INTERNATIONAL COURT OF ARBITRATION

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)

v/

1. GOVERNMENT OF TURKMENISTAN
(Tukmenistan)

2. CONCERN BALKANNEBITGAZSENAGAT
(Tukmenistan)

This document is an original of the Award rendered in conformity with the Rules of the ICC International Court of Arbitration.

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 AND
INTERCONTINENTAL OIL & GAS VENTURES, LTD.

CLAIMANTS

AND

GOVERNMENT OF TURKMENISTAN,
CONCERN BALKANNEBITGAZSENAGAT AND STATE
CONCERN TURKMENNEFT

RESPONDENTS

SECOND PARTIAL AWARD

Introduction

In their First Partial Award, the arbitrators concluded that:

> "...it is clear that the conduct of the Respondents and the Government is repudiatory...They have no intention of performing their part of the bargain."

decided:

> "the conduct of the Respondents and the Government was repudiatory;
>
> the repudiatory conduct of the Respondents and the Government was not justified legally;
>
> the repudiatory conduct of the Respondents and the Government was not accepted by the Claimants;"

and directed the parties as follows:

> "within thirty (30) days of the delivery of this Partial Award to the Claimants they shall advise the Respondents and the arbitrators whether the Claimants accept a repudiation of the Respondents and if so, whether it is based on past or present conduct of the Respondents;
>
> within thirty (30) days of the aforesaid advice by the Claimants, the Respondents shall state whether they consider that the arbitrators have the jurisdiction to award with respect to any claim for damages that the Claimants may then advance as a result of their acceptance or purported acceptance of the aforesaid repudiation;
>
> after the expiration of the aforesaid thirty (30) day periods, the arbitrators shall rule on any challenge to their jurisdiction, or proceed to a consideration of any damages claim then advanced and, or, proceed with the steps necessary to bring final closure to the proceedings;"

By letter dated July 5, the Claimants purported to accept an ongoing repudiation of the Respondents and the Government and asked that the arbitrators consider and deal with their claim for damages arising out of the repudiatory conduct of the Respondents and the Government. The Respondents and the Government take the position that the arbitrators do not have the jurisdiction to entertain the Claimants' claim because the acceptance and its consequences constitute a new cause of action which was not extant at the time the arbitration was initiated. They also contend that the foundation for considering the Claimants' claim - the declaration that the conduct of the Respondents and the Government was repudiatory - was made without jurisdiction.

Three issues are engaged: does the acceptance of the Claimants give rise to a new cause of action; can the arbitrators' declaration in the First Partial Award form the foundation for jurisdiction to deal with the Claimants' damages claim; in any event, have the parties conferred on the arbitrators the jurisdiction to deal with the Claimants' damages claim.

Applicable Law

The Respondents rely principally on the English law with some reference to United States law. The Claimants refer to United States law and rely on the commitment to arbitrate and the Terms of Reference.

The arbitrators have considered all of the sources of law referred to by the parties. The issue engages consideration of the law related to arbitral jurisdiction, but that law must be informed by the substantive law that concerns the implications of an accepted repudiation.

New Cause of Action

The Respondents contend that the Claimants have elected to affirm the JV Agreement and that any purported acceptance at this stage would constitute a cause of action that was not extant at the time the arbitration was initiated. It is clear that in the absence of the consent of the parties, the arbitrators would not have jurisdiction to deal with claims that were not in existence when the arbitration was commenced.[1]

The Respondents rely on 1 *Chitty on Contracts*, twenty-seventh edition, paras. 24-002 and 24-003 for the proposition that once an innocent party has affirmed the contract, its right to terminate for the repudiatory conduct of the other party is lost. As noted by the Claimants, the passage in para. 24-003 contains the following statement:

> "...in the case of a breach which is persisted in by the other party, the fact that the innocent party has continued to press for performance will not normally preclude him at a later stage from treating himself as discharged."

