

"We have completed a two full-day presentation. Yesterday we covered the entire project and today they reviewed in detail the seismic and well data as well as the contract. The technical people was very experienced and they knew exactly what they were doing and what to look for. It was the best team we received since we have been showing the data to others." (Hearing Bundle, p. 07607.)

As for AGIP, the record shows that a 6-member team asked to spend three days to view the data at Bidas' offices in London in September 1994, and that there was a subsequent meeting in Milan. In the event, of course, there was no sale to anyone.

(338) There is nothing inherently surprising about this. It is a story as old as the oil industry. When Bidas contemplated the attraction of a Turkmenistan project in the early 1990s, it may have been willing to take a risk on a more favourable outcome for what had been a major part of the USSR gas industry. But above all, it must be kept in mind that *Bidas was not looking merely for gas, but for hydrocarbons generally*. If there had been an oil find, the economics would have been different.¹⁵ (Oil and liquid gas are far more readily transportable than dry gas.) What Bidas did encounter was the discovery of a remote reservoir of dry gas, tantalising because of its size but nevertheless not at present economical.

(339) The Tribunal also notes the announcement of the Irish Dragon Oil Company, reported in CASPIAN INVESTOR, July 1999, at p. 16 (Hearing Exhibit C-11) to the effect that it was writing off almost the entire value of its assets "due to difficulty in marketing the gas." (Dragon Oil was cited in the Claimants' Skeleton Argument, at page 66 of the annex, as one of several companies whose activities in the Turkmenian gas industry allegedly demonstrate that "the gas market has developed" since the time when Bidas "began its investment.") And yet the Dragon Oil fields, located in *western* Turkmenistan, were described by Mr Atageldyev as "developed" and capable

¹⁵ Bidas' other Turkmenian investment, in JV Keimir, at one point in 1994 produced nearly 17,000 barrels of oil per day for export.

of “maximum projected production” of 4 bcm/yr (Transcript, 25.10.99, p. 173, l. 7-16). There was no suggestion of any breach of contract – merely a lack of commercial outlets.

(340) The Tribunal therefore cannot, and does not, conclude that the Claimants lost profits as a result of the breach of the JV Agreement. Or to put it in the familiar terms of English law, “the plaintiff’s expectation of receiving the defendant’s performance” cannot, under the facts as determined by the Tribunal, including the amount of further investment which would have been necessary to achieve sales from the Yashlar block, be held to embrace reasonable prospects of future gain. Accordingly, the Claimants have failed to prove their case for loss-of-bargain damages.

6. RELIANCE LOSS

6.1 Quantum of Sunk Costs

(341) Before considering Claimant’s rights to damages under this head it will be convenient to deal with the quantum of such damages. As the Tribunal pointed out in section 4.3 above, in relation to the recoverability of reliance loss there are certain presumptions which favour the Claimant. These presumptions do not, however, apply to the proof of the amount of the loss. That the Claimant must prove in the ordinary way, on a preponderance of probabilities.

(342) In presenting their respective cases on reliance loss each party relied on the expert evidence of an accountant. The claimants’ expert was Mr. John Ellison of the well-known firm of KPMG. The Defendant’s expert was Mrs. Barbara J. Duganier of the equally well-known firm of Arthur Andersen. Both these witnesses are highly experienced and very well qualified in their field. Nonetheless, there was a considerable difference in the figures which they presented. Before the quantum hearing last October Mr. Ellison computed the reliance loss, including

interest at US\$247 million. Mrs. Duganier's figure was US\$137 million. The nature of that difference appears from Mr. Ellison's table in Exhibit C14(b) as follows:

Summary of reliance loss		
	KPMG	AA
	\$m	\$m
Costs charged to JVY	131	131
<u>Less:</u> exceptions	(7)	(18)
Y8 workover / "imprudent drilling"	<u>-</u>	<u>(12)</u>
	124	101
<u>Add:</u> central overheads		
not charged to JVY	<u>27</u>	<u>-</u>
Total	151	101
<u>Add:</u> interest and finance costs	<u>96</u>	<u>36</u>
Grand total	<u>247</u>	<u>137</u>

As appears from this Table the differences fell under three heads – "exceptions", "imprudent drilling" and "overheads".

(343) The starting point of the accountants' investigation was the amount of the Claimants' costs as recorded in the accounting records of J.V. Yashlar. Both accountants excluded certain sums from their estimates of damages on the ground either that they were not adequately proved to have been incurred, or that they were not properly attributable to the contract between the parties. Such deductions were generally referred to as "exceptions". Apart from the question of overheads (defined by Mr. Ellison in para 2.1.3 of his Report of 5 March 1999, as "costs incurred by the Claimants which were not charged to or borne by JVY, such as Bidas overheads and management time incurred with a view to entering into the contract and in the performance

of the contract”) the dispute between the experts turned (a) on the adequacy of proof, and (b) whether costs incurred by Bidas were “appropriate”.

(344) The issues of adequacy of proof that expenditures were incurred in the performance of the contract can be dealt with briefly, by reference to a few major matters of dispute. The Tribunal can do so without elaboration, because these issues were canvassed in the Tribunal’s hearing on the merits, and referred to in para 376 of its Interim award of 8 June 1999.

(345) The principal exception in this category was an amount of over \$1 million paid to the firm of Schlumberger for materials shipped to Ashkhabat. Although the supporting evidences for these charges included invoices shipping records and the signatures of Bidas representatives on site, there were no “work tickets” in respect of goods to the value of \$1.2 million. The Tribunal agrees with Mr. Ellison’s conclusion that the documentation provides adequate proof for the purposes of this arbitration. The possibility that the material in question was misdelivered but nonetheless signed for and paid for by Bidas is unrealistic. The same applied to Mrs. Duganier’s “exception” in respect of travel expenses. There too there were payments matched with detailed invoices, giving the names of Bidas personnel travelling, their itineraries (being the routes from Buenos Aires to Ashkhabat) and their ticket numbers. To reject this evidence simply because the used air tickets were not available to the accountants seems to the Tribunal wholly unreasonable.

