IN THE MATTER OF AN ARBITRATION
UNDER THE ARBITRATION RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

OXUS GOLD

v.

THE REPUBLIC OF UZBEKISTAN

FINAL AWARD

of 17 December 2015

Arbitral Tribunal:

Prof. Pierre Tercier, Chairman
Prof. Brigitte Stern
Hon. Marc Lalonde

Place of arbitration:

Paris

In the arbitration proceedings between

OXUS GOLD PLC, 52 Charles Street, London, W1J 5EU, United Kingdom

Claimant

represented by

Dr. Hamid G. Gharavi, Sergey Alekhin, Ms. Mercedeh Azeredo Da Silveira, Ms. Eloïse Obadia, DERAINS & GHARAVI, 25 rue Balzac, 75008 Paris, France, Phone : +33 1 40 555 100, Fax : +33 1 40 555 105, E-mails: hgharavi@derainsgharavi.com; salekhin@derainsgharavi.com; mazeredodasilveira@derainsgharavi.com; eobadia@derainsgharavi.com

and

THE REPUBLIC OF UZBEKISTAN, 43 Uzbekistanskaya Street, Tashkent, Republic of Uzbekistan, 700163

Respondent

represented by

Ms. Carolyn Lamm, Ms. Andrea Menaker, Mr. Brody Greenwald, Mrs. Kristen Young, WHITE & CASE LLP, 701 Thirteenth Street, NW, Washington DC 20005, USA, Phone: +1 202 626 36 00, Fax: +1 202 639 9355, E-mails: clamm@whitecase.com; amenaker@whitecase.com; bgreenwald@whitecase.com; kyoung@whitecase.com.

Claimant and Respondent are hereinafter jointly referred to as "**the Parties**".

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TABLE OF ABBREVIATIONS

2011 Audit Report	Report on the audit on compliance with tax laws and other regulations at CJSC Amantaytau Goldfields
AG	*Aktiengesellschaft* (Stock Corporation)
AGF	Amantaytau Goldfields AO
AGF Administration Agreement	General and Administration Agreement between AGF and ORC
AGF Audit Committee Report 2004	Audit's Committee Conclusion for financial activity of JV "Amantaytau Gold Fields" for 2003
AGF Management Agreement	Management and Services Agreement between AGF and ORC
AGF Original JV Agreement	Joint Venture Agreement of 24 November 1993 establishing AGF
AGF Services Agreement	Advisory and Services Agreement between Goskomgeology and AGF
AIM	Alternative Investment Market
Amended Phase 1 Feasibility Study	Amendments to the Feasibility Report on the Amantaytau Goldfields A. O. JV Project for the Oxus Resources Corporation
Amended Hedged Gold Offtake Agreement	Amended and Restated Gold Offtake Agreement between AGF and Standard Bank
AMMC/AMGK	The Almaly Mining and Metallurgical Kombinat / Plant
AMMC Expert Report	Expert Opinion as to the Feasibility Study of Development of Khandiza Multi-Metalic Ore Field Expressed by Experts of the Joint-Stock Company Almalyk Mining and Metallurgical Combine
Assignment No. 1	Agreement to Assign between ORC and OML of 22 July 1997
Audit 2011	Audit from 21 February to 22 March 2011
Barclays Bank	The Barclays Bank
BCM	BCM International Limited

BCM Sub-Contract Agreement	Contract No. 0021-G between AGF and BCM
BDO Documents	Documents relating to BDO Isle of Man
BIT	Bilateral Investment Treaty
BVI	British Virgin Island
CabMin	The Cabinet of Ministers of Uzbekistan
CCW	Crow Clarke Whitehill LLP
Central Bank Letter 2000	Letter sent from Central Bank to AGF on 3 May 2000
ch.	chapter
CITIC	CITIC Construction Ltd.
Claim.	Claimant
Contracting States	Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Uzbekistan regarding the signing of the Treaty
Credit Agreement	Credit Agreement relating to the Amantaytau Gold Project in Uzbekistan between ORC and AGF
CSMA	CSMA Consultants Limited
CSMA Bankable Feasibility Study for Phase 1	Feasibility Study of Amantaytau Goldfields AO for Oxus Gold Corporation
CSMA Expert Report 2003	Expert Report on Khandiza and SE Uzbekistan Exploration Areas
CSMA Interim Feasibility Study	Interim Feasibility Study on Amantaytau Goldfields AO
CSMA Preliminary Feasability Study	Preliminary Feasability Study of 11 December 1998
CSMA Resource Audit 2001	Audit Report on Khandiza Drilling Programme and Revised Manual Resource Estimation of 16 October 2001
Cyanide License	License ZM N 0007
Decision on Jurisdiction	Partial award issued by the Arbitral Tribunal in 9 August 2012 on the issue of jurisdiction

Decree No. 74	Decreed No. 74 On Additional Measures to Increase the Incentive Role of Privileges Granted to Companies with Foreign Investments
Decree No. 110	Decree No. 110 On Approval of the Regulations on the Procedure for Development, Expertise and Approval of the Documentation on Investment Projects
Decree No. 112	Decree No. 112 On Licensing of mining of precious and rare-earth metals and precious stones
Decree No. 127-20	Decree No. 127-20 ‘On Additional Measures to Ensure the Effective Functioning of the AGF Joint Venture’
Decree No. 133	Decree No. 133 On Entering of Amendments and Invalidations of Some Resolutions of the Government of the Republic of Uzbekistan
Decree No. 213	Classified Decree No. 213-fm
Decree No. 266	Decree No. 266 ‘On Additional Measures to Organize the Operation of the AGF JV’
Decree No. 359	Decree No. 359 On the Development of the Khandiza Polymetallic Deposit
Decree No. DP-837	Presidential Decree No. DP-837 ‘On Measures to Ensure the Currency Control of Export and Import Operations’
Decree No. 477	Decree No. 477 ‘On the Formation of the AGF Joint Venture and on Matters Ensuring its Effective Functioning’
Decree No. PP-649	Decree No. PP-649 On Measures to Improve Procedures for Issuing Subsoil Licenses
Decree No. 4058	Decree No. 4058 On the Program of Measures to Support Enterprises of the Real Economy, Ensuring their Stable Operation and Increase of Export Capacity

Deposit Report 1970	Report on the Polymetallic Deposit at Khandiza of 1 April 1970
Deposit Report 1973-1974	Report on Results of Detailed Exploration of Khandiza Complex Ore Deposit for 1973-1974
DFS	Definitive Feasibility Study
Draft Concession Agreement III	Draft Decree of the Cabinet of Ministers and Concession Agreement
Draft JV Agreement	Draft of the Preliminary Agreement to set up a Joint Venture
e.g	exempli gratia
ECT	Energy Charter Treaty
ER-[Name] [Date]	Expert report of [Name] of [Date]
Ernst & Young Expert Reports	Quantum reports prepared by Ernst & Young and filed by Claimant with its SoC
Expanded area	12,000 km^2 area surrounding the Khandiza Deposit
fol.	following
Exh ./ Exhs.	Exhibit / Exhibits
Exploration License	License which granted AGF exploration rights for the entire 192 km^2 Amantaytau project territory
FCO Report	Report of UK Foreign & Commonwealth Office
Feasibility Study 1974	Feasibility Study of 1974
Feasibility Study 1983	Samarkand Geology's Feasibility Study of 1983
Financing Agreement	Amendment and Restatement Agreement relating to a Credit Agreement dated 17 July 2002
fn.	footnote
Goskomgeology / GeoCom	The State Committee of Uzbekistan for Geology and Mineral Resources
GPR	Gencor Process Research
Hon.	Honourable
i.e.	id est
IFC	International Finance Corporation

Inspection Act	Act of Inspection regarding Issues Of Observance Of the Tax Legislation And Other Legislative Acts in “AMANTAYTAU GOLDFIELDS” Closed Joint Stock Company
JNR	JNR Limited
Kashkadarya	Kashkadarya Expedition
KCA	Kappes Cassiday and Associates
Khandiza Phase I Feasibility Study Proposa l/ WGM Proposal	Proposal by Oxus Mining Corporation to State Committee on Geology of Uzbek Republic for Phase 1 of a Feasibility Study on the Khandiza Massive Sulphide Deposit
Khandiza Feasibility Study 2004 / Bankable Feasibility Study	Khandiza Feasibility Study
Khandiza Preliminary Review	Preliminary Review of the Khandiza Massive Sulphide Deposit, SE Uzbekistan
KNOX	Knox D’Arcy Investments Limited
KORES	Korean Resources Corporation
KSL	Khandiza Services Ltd.
Law on Foreign Investment	No. 609-1 ‘On Foreign Investment’ issued by Uzbekistan
Law on Subsoil	Law of the Republic of Uzbekistan on Subsoil dated 23 September 1994
LIGA	Legal Protection Center League
Liquidation Correspondence	Relevant correspondence and documents relating to the liquidation proceedings of AGF in Uzbekistan
LLC	Limited Liability Company
LLP	Limited Liability Partnership
Ltd.	Limited
MAED	MAED Limited
MAED Sub-Contract Agreement	Contract Agreement No. 10020 for Lump Sum Turnkey Construction of Amantaytau Plant between AGF and MAED
Marakand	Marakand Minerals Ltd.
MFN	Most Favoured Nation
Mining License	License AC No. 002 authorizing AGF to engage in the mining of precious metals

MinFerit/MFERIT	The Ministry of Foreign Economic Relationship, Investments and Trade of Uzbekistan
MinFin	The Ministry of Finance of Uzbekistan
Minutes No. 23	Minutes No. 23 Of the Meeting of the Republican Commission for Reduction of Late Debit and Credit Liabilities and Strengthening of Discipline of Payments of the State Budget
MRT	Mining Resources Trust
[Name]-WS [date]	Witness Statement of [Name] dated [date]
NDRC	
Nedbank	Nedbank Limited
NMMC/NGMK	The Navoi Mining and Metallurgical Kombinat
no.	Number
O’zgeotexliti/UzGeoTechLITI	The Uzbek Research and Design Institute for Geotechnology
OMCL	Oxus Minerals Corporation Limited
OML	Oxus Mining Limited
Open-Pit Project	Phase 1 of the Amantaytau site's development, which would involve development of oxide deposits of Amantaytau Centralny, Uzunbulak and Vyskokovoltnoye in extracting gold by open-pit mine and heal-leach processing
Open-Pit Mining License	License for Right to Use Sub-soil in the Republic of Uzbekistan
ORC	Oxus Resources Corporation
Original AGF Charter	Charter by the Closed Joint Stock Company Amantaytau Goldfields A.O
Original Gold Offtake Agreement	Gold Offtake Agreement between AGF and Standard Bank
Oxus Gold/Oxus/Claimant	Oxus Gold plc
p.	page
para. / paras.	Paragraph / Paragraphs
PEA	Primary Exploration Agreement

Phase 2 Final Feasibility Study	Stage I Amendment to the June 2008 Sulphide Project Bankable Feasibility Study
plc	public limited company
Prof.	Professor
RBC	The Royal Bank of Canada
RBS	The Royal Bank of Scotland
Regulation No. 76	Regulation No. 76 On Taxation, Accounting and Reporting for the AGF Goldfields Joint Venture
Resp.	Respondent
Revised AGF Charter (1)	Charter of the Closed Joint Stock Company Amantaytau Goldfields A.O.
Revised AGF Charter (2)	Revised version of the AGF Charter
RNS	Regulatory News Service, leading service for regulatory news announcements on the London Stock Exchange
SANIGMI	Central Asian Research Hydrometeorological Institute of Uzbekistan in Tashkent
Sanoat	The Sanoatgeokontekhnazorat State Inspectorate
Shakhtastroy	JSC Zarafshan-Shakhtastroy
Shareholder Loan Agreement 2002	Loan Agreement No. 001-2002 between ORC and AGF
Silver Offtake Agreement	Silver Offtake Agreement No. Ex-0004
Silver Refining Agreement	Agreement No. 14-780
Snowden	Snowden Associates
Snowden Report	Report concerning the set-up by ORC of a computer database for the resource evaluation of Khandiza
Soviet Studies	Various reports such as Deposit Report 1970, Feasibility Study 1974, Deposit Report 1973-1974 and Feasibility Study 1983
Special Dividend Agreement	Special Dividend Agreement between the MinFin and AGF
Standard Bank	The Standard Bank London Limited
Tax Stabilization Clause	Clause 7 of Decree No. 477

Treaty	Agreement for the Promotion and Protection of Investments concluded on 24 November 1993 by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Uzbekistan
UBITC	Uzbek-British Trade & Industry Council
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
Underground Project	Phase 2 of the Amantaytau site's development, which would consist mainly in exploiting the underground mine to harness sulphide deposits found in Amantaytau Centralny and Amantayatu Severny
Unhedged Gold Offtake Agreement	Gold Offtake Agreement No. EX-0001
Uzbekistan/Uzbek Government/Respondent	The Republic of Uzbekistan
Uzbek State Expert Report	Expert Report issued by the Department Head of the Experts' Examination of Urban Planning Documentaion
UzGeotechliti Phase 2 Feasibility Study	Feasibility Study for the Development of the Gold Sulphide Ores of Amantaytau Severniy and Centralniy Deposits
v.	versus
VCLT	Vienna Convention on the Law of the Treaties of 23 May 1969
Vigorus	Vigorus Consulting Co.
WAI	Wardell Armstrong International
WAI Expert Opinion	WAI Expert Opinion submitted by Claimant together with its SoC
WAI Phase 2 Bankable Feasibility Study	Bankable Feasibility Study of the Amantaytau Goldfields Severny and Centralny Underground Sulphide Gold Deposits
WGM	Watts, Griffs & McOuat

WGM Phase 1 Feasability Study	Phase 1 Feasability Study on the Khandiza Project in Uzbekistan for Oxus Resources Corporation
Zeromax	Zeromax GmbH

TABLE OF SUBMISSIONS REFERRED TO

Claim. NoA. 31.08.2011	Notice of Arbitration filed by Claimant on 31 August 2011 against (1) the Republic of Uzbekistan, (2) the State Committee of Uzbekistan for Geology & Mineral Resources, and (3) Navoi Mining & Metallurgical Kombinat.
Resp. RNoA. 30.09.2011	Respondent`s Response to the Notice of Arbitration of 30.09.2011
Resp. SoJ. 16.04.2012	Respondent’s Submission on Jurisdiction of 16.04.2012
Claim. AoJ. 12.05.2012	Claimant’s Answer on Jurisdiction of 24 May 2012
Resp. RoJ. 13.06.2012	Respondent’s Reply on Jurisdiction of 13 June 2012
Claim. Rej.J. 25.06.2012	Claimant’s Rejoinder on Jurisdiction of 25 June 2012
Claim. Dis.CfR. 06.07.2012	Claimant’s Application for Disqualification of Counsel for Respondent of 06 July 2012
Resp. A.Dis.CfR. 18.07.2012	Answer to Claimant’s Application for Disqualification of Counsel for Respondent of 18 July 2012
Claim. SoC. 17.09.2012	Claimant’s Statement of Claim of 17 September 2009
Resp. SoD.Class. 04.04.2013	Respondent’s Statement of Defense Classified of 4 April 2013
Claim. Am.Reply. 23.08.2013	Claimant’s Amended Reply dated 23 August 2013 and submitted on 6 February 2014
Resp. Am.Rej. 21.02.2014	Respondent’s Amended Rejoinder dated 21 February 2014 and submitted on 22 April 2014.
Claim. Am.PfR. 09.05.2014	Amended version of Claimant’s Prayer for Relief of 9 May 2014
Claim. Rev.Am.PfR. 06.06.2014	Revised Amended version of Claimant’s Prayer for Relief of 6 June 2014
Claim. PHB I. 21.07.2014	Claimant’s First Post-Hearing Brief of 21 July 2014

Resp. PHB I. 21.07.2014	Respondent's First Post-Hearing Brief of 21 July 2014
Claim. PHB II. 21.08.2014	Claimant's Second Post-Hearing Brief of 21 August 2014
Resp. PHB II. 21.08.2014	Respondent's Second Post Hearing Brief of 21 August 2014

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Antoine Goetz and others and S.A. Affinage des Metaux v. Republic of Burundi ICSID Case No. ARB/01/2, Award of 21 June 2012	*Goetz v. Burundi*
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Asian Agricultural Products Ltd. (AAPL) v. Democratic Socialist Republic of Sri Lanka ICSID Case No. ARB/87/3, Final Award of 27 June 1990	*Asian Agricultural Products Ltd (AAPL) v. Sri Lanka*
AWG Group Ltd. v. The Argentine Republic UNCITRAL, Decision on Liability of 30 July 2010	*AWG v. Argentina*
Azurix Corp. v. The Argentine Republic ICSID Case No. ARB/01/12, Award of 14 July 2006	*Azurix v. Argentina*
Burlington Resources Inc. v. Republic of Ecuador ICSID Case No. ARB/08/5, Decision on Liability of 14 December 2012	*Burlington v. Ecuador*
CMS Gas Transmission Co. v. The Argentine Republic ICSID Case No. ARB/01/8, Award of 12 May 2005	*CMS v. Argentina*

CMS Gas Transmission Co. v. The Argentine Republic ICSID Case No. ARB/01/8, Decision on Annulment of 25 September 2007	*CMS v. Argentina (Annulment)*
Eastern Sugar B.V. (The Netherlands) v. The Czech Republic UNCITRAL, Partial Award of 27 March 2007	*Eastern Sugar v. Czech Republic*
El Paso Energy International Company v. The Argentine Republic ICSID Case No. ARB/03/15, Award of 31 October 2011	*El Paso v. Argentina*
Electrabel S.A. v. Republic of Hungary ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012	*Electrabel v. Hungary*
Emilio Agustín Maffezini v. The Kingdom of Spain ICSID Case No. ARB/9717, Award of 13 November 2000	*Maffezini v. Spain*
Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic ICSID Case No. ARB/01/3, Award of 22 May 2007	*Enron v. Argentina*
Generation Ukraine, Inc. v. Ukraine ICSID Case No. ARB/00/9, Award of 16 September 2003	*Generation Ukraine v. Ukraine*
Gustav F W Hamester GmbH & Co KG v. Republic of Ghana ICSID Case No. ARB/07/24, Award of 18 June 2010	*Hamester v. Ghana*
Inceysa Vallisoletana S.L. v. Republic of El Salvador ICSID Case No. ARB/03/26, Award of 2 August 2006	*Inceysa v. El Salvador*
Jan Oostergetel and Theodora Laurentius v. The Slovak Republic UNCITRAL, Final Award of 23 April 2012	*Jan Oostergetel v. Slovak Republic*

Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais ICSID Case No. ARB/81/2, Decision on Annulment of 3 May 1985	*Klöckner v. Cameroon*
LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. The Argentine Republic ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006	*LG&E Energy v. Argentina*
Link-Trading Joint Stock Co. v. Republic of Moldova UNCITRAL, Final Award of 18 April 2002	*Link-Trading v. Moldova*
Loewen Group, Inc. and Raymond L. Loewen v. United States of America ICSID Case No. ARB(AF)/98/3, Award of 26 June 2003	*Loewen v. USA*
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Metal-Tech Ltd. v. TheRepublic of Uzbekistan ICSID Case No. ARB/10/3, Award of 4 October 2013	*Metal-Tech v. Uzbekistan*
National Grid P.L.C. v. The Argentine Republic UNCITRAL, Award of 3 November 2008	*National Grid v. Argentina*
Noble Ventures v. Romania ICSID Case No. ARB/01/11, Award of 12 October 2012	*Noble Ventures v. Romania*
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Pantechniki S.A. Contractors & Engineers v. The Republic of Albania ICSID Case No. ARB/07/21, Award of 30 July 2009	*Pantechniki v. Albania*

Paushok v. Mongolia UNCITRAL, Award on Jurisdiction and Liability of 28 April 2011	*Paushok v. Mongolia*
Phoenix Action Ltd. v. The Czech Republic ICSID Case No. ARB/06/5, Award of 15 April 2009	*Phoenix Action v. Czech Republic*
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PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim v. Ticaret Limited Sirketi vs Republic of Turkey ICSID Case No. ARB/02/5, Award of 19 January 2007	*PSEG Global v. Turkey*
Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia ICSID Case No. ARB/06/2, Decision on Provisional Measures of 26 February 2010	*Quiborax v. Bolivia*
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Saluka Investments BV v. The Czech Republic UNCITRAL, Partial Award of 17 March 2006	*Saluka v. Czech Republic*
SAUR International S.A. v. The Argentine Republic ICSID Case No. ARB/04/4, Decision on Jurisdiction and Responsibility of 6 June 2012	*SAUR v. Argentina*
Sempra Energy International v. The Argentine Republic ICSID Case No. ARB/02/16, Award of 28 September 2007	*Sempra v. Argentina*

Siemens A.G. v. The Argentine Republic ICSID Case No. ARB/02/8, Award of 6 February 2007	*Siemens v. Argentina*
Société d'Investigation de Recherche et d'Exploitation Minière (SIREXM) v. Burkina Faso ICSID Case No. ARB/97/1, Award of 19 January 2000	*SIREXM v. Burkina Faso*
Spyridon Roussalis v. Romania ICSID Case No. ARB/06/1, Award of 7 December 2011	*Spyridon Roussalis v. Romania*
Starrett Housing Corp. v. Islamic Republic of Iran Iran-US Claims Tribunal, Award No. ITL 32-24-1 of 19 December 1983	*Starrett Housing v. Iran*
Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003	*Tecmed v. Mexico*
Tza Yap Shum v. Republic of Peru ICSID Case No. ARB/07/6, Award of 7 July 2011	*Tza Yap Shum v. Peru*
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Wena Hotels Limited v. Arab Republic of Egypt ICSID Case No. ARB/98/4, Award of 8 December 2000	*Wena Hotels v. Egypt*
World Duty Free Company Limited v. Republic of Kenya ICSID Case No. ARB/00/7, Award of 4 October 2006	*World Duty Free v. Kenya*

DRAMATIS PERSONAE

Mr. Nurmukhammad Akhmedovich Akhmedov	Chairman of Goskomgeology from 1999 to 2006.
Mr. Firdaus Mullayanovna Bayazitova	Worked at Goskomgeology since 1980 in various capacities
Mr. William John Charter	Former Vice-President and Director of ORC, Technical Executive Director of Marakand and Chief Geologist of Oxus Gold.
Mr. Rakhim Gavratovich Davronov	Head of the Department of Examination of Investment Projects at the Ministry for Foreign Relations and International Trade of the Republic of Uzbekistan.
Mr. Mamadier Ergashev	Chief State Tax Inspector of the State Tax Department of the Navoi Region of the State Tax Committee of the Republic of Uzbekistan.
Mr. I. G. Gorlov	Deputy Chairman of Goskomgeology
Mr. Ravshan Ayubovich Gulyamov	Executive Director of the Fund for Reconstruction and Development of Uzbekistan
Mr. Philip Haberman	Chief of the Dispute Services team, Ernst & Young London’s Fraud Investigation & Dispute Services.
Mr. Timothy H. Hart	Expert for Respondent
Mr. Graham David Hill	General Director of AGF until 2010, Project Director of AGF, Member of the AGF Directorate until 2011.
His Excellency Sir Islam Abduganievich Karimov	President of the Republic of Uzbekistan
Mr. Vagif Shovketovich Khaspoladov	Deputy Chief Engineer at the Almalik Mining and Metallurgy Plant.
Mr. Mavlyuda Kulikuva	Lawyer in Uzbekistan.

Mr. Pierre C. Larroque	Expert for Claimant
Ms. Nina Malkina	Chief of the Department on the Formation of Programs of Modernization of the Economy and Developing Branches of Heavy Industry at the Ministry of Economy of the Republic of Uzbekistan
Mr. Khikmatulla Tursunkulovich Maysupov	Head of the Branch Inspectorate on Supervision in the coal mining, ore mining and non-ore mining industry and geological surveying control of the State Inspectorate.
Mr. Davron Kakhramonovich Muhamedzhanov	Head of the Division of the Main Department of Hard Currency Assets and Liabilities of the Ministry of Finance of the Republic of Uzbekistan
Mr. Daniel Nardello	Expert for Respondent.
Mr. Phil Newall	Managing Director of Wardell Amstrong.
Mr. Rex E. Pringle	Expert for Respondent.
Mr. Neal Rigby	Expert for Respondent.
Mr. Jacob Rotschild	Co-Owner of JNR.
Mr. Nathaniel Rotschild	Co-Owner of JNR.
Ms. Anna Aleksandra Rustamova	Chief Accountant and Chief Expert for Internal Audits of Goskomgeology until 2010.
Mr. Abdulmalik Savoravich Sadikov	Chief of the Control Department for Export-Import Operations of the State Tax Department of the Navoi Region of the State Tax Committee of the Republic of Uzbekistan.
Mr. Anvar Zabikhullaevich Salimov	Served in the Ministry of Finance of the Republic of Uzbekistan in various positions from March 2003 to November 2005 and from May 2006 to May 2012.

Dr. Tulkun Shayakubov	Chairman of Goskomgeology from 1986 to 1999.
Mr. Richard Barry Shead	Executive Chairman of Oxus Gold plc.
Mr. P. A. Shemetov	Chief Engineer of NMMC
Ms. Galina Sherbakova	First Deputy Director of the Department of Hard Currency Assets and Liabilities of the Ministry of Finance of the Republic of Uzbekistan
Mr. Utkir Tukhtamuradovich Sultanov	Prime Minister of Uzbekistan
Mr. Ilkholm Bekzhanovich Turamuratov	Current Chairman of Goskomgeology
Mr. Roger Turner	President and CEO of OML
Mr. Yerkin Ergashevich Tursunov	Deputy Minister of the Ministry of International Affairs of the Republic of Uzbketistan
Mr. Richard Vaughan Lindsay Wilkins	Co-Founder of the Oxus group of companies Secretary of Oxus Gold plc
Mr. R. Z. Yuldashev	Chief of Hard Curency & Economic Development Department of Ministry of Finance of the Republic of Uzbekistan

A. THE FACTUAL BACKGROUND

1. In the course of the proceedings, the Arbitral Tribunal issued on 9 August 2012 a *partial award on the issue of jurisdiction* (hereinafter "Decision on Jurisdiction"). For the sake of clarity, the Arbitral Tribunal will reiterate in the present Award certain facts and descriptions already contained in its Decision on Jurisdiction, without however entering into details. At the same time, the Arbitral Tribunal will develop further aspects, which were not dealt with in the past Decision on Jurisdiction and which are relevant for the present Award.

2. ***Important Note:*** When referring to Exhibits, the Tribunal will refer to the English versions of such documents provided by the Parties, whereby it should be noted that such English versions contain grammatical and orthographical mistakes which have not been corrected by the Arbitral Tribunal.

I. The Parties

1. Claimant, its Affiliated Entities and its Service Providers

1.1 Claimant

3. Claimant is ***Oxus Gold plc*** (hereinafter "Claimant" or "Oxus Gold" or "Oxus"), a company incorporated on 21 August 2000 in England, the United Kingdom (hereinafter the "UK"), under the registration number 4056219, attributed by the Registrar of Companies for England (Exh. C-31). Oxus Gold is engaged in the exploration, acquisition and development of precious/base metal properties in Central Asia (Claim. 31.08.2011, para. 1).

4. It was first incorporated in England and Wales, as a private limited company, under the name "Intercede 1642" (Exh. C-27). On 1 December 2000, Intercede 1642 was renamed "Golski Limited" (Exh. C-28). On 5 June 2001, Golski Limited was reregistered as a public limited company and again renamed "Oxus Mining plc" (Exh. C-29) and listed on the Alternative Investment Market ("AIM") of the London Stock Exchange. On 4 June 2003, Oxus Mining plc was renamed "Oxus Gold plc" (Exh. C-31).

1.2 Claimant's Affiliated Entities

5. Claimant's corporate structure is set up as follows and includes in particular the following relevant entities (Resp. SoJ. 16.04.2012, paras. 3.1 - 3.2; Claim. AoJ. 12.05.2012, paras. 8 - 10):

1.2.1 Oxus Ressources Corporation (ORC)

6. On 8 February 1996, *Oxus Resources Corporation* (hereinafter "ORC") was incorporated in the British Virgin Islands, under the name "Oxus Holdings Limited [BVI]" (Exh. C-34, Exh. C-35). On 26 March 1996, it was renamed ORC (Exh. C-35). Although incorporated in the British Virgin Island, ORC's place of business is Malta (Exh. C-36). Both Parties agree that ORC is currently fully owned by "Oxus Holdings (Malta) Limited", which in turn is fully owned by Oxus Gold. ORC is the original party to the Primary Exploration Agreement (see below para. 140) (Resp. SoJ. 16.04.2012, para. 3.2; Claim. AoJ. 12.05.2012, para. 12).

1.2.2 Oxus Mining Limited (OML)

7. *Oxus Mining Limited* (hereinafter"OML") was incorporated in England and Wales. It was later on renamed "*Oxus Services Ltd*" and is wholly owned by ORC (Exh. C-41, Exh. C-42).

1.2.3 Marakand Minerals Limited (Marakand)

8. On 6 July 1999, *Oxus Minerals Corporation Limited* (hereinafter "OMCL") was incorporated in the Island of Guernsey (Exh. C-43). On 17 October 2003, Oxus Minerals Corporation Limited was renamed *Marakand Minerals Limited* (hereinafter "Marakand") (Exh. C-44).

9. On 1 July 2002, Marakand became a party to the Primary Exploration Agreement (see below para. 174) by acquiring all rights, liabilities and obligations under that agreement from Oxus Services Limited.

1.2.4 Khandiza Services Limited (KSL)

10. On 15 March 2004, *Khandiza Services Ltd.* (hereinafter "KSL") was incorporated in Uzbekistan with 100% of the shares being held by Marakand (Claim. 12.05.12, para. 22). This company was liquidated in 2008 (Exh. C-48).

1.2.5 Amantaytau Goldfields AO (AGF)

11. On 31 August 1999, ORC acquired a 43% interest in *Amantaytau Goldfields AO* (hereinafter "AGF"), an Uzbek joint-stock company incorporated in Uzbekistan. ORC now holds 50% of the interest in AGF, while Goskomgeology and NMMC hold the remaining 50% interest, out of an original holding of 57% (see below paras. 22 and 24). ORC acquired its rights by first acquiring 8% of the shares from Lonmin plc, a company registered in England and previously named Lonrho plc, which had previously bought these 8% from the International Finance Corporation (hereinafter "IFC") (Exh. C-37), and subsequently increased its shares in AGF to 50% (Claim. AoJ. 12.05.2012, para. 13). AGF is currently under liquidation (see e.g., Exh. C-698, Exh. C-699, Exh. C-706, Exh. C-707, Exh. R-955, Exh. R-957, Exh. R- 959, Exh. R-961, Exh. R-1375).

1.2.6 Claimant's Shareholders

12. The shareholders of Claimant included at some point:

    (i) *Zeromax GmbH* (hereinafter "Zeromax"), a company incorporated in Switzerland, which acquired in November 2006 a shareholding of 16% in Oxus; Zeromax is currently under liquidation;

    (ii) *Knox D'Arcy Investments Limited* (hereinafter "KNOX"), a British company;

    (iii) *Normandy Mining Limited*, a company incorporated in Australia, which acquired 24.63% shares in Oxus;

    (iv) *MAED Limited* (hereinafter "MAED"), a company incorporated in the Isle of Man and which acquired shares in Oxus in October 2002 and also provided certain services as sub-contractor to AGF (see below para. 424).

1.3 Claimant's Service Providers

13. Apart from the above listed affiliated entities, Claimant further worked together with various other entities, including the following service providers and sub-contractors:

1.3.1 With Regard to the Khandiza Project

14. As advisors to Claimant regarding geological and feasibility studies:

- *Wardell Armstrong International* (hereinafter "WAI"), a leading English mining consultancy firm, mandated by Marakand and involved in the auditing of Marakand's geological resource evaluations;

- *Watts, Griffs & McOuat* (hereinafter "WGM"), mandated by ORC to assist in the preparation of a feasibility study regarding the Khandiza Project;

- *Snowden Associates* (hereinafter "Snowden"), a mineral resource evaluation consultant with specific experience in evaluating former Soviet Union data, mandated by ORC and involved in 1997 in the construction of a computer database for a resource evaluation of Khandiza;

- *CSMA Consultants Limited* (hereinafter "CSMA"), a UK based minerals and mining consultancy, mandated by ORC to produce a new Preliminary Feasibility Study improving the one already submitted by WGM;

- *SANIGMI*, an Uzbek environmental institute based in Tashkent, commissioned by Marakand to prepare a locally required environmental impact assessment ("OVOS").

15. As financial or commercial advisors to Claimant and/or funders:

- *LN Metals*, a UK-based specialist in the trade of ore concentrates and metals, regarding commercial advice and assistance in relation to ORC's non-ferrous base metal mineral resources and related mineral processing facilities in Uzbekistan;

- *Korean Resources Corporation* (hereinafter "KORES"), a South Korean company, interested in equity participation in the Khandiza Project;

- *Nedbank Limited* (hereinafter "Nedbank"), a bank involved in the financing of the Khandiza Project;

- *Barents Group LLC*, a company which upon ORC's request helped prepare economic models regarding a joint venture between ORC and Goskomgeology.

16. As legal advisors:

- *Cameron McKenna*, a law firm, which upon ORC's request issued a legal opinion on the Primary Exploration Agreement (see below para. 35).

1.3.2 With Regard to the AGF Joint Venture Operations

17. As financial advisors and/or potential funders to ORC:

- *The Barclays Bank* (hereinafter "Barclays Bank**")**, a British bank, where Claimant opened a bank account with regard to AGF operational money;

- *The Standard Bank London Limited* (hereinafter "Standard Bank"), a London bank, which together with *WestLB AG* lent up to USD 36 million to AGF;

- *The Royal Bank of Scotland* (hereinafter "RBS") and *the Royal Bank of Canada* (hereinafter "RBC"), which Claimant approached to discuss the financing of Phase 2 of the AGF investment;

- *CITIC Construction Ltd.* (hereinafter "CITIC"), a Chinese equity investment management fund, which organized a consortium (hereinafter "CITIC Consortium") interested at some point to finance the AGF operations. The other members of the CITIC Consortium were Baiyin Non-Ferrous Group Co. Ltd. and Chang Xin Yuan Su (Tianjin) Equity Investment Fund Management LP, two other Chinese entities.

18. As legal advisors, which assisted ORC and/or AGF with regard to the legal proceedings in Uzbekistan:

- *Legal Protection Center League* (hereinafter "LIGA"), a non-governmental entity in Uzbekistan;

- *Vigorus Consulting Co* (hereinafter "Vigorus"), a company with offices in Uzbekistan;

- *Denton Wilde & Sapte,* a law firm with offices in Uzbekistan.

19. As other advisors to ORC or AGF:

- *JNR Limited* (hereinafter "JNR"), an investment advisory company allegedly owned by Messrs Jacob and Nathaniel Rothschild, and who was engaged by ORC to provide certain strategic advice with regard to Claimant's operations in Uzbekistan, in particular the AGF Project;

- *Crow Clarke Whitehill LLP* (hereinafter "CCW"), which audited accounting data from Claimant and is appearing as expert on behalf of Claimant in the present proceedings.

20. As further service providers and sub-contractors to ORC or AGF:

- *Gencor Process Research* (hereinafter "GPR"), a South-African company, which provided services to ORC/AGF by performing testing works in 1994 and 1999 on a number of samples from the oxide ore deposits of the region;

- *Kappes Cassiday and Associates* (hereinafter "KCA"), which provided services to ORC/AGF by performing additional testing works in 1999 and 2000;

- *Mining Resources Trust* (hereinafter "MRT"), which provided consultancy services to AGF at the request of ORC;

- *BCM International Limited* (hereinafter "BCM"), which performed certain works as sub-contractor of AGF;

- *JSC Zarafshan-Shakhtastroy* (hereinafter "Shakhtastroy"), an Uzbek company and sub-contractor to AGF, which eventually initiated bankruptcy proceedings against AGF.

2. Respondent and its Public Entities

2.1 Respondent

21. Respondent is ***the Republic of Uzbekistan*** (hereinafter "Uzbekistan" or "Uzbek Government" or "Respondent"), represented by its President, His Excellency Sir Islam Abduganievich Karimov.

22. The Government entities involved in the present disputes are the following:

- The Cabinet of Ministers of Uzbekistan (hereinafter "CabMin");

- The Ministry of Finance (hereinafter "MinFin");

- The Ministry of Foreign Economic Relationship, Investments and Trade (hereinafter "MinFerit" or "MFERIT");

- The State Tax Committee;

- *The Sanoatgeokontekhnazorat State Inspectorate* (hereinafter "Sanoat"), which monitors each mining enterprise's compliance with the Republic's laws and regulations relating to industrial safety;

- The Uzbek Research and Design Institute for Geotechnology (hereinafter "O'zgeotexliti" or "UzGeoTechLITI").

- *The State Committee of Uzbekistan for Geology and Mineral Resources* (hereinafter "Goskomgeology" or "GeoCom"), a governmental entity reporting directly to the CabMin and which held 57% in AGF jointly with NMMC (Exh. C-216, see below para. 23);

- *The Uzbekistan State Geological Fund*, a State entity under the auspices of Goskomgeology;

- *Samarkand Geology*, a branch of Goskomgeology responsible for mining projects in Western Uzbekistan;

- *Kashkadarya Expedition*, a sub-division of Samarkand Geology;

- Zarafshan Prosecutor's Office for the Navoi Region.

2.2 Respondent's Public Entities

23. The dispute further involves the following State-owned companies:

- *The Navoi Mining and Metallurgical Kombinat* (hereinafter "NMMC" or "NGMK"), a mining company incorporated in Uzbekistan, wholly owned by the Uzbek Government and in charge of managing the ownership, use and disposal of State properties. NMMK held originally 57% (subsequently reduced to 50%) in AGF jointly with Goskomgeology (Exh. C-216).

- *The Almalyk Mining and Metallurgical Combinat/Plant* (hereinafter "AMMC" or "AMGK"), a mining, mineral processing and smelting enterprise incorporated in Uzbekistan, wholly owned by the Uzbek Government.

II. General Overview of the Background of the Dispute

24. Oxus Gold commenced its operations in Uzbekistan in 1997. Its mining activities in Uzbekistan were carried out by and through its wholly-owned subsidiaries, ORC and Marakand (Claim. AoJ. 12.05.2012, para. 10; see also above para. 6 and 8). Oxus Gold pursued two distinct business operations in Uzbekistan: the so-called "AGF Project" and the "Khandiza Project".

25. The present dispute, while between the same parties, concerns thus two different projects, i.e. the *"Khandiza Project"* and the *"AGF Project"*. Notwithstanding the fact that the Arbitral Tribunal will therefore proceed with the examination of these two projects on a separate basis, it is nevertheless useful to firstly lay out the general origin of Claimant's involvement in these projects.

26. The ***Khandiza Project*** concerned the exploration of one of Uzbekistan's mineral deposits situated in the Surkhandaria region in south-east Uzbekistan, i.e. Khandiza. This deposit is a classic volcanogenic sulphide deposit containing sizeable copper, lead, gold, silver and zinc deposits. (Claim. 31.08.2011, para. 26).

27. The ***AGF Project*** refers to the management and operation of AGF which was in charge of the exploitation of the Amantaytau goldfields. These goldfields are one of the world's largest gold endowment and the largest gold production site in Uzbekistan, consisting of 192 km^2 in the Kyzylkum region in the Tien Shan belt. They include the deposits of (i) Amantaytau Centralny, (ii) Amantaytau Severny, (iii) Uzunbulak, and (iv) Vyskokovoltnoye (Claim. SoC. 17.09.2012, para. 241).

1. The Origin of Claimant's Involvement in the Khandiza Project

28. It is undisputed that the Khandiza Deposit was discovered by Samarkand Geology and that diamond drilling had already been carried out between 1958 and 1975 during the Soviet era (Claim. Am.Reply. 23.08.2013, para. 115; Resp. Am.Rej. 21.02.2014, para. 47), although the Parties disagree on the scope and quality of these works performed prior to 1975.

29. The results of these works are summarized in various reports (hereinafter "Soviet studies"), including:

- Report on the Polymetallic Deposit at Khandiza of 1 April 1970 ("Deposit Report 1970") (Exh. R-253);
- Feasibility Study of 1974 ("Feasibility Study 1974") (Exh. R-255);
- Report on Results of Detailed Exploration of Khandiza Complex Ore Deposit for 1973-1974 ("Deposit Report 1973-1974") (Exh. R-786);
- Samarkand Geology's Feasibility Study of 1983 ("Feasibility Study 1983") (Exh. R-256);

30. It is further undisputed that during the Soviet era, i.e., from 1975 to 1996, no further works were performed and the Khandiza Deposit was left undeveloped (Claim. Am.Reply. 23.08.2013, para. 122; Shayakubov, Transcripts of 30 April 2014, 596:18-19). It is only after the independence of Uzbekistan, that the Uzbek Government decided to start developing this Deposit through the help of foreign investment. The Parties however disagree on the reasons for this delay in developing the Khandiza Deposit.

31. In 1996, first contacts took place between Uzbekistan and ORC. The specific circumstances of these first contacts are disputed between the Parties, while it is undisputed that they happened in the context of a Mining Conference held in Denver in the summer of 1996 (Claim. Am.Reply. 23.08.2013, para. 134; Resp. SoD.Class. 04.04.2013, paras. 50 fol.). Thereafter, ORC sent a geologist, Mr. Charter, to Uzbekistan to review Goskomgeology's data regarding the Khandiza Deposit and visit the Khandiza Deposit (Exh. C-146; Resp. SoD.Class. 04.04.2013, para. 54, Resp. Am.Rej. 21.02.2014, para. 65).

32. On 15 August 1996, Goskomgeology and ORC entered into a ***"Protocol of Intentions"*** regarding Khandiza (Exh. C-147). Under this Protocol, Goskomgeology agreed to share with ORC all available information on Khandiza, including the results of all previous Soviet studies. For its part, ORC agreed to

complete a Pre-Feasibility Study and to prepare a programme of further works by October 1, 1996 (Claim. Am.Reply. 23.08.2013, para. 141; Resp. SoD.Class. 04.04.2013, para. 55).

33. On 1 October 1996, Mr. Charter, the geologist of ORC sent on site to review the data of the Khandiza Deposit (see above para. 31) and also the Vice-President and Director of ORC, submitted to Goskomgeology a ***"Preliminary Review of the Khandiza Massive Sulphide Deposit, SE Uzbekistan"*** (hereinafter "Khandiza Preliminary Review**"**) (Exh. C-148). This review suggested that ORC proceed with a more detailed assessment of the Khandiza Deposit by way of a Pre-Feasibility Study (Claim. Am.Reply. 23.08.2013, para. 143).

34. On 2 October 1996, ORC submitted a "Proposal by Oxus Mining Corporation to State Committee on Geology of Uzbek Republic for Phase I of a Feasibility Study on the Khandiza Massive Sulphide Deposit" (hereinafter "Khandiza Phase 1 Feasibility Study Proposal" or "WGM Proposal") issued by WGM. This Proposal laid down a programme of further works for the successful development of the Khandiza mine (Claim. Am.Reply. 23.08.2013, para. 145).

35. On 14 December 1996, ORC and Goskomgeology entered into a ***"Primary Exploration Agreement"*** **(**hereinafter "PEA"**)** (Exh. C-40) in relation to the development of the Khandiza Deposit and a 12,000 km^2 area surrounding it and expanding to the north of the Deposit. The PEA's declared purpose was to develop the initial framework of a Feasibility Study for the Khandiza Deposit and geological additional study in the surrounding area and to carry out exploration works.

36. This Agreement was eventually assigned to Marakand (see Decision on Jurisdiction, paras. 19 fol.) and constitutes the factual basis for Claimant's claims in the present arbitration. It is examined more in detail below (para. 140).

2. The Origin and Evolution of Claimant's Ownership in the AGF Project

2.1 AGF Joint Venture's Operations prior to Claimant's Participation therein

37. On 24 November 1993, AGF was established through a Joint Venture Agreement (hereinafter "AGF Original JV Agreement") (Exh. C-281).

38. On 20 April 1994, Uzbekistan issued ***Presidential Decree No. DP-837 'On Measures to Ensure the Currency Control of Export and Import Operations'*** (hereinafter "Decree No. DP-837") (Exh. R-38) providing in Article 1 as follows:

> *"Quotas for export of goods (works, services) shall not be sold, transferred, or redistributed to other legal entities;*
>
> *Settlements of the export-import operations of the companies, organizations and institutions of the Republic of Uzbekistan with foreign partners through the accounts of the companies in foreign banks shall be prohibited and punishable by law."*

39. On 22 September 1994, CabMin issued ***Decree No. 477 'On the Formation of the AGF Joint Venture and on Matters Ensuring its Effective Functioning'*** (hereinafter "Decree No. 477") (Exh. C-215) in which it granted the AGF Joint Venture certain rights regarding the exploration and development of the Amantaytau goldfields, as well as certain benefits regarding accounting and taxation regimes (Claim. SoC. 17.09.2012, para. 254). At the same time, Prime Minister Sultanov, together with its Deputy Prime Ministers, were designated as responsible for monitoring AGF's implementation of the Project and its compliance with the investment obligations set forth in those Decrees[1] (Resp. SoD.Class. 04.04.2013, para. 209).

Relevant provisions of Decree No. 477 are reproduced hereinbelow:

> *" 'On the creation of the Joint Venture "Amantaytau Goldfields" and measures to ensure its effective functioning'*
>
> *In order to increase the production of precious metals by attracting modern technology and investments from abroad, the Cabinet of Ministers decrees:*
>
> […]
>
> *4. To grant the Joint Venture "Amantaytau Goldfields" the following rights provided by the Agreement about the creation of the Joint Venture dated 24 November 1993, including:*
>
> - *the exclusive right to explore, develop and mine the Goldfields in the Exploration Area within the boundaries and on conditions as defined in the Agreement for the period of 30 years;*
> - *to sell for freely convertible currency and at world prices gold, silver and other products obtained from mining the Goldfields abroad as well as in the Republic of Uzbekistan;*

[1] It appears that while Claimant has largely referred to the term "Resolution" and Respondent to the term "Decree", the Tribunal will use the term "Decree" in this Award, whereby such designation shall not be interpreted as having any particular legal consequence.

- *to open accounts in accordance with the established procedure in any currency with the banks of the Republic of Uzbekistan and foreign banks, and to receive and use foreign currency from such foreing accounts;*

- *to receive and repay credits in freely convertible currency, and to secure such credits with the Joint Venture's property in accordance with the Legislation of the Republic of Uzbekistan;*

- *to obtain insurance from organisations in the Republic of Uzbekistan and also abroad; and*

- *to denominate the Charter Fund in U.S. dollars.*

5. *To include the Joint Venture in the Investment Programme of the Republic of Uzbekistan and to grant to the Joint Venture the following tax and other privileges:*

    - *to exempt the Joint Venture from paying income tax during the first 5 years from the date of the state registration of the Joint Venture with the Ministry of Finance. To allow the Joint Venture the carrying for following years with the respective exclusion from the taxable base, of losses suffered by the Joint Venture on the expiry of the above-mentioned period of exemption from paying income taxes, during any of the five years following the year of suffering the losses;*

    - *to exempt the Joint Venture from paying taxes on customs, taxes on property;*

    - *to exempt foreign shareholders and foreign lenders to the Joint Venture from taxes on dividends and loan-service payments which are transferred abroad;*

    - *to exempt the Joint Venture from the payment of charges or any other taxes with respect to the amortisation of fixed assets*

6. *To take into consideration that apart from deductions and payments contemplated by the Legislation of the Republic of Uzbekistan, the Joint Venture shall effectuate the following payments and charges into the State budget:*

    - *payment for the use of subsoil (royalties) during the period of exemption from paying income tax, 2.5 percent and after the expiry of the period of exemption from paying income tax, 6 percent of all revenue received by the Joint Venture from the sale of mineral resources less expenses incurred in connection with refining and for transport to point of sale, insurance for delivery and selling agent's normal commission. If payment of such royalties would cause the Joint Venture to suffer a net* *operating loss, then the royalty rate would be reduced so as to avoid such losses, but the rate of royalties shall not be reduced to below 2.5 percent. Payment for the use of subsoil (royalty) shall be deemed a rental payment.*

- *if after the expiry of the tax holiday the level of profitability of the Joint Venture shall exceed 30%, there will be an additional deduction from the profits which are in excess of this level at rates to be agreed by the parties.*

- *deduct two percent of the net profit for the social development of the region where the Joint Venture is located.*

Enterprise tax, payments for the use of subsoil, excess profits deductions, deductions for the social development of the region and dividends to the founders shall be paid by the Joint Venture in freely convertible currency.

7. *In the event of changes during the next ten years in the tax law of the Republic of Uzbekistan which adversely affect the activities of the Joint Venture, to provide the application of legal and other normative acts valid at the time of signing of the statute documentation for the Joint Venture."*

Clause 7 of Decree No. 477 is hereafter referred to as the "Tax Stabilization Clause".

40. On 12 December 1994, the AGF Joint Venture was established by signing of the 'Charter by the Closed Joint Stock Company Amantaytau Goldfields A.O' (hereinafter the "Original AGF Charter") by Goskomgeology, NMMK, Lonrho and the IFC. Goskomgeology and NMMK jointly held approximately 57%, Lonrho held approximately 35% and IFC held approximately 8% (Exh. C-216).

41. In 1995, AGF obtained an ***exploration license*** (hereinafter "Exploration License"), which granted AGF exploration rights for the entire 192 km^2 Amantaytau project territory (Claim. SoC. 17.09.2012, para. 361). This license was valid for a period of ten (10) years.

42. On 30 March 1996, CabMin issued ***Decree No. 127-20 'On Additional Measures to Ensure the Effective Functioning of the AGF Joint Venture'*** (hereinafter "Decree No. 127-20") (Exh. C-218), which exempted AGF from certain taxes, including from VAT on materials and equipments, works and services of contracting and/or subcontracting organizations involved in construction before the commissioning of the Project's Phase 2 operations (Claim. SoC. 17.09.2012, para. 255; Resp. SoD.Class. 04.04.2013, para. 117). In this regard, the Decree provided as follows:

"7. Resolve that the privileges, envisaged by the Decree […] No. 477 and this Decree:

- *Apply to foreign companies, conducting construction activities for contract and subcontracting and carrying out technical services and consultations to the JV 'Arnantaytau Goldfields';*

- *Will be valid for the whole mine life period of the joint venture if any other concrete timing is not established.*

8. The Ministry of Finance of the Republic of Uzbekistan shall within one months period:

- *Together with the State Taxation Committee of the Republic of Uzbekistan evaluate and submit for approval to the Cabinet of Ministers The Regulations on taxation regime, accounting system and reporting for the Joint \venture 'Arnantaytau Goldfields';*

- *Approve the order of compensating the difference in cost of power for the JV 'Arnantaytau Goldfields'."*

2.2 Claimant's Acquisition of Shares in AGF Joint Venture

43. In May 1997, Lonrho announced that it was seeking to withdraw from the AGF Project and Respondent was apparently seeking to replace Lonrho with another foreign partner (Claim. SoC. 17.09.2012, para. 242).

44. On 30 April 1998, Uzbekistan issued **Law No. 609-1 'On Foreign Investment'** (hereinafter "Law on Foreign Investment") (Exhs. R-276/277) aimed to "define a legal basis and the procedure for execution of foreign investments on the territory of the Republic of Uzbekistan" and which described its basic tasks as follows:

"The basic tasks of the present Law are the following:

- *economy promotion in the Republic ofUzbekistan and its integration into world economic system by stimulation of flow of foreign investments;*

- *an attraction and efficient use of foreign financial, material, intellectual and other resources, modern foreign technologies and managerial experience."*

In Article 3, the Law on Foreign Investment defined the terms "foreign investments" as follows (Exh. R-277):

"Article 3. Foreign investments

Article 3. Guarantees of foreign investors' rights

The state guarantees and protects the rights of foreign investors who execute investment activity on the territory of the Republic ofUzbekistan.

Discrimination is not admitted to foreign investors in connection with their nationality, place of residence, denomination, a place of execution of economic activity, as well as depending on the country of origin of investors or investments with taking into account guarantee of realization of international agreements of the Republic ofUzbekistan.

Legislative acts including departmental normative ones have not retroactive effect of their execution causes damage to foreign investor or foreign investments.

If the subsequent legislation of the Republic of Uzbekistan makes worse investment conditions, than legislation current on the date of investment is applied to foreign investments within ten years of the date of investment. The foreign investor has the right at his own discretion to apply those provisions of a new legislation which make better conditions of his investment. Worsening conditions of investments refer to changes and amendments to the legislation current on the date of investment or adoption of the new legal acts, providing:

- *increase in the rate of tax on incomes, received as dividends, paid to the foreign investor;* […]

<u>In Articles 10 and 11</u>, the Law on Foreign Investment then sets out various rights and obligations of the investors as follows:

"Article 10. Foreign investors' rights

In accordance with the principles of international law and the legislation of the Republic of Uzbekistan, the foreign investor has the right for the following:

- *to define on his own account the amount, kinds and channels of investments;*
- *to conclude agreements with legal and natural entities to execute investment activity;*
- *to own, use and dispose* [of] *his investments and the results of investment activity. On the decision of the foreign investor, the rights to own, use and dispose* [of] *investments and their results can be assigned to other legal and natural entities in accordance with the procedure established by the legislation of the Republic ofUzbekistan.*

[…]

- *to dispose on his own account and freely an income (including its unobstructed repatriation) resultant from investment activity;*
- *to attract financial resources in the form of credits and loans to the Republic of Uzbekistan;*
- *to use means in national currency on his own accounts for the purpose of purchasing of foreign currency at the local foreign currency market;*
- *to acquire rights for land in cases and on terms provided by the legislation;*
- *to use property and any property rights belonging to him on the right of ownership, as a security on all kinds of obligations undertaken by him including ones directed to attract borrowed funds in accordance with the legislation of the Republic ofUzbekistan;*
- *for receipt of adequate compensation in case of requisition of his investments and other assets;*
- *to get compensation for losses inflicted as a result of unlawful activity (non-activity) and decisions of the state administration bodies, local authorities and their officials.*

The foreign investor also has another rights provided by the legislation of the Republic of Uzbekistan.

Article 11. Obligations of the foreign investors

When execute investment activity on the territory of the Republic of Uzbekistan, the foreign investor has the following obligations:

- *to observe the current legislation of the Republic ofUzbekistan;*
- *to pay taxes and effect other payments in accordance with the legislation of the Republic of Uzbekistan;*
- *to be responsible on contractual liabilities undertaken in connection with investment;*
- *to obtain the conclusions of examination expert of investment projects regarding to observation of sanitary, hygienic, ecological and other requirements following from the legislation of the Republic of Uzbekistan;*
- *to abstain from direct and (or) indirect unlawful influence his partners on investment activity or the state administration bodies and local authorities with the purpose to receive the additional privileges and advantages in comparison with his competitors.*

The foreign investor is responsible for violation of the legislation of the Republic of Uzbekistan on common grounds and answers by his property belonging to him *on the right of ownership, on which a claim can be made in accordance with the legislative acts of the Republic of Uzbekistan."*

45. In February 1999, in view of its intended involvement in the AGF Joint Venture, ORC prepared and submitted a Preliminary Feasibility Study called **'*Amantaytau Daugystau Project/Proposed Development Programme*'** (Exhs. C-209/C-596), which contemplated a two-phase development of the Amantaytau site: Phase 1 would involve development of oxide deposits of Amantaytau Centralny, Uzunbulak and Vyskokovoltnoye in extracting gold by open-pit mine and heal-leach processing (hereinafter "Open-Pit Project"), and Phase 2 would consist mainly in exploiting the underground mine to harness sulphide deposits found in Amantaytau Centralny and Amantayatu Severny (hereinafter "Underground Project") (Claim. SoC. 17.09.2012, para. 243). In this Programme, ORC declared that "[i]*t is assumed that the initial oxide phase will be funded 100% by Oxus/IFC shareholder loans, with no debt finance required from banks*" and that "*it is assumed that 25 percent of available cashflow will be distributed to the Parties as dividends*" (Resp. SoD.Class. 04.04.2013, para. 119, Exh. C-209).