The proposition is reinforced in the *Second Cumulative Supplement to the Twenty-Seventh Edition of Chitty* wherein the editors quote from *Safehaven Investments Inc. v. Springbok Ltd.* (1996), 71 P.&C.R. 59 at page 68:

> "The correct analysis...is not that the innocent party is terminating on account of the original repudiation and going back to his election to affirm. It is that he is treating

[1] *Cathiship SA v. Allanasons Ltd. (The Catherine Helen)*, [1998] 2 Lloyd's Rep 511 at page 519 and arbitration texts generally.

> the contract as being at an end on account of the continuing repudiation reflected in the other party's behavior after the affirmation."

The editors quote the comments of the Court expressing reluctance to impose an irrevocable election and preferring to deal with issues relying on the law of estoppel to avoid injustice to parties who may have been lured into a false understanding of their contractual rights.

Referring to *Yukong Line Ltd. of Korea v. Rendsberg Investments Corporation*, [1996] 2 Lloyd's Rep 604 at page 608, the editors of the Second Supplement add the following comment to para. 24-002:

> "The mere fact that the innocent party has called on the party in breach to change his mind, accept his obligations and perform the contract will not generally, of itself, amount to an affirmation: 'the law does not require an injured party to snatch at a repudiation and he does not automatically lose his right to treat the contract as discharged merely by calling on the other to reconsider his position and recognize his obligation."

Para. 28-022 of Chitty also is instructive. In part, it deals with continuing breaches and states:

> "If the breach consists of a failure to act, it may be held to continue die in diem until the obligation is performed or becomes impossible of performance or until the innocent party elects to treat the continuing non-performance as a repudiation of the contract."

Both the Respondents and the Claimants rely on *Tilcon Ltd. v. Land and Real Estate Investments Inc.*, [1987] 1 WLR 46. It is clear from that authority that a plaintiff may defer its election of remedy. Other authorities preclude the injection of new causes of action into a proceeding.[2]

The Respondents and the Government call in aid references to Law Commission Consultation Paper 151 that deal with contractual obligations that continue to require performance and to cases referred to therein that concern the covenant of a landlord to repair. It

[2] *Eshelby v. Federated European Bank*, [1932] 1 KB 254.

is said that each day of non-performance constitutes a new breach, a new cause of action. This legal context differs from repudiation and the right of the innocent party to elect to end the contract or require it to remain.

If repudiatory conduct were to end without acceptance by the innocent party and without damages to it, there likely would be no declaration of rights because the issue would be academic. This was the situation in *Howard v. Pickford Tool Co.*, [1951] 1 KB 418. The repudiatory conduct has occurred. The authorities say that the innocent party can elect to accept the repudiation at any time before final judgment.

The Claimants say and stated during the hearing in July, 1998, that they did not and were not obliged to elect their remedy prior to the issuance of the First Partial Award. The following exchange took place at the hearing:

> "Mr. Chiasson: In effect you've rejected it because you're continuing to perform.
>
> Mr. Crawford: It's a continuing breach...It's true that if there was a one-off repudiation and it was rejected and the other party then resumes performance...at that point you would have lost the opportunity to repudiate. But this is not the case. The Respondent party is in continuing repudiation...So, we have a continuing right...we're not yet at that point at which it would be reasonable to put us to our election...."

Jurisdiction to Make Declaration

Linked to the Respondents' contention that the arbitrators do not have the jurisdiction to consider the Claimants' claim for damages arising out of their acceptance of the repudiatory conduct of the Respondents and the Government, is the proposition that the arbitrators did not have the jurisdiction to declare that the conduct was repudiatory.[3] The Respondents state that because the Claimants affirmed the JV Agreement, "...the repudiatory

[3] In their submission the Respondents state: "Claimants were not...entitled to a ruling on whether Respondent's breaches were repudiatory...." The Respondents incorrectly call in aid the dissenting opinion of Professor Smit stating that he "correctly points out" this observation therein. He did not do so. Professor Smit was referring to the comments in the Partial Award concerning the compensation payable to the Claimants if they were to accept a repudiation. Repeatedly, Professor Smit referred to the repudiation of the Respondents and to their fundamental breach of the JV Agreement.

character of [the Respondents'] breaches became academic and therefor not a matter on which the Panel could...rule".

The assertion is contrary to the position taken by the Respondents at the July, 1998 hearing.

