

**I. JURISDICTIONAL AWARD  
RENDERED IN 2003 IN SCC CASE 122/2001  
II. FINAL AWARD  
RENDERED IN 2004 IN SCC CASE 122/2001  
III. SUPPLEMENTAL AWARD AND  
INTERPRETATION  
RENDERED IN 2004 IN SCC CASE 122/2001**

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**Parties:**

Claimant: Claimant–investor (New York, USA)

Respondent: Respondent–Kazakhstan (Republic of Kazakhstan)

**Place of arbitration:**

Stockholm, Sweden

**Language of the proceedings:**

English

**Applicable law:**

The Law of the Republic Kazakhstan on Foreign Investment, the Treaty between the USA and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment, and the norms of international law

**Arbitral Tribunal:**

Chairman: Norway

Arbitrator: James H. Carter, USA

Arbitrator: Christer Söderlund, Sweden

**Parties' Counsel:**

Claimant: Kaj Hobér, Hedvig Wallander and Henrik Carlberg, Mannheimer Swartling Advokatbyrå AB, Sweden

Respondent: John W. Barnum, Alexander Barsukov, Assel N. Tokusheva and Dinara M. Jarmukhanova, McGuire Woods Kazakhstan LLP, Kazakhstan

**Amount in dispute:**

EUR 178,892,338

**Arbitration cost:**

EUR 123,000

**Summary**

The government of Kazakhstan held 87.9 per cent shares of a Kazakh Company (the Kazakh Company), which was the owner of an oil refinery (the Refinery).

The Refinery was commissioned as a state enterprise in 1978. In 1994, it was reorganized as an open joint-stock company established under the laws of Kazakhstan.

On 7 May 1997, Claimant-investor and Respondent-Kazakhstan entered into a concession agreement (the First agreement) for the transfer to Claimant-investor of the right to possess use and manage Respondent-Kazakhstan's 87.9 per cent shares in the Kazakh company for a period of five years.

On about 8 July 1997, Claimant-investor and Respondent-Kazakhstan signed a new or revised concession agreement (the Agreement) to replace the First Agreement.

Before the Agreement was signed, a financial analysis performed by a consulting firm on 18 April 1997 made both parties fully aware of the considerable debt that was payable by the Kazakh Company, including the court action brought by a Kazakh company (Company X) which resulted in a major court award against the Kazakh Company on 19 May 1997.

The Agreement contained a dispute settlement clause which, in brief, established that certain disputes in connection with the Agreement associated with any "foreign investment," as defined, should be settled at the Arbitration Institute of the Stockholm Chamber of Commerce in Stockholm (the SCC), while all other disputes should be settled by court in Kazakhstan with a right to appeal according to the legislation of Kazakhstan.

[On] 1 September 1997, the operation of the Refinery was transferred to a new Kazakh company on behalf of Claimant-investor (the New Kazakh Company), [and] registered on 15 August 1997, under a lease agreement

(the Lease Agreement) between the Kazakh Company and the New Kazakh Company.

During the operation of the Agreement, [and] by court actions, Company X gained the right to attach and subsequently to take over the ownership of the Refinery's assets in satisfaction of its claims against the Kazakh Company.

Further, the Office of the General Prosecutor of Kazakhstan (the General Prosecutor) brought an action in a Kazakh city court of law (the Kazakh City Court) and obtained a decision on 9 June 2000 under the Civil Code of Kazakhstan that the Agreement be terminated.

The Kazakh City Court's decision to terminate the Agreement was affirmed by the Supreme Court in Kazakhstan on 18 July 2000.

Based on the decision of the Kazakh City Court, the Ministry of Finance Committee for State Property and Privatization in Kazakhstan issued Order No. 156 that the Agreement must be terminated.

On 18 December 2001, Claimant-investor submitted a Request for Arbitration against Respondent-Kazakhstan to the SCC.

The arbitration procedures were in a first stage limited to five issues on jurisdiction, as specified in the Respondent- Kazakhstan's request for a separate decision. A hearing on these jurisdictional issues was held, and a decision on jurisdiction was made by the Arbitral Tribunal in 2003.

After exchange of further written briefs and a hearing on all remaining issues, an arbitral award was rendered in 2004.

In April 2004, Claimant-investor submitted its request for a supplemental award and interpretation.

### **I. Jurisdictional Award Rendered in 2003 in SCC Case 122/2001**

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#### **Subject Matters:**

- (1) Applicable law to jurisdictional issues under the arbitration clause.
- (2) *Res judicata* and collateral estoppel.
- (3) Principle of Separability, Competence-Competence Doctrine.
- (4) Act of State Doctrine.
- (5) Comity among states.
- (6) Sovereign state, Issue of sovereign immunity.

- (7) Definition of “foreign investor” under the Foreign Investment Law of Kazakhstan.
- (8) Applicable law to jurisdictional issues under the Treaty between the USA and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment (19 May 1992) (“BIT”).
- (9) Definition of “National of another Contracting State” under the Treaty between the USA and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment.
- (10) Burden of proof to establish “National of another Contracting State” under the Treaty between the USA and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment.

### Findings:

- (1) The SCC Rules, supplemented by the Swedish Arbitration Act and other pertinent Swedish law, being the law of the place of arbitration expressly agreed by the parties (i.e., *lex arbitri*), applies to arbitration on the basis of the parties’ arbitration clause.
- (2) Kazakh law on *res judicata* does not apply because the applicable procedural law is the SCC rules and Swedish law. Under Swedish law, *res judicata* operates only in respect of a cause of action before a Swedish court of law where there is a prior ruling in respect of the same cause of action rendered by a Swedish court of law or by a foreign state court, the judgment of which is enforceable in Sweden by operation of statute or treaty.
- (3) Under Swedish law, Kazakh court decisions to terminate the agreement which contains the arbitration clause in dispute are not binding upon the Arbitral Tribunal, and the Tribunal is empowered to determine its own competence.
- (4) The Act of State Doctrine, as a U.S. procedural principle, does not apply as the applicable procedural law is the SCC rules and Swedish law. The nationality of the claimant party is not sufficient to make U.S. procedural principles applicable, and the SCC Rules or Swedish arbitration law do not have any provisions corresponding to the Act of State Doctrine.
- (5) The concept of “comity” among states, in international law or practice, has no applicability in arbitration.
- (6) Kazakhstan, as a sovereign state choosing to enter into a commercial contract with a foreign party and obliging itself to arbitration in case of certain disputes, should not be free to disregard its contractual obligations.

- (7) Questions of direct or indirect ownership or control of the investor need not be explored under the Foreign Investment Law in Kazakhstan. Claimant qualified as an investor under the Foreign Investment Law in Kazakhstan as it was defined as a foreign juridical person.  
The decisions of the Kazakh courts on whether the dispute is associated with “foreign investment” under the Foreign Investment Law are not binding on the Tribunal.
- (8) The Arbitral Tribunal found that under a natural reading of the U.S.–Kazakhstan treaty, the SCC Rules as chosen by the parties and the Swedish Arbitration Act apply to jurisdictional issues under the Treaty.
- (9) However, the ownership and control of Claimant–investor and the question whether a company seeking protection is an “empty shell” without any business activity within the territory of a Party to the Treaty, must be taken into regard in the interpretation and application of the Treaty.
- (10) It is [a] procedural requirement that a claimant party, requesting arbitration on the basis of the Treaty, provides [the] necessary information and evidence concerning the circumstances of ownership and control, directly or indirectly, over itself at all relevant times, especially when reasonable doubt has been raised as to the actual ownership of and control over the company seeking protection.

### *The Position of the Parties*

#### *Claimant–investor*

Claimant–investor’s Request for Arbitration is premised on three bases:

- (a) Clause 9.2.1 of [the Agreement]
- (b) Article 27.2 of the Law of the Republic Kazakhstan on Foreign Investment, of 27 December 1994 as amended (the Foreign Investment Law of Kazakhstan), and
- (c) Article VI (3)(a) (iv) of the Treaty between the USA and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment, of 19 May 1992 (the Treaty).

#### *Respondent–Kazakhstan*

Respondent–Kazakhstan asserts that the Arbitral Tribunal lacks jurisdiction under all of the bases.

Respondent–Kazakhstan requests that jurisdictional and related issues be decided separately, and requests the Tribunal

...

- (3) Deny that it has jurisdiction to hear this dispute either because:
  - (a) there is no Treaty jurisdiction since [Claimant–investor] is not owned or controlled by a U.S. citizen; or
  - (b) there is no Foreign Investments Law jurisdiction since [Claimant–investor] is no longer a foreign investor; or
  - (c) [Claimant–investor]’s claims are barred by *res judicata* and collateral estoppel; or
  - (d) The agreement containing an arbitration clause has been terminated and the arbitration clause cannot or should not be revived to create jurisdiction; or
  - (e) [Respondent–Kazakhstan] is entitled to enforce its laws against its own government agencies and persons doing business with those agencies without interference by a foreign tribunal.
- (4) Deny [Claimant–investor]’s claims for damages in their entirety.
- (5) Award Respondent its costs and expenses in this proceeding, ... and charge [Claimant–investor] with the entire fees and costs of the [SCC] and the Tribunal.

#### *The Arbitral Tribunal*

The first two bases of Claimant–investor’s Request for Arbitration make reference to arbitration according to the Rules of the SCC (the SCC Rules); in Claimant–investor’s view, the third gives it the option to choose such arbitration.

The Arbitral Tribunal considers, and the parties agree, that arbitrations on these different bases may be consolidated in one arbitral procedure. However, the Tribunal considers that the conditions for invoking each of the bases, as well as the scope of the Arbitral Tribunal’s jurisdiction under each of them, must be considered separately.

At a preliminary meeting, the Arbitral Tribunal decided to resolve the five issues specified in No. 3 of Respondent–Kazakhstan’s conclusions and to make a separate jurisdictional award.

Other objections related to the Arbitral Tribunal’s jurisdiction have also been raised, such as that the Agreement is invalid because it was signed by unauthorized persons, and that [Claimant–investor] has waived its right to arbitration by submitting to the jurisdiction of the Kazakh courts of law by

participating in actions before the courts initiated by the General Prosecutor of Kazakhstan. However, all such other issues are to be decided in connection with the merits of the case, if the arbitration is to continue. The Tribunal also emphasizes that the question to be considered in [the jurisdictional award] is the total dismissal of the arbitration case for lack of jurisdiction, not the questions of the exact scope of the Tribunal's jurisdiction under each of the three bases for jurisdiction asserted by [Claimant-investor].

### Jurisdictional Decision of the Arbitral Tribunal

#### (1) Applicable Law to the Jurisdictional Issues Under the Arbitration Clause

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##### *Introduction*

*Article 9 of the Agreement reads as follows:*

- 9.1 *If a certain matter is not covered by this Agreement, the Parties shall follow the legislation of the Republic of Kazakhstan in effect, the provisions of international treaties to which the Republic of Kazakhstan is a Party and the norms of international law.*
- 9.2 *Any dispute, discrepancy or claim arising in connection with this Agreement shall be settled, to the extent possible, by means of negotiations and discussions between the Parties. In the event that the Parties are unable to reach mutual agreement through negotiations and discussions, the dispute shall be resolved as follows, the law of the Republic of Kazakhstan being the governing law:*
- 9.2.1 *Any dispute between the Parties arising in connection with this Agreement which is associated with any "foreign investment" (as defined in Clause 2.3 of this Agreement) shall be referred to the Arbitration Institute of the International Chamber of Commerce in Stockholm and be resolved in accordance with the arbitration rules of the International Chamber of Commerce in Stockholm. The place of arbitration shall be Stockholm, and the English language shall be used throughout the proceedings;*
- 9.2.2 *Any dispute not related to "foreign investments" (as defined in Clause 2.3 of this Agreement) shall be resolved in a Kazakh court having jurisdiction, and its decision may be appealed in accordance with the legislation of the Republic of Kazakhstan.*

Clause 2.3 of the Agreement referred to in Clause 9.2.1 reads as follows:

- 2.3 *The Parties agree that this Agreement provides for the making of "foreign investments as defined in Chapter 1 of the Law of the Republic of Kazakhstan On Foreign Investment" dated 27 December 1997.*

*Law Applicable to the Jurisdictional Issues Under  
the Arbitration Clause*

The Arbitral Tribunal notes the general reference in Clause 9.2 to Kazakh law as the governing law. The Tribunal also notes the specific reference to Kazakh legislation and international law in Clause 7.1 of the Agreement:

*7.1 In the event of a failure to perform, or the improper performance of, their obligations hereunder, the Parties shall be held liable in accordance with the legislation of the Republic of Kazakhstan and the provisions of international law.*

The Tribunal understands these provisions to the effect that the contractual relationship between the parties is generally governed by Kazakh law. Where the Agreement is silent and in need of interpretation, the legislation of [Kazakhstan] at the relevant time, as well as the provisions of international treaties to which [Kazakhstan] is a Party and the norms of international law shall apply. The parties have not disputed this general understanding.

[Claimant–investor] has contended, and [Respondent–Kazakhstan] has not denied, that it is a general principle of Kazakh law that the literal meaning of words is decisive, that treaties to which Kazakhstan is a Party are part of Kazakh law and prevail over other Kazakh law and that treaties are to be interpreted in accordance with the Vienna Convention of 23 May 1969.