46. On 10 June 1999, Goskomgeology, NMMC and ORC signed a letter of intent, recording the former two's support for ORC to enter the AGF Project in replacement of Lonrho (Exh. C-210).

47. On 31 August 1999, IFC entered into an **"*Assignment and Release Agreement*"** with Lonrho assigning its 8% shares in AGF to Lonrho (by then renamed 'Lonmin') (Exh. C-37).

48. On 31 August 1999, ORC concluded with Lonmin an **"*Agreement for the Sale and Purchase of an Equity Interest in Amantaytau Goldfieds A.O*."** (Exh. C-37) by which it acquired Lonmin's 43% shareholding in the AGF JV against USD 4,3 million consideration, comprising a USD 3 million special warrant to acquire shares in ORC and USD 1,3 million in convertible debentures, which could be converted into either special warrants or ordinary shares (Claim. SoC. 17.09.2012, para. 247). The IFC had previously already transferred its 8% shares to Lonmin, as mentioned in para. 47 above. (Resp. SoD.Class. 04.04.2013, para. 120).

49. On 1 October 1999, CabMin issued ***Decree No. 425-108***, approving ORC's shares and rights in AGF (Exh. C-211).

50. On 3 May 2000, a letter was sent from Central Bank to AGF regarding the use of a foreign bank account at Barclay's Bank, London, and the transfer of its foreign currency to the foreign account as well as the utilization of the same (hereinafter "Central Bank Letter 2000") (Exh. R-42). The letter provided in particular as follows:

"a) The following foreign currency may be credited to the said account:

- contributions to the share fund received from foreign founders;

- loans received from foreign financial entities.

b) The funds kept on an open account may be used:

- to repay foreign loans;

- to pay debts to foreign creditors in foreign currency;

- to pay bank fees according the bank's rates.

***At that said, it is necessary to note that paying from an account abroad under import contracts and crediting foreign currency earnings under export contracts to those accounts are strictly prohibited**."* (emphasis as in original)

51. On 25 May 2000, Uzbekistan issued a new law, *Law No. 71-II **'On Licensing of Certain Types of Activities'*** (Exh. R-144) setting out the conditions for applying and obtaining licenses, including also terms for refusal, suspension or renewal of licenses.

52. On 10 July 2000, Goskomgeology, NMMC and ORC signed the **"*Charter of the Closed Joint Stock Company Amantaytau Goldfields A. O.*"** (hereinafter "Revised AGF Charter (1)") (Exh. C-212). Clause 2.2 of the AGF Charter described AGF's activities as follows:

"SECTION 2.2. Subject of the Company's Activities.

(a) to prepare a bankable feasibility study ('Feasibility Study') defining the commercial and technical expediency of a project ('Project') for the commercial mining of the Gold Deposits;

(6) (b) subject to the outcome of and a decision to implement the Feasibility Study, to develop and mine the Gold Deposits (by open pit or underground methods) as a profitmaking commercial enterprise and to extract, refine, produce and dispose of the mined gold and other valuable minerals contained in these deposits;

(β) (c) to provide equity capital from the Shareholders and loan finance from international financial institutions and commercial banks required in connection with the objectives of the activity of the Company;

(r) (d) to further prospect and explore the Project Territory with the aim to discover deposits of gold and other valuable minerals, and certain other commercial minerals required to develop, mine and operate the Gold Deposits, and to develop and mine such deposits;

(π) (e) to sell mined gold and other valuable products for freely convertible currency (which -shall be in U.S. Dollars, Sterling, Deutschmarks, French Francs or any other freely convertible currency agreed by all of the Shareholders) at world prices within and outside the Republic of Uzbekistal).;

(e) (f) after payment of taxes and required expenditures, payments for its liabilities and making provisions for required reserves, to distribute any remaining profits to its Shareholders by way of dividends;

(Ψ) (g) to engage in any other activities in connection with or relating to the subject of the Company's activity; and

(3) (h) to engage in any other activities in accordance with Uzbek Law.

All types of activity requiring a special permit (licence) shall be performed after receipt of such permit in accordance with the procedures established by Uzbek Law."

53. On 11 July 2000, CabMin issued ***Decree No. 266 'On Additional Measures to Organize the Operation of the AGF JV'*** (hereinafter "Decree No. 266") (Exhs. C-213/R-573), pursuant to which it took note of ORC's right of participation in the AGF joint venture as foreign investor and agreed to increase ORC's shareholding by another 7% to 50% in exchange for an additional USD 813,955 contribution to the company's charter fund. In addition, CabMin confirmed certain tax privileges previously granted to AGF and renewed the tax stabilization clause granted under Clause 7 of Decree No. 477 (see above para. 39) for a period of 10 years, i.e. until 11 July 2010 (Claim. SoC. 17.09.2012, para. 256; Resp. SoD.Class. 04.04.2013, para. 120; Resp. PHB I. 21.07.2014, para. 72). Under this Decree, CabMin directed the Ministry of Macroeconomics and Statistics to include AGF in the targeted part of its investment program, and reaffirmed Prime Minister Sultanov's responsibility to monitor the implementation of Decree No. 266. (Resp. SoD.Class. 04.04.2013, para. 209). For this purpose, AGF was required to "*provide information on the project progress to the Cabinet of Ministers every month.*" (Exh. R-400).

The relevant parts of the Decree No. 266 are reproduced below:

"4. The proposal of the founders of the joint venture "Amantaytau Goldfields" to implement the project step-by-step shall be accepted.

It shall be noted that:

the capital costs at the first stage represent 53.1 million US dollars and be made by Oxus Resources Corporation in the form of direct investments from its own and attracted funds;

the value, sources of financing and conditions of implementation of the second stage will be defined in 2001 on the basis of the project's financial and economic parameters.

5. *The Ministry for Macroeconomics and Statistics of the Republic of Uzbekistan shall include this project in the targeted part of the Investment Program of the Republic of Uzbekistan, namely, in a section of the projects financed though direct foreign investments, with a development forecast in 2000 for the amount totalling 5 million US dollars.*

6. *All the rights, privileges, conditions of taxation and guarantees that have been granted to the project's participants by the decrees of the Cabinet of Ministers of the Republic of Uzbekistan, which were adopted earlier, shall be reserved.*

7. *It shall be established that:*

   Clause 7 of Decree No. 477 of the Cabinet of Ministers of Republic of Uzbekistan, dated 22 September 1994, came into effect as of the date of this Decree;

   a tax for the use of subsoil will be collected from the JV "Amantaytau Goldfields" in the amount established by current legislation, i.e. 2.8 per cent of the amount of the proceeds gained by the joint venture from selling the extracted precious metals and other associated products.

8. *The State Committee for Geology of the Republic of Uzbekistan shall issue to the JV "Amantaytau Goldfields", in a prescribed manner, a licence for the subsoil use granting the rights to carry out the exploration works and mining operations within the project area.*

54. <u>On 19 July 2000</u>, Mr. Wilkins on behalf of Oxus Gold (then Oxus Mining) responded to the Central Bank's letter of 3 May 2000 (see above para. 50) by sending back the letter to the Central Bank and stating as follows (Exh. C-630):

> *"Dear Mr. Rakhimov*
>
> *I refer to your letter of 3 May 2000* […]. *As you know a Decree of the Cabinet of Ministers has recently been issued which further highlights the Government's commitment to the success of the AGF project. It also specifically preserves all the rights and privileges previously granted to AGF in earlier decrees. In the light of this, I am returning the original of your letter to you. In any event it does not address the issue raised in our letter of 5 April.*
>
> *As I am sure you will understand, if your letter was allowed to remain in our files, we would be unable to finance the AGF project. Lawyers acting on behalf of the London Stock Exchange and various international lending banks will shortly be carrying out legal due diligence on the AGF project.*

Even if there have been changes in Uzbek legislation, it is important that the rights of foreign investors are protected and that privileges previously granted cannot be unilaterally withdrawn. […]

Accordingly we intend to continue operating AGF in accordance with the Joint Venture […], *the Charter* […], *and* [Decrees No. 477, 127-20, 452-108, 266]. *We also note the privileges and guarantees afforded to us pursuant to the Law on Foreign Investments* […], *the Law on Guarantees and Measures to Protect the Rights of Foreign Investors* […] *and the inclusion of AGF into the Republican Foreign Investment Programme pursuant to* [Decree No. 550].

It is of fundamental importance to Oxus, as the foreign investor, and to any international lending banks, that proceeds from gold sales can be paid into the AGF offshore account, as already agreed with the Government. It is on this basis that Oxus chose to invest in the project and purchase Lonrho's 43% shareholding. […]"

During the Hearing, Mr. Wilkins gave the following testimony concerning this letter (see Transcripts of 29 April 2014, 305:13 - 306:3):

" And what happened in 2000, Colm Hussey, the AGF accountant, wrote a letter, which I didn't know about, to the Central Bank requesting clarification on something, frankly, very immaterial. I don't even remember what it was.

To my horror, the Central Bank replied with a letter that canceled--effectively canceled our rights to the offshore bank account. I mean, this was immediately prior to us about to go to the London Stock Exchange to raise money. This was outrageous. It took me completely by surprise. As you saw yesterday, my reaction was to return the letter to the Central Bank, the original signed version, with a letter from me basically saying, You can't do this, you're in breach of the foreign investment law. This is a material adverse change, and this could--this would wreck us. We wouldn't be able to finance the company. Having returned it, I heard nothing since."

55. On 24 July 2000, Goskomgeology, NMMC and ORC adopted a revised version of the AGF Charter (hereinafter "Revised AGF Charter (2)") (Exh. C-446) (see above para. 52) to account for the increased shareholding of ORC in AGF as approved by Decree No. 266 (see above para. 53).

56. On 28 July 2000, AGF held one of the first General Shareholders Meeting including ORC as shareholder (Exh. R-400). At this Meeting, the shareholders discussed among other matters the issue of "*the situation with bankable feasibility study (FS) of AGF for the Stage 1 and proposed work program for completion of the FS and debt financing*", during which Mr. Turner reported on the status of

progress and the requirement for obtaining appropriate financing for completing the works in accordance with the schedule (see further below para. 407)

57. On 3 July 2001, Oxus Gold (then Oxus Mining) acquired all of ORC's share capital, thus becoming the parent company of ORC (Exh. C-38, p. 28 "Basis of consolidation").

58. On 25 June 2004, Oxus Gold transferred its shareholding in ORC to Oxus Holdings (Malta) Limited (Exh. C-39). As of that date, Oxus Gold holds 50% of the AGF through the intermediary of Oxus Holdings (Malta) Limited and its daughter company ORC.

III. The Arbitral Proceedings

59. As indicated above, the Arbitral Tribunal has already issued a Decision on Jurisdiction laying out the procedural steps completed until then. Thus, the present description of the arbitral proceeding has been simplified with regard to steps completed prior to the Decision on Jurisdiction and focuses on procedural steps completed thereafter.

1. The Initiation of the Procedure

60. On 31 August 2011, Claimant filed its ***Notice of Arbitration*** (hereinafter "Claim. NoA. 31.08.2011") against (1) the Republic of Uzbekistan, (2) the State Committee of Uzbekistan for Geology & Mineral Resources, and (3) Navoi Mining & Metallurgical Kombinat, whereby it appointed the Hon. Marc Lalonde as arbitrator.

61. On 5 and 28 March 2012, respectively, Claimant officially confirmed the withdrawal of its direct claims against the State Committee of Uzbekistan for Geology and Mineral Resources, and the Navoi Mining and Metallurgic Kombinat and submitted an 'Amended Notice of Arbitration' to reflect the withdrawal of those claims.

62. On 30 September 2011, Respondent filed its ***Response to the Notice of Arbitration*** (hereinafter "Resp. RNoA. 30.09.2011"), whereby it appointed Professor Brigitte Stern as arbitrator.

63. On 13 December 2011, the two party-designated arbitrators appointed Professor Pierre Tercier as chairman and on 20 December 2011 they informed the Parties of

Professor Tercier's acceptance to chair the Arbitral Tribunal and confirmed his nomination. Thus, on 20 December 2011, the Arbitral Tribunal was officially constituted in accordance with Article 7 of the UNCITRAL Rules.

64. On 8 February 2012, a ***Preliminary Meeting*** took place in Geneva, during which the Parties formally confirmed that they did not object to the constitution of the Arbitral Tribunal (see Minutes of the Preliminary Hearing, 8 February 2012, section 2). At this Meeting, the Parties discussed the time limits applicable to the procedure, which were approved by the Arbitral Tribunal (see Minutes of the Preliminary Hearing, 8 February 2012, section 4.3.4).

65. On 16 February 2012, the Arbitral Tribunal issued ***Procedural Order No. 1*** containing instructions as to the general conduct of the arbitration.

66. On 28 February 2012, Claimant informed the Arbitral Tribunal of the substitution of its former legal counsel by Derains & Gharavi.

67. On 19 March 2012, the Arbitral Tribunal issued ***Procedural Order No. 2*** by which it bifurcated the present proceedings as follows:

> *"The procedure shall be bifurcated. The jurisdictional phase shall be carried out in accordance with the Timetable attached to this Procedural Order.*
>
> *The only matter for consideration during the preliminary phase on jurisdiction shall be Claimant's standing under the BIT."*

68. On the same day, the Arbitral Tribunal issued ***Procedural Order No. 3*** concerning the issue of confidentiality of the proceedings.

69. On 28 March 2012, the Arbitral Tribunal informed the Parties that it had decided not to hold a Hearing on jurisdiction.

2. The First (Jurisdictional) Phase

70. On 16 April 2012, Respondent filed ***Respondent's First Submission on Jurisdiction*** (hereinafter "Resp. SoJ. 16.04.2012"), in which it requested – among others – that the Arbitral Tribunal dismiss with prejudice all of Claimant's claims for lack of jurisdiction.

71. On 12 May 2012, Claimant filed ***Claimant's Answer on Jurisdiction***, in which it requested – among others – that the Arbitral Tribunal dismiss Respondent's

jurisdictional objection by declaring that Claimant has standing under the BIT to bring claims against Uzbekistan, and proceed with the merits of the arbitration.

72. On 24 May 2012, Ms Carolyn Lamm informed the Arbitral Tribunal that Respondent had replaced its representation, Dewey & LeBoeuf, with Carolyn Lamm at White & Case LLP (hereinafter "White & Case") due to the departure of lawyers involved in Respondent's previous representation. Ms Lamm advised that the substitution had already taken place and that the decision had been communicated to Dewey & LeBoeuf on 23 May 2012. Ms Lamm forwarded her power of attorney to the Arbitral Tribunal.

73. On 24 and 29 May 2012, Claimant objected to the change of counsel contending that White & Case was subject to a conflict of interest representing Uzbekistan and requested that White & Case withdraw from their mandate within 48 hours.

74. On 1 June 2012, the Arbitral Tribunal issued ***Procedural Order No. 4*** concerning the amendment of the timetable applicable to the jurisdictional phase.

75. Between 1 June and 26 June 2012, the Parties exchanged various correspondence regarding the issue of White & Case's representation of Respondent.

76. On 13 June 2012, Respondent filed ***Respondent's Reply on Jurisdiction*** (hereinafter "Resp. RoJ. 13.06.2012") reiterating its previous request that the Arbitral Tribunal dismiss with prejudice all of Claimant's claims for lack of jurisdiction.

77. On 25 June 2012, Claimant filed ***Claimant's Rejoinder on Jurisdiction*** (hereinafter "Claim. Rej.J. 25.06.2012") reiterating its previous request that the Arbitral Tribunal dismiss Respondent's jurisdictional objection by declaring that Claimant has standing under the BIT to bring claims against Uzbekistan, and proceed with the merits of the arbitration.

78. On 5 July 2012, the Arbitral Tribunal directed Claimant, in case it continued to object to the representation of Respondent by White & Case, to file a formal application for disqualification of White & Case by 6 July and in case it does so, invited Respondent to provide a full response by 18 July 2014. The Arbitral Tribunal further ruled that no further exchange of submissions would be allowed afterwards, except as otherwise requested by Claimant and accepted by the Arbitral Tribunal.

79. On 6 July 2012, Claimant submitted its ***Application for Disqualification of Counsel for Respondent*** (hereinafter "Claim. Dis.CfR. 06.07.2012").

80. On 18 July 2012, White & Case filed its Answer to Claimant's Application for Disqualification of Counsel for Respondent (hereinafter "Resp. A.Dis.CfR. 18.07.2012").

81. On 9 August 2012, the Arbitral Tribunal issued its ***Decision on Jurisdiction***, in which it ruled over Respondent's objection concerning Claimant's lack of standing as follows:

> *"1. The jurisdictional objection raised by Respondent with regard to Claimant's standing is dismissed.*
>
> *2. All other jurisdictional objections shall be examined in a subsequent or final award.*
>
> *3. The allocation of the costs related to this procedural incident shall be decided in a subsequent or final award.*
>
> *4. The timetable for the merits phase shall be determined after consultation with the Parties.*
>
> *5. All of the other requests are denied."*

The Decision on Jurisdiction was limited to Respondent's objection concerning Claimant's lack of standing and was issued "*without prejudice to any subsequent decision by this Arbitral Tribunal with regard to other jurisdictional objections which may be raised by the Parties during the second phase of the proceedings*" (Decision on Jurisdiction, para. 56).

82. On 14 September 2012, the Arbitral Tribunal issued ***Procedural Order No. 5***, in which it ruled over Claimant's Disqualification Request of White & Case as follows:

> *"1. Claimant's application for the disqualification of Respondent's counsel is denied, together with all its accessory requests.*
>
> *2. The allocation of costs related to this procedural incident shall be decided in a subsequent or final award."*

3. The Written Submissions

83. On 17 September 2012, Claimant filed its ***Statement of Claim*** (hereinafter "Claim. SoC. 17.09.2012") of 245 pages, in which it addressed its claims on the merits and the quantification of the damages. Its Statement of Claim was accompanied by (i) factual and legal Exhs. C-75 to C-502 and CL-78 to CL-154 respectively, (ii) four witness statements of Richard Wilkins, Bill Charter, Richard Shead and Graham Hill (iii) one expert legal opinion of Mavlyuda Kulikova (iv)

two quantum reports prepared by Ernst & Young (hereinafter "Ernst & Young Expert Reports") and by WAI (hereinafter "WAI Expert Opinion"). In its Statement of Claim, Claimant submitted several Prayers for Relief, which it later on amended (see below para. 133).

84. On 25 February 2013, the Arbitral Tribunal issued ***Procedural Order No. 6***, in which the Arbitral Tribunal rejected an order for confidentiality requested by Respondent and directed Respondent to submit its Statement of Defense in a redacted form if necessary and to file a separate request for confidentiality.

85. On 26 February 2013, Respondent filed a redacted version of its ***Statement of Defense*** of 381 pages, in which it laid out its defense to Claimant's claims as well as its own Counter-claims against Claimant. Its Statement of Defense was accompanied by (i) factual and legal Exhs. R-21 to R-688 and RL-199 to RL-348 respectively (without Exhs. R-243, R-244, R-245, R-327, R-669, R-371 and R-375 for which Respondent requested specific confidentiality protection measures), (ii) 18 witness statements and (iii) three expert reports from Mr. Timothy Hart of 15 February 2013 (hereinafter "ER-Hart I"), Rex Pingle of 14 February 2013 (hereinafter "ER-Pingle I (14.02.2013)) and Neal Rigby of 19 February 2013 (hereinafter "ER-Rigby I (20.02.2014)").

In its Statement of Defense, Respondent concluded as follows:

> *"547. For all the reasons set forth above, Respondent respectfully requests that the Tribunal dismiss Claimant's claims in their entirety and issue a decision in favor of Respondent in respect of its Counterclaims. Respondent furthermore respectfully requests that it be awarded all the expense and costs associated with defending against Claimant's claims."*

86. On 28 March 2013, the Arbitral Tribunal issued ***Procedural Order No. 7***, in which it ordered certain measures to restrict access and protect confidentiality of Exhs. R-243, R-244, R-245, R-327, R-669, R-371 and R-375 submitted by Respondent together with its Statement of Defense.

87. On 4 April 2013, Respondent submitted an unredacted version of its Statement of Defense (hereinafter "Resp. SoD.Class. 04.04.2013") of 381 pages together with Exhs. R-243, R-244, R-245, R-327, R-669, R-371 and R-375.

88. On 26 and 31 June 2013, the Arbitral Tribunal issued ***Procedural Orders No. 8 and 9***, in which it ruled over the Parties' respective requests for document production and objections thereto.

89. On 23 August 2013, Claimant filed its ***Reply***[2] of 587 pages, accompanied by (i) factual and legal Exhs. C-504 to C-727 and CL-155 to CL-178 respectively, (ii) ten witness statements (including rebuttal witness statements) of Hartley Booth, Mark Tyler, Richard Robinson, Richard Wilkins, Barry Cosson, John Donald, Jonathan Kipps, Richard Shead, Bill Charter and Graham Hill (iii) three expert reports of Pierre Laroque, Philip Haberman and WAI's Rebuttal Expert Report. In its Reply, Claimant submitted several Prayers for Relief, which it later on amended (see below para. 133).

90. On 23 December 2013, the Arbitral Tribunal issued ***Procedural Order No. 10,*** in which it ruled on the admissibility and qualification of Claimant's Exh. C-550, i.e. the CCW Report. The Arbitral Tribunal ruled that such report constituted an expert report under section 6.1 of the Procedural Order No. 1 and was thus to be accorded treatment as such under sections 5 and 6 of the Procedural Order No. 1 and be in particular subject to cross-examination by Respondent during the Hearing.

91. On 6 February 2014, Claimant filed an amended version of its ***Reply*** (hereinafter "Claim. Am.Reply. 23.08.2013") of 612 pages. The Claimant presented a 10-page prayer for relief, asking the Tribunal to declare that different violations have been committed by Uzbekistan with regard to the Khandiza and the AGF Projects and proposing numerous alternative damages calculations. Claimant's specific claims are listed below and have been re-numbered by the Arbitral Tribunal (see below para. 133).

92. On 21 February 2014, Respondent submitted its ***Rejoinder*** of 714 pages, accompanied by (i) factual and legal Exhs. R-38, R-236, R-308, R-314, R-405, R-454, R-689 to R-1380 and RL-314, RL-349 to RL-370, (ii) 31 witness statements and (iii) 4 expert reports of Timonthy H. Hart, Daniel Nordello, Rex E. Pingle and Neal Rigby.

In the said Rejoinder, Respondent concluded as follows:

> *"999. For all the reasons set forth above, Respondent respectfully requests that the Tribunal dismiss Claimant's claims in their entirety and issue a decision in favor of Respondent in respect of its Counterclaims. Respondent furthermore respectfully requests that it be awarded all the expense and costs associated with defending against Claimant's claims."*

93. On 19 March 2014, the Arbitral Tribunal issued ***Procedural Order No. 11***, in which it ruled on the calling and examination of certain witnesses at the Hearing.

[2] Claimant's Reply is erroneously dated 12 August 2012. It should state 2013 instead of 2012.

94. On 28 March 2014, the Arbitral Tribunal issued ***Procedural Order No. 12***, rejecting Claimant's request for a formal bifurcation of the Hearing and ruling to maintain the Hearing as scheduled.

95. On 9 April 2014, the Arbitral Tribunal issued ***Procedural Order No. 13***, in which it ruled on the admissibility of certain evidence. It excluded certain evidence and invited Respondent to submit an amended Rejoinder Statement without references to the evidence excluded from the record.

96. On 22 April 2014, Respondent submitted an amended ***Rejoinder*** (hereinafter "Resp. Am.Rej. 21.02.2014") of 703 pages.

4. The Hearing in Paris

97. On 9, 17 and 23 April 2014, the Arbitral Tribunal issued ***Procedural Orders No. 14, No. 15 and No. 16*** respectively, in which it ruled on various organizational issues regarding the Hearing.

98. From 28 April to 3 May 2014, a ***Hearing*** took place in Paris, which was attended by the following Parties' representatives:

(i) On behalf of Claimant:

- As Party representatives: (i) Mr. Richard Shead, Executive Chairman of Oxus Gold PLC, (ii) Mr. John Donald, Director, Marakand Minerals Ltd, and (iii) Mr. Thomas Tran, Accounting Officer, Oxus Gold PLC;

- As counsel: Dr. Hamid Gharavi, Ms. Eloise Obadia, Ms. Melanie van Leeuwen, Dr. Mercedeh Azeredo Da Silveira, Ms. Clea Bigelow-Nuttal, Mr Sergey Alekhin, Mr. Emmanuel Foy, Ms. Amany Chamieh, Ms.Carmela Viccaro, Ms. Lara Djavadian, Ms. Anne-Sophie Gidoin, Ms. Olga Kuprenkova.

(ii) On behalf of Respondent:

- As Party representatives: (i) Mr. Muzraf Ikramov, First Deputy Minister of Justice of Uzbekistan, (ii) Mr. Esemurat Kanyazov, Rector of Tashkent State University of Law, (iii) Mr. Davronbek Akhmedov, Head of International Department of the Ministry of Justice of Uzbekistan, (iv) Mr. Sobir Mirzahujaev, Chief Specialist of the Ministry of Justice of Uzbekistan, (v) Ms. Malika Rakhmanova, Chief Specialist of the Ministry of Justice of Uzbekistan;

- As counsel: Ms. Carolyn Lamm, Ms. Andrea Menaker, Mr. Frank Vasquez, Mr. William Curry (in Tashkent), Mr. Brody Greenwald, Ms. Kristen Young, Mr. Matthew Drossos, Mr. Chauncey Bratt, Ms. Amara Levy-Moore, Ms. Larissa Eltsefon, Ms. Jennifer Trusz, Mr. Dmitry Savransky, Ms. Erin Vaccaro, Mr. Timothy Perry, Mr. Kees de Ridder, Mr. Jeffrey Stellhorn, Ms. Noor Davies.

99. The Hearing was organized as follows:

(i) On 28 April 2014, Claimant's and Respondent's Counsel held their Opening Statements.

(ii) On 29 April 2014, the day started with the witness examination of Mr. Richard Wilkins, followed by the examination of Mr. Jonathan Kipps and Mr. Graham Hill.

(iii) On 30 April 2014, the day started with the witness examination by video-conferencing of Mr. Tulkun Shayakubov, followed by the examination of Mr. Bill Charter and Mr. Mark Tyler. The day ended with the examination of Mr. Nurmukhammad Akhmedovich Akhmedov.

(iv) On 1 May 2014, the day started with the resumption of the examination of Mr. Nurmukhammad Akhmedovich Akhmedov, followed by the examination of Ms. Nina Malkina and Mr. Ilkholmbay Turamuratov. The day ended with the examination of Mr. Ravshan Gulyamov.

(v) On 2 May 2014, the day started with the examination of Mr. Khikmatulla Tursunkulovich Maysupov, followed by the examination of Mr. Yerkin Ergashevich Tursunov and Mr. Ilhom Chinkulov. The day ended with the examination of Mr. Pierre Larroque and Mr. Rex E. Pingle, first separately and then through expert conferencing. On that day, Claimant also filed three Exhs. C-733, C-734 and C-735 into the record.

(vi) On 3 May 2014, the day started with the examination of Mr. Philip Haberman, followed by the examination of Mr. Phil Newall, Mr. Timothy Hart, and Mr. Neal Rigby.

100. At the end of the last Hearing day, the Arbitral Tribunal and the Parties jointly discussed the next steps of the proceedings. After consulting with both Parties, it was agreed as follows (Transcripts of 3 May 2014 (Day 6), 1528:6 - 1535:16):

- That Respondent would be given five days to file its announced procedural requests arising out of the evidence taken at the Hearing and Claimant would be given five days to file an amendment to its Prayer for Relief;

- That both Parties would consult to agree on a final version of the transcripts;

- That the Parties would be given the opportunity to file Post-Hearing Briefs and that for such purpose the Arbitral Tribunal would prepare a list of questions.

Both Parties confirmed that they had no objection regarding the way the Hearing had been conducted, whereby Respondent underlined its request to be given the opportunity to provide final post-hearing observations (Transcripts of 3 May 2014 (Day 6), 1531:22 - 1534:13).

5. The Post-Hearing Submissions

101. On 3 May 2014, as a result of the testimony of Messrs Kipps and Wilkins, Respondent filed a request for document production including documents relating to Mining Resources Trust (hereinafter "MRT"), the 2009 Witness Statement of Mr. Bill (William) Trew and documents relating to the Independent Committee.

102. On the same day, upon agreement of the Parties, Respondent submitted two letters with respect to the Central Bank of Uzbekistan dated 21 July and 4 August 2010 as Exhs. R-1381 and R-1382.

103. On 9 May 2014, Claimant filed its ***Amended Prayer for Relief*** (hereinafter "Claim. Am.PfR. 09.05.2014"), comprised of a 3-page letter, a 1-page "Revised Summary Table" with the amended and updated amounts claimed by Claimant and a 7-page prayer for relief to replace the previous prayer for relief included in Claimant's Reply.

104. On 21 May 2014, Respondent complained about errors and inaccuracies in Claimant's Updated Prayer for Relief I and requested (i) leave from the Arbitral Tribunal to respond to Claimant's Updated Prayer for Relief in full and (ii) that Messrs. Haberman and Newall provide the specific sources, calculations, and models underlying the adjusted values contained in Claimant's Updated Prayer for Relief I.

105. On 27 May 2014, the Arbitral Tribunal issued ***Procedural Order No. 17***, in which it ruled on Respondent's objections towards Claimant's Updated Prayer for Relief I and the Parties' requests for document production and submission of further

documents. In particular, the Arbitral Tribunal granted Respondent's request for further information regarding Claimant's Updated Prayer for Relief I, allowed the Parties to file relevant correspondence and documents relating to the liquidation proceedings of AGF in Uzbekistan (hereinafter "Liquidation Correspondence") and rejected Respondent's request to admit Exhs. R-1401 to R-1408 into the record. With regard to Respondent's request for production of various documents, the Arbitral Tribunal granted this request with regard to documents relating to BDO Isle of Man (hereinafter "BDO Documents") and rejected the other requests.

106. On the same day, Claimant submitted 29 letters exchanged with the Uzbek liquidator, filed under Exhs. C-739 to C-767.

107. On 5 June 2014, the Parties submitted a jointly agreed and amended version of the transcripts.

108. On 5 June 2014, the Arbitral Tribunal sent a letter to the Parties indicating a list of issues it wished the Parties to address in their Post-Hearing Briefs, including (i) the issue of the Arbitral Tribunal's jurisdiction over the Counter-claim, which was not addressed at the Hearing, (ii) the tax stabilization clause, and in particular its scope, duration and effect, to what extent it makes a difference whether such clause is contained in general law, a specific decree or a contract, and to what extent the tax law changes occurred in 2006, 2009 and 2011 may have breached such stabilization clause, and (iii) the liquidation procedure, and in particular the specific irregularities allegedly affecting the liquidation process and to what extent these irregularities could constitute a breach of local procedural law and/or of the BIT protection standards and the impact of any such breach. It further invited the Parties to agree on the format and conditions for filing of the Post-Hearing Briefs.

109. On 6 June 2014, Respondent submitted Exhs. R-1411 to R-1417 in response to Claimant's submission of 27 May 2014 concerning correspondence exchanged with the liquidator.

110. On the same day, pursuant to the Arbitral Tribunal's directions as set out in Procedural Order No. 17 (see above para. 105), Claimant submitted "clarifications and corrections" to its ***Revised Amended Prayer for Relief*** (hereinafter "Claim. Rev.Am.PfR. 06.06.2014"). This submission consisted of a 5-page letter including a table listing the key amounts and 5 Annexes in the form of Excel spreadsheets.

111. On 13 and 16 June 2014, Respondent and Claimant informed the Arbitral Tribunal of their agreement regarding the conditions and formalities for filing of the Post-Hearing Briefs. The Parties also agreed on new deadlines for Respondent

to comment on Claimant's Updated Prayer for Relief II and on the BDO Documents.

112. On 16 June 2014, Claimant filed comments regarding Respondent's submissions of 6 June 2014 concerning the liquidation proceedings of AGF in Uzbekistan.

113. On 9 July 2014, based on a joint agreement between the Parties, Claimant filed two other documents relating to the liquidation proceedings of AGF in Uzbekistan as Exhs. C-768 and C-769.

114. On 10 July 2014, Respondent filed its comments regarding (i) Claimant's Updated Prayer for Relief II as filed by Claimant on 6 June 2014 and (ii) the BDO Documents submitted by Claimant pursuant to Respondent's document production request. As concerns Claimant's Updated Prayer for Relief II, Respondent also submitted an expert report from Mr. Timothy Hart (hereinafter "ER-Hart III (10.07.2014)" and requested that Annexes 4 and 5 to Claimant's Updated Prayer for Relief II be excluded from the record.

115. On 21 July 2014, Claimant objected to the scope of Respondent's comments and requested leave to address Respondent's comments outside of the scope of the Post-Hearing Briefs.

116. On 21 July 2014, the Arbitral Tribunal granted Claimant's request and confirmed this ruling by letter of 23 July 2014.

117. On 21 July 2014, both Parties filed their first post-hearing submissions, i.e. Claimant filed its ***First Post-Hearing Brief*** **(**hereinafter "Claim. PHB I. 21.07.2014") and Respondent filed it ***Post-Hearing Submission*** **(**hereinafter "Resp. PHB I. 21.07.2014"**).**

118. On 25 July 2014, Claimant submitted its comments regarding Respondent's requests to exclude from the record Annexes 4 and 5 of Claimant's Updated Prayer for Relief II and comments on the BDO Documents.

119. On 8 August 2014, Respondent filed further comments regarding Annexes 4 and 5 of Claimant's Updated Prayer for Relief and the BDO Documents.

120. On 21 August 2014, both Parties filed their reply post-hearing submissions, i.e. Claimant filed its ***Rebuttal Post-Hearing Brief*** (hereinafter "Claim. PHB II. 21.08.2014") and Respondent filed its ***Post-Hearing Reply*** (hereinafter "Resp. PHB II. 21.08.2014").

121. On 10 September 2014, the Arbitral Tribunal issued ***Procedural Order No. 18***, in which it rejected Respondent's request to exclude Annexes 4 and 5 of Claimant's Updated Prayer for Relief II from the record and reserved its decision as to whether and when to provide Respondent with a further opportunity to respond to the information included in Annexes 4 and 5.

122. On 27 October 2015, the Arbitral Tribunal sent a letter to the Parties in which it rejected Respondent's request for a further opportunity to respond to Annexes 4 and 5 of Claimant's Updated Prayer for Relief II and declared the hearings closed in accordance with Article 31(1) of the UNCITRAL Arbitration Rules 2010.

B. LEGAL CONSIDERATIONS

I. In General

1. The Procedural Framework

1.1 The Arbitration Clause

123. These arbitration proceedings have been initiated based on Article 8 of the ***Agreement for the Promotion and Protection of Investments*** (hereinafter "Treaty"), concluded on 24 November 1993 by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Uzbekistan (hereinafter "Contracting States").

124. Article 8 of the Treaty contains the following provision:

> *"Settlement of Disputes between an Investor and a Host State*
>
> *(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification to a claim, be submitted to international arbitration if the national or company concerned so wishes.*
>
> *(2) Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to:*

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington DC on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or

(b) the Court of Arbitration of the International Chamber of Commerce;

or

(c) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall at the request in writing of the national or company concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules."

1.2 The Constitution of the Arbitral Tribunal

125. The Arbitral Tribunal was constituted in accordance with the UNCITRAL Arbitration Rules in their 2010 version, applicable to this procedure in accordance with Article 8 of the Treaty. The Parties have raised no objections regarding the constitution of the Arbitral Tribunal (see Minutes of the Preliminary Hearing, 8 February 2012, section 2). Therefore, the Arbitral Tribunal is deemed validly constituted.

1.3 The Arbitral Procedure

126. The Arbitral Tribunal has rendered a Decision on Jurisdiction, in which it rejected Respondent's jurisdictional objections with regard to Claimant's standing and whereby it left open further jurisdictional objections raised by the Parties (see above para. 81). The Decision on Jurisdiction is hereby integrated into and forms part of the present Award.

127. It is undisputed that Claimant is being assisted by a third party funder in this arbitration proceeding. The Arbitral Tribunal has mentioned this fact in its Procedural Order Nos. 6 and 7. However, this fact has no impact on this arbitration proceeding.

128. During the course of the arbitration proceedings, the Arbitral Tribunal issued 18 Procedural Orders ruling on various procedural incidents and requests. At this point, no formal procedural request remains pending, subject to the Arbitral Tribunal's appreciation in this Award of the weight to be given to the Liquidation Correspondence and the BDO Documents.

129. Based on the length of the proceedings, the number and scope of the Parties' written submissions and correspondence, and the Hearings held, the Arbitral Tribunal considers that the Parties have been provided with a sufficient opportunity to make their case.

130. At the Hearing, neither Party raised any objection against the way in which the Arbitral Tribunal conducted the proceedings (Transcripts of 3 May 2014 (Day 6), 1531:22 - 1534:13). As concerns Respondent's request expressed at the end of the Hearing to be given an opportunity to provide post-hearing comments, the Arbitral Tribunal considers that such opportunity has been duly granted in view of the various post-hearing correspondence and the Parties' two Post-Hearing Briefs.

131. On 27 October 2015, the Arbitral Tribunal concluded that it was in a position to render its Final Award and declared the proceedings closed.

132. Thus, the Arbitral Tribunal hereby issues its Final Award.

2. The Parties' Latest Prayers for Relief

2.1 Claimant's Prayers for Relief

133. As mentioned above (para. 83), Claimant's Prayer for Relief were amended on several occasions, most recently with its Updated Prayers for Relief on 9 May and 6 June 2014. In the latest version, as amended on 6 June 2014, Claimant's Prayers for Relief provide as follows:

> *"IV. RELIEF SOUGHT*
>
> *1583. Claimant respectfully requests the Arbitral Tribunal, without prejudice to any other or further claims or amendments it may have, to:*
>
> *1583.1.* [**Jurisdiction Claim No. 1**] *Dismiss Respondent's objections to the Tribunal's jurisdiction;*

1583.2. [***Jurisdiction Claim No. 2***] *Dismiss Respondent's objections that Claimant's claims are inadmissible;*

1583.3. [***Jurisdiction Claim No. 3***] *Find that it has jurisdiction over Oxus' claims and that Claimant's claims are admissible;*

Khandiza

1583.4. [***Khandiza Claim No. 1***] *Declare that Respondent has committed an unlawful expropriation of Claimant's investment in Khandiza, breached its specific undertakings, as well as its obligations of fair and equitable treatment, of protection against unreasonable and arbitrary measures, and of full protection and security by:*

1583.4.1. [***Khandiza Claim No. 1.1***] *Decision No. 09-62-90 ordering, once the deposit had been de-risked and prepared for commercial development by Claimant, that Khandiza be developed under a 50/50 joint venture between Uzbekistan and Marakand, thus depriving Claimant of its right, to develop the Khandiza deposit by way of a concession agreement; and*

1583.4.2. *[**Khandiza Claim No. 1.2**] Decree No. PP-442 ordering Goskomgeology to transfer the mineral resources of the Khandiza deposit to AMMC's balance sheet and unilaterally cancelling Decree No. 359 of October 17, 2002, thus depriving Claimant entirely of its rights and interest in Khandiza; and*

1583.4.3. [***Khandiza Claim No. 1.3**] In the alternative, by depriving Claimant, abruptly and unjustifiably, of its exclusive right to negotiate the terms of a concession agreement or, alternatively, of a joint venture agreement, under which the mine would be developed.*

1583.5. [***Khandiza Claim No. 2***] *Award damages in the following amounts for the breaches set out in Section III.B above:*

1583.5.1. [***Khandiza Claim No. 2.1***] ***USD 588.7 million*** *for the loss of the right to develop the project by way of a concession, assuming that the date of valuation is the date of the arbitral Award (provisionally set at June 30, 2012);*

1583.5.1.1. [***Khandiza Claim No. 2.1.1***] *Alternatively,* ***USD 307.6 million*** *for the loss of the right to develop the project by way of a joint venture agreement* *with Uzbekistan, assuming that the valuation date is the date of the arbitral Award (provisionally set at June 30, 2012);*

1583.5.1.2. [***Khandiza Claim No. 2.1.2***] *As a second alternative, **USD 146.1 million** for the loss of the right to develop the project by way of a concession agreement, assuming that the valuation date is the date of expropriation, namely August 10, 2006;*

1583.5.1.3. [***Khandiza Claim No. 2.1.3***] *As a third alternative, **USD 72.1 million** for the loss of the right to develop the project by way of a joint venture agreement, assuming that the valuation date is the date of expropriation, namely August 10, 2006;*

1583.5.1.4. [***Khandiza Claim No. 2.1.4***] *As a fourth alternative, **USD 9 million plus 15% as of August 10, 2006** for restitution of the amount invested by Claimant in the Khandiza project.*

1583.6. [***Khandiza Claim No. 3***] *In the alternative, declare that Respondent's expropriation of Claimant's right to develop the Khandiza deposit by way of a concession or, alternatively, by way of a joint venture, was lawful but made without payment of adequate, prompt, and effective compensation required under the BIT, and award damages in the amount of:*

1583.6.1. [***Khandiza Claim No. 3.1***] ***USD 146.1 million** for compensation following the taking, on August 10, 2006, of Claimant's right to develop the deposit by way of a concession agreement;*

1583.6.1.1. [***Khandiza Claim No. 3.1.1***] *Alternatively, **USD 72.1 million** for compensation following the taking, on August 10, 2006, of Claimant's right to develop the deposit by way of a joint venture agreement; and*

1583.6.1.2. [***Khandiza Claim No. 3.1.2***] *As a second alternative, **USD 9 million plus 15% as of August 10, 2006** for restitution of the amount invested by Claimant in the Khandiza project.*

1583.7. [***Khandiza Claim No. 4***] *Declare that Respondent has committed an unlawful expropriation of Claimant's exploration rights in the Southeast Uzbekistan Exploration Area and violated its international obligations under the BIT (including its obligations of fair and equitable treatment, protection against unreasonable* *and arbitrary measures as well as the obligation of full protection and security) by reducing from 5,259 km. to 1,199.5 km. the size of the Southeast Uzbekistan Exploration Area by way of Supplemental Agreement No. 6 to the PEA, and award damages in the amount of* ***USD 200 million*** *for loss of a chance to establish the reserves of, and develop, the Expanded Area."*

*"**AGF***

1583.8. [***AGF Claim No. 1***] *Declare that Respondent has committed an unlawful expropriation of Claimant's investment in AGF, and violated its specific undertakings, its obligations of fair and equitable treatment, its obligations of protection against unreasonable and arbitrary measures as well as its obligation of full protection and security under the BIT and order Respondent to pay Claimant damages;*

1583.8.1. [***AGF Claim No. 2***] *In the amount of* ***USD 431.8 million*** *(which includes USD 75.0 million for the oxide Phase I; USD 205.1 million for sulphide Phase II, as well as USD 151.7 million for the anticipated expansion of both Phases) for the expropriation of Claimant's investment in the AGF project on the assumption that all of Uzbekistan's actions and omissions constituted breaches of the BIT and of international law, and that the valuation date is the date of the arbitral Award;*

1583.8.2. [***AGF Claim No. 3***] *Alternatively, order Respondent to pay Claimant damages in the amount of* ***USD 399.6 million*** *(which includes USD 91.3 million for the oxide Phase I; USD 161.5 million for sulphide Phase II, as well as USD 146.8 million for the anticipated expansion of both Phases), for the expropriation of Claimant's investment in the AGF project on the assumption that the only breaches committed by Uzbekistan vis-à-vis Oxus were those regarding the revocation of AGF's tax exemptions and the repeated amendments to the tax code;*

1583.8.3. [***AGF Claim No. 4***] *As a second alternative, order Respondent to pay Claimant damages in the amount of* ***USD 346.5 million*** *(which includes USD 73.7 million for the oxide Phase I; USD 126.0 million for sulphide Phase II, as well as USD 146.8 million for the anticipated expansion of both Phases), for the expropriation of Claimant's investment in the AGF project on the assumption that the only breach committed by Uzbekistan vis-à-vis Oxus was the amendment of the tax code on December 24, 2010, which made AGF's sales liable to VAT;*

1583.8.4. [***AGF Claim No. 5***] *As a third alternative, order Respondent to pay Claimant damages in the amount of* ***USD 428.7 million*** *(including USD 72.5 million for Phase I, USD 147.4 million for Phase II, as well as USD 208.8 million for anticipated expansion* *of both Phases), for the expropriation of Claimant's investment in the AGF project on the assumption that all of Uzbekistan's actions and omissions constituted breaches of the BIT and of international law, but that the valuation date is March 18, 2011, when Claimant declared force majeure;*

1583.8.5. [***AGF Claim No. 6***] *As a fourth alternative, order Respondent to pay Claimant damages in the amount of* ***USD 295.4 million*** *(including USD 56.7 million for Phase I, USD 91.9 million for Phase II, as well as USD 146.8 million for anticipated expansion of both Phases), for the expropriation of Claimant's investment in the AGF project on the assumption that the expropriation was carried out for a public purpose, on a non-discriminatory basis, and that was related to the internal needs of the State, Oxus would therefore be entitled to compensation amounting to the fair market value of the investment, this fourth alternative claim also assumes that the date of valuation is the date of the arbitral Award;*

1583.8.6. [***AGF Claim No. 7***] *As a fifth alternative, order Respondent to pay Claimant damages in the amount of* ***USD 291.5 million*** *(including USD 43.3 million for Phase I, USD 46.3 million for Phase II, as well as USD 201.9 million for anticipated expansion of both Phases), on the assumption that the expropriation was carried out for a public purpose, on a non-discriminatory basis, and that was related to the internal needs of the State, Oxus would therefore be entitled to compensation amounting to the fair market value of the investment, this fifth alternative claim also assumes that the date is March 18, 2011, when Claimant declared force majeure;*

1583.8.7. [***AGF Claim No. 8***] *Alternatively, order Respondent to pay Claimant damages in the amount determined by the Arbitral Tribunal according to its findings in relation to Uzbekistan's individual breaches of the BIT and of international law in connection to Claimant's investment in the AGF project for an amount corresponding to the corresponding valuations, as set out in the Haberman Expert Report and the Damages section above, and more specifically;*

1583.8.7.1. [***AGF Claim No. 9***] *Damages representing the value of the respective Phase I, Phase II and anticipated expansion stages based on the primary and alternative valuations set out above and in the Haberman Expert Report, and/or even more specifically;*

1583.8.7.1.1. *The revocation of AGF's tax exemptions in 2006, quantified in the amount of* ***USD 14.1 million*** *(including USD 4 million for Phase I, and USD 10.1 million for Phase II) as at June 30, 2012, or* *alternatively **USD 13.3 million** (including USD 4.0 million for Phase I, and USD 9.3 million for Phase II) as at March 18, 2011;*

1583.8.7.1.2. *The withholding by Uzbekistan of AGF's input VAT, quantified in the amount of **USD 2.7 million**;*

1583.8.7.1.3. *The 2009 modifications to the VAT regime applicable to AGF, resulting in AGF's inability to reclaim input VAT anymore: **USD 39.0 million** (including USD 13.6 million for Phase I and USD 25.4 million for Phase II) as at June 30, 2012, or alternatively **USD 35.5 million** (including USD 13.1 million for Phase I and USD 22.4 million for Phase II) as at March 18, 2011;*

1583.8.7.1.4. *The Freezing of AGF's bank accounts following the 2006 State Audit, leading to cessation of mining operations in October 2006, as well as and cash flow problems caused by the silver refining delays, leading to cessation of mining operations on several occasions in 2008 and in January 2009, quantified as a gain in the amount of **USD 3.2 million** (including the positive impact of USD 36.3 million for Phase I due to the delay in mining and the simultaneous increase in gold prices, and a negative impact of USD 33.1 million for Phase II) as at June 30, 2012, or alternatively **USD 24.6 million** (including the positive impact of USD 16.2 million for Phase I due to the delay in mining and the simultaneous increase in gold prices, and a negative impact of USD 40.8 million for Phase II) as at March 18, 2011;*

1583.8.7.1.5. *The Special Dividend paid to Uzbekistan, in the amount of **USD 1.0 million**;*

1583.8.7.1.6. *The 2011 further modifications to the VAT regime applicable to AGF, making AGF's sales liable for VAT, quantified in the amount of **USD 51.1 million** (including USD 17.0 million for Phase I, and USD 34.1 million for Phase II) as at June 30, 2012, or alternatively **USD 32.5 million** (including USD 11.8 million for Phase I, and USD 20.7 million for Phase II) as at March 18, 2011;*

1583.8.7.1.7. *Uzbekistan's failure to grant AGF a mining project license for the Sarybatyr deposit, which relates to Phase I operations, and the consequent impossibility for AGF to mine this deposit, quantified in the amount of* ***USD 31.7 million*** *(including USD 26.8 million for Phase I and USD 4.9 million for anticipated expansion of both Phases) as at June 30, 2012, or alternatively USD 27.6 million (including* ***USD 20.7 million*** *for Phase I, and USD 6.9 million for anticipated expansion of both Phases) as at March 18, 2011;*

1583.9. [***AGF Claim No. 10***] *Order Respondent to reimburse Claimant the amount of* ***USD 2,562,599.99*** *against the total price of the Atlas Copco drill rig for expropriation by Uzbekistan or acts and omissions in breach of its obligations of fair, equitable treatment, protection against unreasonable and arbitrary measures and to full protection and security under the BIT that deprived Claimant of the right to the use, enjoyment and benefit of the rig;*

1583.10. [***AGF Claim No. 11***] *Order Respondent to reimburse Claimant the amount of* ***USD 752,385.47*** *that Claimant disbursed to purchase a silver refinery from Italy, for Respondent's acts and omissions in breach of its obligations of fair, equitable treatment, protection against unreasonable and arbitrary measures and to full protection and security under the BIT that deprived Claimant of the right to the use, enjoyment and benefit thereof for its investment;*

1583.11. [***AGF Claim No. 12***] *Declare Oxus'* ***USD 10,841,256.16*** *liability to Respondent under the Special Dividend Agreement, the Associated Agreements, and the reconciliation deed null and void on the basis that it was conceded under duress;*

1583.12. [***AGF Claim No. 13***] *Declare that all instruments in relation to this Special Dividend referred to above, including the guarantee letters of March 13 and April 1, 2004, the Special Dividend Agreement, and the reconciliation deed, be declared null and void on the basis that these are tantamount to expropriation and/or were obtained through duress and/or constitute inequitable treatment and/or discriminatory measures;*

1583.13. [***AGF Claim No. 14***] *Order Respondent to pay Claimant damages in the amount of* ***USD 117 million*** *for Respondent's breaches of its obligations under the BIT and international law, which resulted in Claimant being deprived of the exploration area adjacent to the AGF deposits, as at the date of June 30, 2012;*

1583.13.1. *Alternatively, order Respondent to pay Claimant damages in the amount of USD 108 million for expropriation and Respondent's breaches of its* *specific commitment, and breach of obligations of fair equitable treatment, protection against unreasonable and arbitrary measures and full protection and security under the BIT and international law, which resulted in Claimant being deprived of the exploration area adjacent to the AGF deposits, as at the date of March 18, 2011;*

1583.13.2. *As a second alternative, order Respondent to pay Claimant damages in the amount of USD 39.1 million for the loss of an opportunity to explore, establish the reserves of, and develop the AGF Exploration Area;*

1583.14. [***AGF Claim No. 15***] *Declare the judgments of the Tashkent Economic Court of October 18, 2010, and December 2, 2010, null and void on the basis that Claimant was denied justice during these proceedings;*

1583.15. [***AGF Claim No. 16***] *Order Respondent to compensate Claimant in the amount of USD 2 million for the moral damages suffered by Claimant;*

1583.16. [***Cost Claim***] *Order Respondent to pay Claimant the costs of this arbitration, including all expenses that it has incurred, and including all of the fees and expenses of the arbitrators, legal counsel, experts and consultants, as well as Oxus' own expenses in pursing this arbitration;*

1583.17. [***Interest Claim***] *Order Respondent to pay Claimant compound interest at a rate of LIBOR +2 compounded semi-annually, to be established on the above amounts as of the date these amounts are determined to have been due to Claimant;*

1583.18. [***Set-Off Claim***] *Order Respondent to pay the above amounts outside of Uzbekistan without any right of set-off;*

1583.19. [***Residual Claim***] *Order any other and further relief as the Arbitral Tribunal shall deem appropriate. "*

2.2 Respondent's Prayer for Relief

134. In its Post-Hearing Reply, Respondent concluded as follows:

"69. For all the reasons set forth above, Respondent respectfully requests that the Tribunal dismiss Claimant's claims in their entirety and issue a decision in favor of Respondent in respect of its Counterclaims. Respondent furthermore respectfully requests that it be awarded all

the expense and costs associated with defending against Claimant's claims."

This Prayer for Relief is identical to the Prayer contained in Respondent's previous submissions, namely its Post-Hearing Brief (para. 155), Rejoinder (para. 999) and Statement of Defense (para. 547).

135. As concerns Respondent's Counter-claims, they are not expressed in monetary terms in Respondent's Prayer for Relief itself, and it appears that they evolved during the course of the arbitration as follows:

(i) In its Statement of Defense, Respondent contended that "[a]*s a result of Claimant's unlawful conduct and breach of its investment obligations*, […], Respondent has suffered damages amounting to at least US$ 106.1 million" (Resp. SoD.Class. 04.04.2013, para. 545) and claimed that "*Claimant is liable to Respondent for an amount of not less than US$ 106.1 million and an accounting of all financial transactions relating to its investments in the Republic of Uzbekistan*" (Resp. SoD.Class. 04.04.2013, para. 546).

(ii) In its Rejoinder, while Respondent further substantiated the legal and factual basis of its Counter-claims and concluded that "*the Tribunal can and should adjudicate the counterclaims and find Claimant liable for the damage it caused Respondent*" (Resp. Am.Rej. 21.02.2014, para. 977), it did not re-state its Counter-claims. Instead, it referred to its Statement of Defense and Mr. Hart's Expert Reports concluding in its Rejoinder as follows:

"*997. In both its Statement of Defense and above, Respondent has plainly demonstrated that Claimant's violations have caused financial damage to Respondent both in its capacity as the State, and as a shareholder of Goskomgeology and NGMK, shareholders in the AGF Joint Venture.*

998. Finally, Respondent's expert, Mr. Hart, has calculated the minimum amount of damage that Respondent has suffered as a result of Claimant's misrepresentations, fraud, self-dealing, other violations of Uzbek law in the operation of AGF, and mismanagement of AGF. In his first report, Mr. Hart delineated and quantified Respondent's damages arising from Claimant's violations, and he reiterates and updates his observations as to Claimant's actions herein. Mr. Hart maintains that, at a minimum, Claimant's actions resulted in US$ 109 million in damages." [references omitted]

In his second Expert Report submitted with Respondent's Rejoinder (ER-Hart II (20.02.2014), para. 348), Mr. Hart summarizes Respondent's Counter-claims as follows:

Table 9.1: Summary of Counterclaim Damages

Source: Hart First Report, Exhibit 6 (modified as detailed throughout Section 9)

Counterclaim	Amount (USD millions)	Alternate Amount (USD millions)
AGF Phase I wasted resources	$42.30	$42.30
Goods and services	4.35	4.35
Improper debt repayment	23.20	8.30
Management and administrative fees	1.46	1.46
Mining site restoration	23.50	23.50
Special Dividend	10.84	10.84
Unequal Dividends	0	0
Unspecified repayment to ORC	3.50	3.50
Total	**$109.15**	**$94.25**

(iii) In its Post-Hearing Reply (para. 68), Respondent concluded as follows as concerns its Counter-claims:

> *"The Tribunal thus should hold Claimant liable for the substantial damage that Respondent has suffered as a result of Claimant's unlawful conduct, including Claimant's failure to pay sums admittedly owed to the Ministry of Finance under the Special Dividend Agreement, the numerous self-interested transactions that Claimant caused AGF to enter into with Claimant and/or its affiliates, and its operation of AGF in violation of the Republic's currency law, totalling US$ 117.54 million."* [references omitted]

As concerns the amount of USD 117.54 million, Respondent contends that it is based on the Table 9.1 of ER-Hart II (20.02.2014) (see above (ii)) whereby the amounts therein were updated to reflect interest on the Special Dividend as of 21 July 2014, as well as additional damages caused by AGF's payment to MRT (of USD 4.42 million as illustrated in Table 3.2 of ER-Hart II (20.02.2014) (Resp. Am.Rej. 21.02.2014, footnote 299).

