

INTERNATIONAL COURT OF ARBITRATION

CASE No. 9058/FMS/KGA

- 1. BRIDAS S.A.P.I.C.
(Argentina)**
- 2. BRIDAS ENERGY INTERNATIONAL LTD
(British Virgin Islands)**
- 3. INTERCONTINENTAL OIL & GAS VENTURES LTD.
(British Virgin Islands)**
- 4. BRIDAS CORPORATION
(British Virgin Islands)**

v/

- 1. GOVERNMENT OF TURKMENISTAN
(Tukmenistan)**
- 2. CONCERN BALKANNEBITGAZSENAGAT
(Tukmenistan)**
- 3. STATE CONCERN TURKMENNEFT
(Tukmenistan)**

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**INTERNATIONAL COURT OF ARBITRATION
OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE NO. 9058/FMS/KGA

BETWEEN

BRIDAS S.A.P.I.C.
BRIDAS ENERGY INTERNATIONAL, LTD
INTERCONTINENTAL OIL & GAS VENTURES, LTD. and
BRIDAS CORPORATION

CLAIMANTS

AND

GOVERNMENT OF TURKMENISTAN,
CONCERN BALKANNEBITGAZSENAGAT AND STATE
CONCERN TURKMENNEFT

RESPONDENTS

THIRD PARTIAL AWARD

Introduction

In their Second Partial Award, the arbitrators concluded that:

“...this arbitral tribunal has the jurisdiction to consider and make an award concerning the Claimants’ claim for damages arising out of their acceptance of the repudiatory conduct of the Respondents and the Government.”

With the concurrence of the parties, two arbitrators met in Houston, Texas with the parties on January 26, 2000 in order to clarify issues and focus the proceeding concerning the quantum of the Claimants’ damages.¹ A hearing with all arbitrators took place in Houston on January 27, 2000 and final oral submissions were made in Atlanta, Georgia on February 5, 2000.

¹ One of the arbitrators was unable to attend on that day due to weather related travelling problems.

Positions of the Parties

The Claimants sought \$1,045,880,661², plus interest to the date of the award and interest on that sum until payment and costs in the amount of \$10,722,859. The Respondents contended that at the maximum, the result should be \$252,454,000 in total, plus interest, but at a lesser amount than pursued by the Claimants and no costs. Both parties initially based their calculations as of January 31, 2000, but at the request of the arbitrators provided conclusions as of July 5, 1999, the date the Claimants accepted the Respondents' repudiation. It was on that date that the loss of bargain of the Claimants crystallised. The parties agreed that this is the appropriate date from which to calculate the Claimants' entitlement.

The revised maximum figures as of July 5, 1999 advanced by the parties are:

Claimants - \$980,050,451 for loss of bargain and recovery of expenditures, plus compound interest and costs;

Respondents - \$247,380,000, plus simple interest and no costs.

The Respondents take the position that their continued participation in the arbitration is without prejudice to the legal positions they advance in other proceedings. The arbitrators have not been asked to comment on this contention and do not do so.

The Government was not represented at the 2000 proceedings.³ The Claimants seek an award of damages against the Government and the Respondents jointly and severally. In the First Partial Award, the arbitrators stated:

“The key complaint of the Claimants is that they were prevented from exploiting the resource. A violation of that right would be a breach of contract affording redress by the Claimants against both the Turkmenian Party and the Government. The contractual dispute resolving mechanism in the documents that contain the obligation is the foundation of this arbitration.”

² All amounts are expressed in United States' dollars.

³ Although the arbitrators previously concluded that the Government is a proper party to the arbitration, they have recognized that the Government has not actively participated in the proceeding and have not opined on the extent to which it may be considered to have attorned to the process. The Government did not directly defend its position in the arbitration. The burden and costs of so doing were borne by the Respondents.

The Government and the Respondents are liable for the Claimants' loss-of-bargain damages, but the Government is not liable for the payment to the Claimants of 50% of their foreign party contribution account, that is, for the "...Cost Recoverable amounts advanced to [the Respondents]...pursuant to Article 10 of the JV Agreement."⁴ The Respondents have that liability irrespective of any breach of contract.⁵

There was discussion at the 2000 hearing concerning remedies. These included imposing a lien on or an order transferring interests in Joint Venture Keimir and its assets or in some other way assisting the parties to end their relationship completely. The arbitrators are obliged to decide the matters in issue in accordance with law and are not authorized to act as *amiable compositeurs* or to decide *ex aequo et bono* and do not do so.

The parties made it clear that at this stage of the proceedings they did not want the arbitrators to make orders or directives beyond a determination of damages and costs.

The Claimants were concerned with securing payment of any award in their favour and took the position that they had continuing rights and obligations in JV Keimir, including its liquidation. The Respondents contended that the Claimants had no such rights and urged the arbitrators to do nothing that would suggest any continuing entitlement in the project by the Claimants.

The following discussion took place with counsel for the Respondents. It illustrates the sensitivity of the issue.

"The termination of the contract effectively severed Bidas' relationship to the joint venture and its rights under the agreement, save for such matters as the continuing adjudication under this arbitration of the consequences of actions that took place before the date of acceptance. They have no further rights going forward. To the extent that they are relying on invitations, presumably from the joint venture, consisting of nominees of Bidas, I would respectfully submit that those nominees are effectively

⁴ Although the arbitrators questioned whether this amount should be discounted to a present day value as of July 5, 1999, both sides based their calculations on full recovery of the amount owing.

⁵ This conclusion is a natural corollary of the limited basis on which the arbitrators concluded that the Government is a proper party to the arbitration as stated in the First Partial Award.

functus officio since the date of acceptance. But be that as it may, that's not a matter for the Tribunal to decide. The relations as between these parties are no longer based on the agreement; and, therefore, that is a matter to be resolved elsewhere.

The contract has been terminated. I think that the Chairman was exactly right, that there may or may not be a termination. I think the joint venture continues in existence. It is without its foreign party. And its reason for being may be called into question by the -- by Turkmenneft and by the authorities in Turkmenistan, but its outcome is beyond what this Panel is called upon to do. Liquidation under Turkmenian law is a matter of statutory procedure, and that will be taken care of by having severed its connection with the joint venture. By accepting termination, Bidas is no longer a party to that process.

Arbitrator Chiasson: Do you want us to do anything?

Mr. Knull: I want, I think, to do two things. One is to declare effective and irreversible the acceptance of termination. But, two, I want you to exercise prudence in what you attempt to do in light of the circumstances that we face now. Bidas has terminated the contract, it remains in possession. As long as it remains in possession, Turkmenneft can't resume production, can't resume earning income, including income that might be used to pay the debt. I want you to refrain from doing anything that would encourage that continuation or encourage the continued interference with earning that income that would facilitate the payment and final resolution of this matter. I want you to avoid taking any action that would leave the parties at risk of breach of the peace or the kinds of confrontations with which this proceeding started. I don't think there is a risk of that, but I don't want anything in an award that is going to encourage Bidas to stay that would require the consideration of what remedies are available locally.

And finally, I don't want anything in the award that would impede the clear title to this property that has got to result from the termination of the agreement. Because, again, the ability to bring in a different investor may be the key to

achieving the early payment of the -- of whatever award is entered. would note that I think that it is common ground as between the parties, that as a result of the loss of bargain award, that all of the assets that are on the ground will have been consumed in earning that over the life of the hypothetical agreement. There has been no evidence of any residual salvage value or any claim for any such value, and, therefore, there's no amount there that needs to be considered by the Panel.

Arbitrator Bell: They probably -- I'm sure they want to get paid and you want to get them off the property.

Mr. Knull: right.

Arbitrator Bell: And we can't, seem to me, make any order about getting them off the property.

Mr.. Knull: I think that would exceed --

Arbitrator Bell: Might not have jurisdiction.

Mr. Knull: I think that would exceed your jurisdiction, that's right."

Requiring the Claimants to surrender their interests in JV Keimir on satisfaction of the award may connote a conclusion by the arbitrators that the Claimants are entitled to remain on site or that they have a continuing interest in the joint venture. The arbitrators do not opine on these matters and respect the wishes of counsel that they say nothing that might be construed as doing so.

