INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
CASE NO. ARB/08/12

CARATUBE INTERNATIONAL OIL COMPANY LLP,
CLAIMANT

V.

THE REPUBLIC OF KAZAKHSTAN,
RESPONDENT

Arbitral Tribunal:
Prof. Dr. Karl-Heinz Böckstiegel, President
Dr. Gavan Griffith QC, Arbitrator
Dr. Kamal Hossain, Arbitrator

Decision
Regarding Claimant's Application for Provisional Measures

Date of Decision: 31 July 2009

Claimant:	Caratube International Oil Company LLP
Claimant's counsel:	Judith Gill QC Matthew Gearing Jan K. Schaefer Anthony Sinclair Alexander Thavenot Henrietta Jackson-Stops Allen & Overy LLP
Respondent:	The Republic of Kazakhstan
Respondent's counsel:	Peter Wolrich Geoffroy Lyonnet Galileo Pozzoli Gabriela Alvarez Avila Askar Moukhitdinov Curtis, Mallet-Prevost, Colt Mosle LLP

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Abbreviations

BIT	Bilateral Investment Treaty Kazakhstan – United States of 19 May 1992
C-I	Claimant's Request for Arbitration of 16 June 2008
C-II	Claimant's Request for Provisional Measures of 14 April 2009
C-III	Claimant's Amended Request for Provisional Measures of 29 April 2009
C-IV	Claimant's Memorial of 14 May 2009
CIOC	Caratube International Oil Company
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965
MEMR	Kazakhstan's Ministry of Energy and Mineral Resources
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
KNB	Kazakhstan's Committee of National Security
p.	Page
para.	Paragraph
paras.	Paragraphs
R-I	Respondent's Summary Reply to Request for Arbitration of 31 March 2009
R-II	Respondent's Response to the Claimant's Request for Provisional Measures of 15 June 2009
Tr.	Transcript of London Hearing on 30 June 2009
VCLT	Vienna Convention on the Law of Treaties
Zapkaznedra	Western Kazakhstan Territorial Administration of Geology and Subsoil Use, a subdivision of Kazakhstan's Ministry of Energy and Mineral Resources

A. The Parties

The Claimant	Caratube International Oil Company LLP
Represented by	Judith Gill QC Matthew Gearing Jan K. Schaefer Anthony Sinclair Alexander Thavenot Henrietta Jackson-Stops Allen & Overy LLP One Bishops Square London E1 6AD United Kingdom
The Respondent	The Republic of Kazakhstan
Represented by	Peter Wolrich Geoffroy Lyonnet Curtis, Mallet-Prevost, Colt & Mosle LLP 6, avenue Vélasquez 75008 Paris France Galileo Pozzoli Curtis, Mallet-Prevost, Colt & Mosle LLP Corso Venezia, 5 20121 Milano Italy Gabriela Alvarez Avila Curtis, Mallet-Prevost, Colt & Mosle S.C. Ruben Dario 281 Piso 9 Col. Bosque de Chapultepec 11580 Mexico City Mexico Askar Moukhitdinov Curtis, Mallet-Prevost, Colt MosIe LLP The Nurlay-Tau Centre 13 al-Faraby Street Block 1-V, 4th floor, Suite 5 Almaty, Kazakhstan 050059

B. The Tribunal

Professor Dr. Karl-Heinz Böckstiegel, President
Parkstrasse 38
D-51427 Bergisch-Gladbach
Germany

Dr. Gavan Grifith QC
Essex Court Chambers
24 Lincoln's Inn Fields
London WCA 3 EG
United Kingdom

Dr. Kamal Hossain
Dr. Kamal Hossain and Associates
Chamber Building, 2nd Floor
122-124 Motijheel Commercial Area
Dhaka 1000
Bangladesh

C. Short Identification of the Case

C.I. The Claimant's Perspective

1. The following quotation from the Claimant's Request for Arbitration summarizes the main aspects of the dispute as follows (C-I, paras. 1-7):

-

"1. […] Claims in this arbitration relate to breaches of the [USA-Kazakhstan BIT][1] and also breaches of Contract No. 954 dated 27 May 2002 (as amended) (the "Contract") which provided for the exploration and production of hydrocarbons within parts of Blocks XXIV-20-C and XXIV-21-A including the Caratube Field in the Baianin District of the Aktobe Oblast region of Kazakhstan (the "Field").

2. In short, following five years of successful and harmonious operation during which time the Claimant made very substantial investments in the Field, from September 2007 the relationship between the parties suddenly and dramatically deteriorated, apparently for reasons unconnected with the contractual performance of [Claimant]. By order of 30 January 2008 the Minister of Energy and Minerals Resources (the "Minister") purported to inform [Claimant] that the Contract was "unilaterally terminated". [Claimant] denies that it was in breach of the Contract or failed to fulfil its obligations as alleged or at all.

3. The Kazakh Ministry of Energy and Mineral Resources (the "Ministry"), acting on behalf of the State, has acted in flagrant breach of the Contract by purporting unilaterally to terminate Claimant's rights in circumstances where there is no justification for doing so. Furthermore, Claimant, together with its principal shareholder and his family, as well as senior management and employees of Claimant, have been subjected to a campaign of sustained and unlawful harassment. In particular there has been a series of protracted, intrusive and burdensome investigations into the affairs of Claimant conducted by various authorities, including the finance police, state prosecutors, the police force, secret services and the tax authorities. Claimant's principal shareholder and his family, as well as senior management and employees of Claimant, have also been subjected to personal threats and intimidation.

4. Kazakhstan has repeatedly breached not only its obligations under the Contract but also its obligations under both international and Kazakh law with respect to [Claimant's] investment in Kazakhstan. These breaches have

[1] The Treaty is attached as Exhibit C-1.

caused very substantial loss and damage to Claimant, not least because Claimant stood to make at least 2 USD billion from the Production stage of the reserves it had already identified in the Exploration stage of the Contract. Claimant commences these proceedings to enforce its rights, and seeks compensation for the loss and damage which it has suffered as a result of Kazakhstan's breaches.

B.1 The Claimant

5. The Claimant, CIOC, is a corporation constituted under the laws of Kazakhstan, with legal domicile at 92A Polezhaeva St., Zhelysusskiy Region Almaty, 050050, Republic of Kazakhstan.

6. CIOC is directly owned by nationals of the United States of America and the Republic of Lebanon, namely:

(a) Mr Devincci Salah Hourani, a national of the United States of America, who owns 92% of the shares of CIOC.
(b) Mr Kassem Omar Abdallah, a national of the Republic of Lebanon, who owns the remaining shares of CIOC.

7. Accordingly, 92% of CIOC's shares are controlled directly or indirectly by a US national."

2. Claimant's Memorial on the Merits of 14 May 2009 (C-III, paras. 7-12) contains the following Executive Summary of the case:

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

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

9. For five years CIOC had successfully, and without any serious controversy, pursued its investment. New oil wells were drilled and Soviet-era ones were reopened, extensive geological testing and exploration work was carried out, infrastructure was installed at the field and pilot production commenced. Suddenly in mid 2007, the political landscape changed. A political rivalry that had developed between President Nazarbayev and his powerful son-in-law, Rakhat Aliyev flared into open hostility. In Kazakhstan's campaign to

persecute Rakhat Aliyev that followed, it seems it became no longer politically convenient for Kazakhstan to allow CIOC to continue its business since the brother of Devincci Hourani, CIOC's majority owner, is Rakhat Aliyev's brother-in-law. A reasonable person might have thought that CIOC was sufficiently far removed from the dispute between the President and Rakhat Aliyev however, in Kazakhstan, "politics is a family affair"[2]. Family, business partners and associates of Rakhat Aliyev have all been victimised in the course of the fall out between the President and Mr Aliyev.

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

11. Kazakh officials concocted unsubstantiated allegations that CIOC was in breach of its contractual obligations as a pretext for what was no more than a politically-motivated campaign against the company and its owner. CIOC's answers to these allegations went unheard and unanswered. In its haste to purport to terminate the Contract, Kazakhstan also failed to follow the stipulated legal procedures.

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

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

C.II. The Respondent's Perspective

3. In its Summary Reply to Claimant's Request for Arbitration Respondent inter alia states (R-I, para. 6):

> *"6. […] Respondent will show that all of the claims currently brought by Claimant relate to lawful actions the Republic took in an effort to obtain that to which it was rightfully entitled, namely Claimant's proper performance of the Contract. Despite Claimant's contention to the contrary, Respondent will demonstrate that the termination notices issued by the Republic were justified."*

D. Procedural History

4. On 16 June 2008 Claimant filed the Request for Arbitration against the Republic of Kazakhstan pursuant to the USA-Kazakhstan Bilateral Investment Treaty of 19 May 1992, following the unilateral termination of the contract No. 954 of 27 May 2002 (as amended) in relation to the exploration and production of hydrocarbons, inter alia in the Caratube Field, by the order of the Minister of Energy and Mineral Resources of Kazakhstan dated 30 January 2008.

5. On 23 February 2009 the Tribunal was constituted. By ICSID letter of 23 February 2009 the Parties were also informed that Mr. Tomás Solís, Counsel, ICSID, would serve as the Secretary of the Tribunal.

6. In a letter of 25 February 2009, the Secretary of the Tribunal Mr. Tomás Solís drew the attention of the Parties to ICSID Administrative and Financial Regulation 14 which provides for periodic advance payments to be made to the Centre by parties to ICSID arbitration proceedings in order to enable the Centre to meet the costs of such proceedings, including the fees and expenses of arbitrators. The Centre estimated, after consultation with the President of the Tribunal, that an amount of US$200,000 (two hundred thousand United States dollars) would be required to meet the costs to be incurred in the proceeding during the next three to six months, including the costs related to the first session of the Tribunal. Pursuant to ICSID Administrative and Financial Regulation 14(3)(d), each party was accordingly requested to pay the sum of US$100,000 (one hundred thousand United States dollars). Pursuant to Regulation 14, each advance payment of US$100,000 (one hundred thousand United States dollars) was to be made in full thirty days after the request for payment has been made, i.e., on or before 27 March 2009 to the account of the International Bank for Reconstruction and Development (Account holder) in New York.

7. The Tribunal, by letter of 25 February 2009, referred to Rule 13 of ICSID Arbitration Rules which provides that the first session of the Tribunal should take place within 60 days after the Tribunal's constitution, unless the Parties agree otherwise, and proposed to hold the First Session at the Frankfurt International Arbitration Centre, Germany, on 16 April 2009. Parties were invited to submit any observations concerning the date and venue by 4 March 2009. The President of the Tribunal further invited the Parties to confer and jointly advise the Tribunal by 25 March 2009 of any points of the provisional agenda attached, on which they were able to reach agreement.

8. By letter of 26 February 2009 the President wrote to Respondent referring to Respondent's reservation of all defenses to the claims asserted in the present proceeding, including jurisdictional defenses, as stated in different letters from the Respondent, such as that of 17 February 2009. The Tribunal informed the Respondent that *"the Tribunal would be grateful if the Respondent could submit, by March 31, 2009, and without prejudice to later submissions, a short Summary Reply to the Claimant's Request for Arbitration in order to have a more balanced picture of the dispute before the First Session."*

9. By letters of 3 and 4 March 2009 respectively both Parties agreed with the venue and date for the First Session of the Tribunal (as proposed by Tribunal's letter of 25 February 2009).

10. The President of the Tribunal informed the Parties by letter dated 10 March 2009 of the precise time (9.30 am) and the exact venue (room) for the First Session of the Tribunal. The President of the Tribunal further asked the Parties to submit, by 25 March 2009, a list of the persons who would be attending the session, indicating their affiliation to the relevant Party.

11. By letter of 25 March 2009 Claimant informed the Tribunal that both Parties were working on the matters set out on the draft agenda (as proposed by the Tribunal in a letter of 25 February 2009) and – in the name of both Parties – requested an extension until 3 April 2009.

12. The Tribunal, by letter of 25 March 2009, communicated its agreement to the Parties' proposal to send a joint submission on the matters set out in the draft agenda of the first session on or before 3 April 2009.

13. On 31 March 2009 Respondent submitted its Summary Reply to Claimant's Request for Arbitration.

14. By Joint Submission of 3 April 2009 the Parties informed the Tribunal about the items on the agenda of the First session on which they were able to reach agreement.

15. On 14 April 2009 Claimant filed a Request for Provisional Measures. The Request was accompanied by a file of supporting materials comprising 31

exhibits (referenced as Annexes 1 to 31) and eight legal authorities (Annexes 32 to 39).

16. On 16 April 2009 the Tribunal held its First Session at the Frankfurt International Arbitration Centre, Frankfurt Chamber of Commerce, Börsenplatz 4, 60313 Frankfurt and discussed procedural matters with the Parties.

17. The First Session on 16 April 2009 was attended by:

(a) Members of the Tribunal:
Professor Dr. Karl-Heinz Böckstiegel, President
Dr. Kamal Hossain, Arbitrator
Dr. Gavan Griffith QC, Arbitrator (absent)

(b) ICSID Secretariat:
Mr. Tomás Solís, Secretary of the Tribunal

(c) Attending on behalf of the Claimant:
Mr. Devincci Hourani, Caratube International
Mr. Qassim Omar, Caratube International
Mr. Omar Antar, Caratube International
Ms. Judith Gill, Allen & Overy LLP
Mr. Jan Schäfer, Allen & Overy LLP

(d) Attending on behalf of the Respondent:
Mr. Peter M. Wolrich, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Gabriela Alvarez Avila, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Geoffroy Lyonnet, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Galileo Pozzoli, Curtis, Mallet-Prevost, Colt & Mosle LLP

18. The draft version of the Minutes of the First Session of 16 April 2009 was provided to the Parties by letter of 23 April 2009. Parties were given time until 30 April 2009 for commenting on the contents of the draft minutes.

19. In a letter of 24 April 2009 Claimant informed the Tribunal about the raids of Claimant's regional office in Actobe (16 April 2009), its head office in Almaty (17 April 2009) and its site office at Caratube oilfield (17 April 2009) by officers of the Kazakhstan's Committee of National Security (KNB). Representatives of KNB, which is Kazakhstan's security and intelligence agency, searched the offices and seized *"voluminous records including documents, files, computer disks and hard drives, and other materials"*. The letter also reported that *"KNB officers interrogated CIOC staff. The officers expressly stated that they were seeking information to establish that Mr Devincci Hourani is not in fact the majority owner of CIOC"*. Claimant stressed that the raids took place on the day of the first session of the Tribunal and the next day. The letter of the Claimant was accompanied by Protocols of Search and requested the issuance of provisional measures by the Tribunal..

20. By letter dated 27 April 2009 the Tribunal invited the Respondent to submit any comments concerning provisional measures as requested by Claimant in its letter of 24 April 2009 by 29 April 2009.

21. By letter of 29 April 2009 Respondent submitted brief comments on Claimant's requests for provisional measures and referred to the timetable agreed upon in the first session on 16 April 2009 which provided for a deadline of 15 June 2009 for Respondent to submit a response to the Request for Provisional Measures.

22. On 29 April 2009 Claimant submitted the Amended Request for Provisional Measures. From Claimant's perspective the amendment of the initial Request for Provisional Measures became necessary following the raids by KNB officers on 16, 17 and 26 April 2009 at Caratube oilfield. Claimant introduced three new exhibits (C-50 to C-52) and provided a consolidated index of the Claimant's exhibits and authorities.

23. Respondent confirmed by letter of 30 April 2009 that it had reviewed the draft Minutes of the First session and had no comments in this respect.

24. Claimant by letter of 30 April 2009 commented on the draft Minutes of the Hearing of 16 April 2009 and proposed two clarifications.

25. The final version of the minutes of the First Session of the Tribunal was sent to the Parties on 4 May 2009 including the following provisions relevant in the present context:

"I. PROCEDURAL MATTERS

…5. Applicable Arbitration Rules (Convention Article 44)
The ICSID Arbitration Rules as amended and effective on 10 April 2006, shall apply to the proceedings.

6. Place of Proceeding (Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3))
The Parties agreed that the place of the proceeding shall be Frankfurt, Germany, although individual hearings may take place elsewhere if the Parties and the Tribunal so agree.

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

14.7. By 15 January 2010:
Parties exchange document requests (if any) without sending copies to the Tribunal.

14.8. By 1 February 2010:
Parties try to agree on document requests, if any.

14.9. By 19 February 2010:
In so far as they have not reached agreement, the Parties may submit reasoned applications to Tribunal in the form of "Redfern Schedules", to order the production of documents.

14.10. By 19 March 2010:
Tribunal rules on applications.

14.11. The parties shall produce the documents so ordered by 16 April 2010.

II. OTHER MATTERS

20. Claimant's Application for Provisional Measures
The Tribunal noted that the Claimant submitted on 14 April 2009 a request for provisional measures.
The Respondent shall submit its response to the Claimant's request for provisional measures on 15 June 2009 (within two months from the first session). The Respondent noted that, if necessary, it may request an extension of this deadline.

A hearing on provisional measures is provisionally fixed by 30 June 2009 in London, if considered necessary by the Tribunal after consultation with the Parties.

If the need arises, the Tribunal shall request from the parties additional information prior to issuing its decision on the Claimant's request."

26. By letter of 4 May 2009 the Tribunal informed the Parties that in view of the new developments reported by Claimant and the Amended Request for Provisional Measures it considered necessary to hold a Hearing on Provisional Measures in London on 30 June 2009. The venue of the hearing, which would start at 9.30 am, would be the International Dispute Resolution Centre (IDRC) located at 70 Fleet Street, London. In the same letter the Tribunal stated that Respondent should submit its Reply Memorial to the Claimant's Requests by 15 June 2009 and underlined that no extension of this date could be granted in view of the above.

27. By letter of 11 May 2009 the Parties were informed that in accordance with § 21 of the Minutes of the First Session the President of the Tribunal - in view of the urgent developments of the procedure regarding provisional measures - appointed Mr. Dmitry Marenkov as Assistant. The Parties were invited to submit any comments they might have by 14 May 2009. No comments were received from the Parties.

Pursuant to the timetable agreed upon in the First session on 16 April 2009, Claimant on 14 May 2009 submitted its Memorial on the Merits.

28. In a letter dated 19 May 2009 Claimant referred to *"continued and intolerable events at the Claimant's branch office in Aktobe"*. The Claimant stated that travel and identity documents of two CIOC's Palestinian overseas workers (Mr. Rashid Badran and Mr. Nader Hourani) had been seized and remained confiscated. Claimant urged Respondent to return the respective documents and that *"If a resolution is not reached in the interim, these matters will be raised again at the hearing to take place in London on 30 June 2009"*.

29. By letter of 2 June 2009 the Tribunal sent the Parties a draft Procedural Order No. 1 regarding details of the Hearing in London on 30 June 2009 to deal with Claimant's Application for Provisional Measures. Parties were given the opportunity to comment on the contents of the draft Procedural Order No. 1 by 17 June 2009.

30. On 10 June 2009 Mr. K. Safinov, an Executive Secretary of Kazakhstan's Ministry of Energy and Mineral Resources, wrote a letter replying to Claimant's letter of 9 December 2008 dealing with issues of negotiations on the hand-over of the Contract Area (Exhibit R-1).

31. On 15 June 2009 Respondent submitted a Response to Claimant's Amended Request for Provisional Measures together with its exhibits (including four CD-ROMs).

32. By letters of 17 June 2009 both Parties confirmed that they had reviewed the draft Procedural Order No. 1 and had no comments thereon.

33. By letter of 18 June 2009 Parties were provided with the final version of Procedural Order No. 1 which stated:

"Procedural Order (PO) No. 1
Regarding details of the Hearing in London on June 30, 2009
To deal with Claimant's Application for Provisional Measures

The draft of PO-1 was sent to the Parties for comments by 17 June 2009. In view of the short time available after the Respondent's Response Brief due by 15 June 2009, and to allow input from the Parties before the Tribunal issues the PO in time before the hearing on 30 June, 2009, the draft was sent now, but subject to any reconsideration after that Response Brief has been submitted. Since the Parties have not suggested any changes in their submissions of 17 June 2007, it is now issued in its final version.