As such, the amount of USD 117.54 million is composed as follows:

Cost item	Amount in USD million		Source
Damage to be Compensated		**102.73**	RSP-PHB II para. 66
AGF Phase I wasted resources	42.3	98.31	Table 9.2 ER-Hart II
Goods and Services	4.35		Table 9.2 ER-Hart II
Improper debt repayment	23.2		Table 9.2 ER-Hart II
Management and administrative fees	1.46		Table 9.2 ER-Hart II
Mining site restoration	23.5		Table 9.2 ER-Hart II
Unequal Dividend	0		Table 9.2 ER-Hart II
Unspecified Repayment to ORC	3.5		Table 9.2 ER-Hart II
Damage caused by AGF's payment to MRT		4.42	Table 3.2 ER-Hart II
Damage to be either Set-Off or Compensated		**14.80264642**	
Special Dividend		12.74	Table 9.2 ER-Hart II with interest updated per 21.7.2014 as inidcated in RSP-PHB II footnote 299
Damage caused by the stealing of silver		2.06264642	RSP-PHB II para. 65 and references quoted therein
TOTAL DAMAGE CLAIM		**117.53265**	RSP-PHB II para. 68

These conclusions largely reflect the conclusions drawn in Respondent's Post-Hearing Brief (paras. 152-154).

3. The Structure of the Present Award

136. Before entering into the merits of the issue, the Arbitral Tribunal should in principle deal with any remaining jurisdictional objections. In the present case, both Claimant and Respondent raised jurisdictional objections which have not been addressed in the Decision on Jurisdiction:

(i) *Respondent's jurisdictional objections*: In its Statement of Defense, Respondent raised jurisdictional objections which appeared to be directed at Claimant's Claims in general (see Resp. SoD.Class. 04.04.2013, section V.B, paras 348 fol.). However, as of its Rejoinder, Respondent raised these jurisdictional objections with regard to the Claims relating to the AGF Project only. Actually, these objections are either included in the sections dedicated to the AGF Claims (see Resp. Am.Rej. 21.02.2014, section VII: "**AGF** Legal Argument") or expressly limited to the AGF Project (see Resp. PHB I. 21.07.2014 and Resp. PHB II. 21.08.2014, sections III: "*The Tribunal lacks jurisdiction **over Claimant's AGF Claims** and/or they are inadmissible*", emphasis added). The same conclusion arises from Respondent's Counsel Opening Statement at the Hearing, in which Ms. Menaker stated as follows: "*Claimant's claims **with respect to AGF Phase I** should be rejected on jurisdictional and admissibility grounds* […]"

(Transcripts of 28 April 2014, 185:24 - 186:2). As such, Respondent's jurisdictional objections are not directed (anymore) at the Claims relating to the Khandiza Project, but concern only the AGF Project.

(ii) *Claimant's jurisdictional objections*: In its various written submissions, Claimant has raised objections towards the Arbitral Tribunal's jurisdiction over Respondent's Counter-claims and/or their admissibility (see Claim. Am.Reply. 23.08.2013, paras. 1452 fol.; Claim. PHB I. 21.07.2014, paras. 185 fol.).

137. To the extent that these objections are limited to certain parts of the Parties' claims, in particular Claimant's AGF Claims and Respondent's Counter-claims, the Arbitral Tribunal considers it more appropriate to deal with these objections when dealing with the claims concerned thereby.

138. Therefore, the Arbitral Tribunal will examine the Parties' claims according to the following order:

- It will first deal with the *claims relating to the Khandiza Project* **(B.II)**;

- It will then deal with the ***claims relating to the AGF Project, including Respondent's Counter-claims*** **(B.III)** and, in this context, examine the Parties' respective jurisdictional and admissibility objections;

- Finally, the Arbitral Tribunal will address the ***issue of the costs*** **(C)**.

II. The Claims Regarding the Khandiza Project

139. After a summary of the key facts underlying Claimant's claims in the Khandiza Project (1), the Arbitral Tribunal will briefly present the claims themselves (2) before examining the various issues relating thereto (3).

1. The Key Facts

1.1 The Primary Exploration Agreement and Phase 1

140. <u>On 14 December 1996</u>, ORC and Goskomgeology entered into the PEA (see above para. 35, Exh. C-40) in relation to the Khandiza Deposit and a 12,000 km^2 area surrounding it and expanding to the north of the Deposit (hereinafter

“Expanded Area”). This Agreement was entered into for a duration of five years, i.e., until 14 December 2001, unless the parties agreed in writing to extend the Agreement.

Relevant provisions of the PEA provide as follows:

“1. OBJECTIVES

The purpose of this Agreement is to develop the initial framework of a feasibility study of the Khandiza Polymetallic Deposit and geological additional study within the region immediately surrounding the Khandiza Deposit (hereinafter, collectively the "Property," as further defined in the Annex l), and to carry out the exploration works at the expanded surrounding area to delineate perspective sites, to set out exploration works and to choose the properties to be further worked out (hereinafter, the "Expanded Area" as further defined the Annex 2). In order to achieve these objectives. Goscomgeologia shall grant to Oxus:

1) *exclusive rights to carry out exploration within the Property and the Expanded Area;*

2) *access to all maps, results of preceding works and other information related to the Property and the Expanded Area and right to photocopy such materials;*

3) *pulps from previous core drills, mine workings, and right to reanalyze them;*

4) *right to take out the information received, samples of ores and rocks outside of the Republic of Uzbekistan;*

5) *ability to import equipment necessary for exploration;*

6) *right to establish temporary infrastructure to facilitate exploration;*

Oxus will provide:

1) *financing and shall prepare a preliminary feasibility study (hereinafter the "Phase 1 Study") which shall be completed no later than December 31 1997, will include a proposal on mining, milling, positioning of a concentrator, tailings storage and other infrastructure; marketing and environmental impact studies; and an analysis of the feasibility of development; detailed purposes and terms and conditions of cooperation are described in the Annex 3.*

2) *financing of works for geological studies in the Expanded Area which will include the accumulation of regional geological information scaled to 1:500.000 - 1:100.000, the analysis and computerised processing thereof to identify the areas where new deposits etre likely to be found; accumulation of more detailed information on a prospective area identified in 1:50.000 – 1:10.000 scale with the aim of identifying specific deposits with promising reserves, exploration works carried out to evaluate the deposits discovered.*

2. RESULTS OF WORKS

In the event of positive outcome of the Phase I Study, the Parties will initiate the negotiations on a Joint Venture Agreement under mutually acceptable for the Parties. The objective for such a Joint Venture shall be to complete a full bankable feasibility study and commercial development of economically viable deposits within the territory of the Property.

In the event of negative outcome of the Phase I Study, Oxus shall not claim for any reimbursement of costs incurred in the process of developing the feasibility study and will be obligated to cede back to Goskomgeologia all geological materials previously obtained therefrom.

If in the result of geo-exploration works in the Expanded Area a commercially viable ore mineral deposit is discovered, Oxus should properly notify the State Geology Committee. Despite the fact that exploration may continue in other parts of the Expanded Area, Oxus shall be prepared to enter into a Joint Venture with Goskomgeologia to develop such a deposit in a commercial scale.

All negotiations on future agreements regarding the Expanded Area will remain separate and intact from any stipulations contained in this Agreement regarding a Joint Venture Agreement pertaining to the Property.

3. DURATION

This Agreement shall be effective for a period of five (5) vears from the date hereof. The Parties may agree in writing to extend this Agreement. After termination of this Agreement, each Party shall be free from any obligation or liability to the other Parties stipulated in this Agreement, except for the obligations specified in Section 9 herein.

Oxus hereby agrees that after one (1) year from the effective date of this Agreement (or earlier, if the Parties mutually agree) and after completion of the Phase I Study, it will enter into formal negotiations with Goscomgeologia to create a Joint Venture Agreement pertaining to the Property, or it shall cede the Property back to Goscomgeologia, should such an arrangement for a Joint Venture Agreement be not achieved.

Oxus also agrees that after three (3) years, it shall cede those areas of the Expanded Area where it has adopted a decision not to conduct further exploration, where the ceded areas shall constitute no less than fifty percent (50%) of the Expanded Area. Oxus shall have the right to proceed with exploration in accordance with this Agreement for within two (2) years on the remaining portions of the Expanded Area for two (2) years with the preferential right of further extension in the event of prospective sites discovered.

4. DECLARATIONS AND OBLIGATIONS OF THE PARTIES

Goscomgeologia hereby states and guarantees that:

i. from the effective date of this Agreement, and over the period of the Agreement, the terms of any previous agreements should not materially influence or prevent Goscomgeologia from carrying out its obligations under this Agreement;

ii. for the period of this Agreement, it has not and shall not enter into any similar agreements granting any form of exploration, exploitation or other metal mineral-related rights to third foreign parties or parties with foreign participation with respect to the Property or Expanded Area except for previous agreements which have been mutually reviewed and accepted by both Parties;

iii. by entering into this Agreement, it shall not violate any other agreements or treaties, and that this Agreement, once signed, is effective and binding thereof; and

iv. after one (l) year from the effective date of this Agreement, it will enter into formal negotiations with Oxus to create a Joint Venture Agreement pertaining to the Property. If Goskomgeologia shall, with the positive results of the Phase 1 Study, waive of entering into Joint Venture Agreement pertaining to the Property, and if, within three (3) years [i.e., until 10 July 1997] *of the signing of this Agreement Goscomgeologia shall enter into negotiations for a Joint Venture Agreement pertaining to the Property with an independent party, then Goscomgeologia shall reimburse Oxus for all expenses incurred during the Phase I Study plus an additional fifteen percent (15%) of those expenses.*

Oxus hereby states and guarantees that:

i. it is a duly registered company;

ii. it is capable of entering into this Agreement, and all procedural requirements that make it eligible to enter into and perform its obligations under this Agreement have been duly carried out;

iii. by entering into this Agreement, it shall not violate any other agreements or treaties, and that this Agreement, once signed, is effective and binding thereof;

iv. it is financially able to meet its obligations under this Agreement;

v. all results of studies including field materials, surveys of any types, results of analyses, interpretation materials and any other information obtained in the progress of works under this Agreement will be regularly exchanged with Goskomgeologia on the confidential basis;

vi. upon the termination of the exploration, it is obligated to return the affected land and environment to its original state according to environmental standards; and remove all equipment and structures, unless they are useful to the local community; and *vii. upon the termination of the exploration, should the results be negative, it is obligated to return all information received in connection with the Property and Expanded Area.*

For avoidance of doubt, the Parties agree that Goskomgeologia shall not be materially responsible fro any expenses incurred by Oxus in connection with geoexploration works within the Property and Expanded Area in the event if no commercially viable deposit will have been found within the territory.

[…]

12. GUARANTEES OF FOREIGN INVESTORS' RIGHTS

Pursuant to the Law of the Republic of Uzbekistan: "On Foreign Investments and Guarantees of Foreign Investors' Activities", the Republic of Uzbekistan guarantees the protection of the foreign investors' rights while carrying out the investment activity within the territory of the Republic of Uzbekistan in accordance with the generally accepted international law. In the event any future laws of the Republic of Uzbekistan deteriorate the investing environment, then the legislation in force on the day of initial investment shall be applicable to foreign investments from not more than 10 (ten) years, except for those changes which pertain to defence, national security, public order and protection of the environment."

Further, Annexes 3 and 4 provided as follows with regard to the structure and funding of the investment activities:

"Annex 3 TERMS OF COOPERATION

OBJECTIVES

Oxus will achieve the following objectives relevant to the Phase l Study within the period of the Agreement:

Computerisation of all existing reserve and geological data
Assessment of all geotechnical and hydrological data, followed by a preliminary evaluation of results from this data
Production of a preliminary mine design and mine development program, and the provisional selection of mining equipment
Evaluation of existing metallurgical data, leading to additional testwork relevant to modern flotation methods
Mill and tailings site selection
Definition of infrastructure requirements and preliminary design
Evaluation of preliminary environmental base line and impact study
Assessment of manpower and training requirements
Analysis of preliminary marketing and concentrate freight studies
Preparation of preliminary operating cost estimates.
Activation of a preliminary exploration program within the Expanded Area
Definition of a scope of work, detailed work program, and schedule and cost estimates for Phase 2 of the bankable feasibility study; estimation of preliminary capital costs for a 1.0 million to 1.5 million tons per year integrated mining

operation
Completion of a technical analysis report of the period of the agreement.

[…]

FUNDING

Oxus estimates its contribution to the activities under this Agreement for the first twelve months will be:

Phase, I Study	*US$*	*600,000.00*
Exploration of the Property	*US$*	*250,000.00*
Accumulation and analysis of information for the Expanded Area and preliminary reconnaissance works	*US$*	*500,000.00*
Other fees and contingency	*US$*	*150,000.00*
Total Estimated Funding	*US$*	*1,500,000.00*

A budget for this funding estimate will be presented to Goscomgeologia. Any material adjustment to this budget will be made with the consent of both Parties. Funding for the development of the Khandiza Deposit in Years 2 through 5 will be dependent on the results of the Phase 1 Study. It is Oxus' intention to spend a minimum of US $1 million in each of the Years 2 and 3 on further exploration within the Expanded Area. Funding for exploration in Years 4 and 5 will be mutually agreed upon by the Parties depending upon the outcome of works."

" Annex 4 COMMERCIAL TERMS AND PROPOSED CAPITAL STRUCTURE

The Parties agree that if the Phase l Study reveals the potential mining project to be economically robust, such that it would be capable of supporting the required levels of debt and equity anticipated by the study, then, A Joint Venture Agreement shall be entered into by the Parties. Said Joint Venture Agreement shall be negotiated within one hundred twenty (120) days of the approval of the Phase l Study by the Parties hereto.

Contributions by the Parties:

1) *The' Parties agree that the Capital Structure of the joint venture company will consist of contributions by each Party as outlined below. The terms relating to these contributions shall be fully stated in the Joint Venture Agreement.*

2) *The Parties agree that the contribution of the Uzbek Party will be made in the form of geological information, and rights to develop any deposits.*

3) *The Parties agree that, provided Ox us has expended a minimum of US $ one (1) million on the Phase l Study, this amount shall be taken into account while forming the Charter Fund of the Joint Venture.*

> 4) *The Parties further agree that, upon completion of the full bankable feasibility study, and provided that Oxus has expended an additional US $5 (five) million on the Property since the completion of the Phase l Study, these expenses shall be also taken into account while forming the Charter Fund of the Joint Venture.*
>
> 5) *The Parties agree that during the preparation of the full bankable study, and prior to construction of the venture, the Charter Fund shall be split to 50:50 percent ratio.*
>
> 6) *In order to commercially develop the Property, and to support debt financing, the Parties shall contribute to the Charter Fund any further increases in the Charter Fund that may prove to be necessary. The Joint Venture shareholdings of the Parties might be adjusted accordingly, such adjustments to be made on a bankable and commercially viable basis."*

141. After the signature of the PEA, Claimant started the exploration works.

142. On 31 May 1997, upon ORC's mandate, Snowden issued a report concerning the set-up by ORC of a computer database for the resource evaluation of Khandiza (hereinafter "Snowden Report") (Exh. C-157) (Claim. SoC. 17.09.2012, para. 137).

143. On 10 July 1997, ORC and Goskomgeology entered into the ***Supplemental Agreement No. 1 to the PEA*** (Exh. R-21), through which the parties amended various sections of the PEA, including the following:

(i) In Article 1 of the PEA:

> *"*[…] *In order to achieve these objectives, Goscomgeologia shall grant to Oxus:*
>
> 1) *exclusive rights to carry out exploration within the Property and the Expanded Area;*
>
> […]*"*

was replaced by:

> *"In order to achieve these objectives, Goskomgeologia shall grant to Oxus or provide necessary support and cooperation <u>to enable Oxus to obtain from the relevant authorities</u>:*
>
> 1) *exclusive rights to carry out exploration within the Property and the Expanded Area;*
>
> […]*"* (emphasis added).

(ii) In Article 2 of the PEA:

> *"In the event of positive outcome of the Phase I Study, the Parties will initiate the negotiations on a Joint Venture Agreement under mutually acceptable for the Parties. The objective for such a Joint Venture shall be to complete a full bankable feasibility study and commercial development of economically viable deposits within the territory of the Property.*
>
> […]
>
> *If in the result of geo-exploration works in the Expanded Area a commercially viable ore mineral deposit is discovered, Oxus should properly notify the State Geology Committee. Despite the fact that exploration may continue in other parts of the Expanded Area, <u>Oxus shall be prepared to enter into a Joint Venture with Goskomgeologia to develop such a deposit in a commercial scale.</u>"*

was replaced by:

> *"In the event of a positive outcome of the Phase 1 Study, the Parties will initiate good-faith, exclusive, formal negotiations on a Joint Venture Agreement <u>and, subject to the approval of the Cabinet of Ministers</u>, shall enter into such Joint Venture Agreement under terms mutually acceptable to the Parties. The objective for such a Joint Venture shall be to complete a fully bankable feasibility <u>study and to commercially develop</u> economically viable deposits within the territory of the Property;*
>
> *If <u>as</u> a result of geo-exploration works ·in the Expanded Area a commercially viable ore mineral deposit is discovered, Oxus should properly notify the State Geology Committee. Despite the fact that exploration may continue in other parts of the Expanded Area, <u>the Parties shall enter into formal, good-faith, exclusive negotiations on a Joint Venture Agreement under terms mutually acceptable to the Parties. The objective for such a Joint Venture Agreement shall be</u> to develop such deposits on a commercial scale."* (emphasis added)

(iii) In Article 3(ii) of the PEA:

> *"ii. Oxus hereby agrees that after one (1) year from the effective date of this Agreement (or earlier, if the Parties mutually agree) and after completion of the Phase I Study, it will enter into formal negotiations with Goscomgeologia to create a Joint Venture Agreement pertaining to the Property, or it shall cede the Property back to Goscomgeologia, should such an arrangement for a Joint Venture Agreement be not achieved."*

was replaced by:

"ii. Oxus hereby agrees that, provided the Phase 1 Study yields positive results, then upon completion of the Phase 1 Study (or earlier, if the Parties mutually agree), it will negotiate on a formal, exclusive and good faith basis and, subject to approval by the Cabinet of Ministers, shall enter into a Joint Venture Agreement with Goskomgeologia pertaining to the Property; in the event that the Phase 1 Study yields negative results and such an arrangement for a Joint Venture Agreement is therefore not achieved, it shall vacate the Property". (*emphasis added*)

(iv) In Article 4 of the PEA:

"ii. for the period of this Agreement, it has not and shall not enter into any similar agreements granting any form of exploration, exploitation or other metal mineral-related rights to third foreign parties or parties with foreign participation with respect to the Property or Expanded Area except for previous agreements which have been mutually reviewed and accepted by both Parties;

[…]

iv. after one (l) year from the effective date of this Agreement, it will enter into formal negotiations with Oxus to create a Joint Venture Agreement pertaining to the Property. If Goskomgeologia shall, with the positive results of the Phase 1 Study, waive of entering into Joint Venture Agreement pertaining to the Property, and if, within three (3) years [i.e., until 10 July 1997] of the signing of this Agreement Goscomgeologia shall enter into negotiations for a Joint Venture Agreement pertaining to the Property with an independent party, then Goscomgeologia shall reimburse Oxus for all expenses incurred during the Phase I Study plus an additional fifteen percent (15%) of those expenses.

[…]

vi. upon the termination of the exploration, it is obligated to return the affected land and environment to its original state according to environmental standards; and remove all equipment and structures, unless they are useful to the local community; […]*".*

was replaced by:

"ii. for the period of this Agreement, it has not and shall not enter into any similar agreement granting any form of exploitation or other metal mineral-related rights to third foreign parties, local parties or parties with foreign participation with respect to the Property or Expanded Area except for previous agreements

*which have been previously reviewed and accepted by both Parties". (*emphasis added*).*

[…]

iv. after one (1) year from the effective date of this Agreement, Goskomgeologia shall enter into formal, exclusive, good-faith negotiations with Oxus to create a Joint Venture Agreement pertaining to the Property and will, provided that the Phase 1 Study yields positive results and approval by the Cabinet of Ministers is obtained, enter into such Joint Venture Agreement with Oxus.

[…]

vi. upon the termination of all exploration and development, <u>Oxus shall be obliged to return the affected land and environment to its original state as at the date when exploration was first begun (any such restoration work to be done according to internationally recognised environmental standards)</u>; and to remove all equipment and structures, unless they are useful to the local community; […]". (emphasis added)

(v) Paragraph 2 of Annex 4:

"2) The Parties agree that the contribution of the Uzbek Party will be made in the form of geological information, and rights to develop any deposits."

was replaced by:

"2) The Parties agree that the contribution of the Uzbek Party will be made in the form of geological information, with rights to develop any deposits <u>and licences issued in accordance with the laws of the Republic of Uzbekistan</u>". (emphasis added)

144. <u>On 22 July 1997</u>, ORC entered into an ***Agreement to Assign*** (hereinafter "Assignment No. 1") with OML, under which the PEA was assigned to OML (Exh. C-41).

145. <u>On 4 August 1997</u>, the Uzbekistan State Geological Fund issued the ***Certificate of Registration No. 97/56/1*** to OML (Exh. C-152).

146. <u>On 8 September 1997</u>, ORC's legal advisors, Cameron McKenna wrote a letter to Mr. Wilkins concerning their review of the PEA.

147. <u>On 11 September 1997</u>, Goskomgeology issued a ***Guarantee Letter*** to OML (no copy of this letter was provided to the Arbitral Tribunal):

148. <u>On 25 September 1997</u>, Oxus issued its ***Preliminary Prospectus*** for its planned listing at the AIM (Exh. C-154). This Preliminary Prospectus provided as follows regarding Khandiza (p. 10):

> *"The Company has a primary exploration agreement made effective as of December 14, 1996 (as amended, the "Khandiza Exploration Agreement") with the State Committee on Geology and Mineral Resources of the Republic of Uzbekistan ("Goskomgeologia"), the specially authorized legal entity and the Uzbek agency responsible for carrying out geological exploration and extraction of minerals management in Uzbekistan. The stated purpose of the Khandiza Exploration Agreement is: (i) to develop the initial framework of a feasibility study of the Khandizazinc-copper-lead-silver deposit and additional geological study within the surrounding area covering in aggregate an 18 kilometre by 10 kilometre area (the "Khandiza Property"), and (ii) to carry out exploration on an expanded surrounding area covering an aggregate of approximately 12,000 square kilometres (the."Expanded Area") to delineate prospective sites for further work.*
>
> *Under the Khandiza Exploration Agreement, Goskomgeologia granted to the Company (or agreed to provide necessary support for the Company to obtain) the exclusive rights to carry out exploration within the Khandiza Property and the Expanded Area, and access to all maps and results of previous work and other information relating to the Khandiza Property and the Expanded Area. The Company has obtained all necessary approvals required at this stage for exploration and release of geological data. The Company is required to prepare a preliminary feasibility study not later than December 31, 1997 and to carry out geological studies of the Expanded Area. The Khandiza Exploration Agreement contemplates the expenditure by the Company on the Khandiza Property of $6,000,000, of which approximately $1,300,000 has been spent to date and an additional amount of approximately $200,000 is expected to be spent by the end of 1997. If the preliminary feasibility study is positive, the parties are to enter into exclusive good faith negotiations to create a joint venture with the objective of completing a fully bankable feasibility study and commercial development of economically viable deposits within the Khandiza Property, initially on,a 50-50 basis. If the preliminary feasibility study is negative (or a joint venture is not achieved), the Company will be required to vacate the Khandiza Property and return to Goskomgeologia all geological materials without reimbursement of costs."*

149. <u>On 21 October 1997</u>, Cameron McKenna issued a second legal opinion concerning their review of the ***PEA***, the ***Supplementary Agreement No. 1***, the ***Assignment No. 1*** and various applicable laws, treaties and regulations, including also the ***Guarantee Letter*** (Exh. C-155). This second legal opinion was meant to supersede Cameron McKenna previous letter to Mr. Wilkins of 8 September 1997 (see above para. 146). In this legal opinion, Cameron McKenna reached – among others – the following conclusion:

> "[…]
>
> 5. *We are of the opinion that the Primary Exploration Agreement, the Guarantee Letter, and the Certificate of Registration as well as the other approvals and letter referred to in paragraph 3 above provide sufficient evidence at this stage that Oxus Mining enjoys the **sole right to carry out exploration of the Khandiza deposit**. Under Article 14 of the Subsoil Law, the person or persons who finance exploration **have an exclusive right to obtain a license for extraction, i.e. mining**. In the light of Oxus Mining instructing us that it and/or its parent company, Oxus Resources, has spent approximately US$1.09 million on such exploration up to 12 October 1997, it is reasonable to conclude, on the documents and facts known to us and on the assumption that Oxus delivers a pre-feasibility study to the State Committee of Geology by the due date referred to in the Primary Exploration Agreement, that Oxus Mining together with such State Committee, its exploration co-venturer, will have established an exclusive right to a mining license at the appropriate time and subject to the usual regulatory approvals in the normal course of an exploration project proceeding towards the construction and mining stages."* (emphasis added)

150. <u>On 17 December 1997</u>, Mr. Roger Turner (from OML) sent a letter to Mr. Shayakubov (Chairman of Goskomgeology) reporting on the status of the Phase 1 Study and stated as follows (Exh. R-267):

> *"I hope the Khandiza trip to Toronto for Goskomgeologia was successful. The results of the Phase I Feasibility Study are, on the whole, much as we expected in terms of resources at various cut-off grades, metallurgy, mine design and concentrator flow sheet. The operating cost estimates are realistic but we have been working with Bechtel and Watts Griffis & McOuat on the capital cost estimates with only limited success. I believe we need to look at the project capital costs more critically using Uzbek contractors and prices as the first stage of the Phase 2 study. For a 1 million ton a year project the capital costs should be in the US$ 120M to US$ I 40M range I believe this can be achieved and we will start a critical review of this with your staff's assistance early next year. This, together with detailing the terms of the Joint Venture Agreement should be our main priority together with the refurbishment of the underground workings. We should be ready to commence an underground diamond drill programme in May to upgrade the B category resources, supply geotechnical data for stope design, and for hydrological studies and bench scale metallurgical test-work. I had hoped to be in Tashkent before the end of the year but we ere currently working on a stock exchange listing for Oxus, which has kept me from making the trip. However, I look forward to discussing the way forward on Khandiza with you early in the New Year.* […]"

151. On 19 December 1997, by letter No. 08-1370, Mr. Shayakubov (Chairman of Goskomgeology) responded to Mr. Turner's (from OML) letter of 17 December 1997 stating as follows (Exh. C-159):

> *"Goskomgeology acknowledges that the company Oxus completed the first phase of the feasibility study on polymer-metallic deposit of Khandiza and achieved the goals and objectives of the Primary Agreement for exploration, signed on 14 December 1996, and additional agreement of 10 July 1997.*
>
> *Based on the results of the first phase, Goskomgeology intends to enter into exclusive negotiations with Oxus in order to create a Joint Venture under the additional conditions of the Primary Agreement for exploration."*

152. On 31 December 1997, WGM issued the "***Phase 1 Feasibility Study on the Khandiza Project in Uzbekistan for Oxus Resources Corporation***" commissioned by ORC (hereinafter "WGM Phase 1 Feasibility Study") (Exh. C-151). WGM drew the following conclusions and made the following recommendations:

> *"17.1 CONCLUSIONS*
>
> *Economic mineral deposits exist in the Central Asian republics in a variety of geologic settings, and the recent start-up of Cameco's Kumtor gold mine in Kyrgyzstan, the Zarafshan-Newmont gold project in Uzbekistan and Nelson Gold's Jilau gold mine in Tajikistan indicate that western based economics and mining methods can be applied with success in the area.*
>
> *Oxus has acquired an Exploration Licence in Uzbekistan which includes the Khandiza deposit. WGM has concluded that at an NSR dollar cutoff of $30 per tonne and taking estimated dilution and mining losses into account for each ore zone, the estimated mineable reserve is 12.1 million tonnes at a grade of 7.1% Zn, 3.4% Pb, 1.0% Cu, 124 g Ag/t and 0.5 g Au/t.*
>
> *WGM has used the discounted cash flow approach to evaluate the Khandiza project. At a production rate of 1. 0 million tonnes per year, the project shows an internal rate of return of 15.4%.*
>
> *17.2 RECOMMENDATIONS*
>
> *WGM recommends that Oxus proceed with a Bankable Feasibility study on the Khandiza project which would begin on January 1, 1998.*
>
> *The work will include diamond drilling for additional confirmation of resources; infill drilling to increase the proven and probable reserves; provision of samples for metallurgical testwork and data for geotechnical and hydrological studies; additional bulk sampling and metallurgical testwork; environmental baseline and impact studies; concentrator, tailings disposal and infrastructure site investigation studies; detailed mine, process, tailings disposal and infrastructure designs; equipment selection and capital*

and operating cost estimates; detailed marketing studies; and manpower training requirements.

The cost of this study is estimated at $4.7 million."

1.2 The Negotiations Towards an Acceptable Bankable Feasibility Study

153. From June to August 1998, Claimant and Barents Group LLC prepared economic models in order to estimate the profits that would derive from the Khandiza Project for Claimant and Goskomgeology respectively after consideration of the applicable Uzbek taxes (Exhs. R-909 to R-911). Based on their economic model of 11 August 1998, the result of Barent's calculations was as follows (Exh. R-911_6):

Total profit of Uzbek Sides (in USD, thousand)		
1.	Managerial honorariums of the Uzbek Sides (5 %)	-
2.	Paid dividends (50%)	45,512
3.	Value added Tax, tax procedures and honorarium (20% and 0.15%)	32,293
4.	Road Tax – 1.4 % of the gross profit	14,651
5.	Environmental tax – 1 % from the total cost	6,043
6.	Land and water taxes	48
7.	All deducted taxes (by interest rate and dividends)	19,576
8.	Payments to the Pension Fund (0.5 % from the sales)	5,233
9.	Tax for the social security (40%)	12,178
10.	Royalty	39,779
11.	Tax on the profit (16%)	10,354
	Total monetary flow for Uzbek Sides	**185,666**
12.	Net Present Value of the project without counting the financing 10%	34,945
13.	Internal rate of profitability of the project without counting financing	15.67%
14.	Net Present Value for Oxus 10%	22,116
15.	Internal rate of profitability for Oxus	16.07%

154. On 4 September 1998, Mr. Shayakubov as Chairman of Goskomgeology sent a letter to the Deputy Prime Minister of Uzbekistan, Mr. Viktor Anatolyevich Chzhen, updating him on the progress of the negotiations with Oxus, stating – inter alia – as follows (Exh. R-268):

"[...]

Idea of works execution at Khandiza deposit on the conditions of concession is perceived positively in general by Oxus. Currently, development of the economic model is being executed; legal aspects of this issue are being studied. Proposals on the most acceptable form of participation in the project for Oxus are to be provided by mid of October.

According to information at our disposal, exploration works and deposit exploitation is carried out on the conditions of concession in the developed market economy. […]

Almost all foreign investors investing to mining industry of the Uzbekistan Republic still prefer to create joint ventures instead of getting objects to concession. In our opinion, it is caused by a number of the following reasons:

- *Legislation for creation and activities of joint venture is more developed than concession legislation.*

- *There are substantial differences in conditions of activities at creation of JV and concession:* […]

Lack of legislative acts regulating effect of the Law of the Republic of Uzbekistan "On Concessions", lack of concession experience of the Republic substantially holds back initiative of foreign investors and complicates work on implementation of the above mentioned law. We would consider reasonable to arrange development of the legislation for concession under the guidance of the Investment Programs Department of the Cabinet of Ministers with participation of foreign specialists and ministers and authorities of the Republic concerned."

155. On 18 September 1998, Mr. Wilkins from OML sent a letter to Mr. Shayakubov from Goskomgeology explaining Oxus' expectation regarding the structure of a partnership on the Khandiza Project and stating – inter alia – as follows (Exh. R-269):

"[...]

As was stated in our letter of 25 Aug. 1998, for the project to have a profitability level acceptable for Oxus, we have tried to arrange for the following criteria to be met with due regard to the prices of metals:

- *the minimal rate of in-house profits of Oxus: 20%;*

- *the minimal share of Oxus: 45% of the cash flow before taxes, royalties and project management fees;*

- *the minimal equity interest of Oxus in the Joint Venture: 50%.*

[...]

We have already submitted to you our economic model as to the Khandiza project assuming that the output will amount to 1 million tons a year. The model is based on the preliminary feasibility studies made by WGM in December 1997 and improved through the repeated count of stocks by Snowden Associates in May 1998. The Barents Group has analyzed the model and confirmed its consistency with current legislation of Uzbekistan *and, consequently, its tax-free period for seven (7) years after the commencement of production, and the profits rate of 16%. All the other assumptions we were based on are explicit in the model. For example, we assumed the project to be exempt from VAT and dues on imported goods and services required for the project to be implemented as well as that expatriates engaged in the project to be exempt from taxes on their salaries."*

Mr. Wilkins then listed a series of tax reduction and exemptions that would be needed. As concerns the structure of the "legal and commercial structure" of the Project, Mr. Wilkins was suggesting two different options, (i) an ordinary joint-stock company, i.e. JV, and (ii) a concession, along the following lines:

> *"We provide two different options. The first option is just a standard approach under which Oxus and Goscomgeologia will co-own a joint-stock company. The second option is an approach under which Oxus will develop the project by means of concession.*
>
> *1) Ordinary-joint-stock company*
>
> *Anakhita Mining Company can be set up as a joint-stock company registered in Uzbekistan and co-owned by Oxus and Goscomgeologia.* […]
>
> *In order to make the required rate of profit available to Oxus and to render the project sufficiently attractive for creditors, the joint-stock company's commercial structure suggested by us is as follows:*
>
> - *the same reductions and exemptions of taxes as those aforesaid;*
> - *Oxus owns 66.67%, Goscomgeologia - 33.33%;*
> - *7% of the production costs is payable to Oxus as project management fees;*
> - *12%-rate on excise loans is payable to Oxus;*
> - *Dividends in the amount of 66.67% are payable to Oxus, and those amounting to 33.33% - to Goscomgeologia.*
>
> […]
>
> *2) Concession*
>
> *The Khandiza deposit may be developed in the form of concession. However, the existing Law on Concessions (August 1995) is superfluously concise, so either amendments thereto or new statutory acts and regulatory instruments will be necessarily required together with supplementary documents protecting the rights to concession. In such an approach Oxus (as a foreign corporate body) will be the owner of concession. In this case, Oxus will be able to create Anakhita Mining Company as a production enterprise and hold 100%-equity interest therein.* […]

In order to make the required rate of profit available to Oxus, we would suggest the possible concession structure be as follows:

- *the same reductions and exemptions of taxes as those aforesaid, in addition, Oxus could pay a higher rate of profits after the expiration of a tax-free period of 7 years (the rate may by 30%, rather than 16%);*
- *Oxus will own 100% of the production enterprise;*
- *there will be no longer any need in considering the size of management fees;*
- *there will be no longer any need in the payment of interest on loans to shareholders;*
- *the concession amount of 10 million will be payable to the Government, in doing so, $1 million will be payable after it is decided to create the said enterprise, $1 million – after construction is completed, and $8 million – after the designed capacity is reached (i.e., once the commercial production has commenced).*

Mr. Wilkins concluded his letter as follows:

> *"For the reasons outlined above, and as concessions have not been in wide use yet,* ***we recommend the negotiations on Khandiza should be continued in view of creating a standard joint venture, which is approved by a resolution of the Cabinet of Ministers****. We think that both parties' good faith and expedited work must make it possible to prepare the required documents until the end of December 1998. This will enable us to instruct independent consultants to get down to making the bank feasibility studies in early 1999 based on the survey currently conducted by Oxus and will be completed by that time.*
>
> *In spite of our restrained attitude to concession, we acknowledge it to be promising for both Uzbekistan and foreign investors. As a consequence, we'll be delighted to continue discussing its advantages and, if concession appears to be more viable and a better option than a standard joint venture, we'll be ready to discuss an opportunity of structuring our relations with respect to Khandiza in the form of concession.*
>
> *We are preparing a brief comparison of the approaches to concession in different countries world-wide and will provide it to you in a few days."* (emphasis added)

156. On 23 November 1998, Mr. Wilkins from OML sent another letter to Mr. Shayakubov, Chairman of Goskomgeology, with a "revised taxation and commercial structure" proposal for the future development of Khandiza (Exh. R-270). In his letter, Mr. Wilkins concluded as follows:

*"Based on discussions already held with the EBRD and various western banks**, it is apparent that the concession route would be preferable** when it comes to providing finance for the project, since concessions are more widely used as commercial structures within the international mining industry. Khandiza would also be the first mining project to be developed under a concession in Uzbekistan and, as such, would attract much favourable publicity for Oxus and the Uzbek Government alike. A successfully structural concession for a project such as Khandiza would, hopefully, act as a catalyst to attract further foreign investment into the Uzbek mining sector.*

Oxus would like to propose, therefore, that the Government confirms to us those issues raised in paragraph (4) above, as soon as possible, and that we then proceed by way of concession. If this is the case we are confident that minor changes can be made to the proposed commercial or tax structure in order to allow Oxus an IRR of 20%.

We look forward to continuing these negotiations in the near future." (emphasis added)

157. <u>On 11 December 1998</u>, CSMA issued the ***Preliminary Feasibility Study*** commissioned by ORC (hereinafter "CSMA Preliminary Feasibility Study"*)* (Exh. C-156). The objectives of this study were as follows:

"[…]

- *review all available information on the Khandiza Deposit held by Oxus in their Working and Samarkand offices;*
- *review testwork results and comment on choice of a flotation route, and the feasibility of using a coarser grind size;*
- *review the current conceptual layouts and arrangements of the mine and plant areas, as indicated in the WGM study of December 1997;*
- *provide revised capital and operating cost estimates;*
- *revise the financial model provided by Oxus to indicate the potential viability of the deposit based on metal prices agreed by Oxus, and*
- *provide a plan of work and an estimated cost for a Definitive Feasibility Study." (p. 4)*

The CSMA Preliminary Feasability Study concluded as follows:

"[…]

CSMA concludes that despite current low metal prices the Khandiza project is sufficiently robust to justify the completion of an agreement with Min Geo *and the government of Uzbekistan, and to proceed with the preparation of a Definitive Feasibility Study.*

Based on these conclusions, CSMA recommends that:

- *Prior to the commencement of the DFS, further testwork must be carried out on the effects of Dense Media Separation (DMS) on representative samples of the ore;*
- *The current and planned programme of core drilling from both underground and surface should be pursued with vigour in order to improve levels of confidence in the resource as early as possible in the DFS period;*
- *Subject to a satisfactory conclusion to the current negotiations, Oxus should proceed with a DFS as soon as practical, and conclude it as expeditiously as possible.*

158. In early 1999, OML initiated a program of further drilling works. For the purpose of this drilling program, OML requested permission from Goskomgeology and Samarkand Geology to use WMC Resources Limited drill rig. This request was denied and OML was asked to contract out the drilling work to Kashkadarya Expedition (hereinafter "Kashkadarya") (Claim. SoC. 17.09.2012, paras. 151-153).

159. On 19 January 1999, Mr. Paul Lush, from Cameron McKenna (Claimant's legal advisor), sent a letter to Ms. Olga Firsova, Legal Counsel at Goskomgeology, in view of a Meeting planned the next day between her and OML (Exh. R-520), providing as follows:

> *"Oxus Mining tells us that the concession route for Khandiza has been approved by Mr. Chzhen, Chairman of the GKI, and that the concept has been submitted to President Karimov's office for further approval. We also understand from informal conversations with Mr Shayakubov that he would also agree to the concession route in principle.*
>
> *Our clients believe, and we would support their belief, that ultimately a formal concession agreement could make it easier to finance the project."*

Cameron McKenna then laid out a series of draft outlines of key agreements necessary under a concession route.

160. On 22 January 1999, Mr. Wilkins from OML sent a letter to Mr. Chzhen, Deputy Prime Minister, entitled "Request for the 'Concession route' for the Khandiza Project to be officially approved by the Government of the Republic of Uzbekistan" (Exh. R-271), in which he set out the perceived advantages of the

concession route and requested Mr. Chzhen's formal approval thereof. In this regard, the letter stated – inter alia – as follows:

> *"Oxus Company has taken great pleasure in working on the Khandiza polymetallic project in Sukhandaryn Region and is very appreciative of the support it has received so far from the State Committee for Geology and from other Government Ministries. We are pleased to confirm that we have completed our pre-feasibility study on the project, and have secured work on the Bankable Feasibility Study.* […]
>
> *We understand that you approve Oxus taking the Concession route as opposed to the joint venture route for the Khandiza Project. As we identified in our letter to Mr. Shayakubov dated 23 November 1998 and Cameron McKenna's letters to Mr. Maksudov of 25 September and 8 Octobre 1998, the Concession route is not free from certain difficulties. For example, the Concession Law requires that the investor (or concessionaire) is a foreign legal entity and* <u>*not*</u> *an Uzbek legal entity. Regrettably, under the current wording of the new Tax Code, this means that the concessionaire would not be able to qualify for the Foreign Investment Programme, and so have the various tax privileges necessary to make the project economic. However goodwill on both sides and appropriate decrees, there is no real reason to think that these technical, legal problems cannot be resolved.*
>
> *We believe that the Concession route has significant advantages to the joint venture route as it is far more widely recognised approach to the internationally mining sector.* […]
>
> ***It would be very helpful if your approval could be given quickly because Oxus would like to instruct its lawyers by 1st February 1999 to prepare a preliminary draft Concession Agreement with a view to concluding all major aspects of the negotiations with the Government by the end of April.*** […]*"* (emphasis added)

161. It appears that no significant event concerning Khandiza occurred between February 1999 and January 2000.

162. <u>On 5 January 2000</u>, senior Government officials, including the Deputy Prime Minister Mr. Chzhen, and Goskomgeology, including its new Chairman Mr. Akhmedov, met and discussed whether to develop Khandiza as a concession (Exh. R-279) based on a comparative table of costs and profits for both JV and concession options prepared by Claimant (Exh. R-748). This table recorded a total profit of USD 89.9 million for the Uzbek State in case of a concession (including USD 53 million in taxes and royalties and USD 37 million in concession fees, including an initial payment of USD 15 million within three years of registering the enterprise (Resp. SoD.Class. 04.04.2013, para. 73; Resp. Am.Rej. 21.02.2014, para. 116)) compared to 95.7 million in case of a JV.

The Minutes of this Meeting record the following decision:

> *"The Participants of the Meeting have decided:*
>
> 1. *To provide Goskomgeology and Oxus Resources Corporation with final estimation data on creation of concession enterprise.*
> 2. *To Goskomgeology:*
>
> - *to work out issue of obtaining of additional financial funds by Uzbek party at changing of terms and volumes of extraction at transfer of the right to develop deposit to Oxus and also to consider mechanism of change of royalty amount from Khandiza deposit exploitation in conditions of excess of the level of prices on the main extraction products previously agreed upon;*
> - *together with the representatives of Oxus to consider availability of reimbursement of the Committee costs incurred during exploration works at Khandiza deposit, to provide for possibility of supply of copper concentrate produced by concession enterprise for processing to Almalyk GMK and development of infrastructure in the given region.*
>
> 3. *To make the appropriate suggestions to the Government of the Republic of Uzbekistan after final approval of the conditions of paragraphs 1, 2 with Oxus."*

163. <u>On 29 January 2000</u>, Mr. Akhmedov, Chairman of Goskomgeology and Mr. Wilkins from OML entered into a ***Letter of Intent*** for the development of the Khandiza ore Deposit (Exh. R-280), stipulating as follows:

> *"The Parties have agreed on the following:*
>
> 1. *Within 3-month period from signing of the present letter of intent to prepare draft Concession Agreement for its submittal to the Government of the Republic of Uzbekistan.*
> 2. *To take into consideration that Oxus undertakes to make the following payments to the Uzbek party (Government and Goskomgeology):*
>   - *Initially fixed concession payment in the amount not less than 15 mln USD within first 3 years after registration of enterprise by installments, amounts and due time of which will be additionally approved by the parties;*
>   - *Current fixed concession payment in the amount not less than 1 mln. USD annually after production of the first products by the enterprise within the whole term of operation life time of the enterprise, and minimal term of operation is 15 years;*
>   - *General fixed amount of concession payments should be not less than 30 mln USD;*

- *Variable amount of concession payment that is not less than 5% of net profit (after taxes);*

- *The Parties in the Concession Agreement will determine mutually acceptable mechanism of additional variable concession payments, if real results of operation activities will show considerable improvement of the project economy compared to preliminary feasibility study and if newly explored on the concession territory ore reserves that were not included into bank feasibility study will be included into development.*

- *Oxus will pay taxes and other payments according to the current legislation of the Uzbekistan Republic, taking into accounts benefits that may be provided by the Government.*

3. *The Parties agree to determine mutually acceptable minimum and maximum marginal prices for each metal (zinc, copper, lead); in case of reduction of actual prices lower minimal amount, tax rate benefits will be stipulated for use of mineral resources (royalty), in case of growth of prices higher than maximum amount, mechanism of equitable distribution of additional profit will be developed.*

4. *At concentrators shipment Oxus will prefer Almalyk Mining and Metallurgical Complex provided that Almalyk complex possesses appropriate capacities and all relations are built on the reasonable internationally accepted economic conditions.*

5. *Bank FS will provide for development of the appropriate social infrastructure of the region.*

6. *Concession Agreement will consider directions of funds' use from capital equipment depreciation.*

7. *At liquidation of the enterprise all remaining assets are divided in the equal shares: 50% -to the Uzbek party, 50% - to Oxus."*

164. It appears that no significant event concerning Khandiza occurred between February 2000 and May 2000.

165. On 9 June 2000, Mr. Wilkins on behalf of OML and Mr. Akhmedov on behalf of Goskomgelolgy entered into ***Supplemental Agreement No. 2 to the PEA*** (Exh. C-161), in which the Parties further amended the PEA. The key amendments concerned the following points:

(i) The Expanded Area was reduced from 12,000 km^2 to approximately 6,000 km^2;

(ii) Oxus shall spend a minimum of USD 500,000 on exploration and other work in respect of the Expanded Area over a two year period.

This reduction of the Expanded Area is not subject to controversy between the Parties, both agreeing that it was contemplated under the PEA (Claim. Am.Reply. 23.08.2013, para. 281, 355; Resp. Am.Rej. 21.02.2014, para. 167).

166. On 1 August 2000, Mr. Maksudov, Deputy Head of the Department of Investment Programs of the Cabinet of Ministers, sent a Letter No. 19/16-191 to Goskomgeology (Exh. C-597) stating as follows:

> *"We inform hereby that #266 Decree of the Cabinet of Ministers "On additional measures to organize the activity of Amantaytau Goldfields Joint Venture" adopted on 11 July 2000 does not restrict Amantaytau Goldfileds Joint Venture in obtaining loans from a third party provided any such loans obtained to conduct the JV activity at stage I are arranged by Oxus Resource Corporation and do not require guarantees of Government of the Republic of Uzbekistan."*

167. On 16 August 2000, Mr. Akhmedov, Chairman of Goskomgeology, forwarded a draft concession agreement (hereinafter "Draft Concession Agreement I") to the Department of Investment Programs of the CabMin for its "*approval and decision-making*" (Exhs. R-282/R-283). According to this Draft Concession Agreement I, Oxus would have the following rights and obligations:

> *"7.1 According to this Agreement the Concessionaire shall have following rights:*
>
> *7 .1.1 to exclusively carry out Subsurface Resources Management Works within the Concession Territory during the period set in Annex 2 of this Agreement, and to obtain a license for it.*
>
> *7.1.2 to freely sell any products produced as a result of Subsurface Resources Management Works, within or without the territory of the Republic of Uzbekistan, and receive payments in foreign currency within or without the territory of the Republic of Uzbekistan free of obligations to exchange any of received amounts into national currency of the Republic of Uzbekistan in accordance with tax laws of the Republic.*
>
> *7.1.3 to freely import and export any property including, but not limited to equipment, mechanisms, spare parts, automobiles, computers and any other movable property pertaining to this Agreement.*
>
> […]
>
> *7 .1. 7 to export his property and products produced as a result of property exploitation;*
>
> *7 .1. 8 to claim in legal agencies as to invalid actions of the Government Authorities and authorized representatives;*

7.1.9 to use the Concession Territory for Prospecting Minerals in order set by the law;

[…]

7.2 According to this Agreement the Concessionaire shall have following obligations:

7 .2.1 to comply with terms and conditions of this Agreement:

7.2.2 to conduct business activities in strict compliance with the legislation of the Republic of Uzbekistan and conditions of this Agreement;

7.2.3 to prepare Interim Bank Feasibility Study which creates the basis for negotiations pertaining the Second Decree on Concession and completion of Bank Feasibility Study.

7.2.4 to return to the Government the equipment given to him under this Agreement within two (2) months from the expiry of this Agreement or in the event of early termination of this Agreement;

7.2.5 to keep books in accordance with the legislation of the Republic of Uzbekistan;

7.2.6 to fulfil all other obligations under the legislation of the Republic of Uzbekistan;

7.2.7 to use Subsurface Resources only for the purposes of this Agreement;

7.2.8 to carry out works in compliance with the Work Programme;

7.2.9 to carry out thorough Prospecting complying with the principles of efficient exploitation and preservation of Subsurface Resources;

7 .2.10 to prevent selective mining of particular sites of the Deposit with high concentration of minerals, excessive minerals waste during mining and processing;

7.2.11 to keep records of balance and amounts of extracted minerals, any losses and ore dilution, as well as to carry out timely re-evaluation and confirmation of resources and write offs;

7.2.12 to keep records of concomitant Minerals and elements temporarily not used;

[…]"

In this Draft Concession Agreement I, the relevant terms "Subsurface Resources Management Work", "Bank feasibility Study", "Interim Bank Feasibility Study" and "Second Decree on Concession" were defined as follows:

“"Bank Feasibility Study" shall mean final and comprehensive profitability study of preparations to develop Khandiza deposit, and this study is provided by the Concessionaire and the Operator depending on the terms of this Agreement, the Decree on Concession and the Second Decree on Concession; the study shall include main option, an option with low initial parameters, and an option with high initial parameters, where the low initial parameters option reaches Minimal Project Economic Indices and is presented in the form reasonably acceptable by international banks and other major financial institutions granting financial credits for Debt financing, and this study after its completion represents a Work Programme for Subsurface Resources Management Works within the Deposit.

"The Second Decree on Concession" shall mean the decree made by the Cabinet of Ministers of the Republic of Uzbekistan after the Interim Bank Feasibility Study is finished and before the Bank Feasibility Study is completed; this decree shall set the terms of the Taxation Agreement and the Concession Charge so that the Bank Feasibility Study is able to reach Minimal Project Economics Indices in the form acceptable for both Parties.

[…]

"Interim Bank Feasibility Study" shall mean a Bank Feasibility Study based on the indices before taxes, royalty and Concession Charge payment, which are included in the Bank Feasibility Study after the Second Decree on Concession.

[…]

“Subsurface Resources Management Works" shall mean all types of activities the Concessionaire and the Operator have rights to conduct under this Agreement including, but not limited to Interim Bank Feasibility Study and Bank Feasibility Study, Geologic Prospecting, Mining, storing, ragging, granulating, processing, transporting and selling of raw materials or products.”

168. On 29 September 2000, Mr. Akhmedov, Deputy Head of the Department of Investment Programs of the CabMin, sent a letter to Goskomgeology attaching the feedback from relevant ministries and departments on the Draft Concession Agreement I and the draft Decrees of the CabMin (Exh. R-284).

169. By the end of 2000, Claimant completed a drilling programme of 31 underground holes (Claim. SoC. 17.09.2012, paras. 151 fol.)

170. On 23 May 2001, based on feedback received from various ministries and departments which had set up a working group to review the concession documents, Goskomgeology resubmitted an updated draft of concession agreement (hereinafter “Draft Concession Agreement II”) (Exh. R-285) and a

draft Decree of CabMin (Exh. R-983) addressing the feedback received from the various ministries and departments.

The draft Decree of CabMin provided as follows:

> *"[…] the Cabinet of Ministers decides:*
>
> *1. To provide "Oxus Resources Corporation" company (UK) for the development with Khandiza polymetallic deposit, which is located in Surkhandarya region, according to Appendix.*
>
> *2. To authorize the State Committee of the Republic of Uzbekistan on Geology and Mineral Resources:*
>
> *to sign an agreement with "Oxus Resources Corporation" company for the development of Khandiza polymetallic deposit;*
>
> *to issue a license in due course for subsoil use within the territory specified in Appendix.*
>
> *3. To take note that upon the results of the developed bankable FS of the project the specific form of cooperation with "Oxus Resources Corporation" will be determined on the basis of the concession agreement or production sharing agreement.*
>
> *4. To provide "Oxus Resources Corporation" company with:*
>
> *an exclusive right to perform geology explorations on the territory specified in Appendix with the subsequent development of any of the identified deposits in the specified territory for a period of development and expertise of the project FS, with prolongation of this right in the case of a decision on the further implementation of the project up to the full development of the deposit;*
>
> *a preferential right to provide new territory for the continuation of the surveys and explorations in the case of not detecting cost-effective deposits for development within the territory specified in Appendix."*

171. <u>On 16 October 2001</u>, Mr. Newal from CSMA issued an **"*Audit Report on Khandiza Drilling Programme and Revised Manual Resource Estimation*"** (hereinafter "CSMA Resource Audit 2001") (Exh. C-163). CSMA reported as follows:

> *"Oxus believed that much of the previous work had been based on unreliable density information and inappropriate ore characterisation. To counter this, Oxus began a programme of underground drilling. By April 2001, 31 holes, totalling 3,776m, had been completed that significantly improved the confidence of the resource base both in terms of ore body geometry and ore parameters.*

From this work, Oxus has been able to provide a revised resource estimate based on a 2% and 5% zinc cut-off, and considering only eight of the nine ore bodies as Ore body 1 was deemed to be sub-economic.

*The Oxus resource work was carried out in accordance with traditional Soviet cross-sectional and irregular blocking methods, using the B and C1 resource categories. It is the opinion of CSMA that the categories defined within the Soviet guidelines for polymetallic deposit resource evaluation**, are of sufficient confidence and reliability in this case, to be considered as Measured and Indicated resources in western terminology (JORC 1999)**.*

[…]

"CSMA has audited the drilling programme and resource calculation methodology and is satisfied that both have been undertaken in a diligent and correct manner.

The result is that Oxus now has a robust and detailed geological interpretation of the deposit down to the 1 ,200m level elevation, and has sufficient data to embark on a revised Datamine® computer software resource evaluation as a basis for commencing a detailed mine design to full feasibility study level.

[…]" (emphasis added)

CSMA further concluded as follows:

"10.0 EXPLORATION POTENTIAL

[…]

CSMA has reviewed much of the exploration data associated with these areas and can conclude that many of the localities listed are of interest for both gold and base metals, although nearly all are at an early stage of exploration.

[…]

10.4 Conclusion

Recent re-interpretation work by Oxus has defined a number of drill targets close to the existing Khandiza deposit, which CSMA believes provide a good opportunity to increase the resources at the project.

In addition, along strike from Khandiza to the east lie a number of interesting base metal prospects that require further investigation. Similarly, several very promising mineral occurrences have been identified and partly explored further afield within the SE Uzbekistan Exploration Concession, although again, all are at an early stage of exploration.