Preliminary Issue

In ruling 8 of the First Partial Award, the arbitrators stated that:

"...if the Claimants were to accept repudiatory conduct by the Respondents and the Government and thus to bring the JV Agreement to an end, their damages would be calculated on a loss-of-bargain basis, involving 218,560,935 barrels of oil equivalent at a net-back price of \$10.50 per barrel, using a discount rate of 10.446% based on a contract term of 25 years with an FPC account adjusted as required to reflect

relevant changes, if any, from June 30, 1997 including interest and taking into account all appropriate provisions of the JV Agreement and facts then relevant;”

The Respondents take the position that the reference to barrels of oil equivalent (“BOE”) incorrectly embraces the Claimants’ evidence concerning production over the life of the Agreement, which sometimes is referred to as a “depletion plan”, because in the body of the award, the arbitrators stated:

“Both sides delivered expert reports and adduced evidence concerning the volume of oil and gas - “Barrels Oil Equivalent (“BOE”) - to be realized over the life of the contract. The arbitrators prefer the evidence of the Respondents’ experts on this point and on the appropriate net-back price per barrel to be used in the damages calculation. They are respectively 218,560,935 BOE and \$10.50 per barrel.”

The Respondents say that having expressed a preference for the evidence of their expert evidence, the BOE volume conclusion of the arbitrators must be significantly less based on the Respondents’ experts’ approach to production. The Claimants assert that the stated preference of the arbitrators does not embrace the depletion program evidence of the Respondents’ experts.

The Claimants take the position that the net-back price of \$10.50 per barrel should be applied to the entirety of the BOE volume stated in the First Partial Award. The expressed net-back price is the price of oil. Because the value of gas and oil is measured differently, it is necessary to ascertain the quantity of gas in the BOE figure and to apply to it an equivalent amount related to the units of measurement for gas. On the Claimants’ calculation, this results in a price for gas of \$1.75 per mcf. The Respondents state that this is contrary to the evidence adduced in the arbitration and that the parties then were *ad item* on prices for gas of \$1.13 and \$1.19 per mcf depending on the method of transportation.

There is a dispute whether the comments in ruling number 8 are binding and whether the arbitrators have the power to alter them if they were to conclude either that they were wrong or that they were ambiguous.

It is not necessary for the arbitrators to resolve these issues and we do not do so.

It is important to recognize what the arbitrators did and what they did not do in the First Partial Award.

The First Partial Award dealt with matters on which there had been evidence and argument and with respect to which the arbitrators considered that guidance to the parties would be helpful. This was reflected in Arbitrators' Communication No. 119, which expressed the unanimous view of the Tribunal.

In the First Partial Award, the comments of the arbitrators were stated to be: "...for the consideration and guidance of the parties." That guidance was based on the evidence and argument presented to the arbitrators by the parties. It was stated further that the arbitrators were "... not [determining] the amount of damages, if any, to which the Claimants would be entitled but, [they did] decide specific issues relevant to the calculation of damages based on the evidence and submissions presented...by the parties in the course of the arbitration." They also noted that any calculation of damages would be undertaken "...taking into account all appropriate provision of the JV Agreement and facts then relevant".

It is clear that the calculation of the Claimants' damages involves some components that are variable and some that are not. The latter would include the fact that it is a loss-of-bargain and not a market value calculation, the duration of the contract, the volumes of the risked reserves and the discount rate, although the latter two also may vary depending on the date at which the calculation is undertaken. They and the price of oil and gas may vary to reflect the "facts then relevant".

The Respondents do not contest a contract term of 25 years and the Claimants accept it. The Respondents also do not quarrel with the loss-of-bargain approach to the calculation.

The risked BOE volume was a matter of dispute at the original hearing. Similarly, the net-back price of oil was the subject of disagreement among the experts of the parties. This was the context of the observation by the arbitrators that they preferred the

evidence of the Respondents' experts and their expression of a price per barrel and the volume of BOE.

The Components of the Damages Calculation

The arbitrators see no reason to depart from their original conclusion that the appropriate approach to the calculation is loss-of-bargain and that the duration is 25 years.

At the original hearing, the evidence was clear that the net-back price of \$10.50 per barrel referred to the price of oil. Gas is not sold in barrels. There was agreed data concerning the price of gas. The price of oil was in dispute. The arbitrators did not comment on the price of gas.

There is no error and no ambiguity in the observations of the arbitrators in the First Partial Award. BOE is a composite expression of the volumes of oil and gas. Separate volumes of oil and gas can, but need not be, derived from the BOE total. It was not used by either party to ascertain value. Value was calculated by both sides based on the price and volume of oil and the price and volume of gas considered separately. It is disingenuous to suggest that it should be otherwise because the arbitrators used the words "net-back price per barrel" and did not add the word "oil". In context and on the clear understanding and usage of the parties, it was not necessary to do so.

As noted in the First Partial Award: "[i]f it were necessary for a tribunal to decide the quantum of damages for loss of bargain, it would do so on the basis of the material and submissions then presented to it by the parties..." The arbitrators expressly did not embark on a calculation of the damages and did not presume to tell the parties how to do so. They provided guidance to the parties concerning the volume of BOE and the net-back price of oil. It remained up to them to use these observations as they saw fit. The arbitrators' guidance could only reflect the evidence adduced at the time of the original hearings, but at that time the Claimants' right to damages had not crystallized. Insofar as price is a changing variable, it is not inappropriate for the arbitrators to place it into the context of July 5, 1999.

Determination of the input numbers for a calculation of damages for loss of bargain is a question of fact which is a matter of judgement based on the evidence.

It is instructive to note what was said in the First Partial Award concerning the discount rate.

“Claimants’ rate is too low and does not adequately reflect risk and the provisions of the contract. The arbitrators conclude that a rate of 10.446% which is the rate charged by the Claimants to the Respondents on the Claimants’ FPC account, *in the circumstances of this case reflects the reality of the factual context as of June 30, 1997*, the notional date for the receipt of money, and the terms of the JV Agreement.”(emphasis added).

Although they consider it to be too high, the Claimants do not challenge the arbitrators’ conclusion in the First Partial Award concerning the discount factor, but the Respondents say that it is too low and should be revised upward, particularly because in another arbitration proceeding, the Claimants admitted that risk is relevant whereas the discount number they advanced in this proceeding did not include risk. Both parties adduced expert evidence concerning the feasibility of marketing the resource. The Claimants reviewed recent developments and future plans. They also referred to the optimistic, public position taken by the Government in recent times. The Respondents noted the absence of completed transportation facilities and the fact that control over them is in the hands of others. It was their position that no gas would be exported for several years.

Having considered the evidence adduced and submissions made at the January and February, 2000 proceeding, the arbitrators see no reason to depart from their earlier assessment of the appropriate discount factor. It was higher than the non-risk discount factor advanced initially by the Claimants⁶ and takes into account the various risks referred to by the parties in the evidence, including those that derive from a consideration of the production plan insofar as it delays or eliminates volumes of production.

As noted, the BOE was the subject of dispute at the original hearing. The conclusions of the parties differ based on the depletion plans that each advances. There was not a great deal of relevant new information provided at the 2000 hearing. Circumstances relevant to the exploitation of the resource over 25 years did not change materially from the time of the

⁶ 7.5% as opposed to 10.446%.

previous hearings to July 5, 1999. The arbitrators are satisfied that their original assessment of the total risked BOE fairly represents the situation.⁷

At the January and February, 2000 hearing, the net-back price of both oil and gas was reviewed by both sides.

We first address the price of gas.

In the previous hearings, there was consensus on the price of gas at \$1.13 or \$1.19 per mcf depending on the mode of transportation. In the 2000 hearings, the price of gas was the subject of dispute and evidence was adduced and arguments made concerning it. The price proposed ranged from a high by the Claimants of \$1.75⁸ to a low of \$0.36 advanced by the Respondents. The Respondents contend that no gas will be sold until 2006. The Claimants say that this is consistent neither with the history of the project nor reflective of present market expectations.