The ***direct mailing*** *of the Respondent's Response according to sections 3.1 and 3.2 below was made by 15 June 2009 before the PO is issued after 17 June.*

1. PLACE AND TIME OF HEARING:

1.1. The Hearing shall take place at the
International Dispute Resolution Centre (IDRC)
In London
70 Fleet Street
on June 30, 2009*.*

1.2. The hearing will commence at 9:30 a.m. and conclude at 1:00 p.m, unless otherwise determined by the Tribunal after consultation with the Parties.

1.3. Should the hearing not be extended into the afternoon, the Tribunal intends to deliberate on its decision that same afternoon.

2. Earlier Ruling

2.1. The Tribunal recalls from the Minutes of the 1st Session in this case:
§ 8 regarding Records of Hearings
§ 13 regarding Written and Oral procedures
§ 20 regarding the Procedure on Provisional Measures.

3. Preparatory Steps

3.1. In view of the very short time before the Hearing and to allow the members of the Tribunal sufficient time to evaluate the submissions, the submissions under sections 3.2 and 3.3 below shall be made, both by courier and by e-mail, not only to ICSID, but also ***directly to the addresses of the members of the Tribunal.*** *In that context, courier submissions to Co-Arbitrator Griffith shall be sent to his address at Essex Court Chambers, London.*

3.2. The Respondent's Response to the Claimant's Request due on ***15 June 2009*** *shall be made also directly to the addresses of the Tribunal as provided in section 3.1. above.*

3.3. ***By June 22, 2009****, the Parties shall submit*
1) lists of the persons attending the hearing from their respective sides,
2) any documents (in the form provided in § 9.8 of the Minutes of the 1st Session) they intend to rely on during the hearing in addition to the documents they have submitted with their briefs, accompanied by a short explanation of the documents newly submitted.

3.4. The Tribunal has taken note of the many and voluminous exhibits submitted by the Parties up to this point. As only a limited number of these exhibits will be used at the Hearing on Provisional Measures, to avoid that all exhibits have to be transported to London, the members of the Tribunal intend to bring to the Hearing what they consider the most relevant documents, but, in order to facilitate and speed up references to documents during the hearing,

the Parties shall prepare and provide in the hearing room ***at the beginning of the Hearing:***
** For the other Party and each member, the Secretary, and the Assistant of the Tribunal, "****Hearing Binders"*** *containing copies of those exhibits or parts of exhibits to which they intend to refer in their oral presentations at the Hearing,*
** one full set of all documents so far submitted in this procedure.*

4. Conduct of the Hearing

4.1. No new documents may be presented at the Hearing. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the timetable or with this Order.

4.2. The Tribunal has taken note of the written submissions by the Parties and there is no need to repeat the contents of such submissions.

4.3. Unless otherwise agreed between the Parties and the Tribunal, the ***Agenda of the Hearing*** *shall be as follows:*
1. Short Introduction by Chairman of Tribunal.
2. Opening Statement by Claimant of up to 30 minutes.
3. Opening Statement by Respondent of up to 30 minutes.
4. Questions by the Tribunal.
5. Closing Statements by the Claimant of up to 30 minutes.
6. Closing Statements by the Respondent of up to 30 minutes.
7. Further questions by the Tribunal, if any.
8. Discussion of any issues of the further procedure.
The members of the Tribunal may raise questions at any time, if considered appropriate.

5. Changes of Rulings
The Tribunal may change any of the rulings in this Order, if considered appropriate under the circumstances."

34. In its letter of 22 June 2009 (Exhibit C-138) Claimant's counsel referred to the letter by Mr. Safinov, Executive Secretary of the Ministry of Energy and Mineral Resources, of 10 June 2009 in which the latter replied to Claimant's letter of 9 December 2008 and expressed his interest and readiness to meet with Claimant's representatives to discuss the handover of the Contract Area:

"Notwithstanding this delay of over six months, our client remains willing to meet with representatives of the Ministry to discuss an orderly handover of the Contract Area. However, we propose that such a meeting should take place at the Contract Area on 24, 25, or 26 June 2009. [...] If the parties are not able to reach agreement as a result of that meeting, the Tribunal will still be able to consider CIOC's request for provisional measures as to the orderly handover of the Contract Area at the hearing in London on 30 June 2009."

35. By letter of 22 June 2009 Claimant – in accordance with para. 3.3 of PO 1 - provided a list of six individuals who would be attending the Hearing in London on 30 June 2009 on behalf of Claimant. Claimant's response of 22 June 2009 to Respondent's letter of 10 June 2009 (Exhibit R-1) was introduced as Exhibit C-138 and attached to this letter. Claimant stated that this letter might be relied upon during the Hearing on 30 June 2009.

36. Respondent informed the Tribunal by letter of 22 June 2009 with reference to PO No. 1 the persons who would be attending the Hearing concerning Claimant's Request for Provisional Measures on 30 June 2009 on behalf of the Respondent. Respondent further stated in this letter that it did not intend to rely during the hearing on any documents other than those that were submitted by the Parties with their briefs as of the date thereof.

37. By letter of 24 June 2009 Claimant informed that it wished to add Mr. Kassem Omar, minority participant in CIOC, to the list of attendees on behalf of the Claimant.

38. With reference to Claimant's letter dated 22 June 2009 Respondent by its letter of 24 June 2009 (Exhibit R-4) communicated that it was logistically impossible to organize the meeting on any of the dates (24, 25 or 26 June 2009) proposed by Claimant. Respondent confirmed its willingness to have constructive meetings at the Contract Area. However, Respondent would need – the letter further stated - to send a number of representatives to the meeting who could not be available on such short notice. Respondent's letter further stated that there were no conditions concerning the handover of the Contract Area beyond those stated in the letter of 10 June 2009 by Respondent's Mr. Safinov. Any specific terms would have to emerge from discussions between the Parties.

39. By e-mail of 29 June 2009 Claimant provided an Index of the Hearing Bundle listing Exhibits and Authorities relied upon by the Claimant. A further e-mail attachment contained Procedural Order No. 3 in the ICSID Case (No. ARB/05/22) *Biwater Gauff (Tanzania) Ltd.* v. *United Republic of Tanzania.*

40. A hearing on Claimant's Request for Provisional Measures was held on 30 June 2009 in London, UK. The Hearing was attended by:

(a) Members of the Tribunal:
Professor Dr. Karl-Heinz Böckstiegel, President
Dr. Kamal Hossain, Arbitrator
Dr. Gavan Griffith QC, Arbitrator

(b) Attending on behalf of the Claimant:
Ms. Judith Gill, Allen & Overy LLP
Mr. Matthew Gearing, Allen & Overy LLP
Mr. Anthony Sinclair, Allen & Overy LLP
Mr. Alexander Thavenot, Allen & Overy LLP

Mr. Omar Antar, Caratube International
Mr. Devincci Hourani, Caratube International
Mr. Kassem Omar, Caratube International

(c) Attending on behalf of the Respondent:
Mr. Peter M. Wolrich, Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Gabriela Alvarez Avila, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Geoffroy Lyonnet, Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Galileo Pozzoli, Curtis, Mallet-Prevost, Colt & Mosle LLP

41. A transcript of the Hearing was prepared by the court reporter Mrs. Claire Hill and provided by e-mail of 30 June 2009.

42. By letter of 1 July 2009 Claimant confirmed that its representatives would be able to attend the handover meeting on 8 and 9 July 2009. Claimant proposed *"that the aim of the meeting should be to agree an inventory of the infrastructure, equipment, and machinery at the Contract Area with a view to completing the full handover of the Contract Area on an 'as is' basis by the end of the meeting"*. Claimant further informed that its representatives Mr. Rashid Badran, Mr. Moussa Abdelghani and Mr. Nadir Hourani would need to travel to the Contract Area on 7 July 2009 and remain there until the handover meeting has been concluded. Claimant requested Respondent's confirmation that Mr. Badran's and Mr. Hourani's identity documents which had been seized by KNB would be returned. Claimant also asked Respondent to provide assurance that Claimant's representatives would not be detained or obstructed by either the KNB or any other Kazakh authority when they travelled to the Contract Area. In this letter Claimant also informed that - since CIOC's senior management was currently not able to enter Kazakhstan due to the actions of the Republic - it decided to instruct a representative of TRACS International Consultancy Ltd., Ms. Svetlana Ternovaya, to attend the handover meeting in order to assist Mr. Badran. Claimant asked Respondent to provide an assurance that neither the KNB nor any other Kazakh authority would hinder her travel to the Contract Area. Finally, Claimant also asked to confirm that neither KNB nor any other Kazakh authority would impede the access of Mr. Badran, Mr. Abdelghani and Ms. Ternovaya to the Contract Area and that each such authority would allow them to move freely around the area and not hinder their ability to prepare the inventory. A draft handover agreement prepared by Claimant was attached to the letter.

43. Respondent replied by letter of 3 July 2009 stating that it was prepared to proceed in a constructive manner with the handover process, starting the meetings at the oil field, as requested by CIOC and described Claimant's concerns regarding a possible impediment to the ability of CIOC's representatives, including the three members of CIOC's personnel mentioned in Claimant's letter of 1 July 2009 as well as Ms. Svetlana Ternovaya to properly participate in this process, on site or otherwise, due to the anticipated interventions of the Republic as "unwarranted". The letter further stated*: "We nonetheless consulted with representatives of the Republic who confirmed the*

above to us". As to the aim of the meeting and the timing of the handover process, Respondent proposed to remain within the initial common grounds resulting from the terms of Claimant's Amended Request for Provisional Measures and MEMR's letter of 10 June 2009 and expressed its belief that the meeting should be geared towards making as much progress as possible in view of an orderly handover. Finally, Respondent stated that it was in the process of reviewing the draft handover agreement prepared by Claimant and would get back in due course with its comments, most probably after the meeting in order to take into account matters that came up at the meeting.

44. On 6 July 2009 Claimant submitted a letter *"to bring to the Tribunal's attention yet more disturbing events that have taken place in Kazakhstan against the Claimant."* Claimant's letter reported that *"the Republic's flagrant disregard for the arbitration process was again demonstrated over this last weekend."* It mentioned that the offices of Hourani family companies at 92A Polezhaeva in Almaty were again visited on 5 July 2009 by the Finance Police informing that the Kazakh Prosecutor's Office had decided to confiscate all properties owned by the Claimant's Director, Mr. Hussam Hourani, including restaurant premises and six residential apartments. *"This was expressly stated to be in connection with the criminal proceedings against Mr. Hourani and the Claimant in respect of the limited oil production at the Contract Area following the purported termination and expropriation on 1 February 2008; in other words precisely those proceedings which are the subject of the pending application to the Tribunal."* The Claimant therefore maintained that *"these actions constitute yet further harassment of the Claimant and its Director. Such actions only serve to reinforce the urgent need for the Tribunal to exercise its jurisdiction and grant the recommendations sought by the Claimant in its application"*.

45. Claimant presented another letter dated 6 July 2009 referring to Respondent's letter of 3 July 2009. Claimant complained about the ambiguity of Respondent's assertions and stated that it was *"patently inadequate to address the matters raised in our letter. We should therefore make clear that we treat your letter as an unqualified representation by counsel on behalf of the Republic that:*

• *The Republic will return Mr. Rashid Badran's and Mr. Nadir Hourani's identity documents so that they can travel to the Contract Area for the purpose of the scheduled meeting; and*

• *The Republic's assurance that none of Mr. Badran, Mr. Hourani or Mr. Moussa Abdelghani will not be detained or obstructed by either the KNB or any other Kazakh authority in attempting to travel to the Contract Area; and*

• *The Republic's assurance that neither the KNB nor any other Kazakh authority will hinder Ms. Svetlana Ternovaya of TRACS International Consultyncy Ltd. travelling to the Contract Area; and*

• *The Republic's assurance that neither the KNB nor any other Kazakh authority will impede the access of Mr. Badran, Mr. Abdelghani, Mr. Houranim and Ms. Ternovaya to the Contract Area, and will allow them to move freely around the area and not hinder their ability to prepare the inventory.*

If in fact the Republic is not providing such assurances please say so in unambiguous terms and forthwirth (i.e. not later than 10am CET tomorrow, 7 July 2009). […] The handover can and should take place without delay in a matter of days or, at most, weeks."

46. Counsel for Respondent Mr. Lyonnet replied by e-mail of 6 July 2009 stating:

"With reference to your letter of today, I have been advised that the Republic is putting everything in place so that the meetings will proceed smoothly. I understand that Mr. Badran has been in direct contact with representatives of the Republic and that all necessary arrangements are being made. I also understand that the appropriate representatives of the Republic are either already in or on their way to Aktobe."

47. By letter of 7 July 2009 Claimant submitted an additional authority, a ruling in the ICSID case (No. ARB/08/5) *Burlington Resources Inc. and Others v. Republic of Ecuador and Another* and drew the Tribunal's attention specifically to:

• section C2 at paras. 59 to 68 (and in particular paras. 60 and 66)
• section D (and in particular paras. 73 and 74 on the question of urgency in the context of a request for a recommendation on the non-aggravation of a dispute); and
• the Tribunal's Orders nos. 7 and 8 on page 29 of the decision.

48. Pursuant to the schedule agreed upon at the First Session, Respondent by letter of 9 July 2009 informed the Tribunal that it would not request bifurcation of the proceedings. In accordance with ICSID Arbitration Rule 41(1), Respondent reserved its right to submit objections to jurisdiction together with its Counter-Memorial on the merits.

49. On 10 July 2009 Claimant provided a Consolidated Index of all Exhibits and Authorities submitted by the Claimant. It included the two documents produced for the Provisional Measures hearing which are now indexed as "Exhibit C-138" and "Authority C-77".

E. The Principal Relevant Legal Provisions

E.I. BIT Kazakhstan - USA

50. The principal relevant legal provision for this arbitration in the USA-Kazakhstan Bilateral Investment Treaty of 19 May 1992 (entered into force on 12 January 1994) is:

"ARTICLE VI

1. For 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 that 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:

(a) to the courts or administrative tribunals of the Party that is a Party to the dispute; or
(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or
(c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:
(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a Party to such Convention; or
(ii) to the Additional Facility of the Centre, if the Centre is not available; or
(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or
(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.

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:
(a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and
(b) an "agreement in writing," for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 ("New York Convention").

5. Any arbitration under paragraph 3(a)(ii), (iii) or (iv) of this Article shall be held in a state that is a Party to the New York Convention.

6. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.

7. In any proceeding involving an investment dispute, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the national or company concerned has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable laws and regulations of a Party 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."

E.II. Relevant ICSID Provisions

51. In respect of the provisional measures requested by Claimant, the principal relevant legal provisions are Article 47 of the ICSID Convention and Rule 39 of ICSID Arbitration Rules:

"Article 47 ICSID Convention

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party."

"Rule 39
Provisional Measures

(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

(2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).

(3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.

(4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations."

(5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.

(6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests."

F. Relief Sought by the Parties

F.I. Relief Sought by Claimant

52. As identified in the Request for Arbitration of 16 June 2008 (C-I, paras. 83-86) Claimant asks the Tribunal to award as follows:

"83. Kazakhstan's violations of the Treaty have caused substantial losses to [Claimant]. Under international law principles, the [BIT] and applicable Kazakh law, [Claimant] is entitled to be placed in the position in which it would have been had its rights not been violated.

84. In addition, Claimant is entitled to damages under the Contract and other specific contractual entitlements, as will be detailed in Claimant's Statement of Claim. Specifically, [Claimant] is entitled to damages arising from third party claims made against it, e.g. by its subcontractors, as well as reimbursement of its exploration costs of more than USD 35,000,000 pursuant to Clause 10.6 of the Contract and all other losses including those arising from its inability to pursue the Commercial Discovery.

85. [Claimant] will quantify and support its computation of its losses in due course. It is clear, however, from the information currently available that [Claimant's] lost profits from the Production of the reserves which it had already identified and was entitled to exploit under the Contract will exceed USD 2 billion. In particular, even on the basis of the extremely conservative official reserves estimates referred to in paragraph 26 above, C-1 and C-2 reserves in the part of the Field contracted to [Claimant] exceed 10,600,000 tonnes (or 77,380,ooo barrels) (in the whole Field the reserves exceed 11,318,000 tonnes or 82,621,400 barrels). Under the Russian system of classification of oil reserves, both classifications designate a high degree of reliability as to the estimate. For ease of reference, one ton of crude oil equals 7.3 barrels and, currently, one barrel of crude oil sells at approximately USD 135 on the world market. The figures were subject to increase and transfer of all C-2 reserves to C-1 reserves after finalisation of the scheduled exploration programme in May 2009.

86. Accordingly the Claimant requests the following relief:

(i) an order declaring that Kazakhstan has violated Articles II(2)(a), (b) and (c) as well as Article III of the BIT, as well as its obligations under international law, Kazakh law and the Contract;

(ii) an order directing Kazakhstan to pay damages equivalent to the financial loss and damage, including lost profit, which [Claimant] has suffered as a result of Kazakhstan's breaches of the BIT as well as its obligations under international law, Kazakh law and the Contract;

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

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

53. Claimant's Memorial of 14 May 2009 contains the following prayer for relief (C-IV, para. 285):

„285. For the foregoing reasons, CIOC hereby requests:

(1) orders adjudging and declaring:

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

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

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

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

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

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

(i) without public purpose;
(ii) in a discriminatory manner; or
(iii) not in accordance with due process of law and the general principles of treatment provided for in Article II(2) of the Treaty;

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

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

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

F.II. Provisional Measures Requested by Claimant

54. In its Amended Request of 29 April 2009 Claimant requests the following provisional measures (C-III, para. 53):

"3.2 The measures requested

53. CIOC respectfully requests the Tribunal to recommend the following provisional measures:

(a) that within 30 days of the date of the Tribunal's order, representatives of Kazakhstan meet with representatives of CIOC at the Contract Area in order to discuss and agree upon the orderly hand-over of the Contract Area;

(b) that within 120 days of the date of the Tribunal's order, or within such other period as the parties may agree, and without prejudice to the parties' claims in this arbitration, Kazakhstan accepts CIOC's relinquishment of the field at Kazakhstan's own expense and risk;

(c) that Kazakhstan takes measures to ensure the preservation of all documents, files, computer disks and all other materials taken from CIOC's offices in Aktobe and Almaty and from the Caratube oilfield since 16 April 2009 and that all such materials, including the corporate seals, are returned to CIOC care of its solicitors, Allen & Overy LLP, within 5 days of the Tribunal's order;

(d) that, in order to avoid an unnecessary aggravation of the dispute, Kazakhstan and all departments, agencies, emanations and other persons for which it is legally responsible stop immediately any harassment of the employees, directors and owners of CIOC, including their families;

(e) that Kazakhstan desists from any conduct which violates the parties' duties of good faith and equality in this arbitration;

(f) that Kazakhstan refrain from taking any other measures in relation to CIOC that would aggravate the present dispute; and

(g) that for the duration of these arbitration proceedings, the Kazakh authorities do not act upon any existing criminal complaints against CIOC or file any new complaints arising out of CIOC's continued occupation of the field and activities after 1 February 2008."

F.III. Relief Sought by Respondent

55. In its Summary Reply to Claimant's Request for Arbitration of 31 March 2009 (R-I, paras. 4-7) Respondent seeks the following relief:

"4. […] Based on the facts presently available to it, Respondent has serious doubts as to the Tribunal's jurisdiction over Claimant's Treaty claims and Respondent fully reserves its right to object to the Tribunal's jurisdiction over those Treaty claims. The nature and extent of these objections depend on documents that are now in the possession and control of Claimant and therefore Respondent will not be in a position to formulate jurisdictional objections until Claimant provides adequate responses to Respondent's evidentiary request. Thus, Respondent hereby respectfully asks the Tribunal to enforce its evidentiary request pursuant to the authority granted to the Tribunal by Rules 33 and 34 of the ICSID Arbitration Rules and Article 43 of the ICSID Convention.

