International Centre for Settlement of Investment Disputes

Washington, D.C.

ICSID Case No. ARB/10/16

THE AES CORPORATION AND TAU POWER B.V.

v.

REPUBLIC OF KAZAKHSTAN

AWARD

Arbitral Tribunal:

Prof. Pierre Tercier, President

Prof. Vaughan Lowe QC

Dr. Klaus Sachs

Secretary of the Tribunal:

Ms. Aissatou Diop

Assistant to the Tribunal:

Dr. Clarisse von Wunschheim

Date of dispatch to the Parties: *1 November 2013*

In the arbitration proceeding among

THE AES CORPORATION, 4300 Wilson Boulevard, Arlington, Virginia, VA 22203, United States of America

Claimant 1

and

TAU POWER B.V., Parklaan 32, 3016 BC Rotterdam, the Netherlands

Claimant 2

represented by Ms. Judith Gill QC, Mr. Mark Levy, Mr. Jeffrey Sullivan, ALLEN & OVERY LLP, One Bishops Square, London E1 6AD, United Kingdom, Tel. : +44 20 3088 0000, Fax : +44 20 3088 0088; E-mail : judith.gill@allenovery.com, mark.levy@allenovery.com, jeffrey.sullivan@allenovery.com

versus

REPUBLIC OF KAZAKHSTAN, Mr. Marat Beketayev, Executive Secretary, Ministry of Justice of Kazakhstan, Mr. Utepov Eduard Karlovich, Chairman of the State Property and Privatization Committee, Mr. Zhamishev Bolat Bidakhmetovich, Minister of Finance of Kazakhstan, 11, Pobeda Avenue, Astana 010000, Kazakhstan, and Mr. Massimov Karim Kazhimkanovich, Head of the President's Administration, Government House, Orynbor Street # 6, Astana 010000, Kazakhstan

Respondent

represented by Ms. Belinda Paisley, Ms. Chloe Carswell, Ms. Dina Nazargalina**,** REED SMITH, The Broadgate Tower, 20 Primrose Street, London EC2A 2RS, Tel. : +44 20 3116 3000, Fax : +44 20 3116 3999, E-mail : bpaisley@reedsmith.com, ccarswell@reedsmith.com, dnazargalina@reedsmith.com

and

Mr. Joe Smouha QC, Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3EG, E-mail : jsmouha@essexcourt.net

and

Mr. Simon Olleson, 13 Old Square Chambers, 13-14 Old Square, Lincoln's Inn, London WC2A 3UE, E-mail : simonolleson@13oldsquare.com

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TABLE OF ABBREVIATIONS AND KAZAKH EXPRESSIONS

AES Corp.	The AES Corporation
BIT	Treaty Between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment, which entered into force on 12 January 1994
CHP	Combined Heat and Power plants
ECT	Energy Charter Treaty signed by Kazakhstan and the Netherlands on 17 December 1994, and entered into force between the Parties on 16 April 1998
EKO	Eastern Kazakhstan Oblast (a region of eastern Kazakhstan)
FIL or 1994 FIL	Kazakh Law on Foreign Investments of 1994
HPP	Hydroelectric Power Plant
IOA	Investment Obligation Agreement
KZT	Kazakh Tenge (Kazakh currency)
STG£	Pound Sterling (UK)
Tau Power	Tau Power B.V.
USD	U.S. Dollars
The AES Entities	
AES Ekibastuz	AES ST Ekibastuz LLP was responsible for running the Ekibastuz GRES 1 coal-fired power plant located in the Pavlodar Oblast of Kazakhstan (C-WS Sergeev, AES Group Structure Charts, Appendixes 1-15).
AES Shygys Energy	AES Shygys Energy LLP (since 2004 has managed the retail trading company Shygys)
Irtysh P&L	Irtysh Power and Light LLP
Nurenergo	Nurenergoservice LLP (centralized electricity trading company in Almaty)

Shulba Hydro	AES Shulbinsk GES LLP (hydro power plants in the EKO)
Sogra CHP	AES Sogrinsk TETS LLP (coal-fired, combined heat and power plants in the EKO)
the CHPs	UK CHP and Sogra CHP together
the Hydros	UK Hydro and Shulba Hydro
UK CHP	AES Ust-Kamenogorsk TETS JSC (coal-fired, combined heat and power plants in the EKO)
UK Hydro	AES Ust-Kamenogorsk GES LLP (hydro power plants in the EKO)
Republic of Kazakhstan Entities	
AltaiEnergo	JSC AltaiEnergo is a state-owned energy trader
ARNM	Agency for the Regulation of Natural Monopolies (attention: Respondent refers to it as the "State Committee on Pricing and Anti-Monopoly Policy", e.g. at Resp. 7.10.11, no. 153).
Competition Agency	The Agency of the Republic of Kazakhstan for Protection of Competition (Antimonopoly Agency) as well as its predecessor entities, including the State Committee on Pricing and Antimonopoly Policy
DAMSPA	Kazakhstan's Department for the Management of State Property and Assets of the Ministry of Finance
DP	Privatization Department of the Ministry of Finance of Kazakhstan
JSC Shulba	JSC Shulbinsk GES is a state-owned company holding the (Shulbinsk) concession assets
JSC UK	JSC Ust-Kamenogorsk GES is a state-owned company holding the Ust-Kamenogorsk concession assets

KEGOC	Kazakhstan Electricity Grid Operating Company (joint stock company responsible for operating all high-voltage networks, purchasing electricity from producers and selling it to buyers)
MINT	Ministry of Industry and New Technologies
Monopolies Register	All Kazakh state register of market entities considered to hold a dominant (monopolistic) position in a relevant market
NES Kazakhstanenergo	National Energy System Kazakhstanenergo
Shygys	Shygysenergotrade LLP (state-owned retail trading company, wholly managed by AES Shygys Energy)
SIEC	Specialised Interregional Economic Court for the East Kazakhstan Province
Kazakh Expressions	
Akim	Governor
Akimat	Regional Government
Ust-Kamenogorsk or UK	Capital of the East Kazakhstan Province

TABLE OF SUBMISSIONS REFERRED TO

RfA	Claimants' Request for Arbitration of 7 June 2010
RSP Answer	Respondent's Answer to the Request for Arbitration
Minutes of the First Session	Minutes of the First Session held on 5 April 2011
CL Memo 28.04.2011	Claimants' Memorial of 28 April 2011
CL Memo 28.04.2011 Annex […]	Annexes to Claimants' Statement of Claim of 28 April 2011
RSP C-Memo 7.10.2011	Respondent's Counter-Memorial of 7 October 2011 as amended on 10 November 2011
RSP C-Memo 7.10.2011 Annex […]	Annexes to Respondent's Counter-Memorial of 7 October 2011
CL Reply 30.03.2012	Claimants' Reply Memorial of 30 March 2012
CL Reply 30.03.2012 Annex […]	Annexes to Claimants' Reply Memorial of 30 March 2012
RSP Rejoinder 25.06.2012	Respondent's Rejoinder of 15 June 2012
RSP Rejoinder 25.06.2012 Appendix […]	Appendixes to Respondent's Rejoinder of 15 June 2012
CL Suppl. Subm. 6.08.2012	Claimants' Supplementary Submission on the Additional Claim of 6 August 2012
RSP Suppl. Subm. 27.08.2012	Respondent's Response to Claimants' Supplementary Submission on the Additional Claim of 27 August 2012
CL Quantum Subm. 2.11.2012	Claimants' Supplementary Quantum Submission of 2 November 2012
CL PHB on Liability 30.11.2012	Claimants' Post-Hearing Brief dated 30 November 2012
RSP PHB on Liability 30.11.2012	Respondent's Post-Hearing Brief on Legal Issues dated 30 November 2012

RSP Quantum Subm. I 18.12.2012	Respondent's Response to the Claimants' Supplementary Quantum Submission of 18 December 2012
RSP Quantum Subm. II 14.12.2013	Respondent's Submission on the Quantum of the Additional Claim of 14 January 2013
CL PHB on Quantum 5.04.2013	Claimants' Post-Hearing Submission Following the 5-7 February 2013 Hearing
RSP PHB on Quantum 5.04.2013	Respondent's Post-Hearing Brief on Quantum of 5 April 2013
CL Reply PHB on Quantum 23.04.2013	Claimants' Reply Post-Hearing Submission on the Tribunal's Question of 23 April 2013
RSP Reply PHB on Quantum 23.04.2013	Respondent's Response to the Claimants' Answer to the Tribunal's Question of 23 April 2013
RSP Response to PO No. 11 of 23.04.2013	Respondent's Response Pursuant to Procedural Order No. 11: Re Paragraphs 6 to 23, and 33 to 53 of the Claimants' Post-Hearing Brief of 23 April 2013
CL Submission on Costs 17.05.2013	Claimants' Schedules of Costs of 17 May 2013
RSP Submission on Costs 17.05.2013	Respondent's Submission on Costs of 17 May 2013
London Transcript Day […] p. […] l. […]	Transcripts of the Hearing held in London from 10 to 15 September 2012
Paris Transcript Day […] p. […] l. […]	Transcripts of the Hearing held in Paris from 5 to 7 February 2013
- […] Hearing Bundle, Volume […]	Hearing Bundle of the relevant Hearing
- PO No. […]	Procedural Order No.
- Exh. C – […]	Claimants' factual Exhibits
- Exh. RfA C – […]	Claimants' factual Exhibits annexed to their Request for Arbitration
- Exh. R – […]:	Respondent's factual Exhibits
- C-WS [last name]	Claimants' Witness Statements
- R-WS [last name]	Respondent's Witness Statements

-C-[last name]	Claimants' Expert Reports
-R-[last name]	Respondent's Expert Reports

I. SUMMARY OF FACTS

A. The Parties

1. Claimant 1, **THE AES CORPORATION** (hereinafter "AES Corp." or "Claimant 1"), is a company incorporated under the laws of Delaware, USA, on 28 January 1981 with its principal place of business at 4300 Wilson Boulevard, Arlington, Virginia 22203, USA[1]. It is a global power company with generation and distribution businesses, providing energy in 27 countries with a workforce of over 27,000 people (cf. http://www.aes.com).

2. Claimant 2, **TAU POWER B.V.** (hereinafter "Tau Power" or "Claimant 2") is a corporation constituted under the laws of the Netherlands on 8 May 1974 under the name Bitacora B.V. and with its registered office at Parklaan 32, 3016 BC Rotterdam, the Netherlands[2]. Bitacora BV belonged to ING Aconto NV and was acquired by AES Global Power Holdings BV (a company ultimately wholly-owned by AES Corp) on 23 July 1997[3].

3. Respondent is the **GOVERNMENT OF THE REPUBLIC OF KAZAKHSTAN** (hereinafter referred to as "Respondent", "the Government" or "Kazakhstan").

4. Claimant 1 and Claimant 2 will together be referred to as "Claimants". Claimants and Respondent will be collectively referred to as the "Parties", whereas Claimants and Respondent will each be referred to as "Party."

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1 Exh. RfA C-4.
2 Exh. RfA C-5.
3 See RfA para. 5; CL Reply 30.03.12, para. 46, Exh. RfA C-5.

B. Overview of Other Relevant Entities Involved

1. "AES Entities"

5. The dispute involves various entities affiliated to Claimants. These include in particular:

1.1 Entities outside Kazakhstan

6. ***AES Suntree Power Limited*** (hereinafter "AES Suntree") is a company wholly owned by AES Corp and incorporated under the laws of Ireland. From 1997-2007 it held full ownership of and managed AES Ekibastuz[4].

   It was disputed between the Parties whether AES Suntree was owned by AES Corp at all relevant times[5] and its history of ownership is therefore summarized below:

   (i) On 2 April 1996, Fernlock Limited (later named 'AES Suntree') was a company incorporated under the laws of Ireland with a registered address at 29, Earlsfort Terrace, Dublin 2, Ireland. At that time, its sole shareholders were Earlsfort Nominees Limited and Earlsfort Registrars Limited with a total issued capital of STG£ 2 (hereinafter "the Original Shareholders"[6].

   (ii) On 20 June 1996, the name of Fernlock Limited was changed to "AES Suntree Power Limited" by special resolution of Fernlock Limited[7].

   On 22 July 1996, upon approval of the Minister of Enterprise and Employment, this change was registered with the Irish Registrar of Companies[8].

   (iii) As of 31 December 1997, the Original Shareholders were still the holders of the only issued shares of AES Suntree[9].

   According to Claimants, AES Electric Limited (hereinafter "AES Electric"), a wholly owned subsidiary of AES Corp, was the beneficial shareholder of AES Suntree at all relevant times from 22 May 1997 onwards, including 23 July 1997 to 28 July 1997 inclusive. Claimants further assert that they provided Respondent with the documents establishing this ownership on 3 January 2012[10].

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4 C-WS Sergeev, AES Group Structure Charts, Appendixes 1-15; CL Memo 28.04.11, para. 69.
5 RSP C-Memo 7.10.2011, paras. 22-26.
6 Exh. R-80.
7 Exh. R-81.
8 Exh. R-82.
9 Exh. R-107.
10 CL Reply 30.03.12, para 46; see also C-WS Sergeev, AES Group Structure Charts, Appendixes 1-15.

In this regard, section 8 of the "Notes to the Account" forming part of AES Suntree's financial report for the period from 2 April 1996 to 31 December 1996 stated as follows:[11]

> *"The company is owned 70% by AES Electric Limited and 30% by Suntree Power BV. Financial statements of AES Electric Limited may be obtained from Burleigh House, 17-19 Worple Way, Richmond, Surrey, TW10 6AG.*
>
> *The ultimate parent company is The AES Corporation, a company incorporated in the State of Delaware, U.S.A. Copies of the ultimate parent company's financial statements can be obtained from the Securities and Exchange Commission, 450 5th Street NW. Washington DC 20549, USA."*

(iv) On 23 January 1998, 99,000 shares of AES Suntree, which were part of the 99,998 unissued shares were cancelled. Out of the remaining 998 unissued shares, 699 were issued to AES Electric Limited and 299 to a company called "Suntree Power B.V."[12]. In addition, two other issued shares remained allotted to the Original Shareholders[13].

(v) On 19 August 1999, Earlsfort Registrars Limited transferred its sole share to Suntree Power B.V., bringing the total number of share held by Suntree Power B.V. to 300[14].

(vi) On 13 September 1999, Suntree Power B.V. transferred its 300 shares to AES Electric Limited[15].

(vii) On 30 November 2000, Earlsfort Nominees Limited transferred its sole share in AES Suntree to AES Electric[16]. Therewith, AES Electric became the sole shareholder of the 1,000 issued shares of AES Suntree.

7. In its Rejoinder, Respondent accepted that AES Corp. was the ultimate owner of the relevant AES Entities, including AES Suntree, throughout the period in question[17].

1.2 Entities in Kazakhstan

8. A first group entails entities relating to the operation of power plants:

i. The coal-fired power plant: ***AES ST Ekibastuz LLP*** (hereinafter "AES Ekibastuz") is a company incorporated under the laws of Kazakhstan, which was wholly owned by AES Suntree from 1996 to 2007. It was responsible for running the Ekibastuz GRES 1 coal-fired power plant located in the Pavlodar Oblast of Kazakhstan, which

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11 Exh. R-74 section 8 p. 01/00211.
12 Exh. R-5; R-110.
13 Exh. R-111.
14 Exh. R-79.
15 Exh. R-79.
16 Exh. R-106.
17 RSP Rejoinder 25.06.2012, para. 320.

was acquired by AES Suntree on 4 July 1996 (hereinafter referred to as "the Ekibastuz Plant"[18]).

ii. The combined heat and power plants, i.e. the "**CHPs**":

- ***AES Ust-Kamenogorsk TETS LLP*** (hereinafter "UK CHP") is a company incorporated under the Laws of Kazakhstan, of which AES Suntree acquired the shares on 23 July 1997 (see below para. 29). It is a combined heat and power plant located in the Eastern Kazakhstan Oblast (hereinafter "EKO")[19].

- ***AES Sogrinsk TETS LLP*** (hereinafter "Sogra CHP") is a company incorporated under the Laws of Kazakhstan, of which AES Suntree acquired the shares on 23 July 1997 (see below para. 29). It is a combined heat and power plant located in the EKO[20].

iii. The hydroelectric power plants, i.e. the **"Hydros"**:

- ***AES Ust-Kamonogorsk GES LLP*** (hereinafter "UK Hydro") is a company incorporated under the Laws of Kazakhstan, of which AES Suntree acquired the shares through on 23 July 1997 (see below para. 29). It is a hydroelectric power plant located in the EKO[21].

- ***AES Shulbinsk GES LLP*** (hereinafter "Shulba Hydro") is a company incorporated under the Laws of Kazakhstan, of which AES Suntree acquired the shares on 23 July 1997 (see below para. 29). It is a hydroelectric power plant located in the EKO[22].

9. The second group entails entities relating to the management of state-owned distribution and retail companies:

i. ***Irtysh Power and Light LLP*** (hereinafter referred to as "Irtysh P&L"), a company incorporated under the laws of Kazakhstan and (indirectly) wholly-owned by Tau Power and, ultimately, by AES Corp. Irtysh P&L managed since 1998 a State-owned heating distribution company in the EKO known as "UK Heat Nets JSC"[23].

ii. ***AES Shygys Energy LLP*** (hereinafter referred to as "AES Shygys Energy"), a company incorporated under the laws of Kazakhstan and (indirectly) wholly-owned by AES Corp. AES Shygys Energy managed two state-owned companies: (a) since June 1999, a state-owned power distribution company in the EKO known as JSC East Kazakhstan Regional Energy Company JSC East Kazakhstan Regional Energy Company (see below para. 17(v)), and (b) since

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18 CL Memo 28.04.11, para. 69; C-WS Sergeev, AES Group Structure Charts, Appendixes 1-15.
19 CL Memo 28.04.11, para. 77; C-WS Sergeev, AES Group Structure Charts, Appendixes 1-15.
20 CL Memo 28.04.11, para. 77, Exh. C-1; C-WS Sergeev, AES Group Structure Charts, Appendixes 1-15.
21 CL Memo 28.04.11, para 77, Exh. C-1; C-WS Sergeev, AES Group Structure Charts, Appendixes 1-15.
22 CL Memo 28.04.11, para. 77, C-WS Sergeev, AES Group Structure Charts, Appendixes 1-15.
23 RfA, para. 28(a); CL Memo 28.04.11, para. 90; C-WS Sergeev, AES Group Structure Charts, Appendixes 1-15.

September 2004, a state-owned retail trading company known as Shygysenergotrade LLP[24].

10. ***AES Kazakhstan LLP*** (hereinafter referred to as "AES Kazakhstan") was a trading company incorporated under the laws of Kazakhstan and indirectly wholly-owned by AES Corp[25], with the purpose of centralizing business for the energy sales from the CHPs and the Hydros, and thereby effectively replacing the State-owned energy trader JSC AltaiEnergo (see below para. 16). AES Kazakhstan was formerly named "East Kazakhstan Power and Light LLP" (from 1997 to 1999).

11. ***Nurenergoservice LLP*** (hereinafter referred to as "Nurenergo"), a wholesale company set up by Tau Power in July 2005 and based in Almaty, with the purpose of taking over AES Kazakhstan's trading activities, i.e. centralizing all trading operations in the EKO[26].

12. Any or all of these entities collectively may be referred to below as the "AES Entities".

2. Various Kazakh state-owned entities

13. ***National Energy System Kazakhstanenergo*** (hereinafter "NES Kazakhstanenergo") is a state-owned entity established in 1995 under the laws of Kazakhstan and which replaced the former state-owned entity "Kazakhstanenergo", which owned all power assets in Kazakhstan. NES Kazakhstanenergo was in charge of restructuring the various state-owned power sector entities, acted as the system and national grid operator and managed the national dispatch center[27].

14. ***Kazakhstan Electricity Grid Operating Company*** (hereinafter "KEGOC") is a state-owned joint-stock company established under the laws of Kazakhstan, to which in 1996 all the high voltage energy assets of NES Kazakhstanenergo were transferred to by the Government[28]. KEGOC was the state-owned entity responsible for the operation of all high-voltage networks, purchasing electricity from producers and selling it to buyers whilst guaranteeing its delivery to customers, and handling any other issues in relation to the distribution of electricity in the country[29].

15. ***Shygysenergotrade LLP*** (hereinafter "Shygys") is a state-owned company incorporated under the laws of Kazakhstan. It is a retail trading company in the EKO, which was managed by AES Shygys Energy[30].

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24 RfA, para. 28(a); CL Memo 28.04.11, para. 90; C-WS Sergeev, AES Group Structure Charts, Appendixes 1-15.
25 C-WS Sergeev, AES Group Structure Charts, Appendixes 1-15.
26 CL Memo 28.04.11 paras. 87-89 and 161 fol.; C-WS Jonagan I, para. 36.
27 RfA, para. 20; CL Memo 28.4.2011, paras. 37 and 58.
28 Exh. C-17.
29 RfA, para. 20; CL Memo 28.04.2011, para. 66.
30 See above para. 9(ii); RfA, para. 28(b); CL Memo 28.04.2011, para. 90; C-WS Sergeev, AES Group Structure Charts, Appendixes 1-15.

16. ***JSC AltaiEnergo*** (hereinafter "JSC Altaienergo") is a state-owned joint-stock trading company established under the laws of Kazakhstan[31]. The trading activities of JSC Altaienergo were taken over by AES Kazakhstan (see above para. 10).

17. The following **power plants entities** were also involved:

    i. ***JSC Ust-Kamenogorsk TETS*** (hereinafter "JSC UK CHP") is a state-owned joint-stock company established under the laws of Kazakhstan[32].

    ii. ***JSC Sogrinsk TETS*** (hereinafter "JSC Sogra") is a state-owned joint-stock company established under the laws of Kazakhstan[33].

    iii. ***JSC Shulbinsk GES*** (hereinafter "JSC Shulba") is a state-owned joint-stock company established under the laws of Kazakhstan holding the hydroelectric concession assets in Shulbinsk[34].

    iv. ***JSC Ust-Kamonogorsk GES*** (hereinafter "JSC UK") is a state-owned joint-stock company established under the laws of Kazakhstan holding the hydroelectric concession assets in Ust-Kamonogorsk[35].

    v. ***JSC East Kazakhstan Regional Energy Company*** (hereinafter "JSC EK REC") is a state-owned joint-stock company established under the laws of Kazakhstan holding the concession assets in Shygys managed by AES Kazakhstan (see above para. 15).

31 RfA, para. 26; CL Memo 28.04.2011, para. 87; RSP C-Memo 7.10.11, para. 135.
32 Exh. C-9.
33 Exh. C-8.
34 Exh. C-6.
35 Exh. C-5.

C. Chronological Overview of the Background of the Dispute

18. The following presentation is summary in nature. It is not meant to be a comprehensive overview of the facts of the dispute. It sets out only the main facts that the Arbitral Tribunal considered relevant for its decision. Where necessary, further issues of fact are discussed in the next section "The Law" (II).

1. The Context

19. From its declaration of independence on 16 December 1991 up until the mid-1990s, Kazakhstan was in dire need of restructuring its electricity sector to prevent it from collapsing. To achieve this objective, the Government sought out foreign investment through a process of privatization of its state-owned power generation companies[36].

20. In the mid-1990s, Kazakhstan undertook a series of legal reforms to facilitate and attract foreign investment. A report of the World Bank issued on 1 December 1999 (Technical Paper No. 451 "Privatization of the Power and Natural Gas Industries in Hungary and Kazakhstan") found that in 1996 Kazakhstan had to attract private investors in order to prevent the electricity sector from collapsing[37].

21. In 1995, Kazakhstan started a reform of the power industry with the intent to privatize it.

22. On 28 July 1995, *Resolution No. 1033* on the "Reorganization of the power industry management of the Republic of Kazakhstan" was passed[38], which created NES Kazakhstanenergo (see above para. 13) with the aim to restructure the various state-owned power sector entities. At the regional level, new "energos" were formed to handle the regional distribution system[39].

23. On 28 February 1996, *Resolution No. 246* "On the Programme for Privatization and Restructuring of the State-Owned Property in the Republic of Kazakhstan for 1996-1998" was issued. This Resolution laid down Kazakhstan's plans for the power industry, in particular its intention to corporatize state-owned entities prior to privatization, and included the transformation of regional generators into independent joint stock companies for the purposes of their privatization[40].

24. On 30 May 1996, *Resolution No. 663* "Concerning the Programme of Privatization and Restructuring of the Electric Energy Sector" was issued (hereinafter referred to as the *"**Restructuring Resolution**"*[41].

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36 Exh. C-122 and R-Butler I, para. 59.
37 Exh. C-76.
38 Exh. C-12.
39 CL Memo 28.4.2011, para. 58.
40 CL Memo 28.4.2011, para. 65; Exh. C-16.
41 Exh. C-15.

(i) According to Claimants, this Resolution sought to create the conditions for the development of a competitive wholesale market for electricity generation by 1998, by, *inter alia*, opening the door to privatizations and providing as follows[42]:

> *" The sector of electric energy will have the features of monopoly and competition. Monopolies (the operation of high-voltage and low-voltage electricity networks, activities associated with transportation of electric and thermal energy) shall be regulated by the state, and the competitive elements (manufacturers of the electric energy) shall be regulated by the market itself."* [43]

(ii) According to Respondent, the statements made in this Restructuring Resolution were nothing more than statements of intent that it would seek to develop a market based on competitive principles[44].

25. In the summer and autumn 1996, various further Resolutions were adopted regarding the restructuring of the electricity market in Kazakhstan in view of its privatization, including – *inter alia* – (i) *Resolution No. 929* "On the State Regulatory Commission on Electrical Power Generation"[45], (ii) *Resolution No. 1188* "On Certain Measures to Restructure the Management of the Energy System of the Republic of Kazakhstan"[46], (iii) *Resolution No. 652* "On Certain Measures to Restructure the Management of the Energy System of the Republic of Kazakhstan"[47].

26. These reforms continued throughout the year 1997, including – *inter alia* – (i) *Resolution No. 369* "On Holding an International Tender To Sell the Irtysh Cascade of Hydroelectric Stations"[48], and (ii) the "Program for the Further Development of the Electrical Energy Market in 1997-2002"[49].

2. The Investment

27. On 4 July 1996, AES Suntree acquired the newly privatized Ekibastuz Plant (see above para. 8i.)[50].

28. On 14 July 1997, AES Suntree was announced the winner of a tender process relating to the concession of two HPs and the sale of four combined heat and power plants[51].

29. On 23 July 1997, Kazakhstan, acting through its Department for the Management of State Property and Assets of the Ministry of Finance (hereinafter "DAMPSA") and the Privatization Department of the Ministry of Finance (hereinafter "DP"), entered into an agreement with AES Suntree entitled: "*Agreement relating to the Sale and Purchase of*

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42 CL Memo 28.04.2011, para. 63.
43 Exh. C-15, p. 2.
44 RSP Memo 7.10.2011, para. 726.
45 Exh. R-10.
46 Exh. C-17.
47 Exh C-17 and C-18.
48 Exh. C-19.
49 Exh. C-129.
50 CL Memo 28.04.11, para. 69 and fn. 46.
51 CL Memo 28.04.11, paras. 71-72; Exh. C- 19.

One Hundred Per Cent (100%) of the Voting Shares in Four (4) Energy Producing Companies and the Grant of a Concession in Respect of the Assets of Two (2) Hydroelectric Companies" with amendments of 2 October 1997 (hereinafter referred to as the *"**Altai Agreement**"*[52]).[53]

Through this Agreement, AES Suntree acquired 100% of the voting shares in (i) four combined heat and power plants, among which were the UK and Sogra CHPs (see above para. 8(ii)), (ii) and a 20-year concession in relation to the Hydros (see above para. 8(iii))[54]).[55] The Altai Agreement was later subject to some modifications in 2006 regarding payment provisions[56].

30. On 28 July 1997, Mr. Morgan, a Director of AES Suntree, gave notice by letter to Mr. Kalmurzaev, Director of the DAMPSA, and Mr. Utepov, Director of the DP, that AES Suntree had ***assigned*** its rights under the Altai Agreement to Tau Power with effect as of 29 July 1997. This notice was counter-signed by Mr. Kalmurzaev and Mr. Utepov, who also affixed the seal of the DAMPSA and the DP[57].

31. On 1 October 1997, UK Hydro and Shulba Hydro entered into ***two additional agreements*** with Kazakhstan (represented by the Department for the Management of State Property and Assets of the Ministry of Finance) and JSC UK and JSC Shulba respectively, providing for the transfer of all the hydroelectric concession assets and rights of the state-owned entities JSC UK and JSC Shulba to UK Hydro and Shulba Hydro respectively[58].

32. On 2 October 1997, through signing a "Deed of Adherence" between Kazakhstan (represented by the DAMPSA and the DP), Tau Power, JSC UK and JSC Shulba, the latter two companies became parties to the Altai Agreement[59].

33. On the same day, an "Assignment Agreement relating to Energy Supply Contracts with the Electricity Distribution Networks as well as other Contracts Supporting AltaiEnergo's Business" (hereinafter referred to as "***Assignment Agreement***") was further passed between JSC AltaiEnergo and AES Kazakhstan, through which AltaiEnergo assigned its contracts with the distribution networks and other thereto relating supporting contracts to AES Kazakhstan[60].

34. On 15 October 1997, furthermore, two "*Asset Sale and Purchase Agreements*" were passed between JSC Sogra and Sogra CHP, and between JSC UK and UK CHP

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52 Exh. C-1 to C3 and Exh. R-6.

53 These amendments consisted in a Deed of Adherence according to which JSC Shulba and JSC UK, the holders of the concession assets, became parties to the Altai Agreement (see below para. 32) and an Assignment Agreement (see below para. 33).

54 CL Memo 28.04.2011, para. 74; RSP C-Memo 7.10.11, para. 109.

55 It appears that Claimants later on sold two of the four combined heat and power plants (i.e. JSC Leninogorsk TETS and JSC Semipalatinsk TETS) in October 2002 (CL Memo 28.04.2011, para. 76 fn. 52).

56 Exh. C-346 to C-352.

57 RfA, para. 22; CL Memo 28.04.2011, para. 75; Exh. C-4 and C-170.

58 Exh. C-5 and C-6.

59 Exh. C-7.

60 Exh. C-114 to C-116.

respectively, through which these AES entities acquired all the assets of the CHPs "free and clear of any encumbrances"[61].

3. The Relevant Legislation in Force at the Time of the Investment

35. The main legal framework relevant to the present dispute, which was in force at the time of the investment included – *inter alia* – the following:[62]

(i) The "*Law on Price Formation*" enacted on 15 December 1990 and the "*Edict on Liberalisation of Prices*" of 3 January 1992, which provided that most products and services would be sold at free market prices, excluding however the electricity sector which remained subject to tariffs fixed by the state[63].

(ii) The "*Law On Development of Competition and Restriction of Monopolistic Activity*" (hereinafter referred to as "the ***Original Competition Law***"[64]), enacted on 11 June 1991 and as amended in 1995 by the *Law No. 2120* and *Laws No. 2488 and 2489*[65], and the thereto related *Decree No. 1275* of 20 December 1993, which confirmed provisional regulations on the "Procedure for Determining the Boundaries of a Market for a Particular type of Good and Deeming an Economic Subject to be a Monopolist" (hereinafter referred to as "***Decree No. 1275***"[66];

(iii) The *Law on Foreign Investments*, enacted on 27 December 1994 and as amended on 23 July 1997 (hereinafter referred to as the *"**1994 FIL**"* or *"FIL"*).

(iv) The "*Law Concerning the Electric Energy Sector*" (hereinafter referred to as the *"**1995 Electricity Law**"*[67]), under which all generation companies were classified under Kazakh law as "natural monopolies" and were subject to tariff controls by state authorities[68].

(v) Privatization regulations including:

- *Decree No. 2721* "On Privatization" (hereinafter referred to as the "***1995 Privatization Law***"[69]), enacted on 23 December 1995, according to which state-owned companies could be sold to private investors.

- *Decree No. 46* "Programme of Privatization and Restructuring of State Ownership in the Republic of Kazakhstan" (hereinafter referred to as

61 Exh. C-8 and 9.
62 Reference to further laws and regulations as well as specific provisions thereof will be made where necessary in the course of the analysis.
63 RSP Memo 7.10.11, paras. 174-177, R-Butler I, paras. 78 fol.
64 Exh. C-10.
65 Exh. C-10.
66 Exh. R-12.
67 Exh. C-13 / Exh. R-8.
68 CL Memo 28.04.2011, para. 59; RSP Memo 7.10.2011, paras. 67, 153, 254.
69 Exh. C-14.

"***Privatization Decree***"[70]), enacted on 23 February 1996 and which provided that certain state-owned enterprises would be separated out from the regional electric power systems on the basis of electricity networks, and transformed into joint stock companies, ready for privatization.

- *Resolution No. 663* "Concerning the Programme of Privatization and Restructuring in the Electric Energy Sector" (hereinafter referred to as the "***Restructuring Resolution***"[71]), enacted on 30 May 1996 and which provided for the privatization of state-owned electricity-generating companies under the Privatization Law and the creation of a competitive sector in the generation of electricity.

- *Resolution No. 246* "On the Programme for Privatization and Restructuring of State-Owned Property in the Republic of Kazakhstan for 1996-1998" of 27 February 1996[72].

- *Resolutions No. 1188* and *No. 652* "On Certain Measures to Restructure the Management of the Energy System of the Republic of Kazakhstan" of 28 September and 4 October 1996, in which Kazakhstan resolved – *inter alia* – that it would (i) "*complete the privatization of the major electric power generation enterprises by the end of the first half of 1997*", (ii) would set up the KEGOC, (iii) transfer to KEGOC all high-voltage grids and related assets from NES Kazakhstanenergo, and (iv) that KEGOC would be responsible for operating all high-voltage networks, purchasing and selling electricity, handling other issues in relation to the distribution of electricity[73].

4. Legislative Evolution from 1997 to 2009

4.1 The De-Monopolization of the Electricity Generation Sector

36. On 9 July 1998, Kazakhstan enacted the Law "On Natural Monopolies" (hereinafter *"**Natural Monopolies Law 1998**"*), pursuant to which power generation companies were no longer classified as natural monopolies as they had been under the 1995 Electricity Law[74].

37. On 9 June 1998, Kazakhstan enacted the Law "On Unfair Competition" (hereinafter ***"1998 Law on Unfair Competition***"[75]), which related to the prevention, identification, and suppression of unfair competition.

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70 R-Butler I, paras. 62-65.
71 Exh. C-15.
72 Exh. C-16.
73 Exh. C-17 & C-18.
74 Exh. C-20; CL Memo 28.04.2011, para. 93; RSP C-Memo 7.10.2011, paras. 186, 249 fol.).
75 Exh. R-049 / WEB-005.

38. On 16 July 1999, Kazakhstan introduced a new Law "On Electric Power Industry" (hereinafter referred to as the *"**1999 Electricity Law**"*[76]), establishing the "*economic, legal and organizational bases of state policy in the field of generation, transmission, distribution, and consumption of electrical capacity, electricity, and heat*" (para. 1) and that its main objective was to organize state management in the electric power industry so as "*to ensure that consumers' demand for power was satisfied to the maximum extent and that the right of electricity and heat market participants are protected, by way of maintaining the reliable and stable functioning of the electric power complex of the Republic of Kazakhstan based on competition and unity of management*" (Article 3(1)). One of the particularities of this law was that it implemented the right of power generators to independently enter into contracts with users and electricity distribution companies for the sale of power (Article 14).

39. On 30 April 1999, the Agency for the Regulation of Natural Monopolies and Protection of Competition (hereinafter referred to as "**ARNM**") adopted by *Order No. 25-OD* the "*Rules for the Formation and Keeping of the State Register of Business Entities Holding a Dominant Position on a Market*" (hereinafter referred to as "***Order No. 25-OD***"[77]), which was aimed at governing the establishment and maintenance of the State Monopolies Register.

4.2 Core Legislative Revisions of the Legal Framework from 2001 to 2008

40. As of 2001, Kazakhstan proceeded to revise the framework of its competition law. Relevant revisions included – *inter alia* – the following:

    (i) On 19 January 2001, Kazakhstan enacted the "*Law No. 144-II on Competition and Restriction of Monopolistic Activities*" (hereinafter referred to as "*the **2001 Competition Law***"[78]). Shortly thereafter, on 3 May 2001, the Original Competition Law (see above para. 35(ii)) was repealed.

    (ii) On 30 January 2001, Kazakhstan enacted the "Code on Administrative Violations" (hereinafter referred to "***Administrative Code***"[79]), providing – *inter alia* – for sanctions concerning "*the restriction of competition, unfair competition, abuse of a dominant position at the market, and equally any other violation of antimonopoly legislation*" (Article 147).

    (iii) On or about 17 April 2001, the Anti-Monopoly Agency issued *Order No. 77-OD* thereby approving the "*Rules For Determining Boundaries of Certain Goods Markets and Declaring Market Entities Monopolists*" (hereinafter referred to as "***the 2001 Order No. 77-OD Rules***"[80]) setting out the specific rules for determining the "relevant goods market" and applying to "*Kazakhstani and foreign legal entities* […] *of all types of ownership*".

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76 Exh. C-21.
77 Exh. R- 14.
78 Exh. C-22.
79 Exh. C-131.
80 Exh. C-23.

(iv) On 25 April 2001, Kazakhstan adopted the "*Rules for Forming and Keeping the Official Register of Market Entities with a Dominant (Monopolistic) Position in a Particular Commodity Market*" by *Order No. 86-OD* (hereinafter referred to as "***Order No. 86-OD***"[81]), which repealed the previous system in place under the Original Competition Law, in particular Order NO. 25-OD (see above para. 39).

(v) On 9 July 2004, the "*Law On the Electric Power Industry*" came into force, the purpose of which was to "*regulate social relations emerging in the process of generation, transmission and usage of electric and heating energy*". According to Claimants, this law provided that the wholesale electricity market prices were set by power generators and the retail market prices were set by energy supplying companies, such as Shygys[82].

(vi) On 10 September 2004, Kazakhstan issued the "*Rules for Organizing and Conducting Centralized trading in Electric Power in the Republic of Kazakhstan*", as amended and supplemented on 26 June 2006 (hereinafter referred to as "***2004 Electric Power Law***"[83]), fixing specific percentages of the amounts of electricity power sold or purchased to be marketed by 'power generating organizations' and 'power providers'.

(vii) On 14 September 2005, the Kazakh Ministry of Industry and Trade approved the "Rules for Determining Monopoly Income" (hereinafter referred to as "***Order 302 on Monopoly Income***"[84]), which set out relevant methods of calculating monopoly income. This order was later revoked by *Order No. 345* of 26 September 2006[85].

(viii) On 7 July 2006, and with amendments made on 27 July 2007, Kazakhstan enacted a new Law "On Competition and on the Limitation of Monopolistic Operations" (hereinafter referred to as the *"**2006 Competition Law**"*[86]), and the thereto relating *Order No. 237-OD* of 22 September 2006 (hereinafter referred to as "***Order No. 237-OD***"[87]), regarding recommendations for the analysis of the competitive environment.

(ix) On 25 December 2008, and as amended on 19 March 2010, Kazakhstan replaced its 2006 Competition Law with the Law No. 112 on Competition (hereinafter referred to as the "***2008 Competition Law"***[88]).

41. On 8 January 2003, Kazakhstan made also changes to its legal framework for foreign investment: the 1994 FIL (see above para. 35 (iii)) was repealed and a new *Foreign Investment Law* came into force (hereinafter referred to as the *"**2003 FIL**"*).

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81 Exh. R-15.
82 CL Memo 28.04.2011, para. 229 fn. 254; Exh. C-24 / Exh. R-24.
83 Exh. C-74.
84 Exh. C-98.
85 Exh. R-16.
86 Exh. C-25.
87 Exh. C-95.
88 Exh. C-27.

4.3 Impact of the New Legislation on Claimants' Business

42. It is Claimants' case that under the privatization regulations implemented in the wake of 1996 and the Natural Monopolies Law, the Hydros and the CHPs were no longer classified as natural monopolies and were thus able to enter into bilateral contracts with customers for the sale of power at freely-negotiated tariffs (though they had to pay the state-owned distribution companies a tariff for the use of the electricity networks and KEGOC for the use of the national transmission grid).[89] The bulk of these sales between 1998 and 2001 were made to AES Kazakhstan which, in turn, on-sold power to customers. While Claimants consider that their modus operandi was consistent with their rights and legitimate expectations under the Altai Agreement and the Restructuring Resolution, the legislation promulgated between 2001 and 2008 affected Claimants' business in various ways[90].

43. In summary, the impact of the new legislation on Claimants' business was threefold:

44. *The first direct impact* of the new competition law regime was the placing of some of the AES entities on the Monopolies Register as ***dominant market entities***: [91]

    (i) On 17 May 2001, and by *Order No. 63*, the Competition Agency placed the Hydros of the EKO plant on the Monopolies Register for the period of 2001-2002[92].

    (ii) On 29 July 2002, and by *Order No. 75*, the Competition Agency placed the Hydros on the Monopolies Register for the period 2002-2003[93].

    (iii) On 6 May 2003, and by *Order No. 63-OD*, the Competition Agency placed UK CHP on the Monopolies Register for the period of 2003-2004[94] .

    (iv) On 25 May 2004, and by *Order No. 89-OD*, the Competition Agency placed the Hydros and UK CHP on the Monopolies Register with effect as of its date of signature for an unspecified duration on the basis that those entities had an aggregate share in excess of 70%[95]. Pursuant to this order, fixed tariffs were set for UK HPP and UK CHP[96].

    (v) On 14 December 2004, and by *Order No. 189-OD*, the Competition Agency placed AES Shygys Energy on the Monopolies Register with effect as of its date of signature for an unspecified duration on the basis that it had a market of over 35% in the EKO[97].

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89 These distribution and transmission tariffs continued to be set by ARNM (CL Memo 28.04.2011, para 94 fn. 74).
90 CL Memo 28.04.2011, para. 94.
91 This list is not exhaustive and is for illustration purposes only. Where necessary, the Arbitral Tribunal will come back to these and/or other orders in the course of its analysis.
92 Exh. C-29.
93 Exh. C-30.
94 Exh. C-31.
95 Exh. C-163.
96 Exh. C-44; C-Memo 7.10.2011, para. 420.
97 Exh. LU-30.

(v) On 18 June 2008, by Order No. 132-OD, the Kazakh authorities placed the Hydros and CHPs on the Monopolies Register with effect as of 18 June 2008 for an unspecified duration[98]. In September 2008, pursuant to this order, the EKO and Pavlodar Inspection carried out an analysis of the retail market for electricity in the EKO and concluded that the AES Entities had a dominant share exceeding 80%[99].