(346) Another “exception” which the Defendant’s expert has persistently advanced relates to payments to Rio Colorado, a company in which Bidas held 50% of the shares. Mr. Ellison has adjusted his estimates on the basis that 50% of Rio Colorado’s profits under the transaction were attributable to Bidas. Mrs. Duganier, however, considers that the possibility that 100% of the profits went to Bidas has not been excluded. There is no evidence whatsoever that Bidas received or was entitled to more than 50% of the profits. On the other hand the evidence referred to by Mr. Ellison – see Day 5, pages 224-226 – shows at least on the balance of probabilities that Bidas had no interest entitling it to more than 50% of any profits.

(347) In general the Tribunal is satisfied that subject to a reservation to which the Tribunal will refer in due course, the expenditures attested by Mr. Ellison were in fact incurred in the performance of the Contract. The detailed evidence on which he relied is to be found in his Second report, his Fourth report and his Fifth Report. His figures are supported by voluminous appendices, in which the details of the expenditures incurred in the Joint Venture are set out as shown in the accounts. The Tribunal does not believe that there was any serious challenge to his figures. Suggestions of "double-dipping" were effectively refuted by Mr. Ellison. The real issue between the experts was that dealt with in the following paragraph.

(348) The next set of disputed issues arises not from question of proof but from a fundamental difference of principle. As Mr. Ellison pointed out (rightly in the view of the Tribunal) Arthur Andersen approached the quantification of damages as if it were conducting a Joint Venture audit. It consequently disallowed some expenditures as inappropriate because they were incurred not for the Joint Venture but for Bidas' own account. Other expenditure was disallowed because by some objective standard it was said to be excessive or unreasonable. This is apparent from Mrs. Duganier's Reports and was emphasised throughout her oral evidence. Thus on Day 8 at p 74 she points out that the seismic data purchased from WaveTech were acquired by Bidas in its own name and not in the name of the Joint Venture.

(349) That is so, but the data were acquired solely for the purpose of JV Yashlar, and have no residual value in Bidas' hands. Mrs. Duganier says at p.75:

"11.2 million of audit exceptions are supported by a reasonableness standard, not solely based on whether they were incurred."

Again, at p 76 she defines the standard as "reasonableness", and states as key questions:

“Did the Joint Venture really receive the benefit ? Did Bidas receive the benefits ? Is the cost so excessive that it is [not] commercially feasible ... and therefore reasonable ?”

It was on this test that Mrs. Duganier classified as exceptions, for example, the cost of leasing equipment (such as a top drive) when it could have been bought, the payment of 26 operatives who actually worked under the Servoil drilling contract when the contract with Servoil provided for only 12, and (originally) what she regarded as excessive costs incurred by reason of “imprudent drilling”, or “operational inefficiencies”.

(350) The Tribunal has no hesitation in holding that the Arthur Andersen approach is, in the present context, quite incorrect. The object of reliance loss damages is to obtain such compensation from the contract breaker as would put the innocent party in the position it would have been in had it not entered into the contract. The expenditure which qualifies as reliance loss must be “appropriate” in the sense that it must have been genuinely and honestly incurred in the performance of the contract. It matters not that some other party might have done the work more economically, or that innocent party made incorrect or even imprudent decisions. There is nothing unfair to a defendant in this. A claimant’s case is based on a showing that whatever was spent would have been recouped had the contract not been repudiated, and had the claimant not thereby been deprived of the opportunity to recoup its expenditure. Provided the expenditure was genuinely for the purposes of the contract it does not lie in the contract-breaker’s mouth to say that less might have been spent by a more competent contracting party. Indeed, at the hearing last October the Defendant abandoned one of its major exceptions under this head, namely \$8.4 million for allegedly excessive drilling costs. This concession (and some others) reduced the difference between the parties, as appears from Mrs. Duganier’s revised Table 1 (Exhibit R78), as follows

REVISED TABLE 1

	(Amounts in thousands)			
	Per	KPMG	Per	AA
Reliance Loss				
FPC subject to audit through June 1997		\$116,179		\$116,179
Inter-venture charges through June 1997		7,039		7,039
Unaudited actual and estimated costs through October 1999		6,691		6,691
Estimate of Claimants' costs not previously charged to JVY		27,731		1,193
Operational inefficiencies (KPMG recognize an exception for Bidas profits in the charges for the Y-8 workover. AA has included these under Exceptions below)		(21)		(3,073)
Exceptions		<u>(6,905)</u>		<u>(18,139)</u>
Reliance Loss before interest		150,714		109,890
Interest		<u>96,107</u>		<u>43,249</u>
Total Reliance Loss		<u>\$246,821</u>		<u>\$153,139</u>

Interest per AA is calculated from the date of breach (November 28, 1995) using the prime rate plus two percent, simple interest.

(351) Although the Tribunal rejects Mrs. Duganier's general approach on this issue there is one item which does appear to it to be exceptional. That is the cost of \$3.1 million for the Well Y-8 "workover". That expenditure was in a broad sense incurred in the performance of the contract, in that only because Bidas had drilled Y-8 in the course of the contract did it become obliged to make it safe. Nonetheless, it seems to the Tribunal that the obligation to make the well safe was one imposed not so much by the contract as by the requirements of the Turkmenian authorities. The Tribunal therefore proposes to allow this exception. If it be said that this is not entirely logical, the Tribunal takes comfort from the oft-cited words of Lord Wright in **The Liesbosch Dredger**, [1933] A.C. 449 at 460:

"The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection ... In the varied web of affairs, the law must abstract some consequences as relevant, not on grounds of pure logic but simply for practical reasons."

(352) As indicated in the Tables set out above, the largest single item of difference between the experts is in the amount claimed for overheads. Mr. Ellison puts this at \$27 million. Mrs. Duganier in her revised Table would concede only a little over \$1 million. Mr. Ellison's starting point is a computation of the total overheads of Bidas S.A.P.I.C. over the contract period, covering such items as the directors' and senior management remuneration, rent of its Buenos Aires offices, company audit fees, insurance of its office, computer costs and general legal fees (excluding those attributable to the present dispute). In general these costs can be described as the costs of management, administration and finance in pursuing the company's overall interests. In the nature of things these expenses were not attributed to specific projects in the accounts of Bidas. Mr. Ellison rightly says that the attribution of general overheads to a specific project is difficult and must inevitably contain an element of subjective judgement. In forming his own judgement Mr. Ellison has compared the amount invested in JVY in a particular year with the total investments made by Bidas in that year. This, he says, "... provides an indication of the

proportion of cost (and effort) being allocated to the Yashlar project". See para 4.1.12 of his report of 5 March 1999. Mr. Ellison frankly states that this method is imperfect, in that it takes no account of projects for which overheads were incurred but for which there was no capital investment nor, on the other hand, projects which involved large capital investment but required little management time. Nonetheless it represents his best estimate of a proper allocation.