Overall, CSMA believes that Oxus holds ground that has the potential to host other significant base metal (and gold) deposits, but that considerable work will be required to achieve this reality.

11.0 FUTURE WORK PROGRAMME & COSTS

CSMA recommends that Oxus should proceed with a revised Datamine® cmnputer software resource evaluation as a basis for a detailed mine design and engineering studies as part of the ongoing feasibility study.

Having completed the underground drilling programme and revised geological interpretation, it is considered that the revised Feasibility Study Cost, excluding further drilling and exploration and Initial Concession Fee payment, is US$3.12m. Table 11.1 provides details of the cost centres.

172. On 30 November 2001, the Ministry of Finance provided CabMin with some comments about the draft documents sent by Goskomgeology. Namely, the Ministry of Finance indicated that it considered it "*inappropriate to transfer Khandiza deposit for use by 'Oxus Resources Corporation' prior to the provision of the developed and approved FS or determination of the forms of cooperation and share of the Uzbek party in the outcomes of the development*" (Exh. R-1106_1) (Resp. Am.Rej. 21.02.2014, para. 102).

173. On 14 December 2001, Mr. Akhmedov on behalf of Goskomgeology and Mr. Wilkins on behalf of ORC entered into the ***Supplemental Agreement No. 3 to the PEA*** (Exh. R-22), thereby amending the PEA as follows:

(i) Extending the duration of the PEA for a further two years as of 14 December 2001, i.e. until 13 December 2003;

(ii) To add the following paragraph to Article 4(ii) of the PEA:

"Based on the fact that Goskomgeology is conducting exploration at its own expense within the Expanded Area, the Parties hereby agree that in the event that Goskomgeology makes a discovery of a potential deposit within the Expanded Area as a result of such exploration, and Oxus subsequently takes a decision to mine that deposit, then Oxus shall reimburse the exploration expenditure incurred by Goskomgeology on that particular deposit from 1 January 1997 onwards. Goskomgeology hereby agrees to supply Oxus with information on its expenditure in the Expanded Area from 1 January 1997, and to keep Oxus informed as to the extent of its ongoing expenditure."

In its preamble, the Supplemental Agreement No. 3 referred to the Parties' discussion about a Concession Agreement as follows:

"WHEREAS Oxus and the Government of the Republic of Uzbekistan are currently in negotiation regarding the possibility of Oxus developing the

Property by way of a concession agreement or a production sharing agreement;

WHEREAS Oxus wishes to complete a definitive feasibility study on the Property and to commercially develop the Property on terms mutually acceptable to the Parties;

[…]"

174. On 1 July 2002, OML (by then renamed Oxus Services Limited) assigned the PEA to OMCL (later on renamed Marakand), a wholly-owned subsidiary of ORC, (Exh. C-42; see above para. 7 and 8).

175. On 20 September 2002, Mr. Akhmedov on behalf of Goskomgeolgy and Mr. Wilkins on behalf of Marakand entered into the ***Supplemental Agreement No. 4 to the PEA*** (Exh. C-164). By this Agreement, OMCL was formally made a party to the PEA, thereby replacing ORC.

176. On 17 October 2002, CabMin issued **'*Decree No. 359 On the Development of the Khandiza Polymetallic Deposit'*** (hereinafter "Decree No. 359") (Exh. C-165), providing as follows:

"[…] *the Cabinet of Ministers hereby:*

1. *Grants to Oxus Resources Corporation the exclusive right to develop the Khandiza Polymetallic Project (Surkhandariskaya Region) in respect of the territory shown in Annex 1;*
2. *Authorises the State Committee of the Republic of Uzbekistan for Geology and Mineral Resources to sign an agreement with Oxus Resources Corporation for the preparation of a feasibility study in respect of the Khandiza Polymetallic Project;*
3. *Takes note that:*

- *Oxus Resources Corporation together with Goskomgeologia are to complete the development of a feasibility study within 24 months of the date of this Decree [i.e., until 16 October 2004];*
- *Oxus Resources Corporation is granted the exclusive right to conduct exploration during the period in which such feasibility study is prepared;*
- *depending on the results of such feasibility study, Oxus Resources Corporation shall have the exclusive right to conduct negotiations for determining the concrete form of cooperation for the development of the Project (concession agreement or production sharing agreement), as well as the financing and other conditions for the development of the Project;*

- *Oxus Resources Corporation is granted a right of first refusal in respect of the award of new parcels of land for the continuation of exploration work in the event that commercially viable deposits are not discovered in the territory shown in Annex 1,*

- *Oxus Resources Corporation assumes the obligation to assure a full geological study and the rational use of mineral resources.*

177. On 16 October 2003, Mr. Akhmedov on behalf of Goskomgeology, Mr. Polikashin on behalf of ORC and Mr. Wilkins on behalf of Oxus Gold and Oxus Minerals entered into the ***Supplemental Agreement No. 5 to the PEA*** (Exh. C-49), which amended the PEA as follows:

    (i) Oxus Gold shall also become a Party to the Agreement until such time as OMCL and Goskomgeology, with the approval of the CabMin, have signed the appropriate agreement(s) on the further development of the Property;

    (ii) The duration of the PEA, which was to expire on 13 December 2003 according to the Supplemental Agreement No. 3 (see above para. 173), was extended until 17 October 2004.

    In its Preamble, the Supplemental Agreement No. 5 to the PEA referred as follows to the Decree No. 359:

    > *"WHEREAS, Decree # 359 adopted by the Cabinet of Ministers of the Republic of Uzbekistan on 17 October 2002* ***granted ORC the exclusive rights to develop the Property*** *and noted that, inter alia, ORC shall complete a feasibility study in respect of the Property by 16 October 2004 and, based on the results of such study,* ***shall have the exclusive rights to hold negotiations to develop the Property by way of a concession agreement or a production sharing agreement****;"* (emphasis added)

178. On 24 October 2003, CSMA issued an **"*Expert Report on Khandiza and SE Uzbekistan Exploration Areas*"** (hereinafter "CSMA Expert Report 2003") (Exh. C-163). This report was prepared in view of the AIM listing of Marakand, which would be the entity in charge of developing the Khandiza Project. CSMA concluded as follows concerning the estimated value of the Khandiza Project:

    > *"CSMA is not able to apportion any definitive value to the Khandiza project at this stage. However, a number of studies have been undertaken on this project in recent years based on different resource bases, capital estimates, metal prices and concentrate sales options etc. The present Marakand approach is to proceed into a Feasibility Study at the earliest opportunity and to examine in detail the various options for the mining, processing and*

likely concentrate marketing routes. Only at this point will a value be realistically ascribed to the project.

All previous studies have shown that the project can exhibit net present values in excess of £16M not including any upside potential for the additional explorations areas. Accordingly, CSMA can confirm that subject to base metal prices maintaining their present (October 2003) levels there is every likelihood that the Khandiza Project Feasibility Study will indicate an NPV in excess of £16M."

179. On 4 December 2003, Marakand was listed on AIM of the London Stock Exchange on the basis of the Khandiza Project. Upon listing, Marakand's market capitalization amounted to approximately USD 75 million (Claim. Am.Reply. 23.08.2013, para. 195; Exhs. C-150/R-603). Marakand's Offering Document provided as follows as concerns its rights in the Khandiza Project:

> *"Marakand Minerals Limited together with Oxus and ORC has been granted the exclusive rights to explore and develop the Khandiza Deposit, a zinc, copper, lead, silver and gold deposit located in the Surkhandarya Province of southeast Uzbekistan, subject to the negotiation of the appropriate form of legal co-operation and the granting of necessary licences and permits."* (p. 12)

180. Between January and August 2004, LN Metals was able to secure for Marakand letters of intent for the placement of concentrates with a number of reputable smelters, including the AMGK, Ust-Kamenogorsk (Glencore), Asturiana de Zinc (Xstrata), Chelyabinsk (Euromin) and LN Metals itself (Exhs. C-169 to C-173). According to Claimant, these letters and their possible subsequent transformation into sales agreement (Exhs. C-193 to C-196) confirmed that the Khandiza Deposit was viable (Claim. Am.Reply. 23.08.2013, para. 184).

1.3 The Discussions Around the Bankable Feasibility Study: The Beginning of the Deadlock

181. On 11 October 2004, within the 24 months time limit provided in Decree No. 359 (see above para. 176), Marakand submitted to Respondent the *"**Khandiza Feasibility Study**"* (hereinafter "Khandiza Feasibility Study 2004" also referred to as the "Bankable Feasibility Study") (Exhs. C-149/R-182), which had been audited by WAI. This Study, which is several hundreds of pages long, covered the various aspects of the mining project including the costs assessment and economic models envisaged.

According to this Bankable Feasibility Study, there would be three mining Phases: (i) Phase 1: mining from 1300m elevation upwards to 1460m elevation; (ii) Phase 2: mining from 1100m elevation upwards to 1300m elevation; and (iii) Phase 3: mining below 1100m elevation (pp. 1-5). This strategy would ensure that mining is started at the most productive elevations, with the largest resource tonnes per vertical metre, and therefore the greatest flexibility underground.

With regard to the status of negotiations between Marakand and Goskomgeology, the Project Summary of the Bankable Feasibility Study provided as follows:

> *"1.1 Introduction*
>
> *The Khandiza Project is being proposed for development by Marakand Minerals Limited (formerly known as Oxus Minerals Corporation Limited), a company listed on AIM in London since December 2003.*
>
> […]
>
> *Marakand holds rights to the Khandiza Project by virtue of Decree No. 359, issued on 17 October 2002. This Decree was issued to Oxus Resources Corporation and later assigned to Marakand. Pursuant to Decree No. 359, Marakand has amongst others:*
>
> - *The exclusive rights to develop the Khandiza Project*
> - *To complete a feasibility study by 17 October 2004*
> - *The exclusive right to conduct negotiations for a concession or production sharing agreement*
>
> *The positive results of this Feasibility Study concludes the first leg in the development process and Marakand will now continue to finalise the terms of the proposed Concession Agreement.*
>
> […]
>
> *1.11 Project Implementation*
>
> *The feasibility study has made various developmental assumptions which will require confirmation and completion during the pre-development and construction phase. These assumptions include:*
>
> - *The completion of negotiations with Goscomgeologia and the Cabinet of Ministers of the Republic of Uzbekistan concerning the terms of the Concession Agreement proposed by Marakand*
> - *Receipt of the formal Decree from the Cabinet of Ministers establishing the formal rights to the Khandiza Project pursuant to the terms of the Concession Agreement. The Decree will also include instructions for assistance from the various Ministries of government for the permits and other project related approvals required by Marakand to*

implement development and construction activities, and ongoing operational requirements

[…]"

According to Claimant, upon submission of this Study, Marakand's market capitalization reached its peak, at approximately USD 124 million (Claim. Am.Reply. 23.08.2013, para. 195, Charter WS).

182. On 15 October 2004, Mr. Akhmedov on behalf of Goskomgeology and Mr. Stuart on behalf of Marakand entered into the ***Supplemental Agreement No. 6 to the PEA*** (Exh. C-50). This Agreement was entered into in view of the expiration on 17 October 2004 of the Supplemental Agreement No 5 (see above para. 177) and under the following context:

"[…]

WHEREAS, on the 11th October 2004 Marakand submitted the Khandiza Feasibility Study to Goscomgeology in accordance with Decree No 359 of the Cabinet of Ministers of the Republic of Uzbekistan dated 17th October 2002, and wishes to commercially develop the Khandiza Polymetallic Mine on the basis of a concession;

WHEREAS, the Parties are in the process of negotiating a Concession Contract based on the provisions of Decree No 359 of the Cabinet of Ministers of the Republic of Uzbekistan dated 11 October 2002;

WHEREAS, the Parties acknowledge that a further Decree of the Cabinet of Ministers of the Republic of Uzbekistan.shall be required in order to grant the concession under such a Concession Contract;

WHEREAS, Marakand has notified Goscomgeology on 1st of October 2004 that it wishes to continue exploration works within the areas, set out in the Appendix to the present Supplementary Agreement # 6 (the "Territory");

WHEREAS, the Parties wish to petition the Cabinet of Ministers of the Republic of Uzbekistan to confirm the exclusive rights of Marakand to carry out geological exploration works within the Territory;"

Under this agreement, the Parties agreed on the following amendments to the PEA with regard to the exploration of the Expanded Area:

"(i) Marakand agrees that the company shall be given the right to carry out geological exploration works for the sole purpose of identifying polymetallic mineralisations;

(ii) Goscomgeology shall reserve for itself the right to carry out geological explorations works within the Territory in respect of all types of valuable mineables;

(iii) the duration of the Primary Exploration Agreement shall be extended until 31st December 2004, or if such date is earlier, till the moment of the conclusion between Goscomgeology and Marakand of a New Exploration ***Agreement in respect of the Territory replacing the Primary Exploration Agreement****."* (emphasis added)

As concerns the "*Territory replacing the Primary Exploration Agreement*", Appendix 1 to the Supplemental Agreement No. 6 defined such area in that it reduced the previous Expanded Area from 5,259 km^2 to 1,199.5 km^2.

183. On 19 November 2004, Mr. Dabizha from AMGK, which formed part of the working group in charge of reviewing the concession documents and provide feedback to Goskomgeology, issued an "Expert Opinion as to the Feasibility Study of Development of Khandiza Mutli-Metallic Ore Field Expressed by Experts of the Joint-Stock Company Almalyk Mining and Metallurgical Combine" (hereinafter "AMMC Expert Report") (Exh. R-98). In this Expert Opinion, AMMC concluded as follows:

> *"The main technical solutions proposed for construction of facilities of the Khandiza Mining and Metallurgical Combine shall be positively assessed […]*
>
> *At the same time:*
>
> 1. *Calculation of operating reserves at the zinc stoping limit of 4% shall be approved as provided by the Cabinet of Ministers of the Republic of Uzbekistan (Article 37 of the Law on Subsoil).*
>
> 2. *In our opinion, operating costs of ore-processing are excessively high compared to those at the Almalyk Mining and Metallurgy Combine. They have to be recalculated and set out in more detail.*
>
> 3. *The level of detail of the financial and economic sections of the feasibility study report is insufficient. Generalised calculations contain all the cost items required, whilst there are some misprints as to the net income (pages 14-16) and total income (pages 14-17), which did not affect the results of the calculation. The internal rate of return made 28.3%.*
>
> 4. *Financial calculations have some reserve for an increase of the costs including:*
>
>   - *incidental operating costs of 15% (see Section 12);*
>
>   - *electric power costs paid for at two tariffs (for normal and overload modes) (see pages 12-4, paragraph 12.2.8);*
>
>   - *replacement of means of transportation (according to the norms effective in the Republic of Uzbekistan, means of transport shall be written off after 7 years of operation, whilst the Feasibility Study*

provides for a two times shorter useful life) (see page 12-4, paragraph 12.2.9).

5. *The Feasibility Study does not provide for or make too low allowances for the following taxes:*

   - infrastructural tax (tax deduction);

   - income tax (tax deduction);

   - subsoil tax (1% of the total income instead of 8.1% for copper, 5% for gold and 8% for silver).

6. *Return or payment for precious metals produced after processing of copper concentrate on tolling terms shall be considered.*

Findings

The Feasibility Study of the Development of Khandiza Multi-Metallic Ore Field is recommended for approval with view to all remarks and suggestions set out above with the following parameters:

1. *Total cost of the project – USD 71.23 thousand:*

   including:

   mine construction – USD 15.45 thousand;

   including:

   mining and transportation equipment – USD 6.19 thousand;

   plant construction – USD 25.74 thousand;

   administration, infrastructure and other direct costs – USD 24.89 thousand;

   other costs – USD 5.15 thousand.

1.[[3]] *Total annual extraction and production – 650 thousand tons.*

2. *Estimated number of employees – 712.*

3. *Duration of construction – 13 months.*

4. *Return of borrowed funds – 29 months.”* (references omitted)

184. On 25 November 2004, by letter No. 06/1017, Mr. Akhmedov, Chairman of Goskomgeology wrote to the Deputy Prime Minister Sultanov, informing the Ministry on the progress of the Khandiza Project as follows (Exh. C-174) (Claim. Am.Reply. 23.08.2013, para. 187):

[3] The numbering, which is apparently erroneous, is reproduced as in the source document.

"[…]

In accordance with the terms determined by the Decree [No. 359] Marakand Minerals Limited has completed the Feasibility Study in October of this year with Concession agreement being selected as a form of cooperation.

Cost of project- is US$71.2M. 0.65Mt of ore will be processed per year and 712 jobs will be created.

The following is proposed for prompt implementation of project:

- *To establish a working group consisting of representatives of concerned ministries and authorities in accordance with the attachment;*
- *To entitle the working group to attract appropriate experts of ministries and authorities for solution of appropriate problems;*
- *To instruct the workings group: within one month to expertise the Feasibility study on Khandiza polymetallic deposit development project;*
- *Before February 1, 2005 to prepare draft Concession agreement and draft Decree of the Cabinet of Ministers on project implementation conditions and submit them to the Cabinet of Ministers of the Republic of Uzbekistan for review and consideration."*

185. <u>On 30 November 2004</u>, the Deputy Prime Minister Sultanov issued a Letter No. 06-1/97-34 forwarding the Bankable Feasibility Study to eight agencies and ministries, and directing them to "*review* […] *the issue of industrial development of Khandiza polymetallic deposit and produce by 1 February 2005 agreed decision*" (Exh. C-175) (Resp. SoD.Class. 04.04.2013, para. 81; Resp. Am.Rej. 21.02.2014, paras. 123 fol.)

186. <u>On or around 21 December 2004</u>, Marakand in cooperation with Goskomgeology submitted to the Cabinet of Ministers a **"*Draft Decree of the Cabinet of Ministers and Concession Agreement*"** (hereinafter "Draft Concession Agreement III"), including a Draft Decree of the Cabinet of Ministers approving the Bankable Feasibility Study and authorizing Claimant to proceed with the development of the Khandiza mine, a Draft Concession Agreement and a draft agreement for use of the subsoil (Exh. C-176, see also Exh. R-294) (Claim. Am.Reply. 23.08.2013, para. 214).

According to the Draft Concession Agreement, the Concession was to have the following object:

" Article 3. CONCESSION. GRANTING OF CONCESSION

3.1 The Concession is the exclusive permission given in the name of the State by the Concession Body to the Concessionaire to :

3.1.1 mine the ore existing within the Territory;

3.1.2 treat or process the ore mined from the Territory in such way and manner as shall render it or any products obtained from it into a saleable form of metal such including, but not limited to zinc, lead, copper, silver and gold (the "Products");

3.1.3 freely and independently sell the Products on such terms and conditions as determined by the Concessionaire provided the provisions of Article 7.3 shall be observed;

3.1.4 freely receive and dispose of any of the proceeds received as a result of the financial -economical activities of the Concessionaire under the Contract; and

3.1.5 receive a license on the use of the subsoil within the boundaries of the Territory for the period of the validity of the Contract with the inclusion of all of the rights foreseen by the Law of the Republic of Uzbekistan "On Subsoil."

As concerns the Concession Fee, the Draft Concession Agreement and the relevant Annex 3 provided as follows:

" Article 8. CONCESSION FEE. TAXES AND OBLIGATORY PAYMENTS RECORDS AND ACCOUNTS

8.1 The Concessionaire shall pay the Concession Fee, taxes and obligatory payments, keep records and accounts in accordance with the Regulation on the peculiarities of taxation, keeping records and accounts, set out in Annex 3 to the Contract."

" Annex No. 3 to the Concession Contract Regulation on the peculiarities of taxation, records and accounts

[…]

3. Concession fee, taxes and obligatory payments

3.1. The Concessionaire shall pay to the Concession body a fee (the "Concession Fee") as follows:

3.1.1. the amount of five hundred thousand US Dollars (500.000 US$) shall be paid within five (5) working days after the period of twelve (12) months following (i) the signing of the Contract and (ii) the confirmation by the Concessionaire to the Concession body that Financing is available; and

3.1.2. the amount oftwo million US Dollars (2 000 000 US$) shall be paid within five (5) working days after the period of twelve (12) months following theCommencement of Production; and

3.1.3. the amount of three million US Dollars (3 000 000 US$) shall be paid within five (5) working days after the period of twenty four (24) months following Commencement of Production; and

3.1.4 the amount of four million and five hundred thousand US Dollars (4 500 000 US$) shall be paid within five (5) working days after the period of thirty six (36) months following Commencement of Production; and

3.1.5 during the period of five (5) years following Commencement of Production, the amount of one US Dollar (1 US$) per ton of ore mined from the Territory shall be paid monthly in arrears within five (5) working days after the end of each month; and

3.1.6 after the period of five (5) years following Commencement of Production, the amount of two US Dollars (2 US$) per ton of ore mined from the Territory shall be paid monthly in arrears within five (5) working days after the end of each month.

3.2. The Concessionaire shall be exempt form the payment of all taxes and the making of all obligatory payments with the exception of:

3.2.1 tax on the use of the subsoil (royalty), at the rate of one percent (1 %) of the revenue derived from the sale of Products irrespective of the kind of metal mined,

3 .2.2 ecology tax at the rate of one percent (1%) of production expenditure and expenditure for the period after the deduction of taxes, duties and payments to the Republican road fund, the state fund for employment assistance and the Pension fund of the Republic of Uzbekistan in accordance with the Legislation of the Republic of Uzbekistan;

3.2.3 payments to the Republican road fund at the Ministry of Finance of the Republic of Uzbekistan at the rate of one and a half percent (1.5%) of the sales value of the Products;

3.2.4 unified social payments at the rate of thirty three percent (33%) of the fund of remuneration of labour of the Operator;

3.2.5 property tax at the rate of one point seventy five percent (1,75%) of the average rest value of assets and non-material assets;

3.2.6 tax on the use of water resources to the amount of 490, 35 sum per 1 cubic meter from surface sources and 630,75 sum per 1 cubic meter from underground sources of water;

3.2.7 land tax to the amount of 9 4 79 sum per one hectare with an exemption for the period of two years

As concerns the further financial aspects of the Concession, the Draft Concession Agreement provided as follows:

> “ *Article 9. TECHNICAL ECONOMICAL PLAN AND BUSINESS PLAN*
>
> 9.1 *The Technical Economical Plan (TEO) and the Business Plan shall be the main documents that shall regulate the financial-economical activity of the Concessionaire under the Contract.*
>
> 9.2 *The Parties shall approve and accept the TEO set out in the Annex 2*[[4]] *to the present Contract, as the first TEO. The approval of each following TEO or making changes and amendments to the first TEO shall be carried out in accordance with the procedure established by the Legislation of the Republic of Uzbekistan.*
>
> 9.3 *The Business Plan shall determine the objectives and the strategy of the financial and economical activity of the Concessionaire for a period of five (5) years. It shall include an overview of estimated monthly activities, estimates of income, expenditures and production for the first year and similar information on the planned quarterly activities during the second year of the Business Plan, the planned annual activities for the remaining three (3) years ofthe Business Plan. The Business Plan shall further identify the sources of financing as well as any relevant financial guarantees involved.*
>
> 9.4 *The first Business Plan shall be submitted to the Concession Body no later than ninety (90) days before the commencement of production activities.* […]
>
> *Article 13. FINANCING*
>
> 13.1 *The organisation of the financing necessary for the conduct of the activities by the Concessionaire under the Contract and the TEO shall solely be the responsibility of the Concessionaire.*
>
> 13.2 *The Concessionaire and the Operator shall be entitled to open accounts in banks both in national currency of the Republic of Uzbekistan and in foreign currency within and outside the Republic of Uzbekistan in accordance with the procedure established by the Legislation of the Republic of Uzbekistan.”*

187. <u>Between December 2004 and February 2005</u>, the various agencies replied to Goskomgeology and/or to CabMin with their comments on the Bankable Feasibility Study (Exhs. R-293, R-296, R-421, R-422, R-424, R-426-428, R-430-431, R-513-515, R-516) (Resp. SoD.Class. 04.04.2013, para 81; Resp. Am.Rej.

[4] This Annex was included neither in Exh. C-176 nor in Exh. R-294.

21.02.2014, paras. 121 fol.). This also gave rise to further correspondence from Marakand (Exhs. R-429, C-568-572, C-576-580, C-582-587) (Claim. Am.Reply. 23.08.2013, para. 226), in which Marakand further explained the rationale underlying both the cash flows and the internal rate of return laid down in the Bankable Feasibility Study and the Draft Concession Agreement. The Parties disagree whether the reactions of the government agencies or lack thereof constitute an approval or a rejection of the Bankable Feasibility Study.

188. On 3 January 2005 (mistakenly dated 2004 in the exhibit), Mr. Akhmedov on behalf of Goskomgeology and Mr. Stuart on behalf of Marakand entered into the ***Supplemental Agreement No. 7 to the PEA***, in view of the expiration on 31 December 2004 of the Supplemental Agreement No. 6 (see above para. 182) (Exh. R-24) (Claim. Am.Reply. 23.08.2013, para. 109). This Agreement prolonged the validity of the PEA to 31 March 2005 (mistakenly dated 2004 in the exhibit) or "if such date is earlier, till the moment of" the conclusion of a new PEA.

189. On 5 February 2005, the Department Head of the Experts' Examination of Urban Planning Documentation issued an Expert Report which had been commissioned by Goskomgeology (hereinafter "Uzbek State Expert Report"). In this report, the pool of experts concluded as follows:

> *" 5. Conclusions*
>
> *5.1. The feasibility study "Development of the Khandiza Polymetallic Deposit" has been drawn up with deviations from the requirements of the regulatory documents in effect in the republic.*
>
> *Design of the underground mine, ore-processing plant, slurry pipeline and other sections of the feasibility study require elaboration with the participation of the O'zgeotexliti specialized institute and the republic's design organizations that in command of the construction regulations and rules of the Republic of Uzbekistan, as well as special regulatory documentation of the industry.*
>
> *5.2. Considering the above, the preliminary feasibility study "Development of the Khandiza Polymetallic Deposit" requires revision in light of the comments of this experts' conclusion."*

190. On 18 February 2005, by letter No. 3-2/7-583, the Ministry of Economy provided observations regarding Marakand's Draft Decree of the Cabinet of Ministers, its Draft Concession Agreement III, and its Draft Agreement on Use of a Section of the Subsoil for Geological Study (see above para. 186) (Exh. R-296; Resp. Am.Rej. 21.02.2014, para. 127). As concerns in particular the financial aspects of the Draft Concession Agreement III, the Ministry of Economy commented – inter alia – as follows:

"The targets forecast for concession development and sale of the finished product under the project in the previous feasibility study do not make it possible to draw an entirely objective conclusion. According to the previous calculations, the net flow of monetary resources amounts to $179.2 million, whereby only $50.7 million will be paid to the Uzbek side. Bearing in mind the rather high internal profit rate (27.4%), after revision of the feasibility study, the draft of the concession agreement should be clarified on the basis of specific substantiated calculations and balance of interests of each side, taking account of the increase in concession fee, both pegged and variable, for the produced ore.

It then concluded its letter with the following paragraph:

"During revision of the document drafts presented, apart from those enclosed in this letter, the comments and proposals of the Ministry of the Economy regarding the feasibility study of the draft of "Development of the Khandiza Polymetallic Deposit" previously sent to Goskomgeology should also be taken into account. The question of adopting a government decision on the concession agreement cannot be examined until the feasibility study draft has been approved."

191. On 28 February 2005, Marakand submitted to the Ministry of Finance an explanation note comparing the Bankable Feasibility Study "concession fee" economic model as suggested by Marakand in the Draft Concession Agreement III, and a "full taxation" scenario, assuming that Marakand would pay no concession fee, but rather all taxes without any exemption (Exh. C-568) (Claim. Am.Reply. 23.08.2013, para. 231). In its accompanying letter, Marakand stated as follows:

"Marakand feels that the general review made by the various government agencies to date may have lead to some misunderstandings as to the tax and concession fee regime proposed in the Feasibility Study. We have attached a background summary (refer Attachment 1) of how Marakand sees its position and proposal. However, to allow for a proper evaluation, Marakand seeks a working meeting with you so that a more detailed presentation and discussion can be made."

As concerns the explanation note, it stated – inter alia – as follows:

"At the present time, the source of project finance remains subject to receipt of the proposed Decree to formally approve the Khandiza Project. Marakand has maintained contact with several interested lenders; however no firm involvements can be agreed until the project Decree has been issued."

192. On 9 March 2005, a Meeting was held between Marakand and the Ministry of Finance, at which Marakand presented the Bankable Feasibility Study "concession fee" economic model, the "full taxation" model and a "compromise

economic scenario" (Claim. Am.Reply. 23.08.2013, para. 247). Marakand followed-up on this Meeting on 10 March 2005 providing a 'cleaner' version of the "concession fee" economic model. A Meeting was held between Goskomgeology and Marakand concerning this issue on 15 March 2005, during which Marakand reiterated its request that the Ministry of Finance issue its conclusions on the Draft Concession Agreement. Another follow-up Meeting was held on 22 March 2005 between Marakand and the Ministry of Finance (Exh. C-552) (Claim. Am.Reply. 23.08.2013, para. 247).

193. On 23 March 2005, a Meeting was held between Marakand and the Agency for Foreign Economic Relations regarding its comments on the Draft Concession Agreement. Marakand provided the Agency with the requested information regarding the cost of capital equipment on 24 March 2005 (Exh. C-588) (Claim. Am.Reply. 23.08.2013, para. 245).

194. On 24 March 2005, a Meeting was held between Marakand and Mr. Khasanov (Deputy Minister of Economy), Ms Malkina (Head of the Department of Industrial Development) and Mr. Yusupov (Director of the Center[5]). Following this Meeting, Mr. Casson (Corporate Finance Manager of Marakand) sent a letter to the Deputy Minister of Economy summarizing the concerns raised by the Uzbek Government during the Meeting and setting out an action plan to address these concerns (Exh. R-300).

195. On 29 March 2005, Mr. Casson from Marakand sent a letter to the Deputy Minister of Economy, following-up on his action plan and providing the Ministry with additional information (Exh. R-301). Mr. Casson concluded his letter as follows:

> *"We hope this additional information clarifies the outstanding concerns of the matters previously raised by the Ministry of Economics. We note that you will be arranging a meeting to discuss the cut-off grade issue, together with representatives of Goscomgeology and others, once the data has been provided to you.*
>
> *We thank you again for your comments and look forward to working with you on finalizing technical and commercial matters."*

196. On 31 March 2005, the Cabinet of Ministers held a Meeting with the senior officers of the Informational and Analytical Department for External Relations, and representatives[6] of Goskomgeology, the Ministry of Economy, the Ministry of Finances and the Ministry of Justice concerning the approval of the Concession.

[5] Exhibit R-300 refers to "Center" without specifying which center is meant.
[6] The specific representatives are not mentioned in the document.

The Protocol of the Meeting stated as follows (Exh. R-302) (Resp. SoD.Class. 04.04.2013, para. 89; Resp. Am.Rej. 21.02.2014, para. 149):

> *"Acknowledged:*
>
> 1. *Comments of the Ministry of Finances and the Ministry of Economy that the production cost calculation of Marakand Minerals Ltd in mining of Khandiza complex deposit are not presented in due form, which prevents drawing up an objective conclusion as to the company's taxation; Representative of the Ministry of Finances proposed taking into account as base of calculation similar calculation made, in particular, by AGMC.*
>
> 2. *Information of the representative of the Ministry of Justice on that, while the Law on Concessions has been adopted in 1995, the legislation yet lacks means for its implementation.*
>
> *Resolved regarding the results of meeting:*
>
> 1. *Goskomgeologii shall assign responsible officer within two days with instruction to complete together with the Ministry of Finances and the Ministry of Economy the production cost calculations (dividing by each product name in standard form).*
>
> 2. *Goskomgeologii and the Ministry of Finances in cooperation with the State Tax Committee, on the basis of complete reports and for the benefit of the Republic of Uzbekistan, shall within one month present the substantiated conclusion on the tax concessions to Marakand Minerals Ltd.*
>
> 3. ***Ministry of Finances, Ministry of Economy, and Ministry of Justice in cooperation with Agency of External Relations within one month shall prepare a conclusion on the necessity to permit mining of Khandiza complex deposit on terms of concession, and suggest the concession fee amounts.***
>
> 4. *Following the results of the above issues, enter the data on the operations performed in the Information and Analytical Department for External Relations."* (emphasis added)

197. On 1 April 2005, Mr. Akhmedov on behalf of Goskomgeology and Mr. Charter on behalf of Marakand entered into the ***Supplemental Agreement No. 8 to the PEA***, in view of the expiry on 31 March 2005 of the Supplemental Agreement No. 7 (see above para. 188) (Exh. R-25) (Claim. Am.Reply. 23.08.2013, para. 209; Resp. Am.Rej. 21.02.2014, para. 172). This Agreement prolonged the validity of the PEA to 30 June 2005 or till the conclusion of a new PEA (whichever came earlier) and provided the following amendment to the PEA:

"Marakand will not claim monetary recovery as to expenses incurred during Feasibility Study preparation and exploration works in the Territory."

198. On 7 April 2005, a Board Meeting of Marakand was held. In view of this Board Meeting, a "Board Paper" was prepared setting out in detail the progress of the negotiations between Marakand/Goskomgeology and the various Ministries (Exh. C-552).[7] As concerns the economic model suggested by Marakand in its Feasibility Study, the Board Paper summarized the situation as follows:

> *"Project Financing matters remain largely on hold, pending finalisation of the Concession Contract and formal Decree. No meaningful discussions can be held with potential lenders until this important aspect has been agreed.*
>
> […]
>
> *Marakand has submitted – by reference in the Feasibility Study – its proposal as to the mix of concession fees and taxes it believes should be payable.* ***However, the general reaction by most agencies and ministries to date has been one of caution and reservation, mainly due to the implied "disparity" of cash to be received by Marakand (~$166M) and the Uzbek Government (~$51M), which clearly favour Marakand.*** *This is not unexpected, as the type of arrangement being sought (in the form of a Concession) is new. Traditionally, foreign investments have been made on the basis of a joint venture or production sharing agreement. In both cases there is a sharing of "profit" apart from whatever royalty and taxes are agreed and there is obviously an expectation (by the Uzbek government) that a concession contract should likewise contain some participation.*
>
> […]
>
> *As a result of responses received, and meetings held, Marakand has had to prepare a number of "scenarios" as to alternative financial models. Notably this included a "full tax regime" scenario, which applied all current (January 2005) taxes, but no concession fees. A further scenario was requested more recently, whereby concession fees were added in order to achieve a total net revenue split of 50/50. A third scenario developed by Marakand was an alternative to the full tax scenario, which provided Marakand with savings in the first five years, so as to assist meeting potential lending ratios during the proposed loan period.*
>
> *A summary of these cases is provided for the information of directors. It is to be stressed that although these various scenarios have been provided mainly pursuant to specific requests received,* ***it has also been made quite clear that the original Marakand proposal has not been amended or revised.*** *The additional scenarios are quite clearly for information purposes only at this point. [Refer "4 – FS Comparison Summary"]*

[7] The author of this Board Paper is not mentioned in the document.

> ***Financing will remain an important matter****, and we will continue to be prepared for discussions with lenders and investors alike in the coming months. Further preliminary work on financing requirements and a financing strategy have been initiated quite recently."*(emphasis added)

199. Between 11 and 28 April 2005, Mr. Casson of Marakand sent various letters to the Agency for Foreign Economic Relations, the Ministry of Finance and of Economy respectively, submitting a revised economic model fitting the format requested by the authorities and requesting meetings (Exhs. C-590-592 and R-303-304) (Claim. Am.Reply. 23.08.2013, para. 248). In this model, Marakand increased the fixed concession fee from USD 10 million to USD 10.5 million and taxes were calculated on the basis of net (rather then gross) proceeds further to the Cabinet of Ministers' Decree No. 407, a decree which was issued with regard to the establishment of another joint venture 'Angren Gold Company' and which provided that royalties and taxes were to be calculated on the basis of net revenues (Claim. Am.Reply. 23.08.2013, paras. 235, 250). The estimated profit of the Project to the Republic of Uzbekistan, from royalties and taxes, was USD 66.408 million, including a USD 23.511 million concession fee (Claim. Am.Reply. 23.08.2013, para. 250; Exh. R-303).

200. In April 2005, Nedbank issued "Indicative Term Sheets" regarding the financing of the Khandiza Project (Exh. C-179) (Claim PHB II. 21.08.2014, para. 28).

1.4 The Rupture

201. On 29 April 2005, the Cabinet of Ministers held a Meeting between the Deputy Prime Minister, Mr. Sultanov, and representatives of various ministries and agencies, including Mr. Akhmedov of Goskomgeology and Mr. Abdullayeva of the Information and Anaysis Department of the Cabinet of Ministers. The Cabinet of Ministers issued a ***Protocol No. 09-62-90*** dated 4 May 2005 (by handwritten annotation), summarizing the decisions made at the Meeting, according to which the Khandiza Project was to be continued on the basis of a Joint Venture between Uzbekistan and Marakand (Exh. C-184) (Claim. Am.Reply. 23.08.2013, paras. 252, 317). In this regard, the Protocol provided as follows:

> *"By 8 May 2005, Goskomgeology (Akhmedov) should submit to the Cabinet of Ministers the information about the results of negotiations with foreign partner on the issue of implementation of the project on the basis of a joint venture."*

202. On 4 May 2005, Mr. Abdullayeva from the Information and Analysis Department of the Cabinet of Ministers issued a letter stating that the Uzbek Government could accept Marakand's concession scheme only if Marakand significantly

increased the concession fee from USD 23.5 million to USD 55.54 million (Exh. R-305). This letter provided – among others – as follows:

> "[…]
>
> *Previously, having reviewed the Feasibility Study for Khandiza Deposit Development Project, Letter from Agency for Foreign Economic Relations No. SHA-01/06-27 dated 24.01.05, a summary was concluded with the following remarks:*
>
> […]
>
> *Yet, in the produced documents, all the points of criticism have been remedied, except for that of the concession fees.*
>
> […]
>
> *According to Article 3 of the Concession Act of the Republic of Uzbekistan, the concession business is based on the mutual benefit principle, for which purpose the Agency for Foreign Economic Relations (AVES) recommends the concession fees to the Republic of Uzbekistan to be estimated as follows:*
>
> […]
>
> ***Fixed payments:***
>
> *1-5 years: USD 250 thousand/quarter (USD 5 million);*
>
> *6-15 years: USD 125 thousand/quarter (USD 5 million);*
>
> ***Variable payments:***
>
> *6-15 years: USD 7 per ton of the mined ore (USD 45.54 million)*
>
> *Thus, the Republic of Uzbekistan will gain a revenue in the form of taxes and concession fees in an amount of USD 100.92 million, including concession fees in an amount of USD 55.54 million, taxes and charges amounting to USD 45.38 million, while Marakand Minerals Company will gain a revenue totaling USD 115.46 million, including effective cash flow of USD 64.4 million.*
>
> *In view of the above and upon having accepted the AVES recommendations, in general we consider it possible to make available for the development the Khandiza Polymetallic Deposit under concession terms."*

203. On 5 May 2005, by letter No. 06-441, Goskomgeology informed Claimant of the Protocol No. 09-62-90 and instructed it to prepare a joint venture proposal and revert to the Cabinet of Ministers by 8 May 2005 (Exh. C-185) (Resp. Am.Rej. 21.02.2014, para. 152).

204. On 23 May 2005, a Meeting was held between Marakand and Deputy Prime Minister Sultanov, during which Mr. Sultanov allegedly said that, if Claimant agreed to enter into a Joint Venture Agreement, all necessary permits and documentation could be finalized within two months (Exh. C-187) (Claim. Am.Reply. 23.08.2013, para. 259; Resp. Am.Rej. 21.02.2014, para. 153). In this regard, Marakand's Minutes of the Board Meeting of 27 May 2005 provide as follows (Exh. R-989, para. 4):

> *"4.1 Noting that the Uzbek Government had recently requested the Company to consider developing the Khandiza project as a joint venture, not a concession, AS tabled various information setting out the status of the concession discussions, the implications of a joint venture agreement as opposed to a concession, and summary financial analyses of the two approaches. RR commented that the joint venture approach appeared to carry a lower risk profile and that, on the face of it, even at a 50%/50% joint venture, the economic returns to the Company were not that different. AS pointed out that the returns were similar at the metal prices assumed in the feasibility study but that, if prices rose by more than approx 10%, the returns escalated in favour of the Uzbek Government and against Marakand. RR noted that, if the Government wished to participate in the upside, it would ideally put up its own share of capital, failing which it should protect Marakand against the downside of falling metal prices. RW pointed out that, under the Law on Subsoil, the fact that Marakand had expended significant sums of money exploring and evaluating the project, and that that expenditure was acknowledged, the Company had now earned the exclusive rights to the mining licence to develop the project.*
>
> *4.2 The joint venture as an alternative option was discussed in detail. After appropriate discussion it was agreed that the Company should respond to the Uzbek Government in writing reaffirming the exclusive rights to develop the project and also the fact that finance had already been raised from the capital markets on the basis of a proposed concession agreement, but confirming that the Company was prepared to consider the joint venture option under certain circumstances. It was agreed that in this respect the Government should first confirm that its share of the Charter Fund of any joint venture would be restricted to the previously indicated historical expenditure valued at approx $11.5 million, that the Government would be prepared to set a tight timetable to complete the discussions, and that the project would remain in the Foreign Investment Programme, thereby qualifying for certain tax and other privileges. AS proposed that this correspondence take the form of a covering letter and a Preliminary Agreement on the Formation of a Joint Venture Company, following which, if the Government reacted favourably, and* ***assuming satisfactory commercial and fiscal terms could be agreed, particularly regarding the implications of changing metal prices****, the appropriate lawyers would be deployed to draft the definitive documentation (perhaps using Oxus' AGF joint venture documentation as a guideline)."* (emphasis added)

The Parties disagree on the content of the Meeting with Mr. Sultanov and the exact scope and meaning of his statements.

205. On 3 June 2005, Mr. Stuart, CEO of Marakand, wrote to Deputy Prime Minister Sultanov confirming Marakand's willingness to discuss the entering into a joint venture in relation to the Khandiza Project along the following lines (Exh. C-187, Exh. R-306) (Claim. Am.Reply. 23.08.2013, para. 261; Resp. Am.Rej. 21.02.2014, paras. 152-155):

> *"Marakand confirms it is prepared to commence discussions concerning the economic parameters of a joint venture but notes that Decree 359 does not foresee the execution of the project on the basis of a joint venture. Such a change represents a material change in the legal structure of the project. For Marakand to enter into any detailed negotiation on the basis of a joint venture it shall be necessary that there be sufficient legal basis to hold such negotiations.*
>
> *Therefore, we propose that the parties to the project enter into a Preliminary Agreement as per the attached draft."*

Marakand attached to its letter a draft of "***Preliminary Agreement to set up a Joint Venture***" (hereinafter "Draft JV Agreement"), which provided as follows concerning the envisaged share distribution (Exh. R-306):

> *"3.1 The Parties hereby agree, that their shares in the Joint Venture equity will be determined upon consideration and agreement of the main commercial indicators of the Project to confirm the expediency of the Project for the Parties, foreign investors and lenders.*
>
> *3.2 The amount of the Joint Venture authorised capital shall be determined upon determination of shares of the Parties as provided by paragraph 3.1 above subject to the appraisal of the contribution of the State Geology Committee as set out in paragraph 3.3 below.*
>
> *3.3 The State Geology Committee shall contribute USD 11,540,000 to the authorised capital:*
>
> *3.3.1 geological data and completed works related to Knandiza field;*
>
> *3.3.2 license for the development of Khandiza field in the area specified in Schedule 1 to this Agreement; and*
>
> *3.3.3 license for geological exploration in the area specified in Schedule 2 to this Agreement.*
>
> *3.4 Marakand shall contribute to the authorised capital:*
>
> *3.4.1 results of previously completed geological exploration at Khandiza field and the Feasibility Study of the Project worth USD 8,000,000; and*

3.4.2 cash to fill up to the share of the company in the authorised capital of the Joint Venture."

206. In Summer 2005, it seems that some South Korean investors were interested in cooperating with Marakand on the Khandiza Project and that Marakand entered into negotiations with them (Resp. SoD.Class. 04.04.2013, para. 96).

207. On 13 June 2005, Mr. Mamadaliev, a Manager at the Information and Analytical Department of the Cabinet of Ministers, forwarded by Letter no.06/104-183 (Exh. R-306) to the Ministries of Economy, Finance, Justice, the Agency for External Economic Relations and Goskomgeology, Marakand's letter of 3 June 2005 (see above para. 205).

208. On 17 June 2005, AGF's internal Audit Committee issued a report (Exh. R-164) (hereinafter "AGF Audit Committee Report 2005"), which concluded that AGF had breached Uzbek law relating to, among other things, (i) unauthorized and undocumented transactions from AGF's foreign currency account at Barclays Bank, (ii) budget mismanagement, (iii) conclusion of interested-party transactions without required approvals or supporting document; and (iv) inaccurate accounting and financial reporting (Resp. SoD.Class. 04.04.2013, para. 200).

209. On 23 June 2005, Mr. Akhmedov of Goskomgeology sent a letter to the Information and Analytical Department of the Cabinet of Ministers suggesting that the JV proposal be approved by the Cabinet of Ministers subject to the following changes to the JV parameters as proposed by Marakand in their Preliminary JV Agreement (see above para. 205) (Exh. R-517):

"[…]

3. *Article 3.1. in the version "the Parties agree that their participation shares in the statutory fund of the Joint Venture are distributed in the following order: 50% - Goscomgeology, 50% - Marakand".*

4. *Article 3.2. in the version "On the basis of the determination of the participation share of the Parties and taking into account preliminary appraisal of Goscomgeology contribution to determine the Statutory Fund in the amount 23080 thousand USD".*

5. *Article 3.3. in the version "Contribution of Goscomgeology to the statutory fund will be geology and other information obtained as a result of carrying out of exploration works at the Khadiza deposit estimated by preliminary data as 11540 thousand dollars. Goscomgeology will address to Goscomimuschestvo (State Property Committee) of the Uzbekistan Republic for approval of contribution of the Uzbek party to the statutory fund."*

6. *Article 3.4. in the version "Marakand" contributes to the statutory fund information obtained during exploration works at Khandiza deposit, preliminary feasibility study of the project, cost of which will be confirmed by examination in the order prescribed by law of the Republic of Uzbekistan and funds in the amount of 11540 thousand US dollars."*

Goskomgeology also proposed the addition of new provisions, including – among others – the following:

> *"Article 9.3. If the Parties do not achieve agreements on establishment of the joint venture on the mutually acceptable conditions and work on the project will be terminated.*
>
> *9.3.1. Marakand will not claim to reimbursement of all costs incured by the company during preparation of the feasibility study of the project and carrying out of exploration works on the Primary agreement on exploration dated 14 December 1996 with addendums dated 10 July 1997, dated 9 June 2000, dated 14 December 2001, dated 16 October 2003, dated 15 October 2004, 3 January 2005, 1 April 2005.*
>
> […]
>
> *9.4. Termination of the present agreement is possible under agreement of the Parties.*
>
> *9.5. If within 12 months after signing of the present Agreement the Parties do not achieve agreements on establishment of the joint venture on the mutually acceptable conditions and order of the Cabinet of Ministers on the project is not adopted, Goscomgeology has the right to terminate unilaterally the present Agreement. In this case termination will take effect in 90 (ninety) calendar days after notification of Marakand by the Uzbek party on termination of the agreement."*

210. <u>On 30 June 2005</u>, Mr. Akhmedov on behalf of Goskomgeology and Mr. Stuart on behalf of Marakand entered into the ***Supplemental Agreement No. 9 to the PEA*** (R-26), in view of the expiration on 30 June 2005 of the Supplemental Agreement No. 8 (see above para. 197). This Agreement prolonged the validity of the PEA until 30 September 2005.

211. <u>On 4 July 2005</u>, Mr. Yakovlev, First Deputy Chairman of the State Property Committee, sent a letter to Goskomgeology stating that it would be "expedient" to "*take a decision after reviewing the following project documents: 1. Draft of Business Plan; 2. Draft Constituent Documents; 3. Draft of the Resolution of the Government; 4. The relevant resolutions of the state institutions engaged in operational procedures of the future company.*" (Exh. R-969) (Resp. Am.Rej. 21.02.2014, para. 155).

212. <u>On the same day</u>, Mr. Akhemdov sent a letter to the Ministries of Economy, Finance and Justice enclosing a draft **"*Cabinet of Ministers Instruction*"** prepared by Mr. Akhmedov of Goskomgeology and to be signed by the Prime Minister, Mr. Mirziyoev, authorizing the Chairman of Goskomgeology and the Chairman of AMGK to "*sign the necessary incorporation documents on behalf of the Uzbek side and represent the interests of the state in supporting business activity of the company with foreign investment established jointly with Marakand Minerals Ltd*." (Exh. R-438).

213. <u>On 5 July 2005</u>, Mr. Stuart of Marakand drafted an ***Urgent and Confidential Board Memorandum*** at the attention of Messrs Bill (William) Trew, Bill Charter, Richard Robinson and in copy to Mr. Richard Wilkins (Exh. C-452). The purpose of this Memorandum was to "*update the Board as to the state of our negotiations concerning the development of Khandiza and advise the Board of our intended next steps.*" As concerns the state of negotiations, Mr. Stuart expressed that their primary objective "*to secure 'title' to the project in moving from the concession basis* […] *to a Joint Venture basis*" and their strategy to "*obtain a preliminary agreement based on certain principle terms concluded before going entering into detailed JV discussion*" had failed and that Marakand therefore needed another "tack". In this regard, Mr. Stuart referred to feedback received from Mr. Akhmedov, who spelt out the Government's expectations as follows:

> *"primarily they insist on a 50-50 share split and wish to see a proposed 'worst' case business plan and proposed constituent documents. He stipulated the current metal prices be used and the full taxation regime under law applied. He went on to state this would be the 'starting point for discussion' on what privileges could be justified to and granted by the Cabinet of Ministers to make the project work."*

In this regard, Mr. Stuart commented and recommended as follows:

> *"In the last week we have examined multiple 50-50 JV scenarios with a range of privileges we feel may be justified and in some cases very far reaching. In short we cannot get the desired economic performance using FS metal prices (which I am convinced should remain our basis) and are forced to conclude the project is simply not good enough to share.*
>
> *I have also engaged DWS to review our legal position given developments since the listing was completed.*
>
> *Currently we do not have sufficient reliable information to decide unequivocally as to whether we should;*
>
> > *We take achieving an 50-50 JV agreement, with the knowledge it yields subeconomic performance, as our primary objective for the sake of attaining an agreement and thereafter considering what to do with it,*
>
> *OR*

> *We take the attaining those certain minimum economic parameters required to fund the project as our primary objective with the knowledge that this will be more difficult and contentious as it will require us to pursue and try to convince the Government of that which they have so far indicated they do not want.*

Accordingly I am reluctant to formally commit Marakand one way or another until we have a better understanding of their position."

214. On 11 July 2005, the Ministry of Finance and the Ministry of Economy sent each a letter to the Cabinet of Ministers with their comments on Marakand's Draft JV Agreement (Exh. R-1374, Exh. R-519) (Resp. Am.Rej. 21.02.2014, para. 155). As concerns the shareholder structure, these letters raised the following points:

"We believe that the Parties to the Agreement must carry out evaluation of their contributions to the statutory fund of the joint venture in question with the help of an independent valuation company. Besides, we think it reasonable to provide for the contribution of the Uzbek Party into the statutory fund of at least 50 per cent." (Exh. R-519_2)

"The feasibility study proves the high economic efficiency of the project, but the interests of the Uzbekistan party are not adequately represented. Therefore, it is reasonable to combine Articles 3.1 and 3.2 into one article and to amend to read as follows: "The authorized fund of Khandiza Mining Company JV shall account for _______ thousand US dollars (specify the amount based on the data provided below) with the following structure: Goscomgeology – 50 percent, Marakand Minerals Limited – 50 percent. Taking into account that the portion of intangible assets in the proposed authorized fund of the Joint Venture is rather significant, the following issues shall be substantiated by an independent expert organization:

company's expenses – 8 mln. US dollars (Article 3.4.1) for geological exploration and the project feasibility study;

cost of geological information and works carried out by Goscomgeology in relation to Khandiza Ore Deposit."

215. On 19 July 2005, by letter No. 3-2/4-1668 prepared by Ms Malkina of the Ministry of Economy on behalf of Mrs Saidova, First Deputy Minister, the latter wrote to the Cabinet of Ministers reporting as follows (Exh. R-308):

"Due to existence of substantial remarks regarding the submitted feasibility study, Goskomgeology was requested to work at the issue of the project implementation on the conditions of the joint venture by the decision of the minutes of the Cabinet of Ministers date 4.05.2005 no.09-62-90. Currently work on preparation of statutory documents is carried out.

> *Taking into account the above stated, Ministry of Economic Affairs considers possible participation of Korean companies as one of the founders of the established joint venture (subject to obtaining of approval of "Oxus Resources Corporation"), or refuse of the subsidiary company of the latter – "Marakand Minerals" from implementation of the project on the conditions of the joint venture."*

216. On 21 July 2005, Mr. Akhmedov on behalf of Goskomgeology wrote to Mrs Saidova, First Deputy Minister of the Ministry of Economy (Exh. R-439), asking about her opinion on the draft "Cabinet of Ministers Instructions" (see above para. 212, Exh. R-438).

217. On 26 July 2005, Mr. Stuart of Marakand sent to Mr. Akhmedov of Goskomgeology a revised draft charter, a draft shareholder's agreement, a draft Decree of the Cabinet of Ministers, and an economic model for the proposed joint venture based on a 15% Net Profit Ratio. In his letter, Mr. Stuart stated that "*Marakand has endeavoured to meet all your requirements and it anticipates the documents being lodged will meet your approval.*" (Exh. R-440) (Resp. Am.Rej. 21.02.2014, para. 160).

218. On 16 August 2005, Mr. Akhmedov of Goskomgeology responded to Mr. Stuart and recommended various revisions to Marakand's drafts both with regard to Marakand's approach to the ore deposit development system (consisting in developing the most high-grade ores in the first 15 years, and the low-grade ores afterwards) and the financial parameters, in particular with regard to the anticipated expenses and interests (Exh. R-441) (Resp. Am.Rej. 21.02.2014, para. 162).

219. On 23 September 2005, Mr. Charter and Mr. Stuart of Marakand met with Deputy Prime Minister Mr. Sultanov who – according to Claimant – confirmed that now that the Bankable Feasibility Study had been completed and an agreement reached on the joint venture structure, Marakand would be the developer and operator of the Khandiza Project (Charter WS) (Claim. Am.Reply. 23.08.2013, para. 266).

220. On 30 September 2005, Mr. Akhmedov on behalf of Goskomgeology and Mr. Charter on behalf of OML entered into the ***Supplemental Agreement No. 10 to the PEA*** (Exh. R-27) in view of the expiration of the Supplemental Agreement No. 9 (see above para. 210). This Agreement prolonged the validity of the PEA until 31 December 2005).

221. On 22 November 2005, Mr. Akhmedov of Goskomgeology sent a letter to the Cabinet of Ministers and other concerned ministries requesting a decision on the submitted JV draft documents as follows (Exh. C-573):

> “ […] *At the present, the drafts of the constituent documents of the JV, economic model are prepared. It is necessary to conduct an examination of documents of the project on the conditions of JV at the interested ministries and agencies, to adopt the Decree of the President of the Republic of Uzbekistan on the conditions of the implementation of the project.*
>
> *In the course of discussion of the economic model of the project, the agreements are reached as to the sharing of the cash flow on the project: 58% - Uzbek side : 42% - foreign investor. The question concerning taxation of the joint venture remains open, it is necessary to coordinate it with the Ministry of Finance and with the State Tax Committee.*
>
> *In pursuance of the Protocol decision of the meeting at the Cabinet of Ministers, The information and analytical Department for questions of energy park, chemistry, metallurgy and mechanical engineering preparing the report to the Administration of the President for the approval of the development project of the polymetallic deposit Khandiza as a JV. After receipt of the approval, documents on the project will be send for the examination to the interested ministries and agencies* […]”

222. On 31 December 2005, the ***Supplemental Agreement No. 10 to the PEA*** expired (see above para. 220).

223. On 3 March 2006, Mr. William Charter of Marakand wrote to Mr. Khasanov of the Minister of Foreign Economic Relations Investments and Trade requesting the latter’s assistance in the finalization of the JV documents as follows (Exh. C-186):

> *“May I therefore take this opportunity to ask you for your assistance in obtaining a positive instruction from the Cabinet of Ministers in the nearest future, so that Marakand and Goscomgeology can jointly proceed with the finalizing and distribution of the project documentation to the relevant ministries and governmental bodies in line with the proposed National Investment Programme schedule.”*

224. In April 2006, Mr. Akhmedov of Goskomgeology sent letters to Mr. Shoismatov, Deputy Prime-Minister, urging him to make a decision on the establishment of the envisaged Joint Venture (Exhs. R-446, R-447).