(vi) By 10 December 2008, by virtue of Order No. 388-OD, Sogra CHP in a group with UK CHP, UK Hydro, Shulba Hydro and AES Ekibastuz were added on to the Monopolies Register with effect as of its date of signature for an unspecified duration[100].

45. By the end of 2008, most of the AES Entities had been placed on the Monopolies Register, based on the orders made pursuant to the 2001 and 2006 Competition Laws[101].

46. *The second indirect impact* was the imposition by the Competition Agency of ***fines and other penalties*** on the AES entities with regard to alleged violations of competition law and/or abuse of their market position. These orders mainly concerned the organization of the business among the various AES entities and in particular the use of a trading company to centralize the sales of electricity:[102]

(i) On 4 March 2004, the Competition Agency issued an "*Opinion on Concerted Acting by UK Hydro and AES Kazakhstan LLP and the Resulting Monopolistic Incomes Derived by AES Kazakhstan LLP*", according to which AES Kazakhstan should – *inter alia* – terminate its alleged concerted acting with other AES entities and transfer the income derived in January-February 2004 from electricity rates increases as a result of such concerted action[103].

(ii) On 12 March and 12 April 2004, the Competition Agency issued *Orders No. 23 and No. 30* requiring, *inter alia*, that the AES Entities stop using the trading company AES Kazakhstan, stop creating obstacles to the market entry of other participants and transfer to the state budget the monopoly earnings and gains as received by it in January-February of 2004 as a result of the anticompetitive collaboration (collusive trade) or anticompetitive practices[104].

(iii) On 16 March 2004, The Competition Agency issued *Order No. 16* in relation to UK Hydro, finding that it entered into concerted actions with AES Kazakhstan, which led to an increase in electricity prices, and ordered UK Hydro to pay a fine[105].

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98 Exh. R-29.

99 (RSP C-Memo 7.10.2011, paras. 469 fol.; Exh. C-49.

100 Exh. C-152; RSP Memo, paras. 472 fol.

101 Exh. C-152 [extract of the Monopolies Register], CL Memo 28.04.2011, para. 225).

102 This list is not exhaustive and is for illustration purposes only. Where necessary, the Arbitral Tribunal will come back on these and/or other orders in the course of its analysis.

103 Exh. C-63.

104 Exh. C-32 and Exh. C-47; RSP Memo 7.11.2011, paras. 393 fol.

105 Exh. C-176.

(iv) On 20 and 26 February 2007, the Competition Agency issued *Orders No. 5 and 8* against the Hydros, according to which certain agreements between the Hydros and Nurenergo breached the 2001 and 2006 Competition Law and ordering the Hydros to terminate all agreements with Nurenergo and to pay the state approximately USD 23 million[106].

(v) On 3 April 2007, the Competition Agency issued *Order No. 15*, ordering Sogra CHP to, *inter alia*, terminate the contract with Nurenergo and cease alleged violations of the antimonopoly legislation with regard to "concentration of economic activity"[107].

(vi) On 13 June 2007, the Competition Agency issued *Order No. 16*, ordering UK CHP to, *inter alia*, stop its alleged 'concerted actions' with other AES Entities and fixing of pricing terms, discontinue its contract with Nurenergo and transfer to Kazakhstan the "monopolistic profits" it was said to have earned[108].

(vii) On 21 June 2007, the Competition Agency issued *Order No. 17* against Shygys following an investigation carried out during the period from 11 April 2007 to 8 June 2007. The Agency considered that Shygys had been engaging in concerted actions with other AES Entities and overcharging its customers, and therefore ordered it, *inter alia*, to stop its concerted actions, set lower prices and pay damages to its customers[109].

(viii) On 23 July 2007, the Competition Agency issued *Order No. 20* against Nurenergo. After investigations, the authorities determined that Nurenergo had been fixing prices at below market levels for three years with UK Hydro, Shulba Hydro, UK CHP, and AES Ekibastuz and decided that such business resulted in a restriction of access of other buyers to the electric energy market. Nurenergo was therefore ordered, *inter alia*, to cease activities with other AES Entities in the EKO market, cancel existing agreements and transfer the income derived as a result of violations of anti-monopoly legislation[110].

Further orders were issued in August and September 2007, ordering Nurenergo to cease violating Kazakh antimonopoly laws and pay fines of several millions USD[111].

(ix) On 15 August 2007, the Competition Agency issued *Orders Nos. 18, 19 and 20* against UK Hydro, Shulba Hydro and Sogra CHP respectively[112], which replaced some of the orders previously issued and annulled by the Kazakh courts. These orders established that the three entities had from late 2005 sold electricity only through Nurenergo and that their business practices had

106 Exh. C-33 and 34; CL Memo 28.04.2011, paras. 182-183.
107 Exh. C-35; CL Memo 28.04.11, para 186(i).
108 Exh. C-36; CL Memo 28.04.11, para 186(ii); RSP Memo 7.10.2011, paras. 426 fol., 468.
109 Exh. C-37; CL Memo 28.04.11, para 186(iii); RSP Memo 7.10.2011, paras. 440 fol.
110 Exh. C-39; CL Memo 28. 04. 11, para 186(iv); RSP Memo 7.10.2011, paras. 444 fol.
111 Exh. C-40, C-185, C-189.
112 Exh. C-41, 42 and 43; CL Memo, para 186(vi)-(viii); RSP Memo, paras. 452 fol.

restricted the competition. The Hydros were ordered to cease these activities, pay damages, terminate their contracts with Nurenergo and enter into direct contracts with named customers. Fines were further imposed in September 2007 in the approximate amounts of USD 100,000 against UK Hydro and USD 80,000 against Shulba Hydro[113].

(x) On 24 December 2008, the Competition Agency issued *Order No. 21* against UK Hydro, ordering it to cease concerted actions with other AES Entities, including Nurenergo, to conclude agreements with specific named entities and to transfer income it had derived from violations of anti-monopoly legislation[114].

47. In the period from May 2001 to December 2010, a total of 53 orders and/or fines were issued against the AES Entities based on the newly issued competition laws and regulations. Many, but not all, of these orders were challenged by the AES Entities. Some of these challenges against such orders were taken all the way up to the Kazakh Supreme Court (hereinafter "Supreme Court") (see e.g. Order No. 63[115]). While some of these orders were cancelled or modified in favor of the AES Entities, the majority of the orders and the substance of the decisions made in respect of the AES Entities competitive behavior were confirmed by the Kazakh courts[116].

48. According to Claimants, the decisions by the Competition Agency (as upheld by the Kazakh judiciary) to place AES Entities on the register and further orders and fines issued against some of the AES Entities were based on an incorrect determination of the relevant concepts of Kazakh competition law, such as the concepts of 'relevant market', 'market share' attributable to the AES entities, 'dominance', 'group of companies', etc.[117]. Claimants say that as a result of the orders the Hydros and UK CHP suffered the following harm[118]:

(i) They became subject to price controls and were required to sell electricity to EKO consumers at tariffs capped by the Competition Agency;

(ii) They were unable to negotiate tariffs freely with customers in the EKO and could not raise their tariffs without approval of the Competition Agency, which curtailed their access to the wholesale electricity market;

(iii) They were required to sell electricity directly to any EKO customer who requested power from them without using the trading company AES Kazakhstan. They were not entitled to refuse to sell un-contracted electricity to any EKO customer who requested power from them.

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113 Exh. C-144 and C-149; RSP Memo 7.10.2011, paras. 460 fol.
114 Exh. C-151, RSP Memo 7.10.2011, paras. 485 fol.
115 C-65, C-66.
116 CL Memo 28.04.11, para. 221; RSP Memo 7.10.11, paras. 362 fol., Annexes 1-5; see also 'Chronological Index Of Orders Of The Competition Agency And Related Documents', Paris Hearing Bundle, Volume 3.
117 CL Memo 28.04.11, paras. 17, 20, 23.
118 CL Memo 28.04.11, para. 125.

49. *The third indirect impact of the new legislation* was that from 2007 onwards various employees of the AES Entities were allegedly subject to ***interrogations and threats of arrests and criminal prosecutions*** by Kazakhstan's Agency on Fighting Economic and Corruption Crimes and other local authorities (hereinafter referred to as "the Financial Police"[119]: [120]

    (i) In February 2006, Mr. Jonagan was summoned to a meeting by the new Akim of the EKO, Mr. Karubzhanov, who allegedly exerted pressure on Mr. Jonagan to lower the prices of electricity sales by AES entities[121].

    (ii) On 5 March 2007, Ms. L. Kosmenyuk, Director of Finance of the Hydros, was interrogated by the Financial Police[122].

    (iii) On 18 March 2008, Mr. M. A. Salibenov, General Director of UK CHP, sent a letter to the Prosecutor of the EKO (and other officials), complaining about illegal actions taken by some Antimonopoly Administration officials of the EKO against AES Entities in requesting certain documents and asking the officials to conduct investigations[123].

    (iv) On 29 May 2008, a meeting was held between Mr. Boris Anpilogov, Director of UK Hydro, representatives of the Akimat and the Competition Agency, in which, according to Mr. Anpilogov, he was allegedly pressured to sign new contracts and tariff agreements and was threatened by the officials representing the Competition Agency and the Akimat with criminal proceedings and arrest[124].

    (v) On 24 June 2008, Mr Jonagan, Head of the AES Group of Companies in Kazakhstan, wrote to the Akim expressly stating that Claimants were agreeing to the Akim's demands only under protest, and "*due to your insistent demands accompanied by interrogations of AES employees and attempts to arrest their family members, as well as threats to apply various sanctions against AES employees*, […]"[125]

50. From June 2008 onwards, Claimants proceeded to sell the majority of the Hydros' power inside the EKO, allegedly because of the various actions taken by Kazakhstan authorities against the AES entities[126]. According to Claimants, these incidents further led senior employees, including John Woodham (the General Director of Nurenergo) and Mr Jim

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119 Claim. 28.04.11 paras.. 31, 207-220, WS Jonagan nos. 54-67, WS Sergeev nos. 38-45, Exh. C-97.

120 This list of events is not exhaustive. Where necessary, the Arbitral Tribunal will come back on these and/or other events in the course of its analysis.

121 CL Memo 28.04.2011, para. 170; C-WS Jonagan I paras. 43-44.

122 minutes of the interrogation, Exh. C-218; explanation on the merits of questions asked of Ms. Kosmenyuk, Exh. C-219

123 Exh. C-96.

124 Exh. C-128; CL Memo 28.04.11, para. 213.

125 Exh. C- 92; CL Memo 28.04.11, para. 214.

126 Exh. C-92; CL Memo 28.04.11, para. 215.

Doak (the General Director of the Hydros) to leave Kazakhstan "*as they felt too threatened and intimidated to continue working for the Claimants in-country*"[127].

5. Further Legislative Evolution from 2009-2012 and the Escalation of the Situation

51. On 1 January 2009, amendments to the Law "On the Electric Power Industry" of 9 July 2004 came into force (hereinafter referred to as the *"**2009 Tariff Amendment**")*[128]. These new regulations provided for a more regulated electricity sector, making the sale of electricity by every generator in Kazakhstan subject to a specific capped tariff. This legislative amendment led to the promulgation of a series of complementary regulations, including:

    (i) On 10 March 2009, the Ministry of Energy and Natural Resources issued *Order No. 61* by which it re-organized the electric power industry into groups of power generating companies based on the type of power generation, rated capacity, type of fuel used and remoteness from fuel location. Pursuant to this Order, UK CHP was placed into Group 3, Sogra CHP in Group 6, and UK Hydro and Shulba Hydro were place into Group 13[129].

    (ii) On 25 March 2009, pursuant to the 2009 Tariff Amendment, Kazakhstan by virtue of *Resolution No. 392*, published the maximum tariffs that each generator was entitled to charge[130].

    (iii) On 3 December 2009, the Kazakh authorities issued *Order No. 366-OD* approving a new version of the Monopolies Register extending the geographic boundaries of the register to the EKO and Pavlodar regions[131]. Notwithstanding this new determination of 'relevant market' the AES Entities remained on the Monopolies Register as 'dominant entities'[132].

52. In connection with the promulgation of these laws and regulations, the AES Entities were subject to further ***government actions and decisions directed at them***, including *inter alia*[133]:

    (i) On 15 May 2009, the Vostochno-Kazakhstanskaya Region Ust-Kamenogorsk Specialized Administrative Court issued *Ruling No. 3-5430/2009* in relation to UK Hydro, establishing that UK Hydro had violated the Administrative Code and ordering it to pay a fine of 10% of the profit received from its monopolistic activities[134].

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127 CL Memo 28.04.11, para 216.
128 C-28.
129 Exh. R-45; RSP C-Memo 7.10.11, paras. 492 fol.
130 Exh. C-132 / Exh. R-46.
131 RSP C-Memo 7.10.11, paras. 499 fol.; Exh. R-94.
132 CL Memo 28.04.11, para. 227 and exhibits mentioned therein.
133 CL Memo 28.04.11, paras. 236.
134 Exh. C-46.

(ii) In early 2010, the Financial Police initiated criminal proceedings against officers of UK Hydro in relation to alleged illegal activities of UK Hydro[135]. In particular Mr. Jim Doak, the General Director of both UK Hydro and Shulba Hydro, was indicted on 4 January 2011[136].

(iii) On 19 February 2010, the Financial Police made an *Order to Commence a Criminal Case and Allow it to Proceed* against persons who performed management functions within UK Hydro (without naming such persons)[137].

(iv) On 23 April 2010, following an investigation of the activities of UK Hydro, the Competition Agency issued an *Order on an Administrative Offense* against UK Hydro, according to which UK Hydro had abused its dominant position by refusing to enter into a contract with a specific entity and was ordered to pay a fine[138].

(v) On 6 August 2010, following an investigation of the activities of UK HPP, the Competition Agency made *Order No. 334-OD*, in which it approved the results of the investigation, according to which UK HPP had – *inter alia* – been charging monopolistically high prices and discriminating against certain customers in terms of prices, and resolved to transmit the records of the investigation to the Financial Police and/or to initiate administrative proceedings under the Administrative Code[139].

53. In parallel, the 2009 Tariff Amendment required power generators to enter into ***"Investment Obligation Agreements"*** (hereinafter "IOAs", also known as "Obligations Performance Agreements") with the Ministry of Energy and Mineral Resources of Kazakhstan. The role of the IOA was to specify the investment obligations undertaken by power generators, in the light of which tariffs were approved. This led to the conclusion of, *inter alia*, the following IOAs with AES Entities:

(i) On 12 May 2009, the Ministry of Energy and Mineral Resources of Kazakhstan and UK CHP entered into "Agreement No. 21 on the fulfillment of investment commitments by AES Ust-Kamenogorsk TE[TS] for 2009-2010"[140].

(ii) On 26 June 2009, the Ministry of Energy and Mineral Resources of Kazakhstan and UK Hydro entered into "Agreement No. 31 on the fulfillment of investment commitments by AES Ust-Kamenogorsk GES LLP"[141].

135 Exh. C-38.
136 Exh. C-121.
137 Exh. C-138; C-WS Jonagan, paras. 74-76.
138 Exh. C-265; for the complete translation see Exh. R-101.
139 RSP C-Memo 7.10.11, paras. 509 fol.; Exh. C-044.
140 Exh. R-75.
141 Exh. R-76.

(iii) On 21 October 2009, the Ministry of Energy and Mineral Resources of Kazakhstan and Shulba Hydro entered into "Agreement No. 41 on the fulfillment of investment commitments by AES Shulbinsk GES LLP"[142].

54. These IOAs were concluded for a *duration of one year*, i.e. including 2010, and had to be renewed for the following years. It appears that the renewal of such IOAs was subject to substantial difficulties:

(i) On 9 July 2010, Mr. Jim Doak, the General Director of the Hydros, by letter requested Mr. Ishekeshev, the Minister of Energy, to review UK Hydro's proposal concerning an "Agreement on the Fulfillment of Investment Obligations of UK Hydro for 2011-2013 between UK Hydro and the Government of Kazakhstan"[143]. This request was reiterated by letter of 15 September 2010[144].

(ii) On 13 August 2010, Mr. Mergaliev, General Director of UK CHP by letter requested Mr. Ishekeshev, the Minister of Energy, to review UK CHP's proposal concerning an "Agreement on the Fulfillment of Investment Obligations of UK CHP for 2011-2013 between UK CHP and the Government of Kazakhstan"[145].

(iii) On 30 October 2010, Mr. Turganov, the Vice-Minister of Energy, informed the Hydros and CHPs that they had to submit agreements on the fulfillment of investment obligations for 2011 by 20 November 2010[146].

(iv) On 11 November 2010, Mr. Jim Doak sent further relevant documents of the Hydros and CHPs as requested by Mr. Turganov on 30 October 2010[147].

(v) On 3 and 6 December 2010, Mr. Turganov, Vice Minister of the Ministry of Energy, sent two letters to UK Hydro and UK CHP ordering them "*to revise the submitted Obligations Performance Agreement for 2011 or to establish the tariff corresponding to the planned amount of investment*"[148].

(vi) On 29 November 2010, Mr. Jim Doak by letter, and referring to his previous letters, requested Mr. Ishekeshev, the Minister of Energy, to review UK Hydro's proposal for an "Agreement on the Fulfillment of Investment Obligations of UK Hydro for 2011-2013 between UK Hydro and the Government of Kazakhstan"[149].

(vii) On the same day, Mr. Konyrbayev, a general director of UK CHP, in response to UK CHP's previous letter of 13 August 2010, requested Mr. Ishekeshev, the

142 Exh. R-77.
143 Exh. C-253.
144 Exh. C-254.
145 Exh. C-259.
146 Exh. C-255.
147 Exh. C-256.
148 Exh. C-107, C-110.
149 Exh. C-257.

Minister of Energy, to review UK CHP's proposal for an "Agreement on the Fulfillment of Investment Obligations of UK CHP for 2011-2013 between UK CHP and the Government of Kazakhstan" [150].

(viii) On 13 December 2010, Mr. Jonagan, for and on behalf of Tau Power, responded to Mr. Turganov's letters of 3 and 6 December 2010, complaining that "*the unjustified refusal to approve the Investment Obligations Performance Agreements with the AES UK Companies will result in the suspension of a number of important projects* […] *and is likely to prejudice the reliability of the power facilities operated by them*"[151].

(ix) On 22 December 2010, a telegram entitled "extremely urgent" was sent to the Hydros and the CHPs by Mr. Bokenbayev, Department Director of the Ministry of Energy, informing them that, as they had not signed any IOAs for 2011 they were invited to a meeting at the Ministry on 23-24 December 2010[152].

(x) On 30 December 2010, after the talks around 23-24 December 2010, Mr. Turganov, sent a letter to UK CHP with the Ministry of Energy's suggestions and comments on the drafts regarding the IOA of UK CHP for the years 2011-2012, in particular with regard to the duration of such agreement, which should be limited to one year, and the specific amount of investment to be made[153].

(xi) On 21 January 2011, Mr. Konyrbayev, Executive Director of UK CHP, responded to Mr. Ishekeshev, the Minister of Energy, regarding the Government's comments of 30 December 2010 on the amendments to the IOA for 2011-2012[154]. Mr. Konyrbayev rejected the limitation of IOAs to one year and further stressed that the generating companies should be free to define their investment obligations.

(xii) By letter of 27 January 2011, Mr. Turganov, the Vice-Minister of Energy, requested Tau Power (without specifying any person as addressee) to revise and submit to the Ministry the IOA and to hand in profits received for 2009-2010[155].

(xiii) On 5 July 2011, Mr. J. Woodham, General Director of UK Hydro, sent to Mr. Jaxaliyev, Vice Minister, of Industry and New Technologies, revised versions of the IOA of UK Hydro[156].

150 Exh. C-260.
151 Exh. C-111.
152 Exh. C-258.
153 Exh. C-237.
154 Exh. C-252.
155 Exh. R-78.
156 Exh. C-236.

(xiv) By letter of 21 July 2011, Mr. Zhumadil, Executive Director of UK CHP, requested Mr. Jaxaliyev, Vice-Minister of Industry and New Technologies, to approve the revised IOAs of UK CHP[157].

(xv) On 2 and 12 August 2011, Mr. Jonagan, for and on behalf of Tau Power, sent a letter to Mr. Jaxaliyev, Vice-Minister of Energy, drawing the Government's attention to the fact that for the period from 2011 onwards, the draft IOAs with UK CHP and UK Hydro that had been sent to them had not been executed. Mr. Jonagan further indicated that absent such agreement, UK CHP and UK Hydro had been forced to suspend a number of projects, and therefore urged the Government to go into an agreement with UK CHP and UK Hydro[158] .

(xvi) On 1 September 2011 and 8 December 2011, referring to the letters of 2 and 12 August 2011, Allen & Overy LLP on behalf of AES Corp and Tau Power requested the Ministry of Energy to urgently approve the draft Investment Agreements with UK CHP and UK Hydro[159].

55. As of January 2011, the situation further deteriorated with AES entities and personnel being subject ***to criminal and other administrative proceedings***:

(i) On 4 January 2011, Mr. Doak, the General Director of both UK Hydro and Shulba Hydro, was indicted by the Financial Police[160] (see above para 52(ii)).

(ii) On 14 March 2011, the Financial Police issued an *Order To Commence a Criminal Case and Allow it to Proceed* against Shulba Hydro with regard to an allegation of establishing and maintaining monopolistically high prices[161].

(iii) On the same day, the Competition Agency issued an *Order on An Administrative Offence*, sanctioning UK CHP with a penalty of approx. USD 920,000 for having abused its dominant position[162].

(iv) On 5 October 2011 and 30 October 2011, the Competition Agency issued two *Orders on an Administrative Offence* against Shygys[163].

(v) On 28 February 2012, Mr. Drobyshev, Finance Director of UK Hydro, was interrogated by the Financial Police[164].

56. On 4 July 2012, Kazakhstan enacted a number of *amendments to the 2009 Electricity Law,* which came into effect on 21 July 2012 (hereinafter "***2012 Electricity Law***"). The specific effect that this law had on Claimants' investments is disputed. While Claimants maintain that this law changed the regime applicable under the 2009 Tariff Amendment

157 Exh. C-251.
158 Exh. C-227 and 228.
159 Exh. C-229 and 230.
160 Exh. C-121.
161 Exh. C-106.
162 Exh. C-262; for the complete translation see Exh. R-98.
163 Exh. C-267, C-268; for the complete translation see Exh. R-103, R-104.
164 minutes of the interrogation, Exh. C-221.

by unduly restricting the independence of the power generators to determine their investment obligations and depriving those generators without approved IOAs of the possibility to cover their costs[165], Respondent asserts that this law merely clarified the 2009 Tariff Amendment and tightened up the mechanisms for enforcement of what remained the same underlying policy[166] (see further below paras. 346-348).

57. On 20 December 2012, new IOAs were finally signed between MINT and each of the following AES Entities, UK Hydro, Shulba Hydro, UK CHP and Sogra CHP[167].

6. Kazakhstan's Challenge to the Altai Agreement and the Arbitration Clause

58. On 23 November 2002, Kazakhstan, through the Committee of State Property and Privatization of the Ministry of Finance, launched proceedings against AES Suntree and Tau Power before the *Court of First Instance of the EKO* seeking a declaration of the Altai Agreement as invalid[168]. The proceedings aimed at invalidating the Altai Agreement on the grounds that it had not been validly entered into according to the principles of the Kazakh Civil Procedure, as the parties to the Altai Agreement had not been able to reach an agreement on fundamental terms thereof.

59. On 19 December 2002, upon Claimants' request, the Court of First Instance dismissed Kazakhstan's claim on the grounds of no jurisdiction[169].

60. On 30 January 2003, after an appeal procedure initiated by Kazakhstan, the Supreme Court upheld the judgment of the Court of First Instance of 19 December 2002 confirming that the Kazakh courts lacked jurisdiction due to the existence of an arbitration clause[170]. However, the Supreme Court in its judgment pointed out that Kazakhstan could reintroduce a separate claim requesting that the arbitration clause of the Altai Agreement (hereinafter the "Arbitration Clause") be declared invalid[171].

61. On 9 April 2003, Kazakhstan filed a *new claim* with the Court of First Instance of the EKO seeking the annulment of the Arbitration Clause contained in the Altai Agreement[172].

62. On 26 September 2003, the Court of First Instance dismissed Kazakhstan's claim to annul the Arbitration Clause of the Altai Agreement[173].

63. On 26 January 2004, on appeal from the judgment of the Court of First Instance rendered on 26 September 2003, the Supreme Court overturned the judgment, ruling in Kazakhstan's favor and annulling the Arbitration Clause of the Altai Agreement[174].

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165 CL Suppl. Subm. 06.08.2012, paras. 25-34.
166 RSP Suppl. Subm. 27.08.2012, paras. 18, 59-62.
167 Exh. R-149.
168 for Kazakhstan's statement of claim: Exh. C-50; CL Memo 28.04.2011, paras. 144 fol.).
169 Exh. C-51 and C-52.
170 Exh. C-53.
171 Exh. C-53 p. 2; CL Memo 28.04.2011, paras. 146 fol.
172 Exh. C-55.
173 Exh. C-54; CL Memo 28.04.2011, para. 152.

64. Later on, in 2009, the state-owned entity JSC UK sought information from UK Hydro on the value of concession assets[175]. When UK Hydro refused to provide this information, JSC UK initiated an action against UK Hydro before the court of First Instance of the EKO. UK Hydro considered this to be a violation of the Arbitration Clause and ancillary agreements and sought anti-suit relief before the *English courts* in London[176].

65. On 31 July 2009, the English court issued an anti-suit injunction in favour of UK Hydro, but the Court of First Instance of the EKO nevertheless granted JSC UK's request on 5 August 2009[177].

66. On 16 April 2010, the English court issued a final judgment in favour of UK Hydro and holding that the Arbitration Clause in the Altai Agreement was valid, contrary to the findings of the Kazakh Supreme Court[178]. Notwithstanding the appeal by Kazakhstan, the judgment of the English court was upheld[179].

174 Exh. C-56; CL Memo 28.04.2011, paras. 154-156.
175 Exh. C-57.
176 CL Memo 28.04.2011, para 237.
177 Exh. C-62.
178 C-Exh. 64 nos. 37 et seq.; CL Memo 28.04.2011, para. 239.
179 Exh. C-212 to a subsequent C-215 and 231.

D. Procedural History

67. In view of the length of the proceedings, the present section does not aim to provide a comprehensive overview of all procedural steps and is limited to presenting the main stages of the proceedings.

1. The Commencement of the Proceeding

68. On 11 June 2010, Claimants filed their Request for Arbitration before ICSID. It was registered on 20 July 2010 as ICSID Case No. ARB/10/16 and a Notice of Registration was transmitted to the Parties on that date.

69. On 7 October 2010, the Claimants informed ICSID that the Parties had not reached an agreement on the method for constituting the Tribunal, and that the Claimants had therefore chosen the default mechanism provided in Article 37(2)(b) of the ICSID Convention. By the same letter, Claimants appointed Dr. Klaus M. Sachs, a national of Germany, as arbitrator.

70. On 22 October 2010, Claimants requested that the Chairman of the Administrative Council of ICSID appoint the arbitrators not yet appointed and designate an arbitrator to be the President of the Tribunal under Article 38 of the ICSID Convention and Rule 4 of the ICSID Arbitration Rules.

71. On 21 November 2010, the Respondent appointed Prof. Vaughan Lowe QC, a national of the United Kingdom, as arbitrator.

72. On 7 December 2010, the Parties agreed, pursuant to Article 37(2)(a) of the ICSID Convention, that the party-appointed arbitrators would appoint the presiding arbitrator. On 23 December 2010, the co-arbitrators informed ICSID that they appointed Mr. Gary Born, a national of the United States, as President of the Tribunal. The Parties confirmed their agreement to this appointment.

2. Constitution of the Arbitral Tribunal

73. On 5 January 2011, the Tribunal was constituted with Mr. Gary B. Born as its Chairman, Dr. Klaus M. Sachs appointed by Claimants, and Prof. Vaughan Lowe QC, appointed by Respondent, as co-arbitrators. Ms. Aissatou Diop was assigned to this case as ICSID's Secretary of the Tribunal.

74. On 31 January 2011, following the resignation of Mr. Gary B. Born, the Secretary of the Tribunal notified the Parties of the vacancy on the Arbitral Tribunal and the proceedings were suspended pursuant to ICSID Arbitration Rule 10(2). As a result, on 14 of February 2011, the co-arbitrators appointed Prof. Pierre Tercier, a national of Switzerland, as President of the Arbitral Tribunal in replacement of Mr. Gary B. Born. On 14 and 18

February 2011, the Claimants and the Respondent, respectively, accepted the appointment of Prof. Tercier as President of the Arbitral Tribunal.

75. On 24 February 2011, the Arbitral Tribunal was reconstituted and the proceeding resumed with Prof. Pierre Tercier as President and Dr. Sachs and Prof. Lowe QC as co-arbitrators.

76. On 24 May 2011, following consultations with the Parties, the Arbitral Tribunal confirmed that Dr. Clarisse von Wunschheim would act as Assistant to the Arbitral Tribunal.

77. On 9 January 2012, Respondent announced that Mr. Qureshi QC of Respondent's legal team had been replaced by Mr. Joe Smouha QC, Essex Court Chambers, 24 Lincoln's Inn Fields, London, WC2A 3EG. This gave rise to an exchange of correspondence between the Parties and the Arbitral Tribunal in relation to the fact that Mr. Joe Smouha QC is a member of the same barristers' chamber, namely Essex Court Chambers, as a member of the Tribunal, Prof. Vaughan Lowe QC.

78. On 30 January 2012, following disclosures by Mr. Smouha QC and Prof. Lowe QC, both Parties confirmed to the Centre and the Arbitral Tribunal that they did not have any objections to the participation of both Prof. Lowe QC and Mr. Smouha QC in the proceeding.

3. The First Session

79. On 5 April 2011, the Arbitral Tribunal held a ***'First Session'*** in London. As contemplated in the Minutes of the First Session, the Parties agreed – *inter alia* – that (i) ICSID Arbitration Rules in effect as of 10 April 2006 would apply to these proceedings, (ii) the Arbitral Tribunal had been properly constituted and that the Parties had no objection to the appointment of any of its Members, (iii) the language of the arbitration would be English.

80. On 19 April 2011, the Arbitral Tribunal issued ***Procedural Order No. 1*** together with a Provisional Timetable and also the Minutes of the First Session held on 5 April 2011. The ICSID Secretariat further circulated a copy of the transcript of the First Session.

4. The Written Submissions

81. On 28 April 2011, Claimants filed their ***'Claimants' Memorial'*** (hereinafter "CL Memo 28.04.11") together with (i) a Witness Statement dated 27 April 2011 of Mr Michael Jonagan ("C-WS Jonagan I"), (ii) a Witness Statement dated 28 April 2011 of Mr Igor Sergeev ("C-WS Sergeev I", and (iii) an Expert Report dated 28 April 2011 of Mr Joseph Kalt and Mr Howard Rosen of FTI Consulting (the "C-Kalt/Rosen I" or "FTI Report I") and supporting documents.

82. On 15 August 2011, the Arbitral Tribunal issued ***Procedural Order No. 2*** concerning a request made by Respondent on 4 August 2011 for an extension of time for submission of its Counter-Memorial. The Arbitral Tribunal decided to grant Respondent an extension of four weeks, and adapted the Provisional Timetable accordingly.

83. On 30 September 2011, the Arbitral Tribunal issued a revised Timetable and forwarded it to the Parties.

84. On 7 October 2011, upon a further extension of the deadline granted by the Arbitral Tribunal, Respondent filed its **'*Counter-Memorial*'** (hereinafter "RSP C-Memo 7.10.11"), together with (i) an Expert Report of Prof George Yarrow and Dr Christopher Decker dated 6 October 2011 ("R-Yarrow/Decker I"), (ii) an Expert Report of Prof William Butler dated 6 October 2011 ("R-Butler I"), and (iii) a Witness Statement of Mr Eduard Utepov dated 7 October 2011 ("R-WS Utepov"). Further Witness Statements of Mr. Boris Parsegov ("R-WS Parsegov") and Ms. Lyudmilla Ustyantseva ("R-WS Ustyantseva") dated 8 October 2011 (but signed on 7 October 2011) were filed on 10 October 2011.

85. On 13 January 2012, after the Parties had exchanged their requests for document production in the form of Redfern Schedules, the Parties submitted to the Arbitral Tribunal their application for an order for document production in accordance with the revised Procedural Timetable of 30 September 2011 (see above para. 83).

86. On 3 February 2012, the Arbitral Tribunal issued ***Procedural Order No. 3*** ruling on the Parties' requests for production of documents.

87. On 30 March 2012, the Claimants filed their **'*Claimants' Reply Memorial*'** (hereinafter "CL Reply 30.03.12"), together with (i) a Witness Statement of Mr Mikhail Anpilogov dated 30 March 2012 ("C-WS Anpilogov"), (ii) a Second Witness Statement of Mr Igor Sergeev dated 30 March 2012 ("C-WS Sergeev II"), (iii) a Second Witness Statement of Mr Michael Jonagan dated 30 March 2012 ("C-WS Jonagan II"), (iv) a Second Expert Report of Mr Joseph Kalt and Mr Howard Rosen of FTI Consulting dated 30 March 2012 (the "C-Kalt/Rosen II" or "FTI Report II"), and (v) en Expert Report of Prof. Maidan Suleimenov and Mr Victor Mokrousov of 30 March 2012 ("C-Suleimenov/Mokrousov"), as well as supporting documents.

88. On 25 June 2012, having previously announced a slight delay, the Respondent filed **'*Kazakhstan's Rejoinder*'** (hereinafter "RSP Rejoinder 25.06.12"), together with (i) a Second Witness Statement of Mr Boris Parsegov dated 15 June 2012 ("R-WS Parsegov II"), (ii) a Second Witness Statement of Ms Lyudmila Ustyantseva dated 22 June 2012 ("R-WS Ustyantseva II"), (iii) a Supplementary Expert Report of Prof George Yarrow and Dr Christopher Decker dated 21 June 2012 ("R-Yarrow/Decker II"), (iv) a Second Expert Report of Prof William Butler dated 21 June 2012 ("R-Butler II"), (v) an Expert Report of Prof Anatoly Grigoryevich Didenko dated 20 June 2012 ("R-Didenko"). The Witness Statement of Vice-Minister Bakhytzhan Jaxaliyev dated 26 June 2012 ("R-WS Jaxaliyev I") and the Expert Report of Mr Wynne Jones dated 27 June 2012 ("R-Jones I" or "Jones Report I") were however filed two days later, on 27 June 2012. In addition, six additional exhibits (five new ones and one English translation of a German exhibit)

completing the Supplementary Report of Professor Yarrow and Dr. Decker were submitted on 6 July 2012.

89. On 27 June 2012, the Parties, the President of the Arbitral Tribunal and Ms. Aissatou Diop from ICSID participated in a ***pre-hearing telephone conference.*** During this conference call, Respondent voiced its wish for a bifurcation of the proceedings. Therefore, the Arbitral Tribunal allowed Claimants until 6 July 2012 to file their comments on the Respondent's application for bifurcation.

90. On 11 July 2012, after an extension of time granted by the Arbitral Tribunal, Claimants submitted their comments on Respondent's request for bifurcation and other matters addressed during the pre-hearing conference. In this submission, Claimants agreed to a split hearing (separating issues of liability and quantum). Claimants further requested *inter alia* that (i) Respondent's submissions on quantum be excluded because they were made belatedly and were in response to the Claimants' Memorial and not to Claimants' Reply Memorial, or in the alternative that Claimants be granted eight weeks to file submissions in response to Respondent's arguments on quantum, and that (ii) Claimants be given permission to bring an additional claim ("Additional Claim") pursuant to ICSID Rule 40(2) in view of the recent promulgation on 4 July 2012 of the new Kazakh Electricity Law, which allegedly adversely affected Claimants' claims.

91. On 18 July 2012, the Arbitral Tribunal issued ***Procedural Order No. 4***, in which it rejected Respondent's request to bifurcate the proceedings and granted the Parties an additional three days of hearings to be held on either 17, 18, 19 October 2012, or on 5, 6, 7 February 2013. The Arbitral Tribunal invited the Parties to agree on the dates.

92. On 23 July 2012, Respondent submitted its comments to Claimants' submission of 11 July 2012 (see above para. 90) and requested the Arbitral Tribunal to (i) reject Claimants' application for permission to file an additional claim and for a split of the issues dealt with during the hearing, or alternatively, (ii) to arrange for a new hearing.

93. On 26 July 2012, the Arbitral Tribunal issued ***Procedural Order No. 5*** in which it decided on the various requests and objections raised by the Parties within the context of the pre-hearing telephone conference of 27 June 2012 (see above para. 89). In particular, the Arbitral Tribunal decided to (i) admit the Jones Report I into the record and granted Claimants an opportunity to respond thereto, and (ii) to grant Claimants' request to submit a new claim providing Respondent with an opportunity to respond thereto.

94. On 6 August 2012, Claimants submitted their ***'Claimants' Supplementary Submission on the Additional Claim'*** (hereinafter "CL Suppl. Subm. 06.08.2012") together with a Witness Statement of Mr Douglas Herron of 6 August 2012 ("C-WS Herron"). In this submission, Claimants laid out their Additional Claim relating to Kazakhstan's enactment of the 2012 Electricity Law. According to Claimants, the application of this law constitutes multiple breaches by Kazakhstan of its obligations under international law, further increasing the loss caused to the Claimants.

95. On 10 August 2012, the Arbitral Tribunal issued ***Procedural Order No. 6*** ruling on the admissibility of certain parts of Claimants' submission on its Additional Claim which had been subject to objections from Respondent. While the Arbitral Tribunal decided to

strike specific paragraphs of Claimants' submission, it maintained and accepted into the records other parts. On the same day, the Arbitral Tribunal provided further clarifications concerning the decisional part of Procedural Order No. 6.

96. On 27 August 2012, Respondent filed its **"*Response to the Claimants' Supplementary Submission on the Additional Claim*"** (hereinafter "RSP Suppl Subm. 27.08.2012"), together with (i) a third Expert Report of Prof. George Yarrow and Dr. Christopher Decker dated 24 August 2012 ("R-Yarrow/Decker III"), (ii) a third Expert Report on the Law of Kazakhstan by Prof. William Butler dated 23 August 2012 ("R-Butler III"), (iii) a third witness statement of Ms Lyudmila Ustyantseva dated 27 August 2012 ("R-WS Ustyantseva III") and (iv) a second witness statement of Vice-Minister Bakhytzhan Jaxaliyev dated 27 August 2012 ("R-WS Jaxaliyev II"). In summary, Respondent contended that the 2012 Electricity Law merely clarified the law and maintained the original scheme implemented in the original 2009 Tariff Amendment. Respondent therefore rejected Claimants' claims that the 2012 Electricity Law involved "departures in critical respects" from the scheme applicable under the original 2009 Tariff Amendment.

5. The Hearings and thereto related Submissions

97. From 10 to 14 September 2012, a ***Hearing*** on the issues of liability took place in London (hereinafter the "London Hearing"). During this hearing, the Arbitral Tribunal heard the following fact and expert witnesses:

(i) On behalf of Claimants:

- Mr. Michael Jonagan;
- Mr. Igor Sergeev;
- Mr. Mikhail Anpilogov;
- Mr. Douglas Herron;
- Prof. Joseph P. Kalt;
- Mr. Howard N. Rosen;
- Mr. Victor Mokrousov.

(ii) On behalf of Respondents:

- Mr. Eduard Utepov;
- Mr. Boris Parsegov;
- Ms. Lyudmila Ustyantseva;
- Mr. Bakytzhan Jaxaliyev;
- Prof. William Butler;
- Prof. George Yarrow.

A transcript of the London Hearing was prepared. After corrections made thereto in consultation with the Parties, a final and approved version was circulated on 14 December 2012.

98. On 5 October 2012, after having consulted the Parties, the Arbitral Tribunal issued ***Procedural Order No. 7***, in which it ruled on the next steps of the procedure and issued a timetable for the submission by the Parties of their submissions regarding the quantum of the claims. With regard to the Post-Hearing Briefs, the Arbitral Tribunal limited their scope to issues addressed during the London Hearing and provided a list of the particular issues the Parties should focus on.

99. On 2 November 2012, after having been granted an extension, Claimants filed their ***"Supplementary Quantum Submission"*** (hereinafter "CL Quantum Subm. 02.11.2012"), including a third Witness Statement of Mr. Michael Jonagan ("C-WS Jonagan III") and a fourth Expert Report from FTI Consulting (hereinafter "FTI Report IV") both dated 2 November 2012. The object of this submission was twofold: it was (i) to respond to the Jones Report I, and (ii) to set out the quantum of Claimants' Additional Claim.

100. On 23 November 2012, the Arbitral Tribunal issued ***Procedural Order No. 8***, in which it ruled on the admissibility of an additional document Claimants sought to introduce in relation to the examination of Prof. Butler during the London Hearing. After having given Respondent the opportunity to respond, the Arbitral Tribunal rejected Claimants' request to enter such document into the record.

101. On 30 November 2012, Claimants and Respondent filed their respective ***Post-Hearing Brief*** according to Procedural Order No. 7 (see above para. 98).

102. On 18 December 2012, Respondent filed its ***"Response to the Claimants' Supplementary Quantum Submission"*** (hereinafter "RSP Quantum Subm. I18.12.2012"), including a second Expert Report from Wynne Jones (hereinafter "R-Jones II" or "Jones Report II"). This submission aimed to respond to Claimants' comments on the Jones Report I.

103. On 4 January 2013, the Arbitral Tribunal issued ***Procedural Order No. 9***, in which it ruled on the admissibility of certain parts of the Jones Report II, which Claimants considered to go beyond the prescribed scope of Respondent's Response to Claimants' Supplementary Quantum Submission. After having given Respondent the opportunity to comment, the Arbitral Tribunal granted Claimants' request and struck certain parts of the Jones Report II from the record.

104. On 14 January 2013, after an extension of time granted by the Arbitral Tribunal, Respondent filed its ***"Submission on the Quantum of the Additional Claim"*** hereinafter "RSP Quantum Subm. II 14.12.2013"), including (i) a third Witness Statement of Mr. Jaxaliyev ("R-WS Bakytzhan Jaxaliyev III"), (ii) a third Expert Report from Wynne Jones ("R-Jones III" or "Jones Report III") and (iii) a fourth Expert Report from Prof. George Yarrow and Dr. Christopher Decker ("R-Yarrow/Decker IV"). The object of this submission was to reply to Claimants' case on quantum regarding their Additional Claims.

