interest in its completion.*
- 2. A decision by a national company to enter into a transaction in whose completion there is a material interest shall be taken by the company's Council of Directors by a majority of the votes of independent directors who have no material interest in its completion.*
- 3. For a decision to be taken to enter into a transaction in whose completion there is a material interest, it must be established by the company's Council of Directors that the proceeds which the company will receive in return for property to be alienated or*

*services to be provided will be no lower, and the expenditures which the company will incur in return for property to be acquired or services to be received will be no higher, than the market price for such property or services determined in conformity with the present Law.*

*4. A decision that a company will enter into a transaction in whose completion there is a material interest shall be taken by a general meeting of shareholders in the following cases:*

*1) if the amount of the transaction exceeds five percent of the balance-sheet value of the company's assets as at the date of the decision being taken by a general meeting of shareholders;*

*2) if the transaction and (or) several mutually interlinked transactions represent a placement of voting shares in the company, or other securities convertible into voting shares, in a quantity exceeding five percent of the voting shares previously issued by the company.*

*5. The conclusion of a transaction in whose completion there is a material interest shall not require: a decision by a general meeting of shareholders as stipulated in paragraph 4 of the present article in the event that:*

*1) the transaction is a loan provided to the company by an interested person;*

*2) the transaction is completed in the course of conduct of ordinary economic activity between the company and the other party which took place before the time since which the person with a material interest has been recognised as such in conformity with article 81 of the present Law.*

*6. In the event that it is impossible, as at the date of a general meeting of shareholders being held, to determine the transactions in whose completion a material interest may in the future arise, the requirements of paragraph 4 of the present article shall be deemed to have been fulfilled on condition that a decision by the general meeting of shareholders is taken: to establish the contractual relationships between the company and the other person with an indication of the nature of transactions that may be completed and their maximum amounts.*

*7. In the event that all the members of a company's Council of Directors are recognised as interested persons, a transaction may be completed by decision of a general meeting of shareholders taken by a majority of the votes of shareholders with no material interest in the transaction.*

*8. In the event that a transaction in whose completion there is a material interest is at the same time a major transaction, the provisions of Chapter 7 of the present Law shall be applied to the procedure for its completion.*

***Article 84: Consequences of non-compliance with requirements for the procedure for entering into a transaction in whose completion there is a material interest***

*A transaction in whose completion there is a material interest which has been entered into in breach of the requirements stipulated in the present Law governing the procedure under which it should be entered into shall be recognised as invalid in a judicial procedure.*

*A person with a material interest in the completion by a company of a transaction that has been entered into in breach of the requirements governing the procedure for its conclusion stipulated in the present Law, shall bear liability towards the company in the*

*amount of the losses caused by that person to the company. In the case of a transaction completed by several persons, their liability towards the company shall be joint.*

### **E.III. Kazakh Investment Laws of 1994 and 2003**

**60. Law No. 266-XIII of 27th December 1994 of the Republic of Kazakhstan Concerning Foreign Investments:**

***Article 8: Guarantees from Illegal Acts of State Bodies and Official Persons***

*Acts of state bodies and their official persons, which are adopted in violation of the Republic of Kazakhstan legislation, and which deteriorate the legal status of foreign investors shall have no legal force.*

**61. Law No. 373 of 8th January 2003 of the Republic of Kazakhstan concerning Investments:**

***Article 4: The Guarantee of Legal Protection of Investor Activities in the Territory of the Republic of Kazakhstan***

*2. An investor shall have the right to compensation for harm caused to him as a result of adoption by state authorities of acts which are not consistent with the legislative acts of the Republic of Kazakhstan, as well as resulting from illegal acts (commission of act) of officials of those authorities in accordance with the civil legislation of the Republic of Kazakhstan.*

### **E.IV. Relevant ICSID Provisions**

**62. Article 42(1):**

*The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*

## **F. Relief Sought by the Parties**

**F.I. Relief Sought by Claimants**

[...]

**F.II. Relief Sought by Respondent**

[...]

**G. Summary of Facts Regarding Liability**

[...]

**G.I. Summary of Facts presented by Claimants**

[...]

**G.II. Summary of Facts presented by Respondent**

[...]

**H. Summary of Contentions**

[...]

**H.I. Contentions Regarding Jurisdiction**

*H.I.1. Summary of Contentions by Claimants*

[...]

*H.I.2. Summary of Contentions by Respondent*

[...]

**H.II. Contentions Regarding Denial of Advantages (ECT Article 17)**

*H.II.1. Summary of Contentions by Claimants*

[...]

*H.II.2. Summary of Contentions by Respondent*

[...]

**H.III. Contentions Regarding Liability**

*H.III.1. Summary of Contentions by Claimants*

[...]

*H.III.2. Summary of Contentions by Respondent*

[...]

**J. Considerations and Conclusions of the Tribunal**

**J.I. Preliminary Considerations**

*J.I.1. Applicable Law*

- i. Claimants

[...]

- ii. Respondent

[...]

- iii. Tribunal

148. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C I paras. 150-156  
C II paras. 95-100  
R I para. 40  
R II paras. 103-106

150. Taking into account the above contentions of the Parties, the Tribunal's considerations are:

151. The Parties agree that the law applicable to the claim under the ECT is the ECT itself and international law. Kazakh law comes into play only in so far as it is relevant in determining whether Respondent acted in breach of an international obligation. The Parties further agree that the claim under the Licence is governed primarily by Kazakh law. The Tribunal concludes that there is no relevant dispute between the Parties with regard to the applicable law.

***J.I.2. Final Admissibility of Disputed Evidence admitted by Procedural Order No.3***

**J.I.2.a) Are the disputed portions of evidence of Mr [...] and Mr [...] admissible?**

This matter is No. 26 in the Agreed List of Issues.

- i. Claimants

[...]

- ii. Respondent

[...]

- iii. Tribunal

155. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

Clifford Chance, letter of 13 May 2009 and 3 June 2009  
Reed Smith, letters of 21 May 2009 and 11 June 2009

[...]

**J.I.2.b) Have Claimants waived any right to challenge the evidence of Mr [...] and the evidence of Mr [...] save in respect of those items identified at paragraph (c) and (g) of Respondent's letter of 21 May 2009 in any event?**

This matter is No. 27 in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

159. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

Clifford Chance, letter of 13 May 2009 and 3 June 2009  
Reed Smith, letters of 21 May 2009 and 11 June 2009

[...]

***J.I.3. Burden of Proof***

This matter is question 3.2 of PO-5.



i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

163. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

CP paras. 172-173  
RP paras. 27, 114

164. Taking into account the above contentions of the Parties, the Tribunal notes that the Parties agree on the general principle that the burden of proof generally lies with Claimants to establish the facts on which the claim is based. However, the Tribunal considers that the burden of proof can shift to Respondent with regard to any exception on which Respondent relies in its defence. The denial of advantages according to Article 17(1) of the ECT is such a situation in which the burden shifts to Respondent.

***J.I.4. Evaluation of Mr [...]’s Testimony given at the Hearing***

This matter is question 3.3 of PO-5.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

167. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

CP paras. 174-177  
RP paras. 16-17

168. The Tribunal regrets that Mr [...] was unable, on short notice, to travel to London to give testimony; it is unable, however, in the circumstances, to draw any categorical conclusion from that fact, for which several different reasons might account. Taking into account the above contentions of the Parties, the Tribunal decides to consider the matter further when and insofar as the evaluation of Mr [...]’s evidence becomes relevant to questions of Respondent’s liability.

***J.I.5. Relevance of Decisions of other Tribunals***

169. In the legal arguments made in their written and oral submissions, the Parties relied on numerous decisions of other courts and tribunals. Accordingly, it is appropriate for the Tribunal to make certain general preliminary observations in this regard.
170. First of all, the Tribunal considers it should make it clear from the outset that it regards its task in these proceedings as the very specific one of applying the relevant provisions of the ECT as far as that is necessary in order to decide on the relief sought by the Parties. In order to do so, the Tribunal must, as required by the “General rule of interpretation” of Article 31 of the VCLT, interpret the ECT’s provisions in good faith in accordance with the ordinary meaning to be given to them in their context and in light of the ECT’s object and purpose. The “context” referred to in the first paragraph of Article 31 is given a specific definition in the second paragraph of Article 31 and comprises three elements: (i) the ECT’s text, including its preamble; (ii) any agreement between the Parties to the ECT in connection with its conclusion; and (iii) any instrument which was made by one of the Parties in connection with the conclusion of the ECT and accepted by the other Parties to the ECT. The “ordinary meaning” as defined above applies unless a special meaning is to be given to a term if it is established that the parties so intended, as it is stated in the fourth paragraph of Article 31.
171. As provided in the “Supplementary means of interpretation” of Article 32 of the VCLT, the Tribunal may have recourse to supplementary means of interpretation (i) in order to confirm the meaning resulting from the application of Article 31 of the VCLT, or (ii) when the interpretation according to Article 31 of the VCLT

either leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable. Those supplementary means of interpretation include the preparatory work of the treaty and the circumstances of its conclusion. Thus, recourse to the supplementary means of interpretation of Article 32 may only be had if the situations mentioned at (i) and (ii) above occur.

