

**ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE**

**CASE No. V (064/2008)**

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**IN THE MATTER OF THE ARBITRATION**

**MOHAMMAD AMMAR AL-BAHLOUL**

**v.**

**REPUBLIC OF TAJIKISTAN**

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**PARTIAL AWARD ON JURISDICTION AND LIABILITY**

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## I. THE PARTIES

1. **Claimant:**

Mohammad Ammar Al-Bahloul, an Austrian citizen residing at 104 Mariahilferstrasse, Vienna, Austria A-1070, (hereinafter "Claimant")

Claimant has been represented in this arbitration by his attorneys, Professor Adnan Amkhan, with offices at Mariahilfer Str. 104, A-1070 Vienna, Austria and Dr. Friedrich Schwank, with offices at the Stock Exchange Building, Wipplingerstrasse 34, A-1010 Vienna, Austria, pursuant to a power of attorney signed by Claimant on June 5, 2008.

2. **Respondent:**

The Republic of Tajikistan (hereinafter "Respondent")

Respondent has been served in this arbitration by registered airmail and by electronic mail to the attention of the President of the Republic of Tajikistan and the Minister of the Ministry of Energy and Industry at the following addresses:

The President of the Republic of Tajikistan

Office of the President, Prospekt Rodaki 42, 734025 Dushanbe, Tajikistan ([mail@president.tj](mailto:mail@president.tj)), and

The Minister of the Ministry of Energy and Industry of the Republic of Tajikistan

10 Bohtar Street, 734025 Dushanbe, Tajikistan ([energo@rs.tj](mailto:energo@rs.tj)).

Respondent did not appear before the Tribunal either directly or through a representative, although duly served with all notices, pleadings, orders and other communications. On March 3, 2009 the Minister of the Ministry of

Energy & Industry of the Republic of Tajikistan wrote to inform the SCC Institute that Respondent contested jurisdiction of the Institute and sought dismissal of the Request for Arbitration (see hereinbelow at paragraphs 45-47.

3. Claimant and Respondent are collectively referred to herein as the "Parties."

## II. THE ARBITRAL TRIBUNAL

4. In his Request for Arbitration dated May 30, 2008 (the "Request"), Claimant appointed Dr. Richard Happ, a national of Germany, as his party-appointed arbitrator. Dr. Happ's mailing address is Luther Rechtsanwaltsgesellschaft mbH, Gansemarkt 45, 20354 Hamburg, Germany.
5. The Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC Institute"), on June 3, 2008, forwarded the Request to Respondent to the attention of the President of the Republic and the Minister of the Ministry of Energy and Industry and requested an Answer by June 17, 2008. This period was subsequently extended to June 29, then to July 14 and finally to July 25, 2008.
6. Upon Respondent's failure to submit an Answer or otherwise appear and failure to appoint an arbitrator in accordance with the Arbitration Rules of the SCC Institute (the "Rules"), the SCC Institute notified the Parties by letter of August 13, 2008 of the appointment by the Board of the SCC Institute of Professor Ivan S. Zykin, as co-arbitrator on behalf of Respondent, and Mr. Jeffrey M. Hertzfeld, as Chairman of the Tribunal.

7. Professor Zykin is a national of the Russian Federation. His mailing address is Andrey Gorodissky & Partners, ul. Znamcnka 13, Bldg. 3, 3<sup>rd</sup> floor, 119019 Moscow, RF.
8. Mr. Hertzfeld is a national of the USA. His mailing address is 5, Boulevard Malesherbes, 75008 Paris, France.
9. Each of the arbitrators signed a declaration confirming his impartiality and independence of the Parties.

### III. PROCEDURE

10. This arbitration has been brought by Claimant on the basis of the Energy Charter Treaty (the “ECT” or the “Treaty”), a multilateral convention which was signed in December 1994 and entered into effect on April 16, 1998 and whose stated purpose is to establish “*a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.*” (Article 2). Austria became a party to the ECT on December 16, 1997 and the Republic of Tajikistan on June 25, 1997, upon the deposit of their instruments of ratification.
11. Part III of the ECT sets out the obligations of Contracting States with respect to the promotion, protection and treatment of investments of investors of other Contracting States. Claimant alleges that Respondent violated a number of these obligations to his detriment and to the detriment of his investment in the Republic of Tajikistan. The substance of these claims is discussed in detail later in this Award.
12. Article 26 of Part V of the ECT provides for the settlement of “*Disputes between a Contracting Party and an Investor of another Contracting Party*”

*relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III..."*

13. Article 26(2) provides, in relevant part, that *"If such disputes can not be [amicably settled] within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:... c) in accordance with the following paragraphs of this Article."*
14. Article 26(4) goes on to provide, in relevant part, that *"In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to... (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce."*
15. Article 26(3)(a) states: *"Subject only to subparagraphs (b) and (c) [note: not here relevant], each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article."*
16. Article 26(5)(a)(ii) states: *"The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:... (ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards...."*
17. Claimant asserts that he is entitled to the protection of the Treaty and the benefit of the above provisions with respect to settlement of disputes arising under Part III of the Treaty, as a national of Austria and an Investor in Tajikistan pursuant to one or more of the following agreements and their

implementation:

- a. A June 5, 1998 “General Agreement on geological exploration and operation works on the projects of the Republic of Tajikistan, perspective for Hydrocarbon raw material (oil, gas),” between Claimant and the State Committee for Oil & Gas of the Republic of Tajikistan (hereafter the “State Committee”) regarding joint exploration work in the Kashkakum area (hereafter the “**June 1998 Agreement**”).
  
- b. A November 10, 1998 “Treaty on geological exploration and operation works on the project of Alimtay in the Republic of Tajikistan, perspective for Hydrocarbon raw material (oil, gas),” between Claimant and the State Committee regarding joint exploration work in the Alimtay area (hereafter the “**November 1998 Agreement**”).
  
- c. A March 8, 2000 Agreement of Association aimed at creating a joint venture to be called “Baldjuvon” for the purpose of “*increasing oil and gas extraction from the currently operating bores...in the South part of the Republic of Tajikistan.*” entered into by Petroleum and Gas Vivalo International Co., Ltd., (hereinafter “Vivalo”), a Bahamian company allegedly established and wholly owned by Claimant,<sup>1</sup> on the one side, and the State Committee, on the other, with a total authorized capital of US\$976,426, of which 60%, or US\$585,856, was to be contributed by Vivalo within a year (hereafter the “**March 2000 Baldjuvon Agreement**”).

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<sup>1</sup> Petroleum & Gas Vivalo International Co., Ltd. was incorporated in the Commonwealth of the Bahamas on October 6, 1998.



- d. A further March 8, 2000 Agreement of Association signed by the same parties on similar terms aimed at creating a second joint venture to operate in the Northern part of the Republic, with a total authorized capital of US\$3,940,125, of which 60%, or US\$2,364,075, was to be contributed by Vivalo within a year (hereafter the “**March 2000 Northern Agreement**”).
- e. Four December 25, 2000 “Treaties on geological exploration and operation works,” signed by Claimant and the State Committee with respect to the East Soupetau area, the Rengan area, the Sargazon area and the Yalgyshak area, respectively, each on similar terms as the November 1998 Agreement referred to in subparagraph (b) above (hereafter referred to collectively as the “**December 2000 Agreements**”).
- f. A June 27, 2001 Constitutive Agreement and Charter of LLC Baldjuvon (hereafter “Baldjuvon”), signed by Vivalo and the Southern Oil & Gas Producing Subsidiary Enterprise (hereafter “SNG”) of the State Unitary Enterprise “Tajikneftegaz,” with a view to “*increasing oil and gas recovery from the hydrocarbon fields now in operation in the terrain of the Baldjuvon region of Republic of Tajikistan with: Beshtentyak, Souldouzy, Uzunakhor*” (hereafter the “**June 2001 Baldjuvon Founding Documents**,” collectively, or the “**June 2001 Baldjuvon Constitutive Agreement**” and “**June 2001 Baldjuvon Charter**,” separately). The authorized capital is US\$2,000,000 of which Vivalo is to contribute 60% (US\$1,200,000) within a year
- g. A June 28, 2001 Constitutive Agreement and Charter of LLC Petroleum SUGD (hereafter “SUGD”), signed by Vivalo and the Subsidiary Enterprise “Sugdnaftugas” of the State Unitary Enterprise “Tajikneftegaz” with a view to “*increasing oil and gas recovery from*

*the hydrocarbon fields now in operation at the terrain of the SUGD area...*” (hereafter the “**June 2001 SUGD Founding Documents**,” collectively, or the “**June 2001 SUGD Constitutive Agreement**” and “**June 2001 SUGD Charter**,” separately). The authorized capital is US\$5,000,000 of which Vivalo is to contribute 60% (US\$3,000,000) within a year.

- h. A January 17, 2003 Agreement between Vivalo and Gazpromgeocomservice (RF) pursuant to which Gazpromgeocomservice agreed to perform, pursuant to a separate US\$4 million credit agreement and a certain technical program (neither of which is in evidence), works to be defined at oil fields of Baldjuvon and SUGD (hereafter the “**January 2003 Gazprom Agreement**”).
17. While exploration and exploitation licenses were issued pursuant to the June 1998 Agreement in respect of the Kashkakum area and the November 1998 Agreement in respect of the Alimtay area, the licenses called for by the four December 2000 Agreements were never issued to Claimant. Moreover, according to Claimant’s testimony, no licenses were ever issued to the Baldjuvon joint venture company and licenses were only issued to the Petroleum SUGD joint venture company on December 20, 2002, and then were kept secret from Vivalo until March 14, 2003.
18. The essence of Claimant’s claim is that the non-issuance of licenses under the four December 2000 Agreements and the late issuance or non-issuance of licenses for the two joint venture companies, required under Tajik law for the conduct of oil and gas activities and promised by government officials, frustrated the projects in which Claimant had invested and had contracted to invest, either directly and through his wholly owned company Vivalo, and deprived Claimant of his investment and of his reasonable profit expectation therefrom.

19. On February 9, 2003, Claimant wrote, on Vivalo letterhead, to Mr. A. Yorov, Minister of the Ministry of Energy of Tajikistan putting him on notice that the applied-for licenses had not been issued, requesting their urgent issuance, and informing him that he had contacted the ECT Secretariat who advised friendly negotiations before any action. There is no evidence in the record of any response from Mr. Yorov or anyone else in his ministry.
20. On February 23, 2003, Claimant wrote, again on Vivalo letterhead, to the President of the Republic, asking for his intervention with the Ministry of Energy to obtain the necessary licenses, and indicating that arbitration would otherwise be commenced under the ECT in Stockholm. There is no evidence in the record of any response to this letter.
21. On March 14, 2003, the Tajik Economic Court of the SUGD region rendered a decision, in an action brought by the Tajik partner in Petroleum SUGD against Vivalo, approving a reduction of the capital of Petroleum SUGD to the level of the parties' actual contributions. The Court found that, while the Tajik partner had paid its share in full, Vivalo had contributed only US\$473,235, which corresponded to 9,46% of the total capital. Claimant asserts, in this arbitration, that the Tajik Economic Court proceeding was conducted without due process in violation of his rights under the ECT and that his appeal from the Court's decision was wrongfully rejected by the appellate court on spurious procedural grounds in further violation of the Treaty.
22. As regards Baldjuvon, Claimant has testified that the company was liquidated due to the non-payment of the balance of the Vivalo share of the authorized capital and that his investment was therefore lost.

23. Claimant commenced the present arbitration with the filing of its Request for Arbitration, dated May 30, 2008, with the SCC Institute.
24. As indicated in paragraph 5 above, the SCC Institute forwarded the Request on June 3, 2008 to Respondent and, in accordance with the SCC Rules, requested an Answer to the Request by June 17, 2008. This period was subsequently extended to June 29, then to July 14, and finally to July 25, 2008.
25. In the absence of any response from Respondent, the SCC Institute by letter of August 13, 2008 informed the Parties of the SCC Board's decision that the Tribunal shall consist of three arbitrators, the names of whom appear in Section II above. The SCC Board fixed the seat of arbitration as Stockholm and established the amount of the advance on costs to be paid by the Parties in equal shares.
26. On September 12, 2008, after Claimant had paid his share of the advance on costs and agreed to establish a bank guarantee covering Respondent's unpaid share, the SCC Institute forwarded the file to the Tribunal and set March 12, 2009 as the date of the final award. Claimant subsequently paid in cash Respondent's share of the advance.
27. By Procedural Order No. 1, issued on September 17, 2008, the Tribunal proposed that a Preparatory Meeting be held at the address of the Chairman in Paris on October 13, 2008 to discuss the procedural rules and calendar for the proceedings. The Tribunal invited the Parties to inform it by September 24 if the proposed place for the meeting was inconvenient for either of them, noting that Article 20 of the SCC Rules allows the Tribunal, after consultation with the Parties, to decide to conduct hearings at any place which it considers appropriate.

28. By letter of September 24, 2008, Dr. Schwank confirmed Claimant's participation at the proposed meeting in Paris. Respondent failed to respond or express any view.
29. Having consulted the Parties, the Tribunal issued its Procedural Order No. 2 on September 26, 2008, confirming the meeting as proposed and attaching a tentative list of procedural issues for discussion at the meeting. The Tribunal noted in its Order that, in accordance with Article 30(2) of the SCC Rules, the failure of a party to appear at a hearing without a showing of good cause will not prevent the Tribunal from proceeding.
30. By email addressed to the Parties on October 1, 2008, the Tribunal asked the Parties to indicate the names of the persons who will participate on their behalf at the Preparatory Meeting.
31. On October 3, 2008, the Tribunal sent a further correspondence to Respondent (with copy to Claimant) as a final notice of the Preparatory Meeting, encouraging Respondent to confirm its participation and to indicate the names of the persons who will attend on its behalf by no later than October 10, 2008. This letter, together with further copies of the previously served Procedural Orders No. 1 and No. 2 and the email of October 1, 2008, were sent both by email, in pdf format, and by DHL to Respondent.
32. The Preparatory Meeting took place as scheduled on October 13, 2008 in Paris, and was attended on behalf of Claimant by Professor Amkhan (counsel), Dr. Schwank (counsel) and Ms. Merran Loewenthal (assisting both counsel). Respondent did not appear.
33. The meeting proceeded on the basis of the list of issues previously circulated. The procedural decisions and instructions resulting from the

meeting were set forth in Procedural Order No. 3 issued on October 17, 2008. Among other things, the Tribunal established a timetable for further submissions and alternative dates for final hearings, depending on whether or not Respondent subsequently decided to appear in the arbitration. Claimant requested that English should be the language of the arbitration. The Tribunal invited comments from Respondent on this question by October 31, 2008.

34. On November 4, 2008, not having received any comments from Respondent regarding the language of the arbitration, the Tribunal issued Procedural Order No. 4, confirming English as the language of the arbitration.
35. Procedural Order No. 3 provided that Claimant's Statement of Claim (hereafter "SOC") was due on December 5, 2008. On December 3, Claimant requested an extension of time until December 19, 2008. On December 4, the Tribunal invited Respondent to comment by December 11 on the request for an extension. Having received no comments from Respondent, the Tribunal granted the extension pursuant to a Procedural Order No. 5.
36. On December 17, 2008, Claimant asked for a further extension until January 16, 2009 to complete and file its SOC, indicating that it was still awaiting the arrival of crucial documents from Tajikistan and the completion of crucial expert witness statements in Tajikistan. The Tribunal, by its Procedural Order No. 6, granted the requested extension, while at the same time extending at its own initiative Respondent's corresponding time period to submit its Statement of Defence (hereafter "SOD"), and rescheduling the final hearings from April 2009 to June 3-5, 2009 (as the dates that would apply in the event of Respondent's failure to submit an SOD).

37. Following a request made by the Tribunal to the SCC Institute for an extension of time to render the award, and the SCC Institute's request for comments by the Parties, the SCC Institute notified the Tribunal and the Parties by letter of January 14, 2009 that the date for the final award was extended to September 30, 2009.
38. On January 14, 2009, counsel for Claimant made one further request for an extension until January 23, 2009 for the filing of its SOC, which it stated was due to difficulties encountered in finalizing an expert report in Tajikistan.
39. By Procedural Order No. 7 issued on January 15, 2009, the Tribunal granted this final extension, and extended in like manner until April 24, 2009 the time period for Respondent to file its SOD.
40. Claimant served his SOC by email on January 23, 2009. There was some delay in delivering the hard copy of the SOC with its exhibits due to customs clearance difficulties.
41. Claimant stated in his SOC that he wished to submit an expert report in support of his alleged damages at a later date. In order not to delay the arbitration proceedings, and in order not to prejudice Respondent's full opportunity and time period to reply to the quantum evidence once submitted, the Tribunal decided in a Procedural Order No. 8 issued on February 2, 2009 to bifurcate the proceedings and to hear in the initial phase only the issue of liability. Respondent was instructed that it may therefore limit its forthcoming SOD to the issue of liability.
42. On February 4, 2009, the Tribunal issued a Procedural Order No. 9 instructing Claimant to provide by February 15, 2009: a) proof of dispatch

of the hard copy of the SOC and its exhibits to Respondent, b) English translations of certain exhibits which were in Russian only, and c) copies of two exhibits in the list of exhibits which were found to be missing.