(353) The resulting figures, set out in figure 6, para 4.1.14 of the above report, show total Bidas overheads for the years 1992 to 1997 as \$244 million, and the amount attributable to the Joint Venture Yashlar as \$27 million. As a percentage of the total that is just above 11%. Mr. Ellison gave the amount as being one-eighth of the total. The figures in any event represents an average of the annual proportion of Bidas' total capital investment attributable to the joint venture

(354) The figure of \$27 million was strongly attacked by Mrs. Duganier, who regarded it as exorbitant. She based her criticism in the first place on a survey of seventeen (unnamed) oil companies by an organisation known as COPAS, which indicated that in general their overheads constituted from 1% to 5% of their total costs. She also took as a comparison the charges of a company known as Stallion Enterprises Ltd and of Bidas companies working elsewhere. She also thought that the overheads attributable to Bidas' British affiliate should not be allowed. She put before the Tribunal maps demonstrating the large number of projects on which Bidas was engaged in South America, which must have taken up considerable management time and effort. Mr. Ellison in reply discounted the relevance of the COPAS Survey, and explained (convincingly in the Tribunal's view) the true nature of the operations of Stallion Enterprises and of the British affiliate. He also pointed out that he had excluded overheads relating to the preparation for entering into the contract.

(355) While appreciating the force of Mr. Ellison's responses to the particular points raised by Mrs. Duganier, the Tribunal does not find it necessary to examine them in detail. In the opinion

of the Tribunal Mrs. Duganier's rejection of Mr. Ellison's figure is well founded. The amount of \$27 million is not rationally established and cannot be justified. There is no doubt that the JVY must have taken up a considerable portion of the Bidas management's time and effort, but there is no warrant for directly relating that time and effort to the capital investment in the Joint Venture. Looking at the problem another way, the direct expenditure incurred under the contract was of the order of \$121 million (i.e. Mr. Ellison's figure of \$124 million less \$3 million for the Y-8 workover). Twenty-seven million dollars therefore represents more than 22% of that direct cost. This seems to the Tribunal to be excessive. The Tribunal does not hold that the proper percentage should necessarily be somewhere in the middle of the COPAS Survey range, nor that the COPAS figure of 5% should be an upper limit. The Tribunal must make what seems to it to be a reasonable estimate of attributable overheads, trying to achieve fairness to both parties. The Tribunal considers that a percentage of something like 3% or 3.5% of cost would be reasonable and fixes this amount at a round figure of \$4 million.

(356) This would place the total reliance loss at \$125 million, apart from interest.

(357) What remains to be considered is the portion of the loss represented by interest on that sum. A number of questions of principle arises. First, is interest to be calculated from the dates of expenditure or from the date of the breach of contract? Given the nature and purpose of reliance loss damages the answer must be the former. Second, should the rate of interest be the actual cost to Bidas of borrowing or some general rate of interest? Again given the nature and purpose of reliance loss damages, together with the fact (not in dispute) that the project like other Bidas projects was debt financed, the actual cost of borrowing should be used. Third, should the interest be simple or compound? Notwithstanding Mr. Ellison's argument that compound interest represents the reality of financial life, the Tribunal will apply the general approach of the English courts and allow simple interest only.

(358) The actual cost of borrowing to Bidas has been averaged by Mr. Ellison from the financial records of Bidas. The results of applying this rate of interest (as well as other suggested rates) are set out in a helpful table originally provided by Mrs. Duganier as (Exhibit R77(i)), and reworked as follows to show interest up to 30 April 2000:

	Interest			
	Through April 30, 2000			
	Date of Breach 1)		Date of Investment 2)	
	Simple Interest	Compound Interest	Simple Interest	Compound Interest
Arthur Andersen (principal \$109.9)				
Bidas Cost of Borrowing 3)	\$44.4	\$52.1	\$62.4	\$80.5
Libor	\$28.0	\$31.0	\$38.2	\$44.5
Libor plus 2%	\$37.5	\$43.0	\$51.3	\$63.2
Prime	\$39.4	\$45.5	\$53.5	\$66.5
Prime plus 2%	\$49.0	\$58.4	\$66.7	\$87.5
KPMG 4) (principal \$150.7)				
Bidas Cost of Borrowing 3)	\$59.6	\$69.9	\$83.2	\$107.1
Libor	\$37.6	\$41.6	\$50.9	\$59.3
Libor plus 2%	\$50.4	\$57.7	\$68.5	\$84.2
Prime	\$53.0	\$61.1	\$71.4	\$88.5
Prime plus 2%	\$65.8	\$78.4	\$89.0	\$116.5

1) Date of Breach is November 28, 1995 per the letter from A. Essenov to C. Bulgheroni suspending activities of JV Yashlar

2) Date of Investment begins January 1, 1992

3) Bidas' cost of borrowing is assumed unchanged since October 1999.

4) AA estimate of KPMG interest calculations.

Prepared at the request of Tribunal

This shows that on a principal of \$151 million, simple interest at Bidas' cost of borrowing would amount to \$83 million from date of investment up to 30 April 2000. (These are rounded figures.) Taking the principal at \$125 million the proportionate interest figure would be approximately \$70 million. The total loss to 30 April 2000, would therefore be \$195 million.

This is, of course a rough estimate, as the Tribunal, in reducing the principal sum has not attempted to ascertain or take account of differing dates of investment.

(359) The Tribunal referred in paragraph (347) above to a “reservation”. This arises from Mr. Ellison’s very fair caveat that in a case of this size, involving estimates and apportionments of costs, “any attempt to quantify damages overall with a precision greater than at least \$500,000 – and possibly higher – would in his opinion represent spurious accuracy”. The Tribunal adds this further caveat. Part of the expenditure included by Mr. Ellison was pre-contract expenditure. In the absence of clear proof to the contrary at least a portion of that expenditure must be regarded as having been incurred not in reliance on the contract but by reason of the Claimants’ unilateral contemplation of success.