172. While Article 38.1.d. of the Statute of the International Court of Justice expressly mandates the Court to also take into account “*judicial decisions*”, there is no such express rule either in the ECT, the ICSID Convention or other applicable part of international law as to whether, and if so to what extent, arbitral awards are of relevance to the Tribunal’s task. It is in any event clear that the decisions of other tribunals are not binding on this Tribunal. The many references by the Parties to certain arbitral decisions in their pleadings do not contradict this conclusion.
173. However, this does not preclude the Tribunal from considering arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they shed any useful light on the issues that arise for decision in this case.
174. Such an examination is conducted by the Tribunal later in this Award, after the Tribunal has considered the Parties’ contentions and arguments regarding the various issues argued and relevant for the interpretation of the applicable ECT provisions, while taking into account the above-mentioned specificity of the ECT to be applied in the present case. This latter aspect gives particular relevance to decisions of other tribunals also interpreting the ECT rather than other investment protection treaties.

## **J.II. Jurisdiction of the Tribunal**

### ***J.II.1. Was Claimants’ investment lawful as a matter of Kazakh and/or international law?***

This matter is No. 1(a) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

180. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C II paras. 169-196  
CS paras. 11.2-11.7  
CP paras. 13-15  
R I paras. 332-336  
R II paras. 33-38  
RS paras. 37-49  
RP paras. 41-44

Expert Reports:

[...], paras. 20-29; 84-85  
[...], paras. 6.1.-6.3

Hearing:

Testimony [...], Tr 264/5-10  
Testimony [...], Tr 426/25-427/14  
Testimony [...], Tr 506/16-507/3

181. Taking into account the above contentions of the Parties, the Tribunal considers that there is a distinction to be drawn between a transaction which is void or invalid, and a transaction which is merely voidable. Whereas a void or invalid transaction has no legal effect from the very beginning, a voidable transaction continues to have legal effect until the moment when it is declared invalid by a Court. However, such a declaration of invalidity, after it is issued, generally has retroactive effect which means that the transaction will then be invalid from the moment of its conclusion.

182. The Tribunal will not deal here with the question whether the transfer of the Licence was a major transaction or a transaction with interest in terms of the JSC Law (Art. 76-80 and Art. 81-84). However, it notes that if the transaction was in breach of the Kazakh law provisions, it follows from Art. 80(2) and Art. 84 of the JSC Law that the transaction is not automatically invalid. Rather, a legal action for the transaction to be recognised as invalid has to be brought by an interested person. Therefore, despite the inconsistent use of the word "invalid" in Art. 80(1), the Tribunal concludes that a transaction in breach of the JSC Law is only voidable. The Tribunal notes that the legal expert presented by Respondent, Professor [...], agreed with this position in his oral testimony (*Tr 506/16-20*). The

Tribunal considers that the term “unlawfulness” does not have any specific legal significance in this context.

183. The Tribunal will deal with Respondent’s allegation of fraud *infra* at J.II.3.

***J.II.2. In case of unlawfulness of the investment, does it fall outside the scope of Respondent’s consent to the jurisdiction of the Centre?***

This matter is No. 1(b) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

186. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties’ Submissions:

C II	paras. 169-196
CP	paras. 16-17
R I	paras. 325-336
R II	paras. 33-38
RP	para. 44

187. Taking into account the above contentions of the Parties, the Tribunal considers that the scope of Respondent’s consent to jurisdiction must be understood to extend also to those investments in respect of which the underlying transaction was made in breach of Kazakh law and was therefore voidable. Since the transfer of the Licence was not invalid, but only voidable, Claimants’ investment does not fall outside the scope of Respondent’s consent to jurisdiction. But even in the case of an investment finally found to be in breach of Kazakh law from the very beginning it could be argued that an investment had still been made and consequently that a dispute over such an investment regarding an alleged breach of the ECT would fall within the jurisdiction of this Tribunal. In such a case, the question of legality might well be relevant to the merits, but it would not have preclusive effect at the level of jurisdiction.

### ***J.II.3. Should Claimants' investment be not protected as a matter of public policy?***

This matter is No. 1(c) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

192. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C II	paras. 169-196
CP	paras. 18-19
R I	paras. 355-371
RII	paras. 33-38
RP	para. 44

Exhibits:

Ex RA-28, *Inceysa v. El Salvador*, paras. 229-252  
Ex RA-31, *World Duty Free v. Kenya*, paras. 136-141  
Ex RA-32, ICC case No. 1110

193. Taking into account the above contentions of the Parties, the Tribunal points out that, in contrast with its conclusion (*supra* at *J.II.1.*) that a transaction made in breach of the JSC Law was only voidable, there are situations in which a transaction is to be considered as automatically invalid from the very beginning. A violation of international public policy is such a case in which an investment is invalid without a legal action for invalidation and without a court declaration of invalidity having to be issued.

194. The Tribunal agrees with the authorities cited by the Parties that it does not have jurisdiction over investments made in violation of international public policy. However, the burden of proving fraud and bribery regarding the making of the original investment lies with Respondent. The Tribunal considers that Respondent

has not provided sufficient proof for its allegations that the Licence was acquired by fraudulent misrepresentation to the Ministry of Energy and/or by fraud on the minority shareholders. Therefore, the Tribunal concludes that Respondent was not able to satisfy its burden of proof of facts showing a breach of international public policy.

***J.II.4. Have Claimants established a prima facie claim (i) with respect to the action of the Kazakh courts; (ii) with respect to the actions of the Ministry of Energy; and (iii) for breach of ECT Article 13 – Expropriation?***

This matter is No. 1(d) (i) (ii) and (iii) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

200. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C II para. 167  
CS paras. 11.8.-11.9.  
CP para. 20  
R I paras. 371-374  
R II paras. 97-98

201. Taking into account the above contentions of the Parties, the Tribunal considers that the question whether Claimants have established a *prima facie* claim is a moot issue. As set out in section B.1. of PO-1, the Parties have agreed that the Tribunal should consider jurisdictional issues with the merits. The Tribunal is now at the stage where it is to rule on questions of liability. Before its consideration of liability, therefore, it does not need to consider whether a *prima facie* claim has been established.

### ***J.II.5. Is Respondent a proper party?***

This matter is No. 1(e) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

204. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

CRfA paras. 5.6.-5.8  
C I paras. 211-216  
C II para. 197-200  
CS paras. 11.10-11.11  
CP para. 21  
R I para. 375

205. Taking into account the above contentions of the Parties, the Tribunal considers that in accordance with Article 26(3) of the ECT, the claim has to be directed against a party to the ECT, and therefore against the Republic of Kazakhstan in the case at hand. The question whether the conduct of other legal entities is attributable to Respondent is an issue of liability.

206. The Tribunal notes that Claimants further allege a violation of Section 29.5 of the Licence. In the Request for Arbitration, Claimants maintain that Section 27 of the Licence provides for disputes and disagreements to be submitted to ICSID. However, the claim for breach of the Licence must also be directed against the Republic of Kazakhstan since the Ministry of Energy which is a party to the Licence is, on any view, part of the Government of the Republic of Kazakhstan.

### ***J.II.6. Has NCL complied with the negotiation period set forth in ECT Article 26 and, if not, does this affect the Tribunal's jurisdiction?***



This matter is No. 1(f) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

209. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C II	paras. 201-206
CS	para. 11.2
CP	para. 22-23
R I	paras. 376-378

Exhibits:

Ex C-55, CCB-125

Hearing:

Testimony [...], Tr 282/17-284/5

210. Taking into account the above contentions of the Parties, the Tribunal notes that LCO notified its claim to the Ministry of Energy by letter of 15 July 2005 which was confirmed by the legal department of the Ministry by letter of 26 August 2005. Therefore, as of August 2005, the Ministry had knowledge of the dispute concerning the invalidation of the transfer of the Licence to LCO. The Tribunal notes that Respondent only gained knowledge of NCL's claim by a letter from counsel for Claimants of 18 June 2007. However, NCL's claim involves exactly the same legal and factual issues as LCO's claim. The Tribunal considers that the purpose of Article 26 of the ECT is to afford Respondent the possibility to examine the issues involved in the case, possibly initiate negotiations, and to prepare its defence. Respondent was in a position to do this as of August 2005, and there is no indication that it was prejudiced by the late introduction of NCL

into the case. The Tribunal concludes that in the circumstances a different treatment of this question would be too formalistic and that, therefore, the entire claim is admissible notwithstanding Article 26 of the ECT.