43. On February 13, 2009, Claimant served the missing and untranslated documents referred to above. Claimant subsequently provided proof of the timely dispatch of the SOC and its exhibits to Respondent.

44. Claimant submitted three witness statements with its SOC, as follows:

a) Claimant's own witness statement dated February 11, 2009.

b) The statement of Mr. Mohammad Khasky, a Russian citizen, holding a master's degree in mechanical engineering from studies in Moscow. He served as a technical director of Vivalo and as Chairman of the Board of Petroleum SUGD, appointed by Vivalo, during the period 1999-2003. He was not regularly involved in any activity of the Baldjuvon joint venture. His statement is dated Belarus, February 11, 2009. It was submitted in English, but was originally prepared by Mr. Khasky in Arabic. At the hearing, signed copies of both versions were presented and confirmed by Mr. Khasky.

c) The statement of Mr. Faizullo Nasrulloev, a Tajik lawyer, who represented Vivalo in connection with the Petroleum SUGD appeal and the Baldjuvon court proceedings in Tajikistan. His statement is referred to as an expert opinion, and indeed he opines on questions of Tajik law and practice. But he is also a fact witness recounting his involvement in the aforementioned court proceedings. His statement was submitted in a Russian original with an English translation, dated January 22, 2009. Mr. Nasrulloev did not appear at the hearing. According to counsel, Mr. Nasrulloev feared for his safety. Without drawing any conclusions as to



the legitimacy of his concerns, the Tribunal decided to admit his written statement, given that Respondent was not, in any event, present to cross-examine him. The Tribunal noted, however, that the weight that would be given to his statement would be affected by the fact that the Tribunal had had no opportunity to question him.

45. On March 3, 2009, the Minister of the Ministry of Energy of the Republic of Tajikistan wrote a letter on behalf of Respondent to the SCC Institute, with copy to Dr. Schwank, Claimant's representative in this arbitration, which was received and acknowledged by the SCC Institute on March 17, 2009. The SCC Institute informed Respondent that, at this stage in the proceedings, it should communicate directly with the Arbitral Tribunal, and forwarded a copy of the Minister's letter to the Tribunal.
46. Respondent, in its above-mentioned letter, challenged the right of the SCC Institute to accept jurisdiction over the present dispute and, citing Article 7 of the 1999 SCC Rules, requested the SCC Institute to reject Claimant's Request for Arbitration because of clear evidence that the Institute does not have jurisdiction over the dispute. Article 7 corresponds to Article 10 of the current Rules, which entered into effect as of January 1, 2007 and which apply to this arbitration. Respondent's arguments are set forth below in Section VI of this Award.
47. In its March 3, 2009 letter, Respondent expressly stated that its letter should not be considered "*as an opinion to the claim to the petition, as provided for in Article 21 of the said Regulation.*" Article 21 of the 1999 SCC Rules corresponds to Article 24(2) of the current Rules, which refers to Respondent's SOD. Therefore, the Tribunal understands it to be Respondent's intention that its letter of March 3, 2009 shall not be construed as an acceptance on its part to participate in these arbitration proceedings.

48. On March 18, 2009, the Tribunal wrote to Respondent to the attention of the Ministry of Energy and Industry and the President of the Republic of Tajikistan, confirming receipt of a copy of the Minister's letter of March 3, 2009 and indicating that the issue of jurisdiction together with the issue of liability will be addressed by the Tribunal in the first phase of this arbitration. The Tribunal indicated that it would in this connection address the points made by Respondent in its March 3, 2009 letter. The Tribunal invited Claimant to comment on Respondent's jurisdictional arguments by April 3, 2009 and reminded Respondent that it has been given, pursuant to the Tribunal's Procedural Order No. 7, until April 24, 2009 the opportunity to submit an SOD in response to Claimant's SOC of January 23, 2009.
49. On April 1, 2009, Claimant's counsel submitted a letter to the Tribunal, with copy to Respondent, commenting on the points raised in Respondent's letter of March 3, 2009.
50. On April 10, 2009, the Tribunal issued Procedural Order No. 10 together with two attachments, being i) an agenda for a pre-hearing telephone conference to be held on May 12, 2009 and ii) a request to Claimant to identify by May 22, 2009 the documentary evidence on which he will rely in respect of certain specified issues. Noting that the time for Respondent to submit its SOD had elapsed and that no submission or request for an extension of time had been received, the Tribunal decided that it would proceed with the arbitration in the absence of Respondent on the basis of Article 30(2) of the SCC Rules and Section 24(3) of the Swedish Arbitration Act which provides that the unexcused failure of a party to submit a SOD or to appear at a hearing, or otherwise avail itself of the opportunity to present its case, shall not prevent the Tribunal from continuing with the proceedings and rendering an Award. The hearings to be held in Stockholm from June 3-5, 2009 on the bifurcated issue of

liability were therefore confirmed and a pre-hearing telephone conference was confirmed for May 12, 2009.

51. The pre-hearing conference call took place as scheduled on May 12, 2009, with the participation of representatives of Claimant. Respondent did not call in or notify as to its unavailability. Minutes of the conference call were issued on the same day. One correction to the minutes was requested by Claimant and adopted on May 13, 2009.
52. Pursuant to the Tribunal's request referred to in paragraph 50 above, Claimant submitted to the Tribunal, with copy to Respondent, supplemental exhibits on the issues that had been specified by the Tribunal.
53. The hearings took place as scheduled during the period June 3-5, 2009. The Tribunal heard opening and closing statements of Claimant's counsel and took the testimony of Messrs. Al-Bahloul and Khasky. No representative of Respondent appeared. The proceedings were transcribed by court reporters and a copy of the transcript was subsequently sent by the Tribunal to both Parties.
54. On June 8, 2009, the Tribunal issued a Procedural Order No. 11 closing the evidence in this phase of the arbitration related to jurisdiction and liability, giving Claimant until June 15 to submit its statement of costs to date and to send copies of any exhibits marked at the hearing to Respondent, and giving Respondent until July 15 to submit its comments (but no new evidence) on the hearing transcript, the documents submitted in evidence at the hearing, and Claimant's statement of costs.
55. On June 15, 2009, Claimant submitted its statement of costs for the period August 2006-June 2009, which totalled **1,464,582.60 euros**, consisting of

legal representation (980,000 euros), arbitral expenses (SCC registration fee, the advance deposits and bank charges) (358,582.60 euros) and incurred expenses (126,000 euros).

56. No comments or submissions were made by Respondent on July 15, 2009 or thereafter.
57. The Tribunal has now deliberated and renders the present Partial Award. The Tribunal has at the same time requested the SCC Institute to grant an extension of time for rendering the Final Award.

#### **IV. FACTUAL BACKGROUND OF THE DISPUTE BASED ON CLAIMANT'S EVIDENCE AND ALLEGATIONS**

58. Claimant, Mr. Al-Bahloul, was born in Syria in 1962. He studied business management at a university in Vienna, Austria, where he graduated in 1985 and thereafter established a business of his own engaged in marketing and trading. He acquired Austrian citizenship on June 27, 1997 through the Austrian naturalization process and at all times since then has continued to be an Austrian citizen and resident.
59. In 1997, Claimant met with the commercial representative of Tajikistan in Austria and was presented with a catalogue of investment projects issued by the Tajik government, including investments in the oil and gas sector. This led to a trip to Dushanbe in the summer of 1998 at the invitation of Prime Minister Azimov of Tajikistan during which Claimant expressed an interest in investing in the field of exploration and production of oil and gas. This in turn was followed by several meetings with Mr. Rakhmanov, Chairman of the State Committee for Oil & Gas, during which more detailed discussions took place.

60. Mr. Al-Bahloul's discussions resulted in the signing of the June 1998 Agreement on oil and gas exploration and thereafter the November 1998 Agreement on oil and gas exploration with the State Committee. These agreements contemplated geological exploration and operations in the oil and gas sector in Tajikistan, in the first case in the Kashkakum area and in the second case in the Alimtay area.
61. The terms of the two Agreements were almost identical. Claimant was to provide at his risk and expense the necessary equipment and materials and was to have the right to delegate and transfer his obligations and rights and to attract and contract with any firm inside or outside Tajikistan to fulfil the work. According to Article 7 of the Agreements, the Tajik party committed, among other things, "*to provide all necessary exhaustive geological and technological material to Austrian Party Experts*", and "*to ensure the License to carry out solely and exclusively geological explorations, and natural resources exploitation works and activities in [Kashkakum, Alimtay] area.*" It was further provided that these areas could be extended in the future as may be determined.
62. On August 1, 1998, less than two months after the signature of the June 1998 Agreement, an exploration license for the Kashkakum area was granted to Claimant signed by the Prime Minister on behalf of the Government of the Republic of Tajikistan. Thereafter, on May 24, 1999, some six months after signature of the November 1998 Agreement, the Prime Minister issued a second license to Claimant for oil and gas exploration in the East Alimtay area for the period May 6, 1999 to May 6, 2004. According to Claimant's testimony, it had been decided that the Alimtay area was more promising, and that work would commence there rather than in Kashkakum.

63. After obtaining the May 24, 1999 license, according to Claimant's witness statement and testimony, he began work in the Alimtay area on the re-drilling of an uncompleted but conserved well. However, after having invested certain funds in the operation and having pursued the work for a period of time in cooperation with the local Tajik workers, Claimant reached the conclusion that the operation would not succeed because of the inadequate technology and level of experience of the Tajik side. He therefore interrupted further work and sealed the well at some point early in 2000.
  
64. Discussions then took place with the Prime Minister and the State Committee and, in the context of the rising international oil prices in early 2000, they agreed with Claimant to a new approach which involved setting up joint venture entities for oil and gas exploration and production both in the northern and southern parts of the country together with the State Committee. Claimant was to have a controlling interest. This led to the signing of the two March 2000 Agreements between Vivalo (signed by Claimant as its General Director) and the State Committee, which contemplated the founding of two joint ventures with Vivalo and the State Committee as Founders. (See subparagraphs 17(c) and (d) above.) The March 2000 Agreements were not accompanied by any corporate charter and no joint venture was in fact registered pursuant to these Agreements. However, they do appear to have been at the origin of further negotiations which led to the signature of the joint venture agreements concluded by Vivalo and two State-owned Tajik production associations in June 2001.
  
65. On September 22, 2000, the President of Tajikistan issued Decree No. 397 entitled "*About the establishment of Tajik and Austrian joint ventures construction of a petroleum refinery.*" The Decree approved a proposal of the State Committee on the establishment of the Baldjuvon joint venture, with the Tajik production association "Leninabadneftgas" as a 40%

shareholder and the “*Austrian company*” Vivalo holding 60%.<sup>2</sup> The activity of Baldjuvon was to be based on the Baldjuvon gas and oil fields and the construction of a petroleum refinery with refining of 500 thousand tons of crude oil per year was envisaged for the Khatlon region. The Decree stated that the designing, manufacturing and purchasing of necessary equipment and material and their transportation for the construction of the refinery is to be funded by Vivalo. Finally, the Decree instructed the State Committee to prepare the necessary constituent documents with Vivalo for registration, to determine with the Chairman of the Khatlon region the place for construction of the refinery, and to supply Vivalo with the necessary technical specifications.

66. According to Mr. Khasky’s testimony, the refinery project was not pursued because the joint venture was unable to obtain access to the production of the Khatlan region where the refinery would have been located, and therefore the project made no economic sense.
67. Three months later, on December 25, 2000, Claimant and the State Committee signed four more agreements on exploration and production, i.e. the December 2000 Agreements, which extended Claimant’s right to oil exploration and production beyond the Kashkakum and Alimtay areas to the East Soupetau area (in Northern Tajikistan), and the Rengan area, the Sargazon area and the Yalgysyak area (all in Southern Tajikistan not far from Alimtay), respectively, on essentially the same terms as the earlier exploration agreements.
68. On June 27 and 28, 2001, the Baldjuvon Founding Documents and the Petroleum SUGD Founding Documents were signed. Baldjuvon was

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<sup>2</sup> Vivalo was in fact a Bahamas company, but is mistakenly identified here as Austrian. It seems it was understood to be a special purpose vehicle established by Claimant, an Austrian national.

finally registered on October 26, 2001 and Petroleum SUGD on November 9, 2001, and at that point came into existence as limited liability companies under Tajik law. These agreements appear to have replaced the two March 2000 Agreements in that they substituted state-owned Tajik production enterprises for the State Committee as Founders and modified the originally contemplated level of capital contributions to be made by the parties. (See subparagraphs 17(f) and (g) above).

69. It will be useful to cite here certain key provisions of the two Constituent Agreements and Charters which are virtually identical, but for the identity of the Tajik participant, the level of authorized capital and the territory of operation within Tajikistan (all of which have already been indicated in subparagraph 17(f) and (g) above).

70. The Constituent Agreements provided in relevant part:

Article 3.2: *“Each of the Partners undertakes to pay his share into the Joint Venture’s fund within a year in full.”*

Article 3.4: *“A decision to alter i.e. to increase or decrease the Authorized Registered Capital, shall be taken at the General Meeting of the Partners....”*

Article 3.5: *“Paying-up of contribution may be effected in form of:  
money resources in national or hard currency;  
Buildings, facilities, equipment, inventory and other material assets;  
Propriety interest on any property, including intellectual one.”*

Article 4.3: *“Clear profit of Joint Venture is to be apportioned among the Partners in proportion to their contributed share.”*



Article 6.1: *“The supreme managerial control body of Joint Venture is General Meeting of the Partners.”*

Article 6.3: *“Authority of the managerial control bodies and delimitation of their competence are defined in the Statute.”*

Article 7.2: *“This Agreement has been concluded for an unspecified term.”*

71. The Charters provided in relevant part:

Article 1.5: *“Joint Venture is considered as created from the date of its registration in the Registration Office and in its activity is guided by the Civil Code of the Republic of Tajikistan, the legislative Act of the Republic of Tajikistan ‘About the Foreign Investments’, as well as by other legal and standard acts and enactments of the Republic of Tajikistan, decisions of the Partners, and this Statute.”*

Article 2.1: *“The basic purpose of creation of Joint Venture is to benefit by way of:*

*Increasing the recovery of oil and gas from the oil and gas fields now in operation on the territory of the Baldjuvon region of the Republic of Tajikistan: Beshtentyak, Souldouzy, Uzounakhor;<sup>3</sup>*

*Recovery of oil and gas and trading in that at the world prices both within the confines of the Republic of Tajikistan and beyond its boundaries;*

*Executing exploration work in the areas that are promising of hydrocarbon resources;*

*Intake of advanced technologies for recovery of oil and gas and for execution of exploration work.”*

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<sup>3</sup> In the case of SUGD, this paragraph simply reads: *“...on the territory of the SUGD area of the Republic of Tajikistan.”*

Article 2.3: *“Joint Venture is entitled to engage itself into the activity which is to be licensed the moment the license is granted, in compliance with the condition of and for the term of validity as indicated in the license.”*

Article 4.4: *“If on expiry of the second and each subsequent fiscal year the cost of clear assets of Joint Venture comes to be less than the Authorized Registered Capital, Joint Venture is obliged to declare and register decrease of its Authorized Registered Capital following the procedure of the Statute. If the cost of the indicated assets becomes less than the minimal extent of the Authorized Registered Capital, Joint Venture becomes subject to liquidation.”*

Article 7.2: *“Joint Venture can be liquidated:*

*Due to systematic violation of provisions of the Laws of the Republic of Tajikistan in force and of valid provisions of this Statute;*

*Due to money-losing state of Joint Venture.*

Article 7.5: *“All the financial assets of Joint Venture, including sales proceeds from the property left after effected settlements with the budget and money lenders, should be transferred to full command of the Partners.”*

72. Despite the creation of the two joint venture companies, according to Claimant's testimony, continuing management and technical problems were encountered throughout 2002. According to Mr. Khasky, Vivalo's technical manager and Chairman of Petroleum SUGD, the Tajik partner put all 1000 of its employees on the joint venture payroll, when only 300 had been agreed to by Vivalo; held the joint venture responsible for payment of unpaid wages, taxes and debts incurred before its creation; cut

off electricity from the oil wells; burdened the joint venture with the obligation of providing public utilities, such as water supply, to the city; and insisted that Vivalo continue to invest, despite the fact that no licenses had been issued after repeated requests to and promises by the Ministry of Energy.<sup>4</sup> As a result of these conditions, Claimant finally sealed the existing wells that Petroleum SUGD had been drilling and ceased incurring further costs.

