



School of International Arbitration

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International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law**

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Award Name and Date: Caratube International Oil Company LLC and Mr. Devincci Salah Hourani v. Republic of Kazakhstan (ICSID Case No. ARB/13/13) – Award and Concurring and Dissenting Opinion by arbitrator Jacques Salès – 27 September 2017

Case Report by: Ana Coimbra Trigo**, Editor Ignacio Torterola***

Summary:

Claimants brought an action for relief against Kazakhstan pursuant to the ICSID Convention, the Law of the Republic of Kazakhstan on Foreign Investments and the Contract concluded between the Parties, alleging, *inter alia*, that Kazakhstan had expropriated its investment in the Caratube fields. The Respondent raised several objections on jurisdiction and denied all claims. A majority of the Tribunal decided in favor of Caratube International Oil Company LLC, awarding USD 39.2 million as compensatory damages.

Main Issues:

Contractual basis jurisdiction; abuse of process, collateral estoppel, *res judicata* in international law; consent and investment pursuant to Article 25(1) of the ICSID Convention; national of another Contracting State and foreign control pursuant to Article 25(2)(b) of the ICSID Convention; Expropriation as the unreasonable substantial deprivation of existing rights of a certain duration caused by a sovereign act of a host State; Sunk costs award.

Tribunal: Dr. Laurent Lévy (President), Professor Laurent Aynès (Arbitrator) and Dr. Jacques Salès (Arbitrator)

Claimants' Counsel: Mr. Hamid Gharavi, Ms. Nada Sader and Mr. Sergey Alekhin, (Derains & Gharavi)

Respondent's Counsel: Mr. Peter M. Wolrich, Mr. Geoffroy Lyonnet, Ms. Gabriela Alvarez-Avila, Mr. Jérôme Lehucher, Ms. Mira Suleimenova, Ms. Svetlana Evliya, Ms. Anna Kouyaté, Mr. Yerzhan Mukhitdinov, Ms. Marie-Claire Argac, Ms. Lisa Arpin-Pont and Ms. Olena Stasyk (Curtis, Mallet-Prevost, Colt & Mosle LLP)

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Digest:

1. Relevant Facts

Caratube International Oil Company LLP ('Caratube' or 'CIOC') is a Kazakh-incorporated company that is a limited liability partnership, with foreign ownership, and Mr. Devincci Salah Hourani is a US national and CIOC's majority shareholder (jointly 'Claimants'). Respondent is the Republic of Kazakhstan ('Kazakhstan' or 'Respondent') (¶¶ 1, 4).

The underlying dispute arose out of Contract No. 954 for the Exploration and Production of Hydrocarbons, originally entered into between Consolidated Contractors (Oil and Gas) Company S.A.L. ('CCC'), and the Ministry of Energy and Mineral Resources of the Republic of Kazakhstan ('MEMR') on 27 May 2002 ("Contract"), and assigned to CIOC on 26 December 2002 by means of Amendment No. 1 to the Contract (¶¶ 6, 14).

The Contract provided for an exploration period of five years (up to 2007), and a subsequent production period of 25 years (up to 2032) (¶ 17). CIOC and Respondent agreed on a Minimum Work Program dated May 2002 ('MWP') for the exploration period that defined the essential works to be realized and its respective budget. The MWP goals were to demonstrate the commerciality of the supra-salt oil reservoirs discovered and further explore them by carrying out a 3D seismic survey and drilling two sub-salt exploration wells (¶¶ 30-32). The MWP was to be determined annually through an "Annual Work Program" ('AWP') by CIOC and the Western Kazakhstan Territorial Administration of Geology and Subsoil Use ('TU Zapkaznedra') (¶ 33).

Upon CIOC's request for a two-year extension of the exploration period on 27 November 2006, on 27 July 2007 both parties entered into Amendment No. 3 of the Contract, which extended the exploration period until 27 May 2009 (¶¶ 35-37).

The Claimants submitted that they spent more than five years to de-risk and re-habilitate the Caratube field, making it ready to produce oil on a commercial scale, investing over USD 39 million between December 2002 and March 2008, and a further USD 18 million during the

two-year extension of the exploration period (¶¶ 39-40). CIOC secured funds for this investment with JOR Investment Inc. SAL, a Lebanese offshore company created in 2002 and held by Mr. Kassem Omar (¶¶ 12, 42).

On 25 March 2007, the MEMR allegedly notified CIOC of all of its breaches at the time, granting CIOC one month to cure them, subject to unilateral termination, to which CIOC did not reply (¶ 49). On 7 September 2007, the Aktobe Prosecutor's Office issued a "Recommendation on elimination of disregard of the rule of law", inviting the MEMR to notify CIOC to cure existing breaches under the works program or to unilaterally terminate the Contract (¶¶ 49, 60). On 24 September 2007, the TU Zapkaznedra once again sent the Notice of Breach to CIOC (¶ 49). On 1 October 2007, the MEMR sent a Notice of Termination of Operations based on CIOC's continued under-performance (¶ 49).

On 27 November 2007, the MEMR authorized CIOC to resume operations, while at the same time demanding the cure of the on-going material breaches within one month (¶¶ 49, 68).

With respect to CIOC's performance during 2008, the MEMR ordered the termination of the Contract on 30 January 2008 and sent the Notice of Termination to CIOC on 1 February 2008 (¶¶ 50, 76-77). Following the termination of the Contract, CIOC retained physical control of the Contract site until April 2009, which thereon became *de facto* controlled by National Security Service of the Republic of Kazakhstan ('KNB') officers.

The Claimants alleged that the KNB confiscated property (seized documents, electronic storage media and computers) and land (all oil wells were sealed) belonging to CIOC as part of a politically-motivated harassment campaign against the Hourani family and all its investments (¶¶ 79-81, 88-89). Respondents rejected all allegations of expropriation and harassment of the Claimants, insisting that CIOC's Contract was terminated for CIOC's material breaches (¶ 90).

The factual context underlying the present dispute has given rise to several dispute resolution procedures, including *Devincci Salah Hourani and Issam Salah Hourani v Republic of Kazakhstan*, ICSID Case No. ARB/15/13 (pending), UNCITRAL case *Ruby Roz* (finished with a negative award on jurisdiction), and the *Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No. ARB/08/12 ('Caratube I arbitration'), where the Tribunal found it lacked jurisdiction under the US-Kazakhstan BIT in an award dated 5 June 2012, ordering CIOC to pay costs to the Respondent (¶ 91).

On 5 June 2013, the Claimants submitted their Request for Arbitration, requesting the institution of arbitration proceedings against the Respondent in accordance with the ICSID Convention, the Law of the Republic of Kazakhstan on Foreign Investments, dated December 27, 1994 ('FIL'), the Treaty Between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment, dated May 19, 1992 ('BIT') (although this was not pursued in their Memorial), and the Contract. The Claimants asked the Tribunal to order Kazakhstan to pay damages of over 1 billion US

dollars in favor of Claimants as a result of its breaches and for any alternative or supplementary claims that Claimants might raise, to pay moral damages in favor of Claimants for injury to their reputation and continuing harassment, to cease its breaches and adverse actions against Claimants, and to pay in favor of Claimants the costs of this arbitration, along with interest (¶¶ 251-252).