(360) Applying these caveats, the Tribunal also takes account of the roughness of the recalculation of the interest and of the fact that 30 April does not necessarily coincide with the effective date of the Award. Bearing in mind that the general burden of proof on the amount of damages is on the Claimants, the Tribunal fixes the final amount of damages at US\$193 million.

(361) The total of reliance loss therefore amounts to \$193 million. The recoverability of this loss must now be considered.

6.2 Recoverability of reliance damages

(362) As pointed out in section 4.3, above, under this head of claim the Claimants seek to be put in the position they would have been in had they never entered into the Joint Venture Agreement. The damages are damages for breach of contract, and the Claimants as a matter of law are therefore not entitled to be put in a better position than they would have been in had the contract been performed. If the contract would not have produced sufficient profit to cover the reliance expenditure there should, in principle, be no recovery of damages – see paragraph (63)(d), above.

(363) Nonetheless, the Claimants' failure to prove loss of profits in their main claim does not preclude them from maintaining their claim for reliance loss. In this context the incidence of the onus of proof is all important. The Tribunal in respect of both these claims attempts to look into the future. The passage from the judgment of Lord Reid in **Davies v. Taylor**, quoted in section 4.2, above, must be kept in mind -

"You can prove that a past event happened, but you cannot prove that a future event will happen All you can do is evaluate the chance."

When what has to be evaluated is a reliance loss it is the Defendant which has the burden of proving the negative - that the expenditure would not have been recouped had the contract been performed.

(364) The main authorities supporting this proposition have been cited in paragraph (64) above. The justification for this reversal of the usual burden of proof was stated in oft-quoted words by Chief Judge Learned Hand in **L. Albert & Son v. Armstrong Rubber Co.** (1949) 178 F. 2d 182 at 189, a case in which the defendant seller had failed to deliver machinery which the buyer had required in order to embark on what it was hoped would be a profitable business.

"Normally a promisee's damages for breach of contract are the value of the promised performance, less his outlay, which includes, not only what he must pay to the promisor, but any expenses necessary to prepare for the performance . . . The Buyer . . . asserts that it is nonetheless entitled to recover the cost of the [expenses necessary to prepare for the performance] upon the theory that what it expended in reliance upon the Seller's performance was a recoverable loss. In cases where the venture would have proved profitable to the promisee, there is no reason why he should not recover his expenses. On the other hand, on those occasions in which the performance would not have covered the promisee's outlay, such a result imposes the risk of the promisee's contract upon the promisor. We cannot agree that the promisor's default in performance should under this guise make him an insurer of the promisee's venture; yet it does not follow that the breach should not throw upon him the duty of showing that the value of the performance would in fact have been less than the promisee's outlay. It is often very hard to learn what the value of the performance would have been; and it is a common expedient, and a just one, in such situations to put the peril of the answer upon that party who by his wrong has made the issue relevant to the rights of the other. On principle therefore the proper solution would seem to be that the promisee may recover his outlay in preparation for the performance, subject to the privilege of the promisor to reduce it by as much as he can show that the promisee would have lost, if the contract has been performed."

In short, it is regarded as only fair that the contract-breaker, having created the situation which makes it necessary to assess the value of a performance which will not take place, must bear the whole burden of proving that the innocent party would not have recouped his expenditure.

(365) Accordingly, a plaintiff's failure positively to prove loss of bargain damages is entirely consistent with a defendant's failure to negative the plaintiff's reliance loss. Moreover, when it is a defendant who has to prove the negative, the presumptions referred to in section 4.3 provide an additional obstacle in his way. In this context too the approach of a court or a tribunal will be (paraphrasing the words of Simon Brown L.J. cited in paragraph (57) above)

“to tend towards a generous assessment given that it was the defendant's [repudiation] that lost the plaintiff the opportunity of succeeding in full or fuller measure.”

This is the legitimate application of the principle derived from **Armory v. Delamirie**, *supra*.

(366) In relation to the quantities of gas in place the Tribunal was able to make its own assessment, without invoking the burden of proof. The Claimants had contended that there was approximately 45 trillion cubic feet (Tcf) of gas in place in the Yashlar Joint Venture area. The Defendant's case was that there was no more than 21Tcf. The Tribunal's own assessment in the light of all the evidence was 37.5 Tcf “unrisked” and 16.88 Tcf risked. See Section 5.1, paragraph (179). Although the assessments of the parties' experts were based on limited facts and were very much a matter of opinion, the Tribunal was able to make its own assessment, i.e. to form its own opinion, without having to consider specifically where the burden of proof lay. In the context of reliance loss it is unnecessary to say more than that the Defendant failed to prove that the gas in place was less than the Tribunal's assessment.

(367) It is however, the analysis of the potential markets for the sale of Yashlar gas which lies at the heart of both damages claims. The Tribunal, in Section 5.2 above, has adverted to the often powerful evidence of the Defendant's experts, evidence which it stated it could not reject, and which the Claimants' expert evidence could not outweigh. But again the Tribunal must emphasise that the fact that the Claimants' expert evidence did not persuade it to reject the Defendants' expert evidence is not equivalent to a once and for all rejection of the views of the Claimants' experts. One is dealing with the possible turns and twists over the next 20 years or so of a volatile market, subject to unpredictable or doubtfully predictable international political and economic developments and influences, not only in Central Asia and the former Soviet Union, but in the Middle East, Europe and even the United States. It is therefore not surprising

that a different burden of proof may lead to a different finding. In its claim for loss of bargain the Claimants undertook a heavy burden – heavy because they were attempting to persuade the Tribunal to reach a particular conclusion about an uncertain future. That heavy load now rests on the shoulders of the Defendant. The Defendant contends and must prove that Bridas had no reasonable prospect of earning any profits whatever from Yashlar in the foreseeable future or, at least, of earning sufficient profits to recoup its reliance expenditure – to which must be added the US\$400 million plus which would represent the minimum cost of the development which would be necessary in order to put Yashlar gas on the market. See paragraph (188) and (309) above.