105. On 21 January 2013, Claimants raised objections concerning certain passages of the Mr. Jaxaliyev's third Witness Statement and requested that these passages be struck from the record. After a further exchange of correspondence with Respondent, the

Parties eventually agreed that these passages would be deleted from the statement and that Claimants would, in exchange, refrain from cross-examining Mr. Jaxaliyev on the subject matter addressed in these paragraphs. On 28 January 2013, the Arbitral Tribunal took note of the Parties' agreement and concluded that no action on its part was necessary.

106. On 24 January 2013, after having consulted the Parties concerning the agenda of the hearing to be held in Paris from 5-7 February 2013, the Arbitral Tribunal sent directions to the Parties on certain logistical issues, which the Parties had not been able to agree upon.

107. From 5 to 7 February 2013, a ***Hearing*** was held in Paris regarding the quantum of Claimants' claims (hereinafter "Paris Hearing"). During this hearing, the Arbitral Tribunal heard the following fact and expert witnesses:

(iii) On behalf of Claimants:
- Mr. Michael Jonagan.
- Mr. Joseph P. Kalt;
- Mr. Howard N. Rosen;

(iv) On behalf of Respondents:
- Mr. Bakytzhan Jaxaliyev;
- Prof. George Yarrow;
- Dr. Christoph Decker;
- Mr. Wynne Jones.

A transcript of the Paris Hearing was prepared. After corrections made thereto in consultation with the Parties, a final and approved version was circulated on 2 April 2013.

108. During the Paris Hearing, it appeared that Claimants had updated the total amount of their claims, in the light of the testimony of Mr. Jaxaliyev in his third Witness Statement ("Updated Claim"). A discussion arose as to the admissibility of this update.[180]

109. On 12 February 2013, the Arbitral Tribunal sent a letter to the Parties concerning various procedural matters. In this letter, the Arbitral Tribunal invited – among others - Claimants to submit their Updated Claim, after which Respondent would have an opportunity to comment thereon before a decision of the Arbitral Tribunal as to its admissibility. The Arbitral Tribunal further informed the Parties that they would be invited to file Post-Hearing Briefs once the Arbitral Tribunal had agreed on a list of issues to be addressed therein, and that each Party would be given an opportunity to respond to the other Party's response to the issues laid out by the Arbitral Tribunal. The Arbitral Tribunal specified that the Post-Hearing Briefs "*should not exceed 40 pages and shall not touch upon the substance of the case*".

[180] Paris Transcript p. 240 l. 11 – p. 252 l. 18.

110. On 12 February 2013, Claimants sent a letter to the Arbitral Tribunal setting out their Updated Claim. In this letter, Claimants stated that updated figures "*reflect*[ed] *the updated computation of the Claimants' losses from 2016 onwards based on the testimony of Vice-Minister Jaxaliyev in his Third Witness Statement dated 13 January 2013* […] *and his testimony on 5 February 2013 (Day 1 of the February Hearing)*" and that Claimants were "*not asserting any new claims in relation to damages*".

111. On 15 and 22 February 2013, Respondent indicated that the updates made by Claimants were not a "*straightforward exercise*" and that it needed to consult with its experts. Respondent indicated that it would revert to the Tribunal with its position as soon as possible.

112. On 4 March 2013, after an enquiry by Claimants and a reminder from the Arbitral Tribunal, Respondent sent a letter to the Arbitral Tribunal setting out its position regarding Claimants' Updated Claim. Respondent requested the Arbitral Tribunal to exclude the Updated Claim on the basis that it had been raised too late and in an inappropriate manner. Alternatively, Respondent requested that in case the Updated Claim was to be allowed, the Arbitral Tribunal defer consideration thereof, or in case the Arbitral Tribunal was inclined to move forward, to issue directions for its disposition.

113. On 8 March 2013, the Arbitral Tribunal issued ***Procedural Order No. 10***, in which the Arbitral Tribunal ruled as follows:

(i) With regard to the admissibility of Claimants' Updated Claim, the Arbitral Tribunal deferred consideration thereof;

(ii) With regard to the Post-Hearing Briefs and the relevant issues to be addressed therein, the Arbitral Tribunal provided the Parties with relevant instructions and invited them to file their Post-Hearing Briefs by Friday 5 April 2013, and their reply thereto by Friday 19 April 2013.

114. On 5 April 2013, Claimants filed their **"*Post-Hearing Submission Following the 5-7 February 2013 Hearing*"** and Respondent filed its **"*Post-Hearing Brief on Quantum*"** (hereinafter referred to as "CL PHB on Quantum 5.04.2013" and "RSP PHB on Quantum 5.04.2013" respectively).

115. On 9 April 2013, Respondent sent a letter to the Arbitral Tribunal complaining that Claimants' Post-Hearing Brief on Quantum exceeded the admissible scope and addressed issues relating to the substance of the case. Respondent therefore requested that relevant parts of Claimants' Post-Hearing Brief be struck out, on the basis that it was in breach of Procedural Order No. 10 (see above para. 113), or alternatively that Respondent be given an opportunity to respond to the positions taken by the Claimants.

116. On 16 April 2013, upon invitation by the Arbitral Tribunal, Claimants responded to Respondent's letter of 9 April 2013 requesting that Respondent's application be rejected in its entirety.

117. On 18 April 2013, the Arbitral Tribunal issued ***Procedural Order No. 11***, in which it (i) rejected Respondent's request to strike out certain parts of Claimants' Post-Hearing

Brief on Quantum, (ii) granted Respondent's the right to comment on these parts in its response to Claimants' Post-Hearing Brief on Quantum of 5 April 2013, and (iii) postponed the deadline for submission of the Parties' responses to the Post-Hearing Briefs on Quantum to 23 April 2013 COB (CET).

118. On the same day, Respondent requested certain clarifications of Procedural Order No. 11 and to be given an additional allowance of 5 pages to provide separate comments on the relevant sections of Claimants' Post-Hearing Brief on Quantum.

119. On 19 April 2013, the Arbitral Tribunal clarified the decisional part of Procedural Order No. 11 and granted Respondent the requested additional 5-page allowance.

120. On the same day, Claimants objected to Respondent's request for an additional allowance of 5 pages. Alternatively, it requested to be given the same additional allowance. This letter crossed with the Arbitral Tribunal's letter of the same day.

121. On 22 April 2013, the Arbitral Tribunal replied to Claimants' letter of 19 April 2013 and rejected Claimants' requests. The Arbitral Tribunal stated that it did not consider it necessary to re-consider its decision taken in Procedural Order No. 11 and as clarified in its message of 19 April 2013 and that it saw no reason to provide Claimants with an additional 5-page allowance.

122. On 23 April 2013, Claimants filed their **"*Reply Post-Hearing Submission on the Tribunal's Question*"** and Respondent filed its **"*Response to the Claimants' Answer to the Tribunal's Question*"** (hereinafter "CL Reply PHB on Quantum 23.04.2013" and "RSP Reply PHB on Quantum 23.04.2013" respectively) in accordance with Procedural Order No. 10 (see above para. 113). In addition, Respondent also filed its **"*Response Pursuant to Procedural Order No. 11: Re Paragraphs 6 to 23, and 33 to 53 of the Claimants' Post-Hearing Brief*"** (hereinafter "RSP Response to PO No. 11 of 23.04.2013").

123. On 17 May 2013, Claimants filed "***Claimants' Schedules of Costs***" and Respondent filed "***Respondent's Submission on Costs***", jointly referred to as **"*Submissions on Costs*"**.

124. On 12 September 2013, the proceeding was declared closed in accordance with Rule 38(1) of the ICSID Arbitration Rules.

II. LEGAL CONSIDERATIONS

A. In General

1. The Bases for the Arbitration

125. Claimants' claims in the present proceedings are primarily based on ***the following law and treaties***[181]:

(i) The 1994 FIL[182];

(ii) The Energy Charter Treaty signed by Kazakhstan and the Netherlands on 17 December 1994, which entered into force between the parties on 16 April 1998 (hereinafter "ECT")[183];

(iii) The Treaty Between the United States of America and the Republic of Kazakhstan Concerning the Encouragement and Reciprocal Protection of Investment, which entered into force on 12 January 1994 (hereinafter the "BIT")[184].

126. The relevant ***dispute resolution clauses*** of these laws and treaties provide as follows:

(i) Article 27 of the FIL provides:

> *"1. Disputes and differences which arise in connection with foreign investments or activity related thereto shall be settled where possible by negotiations or in accordance with previously agreed procedures for the settlement of investment disputes.*
>
> *2. If such disputes cannot be settled by negotiations within three months of the date of written notice by either of the parties to the other, then either of the parties to the dispute may refer the dispute, with the written consent of the foreign investor, for settlement:*
>
> *a) by judicial bodies of the Republic of Kazakhstan which are authorized in accordance with the legislation of the Republic of Kazakhstan to consider such disputes, or;*
>
> *b) at one of the following arbitration bodies:*
>
> *- the International Center for the Settlement of Investment Disputes (henceforth, the Center) established in accordance with the Convention for the Settlement of Investment Disputes between States and Citizens of Other States, opened for signing in Washington on 18 March 1965 (ICSID Convention), provided the investor's government is a signatory to said Convention; or*
>
> *- the Auxiliary Establishment of the Center (operating under the Auxiliary Agency Rules), if the investor's government is not a signatory to the ICSID Convention; or*

181 CL Memo 28.04.2011, para. 2.
182 Exh. C-11.
183 Exh. R-9.
184 Exh. C-112.

- arbitration bodies established in accordance with the arbitration rules of the Commission of the United Nations [Commission] *for International Trade Law (UNCITRAL); or*

- for arbitration consideration at the Arbitration Institute of the International Chamber of Commerce in Stockholm; or

- the Arbitration Commission of the Chamber of Commerce and Industry of the Republic of Kazakhstan.

3. *In the event that a foreign investor does not give written consent to the consideration of a dispute in the procedure stipulated in clause 2 of this Article, the dispute may be referred to judicial bodies of the Republic of Kazakhstan which are authorized to consider such disputes in accordance with the legislation of the Republic of Kazakhstan.*
4. *Investors' disputes with other legal entities and also with citizens of the Republic of Kazakhstan, including those acting as a party to a contract, shall be settled by the authorized judicial bodies of the Republic of Kazakhstan in accordance with the legislation of the Republic of Kazakhstan, unless otherwise stipulated by legislative acts or the agreement of the parties.*
5. *Rulings and awards shall be executed on the basis of the legislation of the Republic of Kazakhstan on the execution of court rulings."*

(ii) Article 26 of the ECT provides:

" Settlement of Disputes Between An Investor And A Contracting Party [reference omitted]

(1) 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 to the former under Part III shall, if possible, be settled amicably.

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

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute; [reference omitted]

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

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

(3) (a) Subject only to subparagraphs (b) and (c), 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.

(b)(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval […].

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(4) 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:

(a)(i) The International Center for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

(ii) The International Center for Settlement of Investment Disputes, established pursuant to the Convention refer to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Center (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the [UNCITRAL]; or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

(5) (a) 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:

(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;

[…]

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

(7) An Investor other than a natural person which has the nationality of a Contracting Party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State".

[…]"

(iii) Article VI of the BIT provides:

"Article VI

1. For the purposes of this Article, an investment dispute is a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.

2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

(a) to the courts or administrative tribunals of the Party that in a Party to the dispute; or

(b) in accordance with any applicable, previously agreed dispute-settlement procedures; or

(c) in accordance with the terms of paragraph 3.

3. (a) Provided that the national or company concerned has not . [sic] submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration:

(i) to the International Centre for the Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a Party to such Convention; or

(ii) to the Additional Facility of the Centre, if the Centre is not available; or

(iii) in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or

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

(b) Once the national or company concerned has so consented, either Party to the dispute may initiate arbitration in accordance with the choice so specified in the consent.

4. Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company under paragraph 3. Such consent, together with the written consent of the national or company when given under paragraph 3 shall satisfy the requirement for:

(a) written consent of the parties to the dispute for purposes of Chapter II of the ICSID Convention (Jurisdiction of the Centre) and for purposes of the Additional Facility Rules; and

[…]

8. For purposes of an arbitration held under paragraph 3 of this Article, any company legally constituted under the applicable law and regulations of a Party or a political subdivision thereof but that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention. "

127. Further relevant provisions of the 1994 FIL, ECT and BIT will be dealt with as the analysis proceeds.

128. The present procedure is further subject to the ***ICSID legal framework***, including the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (hereinafter "ICSID Convention"), the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (hereinafter the "ICSID Institution Rules"), the Rules of Procedure for Arbitration Proceedings (hereinafter the "ICSID Arbitration Rules"), and the Administrative and Financial Regulations, in their versions as amended in 2006. In this regard, both Parties confirmed during the First

Session their common agreement that the ICSID Arbitration Rules as amended in 2006 should apply to these proceedings (see Minutes of the First Session , para. 1.1).

129. While Respondent does not contest the application to the present dispute of the BIT and the ECT, it contends that some of the necessary requirements set out in these treaties for initiation of ICSID arbitration proceedings are not met. With regard to the FIL, Respondent generally objects to its application to the present dispute. These objections by Respondent are dealt with below in the analysis of the existence and scope of the Arbitral Tribunal's jurisdiction (see section II.C.).

2. The Arbitral Procedure

130. The Arbitral Tribunal has been validly constituted (see above paras. 73 fol.), as confirmed by the Parties during the First Session.

131. Through the various rounds of exchange of written submissions and at the London Hearing and the Paris Hearing, both Parties have been given wide and equal opportunity to present their case with regard to the issues of the present case.

132. At both Hearings, each Party confirmed that it had no objections to the way the Arbitral Tribunal had conducted the proceedings.[185]

133. Having read the Parties' written submissions and listened to their oral submissions and testimony of their witnesses and experts during the Hearings, and based on the deliberations held among the members of the Arbitral Tribunal, the Arbitral Tribunal considers itself in a position to render the present Award.

3. Relief Sought

3.1 Claimants' Requests for Relief

134. In their latest submission on the matter (see above para. 99), Claimants filed the following Requests for Relief (the various requests have been numbered by the Arbitral Tribunal)[186]:

> *"For reasons set forth above, as well as those set out in the Memorial, Reply Memorial and the Supplementary Submission, the Claimants request that the Tribunal enter an award in their favour and against the Republic of Kazakhstan as follows:*
>
> *(i)* **[CL-1]** *DECLARING that Kazakhstan has*
>
> *(A) breached Articles 6, 8, 10 and 13 of the FIL;*
>
> *(B) breached Articles 10 and 14 of the ECT;*

185 See London Transcript p. 289 l. 3 to p. 291 l. 9 (the issue regarding the time allocation between the Parties was later on clarified and settled in the Tribunal's letter of 18 September 2012, whereafter neither Party raised any objection). See also Paris Transcript, p. 256 l. 13-18.

186 CL Quantum Subm. 02.11.2012, para 67.

(C) breached Articles II and IV of the BIT; and

(ii) ORDERING that Kazakhstan

(A) **[CL-2]** *provide full restitution to the Claimants by re-establishing the situation which existed prior to Kazakhstan's breaches of the FIL, ECT and BIT; or*

(B) **[CL-3]** *pay the Claimants compensation for all losses suffered as a result of Kazakhstan's breaches of the FIL, ECT and BIT, including moral damages; and*

(C) **[CL-4]** *pay the Claimants pre-award interest; and*

(D) **[CL-5]** *pay the Claimants the costs of this arbitration, including all expenses that the Claimants have incurred or will incur in respect of the fees and expenses of the arbitrators, ICSID, the Secretary of the Tribunal, legal counsel, experts and consultants; and*

(E) **[CL-6]** *pay post-award interest, compounded monthly at a rate to be determined by the Tribunal on the amounts awarded until full payment thereof; and*

(F) **[CL-7]** *any such other and further relief that the Tribunal shall deem just and proper.*

The Claimants reserve their right to amend or supplement this Supplementary Quantum Submission and to request such additional, alternative or different relief as may be appropriate, including conservatory, injunctive or other interim relief"

135. These Requests for Relief are slightly different from those filed previously, to the extent they rely on additional provisions of the relevant legal frameworks (in particular Article 14 ECT and Article IV BIT).

136. As concerns the specific amounts claimed by Claimants, these will be dealt with - if necessary - in the section on Remedies (see below II.G).

3.2 Respondent's Request for Relief

137. In its Supplementary Submission of 27 August 2012 (see above para. 96), Respondent filed the following Requests for Relief (the various requests have been numbered by the Arbitral Tribunal)[187]:

".241. […] *Respondent respectfully requests the Tribunal to adjudge and declare in its Award or Awards in the present proceedings that:*

a. **[RSP-1]** *it has no jurisdiction over the Claimants' claims of breach of the 1994 FIL under the 1994 FIL (including the Additional Claims of breach of the 1994 FIL set out in its Supplementary Submission) and those claims are to be dismissed;*

b. **[RSP-2**] *that the Claimants' Original Claims of breach of the BIT, ECT and 1994 FIL as a result of application of the competition legislation to the AES Entities are not admissible and those claims are to be dismissed.;*

242. To the extent that the Tribunal should hold that it has jurisdiction over the Claimants' claims, and that those claims are admissible, to adjudge and declare that:

[187] RSP Suppl. Subm., paras. 241-242.

a. **[RSP-3**] *Kazakhstan has not violated any of its obligations under the BIT as regards AES Corp, whether as alleged or in any other fashion;*

b. **[RSP-4**] *Kazakhstan has not violated any of its obligations under the ECT as regards Tau Power, whether as alleged or in any other fashion;*

c. **[RSP-5**] *to the extent that any obligations thereunder are applicable, Kazakhstan has not violated its obligations under the 1994 FIL, whether as alleged or in any other fashion;*

d. **[RSP-6**] *the Claimants' claims for compensation fail and are to be dismissed;*

e. **[RSP-7**] *the Claimants are entitled to no further or other relief, whether as requested in the Memorial and Reply, or at all; and*

f. **[RSP-8**] *the Claimants shall pay Kazakhstan's costs and expenses incurred in relation to the present proceedings, including any payments by way of advance that Kazakhstan has made or will make on account of the costs and expenses of the Tribunal, the Secretary to the Tribunal and/or ICSID. "*

138. These Requests are almost identical to the Requests filed in Respondent's previous submissions, [188] with the exception of the inclusion of a reference to the Additional Claim. In its later submissions, including its Post-Hearing Brief (see above paras. 99, 101, 102, 104), Respondent has not formally amended its previous Requests for Relief. As concerns Respondent's position with regard to the quantum of specific claims, it will be dealt with in the relevant section on Remedies (see below II.G).

4. Issues before the Arbitral Tribunal and Structure of the Award

139. The main issue in dispute is whether the new laws and regulations of Kazakhstan and/or the way they were implemented by the relevant Kazakh authorities, led to violations by Kazakhstan of any of its obligations under the ECT and/or the BIT or any other obligation that it undertook towards Claimants (in particular alleged obligations deriving from the 1994 FIL and/or the Altai Agreement) and which fall under the scope of protection of any of these treaties.

140. In determining these issues, the Arbitral Tribunal considers it necessary to determine the following sub-issues:

(i) Does the Arbitral Tribunal have jurisdiction over the entirety of the claims filed by Claimants? If so, are there any procedural impediments preventing the Arbitral Tribunal from hearing Claimants' claims?

(ii) If the Arbitral Tribunal has jurisdiction, did Kazakhstan breach any of the standard of protection awarded under the relevant treaties when promulgating and/or implementing its new laws and regulations?

[188] See RSP Rejoinder 25.06.12, paras. 929-930, see also RSP Memo 7.10.11, para. 847-848.

(iii) In case a breach by Kazakhstan of any of its treaty obligations should be found to have occurred, what are – if any –the remedies to be afforded to Claimants and, in case of monetary compensation, what amount would Claimants be entitled to?

141. In particular, the Arbitral Tribunal is called upon to determine whether the Kazakh laws and regulations and/or the way in which they were applied, entailed a violation of certain provisions in the ECT, the BIT and the FIL. The questions that arise are as follows:

(i) With regard to the ECT and BIT:

a. Whether Kazakhstan breached the Fair and Equitable Treatment Standard under Article 10(1) ECT and II(2)(a) BIT.

b. Whether Kazakhstan breached the prohibition on the taking of arbitrary and unreasonable measures under Article 10(1) ECT and II(2)(b) BIT.

c. Whether Kazakhstan breached its duty to provide 'Full Protection and Security' under Article 10(1) ECT and II(2)(a) BIT.

d. Whether Kazakhstan breached its obligation to guarantee Claimants the right to repatriate returns under Article 14 ECT and IV BIT.

e. Whether and to what extent the Umbrella Clause in Article 10(1) ECT and II(2)(c) BIT is applicable to breaches of the Altai Agreement and/or the 1994 FIL.

(ii) With regard to the FIL:

a. Whether Kazakhstan can be seen to have breached the stabilization clause of Article 6 of the 1994 and/or the standards provided in Articles 8 and 13 of the FIL.

b. If so, to what extent does such breach amount to a treaty breach?

142. Accordingly, the present award will first determine and examine the relevant legal framework underlying Claimants' claims (B). It will then examine whether or not the Arbitral Tribunal has jurisdiction to decide over Claimants' claims (C). Next, the Arbitral Tribunal will consider Claimants' main claims, breaking them down into three different periods: from 2004 to 31 December 2008 (D), from 1 January 2009 to 31 December 2015 (E) and from 1 January 2016 onwards (F). Finally, the Arbitral Tribunal will examine the appropriate remedies to be afforded to Claimants (G) and rule on the costs issues (H).

B. Relevant Provisions

1. The Relevant Treaty Framework

143. Claimants' claims are primarily based on the ECT, the BIT and the 1994 FIL.

1.1 The ECT[189]

144. The ECT is an international agreement which establishes a multilateral framework for cross-border co-operation in the energy industry. It plays an important role as part of an international effort to build a legal foundation for energy security, based on the principles of open, competitive markets and sustainable development. The ECT was developed on the basis of the 1991 Energy Charter. Whereas the latter document was drawn up as a declaration of political intent to promote energy cooperation, the ECT is a legally-binding multilateral instrument. The fundamental aim of the ECT is to strengthen the rule of law on energy issues, by creating a level playing-field of rules to be observed by all participating governments, thereby mitigating risks associated with energy-related investment and trade.[190]

145. Kazakhstan was among the first countries to ratify the ECT and deposited its instrument of ratification on 6 August 1996, although the internal ratification procedures had been completed already on 18 October 1995 (RSP Memo 7.11.2011, para. 160). While the Netherlands is also a member state of the ECT since 16 April 1998, the United States is not a party thereto.

146. Therefore, in the present case, the ECT applies only to the relationship between Tau Power and Respondent, and not to the relationship between AES Corp. and the Respondent.

147. According to Claimants, the way in which Respondent reformed and/or applied its new competition law breached several protection standards set forth in the ECT, in particular those provided for in Articles 10 and 14.

148. In contrast, Respondent contends that, in the light of the obligations undertaken by Kazakhstan under the ECT, and in particular under Article 6 read together with Article 32, Kazakhstan was required to undertake a wholesale overhaul of its Soviet-era competition legislation and the mechanisms of enforcement and Claimants had to expect that this would be done by no later than 1 January 1998, and in any case by 1 July 2001.

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189 Exh. R-9.

190 See http://www.encharter.org/index.php?id=7.

149. The main provisions relied upon by the Parties are the following (Exh. R-9):

(i) Article 1(6) and (9), which provides as follows:

> *"(6) "Investment" means 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 debt 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 licenses and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.*
>
> *A change in the form in which assets are invested does not affect their character as investments and the term "Investment" includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the investment and that for the Contracting Party in the Area of which the investment is made (hereinafter referred to as the "Effective Date") provided that the Treaty shall only apply to matters affecting such investments after the Effective Date.*
>
> *"Investment" refers to any investment associated with an Economic Activity in the Energy Sector and to investments or classes of investments designated by a Contracting Party in its Area as "Charter efficiency projects" and so notified to the Secretariat.*
>
> […]
>
> *(9) "Returns" means the amounts derived from or associated with an Investment, irrespective of the form in which they are paid, including profits, dividends, interest, capital gains, royalty payments, management, technical assistance or other fees and payments in kind.*
>
> […]*"*

(ii) Article 6, which provides as follows:

> *" COMPETITION* [reference omitted]
>
> *(1) Each Contracting Party shall work to alleviate market distortions and barriers to competition in Economic Activity in the Energy Sector.*
>
> *(2) Each Contracting Party shall ensure that within its jurisdiction is has and enforces such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct in Economic Activity in the Energy Sector.* [reference omitted]
>
> […]"

(iii) Article 10, which provides as follows:

> *" PROMOTION, PROTECTION AND TREATMENT OF INVESTMENTS* [reference omitted]
>
> *(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 Investment 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.* [reference omitted] *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.* [reference omitted]
>
> *(2) Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3).*
>
> *(3) For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable.*
>
> […]*"*

(iv) Article 14, which provides as follows:

> *" TRANSFERS RELATED TO INVESTMENTS*[reference omitted]
>
> *(1) Each Contracting Party shall with respect to Investments in its Area of Investors of any other Contracting Party guarantee the freedom of transfer into and out of its Area, including the transfer of:*
>
> *(a) the initial capital plus any additional capital for the maintenance and development of an Investment;*
>
> *(b) Returns;*
>
> *(c) payments under a contract, including amortization of principal and accrued interest payments pursuant to a loan agreement;*
>
> *(d) unspent earnings*[reference omitted] *and other remuneration of personnel engaged from abroad in connection with that Investment;*
>
> *(e) proceeds from the sale or liquidation of all or any part of an Investment;*
>
> *(f) payments arising out of the settlement of a dispute;*
>
> *(g) payments of compensation pursuant to Articles 12 and 13.*
>
> *(2) Transfers under paragraph 81) shall be effected without delay and (except in case of a Return in kind) in a Freely Convertible Currency.* [reference omitted]
>
> *(3) Transfers shall be made at the market rate of exchange existing on the date of transfer with respect to spot transactions in the currency to be transferred. In the absence of a market for foreign exchange, the rate to be used will be the most recent rate applied to inward investments or the most recent exchange rate for conversion of currencies into Special Drawing Rights, whichever is more favourable to the Investor.*
>
> *(4) Notwithstanding paragraphs (1) to (3), a Contracting Party may protect the rights of creditors, or ensure compliance with laws on the issuing, trading and dealing in securities and the satisfaction of judgments in civil,*

administrative and criminal adjudicatory proceedings, through the equitable, non-discriminatory, and good faith application of its laws and regulations.

[…]"

(v) Article 32, which provides as follows:

" *TRANSITIONAL ARRANGEMENTS*

(1) In recognition of the need for time to adapt to the requirements of a market economy, a Contracting Party listed in Annex T may temporarily suspend full compliance with its obligations under one or more of the following provisions of this Treaty, subject to the conditions in paragraphs (3) to (6):

Article 6(2) and (5) [reference omitted]

[…]

Article 14(1)(d) related only to transfer of unspent earning[reference omitted]

[…]

(3) The applicable provisions, the stages towards full implementation of each, the measures to be taken and the date or, exceptionally, contingent event, by which each stage shall be completed and measure taken are listed in Annex T for each Contracting Party claiming transitional arrangements. Each such Contracting Party shall take the measure listed by the date indicated for the relevant provision and stage as set out in Annex T. Contracting Parties which have temporarily suspended full compliance under paragraph (1) undertake to comply fully with the relevant obligations by 1 July 2001. Should a Contracting Party find it necessary, due to exception circumstances, to request that the period of such temporary suspension be extended or that any further temporary suspension not previously listed in Annex T be introduced, the decision on a request to amend Annex T shall be made by the Charter Conference.

[…]"

With regard to Article 32, Kazakhstan is one of the countries listed in Annex T as a country entitled to transitional arrangements.

1.2 The US-KAZ BIT[191]

150. The BIT was signed by the US and Kazakhstan on 19 May 1992 and entered into force on 12 January 1994.

151. The BIT applies only to the relationship between AES Corp. and Respondent, and not to the relationship between Tau Power and Respondent.

152. According to its preamble, the BIT concluded between the US and Kazakhstan aimed at encouraging and protecting investments based on the following core statements:

" *Desiring to promote greater economic cooperation between them, with respect to investment by nationals and companies of one Party in the territory of the other Party;*

[191] Exh. C-112.

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources;

Recognizing that the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights;

[…]*"*

153. According to Claimants, the way in which Respondent reformed and applied its new competition law breached several protection standards set forth in the BIT, in particular those set out in Article II(2)(a)-(c). In contrast, Respondent contends that – in addition to its jurisdictional and admissibility objections (see below section II.C) - the reform and implementation of its laws was at all time in compliance with international standards and did not breach any obligation set out in the BIT.

154. Article I of the BIT provides as follows:

"(a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

(i) tangible and intangible property, including movable and immovable property, as well as rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual property which includes, inter alia, rights relating to: literary and artistic works, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks. and trade names; and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law;

[…]

(d) "return" means an amount derived from or associated with an investment, including profit; dividend; interest; capital gain; royalty payment; management, technical assistance or other fee; or returns in kind;

(e) "associated activities" include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual property rights; the borrowing of funds; the purchase, issuance, and sale of equity shares and other securities; and the purchase of foreign exchange for imports;

[…]

155. Article II(2) (a)-(c) of the BIT provides as follows:

> *"*[…]
>
> *2. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.*
>
> *(b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.*
>
> *(c) Each Party shall observe any obligation it may have entered into with regard to investments. "*

156. Article IV of the BIT provides as follows:

> *"1. Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation pursuant to Article III; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment.*
>
> *2. Transfers shall be made in freely usable currency at the prevailing market rate of exchange on the date of transfer with respect to spot transactions in the currency to be transferred.*
>
> *3. Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, nondiscriminatory and good faith application of its law."*

2. Provisions of National Law and Contract Applicable between the Parties

157. To support their claims of breach of treaty obligations by Kazakhstan, Claimants further rely on obligations that allegedly arise for Kazakhstan as a result of assurances said to have been made by Kazakhstan in connection with Kazakhstan's Foreign Investment Law and the 'Altai Agreement'.

2.1 The 1994 FIL[192]

158. Kazakhstan was among the first of the former Soviet Union Republics to adopt a foreign investment law, on 7 December 1990.[193] The 1994 FIL was adopted on 27

192 Exh. C-11.

193 See C-Butler I, para 38.

December 1994 and amended on 23 July 1997, and thereafter remained in force until it was replaced by the 2003 FIL.

159. According to its preamble, the 1994 FIL was to "*determine the main legal and economic foundations for attracting foreign investments to the economy of the Republic of Kazakhstan, consolidate the state guarantees of the protection of foreign investments, and determine the organizational forms of their implementation and the procedure for the settlement of disputes with the participation of foreign investors*" (Exh. C-11).

160. Claimants allege that, under the 1994 FIL, Respondent made a series of assurances on which Claimants legitimately relied and which were later on breached by Respondent. As such, the 1994 FIL is relevant in three respects:

(i) As an independent undertaking the breach of which would directly engage Respondent's liability under this law.[194]

(ii) As a basis relied upon by Claimants to establish the existence and scope of certain legitimate expectations, the breach of which may constitute a breach of the FET standard under the ECT and BIT. [195]

(iii) As an undertaking covered by the Umbrella Clauses of the ECT and BIT, the breach of which would also constitute a breach of the relevant treaty, thereby triggering Respondent's liability thereunder. [196]

161. In particular, Claimants rely on the following provisions:

(i) Article 4(1), which provides as follows:

> " ***The Legal Regime for Foreign Investments***
>
> *1. Any forms of foreign investments and related activity not prohibited by the applicable legislation of the Republic of Kazakhstan shall be carried out under conditions no less favourable than those which are granted in a similar situation to the investments of individuals or legal entities of the Republic of Kazakhstan or any other foreign individuals and legal entities, depending on which conditions are most favourable.*
>
> […]"

(ii) Article 6 (hereinafter referred to as the "Stabilization Clause"), which provides as follows:

> " ***Guarantees against Change in Legislation and the Political Situation***
>
> *1. Should a foreign investor's position be adversely affected as the result of change in legislation and/or the enactment and/or amendment of the terms and conditions of international treaties, the legislation which was in effect at the moment of the investment was made shall apply to foreign investments for a period of 10 years, and with respect to investments made under long-term contracts (more than 10 years) with authorized state agencies, until the expiration of the term of the contract unless the contract stipulates otherwise.*

194 CL Suppl. Subm. 6.08.2012, paras. 73-79; RSP Suppl. Subm. 27.08.2012, para. 102.
195 CL Supp. Subm. 6.08.2012, para. 82(ii) and (iv).
196 CL Memo 28.04.2011, para. 367; CL Reply 30.03.2012, paras. 479-480.

[…]

3. These requirements shall not apply to changes in the legislation of the Republic of Kazakhstan in the area of ensuring defence potential, national security, ecological safety and public health and morals. If a change in legislation adversely affects the position of a foreign investor in these areas, the foreign investor must be paid immediate adequate and effective compensation in the currency of the investment or in the foreign currency established by the foreign investor's agreement with the Republic of Kazakhstan.

4. The state shall retain property obligations to investors under any circumstances, including war or change of government or state system, subject to the decisions of international arbitration."

(iii) Article 8, which provides as follows:

" ***Guarantees against Illegal Actions of State Agencies and Officials***

Acts and decisions of agencies of the state administration, local representative and executive agencies, law enforcement agencies, and officials at any level which are in no way envisaged by legislation of the Republic of Kazakhstan and adversely affect the establishment, functioning, management, disposal, use, acquisition or expansion of foreign investments, shall be deemed to be invalid. It shall be prohibited to discriminate against foreign investors on the basis of their nationality."

(iv) Article 9, which provides as follows:

" ***Compensation and Reimbursement of Losses to Foreign Investors***

1. Foreign Investors whose investments in the Republic of Kazakhstan have suffered damage as a result of war or other armed conflict, revolution, emergency situation, civil unrest or similar circumstances, as well as in connection with the adoption of illegal regulatory acts and decisions or illegal acts by officials of state agencies, shall enjoy no less favourable treatment than that applied with respect to legal entities and individuals of the Republic of Kazakhstan when compensated for damage incurred by them as a result of the above mentioned circumstances, upon payment of compensation.

2. Losses caused by the illegal suspension, restriction or termination of the business of a foreign investor by acts of the agencies and persons named in Article 8 of this Law shall be compensated to the foreign investor in the currency of the investments or in another currency agreed with the investor at the expense of the budget financing the agency which adopted the illegal decision."

(v) Article 10(1), which provides as follows:

" ***Guarantees of the Use of Income***

1. Foreign investors shall have the right to use at their discretion income received from their activity for reinvestment on the territory of the Republic of Kazakhstan, for the Acquisition of goods, and for other purposes not prohibited by the legislation of the Republic of Kazakhstan.

[…]".

(vi) Article 12(1), which provides as follows:

" ***Openness in Foreign Investors' Activity***

1. All regulatory acts and court rulings which pertain to foreign investments must be accessible to the parties concerned.

[…]".

(vii) Article 13, which provides as follows:

" ***Guarantees Relating to State Inspection***

1. The right to inspect, monitor and supervise the activity of a foreign investor shall be enjoyed only by those state agencies and legal entities to which such right is specifically granted by legislative acts of the Republic of Kazakhstan.

2. The financial and business activity of enterprises with foreign participation shall be audited by state agencies in the procedure established by the legislation of the Republic of Kazakhstan.

3. Inspections by the state tax, sanitary and other inspectorates and state monitoring and supervisory agencies shall be carried out in accordance with their competence. Foreign investors shall have the right not to execute the requirements of such agencies which are outside their competence and not to provide them with materials not related to their activity."

2.2 The Altai Agreement

162. The Altai Agreement is the instrument by which Claimants acquired, through the relevant subsidiaries, the rights over the CHPs and the Hydros (see above para. 29) and Claimants therefore consider this agreement to constitute the basis of their investments in Kazakhstan.

163. In summary, Claimants' position is that Respondent gave in the Altai Agreement certain assurances and undertook certain obligations towards Claimants, which Claimants legitimately relied upon and which were later breached by Respondent. Thus, in Claimants' submission, the Altai Agreement is relevant in two respects:

(i) As one of the bases relied upon by Claimants to establish the existence and scope of certain legitimate expectations, the breach of which constitutes a breach of the FET standard under the ECT and BIT; [197] and

(ii) As an undertaking covered by the Umbrella Clauses of the ECT and BIT under which a breach by Respondent of the Altai Agreement would constitute a breach of the relevant treaty, thereby triggering Respondent's liability thereunder. [198]

164. In contrast, Respondent contends that Claimants' reliance on the Altai Agreement is based on a misunderstanding and misinterpretation of the relevant provisions of the Altai Agreement, the ECT and the BIT, and that in any event Kazakhstan has not breached any of the provisions of the Altai Agreement (RSP Memo 7.7.2011, paras. 114 fol.).

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197 CL Memo 28.04.2011, paras. 319 fol., 324; CL Reply 30.03.2012, paras. 399 fol.; CL PHB on Liability 30.11.2012, paras. 97 fol.

198 CL Memo 28.04.2011, paras. 363-366; CL Reply 30.03.2012, paras. 461 fol.

165. The main provisions of the Altai Agreement, which are particularly relevant to the issues at stake are the following:

(i) With regard to tariffs, Articles 2.8 and 17 provided as follows (Exh. R-006 / C-001):

"2. ***Transition Period***

[…]

2.8 Tariffs During the Transition Period, the Company, with the active support and assistance of the Grantors, shall meet with DAMP and the Eastern Kazakhstan Territorial Antimonopoly and Pricing Committee and shall begin work on the determination of an appropriate Tariff structure for the duration of this Agreement and the adoption of new Tariffs, both in accordance with Clause 17. If a competitive market for Energy develops in Kazakhstan, the Company and Concession Company shall have a right to switch to using market rates for Energy it sells or otherwise realises.

[…]

17. ***Tariffs***

17.1 The Tariffs will be determined in accordance with Kazakhstan Legislation.

[…]

17.7 In respect of Energy produced, transiting through and transported for Customers or users outside of the Republic, the Republic confirms to the Concession Company, their Affiliates and the JSCs that the Tariffs and contractual conditions are not regulated by DAMP or any other State Agencies under applicable provisions of Kazakhstan Legislation and that, accordingly the Company (and/or its Affiliates), the Concession Company, and the JSCs shall be entitled to negotiate freely, determine and agree the levels of Tariffs and all of their other contractual terms.

17.8 Expert

17.8.1 If, in its reasonable opinion, the Company and/or the Concession Company believes that the Tariffs and the level of payment defaults by its Customers makes it impracticable to carry out any or all of the Investment Programme or other Commitments the Company and/or the Concession Company will be entitled to refer the matter to the Republic by Notice with a view to agreeing to:

17.8.2 an appropriate immediate adjustment of the Tariffs; or

17.8.3 an adjustment of the level or terms of the Commitments in which case the Company's obligations will be suspended or adjusted until resolution of these matters; or

17.8.4 agreements are reached in writing between the Parties as to off-sets or other mutually acceptable methods of achieving resolution of all such matters.

17.9 If no agreement can be reached, the Republic and the Company will refer the matter to an independent Expert (not being a national of Kazakhstan or the US) agreed by the Parties, or in default of agreement, to one (1) Expert appointed by the President or Vice-President for the time being of the International Chamber of Commerce of London who shall act as an Expert, but not as an arbitrator, and whose Costs (in an amount and manner agreed by both Parties) shall be borne by the Company and whose decision shall be binding on all Parties.

17.10 *In accordance with clause 2.8, during the Transition Period the Parties have met, discussed and made progress towards negotiating an Agreed Tariff Structure, which, when finalised, shall be initialled by Authorised Representatives of the Parties and attached to the Sale and Purchase and Concession Agreement as a new Schedule 18. When this has been done, the Agreed Tariff Structure will be applied and utilised in determining the Tariffs in accordance with the provisions of this Clause 17.*

(ii) With regard to the use of a trading company, Article 7 provides as follows:

"7. ***Services to Customers***

7.1 The Company and its Affiliates shall have the unrestricted right (but not the exclusive right or any obligation) to supply, transport and sell Energy directly to Customers who are end-users, as well as to invoice, bill and collect payments directly from such Customers who are end-users, and in the absence of prepayment to suspend delivery of Energy to such Customers who are end-users, provided always that, where appropriate, the Company or Concession Company will pay reasonable transportation Costs to any party whose networks the Company or Concession Company uses. The Company anticipates creating a Kazakhstan Affiliate which will be responsible for selling Energy to Customers. Customers shall not have the right to require any one or more of the individual power plants to provide Energy to them directly, circumventing such Kazakhstan Affiliate, and the Company and its Affiliates shall have the right to sell such Energy through the Kazakhstan Affiliate at a blended tariff, which also takes into account the Cost of Energy to the Kazakhstan Affiliate as well as its Costs of selling Energy and carrying on its business and operations, subject also to the provisions of this Agreement on Tariffs.

7.2 The Grantors will facilitate, assist and ensure that the Company, the JSCs and the Concession Company are able to exercise the rights referred to in Clause 7.1 and further that they are provided with all rights necessary or desirable to manage and collect their cash-flows, including:

7.2.1 the right to invoice and collect monies directly from all Customers; and

7.2.2 the right to install, read and maintain meters at all Points of Connection with all Customers.

7.3 The Company shall not be required to supply or deliver Energy to a Customer unless:

7.3.1 such services have been ordered by such Customer;

7.3.2 sufficient Energy is available to the Company;

7.3.3 the capacity of the Assets and the Business (taking into account the demands of other Customers and availability of Energy from producers and suppliers to the Company) is sufficient payment in advance is made by such Customers; and provided that provisions of Clauses 7.3.2 and 7.3.3 will be without prejudice to and shall not affect the liability of the Company under the provisions of any of the Company's contracts with Customers for the sale and delivery of Energy or which otherwise arise in accordance with Kazakhstan Legislation;

7.4 Tariffs being adopted, implemented and published in accordance with the provisions of this Agreement.

[…]"

(iii) With regard to the right to make and transfer returns, Article 5 provides as follows:

"5. Concession Terms

[…]

5.2 Rights of the Company and the Concession Company The Company and the Concession Company shall have the right to:

5.2.1 retain, as their own profits, all amounts remaining after payment of all and any Costs, Special Payments and Taxes;

5.2.2 independently take all decisions on the management of the Hydroelectric Companies.

[…]

5.5 Obligations of the Republic:

5.5.1 to guarantee the repatriation of capital, loans, dividends, interest and other income from the Company, the Concession Company and/or JSCs to it or its Affiliates overseas."