73. No exploration activity was ever carried out in the four additional areas covered by the four December 2000 Agreements. Claimant asserts that this was due to Respondent's failure to provide the necessary licenses despite its commitment to do under Article 7 of each of those Agreements. He cites his letter request to Minister of Energy Yorov on April 30, 2002 to issue licenses for the above four areas so that he could engage a foreign team and mobilize foreign technology. He also stated in that letter that he has financed exploration works in Alimtay in the amount of \$830,000 but, because of the problems encountered, has not proceeded to work in Kashkakum. Claimant asserts that he received no response to this letter.
74. Finally, in late 2002, President Rakhmonov of the Republic of Tajikistan adopted Decree No. 83-r dated November 4, 2002 providing as follows:

*"In compliance with Regulations of Government of Republic of Tajikistan from December 30, 2001, No. 591 "About the order of licensing of activity and services in the sphere of energy of Republic of Tajikistan" and on the basis of the proposal of the Ministry of Energy of the Republic of Tajikistan allow the Ministry of Energy of the Republic of Tajikistan to issue, in accordance with the established procedure, the license for search, exploring, production and processing of oil and gas in the fields of*

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<sup>4</sup> According to the evidence submitted, the State Committee in 2001 was subsumed into the Ministry of Energy.

*Nijazbek – North Karachicum, Madanijat, Makhram, North Karatau, Kanibadam, North Kanibadam, Ravat of Kanibadam district of Sogdijsk region, and also in the fields of Cel-Rokho, Iritan, Obi-Shifo of Isfarinsk district of Sogdijsk region to “Petroleum SUGD Limited.”* It may be noted that the areas referred to in the four December 2000 Agreements are not mentioned in this Decree.

75. At the December 12, 2002 Board meeting of Petroleum SUGD, Mr. Khasky, Chairman of the Board, and indeed all of the Board members, expressed dissatisfaction with the business to date. According to the testimony of Mr. Khasky, while the licenses had still not been issued, work was nonetheless taking place in the field, but at unsatisfactory performance levels. Mr. Khasky proposed during the meeting that Vivalo's remaining share of authorized capital, which had not to date been paid, should be paid in by way of deliveries of equipment, material assets and services, through a service contract which it had negotiated with the Russian company, Gaspromgeocomservice, rather than fully in cash as originally contemplated. This proposal was adopted by the vote of the Vivalo directors to the Petroleum SUGD Board, since they held the necessary majority.
  
76. Three days later, a General Meeting of the Petroleum SUGD shareholders was held, presided by Mr. Khasky. Invited guests included among others Mr. Saidrahmanov, Deputy Minister of Energy; Mr. Mustafakulov, representative of the Ministry of Justice; Mr. Nosimov, Trade Representative of the Republic of Tajikistan in Austria. At the meeting, the Tajik shareholder as well as the representatives of the Ministry of Energy and the Ministry of Justice stated that Vivalo had failed to complete its full contribution into the authorized capital, having contributed only \$455,725. The Deputy Minister of Energy also stated that the Government's decision to build an oil refinery was not being

implemented (although, it may be noted, this related to Baldjuvon, not Petroleum SUGD). The Vivalo representative, Mr. Khasky, replied that Petroleum SUGD had not received the necessary licenses from the Government, and that the capital it had so far invested had gone to solve problems of payment of wages and taxes, and acquisition of equipment rather than to develop the activity of the venture.

The Tajik shareholder moved that the authorized capital of Petroleum SUGD be reduced to reflect the actual contributions of the parties, i.e. \$2 million for the Tajik party and \$455,724 for the foreign party, and that it be recognized that in order to protect its right and interests in line with Tajik legislation, the Tajik party is entitled to appeal to the Tajik Economic Court. This motion was voted down by Vivalo, having the majority vote. Mr. Khasky made a handwritten notation on the Protocol of the meeting as follows: "*We shall provide our share in the statutory fund in full after receiving a license and holding a founding meeting in early February 2003.*"

77. Shortly after the above meeting, Sugdneftegaz, the Tajik partner, brought an action against Vivalo before the Economic Court of the Sugdskaya District seeking the annulment of the decision of the December 15 Annual Meeting and the reduction of the authorized capital of Petroleum SUGD. The hearing of the case was first scheduled for January 28, 2003 but was postponed to February 3, then February 13, February 27, March 5 and finally took place on March 14, 2003. It is alleged that Vivalo requested a further one-day extension until March 15, due to the absence of a visa for Claimant, and that this request was denied. This being said, according to Mr. Khasky's testimony, he was in the Court building on March 14, but did not attend the hearing. It was on that occasion that he encountered the Tajik Trade Representative to Austria, who showed him and later gave him copies of a series of licenses issued by the Ministry of Energy to

Petroleum SUGD dated December 20, 2002, but not previously disclosed to him.

78. In the meanwhile, Claimant had written a further letter to the Minister of Energy on February 9, 2003 requesting once again the issuance of the licenses, referring to Presidential Decree No. 83-r, and requesting cessation of the Court action. Again, according to Claimant's testimony, there was no response.
79. At around this time, a letter was sent by a third party, an Austrian individual by the name of Dr. Schenz, who was formerly employed as CEO of Vivalo, to the Minister of Energy proposing a meeting to explore investment possibilities in Tajikistan's oil & gas sector during a forthcoming trip to Dushanbe. Dr. Schenz is now a principal in an Austrian company called Austrian Energy Partners, which appears to have become a participant in Petroleum SUGD. Claimant raises a claim against Respondent for alleged misconduct in this connection.
80. Finally, in a letter of February 25, 2003, Claimant appealed directly to the President of the Republic, referring to Claimant's existing investment in Alimtay and the alleged lack of cooperation to date from the Tajik side, and requesting the President's intervention with the Minister of Energy in order to obtain long-term licenses for which, he said, application had been made more than six months earlier but without results. Claimant pointed out that without such licenses no investment in oil production could be legally carried out in Tajikistan, and that if the licenses were not granted he would have no alternative but "*to apply to the international court in Stockholm...*" and "*report to the Energy Treaty Charter and the International Monetary Fund...*". There is no evidence in the record of any response to this letter.

81. Following the March 14, 2003 court hearing referred to in para. 77 above, a decision was rendered, holding that the shareholder decision taken at the December 15, 2002 Annual Meeting was void, that the authorized capital of Petroleum SUGD should be decreased to reflect the actual contributions of the parties, and that the General Assembly of Petroleum SUGD should implement the appropriate changes to the constituent documents and register them.
  
82. Mr. Nasrulloev alleges that the appeals filed by Vivalo from this court decision were wrongfully rejected by the appellate instances without regard to due process standards. In particular, he asserts that although the appeal was filed within one month as required by law, the appellate court untruthfully maintained that the filing was not in time. A further appeal in cassation is said to have been rejected because of late payment of state duties, a fact which Mr. Nasrulloev contests. Finally, an application for supervisory review to the Chairman of the Supreme Economic Court was declined, although he acknowledges that such recourse is of a discretionary character.
  
83. According to Mr. Nasrulloev's written statement, there had also been a Board Meeting of Baldjuvon on December 15, 2002, although the protocol of that meeting is not submitted in evidence. Mr. Nasrulloev states that an action was filed on August 29, 2003 by the Tajik shareholder, SNG, with the Supreme Economic Court to declare the Decision of the December 15, 2002 meeting invalid. He asserts that the court ignored the lateness of the action which according to Article 49 of the Law on Limited Liability Companies could only be brought within two months from the date of the decision, in cases such as this where the participant in the company knew or should have known about the decision.

84. The hearing in the Baldjuvon court action was set for September 22, 2003, but postponed until January 6, 2004. Then, according to Mr. Nasrulloev's statement, without notifying Vivalo, the court decided to advance the hearing that had been scheduled and to hold it instead on December 15, 2003. At that hearing, the Court upheld the Tajik partner's application. An appellate hearing took place on February 11, 2004, which upheld the lower court decision. Supervisory review was denied.
85. In the interim, according to Mr. Nasrulloev, a General Meeting of Baldjuvon took place on November 28, 2003, in the absence of the foreign investor, at which a decision was taken to expel the foreign investor from the company.
86. At this point, the Ministry of Finance and the Tajik partner jointly filed an action against Vivalo in the Economic Court to have Baldjuvon LLC declared as a failed enterprise.
87. Mr. Nasrulloev brought a counterclaim in that action seeking to have the November 28, 2003 decision declared void and to oblige the Ministry of Energy to grant licenses to Baldjuvon.
88. Several hearings were set in the Baldjuvon case – on February 25, 2004, March 5, 2004, and March 31, 2004. On each occasion, according to Mr. Nasrulloev's testimony, he received notice of the hearing only hours before the hearing was to take place, making it impossible for him to attend. A decision was rendered on April 2, 2004 granting the Ministry's and the Tajik partner's application and denying Vivalo's.
89. Mr. Nasrulloev filed an appeal from this decision, which was apparently rejected at a court hearing on June 25, 2004, a hearing which he maintains



was notified to him only on July 2, 2004, that is, after the hearing had already taken place.

90. There is no documentary evidence on the record to explain what has transpired after this date and prior to the commencement of this arbitration with respect to either of the joint venture companies. According to Claimant's testimony, Petroleum SUGD has continued to operate without his receiving any information on its activity. In paragraph 45 of Claimant's SOC, he refers to the website [www.energypartners.at](http://www.energypartners.at). According to that website, another Austrian company, EPA Beteiligungsgesellschaft now operates Petroleum SUGD, and Dr. Schenz, mentioned earlier, appears as one of the principal persons in that company. Claimant believes that Baldjuvon was liquidated, but has submitted no evidence of this.
91. Mr. Nasrullojev has expressed the opinion that gross violations of substantive and procedural law have been committed by the Tajik Economic Courts by virtue of the foregoing circumstances, which have caused the wrongful expulsion of Vivalo from Baldjuvon and the wrongful reduction of its share in Petroleum SUGD.

## **V. SUMMARY OF CLAIMANT'S POSITION**

### **A. Application of the Energy Charter Treaty**

92. Claimant asserts that he is entitled to the benefit of the investor protection provisions of the Energy Charter Treaty, as an Austrian citizen who has made an Investment, within the meaning of the Treaty, both directly and through his wholly-owned Bahamian company, Vivalo, in the energy sector in the territory of the Republic of Tajikistan, noting that both Austria and Tajikistan are signatories to the Treaty.

93. An “Investment” is defined in Article 1(6) of the ECT to mean:  
*“Every kind of asset, owned or controlled directly or indirectly by an Investor and includes:*  
*(a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens and pledges;*  
*(b) a company or business enterprise, or shares, stock or other forms of equity participation in a company or business enterprise, and bonds and other debts of a company or business enterprise;*  
*(c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;*  
*(d) intellectual property;*  
*(e) returns;*  
*(f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector ”*
94. “Economic Activity in the Energy Sector” is defined in Article 1(5) of the ECT to mean *“an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and Products....”* “Energy Materials and Products” are defined in Annex EM of the ECT and include *“Petroleum oil and oils obtained from bituminous minerals, crude”* (para. 27.09 of the EM Annex) and *“Liquified petroleum gases and other gaseous hydrocarbons....”* (para. 27.11 of the EM Annex).
95. Claimant alleges that Respondent breached its obligations owing to him as an Investor, under Part III of the Treaty; that Claimant duly informed Respondent of the alleged breaches of obligations; and despite the passage of a number of years, no resolution has been reached.

96. Therefore, Claimant asserts that he has properly invoked the jurisdiction of this Arbitral Tribunal established under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, in accordance with Article 26 of the Treaty, to resolve the dispute.
97. While Claimant's counsel maintain that Respondent acted in violation of Tajik law in its dealings with Claimant, they stress that this is relevant in the present arbitration only as a matter of evidence and fact, and that the basis for Claimant's legal claims in this arbitration is that Respondent violated its Treaty obligations under the ECT and principles of international law. In this connection, Claimant also relies on the provisions of the Vienna Convention on the Law of Treaties (1969) and the UN International Law Commission's Draft Articles on Responsibility for Internationally Wrongful Acts.

#### **B. Alleged Breaches of the Energy Charter Treaty**

98. The obligations which Claimant asserts have been violated by Respondent are contained in Article 10(1) and (7) and in Article 13 of Part III of the Treaty, entitled "Promotion, Protection and Treatment of Investments". It is useful to set forth these provisions, in relevant part, here:

##### ***Article 10 Promotion Protection and Treatment of Investments***

*(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their*

*management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.”*

*“ (7) Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.”*

***“Article 13 Expropriation***

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

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

*Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or*

*impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").*

....

*(3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares."*

99. In particular, Claimant claims that:

(a) Respondent has failed to create stable, equitable, favourable and transparent conditions for Claimant's investment, in breach of Article 10(1) above, which, according to Claimant, is factually interlinked with Respondent's failure to accord fair and equitable treatment;

(b) Claimant's investments were not accorded fair and equitable treatment, in breach of Article 10(1) above. Claimant alleges in support of this position: (i) inconsistency and lack of transparency in Respondent's behaviour on the matter of granting licenses and in refusing Claimant entry visas at a later stage of the investment necessary in order to attend to his business and to defend his investment in judicial proceedings; (ii) failure to issue the necessary licenses which were legitimately expected by Claimant on the basis of the exploration agreement, the provisions of the two joint venture agreements, Presidential Decrees No. 397 and 83-r, and the continuing assurances of the Minister of Energy; (iii) the constant failure by Respondent to observe the fundamental principle of due process in the Tajik court actions, as evidenced by Mr. Nasrulloev's witness statement; and (iv) the meeting between the Minister of Energy and a third party on February 16, 2003 to discuss future investment in Petroleum SUGD a month before the decision of the SUGD court on March 14, 2003.

(c) Claimant's investments were not accorded constant protection and security, in breach of Article 10(1) above. In this connection, Claimant refers to Mr. Khasky's testimony to the effect first, that demands were made by Tajik security forces for immediate cash payments for alleged debts incurred by the predecessor to the Petroleum SUGD joint venture and second, that the Tajik directors of Petroleum SUGD told him that they could not guarantee his personal safety if he failed to support their proposal to reduce Vivalo's share of the joint venture's authorized capital. In addition, Claimant maintains that the alleged miscarriages of justice by the Tajik courts in reducing Claimant's shareholding in Petroleum SUGD and in dissolving Baldjuvon constituted breaches of the obligation of full protection and security;

(d) Claimant's investments were impaired by unreasonable or discriminatory measures affecting its management, maintenance, use, enjoyment or disposal, in breach of Article 10(1) above. In particular, Claimant here relies on the facts referred to above in connection with the fair and equitable treatment obligation, as well as the denial of the opportunity (by refusing licenses) to commence drilling operations as agreed upon in the explorations agreements; negating promises concerning the provision of qualified local expertise for Alimtay drilling operations, insisting on the use of obsolete government-owned drilling equipment; denying entry visas to Claimant in order to manage his business affairs; and frustrating the Gazpromgocomservice Service Contract first, by not issuing the necessary licenses and second, by proceeding to dissolve Baldjuvon and reduce Vivalo's shareholding in Petroleum SUGD, thus affecting the use and enjoyment of the investment.

(e) Claimant's investments were subject to treatment less favourable than that required by international law, in breach of Article 10(1) above. As regards the Baldjuvon joint venture, Claimant points to the Tajik Court's

decision of December 15, 2003 to hear the claim of the Tajik shareholder ten months after the expiry of any right to appeal the December 15, 2002 Board decision; the rendering of the decision without informing Vivalo, the other shareholder; and the failure to notify Vivalo or its legal representative of a hearing on April 2, 2004 thus depriving it of the right to be heard. As regards Petroleum SUGD, the court's failure to postpone the March 14, 2003 hearing by one day to allow Vivalo's representative to attend; the dismissal of appeals for no apparent legal reason; and the misapplication of relevant Tajik law in reaching the decision to reduce Vivalo's share interest in the joint venture.

(f) Respondent has breached its obligation to observe the obligations it has entered into with the Investor and the Investor's Investment, pursuant to Article 10(1) above. Here, Claimant refers to (i) the failure of the State Committee for Oil & Gas to observe Respondent's contractual obligations under the Alimtay Exploration Agreement by failing to cooperate with Claimant by providing the promised expertise and otherwise facilitate the exploration activities pursuant to the Agreement; (ii) the failure of the State Committee for Oil & Gas to issue the licenses necessary to allow Claimant to commence his exploration activities with respect to the East Soupetan, Rengan, Sargazon and Yalgyzkak areas, covered by the December 2000 Agreements which, in turn, prevented Claimant from exploiting the commercial possibilities and attracting additional funding which was crucial for making the exploration a success; and (iii) the failure of the Ministry of Energy to issue the necessary licenses which would have allowed Vivalo to continue its investment in the Baldjuvon and/or Petroleum SUGD joint ventures, in breach of the joint venture agreements and in disregard of Presidential Decree No. 83-r.