(368) The relevant evidence has been traversed in detail in section 5.2 of this Award (“Economics”). The same evidence in the present context can therefore be dealt with comparatively briefly.

(369) As that evidence showed, all the markets adverted to by the Claimants as potential outlets for their gas are bedevilled by uncertainties. But in relation to this alternative claim these uncertainties tell against the Defendant. In the course of the evidence certain disputes arose which were, or might be, relevant to more than one of the potential markets. One such dispute was whether Russia’s gas export capacity would diminish over the coming decade due to the higher costs of developing fields in the more remote parts of the country. The Tribunal found (paragraph (245)) that the evidence of Ms Resley and Dr. Swanson “was inconclusive and was at least neutralised by that of Dr. Grace.” The Defendant has not, by “neutralising” the forecast of Ms Resley and Dr. Swanson, negated it. That particular forecast was related to the possibility of Turkmenian gas penetrating the European markets. In this regard the Tribunal did not accept the Claimants’ contention that they would be selling substantial quantities of Yashlar gas to Europe from the year 2003. It held that it was “at least as probable” that the West European market would not be an outlet for Turkmenian gas until 2010, or even later, and that there could be even less certainty as to the quantity of Yashlar gas which would reach Western Europe (paragraph (241)). Needless to say, these findings do not negate the possibility that, if not by 2003, then within a few years thereafter Yashlar gas may reach the European market in some (unknown) quantity.

(370) Much evidence was devoted to the Ukraine as a market for gas from Turkmenistan, including Yashlar gas. The Claimants had difficulties in this part of their loss of bargain case. There were two main reasons for this. First, the pipeline to the Ukraine is controlled by Gazprom, the Russian government-controlled gas company, which at present shows little disposition to assist Turkmenistan with its gas exports. Second, although in recent years the

Ukraine has acquired gas from Turkmenistan (sometimes by way of barter deals) it has as often as not defaulted on its payment obligations. These factors led the Tribunal to give little weight to the “Trankwilion” and other contracts produced by Mr. Lopez, for the Claimants. Indeed, the difficulties experienced in marketing Turkmenistan gas at present are freely acknowledged in documents filed by Bidas with the Securities Exchange Commission in the United States. All this does not, however, alter the fact that the Ukraine has traditionally been the outlet for most of Turkmenistan’s gas exports. As the Tribunal has found in section 5.2 of this Award (“Economics”), the certainty with which Ms Resley forecast that 20 bcm of Turkmenistan gas would be delivered to the Ukraine (and paid for) every year for the next twenty years was unwarranted and unacceptable. That finding, however, serious as it was for the Claimants and their witnesses, does not and in its nature cannot eliminate the Ukraine as a reasonably possible market for Turkmenistan gas, at least in the middle term.

(371) With regard to Turkey as well Ms Resley’s forecasts were not accepted by the Tribunal as the most probable scenario. Nor can there be certainty as to the future of the Trans-Caspian pipeline. But the real possibility of sales to Turkey was not negated. So too with Iran. The Tribunal considered that Iran was a conceivable outlet for Turkmenistan gas in the near-term future, but that in the longer run the prospects were doubtful. Detailed reasons were given for this finding – see paragraphs (222) to (226) above. Here too Ms Resley’s forecast was regarded as too positive. But there were good grounds found for believing that Iran would as a practical possibility be a market for some quantities of Turkmenian gas.

(372) These are examples of the uncertainties which made it impossible to accept the Claimants’ main case but which, have also made it impossible for the Defendant to discharge the always difficult task of proving a negative – a negative about relatively distant future events.

(373) The Claimants through their expert witnesses included among the potential markets Pakistan and India and even, at a more distant time, China and Japan. See Ms Resley’s diagrams, Claimants’ Exhibit C-8q. The basis for the inclusion of Pakistan and India was a projected pipeline through Afghanistan, as shown in the map at Exhibit C-8c. The same map shows, also as a “planned pipeline”, a line going into north-west China. The Tribunal, it must be said, viewed these projections with considerable scepticism. Although the Tribunal does not presume to prophesy the political and economic future of Afghanistan the obstacles to the building of a pipeline through that country at present seem formidable. Further, the Tribunal has referred to the documents which record the breakdown of Mr. Bulgheroni’s negotiations for a pipeline to Pakistan. As to India, China and Japan, on the evidence of the experts, sales of

Turkmenian gas to those countries seemed to be no more than a distant speculation. But even in regard to these markets, as well as other less remote markets, there is a considerable hurdle which the Defendant must overcome. That is the public statement of Mr. Rejepbay Arazov, the Turkmenian Minister of Oil and Gas, at a conference in London in April, 1999. This statement has been referred to in paragraph (260) above, but in the present context it must be looked at in more detail.

(374) The conference was entitled “Doing Business in Turkmenistan – Focus on Energy Development.” It was under the chairmanship of Mr. W. Knull (the Defendant’s senior counsel in this arbitration). The address of welcome was delivered by a senior British civil servant from the Department of Trade and Industry. The conference was addressed not only by Mr. Arazov but also by two Deputy Prime Ministers of Turkmenistan, Mr. Sarjaev and Mr. Gurbanmuradov (see Claimant’s Exhibit C-1). It can be taken therefore that the addresses at this conference were well-prepared and were intended to be taken seriously. Mr. Arazov spoke of the prospects for gas development in his country. His outlook was highly positive. He distributed or displayed a number of documents, which were put before the Tribunal as Claimant’s Exhibit C-19. Among the statements to be found in these documents are –

“Oil and gas in Turkmenistan – equal opportunities for investment”.

“Turkmenistan welcomes investment – now”.

“Major Caspian opportunities, most in modest water depths”.

“6 pipeline export feasibility studies have been completed”.

“Large, established infrastructure – major growth anticipated”.

The six feasibility studies were identified (and shown on a map) as including,

- 1) Gas – Turkey, Europe
- 2) Oil/Gas to Turkey
- 3) Gas – Pakistan, India
- 4) Gas – China, Japan.