(iv) With regard to compensation issues, Article 10 provides as follows:

*"10. **Compensation***

10.1 The Republic shall indemnify and keep indemnified the Company, the Concession Company and the JSCs from and against:

10.1.1 any losses, liabilities, Costs, claims, proceedings or damages suffered or incurred by them as a result, directly or indirectly, of any breach of this Agreement by the Grantors, default, negligence, error, act, omission, breach of contract or breach of statutory duty of the Grantors which materially and adversely affects the Company, the Business, the Assets or any Excluded Liabilities;

10.1.2 any expropriation, sequestration, re-nationalisation, requisition or compulsory seizure or purchase (other than by the exercise of any compulsory purchase or condemnation rights in respect of private property for public purposes for reasonable compensation) of the Assets or the Business or any of the assets comprised therein or any part thereof or of the share capital of any Kazakhstan incorporated Affiliate of the Company, the Concession Company, the JSCs or of any rights or privileges of the Company under this Agreement; and/or

10.1.3 any Change of Law and any Force Majeure Event provided that such Force Majeure Event is caused (whether in whole or in part) by the default, error, negligence, act, omission or default of the Republic, the Hydroelectric Companies, any State Agencies .for which they are responsible and which materially and adversely affects the Company, the Concession Company, the JSCs, the Assets or the Business,

provided always that the Company shall take reasonable measures to mitigate the matters covered by the indemnity in this Clause 10.1, there shall be no double- recovery by the Company (including by way of off-set or within the Tariffs and pursuant to Clause 17); that the provisions of this Clause 10.1 shall not apply to the ordinary, reasonable and proper enforcement or application of any rights in accordance with the provisions of any contracts and Kazakhstan Legislation; and that any recovery under this Clause 10.1 shall nevertheless be allowed notwithstanding the fact there has been recovery from insurers, to the extent that those insurers have rights of subrogation.

[…]*"*

(v) Article 13, which provides as follows:

"13. Material Adverse Action

Subject to the provisions' of this Agreement, the Republic shall procure that all State Agencies refrain from 'doing anything which would have a material adverse effect on the Assets and the Business or the collection by the Company, the Concession .Company and the JSCs of payments from their Customers or the enjoyment by the Company and the Concession Company of their rights or any material part thereof in accordance with the terms of this Agreement provided always that the provisions of this Clause 13.1 shall not apply to the ordinary, reasonable and proper enforcement or application of any rights in accordance with the provisions of any contracts and Kazakhstan Legislation. »

(vi) Article 23.13 in connection with Schedule 1 define the term of 'Change in Law' as follows:

"In the event of a Change of Law or a Force Majeure Event which materially and adversely affects the Company, the Concession Company and/or the JSCs, this Agreement and the Business, and which arises due to the breach of contract, error, negligence, act, omission or default (and whether in whole or in part) of the Republic and the Grantors or any person for whom they are responsible, including, without limitation, any State Agencies, the Company shall be relieved of its Commitments to such an extent as to reflect the materiality of the effect of the Change of Law or the Force Majeure Event, provided always that the provisions of this Clause 23.13 shall not apply to the ordinary, reasonable, and proper enforcement or application of any rights in accordance with the provisions of any contracts and Kazakhstan Legislation. "

(vii) Article 32, the dispute resolution clause, which provides as follows:

"32. Dispute Resolution

32.1 Subject to the provisions contained in Clauses 17.8 and 17.9, should any dispute or difference arise out of or in connection with any matter or thing in relation to the provisions of this Agreement and the transactions contemplated by the Parties, then the Party or Parties shall issue a Notice to the other Party or Parties, and shall supply full details of the dispute or difference.

32.2 In the event of any such dispute or difference being notified pursuant to Clause 32.1, the Authorised Persons of each of the Parties shall promptly meet together and negotiate in good faith and take all practicable steps in order to try and resolve the same as quickly and economically as possible.

32.3 Should the Parties not have resolved the dispute or difference at the expiry of a period of one (1) month (unless otherwise extended by agreement of the Parties in writing) from the date of any Notice issued in accordance with Clause 32.1 such dispute or difference shall be settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in force at the relevant time.

32.4 In accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("Rules"), the Parties have agreed that there shall only be one (1) arbitrator who shall be appointed by internal agreement between the Parties. If the Parties fail to reach agreement as to the identity of the arbitrator to be appointed within thirty (30) Days of the expiry of the one (1) month period referred to in Clause 32, the arbitrator shall be appointed upon the application of any party to the dispute or difference by the President or Vice-President for the time being of the International Chamber of Commerce of London and the arbitration shall be commenced and carried out as soon as is possible.

32.5 The arbitration shall be carried out and conducted in London, England and shall be in the English language. […]

32.8 The Parties hereto agree to exclude any right of application or appeal to any court which would otherwise have jurisdiction in the matter in connection with any question of law arising in the course of the Expert or arbitration reference or out of the award."

3. Relevant Provisions of Electricity, Monopolies and Competition Law

166. Relevant provisions of Kazakh electricity, monopolies and competition law are included in Appendix 1 hereto.

C. The Arbitral Tribunal's Jurisdiction and Admissibility of the Claims

1. The Relevant Legal Basis

167. It is not contested between the Parties that the Arbitral Tribunal's competence derives from ICSID's jurisdiction under Article 25 ICSID Convention and the relevant provisions of the ECT and BIT, although it is disputed whether such competence can also arise under the 1994 FIL and the Altai Agreement (see above paras. 125 fol.). What is further disputed is the Arbitral Tribunal's scope of competence as deriving from these instruments and provisions.

168. To recall, Article 25 of the ICSID Convention provides:

> *"(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*
>
> *(2) 'National of another Contracting State' means:*
>
> *(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and*
>
> *(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.*
>
> [....]*"*

169. Article 25 of the ICSID Convention contemplates four fundamental conditions for jurisdiction of ICSID:

(i) Existence of a legal dispute;

(ii) A dispute arising directly out of an "investment";

(iii) A dispute between a Contracting State and a national of another Contracting State;

(iv) Existence of a written consent of both Parties.

2. The Parties' Positions

2.1 Respondent's Position

170. Respondent raises the following objections towards the competence of the Arbitral Tribunal and/or admissibility of the present proceedings: (i) lack of consent to arbitrate claims arising out of the 1994 FIL, (ii) certain restrictions regarding Respondent's consent to arbitrate with regard to Claimants' investment, (iii) the inadmissibility of Claimants' claims to the extent they rely on a breach of Kazakhstan competition law.

(i) Lack of Alleged Consent with regard to Claims Under the 1994 FIL

171. By basing part of their claim on an alleged breach by Respondent of the 1994 FIL, Claimants ignore the following facts:[199]

- The 1994 FIL does not apply to electric power regulation and thus does not apply to any part of their claim. The electricity sector, as a natural monopoly, falls under the exclusion of "legislation relating to public health and morality". As such, the Stabilization Clause in the 1994 FIL was not applicable, and the jurisdictional provision contained in the 1994 FIL cannot provide a basis for the jurisdiction of the Tribunal over Claimants' claims in this regard.[200]

- The 1994 FIL has been repealed by the 2003 FIL and contained no provisions continuing or "grandfathering" the effects of the 1994 FIL. As such, upon its repeal, the 1994 FIL in its entirety simply ceased to have effect, and this also applies to the offer of arbitration contained in Article 27 of the 1994 FIL. In this regard, the reasoning of the tribunal in *Rumeli Telekom A.S. v. Republic of Kazakhstan* (hereinafter "*Rumeli*"),[201] i.e., that, as a matter of international law, accrued rights cannot be taken away by domestic legislation, is neither convincing nor strong authority.[202]

- As a consequence, at the time of the filing of the Request for Arbitration there was no existing and valid offer of arbitration by Kazakhstan deriving from the 1994 FIL which could have been accepted by the Claimants and under which the Tribunal could have jurisdiction. Thus, disputes under the 1994 FIL are not disputes which Kazakhstan has consented to submit to ICSID.[203]

172. Even if the 1994 FIL were to apply, any claim made thereunder would be deemed to be made on the basis of Kazakh law, and would accordingly be subject to the general 3-year statute of limitations applicable under Article 178 and 179 of the Kazakh Civil Code. As a consequence, under the FIL, the Arbitral Tribunal only has jurisdiction over claims of breach of the FIL which occurred after 11 June 2007 (i.e. less than 3 years prior to the filing with ICSID of the Request for Arbitration on 11 June 2010), and any claims relating to events prior to that date are time-barred. This is also the case insofar as the alleged

199 RSP C-Memo 7.10.2011, paras. 520 fol.
200 RSP C-Memo 7.10.2011, paras. 523 fol., 528; RSP Rejoinder 25.06.2012, paras. 297 fol.; C-Butler I paras. 44-45
201 ICSID Case No. ARB/05/16, Award, 29 July 2008.
202 RSP C-Memo 7.10.2011, para. 529; RSP Rejoinder 25.06.2012, paras. 301 fol., 314; RSP Suppl. Subm. 27.08.2012, paras. 101-103; C-Butler I, para. 49.
203 RSP C-Memo 7.10.2011, paras. 520 fol., 530-534.

breaches of both the Altai Agreement and the 1994 FIL are relied upon by Claimants as constituting a breach of the relevant Umbrella Clauses contained in the ECT and BIT. This is because, based on *CMS Gas Transmission Company v. Argentine Republic* (hereinafter "*CMS*")[204] and *El Paso Energy International Company v. Argentine Republic* (hereinafter "*El Paso*"),[205] the fact that a claim of breach of obligations under domestic law may become actionable as a breach of international law does not affect the nature of the obligations, nor the law applicable to them, including the period of limitation.[206]

173. Finally, even if the Tribunal were to conclude that the 1994 FIL is applicable in the present case, there has been no material worsening of the position of the Claimants as regards the law which was applicable at the time of making of the investment. Accordingly, there can be no breach of the stabilization clause in the 1994 FIL and there is thus no admissible claim.[207]

(ii) Restrictions Regarding Respondent's Consent with regard to Claimants' Investment

174. Respondent initially contested the existence of an investment, due to an alleged lack of clarity surrounding the relationship between Claimants and the entities that negotiated and concluded the Altai Agreement and Claimants. In particular it was said to be unclear whether AES Corp. and Tau Power had at the material times an investment in the AES Entities for the purposes of the BIT.[208]

175. In its Rejoinder, Respondent accepted that AES Corp. was the ultimate owner of the relevant AES Entities throughout the period in question. However, Respondent stresses two issues arising from the structure of the AES Group:[209]

- Certain AES Entities in relation to which Claimants claim damages have been held by AES Corp through structures that did not involve any significant shareholding held through Tau Power. This would be relevant as regards the assessment of damages, insofar as Tau Power had no significant ownership in the CHPs and did not own 100% of the Hydros.

- Claimants did not have and could not have had any investment for the purposes of the ECT and the BIT until, at earliest, the assignment of the Altai Agreement by AES Suntree to Tau Power on 28 July 1997.

204 ICSID Case No. ARB/01/8, Award, 12 May 2005.
205 ICSID Case No. ARB/03/15, Award, 31 October 2011.
206 RSP C-Memo 7.10.2011, paras. 525 fol., 538-540; RSP Rejoinder 25.06.2012, paras. 331 fol.
207 RSP C-Memo 7.10.2011, paras. 526 and 541.
208 RSP Memo 7.10.2011, paras. 24-28; 88-98; paras. 553 fol., 545-546.
209 RSP Rejoinder 25.06.2012, paras. 319-330.

(iii) Inadmissibility of Claimants' Claims in Relation to Alleged Breaches of Kazakh Competition Law

176. Respondent contends that in putting forward allegations of non-compliance with Kazakhstan's competition legislation, Claimants effectively invite the Tribunal to assess *de novo* each and every one of the Orders adopted by the Kazakh authorities. Such an approach would be impermissible and Claimants' claims would be inadmissible for the following three main reasons:[210]

(i) Claimants' claims relating to the application by Kazakh authorities of the competition legislation to the AES Entities are inadmissible as a consequence of Claimants' recourse to the domestic courts in connection with the "fork in the road" provisions contained in Article 26(4) of the ECT and VI(3)(a) of the BIT and the wider underlying principle that it is impermissible to bring claims before ICSID having the same "fundamental basis" as disputes which have already been submitted and ruled upon by the domestic courts.

In this regard, the relevant test should be that enunciated by the tribunal in *Pantechniki S.A. Contractors & Engineers v. Republic of Albania* (hereinafter "Pantechniki"),[211] which involves assessing whether "*the fundamental basis of the claims sought to be brought before the international tribunal is autonomous of claims to be heard elsewhere*". The essential and fundamental question as to whether the competition legislation was correctly applied to the AES Entities by the competition authorities has already been litigated before the Kazakh courts, and the Claimants cannot seek effectively to have a second bite at the cherry by now seeking to challenge those measures as a misapplication of Kazakh law before the present Tribunal.[212]

(ii) It is impermissible for Claimants to disregard the decisions of the Kazakh courts, and as a consequence, it is only possible for them to submit claims relating to the application of the competition legislation to the AES Entities insofar as they are able to establish a denial of justice, in the sense that there was either some serious procedural shortcoming in the manner in which the Kazakh courts dealt with their complaints, which rises to the requisite level under international law, or that the decisions of the Kazakh courts were obviously and manifestly wrong. It is a precondition of any such claim that all available and effective local remedies have been exhausted. To the extent that avenues of appeal have not been exhausted, the Claimants are precluded from complaining of a denial of justice.

In this regard, Claimants based the majority of their claims on legitimate expectations and breach of the umbrella clause arising out of their interpretation of the Altai Agreement. Assuming for the sake of argument that the Claimants are correct in their interpretation of the various provisions of the Altai Agreement, those arguments (and the arguments based on the supposed stabilizing effect of the 1994 FIL) were undoubtedly relevant to the application of the competition legislation to the AES Entities. However none of those arguments was raised or relied upon in the proceedings before the Kazakh domestic courts. In this regard,

210 RSP Rejoinder 25.06.2012, paras. 233 fol.
211 ICSID Case No. ARB/07/21, Award, 30 July 2009.
212 RSP Rejoinder 25.06.2012, para. 247(a), 248 fol.

the fundamental problem with Claimants' claims as to the application of the competition legislation before this Tribunal is that these claims are purely domestic law complaints of breach of alleged contractual rights, which Claimants have attempted to dress up as international claims.[213]

(iii) Because the AES Entities and Claimants did not raise any of the arguments now put forward, based on the 1994 FIL or Altai Agreement, before domestic courts, their claims relating to the application of competition law to the AES Entities are barred by waiver, acquiescence or extinctive prescription. As a result, the Tribunal is precluded from hearing Claimants' claims that the application of the competition law to the AES Entities constituted a breach of the ECT or BIT.[214]

2.2 Claimants' Position

177. According to Claimants, the Arbitral Tribunal has jurisdiction over the present dispute pursuant to the ICSID Convention, in relation to breaches of the BIT, the ECT and the FIL:[215]

(i) *Legal Disputes*: The matters subject to this proceeding are "legal disputes" within the meaning of Article 25(1) of the ICSID Convention, as they turn on the Claimants' claims that Kazakhstan has violated their rights under the BIT, the ECT and the FIL.

(ii) *Investment*: Claimants' investments in Kazakhstan include in particular:

- Their investment in, and ownership of, the AES Entities;
- Tau Power's contractual rights under the Altai Agreement and AES Corp's interest in those contractual rights;
- Claims to money and claims to performance having an economic value, including monies improperly confiscated by Kazakhstan and investment returns.

AES Corp's investment constitutes an investment under Article I(1)(a) of the BIT and Tau Power's investment constitutes an "investment" under Article 1(6) of the ECT. Claimants' investments further constitute an "investment" under Article 1 of the FIL.

Moreover, since the signing of the Altai Agreement in 1997, the Claimants have invested approximately USD 140 million into the EKO power sector.

(iii) *Contracting States*: The Parties to the dispute are a State (Kazakhstan), a US company (AES) and a Dutch company (Tau Power). All three countries are Contracting States within the meaning of Article 25(1) of the ICSID Convention.

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213 RSP Rejoinder 25.06.2012, para. 247(b), 262 fol.; RSP PHB on Liability 30.11.2012, paras.. 12 fol.

214 RSP Rejoinder 25.06.2012, para. 247(c), 276 fol.

215 CL Memo 28.04.2011, paras. 256 fol.; CL Reply, 30.03.2012, paras. 314 fol.

(iv) *Written Consent*: Kazakhstan's written consent to submit the current dispute to ICSID arbitration is established under Article VI(4) of the BIT and Article 26(3) of the ECT, as well as under Article 27(2)(b) of the 1994 FIL. Citing *Rumeli*, Claimants submit that Respondent consented in the 1994 FIL to arbitrate disputes relating to the electricity sector and to matters of competition, and that this consent cannot be revoked or 'repealed' because it created legitimate expectations in the investors who reasonably relied upon them when making their investments as set out in *Rumeli*.[216]

178. Claimants further contend that both AES and Tau Power have standing to initiate this arbitration proceeding:[217]

(i) AES is a national of the USA and a "company" pursuant to Article I(1)(b) of the BIT;

(ii) Tau Power, as a national of the Netherlands, is a qualifying "investor" pursuant to Article 1(7)(a)(ii).

179. With regard to Respondent's objections to the admissibility of Claimants' claims, Claimants' position is in summary as follows:

(i) Contrary to Respondent's assertions, the fork-in-the-road clauses of Article VI(3)(a) of the BIT and Article 26(3)(b)(i) of the ECT do not operate to bar Claimants' claims because the dispute presented to this Arbitral Tribunal is different from the disputes which were submitted to the Kazakh courts by the AES Entities. The relevant standard to apply to determine whether the disputes are the same is the 'triple identity test', i.e. (1) same parties, (2) same object and (3) same cause of action. Applying this test, it is clear that the Kazakh court proceedings and the present ICSID proceedings concern different disputes, as they involved different parties, concerned a different object and rely on different causes of action. However, even if applying the standard promoted by Respondent, i.e., the 'fundamental basis' standard developed in *Pantechniki*, the claims in this arbitration are still different as they have an 'autonomous existence' outside the failure to comply with Kazakh law and on legal grounds which have never been relied upon before the Kazakh courts.[218]

(ii) As to the question whether the initiation of arbitration requires the exhaustion of local remedies, such requirement is not prescribed as a condition for invoking international arbitration in either the BIT or the ECT. Moreover, the objection is dependent on Respondent's wholly artificial re-characterization of the claims advanced in this proceeding as claims for denial of justice, notwithstanding that the overwhelming majority of Claimants' claims cannot be characterized as denial of justice claims. Finally, the AES Entities have exhausted local remedies in all proceedings where the Kazakh courts are alleged to have failed to comply with basic due process requirements.[219]

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216 CL Reply 30.03.2012, paras. 345 fol.; 361 fol.; CL PHB on Liability 30.11.2012, paras. 77 fol.
217 CL Memo 28.04.211, para 265.
218 CL Reply 30.03.2012, paras. 323 fol.
219 CL Reply 30.03.2012, paras. 338 fol.

(iii) Claimants' claims are not and cannot be time barred because Articles 178 and 179 of the Kazakh Civil Code do not apply to proceedings outside Kazakhstan and limitation under national law cannot bar claims before ICSID tribunals. In any event, the statute of limitations does not apply to a claim for full restitution to the extent that there is a continuing violation of Claimants' rights under the FIL, the ECT and the BIT.[220]

(iv) Claimants' claims are not barred by extinctive prescription. Notwithstanding the fundamental doubts whether extinctive prescription is available as a separate ground to bar treaty claims, it may not apply to the present case in the light of the absence of any inclusion of a specific limitation for bringing claims by the parties to a treaty.[221]

3. The Arbitral Tribunal's Assessment

3.1 Introductory Remarks

180. In this section, the Arbitral Tribunal will examine whether the four basic conditions for jurisdiction are given (see above para. 169), i.e. (i) the existence of a legal dispute, (ii) arising out of an investment, (iii) between a Contracting State and a National of another state, and (iv) based on a written consent. The Arbitral Tribunal will then further examine whether there may be any procedural admissibility issues preventing it from hearing the case.

3.2 Legal Dispute

181. The existence of a legal dispute between the Parties is not disputed and clearly arises from the nature of Claimants' claims through which they allege a breach by Kazakhstan of treaty obligations in relation to the promulgation and/or application of national laws and for which they claim full restitution and/or compensation for the damages arising therefrom.

3.3 Arising out of an Investment

182. It is not disputed between the Parties that the AES Entities as well as the activities conducted by these entities in Kazakhstan constitute an 'investment' (and/or relevant 'economic activity') in the sense of Articles 1 of the 1994 FIL, Article 1 of the BIT and Article 1 of the ECT, as well as Article 25(1) ICSID Convention.[222]

183. However, Respondent nevertheless raised a series of issues with regard to the nature of the dispute as arising out of such investment (see above paras. 170 fol.):

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220 CL Reply 30.03.2012, paras. 348 fol.
221 CL Reply 30.03.2012, paras. 376 fol.
222 RSP C-Memo 7.10.2011, para. 518.

(i) Qualification of Claimants as 'Investors'

184. Respondent initially disputed that Claimants had established their ownership of the investment made in Kazakhstan (RSP Memo, paras. 24-28; 86 fol.; 545 fol.). However, in its Rejoinder, Respondent stated that "[i]*n the light of the documents disclosed by the Claimants, the Respondent accepts that AES Corp was the ultimate owner of the relevant AES Entities in the period in question (i.e. from 2004 onwards)*" (RSP Rejoinder para. 320).

185. As such, Respondent accepts that AES Corp. owned the concerned 'investments' and/or thereto related 'activities' in Kazakhstan and qualifies as 'investor' in the meaning of Article I(1)(a) BIT and Article 1 1994 FIL.

186. Respondent does not dispute that Tau Power was assigned the rights under the Altai Agreement and that it further owned several of the concerned AES Entities. Thus, it is not disputed that Tau Power owned the concerned 'investments' and/or thereto related 'activities' in Kazakhstan and qualifies as 'investor' in the meaning of Article 1(6) of the ECT and Article 1 1994 FIL. As concerns Respondent's arguments regarding Tau Power's shareholding in the CHPs and Hydros (see above para. 175), they relate to the issue of quantum and are irrelevant to the question of jurisdiction or competence. They will therefore be dealt with, to the extent necessary, when dealing with the quantum of Claimants' claims (see below paras. 444 fol.).

(ii) Time of the Investment

187. Respondent argues that Claimants did not have and could not have had any investment for the purposes of the ECT and the BIT until, at the earliest, the assignment of the Altai Agreement to Tau Power on 28 July 1997 (see above para. 175).

188. It is true that Tau Power only acquired the relevant 'investment', i.e. the contractual rights deriving from the Altai Agreement, once it became a party to the Altai Agreement, i.e. on 28 July 1997 (see above para. 30). However, since the ECT only entered into effect between Kazakhstan and the Netherlands on 16 April 1998, the precise time at which the investment occurred prior to that date is not material for jurisdictional purposes under the ECT.

189. As concerns the time of investment and its relevance to jurisdiction under the BIT, Respondent does not dispute that AES Corp. was at all relevant times the ultimate owner of the AES Entities, which were partly established before the entering into of the Altai Agreement. Further, it appears that AES Corp. was at all material times (including the date of signature of the Altai Agreement) the beneficial owner of AES Suntree, which was the original party to the Altai Agreement (see above para. 6). As such, AES Corp. made the relevant investment relating to the Altai Agreement with the signature of such agreement by AES Suntree.

190. Claimants' 'investments' consist in a set of assets and rights, the rights arising under the Altai Agreement being only one of them. The date of entering into and/or of assignment of the rights under this Agreement cannot determine the temporal scope of Claimants' entire investment. It is not possible to determine one single date at which Claimants' entire investment was made, and the Arbitral Tribunal will examine relevant dates where

necessary when dealing with Claimants' specific claims and in the light of the specific investments subject to those claims.

(iii) Contractual Claims vs. Treaty Claims

191. Respondent argues that the present legal dispute is actually a claim about the breach of contractual rights, which has been dressed up as international treaty claim.

192. It is generally accepted that the concept of 'investment' under Article 25 of the ICSID Convention does not necessarily extend to every general commercial dispute, and in particular not to every contractual dispute. It is however also widely accepted that a breach of contract may under certain circumstances also constitute a breach of treaty, where the standard breached and the rights affected by such breach fall within the scope of protection of the treaty.

193. In the present case, the Arbitral Tribunal is of the opinion that Claimants' claims as submitted before the present Arbitral Tribunal are not of a purely contractual nature. While it is true that Claimants' claim relate to an alleged breach of the Altai Agreement, the basis for Claimants' claim for restitution and/or compensation is not that the Altai Agreement itself has allegedly been breached. Claimants' claims are based on the argument that the alleged breach of the Altai Agreement also constitutes (i) a breach of Claimants' legitimate expectations thereunder of such nature that it violates the substantive protections afforded by the provisions of the 1994 FIL, the ECT and the BIT, and (ii) a breach of the Umbrella Clause of the ECT and BIT. The relevant breaches are the alleged breaches of the FIL, the ECT and the BIT, not the alleged breach of the Altai Agreement. In addition, the alleged breaches directly relate to the promulgation and the application of Kazakh law by Kazakh administrative and judicial authorities. The enactment of laws is necessarily an exercise of state power and is thus different from a dispute over the performance or non-performance of contractual obligations.

194. As such, the Arbitral Tribunal considers that Claimants' claims arise 'directly out of an investment' in the sense of Article 25(1) ICSID Convention.

3.4 A dispute between a Contracting State and a national of another Contracting State

195. While Respondent had initially raised a series of objections regarding the qualification of Claimants as 'investors', which it later on withdrew (see above para. 185), it has never contested the fact that AES Corp. is a US company and Tau Power is a Dutch company. Kazakhstan, the United States of America and the Netherlands are all three members to the ICSID Convention.

196. The majority of Claimants' claims relate to acts and decisions taken by the competition authorities, the Kazakh courts and/or Ministries and departments. It is well-established that acts and omissions of State organs such as administrative authorities and judicial bodies are attributable to the State, and this is not disputed by Respondent. Respondent however contends that some of Claimants' claims involve actions of a state-owned company and/or individual members of legislature that are only attributable to the State to the extent that they constitute an exercise of governmental authority.[223] The Arbitral Tribunal considers

[223] RSP C-Memo 7.10.2011, paras. 664 fol.; RSP Rejoinder 25.06.2012, paras. 815 fol.

the issue of attribution as a matter relating to the merits of the case and will thus deal with any issue of attribution where relevant for any specific claim.

197. As such and as a matter of principle, the present dispute is admittedly between 'a Contracting State', i.e. Kazakhstan, and nationals of two other Contracting States, i.e. AES Corp as US company and Tau Power as Dutch company. To the extent that the Arbitral Tribunal would be inclined to grant a claim based on the actions of a non-state organ, it would beforehand decide on any issue of attribution.

3.5 Written Consent

198. It is undisputed that Respondent has consented in writing to the following:

(i) According to Article 26(1)-(5) of the ECT, to submit disputes "*relating to an Investment* […], *which concern an alleged breach of an obligation* […] *under Part III* [of the ECT]" to ICSID arbitration (see above para. 126 (ii)).

(ii) According to Article VI(1)-(4) of the BIT, to submit disputes concerning "*an alleged breach of any right conferred or created by this Treaty with respect to an investment*" to ICSID arbitration (see above para. 125126(iii)).

199. It is further undisputed that Claimants' initiation of the present ICSID proceedings constitutes an acceptance by Claimants of Respondent's offer to submit disputes arising out of investments falling under the scope of the ECT and BIT respectively to ICSID arbitration.

200. Respondent submits, however, that there is no valid written consent to refer disputes arising out of the 1994 FIL to ICSID arbitration for the reasons mentioned above (see paras. 171- 172).

201. In this regard, the issues with regard to the Tribunal's jurisdiction over disputes arising out of the FIL are twofold: (i) *ratione materiae*, does the 1994 FIL apply to the electricity sector? ; (ii) *ratione temporis*, can Claimants base a claim on the 1994 FIL after the latter's repeal?

202. With regard to the scope of application *ratione materiae* of the 1994 FIL, Respondent's main argument is that the electricity sector falls within the matters excluded from the 1994 FIL under Article 6(3), namely "*defence potential, national security, ecological safety and public health and morals*", or alternatively under the exception of "*questions of taxation and other measures of State regulation*" of Article 6(4).[224]

203. The Arbitral Tribunal is not convinced by that argument for the following reasons:

204. First, it should be noted that the electricity sector is not explicitly named in Article 6(3), which lists specific excluded fields. One could only consider the electricity sector as excluded by Article 6(3) if one considered that (i) the list of excluded fields is for illustration purposes only, i.e., not exhaustive, and any area similar to those listed therein

[224] R-Butler I, paras. 44-45; R-Butler II, paras. 22 fol.; London Transcript Day 4 p. 237 l. 22-24 – p. 238 l. 1.

should be treated as being excluded, or (ii) the electricity sector is part of one of the listed fields.

205. Given the importance of a law such as the 1994 FIL, one should not simply assume that a list as the one mentioned in Article 6(3) is for illustrative purposes only. On the contrary, given the importance of the 1994 FIL, the need for legal security and predictability and the specific wording of Article 6(3), one should rather presume that the list of excluded fields is exhaustive. Respondent has not asserted the contrary and has in particular not tried to demonstrate the non-exhaustive character of the list. Thus, the Arbitral Tribunal considers that the list of excluded fields of Article 6(3) is exhaustive.

206. Second, given the exhaustive nature of the list, the only possibility left for the electricity sector to be excluded from the scope of application of the 1994 FIL is if it can be subsumed under any of the listed categories. In this regard, Prof. Butler makes the argument that the electricity sector can be considered part of '*national security*' and or '*public health and morals*'. While the Tribunal concedes that certain aspect of the electricity sector, such as ensuring supply of energy, may under certain circumstances give rise to issues of 'national security', this is hardly the case for issues relating to the management of competition in the electricity market. The fact that electricity may qualify as 'strategic goods' under the 1998 Natural Monopoly Law is in this regard irrelevant. The same reasoning applies with regard to the concept of 'public health and morals'. The electricity market is of a commercial nature, and while being an important component of a country's economy, it is not of a nature to constitute per se and in its entirety a matter of 'ordre public', even supposing that the phrase 'public health and morals' can be given that wide meaning. As concerns the concept of '*taxation and other State regulation*', there is no indication that these terms would have been meant to include competition regulations in the field of electricity supply. The Arbitral Tribunal accordingly decides that the present dispute is not excluded from the ambit *ratione materiae* of the 1994 FIL by the terms of Article 6(3)-(4) of that law.

207. With regard to the scope of application *ratione temporis* of the 1994 FIL, Respondent's arguments touch upon two main questions: (i) is it possible for a State to revoke its consent to ICSID arbitration given in a national law ?, and – if so – (ii) what are the conditions for such revocation, and how does revocation affect rights that an investor may have acquired under the 1994 FIL ?

208. As to the question whether Respondent may revoke its consent to ICSID arbitration as contained in a national law by simply revoking this law, there are two main ways to approach this issue:

(i) The first one, is to consider that a host State is free to change its investment legislation and this freedom includes the right to change the provision concerning the State's consent to ICSID's jurisdiction. In case of the repeal of a law, an offer of consent that is contained in that law and that has not been taken up by the investor will lapse. This approach relies on the same reasoning as applicable with regard to the submission and withdrawal of offers in a contractual context.

(ii) The second approach is to rely more on principles of international public law, and in particular on the concept of 'unilateral declarations', according to which, upon the fulfillment of certain conditions, a State does not have complete freedom to retract a unilateral commitment. This approach may also be supported by the principle of the doctrine of estoppel and the principle of interpretation of treaties in good faith. In accordance with these principles, a party is precluded from acting contrary to its own declaration, when such declaration was made in unequivocal terms and the other party has relied upon it.

209. While Respondent relies on the first approach to make its argument that Kazakhstan validly withdrew its consent to arbitrate and that the Arbitral Tribunal therefore does not have jurisdiction to hear claims arising out of the 1994 FIL, Claimants rely on the second approach as well as on the *Rumeli* award.

210. In the *Rumeli* award, which involved the very same provision of the 1994 FIL, the arbitral tribunal ruled as follows:

> *"333.* […] *The fact that the* [1994 FIL] *was repealed as of January 8, 2003, does not have an impact on ICSID jurisdiction. The* [1994 FIL] *was indeed valid and effective at all times relevant to this dispute. Article 6(1) of the Law provides that "*[i]n the case of a deterioration of the position of a foreign investor, which is a result of changes in the legislation and (or) entering into force and (or) changes in the provisions of international treaties, to foreign investments during ten years the legislation shall be applied which had been current at the moment of making the investment, and with respect to the investments which are carried out in accordance with the long-term (more than ten years) contracts with the authorized State bodies, until the expiry of the effect of the contract, unless the contract stipulates otherwise*." In other words, Article 6(1) grants foreign investors protection against adverse changes in legislation for a period of ten years from the date they made their investment, or for the entire duration of the contract exceeding ten years entered into with authorized State bodies. This is the case here. The relevant investments were made by Claimants from 1998 to 2002, and the Investment Contract entered into between Claimants and Respondent on May 20, 1999, was valid until June 31, 2009, i.e., for a period of more than ten years.*
>
> *334. Respondent has expressed its consent to ICSID arbitration on December 28, 1994, the date of the entry into force of the FIL, and it remains applicable to the dispute pursuant to Article 6(1). On the other hand, Claimants have consented to ICSID jurisdiction by filing their Request for Arbitration. The Arbitral Tribunal has therefore jurisdiction under the FIL.*
>
> *335. Besides Article 6(1), it is also well established in international law that a State may not take away accrued rights of a foreign investor by domestic legislation abrogating the law granting these rights. This is an application of the principles of good faith, estoppel and venire factum proprium.*
>
> *336. The Arbitral Tribunal has therefore jurisdiction under the FIL. It notes however that the FIL is invoked by Claimants only as an alternative basis for the jurisdiction of this Tribunal. In this respect, the Tribunal has reached the conclusion that since the protection granted to foreign investors by the FIL is fully covered by the provisions of the BIT, it need not refer to it to decide the claims submitted by the parties in this arbitration."*

211. Claimants rely on the *Rumeli* award to make the argument that "*Kazakhstan's offer or consent to ICSID arbitration is irrevocable if it creates legitimate expectations in the investors who reasonably relied upon it and reasonably considered it to be irrevocable by making their investments*".[225] Claimants say that they reasonably relied on the terms of the FIL at the time their investment was made, and that in view of further relevant legal principles such as *pacta sunt servanda* and the principle of non-retroactivity, and the application of the Stabilization Clause, Respondent's consent to arbitrate must be seen to have remained in force for the entire duration of the Altai Agreement.[226]

212. In contrast, Respondent alleges that the "*observations of the Tribunal in Rumeli are not strong authority*" and make a "*self-referential boot-strapping use of the Stabilization Clause*" which finds no basis in Kazak law.[227] Respondent contends that, to the extent that the 1994 FIL as a whole was repealed, both the jurisdictional provision and Article 6(1) ceased to have any effect. Article 6(1) could therefore not operate to keep the jurisdictional provision alive following the repeal of the 1994 FIL in 2003.

213. The Arbitral Tribunal is of the following opinion:

214. It is widely acknowledged that a party's consent to submit a dispute to ICSID arbitration jurisdiction must be in writing and once given the withdrawal of that consent is not a matter that falls entirely within the unfettered discretion of that party (Article 25(1)). This is a fundamental principle of ICSID arbitration.

215. However, it cannot be accepted that a State is always unable to revoke its consent, even where such consent is established by a provision in a national law which the State remains free to amend or repeal. The specific scope, duration and effectiveness of a party's consent, in particular where such party is a State, is a matter to be considered in the specific context of each treaty and each such provision.

216. Thus, in the view of the Arbitral Tribunal, the question as to the extent to which the repeal of a national law containing a written consent of the State to submit a particular dispute to ICSID arbitration has the effect of revoking the State's consent given thereunder is not a question that can be answered in general terms. This question is very much case-specific and must be examined in the light of the specificities of ICSID arbitration, the sovereignty of States with regard to their national legislation, the aim and object of the relevant national law and the protection afforded therein, as well as the specific wording of the relevant legal instruments.

217. As far as the 1994 FIL is concerned, Article 27 of such law constitutes a standing consent on part of the State to submit "[d]*isputes and differences which arise in connection with foreign investments or activity related thereto*" to ICSID arbitration. Such standing consent can be 'activated' by either the State or the investor, on condition that the investor also gives its written consent. The question is whether the State's acceptance of jurisdiction can be revoked, and if so, on what conditions.

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225 CL Reply 30.03.2012, para. 365.
226 CL Reply 30.03.2012, paras. 364-367.
227 RSP Rejoinder 25.06.2012, paras. 308-309.

218. Firstly, the Arbitral Tribunal considers that the question of the revocation of consent to arbitrate is, as a matter of law, a different question from the revocation or repeal of a statute. A State remains free at all times to amend its legislation. This does however not mean that the change or repeal of such legislation automatically has the effect of changing or repealing any consent to arbitrate that had been established by such legislation.

219. Secondly, the question is whether the possibility of revoking a State's consent to arbitrate depends on whether such consent has already been activated by the concerned investor. While such a difference is usually made in contract law, allowing an offeror to withdraw its offer with immediate effect as long the offeree has not accepted it, the Arbitral Tribunal considers that in view of the objectives of the ICSID Convention and the nature of treaty claims, it would not be appropriate inflexibly to apply this simple principle regarding offer and acceptance borrowed from general contract law. Here again, the answer to this question will therefore depend on the specific instrument at stake and the scope and nature of the consent given therein.

220. In the present case, the 1994 FIL itself provided an assurance that there could be no immediate unilateral withdrawal of rights by the State that adversely affected foreign investors. The Arbitral Tribunal has given careful consideration to (i) the nature and purpose of the 1994 FIL, i.e. to encourage and protect foreign investment including through the possibility of ICSID arbitration in case of a breach of such protection, (ii) the wording of Article 27 of the 1994 FIL, which (like the remainder of the FIL) does not indicate any possibility of revoking the consent to arbitrate given therein, and (iii) Article 6 of the 1994 FIL (the 'Stabilization Clause', which is analysed further below), which creates an expectation on the investor's side that its investment will benefit from such protection for a duration of at least 10 years. All point to the conclusion that the right to arbitrate given by the 1994 FIL cannot be terminated unilaterally and with immediate effect by the repeal of the FIL. There is, indeed, no evidence beyond the general repeal of the 1994 FIL that Respondent had any intention of cancelling its 'standing consent' to arbitration.

221. Accordingly, the answer to the question whether a particular dispute arising out of an investment is covered by Kazakhstan's consent to arbitrate should depend on the time of making of the investment, and not on the time of filing of the claim. This is because Kazakhstan must be held accountable for the specific expectations it raised through the promulgation of a specific law in place at the time of the investment, and this accountability includes in the present case the right to resort to specific remedies and procedures in case of breach. Thus, Claimants were entitled to expect that Kazakhstan could be held liable for any breach of the FIL according to the remedies and procedures stipulated in that law to be available. A later change of remedies should not influence the accountability of Kazakhstan with regard to investments that were made before such change and which were meant to be protected for a certain duration. Thus, the Arbitral Tribunal agrees with the tribunal in *Rumeli* to the extent that it considers that a consent given by a State in a national law to submit certain disputes to ICSID arbitration may not be revoked without due regard for the legally-recognized expectations raised by the State under such law, which include inter alia expectations concerning available legal remedies.

222. In conclusion, while Kazakhstan remained free at all times to amend the 1994 FIL according to its own agenda, to the extent that any such amendment led to the revocation of its consent to ICSID arbitration, in view of the aim and objective of the 1994 FIL, the nature and scope of the protection afforded therein (and in particular Article 6(1)), as well as the overall circumstances of the case, such revocation may only be effective for the future, i.e. in relation to investments made after the repeal of the 1994 FIL.

223. Therefore, with regard to claims arising out of investments made during the effectiveness of the 1994 FIL, Kazakhstan's consent remains in force. The fact that Claimants raised such claims only after the repeal of the law has no impact on the consent, and may only become relevant with regard to the question whether such claims may be considered time-barred. The Arbitral Tribunal is however of the opinion that this is not a matter of jurisdiction, but rather of substance. It will therefore be dealt with, so far as is necessary, when examining Claimants' claims arising out of the 1994 FIL.

3.6 'Admissibility' Requirements

224. Respondent contends that Claimants' claims are inadmissible. It raises three main arguments relating respectively to (i) Article 26(4) the ECT and VI(3)(a) BIT and their alleged fork-in-the road nature, which would prevent Claimants from bringing the same claims before two different instances, (ii) the alleged failure by Claimants to exhaust local remedies, and (iii) the alleged waiver, acquiescence and/or extinctive prescription of Claimants' claims.

(i) Fork in the Road?

225. Respondent argues that Claimants' recourse to the Kazakh courts had the effect of barring Claimants from submitting 'fundamentally the same claims' to ICSID arbitration based on the fork-in-the-road provisions of Article 26(4) of the ECT and VI(3)(a) of the BIT.

226. In this regard, and referring to what has been said above (see paras. 191 fol.), the Arbitral Tribunal is of the opinion that Claimants' claims as submitted in the present ICSID arbitration are different from those filed by Claimants with the Kazakh courts and that they can thus not be barred by any fork-in-the-road provision.

227. The Arbitral Tribunal is of the opinion that this is the case irrespective of the standard applied, i.e. whether applying the 'triple identity test' or the 'fundamentally same' test under *Pantechniki*. While it is true that the claims before the Kazakh courts and in the present proceedings are based on the same facts and in particular the same alleged basic wrongdoings by Respondent (i.e., the implementation of new laws), they present important differences which do not justify considering these claims as having "*fundamentally the same* [normative] *basis*".

228. The key difference between the claims is as follows: through the court proceedings before the Kazakh courts, Claimants mainly sought to invalidate decisions of the competition authorities with regard to the listing of the AES Entities on the Monopoly Register and to challenge orders through which fines and penalties were imposed on the AES Entities for allegedly anti-competitive behavior. Claimants did so mainly arguing that the relevant authorities had misapplied the relevant Kazakh competition law.

229. Claimants' claims in the present proceeding have a different dimension and meaning: While the implementation by the Kazakh authorities of the new Kazakh competition law plays an important role in the present proceedings, it does so only from a factual perspective in the sense that it is one of the factual causes for Claimants' treaty claims in the present ICSID proceedings. In other words, it is the result of the Kazakh court proceedings, i.e. the confirmation by Kazakh courts that the Kazakh competition law was applied correctly by the administrative authorities, which led Claimants to file a claim for breach of the protection allegedly afforded to Claimants under the ECT, BIT and 1994 FIL in connection with legitimate expectations arising out of and other assurances made in the Altai Agreement. Had the Kazakh courts decided differently, the treatment of Claimants under the law would have been different and the effect on Claimants' alleged legitimate expectations would also have been different.