The arbitrators have considered all of the evidence and arguments presented throughout the arbitration. They reject the Claimants' contention based on an extrapolation from the net-back price of oil, but view the Respondents' position as overly pessimistic.

The arbitrators have considered the price of oil in the context of the date of acceptance of the repudiation by the Claimants. The position of the Respondents again is overly pessimistic. Arguably, the prospects as of July 5, 1999 were improved over the circumstances that existed at the time of the earlier hearings. The arbitrators are satisfied that their original assessment of the likely price for oil was realistic.

Properly understood and after consideration of the submissions and evidence advanced by the parties, the non-variable findings stated in ruling number 8 of the First Partial Award and the conclusions concerning the discount factor and price of oil remain the opinion of the arbitrators and are incorporated into this Third Partial Award. It is not necessary to decide

⁷ The BOE is a global volume number. Until the final damages hearing, values for oil and gas or the percentage of each in the context of the overall volume and value were not considered by the arbitrators.

⁸ Derived from the net-back price referred to in the First Partial Award.

whether they were binding as a result of the First Partial Award or to consider whether that award could or should be re-opened for correction.

In summary: the BOE is 218,560,935⁹; the net-back price of oil is \$10.50; the applicable term is 25 years; the discount factor is 10.446%.

Adjustment to July 5, 1999

Both parties calculated volumes of production as of January 1, 1996 and extrapolated them forward to July 5, 1999. The Claimants did so using a factor of 10.446% and the Respondents 10%. The Respondents used simple interest and the Claimants compounded. At the request of the arbitrators, the parties adjusted their July 5, 1999 calculations to show the results following both methods.

Both sides compounded in their calculations to obtain the loss-of-bargain valuation as of January 1, 1996. It is appropriate to do so in the extrapolation forward to July 5, 1999. This is not an issue of interest on damages, but an adjustment to calculate the value of the income stream at the date the arbitrators consider to be appropriate.

The Loss of Bargain Calculations

Calculation of the present-day value of the Claimants' lost income stream is complex. It must take into account not only relevant risk and discount factors, but deductions dictated by the JV Agreement. These include certain funds, royalties and taxes at different rates. The numbers advanced by the parties, as noted above, take these matters into account.

The volume of oil calculated by the parties is significantly less than that of gas. In a chart presented by the Respondents at the 2000 hearing, the total barrels of oil and BOE of gas asserted by the Respondents are respectively 40,807,107 and 127,247,004 and for the Claimants 48,089,648 and 161,527,189. In either calculation, gas is approximately 75% of the total reserve volume.

⁹ Which was adjusted by the Claimants to 209,617,189 to reflect a 25 as opposed to a 35 year term. The Respondents contend that the BOE should be 168,054,111 based on their depletion plan, but agree that 209,617,189 is the correct 25 year figure if the 35 year risked BOE were 218,560,935.

The present value of the lost oil and gas income stream accounts for approximately \$798,000,000 of the Claimants' total claim as of July 5, 1999. It is based on a gas price of \$1.75 per mcf, which the arbitrators have concluded is too high. As an approximation, it could be inferred that something in the order of 75% of that value, or \$598,000,000, is attributable to gas. The arbitrators conclude that a fair assessment of the present value of the lost income stream for gas is \$295,000,000 to which they add \$200,000,000 for the value of oil, making a total of \$495,000,000.

Mitigation

The arbitrators previously concluded that the Claimants had an obligation to mitigate their damages. The Claimants correctly point to the law of mitigation to state that the Respondents have the burden of showing that the Claimants did not meet their obligation and they refer to the circumstances that existed as of and following the autumn of 1997. In the context of those times, they say that they acted reasonably and that there was no realistic prospect that the export ban would have been lifted.

The situation in this case is not usual.

The arbitrators endeavoured to work with the parties to assist them in limiting the economic consequences of their dispute. There was great reluctance on both sides to take any steps that might give or be perceived as giving an advantage to the other side. The Respondents were not prepared to have the operation continue under the control of the Claimants. The Claimants did not want to relinquish any of their contractual rights. Stalemate was inevitable if there were rigid adherence to these positions.

A seminal requirement was the lifting of the export ban and the Claimants point out that there is no evidence that this would have occurred. They note that previously there was a statement that exports would be allowed, but they were not and that the Respondents consistently maintained that the Claimants would not be allowed to resume operations.

These facts, while true, do not address the situation that was envisioned by the arbitrators' initiative subsequent to the July, 1997 hearing. It then was suggested that the parties jointly operate the field and that the revenues be placed in an escrow account. Counsel for the

Respondents and the Government was prepared to recommend an arrangement to his clients. Of necessity, this would have involved a lifting of the export ban. As a result of the position taken by the Claimants, the initiative did not get to that stage.

For the next approximately year and one-half - until July 5, 1999 - the Claimants kept alive the joint venture agreement and spent money to maintain the field. Their income stream was protected by a factor of at least 10% and they say 10.446%. That is, they made a return on that income stream of that percentage.

In the result, the Claimants benefited from the performance hiatus and have been given credit for that. During the hiatus, they incurred costs which they seek to recover and for which they have been given credit. No serious attempt was made to mitigate their damages, that is, to eliminate or obtain revenue to off-set the costs.

The Claimants did not meet their duty to mitigate their damages. The extent to which a party is obliged to mitigate and the economic consequences of failing to do so, are matters of judgement based on the evidence and the circumstances applicable to the dispute. The arbitrators deduct from the present value of the lost oil and gas income stream the sum of \$50,000,000 as a consequence of the Claimants' failure to mitigate. This leaves a net value of \$445,000,000 payable by the Government and the Respondents to the Claimants.

Foreign Party Contribution Account

In the 2000 hearings, the parties both dealt with the value of the Foreign Party Contribution Account ("FPC"). Their starting point was the value as determined by the arbitrators in the First Partial Award. The arbitrators accept the overall approach of the Claimants, but reject certain elements of their calculation.¹⁰

In simplistic terms, the Claimants are entitled to recover 50% of the money they advanced for the operation of the project as the recovery of a loan to the Respondents. Consideration of this matter involves an analysis of the legal position of the Claimants' post-acceptance of the Respondents' repudiation.

The acceptance put an end to the joint venture agreement.¹¹ Any services rendered to the joint venture after July 5, 1999 were not subject to the provisions of the joint venture agreement. Payment for them may be an obligation of JV Keimir, but the procedures and formula of the joint venture agreement no longer were operative. The arbitrators do not allow sums spent after the termination of the joint venture agreement and claimed by the Claimants as part of the FPC.¹²

After the export ban, the Claimants spent \$42,466,000 caretaking and protecting the field. Included in the FPC is 50% of this amount, \$21,233,000. The Claimants add the same amount to the FPC on the basis that they are entitled to recover 100% of the expenditure because it was made as a result of the breach of contract by the Respondents and the Government. The arbitrators reject this contention.

Having elected to keep the contract extant, the Claimants paid what was required to maintain the field. This was done pursuant to the provision of the joint venture agreement and should be dealt with in accordance with its terms. The Claimants cannot approbate and reprobate. They are entitled to recover only the 50% which is included in their total of \$71,480,000.

The Claimants pursue \$15,882,000 as damages arising out of alleged breaches of contract by the Respondents and the Government under three categories: flared gas, \$15,299,000; excess tariffs, \$131,000; transportation and treatment, \$392,000.

The arbitrators reject these claims. They do not reflect breaches of contract by the Respondents and the Government. The claims arise out of operations that essentially were under the control of the Claimants and, in part, reflect the necessities, exigencies and risks of those operations.

¹⁰ Essentially, the basic framework for recovery is not in dispute, but the parties disagree on the inclusion of certain items in the calculation.

¹¹ This does not deal with the Agreement which is the joint venture agreement and the charter of JV Keimir.

¹² This is subject to a payment of \$3,000,000 to the Finnish Export Credit Authority which is dealt with separately

The Claimants claim \$7,601,000 for expenditures from July 5, 1999 to January 31, 2000. This includes \$3,000,000 payable to the Finnish Export organization which is a direct liability accepted by the Claimants. Fifty percent of that amount is recoverable by the Claimants as part of their FPC.