2. Procedural History

Claimants filed a Request for Arbitration on 5 June 2013, which was registered by ICSID on 28 June 2013 (¶¶ 94-95).

The ICSID Secretary-General confirmed the constitution of the Tribunal on 7 January 2014, as pursuant to Article 37(2)(b) of the ICSID Convention (¶¶ 96-97).

Following a letter of 15 January 2014 whereby the Claimants requested Mr. Boesch, the arbitrator appointed by Respondent, to resign pursuant to Article 8 of the ICSID Arbitration Rules, and the submission of a Proposal for Disqualification by Claimants on 28 January 2014 (¶¶ 99-102), on 20 March 2014 the Unchallenged Arbitrators issued their Decision on the Proposal for Disqualification of Mr. Bruno Boesch, upholding the Claimants' Proposal (¶¶ 106-107). Respondent appointed Dr. Jacques Salés as arbitrator, and on 2 May 2014 the suspension of the proceedings was lifted as of 29 April 2014 (¶¶ 108-109).

The first session of the Tribunal was held on 4 June 2014 in Paris, and on 20 June 2014 the President of the Tribunal issued Procedural Order No. 1 (¶¶ 110-111).

The Claimants submitted requests for provisional measures based on Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, with respect to the allegations of harassment by the Respondent, by letter of 14 July 2014 (¶¶ 112, 121), on 20 March 2015 and on 8 September 2015, however all requests were denied by the Tribunal (¶¶ 119-121, 123, 136-139, 176, 217).

Meanwhile, the Claimants submitted their Memorial on 19 September 2014 (¶ 117), and the Respondent submitted its Counter Memorial on Jurisdiction and the Merits on 20 March 2015, requesting that the Tribunal bifurcate the proceedings or alternatively to split the hearing in two (¶¶ 135, 140), which was rejected by the Tribunal on 27 April 2014 (¶ 141).

On 24 July 2015, the Tribunal issued Procedural Order No. 2 on the Claimants' Document Production Requests on Jurisdiction (¶ 149). On 31 August 2015, Tribunal issued its Procedural Order No. 3 on the Parties' Remaining Document Production Requests (¶ 170). On 14 September 2015, the Tribunal issued Procedural Order No. 4 on the Respondent's Supplemental Document Production Requests (¶ 178).

On 17 September 2015, the Claimants submitted their Defense on Jurisdiction (¶ 181).

On 14 October 2015, the Parties simultaneously submitted their respective Skeleton Arguments (¶ 203). The pre-hearing conference call took place on 23 October 2015 (¶ 219). The evidentiary hearing took place from 2 to 13 November 2015 (¶ 236). By letter of 20 November 2015, the President of the Tribunal confirmed the Post-Hearing Order (¶ 237). On 4 March 2016, the Parties submitted their first Post-Hearing Briefs, and on 13 May 2016, the Parties submitted their Reply Post-Hearing Briefs (¶ 244).

On 13 July 2016, the Parties filed their respective Statement of Costs (¶ 246). On 25 July 2016, the Respondent submitted its Comments, on 15 August 2016 the Claimants replied, and on 26 August 2016 the Respondent submitted its final comments on the Claimants' position (¶¶ 247-250).

The Tribunal declared the proceedings closed on 12 September 2017 (¶ 250).

3. Jurisdiction Issues in analysis

3.1 Preliminary Issues: Law Applicable to the Merits and Burden of Proof

3.1.1 Tribunal's analysis

The Tribunal found that Kazakh law was applicable to the merits of the dispute as the law chosen by the Parties in the Contract, affording a supplemental and corrective function to international law, namely customary international law, on the basis of Article 42(1) of the ICSID Convention (¶¶ 290-291, 294). The Tribunal also found the substantive guarantees and protections provided under the FIL were applicable, as agreed by the Parties in the Contract (¶ 295).

The Tribunal also found that the Claimants had the burden of proving that this Tribunal had jurisdiction pursuant to the ICSID Convention coupled with the Contract and the FIL, as no persuasive reason was put forth that would justify shifting the mentioned burden of proof (¶¶ 308-309, 314).

3.2. Jurisdictional objections raised by Respondent

3.2.1 Tribunal's analysis

The Tribunal found it was not precluded from deciding on its jurisdiction based on these four objections raised by Respondent:

(1) Abuse of process: the Tribunal found that the Respondent had not established that the Claimants were committing abuse of process ("serial pleadings") pursuant to Articles 44 and 45 of the ICSID Convention and general principles by bringing forward claims based on the FIL and the Contract (¶¶ 334, 338, 395); the Tribunal stated that there was no sufficient evidence to show that the Claimants deliberately withheld claims in a bad faith attempt to get

a second bite at the cherry, as they had a legitimate interest in not raising claims deemed unnecessary at the Caratube I arbitration (¶ 357, 383), nor to show that Claimants had relied on the existence of an alleged investment in order to obtain access to ICSID arbitration in a way that qualified as abusive (¶ 384);

(2) Statute of limitations: the Tribunal first found that it was not bound by Kazakh law regarding the question of whether the Claimants' claims are time-barred, although it would take it into consideration when applying the international law principle that a claimant must bring its claims within a reasonable time (¶ 421); secondly, the Tribunal expressed it was not persuaded by the evidence aiming to establish that, under Kazakh law, the three-year statute of limitations would not be interrupted where a claim was filed before a court or (arbitral) tribunal, when ultimately (after more than three years) it denied jurisdiction over the claim, this lack of competence was not manifest and CIOC initiated the first proceedings promptly and diligently (¶¶ 423, 426);

(3) Collateral estoppel: the Tribunal found that, even if it was prepared to accept that there may be room for applying the doctrine of collateral estoppel in investment arbitration, the cumulative requirements for applying the doctrine (a final decision on the merits issued by previous competent court in another case with the same parties deciding an issue that was directly or substantially at issue in the current case, ¶¶ 431-438) were not met in the present case (¶¶ 464, 475); the Tribunal found that the jurisdictional issues decided in the Caratube I award were not identical to the issues to be determined in the present arbitration, and were not decided as "stand-alone" or objective issues, independently of the underlying consent-granting instrument (BIT or contract) (¶ 471);

(4) *Res judicata*: Considering the requirements proposed by Respondent (¶¶ 476-481), the Tribunal found that there was no identity of subject matter, because in *Caratube I* the tribunal was asked whether CIOC had access to ICSID jurisdiction under Article VI(8) of the BIT coupled with Article 25(2)(b) of the ICSID Convention (and not this last provision alone) and in the present case the Tribunal was asked whether the Claimants had access to ICSID jurisdiction under the Contract and/or the FIL; the Tribunal also found there was no identity of cause of action (rights and supporting legal arguments), as the *Caratube I* arbitration had as fundamental basis the BIT, and the present case Claimants rely on the Contract and the FIL, legal foundations entirely different in nature, contracting parties, negotiation and drafting histories, contexts, underlying purposes and applicable rules of interpretation (¶¶ 491-492, 495).