225. On 9 June 2006, AGF’s internal Audit Committee issued a report (Exh. R-173) (hereinafter “AGF Audit Committee Report 2006”), according to which AGF had violated Uzbek law relating to, among other things, (i) unauthorized and undocumented transactions from AGF’s foreign currency account at Barclays Bank, (ii) budget mismanagement, (iii) conclusion of interested-party transactions without required approvals or supporting document; (iv) inaccurate accounting and financial reporting, and (v) breach of the Presidential Decree No. UP-1504 through Oxus’ acting as an intermediary between AGF and its suppliers (Resp.

SoD.Class. 04.04.2013, paras. 200, 201). The Audit Committee issued certain recommendations, such as decreasing the loan debt to ORC by over USD 4 million, which reflected the part not supported by accounting documents and relating also to alleged overpayments of MRT, foregoing further invoices of MRT, requiring signatures of AGF's General Director and its chief accountant to effect payment on behalf of AGF, etc. (Resp. SoD.Class. 04.04.2013, para. 205).

226. On 13 June 2006, Oxus replied to AGF's internal Audit Committee and suggested, among others, to write off approx. USD 1 million against ORC's loan to AGF (Exh. R-174). According to Respondent, this response and the reply to the other recommendations were not acceptable (Resp. SoD.Class. 04.04.2013, para. 206, Rustamova WS).

227. On 13 June 2006, the Cabinet of Ministers held a Meeting during which it decided as follows with regard to the development of the Khandiza Project (Exh. R-448) (Resp. SoD.Class. 04.04.2013, para. 98):

> *"III. On the proposed investment projects of* [AMMC]*:*
>
> *3.1. Ministry of Justice (Mustafaev), Goscomgeology (Akhmedov),* [AMMC] *(Sanakulov) shall form a working group and by June 23, 2006 present a conclusion on the procedure of transfer of implementation of the project "Development of polymetallic ores at Khandiza deposit" from Oxus Resources Corporation (UK) to Almalyk MMC."*

228. On 15 June 2006, Ms Rustamova of Goskomgeology, presented AGF's internal Audit Committee's findings and recommendations to AGF's General Meeting of Shareholders (Exhs. R-175/C-626). The General Meeting resolved that, by 24 June 2006, Claimant and ORC would remedy AGF's shortfalls, and that the Audit Committee would then re-analyze AGF's accounts and financial reports. At this Meeting, Goskomgeology and NMMC voted their combined 50% shareholding to repudiate AGF's numerous interested-party agreements and other unlawful acts, which Claimant opposed (Resp. SoD.Class. 04.04.2013, para. 207). As concerns the dealings with MRT, the Minutes of Meeting provide as follows:

> *"Besides the wages due to foreign specialists in the Republic, fees for consulting services were paid through the company Mining Resources Trust (MRT) under contract dated 1.01.03 No. 03/MRT/01. During the period from 2003 to April 2006 the total amount of the bills presented for payment under the contract run up to 7646,8 thousand US dollars, with the contract value of 2 million US dollars.*
>
> *The amount of 2955,6 thousand US dollars should be uncharged, and 2691,2 thousand US dollars returned by the Oxus Resources Corporation to the settlement account of the AGF JV. The said contract comes under the category of deals in which the members of the Supervisory Board (J. Kipps*

> *and W. Trew) on the part of Oxus and AGF Board of directors are interested. According to article 1 0.1.1 (par.) of the AGF Charter the conclusion of this contract was subject to approval by the General meeting of the AGF Shareholders.*
>
> *J. Kipps reported that though he had signed the contract on behalf of MRT, neither he nor any other member of the Supervisory Board for Oxus had any financial interest in the MRT business. R. Wilkins noted that, taking into consideration all of the above points, in the AGF JV letter dated June 13th, 2006, in reply to the Audit Commission's 18 comments, Oxus did agree to write off the amount of 959395 US dollars from the credit provided by the Oxus Resources Corporation."*

229. On 26 June 2006, Goskomgeology[8] informed William Charter of Marakand of the Cabinet of Ministers' decision to ***assign the Khandiza Project to AGMK*** (Exhs. C-198, C-199) (Resp. SoD.Class. 04.04.2013, para 99).

230. In June and July 2006, Marakand repeatedly protested against a transfer of the Khandiza Project to AGMK (Exhs. C-432, C-433, C-188).

231. On 1 August 2006, a Board Meeting of the Directors of Marakand was held during which it was decided to proceed as follows regarding the potential transfer of the Khandiza Project to AGMK (Exh. C-198):

> *"AS* [Alaistar Stuart] *reminded the meeting that to date no formal resolution or decree altering anything in respect of Khandiza had been received by the Company and indeed what, if anything, does come out may indeed be a very pleasant surprise! DWS have advised waiting for an official document before taking any action w.r.t. announcements.*
>
> *RR* [Richard Robinson] *proposed the purported 'decision' may i) be a genuine one based on a social and economic set of criteria, ii) flying a kite by some dark forces iii) part of an instruction to 'soften'* [Marakand] *for the introduction of another party. AS commented it may too be linked the Oxus Group problems in Kyrgyzstan. Formal communications should also include reference to historical verbal 'instructions' to put those too on the record.*
>
> *The Board acknowledged all forms of discrediting tactics are most likely to be forthcoming as part of a campaign to justify the purported 'decision'."*

232. On 3 August 2006, Mr. Gorlov, Deputy Chairman of Goskomgeology, sent a letter to the Cabinet of Ministers addressing the question of ORC's costs in the works conducted on the Khandiza Deposit (Exh. C-732). It provided in particular as follows:

[8] The specific sender of this letter is not identified therein.

> *"Given that by way of CabMin Decree No. 359 Oxus Resources Corporation was granted exclusive rights in the project, Goskomgeology proposed that the draft Decree of the President of the Republic of Uzbekistan "On measures of expedition of the commencement of exploitation of Khandiza and Uch-Kulach polymetallic deposits" includes a provision on establishment of a working group from the representatives of relevant ministries and State organs to determine the amount of de facto expenses born by Oxus Resources Corporation and Marakand Minerals Ltd. regarding the Khandiza deposit.*
>
> *After the receipt of the message on the development of the project by AMMC alone, without participation of the foreign investor, Oxus Resources Corporation orally proposed to exclude this clause from the draft Presidential Decree mentioned above. It believes that the inclusion of such a clause and compensation of expenses will close any paths for the company to any form of participation in the project. The company hopes to continue negotiations on the project after it has been transferred to AMMC's balance."*

233. On 10 August 2006, Respondent issued a Presidential Decree No. PP-442 'On the Effective Utilization of Mineral and Raw Materials of Polymetallic Ores of the Khandiza and Uch-Kulach polymetallic deposits' (Exh. C-200), which provided for the construction of a mining and processing complex on the basis of the resources of the Khandiza and Uch-Kulach polymetallic deposits. The Decree cancelled Decree 359 and ordered Goskomgeology to transfer within ten days the mineral resources to AMGK.

234. On 20 November 2006, by ***Decree No. 527-F***, the Cabinet of Ministers approved AGMK's Preliminary Feasibility Study to develop the Khandiza and Uch-Kulach deposits, which allowed AMGK to begin production in 2010 (Exh. R-102) (Resp. SoD.Class. 04.04.2013, paras. 100-101).

2. The Khandiza Claim in a Nutshell

235. The Khandiza claim is composed of two sub-claims:

(i) Claim regarding the development of the Khandiza Deposit (see below section 2.1); and

(ii) Claim regarding the exploration of the Southeast Uzbekistan Exploration Area ("Expanded Area") (see below section 2.2).

2.1 Claim Regarding the Development of the Khandiza Deposit

2.1.1 Claimant's Position

236. Claimant claims that, based on the Primary Exploration Agreement (PEA), the ***Decree No. 359*** and other documents and actions of the Uzbek Government and in view of the successful completion of the Phase 1 Feasibility Study, Claimant secured the exclusive right to explore and develop the Khandiza Deposit through a concession agreement.

237. According to Claimant, the condition precedent to development rights in Khandiza was a positive outcome of the Phase 1 Study, and not the successful negotiation of the terms under which the Deposit was then to be developed (Claim. PHB II. 21.08.2014, para. 31). To the extent that Claimant undisputedly successfully completed the Phase 1 Feasibility Study, it secured development rights in Khandiza and Respondent had the duty to negotiate such agreement in good faith (Claim. PHB II. 21.08.2014, para. 29). Alternatively, at the very least, Claimant had the legitimate expectation that it would be granted such development right.

238. However, according to Claimant, Respondent breached its obligations by first taking Claimant's right to develop the Deposit *via* a concession agreement by issuing ***Protocol Decision No. 09-62-90*** on 29 April 2005 instructing Claimant to enter into a joint venture with the State for the development of the mine, whereby Claimant lost 50% of the Project. Respondent then went on to fully expropriate Claimant's right to develop the mine by awarding the Project to AGMK by ***Presidential Decree No. PP-442*** of 16 August 2006 (Claim. SoC. 17.09.2012, para. 228; Claim. PHB II. 21.08.2014, paras. 38 fol.). In addition, the way in which Respondent proceeded was in breach of its obligation of cooperation, good faith, due process and transparency, by unilaterally and abruptly taking Claimant's rights without notice or warning (Claim. PHB II. 21.08.2014, para. 43).

2.1.2 Respondent's Position

239. According to Respondent, Claimant's claims turn largely on a false factual predicate, i.e., that Claimant had a legal right to develop the Khandiza Deposit beyond what the parties had specifically agreed. According to Respondent, Claimant had limited exploration rights that were valid for five years. The right to develop the Khandiza Deposit was conditioned by the submission by Claimant of a mutually beneficial proposal which would need to be approved by the various governmental authorities (Resp. SoD.Class. 04.04.2013, paras. 45, 381; Resp. Am.Rej. 21.02.2014, paras. 82, 100). Claimant's right to develop the Deposit thus

remained contingent on the approval by the Cabinet of Ministers of its Feasibility Study. This approval was never obtained because Claimant's proposal was not 'mutually beneficial' and therefore unacceptable (Resp. PHB I. 21.07.2014, para. 12; Resp. PHB II. 21.08.2014, paras. 2 fol.). As such, Claimant did not secure the rights it pretends to have been deprived of.

240. Under the PEA, Claimant bore the risk of failing to develop a mutually acceptable and commercially viable plan. Goskomgeology worked with Claimant for nearly a decade, but despite several extensions of time Claimant never found a new viable deposit or proposed a mutually acceptable agreement to develop Khandiza. Thus, in accordance with the PEA, Claimant is solely responsible for the cost of its failed exploration works.

2.2 Claim Regarding the Exploration of the Expanded Area

241. According to Claimant, under the PEA, Claimant was given the exclusive right to explore an area of 12,000 km^2 surrounding the Khandiza Deposit (the so-called Southeast Uzbekistan Exploration Area, also referred to as 'Expanded area'). The scope of this area was reduced twice: A first time by Supplementary Agreement No. 2 to the PEA of 9 June 2000, by which the area was reduced by half, i.e. to 5,259 km^2; A second time, by Supplemental Agreement No. 6 to the PEA of 15 October 2004, whereby it was reduced to from 5,259 km^2 to 1,199.5 km^2.

242. It is undisputed that the first reduction was contemplated by the PEA and therefore unproblematic; the Parties however disagree on the appropriateness and legality of the second reduction.

2.2.1 Claimant's Position

243. Claimant claims that the second reduction operated by the Supplemental Agreement No. 6 was unjustified and deprived it of part of its exploration rights, hence constituting an expropriation as it did not serve a public purpose related to the internal needs of Uzbekistan on a non-discriminatory basis (Claim. Am.Reply. 23.08.2013, para. 356).

244. It also constituted a breach, by Respondent, of its specific undertakings towards Claimant and, by the same token, a breach of Respondent's international obligations under Article 2(2) *in fine* of the BIT or by virtue of umbrella clauses in other treaties applicable *via* the most favoured nation clause of the UK-Uzbekistan BIT (Claim. Am.Reply. 23.08.2013, para. 357).

245. By depriving Claimant of its exploration rights, Respondent also breached its obligation to afford Claimant fair and equitable treatment, as it failed to honor Claimant's legitimate expectation that the area that it was authorized to explore would not be reduced to less than half of it, and as it coerced Claimant into accepting a reduction of the Expanded Area. In so doing, Respondent also violated its obligation not to take measures that were unreasonable and not to impair Claimant's exploration rights or violate Claimant's right to FPS (Claim. Am.Reply. 23.08.2013, paras. 358-359).

2.2.2 Respondent's Position

246. According to Respondent, Claimant's claims turn largely on a false factual predicate, i.e., that Claimant had a legal right to explore parts of the Expanded Area beyond what the parties had specifically agreed. The PEA granted ORC exploration rights only from 14 December 1996 to 14 December 2001. Goskomgeology repeatedly agreed in good faith to extend the duration of the PEA. Thus, the Supplemental Agreement No. 6 did not take anything from ORC or Marakand, as neither ORC nor Marakand had exploration rights at that time to be taken. On the contrary, Goskomgeology permitted Marakand to continue exploration works when its rights otherwise were set to expire in accordance with the terms of the PEA and Supplemental Agreements No. 1 through No. 5. As such, the reduction contemplated in Supplemental Agreement No. 6 cannot be deemed as a 'taking' of anything from Claimant.

2.3 With Regard to the Quantum

2.3.1 Claimant's Position

247. With regard to the claim concerning the development of <u>the Khandiza Deposit</u>, Claimant claims a loss of profit as a result of its expropriation of the development rights and/or other breaches of the BIT as follows (Claim. Am.Reply. 23.08.2013, para. 414):

- Primary claim: USD 588.7 million based on full expropriation and with valuation date per date of the Arbitral Award, provisionally set at 30 June 2012;

- 1st alternative: USD 307.6 million based on expropriation of only 50% with valuation date per date of the Arbitral Award, provisionally set at 30 June 2012;

- 2nd alternative: USD 146.1 million based on concession agreement and valuation date on the date of expropriation of 10 August 2006, with interests until 30 June 2012;

- 3rd alternative: USD 72.1 million based on JV contract and valuation date on the date of expropriation of 10 August 2006;

- 4th alternative: USD 9 million as restitution of the amount invested by Claimant plus 5% as of 10 August 2006.

248. Claimant rejects Respondent's criticism concerning its damages calculation. According to Claimant, its valuation of the Khandiza Deposit is in no way speculative but rather based on very reliable data, including the Bankable Feasibility Study, that amply satisfy the "reasonable probability" threshold for the purpose of quantification (see above para. 0) (Claim. PHB II. 21.08.2014, paras. 14 fol.).

249. With regard to the claim concerning the exploration of the Expanded Area, Claimant claims a loss of profit as a result of its deprivation of exploration rights (Claim. Am.Reply. 23.08.2013, paras. 417 fol.):

  - USD 200 million, i.e. the loss sustained as a result of the taking of Claimant's development rights in the Khandiza Deposit divided by three.

2.3.2 Respondent's Position

250. According to Respondent, Claimant has failed to establish that Respondent violated any provision of the BIT in connection with either the Khandiza Deposit or the exploration of the Expanded Area. Absent a treaty breach, Claimant is not entitled to any compensation (Resp. Am.Rej. 21.02.2014, para. 243).

251. Even assuming for the sake of argument that a breach of the BIT occurred, Claimant still is not entitled to the compensation claimed because its alleged losses are inherently speculative and unreliable, as Claimant projects purported damages relating to lost profits on the basis of rights that it never held and operations that never took place (Resp. Am.Rej. 21.02.2014, paras. 243, 247 fol.):

(i) As a matter of law, Claimant bears the burden of proving the damages it seeks and no reparation for speculative or uncertain damages can be awarded. There are no exceptional circumstances justifying to deviate from this principle, and in particular the conditions set out in *Al-Bahoul v. Tajikistan* and other cases that Claimant refers to, neither apply nor are fulfilled in the present case.

(ii) Claimant's damages theories rely on fundamentally flawed assumptions (namely that Claimant had the right to develop the Khandiza Deposit), data (namely the Bankable Feasibility Study, which is not sufficient) and accounting methods (namely with regard to the discount rate and date of valuation).

252. As concerns Claimant's alternative claim for reimbursement of its sunk costs, Claimant effected a waiver as to reimbursement under the PEA and Supplemental Agreement No. 8, and therefore is not entitled to compensation in that regard either (Resp. Am.Rej. 21.02.2014, paras. 244, 266 fol.).

253. In addition, even assuming that Claimant would be entitled to some award of costs, Claimant's calculations of its alleged sunk costs are inconsistent throughout the Reply and its own documents. Moreover, Marakand's internal documents suggest that many of Claimant's alleged expenses related to the Khandiza Project were for self-interested payments to related companies. Claimant thus has failed to provide a reliable breakdown of costs incurred for exploration activities and the preparation of feasibility studies, and its documents suggest that a significant portion of its expenses were instead incurred for payments to its own executives and for its listing on the AIM (Resp. Am.Rej. 21.02.2014, paras. 268 et fol.).

2.4 The Key Issues

254. In view of the Parties' positions, the Arbitral Tribunal considers the following questions to be key in assessing Claimant's claims over <u>the Khandiza Project</u>:

(1) What was the nature and scope of Claimant's rights in the Khandiza Project as arising out of the PEA, Decree No. 359 and other instruments and communications from the Uzbek Government? What were the conditions, if any, of such right? And were these conditions fulfilled ?

(2) Did Respondent deprive Claimant of such rights in a way which is contrary to its obligations under the BIT?

In particular:

- Did Respondent expropriate such right?
- Did Respondent breach the FET standard or any other standard under Article 2 of the BIT by breaching legitimate expectations of Claimant?
- Do Respondent's actions otherwise amount to a breach of the Full Protection and Security ?
- Do Respondent's actions amount to a breach of the umbrella clause ?

(3) If Respondent breached its obligations under the BIT, is Claimant entitled to damages, and if so, to what extent?

255. The Arbitral Tribunal will examine issues (1) and (2) first as concerns the claims relating to the Khandiza Deposit (3.2) and, second, for those relating to the Expanded Area (3.3). The Arbitral Tribunal will address issue 3 only if necessary.

3. With Regard to the Claims Relating to the Khandiza Deposit

3.1 Issue No. 1: The Scope of Claimant's Rights in the Khandiza Deposit

3.1.1 The Parties' Positions [9]

3.1.1.1 Claimant's Position

256. According to Claimant, it was granted in 1996 the exclusive right to explore the Khandiza Deposit and to thereafter develop the mine, provided that the results of its Phase 1 Study be positive. It was the completion of the positive Phase 1 Study, upon exploration and confirmation of the Deposit's potential that gave rise to Claimant's right to develop the Deposit. Claimant's right did not depend on the conclusion of a mutually beneficial agreement for the development of the mine, to be subsequently negotiated. In other words, it is Claimant's position that the completion of a Phase 1 Study directly conferred upon Claimant the right to develop the Deposit under terms that the Parties thereafter had the obligation to negotiate in good faith. Furthermore, Claimant's contractual right to develop the mine was in accord with the Law of the Republic of Uzbekistan "on Subsoil"

[9] The position summarized below is not meant to be exhaustive and focuses merely on the key arguments which the Tribunal considers most relevant to determine the issue at stake.

dated 23 September 1994 (hereinafter "Law on Subsoil") and matched its legitimate expectation, under international law, to develop the Deposit that it had de-risked at its own risk and costs (Exh. C-263; Claim. Am.Reply. 23.08.2013, para 104; Claim. PHB II. 21.08.2014, paras. 31 fol.). The requirement that the Parties' agreement be mutually acceptable did not mean that the Parties had to agree to some sort of equal split of profits. Rather, it implied that the terms of the agreement were to benefit both Parties. The split naturally would be affected by the fact that the risks were not distributed equally (Claim. Am.Reply. 23.08.2013, paras. 154, 225 fol.).

257. More specifically, Claimant relies – among others – on the following main instruments as follows:

(i) The PEA of December 1996 granted ORC full and exclusive rights to carry out exploration of Khandiza and the surrounding 12,000 km^2 (the so-called Southeast Uzbekistan Exploration Area), and tasked ORC with the preparation of a Preliminary Feasibility Study (also referred to as the "Phase 1 Study") (Claim. Am.Reply. 23.08.2013, para. 147);

(ii) The Supplemental Agreement No. 1 to the PEA of 10 July 1997 consolidated ORC`s exclusive rights in that it cancelled Goskomgeology's right to enter into a Joint Venture Agreement with a third party and opt out of the agreement with ORC within three years from the signing of the PEA (Claim. Am.Reply. 23.08.2013, para. 157);

(iii) The Letter of Intent of 29 January 2000, in which ORC and Goskomgeology agreed to engage in negotiations towards an agreement for the development of the mine in view of the conclusive results with respect to the viability of the Deposit. This Letter of Intent superseded the PEA and the Supplemental Agreement No. 1 to the PEA (Claim. Am.Reply. 23.08.2013, paras. 175, 208, 218 fol., 303).

(iv) Through Decree No. 359 of 17 October 2002, the Cabinet of Ministers granted ORC the "*exclusive right to develop the Khandiza Polymetallic Project*" with regard to the relevant territory, and Claimant did not merely secure negotiation rights. The only thing left to be determined was the concrete form of cooperation (Claim. Am.Reply. 23.08.2013, paras. 177-178);

(v) The Supplemental Agreement No. 5 to the PEA of 16 October 2003 further confirmed Claimant's "*exclusive rights to develop the Property*" (Claim. Am.Reply. 23.08.2013, paras. 179, 209) and indicated that the Parties were in negotiation for a concession agreement or production sharing agreement, but not for a Joint Venture Agreement. This would be further confirmed by various subsequent correspondence (Exhs. C-556 to C-561, C-174);

(vi) The Supplemental Agreement No. 6 to the PEA of 15 October 2004 formalized Goskomgeology's agreement to the concession route in relation to Khandiza, based on the provision of Decree No. 359 for a duration of five years (Claim. Am.Reply. 23.08.2013, paras. 187, 209);

(vii) Various intra-State correspondence of Uzbekistan (including Exhs. C-174, R-295, R-438, R-308, R-439, R-446, R-447, C-556 to C-566);

(viii) The Uzbek Expert Report of 5 February 2005 (Exh. R-515);

258. Based thereon, Claimant contends that it was eventually granted an exclusive right to develop the Khandiza Deposit through a concession agreement.

3.1.1.2 Respondent's Position

259. As already mentioned above (paras. 250 fol.), in general, Respondent contends that Claimant's claims turn largely on a false factual predicate, i.e., that Claimant had a legal right to develop the Khandiza Deposit beyond what the parties had specifically agreed. According to Respondent, Claimant had limited exploration rights that were valid for five years. The right to develop the Khandiza Deposit was conditioned by the submission by Claimant of a mutually beneficial proposal which would need to be approved by the various governmental authorities. Claimant's right to develop the Deposit thus remained contingent on the approval by the Cabinet of Ministers of its Bankable Feasibility Study (Resp. SoD.Class. 04.04.2013, para. 381, Resp. Am.Rej. 21.02.2014, paras. 123 fol.).

260. More specifically, Respondent answers Claimant's contentions mainly as follows:

(i) The purpose of the PEA was to establish the initial framework for Claimant to prepare a Feasibility Study regarding the development of Khandiza, for Claimant to study the geology of the area immediately surrounding the Deposit, and for Claimant to explore the Expanded Area. Goskomgeology thus granted Claimant the exclusive right to carry out certain exploration works, as well as access to all of its maps and prior works, whereas Claimant undertook to finance and to prepare a Preliminary Feasibility Study no later than 31 December 1997 and to finance geological analyses of the expanded surrounding area. Under the PEA, Claimant bore the risk of failing to develop a mutually acceptable and commercially viable plan (Resp. SoD.Class. 04.04.2013, paras. 62

fol.; Resp. Am.Rej. 21.02.2014, paras. 166 fol.). The PEA originally contemplated a joint venture with a split of 50/50 ratio, thus envisioning an equitable allocation of any profits (Resp. SoD.Class. 04.04.2013, para. 60).

(ii) At the time of the Supplemental Agreement No. 1 to the PEA of 10 July 1997, Claimant had performed only preliminary works, and had not yet completed its Phase 1 Feasibility Study. Thus, Claimant's contentions are wrong and this amendment did not mean that Goskomgeology was somehow bound to enter into a Joint Venture Agreement with Claimant. The purpose of entering into Supplemental Agreement No. 1 was to reaffirm Claimant's obligation to obtain the approval of the Cabinet of Ministers regarding the main economic and technical parameters of its proposal before it would obtain any development rights (Resp. Am.Rej. 21.02.2014, para. 87).

(iii) The Letter of Intent of 29 January 2000 did not supersede the PEA, which remained in force. In addition, following the conclusion of this Letter of Intent, Claimant "*knew the economic terms that it had to meet in order to develop the project on the basis of a concession*" (Akhmedov-WS 09.02.2013, para. 5) (Resp. SoD.Class. 04.04.2013, para. 75; Resp. Am.Rej. 21.02.2014, paras. 97, 117 fol.);

(iv) As concerns Decree No. 359, the changes made in the final version of this Decree compared to the draft Decree prepared by Claimant and Goskomgeology, and in particular Articles 2 and 3, show that the securing of development rights were still subject to Claimant being able to develop a Bankable Feasibility Study for the Government's review in accordance with the procedure established by Uzbek law, and that Claimant's rights in the Project still depended on the results of such Feasibility Study. Decree No. 359 is only the first of two Decrees needed entitling Claimant to engage in direct negotiations regarding the provisions of a concession agreement. The other Decree would be necessary to approve the concession agreement itself (Resp. Am.Rej. 21.02.2014, paras. 100 fol.);

(v) The Supplemental Agreement No. 5 to the PEA clearly confirms the necessity of completing a Feasibility Study and getting the approval of the Cabinet of Ministers before an appropriate agreement could be signed (Resp. Am.Rej. 21.02.2014, para. 104);

(vi) The Supplemental Agreement No. 6 to the PEA was valid only until 31 December 2004 or the conclusion of a new PEA. In addition, this

Agreement expressly referred to the need to obtain a further Decree for ORC to be granted any concession and therefore, as the other ones, confirms that Claimant needed the approval of the Cabinet of Ministers to obtain a concession and secure the right to develop the Khandiza Deposit (Resp. Am.Rej. 21.02.2014, para. 104);

(vii) Various internal documents of Claimant, correspondence of ORC/Marakand as well as Marakand's public listing documents show that Claimant was very much aware that its rights in Khandiza were limited to those specifically agreed upon and did not extend to an unconditional right to develop Khandiza based on a concession agreement (e.g., Exhs. R-98, R-293, R-421, R-513, R-424, R-426, R-428, C-452, R-515, R-296, R-430, R-431, R-1142, R-516, R-305, R-300) (Resp. PHB I. 21.07.2014, paras. 15 fol.).

261. Based thereon, Respondent contends that because Claimant was never able to provide the Cabinet of Ministers with an acceptable Bankable Feasibility Study, it never secured any rights to develop the Khandiza Deposit.

3.1.2 The Arbitral Tribunal's Findings

3.1.2.1.The Problem

262. Based on Article 1 of the PEA, Claimant secured "*exclusive rights to carry out exploration*" as well as thereto related accessory rights to information and to set up relevant infrastructure.

263. The PEA did not, and this is undisputed in the Parties' latest submissions, grant Claimant direct and unconditional development rights, although the Parties disagree on the conditions for the obtention of such right (see in particular Reply, para. 152, where Claimant refers to "terms and conditions that were to be negotiated", see also Claim. PHB II. 21.08.2014, para. 31)

264. In the Arbitral Tribunal's understanding, the PEA instituted <u>a three steps system</u>:

(1) The first step contemplated by the PEA was the completion of a Preliminary Feasibility Study, i.e. "Phase 1 Study".

(2) If such study was to be positive, the PEA then contemplated as the second step the negotiation of a "Joint Venture Agreement", which was contemplated as a 50%/50% Joint Venture and the primary purpose of which was to develop a full Bankable Feasibility Study.

(3) The third step would then consist in the development of the Deposit based on the commercial model developed in the Fully Bankable Feasibility Study.

265. It is undisputed between the Parties that the first step, i.e. the completion of a Preliminary Feasibility Study, was successfully completed (see above para. 151). The dispute concerns the further two steps, and in particular whether their completion was necessary for Claimant to secure the development right and, if so, whether the Parties' behavior in the completion of these steps actually led to a "secured" right of development of Claimant. In other words, the Arbitral Tribunal shall examine the rights arising out of the original agreement and to what extent, if at all, these rights were subsequently modified.

3.1.2.2 The Original Agreement Contemplated in the PEA

266. The PEA and its Annexes provide as follows regarding the nature and scope of Claimant's rights in the Khandiza Deposit:

- <u>Article 1 of the PEA,</u> dealing with the objectives of the PEA, provides that:

> *"the purpose of this Agreement is to develop the initial framework of a feasibility study of the Khandiza Polymetallic Deposit [...] and to carry out the exploration works";*

- <u>Article 2 of the PEA</u>, dealing with the 'Results of Works', provides that:

> *"**In the event of positive outcome of Phase 1 Study**, the Parties **will initiate the negotiations on a Joint Venture Agreement under mutually acceptable [conditions]** for the Parties. **The objective of such a Joint Venture shall be to complete a full bankable feasibility study** and commercial development of economically viable deposits within the territory of the Property.*
>
> ***In the event of negative outcome of Phase 1 Study**, Oxus shall not claim for any reimbursement of costs incurred in the process of developing the feasibility study and will be obligated to cede back to Goskomgeologia all geological materials previously obtained therefrom."* (emphasis added)

- <u>Article 3 of the PEA</u>, dealing with the duration of the PEA, provides that:

> *"after completion of the Phase 1 Study, [Oxus] **will enter into formal negotiations with Goscomgeologia to create a Joint Venture pertaining to the Property**, or it shall cede the Property back to Goscomgeologia, should*

such an arrangement for a Joint Venture Agreement be not achieved." (emphasis added)

- Annex 4 to the PEA, dealing with the commercial terms and capital structure of the Joint Venture, provides that "the Parties agree that during the preparation of the full bankable study, and prior to construction of the venture, the Charter Fund shall be split to 50 : 50 percent ratio."

267. Thus, under the PEA, Claimant was granted exclusive exploration rights as well as, in case of a positive Preliminary Feasibility Study, the right to enter into negotiations for a 50/50 Joint Venture Agreement in view of preparing a full Bankable Feasibility Study and develop the Deposit in a commercial viable way on mutually acceptable terms.

268. *In conclusion*, at the time of the execution of the PEA, there was no unconditional or "secured" right of Claimant to exclusively develop the Khandiza Deposit.

269. The question is thus whether this right was modified later on so as to procure Claimant with an exclusive right to develop the Khandiza Deposit based on a concession agreement, as claimed by Claimant.

3.1.2.3 Did Subsequent Agreements Modify the Nature of Claimant's Rights ?

270. The Arbitral Tribunal shall examine whether any of the subsequent contractual agreements and/or decrees issued by Uzbekistan relied upon by Claimant were such as to modify the nature of Claimant's original right under the PEA and transform it into a "secured" right to develop the Khandiza Deposit.

271. **As concerns the Supplemental Agreement No. 1 to the PEA** (see above para. 143), the Arbitral Tribunal does not find that it substantially modified the nature of Claimant's rights under the PEA. The modifications made to the PEA by this Supplemental Agreement merely specified the right to negotiate a mutually acceptable Joint Venture Agreement and further stressed the necessity of obtaining approval from the relevant government authorities as follows:

- Article 2 of the PEA was modified to refer expressly to "good-faith, exclusive, formal negotiations on a Joint Venture Agreement and, subject to the approval of the Cabinet of Ministers, […] under terms mutually acceptable to the Parties."

- Article 3(ii) of the PEA was modified to refer expressly to Oxus' right to "negotiate on a formal, exclusive and good faith basis and, subject to approval by the Cabinet of Ministers."

272. The Supplemental Agreement No. 1 to the PEA of 10 July 1997 nonetheless consolidated Claimant's right to exclusivity, by confirming the prohibition for Goskomgeology to enter into negotiations for a Joint Venture Agreement with third parties. However, it did not transform Claimant's right into an unconditional or "secured" right to development of the Khandiza Deposit.

273. As a consequence, when Claimant submitted on 31 December 1997 the "WGM Phase 1 Feasibility Study" (see above para. 152, Exh. C-159, see Transcripts of 30 April 2014, 614:7 – 614:11 [Mr. Akhemdov's cross-examination]) and thereby reached a "*positive outcome*" in the sense of Art. 1 para. 1 of the PEA, it secured the right to enter into "*formal, exclusive and good faith negotiations*" with Goskomgeology for a 50/50 Joint Venture Agreement under mutually acceptable terms.

274. **As concerns the Letter of Intent of January 2000** (see above para. 163)**,** it provides that OML and Goskomgeology agreed "*to prepare a draft Concession Agreement*" under the terms as listed in the Letter to be approved by the Uzbek Government. While Claimant contends that this Letter of Intent superseded the PEA (Claim. Am.Reply. 23.08.2013, para. 208), i.e. presumably in changing Claimant's right to negotiate a Joint Venture Agreement into a right to negotiate a concession agreement, the Arbitral Tribunal finds no basis for such argument.

275. The events preceding the conclusion of the Letter of Intent show that it was Claimant who, in or around summer 1998 (see above para. 154), first suggested the concession scheme instead of a Joint Venture Agreement. It appears that Goskomgeology was willing to enter into such talks notwithstanding the fact that Uzbek law was not very developed as concerns the granting of concessions (Exh. R-268). Thus, from 1998 to 2000, talks were held between ORC and Goskomgeology as to the pros and cons of the two schemes and various discussions were held with the Uzbek Government to develop a mutually acceptable concession system. In this regard, it should be stressed that Claimant itself changed its position several times, suggesting first a concession scheme (see above para. 153; Exh. R-911), then going back in September 1998 to a proposed joint venture scheme (see above para. 154; Exh. R-269) and finally, in November 1998, reverting to a concession scheme (see above para. 156; Exh. R-270).

276. *In conclusion*, under these circumstances, the Arbitral Tribunal does not consider that the Letter of Intent is of a nature to supersede the clear terms of the PEA. This is all the more the case that no mention of this Letter of Intent was ever made in any of the subsequent Supplemental Agreements to the PEA.

277. The question thus is whether and to what extent Claimant secured direct development rights through Decree No. 359 of 17 October 2002.

278. **As concerns Decree No. 359**, (see above para. 176), it expressly provides that "the Cabinet of Ministers hereby […] [g]rants Oxus Resources Corporation the exclusive right to develop the Khandiza Polymetallic Project (Surkhandariskaya Region)." It therefore undeniably refers to "development rights" and not merely to "exploration rights". However, this sentence has to be read in its broader context, both taking into account the ongoing negotiations between the Parties and the other provisions of the Decree No. 359.

279. At the time of the adoption of Decree No. 359, Marakand and Goskomgeology were deeply engaged in negotiations regarding the specific terms of a concession agreement, whereby they had already provided the Uzbek Government with two draft concession agreements and drafts of relevant decrees (see above para. 166 and 170). As such, it was not contested that Claimant had delivered a positive Phase 1 Feasibility Study and that it was in principle entitled to develop the Khandiza Deposit. The key issue was the finalization of the formal agreement regarding the specific terms and conditions of such commercial development and the economic benefits for Marakand, Goskomgeology and the Uzbek State, which would be further subject to the approval by the Uzbek Government.

280. This is further confirmed by the other provisions of the Decree No. 359, in which the Uzbek Government "authorized" Goskomgeology "to sign an agreement with ORC for the preparation of a Feasibility Study in respect of the Khandiza Polymetallic Project" and further provided that "depending on the results of the such feasibility study, [ORC] shall have the exclusive right to conduct negotiations for determining the concrete form of cooperation for the development of the Project (concession agreement or production sharing agreement), as well as the financing and other conditions for the development of the Project" (see above para. 175).

281. *In conclusion*, Decree No. 359 entitled ORC and Goskomgeology to proceed with step No. 2 under the PEA, i.e., the signing of an agreement to prepare a full bankable study. Decree No. 359 makes it sufficiently clear that neither the final form of the cooperation between ORC and Goskomgeology (concession agreement or production sharing agreement) nor the "*final financing and other conditions for the development*" had been finally agreed upon. As such, it did not provide Claimant with an unconditional right to develop the Khandiza Deposit based on a concession agreement.

282. **As concerns the Supplemental Agreements No. 5 and No. 6**, the Arbitral Tribunal further does not consider that these agreements granted Claimant any farther-reaching rights than those already granted under Decree No. 359.

(i) The Supplemental Agreement No. 5 of 16 October 2003 (see above para. 177) refers to the Decree No. 359 and its wording regarding the granting of "*exclusive rights to develop the Property*", but at the same time specifies that ORC "*shall have the exclusive rights to hold negotiations to develop the Property by way of a concession agreement or a production sharing agreement*", thereby showing that the securing of the exclusive development rights depended on the outcome of the negotiations;

(ii) The Supplemental Agreement No. 6 of 15 October 2004 (see above para. 182) expressly mentions that "*the Parties acknowledge that a further Decree of the Cabinet of Ministers of the Republic of Uzbekistan shall be required in order to grant the concession under such a Concession Contract*."

283. As such, for Claimant to have secured definitive rights to develop the Khandiza Deposit, it would have been necessary to complete the third step contemplated under the PEA (see above para. 264), i.e. the conclusion of a final agreement with Goskomgeology over the commercial and financial terms of their cooperation and its approval by the Cabinet of Ministers. For this to happen, Claimant needed to get the approval by the Cabinet of Ministers of its Bankable Feasibility Study, which was submitted on 11 October 2004 (see above para. 0). Thus, by the time ORC entered into the Supplemental Agreement No. 6, it knew and acknowledged that it still required the approval of the Bankable Feasibilty Study.

284. **As concerns the various intra-state correspondence** referred to by Claimant (see above para. 257 (vii)), the same conclusion derives from their analysis:

(i) ***Mr. Akhmedov's letter to Deputy Prime Minister Sultanov of 25 November 2004*** (see above para. 184) expressly refers to the "draft" nature of the envisaged concession agreement and decree and to the necessity to "*submit them to the Cabinet of Ministers of Uzbekistan for review and consideration.*" (Exh C-174);

(ii) **Mr. Akhmedov's letter to Mr. Eshmuratov,** Khokim of the Surkhandarya Region (Exh. R-295), provided that "[o]n November 30,2004, the Deputy Prime Minister of the Republic of Uzbekistan, U. T. Sultanov, instructed all the interested ministries and agencies to agree and adopt a joint decision as to the industrial development of the Khandiza field by February 1, 2005", thereby referring to the ongoing approval process. Although the tone of the letter seemed to assume that the Concession Agreement would be approved, the letter cannot be read as a replacement of an approval that had to come from the Cabinet of Ministers.

(iii) As concerns the draft ***Cabinet of Ministers Instruction*** suggested by Mr. Akhmedov on 5 July 2005 (see above para. 212), it is unclear whether this instruction sheet was ever signed by the Prime Minister (Exh 438 is an unsigned version). In any event, the Arbitral Tribunal considers that this instruction was a mere government internal instruction allowing Mr. Akhmedov to sign relevant documents for the set-up of the Joint Venture. Thus, this letter and the attached instruction dealt with the representation powers of Mr. Akhmedov and cannot be considered to be a substitute for the required approval of the final Joint Venture Agreement by the Cabinet of Ministers.

(iv) ***Mrs Saidova's letter of 19 July 2005 to the Cabinet of Ministers*** (see above para. 215) refers to "*substantial remarks regarding the submitted feasibility study*" and therefore considered the possibility to enter into the JV with Korean companies or simply refuse to continue the Project with Marakand. This letter therefore further indicates that the deal between ORC and Goskomgeology was not sealed and no rights had been definitely secured by ORC.

(v) ***Mr. Akhmedov's letters to Mrs Saidova, Deputy Prime Minister***, of October 2004 (Exhs. C-556 to C-566), of 21 July 2005 (see above para. 216, Exh. R-439) and of 14 April 2006 to Mr. Shoismatov, subsequent Deputy Prime Minister (see above para. 224; Exhs. R-446 and R-447) show that Goskomgeology took an active role in liaising with relevant Ministries and Officials to push for responses and approval of the draft decrees and/or agreements. However, this correspondence further confirms that further steps, in particular approval, were outstanding and that no formal rights had yet been secured by ORC.

285. The fact that negotiations regarding the final form and conditions for a joint development of the Khandiza Deposit were ongoing is further shown by the correspondence and other government documents referred to by Respondent, including for example R-98, R-293, R-296, R-300, R-305, R-421, R-424, R-426, R-428, R-430, R-431, R-513, R-515, R-516, R-1142. Some of this correspondence clearly stressed that certain terms of the proposed agreements and decrees were not acceptable to some Ministries, and based thereon, Claimant could not assume that it had formally secured the right to implement the Concession or Joint Venture scheme as proposed.

286. Finally, it appears that Claimant was very well aware that (i) its rights to develop the Khandiza Deposit were subject to further approval by the Government and that (ii) the proposed Concession and Joint Venture schemes were not uncontroversial and gave rise to various objections from various Ministries. This is clearly evidenced by the statements made by Mr. Alasdair Stuart in the ***Urgent and Confidential Board Memorandum*** of 5 July 2005 (see above para. 213), reporting to Mr. Bill (William) Trew, Bill Charter, Richard Robinson and Richard Wilkins, stating, among others, that the "*Decree 359 is very clear on our 'exclusive' rights to 'negotiate' a deal on Khandiza (as a Concession or PSA)* ***but does not state we have exclusive rights to the project per say.*** (sic) *One may argue the exclusive negotiation rights do not exist for negotiating a JV deal (which is why the idea of a Preliminary Agreement on a JV was conceived – currently abandoned).*" (emphasis added)

3.1.2.4 Conclusion

287. In conclusion, Claimant did not secure an unconditional right to develop Khandiza through a concession agreement, but only a right to formal, exclusive and good faith negotiations to develop the Khandiza Deposit jointly with the Uzbek Parties on mutually acceptable terms, primarily on the basis of a 50/50 Joint Venture.

3.2 Issue No. 2: Did Uzbekistan Deprive Claimant of Such Rights in a Way Which is Contrary to its Obligations under the BIT?

288. Claimant raises various claims of breach of the BIT by Respondent, which will be dealt with separately in the following order:

(i) Claimant's Claim for Expropriation under Article 5(1) BIT (see below section 0);

(ii) Claimant's Claim for Breach of Article 2 of the BIT, including the breach of the FET standard and the claim resulting from arbitrary and unreasonable measures (see below section 0);

(iii) Claimant's Claim for Breach of the standard of Full Security and Protection ("FPS standard") under Article 2 of the BIT (see below section 0);

(iv) Claimant's Claim for Breach of the umbrella clause of Article 2(2) *in fine* of the BIT (see below section 0).

3.2.1 Claimant's Claim for Expropriation Under Article 5(1) BIT

3.2.1.1 The Parties' Positions

(a) Claimant's Position

289. According to Claimant, (i) Khandiza is a textbook case of unlawful expropriation by the host State of the rights and investment of Claimant; (ii) Uzbekistan carried out this expropriation after Claimant had spent considerable human and financial resources as well as expertise to de-risk the Deposit and had secured development rights, in accordance with industry standards, agreement terms, and international law; (iii) Uzbekistan did so unapologetically, without justification, and without ever suggesting any wrongdoing on the part of Claimant; and (iv) Uzbekistan did not offer any compensation for this taking (Claim. Am.Reply. 23.08.2013, para. 95). According to Claimant, this expropriation happened in two steps:

(i) Respondent first took Claimant's vested right to develop the Deposit *via* a concession agreement, by instructing Claimant to enter into a joint venture with the State for the development of the mine. This happened on 4 May 2005 by CabMin Protocol Decision No. 09-62-90, which reduced Claimant's rights to Khandiza area to 50% by ordering a 50/50% JV with Goskomgeology (Claim. SoC. 17.09.2012, paras. 209, 591; Claim. Am.Reply. 23.08.2013, paras. 253, 258, 308, 334; Exh. C-184).

(ii) Respondent then went on to fully expropriate Claimant's right to develop the mine by awarding the Project to a State-owned entity. This happened on 10 August 2006 by Presidential Decree No. PP-442, which assigned the Khandiza Project to AMGK (Claim. SoC. 17.09.2012, paras. 228, 229, 232, 597, 598; Claim. Am.Reply. 23.08.2013, paras. 213, 308; Exh. C-200).

290. This expropriation did not satisfy the conditions of Article 5(1) of the BIT and was therefore unlawful: it did not serve a public purpose and no compensation was offered to Claimant (Claim. SoC. 17.09.2012, paras. 474 fol.).

291. In any event, even if Respondent's defense that Claimant never acquired the right to develop the Deposit were to be upheld, Claimant alternatively submits that it did, at the very least, have the exclusive right to good faith negotiations for these rights. If the conclusion of such negotiations constituted a condition precedent to Claimant acquiring development rights, the fact that Respondent prevented its materialization also amounts to an expropriation of Claimant's rights and investment (Claim. Am.Reply. 23.08.2013, para. 292; Claim. PHB II. 21.08.2014, paras. 18, 53 fol.).

292. Finally, even assuming that none of Claimant's proposals were mutually acceptable, Respondent failed to comply with its obligations when it abruptly broke off the negotiations, without any warning or explanation and awarded the Project to AMGK (Claim. Am.Reply. 23.08.2013, paras. 319, 321).

(b) Respondent's Position

293. According to Respondent, Claimant never had the particular investments that it now alleges were taken by Respondent (Resp. Am.Rej. 21.02.2014, paras. 184 fol.). Claimant's rights in the Khandiza Project consisted only of the right to (1) carry out exploration works to search for a new, undiscovered deposit in the region surrounding the Khandiza Deposit, i.e. the Expanded Area, (2) to develop a Preliminary Feasibility Study regarding the possible development of the Khandiza Deposit (referred to in the PEA as "Property"), and (3) to initiate negotiations, in the event that the results of its Preliminary Feasibility Study were positive, regarding the establishment of a Joint Venture under terms that were mutually acceptable to Claimant and the State (Resp. Am.Rej. 21.02.2014, para. 83). In order to obtain the right to develop, Claimant would need to demonstrate to the Government both the economic and technical viability of its proposal and the commercial benefits for the Government of entering into such a partnership. It arises out of the various Prospectuses and Annual Reports of Marakand and ORC, that they were well aware that their rights were limited to a right to negotiate and what requirements were needed to be fulfilled to conclude an agreement with the State (Exhs. C-154, C-150, R-915, C-452) Resp. Am.Rej. 21.02.2014, para. 189). However, Claimant refused to address the issues raised by the State in particular with regard to (i) the inequitable division of profits, (ii) the preferential tax treatment afforded to Marakand in deviation from Uzbek law, (iii) the underutilization of mineral resources, and (iv) the technical and environmental concerns (Resp. Am.Rej. 21.02.2014, para. 198).

294. As to Claimant's theory of expropriation of a right to good-faith negotiation, Claimant has failed to identify any authority that supports its position that the mere absence of good faith negotiations can alone rise to the level of an expropriation (Resp. Am.Rej. 21.02.2014, para. 195). According to Respondent, who relies on *Generation Ukraine v. Ukraine*, "*there cannot be an expropriation unless the complainant demonstrates the existence of proprietary rights in the first place*" and a right to good-faith negotiation does not constitute such proprietary right (Resp. PHB I. 21.07.2014, paras. 8 fol.; Exh. RL-240). In any event, in case bad faith would have been ascertained, the factual evidence demonstrates that Marakand – not Respondent – would have failed to negotiate in good faith.

295. Given the absence of any actual investment to expropriate, or any expropriatory act, Claimant's expropriation claim must be dismissed (Resp. Am.Rej. 21.02.2014, paras. 184, 202).

3.2.1.2 The Arbitral Tribunal's Findings

(a) The Applicable Legal Basis

296. Article 5 of the BIT provides as follows (Exh. CL-20):

> *"ARTICLE 5*
>
> *Expropriation*
>
> *(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.*
>
> *(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares."*

297. As such, Article 5(1) provides for expropriation under the following terms and conditions:

(i) expropriation, or any measure having equivalent effect, must be justified by a public purpose;

(ii) it must be effected on a non-discriminatory basis;

(iii) it must be accompanied by adequate compensation to be calculated based on the "*value of the investment expropriated immediately before the expropriation*", including interests;

(iv) such compensation must be effected "without delay";

(v) the expropriation or the valuation of the compensation shall be subject to judicial review.

The situation of an expropriation of "assets" of a company which is constituted under the law of Uzbekistan, i.e. Marakand, is expressly contemplated in para. 2 of Article 5, which further provides that the foreign shareholder of such company, i.e. Claimant, shall be entitled to the same treatment as described in para. 1 as concerns the loss of value of its investment in such company.

(b) The Relevancy of Article 5 in the Present Case

298. The Arbitral Tribunal has already found that Claimant did not secure an unconditional right to develop the Khandiza Deposit through a concession agreement, but only a right to formal, exclusive and good faith negotiations to develop the Khandiza Deposit on an exclusive basis jointly with the Uzbek Parties on mutually acceptable terms, primarily on the basis of a 50/50 Joint Venture (see above para. 287).

299. It is undisputed that negotiations took place and that they were unsuccessful, and that the development of the Khandiza Deposit was ultimately assigned to AMGK instead of Marakand. As a result thereof, and blaming Respondent for the failure of the negotiations, Claimant claims that is has been expropriated of its right of development.

300. The Arbitral Tribunal considers that Claimant's reasoning puts on an equal footing the duty to conduct negotiations according to a certain standard and the success of such negotiations. In the Arbitral Tribunal's view, these are however rights of a distinct nature.

301. The Arbitral Tribunal is of the opinion that a right to formal negotiations cannot be subject to an "expropriation" in the sense of Article 5 of the BIT, because it lacks the nature of proprietary right, i.e. of "asset" in the sense of Article 5(2) of the BIT. Finding otherwise by following Claimant's reasoning would lead to assuming that the State had an obligation to conclude an agreement at specific conditions. This would contradict the relevant contractual provisions, which emphasized aspects such as a "negotiation" and "mutually acceptable terms". Finding that a right to mere formal negotiations could be subject to expropriation in the sense of Article 5 of the BIT would lead to transforming an obligation to do

something according to certain standards (i.e. "*une obligation de moyens*") into an obligation to achieve a certain result (i.e. "*une obligation de résultat*"). This cannot be the purpose or meaning of Article 5 of the BIT.

302. That however does not mean that the failure to achieve a positive outcome of the negotiations could not give rise to a breach of the BIT, depending on the circumstances and causes for such failure, namely if such failure is imputable to the State. The Arbitral Tribunal however considers that such a scenario would fall under the scope of application of Article 2 of the BIT, and not under Article 5 of the BIT.

3.2.1.3 Conclusion

303. Claimant's Khandiza Claims No. 1 and No. 3, to the extent they are based on an allegation of expropriation under Article 5 of the BIT, are rejected.

304. The facts underlying this claim shall however be taken into consideration when 153avourabl a potential breach of Article 2 of the BIT.

3.2.2 Claimant's Claim for Breach of Article 2 of the BIT

3.2.2.1 The Parties' Positions

(a) Claimant's Position

305. As concerns Article 2 of the BIT, Claimant raises two different claims based on (i) a breach of the FET standard of Article 2(2) of the BIT, and (ii) a breach of Respondent's obligation to refrain from arbitrary or unreasonable measures under Article 2(2) of the BIT.

306. **As concerns the FET standard,** Claimant contends that Respondent breached such standard in that the taking of Claimant's right to develop the Khandiza Deposit was unfair and inequitable. The FET standard of Article 2(2) of the BIT imposes on Respondent an obligation to act consistently and transparently, to honor the investor's legitimate expectations, to refrain from exercising coercion, to act in good faith, and to refrain from acting arbitrarily, grossly unfairly, unjustly, idiosyncratically, discriminatorily, or without observing due process (Claim. Am.Reply. 23.08.2013, para. 330; Claim. SoC. 17.09.2012, paras. 501-558). Respondent breached these obligations by (i) ordering that Claimant abandon the concession route and make a proposal for a 50/50 Joint Venture Agreement, (ii) by thereafter abruptly ending the negotiations and issuing Presidential Decree No. 09-62-90 awarding the Project to AMGK and thereby

breaching Claimant's legitimate expectations and further failing to observe due process (Claim. Am.Reply. 23.08.2013, paras. 329 fol*; Rumeli v. Kazakhstan, PSEG Global v. Turkey, ADC Affiliate Limited v. Hungary*). In addition, Respondent failed to ever clearly state its expectations or the terms it would agree to or to ensure a transparent and predictable framework for Claimant's draft proposals (Claim. Am.Reply. 23.08.2013, para. 343; *Metalclad v. Mexico*, Exh. CL-93).

307. **As concerns the obligation to refrain from arbitrary or unreasonable 154avourabl**, Claimant contends that Respondent's inconsistent behaviour was unreasonable considering that Respondent had agreed to, and even encouraged Claimant's investments in the Khandiza Deposit and Claimant's completion of a Bankable Feasibility Study, that Claimant had addressed in detail all of Respondent's questions regarding technical and financial aspects of Claimant's Draft Concession Agreement, and that Claimant had even agreed, thereafter, to enter into a 50/50 Joint Venture Agreement for the development of the mine despite the loss that this entailed. Under these circumstances Respondent's inconsistent, unreasonable and arbitrary behaviour violates Article 2 of the BIT (Claim. Am.Reply. 23.08.2013, para. 350).

(b) Respondent's Position

308. According to Respondent, Claimant's claims are unfounded as all of its Khandiza related claims turn on alleged undertaking and assurances that Respondent never gave (Resp. Rej, para. 236).

309. **As concerns Claimant's FET claim**, it is primarily based on an assertion that Claimant had certain legitimate expectations, which were ultimately unduly deceived by Respondent. However, a claim based on legitimate expectations must proceed from the exact identification of the origin of the expectations alleged. Claimant has not identified any such specific assurances or commitments with respect to the Khandiza site – beyond those affording ORC the undisputed right to negotiate a possible deal to develop the Deposit. In addition, the PEA provided ORC merely with a right to negotiate an economically viable plan for Khandiza that was mutually beneficial to both parties and subject to requisite State approvals. Accordingly, Claimant could have no legitimate expectation to a purported development right that it, in fact, acknowledged did not exist. Accordingly, Respondent did not violate any purported legitimate expectations of Claimant in connection with its non-existent rights to develop the Khandiza Deposit or to explore certain parts of the Expanded Area beyond what the parties had agreed (Resp. Rej, paras. 214 fol.).

310. As to Claimant's allegation that Respondent violated the FET standard because its conduct in the Khandiza negotiations was "*procedurally flawed, as Respondent did not observe due process*", it is unfounded. ORC and Marakand were afforded ample due process, but chose to squander the opportunity through unreasonable proposals and bad faith negotiations (Resp. Am.Rej. 21.02.2014, para. 221; Resp. PHB I. 21.07.2014, para. 16). Claimant merely complains of the outcome that naturally followed from their own negotiating positions and tactics. In fact, the Government was active, responsive and straightforward in detailing its expectations, while first ORC then Marakand repeatedly made untimely and unresponsive proposals without regard for the feedback that they received (Resp. Am.Rej. 21.02.2014, para 226). Marakand's internal documents show that Marakand was well aware of – yet unwilling to address – the Government's concerns. The due process component of the FET standard does not require a State to pursue endless process, nor to continue to entertain fruitless negotiations that are leading nowhere (Resp. Am.Rej. 21.02.2014, paras. 224 fol.).