In summary, the arbitrators find that the Claimants are entitled to \$103,548,000 for the recovery of expenditures made up of \$71,480,000 - 50% of the net balance of the FPC as of July 5, 1999 plus \$32,068,000 - interest thereon to July 5, 1999 and \$1,500,000, plus interest thereon from the date of payment to the Finnish Export organization to the date of payment by the Respondent at the applicable rate in the JV Agreement

Interest

The JV Agreement addresses the issue of interest in article 24.4I as follows:

“...the award shall include interest from the date of the breach or violation of the Agreement, as determined by the arbitral award until paid in full, at the interest rate established by the arbitral award;”¹³

The JV Agreement requires interest on the FPC at prime, plus 2%¹⁴ and this sum is included in the Claimants' calculation noted above. The Claimants are entitled to interest on \$71,480,000, at this rate from July 5, 1999 until the sum is paid.

In the context of this case, the date of the breach or violation must be the date of acceptance of the repudiation. Prior to that date, the breach or violation was legally of no consequence.

The wording of the Agreement suggests that there will be no distinction between the rate of pre- and post-award interest. The arbitrators consider that they have a discretion concerning the rate of interest and conclude that an appropriate rate is 10%. The Claimants also are entitled to interest at the same rate on the amount of the award and costs until the same are paid.

¹³ The reference is to the agreement, which is a constituent document of the JV Agreement.

¹⁴ Article 10.1 of the agreement, which is a constituent document of the JV Agreement, provides for interest on the FPC “...equal to the current prime rate plus (2) points at the Chase Manhattan Bank”.

If the parties were unable to agree on the quantum of the interest payable, the arbitrators would determine the amount after considering the positions of the parties.

Punitive Damages

The Claimants pursue punitive damages pursuant to article 24.4H of the Agreement which disallows punitive damages unless a "...Party has engaged in undue delay of the procedures of arbitration."

It is asserted by the Claimants that the Respondents have taken every possible adverse position they could and thereby exacerbated the arbitration. The arbitrators reject this contention.

Both sides have fought all issues very hard. The costs of both have been enormous. The Respondents called for an audit based on fraud which was not established, but it did show a significant amount of money that had been, but which should not have been, credited to the Claimants' FPC. Although the Claimants were obliged to bear the majority of the costs of the audit, the Respondents also were assessed a portion.

The Claimants' claim for punitive damages is not allowed.

Costs - legal fees and expenses¹⁵

Costs often are a difficult issue and in this case are of considerable monetary significance.

The Claimants seek to recover \$10,722,859 to the date of the final written submissions and an allowance for work done thereafter. The Respondents say that the Claimants should get no costs.

The Agreement and the ICC Rules give authority to the arbitrators to award costs as they consider to be appropriate.

¹⁵ The quantum of the "costs of the arbitration" - the ICC's administrative costs and the fees and expenses of the arbitrators - will be dealt with in the final award.

It is usual for costs to follow the event. In this case, the Respondents and the Government repudiated the Agreement. Their conduct deprived the Claimants of the benefit of their bargain. The Respondents could have sought redress for the evil they perceived in an arbitration as envisioned by the Agreement. They did not do so. Instead, they pursued self-help and obliged the Claimants to resort to the arbitral process for relief.

The Respondents did establish the need for a significant reduction in the Claimants' FPC based on breaches of contract by the Claimants.

There is little doubt that the conduct of the Claimants acerbated and prolonged the arbitration. They have been penalised for their conduct in the context of the costs of the audit, but the recovery of their own costs also must reflect that conduct. The efforts of their legal advisors and experts were affected by that conduct and their costs increased. That burden should not be borne by the Respondents.

In the result, the Claimants have established an entitlement to a considerable sum in damages, albeit at a greatly reduced amount from that which was pursued. They are entitled to some recovery of their costs, but at a greatly reduced amount which takes into account matters such as their recalcitrant conduct, the use and presence of counsel and experts who were not essential,¹⁶ a recovery that is considerably lower than what was pursued and the not inconsequential reduction in their FPC. The Claimants are entitled to recover their costs from the Government and the Respondents in the amount of \$3,000,000.

In addition to the costs that the parties incurred in the presentation of their cases in the arbitration, they funded the process through the ICC. It is the decision of the arbitrators that each should bear their own portion of those costs, that is, that the Claimants are responsible for 50% of the costs of the arbitration and the Respondents and the Government are responsible for 50% of the costs of the arbitration.

In the result, the arbitrators award:

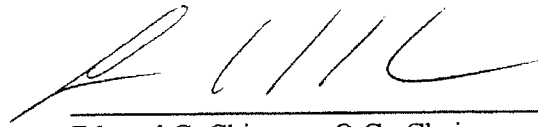
¹⁶ In this context, the arbitrators make no criticism of the Claimants or their advisors. They are entitled to manage their litigation resources as they see fit. The issue is whether it is reasonable to place the financial burden of their decision onto the Respondents.

1. the Government and the Respondents shall pay to the Claimants \$445,000,000 for damages caused by their repudiation of the Agreement, plus simple interest thereon at 10% per annum from July 5, 1999 to the date of payment ($\$445,000,000 \times .10 = \$44,500,000$ per annum / 365 days = \$121,917.81 per day);
2. the Respondents shall pay to the Claimants \$103,548,000 being the recovery of 50% of the Claimants' FPC, inclusive of interest to July 5, 1999 in the amount of \$32,068,000, plus interest on \$71,480,000, the net amount of its FPC, equal to the current prime rate plus (2) points at the Chase Manhattan Bank pursuant to the provisions of the JV Agreement from July 5, 1999 to the date of payment;
3. the Respondents shall pay to the Claimants \$1,500,000 being the recovery of 50% of the sum payable by the Claimants to the Finnish Export Credit Authority, plus interest thereon equal to the current prime rate plus (2) points at the Chase Manhattan Bank pursuant to the provisions of the JV Agreement from the date of payment by the Claimants until paid by the Respondents to the Claimants;
4. the Claimants' claim for punitive damages is dismissed;
5. the Claimants are entitled to recover from the Government and the Respondents their legal costs in the amount of \$3,000,000 plus simple interest thereon at 10% per annum from the date of this award to the date of payment ($\$3,000,000 \times .10 = \$300,000$ per annum / 365 days = \$821.92 per day);

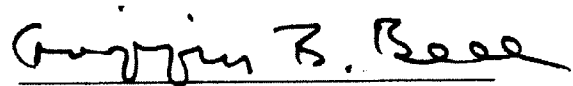
The arbitrators retain jurisdiction to deal with all questions relating to the interpretation and implementation of the this award, any matters of calculation and to correct any errors of form or arithmetic. If their further assistance were required, they are to be so notified

within 60 days of the date of this partial award, after which steps will be taken to conclude finally the arbitration.

Made by the arbitrators and signed in the original as of September 2, 2000.



Edward C. Chiasson, Q.C., Chairman



Griffin B. Bell, Esq., Arbitrator

Professor Smit does not agree with some of the substantive conclusions in this Partial Award and is providing separate comments to the parties stating his reasons. The majority arbitrators have had the opportunity to read a draft of Professor Smit's comments. In addition to providing his reasons for concluding as he does, they provide a critique of the position and reasoning of the majority. Although the majority arbitrators do not consider it appropriate to debate these matters in this Partial Award, they have expanded some of their reasoning to address some of the, as always, prescient observation of Professor Smit, but otherwise state simply that in addition to the points of obvious departure, they disagree with much of Professor Smit's characterization of what was done in the previous partial awards and what is done in this Partial Award.