230. In summary, the Kazakh court proceedings are a factual foundation of Claimants' treaty claim. They determined whether the new laws were applied correctly and to what extent Claimants' legitimate expectations and/or other treaty protection rights were adversely affected. Thus, depriving Claimants of the possibility to file treaty claims in the present ICSID proceedings because of the prior conduct of such proceedings before the Kazakh courts would be inadequate.

(ii) Exhaustion of Local Remedies

231. Respondent's argument is that Claimants' claims with regard to the application of Kazakh law (which was already subject to the Kazakh court proceedings) may only be examined under the standard of 'denial of justice' and this would firstly require that all local remedies have been exhausted.

232. There are different views among scholars and arbitral tribunals regarding the qualification of a requirement of 'exhaustion of local remedies' as a matter of jurisdiction, admissibility and / or substance. As concerns Respondent, it submits that the question of the standard to be applied to examine whether Claimants' claims are well-founded is a question of substance and not of jurisdiction. [228]

233. As to whether the exhaustion of local remedies is a jurisdictional requirement, suffice it to say at this stage that neither Article 26 of the ICSID Convention, nor Article 26 of the ECT, Article VI of the BIT, nor Article 27 of the 1994 FIL provide for such requirement.

234. As such, the Arbitral Tribunal is of the opinion that the exhaustion of local remedies is not a jurisdictional requirement in the present case. Whether or not a similar argument may operate as an admissibility requirement is a question that may remain open, to the extent that it would apply only in case the Arbitral Tribunal agreed with Respondent with regard to the application of the standard of 'denial of justice'. It will therefore be dealt with, if necessary, when examining the relevant standard for measurement of the alleged breach of treaties.

[228] RSP Rejoinder 25.06.2012, para. 262.

(iii) Waiver, Acquiescence and/or Prescriptive Extinction

235. Respondent contends that Claimants' claims relating to the application of competition law to the AES Entities are barred by waiver, acquiescence or extinctive prescription, because neither the AES Entities nor Claimants previously raised before domestic courts any of the arguments now put forward and based on the 1994 FIL or Altai Agreement.

236. With reference to what has been said above with regard to the nature of Claimants' claims (see paras. 191 fol.) and for the same reasons that the Arbitral Tribunal rejected Respondent's argument of fork-in-the-road (see above paras. 225 fol.), the Arbitral Tribunal considers that Claimants' claims cannot be deemed to have been waived, acquiesced or extinguished on the ground of Claimants' non-invocation of certain arguments at an earlier stage.

237. In this regard, it should be stressed that it clearly arises out of the record that Claimants repeatedly and insistently objected to the way in which the local authorities applied Kazakh law. The fact that they first resorted to local authorities to raise claims under Kazakh law does not prevent them from later on resorting to ICSID arbitration where the proceedings before the local authorities laid part of the factual foundation of the claims and where the dispute presented to the Tribunal consists of alleged breaches of relevant treaty protections.

4. First Conclusion

238. **Based on the above considerations, the Arbitral Tribunal has jurisdiction to hear Claimants' claims as submitted in this proceeding and there is no procedural impediment preventing it to hear such claims.**

D. For the Period from 2004 to 31 December 2008

1. The Issues

239. Claimants' claims against Respondent for the period from 2004 to 31 December 2008 relate primarily to the way Kazakhstan promulgated and then applied new laws and regulations in the field of competition law to the AES Entities.

240. In this regard, Claimants' case is that Kazakhstan did not apply those laws in a rational, proportionate, non-arbitrary and reasonable way in pursuance of a rational policy goal, and thereby improperly frustrated the Claimants' legitimate expectations and further breached relevant standards of protection under the 1994 FIL, the ECT and the BIT.

241. Based thereon, Claimants raise two sets of claims, i.e. one set of claims relating to alleged breaches of the 1994 FIL and one set of claims relating to alleged breaches of the ECT and BIT.

(i) *With regard to the 1994 FIL*, Claimants contend that Respondent's breach is threefold:[229]

- Kazakhstan's promulgation and application to the AES Entities of the changes in Kazakh legislation was inconsistent with the guarantees provided under the Stabilization Clause of Article 6 of the 1994 FIL as their effect was to worsen Claimants' position compared to their position under the legal regime applicable to them at the time of entering into the Altai Agreement.

- Kazakhstan breached Article 8 of the 1994 FIL by adopting 'acts and decisions' in respect of the AES Entities, which were not in accordance with, or not envisaged under the legal regime applicable to them at the time of entering into the Altai Agreement.

- Kazakhstan breached Article 13 of the 1994 FIL by repeatedly failing to comply with its own laws.

(ii) *With regard to the ECT and BIT*, Claimants raise four different types of claims:

- A breach of the FET standard under Article 10(1) of the ECT and Article II(2)(a) of the BIT consisting in the failure (i) to respect Claimants' legitimate expectations, (ii) to provide a transparent, stable and predictable legal environment, (iii) to prevent coercion and harassment, (iv) to act in good faith, and (v) to accord due process.[230]

[229] CL Reply 30.03.2012, paras. 490 fol., paras. 505 fol. and paras. 515 fol.
[230] CL Reply 30.03.2012, paras. 386 fol.

- A breach of the duty to refrain from adopting unreasonable or arbitrary measures under Article 10(1) of the ECT and Article II(2)(b) of the BIT by (i) unreasonably and arbitrarily applying competition law to the AES Entities, (ii) determining that activities of AES Entities contemplated under the Altai Agreement are in breach of competition law and (iii) resorting to coercion and harassment.[231]

- A breach of the Umbrella Clauses contained in Article 10(1) of the ECT and Article II(2)(c) of the BIT consisting in the failure by Kazakhstan to comply with its obligations under the 1994 FIL and the Altai Agreement.[232]

- A breach of the standard of full protection and security under Article 10(1) of the ECT and Article II(2)(a) of the BIT consisting in the failure to provide a secure investment environment.[233]

242. In Respondent's view, Claimants claims are entirely unfounded. Claimants' claims rely primarily on the issue of stabilization. Without stabilization, and subject to Claimants' other alleged legitimate expectations, this arbitration is simply about the meaning of Kazakhstan legislation, and the application of the legislation to Claimants, taking into account their activities in Kazakhstan. In this regard, Respondent's position is that Claimants were not stabilized in a manner that precluded subsequent changes to Kazakh competition law under the 1994 FIL, the 2003 FIL or the Altai Agreement and as such, they were fully subject to Kazakh competition law as it evolved over time. As to the meaning and application of Kazakh competition law, Respondent contends that the Kazakh authorities applied the new laws to the best of their knowledge and such application was largely in line with standards applied in other countries, namely the European Union. In this regard, it is insufficient for Claimants to allege only that the Republic's competition agency got it wrong and there is no basis in international law that would permit an international tribunal to treat as international wrongs the mere alleged misapplication of domestic legislation and principles, whether by the courts or by administrative bodies. Claimants would have to prove a substantive denial of justice.[234]

243. It is not disputed between the Parties that the legal framework of Kazakh competition law changed and that Kazakhstan was entitled to amend that legal framework. It is also not disputed that Claimants were in principle subject to this framework.[235] What is disputed is (i) whether the application of such new laws and regulations were in breach of any relevant treaty protection standard, and (ii) to what extent the answer to this question depends on whether or not Claimants' rights were stabilized under the law in place at the time of the investment and/or whether or not Claimants were frustrated in their legitimate expectations.

231 CL Reply 30.03.2012, paras. 451 fol.
232 CL Reply 30.03.2012, paras. 460 fol.
233 CL Reply 30.03.2012, paras. 483 fol.
234 RSP Rejoinder 25.06.2012 , paras. 9-16.
235 CL Reply 30.03.2012, para 10; London Transcript p. 48 l. 17-24.

244. Based thereon, the Arbitral Tribunal considers that there are three key issues to be determined in connection with Claimants' claims:

(i) *The issue of stabilization,* i.e. whether Claimants were stabilized and, if so, whether the promulgation and application of the changes in the Kazakh Competition Law was in breach of the stabilization guarantee;

(ii) *The issue of legitimate expectations*, i.e. what were Claimants' legitimate expectations, were these legitimate expectations frustrated and to what extent may such a frustration give rise to a treaty claim; and

(iii) *The issue of other breaches,* i.e. whether Kazakhstan's application of the law can be deemed to have breached relevant treaty standard and how this question may be influenced by the previous two.

2. Stabilization

2.1 Introductory Remarks – the Role of the Stabilization Clause

245. While Respondent alleges that Claimants' case relies primarily on the issue of stabilization,[236] Claimants contend that their case is primarily a claim that the measures taken by Kazakhstan were irrational, arbitrary and unreasonable, and were not taken in pursuance of a rational policy goal.[237] Thus, the Stabilization Clause is only one among several aspects of Claimants' claim and, even if the Stabilization Clause does not apply, Claimants submit that Kazakhstan has still breached its obligations under the ECT, the BIT and other provisions of the FIL.

246. After examining the structure of Claimants' claims, the Arbitral Tribunal is of the opinion that the Stabilization Clause plays an important role in the present proceedings:

247. Claimants' claim regarding the Stabilization Clause of Article 6 of the 1994 FIL constitutes the legal basis giving rise to the following treaty claims:

(i) An independent claim for breach of Article 6 of the 1994 FIL for which the Arbitral Tribunal has direct jurisdiction based on Article 27 of the 1994 FIL;

(ii) An independent claim for breach of the BIT and ECT pursuant to the operation of the Umbrella Clauses in those treaties.

248. In addition, the issue of stabilization is also relevant as a factual basis for the following claims:

(i) Claimants' claim of breach of Article 8 of the 1994 FIL, to the extent that this claim is based on the argument that "*acts or decisions against the AES Entities were based on competition laws that were not in effect when the investment was made*" and thus amount to illegal acts prohibited under Article 8 of the 1994 FIL.[238] The

[236] RSP Rejoinder 25.06.2012, paras. 9 and 16.
[237] CL Reply 30.03.2012, paras. 151-152, 159, 163, 182.
[238] CL Reply 30.03.2012, paras. 512 fol.

premise of this claim is that Kazakhstan was not entitled to apply the new legislation to the AES Entities, i.e., that the AES Entities were stabilized;

(ii) Claimants' claim of breach of the FET standard in connection with alleged legitimate expectations: Claimants rely on the Stabilization Clause to establish the 'legitimate expectation' that no detrimental changes in legislation would be applied to the Claimants' investments.[239]

249. Thus, the issue of stabilization is an issue affecting various aspects of Claimants' claims, and will therefore be dealt with first.

2.2 Existence, Scope and Effect of Stabilization (Relevant Standard of Measurement)

(i) The Parties' Positions

250. Claimants' case is that while the Stabilization Clause does not prevent Kazakhstan from enacting new legislation, it does require Kazakhstan to refrain from applying those laws against covered investors when such application would have an adverse effect on their investments. In other words "*the Stabilization Clause effectively froze the legal regime that was in place at the time the parties entered into the Altai Agreement, insulating the Claimants' investment from any adverse changes in the legal environment as a result of legislation, decrees, regulations, rules, or orders issued under those regulatory instruments*".[240]

251. Respondent in contrast contends that Claimants are not entitled to claim the benefit of stabilization under the FIL for the following main reasons:[241]

- The 1994 FIL does not apply for the reasons set out above in para. 171;

- Even if stabilization had taken place, Claimants would have been stabilized as a Natural Monopoly, listed on the Natural Monopoly Register and subject to strict price control under the 1995 Electricity Law, namely in a far less beneficial regime than that to which it is presently subject;

- The findings made against Claimants in the Kazakh courts were also made pursuant to the Kazakhstan Constitution and Civil Code, which would apply to Claimants even in case of stabilization;

- Thus, there would have been no worsening of the situation of the Claimants, as required by Article 6 of the 1994 FIL. In this regard, the term 'worsening' of Article 6 of the 1995 of the 1994 FIL should not be interpreted as preventing modifications to the law through an incremental process of reform, to the extent that the position of the investor has not in fact been substantially affected. Instead, it should be understood as having provided protection against substantial changes in the law having a material effect on the situation of an investor, such as, for example, the passing of a law resulting in the prohibition of an activity (constituting an investment) which was previously permitted. "*Its role was not and cannot reasonably be argued to have been, as the Claimants*

239 CL PHB on Liability 30.11.2012, para. 97.
240 CL Memo 28.04.2011, paras. 282-283.
241 RSP Memo 7.10.2011, paras. 5, 193, 541, 568 fol.

allege, to preserve the law in aspic as at the date at which an investment was made. Such an interpretation of Article 6 of the 1994 FIL is wholly unreasonable and would be unworkable in practice; it would result in a fragmented legal system, with different investors subject to different laws, despite the fact of their formal repeal" (RSP Memo, para 586);

- In any event, the choices made by the Kazakh legislature in regulating matters of competition or prices within the electricity energy sector were entirely reasonable, transparent and fully in accordance with internationally accepted approaches to regulation of competition and of pricing in the electrical energy sector. In such circumstances, the Stabilization Clause may only be relied on against an alleged breach by the imposition of new regulations where the host state is also in breach of separate international law obligations. With no breach of a separate international law obligation, there can be no basis for encroaching Kazakhstan's sovereign right to enact legislation.

(ii) The Arbitral Tribunal's Assessment

252. The Arbitral Tribunal is of the opinion that the Stabilization Clause of Article 6 of the 1994 FIL applies to Claimants' investment for the following reasons:

253. At the time Claimants made their investment, the 1994 FIL was effective and Claimants were therefore entitled to expect to be granted the protection afforded by the 1994 FIL and that, for the same reasons as mentioned above in paras. 214-223, such protection could not simply be revoked unilaterally without due regard to Claimants' expectations as raised under such law. Thus, the Stabilization Clause applies to Claimants' investments.

254. The next question concerns the scope of the Stabilization Clause and whether the changes in Kazakh competition law implemented by Kazakhstan breached the scope of stabilization afforded thereunder. This requires the interpretation of Article 6 of the 1994 FIL.

255. Article 6 of the 1994 FIL is construed as follows: Article 6(1) provides for a stabilization effect in case of 'adverse effects', meaning that new legislation shall not apply to Claimants in case such new legislation would "*adversely affect the position of the foreign investor*" (see above para. 161(ii)). However, Article 6(3) provides for certain carve-outs stating that the stabilization shall not apply to changes in the legislation of the Republic of Kazakhstan in "*the area of ensuring defence potential, national security, ecological safety and public health and morals*". In such areas, Kazakhstan remains free to change its laws, although Kazakhstan may have a duty to compensate Claimants for such changes where they "*adversely affect the position*" of Claimants. In summary, the key element of Article 6 is the effect of changes of law and its purpose is to provide stabilization only where changes in law would 'adversely affect' the investor's situation. The nature of such stabilization is however different depending on the area of the concerned law varying from a 'freezing' effect to a duty to compensate Claimants for the adverse effects. Further, the duration of stabilization is afforded for a minimal period of 10 years, and where such investments are made under long term contracts of more than 10 years, for the entire duration of the contract.

256. Thus, Article 6 of the 1994 FIL does not provide for an absolute stabilization, and instead limits the scope of the stabilization based on three factors : (i) the effects produced by the changes, by requiring in any event that such changes 'adversely affect' the investor's

rights, (ii) the nature of laws subject to change, whereby changes in "*the area of ensuring defence potential, national security, ecological safety and public health and morals*" are subject to a limited protection in the sense that the investor may not be 'frozen' in its rights and may only claim for compensation for the adverse effects, and (iii) based on a time limit determined according to the short or long term nature of the investment at stake.

257. Thus, the key question under Article 6 of the 1994 FIL is whether the changes in the Kazakh competition law and its application to Claimants had the effect of 'adversely affecting' Claimants' situation. If no such adverse effects affect Claimants' investment, the Stabilization Clause does not provide any protection, be it a 'freezing' of Claimants' rights or a compensation for the adverse effects.

258. That being said, besides the 1994 FIL, a further duty of stabilization may arise out of the FET standard. It is generally admitted that the FET standard, as contemplated in Article II(2) lit. (a) of the BIT and Article 10(1) of the ECT, includes certain guarantees of stability and transparency of the applicable legal framework. However, under such FET standard, 'stabilization' simply means that changes in law may not be of such nature to compromise the basic transparency, stability or predictability of the existing legal framework.

259. The Arbitral Tribunal does not consider it necessary to determine whether the standards under Article 6 of the 1994 FIL and the FET principle are actually different, because the Arbitral Tribunal considers, as further elaborated below (paras. 261 fol.), that the concerned changes in legislation effected and implemented from 2001 to 31 December 2008 were not of a nature to breach either of these two standards.

(iii) Conclusion

260. In summary, Article 6 of the FIL 1994 applies to Claimants and protects them, at least for the duration of the Altai Agreement, from changes in the Kazakh competition law which would have adversely affected their position, and the key question is therefore whether the changes in the law as implemented by Kazakhstan had the effect of 'adversely affecting' Claimants' rights.

2.3 Application and Breach of Stabilization

(i) The Parties' Positions

261. According to Claimants, the relevant applicable legal framework at the time of the investment was the Original Competition Law. Claimants maintain that based on Article 2 and 7 of the Original Competition Law, Claimants were subject thereto. In addition, the 1995 Electricity Law and the Original Competition Law occupy altogether different fields. The 1995 Electricity Law is sector-specific legislation which simply does not deal with competition regulation and it cannot be cogently compared with the 2001 and 2006 Competition Laws. Therefore, the effect of the changes resulting from the 2001 Competition Law and the 2006 Competition Law should be assessed in comparison to the position prevailing under the Original Competition Law.[242]

[242] CL Reply 30.03.2012, paras. 498 fol.; London Transcript p. 87 l. 8-11.

262. Compared to the legal framework in place at the time of the investment, Claimants allege that the subsequent changes introduced the following novelties:

263. *With regard to the 2001 Competition Law*, Claimants contend that it introduced the following innovations:[243]

- it provided for the establishment of a "Monopolies Register", which would list entities considered 'dominant';

- it provided the 'Anti-Monopoly Agency' (hereinafter referred to as "Competition Agency") with new powers, such as the establishment and maintenance of a 'Monopolies Register' listing entities deemed to have a dominant position and the application to such entities of regulated tariffs;

- it lowered the structural dominance threshold by introducing new standards for so-called "joint dominance", whereby the market share of several market entities could be combined in order to deem those entities "jointly" dominant. In this respect, in addition to the 35% market share threshold for a single entity, the 2001 Competition Law provided that market entities would also be considered structurally dominant if: (1) the aggregate share of two entities amounted to 50% or more of the relevant goods market; or (2) the aggregate share of no more than three entities amounted to 70% or more of that market.

- New provisions on liability (Articles 23-24), supplemented by a new Article 147 of the Code for Administrative Violations dated 30 January 2001 (hereinafter referred to as "the Administrative Code"). These provisions changed the amount of fines that could be imposed on dominant entities.

However, it is Claimants' position that the 2001 Competition Law maintained the 'two-limb test' requiring proof of both a structural and a behavioral dominance in order to establish that an enterprise is to be considered dominant as a matter of Kazakh law.[244]

264. *With regard to the 2006 Competition Law*, Claimants contend that it introduced the following changes:[245]

- it removed the requirement that a market entity had to abuse its position of structural dominance in order to be listed on the Monopolies Register: under the 2006 Competition Law, that entity could be placed on the Monopolies Register if it simply had a high market share. However, in order to submit them to price controls, the Competition Agency was still required to find that an entity had actually abused its dominant position (Articles 9 and 31);

- it further expanded the concept of joint market dominance by lowering the relevant thresholds of market shares necessary (but not sufficient) to qualify as 'dominant' to 15% (instead of 35% under the Competition Law 2001). It further introduced the concept that a group of companies should be treated as a "single market player" for competition purposes;

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243 CL Memo 28.04.2011, paras. 98-110.

244 London Transcript p. 87 l. 17 – p. 94 l. 18.

245 CL Memo 28.04.11 paras. 22 and 172 fol.; London Transcript p. 87 l. 17 – p. 99 l. 22.

- it expanded the types of agreements which could be invalidated on the basis that they are "*anti-competitive*" or constitute "*concerted actions*", by listing eight types of separate types of illegal agreements (compared to four types under the Competition Law 2001);

- it conferred additional discretionary powers on the Competition Agency, namely with regard to the issuance of fines and administrative penalties.

265. *With regard to the 2008 Competition Law*, Claimants contend that while it did not represent a dramatic change from the 2006 Competition Law, it remained – as the 2006 Competition Law had been - vastly different from the Original Competition Law.[246]

266. Consequently, the application to the AES Entities of the 2001 Competition Law, 2006 Competition Law and 2008 Competition Law and the regulations related thereto constituted a breach of the stabilization guarantee provided by Kazakhstan under Article 6 of the 1994 FIL and Article 2.8 of the Altai Agreement to the extent that it worsened their position in comparison to that prevailing under the Original Competition Law in force at the time they made their investment in Kazakhstan.[247]

267. According to Respondent, at the time of entering into the Altai Agreement, the electricity sector was not subject to the Original Competition Law but to the 1995 Electricity Law and associated tariff setting regulations. Under the 1995 Electricity Law, all electricity generation companies were classified under Kazakh law as "natural monopolies" and were, for that reason, subject to tariffs set by the State Regulating Commission on a 'cost plus' basis in accordance with Article 6(3) of the 1994 FIL. Therefore, even if the 1994 FIL imposed continuing obligations (which is denied), the Stabilization Clause could not have "frozen" obligations under the Original Competition Law (which was not applicable to Claimants at the time of the investment).[248]

268. With the entering into force of the Natural Monopolies Law 1998, the electricity generation sector ceased to be qualified as "natural monopoly" and thus became subject to the Original Competition Law. Thus, from that point on, AES Entities could have been placed on the Monopolies Register if and to the extent that they were deemed to hold a dominant position.[249] This is eventually what happened:

(i) Firstly, the Original Competition Law did not provide for a 2-limb test: structural dominance was in itself sufficient to qualify an entity as dominant, and behavioral dominance was only relevant to determine whether conduct was prohibited and whether sanctions should be applied.[250]

(ii) With regard to the 2001 Competition Law, Respondent's position is that this law constituted a "*restatement of preceding law as to the regulation of anti-competitive conduct, although it also included elements of consumer protection*".[251]

246 CL Memo 28.04.2011, para. 226.
247 CL Memo 28.04.2011, paras. 271 fol., 282; CL Reply 30.03.2012, para. 490.
248 RSP C-Memo 7.10.2011, para 193.
249 RSP C-Memo 7.10.2011, para. 187-188
250 RSP C-Memo 7.10.2011, paras. 145, 234 fol.
251 RSP C-Memo 7.10.2011, paras. 265 fol., 266.

(iii) With regard to the 2006 Competition Law, Respondent contends that the approach to definition of the relevant market remained broadly similar. In particular, the central concept remained, as it had done under the Original Competition Law, the notion of interchangeability of goods from the perspective of purchasers. However, in contrast to the position under the Original Competition Law, detailed provision as to applicable criteria for determination of the geographical boundaries of the relevant market was contained in the 2006 Competition Law itself, rather than being contained in regulations adopted by the relevant agency.[252]

(iv) With regard to the 2008 Competition Law, Respondent contends that Claimants actually accept that the 2008 Competition Law did not represent a dramatic change from the 2006 Competition Law.

269. Further and in any case, Respondent maintains that none of the modifications to the competition law are in fact of a character or seriousness such as to engage Respondent's international responsibility. Fundamental concepts under the original Competition Law have not changed throughout the evolution of Kazakhstan competition law, such as the concepts of relevant market, market share, finding of dominance, abuse of dominant position, fines and damages as sanctions of abuse, and the tariff regime. Changes to Kazakh law have of course been made, but this was envisaged by the ECT, and would and should have been anticipated as at the period of conclusion of the Altai Agreement.[253]

(ii) The Arbitral Tribunal's Assessment

270. The key issue is whether the above mentioned changes fall within the scope of protection of the Stabilization Clause, i.e. whether they adversely affected Claimants' position as an investor. For the purpose of this examination, the Arbitral Tribunal will rely on the way the Kazakh authorities applied the relevant provisions.

271. The Arbitral Tribunal considers that the changes made by Kazakhstan to its competition legislation and applied to the AES Entities cannot be deemed to have 'adversely affected' Claimants' position under Article 6 of the 1994 FIL for the following main reasons:

272. Where a new law is promulgated and implemented, it must be looked at in its entirety, and it must also be put into its general context. Stabilization cannot mean that an investor is entitled to cherry-pick favorable provisions in a new legislation and request to be exempted from the application of unfavorable provisions. This would not only be unmanageable, but it would also create problems of transparency and predictability as to which provisions apply to a particular investor and which do not. The fact that specific provisions within the general legal framework may have had adverse effects on Claimants' operations and business cannot therefore be sufficient to conclude that Claimants' position was 'adversely affected' under Article 6 of the 1994 FIL.

273. In this regard, the Arbitral Tribunal finds that at the time of entering into the Altai Agreement (which forms the main basis for Claimants' position that the changes in Kazakh competition law adversely affected their position), i.e. in 1997, the relevant legal framework applicable to Claimants' activities was primarily the 1995 Electricity Law. While the Arbitral Tribunal acknowledges that the Original Competition Law and the 1995

252 RSP C-Memo 7.10.2011, para. 206 fol.

253 RSP C-Memo 7.10.2011, paras. 176, 193-194, 334 fol.

Electricity Law may have had different scopes of application, the key issue which constitutes the core of Claimants' claims, i.e., the prices which electricity generators were entitled to charge, was strictly regulated by the 1995 Electricity Law. Under this Law, all generation companies were classified under Kazakh law as 'natural monopolies' and were for that reason subject to regulated tariffs set by the State Regulating Commission (see Article 6 of the 1995 Electricity Law).

274. Thus, the starting point for measuring any adverse effects on Claimants' situation is their situation under the 1995 Electricity Law, and not under the Original Competition Law.

275. Claimants are not alleging that the 'adverse effect' consists in the application of the Original Competition Law to the AES Entities as compared to the application of the 1995 Electricity Law. Instead, Claimants rely on the various subsequent changes made to the Original Competition Law through the 2001 Competition Law, the 2006 Competition Law and the 2008 Competition Law to establish an adverse effect compared to the regime in place under the Original Competition Law.

276. Thus, the relevant standard for measurement of the adverse nature of any effects on Claimants' position is the 1995 Electricity Law and Claimants have failed to establish that the promulgation of the 1998 Natural Monopolies Law, which had the effect of subjecting Claimants' activities to the Original Competition Law, led to any such 'adverse effects'.

277. In addition, even if Claimants were right that the relevant standard for measurement of 'adverse effects' should be the Original Competition Law, Claimants would still have failed to establish the existence of an adverse effect under Article 6 of the 1994 FIL. The amendment of the Kazakh Competition Law in 2001, 2006 and 2008 followed a political will to further develop competition. The privatization of the electricity generation sector constituted a clear improvement beneficial to Claimants and the aim of the various legal amendments implemented by Kazakhstan was to establish a competitive market in the field of energy generation and trading. It is undisputed that the establishment of a competitive market would have been to the benefit of Claimants. Moreover, the changes made to the Kazakh Competition Law and which are the subject of Claimants complaints are not of an extraordinary nature and similar principles exist in other countries. They follow a common approach to the regulation of markets in the general public interest.

278. In this regard, the Arbitral Tribunal considers that Claimants reliance on the amendment of specific elements of the law, such as the threshold for qualifying as dominant, the definition of relevant market, etc. is not sufficient *per se* to establish an 'adverse effect' under Article 6 of the 1994 FIL and is therefore not sufficient to trigger the protection of the Stabilization Clause.

279. As concerns the question of breach of 'stability' as afforded under the FET standard, the Arbitral Tribunal finds that there is no such breach. In view of the general purpose of the changes made to Kazakh competition legislation, which was to develop competition within the electricity market, it was clear from the very beginning of the investment that Kazakhstan would be reforming its competition law. Such reforms were expected and encouraged, as they were to benefit all market players, i.e. including Claimants. Therefore, the mere fact that some of these changes may have resulted in certain circumstances in disadvantages to Claimants is not sufficient to result in a breach of the guarantee of 'stability' provided under the FET standard under Article 10(1) of the ECT and Article

II(2)(a) of the BIT. Whether further aspects of the FET standard may have been breached through the application to Claimants of the Kazakh competition legislation will be examined further below (paras. 308 fol.). At this point, suffice is to say that the FET standard did not provide Claimants with a right to be stabilized in their previous position so as to be exempt from changes in Kazakh competition legislation.

(iii) Conclusion

280. Claimants have failed to establish that, compared to the situation under the 1995 Electricity Law which was the key legal regime in place at the time of their main investment (i.e., the execution of the Altai Agreement), the promulgation and application by Kazakhstan of the various iterations of its competition law 'adversely affected' Claimants' position.

281. Accordingly, Claimants have failed to establish that they should have been 'protected' from the promulgation and application by Kazakhstan of its competition legislation. To the extent that this competition legislation did not lead to adverse effects, it does not fall within the scope of guaranteed stabilization afforded under Article 6 of the 1994 FIL. To the extent that it brought a major improvement to the general market condition and framework, it can also not lead to a breach of the 'stability' protection afforded under the FET standard of Article 10(1) of the ECT and Article II(2)(a) of the BIT.

282. Whether or not the effect of any such specific change may be in breach of relevant protection standards afforded under the ECT and/or the BIT will be dealt with when examining the relevant standards (see below paras. 305 fol.). It may however not give rise to a separate claim based on the Stabilization Clause.

3. Legitimate Expectations

3.1 Claimants' Alleged Legitimate Expectations

283. According to Claimants, the provisions of the Altai Agreement, together with provisions of the FIL, the Restructuring Resolution, the Original Competition Law and the ECT, considered in conjunction with the circumstances in which the Altai Agreement was concluded, reflected and gave rise to, *inter alia*, the following legitimate expectations on the part of Claimants as concerns the period prior to 2009:[254]

(i) *Based on Article 2.8 of the Altai Agreement and the Restructuring Resolution*, Claimants would have the right to charge market-based tariffs once the electricity generation sector changed to a competitive market structure.

(ii) *Based on Article 7.1 of the Altai Agreement*, Claimants' power generation companies would have the right to pool the energy they produced and sell it centrally through locally incorporated trading affiliates and would not be required to make direct sales to customers which would circumvent sales through the trading affiliate, and Claimants would also have the right to pool the energy they produced

[254] CL Reply 30.03.2012, para. 49; CL Suppl. Submission, 6.08.2012, para. 13.

and make sales at a blended tariff taking into account the cost of purchasing energy from multiple generators.

(iii) *Based on Article 13.1 of the Altai Agreement and Article 8 of the 1994 FIL*, Kazakhstan would refrain from taking any action that would have a material adverse effect on the Claimants' investments or their enjoyment of their rights under the Altai Agreement and, further, would ensure that any enforcement action taken by the Kazakh authorities would be consistent with applicable requirements of the then-prevailing Kazakh law.

(iv) *Based on Article 10.1 of the Altai Agreement,* Claimants would be indemnified for losses resulting from any breaches of the Altai Agreement and from any change of law (including new legislation) that materially reduced, prejudiced or otherwise adversely affected their investments. Moreover, *based on Article 6 of the 1994 FIL*, Claimants would not be subject to legislation which was more adverse to their investment than legislation prevailing at the time of the signature of the Altai Agreement.

(v) *Based on Article 13.1 of the Altai Agreement, Article 8 of the 1994 FIL and Article 6 of the ECT*, the AES Entities would only be subject to rational competition policies which are applied in a reasonable and proper manner for the purpose of deterring or redressing anti-competitive conduct.

(vi) The AES Entities would *not be subject to price control or other sanctions* by the Kazakh Government in a competitive market setting merely because the AES Entities (i) were the owners of assets transferred to them under the Altai Agreement or (ii) collaborated with each other to pool the energy they produced and market it through locally incorporated trading affiliates.

(vii) *Based on Article 32 of the Altai Agreement,* Kazakhstan would resolve disputes by way of international arbitration.

284. In view of the changes brought by the revisions of the Kazakh competition law, according to Claimants, these legitimate expectations have been unduly frustrated by the actions of Kazakhstan and such actions cannot be justified by reference to valid competition policy concerns.[255]

285. According to Respondent, Claimants' asserted legitimate expectations relate principally to Claimants' claims as to the application of the competition law, and there are two broad categories relating to (i) the asserted expectation of a right to charge market prices in a competitive market and not to be subject to intervention in their pricing policies, and (ii) the asserted expectation of a right to use a trading company and to charge a blended tariff. However, Respondent disputes Claimants' interpretation of the various provisions of the Altai Agreement relied upon in that regard, and denies that Claimants could, or in fact did, hold any legitimate expectations having the content alleged as at the time of making their investment.[256]

[255] CL Reply 30.03.2012, paras.. 133 fol. and 154 fol.

[256] RSP Rejoinder 25.06.2012, paras. 272-275 and 442 fol.

3.2 The Arbitral Tribunal's Assessment

286. The Arbitral Tribunal considers that – for the period up to 31 December 2008 – Claimants assert four different kinds of expectations:

(i) Expectations of a stabilization of their position towards legislation being more adverse to their investment;

(ii) Expectations regarding the way in which Claimants were allegedly entitled to be treated under relevant Kazakh competition law, in particular with regard to their asserted right to sell electricity at market rates and to do so through central trading companies using blended tariffs;

(iii) Expectations that Kazakhstan would only apply rational competition policies in a reasonable and proper manner for the purpose of deterring or redressing anti-competitive conduct.

(iv) Expectations that Kazakhstan would resolve disputes arising out of the Altai Agreement by way of arbitration.

287. Claimants' submissions under this heading are all directed to the effects, actual and potential, of the revisions of the Kazakh competition law.

288. With regard to Claimants' asserted expectation that they would not be subject to legislation with adverse effects on their situation, the Arbitral Tribunal has already indicated, in its analysis of Claimants' arguments under the Stabilization Clause in the FIL (see above paras. 280-282), that it does not consider that Claimants had any legitimate expectation that Respondent would not amend its general competition law in the general public interest, or that Claimants would be exempt from the application of any such revisions.

289. Similarly, the Tribunal does not consider that any of the successive amendments of the competition law were of such a nature as to violate any legitimate expectations under the ECT and / or the BIT. Investments are made in the context of the general regulatory framework of the host State, and it would require the very clearest of commitments on the part of the State to refrain from adjusting that regulatory framework in some specified manner to give rise to any expectation that an investment would be insulated from the effects of normal legal and regulatory evolution. This is particularly the case where (as here) that evolution takes the form of the introduction of commonly-used regulatory mechanisms in pursuit of goals that had been clearly announced at the time when the investment was contemplated and made.

290. With regard to Claimants' alleged expectations as concerns market prices and trading practices, they derive primarily from the Altai Agreement, in particular Articles 2.8 and 7.1 of the Altai Agreement. The key question here is whether the provisions of the Altai Agreement were such as to give rise to a legitimate expectation falling under the scope of protection under the ECT and BIT, and the frustration of which would constitute an independent breach of the FET standard.

291. For the reasons exposed above (see paras. 191-194), a breach of contract does not *per se* trigger a breach of treaty protection. It will be a breach of treaty only if the legitimate expectation is of such nature as to justify its protection under the relevant treaty and its

frustration is of sufficiently serious character to constitute an independent breach of the relevant treaty protection standard. Thus the concept of 'legitimate expectation' in a treaty claim is not necessarily coterminous with a legitimate expectation a party may have under a contract. Furthermore, a contractual right constitutes a 'legitimate expectation' protected by treaty only where there are factors other than the simple fact of the existence of the contract which justify giving the expectation of performance of the contract the status of a legitimate expectation protected by the treaty. In this regard, it is necessary to take into account the overall circumstances giving rise to the legitimate expectation and its frustration, such as the basis for the expectation, reliance upon it in practice, the reasons and context for its frustration, etc.

292. As concerns Article 2.8 (see above para. 165(i)) and Article 7.1 of the Altai Agreement (see above para. 165(ii)), the Arbitral Tribunal does not consider that these provisions were of a nature to give rise to a legitimate expectation protected under the FET standard as asserted by Claimants. Their wording is very broad and key terms such as 'market rates', 'competitive market' and 'blended tariffs' are not defined. The Parties have very different views as to what these terms mean and how they should be interpreted. In view of the stage of development of the Kazakh economy and the stage of legislative development in the field of electricity and competition, these provisions do not suffice to establish a 'legitimate expectation' protected and enforceable under the FET standard that Claimants would be entitled under any circumstances to apply 'market prices' in the sense of what they considered to be a 'competitive market price' or to use a trading company and sell goods at a 'blended tariff' irrespective of whether such practice may have breached applicable competition legislation.

293. It is true that, in view of the size of Claimants' investment and activities, the application of the Original Competition Law and its later iterations to Claimants had the effect of qualifying them as dominant entities. Claimants therefore contend that they never got a fair chance to benefit from the more liberal competition framework. However, put in other words, Claimants assert that they had a 'legitimate expectation' to be exempted from the legal provisions applicable to monopolies, and the frustration of such legitimate expectation would be in breach of the FET standard. The Arbitral Tribunal has already set out why the Stabilization Clause is of no avail to Claimants in the present case and that it can in particular not serve to be exempted from particular legal provisions of a law, while remaining subject to other more beneficial provisions.

294. With regard to Claimants' asserted expectation that Kazakhstan would only apply rational competition policies in a reasonable and proper manner for the purpose of deterring or redressing anti-competitive conduct, the Arbitral Tribunal is of the opinion that this expectation is covered by the principles of FET under Article 10(1) of the ECT and Article II(2)(b) of the BIT and the obligation to refrain from unreasonable and arbitrary measures under Article 10(1) of the ECT and Article II(2)(b) of the BIT. Thus, Claimants' asserted legitimate expectation in this regard is nothing more than a legitimate expectation that those protection standards would be applied by Kazakhstan. Therefore, the real question is whether the competition legislation as promulgated and applied by Kazakhstan was in breach of any of those protection standards.

295. The Altai Agreement contains in Article 32 an Arbitration Clause providing for ICC arbitration in London (see above para. 165(vii)). While this provision may give rise to a contractual expectation to resort to arbitration, such contractual expectation may not per se suffice to give rise to a 'legitimate expectation' protected under the FET standard. Thus the

mere frustration of such contractual expectation may *per se* not trigger a breach of the FET standard, unless further circumstances surrounding the frustration of Claimants' contractual expectation are such as to breach certain protection standards afforded under the FET. Whether this is the case in the present case is dealt with below (paras. 322-323).

3.3 Conclusion

296. Accordingly, the Tribunal does not consider that Claimants had any legitimate expectations under the ECT and / or the BIT that were breached by the amendments of Kazakh competition law.

297. The Arbitral Tribunal considers it important to stress that these conclusions are drawn based on a concept of 'legitimate expectation' as relevant for the purpose of determining the scope of treaty protection. The ruling of the Arbitral Tribunal in this regard bears no prejudice to the question whether Claimants may have had similar expectations of a contractual nature. This is a matter of contractual interpretation subject to the law applicable to the contract and therefore beyond the scope of jurisdiction of the present Arbitral Tribunal.

4. Impact on Claimants' Claims

4.1 Claims based on the FIL

(i) Claim for Breach of Article 6 FIL

298. As mentioned above (paras. 252 fol.), the Arbitral Tribunal found that the scope of stabilization provided for under Article 6 of the 1994 FIL does not cover the changes made by Kazakhstan to relevant competition legislation for the reason that such legislation did not 'adversely affect' Claimants in comparison to the regime in place under the 1995 Electricity Law.

299. Accordingly, Kazakhstan cannot be deemed to have breached the stabilization guarantee provided for in Article 6 of the 1994 FIL by promulgating and applying to the AES Entities the changes in its competition legislation.

(ii) Claim for Breach of Article 8 FIL (Illegal Actions)

300. Claimants assert that Kazakhstan breached Article 8 of the 1994 FIL by (i) adopting 'acts and decisions' against the AES Entities, which were not in accordance or not envisaged under the legal regime applicable to them at the time of entering into the Altai Agreement, and by (ii) frustrating Claimants' legitimate expectation that the AES Entities would only be subject to rational competition policies which are applied in a reasonable and proper manner for the purpose of deterring or redressing anti-competitive conduct. Measures taken by Kazakhstan in breach of these two principles would constitute illegal acts in the sense of Article 8 of the 1994 FIL.[257]

[257] CL Reply 30.03.2012, paras. 505 fol.

301. The first part of Claimants' claim relies on the assumption that the legal regime applicable to the AES Entities at the time of entering into the Altai Agreement' was the Original Competition Law. However, as explained above (paras. 270-279), the relevant legal regime was the 1995 Electricity Law. In addition, the Arbitral Tribunal found that the application to the AES Entities of the Original Competition Law and its amendments was generally more advantageous than the application of the 1995 Electricity Law and does therefore not fall under the scope of stabilization provided for under Article 6 of the 1994 FIL or give rise to a similar expectation of stabilization under the FET standard under Article 10(1) of the ECT and Article II(2)(a) of the BIT. As such, this part of Claimants' claim must fail.

302. As concerns the second part of Claimants' claim, as mentioned above (see para. 294), it is already covered by Claimants' claims for breach of the FET Standard under Article 10(1) of the ECT and Article II(2)(a) of the BIT and the obligation to refrain from unreasonable and arbitrary measures under Article 10(1) of the ECT and Article II(2)(b) of the BIT. Thus, the Arbitral Tribunal will deal with the substance of this claim when examining a breach of the relevant treaty provisions and does not need to make an independent finding on the basis of Article 8 of the FIL.

(iii) Claim for Breach of Article 13 FIL (Excess of Power)

303. Claimants assert that Kazakhstan exceeded its powers by repeatedly failing to comply with its own laws and thereby breached the standard of Article 13 of the 1994 FIL.

304. The Arbitral Tribunal is of the opinion that Article 13 of the 1994 FIL does not establish a standard, which is different from the standard already afforded under the FET Standard under Article 10(1) of the ECT and Article II(2)(a) of the BIT and the obligation to refrain from unreasonable and arbitrary measures under Article 10(1) of the ECT and Article II(2)(b) of the BIT. Thus, the Arbitral Tribunal will deal with the substance of this claim when examining a breach of the relevant treaty provisions and does not need to make an independent finding on the basis of Article 13 of the 1994 FIL.