> "PROFESSOR SMIT: You [concede] that the Tribunal can say, yes, that there has been a repudiation.
>
> MR. GOODE: Oh, of course, it could say –
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> MR. CHIASSON: And retain jurisdiction.
>
> PROFESSOR SMIT: And retain jurisdiction.
>
> MR. GOODE: Well, sir, how long is this jurisdiction going to go on for? You could be here till kingdom come on this basis.
>
> PROFESSOR SMIT: Well, apart from that, then the Tribunal is merely deciding an existing question, a concrete real question.
>
> MR. GOODE: Yes, it can decide –
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> ********
>
> MR. GOODE: Exactly. Now, sir, what I say about that is it is perfectly proper for this Tribunal to say, if it so found, that what has occurred until now constitutes a repudiatory breach by [the Respondents]. We have no problem with that.
>
> ********
>
> They're asking for a declaration where there's been consistent repudiation. We have no problem with that;
>
> MR. CHIASSON: I gather it's acknowledged that we could make a partial award that says there's been a repudiatory breach.
>
> ********
>
> MR. CHIASSON: I just want to get your point. What you are saying is we could not retain jurisdiction to deal with a future acceptance.

> MR. GOODE: Yes, that's right. No...you could not retain -- let's be clear – you could not retain jurisdiction to deal with an acceptance of a future repudiation.
>
> PROFESSOR SMIT: But, Professor Goode, that's not a function of the scope of the power of the Tribunal but of basically the definition of the dispute by the terms of reference.
>
> MR. GOODE: Exactly. Exactly. And the terms of reference allege that [the Respondents have] been guilty of repudiation breaches. And, of course, it's perfectly proper for you to rule on that."

It is clear that English law recognizes the authority of Courts to make declaratory judgments. Under English law, this extends even to circumstances where the plaintiff may not have a cause of action.[4] The power also has been recognized in arbitrators.[5]

Whether to issue a declaration is a matter of discretion and tribunals tend not to act in hypothetical circumstances. *Howard v. Pickford Tool Co.* illustrates the point. At page 420 the Court expressed its concern with issuing the declaration there sought.

> "[the plaintiff alleged]...that certain actions of the defendants' chairman at some period of time before the issue of the writ...constituted a breach of this contract. If the action were to proceed, the court would be asked to say whether those actions in September then amounted to a repudiation which the plaintiff could then have accepted. He did not...accept them as a repudiation, and a decision that they might have been accepted would not...involve the result that they now could be relied upon as such repudiation and that the plaintiff could accept them now..."

On the facts of the *Howard* case, both parties continued to perform their obligations under the contract. The conduct complained of was not continuing. The plaintiff had suffered no damages as a result of it. A declaration could have served no useful purpose.

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[4] *Guarantee Trust Company of New York v. Hannay & Company*, [1915] 2 KB 536; and see the comments of Wilberforce J. in *Eastham v. Newcastle United Football Club Ltd. and others*, [1964] 1 Ch at page 440.

[5] *Russell on Arbitration*, 20th edition, 1982 at pages 305-306 and 21st edition at sections 6-117 and 6-118; the latter states that the power matters relevant to its exercise are the same for arbitrators as for the Court; see also *Mustill & Boyd* 2nd edition, at page 390.

Authority of Arbitrators

It is not the purpose of the present application to revisit the substantive decisions contained in the First Partial Award, but it is instructive to place the declaration of the arbitrators into context.

The Respondents rely on comments in International Chamber of Commerce Arbitration[6] in support of the proposition that the Terms of Reference do not replace the commitment of parties to arbitrate. The observation is useful as far as it goes, but parties always are entitled by consent to expand, retract, modify or replace their commitment to arbitrate. The provisions of the Terms of Reference do not do so automatically, but there is no reason why they could not if that were the wish of the parties.