311. **As concerns Claimant's claim based on arbitrary or unreasonable measures**, Claimant already conceded in its Statement of Claim that the unreasonable and arbitrary factors that it reads under Article 2(2) of the BIT are subsumed under the fair and equitable treatment standard, also under Article 2. Thus, these are not two different standards. As a consequence, since Claimant's FET claim must be rejected, the claim for unreasonable or arbitrary measures shares the same fate (Resp. Am.Rej. 21.02.2014, para. 233).

3.2.2.2 The Arbitral Tribunal's Findings

(a) The Applicable Legal Basis

312. The relevant part of <u>Article 2 of the BIT</u> provides as follows:

> *"(1) Each Contracting Party shall encourage and create 155avourable conditions for nationals or companies of the other Contracting Party to invest in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.*
>
> *(2) Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.* […]*"*

313. The Arbitral Tribunal does not consider it necessary to enter into a lengthy analysis of the concept and scope of the FET standard in general. It will simply acknowledge that there is a great variation in the way this standard is applied by international tribunals, partly because of the different approaches towards the origins and nature of the FET standard (e.g. whether conceived as an international minimum standard or as an autonomous standard) (for a summary of the situation, see *El Paso v. Argentina*, paras. 330 fol.), partly because the relevant provisions contemplating the FET standards in BITs differ in their structure and wording, thereby requiring a case by case analysis and application. However, as stated in *El Paso v. Argentina* (para. 348), the legitimate expectation of the investors have generally been considered central in the definition of the FET standard, whatever its scope. The Arbitral Tribunal further agrees with the tribunal in *El Paso v. Argentina*, that the concept of "legitimate expectations" is an objective concept, that is the result of interests and rights of both the investor and the State, and that the result of such balancing may thus vary according to the specific context (*El Paso v. Argentina*, paras. 356 fol.).

314. Thus, the Arbitral Tribunal will focus its analysis on the scope of the FET standard based on Article 2(2) of the BIT and its delimitation with other standards mentioned in this provision, before determining whether Respondent breached any of Claimant's legitimate expectations as protected under any of these standards.

(aa) The Scope of the FET Standard Under Article 2(2) of the BIT

315. Article 2(2) of the BIT is drafted in very general terms and, with respect to the FET standard, merely states that "*each Contracting Party shall at all times be accorded fair and equitable treatment.*" There is no definition of the FET standard.

316. According to the 1969 Vienna Convention on the Law of Treaties, a treaty is to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

317. The object and purpose of the BIT is set out as follows in the Preamble (Exh. CL-20):

> *"The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Uzbekistan;*
>
> *Desiring to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State;*

Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;"

318. Considering the lack of specific definition in the BIT, the FET standard as contemplated by Article 2(2) must be understood as a means to guarantee justice to foreign investors, and when doing so, for the States' actions to give due regard to an investor's legitimate expectations by refraining from taking measures which are not justified under the circumstances, i.e. unreasonable, disproportionate or discriminatory.

(ab) The Relationship Between the FET Standard and the Other Standards Provided for in Article 2(2) of the BIT

319. Article 2(2) of the BIT refers, in addition to the FET standard, to three other duties of the States, (i) the duty to ensure full protection and security ("FPS standard"), (ii) the duty to refrain from impairing "*by unreasonable or discriminatory measures the management, maintenance, use enjoyment or disposal of investments*" and (iii) the duty to "*observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party*" (so-called "umbrella clause").

320. As concerns the FPS standard and the umbrella clause, the specific scope of these standards and their relation with the FET standard is disputed. Therefore, the Arbitral Tribunal will examine these two standards and their alleged violation separately.

321. As concerns the duty to refrain from unreasonable or discriminatory measures, although Claimant deals with its violation separately, Claimant has conceded in its Statement of Claim that "*the standard of reasonabless does not have a different meaning from the fair and equitable treatment standard 'with which it is associated'*" (Claim. SoC. 17.09.2012, para. 551 quoting the *Saluka v. Czech Republic* case) and that the standard of protection against arbitrariness (presumably included in the standard of reasonableness) "*is related*" to that of fair and equitable treatment, in that "*any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.*" (Claim. SoC. 17.09.2012, para. 552 quoting the *CMS v. Argentina* case). Actually, in certain parts of its submissions, Claimant even presents the obligation not to engage in conduct that is "*arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking due process*" as the "*sixth element*" of the FET standard (Claim. SoC. 17.09.2012, para. 535).

322. As such, Claimant does not claim that a breach of the duty to refrain from unreasonable, arbitrary or discriminatory measures is an independent standard form the FET and constitute a separate basis for Claimant's claims. In addition, the factual basis on which Claimant's relies to argue that Respondent resorted to arbitrary and unreasonable measures is not different from the factual basis underlying its claim for a breach of FET (Claim. Am.Reply. 23.08.2013, paras. 348-350).

323. As a consequence, the Arbitral Tribunal considers that the duty to refrain from unreasonable or discriminatory measures as provided in Article 2(2) of the BIT is subsumed under the broader FET standard and that a 158avourabl which is unreasonable or discriminatory in the sense of Article 2(2) would at the same time constitute a breach of the FET standard. This is not to say that both standards are fully equivalent, in particular – as explained above (para. 318) – the FET standard may have a broader scope than the more specific duties to act in a reasonable and non-discriminatory way.

(b) The Relevancy of the FET Standard in the Present Case

324. When applying the FET standard of Article 2(2) of the BIT to the Khandiza Project, it is of particular relevance that Claimant had successfully completed the first step contemplated in the PEA, i.e. the Preliminary Feasibility Study. In addition, both Parties engaged into the second step, i.e., the negotiation of a formal agreement.

325. Under these circumstances, although Claimant had no specific right to a particular result as concerns the final form and terms of cooperation, Claimant had a legitimate expectation that it would be granted the right to develop the Khandiza Deposit, provided it would be able to finalize the terms of cooperation with the Uzbek Parties and the State under mutually acceptable terms. With regard to this second step, Claimant was entitled to expect that Respondent would act in good faith, according to the law. However, as mentioned in the *Maffezini v. Spain* case, a BIT is not an insurance policy against bad business judgments, or for that matter, unprofitable business (see *Maffezini v. Spain*, para. 64).

326. The question thus is whether Respondent breached these legitimate expectations by otherwise acting in a way contrary to the FET standard.

327. Claimant's reproaches towards Respondent can be summarized as follows (Claim. Am.Reply. 23.08.2013, paras. 329 fol.):

(i) Respondent's Protocol Decision No. 09-62-90 by which it ordered Claimant to abandon the concession route and make a proposal for a 50/50 Joint Venture Agreement and its later Decree No PP.-442 by which it awarded the development of the Khandiza Deposit to AMGK breached the FET standard in that it was substantively adverse to Claimant's legitimate expectations to develop the Khandiza Deposit by way of a concession agreement;

(ii) By failing to negotiate in good faith the terms of a concession agreement under which the Khandiza Deposit would be developed, Respondent breached its obligation of good faith under the FET standard;

(iii) By abruptly ending the negotiations and issuing Presidential Decree No. 09-62-90 awarding the Project to AMGK, Respondent failed to observe due process and thereby breached the FET standard.

328. Claimant's claim for breach of FET standard seems to have a 'substantive' and a 'procedural' component. On one side, Claimant claims about the result, i.e. having been deprived of its legitimate expectation to be granted the right to develop the Khandiza Deposit (i.e. 'substantive component'). On the other side, Claimant further complains about the way in which Respondent behaved during the negotiation process (i.e. 'procedural component').

329. The Arbitral Tribunal will analyse both components separately:

(ba) As Concerns the Substantive Component of Claimant's FET Claim

330. To the extent that Claimant complains about the result, i.e. not having been granted the final right to develop the Khandiza Deposit under the terms of a concession put forward by Claimant, it must be stressed that – as stated above – Claimant cannot be deemed to have had a legitimate expectation to a particular result of the negotiation process. Claimant only had a legitimate expectation to be granted the exclusive development right to the Khandiza Deposit under "mutually acceptable terms." Under these circumstances, the mere failure to achieve an agreement could only constitute a breach of the FET standard if Claimant established that Respondent refused without justifiable reason a proposal which should have been considered as "mutually acceptable" in view of all the relevant circumstances of the case.

331. Thus, the Arbitral Tribunal will examine whether (i) Respondent's decision through Protocol Decision No. 09-62-90, to "abandon" the concession route, and/or (ii) its later Decree No. PP-442 to allocate the Khandiza Project to AMGK

were in breach of the FET standard in that they unduly rejected proposals from Claimant which were to be deemed "mutually acceptable."

332. *As concerns the concession scheme*, this scheme was proposed by Claimant knowing that the Uzbek Government was not experienced in the granting of concessions and its implementation would require an amendment of the Uzbek legal framework in place (see above para. 155; Exh R-269). As such, Claimant took the risk of not being able to convince the Uzbek Government of the attractiveness and feasibility of this scheme and/or to convince it to introduce the necessary legal changes.

333. It is further established that the concession scheme was eventually rejected by the Uzbek Government ultimately because of a failure of the Parties to agree on an appropriate concession fee (see above para. 202; Exh. R-305). The Uzbek Government made it sufficiently clear that the reasons for such rejection was that the financial terms contemplated by Claimant under the draft concession agreements were not acceptable. Marakand's Board Memorandum of 7 April 2005 clearly shows that Marakand was aware of the concerns of the Uzbek Government regarding the "*disparity of cash"* of the concession scheme *"to be received by Marakand (~$166M) and the Uzbek Government (~$51M), which clearly favour Marakand.*" According to the Board Memorandum, these concerns of the Uzbek Government were "*not unexpected, as the type of arrangement being sought (in the form of a Concession) is new*." (see above para. 198; Exh. C-552).

334. Under these circumstances, it is not the Arbitral Tribunal's role to review in detail the economic attractiveness of Claimant's proposal as one would do when judging the due performance of contractual obligations. For the purpose of assessing a potential breach of the FET standard under Article 2 of the BIT, the key question is whether such rejection was a violation of the standard.

335. Based on the evidence at hand, and in particular Marakand's awareness of the risks of the concession scheme and the thereunder disadvantageous cash position for the Uzbek Government, the Arbitral Tribunal finds that the Uzbek Government's refusal to approve the proposed concession scheme and its instruction through Protocol No. 09-62-90 to revert to a negotiation of a Joint Venture Agreement cannot be deemed to constitute a violation of the FET standard.

336. *As concerns the proposed Joint Venture terms*, the Arbitral Tribunal finds that the PEA originally contemplated a Joint Venture with a 50%/50% split of the Charter Fund (see above paras. 140 and 287). Thus, Claimant's argument that the terms "mutually acceptable" did not necessarily amount to a 50%/50% split is irrelevant.

The question is rather whether Respondent insisted on such a split in a manner contrary to the FET standard thereby preventing the possibility of any agreement.

337. The Arbitral Tribunal finds that there is no factual basis to come to such conclusion.

338. The Uzbek Government made it sufficiently clear that it did not consider the capital distribution proposed by Claimant in its draft Joint Venture Agreement as sufficiently mutually beneficial (see above para. 214). This was clear to Marakand, as evidenced by the Urgent and Confidential Board Memorandum of 5 July 2005 (see above para. 213; Exh. C-452), in which Mr. Stuart expressly stated that "[i]*n short we cannot get the desired economic performance using* [Feasibility Study] *metal prices (which I am convinced should remain our basis) and are forced to conclude the project is simply not good enough to share*" and that based on this statement he considered that there were two strategic options for Marakand: (i) agreeing to a 50%/50% split knowing that it would "yield subeconomic performance", or (ii) insisting on the Marakand's proposal, which "*will be more difficult and contentions as it will require* [Marakand] *to pursue and try to convince the Government of that which they have so far indicated they do not want.*"

339. Marakand decided to insist on what they believed to be the more beneficial scheme for Claimant. This was a strategic decision taken on the basis of a clear understanding of the Government's concerns. The risk identified by Marakand, i.e. that it would fail to convince the Uzbek Government of the "mutually beneficial" character of their envisaged Joint Venture scheme, simply 161avourable161d. Claimant failed to establish that the Uzbek Government's criticism towards the sharing of the economic benefits of the Project as contemplated by Marakand was not based on reasonable concerns.

340. Under these circumstances, it would not be appropriate to conclude that the Uzbek Government's eventual refusal to approve a Joint Venture Agreement on such basis and its decision through Decree No. PP-442 to assign the Khandiza Project to AMGK were *per se* contrary to the FET standard.

(bb) As Concerns the Procedural Component of Claimant's FET Claim

341. To the extent that Claimant complains about the procedure, i.e. Respondent's failure to participate in good faith and its allegedely abrupt interruption of the negotiation process, these allegations could – if established – constitute a breach of the FET standard. The Arbitral Tribunal therefore needs to examine whether Respondent's lacked good faith or otherwise unduly undermined or interrupted the negotiation process.

342. It arises out of the record that there were extensive negotiations between Claimant, Goskomgeology and various departments of the Uzbek Government as concerns the form of cooperation to develop the Khandiza Deposit. In addition, it arises from the record that Goskomgeology and the relevant Uzbek Government departments were open to discuss also avenues not originally contemplated under the PEA, i.e. the concession agreement, and provided feedback to Claimant and/or Goskomgeology regarding Claimant's proposals.

343. In particular, the record shows the following:

(i) Goskomgeology supported the Joint Venture project, subject to certain amendments to the scheme proposed by Claimant, and liaised with the Uzbek Government to have it approved (see e.g. above paras. 221 (Exh. C-573) and 224 (Exhs. R-446, R-447);

(ii) Various entities and departments of the Uzbek Government provided feedback on the draft Joint Venture Agreement. This feedback showed that various government departments took issues with various aspects of the scheme proposed by Claimant, in particular (i) the financial aspects of the shareholding and cost and profit shares, which were not considered to be sufficiently "mutually acceptable" and (ii) the technical and economic aspects of the envisaged development activities, which were not considered to be appropriate in view of the characteristics of the Khandiza Deposit and the surrounding environment and infrastructure (see e.g. above paras. 190, 194, 196 (Exhs. R-296, R-300 and R-302) as concerns the concession scheme, and paras. 202 and 214 (Exhs. R-1374, R-519, R-305, R-308) as concerns the JV scheme);

(iii) Claimant was largely aware of these concerns, as documented in the Urgent and Confidential Board Memorandum of 5 July 2005 (Exh. C-452, see above para. 338);

(iv) The negotiations with the Uzbek Government lasted from the summer 1998 until winter 2005, i.e. over 7 years, during which Goskomgeology extended the duration of the PEA Agreement seven times for a total of four years, i.e. from 31 December 2001 to 31 December 2005 (see above paras. 173, 177, 182, 188, 197, 210, 220);

344. Based thereon, Claimant's contentions that the Uzbek Government acted in bad faith or 'abruptly ended' the negotiations with Claimant are unfounded. It may very well be that due to the number of government entities involved and communication issues relating to the language and existing tensions between Goskomgeology and Marakand (in view of the problems incurred in the AGF

Project, see below para. 467), Claimant was not kept informed of every single correspondence from or concern raised by the Uzbek Government and that there was lack of efficiency and maybe even inconsistencies in the feedback received. However, all in all, Claimant was aware of the concerns of the Government and made certain strategic choices in deciding how to address them.

345. It further arises from the record that the Uzbek Government's decision to assign the Project to AMGK was not an 'abrupt' one, but was first discussed by the Cabinet of Ministers on 13 June 2006 (i.e. 5 years after the original expiry date of the PEA, see above para. 227) and formalized only on 10 August 2006, i.e. over two months later during which Marakand tried to reverse the course of this decision but without success (see above paras. 230 and 231).

346. Under these circumstances, the Arbitral Tribunal finds that, based on the factual context as arising out of the evidence at hand, the way in which the Uzbek Government managed the negotiation process with Goskomgeology and/or Marakand does not reach the threshold of a breach of the FET standard.

3.2.2.3 Conclusion

347. Claimant's Khandiza Claim No. 1, to the extent it is based on an alleged breach of the FET standard and/or arbitrary and unreasonable treatment under Article 2(1) of the BIT, is rejected.

3.2.3 Claimant's Claim for Breach of the Standard of Full Security and Protection ("FPS Standard") Under Article 2(2) of the BIT

3.2.3.1 The Parties' Positions

(a) Claimant's Position

348. According to Claimant, the acts and omissions of Respondent, namely the revocation through Protocol Decision No. 09-62-09 of the right to develop the mine by way of concession and then the revocation through Decree No. PP-442 of Claimant's development rights altogether and the attribution of the same to AMGK were also substantively and procedurally constitutive of a violation of Claimant's right to Full Security and Protection, hence a violation of Article 2(2) of the BIT (Claim. SoC. 17.09.2012, paras. 559 fol.; Claim. Am.Reply. 23.08.2013, paras. 351 fol.).

(b) Respondent's Position

349. According to Respondent, Article 2(2) of the BIT is meant "*to protect more specifically the physical integrity of an investment against interference by use of force*" and not other forms of impairment to an investment (Resp. SoD.Class. 04.04.2013, para. 460; Resp. Am.Rej. 21.02.2014, para. 239). Claimant has not alleged any form of interference with the physical integrity of its alleged investment at the Khandiza site, by a third party or otherwise. On this basis alone, Claimant's full protection and security claim fails.

3.2.3.2 The Arbitral Tribunal's Findings

(a) The Applicable Legal Basis

350. The relevant part of Article 2 of the BIT provides as follows:

> *"(1) Each Contracting Party shall encourage and create 164avourable conditions for nationals or companies of the other Contracting Party to invest in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.*
>
> *(2) Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and* ***shall enjoy full protection and security in the territory of the other Contracting Party****. [...]."* (emphasis added).

351. As for the FET standard, Article 2 of the BIT does not provide a specific definition of the FPS standard and uses a very broad and general wording.

352. The question thus arises whether, in this context, the FPS standard is really different from the FET standard, and if so, to what extent.

353. In this regard, the Arbitral Tribunal once again agrees with the tribunal in *El Paso v. Argentina*, according to which the FPS standard "is no more than the traditional obligation to protect aliens under international customary law and that it is a residual obligation provided for those cases in which the acts challenged may not in themselves be attributed to the Government, but to a third party" (para. 522). In other words, unless otherwise expressly defined in a specific BIT, the general FPS standard complements the FET standard by providing protection towards acts of third parties, i.e. non-state parties, which are not covered by the FET standard. Thus, where an incriminated act is done by a State-organ, the applicable standard is the FET standard, whereas where such act is done by a non-state entity, the applicable standard becomes the FPS standard. As concerns the content of the FPS standard, case-law and commentators generally agree that it includes an

"obligation of vigilance and due diligence", which in turn comprises a duty of prevention and a duty of repression (see e.g. *TecnicosMedioanbientales Tecmed v. Mexico*, para. 177 ; *El Paso v. Argentina*, paras. 522-523 ; *Pantechniki v. Albania*, paras. 77 and 81. The question thus arises whether the "obligation of vigilance and due diligence" of the FPS standard is of the same nature and scope as the obligations arising out of the FET standard, i.e. whether the FPS standard prescribes to ensure investors "fair and equitable" treatment by non-state entities. It seems obvious that a State is not in a position to ensure the level of commitment with regard to the conduct of non-state entities, including commercial entities which are State-owned but operated independently according to commercial law and practice, compared with the conduct of its own organs. As such, under the FPS standard, an investor may not expect a State to ensure that the investor be treated "fairly and equitably" by any third party, but instead the investor has the right to expect that the State takes reasonable measures within its power to prevent wrongful injuries by third parties, and where such injuries have already happened, to punish them. This is why the FPS standard is often referred to and applied in the context of "use of force" (see e.g. *Saluka v. Czech Republic*, para. 26 A; *Wena Hotels v. Egypt*, para. 84; *Eastern Sugar v. Czech Republic*, para. 203; see also *Enron v. Argentina*, para. 286 and *Sempra v. Argentina*, para. 323).

354. The Tribunal therefore agrees with the Respondent which distinguishes the two concepts, when stating that "Claimant's characterization of the BIT's full protection and security standard as broad protection for its investment that essentially is coterminous with the fair and equitable treatment standard is misplaced. Claimant does not address, for example, authorities that have held that the full protection and security standard is directed at different kinds of treatment from those covered by such standards as fair and equitable treatment or expropriation. These authorities correctly distinguish between these treaty standards on the basis that FET and expropriation involve the investor and the host State, whereas the full protection and security standard concerns the host State's obligation to exercise reasonable care in protecting the investment from actions of third parties. This distinction between treaty standards is consistent with the *effet utile* principle." (Resp. SoD. Class. 04. 04. 2013, para. 456. References omitted). The Tribunal considers indeed that the *effet utile* principle is an important element of interpretation of legal instruments.

355. If a State fails to exercise vigilance or due diligence to prevent or punish such injuries, it is responsible for this omission and is liable for the ensuing damage. The precise degree of diligence required depends largely on the circumstances of the case at hand.

(b) The Relevancy of the FPS Standard in the Present Case

356. Within the context of the Khandiza Project, the facts underlying Claimant's claims are mainly the revocation by the Uzbek Government of certain alleged rights, as well as the lack of good faith and cooperation during the negotiation process.

357. To the extent that these facts relate to actions or omissions of the Uzbek Government organs, claims based thereon fall outside the scope of the FPS standard.

358. As mentioned above, only conduct of a non-state entity may give rise to a claim based on the FPS standard. In this regard, as concerns the Khandiza Project, the only party which enters into consideration is Goskomgeology. The status of Goskomgeology, and in particular its relationship with and functions for the Uzbek State have not been extensively dealt with in the course of the proceedings. The Arbitral Tribunal however considers that this question may remain open. Indeed, if the acts of Goskomgeology are considered as attributable to the State, such acts fall under the scope of the FET standard (and the Arbitral Tribunal has already ruled that there was no breach of such standard, see above paras. 312 fol.). If Goskomgeology was to be considered as a "non-state entity", whose acts are not attributable to the State, the Arbitral Tribunal considers that there is no factual basis to support a breach of FPS for the following reasons:

359. Claimant's claims are based on reproaches against Goskomgeology, according to which the latter would have failed to sufficiently support Claimant's proposal and/or convey feedback from the Government. In other words, Goskomgeology would have contributed to the undue failure of the negotiation process. Claimant has however failed to substantiate and establish how this kind of alleged failure to duly fulfil its contractual duties towards Marakand would amount to a breach by the State of its "*duty of vigilance or due diligence*" towards Claimant. Claimant has further not raised any claim based on the use of force by Goskomgeology in the context of the Khandiza Project.

360. Under these circumstances, the facts underlying Claimant's claims with regard to the Khandiza Deposit do not fall under the scope of the FPS standard.

3.2.3.3 Conclusion

361. Claimant's Khandiza Claim No. 1, to the extent it is based on a breach of the FPS standard under Article 2(1) of the BIT, is rejected.

3.2.4 Claimant's Claim for Breach of the Umbrella Clause of Article 2(2) *in fine* of the BIT

3.2.4.1 The Parties' Positions

(a) Claimant's Position

362. According to Claimant, the taking of Claimant's vested development rights (or alternatively Claimant's right to exclusive negotiations for the development of the Deposit) also constituted a breach of the PEA and/or of the State's undertaking, including under CabMin Decree No. 359 and of the Law of the Republic of Uzbekistan on Foreign Investments, in particular its Article 10 which provides that a foreign investor has the right "*to own, use and dispose* [of] *his investments and result of investment activity.*" By breaching its contractual and/or regulatory undertakings, Respondent violated its international obligations under Article 2(2) *in fine* of the BIT (Claim. Am.Reply. 23.08.2013, para. 323).

(b) Respondent's Position

363. According to Respondent, Claimant's umbrella clause arguments have no merit. First, Claimant is not a party to any of the instruments on which it purports to rely upon and, therefore, its umbrella clause claims must fail (Resp. Am.Rej. 21.02.2014, para. 204). Second, Respondent never undertook to grant the particular development or exploration rights that Claimant now claims. In addition, the Law on Foreign Investments is too general in nature to support an umbrella clause claim (by Claimant or any other party) (Resp. Am.Rej. 21.02.2014, paras. 204, 206). Third, the breaches that Claimant alleges – namely, a failure to meet purported obligations to grant development or exploration rights, or to negotiate such rights – are purely contractual in nature, and do not constitute sovereign measures, as needed to rise to the level of Treaty breach (Resp. Am.Rej. 21.02.2014, paras. 204, 201 fol.).

3.2.4.2 The Arbitral Tribunal's Findings

(a) The Applicable Legal Basis

364. Article 2(2) *in fine* of the BIT provides as follows:

> *"(2)* […] *Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."*

365. Through an umbrella clause, the State assumes on the international level contractual obligations it might have entered into with a foreign investor. In the absence of an umbrella clause, the State is not liable, on the international level, for violation of purely contractual obligations it has committed to under its national legal order, unless liability has been found on other grounds, such as breaches of the FET, under a BIT. This was well explained in *Noble Ventures v. Romania*: [10]

> *"53. The Tribunal recalls the well established rule of general international law that in normal circumstances per se a breach of a contract by the State does not give rise to direct international responsibility on the part of the State. This derives from the clear distinction between municipal law on the one hand and international law on the other..*
>
> [...]
>
> *55. Thus, an umbrella clause, when included in a bilateral investment treaty, introduces an exception to the general separation of States obligations under municipal and under international law."*

366. For a claim to be based on an umbrella clause as the one at stake, the claimant must establish, among others, that it is the creditor of the "obligation" at stake and this requirement has two aspects:

367. First of all, the obligation which is alleged to be breached must exist. If the obligation brought forward by the claimant does not exist, it can *a fortiori* not be breached.

368. Secondly, such obligation at stake must have been **entered into** by the State or one of its organs towards the claimant specifically, and not just an affiliated or a subsidiary of the claimant (so-called "privity requirements") (see e.g., *Burlington v. Ecuador*, para. 208 ; *Azurix v. Argentina*, para. 384 ; *Siemens v. Argentina*, para. 204 ; *CMS v. Argentina (Annulment)*, para. 95). In other words, as set out in *CMS v. Argentina (Annulment)*, an umbrella clause can only concern consensual obligations and not general obligations:

> *"In speaking of 'any obligations it may have entered into with regard to investment,' it seems clear that Article II(2)I* ***is concerned with consensual obligations*** *arising independently of the BIT ...* ***They do not cover general requirements imposed by law****."*(para. 95(a); emphasis added))

369. Indeed, an umbrella clause can only apply to specific committments, ***because if it were to apply to all legal undertakings of the State in its national law, it would render the other standard of protection superfluous, as well expressed in SGS v. Pakistan*** :

[10] *Noble Ventures v. Romania*,, para. 53 and para. 55.

> *"*[T]*he claimant's view of Article 11 tends to make Articles 3 to 7 of the BIT substantially superfluous. There would be no real need to demonstrate a violation of those substantive treaty standards if a simple breach of contract, or of municipal statute or regulation by itself, would suffice to constitute a treaty violation on the part of a Contracting Party and engage the international responsibility of the Party"* (Decision, para. 168)

370. These principles were also clearly stated by the tribunal in *Noble Ventures*:

> *"Considering that Art. II (2)I BIT*[11] *uses the term "shall" and that it forms part of the Article which provides for the major substantial obligations undertaken by the parties, there can be no doubt that the Article was intended to create obligations, and obviously obligations beyond those specified in other provisions of the BIT itself. […] The employment of the notion "entered into" indicates that specific commitments are referred to and not general commitments, for example by way of legislative acts. This is also the reason why Art. II (2)I would be very much an empty base unless understood as referring to contracts."*

371. If the violation of any legal obligation contained in the national legal order would be transformed by an umbrella clause into a violation of the Treaty, whatever the internal source of the obligation or the seriousness of the breach, it would be sufficient to include an umbrella clause in the Treaty and no other standard of protection. This would result in the fact that the whole national legal order would be automatically internationalized through an umbrella clause, which cannot be.

(b) The Relevancy of the Umbrella Clause in the Present Case

372. In order to decide on Claimant's claim, it is therefore firstly necessary to determine what is the "obligation" which has allegedly been breached and what sort of breach would amount to a breach of the umbrella clause.

373. In this regard, Claimant relies on two main types of "obligations" including (i) the alleged contractual entitlement to the development rights in the Khandiza Deposit and (ii) the alleged legal entitlement under Article 10 of the the Law on Foreign Investments "*to own, use and dispose* [of] *his investments and result of investment activity.*"

374. As concerns the alleged contractual entitlement to development rights in the Khandiza Deposit, the Arbitral Tribunal has already found that through the PEA Claimant did not secure the alleged unconditional right to develop Khandiza, but only a right to formal, exclusive and good faith negotiations to develop the

[11] This Article reads as follows: "*Each party shall observe any obligation it may have entered into with regard to investments.*"

Khandiza Deposit jointly with the Uzbek Parties on mutually acceptable terms (see above para. 287).

375. As such, the relevant "obligation" under the umbrella clause of Article 2(2) of the BIT is the duty to negotiate on an exclusive basis and in good faith a mutually acceptable agreement for the development of the Khandiza Deposit.

376. Thus, firstly, the mere failure to be granted such development rights cannot be deemed to constitute a breach of an "obligation" in the sense of the umbrella clause of Article 2(2) of the BIT, as such contractual obligation did not exist. Secondly, to the extent that the Arbitral Tribunal found that the way in which the Uzbek Government managed the negotiation process with Goskomgeology and/or Marakand does not reach the threshold of a breach of the FET standard (see above para. 346), it is difficult to see how it could breach the umbrella clause based on a breach of the PEA.

377. Finally, another hurdle which Claimant has not overcome is the fact that the parties to the PEA are Goskomgeology and Marakand and not the State and Oxus. As such, the privity requirement would be an additional impediment which would prevent Claimant to rely on the umbrella clause with regard to the "revocation" of its alleged contractual rights to development of the Khandiza Deposit.

378. The situation is similar if looking at the Law on Foreign Investments in connection with CabMin Decree No. 359.

379. As mentioned above (para. 368), the umbrella clause refers to obligations "entered into" which implies a counterpart and not a general undertaking of an obligation. In this regard, the Law on Foreign Investments is a law of general nature setting out obligations of the State in a general way. As such, a breach of Article 10 of the Law on Foreign Investments is *per se* not sufficient to constitute a breach of the umbrella clause.

380. Claimant attempts to remedy this defect by invoking CabMin Decree No. 359 which is a decree specifically aimed at Oxus and not just a general legislation act. However, this Decree is of no avail to Claimant. First, Claimant's claim of a breach of such Decree presupposes that it had acquired the specific right to develop the Khandiza Deposit and was deprived of the ownership, use or disposal of such right. However, as mentioned above, the Arbitral Tribunal ruled that Claimant did not hold this right in the extent it alleges. It only held a right to exclusive and good faith negotiations of a mutually acceptable agreement. Thus, as mentioned with regard to the alleged breach of the PEA (see above para. 376), to the extent that the Arbitral Tribunal found that the way in which the Uzbek Government managed the negotiation process with Goskomgeology and/or

Marakand does not reach the threshold of a breach of the FET standard (see above para. 346), it is difficult to see how it could breach the umbrella clause based on a breach of Decree No. 359.

381. As a result, the Arbitral Tribunal considers that Claimant has failed to establish that it actually held an "obligation" protected by the umbrella clause.

3.2.4.3 Conclusion

382. Claimant's Khandiza Claim No. 1, to the extent it is based on a breach of the umbrella clause of Article 2(2) *in fine* of the BIT, is rejected.

4. With Regard to the Claims Relating to the Expanded Area

4.1 The Problem

383. As mentioned above (para. 241), it is undisputed that Claimant was afforded the right under the PEA to explore the Expanded Area, which was originally 12,000 km^2. It is further undisputed that this area was reduced twice, once by Supplementary Agreement No. 2 to the PEA of 9 June 2000 (see above para. 165), by which the area was reduced by half, i.e. to 5,259 km^2 and a second time, by Supplemental Agreement No. 6 to the PEA of 15 October 2004, whereby it was reduced from 5,259 km^2 to 1,199.5 km^2 (see above para. 182).

384. It is further undisputed that the first reduction implemented by the Supplementary Agreement No. 2 was contemplated by the PEA and therefore unproblematic. The key question is thus whether the reduction of the Expanded Area as implemented by Supplemental Agreement No. 6 was in breach of any of Respondent's obligations under the BIT.

4.2 The Parties' Positions

385. According to Claimant, the reduction of the Expanded Area implemented by the Supplemental Agreement No. 6 was not contemplated by the PEA and therefore constitutes a taking of Claimant's investment. In this regard, Goskomgeology, who signed the Supplemental Agreement No. 6 must be seen as an agent of the State and the reduction of the size constitutes an expropriation as well as a breach of Respondent's obligations under Article 2 of the BIT (Claim. Am.Reply. 23.08.2013, paras. 280 fol., 354 fol.).

386. According to Respondent, the PEA granted ORC exploration rights only from 14 December 1996 to 14 December 2001. Goskomgeology repeatedly agreed in good faith to extend the duration of the PEA, but Claimant had no right to such "extension". Thus, when the Expanded Area was reduced to 1,199.5 km^2 in October 2004, Goskomgeology did not take anything from ORC or Marakand, as neither ORC nor Marakand had a right that its existing exploration rights be once again extended (Resp. Am.Rej. 21.02.2014, para. 168).

4.3 The Arbitral Tribunal's Findings

387. Claimant's claim is based on a two-folded presumption that (i) it had the right to explore the full 5,259 km^2 of the Khandiza Expanded Area and that (ii) this right was unduly taken away by Goskomgeology through the signing of Supplemental Agreement No. 6.

388. The right to explore the Khandiza Expanded area arises from the PEA. The PEA was entered into for an initial period of five years expiring on 31 December 2001. ORC/Marakand and Goskomgeology agreed several times, in total seven times, to extend the duration of the PEA from 31 December 2001 to 31 December 2005 (see above paras. 173, 177, 182, 188, 197, 210, 220).

389. At the time of entering into the Supplemental Agreement No. 6 on 15 October 2004, the PEA had already been extended twice by Supplemental Agreement No. 3 and No. 5 (see above paras. 173 and 177). Thus, without these extensions, the rights deriving from the PEA, including the exploration rights in Khandiza Expanded Area, would have expired.

390. In other words, the signing of Supplemental Agreement No. 6 did not "deprive" Claimant of any right, but instead extended a right which would have otherwise expired. While it is true that the extension concerned only part of the previous right, i.e. 1,199.5 km^2 instead of 5,259 km^2, for Claimant to have been "deprived" of anything, it would need to establish that it was entitled or otherwise had a legitimate expectation that its exploration right would be extended for the entire Extended Area. In the eyes of the Arbitral Tribunal, Claimant has failed to establish such right to an extension.

391. Failing an entitlement to the extension of its exploration rights on the Khandiza Expanded Area, Claimant's claim under Article 5 or 2 of the BIT are unfounded.

4.4 Conclusion

392. Claimant's Khandiza Claim No. 4 is hereby rejected.

5. With Regard to the Quantum

5.1 In General

393. To the extent the Arbitral Tribunal has considered Claimant's claims for breach of Articles 2 and 5 of the BIT as unfounded, Claimant's claims for damage lack the necessary basis.

394. The only remaining question is whether Claimant may be entitled to a restitution of the amount invested by Claimant in the Khandiza Project (see above para. 133 'Claimant's Khandiza Claim 2.1.4', so-called "Claim for sunk costs").

5.2 As Concerns the Sunk Costs

5.2.1 The Parties' Positions

395. According to Claimant, with regard to the sunk costs, it can rely on Article 4 of the PEA, which provided for a right to sunk costs + 15% in case that Goskomgeology entered into a joint venture agreement with a third party within three years of the signing of the PEA, and Supplemental Agreement No. 1, which – according to Claimant – cancelled the "opt out alternative" with the consequence that Claimant had the legimitate expectation not only to be reimbursed its full sunk costs +15% uplift, but full compensation for the actual value of the investment (Claim. Am.Reply. 23.08.2013, para. 415).

396. According to Respondent, Claimant is not entitled to reimbursement of costs because it expressly waived any purported right to them under Supplemental Agreement No. 8 (Art. ii).

5.2.2 The Arbitral Tribunal's Findings

397. The relevant provisions provide as follows:

(i) Article 4 of the PEA provides:

> *"iv. after one (l) year from the effective date of this Agreement, it will enter into formal negotiations with Oxus to create a Joint Venture Agreement pertaining to the Property. If Goskomgeologia shall, with the positive results of the Phase 1 Study, waive of entering into Joint Venture Agreement pertaining to the Property, and if, within three (3) years [i.e., until 10 July 1997] of the signing of this Agreement Goscomgeologia shall enter into negotiations for a Joint Venture Agreement pertaining to the Property with an independent party, <u>then Goscomgeologia shall reimburse Oxus for all expenses incurred during the Phase I Study plus an additional fifteen percent (15%) of those expenses</u>."* (emphasis added)

(ii) *The Supplemental Agreement No. 1* amended Article 4(iv) of the PEA as follows (see above para. 143):

> *vi. upon the termination of all exploration and development, <u>Oxus shall be obliged to return the affected land and environment to its original state as at the date when exploration was first begun (any such restoration work to be done according to internationally recognised environmental standards)</u>; and to remove all equipment and structures, unless they are useful to the local community; […]"* (emphasis added)

(iii) *The Supplemental Agreement No. 8* provided as follows (see above para. 197):

> *"Marakand will not claim monetary recovery as to expenses incurred during Feasibility Study preparation and exploration works in the Territory."*

398. The Arbitral Tribunal is of the opinion that, to the extent Claimant's claim for sunk costs is based on the PEA and/or its Supplemental Agreements, it is a mere contractual right towards Goskomgeology. Mere contractual breaches in principle fall outside the jurisdiction of the Arbitral Tribunal, unless they constitute at the same time a breach of Respondent's obligations under the BIT. As laid out in the considerations above, the Arbitral Tribunal has found that Respondent's conduct in the negotiations of a Khandiza concession or Joint Venture agreement was not in breach of any BIT standard, and that instead Claimant was largely aware of the existing challenges and made strategic choices for which it has to bear responsibility. As such, the Arbitral Tribunal does not see how the removal during the negotiations of any clause for compensation of sunk costs would justify a different treatment than other aspects of the contractual negotiations.

399. Consequently, the Arbitral Tribunal finds that there is no basis in the BIT for compensation of the sunk costs.

5.3 Conclusion

400. Claimant's Khandiza Claim No. 2, including all sub-claims (2.1, 2.1.1, 2.1.2, 2.1.3 and 2.1.4) as well as Claim No. 3.1 (including sub-claims 3.1.1 and 3.1.2) are rejected.

III. The Claims Regarding the AGF Project

1. The Key Facts

401. The following summary of facts follows an over-all chronological order, although certain issues have been re-grouped together in order to facilitate the understanding of the key events. As such, the chronological order applies to the over-all timeline, but not always to the specific issues.

1.1 1998-2004: Reminder of the Origins of AGF and the Launch of the Operations

402. As mentioned above (see paras 37 fol.), AGF was established through a Joint Venture Agreement entered into on 24 November 1993 between Goskomgeology, NMMK, Lonrho and the IFC. The legal framework applicable to the Joint Venture and its specific operations was put into place during the year 1994, including in particular through the Decree No. DP-837, the Decree No. 477 and the Original AGF's Charter.

403. <u>In the course of 1998</u>, ORC expressed its interest in becoming a partner in the AGF Joint Venture following the announcement of the withdrawal of Lonrho. To that purpose, ORC submitted a '***Proposed Development Programme***' (Exhs. C-209/C-596). It contemplated a two-phase development of the Amantaytau site: Phase 1 consisted in the Open-Pit Project involving the development of oxide deposits of Amantaytau Centralny, Uzunbulak and Vyskokovoltnoye in extracting gold by open-pit mine and heal-leach processing, and Phase 2, which consisted in the Underground Project, focused mainly on exploiting the underground mine to harness sulphide deposits found in Amantaytau Centralny and Amantayatu Severny (Claim. SoC. 17.09.2012, para. 243).

404. On 1 October 1999, the CabMin issued ***'Decree No. 425-108'***, approving ORC's shares and rights in AGF (Exh. C-211, see above para. 49). Then, in the course of 2000, various agreements and legislative acts were implemented to give effect to the fact that ORC was joining the AGF Joint Venture (see above paras. 53 fol.).

405. On 7 December 1999, CSMA issued an ***'Interim Feasibility Study on Amantaytau Goldfields AO'*** (hereinafter "CSMA Interim Feasibility Study") (Exh. C-444). It proposed a detailed development program for the Phase 1 mining of the three principal near-surface oxide desposits of Amantaytau Centralny, Uzunbulak and Vysovoltnoye, as well as a scoping level study for the Phase 2 underground sulphide deposits mining at Amantaytau Severny and Centralny. The Feasibility Study concluded as follows:

(i) As concerns the Phase 1 development of the oxide deposits:

> *"For the oxides, the conclusions from this study are positive and the project has been proved to be economically viable.*
>
> *A reserve statement complying with criteria as described within the JORC code indicates a robust oxide reserve estimate of* ***10.4 Mt @ 2.87 g/t Au****, which includes a silver-rich portion at Vysokovoltnoye of* ***5.75 Mt @ 1.30 g/t Au and 49.44 g/t Ag****.*
>
> *The Project NPV pre-tax, ungeared is $37.1 million at a 12% discount rate, equivalent to an IRR of 65.1%. The ungeared NPV after tax is $29.7 million, equivalent to an IRR of 55.2%.*
>
> *Based on Oxus 43% ownership of AGF the NPV to Oxus is $14.9 million, equivalent to an IRR of 39.9%.*
>
> *Consequently, it is recommended that a definitive feasibility study (DFS) be completed on the oxides with a view to early construction and commissioning of gold production.* […]" (pp. 12-13) (emphasis as in original)

(ii) As concerns the Phase 2 development of the sulphide deposits:

> "[…] *The sulphide development proposed by Oxus is markedly different to that envisaged by Lonrho and thus many of the parameters used by Lonrho are not applicable to the Oxus study. Consequently, CSMA can only provide a scoping level report on the sulphide development programme.*
>
> *To upgrade this scoping level work to pre-feasibility standard, a number of recommendations are made:* […]*"*

406. On 3 May 2000, Mr. Rakhimov, Deputy Chairman of the Central Bank of Uzbekistan, sent a ***Letter no. 1308/1062*** to AGF concerning the permitted use of foreign currency account (Exh. R-42; see also above para. 50):

"a) The following foreign currency may be credited to the said account:

- contributions to the share fund received from foreign founders;

- loans received from foreign financial entities.

b) The funds kept on an open account may be used:

- to repay foreign loans;

- to pay debts to foreign creditors in foreign currency;

- to pay bank fees according the bank's rates.

***At that said, it is necessary to note that paying from an account abroad under import contracts and crediting foreign currency earnings under export contracts to those accounts are strictly prohibited*"**. (emphasis as in original).

407. On 28 July 2000, AGF held one of the first General Shareholders Meetings including ORC as a shareholder (Exh. R-400). As mentioned above (see para. 56), the shareholders discussed among other matters the issue of "*the situation with bankable feasibility study (FS) of AGF for the Stage 1 and proposed work program for completion of the FS and debt financing.*" When dealing with this item, Mr. Turner provided a status report as follows:

> *"As Oxus would like to hold negotiations on debt financing at the Stage 1 not later than October this year, R. Turner specified the key issues that need to be settled for obtaining of debt financing.*
>
> *He said that to get financing it is necessary to: perform state registration of redrafted JV AGF Charter; make amendments to the existing Fiscal Provisions of the JV; to get a subsoil license, State Property Committee order for transfer of geological and other information and rights to geological exploration and deposit development and to register JV AGF shares. It is also necessary to start preparation of the agreements on rendering of management services, loans and loan obligations.*
>
> *R. Turner presented AGF work schedule for the nearest future.*
>
> *Upon discussion of all issues the shareholders unanimously decided to:*
>
> *1.1 Take into account the information presented by AGF General Director (R. Turner) and commission him with strict control of AGF work schedule observance (attached hereto) and all work planned under the project;*
>
> *1.2 Commission Oxus (R. Wilkins and K. Taylor) with commencing of preparation of the Shareholders Loan Agreement that shall be entered into between Oxus and AGF and shall be a part of the set*

of guarantee documents for debt financing by third parties and after the Audit Commission gives its opinion on AGF annual reports for 1998 and 1999 and confirmation of Oxus costs related to AGF project, to approve transfer of $813955 by Oxus to the Authorized Fund in form of equipment (in the amount of $300000) and the loan provided by Oxus to AGF during 1998 and 1999 in the amount of $513955, thus, increasing Oxus contribution to the Authorized Fund to the required amount of $5813955;

[…].*"*

408. On 1 August 2000, Mr. Maksudov, from the Cabinet of Ministers, issued a letter to ORC and AGF specifying that Decree No. 266 "*does not restrict* [AGF JV] *in obtaining loans from a third party provided any such loans obtained to conduct the JV activity at stage I are arreanged by* [ORC] *and do not require guarantees of the Government of the Republic of Uzbekistan.*" (Exh. C-597).

409. On 11 August 2000, based on the CSMA Interim Feasibility Study, CSMA issued a bankable '***Feasibility Study of Amantaytau Goldfields AO for Oxus Gold Corporation***' (hereinafter "CSMA Bankable Feasibility Study for Phase 1") (Exhs. R-281/C-526). It concluded as follows with regard to the financial analysis of the AGF Project:

"12.5 Summary of Financial Analysis

- *Total capital expenditure is $45.8 million, of which the pre-production capital cost is $34.6 million.*
- *The Project NPV (after tax, ungeared) is $26.8 million at a 10% discount rate, equivalent to an IRR of 43.3.*
- *Oxus NPV, at 10% discount rate, on 50% ownership of AGF is estimated to be $ 14.1 million, equivalent to an IRR to Oxus of 30.6%.*
- *The Oxus share of distributable cash (management fees, taxes & royalties, dividends), excluding project loan repayments, over the life of the Project is $29.9 million, or 39.9% of the total.*
- *Ungeared, the cash cost of production per ounce is $112, the direct production cost is $177.24, and the total (taxed) cost is $202. This implies a break-even gold price for the Project of approximately $225 per ounce, if contingency is allowed for shareholder or bank loan interest."*

410. On 15 September 2000, AGF was issued a **'License for Right to Use Sub-soil in the Republic of Uzbekistan'**. It provided AGF, among others, with the right to "carry out geological exploration and mining of useful resources containing

precious metals and other accompanying raw materials" for all of AGF's open-pit mines in the Amantaytau project territory (hereinafter "Open-Pit Mining License") (Exh. C-320). This license provided for a "term of validity" as follows: "[u]ntil complete economically profitable mining of existing and newly discovered deposits", although the license also provided for a series of circumstances justifying termination of the license as follows:

> *"Right to use sub-soil shall be terminated :*
>
> *When AGF repudiates license for right ot use sub-soil;*
>
> *On rise of circumstances excluding further performance of granted right to use sub-soil;*
>
> *If AGF does not commence usage of sub-soil within one year starting from date of issuance of license;*
>
> *On occurrence of ovious threat of life or health of people working and living in zone of impact of work associated with usage of sub-soil;*
>
> *If AGF violates established in the Republic of Uzbekistan rules and standards for usage, protection of sub-soil and environment, safe performance of work associate with usage of sub-soil;*
>
> *If usage of sub-soil is performed not in compliance with purpose for which right was granted;*
>
> *In case of systematic non-payment of payments for usage of sub-soil by AGF;*
>
> *Liquidation of AGF or stoppage of its activity;*
>
> *Right to use sub-soil shall be terminated by annulment of this license by Goscomgeology with concordance with Cabinet of Ministers and act identifying mine lease area by agency Snoatkontekhnazorat (State Tehcnical Inspection).*
>
> *Decision on termination, temporary stoppage or limitation of right to use sub-soil ahead of time may be appealed by AGF in legal form."*

411. <u>On 2 December 2000</u>, the Ministry of Justice issued ***Decree No. 988*** on 'Regulations on the Order of Registration of Export-Import Contracts (Contracts Agreement) entered into by business entities of the Republic of Uzbekistan in the Ministry of Foreign Economic Relations of the Republic of Uzbekistan' (Exh. R-239). According to this Decree, certain contracts, including contracts for import and export of goods, were required to be registered with the Ministry of Foreign Economic Relations. Article III, regarding the conditions for registration of such contracts, provided as follows:

> *"III. Requisite conditions for registration of export-import contracts*
>
> *To register the contract it is required that:*

Conditions of the contract comply with generally accepted rules of international trade, existing legislation and statutory acts of the Republic of Uzbekistan, as well as liabilities to other states and international organizations accepted by the Republic of Uzbekistan;

Prices specified in the contract correspond to average international prices and existing state of the market;

Required set of documents specified in the II section of the Regulations is provided."

412. <u>On 18 June 2001</u>, Mr. Akhmedov from Goskomgeology sent a letter to the Head of Department on Development of Fuel and Energy Complex of the CabMin, providing certain explanations about the financing of the Project (Exh. R-1096). The letter referred to certain delays as follows:

> *"The main constraining factor for the start of construction of "Amantaytau Goldfields" JV is a delay in the start of financing:*
>
> - *During the last month Oxus company performed listing on the London Stock Exchange in order to obtain additional funds for construction.*
> - *The negotiations with Barclays Bank and Societe Generale Bank on the loan for the project are in the final stage (issues of the bank interest rate for the loan are being discussed).*
> - *So far, the Ministry of Finance and the State Tax Committee are pending the Provision on taxation of "Amantaytau Goldfields" JV, which is required to be submitted to the banks for obtaining loans."*

413. <u>On 29 June 2001</u>, Oxus was listed on AIM and trading of shares began on 4 July 2001 (Exh. C-214). According to Claimant, Oxus achieved a market capitalization of around GBP 37 million (Exh. C-30) (Claim. SoC. 17.09.2012, para. 251). According to Respondent, its listing was disappointing as its list price on 4 July 2001 was only 30 pence, i.e. one-third of its initial valuation. Thus, Claimant did not mobilize the anticipated cash to fund the AGF Project as planned (Resp. SoD.Class. 04.04.2013, para. 133).

414. <u>On 10 August 2001</u>, the MinFin and the State Tax Committee jointly issued Regulation No. 76 ***'On Taxation, Accounting and Reporting for the AGF Goldfields Joint Venture'*** (hereinafter "Regulation No. 76") (Exh. C-217). It collated AGF's various investment protections and guarantees into one document. It provided, among others, as follows:

> *"　2. Income Tax*

4.[12] *The JV shall commence paying income (profit) tax upon expiry of five years from the moment (date) of completion of one of the events as follows:*

- *sale of the first lot of the Product;*
- *State acceptance of the processing plant for the oxide ore to be mined by open pit methods.*

[…]

4. Value Added Tax

15. JV shall be exempt from the Value Added Tax (VAT) in respect of imported materials and equipment, works and services which are used for construction by contractors or sub-contractors until commissioning of the Second Phase of Operations.

16. The amount of VAT actually paid to contractors or sub-contractors for the acquisition of such materials, equipment, works and services in the course of the construction and until commissioning of the Second Phase of Operations shall be offset against the sub-soil usage tax (royalty). Should the VAT amount exceed the amount of sub-soil usage tax (royalty) due, the excess of VAT shall be offset against sub-soil usage tax (royalty) due in the subsequent reporting period.

[…]

7. Property Tax

25. AGF shall be exempt of Property Tax for the entire period of its activities.

8. Customs Duties

26. JV shall be exempt from the customs duties for the whole period of its activities.

[…]

11. Withholding Tax

30. Foreign shareholders and lenders of the JV shall be exempt from paying taxes on dividends and payments on loans when transferring these monies outside the country.

[…]

14. Special Conditions

33. Privileges, stipulated by this Regulation, shall cover foreign companies which are construction contractors and subcontractors as well as those

[12] The paragraph numbering in the document is continuous and thus section 2 starts with para. 4.

which provide with technical services and consultations to Amantaytau Goldfields JV.

34. In the event of adverse changes in the tax regime of the Republic of Uzbekistan, which worsen conditions of JV's functioning, the legal acts valid as at 1 July 2000, including this Regulation, shall remain in force until 1 July 2010. "

415. On 28 November 2001, the CabMin issued the license AC No. 002 authorizing AGF to engage in the mining of precious metals (hereinafter "Mining License") (C-312). This license was issued for five years, i.e. until 27 November 2006.

416. On 25 December 2001, Goskomgeology, acting as a specially authorized body on instruction of the CabMin, entered into a '***License Agreement***' with AGF (Exh. C-633). It provided AGF with the following rights and obligations:

*"**1. Obligations and Rights of the Licensee:***

The Licensee shall be obliged:

- *to exercise the right given to him in accordance with this Agreement;*
- *to follow the requirements of the laws of the Republic of Uzbekistan, set up standards (regulations and rules) for reasonable and complex use and protection of sub-soil, environment, work safety in relation to use of sub-soil;*
- *to follow the set up rules and regulations for mining and drilling methods and other types of operations related to mining and processing of minerals;*
- *to arrange obtaining, when necessary, of licenses for some types of activities related to conducting minerals mining and processing operations;*
- *to keep geological, topographical and other documentation during mining of minerals and to arrange for its safety;*
- *to submit information on sub-soil, as well as data on the status and movement of mineral reserves and resources and contained minerals to the State Geological Archives at Goscomgeology of the Republic of Uzbekistan;*
- *to provide with qualified specialists for carrying out types of activities related to mining of minerals;*
- *to have necessary equipment and technical means for carrying out mining of minerals;*
- […]

- *during auditing procedure, to submit to the Licensor all the necessary documentation, to give reasons for the issues which appear during auditing procedure, to arrange for relevant conditions to conduct auditing.*

The Licensee shall have a right:

- *to use the results of its activities including obtained geological and other information on sub-soil, as well as mined minerals;*
- *for extension of the validity of the License Agreement provided terms and requirements of this License Agreement have been met;*
- *to complain about the Licensor's actions within the procedure set forth by the laws of the Republic of Uzbekistan.".*

The License Agreement was entered into for a period of five years, subject however to its early termination as follows:

"4. Reasons for Suspension or Termination of the License Agreement

The License Agreement may be ***suspended*** *in the events that:*

- *the Licensee violates the requirements and terms set forth by this License Agreement;*
- *the Licensee fails to fulfil resolutions of the Licensor which obliges the Licensee to remove the found violations.*

The License Agreement may be ***terminated*** *in the events of:*

- *the Licensee's application to terminate validity of this License Agreement;*
- *the Licensees liquidation or reorganization (with the exception of transformation);*
- *the Licensee's systematic or single gross infringement of the License requirements and terms set forth by this License Agreement;*
- *failure to remove violations of the License Agreement by the Licensee within period of time set forth by the Licensor;*
- *failure of the Licensee to fulfil requirements of the laws of the Republic of Uzbekistan, set up standards (regulations and rules) on reasonable and complex use and protection of sub-soil and environment, safety of operations related to use of sub-soil;*
- *termination of period of validity of License."* (emphasis added)

Article 5 of the License Agreement further provided Goskomgeology with the right to conduct ordinary and extraordinary audits of how the License requirements and terms are observed by AGF, and to take certain actions depending on the results of such audit.

417. As of 31 December 2001, ORC's shareholder loans to AGF amounted to approx. USD 6.1 million (see Preamble of C-447; Wilkins II 43).