*Respondent–Kazakhstan’s Position*

When it comes to laws and rules governing the procedures before the Arbitral Tribunal, and the Tribunal’s competence, there is disagreement between the parties. [Respondent–Kazakhstan] contends that in the particular circumstances of this case Kazakh laws and rules apply to the procedures before, and the competence of, the Tribunal. [Respondent–Kazakhstan] also asserts the applicability of certain United States legal principles, such as the so-called Act of State Doctrine, as well as certain principles of international law such as comity among states. [Respondent–Kazakhstan] has also referred to provisions of the European Convention on International Commercial Arbitration of 1961, to which Kazakhstan is a Party.

*Claimant–investor’s Position*

[Claimant–investor] contends that only the procedural laws and rules of Sweden, being the agreed place of the arbitration, shall apply, together with the specifically and expressly agreed SCC Rules. However, the parties seem to be in agreement that several of the procedural issues would have the same solution whether subjected to Kazakh or Swedish law or to international law principles.

*Tribunal’s Findings*

The Arbitral Tribunal finds, in the case of arbitration on the basis of the arbitration clause in the Agreement, that the SCC Rules shall apply, supplemented by the Swedish Arbitration Act and other pertinent Swedish law, being the law of the place of arbitration expressly agreed by the parties. On the background of the specific provision on arbitration rules, and in view of the generally accepted principle that the *lex arbitri* shall govern the arbitration process unless otherwise agreed, the Tribunal finds that the reference to Kazakh law being generally applicable does not extend to the laws and rules governing the arbitral process, and consequently that Kazakh procedural laws or principles are not applicable to an arbitration based on the arbitration clause of the Agreement.

... [Respondent–Kazakhstan] contends that Clause 9.2.1 cannot serve as a basis for this arbitration for a number of reasons, some of which are interrelated:

**(2) Res Judicata and Collateral Estoppel**

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*Background*

... on 29 April 2000 the General Prosecutor brought an action in [the Kazakh City Court] against [Claimant–investor] on behalf of [Respondent–Kazakhstan], requesting in his Statement of Claim that the Agreement be terminated. Reference was made to the Kazakh Civil Code of 27 December 1994 Art. 401, which reads in part:

*Upon the demand of one of the parties a contract may be changed or dissolved by decision of a court only: (1) in the event of a material violation of the contract by the other party; ...*

According to [Respondent–Kazakhstan], Section 3 of Article 55 of the Kazakh Civil Procedure Code provides the General Prosecutor with the right to file this claim with the courts of [Kazakhstan]. According to this Section,

*[t]he Prosecutor shall have the right to petition to the court with a lawsuit, application to protect the rights, freedoms and legitimate interests of citizens, rights and legitimate interests of organizations, public or state interests.*

According to [Respondent–Kazakhstan], The General Prosecutor’s jurisdiction is also set forth in Article 83(1) of the Constitution of [Kazakhstan], which provides:

*The Prosecutor’s Office, on behalf of the state, shall exercise the highest supervision over exact and uniform application of law, the decrees of the President of the Republic of Kazakhstan and other regulatory legal acts on the territory of the Republic, legality of preliminary investigation, inquest and inspection, administrative and executive legal procedure; and take measures for exposure and elimination of any violations of the law, the independence of courts as well as the appeal of laws and other regulatory legal acts contradicting the Constitution and laws of the Republic. The Procurator’s office of the Republic shall represent interest of the state in court as well as conduct criminal prosecution in cases using procedures and within the limits, stipulated by law.” And also according to Article 1(2) of the Law “On Prosecutor’s Office,” pursuant to which the “Prosecutor’s Office shall take measures to reveal and eliminate any breaches of legality, protect laws and other legal acts that contradict the Constitution and laws of the Republic, represent interests of the state in court...*

The claim by the General Prosecutor for termination of the Agreement was based on the alleged substantial damage sustained by Kazakhstan as a result of alleged contractual breaches by [Claimant–investor] and the failure of both [Claimant–investor] and [the committee supervising Respondent—Kazakhstan’s interests in the Agreement], to fulfill their obligations. However, these alleged contractual breaches and failures and the possible *res judicata* effects of the courts’ findings are not subject of consideration in the present decision.

[Claimant–investor] objected to [the Kazakh City Court] on the ground that the dispute was to be determined by arbitration in Stockholm in accordance with the arbitration clause in the Agreement, but the court on 29 May 2000 decided that the action for termination fell outside the scope of the arbitration clause, and by decision of 6 June 2000, after considering the merits of the General Prosecutor’s claim, decided that the Agreement be terminated. Appeals by [Claimant–investor] to the appellate court and further to the Supreme court were rejected, and with the Supreme Court’s ruling of 18 August 2000 the decision to terminate the Agreement became final.

#### *Respondent–Kazakhstan’s Position*

In its Brief in Support of Motion to Dismiss [Respondent–Kazakhstan] states that “we use the term ‘*res judicata*’ here in a generic sense to include

both *res judicata*, also referred to as claim preclusion, and collateral estoppel, or issue preclusion.”

[Respondent–Kazakhstan] claims that the arbitration on [the] basis of the arbitration clause be dismissed for *res judicata* reasons. It refers to Articles 235 (4) and 247 of the Civil Procedure Code of [Kazakhstan], according to which a final judgment on the merits bars further claims and issues raised by the same parties based on the same cause of action:

*Article 235(4). “ . . . upon the entry of a court judgment into legal force, the parties and other persons participating in the action as well as their legal successors may not relitigate same claim on the same basis, as well as challenge in a different lawsuit the facts and legal relations established by the court.”*

*Article 247. “The court shall discontinue the proceeding when: . . .*

*(2) there is a court judgment that came into legal force and was issued on the matter between same parties, on same subject-matter and same grounds, or a ruling of a court to discontinue the proceeding because of renunciation of a suit by plaintiff, or amicable agreement of the parties.”*

[Respondent–Kazakhstan] further argues that the courts of other jurisdictions, including the forum of this arbitration, Sweden, also recognize the principle of *res judicata*. *Res judicata* is also recognized in, for example, Switzerland, Austria, France, Germany, Greece, Italy, and Spain. In the United States, *res judicata* and collateral estoppel are a complete bar to any further proceedings on the same claims in any other forum.

In this context [Respondent–Kazakhstan] has also argued that the Kazakhstani courts have established that the dispute submitted to arbitration by [Claimant–investor] is not an “investment agreement” and therefore not encompassed by the arbitration clause contained in the Agreement.

#### *Claimant-investor’s Position*

[Claimant–investor] denies that rules of *res judicata* are applicable to this case, for a number of reasons. First, Kazakh procedural law is not applicable to this arbitration, . . . Secondly, *res judicata* rules are not applicable in the relationship between court decisions and arbitration, but only regulate the relationship between decisions of courts of law within the same state jurisdiction. Thirdly, under applicable Swedish law, decisions of foreign courts are only binding for a Swedish court or a Swedish arbitral tribunal to the extent such foreign court decisions are recognized and enforceable in Sweden. That is not the case with any Kazakh court decisions. Fourthly, there is in any event no *res judicata* effect since the issues

decided in the Kazakh courts are not the same as the jurisdictional issues now to be decided by this Tribunal.

### *The Tribunal's Findings*

The Arbitral Tribunal finds, as will be seen from the conclusions above concerning applicable procedural law, that Kazakh law on *res judicata* does not apply in this arbitration. It is[,] therefore[,] not necessary to consider whether or not Kazakh law on *res judicata* would have had the effect of blocking the arbitration requested by [Claimant–investor].

Further, the Arbitral Tribunal finds that according to Swedish jurisprudence *res judicata* operates only in respect of a cause of action before a Swedish court of law where there is a prior ruling in respect of the same cause of action rendered by a Swedish court of law or by a foreign state court, the judgment of which is enforceable in Sweden by operation of statute or treaty. However, if a court of law has been seized of an identical cause of action pending or initiated before an Arbitral Tribunal, the issue of *res judicata* will not arise but only the question whether the court was competent or not.

In this last mentioned respect, the Swedish Arbitration Act of 1999... Article 2, mandates the Swedish court of law at the place of arbitration, in the present case Stockholm ..., to consider the jurisdiction of the Arbitral Tribunal at the request of a party. A court decision by the appropriate Swedish court of law finding that the Arbitral Tribunal lacks jurisdiction is binding upon the Tribunal, which in such a case will have to terminate its proceedings. Also, a party may bring a setting-aside action against any award made by the arbitrators. But none of these interventions by the courts of law has the effect of *res judicata*, i.e., the effect that the Arbitral Tribunal is barred in advance from taking the arbitral dispute under consideration and [rendering] its decisions.

[Respondent–Kazakhstan] has also referred to the fact that Kazakhstan has acceded to the European Convention on International Commercial Arbitration of 1961, claiming that the provisions of the Convention are thereby part of Kazakh internal law and claiming that this gives Kazakh courts the mandate to review the jurisdiction of the Arbitral Tribunal. The Arbitral Tribunal does not find it necessary to decide whether the Convention gives a Party to the Convention, other than the State on which territory the arbitration is to take place, the right to review the jurisdiction of an arbitral tribunal subject to the Convention Rules. No such Convention based right, if any, can be asserted vis-à-vis companies or

persons of a State which is not a Party to the Convention. Sweden, and for that matter the United States, are not Parties to the European Convention.

[Claimant–investor] has also denied any *res judicata* effect on the ground [that] the claims and issues decided by the Kazakh courts are not the same as those raised before the Arbitral Tribunal. [Claimant–investor] contends that while the Kazakh court action and decision concerned the contractual right to terminate the Agreement, the claims before the Arbitral Tribunal are the contractual consequences of the allegedly unfounded termination of the Agreement decreed by the Kazakh courts. [Respondent–Kazakhstan] did not specifically address this issue. In view of its other findings that *res judicata* is not a reason for dismissal[,] the Arbitral Tribunal does not find reason to consider whether this contention by [Claimant–investor] would be an additional bar to *res judicata* effects.

In respect of [Respondent–Kazakhstan]’s argument that the Kazakhstani courts have determined that the present dispute does not constitute an “investment dispute” according to the terms of the Agreement[,] the Tribunal finds that the present dispute is in fact an “investment dispute” in the meaning of the Agreement for the following reason.

From [Claimant–investor]’s Request for Arbitration and Statement of Claim it appears that [Claimant–investor] seeks indemnification for certain alleged investments in acquisition of concession rights and certain capital expenditure. The fact that alleges having made disbursements of funds, for purposes which would qualify as investments in the meaning of the Foreign Investment Law to which the Agreement refers in its Clause 2.3, is a sufficient basis for the Tribunal to be vested with competence to adjudicate these issues (whether [Claimant–investor] will be able to establish that there were in fact investments made and that these are indemnifiable on one basis or the other is obviously a matter which will be deferred to the examination of the merits of the case).

The Arbitral Tribunal’s conclusion is that *res judicata* is not a bar to jurisdiction under the arbitration clause.

### **(3) Principle of Separability, Competence-Competence Doctrine**

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#### *Respondent–Kazakhstan’s Position*

[Respondent–Kazakhstan] further claims that since the Agreement has been terminated by the Kazakh courts, the whole Agreement including its arbitration clause is terminated. Therefore, the arbitration clause cannot be invoked as a legal basis for arbitration.

[Respondent–Kazakhstan] admits that [Kazakhstan] recognizes the principle of severability of an arbitration clause. Reference is made to Regulation No. 5 of [Kazakhstan]’s Chamber of Commerce and Industry and, more recently, to the definition of “Arbitration Clause” in the Regulations of International Court of IUS Law Center adopted on 30 December 2001—both to the same effect that invalidation of an agreement does not invalidate an arbitration clause therein. However, a distinction must be made between invalidation and termination of an agreement, at least where the agreement is terminated by a court rather than a party to the contract. Termination falls outside the scope of the separability principle and leads to the extinction also of the arbitration clause. [Respondent–Kazakhstan] has referred to recent rulings of the Kazakh Supreme Court holding this, hereunder a decision of 27 January 1999 in a so-called TWG/SSGPO case.

#### *Claimant-investor’s Position*

[Claimant–investor] contends that the courts’ decision to terminate the Agreement has no legal effect in the present arbitration, since the arbitration clause excludes the jurisdiction of Kazakh courts to consider the validity or termination of the Agreement. The finding of the Kazakh courts that they had jurisdiction to hear the case on termination is incorrect and has no *res judicata* effect, as explored above. Also, Kazakh procedural law has no application in the present case. Further, [Claimant–investor] argues that in any event the scope of the Kazakh courts’ decision does not extend to a termination of the arbitration clause. The principle of separability of the arbitration clause, existing under both Swedish and Kazakh law, establishes that the agreement to arbitrate is to be considered and evaluated as a separate agreement. This principle is firmly established in numerous countries and laid down in the UNCITRAL Model Law on Arbitration. The contention that a distinction between invalidity and termination of an agreement, or between a termination declared by a party or by a court, are novelties without any substantiation.

#### *The Tribunal’s Findings*

The Arbitral Tribunal refers to its finding above that Swedish law is decisive for the legal effects to be attributed to the Kazakh courts’ decision to terminate the Agreement. Under Swedish law there is no doubt that these Kazakh court decisions are not binding upon the Arbitral Tribunal, and that the Tribunal is empowered to determine its own competence. The evidentiary effect attributable to Kazakh jurisprudence is of little[,] if any[,] significance when the law such jurisprudence is alleged to clarify is without application in the present case.