(g) Claimant's investments were accorded treatment less favourable than that accorded to national investors and Investors of other Contracting

Parties to the ECT, or any third State, in breach of Article 10(7). Specifically, Claimant argues that it was a breach of the national treatment standard to permit the Tajik party of the two joint ventures to receive 40% of the share capital in return for outdated machinery, equipment and other tangibles, while refusing Vivalo the opportunity to contribute its share of authorized capital in anything other than cash.

(h) Finally, it is argued that Claimant's investments were subject to measures equivalent to expropriation in breach of Article 13 above, by virtue of Respondent's (i) failure to issue exploration licenses with respect to the four December 2000 Agreements; (ii) failure to issue the necessary licenses with respect to the Baldjuvon joint venture and the subsequent dissolution of the joint venture by the Supreme Court of Tajikistan on application of the Ministry of Finance; (iii) failure to issue the necessary licenses with respect to Petroleum SUGD, and the subsequent forced reduction of Vivalo's share interest in the joint venture; and (iv) the failure of Respondent to offer to pay Vivalo dividends from production of oil and gas products in respect of its reduced share in Petroleum SUGD since March 14, 2003.

100. Claimant relies on the principles of attribution contained in the UN Draft Articles on Responsibility for Internationally Wrongful Acts for the principle that the State is responsible for the acts and omissions of the Government, including its executive, legislative and judicial branches, and its administrative authorities.

### **C. Relief Claimed**

101. Claimant in his SOC has asked the Tribunal to render an award in the following manner (paras. 243.1-243.14 SOC):



- declaring that the Republic has breached its obligations under Articles 10(1), 10(7) and 13 of the ECT;
- declaring that Respondent has breached its obligations owed to Claimant under the various agreements, joint ventures agreements, and under Tajik law;
- ordering the Republic to issue the necessary licences for the exploration areas agreed upon in the six exploration agreements, namely: Yalgyzkak, East Soupetan, Rengan, Sargazon, Alimtay and Kashkakum.
- ordering the Republic to reinstate the Baldjuvon Joint Venture and reinstate Vivalo's shares at their original share of 60%;
- ordering the Republic to issue the necessary licences for the reinstated Baldjuvon Joint Venture;
- ordering the Republic to reinstate Vivalo's shares in the "Petroleum Sugd" Joint Venture at their original share of 60%;
- ordering the Republic to issue the necessary licences for the reinstated "Petroleum Sugd" Joint Venture;
- awarding Claimant compensatory damages of USD 830,000 in respect to the Alimtay Exploration Agreement, or such sum as the Arbitral Tribunal deems just and proper compensation;
- awarding Claimant compensatory damages of USD 5,923,000 in respect to the "Baldjuvon" Joint Venture, or such sum as the Arbitral Tribunal deems just and proper compensation;

- awarding Claimant compensatory damages of USD 73 million with respect to “Petroleum Sugd” Joint Venture, or such sum as the Arbitral Tribunal deems just and proper compensation;
  - awarding to Claimant both pre-award and post-award interest at the minimum rate of interest specified in the EU Directive 2000/35/EC dated 29 June 2000 on combating late payment in commercial transactions;
  - an order reserving the right to review the compensatory sums awarded to Claimant with respect to “Baldjuvon” and “Petroleum Sugd” Joint Ventures in the event that more information becomes available concerning the volume of oil and gas production in both or either of the Joint Ventures;
  - awarding to Claimant the costs of the arbitration in their entirety, including Claimant’s own legal fees and expenses, the fees and expenses of the Arbitral Tribunal and the fees of the Arbitration Institute of the Stockholm Chamber of Commerce; and
  - awarding to Claimant such further or other relief, as may be deemed appropriate.
102. Subsequent to submission of the SOC, the Tribunal decided to bifurcate the proceedings and reserve the issue of quantum of damages and/or other remedies for a possible second phase and to limit the first phase of the proceedings to the issues of jurisdiction and liability. Claimant, at the hearings, therefore limited his request to the Tribunal for the first phase of the proceeding to an award as follows:
- a) declaring that the Arbitral Tribunal has jurisdiction to hear and decide upon all of Claimant’s claims;

b) declaring that Respondent has breached its ECT obligations under Articles 10(1), 10(7) and 13, and

c) awarding Claimant the costs incurred by him for this first phase of the arbitration proceedings, including Claimant's own legal fees and all other expenses.

103. In light of the bifurcation, the Tribunal accepts Claimant's limited request in respect of the first phase of the proceedings as formulated above.

#### **VI. SUMMARY OF RESPONDENT'S POSITION ON JURISDICTION (LETTER OF 3/3/09)**

104. Respondent's defence in this arbitration has been limited to a challenge to the Tribunal's jurisdiction set forth in a letter addressed by the Minister of the Ministry of Energy and Industry of the Republic of Tajikistan on March 3, 2009 to the SCC Institute, with copy to Dr. Schwank, Claimant's representative, and referred to in paragraphs 45-47 of this Award.

105. Respondent argues that this Tribunal has no jurisdiction over the present dispute for the following reasons:

There is, according to Respondent, no written agreement between the Parties submitting the dispute to arbitration before the SCC Institute, whereas Article 5 of the SCC Rules (Respondent erroneously referred to the April 1, 1999 Rules, but the present Rules have not fundamentally altered the cited provision) requires the Request for Arbitration to include a copy of the relevant arbitration agreement. Moreover, Respondent argues, Articles 26 and 27 of the ECT also requires a written agreement

between the disputing parties.

According to Respondent, the Foundation Agreement on creation of Petroleum SUGD dated June 28, 2001 and signed by the unitary enterprise “Sugdneftegaz (Republic of Tajikistan), Petroleum and Gas Babylon International Co. Ltd. (Commonwealth of Bahamas) and “EPA Betailungsgezellshaft” (Republic of Austria) contains a provision in Article 8 that disputes between the company and any legal and natural persons, including foreign persons, are to be considered in accordance with the laws of the Republic of Tajikistan. Moreover, Article 7 of the “joint agreement” of the Petroleum SUGD signed by the parties of the company on April 3, 2003 provides that any disputes between the founders and between the company and other legal and natural persons, including foreigners, shall be resolved by the Supreme Economic Court of the Republic of Tajikistan in accordance with the law of the Republic of Tajikistan. In accordance with Article 22 of the Tajik Law “On Foreign Investments,” investment disputes between the parties to the investment activities are resolved in accordance with the terms of the agreements between the parties.

Respondent further relies on the following provisions of the Tajik Code of Economic Proceedings [Civil Procedure Code] and asserts that only the economic courts of the Republic of Tajikistan have the power to hear cases involving foreign entities in disputes related to State-owned assets: Article 26, Article 34 and Article 227.

Respondent believes that the SCC Institute should have rejected, and asks that it now reject, the request for arbitration because of the absence of clear evidence of jurisdiction.

## VII. INTRODUCTION TO THE TRIBUNAL'S ANALYSIS

106. By Procedural Order No. 8, the Tribunal bifurcated the present arbitration, and decided to render an award in the first instance on the questions of jurisdiction and liability, leaving the question of remedies and quantum for a later stage as the case may be.
107. Therefore, the Tribunal's analysis set out in Sections VIII and IX below of this Award is limited to the question of jurisdiction pursuant to the ECT and to determination of whether or not Respondent has breached any obligations invoked by Claimant, as specified in Section V.B and V.C above.
108. Respondent, in its letter of March 3, 2009 referred to in Section VI above, has challenged the jurisdiction of the SCC Institute as an arbitral institution competent to deal with the present dispute. Consequently, it has implicitly challenged as well the jurisdiction of this Tribunal appointed pursuant to the SCC Rules. The Tribunal addresses Respondent's arguments in its discussion of the question of jurisdiction in Section VI below.
109. In its analysis of both jurisdiction and merits, the Tribunal has considered not only the positions of Claimant as summarized in Section V but also the numerous detailed arguments in support of those positions made at the hearing and in the written memorials. To the extent that these arguments are not referred to expressly, they must be deemed to be subsumed in the analysis.
110. Counsel for Claimant have done an able job setting forth the legal standards that they contend are applicable in determining whether a breach of obligations has occurred in violation of the investor protections set out

in Part III of the ECT. They have submitted ten volumes of prior arbitral decisions, scholarly articles, and other legal materials bearing on the interpretation of the provisions of the ECT and similar provisions of other investment protection treaties. And they have made clear written and oral presentations on the Treaty and applicable international law.

111. The jurisprudence of prior cases, while of course not binding on the Tribunal, has been very helpful. However, the Tribunal has kept two considerations in mind. First, while investment treaties tend to be broadly similar in the protections they provide, they are not identical, and it is our duty to interpret the specific text of the Treaty before us. Secondly, general statements of principle from prior arbitral decisions cannot be taken in a vacuum; they are made in a particular factual context which may or may not be comparable to the case before us.
112. As Claimant has correctly pointed out, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 1969, "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.*" We have been guided by this principle in interpreting the Treaty.
113. The principal difficulty we have encountered in the present case relates not to the law or the applicable legal standards, but to the factual evidence submitted in support of Claimant's legal positions. The Tribunal has repeated on a number of occasions during this arbitration that Claimant bears the burden of proving the factual allegations essential to support its legal claims, notwithstanding Respondent's non-appearance in the proceedings. Although Swedish law, the applicable procedural law in this arbitration, does not contain any specific statutory provisions dealing with allocation of the burden of proof or rules concerning the standard of proof

required, it is generally accepted that a party who raises a claim needs to prove the circumstances which form its legal and factual basis.

114. With respect to many of Claimant's claims, the Tribunal has found the evidence to be too limited, circumstantial, unsubstantiated or insufficiently substantiated to permit the Tribunal to draw the factual conclusions advocated by Claimant, even accepting Claimant's legal arguments.
115. Claimant has represented to the Tribunal that extensive efforts were made to obtain further documentary evidence in support of his case, but were not successful since such evidence is located in Tajikistan where Claimant and his representatives no longer have access to it. While the Tribunal can understand that currently Claimant may have no or very limited access to documents in Tajikistan, this does not allow the Tribunal to make far-reaching assumptions to the detriment of Respondent.
116. Beyond the letters written by Claimant or Vivalo to Government officials and the witness statements of Claimant and Claimant's representatives prepared for and submitted in this arbitration, the factual evidence in this case has been essentially limited to the following: i) the agreements themselves which gave rise to Claimant's investments, ii) copies of the licenses in fact issued by Respondent in connection with certain of those agreements, iii) copies of board and/or shareholder minutes of Petroleum SUGD relating to the December 2002 and February 2003 meetings, iv) copy of the decision of the SUGD economic court of March 14, 2003, v) copies of the Presidential Decrees No. 83-r and No. 397, and vi) various extracts of Tajik legislation. There is not a single letter, telefax, email or other communication emanating from the Tajik Government or either of the Tajik partners in the two joint venture companies to flesh out the matters in dispute. Nor has the Tribunal seen a copy of any of the joint

venture applications for licenses, which were allegedly made and which were allegedly rejected or delayed by Respondent.

117. As a result, the Tribunal has before it a very fragmentary picture, making it difficult without engaging in considerable speculation to draw affirmative conclusions with respect to many of Claimant's factual allegations.
118. Finally, it is recalled that Claimant's Tajik legal expert, Mr. Nasrulloev, who had submitted a witness statement in this arbitration along with materials on Tajik law, failed to appear to testify at the hearings, on the ground that he feared for his safety in Tajikistan if he were to do so. The Tribunal has no concrete information on which to evaluate this explanation for Mr. Nasrulloev's non-appearance. Nonetheless, after discussion with counsel at the hearings, the Tribunal decided to admit the witness statement of Mr. Nasrulloev, with the reservation that its weight as evidence would be affected by the fact that the Tribunal had not had an opportunity to pose questions to him about his statement. The Tribunal also noted at that time that Mr. Nasrulloev, in light of his representation of Vivalo in the court proceedings in Tajikistan related to this dispute, does not qualify as an independent expert. As the Tribunal indicated, his report has a "mixed" character, being in part a legal opinion on principles of Tajik law and in part a fact witness statement with respect to the conduct of the Tajik court proceedings in which he was personally involved. (See subparagraph 44(c) above).
119. Thus, the Tribunal has made its findings of fact as set forth in this award taking into account the evidence submitted and giving that evidence the weight which the Tribunal considers appropriate.



## VIII. JURISDICTION AND APPLICABLE LAW

### A. Existence of an Arbitration Agreement

120. Submission of the present dispute to the jurisdiction of a tribunal established under the SCC Rules requires an arbitration agreement between the Parties to that effect. Respondent in its letter of March 3, 2009 (see Section VI above) contends that such an agreement does not exist. Respondent cites Articles 26 and 27 of the ECT as requiring a written arbitration agreement between the disputing parties, but notes that Claimant himself is not a party to the ECT, although it is not disputed that the Republic of Tajikistan became a Contracting Party to the ECT upon its deposit of instruments of ratification on June 25, 1997. Respondent further cites the SCC Rules as requiring Claimant to produce such an arbitration agreement with its Request for Arbitration.
121. Article 26 of the ECT deals with disputes between an Investor and a Contracting Party. Article 27, on the other hand, deals with disputes between Contracting Parties themselves, and is therefore not here relevant.
122. It is widely recognized in international arbitral law and practice that the dispute settlement clause in an investment treaty between two or more signatory States constitutes an “offer,” which a qualified investor may “accept” by filing a claim. With the acceptance of the offer, an arbitration agreement comes into existence.
123. As regards the ECT, such a mechanism for meeting the requirement of an agreement in writing is expressly provided for in Article 26, and, most relevant to the present case, by the provisions contained in Article 26(2)(c), (3)(a), (4)(c) and (5)(a)(ii). According to those provisions (quoted earlier in this Award at paras. 13-16), Tajikistan as a Contracting

Party to the Treaty has given its unconditional consent to the submission to international arbitration by an “Investor” of a dispute arising under Part III of the Treaty.

124. Moreover, pursuant to the above-mentioned provisions, Tajikistan has agreed that such an Investor may, by expressing its written consent to do so, choose to submit such dispute relating to its “Investment” in the “Area” of the Republic to an arbitral proceeding under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.
125. Claimant, by his letter of May 16, 2008 attached as part of Annex 14 to its Request for Arbitration in the present case, gave his written consent to arbitrate his dispute consisting of claims based on Part III of the ECT before the Arbitration Institute of the Stockholm Chamber of Commerce.
126. According to Article 26(5)(a)(ii) of the Treaty, the consent given by the Republic of Tajikistan and the consent given by the Investor-Claimant, referred to in the preceding paragraphs, satisfy the requirement for an arbitration agreement in writing for purposes of Article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
127. The SCC Rules provide that Claimant’s Request for Arbitration shall include *“a copy or description of the arbitration agreement or clause under which the dispute is to be settled.”* (SCC Rules, Article 2(iv)) Paragraph 42 of Claimant’s Request for Arbitration provided such a description and quoted the text of Article 26 of the ECT.
128. Thus, a valid arbitration agreement exists, subject to determining whether Claimant is an “Investor” within the meaning of the Treaty and whether

the dispute relates to his “Investment” within the “Area” of Respondent, as those terms are defined in the Treaty.

**B. Claimant as an Investor under the Treaty**

129. Claimant has alleged that he is a citizen of Austria. Austria is a Contracting Party to the ECT by virtue of the deposit of its instruments of ratification on December 16, 1997. Pursuant to Article 1(7) of the ECT, an “Investor” for purposes of the Treaty includes “*a natural person having the citizenship or nationality of or who is permanently residing in that Contracting Party [that is, a Contracting Party other than the host State of the Investment] in accordance with its applicable law.*”
130. As proof of his Austrian nationality, Claimant has submitted a copy of his Austrian passport and his 1997 certificate of naturalization (he was born in Syria). (See paragraph 58 above). Nationality certificates and passports are considered to constitute *prima facie* proof of nationality. There is nothing in the record to cast doubt on the authenticity or validity of these documents.
131. Thus, the Tribunal considers it to be established that Claimant is an Austrian national and thus qualified to be considered as an “Investor” of a Contracting Party to the ECT, other than Tajikistan.
132. As the naturalization certificate dates from 1997, i.e. before the first alleged investment was made in June 1998, Claimant would also have qualified as an Investor under the Treaty at the time of making his alleged investment (whether one considers this to be necessary or not).

**C. Existence of an Investment in the Area of the Contracting Party**

133. A dispute exists between Claimant and the Republic of Tajikistan, as presented by Claimant in his Request for Arbitration and in his SOC. However, the Treaty requires that the dispute relate to an “Investment” in the “Area” of the Contracting Party.