5. […] While it is Respondent's view that this dispute is at its core a contract dispute, Respondent, in the absence of evidence as to the true nature of the purported investor and investment, is unable to determine whether Claimant has stated a claim arising from the Contract which meets the requirements for ICSID jurisdiction until it receives Claimant's response to Respondent's evidentiary request (attached as Annex A).

6. With respect to the merits, if the Tribunal were to determine that it has jurisdiction to hear any of Claimant's claims, Respondent will demonstrate in the course of this arbitration that those claims are not meritorious. Respondent will show that all of the claims currently brought by Claimant relate to lawful actions the Republic took in an effort to obtain that to which it was rightfully entitled, namely Claimant's proper performance of the Contract. Despite Claimant's contention to the contrary, Respondent will demonstrate that the termination notices issued by the Republic were justified.

7. The Republic of Kazakhstan hereby expressly and without prejudice reserves its rights as follows:

a. The Republic reserves its right to contest jurisdiction with regard to any and all claims brought by Claimant;
b. The Republic reserves its right to request bifurcation of the Tribunal's consideration of its jurisdictional objections, if any, to be filed as soon as possible after receipt of the documents requested in Annex A attached hereto, from the Tribunal's consideration of the merits of the case;
c. The Republic reserves its right to request provisional measures as provided for in Rule 39 of the ICSID Arbitration Rules and to raise any ancillary claims it deems appropriate as provided for by Rule 40 of the ICSID Arbitration Rules; and
d. The Republic reserves the right to request the production of additional evidence relevant to this dispute as provided by Rules 33 and 34 of the ICSID Arbitration Rules."

56. Respondent's evidentiary Request for Production of Documents (R-I, Annex A) reads as follows:

"Annex A
Respondent's Request for Production of Documents

Pursuant to Rules 33 and 34 of the ICSID Arbitration Rules and Article 43 of the ICSID Convention, Respondent hereby respectfully requests that the Tribunal require Claimant to produce the documents described below. The information requested is solely in the possession or control of Claimant and is needed to evaluate whether ICSID has jurisdiction over this dispute.

1. Documents related to Devincci Salah Hourani's citizenship, in particular:
a. Documents such as naturalization papers indicating the date and nature of Mr. Hourani's acquisition of United States citizenship;
b. Evidence indicating that Mr. Hourani has acquired a valid United States Social Security Number;
c. United States federal or state voter registration records or a statement that no such registration was made;
d. Copies of US tax filings for the years 2002-2008, if any, or, if no such filings were made, confirmation that no tax returns were filed by Mr. Hourani;
e. Documents related to any other citizenship currently or previously held by Mr. Hourani indicating the date and nature of the acquisition of that citizenship and/or the date and nature of the relinquishment, abandonment or denunciation of that citizenship; and
f. Copies of any and all passports, including but not limited to his United States passport, possessed by Mr. Hourani in the period from January 1, 2002 to June 16, 2008, including the identity page and all pages indicating exit or entry into any country.

2. Corporate records related to the ownership of shares of Caratube International Oil Company LLP ("CIOC"), in particular:

a. Corporate records showing who were and are the shareholders of CIOC from its creation to the present date;
b. Share contribution, purchase and/or transfer agreements entered into by each and every person who has ever been a shareholder of CIOC; and
c. Any shareholder agreements among the shareholders of CIOC, and any agreements or undertaking by the shareholders of CIOC with respect to the shares of CIOC.

3. Documents related to Mr. Hourani's purported investment, in particular:
a. Any agreements or undertakings entered into by Mr. Hourani with respect to the shares of CIOC;
b. Any documents evidencing the acquisition of shares of CIOC by Mr. Hourani, including the date of acquisition and the price paid for such shares;
c. Any documents evidencing the sale or transfer of shares of CIOC by Mr. Hourani, including the date of any such sale or transfer and the price of such sale or transfer;
d. Records of payment for shares by Mr. Hourani, such as wire transfer records;
e. Any documents evidencing the source of funds used by Mr. Hourani to make the alleged investment;
f. Any documents evidencing a lien, pledge or other duty to repay the funds used by Mr. Hourani to make the alleged investment;
g. Bank or other records showing that such funds belonged to Mr. Hourani; and
f. If such funds were in an account outside of the United States and had a value on any given day of more than $10,000 (Ten Thousand United States Dollars), a copy of United States Treasury Department Form 90-22.1, the Foreign Bank and Financial Account Report, filed for the tax year or years in which the account had a balance of more than $10,000 (Ten Thousand United States Dollars) as is required to be filed by United States law of all United States citizens holding overseas bank accounts."

F.IV. Respondent's Reply to Claimant's Request for Provisional Measures

57. Respondent in its Response to the Claimant's Amended Request for Provisional Measures of 15 June 2009 (R-II, paras. 33-34) requests the following:

"33. In conclusion, the Republic respectfully requests that this Tribunal reject CIOC's requests for provisional measures. It has been shown that the requests concerning the hand-over of the Contract Area have been rendered moot by the Republic's letter to CIOC dated June 10, 2009 in which the Republic agrees to meet with CIOC representatives and proceed with the taking over of the Contract Area subject to mutual agreement on the terms and conditions for

the hand-over. It has also been shown that the two remaining categories of CIOC's requests fail to meet the criteria to be applied in determining whether to grant provisional measures.

34. The Republic respectfully submits that it would be wise to let the parties proceed with the hand-over in the absence of pro-active measures by the Tribunal, which may well be more counterproductive than helpful".

G. Short Summary of Contentions Regarding Provisional Measures

G.I. Short Summary of Contentions by Claimant

58. Claimant substantiates the need for ordering provisional measures (C-III, paras.1-61) as follows:

"1. In this Application, CIOC seeks recommendations from the Tribunal:
*(a) as to the orderly hand-over of the Contract Area from CIOC to the Respondent, the Republic of Kazakhstan (**Kazakhstan**);*
(b) that Kazakhstan returns documents and materials, including CIOC's corporate seals, seized from CIOC and its employees in recent raids;
(c) that Kazakhstan refrain from taking any steps that violate the duty of good faith the parties owe to each other and to the Tribunal, in international arbitration proceedings, or violate the principle of the equality of the parties; and
(d) that Kazakhstan refrain from taking any steps which might undermine the procedural integrity, or the orderly working, of the arbitral process, or which might aggravate or exacerbate the dispute between the parties.

*2. The need to amend CIOC's Request for Provisional Measures dated 14 April 2009 was brought about by the events set out in the letter dated 24 April 2009 to the Tribunal (the **24 April 2009 Letter**) (**Exhibit C-50)** and the fact of a further raid at the Caratube oilfield by KNB officers and armed Government agents on 26 April 2009. Such events have escalated the urgency of this Amended Request for Provisional Measures.*

3. The present amended Application has become necessary in part at least as a result of the uncertain and unsatisfactory position with regard to the continued operation of the Contract Area, as discussed further below. Until very recently, CIOC has been put in a position of being required to continue limited operation of certain wells to avoid potentially catastrophic technical consequences should it fail to do so, and yet at the same time Kazakhstan has instituted criminal proceedings condemning CIOC's actions. Those criminal charges directly impinge upon and engage the responsibility of CIOC's

director, Mr Hussam Hourani. However, since the original Application was filed, Kazakhstan has ordered CIOC employees at the oilfield to close all wells immediately without regard to best oilfield practices or necessary safety precautions. This request for provisional measures seeks, among other things, to resolve that situation pending the substantive determination of these arbitration proceedings.

4. The background to the parties' dispute, which sets the context for this Application, has already been set out in the Request for Arbitration to which the Tribunal is respectfully referred. The following is a brief summary only of the facts that are key to the Application. CIOC accepts of course that to the extent this summary raises substantive issues for determination in the arbitration, the Tribunal cannot reach a final conclusion on these issues in the context of the current application. Nevertheless CIOC's position on these issues is relevant to an understanding of why the recommendations currently sought are necessary.

5. Reference is made to certain exhibits identified in the form Exhibit C-1, etc. Legal authorities to which CIOC refers are also produced and are referred to in the form Authority C-1, etc. A consolidated index of exhibits and authorities filed to date is provided.

2.1 The Contract

*6. On 27 May 2002, the Contract was awarded by Kazakhstan to Consolidated Contractors (Oil and Gas) Company S.A.L (**CCC**) (**Exhibit C-4**). Pursuant to an amendment to the Contract dated 26 December 2002, CCC assigned all of its rights under the Contract to CIOC with full knowledge and approval of Kazakhstan.*

7. The Contract grants to CIOC, amongst other things, exclusive right to conduct operations connected with prospecting and exploration for hydrocarbons, their extraction and eventual Production. The Exploration period was initially fixed for five years with the possibility at CIOC's option of two further extensions of two years each. The Contract was indeed extended for two years by virtue of an amendment dated 27 July 2007. In the event of a Commercial Discovery during the Exploration period, CIOC was given the exclusive right to proceed to the Production stage, which was to last 25 years.

8. Pursuant to the Contract, CIOC made substantial investments in Kazakhstan. CIOC's efforts led to Commercial Discoveries, guaranteeing CIOC a Production licence. Yet CIOC was not able to proceed with its investment as in the latter half of 2007 Kazakh authorities adversely and unlawfully interfered with CIOC's investment, through a campaign of persecution and harassment of CIOC, its majority owner and employees, and ultimately expropriated it in February 2008 by purporting to terminate without cause, and thus wrongfully repudiating, the Contract.

2.2 Violations of the BIT

*9. In order to understand the position in which CIOC presently finds itself, and its motivation for this Application, it is necessary to recall briefly Kazakhstan's violations of CIOC's legal rights, including as an investor entitled to the protection of the Kazakhstan-United States of America bilateral investment treaty (the **BIT**) by virtue of its majority ownership by Mr Devincci Hourani, a national of the United States (**US**). These submissions will, of course, be refined and elaborated upon in due course when CIOC sets out its case in its Memorial.*

10. Article III of the BIT provides that Kazakhstan shall not expropriate or nationalise the investments of US investors except if this is done for a public purpose, in a non-discriminatory manner and in accordance with due process of law including the general principles of treatment set out in Article II(2) of the BIT, and provided it is accompanied by payment of prompt, adequate and effective compensation. Kazakhstan first substantially eroded the value of, and ultimately expropriated, CIOC's investment by a campaign of harassment and persecution, carried out by its organs and agencies, culminating in the wrongful and repudiatory termination of the Contract. Kazakhstan did not comply with any of the conditions set out in Article III, including the payment of compensation.

11. Article II(2)(a) of the BIT contains Kazakhstan's undertaking to accord fair and equitable treatment and full protection and security to foreign investments. This provision requires inter alia that Kazakhstan provide a stable and predictable investment environment consistent with investors' legitimate expectations. Article II(2)(a) of the BIT was breached inter alia by the conduct of Kazakhstan's organs and agencies which, under the guise of carrying out lawful investigations and monitoring, was both abusive and on such a scale as to disrupt and ultimately destroy CIOC's investment. Further, Devincci Hourani, along with members of his family and CIOC's employees, were subjected to intimidation and harassment by Kazakhstan's organs and agencies. These breaches culminated in Kazakhstan's repudiation of the Contract by its unlawful purported termination of the Contract.

12. Article II(2)(b) of the BIT also provides that Kazakhstan shall not impair the investments of US investors by arbitrary or discriminatory measures. Kazakhstan's abusive persecution of CIOC culminating in the unjustified and unlawful purported termination of the Contract, and the intimidation and harassment to which Devincci Hourani personally, and his family and CIOC's employees were subjected, were arbitrary and discriminatory in nature and impaired the "management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal" of CIOC's investment.

13. Kazakhstan failed to comply with its undertaking in Article II(2)(c) of the BIT to observe obligations entered into with regard to the investments of US nationals. Such obligations included inter alia those commitments expressed in

the Contract. By operation of Article II(2)(c), Kazakhstan's failure to observe its obligations in the Contract is also a violation of a parallel or "umbrella" treaty obligation.

2.3 Correspondence concerning the expropriation of the field and its consequences

*14. Kazakhstan's Ministry of Energy and Mineral Resources (the **MEMR**) unilaterally terminated the Contract without proper cause by order dated 30 January 2008 (**Exhibit C-17**) and notice dated 1 February 2008 (**Exhibit C-18**), the latter being only received by at CIOC's head office ten days later on 11 February 2008 as it had been sent to CIOC's branch office in Aktobe. In its notice, the MEMR requested CIOC to hand over the exploration site (the **Contract Area**).*

15. Without setting out the detail here, CIOC has repeatedly and clearly set out in correspondence why the MEMR's allegations of breach were and remain wholly unfounded, and has made clear the reasons why it believes that the MEMR's purported termination is unlawful and itself in breach of the terms of the Contract and the BIT.

*16. CIOC responded to the notice of termination on 12 February 2008 (**Exhibit C-26**). CIOC immediately rejected the MEMR's unfounded notice of termination. CIOC emphasised that the work it had completed in 2007, and its planned investments for 2008, had all been approved. In summarising its achievements, CIOC pointed out that it had invested tens of millions of US dollars into the development of the Contract Area. Moreover, pursuant to clauses 29.6 and 29.8 of the Contract, CIOC observed that Kazakhstan is not entitled to terminate the Contract or require CIOC to relinquish the Contract Area until an international arbitral tribunal has issued an award on the merits of each party's respective claims. Accordingly CIOC responded that the MEMR's demands that it abandon the field and relinquish the Contract Area were without any legal justification. In the circumstances, CIOC refused to comply with such demands.*

*17. On 6 March 2008, CIOC wrote again to the MEMR disputing the alleged grounds for termination and requested negotiations in accordance with the Contract, failing which it stated it would refer the dispute to arbitration (**Exhibit C-27**). On 11 March 2008, CIOC wrote to Mr Batalov, the Executive Secretary of the MEMR (**Exhibit C-6**) and to the Prosecutor General's office (**Exhibit C-28**), and Devincci Hourani also wrote in near identical terms to the Minister of the MEMR (**Exhibit C-29**) and the Prosecutor General's office (**Exhibit C-30**), to dispute the existence of grounds justifying termination and to draw attention to the procedures in the Contract to resolve the parties' dispute.*

18. By a letter dated 12 March 2008 addressed to CIOC's director, Hussam Hourani, Mr Baikadamov, the Head of Inspection of the Western Kazakhstan

*Territorial Administration of Geology and Subsoil Use (**Zapkaznedra**), a subdivision of the MEMR, made further demands that CIOC hand over the Contract Area (**Exhibit C-19**). On this occasion, CIOC was asked to "reverse the land used" by no later than 17 March 2008 (just five days later) and to nominate a candidate to participate in an "Inter-Departmental Contract Area Transfer and Acceptance Commission".*

*19. CIOC's response to Mr Baikadamov, dated 17 March 2008, stated that the demand to hand over the Contract Area was premature and in breach of Clauses 27.2 and 29.6 of the Contract (**Exhibit C-20**). CIOC requested that Zapkaznedra and the MEMR desist in their demands to seize the field until the dispute could be amicably resolved or determined by an arbitral tribunal. CIOC pointed out that it had attended meetings on 13-14 March 2008 with MEMR representatives to review the circumstances of the purported termination, and that the MEMR's official conclusions on the results of those meetings were expected within the next two or three days. In the circumstances, CIOC stated that Zapkaznedra's "actions aimed at returning the Caratube field territory are premature and are in breach of the main Contract conditions".*

*20. In a letter dated 8 May 2008 from its counsel to the MEMR, CIOC set out its view that the MEMR's alleged termination of the Contract was not based on CIOC's performance of its obligations but was entirely politically motivated (**Exhibit C-24**).*

*21. By letter dated 19 May 2008 from CIOC's counsel to the President of Kazakhstan, President Nazarbayev, CIOC again stated that the MEMR's request for it to hand over the Contract Area was unjustified and in breach of the MEMR's legal obligations (**Exhibit C-25**). CIOC has not received any reply to this letter.*

22. Throughout this period, from the date of termination to this day, CIOC remains in possession of the Contract Area. Zapkaznedra's express acceptance (referred to below) that because of their technical characteristics certain wells cannot be safely shut off has resulted in CIOC continuing the production of very low volumes of crude oil from these wells. However, notwithstanding Zapkaznedra's understanding of the technical conditions which demand that some wells continue to flow, CIOC has become the object of criminal sanctions in relation to CIOC's continued activities.

*23. First, on 1 April 2008 CIOC received a ruling issued by Mr K. K. Tymbayev, Senior Investigator of Special Cases of the Investigation Section of the Department for Economic and Corruption-Related Crimes in the Aktyubinsk Region ordering the seizure of its documents and other information (**Exhibit C-31**). The ruling alleged that from 31 January 2008 to 6 March 2008, CIOC had engaged in illegal business operations in the Caratube oil field, as a result of which it obtained 113,342,860.80 tenge in revenue (around US$885,000 as at 6 March 2008). Then, on 18 April 2008, CIOC received*

*another Order on Execution of Seizure, again issued by Mr Tymbayev (**Exhibit C- 32**). The Order reported that criminal case no. 0815005100091 had been commenced against CIOC and that CIOC had been found to have carried out illegal business activities at the Caratube field, namely subsoil activities without a valid licence, resulting in the seizure of crude oil and an order that CIOC be further investigated. Following those investigations, on 18 June 2008, CIOC received an Ordinance issued by the Tax Committee of the Zhetysusky District of Almaty purporting to freeze CIOC's bank accounts held with the Almaty Branch of Turan Alem Bank Joint Stock Company (**BTA**) (**Exhibit C-33**). This Ordinance was followed on 20 June 2008 by another, issued by the Investigative Department on Economic Crimes with the Division for Internal Affairs in the Aktyubinsk Region, again based on the so-called illegal business operations between 31 January 2008 to 6 March 2008. (**Exhibit C-34**). The 20 June 2008 Ordinance purported to freeze transactions in all of CIOC's known bank accounts, including with BTA and another bank, Nurbank Joint Stock Company (**Nurbank**).*

*24. On 19 June 2008, the MEMR sent a letter to CIOC insisting that it had unilaterally terminated the Contract by lawful means (**Exhibit C-35**). The MEMR demanded that CIOC should provide information and hand over control of the Contract Area. The MEMR's detailed list of demands required CIOC to return or reverse:*

"1. Geological information
2. Contractual territory
3. To reverse the Contract
4. To fulfil the obligations currently outstanding as of the time of the Contract termination (paragraph 5 Clause 45-2 of the Law of the Republic of Kazakhstan "On Subsoil and Subsoil Use")
5. To recover the contractual territory up to the level of environmental and public health and safety in accordance with the legislation (paragraph 6 Clause 45-2 of the Law of the Republic of Kazakhstan "On Subsoil and Subsoil Use")
6. To take any other action associated with the Contract termination and specified by the applicable legislation of the Republic of Kazakhstan
7. To submit a brief report on activities directed at implementation of contractual provisions and of the notification".

*25. On 2 July 2008, CIOC's Kazakh legal counsel, Mr S. Z. Musin, sent a petition to the Aktobe Prosecutor's Office in respect of the criminal case against CIOC (**Exhibit C-36**). Mr Musin pointed out that the investigator who had prepared the charges, Mr Tymbayev, had himself acknowledged that CIOC had good reason to continue to permit low levels of production from a limited number of wells. Mr Musin remarked that Mr Tymbayev had observed in his 20 June 2008 Order (see **Exhibit C-34**, described above) that*

> *"…the continuing production and sale of oil can be explained by the fact that, taking into account the specific nature and particular*

difficulties of operating the wells, their shutdown might cause blowout of crude hydrocarbons to the surface and also one of the wells in the field is in breakdown condition".