The Arbitral Tribunal's conclusion is that the Kazakh courts' decision to terminate the Agreement is no bar to jurisdiction under the arbitration clause.

#### (4) Act of State Doctrine

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##### *Respondent—Kazakhstan's Position*

[Respondent—Kazakhstan] claims that the action of the General Prosecutor and the decisions of the Kazakh courts to terminate the Agreement are sovereign acts of [Kazakhstan] in enforcing Kazakh law within its territory and should not be adjudicated by this Tribunal. [Respondent—Kazakhstan] argues that such a complaint would be barred by the Act of State doctrine in the United States, allegedly [Claimant—investor]'s citizenship. [Respondent—Kazakhstan] admits that 9 U.S.C. Section 15 enacted in 1988 provides that enforcement of arbitration agreements and the confirmation of arbitration awards are enforceable in the United States notwithstanding the Act of State doctrine, but asserts that this is not the issue in the present arbitration, and refers to U.S. cases supporting that the Act of State doctrine bars consideration of claims in U.S. courts.

##### *Claimant—investor's Position*

[Claimant—investor] argues the Act of State Doctrine is an American judicial principle preventing U.S. courts from trying the legality of actions of foreign states. The Act of State Doctrine is, however, a principle of U.S. procedural law and does not bind courts, let alone arbitral tribunals, outside the United States. Consequently, the Act of State Doctrine does not apply to international commercial arbitrations. It has no relevance whatsoever to the dispute before the Arbitral Tribunal. According to [Claimant—investor] the Act of State doctrine does not even apply to arbitrations in the United States. Reference is made to Chapter 1 § 15 of the United States Arbitration Act, which stipulates that:

*Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State Doctrine.*

##### *The Tribunal's Findings*

The Arbitral Tribunal does not find that the U.S. procedural principle referred to as the Act of State Doctrine is applicable in the present arbitration. The nationality of [Claimant—investor] is obviously not

sufficient to make U.S. procedural principles applicable. The SCC Rules or Swedish arbitration law do not contain any provisions corresponding to the procedural principle asserted by [Respondent–Kazakhstan].

The Arbitral Tribunal, therefore, concludes that the Act of State Doctrine, or the asserted nature of the General Prosecutor’s actions or the decisions of the Kazakh courts, asserted to be sovereign acts of a State, do not constitute bars to jurisdiction under the arbitration clause.

## (5) Comity Among States

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### *Respondent–Kazakhstan’s Position*

[Respondent–Kazakhstan] also contends that “as a matter of international comity this Tribunal should be hesitant to review the acts of [Kazakhstan] in its sovereign and judicial capacity, acting to enforce its laws against its own government agency, absent a blatant abuse of power, which clearly is not this case.” The Tribunal “should at least give the sovereign, non-commercial acts of [Kazakhstan] the deference that comity requires.”

### *Claimant–investor’s Position*

[Claimant–investor] states that [Respondent–Kazakhstan]’s reference to “comity” is as misplaced as the reference to the Act of State Doctrine. Comity—*comitas gentium*—is a concept of public international law which refers to non-binding rules of politeness, convenience and goodwill observed by sovereign states in their mutual dealings. The Arbitral Tribunal does not act in the interests of any State, nor does it exercise State authority of any kind. The Arbitral Tribunal derives its authority from the arbitration agreement entered into by [Claimant–investor] and [Respondent–Kazakhstan]. There is no room for “comity” in such context.

### *The Tribunal’s Findings*

The Arbitral Tribunal must agree with [Claimant–investor] that the concept of “comity” among states, in international law or practice, has no applicability in arbitration. It has not been shown that such a legal principle is part of any known laws or rules concerning international commercial arbitration, including Swedish or Kazakh arbitration law.

The Arbitral Tribunal has no basis, in the arbitration agreement or in applicable laws and rules, to exercise “hesitance” and abstain from decisions otherwise following from the circumstances of the case, solely on the ground that the breaches of contract alleged by [Claimant–investor] are the acts of a sovereign state.

The Arbitral Tribunal concludes that “comity” as asserted by [Respondent–Kazakhstan] is no bar to or restriction of jurisdiction under the arbitration clause.

## (6) Sovereign State, Issue of Sovereign Immunity

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### *Respondent–Kazakhstan’s Position*

Under point (3) (e) of the conclusions in the Statement of Defence [Respondent–Kazakhstan] stated as a fifth reason for the Tribunal to deny jurisdiction that:

*(e) the Republic of Kazakhstan is entitled to enforce its laws against its own government agencies and persons doing business with those agencies without interference by a foreign tribunal.*

No further explanation or elaboration of this asserted “entitlement to enforce its laws ... without interference by a foreign tribunal” was given in the Statement of Defence, in the related Motion to Dismiss, in the subsequent briefs or in the oral presentation at the hearing on.... At the hearing ... the chairman assumed that this objection was concerned with the arbitration clause, and asked [Respondent–Kazakhstan] whether it also was an objection to Treaty and Investment Law, but obtained no response.

In the related Brief in Support of Motion to Dismiss [Respondent–Kazakhstan] commences as follows:

*[Respondent–Kazakhstan] moves the Tribunal to dismiss [Claimant–investor]’s Request for Arbitration and Statement of Claim on the following grounds:*

- (1) The Arbitration Institute lacks jurisdiction under the Treaty and the Foreign Investments Law because there is no U.S. or foreign investor involved.*
- (2) The claims and issues raised by [Claimant–investor] have already been decided adversely to [Claimant–investor] by competent courts in Kazakhstan.*
- (3) The Concession Agreement with the arbitration clause was terminated by the same courts before the Request for Arbitration was filed.*
- (4) Under these circumstances [the Arbitral Tribunal’s emphasis] it is not appropriate for an international arbitration tribunal to adjudicate the propriety of [Kazakhstan]’s enforcement of its laws against its own government agencies and citizens.*

The emphasized expression may suggest that the asserted “entitlement”—or lack of appropriateness—is not made as an independent objection to jurisdiction but rather is an alternative way of summing up one or several of the objections dealt with under [(1)–(4)] above.

[Respondent–Kazakhstan] has not commented specifically on this fifth objection.

*The Tribunal's Findings*

The Arbitral Tribunal finds that it lacks any foundation to assert that [Respondent–Kazakhstan], choosing to enter into a commercial contract with a foreign party and obliging itself to arbitration in case of certain disputes, should be free to disregard its contractual obligations. Kazakhstan, both in its Foreign Investment Law and as Party to the Treaty, has embraced and validated the concept of binding settlement of disputes by arbitration. In the absence of any substantiation or even explanation of this fifth objection, the Arbitral Tribunal concludes that these assertions are unfounded and constitute no bar to jurisdiction under the arbitration clause.

*Conclusion as to Jurisdiction under the Arbitration Clause*

Summing up the conclusions ... above, the Arbitral Tribunal finds that the objections raised do not constitute any bar to the Arbitral Tribunal's jurisdiction under the arbitration clause.

**(7) Definition of "Foreign Investor" Under the Foreign Investment Law of Kazakhstan**

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*Relevant Provisions of the Foreign Investment Law as Quoted by the Arbitral Tribunal*

The Foreign Investment Law contains, *inter alia*, the following provisions:

*Article 1. Principal Terms and Concepts*

*"Investments" are all types of property and intellectual valuables to be invested in objects of entrepreneurial activity for the purpose of receiving revenue, including:*

...

*—any right to effectuate activity based on a license or in other form granted by a state agency.*

*"Foreign investments" are investments effectuated in the form of participation in the charter capital of juridical persons of the Republic Kazakhstan, and also the granting of loans (or credits) to juridical persons of the Republic Kazakhstan with respect to which foreign investors have the right to determine the decisions to be adopted by such juridical persons . . .*

*"Foreign investor" is:*

—foreign juridical persons;

—foreign citizens . . .

—foreign States;

...

*“Foreign juridical person” is a juridical person (company, firm, enterprise, organization, association, etc.) created in accordance with legislation of a foreign State beyond the limits of the Republic Kazakhstan.*

*“Empowered State agency” is a State agency, which has the right to act in the name of the Republic Kazakhstan within the framework of its competence established by legislative and normative legal acts.*

*“Investment Dispute” is any dispute between a foreign investor and the Republic Kazakhstan in the person of empowered State agencies arising in connection with foreign investments, including a dispute connected with*

*—the actions of empowered State agencies violating the rights and interests of foreign investors provided for by the present Law, other legislation of the Republic Kazakhstan, or the applicable law;*

...

*—any agreement between the Republic Kazakhstan and a foreign investor;*

...

### *Article 3. Sphere of Operation of Law*

(1) *Relations connected with foreign investments in the Republic Kazakhstan shall be regulated by the present law, and also by other legislation of the Republic Kazakhstan.*

...

(4) *If other provisions have been established by an international treaty ratified by the Republic Kazakhstan than those which have been provided for by the present Law, the provisions of the international treaty shall apply.*

...

### *Article 27. Settlement of Disputes*

(1) *Investment disputes shall be settled, whenever possible, by means of negotiations.*

(2) *If such disputes can not be settled by means of negotiations . . . then the dispute at the choice of any of the parties thereof may be transferred for settlement when there exists the written consent of the foreign investor:*

(1) *to judicial agencies of the Republic Kazakhstan;*

- (2) *in accordance with the agreed procedure for the settlement of disputes, including in the contract or any other agreement between the parties to the dispute, to one of the following arbitration agencies:*
- (a) *the International Centre for Settlement of Investment Disputes . . .*
  - (b) *The Supplementary Organ of the Centre . . .*
  - (c) *arbitration organs founded in accordance with [the UNCITRAL Arbitration Rules]. . .*
  - (d) *for arbitral consideration at the Arbitration Institute of the Chamber of Commerce in Stockholm,*
  - (e) *the Arbitration Commission attached to the Chamber of Commerce and Industry of the Republic Kazakhstan.*

### *The Arbitral Tribunal's Findings*

Article 3 [of the Agreement] clearly stipulates that Kazakh law and legislation shall generally govern legal relationships established under the Law, with the modifications following from treaties to which Kazakhstan is a party. However, [the Foreign Investment Law] grants the parties considerable freedom to choose an arbitration agency, the place of arbitration and the arbitration rules to govern the dispute. In the absence of indications to the contrary, the natural interpretation is therefore that insofar as a place of arbitration, and the applicable rules of arbitration are chosen in accordance with the Foreign Investment Law, the chosen rules and pertinent law at the chosen place of arbitration governs the arbitration, with the parties' national legal systems not being applicable.

It follows from these provisions [of the Foreign Investment Law] that, for [Claimant–investor] to be entitled to demand arbitration according to the SCC Rules under the Foreign Investment Law, several conditions must be fulfilled:

- (1) The dispute must be an investment dispute within the meaning of the Foreign Investment Law, which implies that:
  - a) the dispute must involve a “foreign investor” within the meaning of the Law, which includes a “foreign juridical person,” being defined as a juridical person (company etc.) created in accordance with legislation of a foreign State beyond the limits of the Republic;
  - b) the dispute must be between the foreign investor and the Republic Kazakhstan;
  - c) the dispute must be arising in connection with “foreign investments,” which includes a dispute connected with, among other alternatives, “any agreement between the Republic and a foreign investor.”

- (2) The parties have not been able to settle the dispute by negotiations;
- (3) There must exist a written consent of the foreign investor;
- (4) The chosen procedure must be in accordance with the agreed procedure for the settlement of disputes, including an agreement for settlement of disputes in the contract or any other agreement between the parties to the dispute.

At first glance, all of these conditions appear to have been met: [Claimant–investor] is a company created and existing under the laws of New York, U.S.A.; the Agreement is between that foreign juridical person and [Respondent–Kazakhstan]; [and] the dispute meets the requirements of a “foreign investment.” The Tribunal is satisfied that serious attempts were made to settle the dispute through negotiations, and the fact of [Claimant–investor]’s initiating this arbitration is ample proof of [Claimant–investor]’s consent to this procedure for settlement of the dispute between the parties.

#### *Respondent–Kazakhstan’s Position*

[Respondent–Kazakhstan] objects to the Tribunal’s jurisdiction under the Foreign Investment Law principally on the ground that “[Claimant–investor] is no longer a foreign investor,” ...