### ***J.II.7. Jurisdiction under the arbitration clause of the Licence Agreement***

Clause 27 of the Licence reads as follows:

*“27.1. The parties take all measures to settle disputes and disagreements upon the Contract conducting negotiations.*

*27.2. If during 60 days from the moment of moot question arise, it can not be resolve by negotiations, the Parties can appeal to:*

*- one of the following arbitration bodies:*

*- international centre on regulation of investment disputes (further-centre) created with respect to convention on regulation of investment disputes (IKSID), if the State is a participant of this convention...” [sic]*

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

213. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

CRfA paras. 5.6.-5.8

C I paras. 142-143

R II para. 159

214. Taking into account the above contentions of the Parties, the Tribunal considers that the wording of Clause 27 of the Licence is sufficiently clear to constitute consent of both Parties to ICSID jurisdiction to resolve any disputes and disagreements arising under the Licence. Therefore, the Tribunal has jurisdiction over the claims for a breach of the Licence in addition to the claims based on the

ECT. It goes without saying that this conclusion is without prejudice to the question to be considered later in this Award whether LCO was a party to the Licence agreement in spite of the court decisions regarding the transfer of the Licence.

215. After having considered the jurisdictional issues *stricto sensu*, the Tribunal will now have to examine whether Respondent can invoke the right to deny the advantages of the ECT to Claimants according to ECT Article 17.

### **J.III. Denial of Advantages (ECT Article 17(1))**

Article 17 of the ECT reads as follows:

*Each Contracting Party reserves the right to deny the advantages of this Part to:*

*(1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized; or*

*(2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:*

*(a) does not maintain a diplomatic relationship; or*

*(b) adopts or maintains measures that:*

*(i) prohibit transactions with Investors of that state; or*

*(ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments.*

#### ***J.III.1. Can the right to deny advantages only be exercised prospectively?***

This matter is No. 3 in the Parties Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

223. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C II	paras. 230-241
CS	paras. 12.5-12-6
CP	paras. 26-27
R II	paras. 63-87
RS	paras. 17-25
RP	paras. 69-71

Exhibits:

Ex C-55; CCB-125  
Ex C-56; CCB-129  
Ex RA-30, *Plama v. Bulgaria*, Award on Jurisdiction

Hearing:

Testimony [...], Tr 282/22-284/19; Tr 286/3-287/5  
Claimants' Oral Closing Submissions, Tr 621/21-622/5

224. Taking into account the above contentions of the Parties, the Tribunal notes that there is no disagreement between the Parties on the point that Article 17 contains a notification requirement to the effect that a state must expressly invoke Article 17(1) of the ECT to rely on the rights under that provision. The Tribunal agrees that this is the only interpretation that can be drawn from the wording that the host state “*reserves the right to deny the advantages of this Part*”. To reserve a right, it has to be exercised in an explicit way.
225. With regard to the question of whether the right under Article 17(1) of the ECT can only be exercised prospectively, the Tribunal considers that the above mentioned notification requirement – on which the Parties agree – can only lead to the conclusion that the notification has prospective but no retroactive effect. Accepting the option of a retroactive notification would not be compatible with the object and purpose of the ECT, which the Tribunal has to take into account according to Article 31(1) of the VCLT, and which the ECT, in its Article 2, expressly identifies as “*to promote long-term co-operation in the energy field*”. Such long-term co-operation requires, and it also follows from the principle of legal certainty, that an investor must be able to rely on the advantages under the ECT, as long as the host state has not explicitly invoked the right to deny such advantages. Therefore, the Tribunal finds that Article 17(1) of the ECT does not have retroactive effect.

226. In view of the above conclusions, the Tribunal does not have to deal with the question of whether the intention to rely on the right under Article 17(1) of the ECT must be notified to the investor prior to the making of the investment. To decide the case at hand, it is sufficient to note that when Respondent invoked Article 17(1) of the ECT for the first time in the Counter-Memorial on 4 August 2008, it did so belatedly since it was more than one year after Claimants had filed their Request for Arbitration.
227. The Tribunal also does not have to decide whether in case of a change in the relevant factual circumstances or appearance of new facts, the host state may exceptionally be permitted to retroactively invoke the right under Article 17(1) of the ECT at the time when it becomes aware of the new situation. In that context, the Tribunal finds that, in any event, the state relying on Article 17 would have the burden of proof with regard to the relevant facts, its belated knowledge, and that such knowledge would have caused it to invoke Article 17. Therefore, in the present case, Respondent had to prove that the Ministry of Energy neither had actual knowledge nor was in a position to know of the involvement of [Z] in the transaction and that such knowledge would have caused it to invoke Article 17. From the Ministry's letter of 26 August 2005 (*ExC-55 and CBB-125*) and the testimony of Mr [...] (*Tr 282/22-284/19*) the Tribunal concludes that Respondent already had the relevant knowledge at that time. Furthermore, Respondent had a more detailed knowledge of [Z]'s role at the latest when on 18 June 2007 the Request for Arbitration was filed, which exposed the details of the transaction (*CRfA paras. 6.2.-6.8.*). Respondent has not given any explanation why more than one further year passed before it invoked Article 17(1) of the ECT for the first time.

### ***J.III.2. Is the first limb of Article 17(1) in this case satisfied?***

This matter is No. 2 in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

248. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C II paras. 213-229  
CS paras. 12.1-12.3  
CP paras. 24-25 and paras 178-196  
R I para. 352  
R II paras. 44-62  
RS paras. 5-16  
RP paras. 45-68

Exhibits:

Ex C-71, CCB-185  
Ex C-72, CCB-186  
Ex C-81, CCB-195  
Ex C-110, CCB-155  
Ex C-112, CCB-160  
Pleadings II Appendix 11, 492

Witness Statements:

[...], paras. 7-15  
[...], paras. 7-13  
[...], paras. 13-14, 27  
[...], paras. 9-21

Hearing:

Testimony [...], Tr 126/4-202/16  
Testimony [...], Tr 203/25-213/7  
Testimony [...], Tr 396/3-13; 398/12-407/23

249. Taking into account the above contentions of the Parties, the Tribunal considers that the question whether Mr [...] owned or controlled Claimants is a moot issue because, as concluded above, the right to deny advantages can only be exercised prospectively. Respondent invoked Article 17(1) of the ECT for the first time in the Counter-Memorial of 4 August 2008. Therefore, the provision is not applicable to Claimants' claim notified to Respondent on 15 July 2005 and filed on 18 June 2007.

***J.III.3. Does the fact that Respondent has purported to exercise its right to deny advantages after the commencement of the ICSID arbitration affect its ability to do so?***

This matter is No. 4 in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

253. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C II	paras. 242-248
CS	para. 12.7
CP	para. 28
R II	paras. 88-91
RS	paras. 26-30

254. Taking into account the above contentions of the Parties, the Tribunal considers that the question whether ECT Article 17(1) right can be exercised after consent to arbitration is a moot question because, as seen above, ECT Article 17(1) cannot be invoked retroactively by Respondent with reference to the dispute at hand.

***J.III.4. Does ECT Article 17(1) deprive the Tribunal of jurisdiction to hear the affected claims or does it make the claims inadmissible?***

This matter is No. 5 in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

257. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C II para. 166  
CP para. 29  
R I paras. 339-350, 353-354  
R II paras. 92-96

Exhibits:

Ex RA-30, *Plama v. Bulgaria*, Decision on Jurisdiction

258. Taking into account the above contentions of the Parties, the Tribunal considers that the question of whether ECT Article 17(1) is a matter of jurisdiction or of admissibility is irrelevant for the case at hand because, as seen above, this provision cannot be invoked by Respondent in the circumstances of the present case.

259. After having concluded that Respondent cannot invoke ECT Article 17(1) to deny advantages, the Tribunal will now have to examine the issues regarding liability.

## **J.IV. Issues Regarding Liability**

### ***J.IV.1. Applicable Standard for Determining Breaches of the ECT***

With regard to this matter, the Parties address the following points in their Agreed List of Issues:

#### **J.IV.1.a) What is the relationship between the obligations of treatment provided for in ECT Article 10(1) and the minimum standard of treatment under international law?**

This matter is No. 19 (a) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent



[...]

iii. Tribunal

262. The Tribunal, without repeating the contents, takes particular note of the following documents on file :

Parties' Submissions:

C II paras. 108-117, 132  
CS para. 8.5  
CP para. 160  
R I paras. 235-236, 240-243, 251  
R II paras. 109-113, 114-122

263. Taking into account the above contentions of the Parties, the Tribunal considers that the purpose of ECT Article 10(1), second sentence, is to provide a protection which goes beyond the minimum standard of treatment under international law. The ECT was intended to go further than simply reiterating the protection offered by the latter. In this respect, ECT Article 10(1), second sentence, differs from NAFTA Article 1105 (in its interpretation given by the Free Trade Commission on 31 July 2001) which contains an express reference to international law. Therefore, when assessing Respondent's actions, a specific standard of fairness and equitableness above the minimum standard must be identified and applied for the application of the ECT.