134. Pursuant to Article 1(6) of the ECT (cited *supra*, in its entirety, at para. 93 *supra*), the following are among the assets included within the term “Investment”:

*“Every kind of asset, owned or controlled directly or indirectly by an Investor and includes:*

*(a) tangible and intangible, and movable and immovable, property and any property rights...;*

*(b) ...shares, stock or other forms of equity participation in a company or business enterprise...;*

*(c) ...claims to performance pursuant to contract having an economic value and associated with an Investment;*

*...*

*(f) ...any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.*

*‘Investment’ refers to any investment associated with an Economic Activity in the Energy Sector....”*

135. The definition of “*Economic Activity in the Energy Sector*” is set forth at Para. 94 *supra* and includes among other things the exploration and extraction of oil and gas.

136. The dispute presented by Claimant in this arbitration relates to:

i) six oil and gas exploration agreements concluded by Claimant in his personal capacity with the Chairman of the State Committee for Oil & Gas of the Republic of Tajikistan regarding different areas within the Republic, and

ii) shares in two Tajik joint venture companies, Baldjuvon and Petroleum SUGD, established by Vivalo, a Bahamanian company allegedly owned and controlled by Claimant, and Tajik state-owned enterprises in the oil and gas sector, for the principal purpose of exploiting certain oil fields in the Republic of Tajikistan.

137. The six exploration agreements are the "General Agreement" of June 1998 relating to the Kashkagun area (CL-2), the "Alimtay" Agreement of November 1998, relating to the Alimtay area (CL-3) and the four "Treaties" concluded in December 2000, relating to the East Soupetau area, the Rengan area, the Sargazon area and the Yagyshak area, respectively (CL-4 to CL-7).<sup>5</sup>

138. The above agreements have a similar structure. Claimant is to finance, at his own risk, oil and gas exploration works. Should they prove successful, Claimant first is to be reimbursed for his expenses by the oil. Afterwards, the parties are to create a joint venture to perform further operations. The State Committee for Oil & Gas was to supply the necessary geological and technological material and to ensure the licenses required to carry out exploration and exploitation activities.

139. Since the exercise of the exploration and exploitation rights pursuant to these agreements requires the issuance of a license, they cannot be

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<sup>5</sup> Claimant's exhibits have been marked "CL" for legislation and legal documents, "CA" for legal authorities and cases, and "C" for other documentary evidence and witness statements.

considered to constitute "*rights conferred by law...to undertake any Economic Activity in the Energy Sector*" pursuant to Article 1(6)(f) of the ECT. However, they do give Claimant a contractual right – vis-à-vis the State Committee for Oil & Gas of the Republic of Tajikistan – to the issuance of the necessary licenses to start these activities and to provide the necessary geological and technological material. As such, they may be considered as "*claims to performance pursuant to contract having an economic value and associated with an Investment*" pursuant to Article 1(6)(c) of the ECT. It is clear that they relate to an Economic Activity in the Energy Sector, and therefore satisfy that requirement as well.

140. The six oil and gas exploration agreements thus constitute "Investments" within the meaning of Article 1(6) of the ECT. Since all of the Investments envisage oil exploration at sites located within the territory of the Republic, it is equally evident that they constitute Investments in the "Area" of the Contracting Party, "Area" being defined in the Treaty as territory under the Contracting Party's sovereignty (Article 1(10) of the ECT).
141. Shares in Tajik joint venture companies are the kind of asset which can qualify as an "Investment" under the Treaty since they fall within Article 1(6)(b). However, the foreign shareholder of the two joint ventures here in question is not Claimant but Vivalo, a company registered in the Bahamas and thus not an Investor of another Contracting Party. In addition, it is not a claimant in the case at hand.
142. However, the Energy Charter Treaty protects not only directly, but also indirectly, owned or controlled investments. It applies to assets held through an intermediary company in a non-ECT State. Here, Claimant alleges that he owns and controls 100% of the shares in Vivalo, namely 5,000 shares (except for one share held for him in trust), and thus

indirectly owns the shares in the Baldjuvon and Petroleum SUGD joint venture companies.

143. As evidence of Claimant's control of Vivalo, Claimant has referred to various letters in evidence which Claimant wrote to Tajik government authorities on Vivalo letterhead in his capacity as Vivalo's General Director. However, this would not constitute proof of his control of Vivalo. As Understanding No. 3 to the ECT indicates, "control" is shown by the ability to exert influence over the management of a company. Thus, being a part of management cannot constitute control.
144. However, as evidence of Claimant's ownership of Vivalo, Claimant has produced i) an extract from the Company share register reflecting 5,000 shares registered in his name and stamped "Registrar General's Dept, May 27, 2009, Nassau Bahamas," ii) a Certificate of Good Standing of the Company signed by the Acting Registrar General of the Commonwealth of the Bahamas, dated May 25, 2009, and iii) a certification signed by Claimant as sole director of the Company dated May 20, 2009 declaring that, since the Company's incorporation on October 6, 1998, he has been and is the sole beneficial owner of all 5,000 shares in the Company, that the shares are fully paid up, and that one of the 5000 shares is held for him in trust by a Mr. Charles Mackey pursuant to an attached Declaration of Trust.
145. While this evidence would have been stronger had it been accompanied by a notarized certification of the Company secretary, the Tribunal, in the absence of any evidence to the contrary, is inclined to accept the evidence as giving rise to a reasonable probability that Claimant is indeed and has been from the time of incorporation of Company on October 6, 1998 its sole legal (but for one share held in trust for his benefit) and beneficial shareholder.

146. In light of this, the shares in the two Tajik joint venture companies which are or were held by Vivalo, following the signature of the Foundation Documents of those companies in June 2001 constitute Investments of Claimant under the ECT for jurisdictional purposes.

**D. An alleged breach of an obligation under Part III of the ECT**

147. For jurisdiction to be established, the dispute must concern an alleged breach of the Contracting Party's obligations under Part III of the ECT. Claimant alleges that Respondent breached several of its obligations under Part III, including under Articles 10 and 13 of the ECT.
148. In recent years, tribunals have generally held that in order to have jurisdiction over treaty claims, a claim must pass the so-called "Oil-Platforms Test": the facts as alleged by Claimant, if assumed to be true, must be able to constitute breaches of the respective investment treaty. See Happ/Rubins, *Digest of ICSID Awards and Decisions 2003-2007*, pp. 332/333. The Tribunal endorses this approach.
149. Assuming that the facts as alleged by Claimant will be proven, it is at least possible that those facts constitute a breach of the ECT. Whether this is indeed the case needs to be determined on the merits. Given that the ECT requires only an "alleged" breach for jurisdictional purposes, we consider that Claimant's submissions are sufficient to meet the jurisdictional test.

**E. Significance of the Cooling-off Period in Article 26(2) of the ECT**

150. The ECT requires that a dispute should be settled amicably, if possible. Only if no such settlement has been possible within a period of three months from the date on which either party to the dispute requested



amicable settlement may the Investor submit the dispute to arbitration. Such period is sometimes called the “waiting period” or “cooling-off” period.

151. It is debatable when Claimant may have triggered the three-month period. It could be argued that it did so as early as February 2003 when Vivalo wrote to the Minister of Energy and to the President of the Republic of Tajikistan requesting the issuance of licenses and the cessation of court actions by the Tajik partners in the joint venture companies, and indicated that it would be obliged to bring the matter to the international court in Stockholm and to report to the Secretariat of the Energy Charter Treaty if this were not done. However, these letters were written by Vivalo, and not by Claimant himself.
152. If, on the other hand, the three-month period were considered to run from the date when Claimant filed his notice of dispute, Claimant has not complied with the waiting period. The notice of dispute dates from March 12, 2008 (see letter attached as part of Annex 14 to the Request for Arbitration), while the claim has been submitted on May 30, 2008, i.e. the date on which the Request was received by the Stockholm Arbitration Institute. In this case, the three-month period would have expired on June 12, 2008, approximately two weeks later.
153. This argument was not raised by Respondent in its letter of March 3, 2009 as one of the grounds on which it challenged jurisdiction.
154. There have been conflicting views among arbitral tribunals as to whether a cooling-off period (which is contained in most recent bilateral investment treaties) constitutes a mere procedural requirement, such that failure to comply would not affect jurisdiction, or a jurisdictional requirement. The argumentation in many cases has seemed to be fact-driven, i.e. whether the

State had in fact been given an opportunity to negotiate (and simply failed to do so) or not. In cases where the State did not react to the notice of dispute, tribunals have considered that dismissing the claim and asking Claimant to resubmit it would be an unnecessary formality. This is an eminently sound approach.

155. There is nothing in the record showing that Respondent demonstrated a willingness to find an amicable settlement to the dispute raised by Claimant either at the time of Vivalo's letters of February 2003 or at the time of the 2008 formal notice of dispute. In this regard, it is noteworthy that Respondent, in its letter of March 3, 2009 objecting to the jurisdiction of the Tribunal, did not raise non-compliance with the cooling-off period as an issue. Thus, it seems clear that Respondent was not interested in settling the dispute amicably. Insisting on compliance with the three-month period thus would be an unnecessary formality.
156. Consequently, it is the Tribunal's opinion, based on the factual circumstances of this case that, even if Claimant failed to comply with the three-month period, it does not affect the Tribunal's jurisdiction or the admissibility of the claims brought by Claimant.

#### **F. Forum Selection**

157. In its letter of March 3, 2009, Respondent objects to the jurisdiction of the Tribunal on the ground that, under Tajik law and the bylaws of the joint venture company Petroleum SUGD, the dispute should be settled before the Tajik courts. While Respondent does not refer to the Baldjuvon joint venture company, it may be noted that the same dispute resolution provisions are contained in its bylaws as in those of Petroleum SUGD.

158. This objection has no merit. Firstly, Article 26 of the ECT gives the investor the choice to submit the dispute either to national courts, or to previously agreed dispute settlement procedures, or to arbitration. Thus, national courts and contractually stipulated clauses constitute only alternatives to arbitration, but do not prevail over it.
159. Secondly, Respondent has confused treaty claims with contract claims. Respondent's reference to the dispute resolution clause in the Foundation Documents of Petroleum SUGD is off-point. The claim here is not a contract claim by Vivalo against its joint venture partners for breach of the joint venture agreements. It is a claim by the Investor against the host State for breach of obligations under the ECT. These are distinct actions. Neither precludes the other. As regards the treaty-based action, the ECT expressly permits an arbitral tribunal established pursuant to its terms to decide the question of breach of obligations under Part III of the Treaty by Respondent, applying for this purpose the provisions of the Treaty and applicable rules and principles of international law.
160. While Respondent has not at all referred to the six exploration agreements which the State Committee for Oil & Gas concluded with Claimant, it may be noted here that those agreements provide that all disputes based on them "*are to be settled in order determined by Legislation of Republic of Tajikistan and by International Law Acts.*" We interpret the reference to International Law Acts to refer to applicable treaties, which by virtue of their ratification, become part of the legislation of the Republic.
161. Article 37 of the Tajik Law on Foreign Investment explicitly states that, in case of conflict with national law, the provisions of international treaties shall prevail: "*If an international treaty of the Republic of Tajikistan establishes rules other than those contained in the legislation of the*

*Republic of Tajikistan, rules of the international treaty apply.*" (Annex to Exhibit CA-1)

162. Thus, the jurisdiction of this Tribunal and the choice of applicable law in a dispute arising under the ECT are to be determined in accordance with the terms of the ECT.
163. For the reasons stated in this Section VIII, the Tribunal therefore concludes that it has jurisdiction to hear Claimant's claims in this arbitration based on violation of his rights under Part III of the ECT. In accordance with Article 26(6) of the ECT, the Tribunal "*shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.*"

## **IX. LIABILITY - THE MERITS OF CLAIMANT'S CLAIMS UNDER THE ECT**

### **A. Attribution of Conduct to the State**

164. Claimant has alleged that Respondent is liable for breaches of obligations under Part III of the ECT. In order to find that Respondent is in breach of the ECT, we must find that its international responsibility is incurred, i.e. that the actions or omissions alleged to be in breach of the Part III obligations under the Treaty are in fact attributable to the State. The attribution to the State of acts or omissions of state bodies or persons authorized to perform governmental functions is generally accepted to be a question of customary international law.
165. An effort was made by the International Law Commission of the United Nations to codify the applicable legal principles. In 2001, the Commission finalized a set of draft articles on the "Responsibility of States for Internationally Wrongful Act" (hereafter "the Draft Articles") which,

although without legal force, is widely viewed as the most authoritative statement of the law in this area that exists today.

166. According to Article 4 of the Draft Articles:

*“1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”*

167. Article 5 of the Draft Articles extends the principle of attribution to the conduct of a person or entity, which would include a State-owned enterprise, in the following circumstance:

*“The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”*

168. In the present case, the acts or omissions allegedly in breach of the Treaty are those of the State Committee for Oil & Gas and the Ministry of Energy (principally regarding the failure to issue licenses for oil and gas exploration and exploitation), and the Tajik economic courts (in respect of alleged denial of justice and lack of due process in proceedings which allegedly affected and/or expropriated Claimant’s investment in the two joint venture companies).

169. As previously mentioned, the functions of the State Committee for Oil & Gas were subsumed within the Ministry of Energy, once the Ministry was

established in 2001. They are organs of the State's governmental structure. The economic courts of Tajikistan comprise part of the State judiciary, and as such are also recognized as organs of the State. Thus, in accordance with the Draft Articles, the conduct of the State Committee, the Ministry of Energy and the Tajik economic courts are attributable to the State, and Claimant's claims based on alleged Part III breaches resulting from the conduct of these organs are properly before us.

170. The SOC is not entirely clear as to whether Claimant also considers actions of the state-owned enterprises which were partners in the two joint venture companies to give rise to breaches of Respondent's Part III obligations. According to Article 5 of the Draft Articles, actions of state-owned enterprises may be attributed to the State if the actions are made in the exercise of governmental authority.
171. Article 22 of the ECT deals specifically with state enterprises. In particular, and insofar as Article 22 may be relevant to the present case, Article 22(1) requires a Contracting Party to ensure that its state enterprises conduct their activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III, and Article 22(2) forbids a Contracting Party from encouraging or requiring a state enterprise to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under other provisions of this Treaty, which presumably includes Part III.
172. However, it must be noted that Article 22 is not contained in Part III of the Treaty (although it does cross-refer to Part III obligations), and the question of the arbitrability of claims based on Article 22 has not been tested to date. In the recent award in the case of **AMTO v. Ukraine**, the

tribunal considered that Article 22 should not be understood as a rule of strict liability for the state, but rather as an independent obligation.<sup>6</sup>

173. Irrespective of how Article 22 is to be understood, the Tribunal need only reach these questions if there is a sufficient factual basis establishing the alleged acts of the state-owned enterprises in the first place. Little, if any, direct evidence of the conduct of the Tajik partners in the two joint ventures has been presented in this case. We have the assertion of Mr. Khasky that a Tajik director in Petroleum SUGD threatened him by saying that, if he would not support its proposal to reduce Vivalo's share in the joint venture Petroleum SUGD, his physical security could not be guaranteed, but nothing to substantiate it. We have his further assertion that the Tajik partner in Petroleum SUGD had a contractual obligation to supply workers and equipment to the joint venture of a certain quality, but we have not seen any agreement that may have been concluded between the joint venture partners on this particular issue. In the absence of supporting evidence, these allegations must fail.
174. The Tribunal therefore finds it unnecessary to reach the legal question of the arbitrability of a breach of Article 22 or to give further consideration to the question of the attribution to the State of misconduct by State-owned enterprises.

#### **B. Fair and Equitable Treatment**

175. Claimant alleges that Respondent is in breach of its obligations under the first sentence of Article 10(1) of the ECT which reads as follows:

*"Each Contracting Party shall, in accordance with the provisions of this*

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<sup>6</sup> *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005 (ECT), Award of March 26, 2008, para. 112.

*Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area.”*

176. However, in his SOC, Claimant took the position that the obligation under the first sentence of Article 10(1) is mutually interlinked with the obligation to accord fair and equitable treatment as set forth in the second sentence of Article 10(1), which reads as follows:

*“Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.”*

177. In order to avoid repetition, Claimant therefore chose to consolidate his arguments under these two provisions of Article 10(1) and treat them together in his factual and legal case of breach of the fair and equitable treatment obligation. (See SOC, paras. 151-155).