4.2 Claims based on the ECT & BIT

(i) Standard of Review

305. Claimants' claims of a breach of the ECT and the BIT are based on two primary assumptions; (i) that the legal regime applicable to them was stabilized under the Original Competition Law, and (ii) that Kazakhstan repeatedly misapplied its own laws. Claimants further assert that, even if the Arbitral Tribunal found that the legal regime was not stabilized and Kazakhstan correctly applied its own law, Kazakhstan's actions would still qualify as unreasonable or arbitrary under Article 10(1) of the ECT.

306. Thus, Claimants' claims are closely related to the way Kazakhstan applied its own law. In this regard, it should be stressed that the role of an international arbitral tribunal hearing treaty claims is not to determine whether the domestic law of a respondent State was correctly applied or not, in the way that a local appeal court might do. The Tribunal's role can only be to determine whether the application of such legislation was of such nature as to breach relevant treaty protection standards, such as FET.

307. One may debate whether or not Kazakhstan correctly applied its own law; and indeed the record shows that this question was submitted to various judicial bodies in Kazakhstan. It is not the role of the Arbitral Tribunal to re-assess whether these bodies were mistaken in their understanding of their country's own legislation. The Tribunal will base its decision on the way such legislation was in fact applied and determine whether such application may be in breach of any relevant treaty standard.

(ii) Claim for Breach of FET under Article 10(1) of the ECT and Article II(2)(a) of the BIT

308. Claimants claim that there was a breach by Kazakhstan of the FET standard under Articles 10(1) ECT with regard to Tau Power and Article II(2)(a) of the BIT with regard to AES Corp.

309. Claimants substantiate their claim of breach of the FET standard based on the following key arguments:[258]

(i) that Kazakhstan failed to respect Claimants' legitimate expectations;

(ii) that Kazakhstan failed to provide a transparent, stable and predictable legal framework;

(iii) that Kazakhstan failed to prevent coercion and harassment of staff members of the AES Entities;

(iv) that Kazakhstan acted in bad faith;

(v) that the AES Entities were not afforded due process when litigating before the Kazakh courts and administrative authorities regarding the application of Kazakh competition laws and regarding the Kazakh Supreme Court's ruling that the Arbitration Clause in the Altai Agreement was invalid.

310. In addition, Claimants contend that, even if any of these individual circumstances do not in themselves amount to a breach of the FET standard, their accumulation, taken together, must lead to the conclusion that Kazakhstan failed to accord fair and equitable treatment to the AES Entities.[259]

311. According to Respondent, the Parties largely agree on the general standard under the FET principle, and the dispute between them only concerns the application of that standard to the circumstances of the present case. In particular, the dispute centers on whether, in all the circumstances, and in particular in the light of the conduct of the AES Entities, the measures adopted by the Respondent were legitimate and justified. In this regard, Respondent insists that its promulgation and application to the AES Entities of successive modifications to the competition law prior to 2009 were justified and legitimate in view of the overall circumstances including the state of the electricity market in Kazakhstan and the challenges it faced, as well as the effects thereon of the AES Entities practices.[260]

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258 CL Reply 30.03.2012, paras. 386 fol.

259 CL Reply 30.03.2012, para. 450.

260 RSP Rejoinder 25.06.2012, para. 374; RSP Suppl. Submission 27.08.2012, paras. 99 fol.

312. With regard to the various arguments relied upon by Claimants in support of their claim of breach of the FET standard, Respondent replies as follows:[261]

(i) There can be no breach of the FET standard based on an alleged frustration of asserted legitimate expectations to the extent that Claimants' alleged legitimate expectations were unfounded.

(ii) With regard to Claimants' claim as to a lack of transparent, stable and predictable legal framework, Claimants' case is reliant on supposed assurances of stability made through either the 1994 FIL or the Altai Agreement. As such, it is indistinguishable from, and adds nothing to, the Claimants case based on frustration of their supposed legitimate expectations based on those provisions. To the extent that that case fails, the claim relating to change of legislation must likewise fail.

However, even if Claimants' case with regard to the FET standard was not tied to their asserted legitimate expectations, it would equally fail. To the extent that Claimants' case is based on changes in legislation *per se*, i.e., is independent of Claimants' alleged legitimate expectations, Claimants failed to establish that the different iterations of the competition legislation in fact resulted in a lack of either transparency, stability or predictability in a fashion such as to breach the FET standard. To the extent that Claimants' case is based on a misapplication of Kazakhstan's own laws and thereby results in an inconsistent and arbitrary application, Claimants fail to establish that (i) Kazakh law was misapplied, and that (ii), if misapplied, it would have been misapplied in such a way as to amount to 'inconsistent and arbitrary' treatment under the FET standard. The mere misapplication of domestic law does not as such constitute, without more a breach of international law.

(iii) With regard to Claimants' claim of failure to prevent coercion and harassment of the AES Entities and their employees, Respondent says that it is unsubstantiated and not worthy of credit. Claimants have failed to articulate the consequences that a finding of breach in this regard would have on their claims for damages. Claimants have also failed to show that the investigative measures adopted by the competent Kazakh authorities were in any way improper, and were not properly undertaken in the context of criminal investigations into the conduct of the AES Entities.

(iv) With regard to Claimants' claim of breach of due process in relation to the application of competition law, Claimants failed to discuss the relevant standard for denial of justice under international law. Claimants' case is solely based on the proposition that the judgments of Kazakh courts "*were grossly inadequate, as they endorsed the unreasonable and arbitrary criteria applied by* [the] *regulator imposing significant penalties and damages on the AES Entities*" and that "*the judgments failed to analyse the key allegations and evidence raised by the AES Entities in the course of the proceedings, thereby failing to conduct an independent analysis and reasoning of the case and simply endorsed the content of the orders*". According to Respondent, these propositions are unsubstantiated and unproven. It is only insofar as it is shown that a particular interpretation was grossly and patently

[261] RSP Rejoinder, paras. 539 fol., 559 fol., 582 fol., 611 fol.

wrong and inconsistent with the terms of the relevant law that any complaint can be made.

(v) With regard to Claimants' claim of a lack of good faith in the application of competition law, Claimants' case boils down to its assertion, on the one hand, that the competition legislation was applied 'abusively', and on the other, that it was a breach of good faith for Respondent first to enter into the Altai Agreement and then to declare that "*the business activities envisaged in that agreement are in breach of national law*". As to the first point, Respondent's position is that Claimants failed to establish that the competition authorities acted in bad faith in adopting relevant measures in application of the competition legislation against the AES Entities. As to the second point, it overlaps with Claimants' alleged legitimate expectation that they would not be subject to regulation merely on the basis that they acquired generator assets. Thus, to the extent Claimants' alleged legitimate expectations are unfounded, their case based on bad faith fails too.

(vi) With regard to Claimants' claim in relation to the application of competition law on the theory of a cumulative or 'global' breach, Respondent doubts that Claimants' theory of 'global breach' of the FET standard is at all admissible. In any case, Respondent denies that its application is appropriate in the circumstances of the present case. Contrary to the approach taken by the tribunal in the *El Paso* case on which Claimants rely, in the present case, the various measures and conduct relied upon here by Claimants cannot be characterized as forming a 'composite act', and do not all contribute concurrently to the same loss claimed by Claimants. In addition, even if Claimants were to establish a breach of the FET standard as a consequence of combination of the application to the AES Entities of the competition legislation and the other matters relied upon, the cause of the alleged loss in respect of which compensation is claimed is a series of individual measures each of which constitutes the sole and unique cause of a certain potential loss. As such, even if the Tribunal were to conclude that, as an accumulation of a number of the various measures relied upon by Claimants, there had been a breach of the FET standard, this would not justify the award of the full amount of compensation claimed by Claimants by way of past loss of profits and incremental costs.

313. The Arbitral Tribunal finds as follows regarding the various sub-claims advanced by Claimants in support of its claim for breach of the FET standard, be it under the ECT or the BIT.

314. Different tribunals have explained the content of the FET standard in different words; and as a matter of legal principle the phrase must be interpreted in the context of each treaty in which it appears. In the present case, however, it is unnecessary to enter into detailed discussions of the meaning of FET, because all interpretations of the phrase set a significant threshold of impropriety. Thus, accepting for the sake of argument Claimants' formulation which asserts that a failure to provide a transparent, stable and predictable legal framework can amount to a breach of the FET standard, the crucial question remains whether any failure on the part of the Respondent is sufficiently serious to fall below the requisite standard of transparency, stability and predictability. As it was put by the tribunal in the case of AES Summit Generation Ltd v. Hungary (hereinafter "*AES v Hungary*")[262],

[262] ICSID Case No. ARB/07/22, Award, 23 September 2010, paragraph 9.3.40, Exh. RL-29.

"[i]*t is only when a State's acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety – to use the words of the Tecmed Tribunal – that the standard can be said to have been infringed*". In the present case the Tribunal finds, as is explained below, that neither the enactment nor the application of the changes in Kazakhstan's competition laws reach that threshold.

315. As concerns Claimants' claim based on a frustration of their asserted legitimate expectations, to the extent that the Arbitral Tribunal found that the Stabilization Clause of Article 6 of the 1994 FIL or the FET standard did not afford protection from the changes in the Kazakh competition legislation and that Claimants' asserted expectations with regard to 'market prices' and the use of a trading company were unfounded (see above paras. 286 fol.), the remaining basis for Claimants' claim is their alleged expectation that Kazakhstan would implement a rational competition law framework and would apply it properly to the AES Entities. As such, the basis for this claim is no different than Claimants' claim based on the standard of 'transparent, stable and predictable legal framework'.

316. As concerns Claimants' claim based on Kazakhstan's alleged failure to provide, with regard to competition legislation, for a transparent, stable and predictable legal framework, the Arbitral Tribunal is of the opinion that Claimants' claim is not established.

317. As mentioned above (paras. 270-279), the changes in competition legislation were part of a general effort to liberalize the electricity market and were thus aimed at benefiting the market and the market players, including the AES Entities and the public at large. With regard to the general nature of the Kazakh Original Competition Law, it is not alleged that the application of such law to Claimants was in breach of any treaty protection standard. The question is whether the subsequent changes made to the Kazakh Competition Law in 2001, 2006 and 2008 and thereto related regulations were of such a nature as to lack transparency, stability or predictability. In this regard, the Arbitral Tribunal considers that the nature of the changes made to the Kazakh competition legislation are not of a nature to breach the FET standard under Article 10(1) of the ECT or Article II(2)(a) of the BIT. The reasons are the following: (i) the frequency of the changes were reasonable in view of the evolution of the Kazakh economy, and in particular of the country's increasing needs in energy; (ii) the changes made to the legislation concerned specific elements, such as relevant thresholds to determine market shares, refinement of definitions of specific concepts, etc., and the general principles and approach of the competition legislation remained the same throughout the relevant time. In addition, the nature of the changes made and the approach adopted by Kazakhstan were similar to practices in other European countries and emerging economies.[263] With regard to the argument of 'predictability', it must be weighted in the light of the state of development of the Kazakh market, and in particular the electricity market, where Kazakhstan had to pass from a state monopolies regime to a more liberal competition system. It is understandable that such a change could not be made in a single step, and that regular adjustments to the competition legislation would be necessary. The Arbitral Tribunal does not find any element indicating that the changes made lacked transparency, stability or predictability under the FET standard.

263 R-Yarrow/Decker II, paras. 64-83.

318. As to the question whether the application of the competition legislation to the AES Entities may have been in breach of the FET Standard, the Arbitral Tribunal is of the opinion, as stated above (para. 307), that it is not its role to re-assess whether the Kazakh courts and administrative bodies correctly implemented Kazakh competition law. The key question is rather whether the result of such application, i.e. the effects of such application on the AES Entities may be such as to be in breach of the FET standard. In this regard, the main reason why Claimants consider such application to have been unfair and inequitable is because it was inconsistent with what Claimants' thought they were entitled to expect under the Altai Agreement. However, as explained above (paras. 286-297), the Arbitral Tribunal has already found that Claimants' asserted legitimate expectations as to stabilization, market prices and use of a trading company were unfounded. Thus, in as much as Claimants did not legitimately hold such expectations, their claim of breach of FET standard also fails.

319. As concerns Claimants' claim of coercion and harassment, the record clearly shows that investigations took place and that the AES Entities complained about the way some of their employees were treated by the local authorities in the context of these investigations. In particular, it does appear that there was a gap between what Claimants believed they were entitled to expect and to do, and the understanding of the Kazakh authorities about the way that their legislation had to be implemented. While it is possible that the manner in which these investigations were conducted may not have been exemplary, the Arbitral Tribunal considers that the factual elements on which Claimants rely are not sufficient to amount to coercion or harassment' or to give rise by themselves to a breach of the FET Standard for reason of 'coercion or harassment'.

320. As concerns Claimants' claim based on an application in bad faith of Kazakh competition legislation, the Arbitral Tribunal is of the opinion that this claim is also closely related to Claimants' asserted legitimate expectation. Claimants argue that it was a violation of their treaty rights for Kazakhstan to penalize Claimants for market practices which were contemplated in the Altai Agreement. However, this argument relies on the assumption that Claimants had a legitimate expectation of being able to engage in such market practices irrespective of changes in competition legislation. As was noted above (paras. 286-297), the Arbitral Tribunal has found that Claimants' had no such legitimate expectation protected by the ECT or the BIT. Accordingly, the mere fact that Claimants may have been disappointed that what they envisaged would happen under the Altai Agreement did not in fact happen, is not sufficient to establish 'bad faith' on the part of Respondent, let alone constitute a breach of the FET standard based on such an argument of bad faith.

321. As concerns Claimants' claim of lack of due process, it largely relies on the contention that the Kazakh courts misapplied Kazakh law and disregarded key arguments advanced by the AES Entities. With regard to the misapplication of Kazakh law, the Arbitral Tribunal refers to its position as stated above (paras. 305-307). As concerns the alleged disregard by the Kazakh courts of certain arguments advanced by Claimants, such disregard may be relevant under the FET Standard only if it was such as to amount to a substantial denial of justice. In view of the various proceedings conducted in Kazakhstan by the AES Entities, and the judgments and decisions rendered by the Kazakh courts and administrative bodies, which appear the Arbitral Tribunal to be properly motivated and detailed in their findings of facts and law, and considering that in certain instances the courts decided in favor of the AES Entities the Arbitral Tribunal does not find that the court proceedings and their findings amounted to a substantial denial of justice.

322. Another aspect of Claimants' claim for lack of due process concerns the ruling of the Supreme Court of Kazakhstan that the Arbitration Clause in the Altai Agreement was invalid (see above paras. 58-66, 63). According to Claimants, this ruling was 'patently incorrect' as the Supreme Court "*did not have, and should not have purported to assert, any jurisdiction to determine the issue*"[264]. For Claimants, the validity of the Arbitration Clause is subject to English law and the English judge has already confirmed the validity of such clause (see above para. 66). Thus, this ruling by the Supreme Court of Kazakhstan deprived Claimants of a neutral and legitimate forum to resolve claims concerning breaches of the Altai Agreement and allowed Kazakhstan to disregard its obligations under the Altai Agreement with impunity. Consequently, Claimants would actually be denied justice as concerns their contractual claims under the Altai Agreement. Such denial would constitute a breach of the FET Standard.[265]

323. The Arbitral Tribunal does not have jurisdiction to determine the validity of the Arbitration Clause in the Altai Agreement. Similarly, it is not its role to determine to what extent the Kazakh Supreme Court had jurisdiction to rule on that issue and whether its ruling was correct. The Arbitral Tribunal merely takes note of the fact that the courts at the place of arbitration, i.e., England, have confirmed the validity of the Arbitration Clause. Accordingly, the Arbitral Tribunal does not consider that Claimants have been deprived of any 'legitimate forum' to resolve claims for breaches of the Altai Agreement. In addition, Claimants have not established what damage they have actually suffered because of such ruling. Whether or not the ruling of the Kazakh Supreme Court may in future cause issues of enforcement in the situation in which Claimants pursue arbitration under the Altai Agreement and win, is a highly hypothetical question. Thus, Claimants may at this stage not base a claim for breach of FET on the mere fact that the Kazakh Supreme Court ruled to invalidate the Arbitration Clause in the Altai Agreement. If that ruling were to cause damage to Claimants in future, Claimants would be free to file a new claim.

324. In conclusion, the Arbitral Tribunal finds that Claimants' claims for breach of the FET Standard under Article 10(1) of the ECT and Article II(2)(a) of the BIT fail.

(iii) Claim for Unreasonable and Arbitrary Measures under Article 10(1) of the ECT and Article II(2)(b) of the BIT

325. With regard to the applicable standard for measuring a breach of the obligation to refrain from unreasonably or arbitrarily impairing investments, Claimants contend that this standard is not identical to the FET standard. Nevertheless, Claimants agree with Respondent that the obligation to refrain from impairing investments through unreasonable measures requires, as stated in the *Saluka Investments B.V. v. Czech Republic* (hereinafter "*Saluka*")[266] case, a "*showing that the State's conduct bears a reasonable relationship to some rational policy*" and that arbitrariness refers to action which is opposed to the rule of law rather than any particular rule of law and/or are not based on reason (see *Elettronica Sicula S.p.A.* (hereinafter "*ELSI*")[267] and *Siemens A.G. v. Argentine Republic* (hereinafter "*Siemens*").[268] However, according to Claimants, the question whether any particular

264 CL Memo 28.04.2011, para. 158.
265 CL Reply 30.03.2012, paras. 30 & 312.
266 Saluka Investments BV v. Czech Republic, Partial Award of 17 March 2006 (RL-22).
267 Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy), Judgment, I.C.J. Reports 1989 (RL-18)
268 ICSID Case No. ARB/02/8, Award, 6 February 2007.

measures were or not in compliance with national law is irrelevant, as compliance with national law does not suffice to demonstrate reasonableness or non-arbitrariness.[269]

326. According to Claimants, Kazakhstan has failed to comply with its obligations under the non-impairment provisions of Article 10(1) of the ECT and Article II(2)(b) of the BIT based mainly due to:[270]

(i) Its unreasonable and arbitrary application of competition laws to the AES Entities, in particular its imposition of competition law sanctions absent any demonstration of abusive behavior, its unjustified finding of illegal collusion, its imposition of price caps and fines set at arbitrary levels without any economic justification. According to Claimants, Kazakhstan's measures against the AES Entities based on Kazakh competition law bear no relationship to any legitimate policy objective of preventing anti-competitive conduct;

(ii) Its coercion and harassment of various AES employees for the purposes of forcing the AES Entities to adopt certain business practices;

(iii) Its determination that the activities of the AES Entities, which were fully contemplated under the Altai Agreement, are in breach of competition laws despite its prior approval of Claimants' investment.

327. According to Respondent, Claimants' claims are unfounded for the following main reasons:

(i) With regard to the claim based on an unreasonable and arbitrary application of competition laws to the AES Entities, Respondent contends that even if the standard under the FET and the obligation to refrain from unreasonable and arbitrary impairment are not identical, there is a substantial overlap between these two standards to the extent that Claimants allege a breach of the FET standard based on the unreasonableness and arbitrariness of measures taken in application of Kazakh competition law. Referring to the *ELSI* case, Respondent contends that in order to find a breach of the prohibition of unreasonable and arbitrary impairment, it would be necessary that the act at stake be characterized as "*a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety*". According to Respondent, Claimants' claim in this regard fail because it is based on the inappropriate assumption that Claimants could legitimately expect to be exempted from applicable competition legislation and Claimants unfounded view that the competition legislation was applied inappropriately by the Kazakh authorities.[271]

(ii) With regard to the claim based on alleged coercion and harassment, Respondent denies that its authorities have acted in any way improperly. In addition, even if Claimants were to establish that the measures were improper, the measures complained of against AES employees are not causative of any of the monetary losses claimed by Claimants.[272]

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269 CL Reply 30.03.2012, paras. 453 fol.
270 CL Reply 30.03.2012, para. 451.
271 RSP Rejoinder 25.06.2012, paras. 626 fol., and 640 fol.
272 RSP Rejoinder 25.06.2012, para. 625.

328. For the Arbitral Tribunal, Claimants' claim of unreasonable and arbitrary impairment is largely twofold: it relies (i) on the way the Kazakh authorities applied Kazakh competition law, and (ii) on the fact that the measures taken by Kazakhstan were inconsistent with alleged assurances made under the Altai Agreement upon which Claimants were entitled to rely.

329. *With regard to the first point*, Claimants' primary contentions are that Kazakhstan misapplied its own law, and that such misapplication was unreasonable as it was not based on a rational policy, and was arbitrary to the extent that it was particularly directed at the AES Entities. As mentioned above (paras. 305-307), it is not the role of the Arbitral Tribunal to re-assess whether the Kazakh authorities applied Kazakh law correctly. Thus, the only question remaining is whether the law as applied can be deemed in breach of any protection standard afforded under the treaty. However, in this regard, the Arbitral Tribunal considers that even if there may be, in theory, differences between the FET standard and the standard of prohibition of unreasonable and arbitrary impairment, the ways in which Claimants constructed their claims under these two standards actually overlap. Consequently, for the same reasons as mentioned above with regard to the FET standard (paras. 313-320), the Arbitral Tribunal does not consider that the measures taken by Kazakhstan were of an unreasonable or arbitrary character in the sense of Article 10(1) of the ECT and Article (II)(2)(b) of the BIT.

330. *With regard to the second point*, Claimants' claim is closely related to the question of Claimants' legitimate expectations. As the Arbitral Tribunal has already considered Claimants' alleged legitimate expectations arising out of the Altai Agreement to be unfounded (see above paras. 290 fol.), such expectations cannot lead to a breach of the non-impairment standard under Article 10(1) of the ECT and Article (II)(2)(b) of the BIT.

331. In conclusion, Claimants' claim for breach of the obligation to refrain from unreasonable and arbitrary impairment of investments under Article 10(1) of the ECT and Article (II)(2)(b) of the BIT fails.

(iv) Claim for Breach of the Umbrella Clauses under Article 10(1) of the ECT and Article II(2)(c) of the BIT

332. Claimants' claims under the Umbrella Clauses fall into two main categories: (i) claims based on breaches of the 1994 FIL and (ii) claims based on breaches of the Altai Agreement.[273]

333. *With regard to the 1994 FIL*, the Arbitral Tribunal accepts that as a matter of principle a breach of the 1994 FIL could trigger a treaty breach based on the Umbrella Clauses. However, it has already rejected the claim for breach of Article 6 and 8 of the 1994 FIL, (see paras. 298 fol.).

334. *With regard to an alleged breach of Article 13 of the 1994 FIL*, the Arbitral Tribunal has already explained that it did not consider Article 13 of the 1994 FIL to establish a standard different from the standard of protection afforded directly under the ECT and the BIT (see above para. 304). As the Arbitral Tribunal considered that there was no breach of

[273] CL Reply 30.03.2012, paras. 461 fol.

relevant standards under the ECT and/or the BIT, there can be no breach based on Article 13 of the 1994 FIL either.

335. Consequently, the Umbrella Clauses of the ECT and BIT cannot trigger a breach of treaty with regard to Articles 6, 8 or 13 of the 1994 FIL. In this regard, Claimants' claim fails.

336. With regard to the Altai Agreement, the Arbitral Tribunal considers Claimants' claim to be similarly unfounded. The Altai Agreement contains no express commitment not to amend the Kazakh competition law, and the Arbitral Tribunal finds no ground for implying any such commitment in the Altai Agreement. Accordingly, no question arises of an obligation on this matter that might be transformed into a treaty obligation under the Umbrella Clauses. This part of Claimants' case also fails.

(v) Claim for Breach of Full Protection and Security under Article 10(1) of the ECT and Article II(2)(a) of the BIT

337. According to Claimants, the standard of full protection and security ("FPS") includes adverse effects of regulatory measure or administrative actions on the investment, whereby the standard is then very close to the FET standard. Claimants claim that Kazakhstan failed to comply with this standard by allowing the Competition Agency to wrongfully apply to the AES Entities new legislation, by failing to follow Kazakh law and by breaching the provisions of the Altai Agreement. In particular, Claimants maintain that, while full protection and security clauses require protection from 'physical violence', it does not follow that these clauses cannot go beyond a mere safeguard from physical violence and embrace legal protection for an investor as well.[274]

338. Respondent contends that Claimants have failed to substantiate the alleged breaches of the FPS standard, and that their claim merely replicates what Claimants already claim under the FET standard, i.e., that no legislation other than the Original Competition Law should have been applied to the AES Entities, that the Kazakh authorities misapplied Kazakh law, and that this was in breach of the provisions of the Altai Agreement. In addition, Respondent's position is that the FPS standard does not impose any obligations in respect of legal stability and protects only physical security and protection.[275]

339. The Arbitral Tribunal is of the opinion that Claimants have failed to substantiate their claim under the FPS standard. In particular, Claimants have not demonstrated that such claim, which is based 'on adverse effects of regulatory measure or administrative actions on the investment', is actually different from the claim raised under the FET standard and the obligation to refrain from unreasonable and arbitrary impairment. The Arbitral Tribunal has already found that Claimants' claims under the FET standard and the obligation to refrain from unreasonable and arbitrary impairment cannot be sustained, and it sees no additional element in or aspect of Respondent's conduct that constitutes a breach of the FPS standard.

274 CL Memo 28.04.2011, paras. 361-363; CL Reply 30.03.2012, para. 485.
275 RSP Rejoinder 25.06.2012, paras. 697 fol.

5. Second Conclusion

340. **In conclusion, Claimants' claims relating to the changes in Kazakh competition legislation and its application to the AES Entities for the period from 2004 to 31 December 2008, and based on alleged breaches of**

(i) Articles 6, 8 and 13 of the 1994 FIL;

(ii) the FET standard under Article 10(1) of the ECT and Article II(2)(a) of the BIT;

(iii) the obligation to refrain from unreasonably and arbitrarily impairing investments under Article 10(1) of the ECT and Article II(2)(b) of the BIT;

(iv) the Umbrella Clauses contained in Article 10(1) of the ECT and Article II(2)(c) of the BIT; and

(v) the FPS standard under Article 10(1) of the ECT and Article II(2)(a) of the BIT,

are unfounded.

E. For the Period from 1 January 2009 to 31 December 2015

1. The Issues

341. In summary, Claimants claim that by enacting and implementing the 2009 Tariff Amendment, Kazakhstan reverted to a heavily-regulated market model with capped tariffs imposed by the state for all electricity generators. The situation was then further exacerbated by the enactment and implementation of the 2012 Electricity Law, which Claimants consider to be an arbitrary and irrational piece of legislation, which did not pursue any legitimate policy goals and which was clearly aimed at preventing Claimants from making any distributable return on or of their investment in their electricity generation activities in the EKO until 2016 at the earliest.[276]

342. Based thereon, Claimants raise two sets of claims: (i) one set of claims relating to alleged breaches of the 1994 FIL and (ii) one set of claims relating to alleged breaches of the ECT and BIT.

(i) *With regard to the 1994 FIL*, Claimants contend that Respondent's breach is threefold:[277]

- The application of the 2009 Tariff Amendment to the AES Entities is itself a breach of the Stabilization Clause, and the 2012 Electricity Law which enacts amendments to the 2009 Tariff Amendments, is therefore a continuing and additional breach of the Stabilization Clause.

- Such breach of the Stabilization Clause constitutes simultaneously a breach of Article 8 of the 1994 FIL.

- Kazakhstan breached Article 10(1) of the 1994 FIL by restricting Claimants' right to use income received from their investment at their discretion.

(ii) *With regard to the ECT and BIT*, Claimants raise five different claims:[278]

- A breach of the FET standard under Article 10(1) of the ECT and Article II(2)(a) of the BIT for failure to respect Claimants' legitimate expectations without a reasonable or proportionate public policy justification.

- A breach of the duty to encourage and create favourable and transparent conditions for investors under Article 10(1) of the ECT by preventing generators from having any discretion over their income or profit and by penalizing generators which do not have a signed Investment Obligation Agreement.

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276 CL Suppl. Subm. 6.08.2012, paras. 7-12; CL PHB on Liability 30.11.2012, paras. 157-159.
277 CL Suppl. Subm. 6.08.2012, paras. 73 fol.
278 CL Suppl. Subm. 6.08.2012, paras. 91 fol.

- A breach of the duty to refrain from adopting unreasonable or arbitrary measures under Article 10(1) of the ECT and Article II(2)(b) of the BIT by enacting the 2012 Electricity Law, which provides arbitrary and unreasonable measures.

- A breach of the Umbrella Clauses contained in Article 10(1) of the ECT and Article II(2)(c) of the BIT for failure by Kazakhstan to comply with its obligations under the Altai Agreement.

- A breach of the duty to guarantee the freedom of transfer of the Claimants' returns from their investments out of Kazakhstan without delay under Article 14 of the ECT and Article IV(1) of the BIT by enacting the 2012 Electricity Law which improperly prohibits Claimants to freely transfer their returns (as defined in the BIT and the ECT) out of Kazakhstan.

343. In Respondent's view, Claimants' claims are entirely unfounded for various reasons:[279]

(i) Claimants disregard the fact that the enactment of the 2009 Tariff Amendment and the 2012 Electricity Law were necessary to address an urgent need for investment and prevent a risk of critical shortage of electricity power. As such, they were motivated by pressing public interest concerns and the system put in place by the 2009 Tariff Amendments and the 2012 Electricity Law – i.e., the 'tariff in exchange for investment policy – was aimed at both incentivizing and ensuring sufficient investment.

(ii) Claimants' understanding of the 2009 Tariff Amendments is wrong and the claims raised with regard to the 2012 Electricity Law are therefore partly flawed.

(iii) In view of the above circumstances, the various claims raised by Claimants lack factual and/or legal basis, as Claimants have failed to meet the relevant requirements or thresholds.

344. In order to determine to what extent Claimants' claims with regard to the 2009 Tariff Amendment and 2012 Electricity Law may be justified, the Arbitral Tribunal considers it appropriate first to clarify the following preliminary issues, which appear to be relevant for a number of Claimants' claims:

- The specific mechanism set in place by the 2009 Tariff Amendment and the 2012 Electricity Law, the material differences (if any) between these two laws, and the relevance of any such differences to Claimants' claims.

- The policy goals underlying the 2009 Tariff Amendments and the 2012 Electricity Law.

345. Once these preliminary issues have been clarified, the Arbitral Tribunal will proceed to examine each head of claim raised by Claimants.

[279] RSP Suppl. Subm. 27.08.2012, paras. 4 fol., paras. 32.58; RSP PHB on Liability 30.11.2012, paras. 118 fol.

2. The Mechanism Set in Place by the 2009 Tariff Amendments and the 2012 Electricity Law

(i) The Parties' Positions

346. According to Claimants, the mechanism implemented under the 2009 Tariff Amendment is different from the mechanism under the 2012 Electricity Law:[280]

(i) The 2009 Tariff Amendment constituted an abrupt abandonment of a competitive market for the generation of electricity by subjecting all generators to government-imposed capped prices, which were lower than competitive market prices. In order to be able to sell at prices up to a maximum tariff, the 2009 Tariff Amendment required that generators enter into IOAs with MINT. However, the way in which a generator chose to use its own profit remained a matter entirely for that generator's discretion. In this regard, Claimants rely on Article 12-1(3) of the 2009 Tariff Amendment, which provides that "*Power-generating organisations shall independently determine their investment commitments*". As such, Claimants' position is that there was nothing in the 2009 Tariff Amendment which permitted MINT to make any demands of generators with respect to their level of investment. In particular, there was no provision in the 2009 Tariff Amendment establishing any correlation between the chargeable tariff and the amount of investment committed to under the IOA, and there was no provision permitting MINT to refuse to sign an IOA, the latter's role being limited to "*monitoring performance*" under the IOA. In other words, under the 2009 Tariff Amendment, Claimants were entitled both to use their profits as they wished and to repatriate funds by way of both return of and return on capital. Claimants maintain that their understanding of the 2009 Tariff Amendment is further supported by the fact that in 2009, MINT signed IOAs for the AES generators (see above para. 53) in full knowledge that there was no correlation between the amount that those AES generators planned to invest and the tariff that they proposed to charge. Thus, both the text of the 2009 Tariff Amendment and the practice of Kazakhstan's own officials would confirm Claimants' case.

(ii) The correlation between the chargeable tariff and the amount of investment committed to under the IOA, and also the right of MINT to refuse to enter into an IOA were novelties introduced by the 2012 Electricity Law:

- With regard to the correlation, under the 2012 Electricity Law, the tariff that a generator is entitled to charge for electricity is fixed at an amount that would cover only the generator's generating costs, planned depreciation, and the cost of funding the investments it has committed to make pursuant to its IOAs. Generators are then expected to reinvest into their facilities all of the profits they make from electricity sales, including a sum representing the cash equivalent of depreciation. Thus, generators are deprived of the use of any of their operating cash flow. This novelty was introduced by modifying the wording of Article 12-1(3) of the 2009 Tariff Amendments as follows: "*Power-generating organisations shall independently determine their*

[280] CL Suppl. Subm. 6.08.2012, paras. 16 fol.; CL PHB on Liability 30.11.2012, paras. 182 fol.; CL PHB on Quantum 5.04.2013, paras. 6-9.

investment commitments ***subject to their planned depreciation charges and the level of net income gained through the sale of electric power at prices not exceeding capped tariffs***" (emphasis as added by Claimants). Under such provision, all net income earned must be reinvested, that is, investors are not entitled to retain any profits whatsoever, whether as working cash in the business or by way of a distribution or otherwise. While Kazakhstan argues that such profits will be recouped by the generators post-2015 in the form of increased returns and more valuable assets, there is simply no guarantee whatsoever that this will happen.

- With regard to MINT's right to refuse to enter into a IOA, while the 2012 Electricity Law introduced such a right for MINT, it provides no guidance, no limitations and no suggestions as to what might constitute justified grounds for a refusal by MINT to sign an IOA.

- Another novelty of the 2012 Electricity Law concerns generators which have not signed any IOA. Under Article 25(5) of the 2012 Electricity Law, such generators will be entitled to charge only a tariff that covers its costs of generation and that does not include any margin to compensate for depreciation, or to provide operating cash flow or a return on capital. In other words, a generator without an IOA would be unable to recover even a return of capital through depreciation, much less a return on capital by generating and repatriating profit from its activities.

- If the Arbitral Tribunal was to determine that these 'new' requirements were in fact already part of the 2009 Tariff Amendment, then Claimants' position would be that the breaches of Claimants' rights would also date back to 2009.[281]

(iii) The existing regime of capped tariffs introduced under the 2009 Tariff Amendment will continue to apply until the end of 2015.

(iv) According to Claimants, it is undisputed that the requirement of forced reinvestment coupled with the prohibition on payment of dividends prevents Claimants from making any returns of or on any un-depreciated capital invested by them prior to 31 December 2008. In other words, any un-depreciated capital invested by the AES Entities prior to 1 January 2009 is lost and not recoverable between 2009-2015. It is also undisputed that Kazakhstan has in effect prohibited Claimants from earning return *on* the capital they are forced to invest in the seven year period 2009-2015, except in very specific circumstances where Claimants are able to generate electricity below certain costs and the market demand is high enough to guarantee a certain level of sales. Moreover, Claimants will only be able to earn a return *of* capital invested between 2009 and 2015 if they are able to meet their revenue and cost targets. In other words, if they are unable to sell sufficient quantities of electricity at the price needed in order to meet the cost of their forced investments, they will not even earn a return of the full amount of the forced investment and they will operate at a net loss. This is the case regardless of whether

[281] Paris Hearing Day 1 p. 19 l. 22 – p. 20 l. 1.

they have IOAs in place or not. If they do not have IOAs in place, they will be forced to operate at a net loss.[282]

347. According to Respondent, Claimants' understanding of the relationship between the 2009 Tariff Amendment and the 2012 Electricity Law is mistaken. The 'tariff in exchange for investment' policy was already contemplated by the 2009 Tariff Amendment, and the 2012 Electricity Law only aimed to ensure that this policy was implemented correctly. In other words, the 2012 Electricity Law constitutes a tightening up of mechanisms ensuring compliance with the same underlying policy of 'tariff in exchange of investment' provided for in the 2009 Tariff Amendment.[283]

(i) The system put in place by the 2009 Tariff Amendment permitted the generators to charge more than the then-existing tariffs under the competition legislation provided that they had an IOA in place. Thus, any increase in prices charged up to the maximum tariff set by the 2009 Tariff Amendment for a relevant group of generators had to be subject to such IOA with MINT and such approval was only to be given where the proposed increase in prices was matched by a corresponding increase in the level of investment. Generators could not charge prices up to the maximum tariff without adjusting their investment accordingly.

(ii) In this context, Claimants' interpretation of the 2009 Tariff Amendment makes no sense and is not supported by any legal expertise or citation of Kazakh law.

- If Claimants' view that generators remained free under the 2009 Tariff Amendment to determine the level of investment was true, than the very purpose of the IOAs would have become meaningless as there would have been no incentive for any generator to do any more than make merely token investments whilst charging the maximum tariff. Each of the IOA entered into by the MINT contained a provision by which the price at which power was to be sold was fixed, and such provision indicates clearly that it was envisaged from the very beginning that there was a link between the chargeable tariff and the level of investment that the generator was willing to commit to. Further, Article 12-1(4) of the 2009 Tariff Amendment provided that a generator could apply for permission to charge higher tariffs, where "*investment obligations of a power-generating organization cannot be performed using funds received from selling electricity at tariffs not exceeding maximum capped rates*". Respondent submitted that Claimants were well aware of the intended mechanism of the 2009 Tariff Amendment and in particular of the underlying principle of 'tariff in exchange for investment'.

- The authority of MINT to conclude an IOA necessarily includes the power to refuse such to conclude such an IOA, for example where the link between the chargeable tariff and the level of investment is not respected. The purpose of the additional wording in the 2012 Electricity Law was to increase the accountability of MINT in instances where it refused to sign an IOA; it did not constitute the basis for MINT's right to refuse an IOA.

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282 CL PHB on Quantum 5.04.2013, paras. 12-13 and references quoted therein; Paris Hearing Day 1 p. 19 l. 17 – p. 21 l. 1; p. 61 l. 8 - p. 62 l. 3.

283 RSP Suppl. Subm. 27.08.2012, paras. 4 fol., 32 fol.; RSP PHB on Liability 30.11.2012, 108 fol.

(iii) The only novelty introduced by the 2012 Electricity Law is Article 25(5), which was intended to ensure compliance by generators with their pre-existing obligation to enter into an IOA. Such obligation was contemplated by the 2009 Tariff Amendment; and Article 25(5) introduced an additional incentive to fulfill the obligation, by punishing non-compliance with the law.

(iv) Consequently, under the 'tariff in exchange of investment' policy contemplated by both the 2009 Tariff Amendment and the 2012 Electricity Law, Claimants were bound to charge according to the maximum tariff and to reinvest all revenue above cost, unless they can show that said legislation was irrational and arbitrary. In any case, however, Claimants would still have been regulated under Kazakh competition legislation and, as dominant entities, would have been subject to regulated tariffs calculated on a cost-plus basis: Claimants would not have been free to set tariffs at whatever levels they wished.

348. As concerns the specific functioning of the 'tariff in exchange for investment' policy, Respondent acknowledges that the Kazakh Government intended that all "profits", (defined as revenue above costs) be reinvested in infrastructure. Thus, while the generators were permitted to retain profits, they had to reinvest those profits. These profits were therefore not taken away from the generators: generators were simply required to "*lock in*" those profits in exchange for receiving the substantial additional capital injection funded by the consumers who were paying increased prices at the maximum capped tariff. In this regard, the cost of depreciation can be charged as a cost, although the equivalent sum has to be reinvested. Thus, depreciation costs can be recovered and retained, although they will be locked in as (re-)investments in infrastructure. Exceptions may be applied to companies which may require less investment or which have already completed all the necessary investment prior to 2015. With regard to generators which do not enter into an IOA with MINT, they may not treat depreciation as a cost, but must reinvest all of the income generated by the sales of electricity.[284]

(ii) The Arbitral Tribunal's Assessment

349. It emerges from both parties' submissions that it is essentially undisputed that the 'tariff in exchange for investment' scheme required all profits, defined as net revenue, to be reinvested into the generator. While depreciation would be accounted for as a cost (provided the generator had signed an IOA), the equivalent sum was also to be reinvested. Thus, generators benefitting from an IOA had to reinvest all operating cash. Generators without an IOA in place were not even allowed to account for depreciation, and were thus *de facto* operating at a loss.

350. What is disputed is whether the 'tariff in exchange for investment' scheme already existed under the 2009 Tariff Amendment, or whether it was introduced only by the 2012 Electricity Law. This question appears to be relevant in the following two ways:

(i) According to Respondent, some of the claims raised by Claimants in relation to the 'tariff in exchange for investment' scheme in their Supplementary Submission of 6 August 2012 are based only on the 2012 Electricity Law. In this regard, Respondent contends that these claims may therefore only be examined with regard

[284] RSP PHB on Liability 30.11.2012, paras. 108-117; RSP PHB on Quantum 5.04.2013, paras. 37-47; London Hearing Day 4 p. 166 l. 11-14; Paris Hearing Day 1 p. 77 l. 25 – p. 78 l. 10; p. 161 l. 12 – p. 163 l. 9.

to the 2012 Electricity Law, and it is too late to raise them as claims with regard to the 2009 Tariff Amendment. In other words, where the basis of Claimants' complaint arises out of the 2009 Tariff Amendment, then Claimants' claims should be rejected as untimely.

(ii) It appears that the AES Entities continued to repatriate profits during the years 2009-2011, and Respondent objects to this repatriation as being in breach of the 'tariff in exchange for investment' scheme. On the other hand, Claimants argue that such repatriation was legitimate as the 2009 Tariff Amendment did not yet establish a correlation between the level of investment made and the level of tariff chargeable.[285] This issue, which may be relevant with regard to quantum, depends on whether the duty to reinvest all profits was already in effect under the 2009 Tariff Amendment or came into effect only with the 2012 Electricity Law.

351. Looking at the provisions of the 2009 Tariff Amendment, in the view of the Tribunal it appears quite clear that there was a link between investment and tariff, although the specific details of that link were not clearly spelled out. It was also quite clear that the generators could not use additional revenues however they deemed fit. Letters from MINT dating back to August 2010 are in the record in which the MINT requested a higher level of investment commitment for the 2010-2011 IAO and complained that the AES Entities did not make sufficient investment under the 2009-2010 IAO.[286] This confirms that the 'tariff in exchange for investment' scheme was already contemplated by the 2009 Tariff Amendment, although it may have been refined by the 2012 Electricity Law.