INTERNATIONAL COURT OF ARBITRATION
of the
INTERNATIONAL CHAMBER OF COMMERCE
Case No. 9058/FMS/KGA

— in the matter of —

BRIDAS S.A. P.I.C. (Argentina)
BRIDAS ENERGY INTERNATIONAL LTD.
INTERCONTINENTAL OIL & GAS VENTURES, LTD.
BRIDAS CORPORATION

-v-

GOVERNMENT OF TURKMENISTAN,
CONCERN BALKANNEBITGAZSENAGAT, AND
STATE CONCERN TURKMENEFT

OPINION
of
HANS SMIT, ARBITRATOR,
DISSENTING FROM THE THIRD PARTIAL AWARD

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PART I
THE SUBSTANCE OF MY DISSENTING OPINION

I. INTRODUCTION

1. In my Dissent to the First Partial Award, I concluded that both the Claimants (hereinafter “Bridas”) and the Respondent Turkmenneft had fundamentally breached their contractual obligations, that the joint venture agreement had come to an end, and that Turkmenistan was not a proper party to this arbitration. The majority of the Tribunal reached different conclusions. It found that only Turkmenneft had fundamentally breached the joint venture agreement, but that, since Bridas had not accepted this repudiation, the joint venture agreement continued in effect. The majority also indicated on what basis Bridas’ claims for lost profits should be computed, if Bridas did accept the repudiation. I also dissenting from this part of the majority’s opinion on the ground that, as long as Bridas had not accepted Turkmenneft’s repudiation, the Tribunal should not give an advisory opinion on what the parties’ legal position might be, if an event that was non-existent at the time of the award (Bridas’ acceptance of Turkmenneft’s breach) might occur in the future.

2. After the rendition of the First Partial Award, Bidas, on July 5, 1999, did accept Turkmeneft's repudiation and requested that the Tribunal award damages on the basis indicated in that Award.

3. The Tribunal, in its Second Partial Award, over Turkmeneft's objection, did rule that it had authority to rule upon Bidas request. In my dissent to that Award, I concluded that claims that had accrued after issuance of the First Partial Award should be presented to another tribunal and that, in regard to matters already decided on the merits, the Tribunal was functus officio.

4. The majority is now rendering a Third Award, ruling upon Bidas' claims and awarding various forms of relief.

II. THE AWARD I DEEM APPROPRIATE

5. I persist in my judgment that the Tribunal should have ruled the joint venture agreement at an end on the ground that it had been fundamentally breached by both parties and that the Tribunal should fashion an equitable dissolution of the parties' relationship. This should be done by directing that Turkmeneft repay Bidas the amount of Foreign Party Contributions, plus appropriate interest, but minus the adjustments for transactions not authorized under the Joint Venture Agreement and reasonable depreciation, and, in addition, by directing that

Turkmenefit pay Bidas fifty percent of the net revenues obtained during the venture's existence. To put an effective end to the joint venture, I would decree that Bidas be paid these amounts only upon assigning all of its interests in the Joint Venture Keimir to Turkmenefit. The precise amounts due under this disposition would be determined after a hearing for the purpose of determining these amounts. I would also direct that costs be allocated as detailed below (see paragraphs 15–16 below).

6. The advantages of this solution would be many. Both parties bear responsibility for the failure of the joint venture. The Tribunal, in ruling that Bidas has engaged in improper self-dealing and unauthorized transactions that require a twenty-seven million dollar adjustment in the contributions claimed by Bidas, found what by no means is a breach of contract of little moment. The Tribunal now rules in addition that Bidas failed in taking reasonable measures to keep the joint venture operating and is responsible for the loss of some fifty million dollars. It further imposes on Bidas the bulk of the cost of the audit, because of Bidas' failure properly to co-operate in it. Finally, Bidas' willful failure properly to comply with the Tribunal's orders to produce evidence to the production of which Turkmenefit was contractually entitled has necessitated arbitral efforts at resolution and expense that in my experience are unprecedented. Surely, in these circumstances, Turkmenefit could not reasonably be expected to continue a

relationship that must be based on mutual confidence and trust. Of course, Turkmenneft should have refrained from resorting to self-help and cannot escape the consequences of its actions. If it had gone to arbitration, rather than practice self-help, the appropriate solution would have been to terminate the joint venture and leave Bidas to settle its claims against the joint venture in liquidation proceedings in Turkmenistan. But since both parties are at fault, the proper solution is to put both in a position that is reasonable in the circumstances. The equitable disposition I would render would achieve this.

7. This solution would also avoid the necessity for the Tribunal's speculating about the most uncertain future the joint venture would have faced. Reputable and experienced experts have provided the Tribunal with estimates of the present net value of Bidas' future revenues, varying from in excess of a billion U.S. dollars to 127 million U.S. dollars. Most significantly, what accounts for the striking difference between these evaluations is not disagreement about the quantity of oil and gas upon which the joint venture could draw, but starkly differing views as to of the uncertainties and difficulties likely to be experienced in getting the oil and gas to market, as to the cost of transportation, as to the net prices to be obtained, and as to the discount rate to be applied to bring future receipts back to July 5, 1999. A great advantage of the solution I deem appropriate is that it avoids this type of adjudicatory soothsaying.

8. Under the solution endorsed by the Tribunal, decisions on the many uncertainties indicated in paragraph 7 must be made. Of course, the Tribunal cannot refuse to rule because the task it faces is so replete with uncertainties. But, in resolving these problems, the Tribunal should not lose sight of what will be the ultimate question: To what extent should Bidas be permitted to recoup not only its initial investment in Foreign Party Contributions, but also a return on this investment? Rather than engage in speculative economic forecasting, arbitrators should put the parties in the position in which, from a viewpoint of overall fairness and with due regard to what the law permits, they should be put. And, clearly, Bidas' reward for its self-dealing and unauthorized transactions and its obstruction of the arbitral process should not be more than a modest return on its investment. Instead, the majority grants Bidas a recovery that would give it a return of all amounts invested plus a multiple of those amounts on top of that. This, I judge to be a wholly inappropriate reward for Bidas' numerous and consistent breaches of its contractual obligations.

9. Under the solution I deem appropriate, all claims that may have arisen subsequent to the termination of the Joint Venture Agreement, the date of which I would fix at the commencement of this arbitration, would essentially be claims of Bidas against the Joint Venture Keimir, would therefore not be cognizable in this arbitration, and would be rejected.

10. Insofar as the allocation of the parties' costs and the cost of this arbitration is concerned, I deem appropriate the allocation detailed in paragraphs 11-15.

11. Bidas has asked for the assessment of punitive damages against Turkmenefit. Generally, the law does not allow punitive damages in contract disputes. However, the Joint Venture Agreement provides in Article 24.4 (h) for the allowance of punitive damages when a "Party has engaged in undue delay of the procedures of arbitration." This raises the question of whether parties can contractually provide for the grant of punitive damages when the law does not provide for the grant of such damages in the absence of such agreement. The majority does not address this issue, because it is Bidas that is seeking punitive damages and the majority correctly rules that Turkmenefit has not unduly delayed the procedures of arbitration. However, I believe that the record amply establishes a factual basis for the finding that it is Bidas that has unduly delayed this arbitration. Indeed, the majority correctly rules that "the conduct of the Claimants exacerbated and prolonged the arbitration." Nevertheless, the majority grants Bidas recovery of \$3 million dollars of its costs.

12. Since the entire Tribunal agrees that Bidas unduly delayed the arbitration, I would give consequence to the spirit of the punitive damage provision at least to the extent of not granting Bidas recovery of any of its costs. While I

believe that it is entirely permissible for parties to provide for the grant of punitive damages even when the law, in the absence of such agreement, would not authorize the award of such damages, I do not judge it to be necessary to grant such damages in order to give consequence to the spirit of the contractual provision for the grant of such damages. Its purpose can readily be achieved by the Tribunal's exercising its well-established authority to allocate costs as it sees fit. I would therefore exercise that authority by denying Bidas any recovery of its costs.

13. Since, in my judgment, both Bidas and Turkmenefit have breached the Joint Venture Agreement, it would normally be appropriate to direct that each bear its own cost. However, since, as the Tribunal has unanimously found, Bidas has unduly delayed this arbitration, I would grant Turkmenefit recovery of that part of its costs occasioned by Bidas' undue protraction of this arbitration. I judge this delay responsible for twenty-five percent of the costs incurred by Turkmenefit. I find that the costs properly expended by Turkmenefit amount to \$5 million dollars. I would therefore award Turkmenefit recovery of \$1,250,000 of its cost, plus interest at 10 percent per annum from the date of this award.