178. There is precedent in prior investment treaty arbitrations for this approach. Indeed, the tribunal in the ECT arbitration, **Petrobart v. The Kyrgyz Republic**, went even further and stated in its Award of March 29, 2005 that all of the provisions of Article 10(1) were interlinked: *“The Arbitral Tribunal does not find it necessary to analyse the Kyrgyz Republic’s action in relation to the various specific elements in Article 10(1) of the Treaty but notes that this paragraph in its entirety is intended to ensure a fair and equitable treatment of investments.”*<sup>7</sup>

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<sup>7</sup> C H Schreuer, *Fair and Equitable Treatment (FET): Interaction with other Standards*, Transnational Dispute Management, Vol. 4, issue 5, September 2007, p. 1.



179. The Tribunal will therefore adopt Claimant's approach and consider his arguments under the first two sentences of Article 10(1) together as claims under the fair and equitable treatment standard.
180. Claimant relies on four grounds for his allegation of breach of the fair and equitable treatment obligation (see *supra* para. 99 (b)):
- i) inconsistency and lack of transparency in the issuance of licenses and in the issuance of visas;
  - ii) failure to meet legitimate expectations regarding the issuance of licenses;
  - iii) failure to observe due process in court proceedings; and
  - iv) unfair treatment by opening negotiations with a new potential investor for Petroleum SUGD before the decision of the SUGD economic court on March 14, 2003 and without informing Claimant.
181. We will address each of these grounds in turn.

**i) Inconsistency or Lack of Transparency in the Issuance of Licenses and Visas**

182. The first question is whether there has been demonstrated an inconsistency and lack of transparency in respect to the issuance of oil and gas exploration and exploitation licenses.
183. The notion of transparency as an element of fair and equitable treatment has been expounded upon in a number of investment treaty arbitration decisions. Interpreting transparency in the context of the NAFTA treaty, the tribunal in *Metalclad v. Mexico* considered it "*to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to*

*all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.*"<sup>8</sup>

184. The notion of consistency as an element of fair and equitable treatment has been found to stand for the proposition that the foreign investor should be entitled to expect the host State to act "*without arbitrarily revoking any pre-existing decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.*" See **Tecmed v. Mexico**.<sup>9</sup>
185. Neither of these criteria is intended however to go so far as to require the State to freeze its legal framework, but rather to act in an open manner and consistent with commitments it has undertaken. As noted by the Tribunal in **CMS v. Argentina** : "*It is not a question of whether the legal framework might need to be frozen as it can always evolve and be adapted to changing circumstances, but neither is it a question of whether the framework can be dispensed with altogether when specific commitments to the contrary have been made.*"<sup>10</sup>

**a) Licenses under the Exploration Agreements**

186. Claimant received a license pursuant to the June 1998 Agreement within two months after signature of the agreement and pursuant to the November 1998 Agreement with six months after signature. Both of these agreements had been signed with the State Committee for Oil & Gas. The parties decided not to proceed under the first license, but rather to proceed

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<sup>8</sup> *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award of August 30, 2000, para. 76.

<sup>9</sup> See *Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003, para. 154.

<sup>10</sup> *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award of May 12, 2005, para. 277.

with exploration activity under the second license relating to the Alimtay area, since this area appeared to have greater potential.

187. According to the testimony, which stands unrebutted, the State failed to issue licenses pursuant to any of the four December 2000 Agreements, despite the fact that these agreements were also signed by the State Committee for Oil & Gas and that the State Committee had contractually agreed in each of the four agreements to ensure the issuance of such licenses. No explanation is offered for this failure. The assurances given by the State Committee in the December 2000 Agreements were not different in their terms from those given in the June and November 1998 Agreements, for which licenses had been issued by the Prime Minister of the Republic without delay.
188. On its face, therefore, this would suggest that the State may indeed have acted inconsistently towards the Investor. And, as a matter of transparency, it would seem reasonable to expect the State to have made known to Claimant that it intended to deal differently with the issuance of these licenses than it had done with the first two. Indeed, had all six of these agreements been signed on or around the same time period, the Tribunal would have had little difficulty reaching this conclusion. However, there was an interval of more than two years between the first two agreements and the last four agreements, and we have little information as to the evolving conditions in the country during that period or, for that matter, the discussions that may have taken place at the time of signature of the last four exploration agreements. Such information could have a bearing on a finding as to whether the State's conduct here can be characterized as inconsistent or lacking in transparency.
189. There is no doubt, however, that Respondent had undertaken clear contractual commitments towards Claimant under these agreements. We

believe therefore that the analysis of Claimant's treaty rights with respect to the non-issuance of licenses pursuant to the December 2000 Agreements can be better addressed under the umbrella clause in Article 10 of the ECT, to which we will return later in this Award.

*b) Issuance of Licenses to the Two Joint Venture Companies*

190. The two joint venture companies, which were registered and came into existence in October and November 2001 respectively, needed licenses for their oil and gas activities. It is clear from the language of the Charters of these companies and is uncontested by Claimant that to obtain these licenses the companies needed to make applications in accordance with the applicable legislation. (See Article 2.3 of the Charters, cited earlier). Claimant's February 25, 2003 letter, on Vivalo letterhead, to the President of the Republic states that such applications had been made "more than six months ago," which would suggest that applications may have been filed around August 2002.
191. The Tribunal however has not been shown any of these applications. There is no evidence as to precisely when these licenses were applied for, whether they complied with the applicable legal requirements, what specific license rights were sought and for what period of time, and whether any questions were raised by the Government in response to these applications. There is some indication, although not substantiated, that licenses were initially offered by the Government for a three-year period, which Claimant found to be too short, and which may therefore have caused a certain delay in processing the applications. When questioned about the licensing process by the Tribunal at the hearings, Mr. Khasky testified that, although he was Chairman of the Board of Petroleum SUGD, he was not involved in the mechanics of filing license applications, which

was the responsibility of the company's General Director, an appointee of the Tajik partner.

192. As regards Petroleum SUGD, the fact that the applications were indeed made cannot be doubted. Presidential Decree 83-r, adopted on November 4, 2002 approved a proposal of the Ministry of Energy to issue licenses to Petroleum SUGD, and licenses were then issued on December 20, 2002. Accepting for present purposes that the applications were filed in August 2002, as indicated above, the Tribunal finds that there was in fact no refusal to issue licenses or unreasonable delay in doing so.
193. It appears from the record that Claimant learned of the issuance of these licenses only on March 14, 2003, when Mr. Khasky chanced to meet the Tajik Trade Representative to Austria at the Tajik courthouse during the Petroleum SUGD hearings. Thus, it would seem that the General Director of Petroleum SUGD may have failed to inform Mr. Khasky when he received these licenses. However, even though this failure is criticisable, there is no factual basis for attributing it to the State, which had in fact issued the licenses to the applicant.
194. As regards the Baldjuvon joint venture, while it appears that no licenses were ever issued for its activity, there is also no direct evidence whatsoever that any license applications were ever filed. Mr. Khasky testified that he was not involved with the Baldjuvon joint venture and had only visited that company on one occasion. He had no knowledge of whether or not the joint venture had applied for licenses. He merely assumed they had.
195. The Presidential Decree No. 397 adopted in September 22, 2000, before the Baldjuvon joint venture was established, did not deal with the question of licenses at all, but rather with the possible construction of a refinery in

the Khalton region by a future Baldjuvon joint venture to be established by Vivalo and a Tajik state enterprise called "Leninabadneftegaz" (It may be noted that this enterprise did not ultimately become the partner in the Baldjuvon joint venture which was later established). This project, according to Mr. Khasky, was subsequently abandoned because of lack of access to local oil production.

196. We therefore find no basis for a claim of unfair or inequitable treatment based on denial of licenses to the Baldjuvon joint venture.

*c) Issuance of Travel Visas*

197. Similarly, the allegation of lack of transparency or consistency with respect to the issuance of visas for Claimant's travel to Tajikistan to defend his business interests or for other purposes is not sufficiently documented to permit an affirmative finding by the Tribunal. There is no proof that a visa was applied for, or when, or that such application complied with the applicable rules, even if Claimant may in good faith have thought that he had complied with the rules.
198. Therefore, the claim based on this allegation is rejected for insufficient evidence.

**ii. Failure to Meet Legitimate Expectations in the Issuance of Licenses**

199. Claimant's second argument under the heading of fair and equitable treatment is that Respondent failed to meet Claimant's legitimate expectations with respect to the issuance of licenses.

200. To establish a failure to meet legitimate expectations, several factors must be demonstrated – the nature of the expectation, the reliance on the expectation and the legitimacy of that reliance.

201. The legal standard for legitimate expectations has been discussed in the NAFTA arbitration, **Thunderbird v. Mexico**, as follows:

*"[...]the concept of 'legitimate expectations' relates, [...] to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages."*<sup>11</sup>

202. The point was made in **Parkerings-Compagnie AS v. Lithuania**, that legitimate expectations can be based on the legal order of the host State and/or explicit or implicit assurances:

*"The expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representations that the investor took into account in making the investment. Finally, in the situation where the host-State made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate. In order to determine the legitimate expectation of an investor, it is also necessary to analyse the conduct of the State at the time of the investment."*<sup>12</sup>

<sup>11</sup> *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL (NAFTA), Award of January 26, 2006, para. 147.

<sup>12</sup> *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award of September 11, 2007, para. 331.

203. Claimant argues that it had a legitimate expectation that licenses would be issued based on the exploration agreements, the two joint venture Foundation Documents, Presidential Decrees No. 397 and 83-r and the repeated assurances of the Minister of Energy and the President of the Republic.

***a) Legitimate Expectations under the December 2000 Exploration Agreements***

204. With respect to the December 2000 Agreements, i.e. the four exploration agreements relating to the East Soupetau, Rengan, Sargazon, and Yalgyzkak areas, the Tribunal agrees that it was reasonable for Claimant to expect that licenses would be issued within a reasonable period of time following the signature of these agreements. Indeed, this had already been the case with the two initial exploration agreements, and all six of the exploration agreements contained a similar provision pursuant to which Respondent expressly “ensured the License to carry out solely and exclusively geological exploration, and natural resources exploitation works and activities” in the respective areas.
205. Did Claimant rely upon this expectation with respect to the December 2000 Agreements for which licenses were not granted?
206. While the December 2000 Agreements may well have constituted a valuable asset in the hands of Claimant,<sup>13</sup> there is no evidence that Claimant incurred any expenses following the signature of these Agreements in preparation for exploration work in the specified areas upon issuance of licenses. According to the record, the only identified area in

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<sup>13</sup> Claimant submitted as Exhibit C-6 to its SOC a table reflecting the following annual estimated production values for three of the four areas covered by the December 2000 Agreements. Sargazon - \$44 million; Rengan - \$56 million; and East Soupetau - \$65,992 million. No figure was provided for Yalgyzkak.



which Claimant had commenced work was the Alimtay area, and that was pursuant to the November 1998 Agreement for which a license had been duly issued. That work stopped in 2000. No exploration work was carried out since 2000.<sup>14</sup>

207. Nor does the evidence support a conclusion that Claimant relied upon issuance of the four further exploration licenses when making his initial investment in the two joint venture companies. Indeed, none of the four areas covered by the December 2000 Agreements are mentioned as being included in the areas of activity specified for the Baldjuvon joint venture (which refers to the Beshtentyak, Souldouzy, and Uzounakhor areas) or the Petroleum SUGD joint venture (which refers to the Sugd area). Therefore, we find insufficient evidentiary basis to conclude that Claimant's investment in those joint ventures was made in reliance upon licenses being issued in respect of these four exploration agreements.
208. While the minutes of the December 15, 2002 Shareholders Meeting of Petroleum SUGD indicate, and as Mr. Khasky confirmed in his testimony, that the joint venture managed to conduct oil and gas activities despite the absence of the required license, there is nothing to indicate that these activities took place in any of the areas granted to Claimant under the December 2000 Agreements.
209. Claimant stated in his testimony at the hearings that he needed all six exploration agreements to be licensed in order to continue with his investments. However, this goes to support his expectation, but does not establish that he in fact relied upon that expectation to his financial detriment.

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<sup>14</sup> See SOC para. 48.

210. Therefore, it is the Tribunal's opinion that Claimant had a right to rely upon Respondent's commitment to issue the four further exploration licenses, but his claim based on legitimate expectations fails for lack of evidence of actual reliance thereon. This being said, as previously noted, Respondent had indeed obligated itself to issue licenses under the December 2000 Agreements and failed to do so, a matter to which we will return in our discussion of the umbrella clause of the ECT.

*b) Legitimate Expectations regarding the Two Joint Venture Companies*

211. With respect to the joint venture companies, in evaluating Claimant's legitimate expectation regarding the issuance of licenses, it may be useful to recall the circumstances preceding the establishment of these companies.

212. The idea of eventually creating a joint operating company had already been envisaged in the June and November 1998 Agreements, in the event of positive exploration results. Following meetings between Claimant and the State Committee for Oil & Gas, a first set of joint venture agreements were signed in March 2000 by Vivalo and the Chairman of the State Committee. The agreements gave no assurance with respect to the issuance of licenses but, given the earlier assurances of the Committee in the first two exploration agreements and the subsequent issuance of the necessary licenses, it might have been reasonable for Claimant to expect that the necessary licenses for the joint ventures' activities would also be forthcoming.

213. As far as we know, the joint ventures contemplated by the March 2000 Agreements were not established. Instead, more than a year later, in June 2001, two new joint venture agreements were negotiated and signed by Vivalo with Tajik state-owned oil production enterprises. These

agreements consisted of Constituent Agreements and Charters. These were the Baldjuvon and Petroleum SUGD Foundation Documents. They contained no assurance as to the issuance of licenses, contrary to the six exploration agreements, but indicated that licenses would be needed for the companies' oil and gas activities.

214. It took more than seven months to register the Foundation Documents of the two joint ventures, at which point the companies came into existence. There is no evidence of any discussions on the question of licenses during this period. Claimant's initial capital contributions were made only after the registration of the companies.
215. Nonetheless, taking into account the history of the relations between Claimant and Respondent, Claimant may well have had a legitimate expectation that licenses would be issued if properly applied for, and Claimant may well have relied on this expectation in making its initial capital contribution in the ventures and in participating in the activities of the joint ventures.
216. However, the Tribunal finds that, as to Petroleum SUGD, Respondent satisfied this expectation by issuing the licenses on December 20, 2002. If we assume that the licenses were only applied for in August 2002 (see Para. 190 *supra*), it is difficult to reasonably expect that they should necessarily have been issued earlier than they were. As to Baldjuvon, Claimant failed to produce evidence sufficient to prove that the necessary license applications were in fact filed at all.
217. Moreover, the Tribunal finds no basis for any legitimate expectation that licenses would necessarily be issued to the joint ventures prior to full payment of the shareholders' capital contributions. A literal reading of the Foundation Documents does not support such an expectation. The Charter

states simply that payment of capital in full must be made within one year. If the parties had intended this to mean one year from the issuance of licenses as opposed to one year from the establishment of the company, they would have had to express that intention with greater clarity.

**iii. Due Process and/or Denial of Justice**

218. Claimant's third basis for alleging unfair and inequitable treatment relates to the question of due process and/or denial of justice in the Tajik court actions, with respect to his investments in both Petroleum SUGD and Baldjuvon.
219. Claimant asserts that Respondent failed to observe "fundamental principles of due process" (SOC paras. 174, 197). In particular, he complains that the courts, in the proceedings regarding Baldjuvon and Petroleum SUGD, breached applicable procedural and substantive laws. He asserts as a breach of due process that he was not given notice of court hearings and that the court (in the Petroleum SUGD proceedings) did not adjourn a hearing to allow him to take part.
220. Vivalo, and not Claimant, was a party in these proceedings. Article 10 (1) ECT, read literally, protects only the investment and not the investor. Vivalo, being a Bahamian company, would not even constitute an investment protected under the ECT. However, this Tribunal considers that it would be contrary to the object and purpose of the ECT to allow a Contracting Party to deny due process to a foreign company owned by an ECT national. In the case at hand, this is even more conclusive since the shares in the joint ventures held by that company – being the object of the court proceedings - constitute investments indirectly owned by the Investor.

221. It is recognized in literature and jurisprudence that the duty to provide due process is part of the obligation to provide fair and equitable treatment. Many commentators and tribunals also see denial of justice as part of fair and equitable treatment. In this section, we shall adhere to that position. The obligation to provide due process has several facets, some of which overlap:

--The obligation to notify an investor of hearings and not to decide about a claim in his absence or in gross violation of procedural rules. Breaches may also exist if the procedure is delayed, if the Government influences administrative or court procedures, or if the composition of courts responsible for a certain procedure is altered.<sup>15</sup>

--The obligation not to maliciously misapply the substantive law. This has been well formulated as follows by the tribunal in the *Mondev v. USA* arbitration : *"The test is not whether a particular result is surprising, but whether the shock or surprise occasioned to an impartial tribunal leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal, and on the other hand that Chapter 11 of NAFTA (like other treaties for the protection of investments) is intended to provide a real measure of protection. In the end, the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the available facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to unfair and inequitable treatment. This is admittedly a somewhat open-ended standard, but it may be that in practice no more precise formula can*

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<sup>15</sup> See J. Paulsson, *Denial of Justice in International Law* (Cambridge University Press: 2005), pp. 131-178.