26. Mr Musin added that, given the technical characteristics of some of the wells, the shutdown of CIOC's wells and operations was extremely difficult if not effectively impossible without risking irreparable harm to the environment. The limited volumes of crude oil that were therefore produced inevitably had to be sold since CIOC's storage tanks were also full. As Mr Musin explained:

"Thus, the shutdown of the enterprise's production activities and of operation of the Karatyube Field really is impossible. Otherwise the blowout of crude hydrocarbons may cause irreparable harm to the environment in the places where the wells are situated and operating, and the existing tanks are over-full. Sale of the oil to third parties is a consequence of the impossibility of shutting down the continuous technological process of production at the Karatyube Field. The purpose is, to exclude blowout of crude hydrocarbons to the surface".

27. In the circumstances, Mr Musin petitioned for CIOC's accounts with BTA and Nurbank to be unfrozen to allow CIOC to pay employees and suppliers, and to continue the limited operations necessary to maintain the integrity of the field. Mr Musin also sought to oblige the MEMR to comply with the dispute settlement obligations in the Contract.

*28. In July 2008, Zapkaznedra carried out an unscheduled inspection of CIOC's continued activities. In the resulting Prescriptive Order, Zapkaznedra essentially confirmed CIOC's explanations and Mr Tymbayev's findings, described above, in observing that "suspension of operations is impossible without complex of activities… as the spring, oil blowout to surface, may occur". A number of wells were sealed, but Well No. G-31 was not sealed "because of possibility of spring caused by damage of casing integrity" (**Exhibit C-37**).*

*29. After this time, CIOC remained in the field, monitoring the condition of a few wells with particularly high pressure and permitting low volumes of production from them. This was done with the approval of Kazakh authorities. On 29 July 2008, Mr Baikadamov wrote to CIOC's geologist, Mr K. A. Djanbekova, observing that CIOC should pay particular attention to well G-38 given its pressure and the risk that it may reach "critical levels" (**Exhibit C-38**). On 5 August 2008, a joint meeting was held between CIOC's field manager Mr Rashid Badran and Mr Djanbekova, and officials from Zapkaznedra, Akberen (a state agency charged with monitoring well safety), the Aktobe Directorate for Investigation of Economic and Financial Crimes, and the Aktobe Geology and Subsoil Use Inspectorate. The minutes of that meeting report that amongst other things it was decided "to prevent emergency oil spillage and exercise control over the technical condition, to permit resuming operation of [well numbers] 307, 309, 332, 301, 317, 315" (**Exhibit C-39**). On 8 August 2008, Mr Baikadamov wrote to Mr Badran and confirmed*

*"In pursuance of the Minutes dated 5 August 2008, I hereby permit to resume operations of wells Nos. 307, 309, 332, 301, 317, 315" (**Exhibit C-40**).*

*30. On 3 September 2008, CIOC's counsel, Allen & Overy LLP, wrote to representatives of the Government of Kazakhstan reporting a "clearly undesirable and unsatisfactory" threat conveyed to CIOC employees in Almaty that if the ICSID claim was not resolved, an international arrest warrant may be issued through Interpol, presumably for either Devincci or Hussam Hourani (**Exhibit C-41**).*

*31. Also on 3 September 2008, Mr Batalov again wrote to CIOC on behalf of the MEMR to demand that CIOC relinquish the Contract Area, return original documents and restore the field to its pre-Contract condition (**Exhibit C-42**). The deadline set for these works was 30 September 2008.*

*32. In a letter dated 26 September 2008 (**Exhibit C-43**), CIOC responded through its counsel to the MEMR, explaining that the MEMR's demands were without any legal justification. CIOC explained that even if it were obliged or inclined to do so, it was not practically feasible to meet the MEMR's demands by the stipulated date. The course of conduct called for by the MEMR also risked:*

> *"the possibility of: (1) alteration of the texture and structure of the reservoir proper due to water encroachment; (2) clogging of the oil reservoir channels; and (3) the discharge of liquid and gaseous hydrocarbon pollutants with their consequent ingress into the ground water".*

33. CIOC stated that it could not prudently or safely undertake such action and was not willing to be a party to or to take responsibility for such an approach. CIOC warned that if Kazakhstan sought to take control of the field that the Government alone would be responsible for all loss and damage arising from such action.

*34. On 31 October 2008, the Head of Zapkaznedra, Mr Nadyrbaev, wrote to CIOC requesting a meeting on 6 November 2008 with CIOC's director, Hussam Hourani, and chief geologist, Professor Nikolai Davydov (**Exhibit C-44**). CIOC only received this letter on 3 November, so the meeting was unable to be arranged in the time available.*

*35. By letter dated 6 November 2008 from its counsel (**Exhibit C-45**), CIOC replied to Mr Nadyrbaev, restating that under clauses 29.8 and 29.9 of the Contract, Kazakhstan is not entitled to transfer of the Contract Area until an international arbitral tribunal has issued an award on the merits of each party's respective claims. However, CIOC confirmed that* "whilst retaining all its rights, CIOC will attend, as demanded to do whatever they can to ensure that any damage such as we have described in our [26 September 2008] letter to Mr. Batalov is avoided". *CIOC offered to meet with Mr Nadyrbaev in the week beginning 17 November 2008.*

*36. On 10 November 2008, the Deputy Head of Zapkaznedra, Mr Kurbanov, wrote to CIOC care of its counsel and confirmed that a meeting was possible in the week 17-21 November 2008 (**Exhibit C-46**). On 19 November, CIOC confirmed by letter that its Oil Field Manager, Mr Rashid Badran, and an assistant would meet with Mr Kurbanov and Mr Nadyrbaev on 21 November 2008 to discuss the situation at the site (**Exhibit C-47**).*

*37. Mr Badran first telephoned Zapkaznedra in the morning of 21 November 2008 to confirm the meeting, without success, and then visited Zapkaznedra's offices in person but Mr Nadyrbaev refused to meet with him. Mr Badran recorded his efforts to meet with Mr Nadyrbaev as had been agreed in an attendance note (**Exhibit C-48**).*

*38. In a letter dated 9 December 2008 (**Exhibit C-49**) addressed to Mr Kurbanov, CIOC explained how its attempts to meet Mr Nadyrbaev had failed and reaffirmed its commitment to a meeting. CIOC therefore summarised in writing the matters, which are repeated below, that Mr Badran had intended to convey in person:*

> *"1. CIOC maintains that its rights under Contract No. 954 dated 27 May 2002 for Exploration and Production of Hydrocarbons within Blocks XXIV-20-C (partially); XXIV-21-A (partially), including Karatube Field (oversalt) in Baiganin District of Aktobe Oblast of the Republic of Kazakhstan (the **Contract**) have been unlawfully expropriated, for political reasons, and without compensation.*
> *2. CIOC denies the existence of any grounds for the termination of the Contract.*
> *3. CIOC has commenced international arbitration proceedings against the Republic of Kazakhstan that will determine whether the Government has acted unlawfully.*
> *4. As we wrote to you on 6 November 2008 (copied to Mr Batalov), the Government is not entitled to transfer the Licence Area until the international arbitral tribunal has decided the dispute (see Clauses 29.8 and 29.9 of the Contract).*
> *5. If the Government is going to force CIOC to hand over the Licence Area, or to shut down the field:*
>
> > *(a) the Government will be held responsible for any damages or losses caused, including to the oilfield and infrastructure (in addition to it already being responsible for all damage that has resulted from previously closing the wells);*
> > *(b) CIOC will not pay for any costs involved in a transfer or shutdown of the field;*
> > *(c) CIOC will be entitled to claim additional compensation or damages from the international arbitral tribunal for any losses or damage caused as a result of the Government's actions;*

(d) CIOC is, however, willing to cooperate with the Government in any transfer or shutdown of the field as a consultant, providing technical advice and information;
(e) any cooperation on the part of CIOC is not to be understood as evidence of CIOC's consent to the transfer or shutdown of the field, or as a waiver of any of its legal rights".

39. CIOC did not receive a response to this letter.

2.4 The situation today

40. As at the date of this Amended Application, CIOC still retains physical control of the Contract Area, acting primarily out of a sense of duty not to allow damage to occur to the wells or to the oil bearing structures. CIOC continues to monitor and ensure the safety and integrity of the six operating wells and related infrastructure at both some effort and expense to itself (although we understand that CIOC employees have now been ordered to shut down even those six wells during the recent raids). CIOC still employs approximately 60 staff, working mostly in the Contract Area but also at its branch office in Aktobe. As described above and until recently, very low levels of production have been permitted (with the express approval of the relevant authorities) from a small number of wells due to their relatively high pressure. This has been done for reasons explained to and understood by Zapkaznedra, Mr Tymbayev of the Department for Economic and Corruption-Related Crimes in the Aktyubinsk Region, and other competent agencies.

41. Yet at the same time, CIOC is subject to criminal investigations linked to the alleged unlicensed oilfield operations. As already mentioned in paragraph 42 of the Request for Arbitration and will be described further in evidence to be served with the Claimant's Memorial, the majority owner of CIOC, Mr Devincci Hourani, his family, and CIOC's employees have been subjected to a sustained and protracted campaign of harassment and intimidation by Kazakhstan's organs and agencies including the Kazakhstan national security agents. Devincci Hourani was, on one occasion, dragged from his bed in the middle of the night and taken to an undisclosed location to be subjected to interrogation by armed Government agents. Devincci Hourani and his brothers have also been threatened that they would face criminal charges, in at least one case expressly on the basis that this would happen if they did not assist the Government in its dispute with the President's former son-inlaw, Rakhat Aliyev.

42. All of Devincci Hourani's business assets in Kazakhstan, including a number of companies besides CIOC, have been taken from him. He finally fled Kazakhstan in March 2008, fearing for his safety, and has not returned since. However members of his family remain, as do CIOC employees who since mid-2007 and to this day continue to be subject to harassment and intimidation. CIOC staff have been subjected to repeated interrogations that have led to a number of employees resigning without notice and had a

significant negative impact on the morale of those who remain. Some individuals appear to have suffered health issues caused by the stress of working in such a tense and intimidating environment. The sum of Kazakhstan's conduct, including the wrongful repudiation of the Contract, as well as the harassment and persecution briefly mentioned above, have destroyed CIOC's investment such that there is no longer any realistic possibility of resurrecting it.

43. In addition, recent events have demonstrated Kazakhstan's defiance of the arbitral process and its violation of the integrity of the agreed dispute resolution procedure and involve precisely the sort of violations that CIOC sought to prevent in formulating the original Request for Provisional Measures. It is a fitting example of Kazakhstan's disregard for its international obligations that, on the very day that the parties convened for the First Session of the Tribunal in Frankfurt in an attempt to settle the dispute between them through the proper legal channels and with due regard to legal process, the Kazakhstan authorities raided CIOC's regional office in Aktobe and the Caratube oilfield and, on the following day, 17 April 2009, CIOC's head office in Almaty. Since the 24 April 2009 Letter was sent to the Tribunal, further raids have been carried out on 26 April 2009 at the Caratube oilfield when seven KNB officers, and four other armed men dressed in Kazakh military uniform, again visited the field.

*44. The details of the raids on the 16 and 17 April 2009 are contained within the 24 April 2009 Letter and in the official reports prepared by the Kazakh authorities (**Exhibits C-51 and C-52)**. Whilst CIOC does not agree with every detail recorded, the reports confirm the fact of the pertinent raid and those present (although the report of the raid at the Almaty office fails to mention that there were approximately 30 officers in total present). We have been instructed that although the reports confirm that a large number of documents and files were seized, they materially understate the volume of documents, files and other materials taken.*

45. The seizure of substantially all of CIOC's documents and materials (including its corporate seals) reinforces the need for this Amended Application, having put in doubt CIOC's ability to present its case fully in this arbitration. The documents and materials seized form evidence upon which CIOC might otherwise rely to argue and prove its case, including to quantify the loss it has suffered. The KNB officers carrying out the recent raids also made no attempts to conceal that the purpose of such raids was to find documents to suggest that Devincci Hourani is not the owner of CIOC in an attempt to support potential objections to the jurisdiction of the Tribunal. In the raid on 26 April 2006 we are instructed that CIOC staff were even pressured to sign false documents that assert that it was not Devincci Hourani who, in 2002, acquired the rights under the Contract. CIOC staff refused to do so as the allegation is not true.

46. It is no surprise that CIOC has come to the realisation over the past year, evidenced by its most recent correspondence described above and confirmed by recent events, that despite its firm view that Kazakhstan has no right to terminate the Contract or to seize the field pending the determination of this arbitration tribunal, nevertheless restitution of the Contract Area and confirmation of CIOC's contractual rights are not practically possible even if, as a matter of principle, they are available remedies. It may be that restitution is even legally (as well as factually) impossible in circumstances where a State has exercised its sovereign powers to put an end to a contract or licence, such as here. In any event, the position is clear since the primary remedy that CIOC seeks for the expropriation of its investment and other violations of the BIT and the Contract is monetary compensation and damages.

47. In these circumstances, CIOC's continued custody of the Contract Area exposes it to considerable risk and expense. Kazakhstan has made demands that CIOC relinquish the field yet, when CIOC has realised that it has no choice but to accept this outcome and has taken steps to effect an orderly handover, there has been no indication of any cooperation on the part of the MEMR in order to implement the relinquishment demanded in an economically and ecologically correct and responsible manner. Zapkaznedra officials failed to attend a meeting at an agreed time in order to coordinate the orderly handover of the Contract Area and failed to respond to CIOC's letter in which it proposed principles that would govern such a handover. KNB officers have since demanded that the wells be shut down. This order is in contravention of the recommendations and suggestions that CIOC has made to Kazakhstan as to the safe handover of the site. In particular, CIOC has emphasised that it would not be reasonable for CIOC simply to abandon the wells without proper maintenance and supervision since this would risk substantial economic and ecological damage. Any shut-down of the oil wells without following the appropriate oil field practices would also risk damage to the technical condition of the field and wells, as well as damage to the surrounding environment. Yet CIOC remains exposed to financial and legal risk by its continued occupation of the Contract Area, albeit as a custodian only, with no effective contractual rights. It is in this context that CIOC seeks the provisional measures outlined below.

3. PROVISIONAL MEASURES

48. Pursuant to Article 47 of the Convention, the Tribunal is competent to recommend any provisional measures that should be taken to preserve the respective rights of either party, if the circumstances so require. Rule 39(1) of the ICSID Arbitration Rules requires that when seeking provisional measures a party must specify:
(a) the rights to be preserved;
(b) the measures the recommendation of which is requested; and
(c) the circumstances that require such measures.

49. A consistent line of decisions by ICSID tribunals confirm that the circumstances under which provisional measures are required under Article 47 are those in which the measures are necessary to preserve a party's rights and that need is urgent. For example, the Tribunal in Saipem v. Bangladesh confirmed that Article 47 requires that "the requested measure be both necessary and urgent". *ICSID tribunals, including those presiding in Tokios Tokelės v. Ukraine and Occidental v. Ecuador, for example, have confirmed that measures are necessary where the actions of a party* "are capable of causing or threatening irreparable prejudice to the rights invoked", *and urgent where* "action prejudicial to the rights of either party is likely to be taken before such final decision is taken". *In sum, as the Tribunal in Occidental v. Ecuador stated:*
"…in order for an international tribunal to grant provisional measures, there must exist both a right to be preserved and circumstances of necessity and urgency to avoid irreparable harm" (emphasis original).

50. CIOC addresses each of these requirements in turn, below, and explains why recommendation of the requested provisional measures is appropriate in the circumstances.

3.1 The rights to be preserved

51. It is clear, as confirmed by the Tribunal in Biwater v. Tanzania, that the power of ICSID tribunals to grant provisional measures is very broad and is not limited to substantive rights, but also includes procedural rights. By this Application, CIOC seeks to protect the following procedural and substantive rights:
(a) CIOC's right to avoid further exposure to or responsibility for potential economic or ecological damage in the Contract Area, and other uncertainty, risk and responsibility (including further financial exposure) associated with its continued custody of the Contract Area, which may aggravate the dispute;
(b) CIOC's right to pursue its claims in this arbitration without risk of being beholden to Kazakh authorities in such a manner that may aggravate the dispute. In particular, CIOC and its employees should not be exposed to the risk of further sanctions or harassment arising out of its continued occupation of the Contract Area (whether criminal, civil or otherwise) that may have the effect of aggravating the dispute. In the light of the existing criminal charges made against CIOC, continued occupation of the field would appear likely to attract expanded charges or more extensive criminal penalties;
(c) CIOC's right to pursue its claims in this arbitration in an orderly fashion without risk that CIOC or its employees are exposed to the risk of further sanctions or harassment relating to its dispute with Kazakhstan, including arising out of its continued occupation of the Contract Area that may have the effect of intimidating, harassing or inconveniencing CIOC employees upon whom CIOC may wish to rely to produce evidence or to provide information or documents; and

(d) CIOC's right to have access to its documents and materials, including its corporate seals, so that it can present its case in these proceedings to the fullest extent possible.

52. Without the requested measures, these rights would be prejudiced. Such prejudice could not be offset by an award of damages alone.

3.3 Circumstances requiring the recommendation of provisional measures

54. The factual background to this Application is briefly outlined in Section 2 above. As for the applicable legal tests, the requested measures are both urgent and necessary. In the raids at the Caratube oilfield, CIOC's employees were ordered to shut down the wells immediately without heed of oilfield best practice and without taking necessary precautions. If the field and wells are simply abandoned without an orderly handover of control and responsibility there is a risk of aggravation of the dispute arising out of inter alia the possibility of irreparable economic and ecological damage to the field, and resulting further harassment of and repercussions to CIOC and its employees. On the other hand, the present situation cannot continue. Devincci Hourani and his businesses including CIOC have been the victim of an intense campaign of targeted harassment in Kazakhstan and, recently, raids which have resulted in the seizure of substantially all CIOC's documents and materials, including its corporate seals. CIOC is the subject of criminal proceedings due to CIOC's continued occupation and activities at the site, which also engage the responsibility of CIOC's director, Hussam Hourani. Yet the operating wells require both attention and resources to maintain them in a safe condition, both of which CIOC is in no position to provide given the expropriation of its investment, the persecution of its majority owner and employees, the freezing of its accounts, and the criminal proceeding against it and its director. CIOC's presence and activities in the Contract Area, through no fault of its own, render it and those connected with it a target for harassment and a source of aggravation of the present dispute. The measures requested would assist the parties to avoid actions that might aggravate or extend the dispute or render its resolution more difficult. The measures requested would also ensure that CIOC is not deprived of the documents and materials which may form evidence relevant to its claim against Kazakhstan, including the quantification of its loss. CIOC considers these documents to be at risk of loss or destruction if left in the possession of the Kazakh authorities.

55. More specifically, there is support in ICSID arbitral practice for the recommendations requested. There is an established principle:

> *"…according to which both parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult".*

56. Applying this principle, the Tribunal in Azurix v. Argentina invited the parties "to abstain from adopting measures of any character that could

aggravate or extend the controversy submitted to this arbitration". *In Pey Casado v. Chile, the Tribunal invited the parties to "prevent any act, of whatever nature, which could aggravate or extend the dispute submitted to the Arbitral Tribunal".*

57. CIOC requests the requested measures, including in particular in relation to (e) above, as a matter of urgency. These measures are also necessary to ensure CIOC's ability to furnish evidence of its claim. Necessity and urgency are recognised in ICSID practice as being present where a respondent fails to take steps to preserve or to provide documentation relevant to the claimant's case, or in circumstances where there is a risk of loss or destruction of such documentation.