3.3. Jurisdiction over CIOC and Mr Devincci Hourani's claims

3.3.1 CIOC's claims based on Article 25 of the ICSID Convention and one of the consent-granting instruments, i.e. the Contract and/or the FIL

3.3.1.1. *The parties' position*

The Claimants argued that the Respondent was a party to the ICSID Convention and this therefore granted CIOC access to ICSID arbitration (¶ 534). The Claimants put forth that both Parties *consented* to ICSID jurisdiction as required by Article 25 of the ICSID Convention and Article 2(1)(c) of the ICSID Institution Rules. In particular, the Claimants expressed their consent in their notice of dispute dated 18 October 2012 and again in their Request for Arbitration, and the Respondent consented to ICSID jurisdiction on the date of the signature of the Contract and on the date of the entry into force of the FIL (¶ 503). Respondent rejected this, arguing that the arbitration clause in Clause 27 of the Contract only covered claims arising out of the Contract and, thus, not claims arising out of the FIL, and even if admitted otherwise, because CIOC did not meet the nationality requirements of the ICSID Convention there was no ICSID jurisdiction over CIOC's claims (¶ 577).

Additionally, the Claimants argued that CIOC complied with Article 25(2)(b) of the ICSID Convention and Rule 2(1)(d)(iii) of the ICSID Institution Rules, because the Parties agreed to *treat CIOC as a national of another Contracting State* and because CIOC was under *foreign control* within the meaning of Article 25(2)(b) of the ICSID Convention (¶ 504).

Regarding the first matter, the Claimants alleged that the Respondent explicitly agreed to treat CIOC as a national of another Contracting State under the Contract. Clause 27.8, in the governing Russian version, provided that the Contractor was a national of Lebanon, or in the event of an assignment a national of the country of residence of the assignee, and the Contractor would accordingly be considered a national of Lebanon or other relevant country for the purposes of the ICSID Convention (¶ 505). Claimants argued that Respondent was fully aware that CIOC was a company constituted in accordance with the laws of Kazakhstan and owned 92% by Mr. Devincci Hourani, a US national, and thus a “national of another contracting State” within the meaning of Article 25 of the ICSID Convention (¶¶ 504, 507). Respondent's view was that this Clause stipulated that CIOC, as an assignee, undeniably incorporated and operating in Kazakhstan, must be treated as a national of its resident country Kazakhstan (¶ 564), rejecting any explicit agreement.

Furthermore, the Respondent rejected the Claimants' submission of an implicit agreement to the same end (via the ICSID clause in Clause 27 of the Contract, by incorporating certain rights and benefits available solely to foreigners on the Contract (¶ 509), and via the FIL as it provided protection exclusively to foreign investors and considered that local Kazakh entities controlled by foreign investors would have foreign investor status (¶ 510), because an implicit agreement could not override the express agreement that considered the assignee CIOC a Kazakh national, and because was no such implicit agreement existed between the Parties (¶ 566).

Regarding the second matter, the Claimant alleged that through his ownership of shares, Mr. Devincci Hourani controlled CIOC within the meaning of Article 25(2)(b) of the ICSID Convention, for the purposes of which legal control over a company was sufficient, rejecting

a restrictive interpretation of “control” that would limit access to ICSID (¶ 512). Also, the Contract expressly conferred foreign control status by means of the nationality of the owners (¶ 513) and this agreement to define foreign control based on shareholding was reasonable, as it did not deprive the requirement of its objective significance under Article 25(2)(b) of the ICSID Convention and was accepted in case law (¶ 514). Respondent however argued that Mr. Devincci Hourani’s did not control CIOC, and that majority share ownership in CIOC, standing alone merely created a presumption of control, not enough to satisfy the foreign control requirement of objective and actual control (¶ 569). Respondent was of the position that Mr. Devincci Hourani did not exert actual control as he was not involved in the management of CIOC and had no experience in the oil industry (¶ 570). The Claimants rejected Respondent’s allegations of CIOC being controlled by JOR, controlled by Mr. Issam Hourani (¶ 518), and even if this was the case, still Respondent would have to be considered as under foreign control, namely Lebanese control.

The Claimants submitted that CIOC made an *investment* within the meaning of Article 25 of the ICSID Convention and within the meaning of the FIL, as it was made for a significant duration (2002 and expected until at least 2034 for the production period); was substantial (USD 39 million in capital in addition to a significant contribution in know-how, training and management, including the shareholding in CIOC with the associated liabilities and obligations); was risky (due to the fluctuating oil prices, the possibility of lower than expected oil reserves, and the risk of having to bear the exploration expenses in case of no discovery); and was of strategic importance for the development of Kazakhstan’s natural resources and economy (¶ 521). The Claimants stressed that the Respondent expressly agreed in Clause 27.7 of the Contract that CIOC had made an investment for the purposes of Article 25 of the ICSID Convention, creating a quasi-irrefutable presumption that an investment exists, which Respondent had failed to rebut (¶ 523). Respondent rejected these arguments, as the elements of contribution and risk, that tribunals and authors unanimously recognize, were not present (¶ 573). Respondent argued that Claimants did not contribute any money or financial resources and were now claiming nearly one billion dollars on the basis of the Contract (¶ 574). Claimants dismissed this requirement and added that CIOC was not a mere shell company, but had over a hundred employees and was fulfilling a long-term concession contract (¶¶ 524-525).

The Claimants alleged that the provisions of the FIL were to be interpreted broadly and that Respondent (as the State, with the burden of proof regarding interpretation of the provisions of its own laws) had failed to demonstrate otherwise (¶ 537). In response to Claimants’ arguments (¶¶ 538-554), the Respondent argued that first, CIOC was not a foreign investor under the FIL (requiring a foreign citizenship or resident element and a registration element, whereas Claimants stressed Mr. Devincci Hourani’s US nationality and dismissed the registration element) and had no rights under it (¶ 580), and second, that CIOC did not make an investment pursuant to the FIL (requiring a contribution element) (¶ 586); in any case, the Respondent argued that the FIL alone did not contain a binding offer to arbitrate, merely listing ICSID arbitration as one possible means of dispute resolution between the foreign investor and Respondent (¶ 587), and lastly, even if that was the case, the FIL had been

repealed in its entirety ten years before CIOC attempted to accept it by filing its Request for Arbitration on 5 June 2013 and its Article 27 did not confer on the Claimants any vested rights that survived the FIL's repeal (¶¶ 588-589, 593).