...[Respondent–Kazakhstan] has elaborated on this contention as follows:

*A stipulation of parties to a contract, including a governmental body like the Department for State Property, to the effect that they are entitled to protection of a particular law does not make it so. If the law is in fact not applicable to their contract, saying it is does not make it so. The parties to the Agreement could not have stipulated, for example, that [Claimant–investor] was or is entitled to be regarded as a U.S. national entitled to invoke the Treaty if, when the time came, the facts concerning [Claimant–investor] did not support Treaty jurisdiction. The same must be true with respect to the [Foreign Investment Law]. It was and is not up to [Claimant–investor] to decide, even if a government Department agreed at the time, that it is now entitled to be regarded by this Tribunal as a “foreign investor” under the [Foreign Investment Law], or that the Agreement is now a foreign investment. [emphasized by Respondent–Kazakhstan]*

*Moreover, what may have been true when the Agreement was executed in 1997 may not be true today. If, for example, ownership and control of the New York company called [Claimant–investor] had not only subsequently been acquired by [the Holding Company, a holding company of the same name as Claimant–investor’s], but has also (1) become a hollow U.S. shell without assets or activities in the United States, and (2) become controlled by Kazakhstani nationals, by contract, payments, intimidation or otherwise[,] [T]he [Foreign Investment Law] is no longer applicable, no matter what [Claimant–investor] was in 1997 when it signed the Agreement.*

*[Respondent–Kazakhstan] believes that the facts will show that [Mr. X] [alleged president of Claimant–investor, Editor’s note] has long since lost control of [Claimant–investor;] even if [Mr. X,] and a group of investors [Mr. X] has refused to identify[,] still nominally “own” [the Holding Company] and in turn [Claimant–investor]. But even if they, as [Mr. X] protests..., are genuinely non-Kazakhstani investors and therefore might qualify as “foreign investors” under the [Foreign Investment Law], we also believe what [Mr. X] said in his message sent to us by the General Prosecutor, that [Mr. X] is being controlled by others, not his non-Kazakhstani partners. ...*

*It would appear that [Mr. X] has now made a deal with Kazakhstani interests who see[,] in the sad history of [Claimant–investor]’s dealings with [the Refinery,] an opportunity to invoke all the protective language of the Treaty and the [Foreign Investment Law] against condemnations and expropriations and discriminations. By using an empty New York shell company owned nominally by foreigners, they hope to have an international arbitration tribunal award damages for expropriation etc., whereas the Agreement specifically provides that if the dispute is not related to foreign investments, it “shall be resolved in a Kazakh court”. ...*

In connection with the arbitration clause, [Respondent–Kazakhstan] asserts that the Kazakh courts have ruled that the dispute before it was not associated with “foreign investment” and, therefore, not within the scope of the arbitration clause. [Respondent–Kazakhstan] appears to contend that these court rulings are also binding with respect to the Foreign Investment Law and exclude arbitration on the basis of the [Foreign Investment Law].

#### *Claimant–investor’s Position*

[Claimant–investor] denies that there is anything in the Foreign Investment Law to support that the application of the law is excluded in cases where a U.S. company is owned or controlled, directly or indirectly, by other than U.S. citizens or companies. The only requirement under [the Foreign Investment Law] to qualify as a “foreign juridical person” is that the company is created in accordance with legislation of a foreign State beyond the limits of [Kazakhstan]. In any event, [Claimant–investor] is owned 100 per cent by the [the Holding Company], but indirectly owned and controlled by [Mr. X], an American citizen holding 51 per cent of the shares in the [Holding Company].... The decisions of the Kazakh courts with regard to “foreign investments” are not binding, for the same reasons as set forth in connection with the arbitration clause.

#### *The Tribunal’s Findings*

The Arbitral Tribunal notes that the questions of direct or indirect ownership or control of [Claimant–investor] need to be explored in connection with arbitration on the basis of the Treaty,... But [Respondent–Kazakhstan] has offered no evidence, or even indication, that the Foreign

Investment Law is to be given such narrow interpretation as contended, or that [the Foreign Investment Law] contains exceptions similar to Article I (2) of the Treaty. By the clear wording of the [the Foreign Investment Law], [Claimant-investor] qualifies as a “foreign investor” and the dispute before this Arbitral Tribunal as an investment dispute under the Foreign Investment Law.

For the same reasons as set forth in connection with the arbitration clause[,] the decisions of the Kazakh courts constitute no bar to jurisdiction under the Foreign Investment Law.

With regard to the argument [of Respondent–Kazakhstan] that the parties are not capable of agreeing that the Foreign Investment Law is applicable when on the facts of a case it is not, the Tribunal finds it sufficient to refer to the [Foreign Investment Law]’s definition of “foreign investments,” which clearly covers [Claimant–investor]’s contractual rights in connection with [Respondent–Kazakhstan]’s shares in [the Kazakh Company], and to the definition of an “investment dispute,” which includes the alternative that “any agreement between [Kazakhstan] and a foreign investor” in connection with foreign investments is covered. Whether or not [Kazakhstan] is capable of extending the application of the Foreign Investment Law through agreements with foreign investors, the present Agreement is clearly within the framework of the [Foreign Investment Law].

...

The Tribunal therefore concludes that [Respondent-Kazakhstan] has not proven any bar to the Tribunal’s jurisdiction under the Foreign Investment Law.

**(8) Applicable Law to Jurisdictional Issues Under the Treaty Between the USA and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment (19 May 1992) (“BIT”)**

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*Relevant Provisions of the Treaty*

Articles I and VI of the treaty of 19 May 1992 between the USA and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment read in part as follows:

## Article I

- (1) For the purposes of this Treaty,
- /a/ "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party ....
  - /b/ "company of a Party means any kind of corporation, company ... legally constituted under the laws and regulations of a Party or a political subdivision thereof
  - ...
  - /c/ "national" of a Party means a natural person who is a national of a Party under its applicable law.
  - ...
- (2) Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.
- ...

## Article VI

- (1) For the purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to:
- /a/ an investment agreement between the Party and such national or company;
  - /b/ an investment authorization granted by that Party's foreign investment authority to such national or company; or
  - /c/ an alleged breach of any right conferred or created by this Treaty with respect to an investment.
- (2) In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:
- (c) in accordance with the terms of para. 3.
- (3) (a) ... [T]he national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
- ...
  - iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.
  - (b) Once the national or company concerned has so consented, either party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.
  - ...
- (8) For purposes of an arbitration held under para. 3 of the Article, any company legally constituted under the applicable laws and regulations of a Party or a

*political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25 (2) (b) of the ICSID Convention.*

Article 25 (2) (b) of the ICSID Convention referred to in Article VI (8) reads as follows:

*“(2) National of another Contracting State’ means:*

...

*(b) any juridical person which had the nationality of Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.*

#### *The Tribunal’s Findings*

With respect to arbitration based on the provisions of the Treaty, the Treaty does not contain express choice of law provisions corresponding to Clause 9.2 of the Agreement or Article 3 of the Foreign Investment Law, but does contain references to the predominance of the parties’ agreement with regard to the rules of arbitration under the various alternatives. Thus..., Article VI (3) (a) iv) provides:

*(3)...[T]he national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:*

...

*iv) to any other arbitration institution, or in accordance with any other arbitration rules, as may be mutually agreed between the parties to the dispute.*

The Arbitral Tribunal finds that a natural reading of the Treaty leads to the conclusion that, insofar as it is found that the parties have agreed to arbitration in Stockholm in accordance with the SCC Rules, those rules of arbitration are applicable, supplemented by the Swedish Arbitration Act being the law of the chosen place of arbitration. There is no basis for holding that Kazakh procedural law, or for that matter U.S. procedural law, the procedural laws of the parties to the arbitration, is applicable.

**(9) Definition of “National of Another Contracting State”  
Under the Treaty Between the USA and the Republic  
of Kazakhstan Concerning the Encouragement  
and Reciprocal Protection of Investment**

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*The Arbitral Tribunal’s Finding*

It follows from the provisions [of the Treaty] that, for [Claimant-investor] to be entitled to demand arbitration at [the SCC] in Stockholm under the Treaty, several conditions must be fulfilled:

- (1) The dispute must be an “investment dispute” within the meaning of the Treaty, which implies that:
  - a) the dispute must be arising out of or relating to an “investment agreement,” an “investment authorization” within the meaning of the Treaty, or an alleged breach of any right conferred or created by the Treaty with respect to an investment;
  - b) the dispute must be between a U.S. national or company and [Kazakhstan];
- (2) The parties have not been able to settle the dispute by negotiations;
- (3) The parties must have mutually agreed to submit the dispute to this particular arbitration institution;
- (4) [Kazakhstan] must not have exercised its right under Article I (2) of the Treaty to deny to [Claimant-investor] the advantages of the Treaty.

The Tribunal is satisfied that the requirements under (2) and (3) above have been met, and there has been no contention that [Kazakhstan] has exercised any right according to the Treaty Article I (2) (point 4 above) to deny [Claimant-investor] the advantages of the Treaty.

[Claimant-investor] asserts Article VI (3) (a) (iv) of the Treaty as one basis for this arbitration. [Respondent-Kazakhstan] denies on various grounds that the Arbitral Tribunal has such jurisdiction. Some of [Respondent-Kazakhstan]’s contentions are related to the ownership or control, directly or indirectly, of [Claimant-investor], and the nationality of the companies and persons involved. Other contentions are related to the legal consequences of the decisions of the Kazakh courts of law concerning the termination of the Agreement.

*Assertions as to the Ownership and Control  
of [Claimant–investor]*

The Arbitral Tribunal finds it practical first to give a description of the asserted ownership and control of [Claimant–investor], as a general background.

Much of the following is based on statements made by [Mr. X], president of [Claimant–investor]. His statements have been objected to by [Respondent–Kazakhstan], requesting that his testimony be substantiated by documentary evidence available to [Claimant–investor]. The Tribunal comes back to this evidentiary issue below, but finds his assertions useful as a background for the decisions to be made.

... [I]n 1986 [Mr. X, a national of the United States] became the [sole] owner of an offshore company [the Offshore Company], ... [which] formed a joint stock company in 1987 under the laws of New York state with the name of [Claimant–investor] ... [Mr. X] asserts that [Claimant–investor] was 100 per cent owned by him, which presumably means that he was the sole shareholder, when the First Agreement was signed on 7 March 1997.

The [First Agreement] required considerable payments into [the Kazakh Company], which were financed by loans from a group headed by [Mr. Y]. In the Statement of Defence it is stated that [Mr. Y] was chairman of [another Kazakh Company in another industry], and was believed to be a Kazakh citizen. [Mr. X] in his testimony at the hearing stated that [Mr. Y] is not a Kazakh but a Russian citizen. The financing group [headed by Mr. Y] acquired 50 per cent of the shares in [Claimant–investor], whereby [Mr. X] became a 50 per cent shareholder in the company. This transfer of shares took place in May 1997, after the First Agreement but before the Agreement was signed on or about 8 July 1997. [Mr. X] has not been able or willing to give the names or nationalities of the shareholders who held 50 per cent of the shares in [Claimant–investor] from 1997 to 2000, beyond a suggestion that there were “some westerners and some Russians, and possibly some Kazakhs.”

In May 1998, [Claimant–investor] acquired two ... plants in ... New financing was required, and [Mr. X] had to reduce his shareholding to 25 per cent. It has been suggested that the financing group [headed by Mr. Y] all in all invested close to 100 million USD to [the Kazakh Company] as loans, while [Mr. X] himself invested about 2 million USD.

After [Claimant–investor] entered into the Agreement all activities of [Claimant–investor] other than operating the Refinery and executing the

Agreement ceased. Today, [Claimant–investor] has no other assets than the claim against [Respondent–Kazakhstan] for breach of the Agreement.

After the Agreement was terminated by the Kazakh courts in 2000, part of the group of investors decided that they did not wish to participate in an arbitration against [Respondent–Kazakhstan], the reason given was that they had, or intended to have, business with [Respondent–Kazakhstan]. After negotiations, this group of investors withdrew as shareholders in [Claimant–investor] and formed a company, which took over the ownership of the two ... plants from [Claimant–investor]. As a result of these transactions [Mr. X] became 51 per cent shareholder in [Claimant–investor], while the investors who remained held 49 per cent of the [Claimant–investor] shares. It has not been further explained why or how [Mr. X] acquired 51 per cent of the shares in [Claimant–investor], nor has it been documented that he obtained this percentage of the shares.

On 16 February 1998 a Virgin Islands Company was formed, with the name of ... [the Holding Company]. This company is said now to own all the shares in [Claimant–investor], while [Mr. X] owns 51 per cent and the remaining investor group 49 per cent of the shares in [the Holding Company].

This 49 per cent shareholder group is represented by [Mr. Z], a Geneva lawyer. [Ms. S] testified, with no denial from [Mr. X], that [Mr. P], previously the president of [Claimant–investor], receives mail to [Claimant–investor] and forwards all such mail to [Mr. Z], not to [Mr. X]. The group represented by [Mr. Z] finances 100 per cent of the costs of the present arbitration. [Mr. X] has entered into an oral agreement with the group that he will receive one sixth of any proceeds of the arbitration (and again become a 100 per cent shareholder of [Claimant–investor]) while the group will keep five sixths of any proceeds of the arbitration.

...

#### *Respondent–Kazakhstan's Position*

[Respondent–Kazakhstan] objects to the Tribunal's jurisdiction under the Treaty principally on the ground that 'there is no Treaty jurisdiction since [Claimant–investor] is not owned or controlled by a U.S. citizen,' ...

[Respondent–Kazakhstan] does not deny that [Claimant–investor] is created and existing under the laws of the State of New York and as such is a "company of a Party" within the meaning of the Treaty. Nor does [Respondent–Kazakhstan] deny that [Mr. X], the president of [Claimant–investor] and the asserted majority shareholder in [the Holding Company],

is a “national” of a Party to the Treaty. But [Respondent–Kazakhstan] maintains that available information, including [Mr. X]’s statements in other connections, and his oral testimony at the hearing..., indicates that [Claimant–investor] directly or indirectly is controlled by others, possibly Kazakh citizens, who are not protected by the Treaty. [Respondent–Kazakhstan] contends that [Claimant–investor] must provide the Arbitral Tribunal with evidence and precise information concerning the shareholders’ nationality and the size of their shareholdings in and their control, directly or indirectly, of the companies concerned. [Respondent–Kazakhstan] also asserts that [Claimant–investor] is an “empty shell” with no business activity in the United States.