14. Furthermore, since, in my judgment, Bidas has improperly drawn the Government of Turkmenistan into this arbitration, I would award the Government recovery of all its reasonable costs which I find to be \$200,000, plus annual interest at 10 percent from the date of the Award.

15. Insofar as the cost of this arbitration is concerned, since both Bidas and Turkmeneft fundamentally breached their obligations, each should normally pay one-half of the cost of this arbitration. However, since Bidas unduly delayed the arbitration, Bidas should also pay one-quarter of the amount that would otherwise come for Turkmeneft's account. Furthermore, before this allocation is performed, an appropriate share of the total arbitration costs should be allocated to the cost of arbitrating the issue of the Government's being a proper party to this arbitration. I would allocate ten percent of the total arbitration cost to the adjudication of this issue and charge this to Bidas, so that the final allocation would be:

(a) Bidas is liable for ten percent of the total cost of this arbitration plus interest, exclusive of the costs of the auditors;

(b) Bidas is liable for sixty-seven and a half percent of all arbitration costs plus interest, after deduction of the amount specified in subparagraph (a) of this paragraph;

(c) Bidas, on the reasoning advanced by the majority, is liable for the amounts specified by the majority out of the total cost charged by the auditors plus interest; and

(d) Turkmenefit is liable for thirty-two and a half percent of all arbitration costs plus interest, after deduction of the amount specified in subparagraph (c).

16. I therefore conclude that the following award is proper:

(a) the Joint Venture Agreement was terminated as the result of its fundamental breach by both parties as of the date of the commencement of this arbitration;

(b) upon Bidas' assigning and transferring all of its interest and title in the Keimir Joint Venture to Turkmenefit, Turkmenefit shall pay to Bidas the amount of the properly authorized foreign party contributions, plus interest pursuant to the provisions of the Joint Venture Agreement, minus deduction of a reasonable amount for depreciation, to be determined either by mutual agreement of the parties or by the Tribunal in the absence of such agreement, augmented by all other amounts due Bidas under this award;

(c) Bidas and Turkmenefit shall share equally in the net revenues of the Joint Venture, to be determined either by the parties in mutual agreement or by the Tribunal in the absence of such agreement;

(d) the Tribunal has no jurisdiction over the Government of Turkmenistan and all claims against the Government are therefore dismissed;

(e) Bidas' claim for punitive damages is rejected;

(f) Bidas shall pay the Government \$200,000 as a contribution to its costs in defending itself in this arbitration, plus annual interest at ten percent from the date of this award to the date of payment;

(g) Bidas shall pay Turkmeneft an amount of \$1,250,000 to compensate it for costs caused by Bidas' undue delay of this arbitration, plus annual interest at ten percent from the date of disbursement by Turkmeneft to the date of payment;

(h) Bidas shall pay Turkmeneft the appropriate amount to reimburse Turkmeneft for its contribution to the auditors' costs, plus annual interest at ten percent from the date of disbursement by Turkmeneft to the date of payment;

(i) Bidas shall pay Turkmeneft twenty-five percent of the total advances deposited by Turkmeneft with the ICC International Court of Arbitration, other than auditors' costs, with interest at ten percent from the date of disbursement by Turkmeneft to the date of payment;

(j) all other claims of the parties are rejected;

(k) each of the parties shall submit to the Tribunal or each other, within thirty days after the date of this award, a proposed closing statement, conforming to the determinations made in this award, specifying the precise amounts to be paid by Bidas and Turkmeneft and transferring to Turkmeneft all of

Bridas' interest in the Joint Venture Keimir, with the Tribunal determining, within sixty days after the date of this award, the closing statement on which the payments and transfer shall be made; and

(l) the Tribunal retains jurisdiction, to the extent necessary to determine the amount referred to in subparagraphs (b) and (c) of this paragraph of this Award. The Tribunal also retains jurisdiction to determine, to the extent necessary, all issues that may not have been properly addressed, but this retention shall not affect the finality of this award.

PART II

MY OPINION ON THE MAJORITY'S AWARD

I. INTRODUCTION

17. Since it may serve a useful purpose for me to provide my views on the award rendered by the majority, I provide them in this Part II of my dissenting opinion. These views are premised on the (what I regard as erroneous) assumption that, as the majority has ruled, Bridas has not fundamentally breached the Joint Venture Agreement.

II. THE TRIBUNAL'S AUTHORITY TO RENDER AN AWARD ON LOST PROFITS

18. In my dissent to the Second Partial Award, I concluded that claims based upon Bidas's acceptance of Turkmeneft's repudiation of the joint venture agreement, as new claims that came into existence after the rendition of the First Partial Award by Bidas' acceptance of Turkmeneft's repudiation, could not be heard by this Tribunal. The majority rejects this conclusion and does adjudicate these new claims.

19. The majority, in its First Partial Award, even though Bidas had not accepted Turkmeneft's repudiation, also made certain rulings on the merits of future damage claims, in particular as to the bases on which the lost profits should be computed. I concluded in my dissent to the First Partial Award that the Tribunal should not make these rulings, since they provided answers to questions that, at that stage, were purely hypothetical. If that conclusion is correct, the Tribunal is not in any way precluded from departing in any way it sees fit from the rulings it made in its First Partial Award. If it is incorrect, the Tribunal is bound by the determinations made in the First Partial Award. However, even if the Tribunal were not bound by its hypothetical rulings in the First Partial Award, it should refrain from proceeding with the adjudication of this case. The Tribunal, by ruling

itself not bound by its own rulings, could not dispassionately continue its task. It is therefore entirely understandable that the majority purports not to deviate in this Award from its earlier rulings.

20. However, even if the Tribunal were bound by its rulings on the merits in the First Partial Award, it should resolve any ambiguities there might be in the First Partial Award. In Hyle v. Doctors' Associates, 198 F.3d 368 (2d. Cir. 1999), the Second Circuit ruled that an arbitral tribunal has inherent authority, transcending limitations imposed by institutional rules and the Federal Arbitration Act, to resolve ambiguities in its award. Significantly, in that case, the arbitrator, by his own confession, had made a mistake in imposing on a wrong party the obligation to provide monetary and injunctive relief. The case was therefore more one of a mistake than one of ambiguity, but it does highlight the court's readiness to permit arbitrators to correct errors in their awards.

21. The Tribunal also has the authority to, and indeed should, modify its First Partial Award to take account of relevant events that occurred after it rendered its First Partial Award. The Third Circuit so ruled in Office & Professional Employees Int'l. Union, Local No. 471 v. Brownsville General Hospital, 186 F.3d 326 (1999). See also Olympia & York v. Gould, 776 F.2d 42 (2d Cir. 1985). As a result of Bidas' acceptance of Turkmenef's repudiation after

the rendition of the First Partial Award, the figures adopted by the First Partial Award for quantities of oil and gas, which took January 30, 2000, as an assumed date of termination, have become incorrect. Furthermore, in the Yashlar arbitration between the same parties, Bridas has acknowledged that, in determining risked quantities, risks external to Turkmenistan must be taken into account. It had denied this in this arbitration before the First Partial Award was rendered. These events, subsequent to the rendition of the First Partial Award, require a substantial reduction in risked quantities of oil and gas on which a lost profits calculation is to be based (see paragraph 35–36 below).

22. Of course, as to issues not addressed dispositively in the First and Second Partial Awards, the Tribunal has the authority to make appropriate rulings. Insofar as these rulings relate to claims accrued after the First Partial Award, the Tribunal's ruling that it may entertain such claims (which I judge to be erroneous) clears the way for its adjudicating these issues.

23. Accepting the majority's First and Second Partial Awards as given, I indicate below to what extent I share the majority's subsequent analysis.