3.3.1.2 Tribunal's analysis

The Tribunal found the requirement of consent of the Parties to submit their dispute to arbitration under the ICSID Convention was met (¶ 625), mirroring Claimants arguments (¶ 626). Additionally, the Tribunal dismissed Respondent's argument that this consent would exclude claims arising out of the FIL (or others), because the Parties had incorporated the substantive provisions of the FIL in the Contract and a unilateral repeal by Respondent would be irrelevant due to the stabilization clauses provided in the Contract (¶¶ 628, 659).

The Tribunal concluded that the two threshold requirements in Article 25(2)(b) of the ICSID Convention were met and that CIOC should be considered as a national of another Contracting State, i.e. a US national, for the purposes of Article 25 of the ICSID Convention (¶ 624).

On the matter of treatment of CIOC as a national of another Contracting State, the Tribunal concluded that Clause 27.8 of the Contract could only be interpreted as an expression of the Parties' agreement to do so for the purposes of the ICSID Convention (¶ 610). The Tribunal looked into the wording of the Russian version of this Clause 27.8, and concluded it expressed the Parties' intention to treat the Contractor as a foreign national for the purposes of the ICSID Convention, notwithstanding the Contractor's Kazakh residence (¶ 602). The Tribunal gave relevance to the interpretation arguments provided by Claimant (¶¶ 605, 608).

On the matter of foreign control, the Tribunal sought to interpret it in conformity with Article 31 of the Vienna Convention (¶ 612), noting that the wording of this Article 25(2)(b) of the ICSID Convention did not specify the required form and extent of foreign control and, more specifically, did not expressly require actual, effective control, rather than legal control (¶ 615). The Tribunal noted that Claimant had pointed to a number of cases reflecting situations where the Court found that where there is 100% ownership or a majority of voting rights, there is almost inevitably control. Moreover, the Respondent had not provided case law establishing that actual and objective control was required, rather than formal or legal control (¶¶ 618-619). Following this, the Tribunal found that the Respondent also had provided no evidence to rebut the presumption of "foreign control" based on Mr. Devincci Hourani's undisputable legal capacity to control CIOC (92% ownership of CIOC's shares), coupled with the Parties' agreement in Clause 27.8 of the Contract to treat the Contractor as a foreign national for the purposes of the ICSID Convention (¶¶ 622-623).

The Tribunal also concluded that an investment was made under the Contract, as Parties expressly agreed in Clause 27.7 that all transactions contemplated by the Contract would constitute investments within the jurisdiction of ICSID (¶ 630). The Tribunal noted that this Contract was directly negotiated between the Parties, and that Respondent was aware of the

identity of CIOC when approving the assignment process (¶ 631). Respondent's argument that the investor was not CIOC but another entity or person, was dismissed by the Tribunal (¶ 637, 649).

The Tribunal found that question of whether the FIL could have found jurisdiction over CIOC's claims as an "alternative consent-granting instrument" did not call for a decision (¶ 651), because the Parties had incorporated the substantive provisions of the FIL in the Contract and a unilateral repeal by Respondent would be irrelevant due to the stabilization clauses provided in the Contract (¶¶ 628, 659).

3.3.2 Mr. Devincci Hourani's claims based on Article 25 of the ICSID Convention and the FIL

3.3.2.1 The Parties' position

Respondent preliminarily observed that it was of the position that the Tribunal should decline jurisdiction on all of the Claimants' claims on the ground that the Claimants had not proved the legality of Mr. Devincci Hourani's US nationality (¶ 674).

Under the Article 25 of the ICSID Convention, it was the Claimants' position that the Tribunal had jurisdiction over Mr. Devincci Hourani's claims because he made an investment within the meaning of that Convention. Conversely, Respondent argued that Mr. Devincci Hourani was acting merely as a frontman (¶ 675, 681) for JOR, who took the risk with respect to the success of the Caratube project and who actually made the real investment in CIOC (¶ 679). The Claimants argued that Mr. Devincci Hourani had no obligation, in his personal capacity, to contribute any capital to CIOC (¶ 664), and that the real test was one of intent to develop economic activities, and not of numerical figures (¶¶ 665-666). Claimant added that the risk incurred by Mr. Devincci Hourani was his liability towards JOR in the event CIOC defaulted on its loans (¶ 669).

The Claimants' position was that Mr. Devincci Hourani fell within the substantive protections of the FIL (¶ 670). First, the Claimants argued that the substantive protections of the FIL survived its repeal and were applicable to Mr. Devincci Hourani and his claims, due to stabilization clauses in the FIL, the Contract and Kazakh law, and as well as by virtue of the concept of vested or accrued rights (¶ 670); the Respondent counter argued that this was not the case as Mr. Devincci Hourani allegedly made his investment after the FIL's repeal, thus he did not have any accrued rights nor could he benefit from the stabilization clause in the FIL (as he was not a party to the Contract) (¶ 684). Second, Claimants contended that Mr. Devincci Hourani was a foreign investor under the FIL, as the registration requirement under Article 1 of the FIL was not applicable to a foreign investor who invests through the ownership of shares in registered local companies, such as CIOC (¶ 671), and made an investment under the FIL by means of his shareholding in CIOC and his active participation in the venture (¶ 672), which Respondent rejected (¶¶ 685-687). Finally, Claimants repeated

the FIL expression of the Respondent's consent to arbitrate disputes arising out of Mr. Devincci Hourani's claims (¶ 673) that Respondent also denied (¶ 688).

3.3.2.2 Tribunal's analysis

The Tribunal found that it did not have jurisdiction over Mr. Devincci Hourani's claims, given that the only potentially available consent-granting instrument, i.e. the FIL, was already repealed in January 2003, namely over a year before Mr. Devincci Hourani acquired his shares in CIOC (¶ 690). Additionally, the FIL did not provide Mr. Devincci Hourani with any standing to have recourse to ICSID arbitration to protect his shares, independent of CIOC (as other BIT's might provide) (¶¶ 694-695).

4. Claims in analysis

4.1 Claimants' Claim for expropriation

4.1.1 The parties' position

The Claimants argued that the Respondent wrongfully terminated the Contract in January 2008 and that this amounted to a direct or alternatively creeping expropriation, in that it was motivated by political reasons and thus caused by state action (¶¶ 815, 824). In contrast, the Respondent submitted that the termination of the Contract was lawful because CIOC was in material breach of the Contract during the entire lifetime of the Contract; in the absence of a sovereign act, an unlawful termination of contract could not, in any event, constitute an expropriation (¶ 816).

4.1.1.1 Applicable standard

Respondent proposed that, in order for CIOC to prevail on either a direct or an indirect expropriation claim, it must establish the elements of expropriation, i.e. (i) an unreasonable substantial deprivation of existing rights; (ii) of a certain duration; and (iii) caused by a sovereign act of the host State (¶ 825). The Claimants primarily relied on the FIL, namely Article 7, and Kazakh law (and, in any event, customary international law) in support of their position that there had been an expropriation: the rights under the Contract were terminated, and Mr. Devincci Hourani and CIOC deprived of the use, enjoyment and benefits of their investment in breach of substantive and procedural law (¶ 702).