**J.IV.1.b) How does the international law delict of denial of justice relate to the fair and equitable treatment standard under ECT Article 10(1)?**

This matter is No. 19(b) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

267. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C II paras. 118-121  
CP paras. 156-159  
R I paras. 246, 251  
R II paras. 134-141

268. Taking into account the above contentions of the Parties, the Tribunal considers that the international delict of denial of justice is an example of the standard of fair and equitable treatment under Article 10(1), second sentence, of the ECT. In other words, fair treatment implies that there is no denial of justice. The Tribunal does see merit in Claimants' argument that the two standards are not synonymous with regard to acts of courts because this would introduce a distinction between acts of courts and acts of other State entities for which no support is provided by the ECT. But, on the other hand, one will have to take into account the different functions held by administrative organs and judicial organs of a state and the resulting differences in their discretion when applying the law and in the appeals available against their decisions. The Tribunal will take that into account in later sections of this Award. However, to decide the case at hand, the Tribunal does not have to deal with the relationship between fair and equitable treatment and denial of justice in general or, if that were at all possible, to make a clear-cut ruling in the abstract on this matter in this preliminary consideration of the applicable standard.

**J.IV.1.c) What is the scope of the international law delict of denial of justice?**

This matter is No. 19(c) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

272. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C II paras. 122-126  
CS para. 8.9-8.11

CP paras. 164-171  
R I paras. 256-264  
R II paras. 124-133  
RP para. 30

Exhibits:

Ex RA-19, *Mondev v. USA*  
EX RA-12, *ELSI*  
Ex CA-23, *Azinian v. USA*  
Ex CA-5, *AMCO II*  
Ex CA-10, *Loewen v. USA*  
Ex RA-9, *Azinian v. USA*  
Ex RA-6; RA-47; Ex CA-9; CA-61 (Jan Paulsson: Denial of Justice)

Hearing:

Oral Closing Submissions Tr 574/21-575/6

273. Taking into account the above contentions of the Parties, the Tribunal notes that the Parties share the same reasoning concerning the basic ideas of the scope of denial of justice as a principle of international law. However, Respondent focuses on procedure while Claimants also include under this rubric, in extreme cases, the substance of decisions of national courts.
274. The Tribunal emphasizes that an international arbitration tribunal is not an appellate body and its function is not to correct errors of domestic procedural or substantive law which may have been committed by the national courts. The Tribunal stresses that the threshold of the international delict of denial of justice is high and goes far beyond the mere misapplication of domestic law.
275. To determine the scope of denial of justice, the Tribunal takes into account the several authorities which have been referred to by the Parties. In *Mondev v. United States of America (Ex RA-19)*, para. 127, the NAFTA tribunal, relying on the ELSI case, held:

“The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and

discreditable, with the result that the investment has been subjected to unfair and inequitable treatment.”

276. In his work “Denial of Justice” (introduced to the proceedings by both Parties, *cf.* Ex RA-6; RA-47; Ex CA-9; CA-61), Jan Paulsson defines the scope of denial of justice, at p. 98, as follows:  
“Denial of justice is always procedural. There may be extreme cases where the proof of the failed process is that the substance of a decision is so egregiously wrong that no honest or competent court could possibly have given it. Such cases would sanction the state’s failure to provide a decent system of justice. They do not constitute an international appellate review of national law.”
277. The Tribunal further takes into consideration the definition of denial of justice in Article 9 of the Harvard Law School, Draft Convention on the Law of the Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners (set out in *Paulsson, Denial of Justice*, at p. 96 and introduced by Claimants in C II para. 125, footnote 119):  
“A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable in the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.”
278. The Tribunal finds further support for the above position regarding the interpretation of denial of justice in the *Loewen* case, Final Award (*Ex CA-10*) para. 132: “Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough ....” This qualification seems correct even if one does not agree with all other conclusions of that award.
279. Taking into account the above authorities, the Tribunal concludes that Respondent can only be held liable for denial of justice if Claimants are able to prove that the court system fundamentally failed. Such failure is mainly to be held established in cases of major procedural errors such as lack of due process. The substantive outcome of a case can be relevant as an indication of lack of due process and thus can be considered as an element to prove denial of justice.

**J.IV.1.d) How is the conduct of national courts to be measured when there are allegations of breaches of the protections for investors set out in ECT Article 10(1)?**

This matter is No. 19(d) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

284. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C II	paras. 130-138
R I	paras. 252, 292, 294
R II	paras. 123-126; 134-141
RP	paras. 35, 38

Exhibits :

Ex CA-15, *Waste Management v. Mexico*

285. Taking into account the above contentions of the Parties, the Tribunal reiterates that there is no need to take any general position on the relationship between the standard of fair and equitable treatment and denial of justice. To decide the case at hand, it is sufficient to state that a judicial act breaches both or either of those standards only if the act attains the high threshold which is described in *Waste Management*, Final Award (*Ex CA-15*) at para. 98:

“Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.”

The Tribunal views that a misapplication of domestic procedural or substantive law provision might under certain circumstances be an indication of lack of due process. However, the Tribunal emphasizes, and the Parties agree, that by no means would this be sufficient to establish a breach of Article 10(1) ECT committed by a judicial act.

**J.IV.1.e) What is the scope of the standard of most constant protection and security in ECT Article 10(1)?**

This matter is No. 19(e) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

288. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C II paras. 127-129  
CS para. 8.15  
R I paras. 265-272  
R II paras. 142-147

Exhibits:

Ex CA-22, *CME v. Czech Republic*  
Ex CA-13, *Azurix v. Argentine Republic*  
Ex CA-63, *Occidental v. Ecuador*  
Ex CA-24, *Siemens v. Argentina*  
Ex CA-20, *Saluka*

289. Taking into account the above contentions of the Parties, the Tribunal emphasizes again at this point that it is not an appellate body on national law, neither is it a forum to resolve contractual disputes. With regard to the standard of most constant protection and security, the Tribunal holds that this provision, which must have a meaning beyond, and distinct from, the standard of fair and equitable treatment, provides a standard which does not extend to any contractual rights but whose purpose is rather to protect the integrity of an investment against interference by the use of force and particularly physical damage. The actions disputed in the present case do not involve any such interference and, therefore, are not covered by this additional standard.

**J.IV.1.f) Was there an expropriation or measure or measures having effect equivalent to expropriation pursuant to ECT Article 13?**

This matter is No. 20 in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

292. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C II paras. 127-129  
CS para. 8.15  
R I paras. 265-272  
R II paras. 142-147

Exhibits:

Ex CA-22, *CME v. Czech Republic*  
Ex CA-13, *Azurix v. Argentine Republic*  
Ex CA-63, *Occidental v. Ecuador*  
Ex CA-24, *Siemens v. Argentina*  
Ex CA-20, *Saluka*

293. Taking into account the above contentions of the Parties, the Tribunal notes that the Parties agree in principle on the standard and understanding of Article 13 of the ECT. A measure constitutes an expropriation if it constitutes a substantial deprivation of property forming all or a material part of the investment, provided that the measure is attributable to Respondent. If it is an expropriation, it is lawful if the requirements set forth in ECT Article 13 are complied with. Whether that agreed standard has been met will have to be considered in later sections of this Award after having examined the measures disputed in this case.

***J.IV.2. Has Respondent breached ECT Article 10(1) second sentence (fair and equitable treatment)?***

**J.IV.2.a) Was the transfer of the Licence in breach of the JSC Law Requirements?**

With regard to this matter, the Parties address the following points in their Agreed List of issues which, in view of their interrelation, the Tribunal will consider together:

*J.IV.2.a)aa) Was the transfer of the Licence a major transaction?*

This matter is No. 6(a) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

*J.IV.2.a)bb) Were the Kazakh law mandatory requirements for major transactions complied with?*

This matter is No. 6(b) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

*J.IV.2.a)cc) If not, did that render the transaction voidable at the suit of an interested party? Could the breaches subsequently be ratified?*

This matter is No. 6(c) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]



J.IV.2.a)dd) Could LCO avail itself of the good faith exception under Article 80(1) of the JSC Law?

This matter is No. 6(d) in the Parties Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

J.IV.2.a)ee) If it could, did LCO in fact argue this point before the Kazakh courts? Was the burden on LCO to raise Article 80(1) of the JSC Law, or was the burden on the Kazakh courts to raise it?

This matter is No. 6(e) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

J.IV.2.a)ff) Was the transfer of the Licence a transaction with interest?

This matter is No. 6(f) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

J.IV.2.a)gg) Were the Kazakh law mandatory requirements for transactions with interest complied with?