The Minister also produced a graph under the heading “Turkmenistan’s importance as a potential major gas supplier is unquestionable. . . .” This graph showed projected Turkmenian gas

exports over the period 1999 to 2019. Over the final ten years exports are shown as approaching or even exceeding 150 billion cubic metres per annum.

(375) As has already been pointed out (paragraph (261) above) the Minister's graph is remarkably similar to Ms Resley's own projections. Compare the graph Exhibit C-8q (Ms Resley) with that at Exhibit C-8r (Minister Arazov) Mr. Malek, for the Claimants, understandably placed great weight on this material, both in his opening and closing addresses. Mr. Knull, in reply, was inclined to brush aside the Minister's statements, suggesting that they represented hopes rather than reality. He was also able to point to the fact that the Minister's graphic representation had already been shown to be wrong in respect of exports to the Ukraine in 1999. Nonetheless, Mr. Malek's point is a valid one. The Tribunal has held (paragraph (264)) that in the context of the loss of bargain claim the inferences to be drawn from the Minister's statement did not suffice to discharge the burden of proof resting on the Claimants. In the context of the reliance loss claim, however, the Minister's statements, including his graph, and the inferences therefrom require to be negatived or at least explained by the Defendant, if it is to defeat the claim.

(376) Dr. Stauffer's evidence, impressive as it was, did not in the Tribunal's view suffice to carry that burden. Minister Arazov by reason of his position was well-placed to speak on the subject of markets, actual and potential. The Defendant's witness, Mr. Atageldyev, confirmed this – Day 7, pages 163 – 164. On the next page of his evidence Mr. Atageldyev agreed that the graph represented the Minister's view of what was likely to happen over the next 20 years. Quite apart from these answers the Tribunal must assume that a responsible Minister, representing his government at an officially sponsored international conference, would have made the forecasts which he did only in good faith and on the strength of factual information at his disposal. His reference to feasibility studies bears this out. These studies must exist. The Tribunal must also advert to the fact that neither Minister Arazov nor any other Minister or official was called by the Defendant to "explain away" or even modify the Minister's statements. Moreover, other positive statements had been made, also on high authority – see the announcement of the President of Turkmenistan on 13th October, 1999, with projections very much along the lines of Mr. Arazov's graph. See Claimants' Exhibit C-9, and cf. paragraph (261) above. No explanation was given by any Minister or state official of the marked contrast between Dr. Stauffer's pessimistic view and the optimism of those in government with access to information not, it seems, available to Dr. Stauffer.

(377) It is not in dispute that the Turkmenistan government has in its possession documents relevant to its potential export markets, including, but not limited to, the feasibility studies referred to by Minister Arazov. The Claimants called for disclosure of those documents. This was refused by the Defendant on the grounds that they were sensitive and confidential, and involved the interests of third parties who would not consent to disclosure. (See Mr. Knull's closing address, Day 9 p. 220). The Tribunal accepts Mr. Knull's characterisation of the documents. Nonetheless, the failure to produce the documents must tell against the Defendant, as the party bearing the burden of proof. The Tribunal is entitled to draw the inference that the undisclosed documents would tend to support the Minister's forecasts rather than Dr. Stauffer's

(378) The Tribunal is also entitled to draw inferences adverse to the Defendant from its failure to call as a witness either Minister Arazov or any other state official. Mr. Knull submitted that it was not possible for the Minister to testify because of his busy schedule and "his concerns about the confidentiality of his information" – Day 9, pages 223-224. That explanation is no doubt true, but it is not adequate to overcome the inference that the Minister's evidence would have been unhelpful to the Defendant. It would not have been impossible for the Minister or one of his deputies to have given an explanation of the official forecast, if an explanation existed, even if certain confidential matters were to be withheld. Nor would the Tribunal have had the power to compel any witness to answer questions on matters of confidentiality. On the drawing of adverse inferences from the failure to call a witness, see **Cross on Evidence**, 7th ed. p. 37.

(379) On the general issue of the export market for Turkmenistan gas over the next 20 years the Defendant has therefore in the view of the Tribunal failed to discharge the burden of proof. The Tribunal points out that in its Interim Award on the issue of frustration (where the burden of proof was likewise on the Defendant) having considered the evidence of Ms Resley and Dr. Stauffer, it found that the Defendant had not discharged the burden of proof. It is apposite to quote the following passages from paragraphs 513 and 514 of the Interim Award:

"513 ... The Defendant, as the party asserting that the JV Agreement has been frustrated, has the burden of proof. In the light of the contrary evidence of Ms Resley and of the statements by the Turkmenistan Government itself, Dr Stauffer's evidence is insufficient to discharge this burden. However optimistic Dr. Stauffer may think it, the statement of the President of the country cannot be simply disregarded. The Defendant in this case is the Minister of Oil and Gas Industry and Mineral Resources of Turkmenistan. It must have been open to the Defendant to bring witnesses with direct knowledge of Turkmenistan's gas pipeline and gas export projects and negotiations. It must also have had access to Government studies and other documents on these subjects. ..."

“514 The Arbitral Tribunal considers that it was for the Defendant to elucidate these matters. It is possible, by reason of the failure to adduce such evidence, to draw the inference that such evidence would have been unhelpful to the Defendant. See Cross on Evidence 7th, Edition page 37. But, whether or not such an inference is drawn, in the absence of such evidence the Arbitral Tribunal does not find it possible to uphold the Defendant’s contention that the facts and circumstances “have combined to completely undermine the capacity of the Joint Venture to make hard currency profits at any point in the foreseeable future”.”

That passage is consistent with the Tribunal’s present evaluation. Although fuller evidence was heard on the economic issues in the damages hearing than in the earlier hearing, the Defendant has again been unable to satisfy the Tribunal on the general market issue when it assumed the onus of proof.