A key purpose of the Terms of Reference is to state the claims advanced by the parties. These, of course, must be within the scope of the commitment to arbitrate unless it were altered by consent, but within that framework, parties generally are not fettered in the claims they may make and, subject to expressed reservations, the jurisdiction of the arbitrators to deal with their claims is confirmed.[7]

Paragraph 30(g) set out some of the claims of the Claimants:

> "...in the event that the alleged breaches by the Respondents and the Government continue one or more of (i) a declaration that the Claimants are entitled to rescind or terminate for cause the JV Agreement; (ii) damages relating to the breaches and the rescission or termination in an amount to be calculated; (iii) if the JV Agreement were rescinded or terminated, an order requiring the Respondents and the Government to account and to co-operate in order to ensure payment of sums due from JV Keimir to the Claimants;"

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[6] Craig, Park and Paulsson, second edition, 1990 at pages 266-277.

[7] In this case, reservations concerning the jurisdiction and power of the arbitrators were expressed in the Terms of Reference concerning issues related to the Government and to the claims for rescission and rectification, but not to the claims by both sides for declarations.

This claim is based on the alleged continuing nature of the alleged breaches of the Respondents and reflects the alternative positions taken by the Claimants. That is, relief obliging the Respondents and the Government to stop preventing the Claimants' performance and performance by the other side or a declaration that the Claimants are entitled to terminate based on the failure of the Respondents or the Government to allow the project to continue and damages if the Claimants were to do so.

Paragraph 31(c) confirms a claim by the Respondents for termination of the Agreement as a result of the conduct of the Claimants and paragraph 31(h) asserts alternative claims by the Respondents if there were no termination. These include the revision of the amount of the Claimants' recoverable contribution to JV Keimir.

The issues then extant were set out in paragraph 32 of the Terms of Reference. They included in subparagraph (k) whether the Respondents or the Government have breached the Agreement and in subparagraphs (l) and (m), if so, what damages. Perhaps more importantly paragraph 32(g) asks "does either side have a right to terminate or rescind the JV Agreement".

It is clear that the claim for a declaration flows out of allegations of breach of contract which are within the scope of the commitment to arbitrate in the JV Agreement. The conduct giving rise to the alleged breaches, that is, to the causes of action asserted in the arbitration, preceded its initiation. The breaches were alleged to be continuing and the claims, in part, reflected that fact. The claims including a declaration that the Claimants are entitled to terminate the JV Agreement were made in the Claimants' Request for Arbitration that initiated the proceeding. They were reproduced in the Terms of Reference. A great deal of evidence was called and arguments advanced concerning the alleged repudiatory conduct of the Respondents and the Government.

Conclusion and Direction

The parties conferred on the arbitrators the task of determining whether the conduct of the Respondents and the Government was repudiatory.[8] They concluded that it was.

[8] This was done in the Terms of Reference and conceded by the Respondents at the oral hearing in July, 1998. As noted by Professor Smit and agreed to by one of the counsel for the Respondents, the issue involves a question of the definition of the dispute in the Terms of Reference.

In our opinion, the Claimants are not injecting a new cause of action into the arbitration. The repudiatory conduct of the Respondents and the Government was extant at the time the arbitration was initiated and it continued.

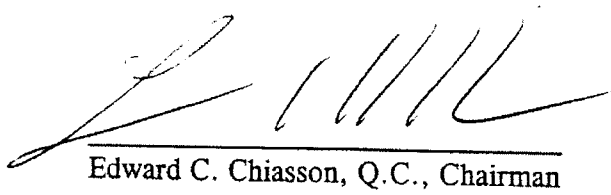
It is suggested that the Claimants' claim for damages arising out of the repudiatory conduct of the Respondents and the Government did not arise until after the First Partial Award because the Claimants had not accepted the repudiation. This confuses the right to claim with the remedy. If the proposition were true, the arbitrators would never have had the jurisdiction to award damages arising out of the repudiatory conduct because there was no acceptance before the initiation of the arbitration. This clearly is not the case as a matter of law and on the Request for Arbitration and the Terms of Reference.

It also is asserted that the arbitrators have decided the damages to which the Claimants are entitled and that the tribunal is *functus officio*. The First Partial Award did not so decide. It also left open for future consideration the extent to which the arbitrators' conclusions on elements of the damages calculation that had been addressed in detail by the parties in evidence and submissions would be binding in subsequent proceedings before them or another tribunal.