This matter is No. 6(g) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

*J.IV.2.a)hh) If not, did that render the transaction voidable at the suit of an interested party?*

*Could the breaches subsequently be ratified?*

This matter is No. 6(h) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

*J.IV.2.a)jj) Did both the major transaction and transaction with interest requirements apply to the transfer of the Licence and if so, what was the effect on the validity of the transfer?*

This matter is No. 6(i) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

*J.IV.2.a)kk) Tribunal*

323. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C II paras. 53-54, 70-74  
CP paras. 30-37  
Letter by Clifford Chance of 9 October 2009  
R I paras. 6, 44-54  
R II paras. 170-200  
RS paras. 39-42  
RP paras. 98-106

Exhibits:

Ex C-90, CCB-58, p. 4, 8  
Ex C-44; CORE-33  
Ex NE-4 ; CORE-28 p. 435  
Ex R-12, CCB-93, p. 6

Ex R-11, CCB-82, p. 9  
Ex R-16; CORE-7  
Ex C-17; CORE-6  
Ex C-18A/R-20, CORE-18

Expert Reports:

[...], paras. 19-63  
[...], paras. 2.7-2.13, 3.1.-3.3  
[...], paras. 45-53  
[...], paras. 17-31

Hearing:

Claimants' Oral Opening Submission, Tr 43/4-14; Tr 50/10-15; Tr 52/1-6  
Claimants' Oral Closing Submissions, Tr 609/12-16  
Testimony [...], Tr 505/23-508/19  
Testimony [...], Tr 469/12-472/12  
Testimony [...], Tr 484/15-489/6

324. Taking into account the above contentions of the Parties regarding the various issues addressed above, the Tribunal's major considerations are found below:
325. With regard to the applicable standard for breach of ECT Article 10(1), second sentence, the Tribunal recalls again that it must not function as an appeal body to correct errors, if any, of domestic procedural or substantive law committed by the host states' national courts. Therefore, the Tribunal sees no need to deal with the question of whether the transaction of the Licence from [X] to LCO was a major transaction or a transaction with interest in terms of the JSC Law and whether the requirements of this law were complied with.
326. The Tribunal notes that even if Claimants' investment does not comply with the requirements set out in the JSC Law and even if LCO could not avail itself of the good faith exception under Article 80(1) of the JSC Law, it is clear from the Parties' contentions and the testimony of the legal expert presented by Respondent that the transactions were then only voidable (*Claimants' Opening Submissions, Tr 43/15-23; Testimony Maggs Tr 506/16-20*). This means that under Kazakh law, they are considered valid until they are declared invalid at the request of an interested person by a decision of a court. However, this conclusion has no legal significance for the only relevant issue which is whether the Kazakh courts violated ECT Article 10(1), second sentence, when making their decisions. From the perspective of international law, a state cannot invoke national law as a justification for its failure to perform a treaty (*cf.* Article 27 of the VCLT). Domestic law is only considered to be relevant from the international perspective in so far as domestic court decisions are acts attributable to a state and must be assessed under international law like any other state behavior. Therefore, a court decision can be incorrect in terms of domestic law but still be irreproachable from

the perspective of international law. And *vice versa*, a court decision which is lawful under domestic law can still be considered to violate international law.

**J.IV.2.b) [Q]’s statement/application:**

With regard to this matter, the Parties address the following points in their Agreed List of Issues which, in view of their interrelation, the Tribunal will consider together:

J.IV.2.b)aa) Was this document an application to withdraw a suit, or a statement of evidence from [Q]?

This matter is No. 7(a) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

J.IV.2.b)bb) If it was intended to be an application to withdraw a suit, (i) did it comply with the applicable Kazakh law requirements for such an application and (ii) would it have made any difference to the claims asserted by [M] and the outcome of the Kazakh Court Proceedings?

This matter is No. 7(b) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

J.IV.2.b)cc) Was it filed before the Almaty City Court, or only later before the Civil College?

This matter is No. 7(c) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

J.IV.2.b)dd) Did the Civil College treat the document in accordance with the applicable principles of Kazakh law?

This matter is No. 7(d) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

J.IV.2.b)ee) Tribunal

345. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C I	paras. 89-100
C II	paras. 23-46
CS	paras. 6.3-6.10
CP	paras. 38-51, 54
R I	paras. 110-129
R II	paras. 201-246
RS	paras. 52-58
RP	paras. 73-80

Exhibits:

Ex C-43, CORE-31  
Ex R-13, CORE-27  
Ex C-46; CCB-107  
Ex C-48; CCB-110  
Ex C-50; CCB-145  
Ex C-51; CCB-149  
Ex C-44; CORE-33

Expert Reports:

[...], paras. 1.1-1.11  
[...], paras. 8-32

Hearing:

Testimony [...], Tr 529/1-546/11

Testimony [...], Tr 421/16-21, Tr 430/24-438/17

346. Taking into account the above contentions of the Parties regarding the various issues addressed above, the Tribunal acknowledges that the Parties agree, and the testimony of the legal experts confirms, that Kazakh law does not require a party to comply with a specific procedure to withdraw a claim as long as the withdrawal is in writing. The Tribunal further takes into account that [Q] had expressed in her statement that she did not have any claims against LCO. Therefore, if the Tribunal were an appeal body, it might come to a different conclusion than the Kazakh court decisions in this respect.
347. However, the Tribunal's mandate is restricted to assessing breaches of the ECT. Therefore, it does not extend to the question whether the Kazakh courts applied the Kazakh provisions on withdrawal of claims correctly or in a persuasive manner. The Tribunal's task is restricted to examining whether the Kazakh court decisions breach Respondent's obligations under the ECT. In examining this question, the Tribunal takes into account that the wording of [Q]'s statement is not entirely unambiguous, because she did not explicitly state that she withdrew her claims. The Tribunal also takes into account the fact that, in the same court proceedings, [Q] had earlier affirmed the opposite with regard to shareholder approval (*Ex R-13, CORE-27*). In other words, her sworn testimony in the proceeding was self-contradictory, and this could have provided a reason for not simply accepting the second statement without explanation.
348. The Tribunal notes that the Kazakh courts did take notice of the statement. In the circumstances, the decision to treat the statement as evidence and the refusal to base the decision on it did not reach the threshold of judicial conduct which could be considered arbitrary, grossly unfair, unjust or idiosyncratic or involving lack of due process. Neither this procedural treatment, nor the substantive outcome, offended judicial propriety, even if they could be considered surprising.
349. The Tribunal concludes that the Kazakh court decisions, from the perspective of international law, are therefore irrefragable and must be accepted.

#### **J.IV.2.c) [M]'s claim for invalidation of the transfer of the Licence to LCO**

With regard to this matter, the Parties address the following points in their Agreed List of Issues which, in view of their interrelation, the Tribunal will consider together:

J.IV.2.c)aa) Did the Kazakh courts determine [M]'s claim correctly as a matter of Kazakh law?

This matter is No. 8(a) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

*J.IV.2.c)bb) If not, were the decisions of the Kazakh courts a breach of Respondent's obligations under the ECT?*

This matter is No. 8(b) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

*J.IV.2.c)cc) Tribunal*

363. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C I	paras. 101-107
C II	paras. 47-58
CS	paras. 6.11-6.17
CP	paras. 57-95
R I	paras. 135-155
R II	paras. 247-269
RS	paras. 59-62
RP	paras. 81-88

Exhibits:

Ex R-19; CCB-42  
Ex C-63; CCB-35  
Ex CA-55, KL-16  
Ex KL-17

Expert Reports:

[...], paras. 2.1-2.17

[...], paras. 64-75  
[...], paras. 33-44

Hearing:

Testimony, [...], Tr 497/6-498/21; 523/16-526/1  
Testimony, [...], Tr 438/19-450/14

364. Taking into account the above contentions of the Parties regarding the several issues, the Tribunal reiterates that it is not an appellate body which has the competence to control the proper application of the Kazakh law provision on standing to bring a claim before national courts. For the determination of whether the court decisions violate ECT Article 10(1), second sentence, the Tribunal takes into consideration that [M] was not a shareholder of [X] at the time of the transfer of the Licence. The Tribunal also acknowledges that [M] realized a profit by first paying US\$ 50,000 to acquire a 94.5% share in [X], to which the Licence was then retransferred, being worth about US\$ 200 million at the time.
365. However, the Tribunal only has to consider from the perspective of international law the decision of the Kazakh courts that [M] had standing to bring a claim. Even if this decision were incorrect as a matter of Kazakh law, the conclusion that the right to bring suit for invalidation of a transaction is associated with the share and passes from a seller to a buyer certainly is not a decision which can be characterized as arbitrary, grossly unfair, unjust, idiosyncratic or involving lack of due process. The rules governing corporate conduct – here, major transactions or transactions with interest – may often be underpinned by serious legal consequences, such as the voidability of the transaction in question. In such cases the law may well be that the loss lies where it falls. If Claimants had been properly advised, they would have ensured that the original transfer of shares was unimpeachable. Instead they chose to run a legal risk, and it was not a breach of ECT Article 10(1), second sentence, for the Kazakh courts to draw the apparent consequences.
366. Therefore, from the perspective of international law, this decision is irreproachable and must be accepted.