#### *Claimant–investor’s Position*

[Claimant–investor] refers to the undisputed fact that [Claimant–investor] is a U.S. company, and contends that [Claimant–investor] as such is entitled to protection and to request arbitration under the Treaty. It is well established, also in international law, that the corporate entity is separate from juridical or physical persons who own or control the company. The Treaty must be interpreted and applied on that basis.

#### **(10) Burden of Proof to Establish “National of Another Contracting State” Under the Treaty Between the USA and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment**

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#### *The Tribunal’s Findings*

The Arbitral Tribunal is satisfied on the evidence that [Claimant–investor] is created and existing under the laws of the State of New York and as such is a “company of a Party” within the meaning of the Treaty, and satisfied that [Mr. X], allegedly the president of [Claimant–investor] and the majority shareholder in [the Holding Company], is a U.S. citizen and a “national” of a Party within the meaning of the Treaty.

However, the Tribunal finds that the ownership and control of [Claimant–investor], and the question whether a company seeking protection is an “empty shell” without any business activity within the territory of a Party, must be taken into regard in the interpretation and application of the Treaty. Although not directly applicable, several provisions of the Treaty take ownership and control into regard. The definition of “investments” in Article I(1)(a) refers to investments “owned or controlled directly or indirectly by nationals or companies of the other

Party;" the right to deny protection under the Treaty according to Article I(2) is based on a Party finding that the company concerned "has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country ...;" and Article VI (8) addresses the situation where an investment changes nationality immediately before the occurrence of the event or the events giving rise to the dispute.

In consequence hereof it must be a procedural requirement that a Claimant party, requesting arbitration on the basis of the Treaty, provides the necessary information and evidence concerning the circumstances of ownership and control, directly or indirectly, over [Claimant–investor] at all relevant times. This is especially the case when reasonable doubt has been raised as to the actual ownership of and control over the company seeking protection. In the present case, by [Mr. X]’s admission, the sole activity of [Claimant–investor] since the termination of the Agreement by the Kazakh courts, and the sole asset of [Claimant–investor], is the arbitration initiated against [Respondent–Kazakhstan]. This activity is financed solely by a group of shareholders allegedly owning 49 per cent of the shares in [the Holding Company], and the economic outcome of the arbitration is fixed to be shared with five sixths to the shareholder group and one sixth to [Mr. X]. This explanation places the burden of proof on [Claimant–investor] to prove that [Mr. X] is in control of the decisions to be made in the arbitration or generally in control, directly or indirectly, of [Claimant–investor].

[Claimant–investor] has repeatedly been requested by [Respondent–Kazakhstan] to provide further information and evidence concerning such ownership and control, but has resisted, partly with the argument that the shareholder group wishes to remain anonymous. The Tribunal cannot find that such an argument can justify for instance that [Claimant–investor] does not provide any evidence of [Mr. X]’s shareholdings in the group at various times.

Under the circumstances, the Arbitral Tribunal does not find it necessary to determine in further detail what ownership or control is necessary under the Treaty to be entitled to demand under the Treaty. The Tribunal finds, on the evidence before it, that [Claimant–investor] has not provided any degree of probability, let alone proof, that U.S. citizens or companies have any degree of control, directly or indirectly, over [Claimant–investor]. The Arbitral Tribunal therefore concludes that it has not been established that the Tribunal has jurisdiction on the basis of the Treaty.

*Other Issues Related to Treaty Jurisdiction*

In its post-hearing brief [Respondent–Kazakhstan] has submitted new arguments and evidence concerning Kazakh law of corporations, placing weight on substance rather than form, and argues that this also throws light on the correct interpretation of the Treaty. [Claimant–investor] objects, at this late stage of the separate proceedings, to deal with new arguments and evidence not included in the five defined issues ... The Tribunal accepts this objection, and also notes that with the findings stated above it appears at this stage that the Tribunal does not, in any event, have jurisdiction under the Treaty.

*Decision on Jurisdiction*

The Arbitral Tribunal renders the following unanimous Decision on Jurisdiction:

1. Tribunal's jurisdiction considered in this decision, that it is vested with jurisdiction to adjudicate the claims brought by [Claimant–investor] on the basis of the arbitration clause in [the Agreement], ..., and on the basis of the Foreign Investment Law of Republic Kazakhstan of 29 December 1994 with amendments, but not on the basis of the Treaty of 19 May 1992 between the USA and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment. ...

**II. Final Award Rendered in 2004 in  
SCC Case 122/2001****Subject Matters:**

- (1) Jurisdiction—Validity of the Agreement—Apparent authority, Ratification by acceptance.
- (2) Jurisdiction—Admission to jurisdiction of the Kazakh courts.
- (3) Party to the arbitration agreement—Sovereign state and state organ—whether the department designated in the Agreement or the State is the contractual party.
- (4) Effects of prior court decision on termination of the Agreement.
- (5) Whether acts of the Prosecutor General, and the national courts, either in its capacity of contractual party to the Agreement or under norms of Kazakh law and customary international law should be considered as acts attributable to Sovereign State.
- (6) Loss of future profit based on contractual right of first refusal — whether a contractual right of first refusal, expressly conditioned

upon the owner's decision to sell and without specification of purchase price to be paid, may give rise to a claim for damage

- (7) Concept of expropriation, "creeping" or "covert" expropriation

### Findings:

- (1) The Agreement is not invalid for lack of authority, where a person who signs the Agreement on behalf of the State, in at least, has apparent authority and where the Agreement was otherwise executed in a proper way to become binding under applicable statutory [law] of the state. In any event, the Agreement was ratified by acceptance by the agencies acting on behalf of the State.
- (2) If the cause of action sought by a private party before the State's courts is altogether different from the one pursued in arbitration proceedings, this [does not] constitute [an] admission of jurisdiction of the State's courts by the private party.
- (3) Where an Agreement expressly states that a Department of the State shall have the right to represent the State in negotiations and the right to execute the Agreement on behalf of the State, and where the State is the owner of the subject of the Agreement, the State is deemed [a] Party to the Agreement.
- (4) The State's courts' decisions to terminate the Agreement have binding effect in the arbitration. The courts' decisions may be afforded evidentiary effects in the arbitration proceedings.
- (5) Based on relevant facts of this case, the Tribunal does not have sufficient basis to conclude that the Prosecutor General, or the courts making the decision to terminate the Agreement, were acting as contractual representatives of Kazakhstan in a contractual relationship.
- (6) Loss of a contractual right of first refusal, conditional upon the owner's decision to sell and without specification on the purchase price to be paid, would normally not give rise to any damage claim, subject to the exception that in reality there is a certainty of a very high degree of probability that the owner would decide to sell in the course of the contract period.  
There is no claim for damages for violation of contractual right of first refusal, when the value of the subject matter and of a right to buy the subject matter is clearly nil.
- (7) The Foreign Investment Law in Kazakhstan and international law require that the expropriation is carried out by a public institution or in the public interest, on a non-discriminatory basis, is subject to due process of law and accompanied by prompt, adequate and effective compensation.

Attachment of assets of the subject matter of the investment agreement by a state-owned company as creditor can not be qualified as acts of state, when the existence of such debt is fully apparent to the investor at the time of investment.

Compensation for an expropriation is the value of the expropriated object at the time the expropriation is executed.

*Position of the Parties*

*Claimant–investor*

Claimant–investor, in its Statement of Claim, requests that the Arbitral Tribunal order Respondent–Kazakhstan:

- i. to pay to [Claimant–investor], as compensation for investments made by [Claimant–investor], an amount of USD [about 116 million] together with interest thereon ...
- ii. to pay to [Claimant–investor], as penalty under the Agreement, an amount of USD [about 3 million], together with interest thereon ...
- iii. to pay to [Claimant–investor], as compensation for lost future profits an amount of approximately USD [about 100 million], together with interest ...

[Claimant–investor] requests the Arbitral Tribunal to order [Respondent–Kazakhstan] to compensate [Claimant–investor] for its cost of arbitration ... and, as between the parties, alone bear the compensation to the Arbitral Tribunal and to [the SCC]. ...

The calculation of the claim was later amended. In the closing statement at the hearing the claim was calculated as follows:

*Breach of the Agreement*

Compensable Investments made	USD [about 62 million]
Compensable Lost Profits	USD [about 262 million]
Penalty ...	<u>USD [about 3 million]</u>
Grand Total Compensation	USD [about 327 million]

*Breach of the Foreign Investment*

*Law and International Law*

Compensable Lost Future Profits	<u>USD [about 262 million]</u>
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[Claimant–investor] states that it does not wish to claim in total more than initially claimed, USD [219 million] ... that the legal grounds are alternative, ...

*Respondent–Kazakhstan*

Respondent–Kazakhstan requested the Arbitral Tribunal to ... (4) Deny Claimant's claims for damages in their entirety and dismiss the Request for arbitration and Statement of Claim. ...

Respondent–Kazakhstan raised a counterclaim that ... the Tribunal should ... either affirm the Kazakhstan Supreme Court's termination of the Agreement or terminate it itself, ...

Respondent–Kazakhstan has raised no monetary counterclaims.

**(1) Jurisdiction—Validity of the Agreement—Apparent Authority, Ratification by Acceptance**

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*The Validity of the Agreement*

As will appear from the statement of [Respondent–Kazakhstan] at the hearing ..., [Respondent–Kazakhstan] reserves the right to challenge the arbitral award on the ground that the Agreement was invalid. This question has a bearing both on the issue of jurisdiction based on the arbitration clause and on the merits of the claims based on the Agreement.

No objections have been raised with regard to the validity of the First Agreement. Nor is there any disagreement with regard to the Parties' intention that the First Agreement should be replaced in its entirety by the Agreement signed on 8 July 1997.

*Respondent–Kazakhstan's Position*

[Respondent–Kazakhstan] has mainly argued that the Agreement is invalid because it was signed on behalf of [Respondent–Kazakhstan] by an unauthorized person, that an appropriate seal was not affixed to the document, that the changes had not been approved by the Interagency Committee, and that its contents were not in conformity with the applicable Resolution of 23 May 1996 [of Kazakhstan]. But [Respondent–Kazakhstan] also concedes that the Agreement was recognized as effective by [Respondent–Kazakhstan] and that invalidity was not asserted when the Prosecutor General brought the action in the Kazakh court with a request for termination.

*Claimant–investor’s Position*

[Claimant–investor] argues that the person who signed on behalf of [Respondent–Kazakhstan] had actual authority, and in any event apparent authority, which under Kazakh law is sufficient and binding upon the state. [Claimant–investor] contends that the Agreement was an amendment to the First Agreement, which was allowed in the First Agreement and therefore did not need new approval by the Interagency Commission [of Kazakhstan]. The 1996 Resolution is for that reason not applicable, and in any event the Resolution is not mandatory.

*The Tribunal’s Findings*

The Arbitral Tribunal finds that the Agreement was signed by a person who in the least had apparent authority to sign and was otherwise executed in a proper way to become binding under Kazakh law. In any event, the Agreement was ratified by the acceptance by the agencies acting in the matter on behalf of [Respondent–Kazakhstan]. The Tribunal considers that the Agreement was in the nature of an amendment to which the Resolution of 23 May 1996 was not applicable, and for which the renewed approval of the Interagency Commission, in view of the approved wording of the First Agreement, was not necessary.

The Tribunal therefore concludes that the Agreement was validly entered into and binding upon the Parties. It follows that the arbitration, on the basis of the arbitration clause, should not be dismissed on the basis of invalidity of the clause.

...

**(2) Jurisdiction—Admission to Jurisdiction  
of the Kazakh Courts**

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*Respondent–Kazakhstan’s Position*

[Respondent–Kazakhstan] also contends that [Claimant–investor] has admitted jurisdiction of the courts of Kazakhstan over disputes that arise out of the Agreement, on the ground that [Claimant–investor] brought a claim in Kazakh courts seeking the invalidation of a Governmental decree not directly relevant to the present issues. In ... hearing it was also suggested that [Claimant–investor] had submitted to Kazakh court jurisdiction and abandoned the right to arbitration by answering in the court action brought by the Prosecutor General seeking the termination of the Agreement.

*The Tribunal's Findings*

As for the former of these arguments, the Arbitral Tribunal finds it sufficient to remark that it is obvious that seeking invalidation of a governmental decree constitutes an altogether different cause of action than the one pursued in this arbitration, and that it cannot be interpreted as an admission of jurisdiction of the Kazakh courts or as having such effect for the present purposes. As for the latter of these arguments, [Claimant-investor] has proven that "[Claimant-investor] limited its comments to objections to the Kazakh courts' jurisdiction, and expressly made reservations against its limited pleadings being construed as submission to the jurisdiction of the Kazakh courts.

With reference to the above, the Arbitral Tribunal concludes that it has jurisdiction to adjudge this case under the arbitration clause and the Foreign Investment Law.