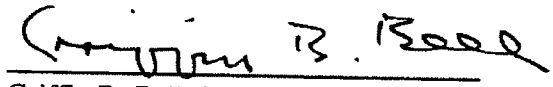
English law does not require the Claimants to elect their remedy before this stage of the proceeding and they expressly declined to do so. They now have done so and have accepted the repudiation of the Respondents and the Government. The contractual obligations of the parties are at an end. The arbitrators have the jurisdiction to consider any claim for damages that the Claimants now advance arising out of the repudiatory conduct of the Respondents and the Government.

We hereby declare and award that the 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.

Made by the arbitrators and signed in the original as of October 21, 1999.



Edward C. Chiasson, Q.C., Chairman



Griffin B. Bell, Esq., Arbitrator

Professor Smit does not agree with the substantive conclusions in this Partial Award and is providing separate comments to the parties stating his reasons.

International Court of Arbitration

1. Bridas S.A.P.I.C. (Argentina); 2. Bridas Energy International, Ltd. (British Virgin Island); 3. Intercontinental Oil & Gas Ventures, Ltd.; (British Virgin Islands) Claimants, - against - 1. The Government of Turkmenistan (Turkmenistan); 2. Concern Balkannebitgazsenagat (Turkmenistan)/ State Concern Turkmenneft Respondents.	**Case No. 9058/FMS/KGA** Dissent of Hans Smit, Arbitrator, to the Tribunal's Second Partial Award of October 21, 1999

1. In this case, the Claimants and Respondent Turkmeneft complained of breaches of a Joint Venture Agreement. In a First Partial Award, the majority of the arbitrators found that Turkmeneft's breaches amounted to a repudiation of that Agreement, but that, since the Claimants had not accepted this repudiation, the Agreement remained in effect. In addition, the majority of the arbitrators also determined to what damages the Claimants would be entitled if they accepted the repudiation.

2. Subsequent to the issuance of the First Partial Award, the Claimants notified the Tribunal and the Respondents that they accepted Turkmeneft's repudiation of the Agreement and requested that the Tribunal determine the damages to which the Claimants are entitled because of their acceptance of the repudiation and the consequent termination of the Agreement.

3. Turkmeneft has contented that the Tribunal lacks the authority to rule upon the consequences of the Claimants' acceptance of its repudiation of the Agreement and their claim for damages.

4. The majority now rules that it has this authority and proposes to determine the damages to which the Claimants are entitled. I judge that the Tribunal should not accede to the Claimants' request. The thrust of Claimants' new claims is that this Tribunal decide the damages to which they are entitled on the ground of their acceptance of Turkmeneft's repudiation. The majority of this Tribunal has already decided these claims and, as to those claims, it is functus officio. I therefore dissent.

5. The first question to be addressed in this context is under what legal rules it is to be decided whether this Tribunal can proceed as requested by the Claimants. The Agreement between the parties provides for the application of English law. But whether the authority of an arbitral tribunal, once attached, continues to cover the claims now asserted and that came into existence after the commencement of the arbitration might arguably be regarded as determined by the law of the place of arbitration, which is Texas law. A third possibility is to regard the issue as arising under the Rules of the International Chamber of Commerce and as to be determined by international principles or lex mercatoria. I believe the third approach is the preferable one. It can derive inspiration from national rules, but accommodate the rules to be applied to the needs of international arbitration.

6. The view that the question is to be determined in the context, and under the umbrage, of the ICC Rules derives support from the circumstance that the assertion of new claims is addressed specifically in Article 16 of the old ICC Rules and Article 19 of the new ICC Rules. It therefore makes sense to view all assertions of new claims from the perspective of the ICC Rules.

7. In determining whether the claims now asserted by the Claimants may be heard by this Tribunal, it is necessary to distinguish between three kinds of new claims: first, claims that accrued before, but were asserted after, the commencement of the arbitration; second, claims that accrued after the commencement of the arbitration; and third, claims that accrued after the rendition of a partial award that addressed and purported to adjudicate them. I believe we are dealing with claims in the third category, but will also consider them insofar as they fall into the second.