**J.IV.2.d) Consideration of the [X] minutes by the Kazakh courts**

With regard to this matter, the Parties address the following points in their Agreed List of Issues which, in view of their interrelation, the Tribunal will consider together:

*J.IV.2.d)aa) How was evidence of [X] board and shareholder meeting minutes presented in the case addressed by the Kazakh courts?*



This matter is No. 9(a) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

*J.IV.2.d)bb) Would the minutes submitted by LCO, even if they had been accepted, have altered the outcome of the trial – do they affect the Court’s determination that the transfer of the Licence was in breach of the JSC Law?*

This matter is No. 9(b) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

*J.IV.2.d)cc) Tribunal*

376. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties’ Submissions:

C I	paras. 108-118
C II	paras. 67-69
CS	paras. 6.18-6.22
CP	paras. 96-104
R I	paras. 156-180
R II	paras. 175-177, 270-294
RS	paras. 63-71
RP	paras. 95-97

Exhibits:

Ex R-15; CORE-5  
Ex C-16; CORE-4  
Ex R-17; CORE-15  
Ex R-16; CORE-7  
Ex C-17; CORE-6

Ex C-18; CORE-14  
Ex R-18; CORE-16  
Ex R-19; CORE-17  
Ex C-18A/R-20; CORE-18  
Ex C-44; CORE-33  
Ex C-65; CORE-19

Expert Reports:

[...] paras. 54-69  
[...] paras. 4.1.-4.4  
[...] paras. 38-41

Hearing:

Testimony [...], Tr 423/18-427/14  
Claimants' Oral Opening Submissions, Tr 43/4-14; Tr 50/10-15; Tr 52/1-6

377. Taking into account the contentions of the Parties, the Tribunal considers that the treatment of the minutes by the Kazakh courts might indeed have violated the Kazakh law provisions on the consideration of evidence. The Tribunal acknowledges that the Kazakh courts did not take into account the minutes of the meetings in 2002 when making their decisions (Minutes of the Shareholders' Meeting of APL on 11 September 2002 (*Ex R-16; CORE-7 and Ex C-17; CORE-6*); Minutes of the APL Board Meeting held on 8 August 2002 (*Ex R-15; CORE-5 and Ex C-16; CORE-4*). The Tribunal further notes that the Kazakh courts did not give any reason for preferring the minutes of the Shareholder Meeting on 8 June 2003 provided by the Almaty Department of Justice over the minutes submitted by LCO. The Tribunal thus agrees with Claimants that there might have been irregularities in the treatment of the minutes. However, Claimants were not able to prove arbitrariness in the consideration of the minutes. The reasons for the courts' treatment of the minutes laid out by Respondent are not entirely convincing. But the Tribunal, particularly in view of the discretion courts have in the evaluation of evidence, does not consider that Claimants have met their burden of proving a misapplication of domestic law in this regard to such an extent that it attains, as regards the jurisdiction of national courts, the threshold for a breach of ECT Article 10(1), second sentence, as identified in the above sections of this Award.

**J.IV.2.e) The Supervisory College's treatment of LCO's application for supervisory review in February 2005**

With regard to this matter, the Parties address the following points in their Agreed List of Issues which, in view of their interrelation, the Tribunal will consider together:

J.IV.2.e)aa) Was the Supervisory College's treatment of LCO's application for supervisory review in February 2005 in accordance with Kazakh law?

This matter is No. 10 in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

J.IV.2.e)bb) If not, did the treatment constitute a breach of Respondent's obligations under the ECT?

This matter is No. 11 in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

J.IV.2.e)cc) Tribunal

382. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C I	paras. 123, 189
C II	paras. 76-77, 133 (4)
CS	paras. 6.29-6.30
CP	paras. 105-107
R I	paras. 189-194, 289-295
R II	paras. 314-334
RS	paras. 79-82

Exhibits:

Ex C-48; CORE-37

Expert Reports:

[...] paras. 77-84

[...] paras. 77-84

383. Taking into account the above contentions of the Parties, the Tribunal reiterates that it has no competence to control the application of Kazakh law by the Kazakh courts. The Supervisory Court might have performed a rather cursory review of the lower court decisions. However, especially on matters of procedure and the assessment of evidence, the practices of final appellate courts differ, and the fact that reasons were succinctly expressed does not entail that the underlying arguments were not considered. On balance, the Tribunal cannot find that there is any proof that the decision was arbitrary, grossly unfair, unjust or idiosyncratic or involved any lack of due process. Therefore, the Tribunal concludes that the supervisory review in February 2005 did not breach ECT Article 10(1), second sentence.

**J.IV.2.f) The denial of LCO's application for permission to bring a second appeal**

With regard to this matter, the Parties address the following points in their Agreed List of Issues which, in view of their interrelation, the Tribunal will consider together:

J.IV.2.f)aa) Was the denial of LCO's application for permission to bring a second appeal to the Supervisory College in January 2006 in accordance with prevailing Kazakh law?

This matter is No. 12 in the Agreed List of Issues.

- i. Claimants

[...]

- ii. Respondent

[...]

J.IV.2.f)bb) If not, did such denial amount to a breach of Respondent's obligations under the ECT?

This matter is No. 13 in the Agreed List of Issues.

- i. Claimants

[...]

ii. Respondent

[...]

J.IV.2.f)cc) Tribunal

388. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C I paras. 124-125, 189  
C II paras. 79-80, 133(4)  
CS paras. 6.31-6.32  
CP paras. 108-111  
R I paras. 195-201, 289-295  
R II paras. 315, 335-344  
RS paras. 83-86  
RP paras. 107-112

Exhibits:

Ex C-51; CORE-41  
Ex CA-57; KL-18  
Ex K-12

Expert Reports:

[...], paras. 5.1-5.5  
[...], paras. 85-100

Hearing:

Testimony [...], Tr 462/1-466/12

389. Taking into account the above contentions of the Parties regarding the several issues, the Tribunal does not need to deal with the details of the date of entry into force of laws in Kazakhstan. The Tribunal considers that both Claimants and Respondent put forward convincing reasons for their respective positions on the requirements for the official publication of a new law.

390. In considering that the publication only in the Russian language is an official publication in terms of the Kazakh CoCP, the Supervisory College came to a conclusion which at least can be considered as plausible. On that basis, it did not

violate the standard of fair and equitable treatment under ECT Article 10(1), second sentence, as identified in the above sections of this Award for the jurisdiction of national courts.

**J.IV.2.g) Did the Supervisory College’s two refusals of a supervisory appeal affect the outcome of the case and/or cause Claimants any loss: i.e., is there a real prospect that the Supervisory College would have overturned the determinations of the Almaty City Court and the Civil College?**

This matter is No. 14 in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

394. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties’ Submissions:

C II paras. 75-80  
CP para. 112  
R I para. 201  
R II paras. 331, 346  
RS para. 81  
RP para. 110

Exhibits:

Ex C-48; CORE-37  
Ex C-51; CORE-41

Expert Report:

[...], para. 100

Hearing:

Testimony [...] Tr 459/20-460/20

395. Taking into account the above contentions of the Parties, the Tribunal considers that the question of whether the Supervisory College's two refusals of a supervisory appeal affect the outcome of the case is a moot issue. Having concluded that the two decisions were beyond reproach from the perspective of international law, the Tribunal does not have to deal with the question whether a different treatment of LCO's application at the supervisory review would have led to a different outcome.

**J.IV.2.h) What is the relevance of the ultimate transfer of the Licence by [X] to [...]?**

This matter is No. 18 in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

399. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C II para. 58, footnote 4  
CP para. 141  
R I paras. 148-155  
R II para. 269

Exhibits:

Ex C-105; CORE-39  
Ex C-107; CCB-147

400. Taking into account the above contentions of the Parties, the Tribunal considers that Claimants' allegations of the ultimate transfer of the Licence to [...] are either unfounded or at least not sufficiently shown to be relevant for the issues to be decided here. The Tribunal does not find any proof of the "shadowy nature" of

[M]’s involvement in the transfer and re-transfer of the Licence which would be relevant to its consideration of a possible breach of the ECT. The fact that [M] benefitted from the re-transfer of the Licence to [X] was addressed *supra* at *J.IV.2.c)* and is irreproachable under international law.

401. The Tribunal acknowledges that the fact that the Licence is now owned by [...] may be relevant to possible remedies. Under international law, the primary remedy is restitution which may become impossible when the Licence is transferred to a new holder. However, the question of remedies only needs to be addressed if Respondent is held to be liable. As the Parties have agreed on the bifurcation of liability and quantum/relief according to section B.2 of PO-1, this matter does not have to be considered at present.