(380) That does not conclude the case on reliance loss. Other questions remain. The first of these concerns the extent of the Yashlar participation in the forecast Turkmenian gas exports. As appears from the discussion in section 5.2 above, the Tribunal was unconvinced by the assumption of Ryder Scott and Ms Resley that Yashlar gas would have accounted for not less than 21% of all Turkmenian gas exports. The reasoning behind that assumption was seriously flawed, if not entirely circular. See paragraphs (274) to (283) above. The Yashlar fields are not particularly well placed, and the Turkmenistan government has important interests in other potentially competitive fields. Mr. Malek’s answer to this difficulty lay in Article 34.6 of the Joint Venture Agreement, which requires from each party good faith in their dealings with each other. The Tribunal dealt with Mr. Malek’s argument in paragraph (287) above, as follows -

“In the Tribunal’s view Mr. Malek’s proposition is valid as it stands. It would have been a breach of good faith for the Government to have prevented JV Yashlar from exporting its gas. The Tribunal would go further, and would accept that the Ministry was under a duty to ensure as far as possible that the Joint Venture obtained a reasonable share of available export markets, and was not excluded from them by a preference for gas wholly-owned by the Ministry. But the questions remain, what share would be “reasonable”, and what share would be feasible, given the situation of the pipelines and the very considerable further expenditure that would be required to develop the Yashlar field? No positive answer can be given to these questions, so that the recognition of the duty of good faith does not greatly advance the Claimants’ case on loss of bargain damages. Again, its relevance in other contexts may have to be considered”.

(381) Considered now in the context of reliance loss, the question can be put as follows -

“Has the Defendant proved that notwithstanding the duty of good faith resting on it, it would not or could not have afforded the Joint Venture a share of the available export markets sufficient to enable it to recoup its expenditure?”

The Tribunal does not believe that the Defendant has proved or in the nature of things could prove that negative proposition. The Tribunal has already stated (in the paragraph quoted above) that no positive answer could be given to the question of what share would be both reasonable and feasible. In the present context it is the Defendant who can give no positive answer.

(382) The further remaining question arises in relation to the requirement mentioned in section 4.2 paragraph (53), namely, whether on the probabilities the Claimants would have continued with the Joint Venture had there been no repudiation. The Tribunal sees no reason to doubt this. The question is not whether another investor would have put its money into Yashlar, nor whether it would have been reasonable and prudent to incur the necessary expenditure. The Claimants had already committed themselves to the enterprise and had spent a not inconsiderable sum on its development. Nor was it without success. It had established Well Y-101 as a “Discovery Well”. Although the activities of the Joint Venture were suspended in December 1995, the Claimants did not leave Turkmenistan and, indeed, remained there while this arbitration was in progress. In their original submissions the Claimants sought to keep the contract alive. It should not be assumed that the Claimants would have preferred the views of Dr. Stauffer to those of Ms Resley and Dr. Swanson, and they would have had before them the various optimistic forecasts of the Turkmenistan government. Above all it must be borne in mind that this exercise in the assessment of damages must assume that there was no repudiation of the contract on the side of the Defendant and that both parties would have observed their contractual obligations, including the obligation of good faith. Given that necessary assumption it appears to the Tribunal that the Claimants succeed on this issue.

6.3 Conclusions on reliance loss

(383) On this part of the case the question of the discount rate does not arise. The Claimants are therefore entitled to recover their reliance loss which, including interest to 30th April, 2000, amounts to US\$193 million.

6.4 Loss of a chance

(384) As indicated earlier in this Final Award, the Claimants instead of attempting to establish their loss of bargain on a detailed deterministic or probabilistic approach, might have claimed damages for the value of the chance of making profits – a chance of which they were deprived by the Defendant’s wrongful repudiation of the Agreement. This alternative basis of claim was not abandoned by the Claimants but, perhaps understandably, they did not undertake to place any value on the lost chance. Mr. Malek said the Tribunal could approach the issue as if it were a jury, not obliged to give reasons for its assessment. He described the approach to be adopted as “tutored guesswork” – Day 9, page 10. This is no doubt another version of the “broad brush” approach – see paragraph (51) above.

(385) The Tribunal repeats what it said in paragraph (58) above. The prospects originally held out by the Defendant when inviting tenders for the Yashlar project, the bid fee required, the investment called for and (the Tribunal would now add) the generally optimistic forecasts made by the Minister and others, raise a reasonable prima facie presumption that the project had some value. These factors place an evidential burden on the Defendant to establish that the Claimants’ chance of earning a profit from the venture was so negligible as to be valueless.

(386) It follows from what has been said on the reliance loss claim that the Defendant has not discharged that evidential burden. How then is the lost chance to be valued? The Tribunal must have regard to all the evidence if its guesswork is to be regarded as “tutored”. It must also have regard to the principle in **Armory v. Delamirie**. Giving all reasonable scope to that principle in the context of this case, the Tribunal is unable to value the lost chance at any figure greater than the reliance loss established by the Claimants.

7. COSTS

(387) The total costs incurred by the Parties are remarkably similar, not only in their magnitude but also in their allocation to the various phases of the arbitration.

(388) As confirmed by their respective communications of 31 January 2000, the Claimants have incurred some US\$ 12.7 million of costs, the Defendant some US\$ 13.7 million. The costs were allocated to the four phases of the proceedings as follows:

	Claimants	Defendant
Jurisdiction	9.6%	6%
Liability	48%	50%
Loss of bargain claim	35.6%	35%
Reliance claim	6.8%	10%

(389) The liability phase was a clear success for the Claimants. Their loss-of-bargain claim, on the other hand, was entirely rejected.

(390) The jurisdictional phase was essentially a success for the Defendant. The reliance claim, on the other hand, resulted essentially in success for the Claimants.

(391) Given the fact that the Parties' claimed costs are similar, it seems appropriate to accept that the Parties implicitly acted on the basis that costs of such magnitude were reasonably incurred.

(392) Moreover, in each phase the prevailing party's claimed allocation was – if only marginally – when expressed as a proportion of its total claimed costs, LESS than that of the other side. The latter can therefore hardly complain if the winning side's figure is accepted.

(393) If the costs claimed by the Claimants on account of the liability phase (\$6,102,498) are added to those they claim on account of the reliance claim (\$861,062), the total is \$6,963,560.

(394) If the costs claimed by the Defendant on account of the jurisdiction phase (\$761,313) are added to those it claims on account of the loss of bargain claim (\$4,738,645), the total is \$5,499,958. (These figures exclude the ICC costs, which are to be dealt with separately, as the Claimants have done)

(395) The difference between the two totals is \$1,463,602 in favour of the Claimants.