58. Authority exists also for the provisional measure requested in (f), above. The Tokios Tokelės v. Ukraine Tribunal held that in ICSID proceedings parties "must refrain from initiating or pursuing proceedings in any other forum in respect of the subject matter of the dispute before ICSID". *It added that:*

> *"The Ukrainian authorities – whether judicial or other – are, therefore, under the legal obligation to abstain from, and to suspend and discontinue, any proceedings before any domestic body, whether judicial or other, which might in any way jeopardize the principle of the exclusivity of ICSID proceedings or aggravate the dispute before it".*

59. The Tribunal therefore recommended that:

> *"Pending the resolution of the dispute now before the Tribunal, both parties shall refrain from, suspend and discontinue, any domestic proceedings, judicial or other, concerning Tokios Tokelės or its investment in Ukraine, […] which might prejudice the rendering or implementation of an eventual decision or award of this Tribunal or aggravate the existing dispute".*

60. To anticipate a question that might be in the minds of the members of the Tribunal, the provisional measures requested do not seek to prejudge the Tribunal's finding on the merits or to achieve an outcome at odds with the parties' expectations. On either party's case, the result is that CIOC cannot continue in occupation of the Contract Area. If CIOC is successful in its claim that Kazakhstan has expropriated its investment, implicit in such a finding is that title to the investment has passed and the appropriate remedy is compensation. In the event of other violations of the Treaty, including a finding that the expropriation is unlawful, CIOC acknowledges that restitution is not practicable and the appropriate remedy is damages. On Kazakhstan's case, it may be successful if it can show that the Contract was validly terminated and for good cause, in which case CIOC would be obliged to relinquish the field.

61. Monetary damages would not be practicable to resolve the circumstances outlined in paragraph 54 and provisional measures are therefore necessary. Furthermore, the rights outlined in paragraph 51 cannot be protected by the possibility of monetary compensation or damages alone."

59. In the Hearing of 30 June 2009 Claimant further argued (Tr., pp. 38-49):

"The second topic is jurisdiction, which I can take very briefly indeed, because, essentially, there is, I think, no dispute between the parties on jurisdiction. It is article 47 of the convention, rule 39. Those are the only jurisdictional requirements, as opposed to matters going to discretion. The rights to be preserved have to be identified, the measures requested have to be identified, and the circumstances said to require them.

The rights to be protected are set out in the request at paragraph 51, and the Republic do not dispute the existence of any of those rights. If one looks at their submission, there is no issue taken that any of the rights asserted do not exist.

So, essentially, the measures are set out in paragraph 53, the rights are set out in paragraph 51, and the submission sets out the circumstances which we say require them. So jurisdiction is established, which brings the Tribunal to the issue of whether it should grant the measures requested.

The case law is not, of course, binding.

It is helpful, and there is a considerable degree of consensus, but it is not a situation where we have to point to a previous tribunal giving an equivalent order. Again, I will just give you the references, but in Tokios order 3 that we were just looking at, at tab 39, paragraph 11 makes that clear. As does the Maffezini case that the Respondents rely on at exhibit RA-3 at paragraph 5.

The generally accepted requirements are threefold: necessity, urgency, and that it must not prejudge the issues in the arbitration, and we accept all of those. The Republic seeks to introduce further requirements, as it were, which we do not accept. First of all, they say it must not be too broad. We accept that the circumstances must justify the measure in order for it to be appropriate under rule 39, but we do not see that there is a separate too broad requirement, because, obviously, what is or is not too broad will depend on the particular circumstances.

Respondent rely on the SGS v Pakistan case, where the scope of what was requested was patently far broader. It was much more in the nature of a general antisuit injunction, rather than what is sought here, which is no further action on a specific set of proceedings which relate to this Arbitration.

They also seek to impose a requirement of irreparable harm, which we do not accept. We do accept that some tribunals have discussed that concept, or

whether damages are an adequate remedy, depending on how one looks at it, but it can also equally be a question of preserving the status quo, and the cases make that clear. Again, I will not take you to them, but let me give you the references: the Plama case relied on by the Respondents at RA-6, paragraph 38, makes that very clear.

So the measures are perfectly capable of not necessarily being irreparable harm, but essentially preserving the status quo, and that is what we say in this case is primarily the motivation.

That is why, in part at least, the argument that is put forward by the Respondent that, actually, you do not need any of these provisional measures, because your claim is damages claim, and you can simply be awarded damages instead, that is simply not right. The measures that we are seeking are primarily geared to maintaining the status quo and to ensuring the fair, equitable resolution of this Arbitration, and if my clients are prevented, for example, from seizure of their documents from advancing their case in the Arbitration, that cannot be compensated by a damages award. So it is just not right to say that an award of damages deals with all of this.

It is also said somehow that it has to be extraordinary for these measures to be awarded. We would say that the circumstances here are extraordinary. So, even if the Tribunal thinks is a requirement, we would say it is met.

Let me just finally go back to the three areas that we accept, and I think both sides accept are relevant. First, the question of urgency: the point that is taken against us there is that the actions complained of began in 2007, and have continued. There is nothing in that.

This application was brought on promptly after the Tribunal was constituted. This sort of application will always go to the Tribunal. It is clear from arbitration rule 39(5) that, even if an application goes in beforehand, essentially, it awaits the constitution of the Tribunal. So the objections that are made are simply not valid. It is perfectly reasonable to wait until that happens.

Also, the Tribunal will recall that the amended application went in very promptly after the hearing on 16 April, and the raids which took place, which gave rise to certain of the measures requested.

So that is urgency. As far as necessity is concerned, it is suggested somehow that the need for protection here is hypothetical. That is suggested in the response at paragraph 21. We do not accept that. The handover of the field is necessary to resolve what is an impossible situation. The documents are necessary. On that, the point taken against us is, you have not said in your memorial that you cannot make out your case because you do not have this, that or the other document. That, we say, completely misses the point. This is a case which is due to be conducted leading up to a final hearing in February 2011. We know that we are going to have contractual issues put on the table

by the Respondents. We should have access to our documentary records to enable us properly to resist those allegations that will be made.

It is also clear, and this is where I would refer to the Biwater order number 3 that has been produced -- I think it may be simplest just to put that at the back of your volume 2, from the back of the authorities bundle. It will be tab 46 in the bundle, and it is authority C-77. We rely upon this. It is somehow suggested against us, you have not shown that you have actually suffered harm in relation to these documents, and we rely on this case as showing that one does not need to have had actual harm already suffered before tribunals will grant preliminary measures.

If one looks at paragraphs 144 and 145 on page 37 of this decision:

> *"It is true that the risk to the integrity of these proceedings, and the danger of an aggravation or exacerbation of this dispute, have yet to manifest themselves in concrete terms. Neither party has demonstrated that it has yet been inhibited, in fact, from participating fully in these proceedings... In truth, BGT's complaint amounts to a concern about the risk of future prejudice, or the potential risk to the arbitral process as it unfolds hereafter. The Tribunal disagrees, however, with the suggestion that the actual harm must be manifested before any measures may be taken. Its mandate and responsibility includes ensuring that the proceedings will be conducted in the future in a regular, fair and orderly manner ..."*

So actual harm need not have been suffered.

Just to save time, while you have that decision open, may I just take you to two other paragraphs I would just draw your attention to.

One is paragraph 135, on page 34:

> *"It is now settled in both treaty and international commercial arbitration that an arbitral tribunal is entitled to direct the parties not to take any step that might harm or prejudice the integrity of the proceedings or aggravate or exacerbate the dispute. Both may be seen as a particular type of provisional measure or simply as a facet of the tribunal's overall procedural powers ..."*

Then it talks about: "... can be articulated in various ways, such as the need to", and it gives various examples, including over the page:

> *"Preserve and promote a relationship of trust and confidence between the parties; ensure the orderly unfolding of the arbitration process; ensure a level playing field; minimise the scope for any external pressure on any party, witness, expert or other participant in the process."*

We say that is precisely what we are seeking here, and, again, I just draw your attention to paragraph 139, which is the quote from Schreuer, which talks about generally keeping the peace, and that is what we suggest you should be doing here.

We rely upon that, because it is suggested by the Respondent that aggravation of itself is not sufficient, and does not fulfil the necessity requirement, and we say that it certainly does. It is a somewhat remarkable proposition that is made by the other side that somehow general aggravation is okay. We say it is not, and we say it is clear from the rulings in Biwater that it is not.

So, really, I have dealt with necessity there. We say it is necessary. We say that, in the circumstances of this case, ultimately, one just has to read those official reports of what has happened to realise that it is necessary for this Tribunal to step in, and regain control of the evidence-gathering in the Arbitration, and ensure that CIOC's rights are protected, and, in that context, we would simply say that Inspector Tusov's evidence is most telling for what it does not say. He gives two statements dealing with specific issues, but we would say he does not take issue with much of what is in the reports, and he gives no explanation for why he was conducting these raids, and helping himself to documents.

Finally, prejudging the issues, and, again, I think I can take this very generally. There is a general keeping of the peace ability for this Tribunal to issue provisional measures.

You are not being asked to decide the rights and wrongs, but you are being asked to reinforce the ground rules going forward, and to give provisional measures which will regulate the parties' conduct going forward.

There was the use of the word "any" in our paragraph 53, any harassment, rather than the harassment, and that was quite deliberate, in that we accept that you cannot rule on it at this stage, although it will be a matter in the final hearing.

What we would also say is that it cannot be right, as appears to be suggested by the Respondent, that simply because harassment allegations, which would infringe the duty of good faith and the duty not to aggravate the proceedings -- merely because there are allegations of harassment which would contradict those duties, that cannot of itself be a reason for you not to grant the provisional measures sought, and there seems to be some suggestion to that effect, which we do not accept.

So, gentlemen, I think it is suggested that what we are asking you for is sweeping. What we say, actually, is much of what we are asking for is simply that the Tribunal order that the Republic complies with its duties to this Tribunal and to this process, in circumstances where, on the undisputed facts,

the Tribunal might rightly conclude that things have not been dealt with as they should have been to date. Thank you."

60. In its Closing Statement of the Hearing on 30 June 2009 Claimant clarified its position as follows: (Tr., pp. 106-108):

"First of all, the point on irreparable harm, and the need to show that. This is not a change of position; yes, we refer to the Occidental decision, but the point we are making is simply that provisional measures of this nature are appropriate, not just in cases of irreparable harm, but also to preserve the status quo. That is clear from the Plama decision which was introduced by the Respondent at their authorities tab 6, paragraph 38, where it is said:

The need for provisional measures must be urgent and necessary to preserve the status quo or avoid the occurrence of irreparable harm or damage."

The point is simply that we say, in this case, that we wish to preserve the status quo.

Irreparable harm is not therefore a necessary requirement without which no measures can be ordered.

The question of whether the measures are extraordinary was also touched on; again, we simply say that is not a separate test, but we do not really think it is an issue in this point.

As far as prejudging the merits are concerned, I have made the point to you already, we are not asking you to determine either the fact of or the consequences of the alleged harassment, as regards the merits of this dispute. There is sufficient in the undisputed record, we say, for you to have the factual basis on which to grant the measures we are seeking.

But there is an important philosophical issue here: it cannot be right that a party who is facing allegations of harassment can then say to the Tribunal, "Well, you cannot grant any preliminary measures, and effectively, I have a licence to harass for the next two and a half years until you give your arbitration award, because it is part of the substantive case". That cannot be right. You must be able, during the pendency of the proceedings, particularly where they are over an extended period, to require the parties to comply with their duties, and to refrain from action, even if that action arguably is also encompassed within the merits.

We are not asking you to determine it, we are asking you to lay the ground rules, and the fact that it is part of the substantive case cannot be effectively a licence to harass the Claimants for the next two and a half years."

G.II. Short Summary of Contentions by Respondent

61. Respondent brings forward the following arguments why the provisional measures as requested by Claimant should not be granted (R-II, paras. 3-4):

> *"3. These seven requests* [C-III, para. 53 (a) to (g)] *fall into three categories:*
> *1) requests relating to the hand-over of the Contract Area to the Republic (items a) to b)); 2) a series of broad and overlapping requests that this Tribunal recommend that in the future the Republic not engage in various alleged types of conduct (items d) through g)); and*
> *3) requests relating to documents and other materials seized by the competent authorities of the Republic (item c)).*
>
> *4. In this Response, the Republic will address each of the three aforementioned categories in turn. First, the Republic will explain why the requests relating to the hand-over of the Contract Area are now moot. Next, the Republic will address the two remaining categories of requests by setting out the applicable criteria for granting provisional measures and then by showing why the requests in those two categories do not meet the requisite criteria. It will become apparent, as a result of the above, that this Tribunal should not grant the provisional measures requested by CIOC.*
> *[...]*
>
> *33. In conclusion, the Republic respectfully requests that this Tribunal reject CIOC's requests for provisional measures. It has been shown that the requests concerning the hand-over of the Contract Area have been rendered moot by the Republic's letter to CIOC dated June 10, 2009 in which the Republic agrees to meet with CIOC representatives and proceed with the taking over of the Contract Area subject to mutual agreement on the terms and conditions for the hand-over. It has also been shown that the two remaining categories of CIOC's requests fail to meet the criteria to be applied in determining whether to grant provisional measures.*
>
> *34. The Republic respectfully submits that it would be wise to let the parties proceed with the hand-over in the absence of pro-active measures by the Tribunal, which may well be more counterproductive than helpful."*

62. In the course of the Hearing on 30 June 2009 Respondent further argued (Tr., pp. 50-53, 116-120):

> *"The only matter before us today is whether the Claimant is entitled or not to the specific provisional measures that they are requesting. Before going through those specific requests, and giving our views on them one by one, I would like to say a few words about the basic criteria for granting a provisional measure.*

It is true, and all the cases say this, that provisional measures are extraordinary measures, and should not be recommended lightly. This is a key concept with respect to provisional measures. They are not ordinary measures that you sort of do like that. They are extraordinary. So I would request that you keep that in mind as a basic test that you should apply, as all the other tribunals have done.
Secondly, we submit that there must be circumstances of necessity and urgency to avoid an irreparable harm. I have heard that counsel on the other side agree with the necessity and urgency, but they are now saying, maybe not irreparable harm. That rather surprised me when I heard it, because, if I look at their recent amended request for provisional measures, of April 29, 2009, and I point to paragraph 49 thereof, they summarise their position on this requirement, and they say:

> *'In sum, as the Tribunal in Occidental v Ecuador stated, 'In order for an international tribunal to grant provisional measures, there must exist both a right to be preserved and circumstances of necessity and urgency to avoid irreparable harm'.*

So that was their position then. Whether it is their position or not, we would submit that that is what the cases say, that the necessity and urgency are not isolated concepts operating out there in the abstract. It is necessity to avoid an irreparable harm, it is urgency to avoid an irreparable harm, and that is what the cases say.
So, as we go through their requests, we submit that we should be focusing on whether there is an irreparable harm here that requires an extraordinary measure to deal with it.
I think both sides are agreed that the provisional measures must not prejudge the Claimant's case. That was agreed to now, as it is a criterion. The cases say that, they have said it in their request, and they say it now, so there is no dispute about that. It is an important point. One must be careful in any provisional measure decision not to prejudge the merits, not to say anything that presupposes a decision on the merits. We maintain that that should be applied.
As to the notion that the provisional measure should not be too broad, the cases say that. We believe that is a sensible idea that should be followed. A provisional measure that is too broad and not specific enough is making a strong, extraordinary measure that would have too great a scope. Of course, that is in your discretion to determine whether it is too broad or not, but we would still maintain that that is something you ought to look to."
(Tr., pp. 50-53)

"First of all, there was a reference to the Plama decision again, what I would point out to you is regardless of what they say in their discussion, in the end, in paragraph 50 of Plama, it is stated very clearly:

> *"The arbitral tribunal rejects claimant's requests for urgent provisional measures in its entirety."*

So the bottom line was that they did not grant the provisional measures, regardless of what language they used in their discussions before they rejected the requests. So I think that is worth pointing out to you.

Then the second point that was raised was concerning right to avoid, they should not have a right to allow harassment for years, and this sort of thing, but it seems to me that if, as we have said today, we start now with an agreement of good faith by both parties, this in my view should be more effective and more efficient than the Tribunal coming down on a state and making some sort of recommendation in the form of an order.

Again, as I say, you are not going to disappear. You are here. If something happens, there is always a possibility then to do something about it, but I can assure you that we as counsel will be advising our clients very clearly to be acting in good faith with respect to this Arbitration, because that is what we also believe is the right way to go. So I think that that should be sufficient.

Now as to the criminal proceedings, well again, regardless of what the Tokios Tokeles tribunal said in order number 1, where they did make a recommendation, when push came to shove, and they were asked to enjoin a state from proceeding with criminal prosecutions, they refused to do it. They did not enjoin it. So again, you know, sometimes there is language to establish principles of a right to do something, but then the bottom line, they did not do it, and I suspect they did not do it because in the back of their minds, there was the SGS concept that you cannot enjoin a state from engaging in criminal prosecution or investigations within its own sovereign territory. So the Tokios Tokeles tribunal took no action on that.

Now again, the question of urgency here, and the reference to rule 39(5) should be dealt with promptly by the Tribunal, yes, that is true, it would actually come before the Tribunal immediately upon the constitution of the Tribunal, but in my view, if I felt that I was being harassed to a point where there was urgent necessity to avoid an irreparable harm or something as bad as they are saying it is, I certainly would have made a request for provisional measures at the earliest possible moment.

I would not have waited months to do it, and I certainly would not have done it in a way that looks rather tactical perhaps, 36 hours before the first session of the Tribunal. That is not the way I would have done it, if I were really concerned about an urgent necessity to avoid an irreparable harm.

So again, with respect to the Biwater case, well, it is what it is; in the Biwater case, the tribunal refused, in similar situation, similar enough, nothing is on all fours, we know that, you are never going to find exactly the same case twice, but this was a case where documents had been seized, they were the documents of the other side, they had been seized by the state, and the Biwater tribunal simply refused to order the return, considering that preservation and

the inventory, and they did not even mention access that much, would be sufficient. So we still believe that the Biwater case supports what we have been saying.

So the last point is that it seems to me that once this handover process has been completed, CIOC will no longer have any active presence with respect to the contract in Kazakhstan, and that also I think will change the situation of possible animosity between the parties, each one with their own theories as to what this is really all about, and that is for the merits, and should not be prejudged here. So those are my few comments in response to remarks of counsel for the other side." (Tr., pp. 116-120)

H. Considerations of the Tribunal Regarding Provisional Measures

63. The Tribunal has given consideration to the extensive factual and legal arguments presented by the Parties in their written and oral submissions, all of which the Tribunal has found helpful. In this Decision, the Tribunal discusses the arguments of the Parties most relevant for its decisions. The Tribunal's reasons, without repeating all the arguments advanced by the Parties, address what the Tribunal itself considers to be the determinative factors required to decide the issues of provisional measures requested by Claimant in this case.

H.I. Preliminary Considerations

1. Applicable Law

64. Regarding the applicable procedural law, as recorded in § 5 of the Minutes of the 1st Session, the ICSID Arbitration Rules as amended and effective on 10 April, 2006, shall apply to the proceedings.

65. Regarding the applicable substantive law, Article 42 of the ICSID Convention and primarily the BIT between Kazakhstan and the United States of America are applicable. Further, the Vienna Convention on the Law of Treaties (VCLT) may be relied upon, and it is generally accepted and in line with Article 42 of the ICSID Convention that the Tribunal may refer to customary international law where the treaty is silent.

2. General Considerations regarding Provisional Measures in ICSID Proceedings.

66. For the decision on provisional measures, particularly Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules are applicable.

67. In that context it should be noted that, according to Rule 39, the Tribunal cannot order, but can only recommend provisional measures in ICSID proceedings.

68. If, as in the present case, a party requests provisional measures, the request must specify the three aspects mentioned in the last sentence of Rule 39 § (1). As can be seen from the summaries of the Parties' contentions in this Decision, the Parties have dealt with these three aspects in detail.

3. The Relevance of the Decisions of other Tribunals

69. In the legal arguments made in their written and oral submissions, the Parties rely on a number of decisions of courts and tribunals. Accordingly, it is appropriate for the Tribunal to make certain general preliminary observations in this regard.

70. First of all, the Tribunal considers it useful to make clear from the outset that it regards its task in these proceedings as a very specific one of applying the relevant provisions of the ICSID Convention and Arbitration Rules and of arriving at the proper meaning to be given to the particular provisions in the context of the present dispute on provisional measures.