#### **J.IV.2.j) The Corruption Case**

With regard to this matter, the Parties address the following points in their Agreed List of Issues which, in view of their interrelation, will be considered by the Tribunal together:

*J.IV.2.j)aa) Were the judgments of the Kazakh court proceedings such that no honest and competent court could possibly have given them?*

This matter is No. 16 in the Agreed List of Issues.

- i. Claimants

[...]

- ii. Respondent

[...]

*J.IV.2.j)bb) What weight (if any) is to be given to Claimants’ (disputed) evidence that [...] indicated to LCO that the claimants in the Kazakh court proceedings had paid money and that LCO would have to pay a similar amount?*

This matter is No. 17(a) in the Agreed List of Issues.

- i. Claimants

[...]

- ii. Respondent

[...]



J.IV.2.j)cc) What weight (if any) is to be given to Claimants' (disputed) evidence that the representatives of [M] expressed extraordinary confidence in the outcome of the Kazakh court proceedings?

This matter is No. 17(b) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

J.IV.2.j)dd) What weight (if any) is to be given to Claimants' (disputed) evidence that the Correspondence from the Ministry of Energy was sent to LCO by a company, [...]?

This matter is No. 17(c) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

J.IV.2.j)ee) What weight (if any) is to be given to Claimants' (disputed) evidence that Respondent's courts have a problem with corruption and undue influence?

This matter is No. 17(d) in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

J.IV.2.j)ff) Tribunal

420. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C I paras. 83-88, 106, 126-128

C II paras. 5-8, 81-87

CS paras. 7.1-7.8  
CP paras. 120-133  
R I paras. 10-13, 142-147, 202-205  
R II paras. 347-370  
RS paras. 87-90  
RP paras. 15; 113-138

Exhibits:

Ex C-6; CCB-163  
Ex C-55, CCB-125  
Ex C-95, CCB-81  
Ex C-97; CCB 89  
Ex C-99, CCB-91  
Ex C-103, CCB-126  
Ex CA-62

Witness Statements:

[...] paras. 38-40, 57-58  
[...] paras. 33, 38  
[...] para. 24

Hearing:

Testimony [...] Tr 324/3-336-22; Tr 342/23-343/25  
Testimony [...] Tr 383/10-24; Tr 386/15-393/8  
Testimony [...] Tr 230/25-233/22; Tr 240/14-241/6; Tr 247/4-252/2  
Testimony [...] Tr 180/14-182/8  
Testimony [...] Tr 555/21-556/8  
Testimony [...] Tr 413/16-414/8

421. Taking into account the above contentions regarding the several issues raised by the Parties, the Tribunal's major considerations are as follows.
422. Corruption, if found, would constitute a grave violation of the standard of fair and equitable treatment under ECT Article 10(1), second sentence. The Tribunal emphasizes that corruption is a serious allegation, especially in the context of the judiciary. The Tribunal notes that both Parties agree that the standard of proof in this respect is a high one. Therefore, generalized allegations of corruption in the Republic of Kazakhstan do not meet Claimants' burden of proof. [...]
423. The Tribunal is aware that it is very difficult to prove corruption because secrecy is inherent in such cases. Corruption can take various forms but in very few cases

can reliable and valid proof of it be brought which is sufficient as a basis for a resulting award declaring liability. However, the Tribunal considers that this cannot be a reason to depart from the general principle that Claimants must fully comply with their undisputed burden to prove that in the case at hand there was corruption.

424. [...] It is not sufficient to present evidence which could possibly indicate that there might have been or even probably was corruption. Rather, Claimants have to *prove* corruption, [...]. [T]he issue is not one of inference, and the Tribunal considers that Claimants have not met their burden of proof in this regard.

### ***J.IV.3. Has Respondent breached Article 13 ECT (expropriation)?***

#### **J.IV.3.a) The invalidation of the transfer of the Licence by the Kazakh courts and the retransfer to [X] by the Ministry of Energy**

[...]

- i. Claimants:

[...]

- ii. Respondent:

[...]

- iii. Tribunal

429. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

#### Parties' Submissions:

C I	paras. 196-203
C II	paras. 139-146
CS	paras. 8.24-8.27
CP	paras. 144-146
R I	paras. 296-299, 252
R II	paras. 148-158

#### Exhibits:

Ex RA-9, *Azinian v. Mexico*

430. Taking into account the above contentions of the Parties, the Tribunal acknowledges that the domestic courts of Kazakhstan are, from the perspective of international law, organs of the Republic of Kazakhstan. Therefore, their decisions are attributable to Respondent and could be measures falling under ECT Article 13. On the other hand, it is also clear and undisputed that Claimants, insofar as they were subject to Kazakh law, were subject to the jurisdiction of the Kazakh courts. The mere fact that decisions of the Kazakh courts declared that Claimants did not prevail and were not holders of rights they claimed to have, therefore, is not sufficient to find an expropriatory measure falling under ECT Article 13.
431. In its consideration of ECT Article 10(1), second sentence, the Tribunal found that the Kazakh court decisions were not arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory or lacking due process, even if they might have been incorrect as a matter of Kazakh law, and that correspondingly they have to be accepted from the perspective of international law and particularly that of the ECT. Consequently, the invalidation of the transfer of the Licence by the Kazakh courts has to be accepted under international law and under the ECT.
432. For these reasons, it cannot be concluded that the transfer was wrongfully annulled as Claimants allege. The decisions of the Kazakh courts do not constitute an expropriation.
433. With regard to the action of the Ministry of Energy, the Tribunal agrees with the reasoning of the *Azinian* tribunal holding that a governmental authority cannot be reproached for acting in accordance with a decision taken by the state's own courts. This is at least so if, as found above, such court decisions are irreproachable and have to be accepted from the perspective of international law.
434. For these reasons, the order of the re-transfer of the Licence to [X], which only executed the court decision, does not constitute an act which could be independently considered as an expropriatory measure according to Article 13 of the ECT.

#### **J.IV.3.b) The rejection of LCO's alleged evidence of payment for the transfer of the Licence**

This matter is No. 15 in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

437. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C I paras. 119-122  
C II para. 92  
CS paras. 6.23-6-25  
CP paras. 113-119  
R I paras. 181-187  
R II paras. 371-380  
RS paras. 91-94

Exhibits:

Ex C-21; CCB-72;  
Ex CCB-73  
Ex C-20; CORE-26  
Ex C-45; CORE-34  
Ex C-44; CORE-33  
Ex C-46; CORE-35

Expert Report:

[...] paras. 70-76

438. Taking into account the above contentions of the Parties, the Tribunal considers that Claimants were not able to prove that US\$ 3,000,000 had been paid for the transfer of the Licence. The Tribunal notes that LCO itself had not made the payment and that there is no proof that [...] paid on behalf of LCO. Furthermore, Claimants did not produce sufficient evidence that the payment represented a benefit to [X] nor that it was received by [Y], but only established that US\$ 3,000,000 have been credited to an account at the [...]. Considering these inconsistencies, the Tribunal concludes that the Kazakh court decisions are irreproachable, from the perspective of the ECT, in considering that there was not sufficient evidence of the payment for the transfer of the Licence. The fact that the decisions do not order the restitution of US\$ 3,000,000 to LCO equally does not constitute a violation of ECT Article 13.

***J.IV.4. Has Respondent breached ECT Article 10(1), last sentence (umbrella clause)?***

**J.IV.4.a) If there was a breach of the Licence, was such breach also a violation of the "umbrella clause" in the last sentence of ECT Article 10(1)?**

This matter is No. 22 in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

441. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C I	paras. 209-216
C II	paras. 147-148
CS	paras. 8.20-8.23
CP	para. 148
R I	paras. 213-216
R II	paras. 159-164
RS	paras. 100-102

Exhibits:

Ex RA-9, *Azinian v. Mexico*  
Ex CA-4, *Amco II*

442. Taking into account the above contentions of the Parties, the Tribunal considers that there could only be a breach of the Licence Agreement, and thus of ECT Article 10(1), last sentence, if LCO was a contracting party to the Licence Agreement. However, the Kazakh courts have invalidated the transfer of the Licence from [X] to LCO. This Tribunal has concluded above with regard to ECT Article 10(1), second sentence, and Article 13 that the decisions of the courts do not constitute a violation of international law and have to be accepted in considering possible breaches of the ECT. The result of the court proceedings that

LCO is not a contractual party to the Licence therefore has to be accepted by this Tribunal when examining a possible breach of the Licence.

443. This means that this Tribunal has to accept that LCO, not being a contractual party, did not have any rights stemming from the Licence. Therefore, LCO cannot invoke any rights of the Licence Agreement or bring a claim for a breach of it or of ECT Article 10(1). Under these circumstances it is unnecessary to consider the various questions raised relating to the so-called umbrella cause in ECT Article 10(1).