*be offered to cover the range of possibilities.”*<sup>16</sup>

In addition, tribunals have identified facets of the standard not mentioned by Claimant.

-- The obligation not to use powers for improper purposes, i.e. purposes not covered by the law authorizing the powers.<sup>17</sup>

-- The obligation not to act intentionally against the investor to harm his investment. As stated in the case of **Waste Management v. Mexico**: *“The tribunal has no doubt that a deliberate conspiracy – that is to say, a conscious combination of various agencies of government without justification to defeat the purposes of an investment agreement – would constitute a breach of article 1105(1). A basic obligation of the State under Article 1105(1) is to act in good faith and form, and not deliberately to set out to destroy or frustrate the investment by improper means.”*<sup>18</sup>

-- The obligation not to exercise unreasonable pressure on an investor to reach certain goals. As noted in the case of **Pope & Talbot v. Canada**: *“Briefly, the Tribunal found that when the Investor instituted the claim, in these proceedings, Canada’s Softwood Lumber Division (“SLD”) changed its previous relationship with the Investor and the Investment from one of cooperation in running the Softwood Lumber Regime to one of threats and misrepresentation. Figuring in this new attitude were assertions of non-existent policy reasons for forcing them to comply with very burdensome*

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<sup>16</sup> *Mondev International Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of October 11, 2002, para. 127.

<sup>17</sup> *Saluka v. Czech Republic*, UNCITRAL, Partial Award of March 17, 2006, para. 307; see also C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press: 2007), para. 7.124; *PSEG Global Inc. et al v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award of January 19, 2007, para. 247.

<sup>18</sup> *Waste Management v. Mexico*, ICSID Case No. ARB(AF)/00/03, Award of April 30, 2004, para. 138.

*demands for documents, refusals to provide them with promised information, threats of reductions and even termination of the Investment's export quotas, serious misrepresentations of fact in memoranda to the Minister concerning the Investor's and the Investment's actions and even suggestions of criminal investigation of the Investment's conduct.*"<sup>19</sup>

In the **Tecmed** case, the Tribunal concluded that the refusal to extend the license was a means to pressure the investor to relocate the waste site at its own costs, and that this was in breach of fair and equitable treatment: *"This statement reveals the two goals pursued by INE upon issuing the Resolution. On the one hand, it denies the renewal of Cytrar's Permit without any compensation whatsoever for the loss of the financial and commercial value of the investment. On the other hand, this denial is described as a means to pressure Cytrar and force it to assume a similar operation in another site, bearing the costs and risks of a new business, mainly because by adopting such course of action, INE expected to overcome the social and political difficulties directly related to the Landfill's relocation. Under such circumstances, such pressure involves forms of coercion that may be considered inconsistent with the fair and equitable treatment to be given to international investments under Article 4(1) of the Agreement and objectionable from the perspective of international law."*<sup>20</sup>

222. Considering the facts alleged by Claimant relying on the witness statement of Mr. Nasrulloev, the legal analysis concentrates on the following questions:
- a) Has a breach of due process been shown in the Baldjuvon Proceedings?
  - b) Has a breach of due process been shown in the Petroleum SUGD

<sup>19</sup> *Pope & Talbot v. Canada*, Award on Damages of May 31, 2002, para. 68.

<sup>20</sup> *Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003, para. 154.

Proceedings?

- c) Has there been clear and malicious misapplication of Tajik substantive law in the Petroleum SUGD Proceedings?
- d) Has a breach of due process occurred by failure to issue licenses?

223. We will deal with these questions in turn.

***a) Breach of Due Process in the Baldjuvon Proceedings***

224. Claimant alleges that the Tajik court in the Baldjuvon proceedings acted in violation of due process standards by accepting to hear a claim to annul a Board decision taken 10 months earlier, whereas the right to challenge such decision must be asserted with a two-month period according to the procedural law. According to Mr. Nasrulloev, the applicable procedural rule is found in Article 49, para. 1 of the Tajik Law “On Limited Liability Companies” which provides in relevant part as follows: *“In case the participant in a company took part in the general meeting of participants in the company, where the appealed decision was taken, this application may be filed within two month from the date of adoption of such a decision.”*

225. The Tribunal notes that Article 49(1) deals with appeals against decisions taken at a Participants’ Meeting, whereas Claimant’s SOC at para. 197(a) refers to the meeting having been a meeting of the Board of Directors. The minutes of the meeting in question have not been submitted in evidence. Article 49(3) of the Tajik Law “On Limited Liability Companies” prescribes no time limit for challenging in court a decision of the Board of Directors. It reads in relevant part as follows: *“The decision of the board of directors...adopted in breach of the requirements of this Law, other legal acts of the Republic of Tajikistan, the statutes of the company, and which violates the rights and legitimate interest of a participant in the*



*company, may be found null and void by the court following the application of this participant in the company.”*

226. Claimant further alleges that Vivalo was not notified of the court hearing which took place on April 2, 2004. On this, we have only Mr. Nasrulloev’s unsubstantiated statement. We have not been provided with any of the court documents or the court decision following this hearing or, for that matter, the appellate court decision which was allegedly rendered thereafter.
227. While the allegations made by Claimant with respect to the above proceedings could indeed, when taken together and if proved, constitute a denial of due process, this Tribunal is not in a position to make such a determination on the basis of the limited evidence on the record.

***b) Breach of Due Process in the Petroleum SUGD Proceedings***

228. On March 14, 2003, after several previous adjournments, the SUGD economic court had scheduled a hearing on March 14, 2003 in the action brought by Sugdneftegaz, the Tajik partner in Petroleum SUGD, against Vivalo. The evidence establishes that Claimant requested this hearing be adjourned until March 15, 2003 or later in order to permit him to obtain a visa to attend. The decision of the court, submitted in evidence (Ex. C-18), refers to a telefax dated March 14, 2003 pursuant to which a request for such an adjournment was made on March 14. While the Tribunal has not seen a request dated March 14, Claimant has submitted a letter to the same effect addressed to the Court by Mr. Khasky on March 3 and another letter by Claimant on March 10 (Ex. C-19).
229. The court states in its decision that it considered the application and decided to proceed on the basis of Article 119 of the Tajik Procedural

Code in the absence of the defendant. Article 119 provides: "*In case of failure of the defendant to appear in the proceeding of the Economic Court, when duly notified of the time and place of the court hearing, the dispute may be resolved in his absence.*" The court commented in its decision that the representative of defendant on several prior occasions had failed to appear at scheduled hearings and cited as an example the hearing scheduled for February 3, 2003 when, it said, Mr Khasky was known to be in the city and, although duly informed of the hearing, failed to appear without a valid reason.

230. Mr. Khasky's testimony in this arbitration acknowledges that he was in the building of the court on March 14, 2003, but did not attend the hearing. He has given no explanation for this. It should be recalled that Vivalo was the named defendant in this action and that Mr. Khasky was the authorized representative of Vivalo in Tajikistan.
231. In light of the foregoing facts, we cannot find a violation of due process standards in the court's decision to proceed with the hearing.
232. Claimant in its SOC relies on the witness statement of Mr. Nasrulloev to support the allegation that the subsequent appeal from the SUGD economic court decision was improperly dismissed on the ground that it was time-barred, when it was, according to him, filed in time. The Tribunal has not been presented with the necessary supporting evidence for this allegation. Mr. Nasrulloev states that the appeal was filed on April 12, 2003 by Claimant, and was sent from Vienna to Tajikistan. Although Mr. Nasrulloev refers in his statement to a postal receipt as proof of timely filing, this receipt has not been submitted in evidence. We can therefore draw no conclusion as to whether or not the appeal was in fact timely filed. Without such a finding, the appellate court's dismissal of the appeal cannot be said to have violated international law due process

standards.

***c) Breach by Malicious Misapplication of Law in the Petroleum SUGD Proceedings***

233. It is the position of Mr. Nasrulloev that the SUGD economic court consciously misapplied Tajik law for the purpose of reducing Vivalo's share in Petroleum SUGD by interpreting the requirement that a shareholder's capital contribution must be paid in full within one year to mean one year from registration of the company as opposed to one year from the commencement of a company's activity which, in the case of Petroleum SUGD, he argues, would only commence from the date when licenses were issued. It is uncontested that Vivalo had not paid in the balance of its capital contribution within one year from registration of the joint venture company.
234. In support of his position, Mr. Nasrulloev cites Article 49 of Part 3 of the Tajik Civil Code which provides: "*...The right of a legal entity to carry out activities, to engage in which one must obtain a license...commences on receipt of such a license or in a specified period of time and is terminated upon the expiration of its actions, unless otherwise stipulated by law or other legal acts.*" This provision makes no reference, however, to the timing of payment of charter capital.
235. The court, in reaching its conclusion that Vivalo had failed to pay in the balance of its capital within the required time period, relied upon the text of Constituent Agreement previously cited at para. 70 above and on the Tajik Law on Limited Liability Companies which provides that "*Each participant of the company shall pay in full its contribution to the charter capital of the company within the period, which is stipulated in the*

*founding agreement and which may not exceed one year from the moment of State registration of the company.” (Article 18(1)).*

236. In reaching its decision to order the reduction of Vivalo’s share in Petroleum SUGD, the court relied on Article 22(2) of the Tajik Law on Limited Liability Companies which provides: *“In case of non full payment of the charter capital of the company within one year from the moment of its State registration, the company shall either reduce its charter capital to the actual amount paid in and register its reduction in the established manner, or take a decision on liquidation of the company.”*
237. While this Tribunal finds the position taken by the court to be more persuasive than that taken by Mr. Nasrulloev, it is not the role of this Tribunal to sit as an appellate court on questions of Tajik law. Suffice it to say, we do not find the Tajik court’s application of Tajik law on this issue to be malicious or clearly wrong, and therefore find no basis for Claimant’s claim of denial of justice.

***d) Breach of Due Process by Failure to Issue Licenses***

238. Claimant alleges essentially the same facts here as in the claim based on unfair and inequitable treatment with respect to the issuance or non-issuance of licenses.
239. The Tribunal considers that this claim fails here for the reasons already given in that section of the present Award.

*e) Breach by Virtue of Meeting of Minister of Energy with Third Party  
Interested in the Tajik Oil Sector*

240. Claimant alleges in its SOC that on February 16, 2003, a month before the decision of the SUGD economic court regarding reduction of Vivalo's share in Petroleum SUGD, a meeting took place between Minister Yorov of the Ministry of Energy and Dr. Richard Schenz, a former general manager of Vivalo and thereafter CEO of a company called Austrian Energy Partners, to discuss future cooperation in the development of oil fields in the SUGD area. The only evidence submitted in this regard is a copy of a letter from Dr. Schenz to the Minister, dated February 26, 2003, in which he expresses thanks to the Minister for a meeting which Dr. Schenz had on February 16 with a Mr. Bertoluzi (no title mentioned). The letter requests a meeting with the Minister on Dr. Schenz' next visit to Dushanbe scheduled for March 2-4, 2003, in order to discuss the "possibilities for cooperation in the oil and gas sector between Tajikistan and Austria." There is no specific mention of Petroleum SUGD in this letter. There is nothing to indicate whether a meeting in fact did take place thereafter during Mr. Schenz' March trip, let alone what might have transpired at such a meeting. If there was a response from the Minister to this letter, it has not been submitted.
241. It does appear from the 2009 website of Austrian Energy Partners, cited by Claimant, that today they are major participants in Petroleum SUGD. Indeed, this is also reflected in the Ministry's letter of March 3, 2009, which made reference to that company as a participant in Petroleum SUGD.
242. This being said, the evidence before this Tribunal is insufficient evidence to support a claim of Treaty violation. There is no proof a meeting with the Minister in fact took place prior to the March 2003 court hearing (even

assuming that such a meeting would be objectionable as a legal matter). If such a meeting did take place at that time, there is no evidence of what transpired. We have no information as to when or under what circumstances Austrian Energy Partners may have become a participant in Petroleum SUGD.

**C. Most Constant Protection and Security under Article 10(1) ECT**

243. Three circumstances have been referred to by Claimant as constituting a violation of its Article 10(1) right to protection and security: demands by the Tajik security forces for cash payments for alleged debts of the predecessor of the Petroleum SUGD joint venture; a Tajik director's alleged statement to Mr. Khasky that his safety could not be guaranteed if he failed to support the Tajik partner's proposal on share reduction; and the alleged miscarriages of justice in the courts in failing to protect Claimant's share interest in the joint venture companies.
244. As to the first circumstance, there is a complete absence of supporting evidence in the record documenting any alleged demands made by Tajik security forces.
245. We have already addressed the second circumstance in the section of this Award dealing with acts attributable to the State and the arbitrability of disputes arising under Article 22 of the ECT. As we have noted, there is again a lack of substantiating evidence to support Mr. Khasky's bare allegations.
246. As regards the third circumstance, it is true that, while the concept of protection and security in investment treaties has developed principally in the context of physical security, some tribunals have applied it more broadly to encompass legal security as well. Therefore, it could arguably

cover a situation in which there has been a demonstrated miscarriage of justice. However, this is not a matter of strict liability and the burden of proof is on Claimant. As stated by the tribunal in the **Tecmed** case: “...*the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it.*”<sup>21</sup> An investor is not guaranteed that he will prevail in a court action under all circumstances.

247. On the facts before us, as discussed earlier in the section of the award on due process, we are unable to find that the Tajik courts could not legitimately reach the substantive law conclusions which they did.

**D. Unreasonable and Discriminatory Measures under Article 10(1) ECT**

248. The conduct of the State alleged by Claimant under this heading is essentially the same conduct alleged in connection with his claim under the heading of unfair and inequitable treatment. Indeed, many arbitral decisions and commentators have observed that the two standards are highly overlapping. In the **Plama** decision, the tribunal found that, “*while the standards can overlap on certain issues, they can also be defined separately. Unreasonable or arbitrary measures...are those which are not founded in reason or fact but on caprice, prejudice or personal preference. With regard to discrimination, it corresponds to the negative formulation of the principle of equality of treatment. It entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds.*”<sup>22</sup>

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<sup>21</sup> *Tecmed v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003, para. 177.

<sup>22</sup> *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award of August 27, 2008, para. 184.

249. Claimant asserts as measures falling under this heading: the failure to issue licenses to permit commencement of drilling operations under the exploration agreements; the failure to provide qualified personnel and the quality of equipment promised for the joint venture activity; the denial of travel visas; and the frustration of the Gazpromgeocomservice Service Contract by not issuing licenses to the joint ventures and by dissolving Baldjuvon and reducing Vivalo's share interest in Petroleum SUGD.
250. For the reasons discussed in the section of this Award addressing unfair and inequitable treatment, the claims based on failure to provide qualified personnel and quality equipment and the denial of travel visas, assuming they can be characterized as "measures," fail for lack of sufficient evidence.
251. As regards the failure to issue licenses pursuant to the December 2000 Agreements, no evidence has been presented to support a finding that this failure was founded in caprice or prejudice such that it might be characterized as "unreasonable" within the meaning of this provision of the Treaty. The reasons for the State's non-performance are unknown. We consider therefore that the State's non-performance here is better addressed in the context of the umbrella clause of the ECT, to which we return in sub-section F below.
252. As regards the frustration of the Gazpromgeocomservice Service Contract, it is recalled that that contract was proposed by Vivalo to the Petroleum SUGD joint venture as an alternative form of capital contribution by Vivalo to the joint venture companies, in lieu of the balance of Vivalo's contractually agreed cash contribution. According to Claimant's and Mr. Khasky's testimony, the proposal to contribute this contract rather than cash in payment of the balance of Vivalo's capital contribution was motivated by Claimant's belief that Vivalo's initial cash contribution has



been misappropriated by the joint venture or the Tajik partner. However, no proof of such misappropriation has been submitted nor any evidence that would justify attributing it to the State.

Moreover, it is not clear to this Tribunal, in light of the language of the corporate Charters defining possible forms of capital contributions, that such a contract falls within any of the specified forms of capital contribution.

Claimant further alleged, without substantiating evidence, that the Minister of Energy had refused any contribution other than cash. However, the decision to accept a different form of capital contribution was a matter for agreement between the partners. The Tajik participant was under no obligation to accept a change in the form of capital contribution originally agreed by the two participants.

253. The reduction of Claimant's share in Petroleum SUGD and the liquidation of Baldjuvon resulted from determinations by the Tajik courts that the full contributions to the charter capital had not been completed within the time period required by Tajik law and the Charters of those companies. They further found that, as a matter of Tajik law, the consequence for this could be either reduction of the share of the party who had not completed its capital contribution or liquidation of the company. It is not for this Tribunal to rule on the correctness of the court's decision, but merely on whether the decision manifestly misapplied the law. As stated earlier, we have found no basis for reaching such a conclusion and therefore conclude that the share reduction and liquidation cannot be found to be the result of unreasonable or discriminatory measures on the part of the State judiciary.