352. However, the Arbitral Tribunal also considers that the 2009 Tariff Amendment was not specific with regard to core aspects of the 'tariff in exchange for investment' scheme, such as the manner according to which investors had to fix the level of required investment and the reasons for refusal by MINT of any IOA. As such, the Arbitral Tribunal finds that it would not be appropriate to consider Claimants' claims as belated just because they are actually based on features already present in the 2009 Tariff Amendment. In view of the lack of specificity of the 2009 Tariff Amendment and the ongoing talks with MINT concerning the conclusion of an IOA, it was reasonable for Claimants to first seek to clarify the situation with MINT.

353. Therefore, the Arbitral Tribunal considers that notwithstanding the fact that the 'tariff in exchange for investment' scheme was already contemplated by the 2009 Tariff Amendment, Claimants' claims relating to such scheme and raised primarily with regard to the 2012 Electricity Law are admissible and should be considered as based on both the 2009 Tariff Amendment and the 2012 Electricity Law.

(iii) Conclusion

354. Without at this stage deciding upon the legal consequences of this characterization, the Arbitral Tribunal considers that the 'tariff in exchange for investment' scheme in effect obliged generators to reinvest all operating cash flow and thereby prevented those generators from being able to realize and make use of any profits from 1 January 2009 until

[285] CL PHB on Liability 30.11.2012, para. 198; RSP Rejoinder 25.06.2012, paras. 782-279; RSP PHB on Quantum 5.04.2013, para. 40.

[286] BJ-17 and BJ-18.

31 December 2015. To the extent that generators could not realize any profits, they were also prevented from distributing and repatriating such profits.

3. The Policy Goals underlying the 2009 Tariff Amendments and the 2012 Electricity Law

(i) The Parties' Positions

355. According to Claimants, there are no rational policy grounds on which Kazakhstan can rely in order to justify its actions under the 2009 Tariff Amendment and/or the 2012 Electricity Law. In particular, the 'tariff in exchange for investment' scheme amounts to a disincentive to investors, and furthermore it encourages imprudent investment to the detriment of consumers. According to Claimants, "*there can be no policy justifications for prohibiting private generation companies from having any free cash flow or from distributing their income in the manner of their own choosing just because, in the view of the State, those private companies are earning so called 'super-profits'* [reference omitted] *and not sufficiently reinvesting in their facilities*".[287] Requiring generators to reinvest all of their profits and operating cash with no margins for any returns would lead only to wasteful and inefficient investment at the expense of the consumers.

356. In addition, Claimants submit that even if the Tribunal were to find that the 2009 Tariff Amendment and 2012 Electricity Law pursued legitimate public interests (which Claimants deny), those laws did not provide a reasonable, non-arbitrary and proportionate way of attaining those interests. In this regard, Claimants argue as follows:[288]

(i) The prohibition on free transfers of capital, in particular the prohibition of payment of dividends and repatriation of profits by foreign investors plainly cannot be a legitimate policy goal. The right to pay dividends is a fundamental right of a foreign investor and cannot be undermined by a public interest consideration, absent some provision in the treaty providing a carve-out for such a prohibition. No carve-out however exists in the either the ECT or the BIT.

(ii) The aim of increasing capacity does not justify heavy regulation or forced reinvestment. Kazakhstan's excessive regulation from 2001 to 2008 is exactly what caused the problem that Kazakhstan sought to address with the 2009/2012 changes to the Electricity Law. But blanket regulation is not the answer to investment problems in the electricity sector. On the contrary, the policies put into place by Kazakhstan under the 'tariff in exchange for investment' clearly discourage investors from investing in the electricity sector in Kazakhstan. Kazakhstan's approach is based on a confusion between the value of the fixed assets of a business and the value of the business itself. Increased investment will not necessarily result in a benefit to the investor, as it may lead to overinvestment and cause a system overload or breakdown, not to mention overcapacity which will impact the level of prices that generators will be able to charge.

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287 CL Suppl. Subm. 6.08.2012, paras. 42 fol., 47.

288 CL PHB on Liability 30.11.2012, para. 161, paras. 162 fol.

(iii) The changes were unreasonable, disproportionate and arbitrary. Kazakhstan's position is that its measures were reasonable because the increased tariffs and thus the investments were funded by the consumers, i.e. the State was in effect raising 'free funds' from consumers for investment in infrastructure by the generators. However, simply being entitled to charge a tariff up to a certain level is no guarantee that the generator will be able to realize that price. In addition, it is not credible for Kazakhstan to suggest that a seven-year prohibition on the payment of dividends is a proportionate response to supposed underinvestment in its electricity sector.

357. According to Respondent, the policy goals behind the 'tariff in exchange for investment' scheme, as set out in the 2009 Tariff Amendment, included the "*maintenance of security of electricity supply to the consumers for the long-term period, creation of conditions to attract investment for reconstruction and development of the power potential of the country and creation of the power market*", as well as the resolution of unsettled issues such as the "*low competition between the producers of electrical energy due to insufficient development of networks and limited transmission capacity of power lines between the areas in Kazakhstan*". As such, at the most fundamental level, the urgent need for the 'tariff in exchange for investment' scheme stems from the forecast that Kazakhstan would face a critical shortage of electrical power in the near future if the status quo were maintained. According to Respondent, there is no dispute that Kazakhstan was facing an imminent crisis which required government action, because the electricity market was generally unresponsive to market signals.[289]

358. With regard to Claimants' challenges to the rationality of Respondent's policy of 'tariff in exchange for investment', whilst Respondent acknowledges that the locking-in of profits may seem to be formally inconsistent with the entitlement to repatriate profits, any such entitlement must be seen against the urgent need for investment. Once the pressing need for investment is acknowledged, there can be no objection to the measures taken by Respondent. According to Respondent, the "*fundamental point at the end of the day is that none of the depreciation costs or 'profits' is taken from the generators* [but from the consumers] *and there is a definite end-date to the investment programme in 2015, beyond which the requirement to reinvest found in the 2009 Tariff Amendment and 2012 Electricity Law will cease*".[290]

359. In conclusion, Respondent contends that in the absence of stabilization, the AES Entities are entitled to charge only such tariffs as are permitted by the prevailing legislation, and not market rates, and that Claimants are seeking to escape the regulated tariffs by arguing that the laws themselves were irrational. The burden of proving that domestic legislation is in and of itself irrational, arbitrary or unreasonable is extremely high and Claimants cannot meet this burden considering that (i) Kazakhstan was facing a serious shortage of electricity in 2009, there was a need for the Government to take action on this front because electricity generation markets appear to be impervious to market signals; (iii) there was a clear link between the 'tariff in exchange for investment' programme and the attempted solution for the impending shortage of electricity; and (iv) there was general agreement by the industry to the 'tariff in exchange for investment' programme. [291]

289 RSP PHB on Liability 30.11.2012, paras. 118-123.
290 RSP PHB on Liability 30.11.2012, para. 131 fol., 132.
291 RSP PHB on Liability 30.11.2012, para. 138 and 155.

(ii) The Arbitral Tribunal's Assessment

360. It is essentially undisputed between the Parties that the policy goal underlying the 'tariff in exchange for investment' scheme was to increase investments in the production and transmission of electricity in order to avoid a shortfall in electric power. What is disputed, however, is whether the specific measures designed by Kazakhstan to achieve this goal were reasonable and proportionate, and the extent to which the answer to this question may impact on Claimants' claims.

361. The Arbitral Tribunal considers that the underlying policy goal of avoiding a shortage in electricity supply by incentivizing increased investments in the electricity sector is *per se* a legitimate policy goal, which may justify the taking of certain measures, including the amendment of applicable laws and regulations and imposing restrictions with regard to prices or other factors which may affect competition in general.

362. Thus, Claimants claim that the 'tariff in exchange for investment' scheme was based on irrational policy grounds is unfounded. However, the fact that the underlying policy goal itself was legitimate and rational does not justify the taking of any action whatsoever in pursuit of that goal. The key question is therefore whether the way in which Kazakhstan planned to realize this goal, i.e. the actual measures it took, was in line with applicable treaty protection standards or whether the measures may have gone too far. This is not a question that can or should be addressed in general terms. It must be analyzed in the context of the relevant provisions invoked by Claimants and in the light of the range of alternative means of securing the necessary investment that were in practice available to the government and were feasible.

(iii) Conclusion

363. The Arbitral Tribunal considers that the general policy goal underlying the 'tariff in exchange for investment' scheme was legitimate and rational, but that the key question is whether the measures taken by Kazakhstan to achieve that goal were adequate and proportional, or whether they may have breached certain standards of protection afforded under the 1994 FIL, the BIT or the ECT.

4. Impact on and Analysis of Claimants' Claims

4.1 Breach of Articles 6 and 8 of the 1994 FIL

(i) The Parties' Positions

364. According to Claimants, the application of both the 2009 Tariff Amendment and the 2012 Electricity Law to the AES Entities constitutes a breach of the Stabilization Clause. Claimants advance the following reasoning:[292]

(i) To the extent that the 2009 Tariff Amendment was part of a series of changes to the regulatory framework introduced by Kazakhstan since 2001, the application of such a new regulatory framework – including the 2009 Tariff Amendment – is itself a

[292] CL Suppl. Subm. 6.08.2012, paras. 75-76.

breach of the Stabilization Clause. The 2012 Electricity Law – which enacts amendments to the 2009 Electricity Law – is therefore a continuing and additional breach of the Stabilization Clause.

(ii) As to the requirement imposed by the 'tariff in exchange for investment' policy on the AES Entities that they reinvest into their facilities all operating cash from electricity sales, thereby preventing Claimants from earning any return of or on their investments in Kazakhstan, such a new requirement undoubtedly had an adverse effect on the Claimants' investment, and its application to the AES Entities therefore constitutes a breach of the Stabilization Clause.

(iii) The breach of the Stabilization Clause of Article 6 of the 1994 FIL also constitutes a breach of Article 8 of the FIL.

365. According to Respondent, Claimants' claim based on the 1994 FIL is entirely groundless for the following main reasons:[293]

(i) The claim that the 2009 Tariff Amendment breached the 1994 FIL was first raised by Claimants in their Supplementary Submission. This claim is inconsistent with the fact that the AES Entities did enter into an IOA in 2009 under which they undertook investment obligations and at no point did they assert that there were not subject to the 2009 Tariff Amendment. Thus, Claimants' claim regarding a breach of Article 6 of the 1994 FIL is inconsistent with Claimants' previous assertions and behavior.

(ii) According to *Rumeli*, the mere fact that the 1994 FIL contained standards of protection paralleling those under international investment treaties in no sense means that a breach of the 1994 FIL constitutes *ipso facto* a breach of international law. Rather, where the content of the substantive protections contained in the 1994 FIL relied upon by the Claimants are replicated by the standards of protection in the applicable BIT, there is no need to assess separately whether there has been a breach of the 1994 FIL.

(iii) Claimants are not entitled to stabilization and there has been no breach of Articles 6(1) or 8 of the 1994 FIL as a consequence of adoption of the 2012 Electricity Law, considering that:

a. The 1994 FIL was repealed and Claimants are not entitled to rely on any of its provisions, be it Article 6, 8 or 10(1);

b. With regard to Article 6 of the 1994 FIL:

- Even if still applicable, Article 6(1) of the 1994 FIL is of 'programmatic character only' and only constitutes a *'renvoi'* provision, without providing direct protection;[294]

- Article 6(1) of the 1994 FIL only provides stabilization "*unless the contract stipulates otherwise*" and Article 10.1.3 of the Altai Agreement

[293] RSP Suppl. Subm. 27.08.2012, para 104 fol.

[294] R-Butler III, paras.. 9, 11-13; see also R-Butler II, paras.. 41, 49 and 52.

constitutes such 'other stipulation' thereby providing a carve-out from stabilization;[295]

- Article 6(4) of the relevant version of the 1994 FIL (i.e. the version in force on 28 July 1997) excludes "*matters of State regulation*", which include the 2012 Electricity Law and the 2009 Tariff Amendment.[296] Thus, these laws cannot be covered by any stabilization.

c. With regard to Article 8 of the 1994 FIL:

- To the extent that Claimants are not stabilized, their claim under Article 8 of the 1994 FIL also fails.

- In any event, as of 27 August 2012, Kazakhstan had not taken any action in application of the 2012 Electricity Law, so that there are as yet no actions or decisions of the relevant agencies which might engage the application of Article 8 of the 1994 FIL.

d. With regard to Article 10(1) of the 1994 FIL:

- The right to use income derived from investment activities is a qualified right and is only applicable to "reinvestment", "acquisition of goods" or for "other purposes not prohibited by the legislation of the Republic of Kazakhstan". Under the 2009 Tariff Amendment and the 2012 Electricity Law any income derived from the generation of electricity was to be reinvested, and its use for any other purpose was not permitted. Thus, the income derived therefrom is subject to the limitation of Article 10(1) of the 1994 FIL and Claimants have no right to receive such income.

(ii) The Arbitral Tribunal's Assessment

366. The Arbitral Tribunal has already ruled (see above paras. 252 fol.) that, although the FIL was repealed, Claimants remained entitled to rely thereon and initiate ICSID arbitration concerning investments made prior to its repeal, and that the stabilization guarantee provided for under Article 6 of the 1994 FIL would continue to produce effects for the duration indicated therein.

367. As to the question whether the implementation of the 'tariff in exchange for investment' scheme may be seen as breaching the stabilization guarantee, the key question is whether such scheme 'adversely affected' Claimants' investments, as compared to their situation under the 1995 Electricity Law (see above para. 257). Claimants have only pleaded the existence of adverse effects compared to the treatment they consider they were entitled to expect under the Original Competition Law in connection with the Altai Agreement. They have failed to sufficiently establish and substantiate the existence of adverse effects compared to regime applicable to them under the 1995 Electricity Law.

295 R-Butler III, para. 12; R-Butler II, paras. 31, 46; R-Didenko, paras. 21-23.

296 R-Butler III, para. 16; see also R-Butler I, para. 44 and R-Butler II, paras. 23-24.

Therefore, the Arbitral Tribunal considers that their claim of breach of the stabilization guarantee is not sufficiently established.

368. As concerns the substantial protection standards afforded under Articles 8 and 13 of the 1994 FIL, as mentioned above (paras. 302 and 304), the Arbitral Tribunal considers such standards to be covered by the protection standards afforded under the BIT and the ECT. Therefore, the Arbitral Tribunal does not see the need to separately examine a breach of these provisions.

(iii) Conclusion

369. Claimants have failed to demonstrate that the implementation of the 'tariff in exchange for investment' scheme adversely affected Claimants' investment compared to the regime applicable to them under the 1995 Electricity Law and their claim based on Article 6 of the 1994 FIL is therefore not sufficiently established.

370. With regard to claims based on Articles 8 and 13 of the 1994 FIL, it is not necessary to decide as the substance of these claims fall for consideration in the context the protection standards afforded under the BIT and the ECT.

4.2 Breach of the Umbrella Clause under Article 10(1) of the ECT and Article II(2)(c) of the BIT

(i) The Parties' Positions

371. According to Claimants, Respondent breached the Umbrella Clauses under Article 10(1) of the ECT and Article II(2)(c) of the BIT, by implementing the 'tariff in exchange for investment' scheme and thereby failing to comply with its obligations under the Altai Agreement,[297] including by:

(i) preventing the Claimants from exercising the right to retain, as their own profits, all amounts remaining after payment of all and any Costs (Clause 5.2.1);

(ii) failing to guarantee the repatriation of capital, loans, dividends, interest and other income from the plants (Clause 5.5.1);

(iii) failing to indemnify the Claimants for any losses resulting from any Change of Law which has a material adverse effect on the Claimants' investment or their enjoyment of their rights under the Altai Agreement (Clause 10.1.3);

(iv) failing to refrain from taking any action that would have a material adverse effect on the Claimants' investments or their enjoyment of their rights under the Altai Agreement (Clause 13.1); and

(v) continuing to prevent the Claimants from exercising the right to switch to market rates for selling energy in the competitive market (Clause 2.8).

[297] CL Suppl. Subm. 6.08.2012, paras. 100 fol.

372. According to Respondent, Claimants claim for breach of the Umbrella Clause is unfounded to the extent that the enactment of the 2012 Electricity Law did not breach any of the clauses of the Altai Agreement invoked by Claimants:[298]

(i) With regard to Clause 5.2.1 of the Altai Agreement, it confers a right to retain profits, whereby 'profits' are defined under this Clause as "*all amounts remaining after the payment of all and any Costs*" and the term 'Costs' is defined in Schedule 1 of the Altai Agreement, as including "*all premiums, reasonable fees, reasonable costs and expenses whatsoever reasonable incurred*". Respondent submits that such right is not affected by the 2012 Electricity Law. During the limited period during which the 'tariff in exchange for investment' policy is applicable and during which generators are required to invest all net revenue received, the AES Entities make no "profit" within the meaning of Clause 5.2.1 of the Altai Agreement. As such, there is no violation of the right to retain the "*amount remaining after the payment of all and any Costs*".

(ii) With regard to Clause 5.5.1 of the Altai Agreement, it only refers to the freedom to repatriate "capital, loans, dividends, interest and other income" and does not refer to "returns". The 2012 Electricity Law does not restrict such right, insofar as the 'tariff in exchange for investment' is based on an IAO agreed upon with the generator. Thus, the generator agrees to reinvest the capital, and the 2012 Electricity Law therefore does not restrict the right of free repatriation of "*capital, loans, dividends, interest and other income*".

(iii) With regard to Clause 10.1.3 of the Altai Agreement, the right to an indemnity provided therein is limited and inapplicable in respect of the 2012 Electricity Law and the 2009 Tariff Amendment, to the extent that such legislation falls under the carve-out of "*ordinary, reasonable and proper enforcement or application of any rights in accordance with the provisions of any contracts and Kazakhstan Legislation*".

(iv) With regard to Clause 2.8 of the Altai Agreement, Respondent submits that Claimants' interpretation of this clause is erroneous and that no right to charge market prices derives from that provision.

(ii) The Arbitral Tribunal's Assessment

373. The factual basis for Claimants' claim of breach of the Umbrella Clauses under Article 10(1) of the ECT and Article II(2)(c) of the BIT is an alleged breach of the Altai Agreement.

374. For the same reasons as set out above with regard to the Original Claims (para. 291), the Arbitral Tribunal considers that it is not its role to determine whether or not the Altai Agreement was breached as a matter of contract law. The Arbitral Tribunal is concerned only with the question whether conduct incompatible with the Altai Agreement is forbidden by the Umbrella Clauses and whether the conduct of Respondent in this case accordingly breaches its obligations under the Umbrella Clauses. The Tribunal considers that different interpretations of the Altai Agreement offered by the Parties reflect the fact

[298] RSP Suppl. Subm. 27.08.2012, paras. 216 fol.

that the text of the Altai Agreement itself does not expressly and unequivocally prohibit the implementation of measures under the 'tariff in exchange for investment' scheme. The question is whether the Altai Agreement contains or gives rise to an implied 'obligation' in this respect that is elevated to a treaty obligation by virtue of the Umbrella Clauses. That question is, in the Arbitral Tribunal's view, essentially the same as the question whether there was a legitimate expectation that Respondent's right to adopt general measures in the public interest would not be exercised in certain ways, including by the adoption of the 'tariff in exchange for investment' scheme. Certainly, such an obligation within the meaning of the Umbrella Clauses could be no wider in its scope than a legitimate expectation arising from the Altai Agreement and covered by the FET clauses. Accordingly, the Tribunal has decided that the part of Claimants' case should be considered in the context of the FET standard and need not be considered separately in the context of the Umbrella Clauses.

(iii) Conclusion

375. The Tribunal concludes that it is not necessary to separately decide upon Claimants' claim that the 'tariff in exchange for investment' scheme is in breach of the Umbrella Clauses under Article 10(1) of the ECT and Article II(2)(c) of the BIT. The substance of that element of the claim properly falls for consideration in the context of the FET standard and will therefore be addressed jointly with the FET standard.

4.3 Breach of the Duty to Encourage and Create Favourable and Transparent Conditions for Investors under Article 10(1) of the ECT

(i) The Parties' Positions

376. According to Claimants, by introducing the 'tariff in exchange for investment' policy, Respondent breached its duty to encourage and create favorable and transparent conditions for investors under Article 10(1) of the ECT for the following reasons:[299]

(i) Respondent removed any discretion from a generator over its own pricing and investment policies and such discretion is vested in its entirety in MINT, who has the power to approve or refuse IOAs depending on the correlation between the chargeable prices and the level of investment suggested by the generator.

(ii) Not only does such policy discourage investment, MINT's opaque right to refuse to sign an IOA can also not be considered to create transparent conditions for investors, or otherwise encourage or create favorable conditions for investors.

(iii) In addition, the consequence of a refusal by MINT to enter into an IOA as contemplated in Article 25(5) of the 2012 Electricity Law is that any concerned generator may only charge tariffs covering its costs of generation, without taking into account any depreciation of capital or profit. Thus, such generator will actually operate at a loss.

377. According to Respondent, to the extent Claimants rely solely on the ECT, this claim can be made solely by Tau Power, and since no such claim has been previously raised as

[299] CL Supp. Subm. 6.08.2012, paras. 94 fol.

part of Claimants' Original Claims, this claim is necessarily limited to the alleged effects of the 2012 Electricity Law.[300]

378. As concerns an alleged breach of Article 10(1) of the ECT, Respondent's position is that the enactment of the 2012 Electricity Law may not constitute such a breach. The first sentence of Article 10(1) of the ECT imposes a general obligation on States Parties to provide appropriate conditions for Investors "*to make Investments*", and as a result is of no continuing application and imposes no obligations once an Investment has in fact been made. However, even if the Tribunal were to hold that the first sentence of Article 10(1) remained applicable after an investment has been made, Respondent's alternative position is that the first sentence of Article 10(1) of the ECT imposes no freestanding obligation, separate from the substantive obligations contained in the ECT.

379. There is no obvious characteristic of the 2012 Electricity Law which sufficiently changes the position, as compared to the situation under the 2009 Tariff Amendment, so as to justify a new claim.

(ii) The Arbitral Tribunal's Assessment

380. The Arbitral Tribunal is of the opinion that the first sentence of Article 10(1) of the ECT which refers to a duty of Kazakhstan to '*encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments*' is an introductory sentence aimed at putting the further obligations laid out in Article 10(1) of the ECT into perspective. As such, it has mainly programmatic character and does not provide for an independent standard of protection or right of action of a kind that is sufficiently specific to be relied upon by an investor. This is confirmed by the use of the terms "*in accordance with the provisions of this treaty*", which precedes the obligation of encouragement on which Claimants rely, and further by the terms "[s]*uch conditions shall include a commitment to accord at all times* […] *fair and equitable treatment*", which indicates that the content of this principle is further described in the following sentences of this provision.

381. In addition, Claimants have failed to establish to what extent this asserted protection standard would actually differ from the FET standard or other standards provided in that very same provision, and how such difference would impact on its claims for damages.

382. Therefore, the Arbitral Tribunal considers that the duty to encourage and create stable and transparent conditions for investment is already covered by the more specific protection standards set out in the remaining part of Article 10(1) of the ECT and does not constitute as self-standing independent standard.

(iii) Conclusion

383. The Arbitral Tribunal is of the opinion that the first sentence of Article 10(1) of the ECT does not establish an independent standard affording protection going beyond the protection already afforded under the more specific protection standards set out in the remaining part of Article 10(1) of the ECT. Consequently, no independent claim may be based on the first sentence of Article 10(1) of the ECT.

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[300] RSP Suppl. Subm. 27.08.2012, paras. 197 fol.

4.4 Breach of FET Standard under Article 10(1) of the ECT and Article II(2)(a) of the BIT

(i) The Parties' Positions

384. According to Claimants, Respondent breached its obligation to accord fair and equitable treatment to Tau Power under Article 10(1) of the ECT and to AES Corp under Article II(2)(a) of the BIT by failing to uphold Claimants' legitimate expectations in a number of key respects without any valid public policy justification.[301]

385. As concerns the legitimate expectations, Claimants consider that by enacting the 2012 Electricity Law, Kazakhstan has breached each of the following provisions thereby frustrating Claimants' legitimate expectations thereunder:

(i) By requiring that AES Entities enter into an IOA and apply regulated tariffs, Kazakhstan frustrated Claimants' expectation to an unrestricted right to sell energy to customers either directly or through a local affiliate or trading company, and to charge for that energy at a blended tariff and at market prices after a competitive market had developed (this expectation is derived from Clauses 7.1 and 2.8 of the Altai Agreement);

(ii) By requiring that AES Entities reinvest the entire net income generated by their sales of electricity and even the entire gross income (where no IOA is in place), Kazakhstan frustrated Claimants' expectation that they would be allowed to use the income received from their investment at their discretion, subject to the limitations imposed by the legislation in effect at the time the investment was made (this expectation is derived from Clauses 5.2.1, 5.5.1 and 18 of the Altai Agreement and Article 10(1) and the Stabilization Clause of the FIL);

(iii) By requiring that AES Entities reinvest the entire net income generated by their sales of electricity and thereby prohibiting the repatriation of those profits as dividends, Kazakhstan frustrated Claimants' expectation that they would be allowed to repatriate capital, loans, dividends, interest and other income from their power generation facilities in Kazakhstan (this expectation is derived from Clause 5.5.1 of the Altai Agreement, Article IV(a) of the BIT and Article 12(1) of the ECT);

(iv) By enacting and implementing the 2012 Electricity Law, Kazakhstan frustrated Claimants' expectation that they would be indemnified for any losses resulting from any breaches by Kazakhstan of the Altai Agreement and from any change of law (including new legislation) that materially reduced, prejudiced or otherwise adversely affected their investments (this expectation is derived from Clause 10.1 of the Altai Agreement and Article 6 of the FIL);

(v) By enacting and implementing the 2012 Electricity Law, Kazakhstan frustrated Claimants' expectation that Kazakhstan would refrain from doing anything adverse to the Claimants' assets or enjoyment of their assets, unless such interference was the result of ordinary, reasonable and proper enforcement or application of rights in accordance with Kazakh legislation (this expectation is derived from Clause 13.1 of the Altai Agreement);

[301] CL Suppl. Subm. 06.08.2012, paras. 83 fol.

(vi) By enacting and implementing the 2012 Electricity Law, Kazakhstan frustrated Claimants' expectation that Kazakhstan would encourage and create favourable and transparent conditions for the Claimants to make their investments (this expectation is derived from Article 10(1) of the ECT); and

(vii) By enacting and implementing the 2012 Electricity Law, Kazakhstan frustrated Claimants' expectation that Kazakhstan would act non-arbitrarily and reasonably (this expectation is derived from Article II(2)(b) of the BIT and Article 10(1) of the ECT).

386. Whilst Claimants acknowledge that the FET standard requires, to a certain extent, a balance between investors' legitimate expectations to make a fair return on its investment and the right of the host State to regulate its economy in the public interest, Claimants submit that there is no legitimate policy goal for Kazakhstan's intervention through the enactment of the 2012 Electricity Law. And, even if the Tribunal considered that mandated re-investment of all profits could be deemed to be a legitimate policy goal, the enactment of the 2012 Electricity Law could not be deemed to be a 'reasonable' or 'proportionate' action to take in pursuit of that goal. There can be no justification for Kazakhstan to require all generators to re-invest all their income and profits back into their generating facilities.

387. According to Respondent, Claimants' claim based on a breach of the FET Standard under Article II(2)(b) of the BIT and Article 10(1) of the ECT is entirely unfounded for the following main reasons:[302]

388. Claimants' FET claim appears to rely solely upon the alleged failure to respect Claimants' asserted legitimate expectations. In this regard, Claimants' expectations can be divided into three categories:

(i) *Category 1*: Expectations which essentially parallel those previously asserted by Claimants at various points in their Reply with regard to Claimants' Original Claims. This is in particular the case where Claimants assert legitimate expectations based on : (a) the asserted right to charge market rates; (b) the asserted right to sell energy through trading affiliates; (c) the asserted right to make sales at a blended tariff; (d) the asserted right to be indemnified for breaches of the Altai Agreement and any changes in the law; (e) the asserted right to stabilization; and (f) the asserted obligation that the Respondent would refrain from action having a material adverse effect on the Claimants' investment or the enjoyment of their asserted rights under the Altai Agreement, and that any enforcement action would be consistent with Kazakhstan law.

(ii) *Category 2*: Additional expectations asserted for the purposes of Claimants' Additional Claim and relating to an expectation to earn a return on their investment, including (relying in particular on Clauses 5.2.1 and 5.5.1 of the Altai Agreement) to use their income realized from their investments at their discretion, subject to the confinement of the then prevailing legislation (relying on Clauses 5.2.1, 5.5.1 and 18 of the Altai Agreement, and Articles 6(1) and 10(1) of the 1994 FIL).

[302] RSP Suppl. Subm. 27.08.2013, paras. 128 fol.

(iii) *Category 3*: Further additional expectations asserted for the purposes of Claimants' Additional Claim, including (a) a new alleged expectation that the Claimants would be permitted to repatriate capital, loans, dividends, interest and other income (relying on Clause 5.5.1 of the Altai Agreement and Article IV(a) of the BIT and Article 21(1) of the ECT); (b) a new alleged expectation that Kazakhstan would encourage and create favorable and transparent conditions for the Claimants to make their investments (relying on Article 10(1) ECT; and (c) a new alleged expectation that Kazakhstan would act non-arbitrarily and reasonably (relying on Article II(2)(b) of the BIT and Article 10(1) of the ECT).

389. In relation to Category 1, as set out with regard to Claimants' Original Claims, Respondent denies that Claimants held or were entitled to hold any such expectations.

390. In relation to Category 2, while Respondent accepts that, as a general matter, Claimants could have legitimately held an expectation that they would be entitled to earn a return on their investment, this expectation could not have been either unqualified or absolute.

391. In this regard, Respondent contends that "*the dispute between the Parties under the FET standard relates to whether, on the one hand, the 2012 Electricity Law constitutes a reasonable and proportionate measure of regulation adopted in pursuit of a legitimate public interest, and on the other, whether, if so, in all the circumstances, whatever legitimate and reasonable expectation Claimants may in fact have held have been improperly frustrated by the adoption of the 2012 Electricity Law in a manner which breaches the FET standard*".[303] According to Respondent, the 'tariff in exchange for investment' policy underlying both the 2009 Tariff Amendment and the 2012 Electricity Law is a reasonable and proportionate measure adopted in pursuit of a legitimate public interest for the following main reasons:

(i) It was necessary to ensure the increase in investment in the power industry so as to increase available generation capacity and avoid a projected shortfall in generating capacity;

(ii) It was financed by the consumers themselves, who bear the financial brunt of the investments which generators make;

(iii) It is entirely rational for generators to undertake to make investments by entering into IAO in circumstances in which the entire cost of those investments is shouldered by consumers, and no capital investment by the generator itself is required;

(iv) The fact that no immediate return on capital is available during the period up to the end of 2015 is more than outweighed by the increase in the capital value of the existing assets of generators which are restored or reconditioned, and the addition of new capital assets as the result of installation of new capacity, which result from the investments made;

(v) The policy of 'tariff in exchange for investment' preserves the right of investors to determine "autonomously" the level of their investment commitments. All that

303 RSP Suppl Subm. 27.08.2013, para. 140.

MINT requires is that the investments which are proposed to be made correspond with the net revenue received from consumers;

(vi) The 'tariff in exchange for investment' does not constitute a disincentive to investors, mainly because the generators are able to take the benefits and the increase in the capital value of their assets resulting from the investments they make and which have been funded by consumers;

(vii) The aim of the 'tariff in exchange for investment' policy was to lead to increased capacity, and not to protect consumers;

(viii) The 'tariff in exchange for investment' does not incentivize wasteful or inefficient investment, to the extent that the policy leaves it to generators to choose what level of investments should be made. As a consequence, the generators are then able to propose the level of tariff which will allow them to finance those investments having taken into account their costs and depreciation.

392. In relation to Category 3, Respondent submits, among others, that Claimants have not provided any evidence that they in fact held the expectations alleged at the time of making of their investment. In this regard, Claimants seek to rely on asserted legitimate expectations which simply replicate the content of substantive provisions of the BIT and ECT, and those claims are therefore indistinguishable from and add nothing to the claims already made under those other standards.

393. In view of these considerations, the 'tariff in exchange for investment' policy constitutes a reasonable and proportionate measure to respond to legitimate public interest, as such any interference with Claimants' supposed legitimate expectations does not rise to the level of breach of the FET standard. The temporary restriction on the ability of Claimants to freely manage assets within Kazakhstan is more than adequately justified by the pressing social need faced by Kazakhstan.

(ii) The Arbitral Tribunal's Assessment

394. The Arbitral Tribunal agrees with Respondent that Claimants' sub-claims for breach of the FET fall into various categories:

395. To the extent that Claimants rely on a frustration of legitimate expectations, which the Arbitral Tribunal considered to be unfounded (see above para. 296), Claimants' claim for breach of the FET standard fails. This concerns in particular Claimants' sub-claims based on Articles 2.8, 7.1 and 13.1 of the Altai Agreement and Article 6 of the 1994 FIL.

396. To the extent that Claimants rely on a frustration of legitimate expectations deriving from other provisions of the ECT and/or BIT, the Arbitral Tribunal agrees with Respondent that the concerned sub-claims merely replicate the content of substantive provisions of the BIT and ECT, and those claims are therefore indistinguishable from and add nothing to the claims already made under those other standards. Therefore, such expectations may not give rise to a separate and independent breach of the FET standard.

397. The remaining question is therefore whether the 'tariff in exchange for investment' scheme as implemented by the 2009 Tariff Exchange and the 2012 Electricity Law breaches the FET standard either because it frustrated other legitimate expectations asserted

by Claimants or because it was otherwise in breach of substantive protection standards afforded under the FET standard.

398. First of all, the Arbitral Tribunal considers that Claimants did have a legitimate expectation that they would have the opportunity to make and to have the right to dispose of a reasonable return of and on their investment. Any investor expects to make a certain return of and on its investment, and in view of the nature and protection afforded in the 1994 FIL, in particular of Article 10(1) of the 1994 FIL, Claimants were entitled to hold the legitimate expectation that they would be able to make a reasonable return of and on their investment. The fact that the 1994 FIL was repealed in 2003 does not affect the existence of such legitimate expectation, which arose at the time of making the main part of the investment, i.e., in 1997, and such legitimate expectation therefore remains protected under the FET standard of Article 10(1) of the ECT and Article II(2)(a) of the BIT. It is therefore unnecessary to determine whether it would also remain protected under the 1994 FIL notwithstanding its repeal.

399. Secondly, the Arbitral Tribunal considers that a legitimate expectation to earn a reasonable return of and on an investment necessarily implies the right to a certain discretion by the investors on how to make use of such return. This right includes in principle the right for foreign investors to repatriate such return.

400. The Arbitral Tribunal further considers that the legitimacy of this expectation was also confirmed by Articles 5.2.1 and 5.5.1 of the Altai Agreement and Article 14(1) of the ECT and Article IV(1) of the BIT. Whilst Articles 2.8 and 7.1 were too broad to give rise to an independent legitimate expectation protected under the FET Standard that Claimants would be able at all times and irrespective of the applicable legal framework to charge what they considered 'market prices' and use trading companies applying blended tariffs (see above paras. 290-293), the situation as concerns the principles set out in Articles 5.2.1 and 5.5.1 of the Altai Agreement is somewhat different. Claimants' legitimate expectation do not arise solely out of these provisions, but derive from the general principle that investors should be entitled to make a reasonable return on and of their investment, combined with the nature of the 1994 FIL and in particular the wording of Article 10(1) thereof and the wording of Article 14(1) of the ECT, Article IV(1) of the BIT and Articles 5.2.1 and 5.5.1 of the Altai Agreement, which clearly provide that the AES Entities would be able not only to retain 'profits' but also to repatriate 'capital, loans, dividends, interest and other income' and 'transfer' 'capital', 'unspent earnings' or 'returns'. As such, all these factors combined gave rise to a legitimate expectation of Claimants that they would be able to make a reasonable return of and on their investment.

401. However, it is also understood that the protection of such a legitimate expectation under the FET standard is not absolute and in order for a restriction of such right to breach the FET standard, it is necessary that the nature of the restriction be seen as unfair or inequitable.

402. In this regard, Respondent contends that the key question is rather whether the 'tariff in exchange for investment' policy as implemented by the 2009 Tariff Amendment and 2012 Electricity Law was reasonable and proportionate. Respondent affirms that it did constitute a reasonable and proportionate measure to respond to legitimate public interest, and that therefore any interference with Claimants' supposed legitimate expectations does not rise to the level of breach of the FET standard. Respondent relies in particular on the 'temporary' and 'necessary' nature of the restrictions imposed by the 2009 Tariff

Amendment and 2012 Electricity Law, and the fact that the generators were able to sell electricity at higher prices than otherwise possible, the increase in price being funded by the consumers themselves.

403. To the extent that the Arbitral Tribunal already ruled that it considered the underlying goals of the 'tariff in exchange for investment' policy to be *per se* unproblematic, it agrees that the key question in the present case is whether such policy was implemented in a proportionate and reasonable way. It further agrees that in order to determine the proportionality or reasonableness of certain restrictions, the duration of the restriction and its necessity to achieve the pursued goal are important criteria.

404. The Arbitral Tribunal however disagrees with Respondent that the restrictions imposed in implementation of the 'tariff in exchange for investment' policy were proportionate and reasonable.

405. As determined above (paras. 349-354), the restrictions imposed by the 'tariff in exchange for investment' scheme were such that they obliged power generators to re-invest *all* operating cash until 31 December 2015 and thereby prevented them from making any different use of the generated income. In addition, for generators without a signed IAO, they were denied the right to account for depreciation as a cost and were therefore forced to reinvest an equivalent amount thereby operating at a loss. This restriction is drastic and radical.

406. While the Arbitral Tribunal accepts that certain restrictions concerning the level of returns to be earned or to be repatriated may be justified in circumstances were investment in electricity generating infrastructure appears indispensable to prevent a collapse of the electricity distribution system, the restrictions imposed by Respondent would only be justified if the threat of collapse was real and imminent and the measures necessary to prevent the collapse could not be implemented by means that involved a lesser intrusion upon the Claimants' rights.

407. The Arbitral Tribunal accepts that in 2008-2009 the risks of a collapse appeared real and imminent, but it considers that Respondent has failed to establish that it could not have prevented such collapse through other, less intrusive, measures. The Arbitral Tribunal is not aware that any alternative measures were considered by the Kazakh government.

408. In addition, even if these restrictions had been the only way to avoid a collapse, once it became apparent that the expected collapse was not going to happen, the principle of proportionality would have required Kazakhstan to adjust the restrictions accordingly.

409. Therefore, and considering that the prohibition on distribution of profits is total and that the drastic restrictions imposed by the 'tariff in exchange for investment' scheme were intended to remain in place for a duration of seven years, and were therefore not aimed only at preventing an imminent danger but were evidently part of a longer-term plan to renovate the national electricity distribution system, they cannot be considered proportional or reasonable and are therefore in breach of the FET standard afforded under Article 10(1) of the ECT and Article II(2)(a) of the BIT.

410. The fact that the generators were entitled to sell the electricity at higher prices than they would have been able to charge without such policy is irrelevant to the extent that the generators were not in a position to benefit from any such increased income for a period of

seven years, and that, as explained below (paras. 434 fol.), there is no guarantee that they may be able to benefit therefrom after the expiry of the seven years period.

(iii) Conclusion

411. In conclusion, Claimants were legitimately entitled to expect that they would have the opportunity to make a reasonable return of and on their investment and to repatriate such return within a reasonable timeframe.

412. In view of the drastic character and extended duration of the restrictions imposed by the 'tariff in exchange for investment' scheme as implemented under the 2009 Tariff Amendment and 2012 Electricity Law, such restrictions cannot be deemed to have been justified by the underlying policy and are therefore in breach of the FET standard afforded under Article 10(1) of the ECT and Article II(2)(a) of the BIT. For reasons explained above, this breach absorbs any breach of the Umbrella Clauses under Article 10(1) of the ECT and Article II(2)(c) of the BIT (see above para. 375).

4.5 Breach of the Duty to Refrain from Adopting Arbitrary or Unreasonable Measures under Article 10(1) of the ECT and Article II(2)(b) of the BIT

(i) The Parties' Positions

413. According to Claimants, by introducing the 'tariff in exchange of investment' policy, Respondent breached its duty to refrain from adopting arbitrary or unreasonable measures under Article 10(1) of the ECT and Article II(2)(b) of the BIT as the amendments embodied in the 2012 Electricity Law are both arbitrary and unreasonable.

414. According to Respondent, Claimants' claim consists of "*a little more than a bare assertion that the 2012 Electricity Law does not constitute a reasonable, non-arbitrary and proportionate measure adopted in pursuit of a rational public policy goal*". The Respondent denies that there has been or will be any unreasonable or arbitrary impairment of the Claimants' investment as a result of the adoption and application of the 2012 Electricity Law. The standard to be applied is similar to the FET standard and for the same reasons that Respondent denies a breach of the FET (i.e. the fact that the 'tariff in exchange for investment' scheme constitutes a legitimate, reasonable and proportionate response in pursuit of a pressing public interest requirement), there can also be no breach of the general duty to encourage and create favorable and transparent investment conditions under Article 10(1) of the ECT.[304]

(ii) The Arbitral Tribunal's Assessment

415. Article 10(1) of the ECT prohibits a State from impairing "*by unreasonable or discriminatory measures* [the] *management, maintenance, use, enjoyment or disposal* [of the investment]" and Article I(2)(b) of the BIT provides for a similar prohibition though referring to an impairment by "*arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments*".

[304] RSP Suppl. Subm. 27.08.2012, paras. 207 fol.

416. In their Supplementary Submission of 27 August 2012, Claimants merely refer to their Memorial of 28 April 2011 (paras. 347-359) and their Reply Memorial of 30 March 2012 (paras. 451-459). However, in their Memorial and Reply, their claim for breach of the prohibition of unreasonable and arbitrary impairment mainly relates to the 2009 Tariff Amendment and "*its reversion to a heavily regulated local electricity market*". Claimants do not specifically address the breach of this provision with regard to the 'tariff in exchange for investment' scheme. In other words, Claimants' position is mainly based on their arguments that the reversion to a heavily regulated local electricity market was the result of irrational policy goals. Therefore, while the relevant provisions refer to 'measures', it appears that Claimants' claim hereunder is actually directed at the underlying policy.

417. In this regard, the Arbitral Tribunal has already found that the policy goals underlying the 'tariff in exchange for investment scheme' were not *per se* irrational (see above paras. 360-363). It can also not be seen as having been discriminatory to the extent that it applied to all power generators equally.