III. THE MAJORITY'S PRESENT AWARD ON LOST PROFITS

24. The majority's award on lost profits deals with four subjects: first, the determination of the discounted net-back price of the risked quantities of oil and gas; second, the determination of the mitigation of damages amount; and third, the determination of Bidas' refundable Foreign Party Contributions. I will deal with each of these separately.

A. The Lost Revenues

25. In order to determine, as of July 5, 1999, the date on which Bidas accepted Turkmenneft's repudiation and, according to the majority, the joint venture agreement came to an end, the profits Bidas lost as a result of this termination, the Tribunal has to proceed through six steps: first, it must determine the quantities of oil and gas on which the joint venture could draw in the remaining years of its contemplated twenty-five year's existence; second, it must determine which of these quantities could effectively be sold on world markets, i.e., the so-called risked quantities that take account of the potential inability effectively to export the oil or gas; third, it must determine the prices at which the quantities found at the second step could effectively be sold on world markets (the so-called net-back price, i.e., the net prices after deduction of the cost of transportation to a port or through a pipeline giving access to a world market); fourth, it must determine the discount rate to be applied to bringing proceeds to be realized in the future back to

July 5, 1999; fifth, these net back prices, multiplied by risked quantities, must be reduced by contractually prescribed deductions; and sixth, it must determine what interest should be applied to the net amount from July 5, 1999, to the date of payment.

26. The experts heard appear to agree on the unrisks quantities of oil and gas on which the joint venture could draw up to the termination of the twenty-fifth year of its existence. Agreement also exists between the parties as to the amounts to be deducted for contractually prescribed deductions. And the parties also accept a net-back price for oil at \$10.45 a barrel. However, major differences exist as to the risked quantities of gas and oil, the net prices that could be realized for oil and gas, and the proper discount and interest rate.

27. The problem facing the majority is that it stated in its First Partial Award that lost revenues should be computed on the basis of 218,560,935 B(arrels of) O(il) E(quivalent) at \$10.45 a barrel and at a discount rate of 10.446, but that it also stated that it accepted the figures proposed by Turkmenefit, while, in fact, the figures it adopted were those espoused by Bidas.

28. This problem disappears under the view expressed in my dissent that the Tribunal had no authority to make these rulings and is therefore not bound by them. However, the majority has rejected this view and is ill-situated to adopt it

now. As a practical matter, it has no choice except to proceed on the basis of its First Partial Award.

29. The case at hand presents a typical example of the rationale for the rule that adjudicators should refrain from ruling on hypothetical questions. One of the dangers in doing that is that decisions are rendered on issues that have not been adequately considered.

30. In its First Partial Award, the majority advised the parties that the lost revenues should be determined on the basis of the figures proposed by the Turkmenefit, while in fact adopting the figures proposed by Bidas. This apparent contradiction creates a major problem, for Turkmenefit computes the lost revenues at \$127 million dollars, while Bidas computed its lost revenues at about one billion dollars.

31. As already indicated, the Tribunal has inherent authority to resolve ambiguities in its award. See Hyle v. Doctor's Associates, 198 F.3d 368 (2d. Cir. 1999). And it might be argued that the Tribunal's ruling that it preferred the figures proposed by Turkmenefit while adopting the figures proposed by Bidas created an ambiguity. Even if that argument were accepted, the only solution open to the Tribunal would appear to be its choosing either the figures proposed by the Turkmenefit or those proposed by Bidas. Resolving the ambiguity in this fashion would truly be a step of major significance, for it makes a difference of some 900

million dollars whether the Tribunal adopts the figures of Bridas or those of Turkmenneft.

32. It therefore causes no wonder that the majority seeks to find a less drastic solution. It does so by ruling that its First Partial Award does not quite mean what it says. While that Award states that the volume of recovery is 218,560,935, BOE at \$10.45 a barrel, the majority now rules that what it actually meant was that twenty-five percent of recovery was composed of barrels of oil and seventy-five percent of gas and that the net-back price of gas is not \$1.75 for each mfc (which is the price adopted by Bridas in its computations on the assumption that each barrel of oil is the equivalent of 6 mfc of gas), because the First Partial Award never indicated what price would be adopted for gas. One may wonder why the majority, if that were its intention, provided a hypothetical ruling that left up in the air the recovery for more than seventy-five percent of production. Such a ruling would not have given Bridas any reliable indication of the amount it was likely to recover if it accepted Turkmenneft's repudiation. It would render the giving of answers to hypothetical questions even less appropriate and, indeed, misleading.

33. Adoption of this approach raises additional problems. For Bridas no doubt relied on the First Partial Award's ruling that the net lost revenues would be based upon a computation leading to a figure of some one billion dollars, while the

present Award more than halves that amount. And Turkmenneft in effect argues that, this Tribunal's having given the rulings it issued, it is now unduly constrained to adhere to its erroneous rulings that are not ambiguous, including those on the discount rate and the risked quantities, even though those rulings are as open to question as the one the Tribunal does revisit. And this is especially true, since, in a related arbitration between the same parties, Bidas admitted risk factors that it had rejected before the rendition of the First Partial Award in this case and both parties acknowledge that the figure of 218,560,935 BOE adopted in the First Partial Award is incorrect.

34. In these circumstances, the perceived need to adhere to what may appear to be the non-ambiguous determinations in the First Partial Award substantially limits the freedom to consider and evaluate in their interrelationships all factors that bear upon the proper determinations of the net lost profits. If the Tribunal had not rendered its advisory opinion in the First Partial Award, these problems would not exist.

35. The First Partial Award determined the quantities of oil and gas to be 218,560,935 BOE at a price of \$14.50 a barrel and a discount rate of 10.446%. The majority translates these determinations as meaning that the quantities of oil are about 25 percent and the quantities of gas are about 75 percent of the 218,560,935 BOE. It does modify the total of BOE, but is not prepared to modify

its determinations of the price of oil, the risked quantities of oil and gas, and the discount rate. As a consequence, the only flexibility the majority has in arriving at a determination of an amount to be awarded to Bidas for lost profits that is fair and reasonable in the circumstances rests in the determination of the net-back price for gas.

36. This is regrettable, because the majority's other determinations in the First Partial Award are subject to serious question. First of all, Bidas has admitted in a related arbitration that there are substantial external risks affecting the feasibility of getting unrisked quantities of gas to entry upon world markets that the majority did not take into account. And it is clear that the provision in the Joint Venture Agreement that Turkmenneft assures that exports can be made through Russian transportation facilities means no more than that Turkmenneft will make those facilities available to the extent it can. Most significantly, the risks not accounted for include that the gas would have to be transported through pipelines that have not been built and through lines of Gazprom, the Russian company controlling existing lines in the Russian Federation. If they were taken into account, the risked amounts of gas would be reduced appreciably. Turkmenneft has presented a depletion plan that appears realistic and that produces an amount between \$107,476,000 and \$127,400 for a net-back price for gas at a \$1.13/Mcf price and a discount rate of 15%. That appears entirely reasonable and does

maintain the \$1.13/Mcf price that appears to have been accepted by both parties in the proceedings that led to the First Partial Award.

37. Secondly, the discount rate of 10.446 adopted by the majority appears too low. It barely exceeds the interest rate on prime debentures and fails to take into account that a return on an investment in a country like Turkmenistan would, under prevailing market conditions, require a far higher rate of return. Turkmenneft has argued that a discount rate of 19 would be proper in the circumstances. I would adopt a discount rate of 15.

38. Finally, the determination of the net-back price of gas is replete with uncertainties. Existing pipelines are controlled by Gazprom, the Russian giant oil and gas company that has no interest in accommodating gas from Turkmenistan. Other pipelines are still to be constructed, and the cost of construction would have to be amortized by levies that would severely depress the net-back price of gas. In the circumstances, a net-back price of \$130,000,000 would appear more realistic than that adopted by the majority.

39. If the net-back price for gas were to be determined on the risked quantities, at the price and at the discount rate I deem appropriate, Bidas' recovery for lost profits would be no more than \$170,000,000 (less the amount for mitigated damages). I can therefore not concur in the ruling by the Tribunal that awards a multiple of that amount.