71. On the other hand, Article 32 VCLT permits recourse, as supplementary means of interpretation, not only to a treaty's "preparatory work" and the "circumstances of its conclusion", but indicates by the word "including" that, beyond the two means expressly mentioned, other supplementary means of interpretation may be applied in order to confirm the meaning resulting from the application of Article 31 VCLT. Article 38(1)(d) of the Statute of the International Court of Justice provides that judicial decisions and awards are applicable for the interpretation of public international law as "subsidiary means". Therefore, these legal materials can also be understood to constitute "supplementary means of interpretation" in the sense of Article 32 VCLT.

72. That being so, it is not evident how far arbitral awards are of determinative relevance to the Tribunal's task. It is at all events clear that the decisions of other tribunals are not binding on this Tribunal. The references by the Parties to certain arbitral decisions in their pleadings do not contradict this conclusion.

73. However, this does not preclude the Tribunal from considering arbitral decisions and the arguments of the Parties based upon them, to the extent that it may find that they throw any useful light on the issues that arise for decision in this case.

74. Such an examination will be conducted by the Tribunal later in this Decision, after the Tribunal has considered the Parties' contentions and arguments

regarding the various issues argued and relevant for the interpretation of the applicable ICSID provisions.

4. Burden of Proof

75. While the Tribunal has a certain discretion whether it considers that it should recommend provisional measures, the party requesting provisional measures must be considered to have the burden of proof regarding its request.

H.II. Request (a) to meet and discuss an agreement on orderly hand-over of the Contract Area within 30 days of the Tribunal's Order

1. Claimant

76. Claimant's request reads as follows (C-III, para. 53 (a)):

"53. CIOC respectfully requests the Tribunal to recommend the following provisional measures:
(a) that within 30 days of the date of the Tribunal's order, representatives of Kazakhstan meet with representatives of CIOC at the Contract Area in order to discuss and agree upon the orderly hand-over of the Contract Area;"

77. Claimant's position and arguments regarding a meeting to discuss the hand-over of the Contract Area are also dealt with in para. 47 of the Amended Request for Provisional Measures of 28 April 2009 (C-III, para. 47):

"47. In these circumstances, CIOC's continued custody of the Contract Area exposes it to considerable risk and expense. Kazakhstan has made demands that CIOC relinquish the field yet, when CIOC has realised that it has no choice but to accept this outcome and has taken steps to effect an orderly handover, there has been no indication of any cooperation on the part of the MEMR in order to implement the relinquishment demanded in an economically and ecologically correct and responsible manner. Zapkaznedra officials failed to attend a meeting at an agreed time in order to coordinate the orderly handover of the Contract Area and failed to respond to CIOC's letter in which it proposed principles that would govern such a handover. KNB officers have since demanded that the wells be shut down. This order is in contravention of the recommendations and suggestions that CIOC has made to Kazakhstan as to the safe handover of the site. In particular, CIOC has emphasised that it would not be reasonable for CIOC simply to abandon the wells without proper maintenance and supervision since this would risk substantial economic and ecological damage. Any shut-down of the oil wells without following the appropriate oil field practices would also risk damage to the technical condition of the field and wells, as well as damage to the

surrounding environment. Yet CIOC remains exposed to financial and legal risk by its continued occupation of the Contract Area, albeit as a custodian only, with no effective contractual rights."

78. In its letter of 22 June 2009 Claimant's counsel referred to the letter by Mr. Safinov, Executive Secretary of the Ministry of Energy and Mineral Resources, of 10 June 2009, in which the latter replies to Claimant's letter of 9 December 2008 and expresses his interest and readiness to meet with Claimant's representative to discuss the hand-over of the Contract Area. In the letter dated 22 June 2009 Claimant's counsel states as follows:

"Notwithstanding this delay of over six months, our client remains willing to meet with representatives of the Ministry to discuss an orderly handover of the Contract Area. However, we propose that such a meeting should take place at the Contract Area on 24, 25, or 26 June 2009. Please note that any terms and conditions discussed at that meeting will be subject to review by Allen & Overy LLP, and the agreement recording such terms and conditions can only be signed by CIOC's competent management, who are currently not able to enter Kazakhstan due to the actions of the Kazakhstan Government. If the parties are not able to reach agreement as a result of that meeting, the Tribunal will still be able to consider CIOC's request for provisional measures as to the orderly handover of the Contract Area at the hearing in London on 30 June 2009.

So far as the Ministry's proposed terms of the handover are concerned, please indicate in detail the terms and conditions it is proposed should be recorded in an agreement as per Condition A in Mr. Safinov's letter. So far as Condition B is concerned, subject to agreement on all other terms and conditions, our client is willing to accept in principle that the handover of the Field is irrevocable and permanent and that neither party shall be entitled to seek specific performance of the Contract (as defined in the Request for Arbitration) but shall be limited to claims in compensation or damages, and declaratory and injunctive relief in relation to any breaches of its terms.

As for the Ministry's Condition C, the Tribunal is aware of this exchange of correspondence and the basis on which the handover is proposed. Accordingly either party should be at liberty to make such submissions in the arbitration as it sees fit as to the circumstances leading to the proposed handover.

Kindly confirm your client's agreement to the proposed meeting, and the names of the Ministry's representatives who will attend. […]"

79. Further, during the Hearing on 30 June 2009, Claimant argued (Tr., pp. 30-32):

"The Respondents categorise it as essentially falling into three different heads, and we are content to accept their categorisation, and we say that the duty of

good faith and the duty not to aggravate are distinct duties, but, in broad terms, we are happy to deal with them together.
The first issue is the handover of the field, and the Tribunal will appreciate that the background to this request was that the Claimant was put in the impossible position of effectively continuing operation, continuing a very limited production on the field, for safety reasons, and authorised by the relevant authorities, but, at the same time, it was being made the subject of criminal prosecutions. Both the company and its director, Hussam Hourani, were made the subject of criminal proceedings, and pursuant on the criminal proceedings, all the company's bank accounts were then frozen. I will not take you to it, but that is at tab 16, which is exhibit C-34 in your bundle. That was the Catch 22 that the company faced, and since then, the KNB have gone into the field at the time of the April hearing, and they have since sought effectively to close the wells, but the field has not been handed back, there has not been a formal handover, despite the fact, and, again, the correspondence is in the bundle and the submissions have referred to this -- the fact that last November and December, there were various communications between the parties which essentially ended with Caratube making clear that, effectively, they were stood up for one meeting in November. A meeting was suggested by the Republic; it was accepted by Caratube; the Republic did not show up. Caratube then wrote back and said, on 9 December, that they were willing to meet and to reschedule the meeting. No answer was ever received to that letter. We then have the request for provisional measures, which seek to address this question of handover. That went in on 14 April. The first we get a response to that is with the formal response that comes in to the application on 15 June, which has with it a 10 June letter saying, "Yes, we will meet, but we will meet at a date after today's date", so after this hearing. We say the rather cynical view of that is that it is nicely choreographed to ensure that this Tribunal can be told, "Do not worry, it is all in hand, you do not need to have any role in this". We say agreeing to an initial meeting really is not sufficiently concrete, and, whilst we would accept that the request for relief concerning the setting up of the meeting is now redundant, the second element of our relief […]".

2. Respondent

80. Respondent presented the following position as to the Request to the Hand-Over of the Contract Area to the Republic (R-II, paras. 5-6):

"5. As indicated in our letter to the Tribunal dated April 29, 2009, the Republic has been studying CIOC's hand-over requests in a constructive manner and, following the completion of such study, has sent a letter to CIOC dated June 10, 2009, agreeing to meet with CIOC "to discuss an orderly hand-over by CIOC of the Contract Area within a reasonable and practicable time period following our meetings, subject to mutual agreement on the terms and conditions for the relinquishment (FN: Ex. R-1, Letter from the Ministry of Energy and Mineral Resources of the Republic to CIOC dated June 10, 2009). In this letter, the Republic proposes an initial meeting between representatives

of the Republic and CIOC at the Contract Area, as proposed by CIOC, on July 8 and 9, 2009. In light of the Republic's agreement as set forth in the letter, there is no need for the Tribunal to grant CIOC's requests for provisional measures relating to the hand-over of the Contract Area, since those requests are rendered moot by the Republic's letter.

6. In sum, the Republic respectfully requests that the Tribunal let the parties meet together and work out the hand-over of the Contract Area without granting any provisional measures in that regard. Indeed, we would suggest that any such provisional measures would be counterproductive."

81. In the Hearing on 30 June 2009 Respondent further argued (Tr., pp. 53-58):

"The handover of the contract area: by its letter to the Claimant, dated June 10, 2009, and this was the Ministry itself writing directly to the Claimant, reflecting the Ministry, the Republic's position and point of view and intentions, the Republic responded to Claimant's handover proposal, which was made in their documents, and agreed to meet with the Claimant in order to organise the handover.

I would suggest that you look at the letter itself, which is in our hearing binder. It is tab number 1 of the hearing binder. If you turn to tab number 1 and look at the first page, at (a) and (b), there are two separate points that the Republic is saying here. First, they are agreeing to meet with representatives of CIOC on Wednesday, July 8 and Thursday, July 9 -- those were the proposed dates, we will come back to that -- at the contract area, which was requested by Claimant, in order to discuss an orderly handover of the contract area, and proceed with the taking over of the contract area within a reasonable and practicable time period following our meetings, subject to mutual agreement on the terms and conditions of the relinquishment.

This mainly mirrors Claimant's own request. They themselves, in their letter back to us, also recognise that, so far as condition (b) is concerned, subject to agreement on all of the terms and conditions, 'our client is willing to accept the principle of the handover would be irrevocable ...' and so on. That is their letter dated June 22, 2009, addressed to myself and Geoffroy Lyonnet.

They also state in their letter, and we were pleased to see that, because we feel there is agreement here, that they are prepared to meet and proceed with this handover.

With respect to that, I would like to make an assurance to this Tribunal, and also to Claimant here: the Republic is totally serious about doing this. We, as counsel, have advised them that they should do it, that this was the proper thing to do. They agreed with that, and sent their own letter, signed by the Ministry, stating their intention to do this.

So I would just like to assure you that this is something that will go ahead, because, clearly, the parties want to do this. Both parties want to do this. As we stated in the letter that we sent, the Ministry has asked that a representative of our firm, in this case Geoffroy Lyonnet, would be present at the time, so that he could advise the Republic on making this thing go smoothly. That is our intention, and that is the Republic's intention, and I want to say that to all of you very clearly.

As to the timing, let us just say a brief word about that. The timing that was proposed by the Ministry was both consistent with the Claimant's requested provisional measures, and also was a time when they could get all of the necessary people together to be able to go to the contract area, because that is quite a trip. You have to fly from Astana or Almaty to Aktobe, and then there is something like a ten hour car trip to the field, and many people will need to be present.

So what had been requested in the provisional measures request was that the first meeting be within 30 days of the recommendation of the Tribunal. We are proposing that the meeting will be held next week, and I am surprised not to hear from you, and I hope maybe later on in the day we will hear from you, because our people are there, and they are ready to go for the 8th and the 9th and meet with you and move this forward, and I say that very sincerely and very seriously, and I would like to hear from you whether you are going to be there on the 8th or the 9th, because, if not, we are going to have to call the whole thing off, and tell people that they should not keep their time slots open, and all the rest of that. So we want to know, are you going to come to this meeting, having requested a meeting, and having agreed to the principle of going through with this process?

So, in view of the above, in view of the obvious agreement of the parties, that this should be done, and in view of the willingness of Kazakhstan to move forward with this, I point out that, in their own requests, they provide for a period of 120 days from the date of the Tribunal's order to make this work. That is because there are some technical issues that have to be gone through. The parties need to sit down with technical people and talk this through and get it done. It does not happen in one meeting, it does not happen overnight, there are details that have to be worked out, but these details will be worked out constructively, with a positive view of making this handover happen, and that is what we have in mind, absolutely. So I wanted to reassure you on that.

So, in view of all of what I have said, we would simply submit that there is no urgent necessity for any provisional measure at this time with respect to the handover, and that there is no or necessity or irreparable harm to be avoided.

Beyond that, we genuinely believe that it would be best to let the parties work this process out together, without any pro-active measures by the Tribunal, which, given the willingness of the parties to go forward, we believe would not be helpful, under the circumstances.

So those are the points that I wanted to raise with you, with respect to the issue of the handover."

3. Tribunal

82. At the outset, the following discussion during the Hearing on 30 June 2009 may be recalled (Tr., pp. 75-77):

"THE CHAIRMAN: Regarding (a) and (b), which is the handover issue, we take it that the meeting will take place on 8 and 9 July?

MS GILL: Yes, sir.

THE CHAIRMAN: Claimant will be there, that question was raised.

MS GILL: Yes, we have been asking for a long time, we will be there. We are arranging for representatives -- CIOC's management obviously cannot be there, Mr Antar would be the most obvious person, but we are arranging for someone else to be there.

THE CHAIRMAN: Very good. (b), of course, is the follow-up on that, and our hope would be that when you meet, you also agree on whatever is necessary regarding (b). Claimant has given a certain period for that, you have made some reservations about the period, but that is a matter that the parties can discuss when they meet on the field.
Regarding (a) and (b) therefore, we would feel that for the time being, subject to what we hear from you, we would feel that the Tribunal, which obviously cannot issue an order anyway within a day or so, would wait, hoping that the parties can agree, not only on (a) but also on (b), and obviously, a party may come back to the Tribunal if that expectation is not fulfilled, and if there is any difficulty which is met in that process."

83. Since the hearing in London, the contacts regarding the 1st meeting for a hand-over have continued. The last information the Tribunal received in this regard is the e-mail of 6 July 2009 from Respondent's Counsel Lyonnet who was travelling to the meeting. No further information regarding the meeting has been received thereafter to the time this Decision is issued..

84. In view of these further developments, the Tribunal considers that the objective of Claimant's 1st Request has been reached and therefore the Request is moot and thus there is no need any more for any recommendations in this regard.

H.III. Request (b) that Respondent accepts Claimant's relinquishment of the field at Respondent's own expense and risk, within 120 days of the Tribunal's order or within such other period Parties agree

1. Claimant

85. Claimant's request reads as follows (C-III, para. 53 (b)):

"53. CIOC respectfully requests the Tribunal to recommend the following provisional measures:

(b) that within 120 days of the date of the Tribunal's order, or within such other period as the parties may agree, and without prejudice to the parties' claims in this arbitration, Kazakhstan accepts CIOC's relinquishment of the field at Kazakhstan's own expense and risk;"

86. Claimant described the circumstances leading to this request in para. 47 of its Amended Request for Provisional Measures of 29 April 2009. (see quote above H.II., para. 78).

87. In the course of the Hearing on 30 June 2009 Claimant argued (Tr., pp. 32-33):

"Whilst we would accept that the request for relief concerning the setting up of the meeting is now redundant, the second element of our relief in paragraph 53(b) of our request for provisional measures is still very much live, because the Claimant needs to be sure that this handover properly happens. I am talking about paragraph 53(b) of Claimant's relief. So that is still, we say, very much live. We need an end date, and we need the Tribunal involved in this process, because the history of it is such that one has concerns that this agreement to a meeting, even if it is fulfilled, is not an end of itself. It needs actually to achieve that handover."

2. Respondent

88. See above (H.II., paras 81 and 82)

89. Further, in the course of the Hearing on 30 June 2009, Respondent argued (Tr., p. 58):

"They mention something about an end date, you know. What they requested was it should be 120 days, as otherwise agreed by the parties. We will make

every effort to do this as quickly as possible, but to put an artificial end date will not change anything here, because the parties will go through and do it to the best of their ability as quickly as they can."

3. Tribunal

90. Again, the Tribunal recalls the discussion during the London hearing quoted above in H.II.3. In this context, the Tribunal finds it appropriate to point out that the meeting which was subject to Claimant's Request (a) considered in the above section of this Decision cannot be the end of the process and that, within a period agreed by the parties or, if no agreement can be reached, within a reasonable period after the meeting, Kazakhstan has an obligation to accept CIOC's relinquishment of the field at Kazakhstan's own expense and risk. In the Tribunal's view, the 120 days suggested by Claimant would be a reasonable time period for this process, unless specific circumstances make a longer duration unavoidable.

91. And as noted above regarding Request (a), again the Tribunal notes further that, according to the latest information it has received from the Parties, since the hearing in London the further discussions between the Parties regarding the procedure until the handover are continuing.

92. In view of these developments, the Tribunal considers that presently there is no need to recommend provisional measures in this regard.

93. However, if the Parties cannot agree on and complete the handover within a reasonable period, taking into account the various steps necessary in that context, a Party may submit a new and updated request for a provisional measure in this regard.

H.IV. Request (c) to order Respondent to take measures to ensure the preservation of all documents, files, computer disks and all other materials taken from Claimant's offices and the Caratube oilfield since April 16, 2009 and to return all such materials within 5 days of the Tribunal's Order

1. Claimant

94. Claimant makes the following request (C-III, para. 53 (c)):

"53. CIOC respectfully requests the Tribunal to recommend the following provisional measures:

(c) that Kazakhstan takes measures to ensure the preservation of all documents, files, computer disks and all other materials taken from CIOC's offices in Aktobe and Almaty and from the Caratube oilfield since 16 April 2009 and that all such materials, including the corporate seals, are returned to CIOC care of its solicitors, Allen & Overy LLP, within 5 days of the Tribunal's order;"

95. Further details concerning this request are provided in paras. 44-45 of the Amended Request for Provisional Measures (C-III, paras. 44, 45) which read as follows:

*"44. The details of the raids on the 16 and 17 April 2009 are contained within the 24 April 2009 Letter and in the official reports prepared by the Kazakh authorities (**Exhibits C-51 and C-52)**. Whilst CIOC does not agree with every detail recorded, the reports confirm the fact of the pertinent raid and those present (although the report of the raid at the Almaty office fails to mention that there were approximately 30 officers in total present). We have been instructed that although the reports confirm that a large number of documents and files were seized, they materially understate the volume of documents, files and other materials taken.*

45. The seizure of substantially all of CIOC's documents and materials (including its corporate seals) reinforces the need for this Amended Application, having put in doubt CIOC's ability to present its case fully in this arbitration. The documents and materials seized form evidence upon which CIOC might otherwise rely to argue and prove its case, including to quantify the loss it has suffered. The KNB officers carrying out the recent raids also made no attempts to conceal that the purpose of such raids was to find documents to suggest that Devincci Hourani is not the owner of CIOC in an attempt to support potential objections to the jurisdiction of the Tribunal. In the raid on 26 April 2006 we are instructed that CIOC staff were even pressured to sign false documents that assert that it was not Devincci Hourani who, in 2002, acquired the rights under the Contract. CIOC staff refused to do so as the allegation is not true."

96. Further, during the Hearing on 30 June 2009, Claimant presented additional arguments in this regard (Tr., pp. 33, 113-116).

2. Respondent

97. Respondent's position on this and the remaining requests for provisional measures is contained in its Response to Claimant's Amended Request for Provisional Measures (R-II, paras. 7-32):

"III. Requests Relating to Future Conduct of the Republic and Requests Relating to Documents

7. The Republic will first review the applicable criteria for granting provisional measures and then will apply them to each of the remaining two categories of CIOC's requests for provisional measures.

