

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
(ICSID Case No. ARB/17/22)**

BIG SKY ENERGY CORPORATION

Claimant

- and -

THE REPUBLIC OF KAZAKHSTAN

Respondent

**RESPONDENT'S MEMORIAL ON JURISDICTION AND
COUNTER-MEMORIAL ON THE MERITS AND
QUANTUM**

29 March 2019

**Professor Bernardo M. Cremades (President of the Tribunal)
Professor Stanimir A. Alexandrov (Arbitrator)
Judge Peter Tomka (Arbitrator)**

Reed Smith LLP
Belinda Paisley
Chloe Carswell
Azhar Kuzutbayeva
Dina Nazargalina
Lucian Ilie
Lucy Winnington-Ingram

Samuel Wordsworth QC
Essex Court Chambers

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Counsel for the Respondent

CHAPTER 3: OBJECTION TO JURISDICTION

307. Pursuant to the denial of benefits clause at Article 1(2) of the BIT, the Respondent is entitled to exercise, and has exercised, its right under that provision to deny the benefits of the BIT – including its dispute resolution provisions – to the Claimant.⁵⁰⁴ It follows that the Tribunal lacks jurisdiction in respect of this dispute.

308. The denial of benefits clause at Article 1(2) of the BIT provides as follows:

“Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations.”

309. Article 1(2) is correctly interpreted as enabling the Respondent state to deny the benefits of BIT protection to the Claimant by invoking this provision in the arbitration, showing that the requirements have been satisfied on the facts. In this respect, the requirements of Article 1(2) will be satisfied (and the Claimant’s claims in this arbitration must be dismissed) if:

- (a) “nationals of any third country control [the Claimant]”; and
- (b) the Claimant either “has no substantial business activities in the territory of [the United States]”, or “is controlled by nationals of a third country with which [the Respondent] does not maintain normal economic relations”.

310. Under Article 1(2), the Respondent’s denial of benefits may encompass all of “the advantages of” the BIT, without limitation, and so includes both substantive and procedural protections under the BIT. [REDACTED]

[REDACTED]

■ [REDACTED]

[REDACTED]

329. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

330. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

331. [REDACTED]
[REDACTED]

The Claimant was managed by a Board of Directors at the time of its investments in Kazakhstan. The Directors have changed over time. Mr Matthew Heysel, [REDACTED] was Chairman of the Board of Directors from April 2000 until June 2009 and Chief Executive Officer of the Claimant from April 2000 to March 2005. At the date of the Request for Arbitration, Mr Scott Lawler was, and continues to be, the Claimant's sole director. [REDACTED]

[REDACTED]

332. The Respondent therefore submitted its Article 43 Application, requesting an order from the Tribunal that the Claimant be required to produce documents [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

333. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

334. [REDACTED]

(i) [REDACTED] Mr Lawler is a nominee director who does not exercise in fact control over the Claimant

335. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

336. Here, although Mr Lawler, a United States national, is (and was at date of the Request for Arbitration) registered as the Claimant’s sole director, [REDACTED] that Mr Lawler is a nominee director, who takes his instructions from another entity or individual.⁵³⁶

337. Mr Lawler is a practicing lawyer at the firm Booth Udall Fuller in Tempe, Arizona,⁵³⁷ who previously served as the lawyer of BSEK and as the Claimant’s SEC securities counsel.⁵³⁸ Mr Lawler further serves (or has previously served) as the officer and/or director of some nine other companies registered in the United States, but which have offices and conduct their operations exclusively in other jurisdictions, such as Russia and Canada. In total, Mr Lawler is the signatory of 156 SEC filings for 56 various corporate entities.⁵³⁹

338. [REDACTED] the circumstances of Mr Lawler’s appointment as its sole director as follows:

Between 22 and 25 March 2013, the Claimant’s Board of Directors resigned from their positions but before doing so, as their final act, they appointed Mr Lawler as the Claimant’s sole Director, President, Secretary and Treasurer. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Mr Lawler is a nominee director [REDACTED]

⁵³⁷ Professional Biography of Mr Lawler (accessed on 3 October 2018): <http://boothudall.com/attorneys/w-scott-lawler> [REDACTED]

⁵³⁸ BSEK (then China Energy Ventures Corp.) Registration Statement dated 19 February 2004 [REDACTED]

⁵³⁹ W. Scott Lawler - ‘Registrant, Group Member and/or Signatory’ date of access (3 October 2018) [REDACTED]

[REDACTED]

339. [REDACTED]

(a) [REDACTED]

(b) [REDACTED]

[REDACTED]

340. [REDACTED]

341. [REDACTED]

[REDACTED]

352. [REDACTED]
[REDACTED]
[REDACTED]

353. Thereafter, the Tribunal issued Procedural Order No. 2 dated 23 October 2018, [REDACTED]
[REDACTED]

[REDACTED]

354. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

355. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]