418. On 31 May 2002, AGF held an Extraordinary General Meeting of Shareholders, during which it was decided among others as follows (Exh. C-606):

> *"3.* […]
>
> *Having noted the above information the General Meeting unanimously DECIDED:*
>
> *3.1 to approve the Company's right to enter into a Project Management Services Agreement with Oxus, and a Project Advisory Services Agreement with Goskomgeology in accordance with the terms agreed at the General Meeting of Shareholders held on 28 July 2000;*
>
> *3.2* […]
>
> *4.* […]
>
> *After careful discussion of issues regarding the [Société Générale] Credit Agreement, the General Meeting unanimously DECIDED to approve the following actions that must be performed by the Company:*
>
> *4.1 To enter into a loan agreement with Société Générale regarding the allocation of the Société Générale loan facility in the amount of up to US$31 million to the Company ("SG Credit Agreement");*
>
> *4.2 To enter into an agreement with Société Générale in respect of the hedging of the Company's gold production on commercialy reasonable terms to Société Générale as part of the security under the SG Credit Agreement ("Hedging Agreement");*
>
> *4.3 To pledge the Company's rights and assets as a property complex, including the rights to and the assets with the Company's bank accounts in Uzbekisatn and the United Kingdom, to Société Générale to secure the liabilities of the Company under the SG Credit Agreement by entering into an enterprise mortgage agreement ("Enterprise Mortgage Agreement");*
>
> […]
>
> *5.* […]

After careful discussion, the General Meeting unanimously DECIDED to approve the following actions that must be performed by the Company in order to fulfil the terms of the Oxus loan facility:

5.1 To enter into the loan agreement with Oxus regarding the allocation to the Company of the Oxus loan facility as subordinated to the Société Généale loan facility and taking second priority to the Société Générale loan facility in all respects ("Oxus Loan Agreement"). […]"

419. On 17 July 2002, ORC and AGF entered into a ***'Credit Agreement relating to the Amantaytau Gold Project in Uzbekistan'*** (hereinafter "Credit Agreement") with Société Générale and other banks (Exhs. C-496/R-1026). Under this Credit Agreement, Société Générale agreed to loan USD 26 million and a cost overrun facility of USD 5 million, subject to certain conditions precedent, including Claimant obtaining USD 15.35 million in secondary financing (Resp. SoD.Class. 04.04.2013, para. 136).

420. On the same day, ORC and AGF entered into a ***'Loan Agreement No. 001-2002'*** (hereinafter "Shareholder Loan Agreement 2002") (Exh. C-447), under which ORC lended to AGF the USD 6,1 million previously lent (see above para. 417), as well as an additional loan of USD 21 million for the purpose of developing and constructing the AGF Project.

421. On the same day, Mr. Turner on behalf of AGF and Mr. Wilkins on behalf of ORC entered into a ***'Management and Services Agreement'*** (hereinafter "AGF Management Agreement") (Exh. C-407) and a ***'General and Administration Agreement'*** (hereinafter "AGF Administration Agreement") (Exh. R-149). Under the former Agreement, ORC was to receive a management fee of 5% of AGF's operating costs, including "*all costs associated with the operation, management, maintenance and repair of the Project, including stripping, mining, rehandling, processing, environmental, insurance, refining, general and administration costs, inclusive of payroll costs associated with these activities, and also inclusive of VAT if such VAT is not recoverable* […]" (Article 4.1), and, under the latter Agreement, AGF undertook to reimburse ORC for its "*general and administration costs and expenses incurred by it in relation to its appointment as manager of the Project*" (Article 2.1).

422. On the the same day, Goskomgeology and AGF entered into an ***'Advisory and Services Agreement'*** (hereinafter "AGF Services Agreement") (Exh. C-280), under which Goskomgeology was to receive a management fee of 2% of the costs of AGF's operating costs (see Article 2.1).

423. On 19 July 2002, Mr. Turner on behalf of AGF entered into a ***'Contract Agreement No. 10020 for Lump Sum Turnkey Construction of Amantaytau Plant'*** with a sub-contractor, MAED (represented by Mr. Trew) (hereinafter "MAED Sub-Contract Agreement") (Exh. R-150). Through this contract, AGF entrusted MAED with the completion of the so-called "Amantaytau Heap Leach Gold Project", i.e. the construction of a heap leach processing plant for the AGF Project for a total contract price of USD 10,696 million.

424. On 23 August 2002, Mr. Manapbekov, Head of the Department for External Economic Relations and Foreign Investments of the CabMin, sent a letter to Claimant confirming that no export license was required to export gold and silver (Exh. C-234):

> *"*[…] *under paragraph 4 of Article 12 of the Law of the Republic of Uzbekistan "On Foreign Investments" no export license is required for enterprises with foreign capital for exporting its own production.*
>
> *Furthermore, by Decree of the Cabinet of Ministers of Uzbekistan of 22 September 1994, No. 477 "On Formation of the JV AGF and on Matters of Ensuring Its Effective Functioning," and authorization was already given to the JV for the export and sale, at world market prices, of gold, silver and other products obtained during the treatment of gold deposits."*

425. On 29 October 2002, Oxus announced that MAED owned an interest in 34,930,237 ordinary shares in the company and that "certain individuals who are employees of Maed or are otherwise associated with Maed (being persons referred to as Maed's 'œassociated ownership entities') in Maed's letter to Oxus dated 12 August 2002) have nonnotifiable interests in a further 2,342,700 Oxus Shares" (Exh. R-511).

After this acquisition, Oxus put in place a new management team, composed of Messrs Trew (MAED's Managing Director and founder and Oxus' new CEO), Donald, Kipps, Shead and Wilkins. Mr. Wilkins was the only one who was already in the management before MAED's acquisition (Exhs. R-1, R-401; R-576) (Resp. SoD.Class. 04.04.2013, para. 143).

426. On 1 January 2003, Messrs Trew, Kipps and Crowe on behalf of ORC signed a contract with Mining Resources Trust (hereinafter "MRT") and AGF, pursuant to which MRT agreed to provide consultancy services to AGF concerning the financing, design and construction of the Phase 1 Project (hereinafter "MRT Consulting Contract") (Exh. R-152). According to section 2 of this contract, the value of the contract was not to exceed USD 2 million during its term, without the prior written approval of the Parties. The core obligations of MRT under this

contract consisted in making available to ORC experienced personnel able to assist in the completion of the financing from the appropriate lending banks, as well as for the completion of the construction of the Project. In case of early completion of the project, MRT was to be entitled to an additional fee of 2.5% of the pre-production capital costs of the Project. According to Respondent, this contract was not approved by AGF General Meeting of Shareholders, nor did AGF register it, in violation of AGF's charter and the law (Resp. SoD.Class. 04.04.2013, para. 144).

427. On 24 January 2003, Oxus issued a document called ***'Amendments to the Feasibility Report on the Amantaytau Goldfields A.O. JV Project for the Oxus Resources Corporation'*** (hereinafter "Amended Phase 1 Feasibility Study") (Exhs. R-289/C-527) amending the CSMA Bankable Feasibility Study for Phase 1. The main change concerned the processing technology, i.e. the switch from the originally proposed heap-leach technology to a conventional milling and Carbon-In-Pulp (CIP) treatment plan, which MAED would build and for which MAED would perform mining works as contractor for a total amount of USD 12,850,050. The reasons given by Oxus for this change were manifold, including (i): the need for a reduction in capital cost, and (ii) the need to increase the gold extraction rates (see "Introduction"). According to the estimates of the Amended Phase 1 Feasibility Study, the Project would allow producing over 635,000 ounces of gold with total production costs of USD 162 per ounce, thereby generating USD 223,3 million in hard currency revenues from its gold sales. Based on estimated operating costs of USD 82,9 million, the Project would allow to yield profits of USD 46,353 million for Oxus (including USD 37,543,000 in dividends, USD 4,167,000 in management fees, USD 3,960,000 in administrative fees and USD 683,000 in interest on its loan to AGF) and USD 53,137 for the Uzbek Parties and the State (including USD 37,543 in dividends, USD 13,927 in taxes and royalties, and USD 1,667 for Goskomgeology's management fees) (see Table 12 at Exh. R-289_86 and Table at R-289_89; Resp. SoD.Class. 04.04.2013, paras. 145, 177).

428. On 24 March 2003, Mr. Crowe and Mr. Salamtin, on behalf of AGF, and Mr. Mather and Mr. Stuart, on behalf of MAED, entered into an ***'Amendment to Contract Agreement'*** by which they amended the MAED Sub-Contract Agreement (see above para. 423) providing for the construction of an Oxide Milling Plant instead of the heap-leach technology and increasing the value of the works sub-contracted to MAED from USD 10,696 million to USD 18,7 million (hereinafter "MAED Sub-Contract Amendment") (Exh. R-153).

429. On 28 March 2003, Mr. Crowe on behalf of AGF and the Executive Chairman of BCM[13] on behalf of BCM entered into a ***'Contract No. 0021-G'*** (hereinafter "BCM Sub-Contract Agreement") (Exh. R-154), under which AGF sub-

[13] The name of the Executive Chairman of BCM is not readable on the document.

contracted works for a total amount of approx. USD 60 million to BCM. According to Respondent, Claimant did so without conducting a competitive tender and contrary to industry norms and Uzbek laws in order to increase Claimant's management fees (Resp. SoD.Class. 04.04.2013, para. 145).

430. On 2 April 2003, Oxus, AGF, Standard Bank and WestLB AG concluded an **'*Amendment and Restatement Agreement relating to a Credit Agreement dated 17 July 2002*'** (hereinafter "Financing Agreement") (Exh. C-219).[14] It changed the Parties to the original Credit Agreement (see above para. 418) but otherwise confirmed the terms of the former Credit Agreement, including in particular the hedging provisions.

431. In the following days, the Financing Agreement was registered with the Central Bank of Uzbekistan (Exhs. C-424 and C-221).

432. On 15 April 2003, AGF and Standard Bank entered into a **'*Gold Offtake Agreement*'** (hereinafter "Original Gold Offtake Agreement") (Exh. C-222). It provided for the sale to Standard Bank of 263,096 ounces of gold at a hedged price of USD 323,35 per ounce (which corresponded to the gold price on the date of signature of the Agreement) (see Article 4.5.1 in connection with Appendix 2). It also provided for sales of unhedged gold at the market rate on the date of the sale, i.e., the 'spot price' (Claim. SoC. 17.09.2012, para. 261).

433. On 22 May 2003, the Agency for Foreign Economic Activities ("AFER") provided certain comments concerning the Gold Offtake Agreement (Exh. C-664). As concerns the hedged price, the AFER commented as follows:

> *"3. A total price of the contract to be defined. Definition of "other gold" to be given.*
>
> *4. Clause 6 Payments. A mechanism and an amount of payment for 263,096 ounces of gold, as well as an amount of payment for "other gold" to be specified. Availability and an amount of prepayment or an advance payment to be specified in the contract. A cash set-off mechanism for supplies to be defined."*

434. From 9 to 20 June 2003, the State Tax Committee conducted a first Audit of AGF as provided under Article 10.1 of the ***Law No. 717-1 'On State Control over Activities of Business Entities'*** dated 24 December 1998 (Exh. R-456):

> *"**Article 10-1. Frequency of scheduled audits of financial and economic activities of enterprises***

[14] The names of the signatories of this Agreement are not provided in the document and the signatures themselves do not allow the Arbitral Tribunal to identify such signatories.

[…]

Routine inspections of the financial and economic activities of small firms, small businesses and farms shall be conducted no more than once every four years, and for other business entities – not more than once every three years.

The financial and economic activities of the newly established small firms and small enterprises and farms shall not be subject of the planned inspections for two years from the date of their registration."

As concerns unscheduled audits, this law provided as follows:

*"**Article 12. Unscheduled inspections***

An unscheduled inspection to check activities of a business entity may be performed on the basis of a decision to carry out an unscheduled inspection taken by a special authorized body, which shall specify the name of the business entity to be inspected, its taxpayer ID, purposes of the inspection, timeframes for carrying out the inspection and reasons behind it; as well as the order issued by the relevant controlling authority that is to perform the inspection specifying the officers who will perform the inspection and timeframes for its performance".

435. On or around this date, according to Claimant, the construction of Phase 1 began (Claim. SoC. 17.09.2012, para. 262).

436. On 6 October 2003, AGF's internal Audit Committee issued a report (hereinafter "AGF Audit Committee Report 2003") (Exh. R-156), which concluded as follows:

"Commission has studied the copies of the original documents proving the production expenditures and ascertained that:

The documents proving expenditures made by Oxus Resources Corporation Company have not been provided in a satisfactory form regarding item Nos 1 [MAED Invoice No. A004], *2* [MAED Invoice No. A005], *3* [MAED Invoice No. A002] *and 4* [MAED Invoice No. A003].

Commission considers it possible to recommend to the General Meeting of Shareholders to acknowledge the expenditures accrued by Oxus Resources Corporation Company during 6 months confirmed for 2003 with regard to item Nos 5 [Surety letter of Standard Bank], *6* [Invoice from MRT No. AGF-06-01] *and 7* [Contract with MRT No. 03/MRT/01] *for the value of USD 796,000.00."*

437. On 10 October 2003, AGF held a General Meeting of Shareholders during which it took, among others, the following resolutions (Exh. C-624):

"After a discussion the following agenda has been UNANIMOUSLY APPROVED:

1. *Approval of the audited accounts of the Company for the year ended 31 December 2002 in accordance with the recommendation of the Audit Committee;* […]

5. *Approval for Oxus to recharge its expenditure for the period November 2002 to June 2003 to the Company in accordance with the recommendation of the Audit Committee;*

6. *Acceptance of the Company's letter dated 3 April 2003 confirming no conflict of interest in respect of the construction contract with MAED Limited;*

[…]"

438. On 11 December 2003, Uzbekistan issued its amended Law ***'On Currency Regulation'*** (Exh. R-54). The purpose of this law was to regulate relations in the field of foreign exchange operations in the Republic of Uzbekistan. With regard to the use of foreign currency by residents in Uzbekistan, Article 16 of the Law on Currency Regulation provided as follows:

> *"Article 16. Accounts of residents*
>
> […]
>
> *Foreign currency funds of legal entities-residents are kept on foreign currency accounts in the authorized banks of the Republic of Uzbekistan and are used by those residents in accordance with the legislation.*
>
> *Foreign currency received by legal entities-residents, including foreign exchange proceeds from export of goods (works, services), must be transferred to their accounts in the authorized banks, unless otherwise stipulated by the Central Bank of the Republic of Uzbekistan.*
>
> *The legal entities-residents are entitled to set up and manage any national and foreign currency accounts in the banks outside the Republic of Uzbekistan in accordance with the procedure set out by the Central Bank of the Republic of Uzbekistan."*

439. In early January 2004, the gold production at Amantaytau began (Wilkins II, para. 51; Exh. C-450).

440. On 20 January 2004, AGF and Standard Bank[15] entered into an ***'Amended and Restated Gold Offtake Agreement'*** covering only the sale of hedged gold (hereinafter "Amended Hedged Gold Offtake Agreement" or "HGOA") (Exh. C-225) as previously suggested by MinFERIT (see para. 433). With regard to the hedging, Article 4.5.1 of the HGOA provided as follows:

> *"The Purchaser and the Seller agree that under this Agreement:*

[15] The names of the specific signatories are not identifiable.

(a) *total amount of deliveries of Gold shall be 263,096 ounces;*

(b) *the deliveries of Gold shall be made by the Seller in amounts and on dates specified in Appendix 2;*

(c) *a preliminary purchase price for Gold shall be USD 323.35 per ounce as specified in Appendix 2 (the Preliminary Purchase Price);*

(d) *subject to the provisions of this Clause 4.5, total amount of this Agreement shall be USD 85,072,091.6;*

(e) *a purchase price for all Other Gold, if any, shall be an amount in the United States dollars (USD) being the London AM fix which shall be determined at the time the ownership rights over Gold pass from the Seller to the Purchaser; amounts and dates of the deliveries of Other Gold shall be subject to further negotiations between the Parties."*

441. On 26 January 2004, AGF submitted the HGOA to AFER for registration (see reference thereto in Exh. C-229).

442. On 16 February 2004, following an enquiry by AGF, Mr. Nazhimov of MinFERIT responded by ***Letter No. HH-01/12-543*** stating that the export of gold produced by AGF was not subject to the need of obtaining a special license, but that "*the registration of export contracts for the supply of gold by the competent state bodies, including the AFER, in the manner prescribed by law is necessary*." (Exh. C-229).

443. On 19 February 2004, Mr. Wilkins from AGF submitted the HGOA to Mr. Ganiev, Deputy Prime Minister and Chairman of MinFERIT (Exh. C-228). In his letter, Mr. Wilkins explained the terms of the hedging and its importance for the financing of the Project. Mr. Wilkins ended his letter as follows:

> *"In order for the gold to be exported at the end of next week, I understand that the Gold Offtake Agreement will need to be registered with your Agency, as well as a local bank and the customs authorities. We first submitted the Agreement to your Agency in May 2003. We received various comments back which we have discussed with Standard Bank and amended where practical. We did not proceed with the registration last year because we were not planning any gold shipments last year and we were informed that we would have to register separately for calendar year 2004. Accordingly AGF and Standard Bank signed and amended Agreement on 20 January 2004. This was submitted for registration on 26 January and we understand that it was passed to the relevant department within your Agency on 12 February. However, the legal experts within that department have now responded with further comments, mainly concerning pricing and payment issues. Having persuaded Standard Bank to amend the Agreement once, we cannot now make any further amendments to this Agreement. Time is obviously becoming critical.*

With respect to pricing and payment issues, I respectfully make the following observations:

- *Decree # 477 dated 22/9/94 grants AGF the right to sell gold at world prices, and to secure credits with joint venture property (ie gold produced);*
- *Decree # 266 dated 11/7/00 preserved all the rights and privileges of Decree # 477;*
- *The AGF Charter dated July 2000, registered with the Ministry of Justice, permits the Company to borrow money and to hedge production, and permits the Supervisory Board to determine the market price of the Company's assets;*
- *The AGF Shareholders' Agreement dated April 2003 grants the Company the right to sell gold in accordance with usual industry practice (which indludes hedging);*
- *The AGF Shareholder's Meeting dated 26/2/03 approved the Company to enter into the loan agreement with the banks and to enter into hedging and gold offtake agreements;*
- *The hedging programme was an integral part of the project finance, and the hedging price was based on world prices at the time. Although the spot price of gold is currently greater that the hedged price, this may not remain the case over the next 2 years.*

I would therefore be most grateful if you could investigate this matter and assist us in expediting the registration of the Agreement and the shipment of gold on 27 February (on Uzbek Air to London). Time is obviously of essence. If we fail to make this shipment, AGF will be declared in breach of the Agreement, with potentially expensive and damaging consequences. […]*"*

444. <u>On 20 February 2004</u>, the AFER returned the HGOA to AGF with the refusal to register it, together with the following recommendations (Exh. R-369):

"1. The contractual gold pricing shall be defined in accordance with the London AM Gold Fix as of the shipment date;

2. The payment shall be carried out on a pre-paid basis or under opening of credit;

3. The following must be specified in Act of God section: the terms of notice of force-majeure circumstances and necessity of delivery of notices from the cognizant authorities of the state, on whose territory the given circumstances took place;

4. Payment of services of a security agency must be foreseen: if the delivery is to be carried out under the EXW conditions (ex works) – at the buyer's expense, if under the CPT conditions (airport at Zurich) – at the seller's expense;

> 5. *It shall be specified, that the contract becomes effective after being registered in AFER;*
>
> 6. *The Russian and English versions shall be of equal legal effect."*

445. On 24 February 2004, Mr. Wilkins on behalf of Oxus sent a letter to Mr. Kuchersky, Director of NMMC (Exh. C-230), and to Mr. Sultanov, Deputy Prime Minister (Exh. C-231), reiterating the concerns raised in Mr. Wilkins earlier letter to Mr. Ganiev (see above para. 443). He concluded as follows (in both letters):

> *"I would therefore be most grateful if you could investigate this matter and assist us in expediting the registration of the Agreement and the shipment of gold on 27 February (on Uzbek Air to London). Alternatively, please could I meet you in order to discuss how to resolve this matter. Time is obviously of the essence. If we fail to make this shipment, AGF will be declared in breach of the Agreement, with potentially expensive and damaging consequences. AGF, for example, will be required to pay the difference between the hedged price and the current gold price on 5,698 ounces* […]. *Of more concern is the future impact on the project, the general perception of Uzbek political risk, and the ongoing relationship with the banks."*

446. In the following days, Mr. Wilkins on behalf of Oxus and Mr. Donald on behalf of AGF sent further letters to Deputy Prime Ministers Azimov, Ganiev and Sultanov. They reiterated their concerns in case AGF could not export its gold at the below-market hedged price and asking for a quick resolution of the issue (Exhs. R-367 and R-368).

447. On 27 February 2004, AGF should have delivered 5,698 ounces of gold to Standard Bank under the HGOA. However, according to Claimant, because Respondent continued to maintain that no exports could take place without registration of the agreement, AGF was prevented from exporting gold and defaulted on this first delivery obligation of 5,698 ounces of gold, thereby breaching the Financing Agreement (Claim. SoC. 17.09.2012, para. 271). According to Respondent, it was not possible to register the HGOA because Uzbek law does not permit the MinFerit to register such an agreement providing for the export of gold at below-market prices (see below para. 725 (i)).

448. On 3 March 2004, Mr. Najimov from the AFER sent a letter to the CabMin and the FinMin reporting about its position on the registration of the HGOA (Exh. R-369). In his letter, he highlighted that the Original Gold Offtake Agreement had originally been submitted in May 2003, at which time the AFER raised certain issues regarding the pricing. Notwithstanding that AGF had entered into a new hedging agreement, this new agreement had not been submitted in time and the issues regarding the pricing had not been resolved. In particular he stated as follows:

> "[…] *A study of documents has shown that the parties have not altered nor updated the contract conditions related to revision of the preliminary price. Thus and so, the fixed buying price of gold shall be 323.35 USD per ounce.*
>
> *As you are well aware, the current world price of gold is at level of 410 USD per ounce, which exceeds the fixed buying price of gold by 86 USD. Considering the contractual obligations of the seller on shipping of 263,096 ounces of gold at the fixed price, the calculated price difference of the full volume of the gold is estimated as 22.88 million USD.*
>
> *On the other hand, in accordance with the Order of the Cabinet of Ministers of the Republic of Uzbekistan No. 477 "On establishment of the joint venture Amantaytau Goldfields" dated September 22, 1994, a joint venture being established is granted a right to sale gold, silver or other production, acquired as a result of gold fields development, at world prices in freely convertible currency in both the Republic of Uzbekistan and international markets.*
>
> […]
>
> *From our point of view, the proposition set forth in the joint address of the State Committee on Geology and Mineral Resources of the Republic of Uzbekistan and Navoi Mining & Metallurgy Combine on giving permission for the initial shipment of gold, shall be considered on conditions of making a corresponding decision (instruction or enactment) of the Cabinet of Ministers of the Republic of Uzbekistan."*

449. On 4 and 11 March 2004, Mr. Wilkins from Oxus and Mr. Watts from AGF sent further letters to Mr. Akhmedov, Chairman of Goskomgeology, and Mr. Nazhimov, First Deputy Chairman of MinFERIT, complaining about the issues with the registration of the HGOA (Exhs. C-224, C-238).

450. On 4 March 2004, the CabMin issued Decree No. 112 ***'On Licensing of mining of precious and rare-earth metals and precious stones'*** (hereinafter "Decree No. 112") (Exh. R-185). Under this Decree, mining licenses would be issued for a period of five years (Article 6); the term of a license may be extended based on an application to be submitted at least two months before the expiration of the license term (Article 25), and a decision to issue a license should be made within 30 days of the date when the application was received (Article 14). This Decree also provided that a license may be refused on the grounds envisaged by Article 17 of the Law "On Licensing Certain Types of Activities" (see above para. 51; Exh. R-144) and set out the procedure for refusal and remedies thereto (Article 19).

451. On 13 March 2004, Messrs Wilkins and Donald on behalf of Oxus signed a ***Guarantee Letter*** provided by MinFERIT (hereinafter "Guarantee Letter"), under which Oxus undertook to reimburse Respondent *via* regular payments of 50% of the difference between the hedged price of gold as set out in the HGOA and agreed maximum price of gold of USD 410 by paying this amount into a special

'Reserve Fund' (Exh. C-239) (see also earlier drafts Exhs. R-733, R-734 and R-740) (Claim. SoC. 17.09.2012, para. 275; Resp. SoD.Class. 04.04.2013, para. 158).

452. On 16 March 2004, by ***Letter No. HH-b-01/02-970***, Mr. Nazhimov, First Deputy Chairman of MinFERIT, sent a letter to AGF[16]. He stated that as "*an inseparable part of the Loan Agreement*", the HGOA shall not be registered with the AFER as a separate "*purchase and sale agreement*", and specified that "[i]*ssues related to implementation of loan agreements, servicing of external borrowings are within the competence of the Ministry of Finance, the Central Bank of the Republic of Uzbekistan, as well as founders of the joint venture*." At the same time, Mr. Nazhimov provided AGF with further comments on the problems raised by the hedging provision (Exh. C-240) (Claim. SoC. 17.09.2012, para. 277).

453. On 18 March 2004, by ***Letter No. 1325/520***, Mr. Tashmuradov, Deputy Chairman of the Central Bank, sent a letter to AGF, confirming that the HGOA was an integral part of the Financing Agreement, which had already been registered by the Central Bank on 9 April 2003 (see above para. 430), and was thus not subject to the need of a separate registration (Exh. C-241).

454. On 18 March 2004, Mr. Watts of AGF wrote to Mr. Serikbaev, Deputy Chairman of the State Customs Committee, requesting the latter to allow the registration of the HGOA with the Navoi State Regional Customs Committee so as to entitle the export of the gold (Exh. C-243). However, it seems the Customs verbally refused to register the HGOA (see reference in Exh. C-244).

455. On 19 March 2004, Mr. Wilkins on behalf of ORC and Oxus wrote to Prime Minister, Mr. Mirziyoyev, complaining further about the fact that AGF continued to be refused permission to export gold and concluding as follows (Exh. C-244):

> *"This situation cannot be allowed to continue. The lending banks will declare AGF officially in default if the first shipment does not take place very soon. AGF also cannot operate indefinitely without operating cash flow. The first gold shipment was supposed to have taken place on 27 February. We are now 3 weeks overdue. There is a very real risk that the mine will be forced to close.*
>
> *Somebody must now make a decision in order to resolve this problem. We understand that a Cabinet of Ministers resolution is being prepared in order to achieve this, and we urge you to ensure that this resolution is unambiguous, is an instruction to all relevant parties (including State Customs), and is issued in good time to allow the first gold to be shipped on Tuesday, 23 March."*

[16] The letter does not mention a particular addressee.

456. On 23 March 2004, by ***Letter No. 04-8/11-785***, Mr. Teshaev, Deputy Head of the State Tax Committee in Navoi region, confirmed to Mr. Watts of AGF that the HGOA required prior registration with competent State authorities before it could be recorded by the Customs (Exh. C-242) (Claim. SoC. 17.09.2012, para. 278).

457. On the same day, Oxus issued a press release stating as follows (Exh. R-730):

> *"As a consequence of the mine production and gold refining being ahead of schedule, the registration of the various documents required to obtain the relevant export permit was unable to keep pace. The partners of AGF (Oxus Resources Corporation, Uzbekistan's State Committee of Geology and Navoi NMMC) have been working diligently to resolve all procedural issues and Oxus is pleased to confirm that the necessary paperwork has now been completed and gold revenue will be received well ahead of the due date for the first loan repayment by AGF."*

458. Between 26 and 30 March 2004, Mr. Wilkins on behalf of Oxus sent further letters to the CabMin, to the Prime Minister and to the Deputy Prime Minister pushing for the permission to export the already produced gold (Exhs. C-245 and C-247) (Claim. SoC. 17.09.2012, para. 280).

459. By 30 March 2004, according to Claimant, 630 kg of gold had been produced, of which 425 kg was ready for export (Claim. SoC. 17.09.2012, para. 280).

460. On 31 March 2004, AGF should have delivered the second gold shipment to Standard Bank. However, according to Claimant, because of Respondent's request that the HGOA be first registered, AGF also defaulted on this second delivery obligation thereby breaching again the Financing Agreement (Claim. SoC. 17.09.2012, para. 272). In addition, Claimant further contends that it was unable to pay its contractors, BCM and MAED (Claim. SoC. 17.09.2012, para. 280; Exh. C-248).

461. On 1 and 2 April 2004, Oxus signed two further undertakings, as ***Amended Guarantee Letters*** (Exhs. C-249, C-250), restating the principles contemplated in the Guarantee Letter (see above para. 451), amending however certain terms and in particular the timing for the various payments to the State (hereinafter "Amended Guarantee Letters").

462. On 6 April 2004, the CabMin issued a **'*Classified Decree No. 213-fm*'** (hereinafter "Decree No. 213") (Exh. R-371). In this Decree, it resolved – among others – to (i) direct the National Bank for Foreign Economic Relations and the State Customs Committee to register AGF's HGOA, and to (ii) grant customs clearance to AGF to export 263,096 ounces of precious metals at USD 323,35 per

ounce from April 2004 to January 2005, according to the schedule in an annex to the Decree.

463. On 7 and 8 April 2004, the National Bank for Foreign Economic Relations and the State Customs respectively registered the HGOA (Exh. C-225, see official stamp on the Agreement) (Resp. SoD.Class. 04.04.2013, para. 161; Claim. SoC. 17.09.2012, para 283).

464. On 9 April 2004, the first shipment of gold under the HGOA took place.

465. On 27 April 2004, AGF and Standard Bank further amended the Original Gold Offtake Agreement (see above para. 432) by entering into a separate ***'Gold Offtake Agreement No. EX-0001'*** (hereinafter "Unhedged Gold Offtake Agreement") covering the sale of unhedged gold.

466. On 12 July 2004, the MinFin and AGF entered into a ***Special Dividend Agreement*** entitled 'Agreement between the Ministry of Finance of the Republic of Uzbekistan and Oxus Gold plc On Payments Related to the Sale of a Part of Gold Produced by Amantaytau Goldfields A.O' (hereinafter "Special Dividend Agreement") (Exh. C-252). This Agreement restated the content of the previous three Guarantee Letters (see above paras 451 and 461; Claim. SoC. 17.09.2012, para. 284). Under this Agreement, full repayment of the 'Additional Income', i.e. the difference between the current world price (London Morning Fixed price) on the date of sale and the hedged gold price pursuant to the HGOA, had to be made before 31 October 2008.

1.2 2004-2006 : The Beginning of Operational Challenges and the Special Dividend Agreement

467. On 15 September 2004, AGF's internal Audit Committee issued a Report called ***'Audit's Committee Conclusion for financial activity of JV "Amantaytau Gold Fields" for 2003'*** (Exh. R-161) (hereinafter "AGF Audit Committee Report 2004"). The Report pointed out certain irregularities, including namely: (i) the failure to submit 'financial outcome report' forms in accordance with applicable rules, (ii) certain irregularities concerning the payment of invoices to suppliers, including MAED, in particular the fact that payments were done without contracts, (iii) the exceeding of the approved JV Budget 2003 of $1.732 million compared to an actual administered budget of $7.171 million, due mainly to the financial costs for loan services and mobilization costs of mining equipment of BCM. The Audit Committee issued the following recommendations and conclusions:

"IV. Audit's committee recommendations

1. *To work out approve accounting policy of JV in accordance to the National Standards for Accounting of RUz.*
2. *To hold annual inventory of assets, draw up JV acts, collation statements and minutes as per the established form.*
3. *To fill financial report in accordance to the Order #140 dated 27/12/2002 of Ministry of Finance*
4. *To register in Ministry of Justice "Statement of Taxation, Accounting an Reporting for JV "Amantaytau Gold Fields"*
5. *To request from MAED Ltd. Report on planned work for the construction of plant, to execute commission report and include it to count.*
6. *To control funds expenditures from accounts Barclays Bank.*

Payment to be done as per the concluded contract signed by Managers of JV authorized to sign and by Chief accountant. To restore agreements used as the basement for payment to supplies for performed works and services rendered from the account of Barclays Bank. Besides, to restore documents confirming fulfillment works and services.

7. *To approve the Budget on JV Board meeting.*

VII. Conclusion

Audit for financial activity of JV "Amantaytau Gold Fields" was hold by "Konsaudit-Farez Ltd." Auditing company. The Conclusion is positive.

Audits committee recommends to Board/shareholders meeting consider expenditures as registered (booked) and approve financial accounting for activity JV "AGF" for 2003."

468. On 22 October 2004, Oxus issued its Annual Report 2004 (Exh. R-2). As concerns the Special Dividend Agreement, it reported as follows:

> *"On 13 March 2004 the company guaranteed to fund an AGF Phase 2 Project Development Fund. This Fund will be paid to the Uzbek Government by AGF as a licence fee in respect of the transfer to AGF of the underground shaft and related underground workings at the AGF site, which form an integral part of the Phase 2 Sulphides project and which are estimated by the directors to have a value of at least $70 million.*
>
> *These assets have already been transferred to AGF. The Fund will be calculated as to the Uzbek Government's share (50%) of the positive difference between the actual world price of gold on the date of sale and the hedged gold price pursuant to the Gold Offtake Agreement signed with the lending banks on 15 April 2003 (as amended on 20 January 2004), subject to a maximum gold price of $410 per ounce. AGF has hedged 263,096*

ounces of gold at $323.35 per ounce over the period February 2004 to January 2006.

The Fund will accrue on a monthly basis from the first date of sale of hedged gold and the company has committed to transfer the appropriate monies to the Fund on a quarterly basis over the period February 2006 to May 2008. At 30 June 2004 the accrued Fund was $1,760,781 (see note 13) and, at a $400 per ounce gold price, the contingent liability in respect of the period July 2004 to January 2006 is estimated at $6.6 million."

469. On 11 November 2004, AGF held its Annual General Meeting of Shareholders, during which the shareholders discussed – among others – AGF's deficient extraction rate, as well as its failure to comply with its approved business plan for 2004. It resolved as follows (Exh. R-162):

> *"3.7 to postpone approval of amendments to the AGF Business plan for 2004 and AGF Business plan for 2005 until the Shareholders examine and find causes of unexpectedly low rates of gold production for which purpose a commission to conduct such a study will be appointed. Oxus agreed to appoint J. MacLochlin, S.L. Salamatin and B. Dzhalolov as members of this commission, Goskomgeologia agreed to appoint E.L. Popov who is the head of the mineral raw materials production department and E.M. Hushbokov who is the chief process engineer of lngichinskaya OMTE, while Navoi Mining and Metallurgical Plant agreed to appoint O.A. Mihin, deputy chief engineer and chief process engineer of Navoi Mining and Metallurgical Plant as well as Kizimov F.P. who is the chief process engineer of CRU. It was decided that the commission shall complete its work as soon as possible so as not to hinder implementation of the AGF plans for 2005.*
>
> *3.8 to request the management of AGF to submit to the Supervisory Board of AGF the Rectified business plan for 2004 and Business plan for 2004 for consideration before the 20th of December 2004 drawn up as per the form agreed upon with the Shareholders and on the basis of the achieved gold production rate without regard to expenses for the expansion of production of oxidized ores up to 1.5 million tons per year but with account of expenses for construction works at Vysokovoltnoye gold and silver mine and improvement of the its production rates, find sources of financing of the expenditures connected to the construction of Vysokovoltnoye gold and silver mine."*

470. On 2 August 2005, AGF held its Annual General Meeting of Shareholders (Exh. C-652), during which the shareholders approved – among others – the annual accounts and financial reporting, the Business Plan 2005, and the Mining Contract with NMMC for Vysokovoltnoye. The shareholders further acknowledged that AGF was not meeting the ore mining, gold recovery and metal production parameters: although the JV had established a production quota of 6.2 tonnes of gold and 20 tonnes of silver, AGF expected to produce only 4.98 tonnes of gold and 8.9 tonnes of silver mentioned in the Business Plan 2005 and therefore

instructed amendments to the Business Plan 2006 (see Resp. SoD.Class. 04.04.2013, para. 188).

471. On 16 September 2005, AGF held an Extraordinary General Meeting of Shareholders, during which the shareholders amended its Business Plan for 2006 to reflect an extraction rate of only 76% and expected production of 4.9 tonnes of gold and 1.7 tons of silver (Exh. R-167). As concerns the distribution of profit, the shareholders unanimously resolved as follows:

> *"5.1 to distribute undistributed profits of AGF accumulated in 2004 as follows:*
>
> *- 12.416 million USD to repay loan provided by Standard Bank*
>
> *- .058 million USD to be contributed to the Reserve fund*
>
> *- 2.5 million USD to be paid to the Shareholders as payment of dividend*
>
> *- .081 USD million to be paid to the Members of the Supervisory board as remuneration."*

472. On 23 September 2005, Goskomgeology issued to AGF a ***'License ZM N 0007'*** (hereinafter "Cyanide License") (Exh. C-329). It authorized AGF to operate the production, transportation and storage of cyanide to extract precious metals from mined ore, including gold and silver. This license was due to expire on 23 September 2010.

473. On 12 December 2005, Sanoat issued an ***'Expert Conclusion'*** (Exh. C-635) regarding the conditions for obtaining a license on the right of mining precious metals by AGF. The Conclusion stated as follows:

> *"*- [AGF] *adheres to all requirements of Uzbek legislation on subsoil and on environmental protection, as well as rules and norms of safety, workplace protection, sanitary norms and rules, hygiene norms, as well as State standards;*
>
> […]
>
> ***Expert Conclusion***
>
> […]
>
> *Experts consider possible to grant [AGF] the license on the right of mining of precious metals."*

474. On 15 December 2005, Mr. Webbstock on behalf of AGF sent a letter to Mr. Sultanov, Deputy Prime Minister, requesting the latter to grant the renewal of AGF's Mining license (Exh. C-313).

475. As of 31 December 2005, Oxus issued a Regulatory News Service press release ("RNS") announcing that AGF recorded a $13.263 million gross profit for the year 2005 and further reported the following highlights (Exh. C-260):

> *Highlights*
>
> * *Net profit on ordinary activities of $4.293 million for the period compared to $3.615 million for the same period for 2004*
>
> * *AGF produces 84,119 ounces of gold for the period and 161,615 ounces for the year ended 31 December 2005*
>
> * *AGF reports $9.042 million profit for the period and $13.263 million profit for the year ended 31 December 2005*
>
> * *AGF project finance repaid and hedge commitments eliminated*
>
> * *AGF total gold production now exceeds 10 tonnes (in excess of 328,000 ounces produced to date)*
>
> * *AGF's Vysokovoltnoye heap leach project produces first silver and gold*
>
> * *AGF Sulphides project feasibility study completed and awaiting Uzbek Government approval*
>
> * *AGF reports significant drilling results for the Asaukak cluster of deposits*
>
> * *AGF starts working on major exploration and reserve development programme*
>
> * *Construction of the processing plant and related infrastructure at the Jerooy project achieves approximately 80% completion, prior to suspension in February 2006 pending the reinstatement of the mining licence*
>
> * *The Group increases its stake in Marakand Minerals to 81.6%*
>
> * *$20 million corporate credit facility drawn down in January 2006."*

476. On 7 and 12 January 2006, Mr. Webbstock, AGF's General Director, sent a letter to Mr. Saidov, Head of Sanoat, to renew its Mining License (Exhs. R-190, R-191), which was due to expire on 27 November 2006 (see above para. 415).

477. From 10 to 14 April 2006, Sanoat conducted an Audit of AGF (hereinafter "Compliance Audit 2006") and issued a Report (Exh. R-189) raising various problems (see below para. 484).

1.3 2006 : First Interventions by the Uzbek Government

1.3.1 The 2006 Tax Regime Changes

478. On 1 May 2006, the CabMin issued Decree No. 74 ***'On Additional Measures to Increase the Incentive Role of Privileges Granted to Companies with Foreign Investments'*** (hereinafter "Decree No. 74") (Exhs. C-255, C-399). It provided as follows:

> *"1. It shall be established that:*
>
> *Taxation of companies with foreign investments registered in the territory of the Republic of Uzbekistan shall be carried out in accordance with the laws existing at the time of taxation;*
>
> *Companies with foreign investments registered in the territory of the Republic of Uzbekistan shall fully use all general tax and customs privileges and preferences established by legal deeds, as well as additional privileges and preferences granted strictly with the procedure and on the terms envisaged by the laws (including investment agreements, production sharing agreements).*
>
> 1. *It shall be established that additional privileges on paying taxes, customs and other compulsory payments shall be granted to companies with foreign investments only for a clearly defined term and cannot be without time limit.*
> 2. *from June 1, 2006, all privileges on paying taxes, customs and other compulsory payments earlier granted by Government resolutions which have not been envisaged by legal documents and which are without time limit shall be cancelled.*
> 3. *In order to secure detailed consideration of issues of necessity and efficiency of further granting of additional privileges and preferences to existing companies with foreign investments which are a part of an industry or are implementing projects recognised by laws as priority projects, a special group shall be created including members in accordance with the Appendix and this group shall be instructed as follows:*
>
> *All aspects of appeals of individual companies with foreign investments, which were granted additional privileges on paying taxes, duties, customs and other compulsory payments without time limit by earlier Government resolutions shall be considered;*
>
> *Based on the results of consideration of appeals relevant substantiated proposals on setting up for individual companies with foreign investments, which earlier had privileges without time limit, of substantiated privileges on paying taxes, duties, customs and other compulsory payments for a clearly defined term followed by further conclusion of investment agreements with foreign investors with the procedure set up by Resolution of the Cabinet of*

Ministers of the Republic of Uzbekistan # 180 dated 2 August 2005 On Measures To Implement Decree of the President of the Republic of Uzbekistan On Additional Incentive Measures To Attract Direct Private Foreign Investments shall be introduced to the Cabinet of Ministers. […]*"*

479. On 7 July 2006, the CabMin issued Decree No. 133 'On Entering of Amendments and Invalidations of Some Resolutions of the Government of the Republic of Uzbekistan' (hereinafter "Decree No. 133") (Exhs. C-256/R-375). It invalidated the following previous decrees: (i) Clauses 5 to 7 of Decree No. 477 (see above para. 39) and (ii) Clauses 6 and 7 of Decree No. 266 (see above para. 53). According to Claimant, it also revoked AGF's exemption from the mandatory procedure for surrendering foreign currency revenues to an authorized bank in the Republic of Uzbekistan in exchange for Uzbek soums (Resp. SoD.Class. 04.04.2013, para. 212; Claim. PHB I. 21.07.2014, paras. 14 fol.).

480. On 22 September 2006, Mr. Norton of AGF wrote to the Minister of Economy and "Head of the Special Working Group" on "Issue related to Granting Privileges to the Companies with Foreign Investments", to complain about the consequences on AGF of Decree No. 74 and No. 133 (C-257). According to Claimant, the net effect of these Decrees meant a USD 43 million increase in costs between 2006 and 2007 (Claim. SoC. 17.09.2012, para. 297).

481. On 22 September 2006, a meeting was held between Mr. Hill and the tax authorities, but no agreement was reached (Claim. SoC. 17.09.2012, para. 306; Hill-WS 31.08.2012, para. 46).

1.3.2 The 2006 Audits

482. On 11 July 2006, representatives of the State Tax Committee arrived at AGF to conduct a further Audit to verify AGF's compliance with the tax, currency and customs law (hereinafter "Complex Audit 2006") (Resp. SoD.Class. 04.04.2013, para. 216; Claim. SoC. 17.09.2012, para. 300).

483. On 27 July 2006, while the Complex Audit 2006 was still ongoing, Oxus entered into a contract with JNR Limited (hereinafter "JNR"), an offshore investment advisory company owned by Jacob and Nathaniel Rotschild (see reference thereto in Exh. C-58).

484. On 18 August 2006, the State Tax Committee and the State Customs Committee issued its audit report (hereinafter "Complex Audit Report 2006") (Exh. R-472) as well as an **'*Act of Inspection regarding Issues Of Observance Of The Tax Legislation And Other Legislative Acts in "AMANTAYTAU GOLDFIELDS" Closed Joint Stock Company*'** (hereinafter "Inspection Act") (Exh. C-268).

According to such Report and Inspection Act, AGF was liable for various non-compliances, including – among others – the following: (i) absence of an annual safety knowledge assessment schedule for the managers and specialists of the SP, (ii) technological deficiencies and violations of the technological regime which do not allow it to reach the scheduled gold recovery rate of 86%, (iii) non-compliance with the requirements of relevant regulations regarding the commercial gold and silver recovery rate, (iv) further technical and accounting non-compliances, in particular with tax, customs and other regulations. This triggered fines and penalties totalling the substantial amount of approx. USD 225 million.

485. On 25 August 2006, Mr. Wilkins on behalf of Oxus sent a letter to Mr. Azimov, Deputy Prime Minister and Minister of Finance, complaining about the way in which the Complex Audit 2006 had been conducted as well as its findings, and requesting to delay the execution of the tax audit provisions (Exh. C-269).

486. On 6 September 2006, Mr. Hill, AGF's General Director, sent to Mr. Teshayev, Chief of the Regional Tax Inspectorate, a letter objecting to the conclusions of the Complex Audit Report 2006, in particular with regard to (i) the withholding tax, (ii) the school tax, (iii) the environmental tax for 2005, (iv) the VAT for imported goods and services, and (v) the single tax from the gross revenue (Exh. C-270). Mr. Hill concluded that "[b]*y wrong actions the inspectors deliberately/"artificially" increased the number of items to be imposed by tax and have additionally calculated the tax.*"

487. On 7 September 2006, the State Tax Inspectorate of Zarafshan City commenced enforcement proceedings in the Navoi Economic Court against AGF for non-payment of due taxes (Exh. R-473) (Claim. SoC. 17.09.2012, para. 305).

488. On 13 September 2006, Mr. Narziev, AGF's chief accountant, notified Messrs Hill, Suter, Wilkins, Kipps and Boyjigitov that, as stressed in the Central Bank Letter No. 1308/1062 dated 3 May 2000 (see above para. 50), it was strictly forbidden for AGF to make payments from its Barclays Bank account under import contracts, and from receiving into that account foreign currency revenue from its export activities (Exh. R-176). Mr. Narziev issued the following recommendation:

> *"Based on above stated, I ask you to stop transferring the receipt of revenue in foreign currency to Barclays Bank in London. To provide performance of laws of RUz about currency regulation. To change bank details in the contract with Standard Bank about sale of gold.*
>
> *Otherwise the State authority will suspend the shipment of finished product."*

489. On 19 September 2006, Mr Hill, AGF's General Director, sent a letter to Mr. Azimov, Deputy Prime Minister, requesting again the delay of enforcement of the tax and custom Audit provisions and enforcement actions so as to allow AGF to continue its operations (Exh. C-271).

490. On 26 September 2006, Mr. Hill of AGF wrote to Mr. Azimov, Deputy Prime Minister, requesting that the execution of the collection order of the Navoi Regional State Customs Department be suspended until 1 November 2006 (Exh. C-476).

491. On 18 October 2006, the Navoi Regional Economic Court issued collection orders on AGF's bank accounts, finished products (i.e. refined silver and gold) and fixed assets (Exh. R-652). According to Claimant, these orders were issued without informing AGF, let alone allowing it an opportunity to contest or challenge them (Claim. SoC. 17.09.2012, para. 307).

492. On 26 October 2006, the Navoi Regional Economic Court rendered a ***'Decision'*** (Case No. 21-06-06/5481) on the State Tax Inspectorate's claims, confirming the latter's finding of liability for approx. USD 225 million (Exh. C-273).

493. On 27 October 2006, Oxus, as a listed company, issued a RNS making the following announcement regarding the Navoi court decision (Exh. C-274):

> *"Oxus* […] *announces that the Regional Economic Court of the Navoi province in Uzbekistan issued a ruling against Amantaytau Goldfields ('AGF') Oxus' subsidiary in Uzbekistan on 26 October 2006 claiming taxes of $15.3 million relating to the period of 1 January 2003 to 31 December 2005, plus related fines and penalties equivalent to $4.9 million. This amount includes $7.1 million of recoverable VAT. AGF is 50% owned by Oxus Gold and 50 by the Uzbek State.*
>
> *In addition the ruling also claims $203.6 million in respect of alleged transgressions during the same period relating to the operation of AGF's overseas foreign currency bank account. The ruling becomes effective after 30 days unless overturned. AGF is appealing the majority of this ruling. AGF has been led to believe that any liabilities resulting from the rulings will be payable pursuant to a reasonable payment schedule.*
>
> *AGF believes it was exempt from the majority of taxes claimed under the ruling.*
>
> *AGF also maintains that it was authorized by decree of the Cabinet of Ministers to operate an overseas bank account and that such operations were conducted legitimately and with the full knowledge of the relevant Uzbek authorities, including the Ministry of Finance and the Central Bank to which AGF regularly submitted the required reports."*

According to Claimant, this announcement together with the revocation of AGF's tax privileges and the 2006 Audit caused Oxus' share price to drop sharply, from nearly GDP 0.80 per share at the beginning of 2006, to below GBP 0.10 (Exhs. C-275-C-276) (Claim. SoC. 17.09.2012, para. 311).

494. On 3 and 28 November 2006, Mr. Hill, AGF's General Director, sent two letters, the first one to Messrs Azimov (First Deputy Prime Minister and Minister of Finance) and Parpiev and Teshayev (Tax Department), the second one to Gorlov (Deputy and Acting Chairman of Goskomgeology), Yuldashev (Chief of Hard Curency & Economic Development Department of Ministry of Finance), Shemetov (Chief Engineer of NMMC) and various people at Oxus and ORC including Messrs Trew, Wilkins and Kipps, in which he complained about the difficulties for AGF to survive, identifying following issues as "critical" and requesting assistance (Exh. C-272 and C-279):

> *"1. Supply of diesel fuel – payments necessary*
>
> *2. Payments to local service providers*
>
> *3. Payment to Navoielectroset – Electrical supply to Karakata pump station*
>
> *4. Agreement with NMB to mine Centralny and using current loan to NMB as financing*
>
> *5. Payment of salaries for the month of October*
>
> *6. Removal of Court Arrests;*
>
> *a. On sales of Product*
>
> *b. On bank accounts*
>
> *7. Lifting of customs claim for historical duties, (pre-June 2006)*
>
> *8. Agreement on repayment schedules for current tax and customs, (post June 2006), including off-set of VAT paid to date*
>
> *9. Agreement on return to original tax/customs regime or postponement of implementation of cancellation of privileges (from June 2006) until such time as new privileges can be agreed that do not force AGF into a loss-making operation*
>
> *10. Resolution of dor*[é] *refining contract with AMMC or permission to export dor*[é] *product*
>
> *11. Agreement with Zarafshan-Newmont on smelting of silver concentrate*
>
> *12. GMZ-2 to agree to refining of gold dor*[é] *,including high silver content (up to 30%), as per contract*
>
> *13. Mining Operations Licence to be renewed."*

495. In December 2006, AGF appealed the ***'Decision in Case No. 21-06-06/5481'*** of the Navoi Regional Economic Court, which had confirmed the finding of the 2006 Audit (Claim. SoC. 17.09.2012, para. 321).

496. On 28 December 2006, the Board of Appeal of the Navoi Regional Economic Court issued its **'*Decree of Appeals Instance of the Economic Court of Navoi Oblast Case No. 21-06-06/5481*'** partially upholding and partially reversing the Court's previous decision on enforcing the findings of the Complex Audit Report 2006 (see above para. 484) (Exh. R-477) as follows:

> "[The Court] *HAS RESOLVED:*
>
> 1. *To change the Decision of the Economic Court of 26.10.2006.*
>
> 2. *To apply financial sanctions to Amantaytau Goldfields ZAO JV in the amount of 16,954,600 soums.*
>
> 3. *To refuse to apply financial sanctions to Amantaytau Goldfields ZAO JV in the amount of 250,984,596,400 soums.*
>
> 4. *To leave without consideration claims regarding collection of additionally calculated taxes and compulsory payment and fines for delay in payment.*
>
> 5. *To leave the Ruling of the Economic Court of Navoi oblast of 18.10.2006 without changes and to leave the Appeal without satisfaction.*"

497. On 15 February 2007, the State Tax Inspectorate appealed to the Economic Court against the decision of the Board of Appeals of the Navoi Economic Court before the Navoi Superior Economic Court and further before the Cassational Instance of the Uzbek Superior Economic Courts. Both Courts upheld the decision of the Board of Appeals and of the lower court by decisions of 27 March and 12 April 2007 respectively (both in Exh. R-478).

1.3.3 The Expiry of the Mining License

498. On 30 October 2006, an Extraordinary Meeting of the AGF Supervisory Board took place (Exh. R-1128). During this Meeting, the issue of the renewal of the Mining License was discussed and it was stressed that four items remained unfulfilled from the 49 items specified in the Inspection Act (see above para. 484), namely:

- Non-performance of laboratory certification (it was guaranteed to be performed in the beginning of December 2006);

- Failure to employ a control instrumentation engineer for tools calibration;

- Failure to fill a technical certificate for mounted equipment;

- Non construction of weight bridge.

499. On 23 November 2006, i.e. four days before the expiry date of AGF's Mining License (see above paras. 415, 474, 476) and eleven months after its application, Mr. Hill sent a letter to Mr. Saidov, the Head of Sanoat, to require assistance regarding the renewal of AGF's Mining License (Exh. C-314) (Claim. SoC. 17.09.2012, para. 353).

500. On 24 November 2006, by ***Letter No. 14-912***, Mr. Saidov, the Head of Sanoat, responded to Mr. Hill of AGF (Exh. C-315), indicating that the renewal of AGF's Mining License was under review and that pending this review, AGF could continue its activities under the license until 28 December 2006.

501. On 30 November 2006, Oxus signed a '***Share Subscription Agreement***' with Zeromax, under which Zeromax acquired a 16% stake in Oxus at GBP 0.21 per share and the right to appoint a non-executive director to the Oxus Board (Exh. C-54).

502. On 18 December 2006, Mr. Hill on behalf of AGF sent a ***Letter No. 1594*** to Mr. Saidov from Sanoat (Exh. R-202). He requested that, in view of the expiry of the additional time period granted until 28 December 2006 (see above para. 500), the Mining license be further extended pursuant to Article 20 of the Law "On Licensing Certain Activities."

503. On 27 December 2006, by ***Letter No. 14-1003***, Mr. Alibaev from Sanoat sent a letter to Mr. Hill from AGF stating that AGF was permitted to continue its mining activities on the basis of its expired mining-activity license, without indicating the duration of such permission or the time it would take to decide on the renewal (Exh. C-316).

1.4 2006-2010 : The Arising of Operational and Financial Problems

1.4.1 The Challenges Regarding the Refining of Silver

504. On 23 January 2006, upon Mr. Akhmedov of Goskomgeology's request of 19 January 2006, Mr. Mamadaliyen on behalf of Mr. Sultanov, Deputy Prime Minister, issued an ***'Order No. 06/22-2'*** to AMGK directing it to expand its silver refinery to be able to process the silver doré from AGF (Exhs. R-100, 101) (Resp. SoD.Class. 04.04.2013, para. 252).

505. On 13 February 2006, AMGK informed AGF that it would have the capacity to refine up to 5,000 kg of silver doré per month, beginning in May 2006 (see reference to this communication in Exh. C-286).

506. On 28 February 2006, Mr. Norton from AGF wrote to Mr. Bill (William) Trew from Oxus, Mrs Sherbakova from the MinFin, Mr. Akhmedov from Goskomgeology and Mr. Kuchersky from NMMC, objecting to AGMK's proposal and noting that AGF had already conducted a tender for the silver refining and intended to work with Metalor, "*due to numerous reasons including legislation in Russia and Kazakhstan restricting off-take agreements and also Metalor's better understanding of the permitting and shipping processes in Uzbekistan.*" According to AGF's assessment, the costs of silver refining through AMGK would be almost three times more expensive than with Metalor (i.e. USD 4,179,412 compared to USD 1,588,867 for 3,454,060 Oz) (Exh. C-286) (Resp. SoD.Class. 04.04.2013, para. 252). In addition, Mr. Norton expressed doubts as to AGMK's capacity to refine all the silver doré given that the monthly production forecast for 2006 would exceed 5,000 kg.