**(3) Party to the Arbitration Agreement—Sovereign State and State Organ—Whether the Department Designated in the Agreement or the State is the Contractual Party**

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*Whether Respondent—Kazakhstan is a Party to the Agreement*

The preamble to the Agreement states as follows:

*The Department for the Management of State Property and Assets of the Ministry of Finance of the Republic of Kazakhstan authorized by the Government of the Republic of Kazakhstan (hereinafter referred to as the Department) ... as one party, and [Claimant-investor] ... as the other party ... have concluded this Agreement as follows:*

Clause 4 of the Agreement is termed "Rights and Obligations of the Parties" and provides for "4.1 Rights of the Department," "4.2 Rights and Guarantees of the Department" and, thereunder, contains a group of provisions headed "The Department guarantees." Also for instance, Clause 7.3 of the Agreement provides for the event of "the unilateral termination of the Department."

"The question has been raised whether the designated Department rather than the Republic of Kazakhstan is the contract Party to the Agreement."

*The Tribunal's Findings*

The Arbitral Tribunal finds it clear that it is the Republic of Kazakhstan which is the contractual Party to the Agreement. The Agreement itself

states expressly that the Department shall have the *right to represent the Government of the Republic* [the Tribunal's Italics] in direct negotiations with the Concessionaire and the *right to execute the Agreement on behalf of the Government of the Republic of Kazakhstan* [the Tribunal's Italics] ... [Respondent–Kazakhstan] was the owner of the shares in [the Kazakh Company], which was the subject of the Agreement.

This finding also implies that [Kazakhstan] is [a] party to the Agreement under international law, that the Department is a state organ, and that its actions are actions of the Republic, under Kazakh and international law.

#### **(4) Effects of Prior Court Decision on Termination of the Agreement**

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##### *The Power of Attorney*

According to Clause 4.2.1 of the Agreement ... the Department on behalf of the state undertakes to:

*transfer to the Concessionaire the right to use and manage the entire state shareholding of 87.9 % of PNPZ JSC and to cause the right to possess and manage PNPZ to be transferred. The issue of a power of attorney by the Department to the Concessionaire shall constitute the transfer of said rights.*

...

##### *The Factual Development*

... the Committee for State Property and Privatization [of Kazakhstan] by a letter of 16 March 2000, after the first Power of Attorney had expired in February 2000, requested of [Claimant–investor] a number of documents, for the purpose of considering the possibility of issuing a new Power of Attorney as applied for by [Claimant–investor]. [Claimant–investor] complied with the request by letter of 2 April 2000.

But on 27 April 2000, the Kazakh Prosecutor General's Office [i.e., the "Prosecutor General"] filed a Statement of Claim in [the Kazakh City Court], charging that both [Claimant–investor] and the Committee for State Property and Privatization had failed in their duties under the Agreement. Reference was made to Article 401 of the Civil Code of Kazakhstan stating that in the event of a material breach of an agreement, it may be terminated by a court decision. With further reference to a Presidential Edict on the Prosecutor General's Office and to Articles 28, 32 and 55 of the Civil Procedural Code, the Prosecutor General applied for the Agreement [to] be terminated.

[Claimant–investor] objected to the action for a number of reasons, *inter alia*, on the ground that the Kazakh court did not have jurisdiction to adjudicate disputes between the contracting parties concerning foreign investments. Appeals against [the Kazakh City Court]’s decision to proceed with the case were rejected, and [the Kazakh City Court] on 9 June 2000 ruled that the Agreement “should be terminated.” [Claimant–investor]’s appeal against this decision was rejected by the Kazakh Supreme Court on 18 July 2000.

[Claimant–investor] noted in a letter of 28 June 2000 to the Prime Minister [of Kazakhstan] that, although [Claimant–investor] did not believe that the Agreement was validly terminated, [the Kazakh City Court]’s decision of 9 June 2000 had immediately led to the suspension of [Claimant–investor] from the management of [the Kazakh Company]. [Claimant–investor] declared that it was no longer in a position to be responsible for the enterprise under the existing circumstances, and proposed that instructions be given to the relevant state authority and a responsible entity be appointed to take over the Refinery. On 11 July 2000, The Ministry of Finance Committee for State Property and Privatization issued Order No. 156, based on [the Kazakh City Court] decision of 9 June 2000, that the Agreement must be terminated and the rights to possess and use the state’s 87.9 per cent shareholding in [the Kazakh Company] must be transferred to the Ministry of Energy, Industry and Trade. By acceptance certificates issued on 13 July 2000 [the New Kazakh Company] handed over to [the Kazakh Company] the assets leased under the Lease Agreement of 1 September 1997.

*The Legal Effects of the Termination Internally in Kazakhstan:  
The Factual Effects*

There is no dispute that the decision of [the Kazakh City Court], affirmed by the Supreme Court [of Kazakhstan]’s decision of ... was legally binding within the national legal system of Kazakhstan, whether or not the Kazakh courts should have declined jurisdiction on a proper interpretation of the arbitration clause of the Agreement. This meant, *inter alia*, that all public institutions, including agents of the state, were bound to base their further actions and exercise their duties on the legal fact that the Agreement was terminated and no longer was in effect (except perhaps for winding-up provisions in the Agreement).

Presumably, the decision was also *res judicata* for [Claimant–investor] within the Kazakh legal system, with no opportunity to appeal. In any event, it had the factual effect that all authorities and agencies would act on the basis that the Agreement was terminated and had ceased to be in effect.

[Claimant–investor] had, in the Tribunal’s view, no option other than to accept the factual situation created by [the Kazakh City Court]’s decision ... [Claimant–investor] in a letter of ... to the Prime Minister [of Kazakhstan] noted that it was no longer in a position to be responsible for the enterprise under the existing circumstances. In accordance with [Claimant–investor]’s proposal, a responsible entity was appointed to take over the Refinery and by acceptance certificates of ... [Claimant–investor] transferred back to [Respondent–Kazakhstan] its rights under the Agreement.

The Arbitral Tribunal finds and *concludes* [the Tribunal’s italic] that the immediate legal effect internally within Kazakhstan, and the factual effect generally, of the courts’ decisions and the subsequent Department Order, was the termination and cessation of the contractual relationship between [Respondent–Kazakhstan] and [Claimant–investor].

#### *The Legal Effect of the Termination in this Arbitration*

As already concluded ... the decision of the Kazakh courts does not have any binding effect in this arbitration. It does not have a *res judicata* effect to prevent this Tribunal from considering all claims in this arbitration on their merits, nor is this Tribunal bound to make its findings on the basis of the decision of the Kazakh courts.

The Tribunal notes that [Claimant–investor] on the one side, denies that the Kazakh courts had any jurisdiction under Clause 9 of the Agreement to make a decision to terminate the Agreement, but on the other side it accepts and contends that the Agreement was terminated by [the Kazakh City Court] ... and, for instance, claims interest on its claims from that date [of the decision by the Kazakh City Court] until payment. The Arbitral Tribunal considers that it must deny any legal effect in this arbitration of the Kazakh courts’ decision, and on a completely free basis decide when and how the Agreement was terminated and the contractual relationship ceased to exist.

However, the Kazakh courts’ decisions may be afforded evidentiary effects, as for instance this Tribunal does when it relies on the statements of the Kazakh courts as evidence of the transfer of ownership to [the Kazakh Company]’s assets, to the extent described.

Also, the factual consequences and effects of the courts’ decisions and the subsequent Department Order are matters to be taken into regard by the Tribunal, but then as matters of fact, to be proven and be relied on as such, to the extent they are relevant for the Tribunal’s conclusions.

(5) **Whether Acts of the Prosecutor General, and the National Courts, Either in its Capacity of Contractual Party to the Agreement or Under Norms of Kazakh law and Customary International Law Should be Considered as Acts Attributable to Sovereign State**

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*Did the Prosecutor General's Action and the Subsequent Events Constitute a Termination of the Agreement by Respondent—Kazakhstan?*

... Clause 8.2 of the Agreement states that the Agreement shall only cease to be in effect for one of the following reasons:

- The expiry of the five year period, unless the Parties agree on an extension;
- by mutual agreement of the Parties;
- if the Concessionaire fails to comply with its obligations to make investments, and is given a 30 days' written notice, but fails to eliminate the reasons described as grounds for the termination before the end of the 30 days' period.

Nevertheless, Clause 7.2 and Clause 7.3 provides for two other termination events:

- 7.2 *In the event of the premature termination of this Agreement, the culpable party must reimburse the other Party for all the losses suffered by such Party as a result of such termination. ...*
- 7.3 *In the event of the unilateral termination of this Agreement by the Department, all the amounts invested by the Concessionaire [etc.] ... must be fully refunded within one month as of the date of the termination of the Agreement.*

Several of the Claimant's claims are built on these clauses, and a first question in relation to these claims is whether the Prosecutor General's action and the subsequent events constitute a termination of the Agreement.

a) The first question is whether the Prosecutor General, or the Kazakh courts, acted as an agent for or representatives of the Government in its capacity of contractual Party to the Agreement.

*Claimant—investor's Position*

[Claimant—investor] contends that the action of the Prosecutor General and the termination by the Kazakh courts was, in fact and law, to be considered as being executed by [Respondent—Kazakhstan] in its capacity of Party to the Agreement. Representatives of the state must obviously have

prompted the Prosecutor General to initiate the termination procedure before [the Kazakh City Court], as an alternative to denying [Claimant–investor] an extension of the power of attorney [under the Agreement], or as an alternative to [Respondent–Kazakhstan]’s declaring termination of the Agreement directly through its appointed representatives in the contractual relationship. Under international law, the Prosecutor General as well as the Kazakh courts must be considered as organs of the state, the actions of which are to be considered equal to actions directly by the state itself.

#### *Respondent–Kazakhstan’s Position*

[Respondent–Kazakhstan] mainly contends that the Prosecutor General acted on his own initiative, in performance of his duties under Kazakh law to intervene when [Kazakhstan]’s interests are not properly taken care of. The Prosecutor General is acting independently and not under instructions by the state. His intervention and the courts’ decisions must be considered an outside event for which [Respondent–Kazakhstan] is not responsible under the Agreement.

#### *The Tribunal’s Findings*

The Arbitral Tribunal finds that there is no positive proof that [Respondent–Kazakhstan] instructed or otherwise prompted the Prosecutor General to initiate the termination proceedings before [the Kazakh City Court]. On the other hand, no explanation has been given why the Prosecutor General commenced his actions at this time. It is undisputed that the Department was in the process of considering whether to issue or deny a new Power of Attorney, and that the Department evidently considered a refusal of a Power of Attorney to be tantamount to the termination of the Agreement. It is a conspicuous coincidence that the Prosecutor General initiated court proceedings exactly at this point in time.

The Tribunal also finds the role and functions of the Prosecutor General unclear. [Respondent–Kazakhstan] maintains that [the Prosecutor General] is independent, does not act under instructions, and performs functions defined in the legislation. But [Respondent–Kazakhstan] also admits that the Prosecutor General’s task is to protect the interests of the state, also in purely commercial, contractual matters as in the present case. The Prosecutor General’s application to the courts, and the courts’ decisions in the case, are all directed at the termination of the contractual relationship. In a number of the court cases submitted in this arbitration, including the major court case brought by [Company X] against [the Kazakh Company], a prosecutor general brought action on behalf of the claimants, apparently acting as their representative. Nor is it a convincing argument that the

Prosecutor General brought complaints against both Parties to the Agreement, both [Claimant–investor] and the Department (on behalf of the state). The only complaint against the Department was that it did not act efficiently to protect the state’s contractual interest, and hereunder did not consider steps to terminate the Agreement. No measures or reactions were asked for with regard to the state’s representatives in the contract, only the termination of the Agreement. In the court’s decision no sanctions were ordered against the Department. The Ministry of Finance was ordered to pay ... about USD 14, which looks more like a court fee than a penalty or fine.

All things considered, the Arbitral Tribunal does not find sufficient basis to conclude that the Prosecutor General, or the courts making the decision to terminate the Agreement, were acting as contractual representatives of the State in the contractual relationship.

*Whether the Prosecutor General, the Courts, and/or the Department Issuing Order to Terminate the Agreement, May be Regarded as Organs of the State*

b) The next question hereunder is, whether the Prosecutor General, the courts, and/or the Department issuing Order No. 156 terminating the Agreement, may be regarded as organs of the state, the actions of which are attributable to the state under the norms of the Foreign Investment Law and customary international law.

The question in this connection is, whether the action of the Prosecutor General—as being yet an embodiment of the sovereign state—may be attributed to the state as a contracting party. Provided there is no collusion or any other form of concerted action compromising the *contractual* [the Tribunal’s Italics] instrumentality of the state the Tribunal is inclined to answer the question in the negative.

However, in the present case the Arbitral Tribunal has to take into consideration that the Department has made a particular commitment in the Agreement as reflected in Clause 4.2.6, which provides as follows:

*“The Department guarantees:*

...

*4.2.6 unconditional compliance with Chapter II of the Law of the Republic of Kazakhstan ‘On Foreign Investment’ dated 27 December 1994, during the entire period of validity of the Agreement.”*

This undertaking, which is in the nature of a guarantee, means that [Respondent–Kazakhstan] in its capacity as a contracting party has to

answer for obligations under international law undertaken in the Foreign Investment Law. [Respondent–Kazakhstan] as a contracting party—has, herefore, by its guarantee concerning observation of international minimum standards extended its responsibility to what would apply for the states merely acting *de jure gestionis* in a commercial contractual relationship with an entrepreneur (whether domestic or foreign).