A. Applicable Criteria for Granting Provisional Measures

*8. While Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules grant tribunals the power to issue provisional measures, such measures are nevertheless considered extraordinary and as such cannot be treated lightly. The Tribunals in both Phoenix Action and Occidental Petroleum, using the exact same language, explicitly stated: "[i]t is not contested that provisional measures are extraordinary measures which should not recommended lightly." (FN: Ex. **RL-1.** Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5, Decision on ProvisionalMeasures dated April 6, 2007, 33 ("Phoenix"); Ex. **CA-3.** Occidental Petroleum Corporation and OccidentalExploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Provisional Measures dated August 17, 2007, 59 Occidental"). In addition, as stated in ICSID's Note D to Rule 39: "[t]he measures recommended must be 'provisional' in character and be appropriate in nature, extent and duration to the risk existing for the rights to be preserved." (FN: Ex. **RL-2.** Notes to Rule 39, Rules of Procedure for Arbitration Proceedings (Arbitration Rules), January 1, 1968, Note D)*

9. Taking the above into account, tribunals have applied the following criteria in order to determine whether to grant a provisional measure:

> *(i) A right to be preserved must exist at the time of the request, must not be hypothetical, and must not concern future rights; (ii) The provisional measure must not be too broad; (iii) There must be circumstances of necessity and urgency in order to avoid irreparable harm; and (iv) The provisional measure must not pre-judge the Claimant's case.*

Each of these criteria will be discussed in more detail below.

(i) A Right to Be Preserved Must Exist at the Time of the Request, Must not Be Hypothetical, and Must not Concern Future Rights

10. Tribunals may exercise their authority to issue provisional measures only to protect rights which actually exist at the time of the request. In addition, the right to be preserved must not be hypothetical or must not be a future right. This follows from Arbitration Rule 39 which provides that "a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal." As summarized by the Maffezini Tribunal:

> *12. Rule 39(1) specifies that a party may request '... provisional measures for the preservation of its rights....'*

> *13. The use of the present tense implies that such rights must exist at the time of the request, must not be hypothetical, nor are ones to be created in the future. (English translation of Spanish original; Ex. RL-3. Emilio Agustin Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Procedural Order No. 2 dated October 28, 1999, UK 12-13 ("MaffezinP').*

(ii) The Provisional Measure Must not Be too Broad

11. A requested measure must be specific in its object and scope and must not be too broad. A clear example of the application of this criterion can be found in the SGS case, where the Tribunal refused to grant a provisional measure that was too broad and also concerned possible future actions. (FN: Ex. RL-4. SGS Societe Generate de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Procedural Order No. 2 dated October 16, 2002 ("SGS"). As stated by the Tribunal:

> *Sub-item (4) of Request No. 1 seeks a recommendation that the Respondent refrain from commencing or participating in 'all proceedings in the courts of Pakistan relating in any way to this arbitration' in the future. This is too broad a request. The Tribunal is aware of Pakistan's concerns about the circumstances in which the PSI Agreement was allegedly procured. We have taken careful note of the fact that there have been legal proceedings in Pakistan relating to the PSI Agreement. The Supreme Court's Reasons for Judgment record the fact of the investigation into the origins of the PSI Agreement and its granting by a former government of Pakistan. There may be further proceedings in that connection in the future. We cannot enjoin a State from conducting the normal processes of criminal, administrative and civil justice within its own territory. We cannot, therefore, purport to restrain the ordinary exercise of these processes, (underlining added) (footnotes omitted)*

(iii) There Must Be Circumstances of Necessity and Urgency in order to Avoid Irreparable Harm

12. This criterion includes three conditions, all of which must be met. The request for provisional measures must be based upon circumstances of necessity and urgency to avoid an irreparable harm. As fully laid out in Occidental Petroleum:

> *59. It is also well established that provisional measures should only be granted in situations of necessity and urgency in order to protect rights that could, absent such measures, be definitely lost.... In other words, the circumstances under which provisional measures are required under Article 47 of the ICSID Convention are those in which the measures are necessary to preserve a party's rights and where the need is urgent in order to avoid irreparable harm.*
>
> * * *
>
> *61. In other words, in order for an international tribunal to grant provisional measures, there must exist both a right to be preserved and circumstances of necessity and urgency to avoid irreparable harm.(emphasis in original; FN: Ex. **CA-3**. Occidental, 1ffl 59, 61.)*

(iv) The Provisional Measure Must not Pre-judge the Claimant's Case

*13. Provisional measures are measures of protection and not measures of enforcement (FN: Ex. **RL-5**. Tanzania Electric Supply Company Limited and Independent Power Tanzania Limited, ICSID Case No. ARB/98/8, Appendix A to Final Award dated June 22, 2001, Decision on the Respondent's Request for Provisional Measures dated December 20, 1999,1J13 ("[T]here is in our view a distinction to be drawn between the protection of rights and the enforcement of rights.") (emphasis in original) (" Tanzania")). This criterion makes it clear that a tribunal must not recommend provisional measures that pre-judge a party's case on the merits. This has been repeatedly set out by tribunals. As stated by the Maffezini Tribunal:*

> *20. Expectations of success or failure in an arbitration or judicial case are conjectures. Until this Arbitral Tribunal hands down an award, no one can state with any certainty what its outcome will be. The meritoriousness of the Claimant's case will be decided by the Tribunal based on the law and the evidence presented to it.*
>
> *21. A determination at this time which may cast a shadow on either party's ability to present its case is not acceptable. It would be improper for the Tribunal to pre-judge the Claimant's case by recommending provisional measures of this nature.[10] (English translation of Spanish original; FN: Ex. **RL-3**. Maffezini, Iffi 20-21.)*

As also stated by the Pey Casado Tribunal:

> *45. It is clearly out of the question for the Arbitral Tribunal to prejudge in any manner (if it were to find that it has jurisdiction on the merits) what its decision may be regarding the substance of the dispute....*
>
> *46. ... For its part, the Arbitral Tribunal cannot and does not want to pre-judge anything, or even, strictly speaking, 'to presume anything in an anticipatory manner. (English translation of French original; FN: Ex. CA-7. Victor Pey Casado and President Allende Foundation v. The Republic of Chile, ICSID Case No. ARB/98/2, Decision on Request for Provisional Measures dated September 25, 1983, Tffl 45-46.)*

14. Having reviewed the relevant criteria for granting provisional measures, we will now examine the two remaining categories of CIOC's requests in light of those criteria.

B. Application of these Criteria to the Requests Relating to Future Conduct of the Republic

15. In its Request, CIOC presents items d) through g), as quoted in paragraph 2 above, as four separate requests for provisional measures. In fact, those requests are really different formulations of what is essentially one request: i.e. that this Tribunal should recommend to the Republic that it stop engaging in certain alleged conduct in the future. Item d) refers to stopping harassment; item e) refers to desisting from conduct that violates the parties' duties of good faith and equality; item f) refers to refraining from any other measures that would aggravate the dispute; and item g) refers to refraining from pursuing any criminal complaints against CIOC arising out of CIOC's continued occupation of the field and activities after February 1, 2008. All of those items presuppose that the Republic has engaged and will engage in certain conduct, as characterized by CIOC, and seek to have this Tribunal recommend that the Republic cease such conduct in the future. These items seek to protect the same alleged rights, arise from the same alleged facts, complain about the same alleged conduct, and, as will be shown below, are in fact defective for essentially the same reasons. As a result, the Republic will deal with all four together in this section.

16. Before proceeding further with this analysis, the Republic wishes to state to the Tribunal that it firmly denies that it has engaged in harassment, violations of good faith and equality or improper criminal investigations. CIOC no doubt makes these allegations in an attempt to disparage the Republic, to solicit sympathy from the Tribunal and to create a basis for certain of its treaty claims in this arbitration. Indeed, CIOC has made a specific

monetary damage claim for alleged moral, non-material damage caused to CIOC and allegedly arising out of conduct of the Republic as characterized by CIOC. These matters will be dealt with, as appropriate, in the Republic's Counter-Memorial on the merits where that discussion belongs and after the Republic has had the requisite time to set out its defenses. For the time being, the Republic will point out some examples of incorrect or misleading statements that have been made by CIOC with respect to the Republic's conduct.

17. First, CIOC alleges that two employees of CIOC, Rashid Badran and Nader Hourani, have been put under house arrest (FN: Letter from CIOC's counsel to the Tribunal dated May 19, 2009.) Attached as an exhibit hereto is a report from Inspector B. Tusov to the Ministry of Justice of the Republic which states that "no measures were taken to arrest Mr. Badran Rashid Mahmud and Nader Hourani Zib or to place them under home arrest by the operational investigative group of the KNB." (FN: Ex. R-2. First Report from B. Tusov, Inspector of the Operational Investigative Group of the National Security Committee, to the Ministry of Justice of the Republic ("First Tusov Report"). In addition, CIOC alleges that travel and identity documents of those two employees were "confiscated without any justification."(FN: Letter from CIOC's counsel to the Tribunal dated May 19, 2009) Inspector Tusov's report explains that the documents of these two employees, who are not citizens of Kazakhstan, were taken in order to determine their legal status in Kazakhstan (FN: Ex- R-2. First Tusov Report). The report indicates that Mr. Hourani does not have a valid work permit and that Mr. Badran obtained a residency permit through a fictitious marriage. In addition, Inspector Tusov states that the documents will be returned to their owners at the end of the verification procedure. Inspector Tusov concludes by stating that "[t]he specialists of the operational investigative group of the KNB treat Badran R.M. and Hourani N.Z. respectfully; all contacts with them are only of procedural character, no moral and especially no physical pressure is put on them. Withdrawal and checking of their documents is being done in accordance with the Legislation of RK."

18. Next, CIOC implies that it does not have access to documents and to the CIOC corporate seals seized by the competent authorities of the Republic in connection with criminal investigations. As discussed in paragraph 32 below, to which we refer the Tribunal, CIOC representatives have in fact asked for and were granted access to seized documents as well as to the CIOC corporate seals, which they actually used to stamp documents.

19. Finally, CIOC has made numerous allegations of improper conduct by the Republic concerning the operation of the oil field. The Republic reserves its right to discuss these matters fully on the merits in its Counter-Memorial. At this early stage, the Republic vigorously contests that it acted without regard to best oil field practices or necessary safety precautions, as alleged by CIOC.

20. The Republic now turns to its analysis of the requests for provisional measures made by CIOC in items d) through g). CIOC is asking the Tribunal to presume at this early stage of the arbitration that the Republic has in fact engaged in conduct that constitutes harassment, aggravation of the dispute, or the absence of good faith and recommend that the Republic not continue such conduct into the future. The Republic submits that those requests presume a hypothetical need for protection, are too broad, are not necessary or urgent in order to avoid irreparable harm and would require the Tribunal to pre-judge CIOC's case. As such, those criteria for granting provisional measures, as detailed in section A above, are not met.

21. First, the Republic submits that the Tribunal is not presently in a position to determine whether CIOC's characterization of the Republic's conduct is correct. The request is thus based upon a hypothetical need for protection.

22. Second, CIOC's requests are clearly too broad. They contain sweeping recommendations that the Republic desist from any conduct which violates the parties' duties of good faith, refrain from taking any other measures in relation to CIOC that would aggravate the dispute and stop any harassment.

23. With respect specifically to the criminal investigations, no tribunal has found that merely preventing general aggravation of the dispute without a threat to the tribunal's own jurisdiction is sufficient to interfere in anything more than a de minimis manner with a state's sovereign powers. In the few cases where tribunals have found that a provisional measure calling for interference with state functions was warranted and enforceable, either the interference was minimal or the state action enjoined was directly related to the rights at issue in the arbitration to a degree such that the tribunal's jurisdiction was threatened or the Claimant's ability to obtain the relief sought was severely compromised. (FN: See, e.g., Ex. CA-2. Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Order No. 3 dated January 18, 2005 ("Tokios Order No. 3") (granting a broad measure, but refusing to enforce that measure on grounds of lack of urgency)). Similar circumstances are simply not present in this case.

*24. In fact, in Tokios, the case so heavily relied on by Claimant in its argument that "authority exists" for a tribunal to issue broad provisional measures interfering with state action (FN: Request, 58-59.), the Tribunal, though it did issue a measure prohibiting any state action "which might in any way jeopardize the principle of exclusivity of ICSID proceedings or aggravate the dispute," refused to enjoin state action analogous to that taken by the Republic (FN: Ex. **CA-8.** Tokios Tokeles v. Ukraine, ICSID Case No. ARB/02/18, Order No. 1 dated July 1, 2003, H 3.). In a subsequent order, the Tokios Tribunal found that its provisional measure was not violated either by an administrative investigation or the criminal prosecution of one of the principals of the claimant (FN: See Ex. **CA-2**. Tokios Order No. 3). The Tokios Tribunal found that these state actions simply do not amount to actions which might aggravate a dispute such that claimant's rights (whatever those rights may be)*

are in urgent need of protection from irreparable harm.

*25. Other tribunals have also refused to exercise their power to issue sweeping provisional measures in cases such as this one. For example, in SGS the Tribunal found that a request for provisional measures, similar in scope to the ones CIOC now requests, seeking to restrain all future state action, was overly broad and could not be justified (FN: Ex. **RL-4**, SGS, p. 301). Noting an arbitral tribunal's lack of authority to issue such broad provisional orders, the SGS Tribunal stated: "[w]e cannot enjoin a State from conducting the normal processes of criminal, administrative and civil justice within its own territory. We cannot, therefore, purport to restrain the ordinary exercise of these processes."*

26. CIOC, like SGS, has failed to meet its burden to show that provisional measures which would severely impinge on the Republic's right to exercise its legitimate sovereign powers are warranted. Assuming arguendo that the Tribunal has jurisdiction to entertain all of the claims that CIOC has pled, the Tribunal's jurisdiction is not threatened. Rather, CIOC's request that the Tribunal issue a provisional measure to the effect that it should cease any existing or future criminal investigations against CIOC amounts to an improper request for immunity from prosecution.

27. Third, CIOC's requests are not based upon circumstances of necessity and urgency in order to avoid irreparable harm. With respect to urgency and necessity, it should be pointed out that the conduct that CIOC refers to allegedly began as early as 2007 and continued through 2008 and 2009. CIOC filed its Request for Arbitration on June 16, 2008, yet it only filed its first Request for Provisional Measures on April 14, 2009, just two days before the First Session of the Tribunal. This seems more motivated by tactics than by urgency and necessity. Surely, if any such urgency and necessity existed, CIOC would have taken action long before it did. Pursuant to Arbitration Rule 39(1) a party may request provisional measures within the ICSID proceedings at any time after the institution of the proceedings, which, pursuant to Rule 6(2) of the Institution Rules, is the date of the registration of the Request for Arbitration. In this case the date of the registration of CIOC's Request for Arbitration was August 26, 2008. As stated by the Tokios Tribunal, "Claimant cannot credibly claim that circumstances it did not consider urgent 18 months ago are urgent now." (FN: Ex. CA-2. Tokios Order No. 3, 13).

28. Moreover, CIOC is simply not currently exposed to any irreparable harm. In its Memorial, dated May 14, 2009, CIOC states claims for money damages and does not seek specific performance. There is therefore no threat that CIOC will not be able to obtain the relief it seeks in the absence of provisional measures. Even if the Tribunal were to find CIOC's claims to be warranted, any damages caused to CIOC by any aggravation could be compensated with money damages. In that regard, tribunals have repeatedly held that provisional measures are not justified when their effect is to mitigate damages (FN: See Ex. RL-1. Phoenix 1 39 (denying request for provisional

measures where the relief sought was equivalent to the relief sought in the final award); see also Ex. RL-6. Plama Consortium Limited and Republic of Bulgaria, ICSID Case No. ARB/03/24, Order dated September 6, 2005, J 41 (rejecting request to stop local court bankruptcy proceedings because harm was limited by scope of relief granted and scope of relief is limited to money damages); Ex. RL-5. Tanzania K 16 (finding that where what claimant asks for is in effect enforcement of the agreement, Tribunal has no power to grant provisional measures. As stated by the Occidental Tribunal:

> *Provisional measures are not designed to merely mitigate the final amount of damages. Indeed, if they were so intended, provisional measures would be available to a claimant in almost every case. In any situation resulting from an illegal act, the mere passage of time aggravates the damages that can be ultimately granted and it is well known that this is not a sufficient basis for ordering provisional measures. (FN: Ex. CA-3. Occidental, H 97.)*

In making this conclusion, tribunals have consistently relied on the dual facts that a claimant has no "existing right" to the object of the prayer for relief in its Request for Arbitration until it has proven its case on the merits and also, that where harm can be later compensated for with money damages, there is no urgency to protect against that harm. This is so because, there is "a distinction to be drawn between the protection of rights and the enforcement of rights." (emphasis in original)

29. Fourth, the provisional measures requested by CIOC would pre-judge CIOC's case. In its Memorial dated May 14, 2009, CIOC claims money damages associated with the Republic's alleged harassment, aggravation, etc. and also alleges that such conduct of the Republic forms the basis for certain of its treaty claims in this arbitration. The Tribunal must thus decide in its final award on the merits whether or not such harassment existed, whether or not CIOC is entitled to money damages with respect thereto and whether any such alleged harassment can form a basis for CIOC's treaty claims. The provisional measures requested by CIOC would thus require the Tribunal to pre-judge CIOC's case by presuming now that the Republic has engaged in such harassment, well before it must make that determination in its final award and at a time when, as stated in the Maffezini case, "no one can state with any certainty what its outcome will be." In such a situation, as again stated in Maffezini: "[i]t would be improper for the Tribunal to pre-judge the Claimant's case by recommending provisional measures of this nature." It is not an uncommon tactic for a party to use a request for provisional measures to incite the tribunal to take a position early in the arbitration with respect to matters that must be decided in the final award on the merits. Such tactics should not succeed.

C. Application of these Criteria to the Request Relating to Documents

30. This request for provisional measures is set out as item c), quoted in paragraph 2 above. In its Request, CIOC's states the goal of having "access to its documents and materials, including its corporate seals, so that it can present its case in these proceedings to the fullest extent possible." In item c) CIOC refers to the need for "preservation" of documents as well as having documents returned to them. The Republic will examine these issues below. By the statement quoted just above, CIOC implies that without access it is unable to "present its case in these proceedings to the fullest extent possible." However, CIOC has not specified any documents or categories of documents which it is lacking in order to present its case. Indeed, CIOC's Memorial of May 14, 2009 includes many documents and contains no indication of any inability to present its case due to lack of access to seized documents. There is thus no showing of urgency or necessity to avoid an irreparable harm.

*The Republic fully recognizes that it has a duty to preserve seized materials. The Republic is in fact discharging this duty. The Reports of Search dated April 16 and 17, 2009 which were duly provided to CIOC by the competent authorities of the Republic and were produced by CIOC itself, state that upon seizure the materials were placed in boxes and packages and receipts were provided to employees of CIOC (FN: Ex. **C-51.** Report of Search dated April 16,2009; Ex. C-52. Report of Search dated April 17, 2009.)*

31. Thus, there is no imminent threat that the materials will be destroyed and consequently no urgent need for provisional measures ordering their preservation. CIOC's representatives have in fact asked for and were granted access to the seized materials, including the CIOC corporate seals. This is clearly stated in the attached report from Investigator B. Tusov to the Ministry of Justice of the Republic (FN: Ex. R-3. Second Report from B. Tusov, Inspector of the Operational Investigative Group of the National Security Committee, to the Ministry of Justice of the Republic). In that report, Mr. Tusov states that "employees of the representative office of 'CIOC LLP in Aktobe city have full access to the documents seized from the offices located in Aktobe and at Caratube field."

32. The report goes on to name the CIOC employees who were given access to documents and who used the corporate seals. Once again, there is no showing of any urgent necessity or risk of irreparable harm to CIOC. Given that the documents are being preserved during the criminal investigations and that CIOC has access to them, there is also no showing of any urgent necessity or risk of irreparable harm requiring a provisional measure recommending the return of those documents."

98. In the Hearing of 30 June 2009 Respondent presented additional arguments in this regard (Tr., pp. 67-74).

3. Tribunal

99. First of all, Tribunal recalls the comments by the Parties regarding this Request during the hearing in response to the Tribunal's questions (Tr., pp. 49, 77-78, 81-97, 119-121).

100. Regarding this Request, in view of the particular importance of procedural equality between the parties in an arbitration proceeding and that all parties can use and rely on the same evidence, the Tribunal notes with pleasure that, during the hearing, considerable progress and agreement could be reached in the discussion between the Parties and the Tribunal.