8. It might be argued that, in arbitration, new claims accruing after the commencement of the arbitration should not be admitted for adjudication unless they were reasonably anticipated when the arbitration was commenced. This argument rests on the premise that arbitrators are selected with a view to their competence in relation to the claims asserted and that it is therefore improper to expand their authority to non–anticipated claims. Under this rationale, new claims accruing after commencement of the arbitration that were not anticipated at its commencement should be heard only by a new arbitral tribunal.

9. It should be stressed that the rules to be applied in arbitration may provide for more limited access of new claims in arbitration than in judicial proceedings. That is, because courts do not derive their authority from the parties and should be free to adjudicate all claims within their competence as defined by the body politic. What may appropriately be said, however, is that, if courts could not hear the new claims asserted, arbitral tribunals should not do so either. Accordingly, to the extent the judicial authorities cited by the parties and the majority deal with the assertion of new claims in court proceedings, they are relevant only insofar as they preclude the assertion of new claims.

10. In my judgment, new claims, whether accrued before or after commencement of the arbitral proceedings may be adjudicated by an arbitral tribunal only if two conditions are met: first, they were, or should reasonably have been, anticipated by the parties at the commencement of the proceedings; and second, they are within the scope of the arbitration clause and within the reach of the Terms of Reference under old Article 16 of the ICC Rules or are permitted by the tribunal under new Article 19 of the ICC Rules, depending on which of these Articles applies. And judicial precedents dealing with judicial proceedings are relevant only insofar as they preclude the assertion of new claims.

11. The submissions of the parties and the Order of the majority focus on whether the claims now asserted by the Claimants are claims that accrued after the commencement of the proceedings. Indeed, the majority's acceptance of the view that claims that came into existence after the commencement of the arbitration may not be adjudicated may explain its attempt to designate these claims as old claims. In my view, the mere question of whether Claimants' new claims came into existence after the commencement of these proceedings is of no particular significance.

12. I should stress, however, that it cannot reasonably be denied that these claims did not exist at the time of the commencement of these proceedings. The crucial characteristic of these claims is that they are based on an accepted repudiation. That basis did not exist before the Partial Award, because the Claimants deliberately did not accept the repudiation until after the issuance of the Partial Award. And, as Asquith, L.J., stated in Howard v. Pickford Tool Co. (Court of Appeal), [1951], K.B. 417: "An unaccepted repudiation is a thing writ in water and of no value to anybody; it confers no legal right of any kind."

13. Not only was the Partial Award based on an unaccepted repudiation ("a thing writ in water"), it is also based on an assumption of an acceptance that, at that time, was purely speculative and, if one pursues Lord Asquith's metaphor, writ in air. Both of the cardinal elements of the Claimants' claims therefore clearly occurred after the Partial Award was rendered.

14. Accordingly, if the decisive question were whether Claimants' claims were new claims that occurred after commencement of the proceedings, I would judge the answer to be affirmative. But as already stated, I do not believe this to be the decisive question.

15. Nor do I believe that the issue before us is one of electing one's remedies.

16. In the proceedings leading up to the Partial Award, the Claimants could have asked for specific performance or damages (up to the issuance of the Award) or both. They could have elected between those remedies. But they could not have asked for damages for the future based on their having accepted Turkmeneft's repudiation because that claim had not come into existence. Claimants did not have it before that time and could therefore not have elected it. But, once they accepted the repudiation, the Claimants had only one claim, to–wit for damages, and they obtained that claim only after the Partial Award.

17. If the question before us were limited to finding whether the Claimants' claims accrued after the commencement of the proceedings, I would therefore judge the answer to be affirmative and to be compelled by the most persuasive authority of Howard v. Pickford Tool Co., supra. But I do not believe it to be so limited. Although the Claimants' new claims arose after the commencement of the proceedings, the decisive question is whether the parties reasonably contemplated, at the time of the commencement of the proceedings,

whether these claims might have to be adjudicated. That question, I believe, would have to be decided negatively.