**J.IV.4.b) Did Respondent breach its Investment Laws of 1994 and 2003? If so, was such a breach also a violation of the "umbrella clause" in the last sentence of ECT Article 10(1)?**

This matter is No. 23 in the Agreed List of Issues.

The provisions of the Kazakh Investment Laws referred to by Claimants read as follows:

***Law No. 266-XIII of 27th December 1994 of the Republic of Kazakhstan Concerning Foreign Investments***

***Article 8: Guarantees from Illegal Acts of State Bodies and Official Persons***

*Acts of state bodies and their official persons, which are adopted in violation of the Republic of Kazakhstan legislation, and which deteriorate the legal status of foreign investors shall have no legal force.*

***Law No. 373 of 8th January 2003 of the Republic of Kazakhstan concerning Investments:***

***Article 4: The Guarantee of Legal Protection of Investor Activities in the Territory of the Republic of Kazakhstan***

*2. An investor shall have the right to compensation for harm caused to him as a result of adoption by state authorities of acts which are not consistent with the legislative acts of the Republic of Kazakhstan, as well as resulting from illegal acts (commission of act) of officials of those authorities in accordance with the civil legislation of the Republic of Kazakhstan.*

[...]

- i. Claimants

[...]

- ii. Respondent

[...]

- iii. Tribunal

447. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C II paras. 149-153  
CP para. 149  
R I paras. 213-216  
R II paras. 416-421

Exhibits:

Ex CA-54 = KL-7(Law No. 266-XIII of 27th December 1994 and Law No. 373 of 8th January 2003 of the Republic of Kazakhstan)  
Ex RA-9, *Azinian v. Mexico*

Expert Report:

[...], paras. 7.1-7.4

448. Taking into account the above contentions of the Parties, the Tribunal considers that it is not clear from the wording of ECT Article 10(1), last sentence, whether the “umbrella clause” also encompasses state legislation concerning the protection of foreign investment such as the Kazakh Investment Laws of 1994 and 2003. The Tribunal notes that the words “*obligation the Respondent has entered into with an investor or an Investment of an Investor of any other Contracting Party*” in ECT Article 10(1), last sentence, rather seem to suggest that a contractual or similar bilateral relationship must exist between the host state and the investor. On the other hand, the Tribunal acknowledges that in the context of consent to jurisdiction of arbitral tribunals, it is commonplace that the host state’s unilateral offer in its national legislation to submit the dispute under certain international arbitration rules to the jurisdiction of an arbitral tribunal, once duly accepted by the claimant, is a sufficient and binding submission to arbitration. This offer can be accepted by the investor by submitting its claim to the arbitration institution or arbitral tribunal. Applying this reasoning to ECT Article 10(1), it could be argued that an abstract unilateral promise by the state in its national legislation and particularly in its laws directed to foreign investors is encompassed by the “umbrella clause”.

449. However, the Tribunal does not have to decide this question in the case at hand. The Tribunal refers to its discussion of ECT Article 10(1), second sentence, and Article 13, and its conclusion that the court decisions and the acts of the Ministry of Energy do not constitute a violation of the ECT and have to be accepted by this



Tribunal. If that is so, these actions must be accepted as being in conformity with Kazakh law including the Kazakh Investment Laws. In this context, the Tribunal notes that the Law No. 266-XIII of 27th December 1994 contains a general reference to Kazakh law in its Article 3 and, according to the above-quoted Article 8 bans the application of “Acts [...] which are adopted in violation of the Republic of Kazakhstan legislation”, and that the Law No. 373 of 8th January 2003 in its Article 2 contains a similar general reference to Kazakh law. The Tribunal further notes that the above-quoted Article 4 provides for compensation only with regard to “acts which are not consistent with the legislative acts of the Republic of Kazakhstan”.

450. The Kazakh courts have decided on the application of Kazakh law and, as seen above, this Tribunal has to accept these decisions as valid. On this basis, a breach of these laws, which would be a precondition for the breach of the umbrella clause, has not been shown by Claimants.

#### ***J.IV.5. Has Respondent breached the Licence Agreement?***

This matter is No. 21 in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

454. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C I	paras. 209-216
C II	paras. 154-155
CP	para. 147
R II	paras. 416-421
RS	paras. 100-102

Exhibits:

Ex RA-9, *Azinian v. Mexico*  
Ex CA-4, *Amco II*

Witness Statement:

[...], paras. 12, 19-22

455. Taking into account the above contentions of the Parties, the Tribunal first notes that its jurisdiction to decide the Licence claim is based on the dispute settlement provision in the Licence Agreement (Clause 27), *supra J.II.7*.
456. With regard to the issue of a breach of the Licence the Tribunal reiterates its conclusions regarding ECT Article 10(1), last sentence, *supra J.IV.4.a*). Acknowledging that Kazakh law is applicable to claims under the Licence, the Tribunal considers that it cannot accept LCO as a legitimate holder of the Licence because the transfer of the Licence from [X] to LCO was invalidated by the Kazakh courts. It follows from the discussion above of ECT Article 10(1), second sentence, and Article 13 that these court decisions are irreproachable from the perspective of international law and the ECT in particular. Therefore, this Tribunal has to accept that LCO did not become a contracting party to the Licence Agreement and cannot bring a claim alleging breach of the Licence Agreement.

## **J.V. Damages and Quantum**

With regard to this matter, the Parties address the following points in their Agreed List of Issues:

***J.V.1. Did any of the alleged failures and/or wrongful acts by the Kazakh courts and/or the Ministry of Energy in fact cause Claimants the alleged or any loss, or was there an intervening cause attributable to other third parties and/or Claimants themselves?***

This matter is No. 24 in the Agreed List of Issues.

- i. Claimants

[...]

- ii. Respondent

[...]

- iii. Tribunal

459. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

C II paras. 158-164  
CS para. 10.1  
R I paras. 308-312  
R II paras. 426-442

Exhibits:

Ex CA-4 (*Amco II*)

460. Taking into account the above contentions of the Parties, the Tribunal considers the question of causation of the damage to be moot because it has found Respondent to be liable neither under the ECT nor under the Licence.

***J.V.2. Did Claimants take all reasonable steps to mitigate such loss as they in fact suffered as a result of the avoidance of the transfer of the Licence?***

This matter is No. 25 in the Agreed List of Issues.

i. Claimants

[...]

ii. Respondent

[...]

iii. Tribunal

463. The Tribunal, without repeating the contents, takes particular note of the following documents on file:

Parties' Submissions:

CP para. 151  
Clifford Chance, letter of 9 October 2009  
R I paras. 315-317  
R II paras. 443-446

464. Taking into account the above contentions of the Parties, the Tribunal considers the question of mitigation to be irrelevant to the Award because Respondent has not been found liable either under the ECT or under the Licence. Apart from that, it should be noted that the Parties have agreed on the bifurcation of liability and quantum/relief according to section B.2 of PO-1.

## **J.VI. Costs**

465. The Tribunal has taken note of the cost claims submitted by the Parties and of their respective comments submitted by the Parties in accordance with PO-5 No 2.

466. The length and complexity of this arbitral procedure shows that neither of the Parties could have easily identified the procedural and substantive outcome of this dispute. Claimants have prevailed on jurisdiction and with regard to the issues under ECT Article 17(1). Respondent has succeeded on the merits of the case. Thus, both sides have been partly successful and partly unsuccessful in their arguments raised during the course of this proceeding.

467. Taking into account the circumstances of the case and using its discretion under Article 61(2) of the ICSID Convention, the Tribunal considers it fair that the costs of arbitration shall be borne in equal shares between Claimants on one side and Respondent on the other side.

468. Also, taking into account these circumstances of the case and using its discretion under Article 61(2) of the ICSID Convention, the Tribunal considers it fair that each Party bears its own costs of legal representation.

**(The Decisions and Signatures of the Tribunal appear on the following separate page of this Award)**

## **K. Decisions**

**For these reasons, the Tribunal decides as follows:**

- 1. The Tribunal has jurisdiction to consider the Claimants' claims.**
- 2. The Respondent is not liable under the Energy Charter Treaty or under the Licence.**
- 3. All other claims submitted by the Claimants in their relief sought are denied, subject to the following decisions regarding costs.**
- 4. The costs of arbitration shall be borne in equal shares between the Claimants on one side and the Respondent on the other side.**
- 5. Each Party shall bear its own costs of legal representation.**

Signatures of the Tribunal:

/Signed/

Professor Kaj Hobér  
(Arbitrator)  
Date: 29 April 2010

/Signed/

Professor James Crawford  
(Arbitrator)  
Date: 20 April 2010

/Signed/

Professor Karl-Heinz Böckstiegel  
(President)  
Date: April 26, 2010