**E. Treatment Less Favourable than Required by International Law under Article 10(1) ECT**

254. Claimant's allegations under this heading are essentially the same as those made under the heading of denial of due process. The Tribunal's reasoning there applies here as well.
255. Claimant's claim under this heading therefore fails for insufficient evidence.

**F. Obligations Undertaken towards Investors under Article 10(1) ECT**

256. The last sentence of Article 10(1) of the ECT provides that "*Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.*" This provision, which appears in similar language in many investment treaties, is commonly referred to as the "umbrella clause."
257. This protection is broadly stated, referring as it does to "any obligation" and, as such, by the ordinary meaning of the words, includes both statutory and contractual obligations. The ICSID Ad Hoc Committee, in annulling the decision in **CMS v Argentina**, took a narrower view, and considered that the words "entered into" suggest that the obligation is limited to those of a consensual nature.<sup>23</sup> In both cases, however, it is clear that the obligation must have been entered into "with" an Investor or an Investment of an Investor. Therefore, this provision does not refer to general obligations of the State arising as a matter of law.
258. In the present case, Claimant has asserted several grounds of breach of the State's obligations under this provision: i) failure of the State Committee

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<sup>23</sup> *CMS Gas Transmission Company v. Argentina*, Annulment Decision of September 25, 2007, para. 95(a).

for Oil & Gas to observe its contractual obligations under the November 1998 Agreement by failing to provide the promised expertise and otherwise facilitate the exploration activities pursuant to that Agreement; ii) failure of the State Committee to ensure the issuance of the licenses necessary to commence exploration activities under the December 2000 Agreements; iii) failure of the Ministry of Energy to issue the necessary licenses for the activity of the Baldjuvon and Petroleum SUGD joint ventures in breach of the joint venture agreements and in disregard of Presidential Decree No. 83-r.

**i. Breach of the November 1998 Agreement**

259. With respect to the November 1998 Agreement, Claimant has testified that, after having commenced work at an existing well in the Alimtay area in Southern Tajikistan, he found it necessary to close down those operations and seal the well in early 2000 because of what he considered to be the low level of competence of the Tajik workers and the poor quality of the Tajik equipment. This led to discussions with the Prime Minister of Tajikistan and the Chairman of the State Committee for Oil & Gas and a proposal to set up joint venture operating companies which would be controlled by Claimant's Bahamian company, Vivalo.
260. While the March 2000 Agreements set out the general concept, those agreements were not in the end used to establish the joint ventures. As we have seen, new joint venture agreements were concluded in June 2001 by Claimant, not with the State Committee, but with State-owned production associations.
261. After the joint ventures were established, operations recommenced in the Alimtay area, but once again problems were encountered similar to those previously encountered regarding the quality of the workers and

equipment supplied by the Tajik side. In addition there were new issues regarding liability for unpaid wages, taxes and other debts incurred by its partners before creation of the joint venture, and other liabilities and burdens. As a consequence, Vivafo once again decided to cease work in the fields.

262. Claimant seeks to characterize the above difficulties as a breach of the State Committee's obligations under the November 1998 Agreement. However, apart from the obligation to ensure the license to carry out the work, the State Committee's obligations under that Agreement consisted only of providing "*all necessary exhaustive geological and technological materials...*" and "*execution of Norms of Legislation of Republic of Tajikistan granting tax privilege to foreign investors*". We therefore do not find here a breach of obligation based on the evidence presented with respect to the November 1998 Agreement.

**ii. Breach of the December 2000 Agreements**

263. The four December 2000 Agreements contain a clear and unconditional obligation on the part of the State Committee, as a party to the Agreements, to ensure the issuance of licenses to Claimant necessary for the commencement of exploration work in the four respective areas.
264. The licenses were not forthcoming. The Agreements were for an unlimited duration (Article 10 of each Agreements states that it "*acts without period restriction*"). There is no indication that they were terminated or revoked.
265. Claimant has therefore established a *prima facie* breach of contract and, consequently a breach of the State's duty to observe its obligations entered into with an Investor.

266. It is Respondent's, and not Claimant's, burden to rebut such a *prima facie* breach of obligation. Respondent has not attempted to so.
267. Nor does any evidence on the record suggest an excuse for Respondent's non-performance. The State Committee entered into the December 2000 Agreements at a time when it was well aware of the difficulties that had been encountered under the November 1998 Agreement, and nonetheless ensured the issuance of the further licenses required under the new agreements.
268. Therefore, under this provision of Article 10(1) of the ECT, the Tribunal finds that Claimant has stated and proved a valid claim for which Respondent is liable.

**iii. Failure to Issue Licenses to the Joint Venture Companies in Breach of the Joint Venture Agreements and in Disregard of Presidential Decree No. 83-r.**

269. This claim fails for reasons previously stated in this award in the discussion under the heading of Fair and Equitable Treatment. In addition, it fails because the joint venture agreements are not obligations undertaken by a State organ, but rather by State-owned enterprises, and there is no basis for concluding that the State-owned enterprises signed these agreements acting in a governmental capacity, even assuming, *arguendo*, that the claim is arbitrable under Article 22 of the ECT.
270. As regards Presidential Decree No. 83-r, even if it is viewed as creating an obligation of the State towards the Investor to issue licenses to Petroleum SUGD, that obligation was in fact performed by issuance of the licenses on December 20, 2002. No breach of obligation has occurred.

**G. National Treatment under Article 10(7) ECT**

271. This is the so-called National Treatment standard which is a common protection in many investment treaties, aimed at assuring that foreign investors receive equal treatment with nationals of the host country.
272. Claimant argues here that it was a breach of the national treatment standard to permit the Tajik party in the two joint ventures to receive 40% of the share capital in return for “outdated” machinery, equipment and other property, while refusing Vivalo the opportunity to contribute its share of authorized capital in anything other than cash.
273. The Tribunal notes that no such “refusal” by Respondent or any entity whose actions are attributable to Respondent is on the record. What is on the record are the court judgments by which the decision to allow Vivalo to contribute the Gazpromgeocomservice contract as a contribution in kind has been annulled. As we have set out, those decisions cannot be considered to constitute a breach of the ECT. Moreover, the judgments do not deny Vivalo the right to make contributions in kind.
274. The Tribunal would like to make an additional remark: capital contributions to joint venture companies are matters of contractual agreement between the founders of the joint venture. At the time when Vivalo signed the joint venture agreements in June 2001, it was or should have been well aware of the condition and value of the equipment and other property being proposed for contribution by the Tajik production associations who were the co-founders of the companies. It accepted that contribution and its valuation at 40% of total capital by signing the agreements.

275. There is no evidence that the agreements were not freely negotiated by the parties or that Vivalo did not freely accept the obligation to contribute its capital in cash. The fact that it later wished to renegotiate the form of its contribution does not mean that the original arrangements were improper.
276. Moreover, there is no evidence that the form or valuation of the parties' capital contributions was imposed on Vivalo by the State. Vivalo was under no obligation to conclude the joint venture agreements if it was not satisfied with the terms that had been negotiated.
277. Therefore, we find no breach of Article 10(7) of the Treaty.

#### **H. Expropriation in Violation of Article 13 ECT**

278. Claimant's claims under Article 13 of the Treaty are based on a theory of indirect expropriation, namely that the State has taken measures having an effect equivalent to expropriation. In particular, Claimant argues that his Investment in the Baldjuvon and Petroleum SUGD joint ventures have been expropriated by virtue of i) the State's failure to issue exploration licenses with respect to the four December 2000 Agreements; ii) the State's failure to issue licenses to Baldjuvon followed by the company's dissolution by the Supreme Court of Tajikistan on application of the Ministry of Finance; iii) the State's failure to issue licenses to Petroleum SUGD and the subsequent forced reduction of Vivalo's share interest in the joint venture; and iv) the failure of the State to offer to pay dividends from Petroleum SUGD's activities since March 14, 2003.
279. The legal standard for indirect expropriation has been discussed in many investment treaty arbitrations. For present purposes, it may be useful to refer to the formulation of this standard that is found in the **Tecmed v. Mexico** award: "*...It is understood that the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they*

*are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that '...any form of exploitation thereof...' has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed... Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary. The government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effect.*"<sup>24</sup>

280. As regards the State's failure to issue licenses under the four December 2000 Agreements, we have already found that this constitutes a breach of the State's obligation under the umbrella clause of Article 10(1). Does it also amount to an expropriation ?
281. As the standard set out in the **Tecmed** case cited above suggests, for an indirect expropriation to have occurred in respect of Claimant's contract rights under the December 2000 Agreements, the conduct of the State must result in an irreversible and permanent taking or destruction of Claimant's rights. In case of contractual rights, a temporary non-fulfilment of the State's contractual obligations is not sufficient to constitute an expropriation. The State must terminate the contract or at least definitively refuse to perform its obligation under it. A temporary deprivation will not suffice to constitute expropriation, even if it may give rise to a claim of damages for losses sustained during the period when the investor has been deprived of the use or enjoyment of his contract rights.

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<sup>24</sup> *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award of May 29, 2003, para. 116.



282. The December 2000 Agreements were of unlimited duration. There is no evidence in the record that they were terminated by either party. Indeed, as one of his claims for relief in this arbitration, Claimant has sought specific performance of the State's obligations under those Agreements. Thus, while it is true that the failure to issue licenses within a reasonable time period after signature of the Agreements was a breach of the obligations of the State under those Agreements, and might have adversely influenced until now Claimant's opportunity to exploit what he believes to be highly valuable assets, no permanent taking of Claimant's contractual rights has been shown, such that this Tribunal could consider Claimant's rights to have been destroyed.
283. We therefore do not consider the non-issuance of the exploration licenses under the four December 2000 Agreements as having amounted to an expropriation under the Treaty. In light of this finding, we need not reach the further question as to whether the failure to issue the licenses here would constitute a "measure" within the meaning of the Section 13 of the Treaty.
284. As regards the State courts' dissolution of the Baldjuvon joint venture and reduction of Vivalo's share interest in the Pctrolcum SUGD joint venture, both of these decisions appears to have resulted from the application of the Tajik law in effect at the time of the court decisions rendered. In both cases, according to the court's analysis, the result was dictated by the fact that Vivalo had failed to comply with its legal obligation to pay in full its capital contribution within one year from registration of the respective joint venture. Claimant contests the Court's interpretation of the law, but the Tribunal does not find the Court's position to be manifestly in contradiction with the Tajik legislation.

285. Consequently, the reduction of Vivalo's share in Petroleum SUGD did not deprive it of anything to which it had an entitlement, since it had failed to pay for the balance of its share interest within the time frame and in the manner required by law and by the Founding Documents, and therefore had lost its right to do so. This being said, Claimant continues to be the legal owner of the shares for which it did pay the corresponding capital contribution, and should therefore be entitled to enjoy the legal rights of a shareholder, including the right to participate in any dividends which the company may declare. In his testimony at the hearings, Claimant asserted at one point that Petroleum SUGD has gone bankrupt and been dissolved.<sup>25</sup> At another point, he asserted that he is still a shareholder of the joint venture.<sup>26</sup> In view of these conflicting statements and the absence of substantiation of the facts, the Tribunal feels unable to find that there has been an expropriation of Claimant's remaining investment. While we have already set out that Petroleum SUGD now seems to be held in part by the Austrian company EPA (referred to in para. 79 *supra*), the facts are so fragmentary that a considerable amount of speculation would be necessary to conclude that Claimant has lost his investment in Petroleum SUGD.

286. There is no evidence of any State action that has prevented the exercise of Claimant's shareholder rights in Petroleum SUGD. Even accepting Claimant's assertion that it has received no notices of shareholder meetings, no financial information on joint venture performance, and no payment of dividends, such information and payments are normally provided by the management of the joint venture, and not by the State or a State organ. Nor is there any indication that these rights no longer exist, even if they are not being respected by the joint venture company. We lack any substantiated factual basis to determine whether the company's

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<sup>25</sup> Transcript, day 1, pages 154-155, lines 21 *et seq.*

<sup>26</sup> Transcript, day 1, page 137, lines 19-21.

conduct could be attributed to the State. Thus, we find no basis for a claim of expropriation here.

287. With respect to the dissolution of Baldjuvon, for the reasons stated earlier, we do not find that the Tajik courts violated the Treaty by their decision ordering the liquidation of Baldjuvon. This being said, in the context of a liquidation, Vivalo should be entitled to its share of any liquidation balance after the payment of creditors. However, we have no evidence as to whether any assets remained for distribution to the partners after taking into account debts owing to the Company's creditors and, if so, whether the Court had approved the distribution of that balance without payment to Vivalo of its pro rata share.
288. In the absence of such evidence, we conclude that a case of expropriation has not been established.

## **X. COSTS OF THE ARBITRATION**

289. Claimant filed its statement of costs as of June 15, 2009 with respect to the first phase of the arbitration. According to the statement, Claimant costs for the period August 2006-June 2009 totalled **1,464,582.60 euros**, and consisted of legal representation (980,000 euros), arbitral expenses (SCC registration fee, the advance deposits and bank charges) (358,582.60 euros) and incurred expenses (126,000 euros).
290. Respondent was given an opportunity to comment on Claimant's costs, but did not do so.
291. The Tribunal has found for Claimant on jurisdiction and has upheld one of Claimant's claims of liability. The other claims of liability have been rejected.

292. The arbitration will therefore continue to a second phase during which Claimant will be asked to present his requests for relief and supporting evidence with respect to the claim for which Respondent has been held liable.
293. Under these circumstances, the Tribunal has decided to defer a determination of costs and an award with respect thereto, until the rendering of a Final Award in the arbitration or until the arbitration is otherwise terminated.

## **XI. DECISIONS**

For the foregoing reasons, the Tribunal now **DECIDES** as follows:

- A. The Tribunal has jurisdiction over Claimant's claims that Respondent has breached its obligations owing to Claimant under Articles 10(1), 10(7) and 13 of Part III of the Energy Charter Treaty;
- B. Respondent has breached its obligation owing to Claimant under Article 10(1) of the Energy Charter Treaty, by failing to perform its contractual undertaking to ensure the License to carry out solely and exclusively geological exploration, and natural resource exploitation works and activities pursuant to the following four Agreements signed on December 25, 2000 by and between Claimant and the State Committee on Oil & Gas of the Republic of Tajikistan:
- i. Treaty on geological exploration and operation works on the project of East Soupetau area in the Republic of Tajikistan, perspective for Hydrocarbon raw material (oil, gas);

- ii. Treaty on geological exploration and operation works on the project of Rengan area in the Republic of Tajikistan, perspective for Hydrocarbon raw material (oil, gas);
  - iii. Treaty on geological exploration and operation works on the project of Sargazon area in the Republic of Tajikistan, perspective for Hydrocarbon raw material (oil, gas); and a
  - iv. Treaty on geological exploration and operation works on the project of Yalgyzkak area in the Republic of Tajikistan, perspective for Hydrocarbon raw material (oil, gas).
- C. All other claims brought by Claimant in this arbitration are denied.
- D. The Tribunal retains jurisdiction for the purpose of determining the relief to be granted with respect to the breach referred to in para. B above.
- E. Until a final award on requests for relief or until the arbitration is otherwise terminated, the determination and allocation of the costs of the arbitration is deferred.

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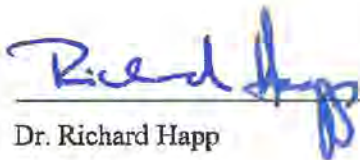
We hereby certify that, for purposes of Article 1 of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, this Partial Award on Jurisdiction and Liability was made in Stockholm, Sweden, on the date set forth below.

This Partial Award has been signed in eight (8) originals, two for each of the Parties, one for each member of the Arbitral Tribunal and one for the Arbitration Institute of the Stockholm Chamber of Commerce.

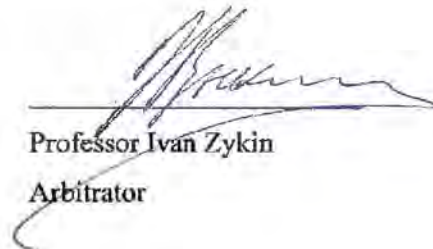
Place of Arbitration: Stockholm, Sweden

Date: September 2, 2009

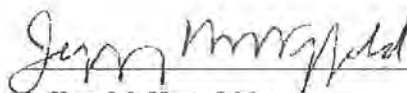
**THE ARBITRAL TRIBUNAL**



Dr. Richard Happ  
Arbitrator



Professor Ivan Zykin  
Arbitrator



Jeffrey M. Hertzfeld  
Chairman of the Tribunal