4.1.1.2 Application of the standard to the present case

4.1.1.2.1 The unreasonable substantial deprivation of existing rights

The Claimants argued that, at the time of the termination of the Contract, CIOC had made a Commercial Discovery within the meaning of Clauses 1.3 and 10 of the Contract, taking virtually all steps required therein, and thus had the exclusive right under the Contract to proceed to the commercial production phase. According to the Claimants, the *wrongful*

termination of the Contract by the Respondent unlawfully expropriated CIOC of its investment and prevented it from developing its contractual and rightful activities (¶¶ 827, 840).

Contrariwise, the Respondent submitted that it *rightfully terminated the Contract* as a matter of substance and procedure, because CIOC was in a persistent state of material breach of its obligations under the Contract, the MWP and the AWP. Furthermore, the Respondent asserted that it notified CIOC of its breaches, gave it reasonable time to cure them and correctly followed the applicable termination procedure (¶ 736).

The Claimants argued that the purpose of the Contract was the exploration or appraisal of known deposits in order to prove the commercial viability of the discoveries made in Soviet times, and thus the Contract did not require the *discovery by CIOC of “new” oil deposits* (¶ 832). Furthermore, Claimants argued that CIOC had fully explored the supra-salt Karatube Field within the Contract area (¶ 835), and that under Clause 10 of the Contract (that did not contain a requirement for CIOC to make a formal declaration of a Commercial Discovery) CIOC had hired a third-party expert in 2008, CER, that prepares an estimate of the reserves that CIOC deemed to be commercially viable, later approved by the Geology Committee of MEMR, and a development plan, that CIOC later filed (¶ 840).

The Respondent, in contrary, upholding a literal interpretation of the Contract and of “new” oil deposits (¶¶ 832, 834), argued that the Claimants had drilled only within and to the depth of the known deposits, in a limited portion of the Caratube field (¶ 835), and alerted that, pursuant to the Contract, the making of a discovery constituted an objective condition and a preliminary to the option to declare commerciality (¶ 835). As such, even admitting that, at the time of the termination of the Contract, CIOC held the rights granted under the Contract’s exploration phase, Respondent was of the position that CIOC had no vested production rights as it had not fulfilled the necessary requirements to continue to the production phase (¶ 828).

The Respondent also argued that CIOC had deliberately misrepresented the status of the 3D seismic study and “carefully concealed” this *misrepresentation* in order to unduly procure the extension of the Contract, and that the MEMR would never have granted the extension but for the alleged misrepresentation (¶¶ 733-735, 849). The Respondent indicated that it had never “approved” the 3D seismic study but only accepted it for the purposes of submission to the archives (¶ 851). In any case, Respondent argued that the 2-year extension of the exploration period did not affect the MEMR’s right to terminate the Contract for breach of the MWP (¶ 749).

The Claimants, in contrast, upheld that the *extension of the Contract* was valid, and thus, Claimants contended that the termination of the Contract was unlawful, for failing the FIL both substantively and procedurally (¶¶ 710-711).

Regarding the *law governing specifically the question of the lawfulness of the termination of the Contract*, the Claimants argued that the 1999 Subsoil Law was applicable based on the stabilizing clause provided in Clause 28.2 of the Contract, given that the 2004 Subsoil Law

deteriorated CIOC's position (granting the Respondent broader rights to terminate the Contract) (¶¶ 861, 862). Respondent argued the opposite, as the 2004 Subsoil Law granted the MEMR a non-waivable right to terminate a contract in Article 45-2, irrespective the existence of any contradictory contractual provisions (¶ 750, 857). The Respondent submitted that a breach of the MWP and of the AWP's also constituted a breach of the Contract in conformity with Clause 1.5 of the Contract (¶ 864).

Regarding the *alleged material breaches* addressed by the Tribunal (see below 4.1.2), Claimants argued that they had fulfilled all "*post-extension*" obligations, namely the Revised 2007 AWP and the Revised MWP, whereby CIOC was to drill two wells before the end of 2007 in the supra-salt formations. Respondent was opposed to that allegation, highlighting the Claimants' failure to maintain its financial obligations, even if the Claimants argued that compliance with exploration obligations using a lower budget than anticipated could not sensibly constitute a breach of Contract (¶¶ 869-870). In any case, the Claimants argued that they were never given proper notice of any alleged material breach, even considering the MEMR Notice of Breach of 3 December 2007 (¶¶ 710, 870). Regarding this notice, the Respondents alleged that there was no need to identify any particular breach, given that it was based on the LKU Reports completed and submitted by CIOC, and CIOC thus was well aware of its breaches (¶¶ 877-878), and that this was a standard measure sent to all underperforming contractors, in an effort to tighten control by the MEMR due to the fact that first contracts in the oil business were coming to an end (¶¶ 771, 937).

Within the second category of "*pre-extension*" obligations under the MWP and the AWP's (that Respondent deemed as additional sources of obligations pursuant to Clause 8.1 of the Contract, ¶ 764), the Claimants maintained that CIOC presented a complete 3D seismic study and had met the trial production phase technical targets by the end of the year 2007 (completion of pilot production program, submission of an audit to the MEMR, presentation of Reserves Report by CER based on the previous) (¶ 884). Respondent argued CIOC had failed to do so, which amounted to a material breach (¶¶ 883, 899). Further, the Claimants argued that the Respondent had waived any right to allege nonperformance by CIOC of the breaches contained in 25 March 2007 Notice with respect to CIOC's obligations that were extended by means of the extension of the Contract's exploration period (¶¶ 710, 894).

4.1.1.2.2 Certain duration

The Respondent submitted that for an expropriation claim to be successful, the deprivation should also be lasting (¶ 906). Although the Parties did not further debate this point, the Claimants pointed out that after the taking of the Claimants' investment, Respondent persisted in its expropriatory act, disregarding Claimants' protests and the specific performance safeguards pending the outcome of the dispute resolution, having also ordered further seizures (¶ 711).

4.1.1.2.3 Sovereign act of the host State

The Claimants argued that it was the issue of the 7 September 2007 Recommendation by the Prosecutor's Offices that, in concrete terms, ignited the process that was intended to and actually resulted in the termination of the Contract (¶ 935). In their view, the Prosecutor's Offices were not authorized under the law to intervene as under both the Contract and the 1999/2004 Subsoil Law, the MEMR being the Competent Authority with respect to all issues essential to the Contract (934).