(396) It may however be objected that no less than \$1,870,751 of the costs put forward by the Claimants under liability and reliance are given no explanation or proof, appearing simply as a lump sum under the heading "other fees," notwithstanding that the fees of all counsel, accountants, and technical experts appear to be listed separately. If this element is disallowed, the balance becomes \$407,149 in favour of the Defendant.

(397) It might be retorted that a similar element of uncertainty is reflected under the Defendant's heading "MBP (disbursements)," which add up to \$693,137 for the jurisdiction phase and the loss of bargain claim. If this element too is disallowed, the calculation swings back to a moderately favourable balance in favour of the Claimant, i.e. \$285,988.

(398) Conscious of the fact that amounts listed under the two aforementioned headings are obviously the sum of a number of items which on inspection would be more or less arguably acceptable, the Tribunal does not believe that it is possible to derive greater fairness by seeking ostensible precision. It may thus be said that the proportion of the Defendant's unexplained disbursements is smaller, and thus less susceptible to criticism, than the Claimants' "other costs." The arbitrators are satisfied that there is in fact no certain appreciable difference between the aggregate costs incurred by each side in respect of those stages of the arbitration where it prevailed

(399) The analysis cannot, however, end here. The Claimants have achieved a significant recovery on account of a breach of their contractual rights. The fact that some of their claims

exceeded what the Tribunal has found to be their entitlement should not, in the Tribunal's view, be allowed to overcome the usual consequences of the fact that a wronged party has been obliged to institute proceedings in order to vindicate its rights. That consequence is the recovery of a measure of its costs. The proportion of the recovery is affected by the degree to which the prevailing party raised unnecessary or unmeritorious issues, and the Tribunal's view of the reasonableness of the costs incurred. The Tribunal does not consider it appropriate that the Claimants' contentions in support of an enhanced cost recovery, by reference to the concept of punitive damages and the manner in which the case has been conducted, should be accepted in this case. Following this approach, the Tribunal deems it appropriate that the Defendant contribute US\$ 1.5 million to the costs of the Claimants, and that the costs of arbitration, determined by the ICC Court as US\$ 1,550,000 be paid 1/3 by the Claimants, 2/3 by the Defendant. The Defendant has already deposited US\$ 775,000 as advances to the ICC. Accordingly the total amount to be recovered by the Claimants from the Defendant on account of costs is US\$ 1,758,333.

8. SUMMARY

(400) Accordingly, the Tribunal has decided:

- i) That the Claimants' loss of bargain claim fails.
- ii) That the Claimants are entitled to reliance loss damages in the amount of one hundred and ninety-three million U.S. dollars (US\$ 193,000,000).
- iii) That the Claimants are entitled to recover costs in an amount of one million seven hundred and fifty-eight thousand three hundred and thirty-three U.S. dollars (US\$ 1,758,333).

(401) The sum of US\$ 193 million includes interest up to 30 April 2000. The Tribunal, as stated above, is aware that this Award may be notified to the parties only after 30 April. This has been taken into account in fixing the amount of damages. In the event, however, that payment of the damages and costs awarded is not made promptly the Claimants would be entitled to further interest. In that event the rate of interest should not be that used in the computation of damages. A conventional rate of interest, appropriate to the currency of account of the Agreement (see Article XVII) and of the claim, should be fixed. The currency of account is U.S. dollars. Taking into account the recent ranges of interest rates in the United States, the Tribunal fixes the rate at 6% per annum, simple interest. In the event of non-payment by the 30th day after notification of the Award interest at that rate will begin to accrue.

9. AWARD

The Arbitral Tribunal refers to the Interim Award pages 205-206 and makes the following final award on the remaining parts of the Terms of Reference, following the numbering of the Terms:

Part (a) The Claimants' and Counderdefendant's Claim

- (F) The Claimants and Counterdefendants are entitled to an award of US\$ 193,000,000 – one hundred and ninety-three million dollars – payable by the Defendant and Counterclaimant forthwith. Simple interest of six per cent per annum will accrue on any amount not paid beginning on the 30th day following notification of the final award.
- (N) The Claimants and Counterdefendants are entitled to costs in the amount of US\$ 1,758,333 – one million seven hundred and fifty-eight thousand three hundred and thirty-three US dollars. Simple interest of six per cent

per annum will accrue on any amount not paid beginning on the 30th day following notification of the final award.

Part (b) The Defendant's and Counterclaimant's Claim

(8) and (14) In its Interim Award the Arbitral Tribunal left it open to the Defendant and Counterclaimant to pursue a claim on the basis of the Claimants' breach of the JV Agreement by carrying out a production test of well Yashlar-8 without a "packer". The Defendant withdrew these damage claims (para 34)).

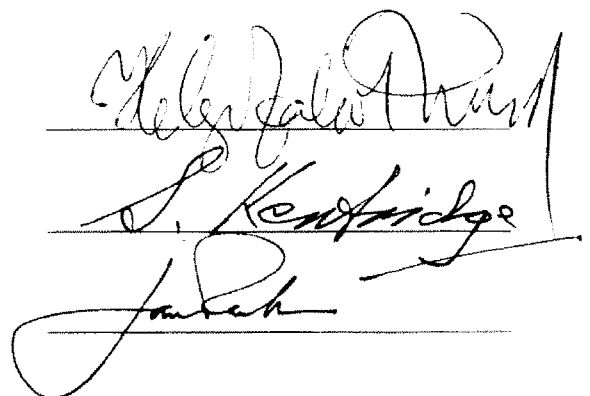
(13)(a)(b) These claims of the Defendant were left open in the Arbitral Tribunal's Interim Award. In the course of the further hearing and the further submissions no evidence or argument was directed to these issues and accordingly no order is made on them.

(15) The Defendant and Counterclaimant shall on account of costs pay US\$ 1,758,333 – one million seven hundred and fifty-eight thousand three hundred and thirty-three US dollars to the Claimants and Counter-defendants. Simple interest of six per cent per annum will accrue on any unpaid amount beginning on the 30th day from the notification of the final award.

Dated at Stockholm

This 18th day of May

2000



The image shows three handwritten signatures, each written over a horizontal line. The top signature is the most elaborate, followed by a middle signature that appears to be 'S. Kentridge', and a bottom signature that is more fluid and cursive.