B. Mitigation

40. I agree with the majority that the Bidas failed in its duty to mitigate damages, and I join in its specification of the legal basis for determining the amount to be deducted from the Bidas' recovery.

41. However, I disagree that the appropriate amount is the rounded-off amount of \$50 million dollars. I believe that the calculation provided by Dr. Strickland, which arrives at a figure of \$67,919,000, should be accepted. There can be no doubt that Bidas failed in its duty to mitigate damages by refusing to operate the joint venture in accordance with the Tribunal's recommendations for a period of eighteen months. Dr. Strickland's computation, which excludes any revenues for gas (consistent with his depletion plan which does not contemplate sales of gas for some six years), arrives, with detailed reasoning, at a figure of \$67,919,000. The majority, even though it also includes revenues for lost gas sales (which it must, in view of its not redetermining risked gas quantities to take account of risk factors admitted in the Yashlar arbitration), selects a rounded figure some \$17,919,000 lower. As the majority properly points out, Bidas counted on receiving 10 percent interest on the Foreign Party Contributions and on its lost profits recovery and did nothing to make the venture operative. In the circumstances, any uncertainty as to the exact amount of damages that should have been mitigated should be resolved against Bidas.

C. Foreign Party Contributions

42. I agree that Bridas is entitled to recover fifty percent of the monies they properly advanced for the operation of the project. To this it is contractually entitled.

43. But I differ with the majority as to the recovery for contributions that were made, but were not contractually authorized. The majority allows recovery also for the latter contributions to the extent of their value, largely as determined by Coopers & Lybrand.

44. Taking this value into account may be proper as an accounting matter, which seeks to determine the actual value added. But the law has a different objective. It does not allow recovery for outlays that were made in breach of contractual obligations on any theory, including that of unjust enrichment. It does so deliberately so as to prevent rewarding a party that disregards its contractual obligations. I would therefore allow recovery only for foreign party contributions that were made in accordance with the provisions of the Joint Venture Agreement.

45. Furthermore, this would be all Bridas could recover under this heading. I agree with the majority, on the grounds specified by it, that Bridas cannot recover in this arbitration for amounts disbursed after July 5, 1999, nor for the additional claims asserted in this connection and rejected by the majority.

46. Included in the claims for which Bridas cannot obtain recovery in his arbitration is the \$3,000,000 payable to the Finnish Export organization. Contrary to the conclusion of the majority, I have concluded that Bridas did not engage its liability for this amount prior to July 5, 1999.

47. I do, however, agree with the majority that the rate of interest payable on the recoverable contributions up to July 5, 1999, is that prescribed in the Joint Venture Agreement.

IV. THE CLAIMS AGAINST THE GOVERNMENT

48. For the reasons set forth in my dissent to the First Partial Award, I would dismiss the Government from these proceedings and grant it recovery of its costs incurred in defending itself in this arbitration. I would also charge ten percent of the total cost of the arbitration itself to Bridas for its unsuccessful attempt to bring the Government into these proceedings.

49. It may be noted in this context that, although the majority has ruled the Government bound by the arbitration clause in the Joint Venture Agreement, it does not hold the Government liable for payment to Bridas of the Foreign Party Contributions. At last that is what is stated on page 3 of its Award. The Award offers as explanation that “the Respondents have that liability irrespective of any breach of contract.” But that explanation appears inadequate for the purpose. If

the Government is bound by the Joint Venture Agreement, it should be bound for all obligations flowing from it.

V. ALLOCATION OF THE COSTS OF THE PARTIES AND THOSE OF THE ARBITRATION

50. If I were to assume, with the majority, that Turkmenistan is a proper party to this arbitration, my allocation would have to be adjusted by eliminating subparagraph (a) and modifying subparagraphs (b) and (c) of paragraph 16, so as to make Bidas responsible for sixty-two and a half percent and Turkmenefit responsible for thirty-seven and a half percent of the costs of the arbitration, including the fees and disbursements of the arbitrators, but exclusive of the costs of the auditors, which Bidas must bear in the proportion indicated by the majority. I would also require Bidas to pay one quarter of Turkmenefit's costs, which I would fix at \$1,250,000.

VI. INTEREST

51. I agree with the majority on the rate of interest (10%) to be paid on the total amount of the award from the date of its rendition.

VII. ASSIGNMENT OF BRIDAS' INTEREST

52. Bidas' whole damages computation is based on the premise that it is entitled to receive now what, over a twenty-five year span, it would receive from Joint Venture Keimir. It is therefore appropriate to ensure that Bidas will not subsequently assert claims for lost profits against the Joint Venture Keimir by requiring Bidas to assign to Turkmenneft all its rights and interests in the Joint Venture Keimir upon Turkmenneft's satisfying its claims for lost profits to the extent recognized by the Tribunal. The majority does not include this requirement. I believe it should.

VIII. COUNTERCLAIMS OF TURKMENEFT

53. The counterclaims relating to the excessive cost of the audit and the protraction of the arbitration have been addressed in the dispositions on the allocation of costs (see paragraphs 13-15 above). The claims for flared gas should be rejected on the grounds advanced by the majority. Claims for delayed production of oil and gas, insofar as allowable, have been addressed in connection with the determination of the amount of mitigation of damages.

54. I would direct the parties to submit, within thirty days after the date of this award, to the Tribunal and each other, a proposed closing statement, conforming to the determinations made in this award, specifying the precise

amounts to be paid by Bidas and Turkmenefit and the particulars of the transfer of Bidas' interest in the Joint Venture Keimir to Turkmenefit, with the Tribunal determining, within 60 days after the date of this award, the closing statement on which the payments and transfer are to be made.

IX. LATE DEVELOPMENTS

55. After the majority had submitted its proposed Award and I had submitted my Dissenting Opinion to the ICC Court pursuant to Article 27 of the ICC Rules, an award was rendered between the same parties by another panel of ICC arbitrators in the closely related Yashlar arbitration.

56. Both cases had commenced at approximately the same time and were likely to raise identical or very similar issues. Turkmenefit had therefore also proposed me as an arbitrator in the companion case and had agreed to the appointment of the same chairman in both arbitrations. If Bidas had followed suit, there would have been identical panels in both cases, which would have produced all the benefits consolidation, if possible, would have offered.

57. However, Bidas not only did not follow suit, I opposed my confirmation in the second case on the ground that I would communicate confidential information from one panel to the other. The ICC Court denied my confirmation.

58. Now the very thing that appointing the same panel would have avoided has come to pass. Turkmenefit contends that the panel in the second case, the Yashlar arbitration, has reached decisions that conflict with those made by the majority and that Bidas has made allegations in one case that are inconsistent with the ones it made in the other.

59. Turkmenefit has requested that the arbitral award in the Yashlar arbitration be communicated to this panel, but the ICC Court, pointing to Article 1.3 of Appendix II of the Rules, has not complied with this request.

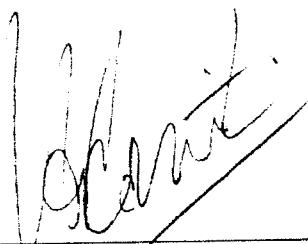
60. Turkmenefit might have considered submitting the second panel's award directly to this panel. However, the majority in this case had already informed the Court and the parties that it did not wish to consider the Yashlar award.

61. I believe the majority should not have precluded reliance by Turkmenefit on the Yashlar award without having examined it. This examination would have been proper for at least two reasons: first, the Yashlar award allegedly confirmed that Bidas had taken inconsistent positions in the two arbitrations on crucial issues, in particular the extent to which risks external to Turkmenistan should be taken into account in determining quantities of oil and gas that could have reached world markets; and second, it allegedly decided identical issues differently. This panel should have considered these allegations, because it should

have considered all events that bear upon the determinations it made (cf. Olympia and York v. Gould, cited para. 21 supra), and because principles of issue and claim preclusion (res judicata and collateral estoppel) also apply in arbitration.

62. International arbitration has now produced two awards that are alleged to be contradictory. This is most unfortunate and should and could have been avoided.

Houston, September 6, 2000



Hans Smit,
Arbitrator