Furthermore, the Claimants argued that, along with the Sabsabi/Ruby Roz saga, the termination was not due to CIOC's allegedly deficient performance of the Contract, but rather to the family and political context underlying the case, as they were perceived to assist Mr. Aliyev, the son-in-law of the President of the Republic of Kazakhstan, Nursultan Nazarbayev, with whom the latter had had a falling out in April 2007 (¶¶ 79-90, ¶ 936)

Conversely, according to the Respondent, the MEMR lawfully terminated the Contract due to CIOC's non-performance and material breaches of the Contract, even before the alleged political events of 2007 (¶ 783). Respondent further asserted that it did not engage in any harassment of CIOC, its shareholders, principals or employees, and acted at all times for legitimate purposes and in accordance with applicable laws and procedures, as well as the Contract (¶ 784), adding that Claimants' allegations lacked serious proof (¶ 789).

Regarding the 7 September 2007 Recommendation, Respondent argued that the Aktobe Prosecutor was simply acting in accordance with his/her duty to ensure the enforcement of the law and of the contract terms with regard to subsoil users and also within the express purview of the Contract (¶ 926), and that the Recommendation did not instruct, but rather recommended that the MEMR either ensured that CIOC complied with its contractual obligations in the future or decided to terminate the Contract (¶ 761). The Respondent acknowledged that as of mid-April 2009, the KNB took *de facto* control of the Caratube field to protect the oil field from looting as CIOC had left it unattended (¶ 933).

4.1.1.2.4 Lawfulness of the expropriation

The Claimants argued that this is a clear case of unlawful expropriation (¶ 942). The Respondent had only disputed that the termination of the Contract constituted an expropriation, without however arguing in the alternative that such expropriation would have to be considered as lawful (¶ 942).

4.1.2 Tribunal's analysis

4.1.2.1 Applicable standard

Regarding the law governing CIOC's expropriation claim (and noting that it was undisputed between the Parties that contractual rights might be the subject of an expropriation (¶ 822)), the Tribunal applied Article 7 of the FIL, entitled "Guarantees against Expropriation" (¶ 820),

concluding that it mirrored the international law standards (requiring that expropriation be made for a public purpose, on a non-discriminatory basis, in accordance with due process of law and accompanied by compensation) (¶ 823).

As Kazakh law, in particular the FIL, did not appear to define the elements of an expropriation, and because the Claimants did not take issue with Respondent's proposed test, the Tribunal applied said test (¶ 826).

4.1.2.2 Application of the standard to the present case

4.1.2.3 The unreasonable substantial deprivation of existing rights

Tribunal agreed that, at the time of the termination of the Contract, CIOC had not made a Commercial Discovery within the meaning of the Contract and, thus, had no vested right to proceed to the production stage of the Contract (¶ 829). In light of the evidence, the Tribunal concluded that the word "discovery" consisted in the finding of something for the first time that was not previously known to exist, as used in usual language, various English dictionaries and in the oil industry (¶ 833). The Tribunal agreed with the Respondent's interpretation of Clauses 1.3 and 10.1 of the Contract (¶ 834).

The Tribunal also found had CIOC did not fully explore the supra-salt Caratube field in the Contract area, as CIOC did not drill any exploratory wells (drilling only within and to the depth of the known deposits, ¶ 835) not any deep wells (as required under the Contract, the MWP and the related AWP, ¶ 839).

The Tribunal also noted that Claimants failed to establish that the CER reserves report related to a Commercial Delivery, and it was shown that the CER field development plan was never submitted to the MEMR, let alone approved (¶¶ 840-841).

Thus, the Tribunal concluded that at the time of the termination of the Contract, CIOC did not have a vested right to proceed to the Contract's production phase (¶ 842). However, *a majority of the Tribunal found that the termination of the Contract by the Respondent was unlawful*, as Respondent deprived CIOC of its existing rights granted to it under the Contract's exploration phase (such as exclusivity of exploration, surface access and land use rights, right to extension of the validity term of the Contract, the right to perform the Contract until May 2009), as well as a continuing possibility to fulfill the requirements needed to move to the production phase (¶¶ 843-846).

Regarding the extension of the Contract term, the Tribunal concluded it was validly obtained, and rejected the Respondent's argument of misrepresentation of the status of 3D seismic study, as this was inconsistent with evidence on the record, taking also into consideration the fact that the MEMR had "accepted", and thus approved this study (according to the minutes of a meeting that took place on 1 November 2007 of the Scientific and Technical Council (STC) of the TU Zapkaznedra), even recognizing that it required corrections (¶¶ 847, 850-851).

Regarding the law governing specifically the question of the lawfulness of the termination of the Contract, the Tribunal deemed the relevant provisions of the Contract and Kazakh law, in conformity with Clause 26 of the Contract applicable (¶ 855). The Tribunal agreed with the Claimants that the 1999 Subsoil Law should apply, however, *in the opinion of a majority, the termination of the Contract by the Respondent did not comply with the Subsoil Law* in either versions (¶ 862). According to Article 401(2) of the Kazakh Civil Code, a breach is deemed to be a material breach (that entitled termination) when it causes the non-breaching party to lose something to a substantial degree that it had the right to expect to gain when it entered into the contract (¶ 864).

Thus, the Tribunal concluded that the Respondent could terminate the Contract based on material breaches (i) committed after the extension of the Contract and in violation of the extended deadlines set forth in the “post-extension” work programs and (ii) committed before the extension and related obligations under the MWP and the AWP that had not been extended (¶ 868).

Regarding the first category, the Tribunal found that, even admitting that CIOC had indeed breached its financial obligations under the 2007 Revised AWP, the Respondent had not established that such breach was “material” and could not have been usefully rolled over into the year 2008 via the 2008 AWP (¶¶ 871, 873). A majority of the Tribunal found that the Respondent, in any event, did not adequately notify CIOC of this alleged “material breach” (¶ 875), as MEMR Notice of on 3 December 2007 did not allow the contractor to identify the relevant breach (the MEMR had only one week earlier on 27 November 2007 authorized CIOC to resume operations under the Contract (¶¶ 876-877) and neither the Ordinance of Termination dated 30 January 2008, nor the Notice of Termination of the Contract dated 1 February 2008 specified the particular material breach on the basis of which the Contract was terminated (¶ 880).).

Regarding the second category, a majority of the Tribunal concluded that the Respondent had not established that CIOC was in material breach of the corresponding obligations under the Contract (taking into account both that the trial production phase was part of the Contract’s exploration period, that was extended, and that in the opinion of a majority of the Tribunal, the Claimants had sufficiently established that the AWP could modify the obligations set forth in the MWP, ¶¶ 887-888), and even if such a breach were admitted, the Respondent did not adequately notify CIOC of such breach before unilaterally terminating the Contract on 30 January 2008 (¶¶ 898, 900). The majority of the Tribunal dispensed with examining whether the Respondent respected any further procedural requirements under Clause 29 of the Contract or the 1999/2004 Subsoil Law (¶ 901).

Finally, the Tribunal noted that, as CIOC was an investment vehicle created specifically for the sole purpose of exploration of the Caratube field in Kazakhstan, it thus concluded that the Respondent substantially deprived CIOC of the value of its investment by depriving CIOC of its right to continue performing the Contract in order to make a Commercial Discovery and

meet the requirements necessary to obtain the exclusive right to move to commercial production (¶ 904).