418. To the extent that Claimants' claim hereunder would be directed at the specific effects of the application of the 2009 Tariff Amendment and 2012 Electricity Law on Claimants' investments, it is unclear to what extent their claim for unreasonable and arbitrary measures differs from their claim for breach of the FET standard. Claimants have also failed to establish to what extent such additional claim would actually impact the requested remedies and be different from remedies already available under the FET standard. To the extent that the Arbitral Tribunal has already ruled that the effects of the 'tariff in exchange for investment' scheme were contrary to the FET standard, it does not consider it necessary to determine whether the same facts would also constitute a breach of the duty to refrain from unreasonable or arbitrary measures.

(iii) Conclusion

419. In conclusion, to the extent that Claimants' claim for breach of the duty to refrain from adopting arbitrary or unreasonable measures under Article 10(1) of the ECT and Article II(2)(b) of the BIT is mainly based on the argument of the 'irrational policy goal' of the 'tariff in exchange for investment' scheme, it is unfounded. To the extent that such claim would be directed at the specific effects of the 'tariff in exchange for investment' policy, the way that Claimants have construed their claim appears no different from their claim for breach of the FET standard and is therefore covered thereby, so that it is unnecessary to determine the existence of a separate breach under the duty to refrain from adopting unreasonable or arbitrary measures.

4.6 Breach of the Duty to Guarantee the Freedom of Transfer of the Claimants' Returns from their Investments out of Kazakhstan without Delay under Article 14(1) of the ECT and Article IV(1) of the BIT

(i) The Parties' Positions

420. According to Claimants, by introducing the 'tariff in exchange for investment' scheme and requiring that all returns be reinvested, Respondent breached its duty to guarantee the freedom of transfer of the Claimants' returns from their investments out of Kazakhstan without delay under Article 14(1) of the ECT and Article IV(1) of the BIT. Such

reinvestment requirement means that Claimants cannot make any transfer of their returns "*freely*", and it further means that they are prevented from transferring such returns "*without delay*".[305]

421. Respondent contends that the relevant provisions of the ECT and BIT refer to different standards with regard to the definition of investment, as well as the specific obligations provided therein. In particular, the definition of investment under Article I(1) of the BIT makes no reference to the term 'returns', and this term is defined separately under Article I(1)(d). In addition, while Article IV(I) of the BIT imposes a requirement that transfers should be permitted "*without delay*", no such requirement is contained in the ECT.[306]

422. According to Respondent, Claimants' claims are not concerned with any material restriction upon the transfer of returns from their investment. In reality, Claimants' argument in this regard rather aims to transform the provisions on freedom of transfer into an international law guarantee of a right to 'receive' returns. On its face, the 2012 Electricity Law does not impose any restriction on the right to transfer returns. In any case, Respondent observes that, even if Claimants were able to establish a breach, it will be for Claimants to provide evidence of the damage in fact caused by any such breach, and which they have in fact suffered as a result.

(ii) The Arbitral Tribunal's Assessment

423. As mentioned above (see above paras. 394-412), the Arbitral Tribunal has already ruled that the nature of the restrictions imposed by Kazakhstan under the 'tariff in exchange for investment' policy were in breach of the FET standard to the extent that they prevented Claimants from making reasonable returns of and on their investment and exercise certain discretion in the use of such returns, including their repatriation.

424. The question therefore arises whether Article 14(1) of the ECT and Article IV(1) of the BIT provide any additional protection to Claimants justifying to examine a separate breach of such provisions.

425. The Arbitral Tribunal considers that Article 14(1) of the ECT and Article IV(1) of the BIT are a specific implementation of the general principle protected under the FET standard that an investor should have the right to earn and transfer reasonable returns of and on its investments. Article 14(1) of the ECT and Article IV(1) of the BIT go further than the protection afforded under the FET by establishing more specific principles concerning the conditions for transfer of such returns and other capital.

426. Thus, while it is possible that certain measures breach the standard of protection afforded under Article 14(1) of the ECT and Article IV(1) of the BIT without breaching the FET standard, where measures restricting the earning and transfer of reasonable returns are such as to breach the FET standard, such breach absorbs a consequential breach of Article 14(1) of the ECT and Article IV(1) of the BIT based on the same specific facts.

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[305] CL Suppl. Subm. 6.08.2012, paras. 100 fol.

[306] RSP Suppl. Subm. 27.08.2012, paras. 231 fol.

(iii) Conclusion

427. In conclusion, to the extent that the Arbitral Tribunal has already determined that the restrictions imposed in implementation of the 'tariff in exchange of investment' policy breached the basic protection afforded under the FET standard with regard to Claimants' rights to earn a reasonable return of and on their investment and exercise a certain discretion with regard to its use (see above paras. 394 fol.), including the repatriation of such returns, such a determination already covers and absorbs any consequential breach of Article 14(1) of the ECT and Article IV(1) of the BIT.

5. Time Limitation

428. Respondent has advanced that claims made under the 1994 FIL and/or the Altai Agreement in connection with the Umbrella Clauses would be deemed to be made on the basis of Kazakh law, and would accordingly be subject to the general 3-year statute of limitations applicable under Article 178 and 179 of the Kazakh Civil Code. As a consequence, claims of breach of the FIL and/or Umbrella Clauses which occurred after 11 June 2007 (i.e. less than 3 years prior to the filing with ICSID of the Request for Arbitration on 11 June 2010), and any claims relating to events prior to that date would be time-barred (see above para. 172).

429. Claimants contend that their claims are not and cannot be time barred because the relevant Articles 178 and 179 of the Kazakh Civil Code do not apply to proceedings outside Kazakhstan and limitation under national law cannot bar claims before ICSID tribunals. In any event, the statute of limitations does not apply to a claim for full restitution to the extent that there is a continuing violation of Claimants' rights under the FIL, the ECT and the BIT (see above para. 179(iii)).[307]

430. The Arbitral Tribunal finds that the question of limitation period under Kazakh law is irrelevant. As concerns claims based on the 1994 FIL and/or Umbrella Clauses, the Arbitral Tribunal has either considered such claims to be unfounded or it considered that standards of the 1994 FIL were similar to standards of protection afforded under the BIT and the ECT and did therefore not require a separate determination (see above paras. 340, 368, 369, 375).

431. As to claims based on alleged breaches of substantial protection standards under the ECT and BIT, it is undisputed that time limitations applicable under national law do not apply to such treaty claims.

432. Consequently, the claim for breach of the FET standard, which the Arbitral Tribunal considered to be founded, is not subject to the three years limitation period under Kazakh law and is therefore not time barred.

[307] CL Reply 30.03.2012, paras. 348 fol.

6. Third Conclusion

433. **With regard to Claimants' claims relating to the implementation by the 2009 Tariff Amendment and 2012 Electricity Law of the 'tariff in exchange for investment' policy, the Arbitral Tribunal finds as follows:**

(i) Claimants' claims for breach of the standards set forth in Article 6, 8 and 13 of the 1994 FIL are unfounded;

(ii) Claimants' claim for breach of Article 10(1) of the 1994 FIL is covered by its claim for breach of the FET standard and does therefore not need to be separately addressed;

(iii) Claimants' claim for breach of the Umbrella Clauses contained in Article 10(1) of the ECT and Article II(2)(c) of the BIT for failure by Kazakhstan to comply with its obligations under the Altai Agreement is absorbed by the breach of the FET standard and does not need to be separately addressed;

(iv) Claimants' claim for breach of the FET standard under Article 10(1) of the ECT and Article II(2)(a) of the BIT is well-founded to the extent that, in view of their drastic character and extended duration, the restrictions imposed by the 'tariff in exchange for investment' policy as implemented by the 2009 Tariff Amendment and 2012 Electricity Law went beyond what could have been considered a proportional and reasonable response to the threat of collapse of the electricity supply system and can therefore not be deemed to have been justified by the underlying policy;

(v) Claimants' claim for breach of the duty to encourage and create favorable and transparent conditions for investors under Article 10(1) of the ECT is rejected for the reason that such duty does not establish an independent standard affording protection going beyond the protection already afforded under the more specific protection standards set out in the remaining part of Article 10(1) of the ECT, in particular the FET standard;

(vi) Claimants' claim for breach of the duty to refrain from adopting unreasonable or arbitrary measures under Article 10(1) of the ECT and Article II(2)(b) of the BIT is unfounded to the extent that it is based on the argument of an 'irrational policy goal' of the 'tariff in exchange for investment' scheme. To the extent that such claim is directed at the restrictions imposed in implementation of such scheme, Claimants' claim overlaps with their claim for breach of the FET standard and does therefore not require a separate determination;

(vii) Claimants' claim for breach of the duty to guarantee the freedom of transfer of the Claimants' returns from their investments out of Kazakhstan without delay under Article 14 of the ECT and Article IV(1) of the BIT is already covered by Claimants' claim for breach of the FET standard and does therefore not require a separate determination.

F. For the Period from 1 January 2016 onwards

1. The Mechanism to Apply Post-2016

434. It is undisputed between the Parties that from 1 January 2016 onwards, the tariff regime stipulated under the 2009 Tariff Amendment and 2012 Electricity Law will cease to apply. It is further undisputed that tariffs will continue to be set by the State for further seven year period until 2022.[308] In particular, the Parties agree that there will be two separate tariff components:

(i) A Maximum Electricity Tariff (MET), which will constitute an upper cap upon the prices which generators can charge their customers. For this purpose, generators will again be divided into groups. Maximum tariffs will be set annually for each group.

(ii) A Maximum Capacity Tariff (MCT), constituting an upper cap on the price which may be charged for capacity maintenance services. Through the capacity market generators will be able to sell capacity maintenance services to KEGOC at a centralized auction at the MCT. Here again, maximum tariffs will be set annually for each group.

435. The Parties however disagree on *the mechanism of determination of these tariffs and their effect*.

436. According to Claimants, the post-1 January 2016 regime does not provide for any return of or on any new investments made by the Claimants from 2016 onwards:[309]

(iii) With regard to the MET, generators will be grouped for the MET according to their operating cost profiles – in other words, generators with very similar levels of production costs. For each group of generators, the MET for the period 2016-2022 will be calculated only in the amount necessary to cover the operating expenses of the generator in that group with the highest operating costs in 2015, not including depreciation costs. Thus, the MET is designed to cover operating costs only and does not provide for any return of or on invested capital.

(iv) With regard to the MCT, this is the price at which a generator may sell its available capacity to the system operator, KEGOC. Generators will be grouped for the MCT according to type and generating capacity; a generator may or may not be in the same group for both the MET and the MCT. For each group of generators, the MCT for each year of the seven year period 2016-2022 will be equal exactly to 1/7th of the highest amount of forced reinvestment made in 2015 by a generator in that group. In other words, the MCT provides for a return on capital with respect to the amount of forced reinvestment made in

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308 RSP PHB on Liability 30.11.2012, paras. 124 fol.; CL PHB on Quantum 05.04.2013, paras. 8 fol.; Paris Hearing Day 1 p. 165 l. 2 – p. 167 l. 20.

309 CL PHB on Quantum 05.04.2013, paras. 8 fol.

2015 only. However, that return on capital will be spread over a seven year period from 2016-2022. No return on invested capital for the years 2009-2014, or from 2016 onwards, is provided by the MCT.

(v) Both the MET and the MCT are maximum capped tariffs, but there is no guarantee that a generator will be able to achieve either of these maximum prices. That is dependent on whether generators are able to make sales. Kazakhstan has acknowledged that there is likely to be an oversupply of electricity in 2016 meaning that it is unlikely that generators will, in fact, be able to receive the maximum capped tariffs.

437. In summary, under the post-1 January 2016 regime as contemplated by the 2012 Electricity Law, the only capital invested by Claimants that may possibly be recovered under the post-1 January 2016 regime is capital forcibly reinvested in a single year, namely 2015. Even then, this capital can only be recovered over a future seven year period, thus greatly reducing the present value of such recovery. Moreover, even this recovery is far from guaranteed as the generator must still manage to trade sufficient capacity in those years to KEGOC at the maximum level of the MCT.

438. According to Respondent, the 'tariff in exchange for investment' policy leaves sufficient room for generators to make profits:[310]

(i) The MET be set for each group based on the "*maximum actual price formed in the respective group of electricity generating organizations realizing electricity within the year which preceded the introduction of maximum electricity tariffs*" (Art. 12-1(2)(3) of the 2012 Electricity Law). Generators will be able to set their own prices up to the level of the cap. As a consequence, to the extent that a generator is able to operate more efficiently by reducing its costs, it will be able to achieve a profit from the sale of electricity.

(ii) The MCT is to be adjusted annually so as to ensure "*the return on investments made in the renewal, maintenance, reconstruction, and technical re-equipping of existing production assets within the limits of the normative period of recoupment equal to seven years*" (Art. 1(31-2)) and is to take into account the need to ensure the investment attractiveness of the industry (Art. 12-1(2-1)(2). In the first year, the MCT is to be set based on "*the means of the electricity generating organization ensuring the return of investments made in the renewal, maintenance, reconstruction, and technical re-equipping of existing generating assets within the limits of the normative period of recoupment equal to seven years*" prevailing within the relevant group of generators used during 2015 (i.e. under the 'tariff in exchange for investment' policy. (Art. 12-1(2-1)(3)).

2. The Arbitral Tribunal's Assessment

439. Based on the way that Claimants' construed their claim relating to the implementation of the 'tariff in exchange for investment' scheme, Claimants' contentions regarding the post-2016 regime mainly served to support their position that there is no guarantee that

[310] RSP PHB on Liability 30.11.2012, paras. 124 fol.; see also Paris Hearing Day 1 p. 165 l. 2 – p. 171 l. 16.

they would ever recover any investments made in the 2008 to 2015 period and that the majority of such investments would be lost. When Claimants submitted their Updated Claim (see above para. 108), they included an updated computation of the Claimants' losses from 2016 onwards. However, Claimants did not raise a separate claim relating to the post-2016 regime and a determination on the admissibility of the 'update' of its previous claims was deferred by the Arbitral Tribunal (see above para. 113(i)).

440. While it is unclear whether the amounts claimed by Claimants with regard to the post-2016 regime have a legal basis independent of the basis of Claimants' claims in relation to the 2009-2015 regime, the Arbitral Tribunal does not consider this question to be relevant.

441. The Arbitral Tribunal considers that any claim relating to what may or may not happen under the post-2016 regime would be premature and therefore at this stage unfounded. The main reasons are the following:

(i) While the 2012 Electricity Law provides general guidelines as to the treatment of generators after 1 January 2016, many questions remain unanswered, such as the specific composition of relevant groups and the specific level of tariffs to be imposed;

(ii) Kazakhstan is free at any time to change its course and amend the 2012 Electricity Law with regard with measures to be taken after 1 January 2016;

(iii) To the extent that the post-2016 regime as currently envisaged by Kazakhstan builds upon the previous 'tariff in exchange for investment' scheme as implemented by the 2009 Tariff Amendment and 2012 Electricity Law and considering that the Arbitral Tribunal ruled such scheme to be in breach of the FET standard under Article 10(1) of the ECT and Article II(2)(a) of the BIT, admitting at this stage a claim relating to the uncertain post-2016 regime would imply assuming that Kazakhstan will disregard the Arbitral Tribunal's ruling. Such assumption would be inappropriate. On the contrary, the Arbitral Tribunal would expect that Kazakhstan will take the appropriate measures to remedy the current breach of the FET standard and adjust the post-2016 regime in such a way as to comply with all of its obligations under the ECT and BIT.

(iv) In any case, due to the uncertainties relating to the post-2016 regime, it would not be possible to determine with sufficient accuracy the specific financial consequences of such regime on Claimants' operation, so that any calculation of potential damages would be highly speculative.

442. This determination does not affect Claimants' rights to file, at the appropriate time, new claims as a new ICSID case in respect of future developments.

3. Fourth Conclusion

443. **Claimants' claims for breach of (a) Articles 6, 8, 10 and 13 of the FIL (b), Articles 10 and 14 of the ECT, and (c) Articles II and IV of the BIT relating to the regime after 1 January 2016 are premature and therefore unfounded.**

G. Remedies

1. With Regard to Claims relating to Kazakh Competition Law and Relating to the Period until 31.12.2008

444. The Arbitral Tribunal has already determined that Claimants' claims relating to the changes in Kazakh competition legislation and its application to the AES Entities in the period prior to 2009 are unfounded (see above para. 340).

445. As a consequence thereof, Kazakhstan may not be held liable for any damage caused to Claimants in application of the relevant Kazakh competition legislation.

446. Claimants' claims for restitution and/or compensation for damages are therefore to be rejected.

2. With Regard to Claims relating to the 'tariff in exchange for investment' scheme for the Period from 1.1.2009 to 31.12.2015

2.1 The Parties' Positions

447. According to Claimants, because of the way in which the 2009 Tariff Amendment and the 2012 Electricity Law operate (see above para. 346), the ultimate effect of this legislation is that it extinguishes the entire fair market value of Claimants' investments.[311] In the terms of Prof. Kalt and Mr Rosen:

> *"Under the 2012* [Electricity Law]*, the situation from an economic and valuation point of view that was created was a business enterprise that was incapable of earning any cash returns, and so its market value had been extinguished".* [reference omitted] *"*[A]*ll you are doing is sitting making the investments, with significant pieces, but with no opportunity to recover even the capital you've invested, much less a return on that capital.* [T]*his has the effect* [...] *of extinguishing the fair value of the plant, the revenue streams, to a willing buyer of those revenue streams".*

448. It is Claimants' case that the change of regulatory regime did not impact on the Claimants' entitlement to charge competitive market prices and therefore the competitive market price should have been available to the AES Entities from 1 January 2009 onwards.[312]

449. Based thereon, Claimants calculated their losses as follows:

(i) For past losses relating to the period 1 January 2009 to 30 September 2012, Claimants claim for loss of profits and incremental costs. Claimants' loss of profits is calculated on the basis of the difference between the competitive market prices which the AES Entities would have charged absent Kazakhstan's breaches (the "but-for" prices) and the actual prices they charged from 1 January 2009 to 30 September 2012. The incremental costs that Claimants sustained between 1

311 CL PHB on Quantum 05.04.2013, para. 22.
312 CL PHB on Quantum 05.04.2013, paras. 60 fol.

January 2009 and 30 September 2012 represent various fines and penalties imposed on the AES Entities by Kazakhstan relating to alleged competition law violations and thereto related defense proceedings.

(ii) As to future losses for the period from 1 October 2012 to 31 December 2015, the principles of damage calculation remain the same, except that Claimants relied on the assumption that the AES Entities would continue to sell power at capped tariffs originally established by the 2009 Tariff Amendment.[313]

(iii) As to future losses from 1 January 2016 onwards, the principles regarding the 'but for' prices remain the same, although Claimants have updated their computation based on additional information provided by Mr. Jaxaliyev as concerns the applicable tariffs.

450. Thus, in all scenarios, Claimants consistently rely on a 'but for' price which corresponds to what they consider to be the 'competitive market price'.[314] This is also the case for the hypothetical scenario submitted by the Arbitral Tribunal in which "*the Arbitral Tribunal were to decide that the 2009/2012 Electricity Law violated Claimants' rights, but that the capping of prices based on the Competition Law did not violate such rights*".

451. According to Respondent, Claimants' damage calculation relies on two critical but fatally flawed assumptions:[315]

(i) They have assumed success on all the breaches alleged, or that any and all breaches alleged result in the same quantum of damages sought. There is no proper analysis of which breaches are causally relevant to any particular part of the total sum sought by way of damages.

(ii) They have assumed that the competition legislation should never have been and should never be applied to the AES Entities and that Claimants were entitled in all relevant periods to charge 'competitive market prices'. However, at all relevant times, the competition legislation continued to operate alongside the regime of 'tariff in exchange for investment'. Accordingly, even if the Tribunal were to hold that the 2009 Tariff Amendment and the 2012 Electricity Law were in breach of Respondent's international obligations, the AES Entities would still have been subject to price regulation under the competition legislation as at all times they were, and remain, on the Register.

452. In addition, even if the Tribunal were to hold that Claimants did have an entitlement to charge 'competitive market prices', the 'but for' prices put forward by Claimants do not, in truth, constitute 'competitive prices'. With regard to the period from 2009 to 2015, Claimants use the Maximum Capped Tariff for Group 1 (in which Ekibastuz is placed) as a proxy. However, this approach is entirely misconceived. Those tariffs are not 'competitive market prices', but regulated prices. Further, they are deliberately set at a level higher than competitive levels in order to incentivize investment by passing the cost thereof on to consumers. It is not appropriate to use the tariffs as a measure of competitive prices without any accompanying obligation to invest. The 'competitive market prices' would in

313 CL PHB on Quantum 05.04.2013, paras. 63 fol.
314 CL PHB on Quantum 05.04.2013, paras. 78 fol. and 171 fol.; CL Reply PHB on Quantum 23.04.2013, paras. 27 fol.
315 RSP PHB on Quantum 05.04.2013, paras. 8 fol.; 157 fol.

fact be closely linked to costs since, as highlighted by Professor Yarrow and Dr Decker, "*in effectively competitive markets there are pressures towards pricing that reflects efficient cost of supply, including a normal return on investment*".[316]

453. Finally, any damage calculation would need to take into account the fact that the AES Entities charged and benefited from the Maximum Capped Tariffs between 2009 and 2011 despite not having IOAs in place, and further, despite not investing all net revenues, plus depreciation, generated under the 'tariff in exchange for investment' programme. Rather, the AES Entities paid out significant sums in dividends to the Claimants. To the extent that the AES Entities in fact charged the Maximum Capped Tariffs and received sums in excess of those they would have been able to charge through regulated tariffs under the competition legislation, those sums fall to be returned to Respondent and must be deducted from any damages awarded to Claimants.[317]

454. As concerns the hypothetical scenario submitted by the Arbitral Tribunal in case "*the Arbitral Tribunal were to decide that the 2009/2012 Electricity Law violated Claimants' rights, but that the capping of prices based on the Competition Law did not violate such rights*", Respondent submits that Claimants have failed to answer the Tribunal's question. Claimants' Scenario A bears no resemblance to the question actually posed and the second fails to address what the returns under the regulated tariffs would have been.[318]

2.2 The Arbitral Tribunal's Assessment

455. The Arbitral Tribunal is of the opinion that it is necessary and appropriate to distinguish claims relating to past losses, including the period from 1 January 2009 up to the date of this Award, and claims related to future losses, including the period from the date of this Award up to 31 December 2015.

(i) For the Period from 1 January 2009 until the date of the Present Award

456. To the extent that the Arbitral Tribunal has already found that the 'tariff in exchange for investment' scheme as implemented under the 2009 Tariff Amendment and the 2012 Electricity Law is in breach of the FET standard under Article 10(1) of the ECT and Article II(2)(a) of the BIT, Respondent is liable for the damage caused to Claimants.

457. The question therefore arises what is the appropriate remedy, if any, that Claimants should be awarded.

458. According to Claimants, to the extent the Tribunal finds that Kazakhstan has breached the BIT or ECT, Kazakhstan's international responsibility has been engaged under the BIT and the ECT. However, since neither the ECT nor the BIT offer guidance as to the appropriate measure of damages or compensation in relation to breaches of those treaties, other than with respect to expropriation, the Arbitral Tribunal should rely on the ILC Articles.[319]

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316 R-Yarrow IV, para 6 and Paris Hearing Day 2 p. 74 l. 19 p. 75 l. 7.
317 RSP PHB on Quantum 05.04.2013, paras. 37 fol.
318 RSP PHB on Quantum 05.04.2013, paras. 3, 7 fol.
319 CL Memo 28.04.2011, 408 fol.; PHB on Quantum 05.04.2013, paras. 24 fol.

459. Under Articles 28 and 31 of the ILC Articles, the international responsibility of a State gives rise to an obligation to make "*full reparation for the injury caused by the internationally wrongful act*", and this includes under Article 34 three forms of reparation: (i) restitution, (ii) compensation and (iii) satisfaction. In the present case, Claimants only request restitution and compensation:

(i) *Restitution*: According to Claimants, Kazakhstan is obliged to effect full restitution by ceasing and withdrawing all wrongful measures carried out or adopted since 23 July 1997.

- With regard to the past, an order of restitution should be made requiring the withdrawal of the offending measures, though such order would necessarily need to be accompanied by an award of compensation so as to make the Claimants whole for the actual losses they have suffered in the past.

- With regard to the future, restitution is without doubt a suitable remedy and it means that Kazakhstan should be ordered to cease its continuing breaches of the BIT and ECT. The Tribunal could actually give Kazakhstan the option of either (i) paying full compensation for future losses in a liquidated amount; or (ii) ceasing to apply the offending measures to the Claimants and the AES Entities on a going forward basis.

(ii) *Compensation*: To the extent that the Tribunal finds that restitution is either impossible or would not wipe out all the harm suffered as a result of Kazakhstan's measures, Kazakhstan must pay compensation to the Claimants for the financial losses they have suffered. In this case, Kazakhstan must compensate the Claimants for both past economic losses and future economic losses caused by its breaches. It is not in dispute that Claimants would be entitled to compensation for their losses if the Tribunal were to find liability. What is in dispute is the amount of compensation due to Claimants.

460. According to Respondent, "*there is no valid claim in restitution and when the claim in compensation is then analyzed it is clear that it has been entirely misconceived and based on a faulty quantification of harm*":[320]

(i) *Restitution* should not be ordered, because Claimants' claim for restitution is essentially that Kazakhstan should be required to modify its legislation so as to exempt Claimants from the application of prevailing legislation relating to pricing and the regulation of competition or should fail to properly apply and enforce its own laws. Such a request for relief is impermissible. In particular, Part Two of the ILC Articles do not apply to investment treaty arbitration between a company and a state. In addition, the basic condition that restitution be both possible and proportionate is not met in the present case. Thus, Claimants should be restricted to claim for compensation.[321]

(ii) Claimants' approach to *compensation* is fundamentally flawed, to the extent that Claimants' claims are based on various legal bases, without however differentiating in any way between the various different instruments under which the claims are

[320] RSP C-Memo 7.10.2011, para 843; RSP PHB on Quantum 05.04.2013, paras. 29 fol.
[321] RSP C-Memo 7.10.2011, paras. 807 fol., paras. 813 fol.; RSP PHB on Quantum 23.04.2013, fn. 4.

made and without attempting in any way to differentiate between the different breaches alleged. Not all the alleged breaches of the 1994 FIL, BIT and ECT, even if established, could have caused all of the losses which Claimants allege that they have suffered.[322]

461. In addition, Respondent stresses that the principle of full reparation is not a one-way street. Insofar as the requirement for full reparation requires that the injured party should be placed in the position it would have been in "but for" the breach, it is necessary that all the consequences of the wrongful act should be removed. That applies equally to matters which were in fact beneficial to the party affected by the breach. This applies to both an order for restitution and an award of compensation.[323]

462. The Arbitral Tribunal is of the following opinion:

463. It is a general principle of law that whoever causes damage as a result of a wrongful act should be liable for such damage. This principle applies to all legal subjects including States and private actors.

464. The question is thus whether this liability is limited to a duty to compensate, or whether it also includes a duty of 'restitution', i.e., to recreate the situation in place before the wrongful act.

465. It is undisputed between the Parties that liability for a wrongful act includes a duty to compensate for the damage caused by such act. The Arbitral Tribunal further considers that such liability includes the duty to cease any ongoing wrongful act.

466. As to the question whether this liability also includes a duty of 'restitution', it can remain open to the extent that, even if available, the Arbitral Tribunal considers that restitution would not be feasible in the circumstances of the present case for the following main reason: In the present case 'restitution' would mean to undo investments which have been already been made in application of the 'tariff in exchange for investment' scheme, which would neither be feasible nor helpful. As such, the Arbitral Tribunal considers that the only options are compensation and cessation of any ongoing wrongful act.

467. In any event, in order to succeed with their claim for compensation, Claimants must establish the scope of damage that they suffered. As set out above (see paras. 449-450), Claimants have calculated their damage based on the difference between a 'but for' price, which would have been the price which they assert the AES Entities could have charged if Kazakhstan had not engaged in the conduct that Claimants say breached Kazakhstan's international obligations, and the 'actual price', corresponding to the price that the AES Entities actually charged. At all times, the 'but for' price relied upon by Claimants is what they considered would have been the 'competitive market price'. The problem with this approach is that it is based on the assumption that Claimants should not have been subject to the restrictions imposed by changes made to the Kazakh competition law. In other words, the 'but for' price relied upon by Claimants is only realistic to the extent that their Original Claims are founded.

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322 RSP C-Memo 7.10.2011, paras. 826 fol.

323 RSP PHB on Quantum 05.04.2013, paras. 29 fol., 34.

468. Given that the Arbitral Tribunal ruled that Claimants' Original Claims are unfounded, the entire basis for Claimants' damage calculation falls. This applies not only to the 'but for' price relied upon by Claimants, but also to the basis for their claim for 'incremental costs' relating to fines and penalties imposed in application of Kazakh competition law.

469. The Arbitral Tribunal therefore considers that Claimants have failed to duly establish their damage. The Arbitral Tribunal also considers that Claimants were given sufficient opportunity to do so and that it would not be appropriate to further prolong these proceedings by giving them yet another additional opportunity. Even when asked by the Arbitral Tribunal how Claimants would approach the issue of the damage in case "*the Arbitral Tribunal were to decide that the 2009/2012 Electricity Law violated Claimants' rights, but that the capping of prices based on the Competition Law did not violate such rights*", Claimants did not re-calculate their damage based on the assumption that the price restrictions imposed by Kazakh competition law were in line with Kazakhstan's treaty obligations. Even after Respondent raised this issue in its Post-Hearing Brief on Quantum of 5 April 2013, Claimants did not provide an alternative 'but for' price in their Reply Post-Hearing Submission on the Tribunal's Question of 23 April 2013. Claimants must therefore bear the risks of having based their claims on a single assumption.

(ii) For the Period from the Date of the Present Award until 31 December 2015

470. With regard to the period following the issuance of the present Award, it cannot be said that Claimants have already suffered any damage. Damage may occur only to the extent that Kazakhstan would fail to remedy the breach of the FET standard and continue applying the 2012 Electricity Law as before. However, it cannot be presumed that such a future breach will occur: on the contrary, the Arbitral Tribunal expects that Kazakhstan will take the necessary measures to bring the position into conformity with its obligations under the FET standard, as identified in this Award.

471. Claimants may not at this stage claim for damage which has not yet occurred and which is based on an assumption that Kazakhstan will disregard the present ruling and perpetuate its breach of the FET standard. In case Kazakhstan fails to remedy the current breach and thereby causes actual damage to Claimants, Claimants would be free to raise a new claim.

472. As to Claimants' claim for restitution, it is equally inappropriate. Restitution aims at reinstating a situation which has previously been modified due to a wrongful act. In the present situation, as concerns the period from the issuance of this Award until 31 December 2015, the wrongful act – which consists in the imposition on the AES Entities of restrictions which are in breach of the FET standard - has not yet been implemented. There can be no 'restitution' with regard to a situation which has not yet occurred.

473. The situation may have been different in case Claimants were claiming for an expropriation, in which future damages may have been taken into account at their 'net present value' as part of the process of determining the present value of the property expropriated, or in which restitution in the sense of an undoing of the expropriation may have been conceivable. However, this is not Claimants' claim. Claimants are claiming that the application of current legislation, which is in breach of Kazakhstan's treaty obligation, unduly prevents them from earning and using returns they would otherwise be able to earn and use. Thus, only the continued application of such legislation causing actual damage would justify the raising of a specific claim for compensation.

474. For this reason, the Arbitral Tribunal considers that Claimants' claims for compensation of damages for the period following the issuance of the present Award until 31 December 2013 are at this stage unfounded.

3. With Regard to Claims relating to the 'Tariff in Exchange for Investment' Scheme for the Period after 1 January 2016

475. The Arbitral Tribunal has already found that Claimants' claims for breach of treaty standards relating to the post-2016 regime are premature and at this stage unfounded (see above para. 443).

476. Consequently, Claimants' claims for restitution and/or compensation based on such claims are equally unfounded and are to be rejected.

4. Fifth Conclusion

477. **Claimants' claim for full restitution by re-establishing Claimants into the situation which existed prior to Kazakhstan's breaches of the FIL, ECT and BIT is rejected (CL-2).**

478. **Claimants' claim for compensation of all losses suffered as a result of Kazakhstan's breaches of the FIL, ECT and BIT, including moral damages**

(i) is rejected to the extent that it relates to Claimants' Original Claims with regard to Kazakh competition law and as relating to the period until 31 December 2008;

(ii) is rejected to the extent that it relates to Claimants' Additional Claim with regard to the 'tariff in exchange for investment' scheme as implemented under the 2009 Tariff Amendment and 2012 Electricity Law as relating to the period from 1 January 2009 to the date of the present Award;

(iii) is deemed premature and therefore unfounded to the extent that it relates to Claimants' Additional Claim with regard to the 'tariff in exchange for investment' scheme as implemented under the 2009 Tariff Amendment and 2012 Electricity Law as relating to the period following the date of this Award. Claimants' claim for restitution for such period is rejected.

H. Costs

1. The Parties' Positions

479. The Parties submitted their Submissions on Costs on 17 May 2013 simultaneously (see above para. 123).

480. Claimants submitted a total amount of costs of **USD 7,818,086.81**, including an amount of USD 5,320,043.37 for legal fees and USD 1,923,043.44 in various costs and disbursements (including USD 156,735.55 in disbursements, USD 1,964,337.89 in Expert fees and expenses), and USD 575,000 for the ICSID advance on costs and lodging fee.

481. Respondent submitted a total amount of costs of **USD 10,620,839.96**, including USD 8,145,480.50 in legal fees (composed of USD 6,349,103.11 in legal fees from Reed Smith LLP, USD 1,504,877.40 in legal fees from other Counsel, and USD 291,500.00 in legal fees from Kazakhstan's legal consultants) and USD 1,925,359.36 in costs and disbursement (including USD 1,091,820.99 in Experts' fees, USD 661,020.95 in translation and interpretation fees, USD 110,001.19 in internal disbursements, USD 62,516.32 in external disbursements) and USD 550,000 for the ICSID advance on costs.

482. With regard to costs, Claimants filed the following request for relief (see above para. 134):

> **"** […] *the Claimants request that the Tribunal enter an award in their favour and against the Republic of Kazakhstan as follows:*
>
> […]
>
> *D.* **[CL-5]** *pay the Claimants the costs of this arbitration, including all expenses that the Claimants have incurred or will incur in respect of the fees and expenses of the arbitrators, ICSID, the Secretary of the Tribunal, legal counsel, experts and consultants;*
>
> […]*"*

483. Respondent filed the following request for relief (see above para. 137):

> " […] *Respondent respectfully requests the Tribunal to adjudge and declare in its Award or Awards in the present proceedings that:*
>
> […]
>
> *f.* **[RSP-8]** *the Claimants shall pay Kazakhstan's costs and expenses incurred in relation to the present proceedings, including any payments by way of advance that Kazakhstan has made or will make on account of the costs and expenses of the Tribunal, the Secretary to the Tribunal and/or ICSID.*

484. In addition, it its Submission on Costs, Respondent concluded as follows: "*In the event of a finding of no breach on the part of the Respondent, the Respondent submits that it should be entitled to its Party Costs and its share of the Costs of the Arbitration. For the reasons outlined above, in the event of a finding of some breach on the part of the Respondent, the Respondent submits that it should nevertheless be entitled to the costs it has incurred in relation to the claims and arguments put forward by the Claimants which*

have been unsuccessful, as well as the corresponding proportion of the Costs of the Arbitration".[324]

485. The fees and expenses of the Tribunal and ICSID's administrative fees and expenses (the costs of the proceeding) are the following:[325]

	USD
Prof. Pierre Tercier	370,259.63
Prof. Vaughan Lowe QC	99,172.11
Dr. Klaus Sachs	201,633.36
Dr. Clarisse von Wunschheim	38,046.12
ICSID's administrative fees and expenses, including hearing costs (estimated)	145,998.01
Total	**855,109.23**

486. The Tribunal's fees and expenses as well as ICSID's administrative fees and expenses are paid out of the advances made by the Parties.[326] As a result, each Party's share of the costs of the proceeding amounts to USD 427,554.61.

2. The Arbitral Tribunal's Assessment

487. Article 61(2) of the ICSID Convention provides as follows:

> "*(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*"

488. This provision gives the Arbitral Tribunal the discretion to allocate the costs of the proceedings among the parties as it considers appropriate, whereby it is common practice to differentiate between parties' costs, including legal fees and disbursement, and the costs of the arbitration, including the arbitrators' fees and the administrative fees of ICSID.

489. In the circumstances of this case, the Arbitral Tribunal considers the following factors to be relevant for the allocation of the overall costs relating to the arbitration:

(i) Claimants' claims were composed of two main bulks of claims, one relating to the effects on Claimants of Kazakh competition law and one relating to the effects on Claimants of the 'tariff in exchange for investment' scheme. The first bulk of

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[324] RSP Submission on Cost 17.05.2013, para. 53.

[325] The ICSID Secretariat will provide the Parties with a detailed financial statement of the case account as soon as all invoices are received and the account is final.

[326] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

claims however represented the core of Claimants' claims and Claimants' claims in this regard have failed. The Arbitral Tribunal nevertheless admitted a breach of the FET standard with regard to the second bulk of claims.

(ii) Since Claimants did not provide individualized damage assessments for each of their claims and based their entire damage calculation on an assumption that the Arbitral Tribunal considered as inapposite, it is not possible to measure the specific proportion of claims which the Arbitral Tribunal considered as founded.

(iii) Although Claimants have failed on the majority of their claims, those claims were in no regard frivolous or otherwise a lost cause. They originated primarily from a disagreement between the Parties about the relationship between assurances made by Kazakhstan in the Altai Agreement and other laws, such as the 1994 FIL, and Kazakhstan's obligations under the BIT and the ECT. In this regard, the Arbitral Tribunal considers that Kazakhstan bears part of the responsibility in the escalation of the dispute into an ICSID arbitration and that it would therefore not be appropriate to let Claimants bear the entire burden of the costs relating to the arbitration proceedings.

490. Consequently, the Arbitral Tribunal considers that it is appropriate to allocate the costs as follows:

(i) Each party shall bear its own legal fees and expenses;

(ii) The costs of the proceeding shall be borne to 67% by Claimants, i.e. USD 572,923.18, and Respondent shall bear the other 33%, i.e. USD 282,186.04. Thus, Claimants shall pay to Respondent the amount of USD 145,368.57.

3. Sixth Conclusion

491. **Consequently, the Arbitral Tribunal rules as follows:**

(i) The costs of the proceeding are fixed at USD 855,109.23.

(ii) Claimants and Respondent shall each bear their own legal fees and expenses.

(iii) The costs of the proceeding shall be borne to 67% by Claimants, i.e. USD 572,923.18, and Respondent shall bear the other 33%, i.e. USD 282,186.04. Thus, Claimants shall pay to Respondent the amount of USD 145,368.57.

III. DECISION OF THE ARBITRAL TRIBUNAL

492. In consideration of the above, the Arbitral Tribunal finds and decides as follows:

1. **The Arbitral Tribunal considers that it has jurisdiction to hear Claimants' claims as submitted in this proceeding and that there is no procedural impediment preventing the Arbitral Tribunal to hear such claims.**

2. **With regard to Claimants' request that the Arbitral Tribunal declare that Kazakhstan has (a) breached Articles 6, 8, 10 and 13 of the FIL, (b) breached Articles 10 and 14 of the ECT, and (c) breached Articles II and IV of the BIT (CL-1), the Arbitral Tribunal finds that:**

   (i) With regard to claims relating to the changes in Kazakh competition legislation and their application to the AES Entities for the period from 2004 to 31 December 2008, Claimants' request is rejected;

   (ii) With regard to claims relating to the 'tariff in exchange for investment' policy as implemented by the 2009 Tariff Amendment and 2012 Electricity Law during the period from 1 January 2009 to the date of this Award, the restrictions imposed under such scheme as described above in paras. 349-354 breached the FET standard under Article 10(1) of the ECT and Article II(2)(a) of the BIT in view of their drastic character and extended duration. All other requests relating to this same period are rejected for the reasons set out above in para. 433;

   (iii) To the extent such request relates to the period after 1 January 2016 it is premature and therefore unfounded.

   (iv) All other requests under this heading are rejected.

3. **With regard to Claimants' request for various orders, the Arbitral Tribunal finds as follows:**

   (i) CL-2: Claimants' request that Kazakhstan be ordered to provide full restitution to the Claimants by re-establishing the situation which existed prior to Kazakhstan's breaches of the FIL, ECT and BIT is rejected.

   (ii) CL-3: Claimants' request that Kazakhstan pay Claimants compensation for all losses suffered as a result of Kazakhstan's breaches of the FIL, ECT and BIT, including moral damages

   - **is rejected to the extent that it relates to Claimants' Original Claims with regard to Kazakh competition law and as relating to the period until 31 December 2008;**

   - **is rejected to the extent that it relates to Claimants' Additional Claim with regard to the 'tariff in exchange for investment' scheme as implemented under the 2009 Tariff Amendment and 2012 Electricity Law as relating to the period from 1 January 2009 to the date of the present Award;**

- **is deemed premature and therefore unfounded to the extent that it relates to Claimants' Additional Claim with regard to the 'tariff in exchange for investment' scheme as implemented under the 2009 Tariff Amendment and 2012 Electricity Law as relating to the period following the date of this Award. Equally, Claimant's claim for restitution for such period is rejected.**

(iii) CL-5: Claimants' request that Kazakhstan be ordered to pay Claimants pre-award interest is rejected.

(iv) CL-6: Claimants' request that Kazakhstan be ordered to pay Claimants post-award interest, compounded monthly at a rate to be determined by the Tribunal on the amounts awarded until full payment thereof is rejected;

(v) CL-7: Claimants' request for any such other and further relief that the Arbitral Tribunal shall deem just and proper is rejected.

4. With regard to each Party's request that the other Party be ordered to pay the costs of the arbitration, including all legal fees and expenses, the fees and expenses of the Members of the Tribunal, and the charges for the use of ICSID's facilities, the Arbitral Tribunal orders that:

(i) Each Party shall bear its own legal fees and expenses; and

(ii) Claimants shall bear 67% of the costs of the proceeding, i.e. USD 572,923.18, and Respondent shall bear the other 33%, i.e. USD 282,186.04. Thus, Claimants shall pay to Respondent USD 145,368.57.

5. All other requests from either side are rejected.

The Arbitral Tribunal:

Professor Vaughan Lowe QC
Arbitrator
Date: 21 October 2013

Dr. Klaus Sachs
Arbitrator
Date: 24 October 2013

Professor Pierre Tercier
President of the Tribunal
Date: 28 October 2013