The Tribunal also notes that, on 11 July 2000, the Ministry of Finance Committee for State Property and Privatization issued Order No. 156, with reference to [the Kazakh City Court]’s decision of 9 June 2000, ordered that the Agreement must be terminated and the rights to possess and use the state shareholding in [the Kazakh Company] must be transferred to the Ministry of Energy, Industry and Trade. The Committee was aware that [Claimant–investor] considered the termination of the Agreement to be invalid, but nevertheless affirmed the termination of the Agreement. This Order stands as a separate and independent legal act, executing the courts’ decision to terminate. But it must be assumed that the Committee would so have been empowered to reinstate [Claimant–investor] in its position of manager of the state shareholding and as operator of the Refinery, had it good reason to continue or renew the Agreement. Therefore, the committee’s affirmation of the courts’ decision to terminate the Agreement stands out as the ultimate decision, which sealed the end of the Agreement.

It is clear that the termination effected by the courts and affirmed by the committee, did not follow the rules of the Agreement for a termination decision. However, it is also clear, as set out above, that the actions of the state organs brought the Agreement to a definite end.

The Arbitral Tribunal therefore *concludes* [the Tribunal’s Italics] that [the Kazakh City Court]’s decision, affirmed by the Supreme Court and by the committee’s Order of 11 July 2000, constituted the ultimate termination of the Agreement.

) **Loss of Future Profit Based on Contractual Right of First Refusal—Whether a Contractual Right of First Refusal, Expressly Conditioned Upon the Owner’s Decision to Sell and Without Specification on the Purchase Price to be Paid, May Give Rise to a Claim for Damages**

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*The Claim for Loss of Future Profits Based on the Agreement*

The claim under the Agreement for compensable lost profits, USD ..., is primarily based on the alleged unjustified termination of the Agreement by [Respondent–Kazakhstan] ..., which allegedly had as an effect that the right

of first refusal to buy [Respondent–Kazakhstan]’s shareholding in [the Kazakh Company] was revoked. [Claimant–investor] asserts that this resulted in a loss of future profits. For this, [Respondent–Kazakhstan] is asserted to be liable under Clause 7.1 of the Agreement in conjunction with Article 350 and Article 9 of the Civil Code. As set out above, Clause 7.1 reads as follows:

*7.1 In the event of a failure to perform, or the improper performance of, their obligation thereunder, the Parties shall be held liable in accordance with legislation of the Republic of Kazakhstan and the provisions of international law.*

a) A first question is whether a conditional right of this kind may give rise to a claim for damages.

The Arbitral Tribunal notes that in the First Agreement, the clauses relating to this claim had the following wording:

#### CLAUSE 4. RIGHTS AND OBLIGATIONS OF THE PARTIES

...

##### 4.2 Obligations and guarantees of the Department

*The Department undertakes to:*

...

*4.2.4 Give the Concessioner a priority right to buy out the state shareholding of AO shares (or a portion thereof).*

#### CLAUSE 12. SPECIAL CONDITIONS

...

*12.3 Following revaluation of the authorized capital stock on the basis of results of an independent auditing expert examination, the volume of the authorized capital stock shall be changed and the shares value shall be fixed to be used as the base for selling the shares to the Concessioner. The authorized capital stock shall be changed within 6 months after the date when this Contract comes into force.*

In the Agreement, the clauses were changed to read as follows:

#### CLAUSE 4. RIGHTS AND OBLIGATIONS OF THE PARTIES

#### 4.2 *Rights and guarantees of the Department*

*The Department undertakes to:*

...

4.2.4 *vest the Concessionaire with the right of first refusal in respect of the state shareholding in [the Refinery] (or any part thereof) if a decision is taken on the sale (privatization) thereof ...* 4

#### CLAUSE 12. SPECIAL CONDITIONS

...

12.3 *Following the charter fund having been re-evaluated based upon the results of an independent audit examination, the amount of the charter capital shall be changed. Such change shall be made within 6 months as of the effective date of this Agreement.*

The Tribunal notes that in the First Agreement [Claimant-investor] was granted an unconditional right to buy the shares, although the clause is not specific as to the time the right was to be exercised, and there was a specific stipulation of the purchase price to be paid. The Agreement, in contrast, only granted a right of first refusal, which was made expressly conditional upon the owner's decision whether to sell: "... if a decision is taken on the sale ...". The reference to the price to be paid was also removed, leaving the question of the purchase right completely open, as is normal in the case of a right to first refusal, where the price is normally determined by the price a third party is willing to pay.

The Arbitral Tribunal finds that the loss of a conditional contractual right of this uncertain nature and of uncertain value would normally not give rise to any damage claim. The only conceivable exception would be if in reality there is certainty, or a very high degree of probability, that the state would decide to sell its shares in the course of the five-year contract period. In view of this, after [Claimant-investor] had submitted its brief ... before the hearing, the Arbitral Tribunal ... sent a letter to the Claimant stating, *inter alia*, as follows:

3. *For its claim for lost profits [Claimant-investor] appears to be referring to Clause 4.2.4 of the Agreement, stating that:*

*The Department undertakes to: ... vest the concessionaire with the right of first refusal in respect of the shareholding in [the Refinery] (or any part thereof) if a decision is taken on the sale (privatisation) thereof.*

*Apart from a remark in ... [Claimant-investor's] the Statement of Claim that 'It was [Claimant-investor]'s understanding that [Respondent- Kazakhstan]'s intention was to*

*privatise [the Kazakh Company] and to do so within a time period of approximately 18 months," the Tribunal notes—without taking any position at this time on the relevance thereof—that [Claimant-investor] cannot be found to have documented or explained the further basis for its expectation that the option to buy the shares in [the Kazakh Company] would materialize.*

*If this is relevant for [Claimant-investor]'s claim for lost profit, [Claimant-investor] is invited to submit further documentation or explanation thereof not later than ....*

[Claimant-investor] has chosen not to give any further explanation or documentation concerning the prospects of [Respondent-Kazakhstan]'s deciding to sell its shares or any part thereof.

Since it is common knowledge that the Kazakh state has carried through a considerable number of sales of state enterprises to private owners, the Tribunal also inquired at the hearing whether there were, or are, any policy decisions or declarations that might throw light on the probability of the sale of the state's shares in [the Kazakh Company]. In response hereto, [Respondent-Kazakhstan] [the Tribunal's Italics] contended at the hearing that there was a general policy for privatising. The Ministry of Energy [in Kazakhstan] had designated several refineries and other energy properties to be privatised, and they were privatised, sold. ... Those [refineries] were sold by the Ministry of Energy through the State Property Committee. [The Refinery] was never put on any list by the Ministry of Energy of properties to be privatised. No evidence was adduced in support of these contentions, [...] nor did [Claimant-investor] object to [Respondent-Kazakhstan]'s contentions.

The Arbitral Tribunal must conclude that [Claimant-investor] has not proved that there was any degree of certainty or even probability that [Respondent-Kazakhstan] would decide to sell its shares in [the Kazakh Company], or any part thereof, and therefore has not proved that it has a damage claim on the basis of the conditional right to first refusal in respect of the state shareholding in [the Kazakh Company] [...]. The claim must therefore be *rejected* [the Tribunal's Italics].

b) Another consideration leads to the same conclusion. A claim for damages under Clause 7.1 of the Agreement or a claim under any other provision of the Agreement must necessarily refer to damages inflicted by the action resulting in the damage, in this case the damage caused by [Respondent-Kazakhstan]'s termination of the Agreement .... By that time, [the Kazakh Company] had definitely and permanently lost virtually all its assets, and [the Kazakh Company] no longer had adequate assets to produce Refinery profits over 20 years as calculated. The value of the shares, and of a right to buy the shares, was clearly nil.

Also, for this reason [Claimant–investor]’s claims must be *rejected* [the Tribunal’s Italics].

## (7) Concept of Expropriation, “Creeping” or “Covert” Expropriation

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### *The Claim for Loss of Profits Based on Expropriation Under the Foreign Investment Law*

#### Introduction

[Claimant–investor] asserts that a number of measures taken by [Respondent–Kazakhstan] amount to expropriation and constitute a breach of Article 7 of the Foreign Investment Law [of Kazakhstan], as well as customary international law. Reference is also made to Article 8 of the Foreign Investment Law.

[Claimant–investor] contends that [Respondent–Kazakhstan] is responsible, pursuant to international law, see Article 4 of the International Law Commission’s Draft Articles on State Responsibility, for actions taken by its state organs, including the Prosecutor General and the Kazakh courts, and officials of such organs. [Claimant–investor] also contends that [Respondent–Kazakhstan] has breached Article 7 of the Foreign Investment Law, as well as customary international law, when it—in its capacity as contracting Party—took away [Claimant–investor]’s contractual rights by unlawfully terminating the Agreement.

At the hearing, [Claimant–investor] listed the measures allegedly amounting to expropriation as follows:

- *Mandatory deliveries of oil products to the state owned agricultural companies.*
- *The court proceedings between [Company X] and [the Kazakh Company] which resulted in the transfer of ownership of a substantial part of the property of [the Kazakh Company] to [Company X].*
- *The Refusal in the spring of 2000 to extend the Power of Attorney.*
- *The proceedings initiated and pursued by the General Prosecutor resulting in the, procedurally and materially unlawful termination of the Agreement.*
- *The subsequent re-transfer of the management of [the Kazakh Company] from [Claimant–investor] to [Respondent–Kazakhstan].*

With regard to the mandatory deliveries to the agricultural organizations, the Arbitral Tribunal notes that according to the Government’s Order No. 187 of 9 March 1998 instructions were issued for the provision of fuel supplies to agricultural organisations. In this order various refineries – not only [the Kazakh Company] – were ordered to supply oil among them.

However, the Order does not conclusively show that the Refinery was saddled with more onerous terms than any other refinery instructed to provide oil supplies to agricultural organisations. The Government's Order does not therefore, without more, provide any substantiation that the Refinery has been subjected to discriminatory treatment, which would create liability under any foreign investment protection scheme.

### *Price Regulation for Oil*

Although they are not asserted in connection with the claim for expropriation compensation, the Tribunal also notes that [Claimant–investor] has asserted several measures that are said to be discriminatory, among them a price regulation for oil. By an Order No. 210 of 22 July 1999 [of Kazakhstan] certain price limits were determined, KZT 1700 for [refinery A, another refinery not related to this dispute], KZT 1800 for [refinery B, another refinery not related to this dispute] and KZT 1680 for [the New Kazakh Company]. It is stated [in the Order No. 210] that prices are determined in “consideration for oil products storage periods.” Without further explanation the Tribunal is at a loss in assessing whether the reference to “storage periods” was a rational and non-discriminatory parameter for fixing varying price levels. However, there is in any event no price variation of any seemingly significant character and the Tribunal cannot conclude that the price differences are of a discriminatory nature.

[Claimant–investor] contends that the compensation due for the alleged expropriation is USD [262 million], equal to the compensation for lost future profits claimed under the Agreement, ...

For an action, or a group of actions, to be classified as expropriation under the Foreign Investment Law or customary international law, certain criteria must be satisfied.

“Article 7 of the Foreign Investment Law reads as follows:

#### *Article 7. Guarantees Against Expropriation*

1. *Foreign investments may not be nationalized, expropriated, or subjected to other measures having the same consequences as nationalization and expropriation (hereinafter: expropriation)[the Tribunal's note], except for instances when such expropriation is effectuated in social interests in compliance with proper legal order and is done without discrimination and with payment of prompt, adequate and effective contributory compensation.*
2. *Contributory compensation must be equal to the fair market value of the investment being expropriated at the moment when the expropriation thereof became known to the investor.*
3. *Contributory compensation must include interest ...*

This exception for certain measures, with special guarantees for compensation to be paid, is in the Tribunal's view fully in accordance with the norms of customary international law. Neither the Foreign Investment Law of the Republic of Kazakhstan nor any bilateral or multilateral investment treaty seeks to proscribe the state's right to expropriate the assets of private individuals or entities. What the Foreign Investment Law and international law requires is that such expropriation meets certain criteria, i.e., that the expropriation is carried out in the public interest, on a non-discriminatory basis, is subject to due process of law and accompanied by prompt, adequate and effective compensation. Other measures, having the same consequences as nationalization or expropriation, fall outside the scope of this exception for lawful expropriations, but are covered, in the case of the Foreign Investment Law, by the state's guarantee against taking any such measures ...

The question is therefore whether the listed measures, separately or in combination, meet the conditions to be considered as expropriation under Article 7 of the Foreign Investment Law.

*Mandatory Deliveries of Oil Products to the  
Agricultural Sector*

The Arbitral Tribunal is satisfied that [the Kazakh Company] was under public orders to deliver oil products to the agricultural sector at least in 1997 and 1998. The Tribunal is also satisfied that other entities were subject to similar delivery orders, and there is no indication that [the Kazakh Company] was subject to arbitrary or discriminatory treatment.