4.1.2.4 Certain duration

For a majority of the Tribunal, the deprivation by the Respondent of CIOC's existing rights under the Contract was lasting and even permanent (¶ 907).

4.1.2.5 Sovereign act of the host State

The majority of the Tribunal considered of particular relevance the "Recommendation on elimination of disregard of the rule of law" dated 7 September 2007, as it was received by the MEMR as an order to terminate the Contract and marked the beginning of the termination process (¶ 916). In particular, for a majority of the Tribunal, the evidence on the record showed that, following this Recommendation, the MEMR was set to terminate the Contract, notwithstanding the fact that the MEMR had adopted Amendment No. 3 regarding the extension of the Contract only shortly before (¶ 925). By acting through the regional and General Prosecutor's Offices, i.e. organs of the Respondent other than the Competent Authority (MEMR), and by interfering in the Contract concluded between CIOC and the MEMR, the Tribunal concluded that the Respondent did not act like a mere private party to the Contract, but rather in its sovereign capacity (¶ 935).

In the majority view, it was the Respondent's sovereign act that caused CIOC's loss of its existing rights under the Contract, rather than the latter's alleged breaches of the Contract. In particular, considering the troubling facts (especially the chronology of the facts taken as a whole) underlying this case and the evidence on the record, a majority of the Tribunal considers that the Claimants had convincingly established that the real motivation behind the termination of the Contract was not CIOC's allegedly deficient performance of the Contract, but rather lied in the family and political context underlying the case (¶ 936, see also ¶¶ 924-934).

In conclusion, a majority of the Tribunal found that, with all three elements of an expropriation being present, CIOC has been expropriated of its existing rights under the Contract, which granted CIOC access to the Caratube field and its exploitation (¶ 939, see 7. below).

4.1.2.6 The lawfulness of expropriation

A majority of the Tribunal finds that the expropriation of CIOC's investment by the Respondent was unlawful, - the taking of CIOC's existing rights under the Contract was not motivated by a public interest and has not been realized via the payment of immediate, adequate and effective compensation - engaging the Respondent's liability (¶ 943).

4.2. Claimants' Claim for compensation

4.2.1 The parties' position

The Claimants submitted that they were entitled to compensation and proposed a valuation method based on the fair market value ('FMV') of the Caratube project at the time of the expropriation, i.e. the price that a hypothetical buyer would be willing to pay for CIOC as at 31 January 2008 (¶ 945, 1078). The Claimants further submitted the discounted cash flow ('DCF') method was the correct approach to estimate CIOC's loss of profits, included in full reparation under Article 36(2) of the ILC Articles on State Responsibility (¶ 1079). The Claimants argued that their loss could be quantified based on the CER Reserves Report, the price of nearby oil fields sold for equivalent values and KTG's contemporaneous offer to purchase CIOC (¶ 969), and calculated their investment FMV at USD 941.05 million (¶ 972).

Alternatively, if the Tribunal would find that CIOC's *lost profits* claim was not established with the required degree of certainty, CIOC would still be entitled to compensation for *loss of opportunity* to obtain profits from the production of the volumes of oil contained in the Caratube field or from the sale of the company with its confirmed reserves (¶ 986). Claimants submitted that they only had to establish that it was sufficiently probable that CIOC would have had opportunities as a result of the proven reserves, as reparation for loss of opportunity is to be awarded in proportion to the probability of its occurrence (¶ 1143). According to the Claimants, CIOC's chances of producing the estimated quantities of oil or selling the company with its confirmed reserves were very high, given the commodity at hand, the confirmation of the reserves by industry experts both at the time of the project and during this arbitration as well as by Kazakhstan itself (¶ 1157).

The Respondent contended a subjective and concrete approach to damages, focusing on the actual damage suffered by CIOC and taking into account the financial situation and the specific plans and competences of CIOC should apply (¶ 946), and that CIOC was not entitled to damages based on lost profits using the DCF method (or based on *lost opportunity*) because any such profits are too uncertain and speculative (¶ 1081) (Claimants request payment of lost profits incurred as a result of the alleged wrongful termination of the Contract and resulting deprivation of CIOC of its rights to produce oil for over 37 years, when the Claimants had no vested rights under the Contract to produce oil at the time of the termination of the Contract and there is no certainty that CIOC, or a third party buyer, would have been able to obtain such rights prior to the end of the Contract extension period in May 2009 and would have been able by then to comply with their exploration obligations, that is the drilling of two overhang wells and two deep wells, (¶ 1003).

For the Respondent, CIOC would be entitled at most to its *sunk investment costs* in the amount of USD 4.2 million (¶¶ 1016, 1081), defined as the net amount of money that the investors had put into the company or that the company had put into the project (¶ 1162), and reduced proportionally to take into account the alleged cessation risk (¶ 1162). The Claimants argued this method would not be appropriate, as it would run contrary to the principle of full

reparation to any business rationale in the oil industry and create an incentive for states to transfer all risks of the exploration stage to the investor. In any event, the Claimants underlined that CIOC's sunk investment costs undisputedly amount to USD 39 million (¶ 1163).

The Respondent argued that any damages awarded to CIOC should be halved to account for the latter's own contribution to its alleged losses, relying in this regard on Kazakh law, ILC and international case law (¶¶ 1185-1189), and the Claimants replied, not only the Respondent had misunderstood the theory and application of the concept of *contributory fault*, but also had not shown how the Claimants' alleged fault decreased the value of their investment (¶ 1190).

CIOC's claim for *moral damages* of USD 50,000,000 was based entirely on the alleged continuous and multi-fronted acts of harassment, threats, intimidation and public bashing by the Respondent against the Hourani family and their relatives, in Kazakhstan and abroad and worldwide via the internet, thus causing fear, anguish, anxiety, humiliation, shame, stress, as well as reputational harm and social seclusion (¶¶ 995, 1201). The Respondent argued the Tribunal lacked jurisdiction to address this matter as this claim was not arbitrable under Kazakh law (¶ 1052), that Claimants had not established that moral damages were justified in the instant case (¶1057), and that the *quantum* requested was disproportionate (¶ 1062).

According to the Claimants, *interest* should run over the entire (uninterrupted) period from 31 January 2008 until the date of full payment of the present Award, whereas the Respondent argues that no interest should run from the date of the *Caratube I* award onwards, i.e. from 5 June 2012 (¶ 1215).

4.2.2. Tribunal's analysis

The Tribunal firstly noted that Kazakh law (including Article 7 of the FIL) does not appear to provide for any specific provisions for assessing damages as a result of an unlawful expropriation (¶¶ 1071, 1068), secondly, that the Parties apparently agreed that the ILC Articles and the Chorzów Factory standard provided for the application of the full reparation standard (¶ 1078), and thirdly that the valuation date should be 31 January 2008, i.e. the day following the order terminating the Contract, and immediately preceding the date of the notice of termination, so as to put Claimants where they would have been had Kazakhstan not breached its obligations (¶ 1090).