101. In particular, as recorded in the Transcript on pages 77, 81 and 82, in response to the respective questions by the Tribunal, Respondent has agreed that

- all documents taken by Respondent shall be preserved by Respondent,
- Respondent will grant to representatives of Claimant access to all documents of to which Claimant requests access,
- the Representatives of Claimant may copy any such documents,
- Representatives of Claimant may take such copies out of Kazakhstan to London.

102. The Tribunal understands that the term "documents" used during this discussion at the hearing of the Request numbered (c) includes files, computer disks and other material taken from Claimant's offices by representatives of Respondent so that the undertakings by Respondent summarized above also refer to these other materials.

103. The Tribunal confirms these undertakings by Respondent, and in view of them, the Tribunal does not consider it necessary to issue any further recommendations for provisional measures in this regard.

104. In so far as a Party wishes to have access to further documents, it may use the procedure provided in §§ 14.7 to 14.11 of the Minutes of the 1st Session for document production requests according to the timetable given in those provisions.

H.V. Request (d) to order Respondent and all its agencies to stop harassment of Claimant's employees, directors and owners, including their families

1. Claimant

105. Claimant's request reads as follows (C-III, para. 53 (d)):

"53. CIOC respectfully requests the Tribunal to recommend the following provisional measures:
(d) that, in order to avoid an unnecessary aggravation of the dispute, Kazakhstan and all departments, agencies, emanations and other persons for which it is legally responsible stop immediately any harassment of the employees, directors and owners of CIOC, including their families;"

106. The alleged harassment of Claimant's employees, directors and owners is further presented in paras. 41-42 of Claimant's Amended Request for Arbitration (C-III, paras. 41-42):

"41. Yet at the same time, CIOC is subject to criminal investigations linked to the alleged unlicensed oilfield operations. As already mentioned in paragraph 42 of the Request for Arbitration and will be described further in evidence to be served with the Claimant's Memorial, the majority owner of CIOC, Mr Devincci Hourani, his family, and CIOC's employees have been subjected to a sustained and protracted campaign of harassment and intimidation by Kazakhstan's organs and agencies including the Kazakhstan national security agents. Devincci Hourani was, on one occasion, dragged from his bed in the middle of the night and taken to an undisclosed location to be subjected to interrogation by armed Government agents. Devincci Hourani and his brothers have also been threatened that they would face criminal charges, in at least one case expressly on the basis that this would happen if they did not assist the Government in its dispute with the President's former son-in-law, Rakhat Aliyev.

42. All of Devincci Hourani's business assets in Kazakhstan, including a number of companies besides CIOC, have been taken from him. He finally fled Kazakhstan in March 2008, fearing for his safety, and has not returned since. However members of his family remain, as do CIOC employees who since mid-2007 and to this day continue to be subject to harassment and intimidation. CIOC staff have been subjected to repeated interrogations that have led to a number of employees resigning without notice and had a significant negative impact on the morale of those who remain. Some individuals appear to have suffered health issues caused by the stress of working in such a tense and intimidating environment. The sum of Kazakhstan's conduct, including the wrongful repudiation of the Contract, as well as the harassment and persecution briefly mentioned above, have destroyed CIOC's investment such that there is no longer any realistic possibility of resurrecting it."

107. In the hearing on 30 June 2009 Claimant presented further arguments in this regard (Tr., pp. 48-49, 107-108).

2. Respondent

108. Respondent's position on this and the remaining requests for provisional measures is contained in its Response to Claimant's Amended Request for Provisional Measures (R-II, paras. 7-32): See above, H.IV.2.

109. In the hearing on 30 June 2009 Respndent presented further arguments in this regard (Tr., pp. 62-67).

3. Tribunal

110. In view of the common discussion at the London Hearing between the Parties and the Tribunal regarding the group of Claimant's Requests numbered (d), (e) and (f), the Tribunal will deal with Request (d) below in section H.VI.of this Decision.

H.VI. Request to order Respondent to desist from any conduct which violates the Parties' duties of good faith and equality in this arbitration

1. Claimant

111. Claimant's request reads as follows (C-III, para. 53 (e)):

"53. CIOC respectfully requests the Tribunal to recommend the following provisional measures:

(e) that Kazakhstan desists from any conduct which violates the parties' duties of good faith and equality in this arbitration;"

112. Claimant stresses the urgency factor which applies in particular to this request (C-III, para. 57):

"3.3 Circumstances requiring the recommendation of provisional measures

57. CIOC requests the requested measures, including in particular in relation to (e) above, as a matter of urgency. These measures are also necessary to ensure CIOC's ability to furnish evidence of its claim. Necessity and urgency are recognised in ICSID practice as being present where a respondent fails to take steps to preserve or to provide documentation relevant to the claimant's case, or in circumstances where there is a risk of loss or destruction of such documentation. [FN: Biwater Gauff v. Tanzania, Procedural Order No. 1, 31 March 2006, para. 86 (**Authority C-4**).]*"*

113. In the hearing on 30 June 2009 Claimant presented further arguments in this regard (Tr., pp. 30, 33-38).

2. Respondent

114. Respondent's position on this and the remaining requests for provisional measures is contained in its Response to Claimant's Amended Request for Provisional Measures (R-II, paras. 7-32): See above, H.IV.2.

115. In its Closing Statement in the course of the Hearing on 30 June 2009 Respondent added the following comment (Tr., p. 117):

> *"If something happens, there is always a possibility then to do something about it, but I can assure you that we as counsel will be advising our clients very clearly to be acting in good faith with respect to this Arbitration, because that is what we also believe is the right way to go. So I think that that should be sufficient."*

3. Tribunal

116. In this section of its Decision, the Tribunal will deal with Claimant's Requests numbered (d), (e) and (f), since, in response to the respective questions raised by the Tribunal, they were discussed together and major agreement reached on most aspects. In this regard, reference is made to the discussion between the Tribunal and the Parties recorded in the Transcript of the London Hearing pp. 78, 98 – 100.

117. First of all, regarding **Claimant's Request numbered (d),** this discussion records that the Parties and the Tribunal agree to the effect that the Parties indeed have an obligation to conduct the procedure in good faith.

118. While this is now agreed and on the record of the hearing, the Tribunal considers it nevertheless necessary to formally record this duty of the Parties in the present Decision. In this context, the Tribunal sees a particular need to remind Respondent of this duty in view of certain measures taken by various of its authorities after this arbitral procedure has started which are identified by Claimant in its Amended Request of 29 April 2009. In particular, the Tribunal reiterates the "surprise" its Chairman expressed during the hearing (Tr p. 95) that, on 16 April 2009, the same day the Parties and the Tribunal had their 1st Session in Frankfurt to discuss and decide on the further procedure including the exchange and production of documents, the Respondent raided Claimant's offices and seized a great volume of documents and other evidence. This was done without any notice at the Frankfurt session. While the Tribunal appreciates the assurance of Respondent's Counsel that he did not know of these measures of Respondent at the time of the Session, this conduct and the further similar measures taken by Respondent after that date make it necessary in the view of the Tribunal to clearly put on record the basic procedural duties of the Parties to an international arbitration procedure and particularly an ICSID procedure. This is without prejudice to the sovereign right of states to apply and enforce their national law inside their territories. But in that context, the undisputed obligation of a state should also be recalled that under international law no state may rely on its national law as a

justification to breach its duties under public international law and that a state is responsible under international law for the acts of all of its organs and institutions. The procedural duties stemming from the ICSID Convention and the reference thereto in the relevant BIT are such - procedural – obligations as part of international law.

119. Regarding the Claimant's **requests numbered (e) and (f),** the Tribunal agrees with the essence and result of the discussion at the hearing referred to above to the effect that the accepted duty of a party in an arbitration to act in good faith includes and covers a duty to avoid any unnecessary aggravation of the dispute and harassment of the other party. And again, in view of the measures taken by Respondent and for the reasons mentioned in the preceding paragraph, the Tribunal considers it necessary to formally record this in this Decision.

120. In conclusion, therefore, the Tribunal confirms that the Parties have an obligation to conduct the procedure in good faith and that this obligation includes a duty to avoid any unnecessary aggravation of the dispute and harassment of the other party.

H.VII. Request (f) to order Respondent to refrain from taking any other measures in relation to Claimant that would aggravate the present dispute

1. Claimant

121. Claimant's request reads as follows (C-III, para. 53 (f)):

"53. CIOC respectfully requests the Tribunal to recommend the following provisional measures:

(f) that Kazakhstan refrain from taking any other measures in relation to CIOC that would aggravate the present dispute;"

122. Claimant cites the following authority for this request (C-III, para. 58):

"58. Authority exists also for the provisional measure requested in (f), above. The Tokios Tokelės v.Ukraine Tribunal held that in ICSID proceedings parties "must refrain from initiating or pursuing proceedings in any other forum in respect of the subject matter of the dispute before ICSID" [FN: Tokios Tokelės v. Ukraine, Procedural Order No. 1, 1 July 2003, para. 1 (**Authority C-8**)]. *It added that: "The Ukrainian authorities – whether judicial or other – are, therefore, under the legal obligation to abstain from, and to suspend and discontinue, any proceedings before any domestic body, whether judicial or other, which might in any way jeopardize the principle of the exclusivity of ICSID proceedings or aggravate the dispute before it"* [FN: ibid., para. 3.]

59. The Tribunal therefore recommended that:

> *'Pending the resolution of the dispute now before the Tribunal, both parties shall refrain from, suspend and discontinue, any domestic proceedings, judicial or other, concerning Tokios Tokelės or its investment in Ukraine, […] which might prejudice the rendering or implementation of an eventual decision or award of this Tribunal or aggravate the existing dispute'* [FN: ibid., para. 7.].

60. To anticipate a question that might be in the minds of the members of the Tribunal, the provisional measures requested do not seek to prejudge the Tribunal's finding on the merits or to achieve an outcome at odds with the parties' expectations. On either party's case, the result is that CIOC cannot continue in occupation of the Contract Area. If CIOC is successful in its claim that Kazakhstan has expropriated its investment, implicit in such a finding is that title to the investment has passed and the appropriate remedy is compensation. In the event of other violations of the Treaty, including a finding that the expropriation is unlawful, CIOC acknowledges that restitution is not practicable and the appropriate remedy is damages. On Kazakhstan's case, it may be successful if it can show that the Contract was validly terminated and for good cause, in which case CIOC would be obliged to relinquish the field."

123. In the Hearing on 30 June 2009 Claimant presented further arguments in this respect (Tr., pp. 23, 30, 103-104).

2. Respondent

124. Respondent's position on this and the related requests for provisional measures is contained in its Response to Claimant's Amended Request for Provisional Measures (R-II, paras. 7-32) and is quoted under H.IV.2.

125. Further reference is made to Respondent's statement in the Hearing of 30 June 2009 as to the aggravation of the dispute (Tr. P. 62 to 67).

3. Tribunal

126. In this context, reference is made to the discussion between the Partuies and the Tribunal during the Hearing on 30 June 2009 (Tr., pp. 100-102).

127. Regarding this Request numbered (f), this Tribunal agrees with the Tribunal in *Burlington*, which, in its Procedural Order No.1 (submitted by Claimant), considered the right to the preservation of the status quo and the non-aggravation of the dispute as "well established since the case of the *Electricity*

Company of Sofia and *Bulgaria* (§ 62 of the Order).

128. However, the present Tribunal does not have to enter into a more detailed discussion of the matter in view of its considerations and conclusions in the preceding chapter of this Decision which also dealt with this Request.

H.VIII. Request (g) to order Respondent's authorities not to act upon any existing criminal complaints against Claimant or file any new complaints arising out of Claimant's continued occupation of the field and activities after February 1, 2008

1. Claimant

129. Claimant's request reads as follows (C-III, para. 53 (g)):

"53. CIOC respectfully requests the Tribunal to recommend the following provisional measures:

(g) that for the duration of these arbitration proceedings, the Kazakh authorities do not act upon
any existing criminal complaints against CIOC or file any new complaints arising out of CIOC's continued occupation of the field and activities after 1 February 2008."

130. In its Amended Request for Arbitration Claimant pleads as follows (C-III, para. 55-59):

55. More specifically, there is support in ICSID arbitral practice for the recommendations requested. There is an established principle:
*"…according to which both parties to a legal dispute should refrain, in their own interest, to do anything that could aggravate or exacerbate the same, thus rendering its solution possibly more difficult".[FN: Amco Asia v. Indonesia, Decision on Provisional Measures, 9 December 1983, para. 5 (**Authority C-5**); also e.g. Azurix v. Argentina, Decision on Provisional Measures, 6 August 2003, paras. 38, 46-7 (unpublished) summarised in Decision on Jurisdiction, 8 December 2003, para. 14 (**Authority C-6**)]*

*56. Applying this principle, the Tribunal in Azurix v. Argentina invited the parties "to abstain from adopting measures of any character that could aggravate or extend the controversy submitted to this arbitration". In Pey Casado v. Chile, the Tribunal invited the parties to "prevent any act, of whatever nature, which could aggravate or extend the dispute submitted to the Arbitral Tribunal". [FN: Pey Casado v. Chile, Decision on Provisional Measures, 25 September 2001, dispositif, (4) (**Authority C-7**).]*

*57. CIOC requests the requested measures, including in particular in relation to (e) above, as a matter of urgency. These measures are also necessary to ensure CIOC's ability to furnish evidence of its claim. Necessity and urgency are recognised in ICSID practice as being present where a respondent fails to take steps to preserve or to provide documentation relevant to the claimant's case, or in circumstances where there is a risk of loss or destruction of such documentation. [FN: Biwater Gauff v. Tanzania, Procedural Order No. 1, 31 March 2006, para. 86 (**Authority C-4**).]*

*58. Authority exists also for the provisional measure requested in (f), above. The Tokios Tokelės v. Ukraine Tribunal held that in ICSID proceedings parties "must refrain from initiating or pursuing proceedings in any other forum in respect of the subject matter of the dispute before ICSID".(FN: Tokios Tokelės v. Ukraine, Procedural Order No. 1, 1 July 2003, para. 1 (**Authority C-8**)] It added that:*

> *"The Ukrainian authorities – whether judicial or other – are, therefore, under the legal obligation to abstain from, and to suspend and discontinue, any proceedings before any domestic body, whether judicial or other, which might in any way jeopardize the principle of the exclusivity of ICSID proceedings or aggravate the dispute before it".*

59. The Tribunal therefore recommended that:

> *"Pending the resolution of the dispute now before the Tribunal, both parties shall refrain from, suspend and discontinue, any domestic proceedings, judicial or other, concerning Tokios Tokelės or its investment in Ukraine, […] which might prejudice the rendering or implementation of an eventual decision or award of this Tribunal or aggravate the existing dispute".*

131. In the course of the Hearing on 30 June 2009, additional arguments were brought forward by Claimant (Tr., pp. 23-24, 34-38, 104-105, 110-111).

2. Respondent

132. Respondent's position on this and the remaining requests for provisional measures is contained in its Response to Claimant's Amended Request for Provisional Measures (R-II, paras. 7-32): See above, H.IV.2.

133. Respondent presented further arguments in the Hearing on 30 June 2009 (Tr., pp. 58-62, 67, 118).

3. Tribunal

134. At the outset of its examination of this Request numbered (g), the Tribunal points out that, while some of its considerations regarding the Requests numbered (d), (e) and (f) also apply here, criminal investigations and measures taken by a state in that context require special considerations.

135. They are a most obvious and undisputed part of the sovereign right of a state to implement and enforce its national law on its territory.

136. On the other hand, the language authorizing ICSID Tribunals in Article 47 of the Convention and Rule 39 is very broad and does not give any indication that any specific state action must be excluded from the scope of possible provisional measures. Therefore, this Tribunal does not agree with the strict approach which seems to have been taken by the Tribunal in the SGS decision (page 301) quoted by Respondent. Rather this broad language can be interpreted to the effect that, in principle, criminal investigations may not be totally excluded from the scope of provisional measures in ICSID proceedings. The present Tribunal, in this regard, agrees with the approach taken by the ICSID Tribunal in the Tokios case in its Orders 1 and 3 to which both Parties in the present case have referred.

137. But, similarly to the considerations of the Tokios Tribunal in §§ 12 and 13 of its Order No.3, this Tribunal feels that a particularly high threshold must be overcome before an ICSID tribunal can indeed recommend provisional measures regarding criminal investigations conducted by a state.

138. This threshold and the respective burden of proof cannot be overcome by Claimant's Request (f) in the present case in order for this Tribunal to issue provisional measures.

139. First of all, applying Rule 39(1), the Tribunal does not find that the right to be preserved is threatened. Claimant has not shown that its procedural right to continue with this ICSID arbitration is precluded by the criminal investigation, if one takes into account the conclusions reached above regarding the other Requests. Regarding Claimant's substantive rights involved, it may well be that further damage is caused by the criminal proceedings, if Claimant can show that they were an abuse of the sovereign right of the State in breach of the BIT. However, such damage may be claimed, examined and decided later in this case in the procedure on the merits. Since, in the present case, Claimant is not claiming specific performance, but money damages, this Tribunal does not have to deal with the question whether other considerations have to be applied in specific performance claims as in the *Burlington* case (see Procedural Order No.1 § 69). In the present case, regarding Claimant's damage claim, no provisional measure is required to protect that right, and indeed the Tribunal might be prejudging that issue if it would recommend provisional measures trying to stop the criminal proceedings. For the same reason, there is no urgency requiring provisional measures in this regard.

140. Therefore, the Tribunal concludes that no provisional measures are appropriate regarding the criminal proceedings.

141. However, to avoid any misunderstanding, the Tribunal points out that this is without prejudice to the question whether, in the proceedings on the merits, Claimant can claim that Respondent's criminal investigation and the measures enforced in that context were an abuse of that sovereign right of the State in breach of the BIT and may lead to damages to which Claimant is entitled.

I. Decisions of the Tribunal

A. Regarding the individual Requests:

I.1. Regarding Claimant's Request (a), the requested meeting has been held and therefore the Request is moot and thus there is no need any more for any recommendations in this regard.

I.2. Regarding Claimant's Request (b), the Tribunal considers that presently there is no need to recommend provisional measures in this regard.

I.3. Regarding Claimant's Requests (c), the Tribunal takes note of and confirms Respondent's undertaking that

- **all documents taken by Respondent shall be preserved by Respondent,**
- **Respondent will grant to representatives of Claimant access to all documents to which Claimant requests access,**
- **the Representatives of Claimant may copy any such documents,**
- **the Representatives of Claimant may take such copies out of Kazakhstan to London.**

In this context, the Tribunal understands that the term "documents" includes files, computer disks and other material taken from Claimant's offices by representatives of Respondent so that the undertakings by Respondent above also refer to these other materials.

The Tribunal does not consider it necessary to issue any further recommendations for provisional measures in this regard.

I.4. Regarding Claimant's Requests (d), (e) and (f), the Tribunal confirms that the Parties have an obligation to conduct the procedure in good faith and that this obligation includes a duty to avoid any unnecessary aggravation of the dispute and harassment of the other party.

I.5. Regarding Claimant's Request (g), the Tribunal decides not to recommend any provisional measures concerning the criminal investigation conducted by Respondent, but points out that this is without prejudice to any claims for damages in this regard that the Claimant may raise in the procedure on the merits.

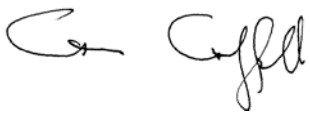
B. Concluding Decision:

I.6. Without prejudice to the rights of the Parties under the ICSID Convention to make renewed applications for provisional measures, for the reasons stated the Tribunal declines Claimant's requests for provisional measures.

Place of Arbitration: Frankfurt (Germany)

Date of Decision: 31 July 2009

Signatures of the Tribunal:



Dr. Gavan Griffith **Dr. Kamal Hossain**

Prof. Dr. Karl-Heinz Böckstiegel (President)