To a large extent payment for the deliveries was guaranteed by the regional authorities, but [Claimant–investor] complains that the guarantees were not honored, nor did the state see to it that the deliveries were paid for. To some extent [Claimant–investor] ensured payment itself, by setting off tax liabilities against its claims for mandatory deliveries of oil products.

[Claimant–investor] does not claim expropriation compensation for the expropriation of oil products to the agricultural sector. In any event, the quantities of delivered oil products and the value thereof have not been documented in such a form and detail as to form basis for an award of such compensation.

[Claimant–investor] rather appears to claim that the forced deliveries of oil products without proper payment contributed to the worsening of [the Kazakh Company]'s financial situation, which [...] as a result [...] the company was unable to pay its creditors and lost all its assets due to the creditors collecting on their claims. However, the Arbitral Tribunal finds

that it is sufficiently clear from the evidence with regard to the deliveries to the agricultural sector that the non-payment for some of these deliveries was not in itself capable of causing the bad financial position and the consequential loss of [the Kazakh Company]'s assets, and its contribution to the final removal of [the Kazakh Company]'s assets must be considered too insignificant to qualify the mandatory deliveries of oil products as part of an expropriation of [the Kazakh Company]'s assets under the Foreign Investment Law or international law. <sup>2</sup>

*The Court Proceedings Between [Company X] and [the Kazakh Company], Which Resulted in the Transfer of Ownership of a Substantial Part of the Property of [the Kazakh Company] to [Company X]*

The court proceedings between [Company X] and [the Kazakh Company] and the resulting transfer of ownership of a substantial part of the property of [the Kazakh Company] to [Company X] are in evidence, ...

Another element of an expropriation concept is normally that the property is acquired by a public institution, or in the public interest. In this connection, [Claimant–investor] contends that the major part of the Refinery's assets were transferred to the ownership of [Company X], which until the spring of 1999 was wholly owned by [Kazakhstan], and now is operated by, and possibly owned by, a subsequently formed Kazakh company, [Petrochemical Company]. According to [Claimant–investor] [Petrochemical Company] is owned 51 per cent by [Company X] and 49 per cent by the Kazakhstan Government. With the Kazakhstan Government said to hold 30 per cent of the shares in [Company X], the Government is purported to own beneficially 64.3 per cent of [Petrochemical Company] through these shareholdings. [Claimant–investor] has also asserted, without presenting any evidence, that this transfer of the Refinery's assets from [the Kazakh Company] to the new group emerged was the realization of a "hidden scheme" [of Kazakhstan] to re-posses the Refinery, ...

[Respondent–Kazakhstan] denies the existence of any such "scheme" and asserts that the unfortunate development was the result of appropriate legal action undertaken by [the Kazakh Company]'s creditors for which [Claimant–investor] is liable.

The Arbitral Tribunal finds that what ultimately caused [Claimant–investor]'s loss of control and ability to manage the Refinery was the attachment of most of its assets in debt collection proceedings pursued by [Company X], which had decided to cash in on its claims which had existed before the commencement of the management of the Refinery by [Claimant–investor]. Such measures by [Company X] cannot be qualified as acts of state even if there was any state ownership in [Company X].

Investment protection is not in place to safeguard a foreign investor from the adverse effects of economic adversity, fully apparent at the time of investment, facing entities. Neither does it provide any safeguards against the vagaries of loss-making business operations generally.

The Tribunal notes that the confiscation or expropriation of property or other rights may take the form of “creeping” or “covert” encroachment on private assets, whereby the owner of the property or rights is exposed to measures which make the enjoyment of the rights impossible or essentially reduced and forces the owner to abandon his ownership or rights.

The Tribunal has considered the Government [of Kazakhstan]’s actions and the developments in the present case in this perspective. In theory, the government might have left the old debt in [the Kazakh Company] not provided for, as an unexploded time bomb, only to explode it in the form of a creditor action by its wholly owned company [Company X] and cash in on [Claimant–investor]’s investments and the increase of the working capital after they had been made in accordance with the Agreement. Or the Government [of Kazakhstan] might conceivably have imposed on [the Kazakh Company] mandatory deliveries to the agricultural sector, or might have imposed a discriminatory VAT [value added tax], an excise tax, and other measures listed by [Claimant–investor], for the purpose of worsening the financial position of [the Kazakh Company] and preparing for a termination of the Agreement on account of [Claimant–investor]’s and [the Kazakh Company]’s inability to perform obligations under the Agreement. However, [Claimant–investor] has not shown, and the Tribunal has not discovered, any evidence or indication that such motivation lies behind any of the Government’s actions in connection with the Agreement. What is in evidence is that both parties to the Agreement were fully aware, or ought to have been aware, that [the Kazakh Company] as a separate legal entity was in a very difficult financial position, but nevertheless they entered into a commercial contract where both parties openly left considerable [the Kazakh Company] debts and obligations not provided for, and thereby openly took the risk that [the Kazakh Company] might go bankrupt or be deprived of its assets and means of further activity. There is nothing in the situation, or the evidence presented, to cause the Tribunal to conclude that [Claimant–investor] has been exposed to any “creeping” or “covert” expropriation. Both Parties have been exposed to the consequences of the risks that they undertook when entering into the Agreement.

The *conclusion* [the Tribunal’s Italics] is therefore that a claim for expropriation compensation on account of the creditors’ collecting on their debt is unfounded.

*The Refusal in the Spring of 2000 to Extend the  
Power of Attorney*

It is in evidence that the Power of Attorney was not renewed when the first Power of Attorney expired on 13 February 2000, ...

[Claimant–investor] has not explained how the failure to renew or extend the Power of Attorney could amount to expropriation, either separately or as a contributing factor in conjunction with the other circumstances listed by [Claimant–investor].

...the Parties may at the time have labored under the conviction that a renewal or extension was legally necessary, in the sense that without a Power of Attorney the Agreement would cease to be in force. If that [would] be the case, a refusal to renew or extend the Power of Attorney would in effect amount to a termination of the Agreement. Be that as it may, the fact of the matter is that the question of a new Power of Attorney never came to the point of a definite refusal. No claims or legal arguments have been based on the lapse of the first Power of Attorney or the failure to renew or extend it after 13 February 2000.

Therefore, this factor cannot amount to, or contribute to, the alleged existence of expropriation within the meaning of the Foreign Investment Law or international law.

*The Proceedings Initiated and Pursued by the General Prosecutor Resulting  
in the Procedurally and Materially Unlawful  
Termination of the Agreement*

- a) The first question hereunder is, what is considered to be the object of this alleged expropriation. To judge from the calculation of the claim, the object is the alleged expropriation of rights under the Agreement, and in particular expropriation of [Claimant–investor]’s right to first refusal in the event that [Respondent–Kazakhstan] should decide to sell its shares in [the Kazakh Company], or a part thereof.
- b) The next question hereunder is whether the intrusion into the contractual relationship of the Parties, by the Prosecutor General and subsequently by the courts, is tantamount to expropriation. As concluded ...above, the legal effect internally in Kazakhstan, and the factual effect, of the actions by the Prosecutor General and subsequently by the courts and [the Kazakh Committee for State Property and Privatization], was that the Agreement, and with it the right to first refusal, were terminated and that this was an act of [Respondent–Kazakhstan]. It must therefore be

concluded that the actions here in question were tantamount to an expropriation.

- c) A further question is, however, what losses were caused by this expropriation, ...

It is a fact that the transfer of ownership of assets to [Company X] was finalized already on 18 October 1999, i.e., prior to the General Prosecutor's action. Whether or not the intention of the Prosecutor General and the courts was to deprive [Claimant-investor] of its right of first refusal, what is due for compensation for an expropriation is the value of the expropriated object at the time the expropriation is executed. As concluded above, the value of the right to first refusal was undoubtedly reduced to nil at the time the expropriation took place.

No expropriation compensation is therefore due on account of the Prosecutor General's and the subsequent courts' and the Committee's actions to terminate the Agreement.

*The Subsequent Re-transfer of the Management of [the Kazakh Company] from [Claimant-investor] to [Respondent-Kazakhstan]*

As considered ...above, the re-transfer of the management of [the Kazakh Company] from [Claimant-investor] to [Respondent-Kazakhstan] was made by [Claimant-investor] subsequent to and in consequence of the termination of the Agreement by the Kazakh courts.

[Claimant-investor] has not explained how this act, performed by itself, can constitute an act of expropriation, or contribute to the constitution of an expropriatory act in conjunction with other circumstances asserted by [Claimant-investor].

The Arbitral Tribunal does not find that [Claimant-investor]'s acceptance of the unavoidable by formally making the transfer back to [Respondent-Kazakhstan] constitutes an act of expropriation.

*The Cumulative Effect of the Circumstances Referred to as Constituting an Expropriation*

It follows from the separate analyses above of the circumstances referred to by [Claimant-investor] that there is no legal basis for finding that the cumulative effect of the circumstances referred to may lead to any different conclusion. In particular, there is no legal basis for combining the results of the creditors' actions and the termination of the Agreement by the courts (subsequently reiterated by the Committee) to conclude that there was an

expropriation or that there was damage suffered and on that basis to conclude that expropriation compensation is due.

### Conclusion

The Arbitral Tribunal *concludes* [the Tribunal's Italics] that the claim for expropriation compensation under the Foreign Investment Law and customary international law should be rejected.

### Arbitral Award

... the Arbitral Tribunal unanimously renders ...

1. The claims of [Claimant–investor], brought under the arbitration clause of the Agreement ... are dismissed.
2. The claims of [Claimant–investor], brought under the arbitration of the Foreign Investment Law of 27 December 1994 of the Republic Kazakhstan, are dismissed.
3. arbitrators and the Arbitration Institute shall be entitled to fees and compensation for expenses ...
  - a) Arbitrators' fees:
  - b) Arbitrators' expenses
  - c) The Arbitration Institute fee
4. As between the Parties, [Claimant–investor] shall be responsible for 50 per cent and [Respondent–Kazakhstan] shall be responsible for 50 per cent of the amounts due in this arbitration to the arbitrators and the Arbitration Institute.

In relation to the arbitrators and the Arbitration Institute, the Parties shall be jointly and severally liable for the payment of the amounts due to the arbitrators and the Arbitration Institute.

### III. Supplemental Award and Interpretation Rendered in 2004 in SCC Case 122/2001

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#### Subject Matters:

- (1) Enforcement of the Tribunal's decision on costs—whether the Tribunal can issue award or order to enforce its decision on costs.
- (2) Correction of the award based on miscalculation.

#### Findings:

- (1) There is no requirement under the SCC Rules or Swedish law applicable to the arbitration that the Arbitral Tribunal shall issue

any such award and order on its own accord to order one party to pay its part of arbitration costs.

- (2) The Arbitral Tribunal's substantive finding on value is not a miscalculation within the meaning of the SCC Rules.

**(1) Enforcement of the Tribunal's Decision on Costs  
—Whether the Tribunal can Issue  
Award or Order to Enforce its Decision on Costs**

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*Claimant–investor's Position*

Claimant-investor requests the Arbitral Tribunal to issue “an award and order for [Respondent–Kazakhstan] to pay [Respondent–Kazakhstan's part of arbitration fees and costs as decided in the final award], plus any legal costs in enforcing the final award, in a form which can be turned into a legal judgment.”

*The Tribunal's Findings*

According to Article 37 (2) [of the SCC Rules], “the Arbitral Tribunal shall, if a party so requests, decide a question which should have been decided in the Award but which has not been decided therein.”

The Tribunal notes that [Claimant–investor] made no request during the arbitral proceedings that the Tribunal should issue an award ordering [Respondent–Kazakhstan] to pay its part of the advances, or of the fees and costs finally determined by the Arbitration Institute. Nor does it follow from the SCC Rules or Swedish law applicable to this arbitration that the Arbitral Tribunal shall issue any such award and order on its own accord. There is no practice to support that an arbitration under the SCC Rules should contain such an order. Consequently, the requested award and order is not a matter that should have been decided in the award. The consequence of the Tribunal's determination that [Respondent–Kazakhstan] is responsible for 50 per cent of the costs ... is for an appropriate court to determine.

The request is therefore rejected.

**(2) Correction of the Award Based  
on Miscalculation**

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*Claimant–investor's Position*

According to Article 37 (1) [of the SCC Rules], any obvious miscalculation shall be corrected. [Claimant–investor] asserts miscalculation,

but does not specify which calculation(s) it considers to be obvious miscalculation(s).

*The Tribunal's Findings*

The award contains only one calculation made by the Tribunal, namely the conversion of the arbitrators' expenses into EURO, ... The Tribunal finds no obvious miscalculation therein.

[Claimant–investor] refers to the Arbitral Tribunal's finding concerning the value of [the Kazakh Company] at a certain point in time, and asks for a "recalculation" based on [Claimant–investor]'s contentions as to the value of [the Kazakh Company]. The Tribunal's finding in this respect is not a miscalculation within the meaning of Article 37 (1), nor is it based on any such calculation.

The Tribunal adds that [Claimant–investor] during the arbitral proceedings presented several calculations of its alleged losses. [Claimant–investor]'s calculations are accounted for in the [final award], ... Obviously, [Claimant–investor]'s contentions, in the form of calculations, may be refuted on substance but may not be the subject of re-calculation by the Tribunal pursuant to Article 37 (1).

For the above reasons, the request for recalculation is rejected