A majority of the Tribunal found that the damages incurred by CIOC were appropriately assessed using a subjective and concrete valuation approach, without FMV. A majority of the Tribunal found that the valuation methods proposed by the Claimants to determine CIOC's FMV, in any event, did not provide a basis for damages that were sufficiently certain, and thus concluded that CIOC's *sunk investment costs* would best express in monetary terms the damages incurred by CIOC as a result of the unlawful expropriation (¶ 1087).

A minority arbitrator disagrees, arguing that damages arising out of an unlawful expropriation or an unlawful termination of a contract, which is the basis of a business, fundamentally consist in the loss of an asset, and it follows that compensation, when it consists in a sum of money, should be equal to the value of the asset at the time of the expropriation. According to a minority arbitrator, there is no logic to order the reimbursement of the sunk costs: if the contract had not been wrongfully terminated, the victim would never be entitled to the reimbursement of its sunk costs (¶¶ 1088-1089).

For a majority of the Tribunal, an award of sunk investment costs aimed to repay all the amounts of investments undertaken and expenses incurred, that in the present case also included all revenues generated from trial production that were reinvested by CIOC into the Caratube project (specifically, USD 39.2 million) (¶ 1170).

For a minority arbitrator, it would be necessary to deduct oil sales revenues from CIOC's total expenditures so that the compensation awarded did not exceed the damage CIOC actually incurred and outflowed the limits of the full reparation standard adopted by the Tribunal (¶ 1171).

The Tribunal denied the application to CIOC's sunk investment costs of a cessation risk premium (¶ 1182) and rejected Respondent's argument of *contributory fault*, as the Tribunal could not agree that CIOC's sub-standard performance prior to the extension of the Contract constituted willful, negligent, reproachable behavior by CIOC, by which the latter materially contributed to its damage (¶¶ 1184, 1194).

The Tribunal rejected CIOC's claim for *moral damages*, as a result of the Tribunal's earlier finding that the Claimants had not sufficiently established their allegations of harassment (¶¶ 1200, 1203).

The Tribunal awarded *interest* on the amount of damages awarded to CIOC at a rate of LIBOR+2%, as suggested by Claimants (¶ 1222), compounded semi-annually, running from 31 January 2008 until the date of full payment of the Award (¶ 1216). The Tribunal mentioned it would not be justified to penalize Claimants in the present case as, it was not only the rule provided in Article 38 of the ILC, but also the Tribunal had previously found that there was no abuse of process (¶¶ 1217-1221, 1227).

4.3 Other Claims

4.3.1 Tribunal's analysis

In light of a majority's conclusion that the Respondent's unlawful termination of the Contract amounts to an unlawful expropriation for which compensation is due, the Tribunal did not deem necessary to analyze and decide upon CIOC's further claims with respect to the Respondent's alleged other breaches of its obligations, such as CIOC's claims regarding fair and equitable treatment, among others (¶ 948).

5. Tribunal's Decision

In sum, the Tribunal found it had jurisdiction over CIOC's claims under the Contract but no jurisdiction over Mr. Devincci Hourani's claims; that the Respondent breached its obligations towards CIOC under the Contract, Kazakh law, the FIL and/or international law and decided that the Respondent shall pay CIOC the amount of USD 39.2 million, and interest at the rate of LIBOR + 2% compounded semi-annually, calculated from 31 January 2008 until payment in full; the Tribunal dismissed all other claims or prayers for relief (¶ 1268).

6. Costs

The Tribunal found that the Parties shall equally share the costs of the Arbitration and that Respondent shall pay the Claimants for the advance payments to ICSID that the Claimants paid on behalf of the Respondent to meet such costs, for a total of USD 1,207,757.44. Additionally, the Tribunal found that each Party should bear the fees, costs and expenses it incurred for the preparation and presentation of its case (¶ 1268).

7. Concurring and Dissenting Opinion of Dr. Jacques Salès pursuant to Article 48(4) of the ICSID Convention

Dr. Jacques Salès dissented from the majority of the Tribunal's conclusion that all three elements of expropriation were met in the present case (¶ 939 above), namely the unreasonable substantial deprivation of existing rights and a sovereign act (¶¶ 5-6 of the Opinion).

Regarding the first element, Dr. Jacques Salès considered CIOC committed a material breach of the Contract (at least of its 3D seismic study obligation) that entitled Respondent to terminate the Contract (¶ 15 of the Opinion). CIOC's unusable 3D seismic study constituted a material breach of the Contract, not excused by Respondent, that merely accepted it for storage purposes, rather than approving it (departing from the majority of the Tribunal's conclusion based on English-language dictionaries) (¶¶ 7-10 of the Opinion). Further, MEMR did give CIOC adequate notice of its breach of its 3D seismic study obligation, albeit not expressly, as the general Notification for resumed operations encompassed this breach and other breaches of the 2007 AWP, mentioning Clause 8.1 of the Contract (¶¶ 11-13 of the Opinion).

Regarding the second element, Dr. Jacques Salès considered that no sovereign act was present, and that Respondent acted as a private party, dissenting from the majority of the Tribunal's position (¶¶ 21, 35 of the Opinion). Dr. Jacques Salès dissents that the 7 September 2007 Recommendation marked the beginning of the termination process, because Respondent had first manifested its intent to terminate the Contract in the 25 March 2007 Notice of Breach (even if the Tribunal had not decided whether this Notice was sent by Respondent and received by the CIOC) (¶¶ 25, 28 of the Opinion) and because the MEMR then continued to cease to tolerate CIOC's faulty performance of the Contract (¶ 29 of the Opinion). Furthermore, Dr. Jacques Salès noted that there was no evidence in the arbitration

that the Prosecutor's Offices had acted in place of the MEMR in relation to the Contract (its interaction was limited to correspondence with MEMR) (¶ 32 of the Opinion), that Respondent satisfied his burden of proof with respect to the claim that the Prosecutor had a duty to ensure the enforcement of the law and the Claimant's failed to rebut it (¶ 33 of the Opinion), that the Prosecutor was acting within the express purview of the Contract (as bears out from the text of the Recommendation), and that the Recommendation could not be characterized as an instruction by the Prosecutor's Office to MEMR (¶ 34 of the Opinion). Finally, Dr. Jacques Salés concluded that the Tribunal should now have drawn conclusions from the coincidence of the timing of the termination of the Contract and the Hourani family's troubles, because only speculation permitted to affirm a causal link between those events (¶ 38 of the Opinion), and that the majority of the Tribunal did not give Respondent's evidence the weight it deserved (namely the notice of breach sent by MEMR to CIOC on 17 January 2007, a time when Mr. Rakhat Aliyev remained in good graces with the President of the Republic of Kazakhstan, and Respondents' allegation that 2007 was a time when a number of policies developed to a tightening of control of subsoil users (¶¶ 38, 39 of the Opinion).