18. If the Claimants' new claims were to be adjudicated by this Tribunal, it would have to adjudicate the difficult problems that have been occasioned by this Claimants' belated acceptance of Turkmeneft's repudiation. In Howard v. Pickford Tool Co., supra, the English Court of Appeal ruled that the court should not render a declaratory judgment on whether the defendant had repudiated the contract between it and the defendant as long as the plaintiff had not accepted the repudiation. In the case at hand, this Tribunal has done more. Not only has it ruled upon the unaccepted repudiation, it has also determined the damages to which the Claimants are entitled on the assumption that the repudiation was accepted.

19. This raises the question of whether this Tribunal had the authority to rule on this hypothetical question and to what extent its findings are binding. This Tribunal would also have to decide whether the repudiation the Claimants could accept is the repudiation that occurred before the commencement of the proceedings, the repudiation that occurred before the Partial Award, or a repudiation that allegedly continued after the Partial Award.

20. All of these questions were clearly unanticipated at the commencement of the proceedings, for the parties could hardly have anticipated that the Tribunal would proceed not only to rule upon an unaccepted repudiation, but would also proceed to rule on the hypothetical question of what the damages would be if the repudiation were accepted. Not only would I judge that this Tribunal should not adjudicate these questions for that reason, but also on the ground that this Tribunal should not rule on the consequences of its having proceeded on the allegedly improper course of deciding a hypothetical question. As the Court of Appeal noted in Howard v. Pickford Tool Co., ruling upon the unacceptable repudiation would result inevitably in another action. Ruling upon the additional hypothetical question of what damages would result if the repudiation were accepted should do so a fortiori.

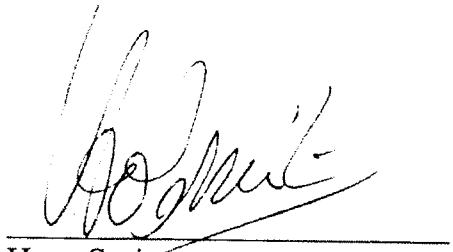
21. In the above, I have indicated why I would not proceed with adjudication of the Claimants' new claims if I regarded the decisive issue to be whether this Tribunal could hear the Claimants' new claims. However, I do not regard this to be the decisive issue.

22. The real question before us is whether this Tribunal can hear claims that it has already decided. This Tribunal has already decided that Turkmeneft repudiated the Joint Venture Agreement. It has also already decided what the damages are resulting from this repudiation. These rulings establish the Claimants' rights on these issues, and the Tribunal's authority to address them has come to an end. In other words, as those issues the Tribunal is functus officio. Now that they have accepted Turkmeneft's repudiation, the Claimants' remedy is to pursue its rights under the Partial Award, if necessary in court or in a proceeding before another tribunal. Of course, the next tribunal would have to decide whether and to what extent this Tribunal had the authority to rule upon Claimants' alleged damages and to what extent its determinations in that regard are binding.

23. A significant advantage of this Tribunal's not going forward with the adjudication of the Claimants' new claims is that its award may be subject to attack on the ground that this Tribunal has no authority to decide these claims, while an award by a new tribunal appointed to hear these claims would not. The parties are ill served by the rendition of an award that is readily subject to attack when an award not so subject can as easily be rendered by another tribunal. The Claimants could have had the award they now seek if they had accepted Turkmeneft's repudiation before commencing this arbitration. Instead, they persuaded the Tribunal to give them an advisory opinion on a hypothetical question. By doing that, they made their choice. They received from this Tribunal all and more than they were entitled to. If they now want even more, they must commence a new arbitration. This Tribunal's going forward will produce a second determination of damages, with both the first and the second subject to attack in court on the grounds detailed in my dissents. This can easily be avoided by having the Claimants pursue their claims in another arbitral tribunal. This would also offer the advantage of cutting short the court proceedings to confirm and to vacate the First Partial Award already initiated by the parties. These proceedings appear doomed to failure, because courts lack authority to proceed in regard to partial awards. See, e.g., Michaels v. Maniforum Shipping, S.A., 624 F.2d 411 (2d Cir. 1980). In any event, fighting in court about partial awards is of little help in settling this controversy definitely.

24. I would therefore direct that the proceedings be closed, and would rule that Claimants' claims for damages will not be heard by this Tribunal, and would make the proper rulings as to costs and attorney's fees.

October 21, 1999



Hans Smit,
Arbitrator

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