507. On 29 March 2007, AGF and AMGK entered into ***'Agreement No. 14-780'*** (hereinafter "Silver Refining Agreement") regarding the refining by AMGK of AGF's silver doré (Exh. C-288). Under Clause 2.1.1 of the Agreement, AGF was required to supply precious metal doré bars in the form of anodes to AMGK, together with "*a passport specifying the number and weight of precious metal dor*[é] *bars and assay results for precious metals and impurities*" in each bar. As concerns the quality requirement of the silver doré bars, Clause 2.1.2 provided in particular as follows:

> "2.1.2 *Acceptance of precious metals dor*[é] *bars in the form of anodes shall be carried out at the Processor' s Refinery with subsequent formalization of a delivery- acceptance certificate.*
>
> *The quality of the dor*[é] *bars shall be similar to the quality data provided in Appendix 2 to this Agreement.*

The amount stated in the delivery-acceptance certificate shall be regarded as final and mandatory for both Parties The Processor shall weigh, sample and carry out a chemical assay of supplied precious metal dor[é] *bars in the form of anodes with a view to their compliance with the passport data).*

In case of discrepancy between the data, the data obtained at the Processor shall be accepted and a conciliation certificate shall be signed."

508. On 21 May 2007, AGF and AMGK entered into a ***'Supplemental Agreement No. 1 to the Silver Refining Agreement'***, by further specifying the weight of the doré bars to be supplied by AGF, the procedure for receiving precious metals doré bars and penalties in case these weight parameters were not complied with (Exh. C-289) (Resp. SoD.Class. 04.04.2013, para. 255):

> *"Clause 2.1.1 shall be added as follows:*
>
> *The surface of the precious metal dor*[é] *bars in the form of anodes should be sharp flashless and free of contaminating (slag) impurities.*
>
> *Each precious metal dor*[é] *bar should weight not more than 30 kg.*
>
> *Each shipment of the precious metal dor*[é] *bars in the form of anodes should consist of the same fusion alloy but not less than 90 kg. (Suppl. Agreement #1 dated 21.05.2007).*
>
> *Clause 2.1.2 shall be added as follows :*
>
> *At the following content of precious metals in dor*[é] *bars :*
>
> - *less than 1% gold recovery shall be 98.8% ;*
> - *less than 74% silver recovery shall be 95.8%.*
>
> *Clause 3.2 shall be added as follows:*
>
> *As agreed between the Parties, supplies of precious metal dor*[é] *bars weighing more than 30 kg shall be admissible. The admissible variance for the dor*[é] *bar weight shall be +/- 10 grammes.*
>
> *Clause 4.1 shall be added as follows:*
>
> *In case of breach of Cl. 2.1.1. and 2.1.2. of the Contract resulting in additional work, the PROCESSOR shall present demands for additional costs based on calculations coordinated with the SUPPLIER."*

509. On 1 June 2007, AGF and Standard Bank entered into a ***'Silver Offtake Agreement No. Ex-0004'*** (hereinafter "Silver Offtake Agreement"), providing for the sale of 2,500,000 troy ounces of silver from AGF to the bank at USD 4,75 per ounce, i.e. a total of nearly USD 32 million (Exh. C-290) (Claim. SoC. 17.09.2012, para. 331).

510. On 8, 12, 15 June and 8 July 2007, Mr. Dabizha of AMGK wrote again several letters to Mr. Ynusov of AGF complaining about alleged breaches by AGF of the required parameters regarding the weight of the supplied doré bars and/or relevant documentation (Exhs. R-107 to R-110) (Resp. SoD.Class. 04.04.2013, para. 255).

511. In August and September 2007, Mr. Dabizha of AMGK wrote several letters to Mr. Ynusov of AGF complaining about the weight quality of the delivered doré bars (Exhs. R-112 to R-114).

512. On 19 July 2007, AGMK and AGF entered into the '***Supplemental Agreement No. 2 to the Silver Refining Agreement***' (Exh. R-111), in which AGMK and AGF agreed that, if AGF failed to submit the results of assays, it would pay AGMK for conducting these assays on its behalf.

513. On 14 November 2007, Mr. Wilkins, Director of Oxus, wrote to Mr. Azimov, Deputy Prime Minister and Minister of Finance, to complain about the fact that AGF had a stockpile of silver doré worth approx. USD 17,5 million, which could not be processed because of AMGK's limited processing capacity. Consequently, Mr. Wilkins requested that the MinFin allow Oxus' outstanding liability under the Special Dividend Agreement to be met with the stockpiled unrefined silver (Exhs. C-291/R-882).

514. On 30 November 2007, Mr. Bekenov, Deputy Minister of Finance, replied to Mr. Wilkins' letter of 14 November 2007 rejecting its request (Exh. C-292).

515. On 16 February 2008, Mr. Khaspoladov and other representatives of AMGK met with representatives of the CabMin, Goskomgeology and AGF to discuss the problems regarding the silver refining (Exh. R-115). During this Meeting, the parties agreed that "[t]*he main reasons for increasing of the timing for refining of AGMK silver and gold dor*[é] *bars is the increase of silver to gold ratio up to 20:1 from the designed ratio of 8:1, breaching of this ratio leads to increasing volumes of turnover materials which require additional processing time*" and made the following decisions:

> *"1. To consider variants of supplementary agreement conclusion between JV "Amantaytau Goldfields" and "Almalyk MMC", OJSC over the period till March 1, 2008, which stipulates:*
>
> - *minimum content of gold and silver in a supplied alloy*
> - *gold and silver recovery ratio*
> - *affining metals return term*
>
> *2. Take note of the approved return schedule of the supplied 16,783.1 kg of alloy "*dor[é]*" as well as AMMC is able to process not more than 10,000 kg of alloy "*dor[é]*" from August to December. AMMC technological capacities make it possible to process not more than 26,783 kg of alloy "*dor[é]*" of the supplied quality in 2008. Thereby 58,936 kg of the alloy "*dor[é]" *is to be affined on the other refinery for plan execution in number 32,153 kg.*

3. *Goskomgeology (Mavlyanov) jointly with JV "Amantaytau Goldfields" to take necessary measured on quality improvement of the silver and gold alloy "dor[é]".*
4. *"Almalyk MMC", OJSC (Ruziev) is responsible for the silver and gold alloy "dor[é]" remaining batches processing and finished product delivery to the JV "Amantaytau Goldfields" according to the return schedule, p. 2 herein.*
5. *JV "Amantaytau Goldfields" over the period till April 1, 2008 provided "Almalyk MMC", OJSC with estimated volume of delivery, chemical and mineralogical makeup of the ore concentrate froth of the Central and North Amantaytau.*
6. *"Almalyk MMC", OJSC over the period till April 10, 2008 is responsible to prepare information on concentrate froth processing possibility.*
7. *JV "Amantaytau Goldfields" jointly with "Almalyk MMC", OJSC till March 1 is responsible to work out the procedure of the conducting independent audit on quality and quantity of the alloy "dor[é]" residue, delivered on processing.*
8. *To recommend "Amantaytau Goldfields" to build a refinery workshop.*

516. On 24 April 2008, AGF held an Extraordinary General Meeting of Shareholders, dealing with the following issues (Exh. C-294):

> *"1. Results of production activities for the 1st Quarter and meeting of the State precious metals production and export targets for the 2nd Quarter 2008*
>
> *2. Approval of the Business Plan for 2008*
>
> *3. On the status of the revised Company's audit report for 2006 and terms for approval of the annual report for 2006*
>
> *4. On the status of the feasibility study for the sulphide project*
>
> *5. On the status of the financing of the sulphide project*
>
> *6. On preparation of the Asaukak heap leach project design*
>
> *7. Proposals on construction of a silver refinery*
>
> *8. On paying off of dividends and the special dividend to the Ministry of Finance and on paying off of the declared dividends for 2005 to all the other Shareholders. Proposals on profit distributions for 2006*
>
> *9. On changes in the Supervisory Board of the Company*
>
> *10. On changes in the Company's Audit Committee and the Directorate*
>
> *11. Miscellaneous."*

As concerns item 7, the Minutes of Meetings provided as follows:

*"**7. Proposals for construction of a silver refinery***

The Chairman gave floor to Mr Hill who informed the Meeting that due to inability of AMMC to meet their obligations on the refining agreement which leads to delays in silver exports and sales the Company had considered an option of building its own refinery. Such construction will allow refining its product in the full amount and within established terms. But as the refinery initially won't have a 'good delivery status' (it takes a lot of time to obtain it) silver bullion will have to be re-refined and/or re-stamped at AMMC or another refinery for the purposes of Good Delivery Status.

The current requirement of the Company in refining capacity is 3 tonnes per month but if the Company receives a license to mine Kosmanachi and Okjetpes silver deposits then construction of a refinery with the capacity 5 t per month. The cost of construction of a 5 t refinery is US$3 million.

*Having voted the General Meeting unanimously **AGREED** as follows:*

7.1. The Company's proposal to build its own refinery shall be supported provided this issue has been agreed with the Cabinet of Ministers of the Republic of Uzbekistan."

517. <u>On 11 June 2008</u>, Mr. Wilkins on behalf of Oxus sent a letter to Mr. Turnusov, Deputy Minister of Finance, regarding various issues, including the repayment of the debt under the Special Dividend Agreement, VAT reimbursement and the problems relating to the export of silver doré bars (Exh. R-884):

"Oxus respectfully requests once again that the Ministry of Finance take appropriate measures with the relevant State organisations to allow AGF to recover the overdue VAT. Oxus also requests that the Ministry of Finance consults with the Uzbek Government to allow AGF to make a one-off shipment of doré silver to an overseas refinery in order to clear the stockpile at Almalyk. The successful resolution of either of these matters will enable AGF to repay Oxus and then Oxus to pay the Ministry of Finance.

Until these matters are resolved, Oxus believes it is in the best interest of all the founders that it continues to use its cash to support and grow the business of AGF.

We trust that you understand the position that we find ourselves in. We acknowledge our liability to the Ministry of Finance and confirm that we too wish to see it cleared as soon as possible. For the avoidance of doubt the proposal that we set out in our letter dated 6 May 2008 envisaged Oxus waiving approximately $5million of shareholder loans due to it from AGF, and asking AGF to pay this amount instead into the special dividend account. Thus Oxus is effectively using its own cash, since the shareholder loan will have been reduced by $5 million without Oxus receiving the payment. The proposal then envisaged AGF either offsetting this amount against the VAT due, or coming to an arrangement whereby the VAT is paid and AGF immediately returns it via the special dividend account.

In the light of the above, and at this important time for the financing of the future of AGF, we respectfully ask that you reconsider your response dated 3 June. For our part, we remain committed to finding a solution to this issue, and to developing AGF for the benefit of all its founders."

518. On 29 September 2008, AGF held its Annual General Meeting of Shareholders, during which the purchase of an overseas silver refinery for construction and operation in Uzbekistan was further discussed (Exh. C-296). The Minutes of the Meeting provide as follows regarding the shareholders' decision:

> *"Having voted the General Meeting of Shareholders unanimously adopted the following **RESOLUTION:***
>
> *9.1. Construction of the silver refinery shall be considered after the financial situation at AGF is stabilized and shall be at AGF's own expense.*
>
> *9.2. AGF management shall continue negotiations with AMMC to agree terms for processing of silver and gold dor*[é] *at AMMC."*

These Minutes were duly signed by the shareholders, although Claimant contends that Mr. Wilkins signed them "purely out of need to keep the Project moving forward and so as to not create even further hurdles to the joint venture's smooth operation over and above Respondent's numerous hostile acts to that point." (Wilkins II, para. 76; Claim. Am.Reply. 23.08.2013, para. 874).

519. On 21 November 2008, AGF and AMGK entered into the ***'Supplemental Agreement No. 4'*** to the Silver Refining Agreement (Exh. C-298). According to this Agreement, the Parties further refined the provision relating to the weight and quality of precious metal as follows:

> *"**Clause 2.1.2 shall be added:***
>
> *The sum of precious metals in Dor*[é] *bar shall not be less than 96%.*
>
> ***Clause 2.2.2 shall be amended as follows:***
>
> *At the following contents of precious metals in Dor*[é] *bars:*
>
> *- gold 1% and above 1% - the recovery shall be 97,33% -*
>
> *- gold less than 1% - the recovery shall be 97,0%*
>
> *- silver 90% and above 90% - the recovery shall be 92,51%*
>
> ***Clause 2.2.4 shall be amended as follows:***
>
> *The "Processor" shall return refined metal to the "Supplier" not later than 120 days from the date when the Dor*[é] *was received for refining.- 120 kg of gold and 1765 kg of silver received in Dor*[é] *for refining in 2007 and now being locked in the "passive part" of*

unfinished process will be returned in 90 days after completion of refurbishment of reverberating furnace. Approximate date of refurbishment – April 2009.

Clause 3.2 shall be added:

The "Supplier" shall take measures to maximum reduce content of impurities, in particular of:

Zinc – not more than 0,04%

Selenium – not more than 0,05%

Bismuth – not more than 0,008%

Nickel – not more than 0,008%"

520. On 21 and 29 April 2009, Mr. Wilkins of Oxus sent letters to Prime Minister Mirziyoyev and Mr. Turdimov, Khokim of Navoi Region (Exhs. C-305/C-306). Oxus requested the right to make a one-off export of silver doré to be refined by Metalor in Switzerland in order to "*enable AGF to pay its current creditors, re-employ the workforce, and re-commence operations*" (Exh. C-305). According to Mr. Wilkins' letter, the Uzbek Government had in principle already agreed during the Meeting of 2 March 2009 (see below para. 572) that the silver doré be exported for the purpose of being refined, subject to the submission of all relevant documentation. However, according to Mr. Hill, the Uzbek Government nevertheless requested that Oxus comply with Uzbek law and organize a tender process (Hill-WS 31.08.2012, para. 86; Claim. SoC. 17.09.2012, para. 341; Resp. SoD.Class. 04.04.2013, para. 261).

521. In June 2009, AGF entered into a '***Silver Doré Refining and Refined Silver and Gold Offtake Agreement No. Ex-0003***' with Metalor of Switzerland (Claim. SoC. 17.09.2012, para. 341; Exh. C-308).

522. On 2 June 2009, a Meeting was held between government agencies, including also Deputy Prime Minister Shoismatov, Goskomgeology represented by Mr. Mavlyanov and Mr. Mukhamedov, as well as AGF and Oxus representatives, including Mr. Hill. During this Meeting, the Government allegedly informed Claimant that, in order to award a tender to an overseas refinery, it would be necessary to follow a complex process of gathering proposals, adjudication with the other two AGF shareholders and contract negotiation with the successful bidder, which would take several months (Exhs. C-310/C-682) (Claim. SoC. 17.09.2012, para. 343).

523. On 22 July 2009, AGF and AMGK entered in to the ***'Supplemental Agreement No. 5 to the Silver Refining Agreement'*** (Exh. C-311). According to this Agreement, the silver doré bars should in future be delivered in the form of

“anodes” subject to specific maximum levels of impurities. According to Respondent, this Agreement was necessary because Claimant failed to meet the parameters set out in Supplemental Agreement No. 4, as concerned the level of impurities of the silver doré bars (see above para. 519). In this latest Agreement, the permissible levels of impurities were amended in the hope to resolve this problem. Thereafter, refining of the AGF’s silver stockpile resumed.

524. On 13 October 2009, Mr. Dabizha, Chief Engineer at AGMK, sent a letter to Mr. Hill of AGF, copying Mr. Mavlyanov, Chairman of Goskomgeology, complaining about technological difficulties with regard to the silver refining (Exh. R-120). Mr. Dabizha stated in particular as follows:

> *“*[…] *The quality of the refined silver produced with the anodes does not confirm the "Good Delivery" status LBMA and the complex cannot mark the bars. That is why it turned out to be necessary to perform additional refining of the metal in the reverberatory furnace and to form anodes for further refining of precious metals. As a result, the expenses of the complex will grow, the amount of the produced silver will decrease and the terms for the delivery of the finished product will become longer.*
>
> *Moreover, for the further electrolysis of the silver and the preparation of a new electrolyte the complex will need additional material with the content of impurities specified in appendix No.2 to addendum No.5.* […]”

525. On 17 November 2009, AMGK and AGF entered in to the ***‘Supplemental Agreements No. 6 and No. 7’*** to the Silver Refining Agreement (Exhs. R-121/R-122).

526. On 24 December 2009, Mr. Dabizha, Chief Engineer of AGMK, sent a letter to Mr. Hill of AGF complaining again about AGF’s failure to meet the requirements as to the property of the silver doré bars to be refined by AGMK (Exh. R-124). In his letter, Mr. Dabizha stated in particular as follows:

> *“*[…] *During the processing of the fifth consignment of anodes we faced technological difficulties again, as one third of the total number of anodes had violations in terms of impurities content: in terms of selenium, according to the contract - not more than 0.2 %, in fact- 0.24-0.39 %(four casts);*
> *in terms of copper, according to the contract - not more than 0.2 %, in fact - 0.24% (one cast); in terms of bismuth, according to the contract- not more than 0.025 %, in fact- 0.058% (one cast). During the processing of such anodes the selenium concentration in the electrolyte increased up to 71 mg/1, as a result the purity of the metal in the cathode silver and, consequently, in the produced bars decreased. Thus, like in the case with the fourth consignment of anodes, it turned out to be necessary to additionally*

refine 900 kg of metal in the reverberatory furnace and to use anodes for further silver refining."

527. On 26 March 2010, Mr. Dabizha, Chief Engineer of AMGK, sent further letters to Mr. Hill of AGF, complaining again about the deficient purity of the silver delivered by AGF for refining (Exh. R-126).

528. On 30 March 2010, AMGK and AGF entered into the ***'Supplemental Agreement No. 8'*** to the Silver Refining Agreement (Exh. R-127).

1.4.2 The Challenges in the Preparation of the Feasibility Study Necessary to Acquire Relevant Licenses and the Halt of the Gold Processing Activities

529. On 17 April 2006, AGF submitted a Preliminary Feasibility Study for Phase 2 (hereinafter "Phase 2 Preliminary Feasibility Study") of the AGF Project for review by UzGeotechliti in order for the latter to "carry out the [Preliminary Feasibility Study]" in accordance with the requirements of Uzbek Law. This Phase 2 Preliminary Feasibilty Study would then be submitted for approval to the relevant State bodies (see references in Exh. C-687).

530. On 10 August 2006, UzGeotechliti returned the Phase 2 Preliminary Feasibility Sudy to AGF, which obtained the Technical Instruction from the Cabinet of Ministers on 5 September 2006, and could thus proceed with submitting the Study to the relevant State bodies for approval (see references in Exh. C-687).

531. On 7 June 2007, the President of Uzbekistan issued Presidential ***Decree No. PP-649 'On Measures to Improve Procedures for Issuing Subsoil Licenses'*** (hereinafter "Decree No. PP-649") (Exhs. C-321/R-133), which established a new mining license regime. Under this new regime, entities with existing rights were required to re-register their existing license and Goskomgeology was appointed as the entity in charge of ensuring the re-registration and delivering relevant licenses (Claim. SoC. 17.09.2012, para. 358; Resp. SoD.Class. 04.04.2013, para. 266).

532. On the same day, the CabMin issued Decree No. 110 'On Approval of the Regulations on the Procedure for Development, Expertise and Approval of the Documentation on Investment Projects' (hereinafter "Decree No. 110") (Exhs. C-337/R-236). It established new standards regarding the submission of 'Pre-project documentation', including 'Pre-feasibility study or pre-feasibility calculation' and a 'Final feasibility study or feasibility calculation'. According to Decree No. 110, the applicant to an investment project had to provide first a Preliminary Feasibility Study (see Article 3 of Annex 1 of Decree No. 110), and upon its approval, a Final Feasibility Study (see Article 4 of Annex 1 of Decree No. 11).

533. On 27 June 2007, the Ministry of Economy sent ***Letter No. 3-1/7-345*** to Goskomgeology providing comments on the Phase 2 Preliminary Feasibility Study and requesting that AGF provide additional information.

534. On 7 August 2007, Goskomgeology issued five subsoil licenses to AGF (Exhs. R-135, 136, 137, 139 [extraction] and C-323 [exploration]). Four of these licenses ("**Extraction Licenses**") granted AGF the right to use the subsoil and extract gold and/or silver for five years in order to develop mineral products at Amantaytau Centralny, Uzunbulak, Vysokovoltnoye and Nuqrakon, and the fifth license, which renewed AGF's Exploration License ("**Renewed Exploration License**") (see above para. 41), granted AGF the right to use the subsoil for three years, i.e. until 7 August 2010, to perform geological exploration works within the AGF Project area.

Each of these licenses contained a series of requirements to be fulfilled by AGF.

As concerns the Extraction Licenses, they provided as follows:

> *"The holder of the license for use of the subsoil block for extraction of mineral resources from Vyssokovoltnoye field shall:*
>
> *comply with requirements of Articles 33, 35, 37, 40, 43, 44, 45 and 50 of the Law of the Republic of Uzbekistan on the Subsoil, the environmental laws of the Republic of Uzbekistan, the laws of the Republic of Uzbekistan on water and water use, as well as other regulatory acts relevant to the geological exploration, use and protection of the subsoil.*
>
> *before February 1 of every calendar year, duly submit to the State Geological Fund of the State Committee for Geology and Mineral Resources of the Republic of Uzbekistan information on status and changes in mineral resources (i. e. a 5GR report).*
>
> *by August 7, 2008, prepare and submit to the State Committee for Geology and Mineral Resources of the Republic of Uzbekistan duly approved Report on the Feasibility Study of Development of Vyssokovoltnoye Gold and Silver Field (in respect of residual resources), whereupon the terms and conditions of use of the subsoil block will be revised.* […]" (Exh. R-137, see also similar wording in Exhs. R-135, 137 and 139)

Similarly to the Extraction License, the Renewed Exploration License also provided for obligations of the Licensee, including in particular:

> *"*[…]

1.2 To meet the requirements established by Articles 11, 12, 16, 33, 35, 36, 40, 43, 45, 50 of the Law of the Republic of Uzbekistan "On mineral resources (subsoil)", legislation of the Republic of Uzbekistan on nature protection, on water and water- consumption, other legal documents in the field of geologic research, use and protection of mineral resources.

1.3. To provide production of exploration works on the action space of the JV Amantaytau Goldfields {Project Territory) in a strict compliance with the current regulations and standards of geologic exploration of mineral resources.

1.4. On completion of the field works to bring the surface mining developments and holes, subject for further use in mining the minerals, into the state, providing life safety and health safety of the population, environment, as well as to eliminate mine openings and holes which are not subject for further use.

1.5. In positive results of geologic exploration works to provide preparation of the report with calculation of gold/silver resources on the action space of the JV Amantaytau Goldfields (Project territory) and submitting for consideration and approval to the State committee for mineral resources under the state Committee of the Republic of Uzbekistan on geology and mineral resources (further SCG) upon expiration of the three-year period from the date of the stare registration of the right to use the subsoil lots".

According to Claimant, this document was backdated and actually only issued to Claimant in January 2009 (Claim. SoC. 17.09.2012, para. 362), after Claimant requested its renewal in April 2008 (Claim. SoC. 17.09.2012, para. 362). According to Respondent, Claimant's assertion is baseless (Claim. SoC. 17.09.2012; Resp. SoD.Class. 04.04.2013, para. 266).

535. <u>On 30 October 2007</u>, Mr. Polikashin sent an email to Mr. Hill, Mr. Wilkins amongst others, listing current problems that the AGF faces which had serious implications (Exh. R-1055). These were:

- The offshore bank account, which was the biggest issue;

- Overseas insurance, as it did not comply with Uzbek law which required it to obtain insurance *via* a partner in Uzbekistan;

- The Vysokovoltnoy Project was running without a State Acceptance Certificate due to non-completion of documentation;

- Import contracts with ABN AMRO, which had been paid *via* Barclay's Bank and therefore, it was difficult to deregister them with ABN AMRO;

- Non-payment of taxes on the contract with BCM;

- Payment of salaries from offshore bank account;

- Non-approval of MAED contract by shareholders, as required by Uzbek law;

- Non-registration with the Central Bank of the supplemental agreement between AGF, Standard Bank and Oxus;

- Overpayments on the contract with MRT and lack of invoices on contracts with Oxus Gold, ORC and Oxus Services Ltd.

536. At some point before fall 2007, the Phase 2 Preliminary Feasibility Study was submitted to the relevant State bodies; it is unclear when exactly, though indirect references in various documents indicate that this would have happened around summer or autumn 2007 (see e.g. Exh. R-660 referring to 3 June 2007 and Exh. C-687 indicating a period posterior to this exhibit, i.e. September 2007).

537. On 21 September 2007 and 27 November 2007, the Ministry of Economy provided further comments on the Phase 2 Preliminary Feasibility Study to Goskomgeology (Exh. R-660 and R-312). Claimant contests having ever received these comments (Claim. Am.Reply. 23.08.2013, para. 939).

538. On 5 December 2007, the Deputy Prime Minister approved Claimant's Phase 2 Preliminary Feasibility Study for the development of the gold-sulphide ore in Amantaytau (Exh. R-231). This approval covered the main economic and technical parameters of the Study, including the total value of the Project of USD 161,391,000, the equipment costs of USD 80,726,000, the costs for construction and assembly works of USD 51,271,000, the miscellaneous costs of USD 17,229,000, the financing costs of USD 12,165,000 as well as the cost of the existing fixed assets of USD 2,856,000. The approval letter further mentioned in a Note, that "[f]*inal engineering and economic indicators of the project will be adjusted by results of tenders.*"[17]

539. On 6 December 2007, Oxus issued a Press Release (Exh. C-331) stating as follows:

[17] Whilst the full Preliminary Feasibility Study is not included in Exh. R-231, the figures above arise directly from the cover letter of the Deputy Prime Minister and have as such not been contested by Claimant.

"Oxus Gold plc ("Oxus" or the "Company") (OXS.L) is pleased to announce that [AGF], *its 50% owned joint venture company, has received formal approval from the Cabinet of Ministers of the Government of Uzbekistan to proceed with the AGF phase 2 underground sulphides project ("Phase 2").*

Wardell Annstrong International ("W AI") has been commissioned to produce a bankable feasibility study based on a new increased tonnage Phase 2 base case scenario developed by AGF. […] *Construction will be subject to the normal permitting process."*

540. On 27 March 2008, i.e. over a year after the expiry of AGF's Mining License and Sanaot's permission to AGF to continue operating under the expired license (see above para. 500-503), by letter No. 14-337, Saonat invited AGF to submit further documents with regard to AGF's application to renew its Mining License (Exh. C-317) (Claim. SoC. 17.09.2012, para. 355).

541. On 20 May 2008, the Kyzylkum regional department of Sanoat issued the following "Expert Conclusion" (Exh. C-636):

"It was established that:

- *JV [AGF] adheres to all requirements of Uzbek legislation on subsoil and on environmental protection, as well as rules and norms of safety, workplace protection, sanitary norms and rules, hygiene norms, as well as State standards;*

[…]

Expert Conclusion

[…]

Experts consider possible to grant JV [AGF] the license on the right of mining precious metals."

542. On 22 May 2008, AGF submitted the additional documents requested by Sanoat in connection with the renewal of AGF's Mining License (see above para. 535) (Exh. C-318).

543. On 3 June 2008, Mr. Tursunov from the MinFin responded to Oxus regarding Oxus' letter of 6 May 2008 In his letter., Mr. Tursunov emphasized the amounts that Oxus still owed to the Ministry of Finance under the Special Dividend Agreement and ordered Oxus to make one immediate payment and then monthly payments starting from June 2008 until October 2009 (Exh. C-484).

544. In June 2008, WAI issued its ***'Bankable Feasibility Study of the Amantaytau Goldfields' Severny and Centralny Underground Sulphide Gold Deposits'*** (hereinafter "WAI Phase 2 Bankable Feasibility Study") (Exh. C-332), which was

to serve as 'Final Feasibility Study' in the sense of Decree No. 110 (see above para. 532).

545. At some point in November 2008, WAI revised its WAI Phase 2 Bankable Feasibility Study based on additional metallurgical test work, and increased the reserve statement by an additional 271,000 ounces of gold (Claim. SoC. 17.09.2012, para. 369, no exhibit submitted).

546. On 18 December 2008, Mr. Kholmatov, the Chief of State Inspection, wrote to Mr. Shaismatov, the Deputy Prime Minister, asking him to give his approval to a draft Protocol No. 3 according to which AGF's request for a Mining License would be approved. This draft Protocol No. 3 seemed to have been already approved by twelve out of fourteen Ministers (Exh. C-507).

547. On 7 January 2009, AGF suspended operation of its gold processing plant. This thus represented the end of AGF's gold mining activities for Phase 1 of the Project (Claim. SoC. 17.09.2012, para. 360; Resp. SoD.Class. 04.04.2013, para. 249). In addition, it appears that the Heap Leaching operations at the Vysokonovolntoe plant were halted because of intermediate product overstock in AGF's storages due to the inability to refine it through AMGK (indirect reference in Exh. R-247).

548. On 16 January 2009, by ***Letter No. 40*** to Goskomgeology, AGF applied for a mining license for the Sarybatyr gold deposit ("Sarybatyr License") (Exh. R-138) (Resp. SoD.Class. 04.04.2013, para. 267).

549. On 5 February 2009, AGF's General Meeting of Shareholders unanimously agreed to "temporary halt the Gold processing plant due to insufficient reserves prepared for oxidise ores recessing that are suitable for refinement at the Plant" and to "resume precious metals production at the "Vysokovoltnoe" plant as soon as the JV AGF intermediate product stock reaches AGMK two-month supply" (Exh. R-247). In addition, AGF management was entrusted "to prepare in terms, stipulated by the legislation of the Republic of Uzbekistan documents for JV AGF to obtain the license to use the subsoil of Sarybatyr deposit, as well as the development, examination and approval of the feasibility study."

1.4.3 Increasing Financial Challenges

550. On or around 30 April 2007, the MinFin issued the ***Minutes No. 23*** 'Of the Meeting of the Republican Commission for Reduction of Late Debit and Credit Liabilities and Strengthening of Discipline of Payments of the State Budget' (hereinafter "Minutes No. 23"), in which it agreed to grant AGF and Claimant deferment of certain tax payment obligations to the State and issued a revised

payment schedule regarding the payments due under the Special Dividend Agreement to take into account the adverse circumstances that affected Oxus' financial situation (Exhs. C-364/C-490/R-997 and R-379) (Claim. SoC. 17.09.2012, para. 401). It reads as follows:

> *"1. The following shall be granted:*
>
> ***State financial support to JV*** **[AGF]** ***in the form of granting deferment on paying the property tax, the withholding tax, customs payments*** *(with the exception of customs clearance fees) for imported goods and equipment for its own needs accrued from 1 May 2007 for a period of 18 months provided these deferred payments will be paid in equal instalments within 6 months starting from 1 November 2008 in accordance with the payment schedule per the Appendix;*
>
> ***Deferment of current payments to the Ministry of Finance*** *of the Republic of Uzbekistan for Oxus Gold plc, starting from 1 May 2007, stipulated by the Agreement between the Ministry of Finance of the Republic of Uzbekistan and Oxus Gold plc dated 12 July 2004, for a period of one year provided the deferred payments will be paid starting from 1 May 2008 in equal monthly instalments within 12 months. This deferment shall be granted provided Oxus Gold plc pays off its current liability as of 1 May 2007 within two weeks."* (Exh. R-997, p. 2) (emphasis added)

551. On 26 April 2007, AGF held an Extraordinary General Meeting of Shareholders (Exh. R-403) to deal with the "urgency situation occurred in the production activity of JV AGF and on possible ways out of it" and "approval of AGF Deputy General Director appointment." During this Meeting, Mr. Hill reported on the situation and explained – among others – that "*for the last two weeks the enterprise was in extremely critical situation because of collection orders amounting to around 4 bln. sums issued by tax authorities and Ministry of Finance which almost paralyzed enterprise activity. The major part of their working time AGF specialists spend for negotiations with tax authorities to obtain permit to use some part of monetary resources from AGF current account for payment of most important contracts and other pressing payments. Because of non-payment Central Mining Administration plans to turn off power supply, the production is limited because of the shortage of balls which JV was unable to pay in due time.*" On the other side, Mr. Mavlyanov of Goskomgeology raised the following complaints regarding AGF's way of operating:

> *"Furthermore, Mr. Mavlyanov expressed his opinion about AGF work. He informed that upon the results of enterprise visiting and documents studying the following conclusions are made:*
>
> *- permanently, starting from 2004 AGF fails to fulfill FS criteria and assignments for precious metals production approved upon the recommendation of JV AGF management;*

- AGF permanently puts issues to the shareholders but does not propose ways to solve them;

- organization of enterprise production is unsatisfactory, there are no people responsible for production;

- operational discipline at the enterprise is unsatisfactory: Business plan is not approved within the terms specified by the Charter systematically every year, until now the Business plan for 2007 is not submitted to the shareholders; contract with Joint-Stock Production Association "Uzmetkombinat" for delivery of grinding balls was being signed for a week, until now AGF did not receive grinding balls from Ukraine and ore thermal furnace regardless of AGF management assurance that all deliveries would be performed by April 15 of current year. Mr. Hill was on vacation for two weeks at the time when the enterprise is in hard condition and lot of issues need to be solved."

552. On 22 June 2007, AGF held its 2007 Annual General Meeting of Shareholders (R-180) addressing the following points:

> *"1. Information about expected performance figures and financial statements for 1st quarter of 2007.*
>
> *2. Consideration of approval of AGF Annual report for 2006 (the result of its inspection by auditors and AGF Audit Commission).*
>
> *3. Approval of Business plan for 2007.*
>
> *4. Consideration and approval of changes the AGF Charter.*
>
> *5. Election of new structure of AGF Supervision Board.*
>
> *6. Establishment of JV AGF branch in Tashkent.*
>
> *7. On cancellation of contracts for management services rendering between Oxus Resources Corporation and JV AGF and between* [Goskomgeology] *and JV AGF.*"

With regard to item 7, in view of AGF's financial difficulties, Goskomgeology suggested suspending the validity of the 2007 AGF Management, AGF Administration and AGF Services Agreements (see above paras. 421 and 422) and their revalidation in case of "enterprise financial stabilization". According to the Minutes of the Meeting, Mr. Wilkins "*informed that it is acceptable for Oxus to defer payments under the contracts but not to cancel the contracts*." Upon discussion, it was then agreed as follows:

> *"Upon discussion the General meeting has taken unanimously the following **DECISION:***

7.1. Within a week term the shareholders shall submit proposals about the possibility to conclude additional agreement to the abovementioned contracts for services provision stipulating deferment of payments under them until the flow of AGF monetary resources improves.

7.2. JV management together with Oxus should make changes into the Contract for provision of general and administrative services as of 17.07.2002 and exclude the amount for compensation of expenses for Tashkent office."

553. On 30 June 2007, AGF reported a loss of USD 6,4 million (Exh. C-33).

554. 26 September 2007, Mr. Hill sent an email to Mr. Wilkins, Mr. Kipps and Mr. Polikashin (Exh. R-1054) discussing the use of an offshore bank account and stating that the negative effects of "*running the business in contravention of legislation are greater*", than the negative effects of abiding by the Uzbzk laws.

555. On 19 October 2007, Oxus issued its Annual Report 2007, which provided as follows with regard to the group's financial situation and the AGF Project (Exh. R-5_5):

"FINANCIAL RESULTS

The Group reports a reduction in gross revenue, excluding attributable joint venture income, to $2.39 million (2006: $3.38 million), resulting primarily from the loss of anticipated fee income following the sale of the Jerooy project. The AGF joint venture contributed an attributable loss of $3.21 million for the year (2006: $10.17 million attributable profit). Total group earnings for the year showed a loss after taxation and minority interest of $18.91 million (6.25 cents per share loss) against a profit of $2.11 million (0.73 cents per share profit) in the comparable year to 30 June 2006.

[…]

The Company has declared a dividend equivalent to $65.69 million (2006: nil). The dividend was paid in specie by the distribution of the majority of the KazakhGold Global Depositary Receipts (GDRs) received as consideration for the sale of the Jerooy project and certain other assets. The dividend was equal to 17.98 cents per share.

[…]

UZBEK STATE TAX AUDIT

During July and August 2006 AGF underwent a State "complex" tax, customs and compliance audit as part of the established regulatory procedure. As a result of the audit, the State tax and customs authorities initially claimed approximately $225 million in taxes, customs duties, fines and penalties for alleged breaches of the Uzbek tax law. Subsequently the

Navoi Regional Economic Court and the Tashkent Supreme Economic Court rejected $224 million of these claims. Oxus made provision within its annual accounts to 30 June 2006 to cover its 50% share of the outstanding liability of $1 million.

The State audit materially disrupted the ongoing operations of AGF due to various restrictions imposed on assets and bank accounts whilst the tax and customs claims were passing through the Uzbek legal process. There are some residual issues still being negotiated with the Uzbek tax authorities within the framework of ongoing constructive discussions which AGF expects to resolve shortly.

During the period AGF also paid approximately $6.2 million in taxes that it had previously been exempted from by virtue of tax privileges granted to AGF by decrees of the Uzbek Government. Following constructive discussions, for a period of 18 months with effect from 1 May 2007 AGF has been granted a deferral of payment of withholding tax, property tax and customs duties on imported goods. These deferred taxes and duties, of which $1.03 million was accrued at the year end, will become payable in six monthly instalments commencing 1 November 2008, and will be financed as part of the capital cost of the Phase 2 sulphides underground project."

556. <u>On 7 March 2008</u>, Mr. Abdukarimov, Vice-President of the Central Bank of Uzbekistan, wrote to AGF referring to Mr. Rakhimov's letter as follows (Exh. R-82):

"Having considered your letter No337 dtd 4 March 2008 Central Bank has to report the following.

According to clause 4 of Order No 477 dtd 22 September 1994 of the Republic of Uzbekistan Cabinet of Ministers "About "Amantaytau Goldfields" joint venture foundation and its efficient operation securement" as well as "Order of issuing permissions to open accounts abroad" registered by the Republic of Uzbekistan Ministry of Justice 22 January 1999 No610, the Republic of Uzbekistan Central Bank permits "Amantaytau Goldfields" joint venture to credit revenues for export contracts to the account opened in Barclays Bank, London (Great Britain).

However, we have to remind that it is necessary to maintain the established order of obligatory sale of revenues in foreign currency via empowered servicing bank in the Republic of Uzbekistan as well as to present timely information about movements on foreign account."

557. <u>On 30 April 2008</u>, Mr. Wilkins on behalf of Oxus wrote to Mr. Tursunov, the Deputy Minister of Finance, with regard to the outstanding debt of Oxus (Exh. R-1016). On one side, Mr. Wilkins acknowledged that Oxus owed an "*amount payable* [of] *10.866.379 U.S. dollars, of which U.S. $ 4.935.150 should be paid according to the Minutes No. 23 of the Meeting of the Republican Commission*."

On the other side, he made suggestions regarding the settlement of this amount as follows:

> "[…] *we would like to offer the following option to settle the debts.*
>
> *1. To sign a tripartite agreement of assignment of the debt between the Ministry of Finance, "Oxus gold" and "AGF". Under this agreement, "Oxus" shall write off "AGF" the part of the debt in the amount of 4.935.150 dollars and delegate to the "AGF" obligation to pay this amount to the Ministry of Finance as a special dividend.*
>
> *2. The Ministry of Finance will support the "AGF" in the provision of the return of the VAT from exporting of products on the same amount. "AGF" having received these 4.935.150 dollars in the form of refund of VAT on the same day shall transfer them to the Ministry of Finance for the payment of a special dividend.*
>
> *3. Regarding the rest of the amount of debt in the amount of 5.931.229 dollars, that must be paid till 31 October 2008, taking into account that the "Oxus" currently attracts funding in the amount of $ 160 million dollars and starting implementation of the Sulfide Project, we would like to ask You about a delay in payment of this amount to start the export of products since the second phase of the project start of production of metal under Sulfide Project is planned for the second quarter of 2009.*
>
> *As to our part, we guarantee the regular transfer of funds to repay that debt within 20% of the revenues from the sale of each lot of precious metals coming from the Almalyk MMC."*

558. <u>On 6 May 2008</u>, Mr. Wilkins of Oxus sent another letter to Mr. Tursunov, Deputy Minister of Finance (Exhs. C-365/R-883), reiterating its proposals to settle the debt as described in Mr. Wilkins earlier letter (see above para. 557). In this letter, Mr. Wilkins again acknowledged the debt of USD 10,866,379 as arising out of the Special Dividend Agreement, out of which USD 4,935,150 owed under the Minutes No. 23 (see above para. 550). Compared to his earlier proposal, Mr. Wilkins here announced that first gold production was expected during the third quarter of 2009 (compared to the earlier mentioned second quarter) and proposed that, as concerned Oxus' undertakings, Oxus would "*guarantee regular payments of cash by AGF as repayment of this deferred loan of up to 10% of the revenue from the sales of each shipment of precious metals received from* [AMMC]" (compared to the earlier proposal of 20%).

559. <u>On 6 and 7 May 2008</u>, RBS accepted a mandate from Claimant to act as exclusive arranger of a debt facility of approx. USD 150 million, without however issuing a formal commitment (Exhs. C-339/C-519) (Claim. SoC. 17.09.2012, para. 374).

560. <u>On 3 June 2008</u>, Mr. Tursunov from the MinFin responded to Oxus regarding Oxus' letter of 6 May 2008 (see above para. 558). In his letter, Mr. Tursunov

emphasized the amounts that Oxus still owed to the Ministry of Finance under the Special Dividend Agreement and ordered Oxus to make one immediate payment and then monthly payments starting from June 2008 until October 2009 (Exh. C-484).

561. On 24 September 2008, Oxus issued a Press Release (Exh. R-614_2) stating as follows with regard to the financing of Phase 2 by RBS:

> *"*[…] *The Company has sufficient cash in the bank to meet its working capital requirements and, since receiving Uzbek Government approval in December 2007 to proceed with our flagship underground sulphides project at AGF (the reason we invested in AGF in the first place), a Bankable Feasibility Study (BFS) has been completed and the Royal Bank of Scotland has been mandated as lead bank to arrange the necessary project finance for AGF. With the current turmoil in the financial markets, the exact timing and availability of this finance is difficult to predict. However, the necessary steps to complete the financing continue to progress in a satisfactory manner, as outlined in the section on new projects in the main body of this report."*

562. On 2 November 2008, Mr. Kipps of Oxus sent an email to Mr. Tyler updating him on the Phase 2 progress and stated as follows with regard to the financing by RBS (Exh. R-1093):

> *"Our modelling expert, Anton Gazivov, has been beavering away bringing the AGF 2009 Business Plan into the overall corporate model, which will be available now in about three weeks time, as he told us on Thursday that he has to go back to Russia as his mother in Astrahkhan is very ill. We have had some debate with RBS who appear to want to project gold prices in later years at unrealistically low values, but for evaluation purposes the price pack included in their term sheet provides adequate revenues for the sulphides project to meet its covenants, including the reserve tail ratio!*
>
> *Largely, things are on track for the bringing the sulphides project to drawdown - but RBS - as you are aware - appears unable to commit and it doesn't look like they will go to credit until 2009; perhaps once the banks have all got through the December 2008 quarter ends, they will be in a better position to think positively into the future."*

563. In November 2008[18], Oxus Gold issued its Annual Report 2008 (Exh. R-10_6) in which it stated as follows regarding the financing of Phase 2:

> *"Underground Sulphide Project*

[18] No specific date is available for the issuance of this Annual Report.

In June 2008 Wardell Armstrong International (WAI) completed a bankable feasibility study (BFS) in respect of AGF's underground sulphide Severny deposit, and part of the Centralny deposit. WAI updated the study in November 2008 to include additional reserve ounces. This study envisaged a 750,000 tonnes per annum (tpa) operation (increasing to 1.2 million tpa) over an initial 8 year mine life, at a capital cost of approximately $170 million. The Royal Bank of Scotland (RBS) was mandated to arrange this finance.

As a result of the current economic and financial conditions, this financing has been delayed and the Company has been in discussions with other potential sources of finance, including a major Chinese contracting and financing group.

In May 2009, WAI completed an addendum to the BFS in respect of a lower capital cost first phase of the underground sulphide project, which also includes AGF's sulphide tailings arising from transitional and sulphide ore previously processed through the CIP plant as part of AGF's open pit oxide operation. This study envisages an initial 450,000 tpa operation at a capital cost of approximately $73 million. The Company believes that, if the originally envisaged project cannot be financed at this time, the lower capital cost first phase of the project will be financed and that construction will finally commence later in 2009, with first sulphide production now scheduled for mid 2011.

The underground sulphide project is an extension and expansion of the existing CIP operation and therefore benefits from the existing infrastructure, existing skilled labour force and management's experience of operating in Uzbekistan."

564. 28 November 2008, ***Decree No. 4058*** 'On the Program of Measures to Support Enterprises of the Real Economy, Ensuring their Stable Operation and Increase of Export Capacity' (hereinafter "Decree No. 4058") was enacted (Exhs. R-756 and R-1009). It aimed at "taking of concrete measures for support of export enterprises by the Government in terms of providing for their competitiveness in foreign markets and creating additional stimuli for exports" and, for this purpose, "to grant soft working capital loans to export enterprises, temporary tax exemptions to exporters and provide them with opportunities to restructure existing credit debt."

565. On or around 1 December 2008, Mr. Wilkins received RBS's due diligence report, which indicated that RBS would very likely not provide the anticipated financing (reference in Exh. R-7, in particular Mr. Wilkins statement that "[r]egarding RBS, we all agree that the dollars are unlikely to be forthcoming")[19].

[19] The RBS's due diligence Report has not been filed; a reference thereto is made in Exh. C-65.

566. <u>On 10-11 December 2008</u>, Mr. Harry Eustace Sr. and Mr. Wilkins exchanged various emails commenting on RBS's refusal to finance the Project following the issuance of a report by the James Mintz Group ("JMG") (Exh. R-7). Mr. Wilkins in particular stated as follows:

> *"Regarding RBS, we all agree that the dollars are unlikely to be forthcoming. However the Cabinet of Ministers is expecting to approve the project in Q1 09 and to do that they require the completed Uzbek FS. I do believe we should complete this so that we have a project properly approved by CabMin, albeit stalled due to the financial situation. I also do not want to do anything that would precipitate an RNS announcing that we have cancelled or delayed the project without having something else positive to say in its place. This would also be perceived very negatively in Uzbekistan. So we quickly need to appraise the viability of any low capital cost alternatives, and the acceptability of such alternatives to the Uzbeks, so that we can inform the market at the same time we kill the big project.*
>
> And Mr. Eustace Sr. responded thereto as follows:
>
> *"Further to my earlier reply, this Mintz Report may be the 'out' that RBS conveniently grabs to spare themselves any embarrassment and put it all on us. That's why we need to get on record as soon as possible objecting to it. I had Carolyn Lamm look at it and she found it laughable. It was all rumor and innuendo and no evidence and reads like a tabloid newspaper."*

567. <u>On 19 December 2008</u>, Mr. Wilkins from Oxus Gold wrote to RBS to object to the findings of the JMG report (Exh. C-65) (see above paras. 565 fol.). He concluded his letter as follows:

> *"Under the circumstances, Oxus objects to JMG's Report as it stands now. Oxus demands that RBS disregard the Report in its current state, and insists that JMG complete a full, adequate and fair investigation. At a minimum, an adequate investigation requires that JMG interview Oxus and Zeromax personnel, review publicly-available and corporate documents, examine the contemporaneous documentary evidence and sworn witness statements concerning the purported allegations, and disregard secret sources who provide uncorroborated information (unless JMG elects to identify the sources). Simply put, the Report, as it stands now, lacks any credibility.*
>
> *Finally, given the importance of the Report to this process, Oxus reserves all rights and waives none."*

568. <u>On 13 February 2009</u>, Mr. Watts, General Director of AGF, and Mr. Narziev, Chief Accountant of AGF, wrote to the Ministry of Justice informing the Ministry that as per Decree No. 477 (see above para. 39) and Central Bank's Letter No. 1308/2882 permitting opening of foreign accounts, it had opened an operating account in Barclay's Bank, London. Furthermore, AGF had entered into offtake and loan agreements as per which the proceeds from the sale of metals must be

received in the account with the Barclay's Bank. The said agreements were registered as per Uzbek law. The Central Bank of Uzbekistan by letter No. 1316/395 had authorized crediting of foreign currency revenues to the Barclay's bank account. AGF also informed that it would provide monthly reports with respect to the Barclay's bank account as per Uzbek law (Exh. C-734).

569. On 27 February 2009, Mr. Mavlonov, First Deputy Chief of Department of the Navoi Region of the Ministry of Justice replied to Mr. Watts, General Director of AGF. He restated that, as per Decree No. 477 and Central Bank's Letters Nos. 1308/2882 and 1316/395, AGF had been granted a right to open a bank account in any currency in a bank in Uzbekistan or a foreign bank. It also stated that, as per Uzbek law, legal entities which were residents of Uzbekistan were permitted to open foreign accounts for the period of their functioning, in accordance with the founding documents, agreements and contracts (Exh. C-735; Transcripts of 3 May 2014 (Day 6), 1513-1515).

1.4.4 Increasing Problems Regarding the Approval of the Feasibility Study and the Obtaining of the Licenses

570. In early February 2009, UzGeotechliti issued a document seemingly called ***'Feasibility Study for the Development of the Gold Sulphide Ores of Amantaytau Severniy and Centralniy Deposits'*** (hereinafter "UzGeotechliti Phase 2 Feasibility Study"), which included comments on the WAI Phase 2 Bankable Feasibility Study (see above para. 544). It concluded that "*it follows that proposed project is cost-effective, efficient and offered for adoption and implementation with [specific] major technical and economic parameters*" (Exhs. R-314 and C-688) (see above paras. 544 and 545).

Whilst Respondent contends that this document represents the 'ORC Feasibility Study' and the 'Final Feasibility Study" in the sense of Decree No. 110 (Resp. SoD.Class. 04.04.2013, para. 276), Claimant contests this qualification and stresses that this was a document prepared by UzGeotechliti (Claim. Am.Reply. 23.08.2013, paras. 943-944).

571. On 11 February 2009, Mr. Hill of AGF submitted to Mr. Mavlyanov of Goskomgeology and to Mr. Kholmatov of the State Mining Inspectorate as well as to Mr. Shemtov of NMMC, the UzGeotechliti Phase 2 Feasibility Study (Exh. R-877; see above para. 570). It appears that Goskomgeology then forwarded this study to the CabMin (Exh. R-232_7; see also Exh R-248).

572. On 2 March 2009, a meeting was held between Mr. Shoismatov, the Deputy Prime Minister, and Goskomgeology. During this meeting, the Minister issued certain recommendations regarding the further steps for the approval of the

UzGeotechliti Phase 2 Feasibility Study, with specific comments on the operation costs and technical parameters as follows (Exh. R-232):

> *"Having considered submitted FS of the project "Mining of gold and sulfide ores at North and South Amantaytau deposits," we report the following.*
>
> *Total cost of the project is 261.2 mln doll., including cost of equipment - 107.1 mln dollars, cost of construction and assembly operations - 96.5 mln doll. and others.*
>
> *Financing of the project is carried out at the expense of credit funds of RBS bank in the amount of 145.2 mln doll., Oxus Gold credit- 35.0 mln doll. and own funds of JV "AGF" CJSC - 42.8 mln doll.*
>
> *According to the resolution of the Cabinet of Ministers dated 07.06.2007 No. 110 Ministry of Foreign Economic Relations, Investments and Trade executes assessment of FS regarding possibility of the project implementation on the basis of the proposed marketing concept, prospects of finished products sale from the viewpoint of international market trends, as well as utmost parameters of prices on equipment according to the proposed technology.*
>
> *Acceptability of construction and assembly operations cost must be confirmed by the statement of the Gosarkhitektstroy.*
>
> *Herewith, the results of the executed price expert assessment of equipment, technical parameters of which are enough specified, confirm availability of its cost optimization towards reduction (attachment without stamp is void).*
>
> *At the same time, for full-scale assessment of the rest part of equipment it is necessary to represent full technical parameters and to specify full name of models.*
>
> *Taking into account the above stated, statement in the part concerning MFERIT may be issued as far as the above stated recommendations are accepted."*

573. On 5 March 2009, M. Faizullaev, Deputy Minister of the Ministry of Economy, sent a letter (prepared by Mrs. Malkina) to Goskomgeology commenting as follows on the Uzgeotechliti Phase 2 Feasibility Study (Exh. R-315):

> *"*[…] ***Recommendations***
>
> *For successful implementation of the project, as well as for optimization of economic parameters of the project initiator should:*
>
> *Receive appropriate conclusions of MFERIT of the Republic of Uzbekistan on value parameters of import processing equipment;*
>
> *include measures to reduce the risk of failure to achieve the projected level of development of production capacities;*
>
> *optimize parameters of project cost (unforeseen costs and other costs);*

after approval of the feasibility study in the prescribed manner, to bring proposals on transfer of the project from consolidated list to the address part of the investment program for 2009 to the Coordination Council on implementation of large and strategically important investment projects involving foreign investments.

Given the above stated, we consider it possible to implement the project "Development of gold sulfide ore Northern and Central Amantaytau deposits" in the prescribed manner with the recommendations and remarks."

574. On 18 March 2009, by ***Letter No. 16-451***, Mr. Mavlyanov, Chairman of Goskomgeology, wrote to Mr. Shaismatov, Deputy Prime Minister, informing him of the comments from the various State authorities (and attaching the relevant correspondence), including from the MinFERIT, the Ministry of Economy and the Ministry of Finance, according to which the UzGeotechliti Phase 2 Feasibility Study had to be revised and asking for an extension of time before submitting the Final Feasibility Study to the CabMin (Exh. R-248).

575. On 24 March 2009, Mr. Mamadaliev of the CabMin directed Goskomgeology[20] to work with Claimant to finalize the Feasibility Study, taking into account the remarks from the MinFERIT, the Ministry of Economy and the Ministry of Finance (Exh. R-316).

576. On 30 April 2009, Goskomgeology submitted Claimant's ***'Revised UzGeotechliti Phase 2 Feasibility Study'*** (hereinafter "Revised UzGeotechliti Phase 2 Feasibility Study"), reducing the total costs from USD 315,7 million to 305.1 million (Exh. R-318; Claim. Am.Reply. 23.08.2013, para. 978).

577. On 12 May 2009, by ***Letter No. 3-1/7-60 DSP***, Mr. Faizullaev, Deputy Minister of the Ministry of Economy, provided Goskomgeology[21] with its comments regarding some of the financial parameters of the Revised UzGeotechliti Phase 2 Feasibility Study (Exh. R-318). As concerns the financial parameters, the letter noted that *"the project is assumed to implement at the expense of credit funds provided by RBS bank (Great Britain)"*, while stressing the high interests of such loan, and further concluded as follows:

*"**Project risks***

1. Increase in terms of project implementation due to late start-up of the facility.

2. Failure to follow development of production capacity and sales targets declared in the feasibility study.

[20] The specific addressee of the document is not identifiable.
[21] The specific addressee of this document is not identifiable.

3. Lack of own funds for the project."

Otherwise, the recommendations included in the letter were the same as those included in Mr. Faizullaev's earlier letter of 5 March 2009 (see above para. 573).

578. On 20 May 2009, Mr. Tulyaganov of the Ministry of Economy further wrote to Goskomgeology – among others – as follows concerning the Final Feasibility Study (Exh. R-234):

> "[…]
>
> *In the project FS provided the project total cost is increased* [compared to the Preliminary Feasibility Study approved on 5 December 2007] *to USD 261.2 m. (exceeding maximum PFS cost in total USD 99.8 m.), including the equipment – USD 95.4 m. and CAW – USD 96.5 m.*
>
> *The project is planned to be financed on account of loan funds of RBS bank in the amount of USD 145.2 m., Oxus Gold loan – USD 35.0 m, internal funds of JV "AGF", including monetary funds – USD 42.8 m., and also current fixed assets – USD 38.1 m.*
>
> […]
>
> *Due to the absence of necessary technical parameters of technological equipment for processing unit, cost estimation was not conducted.*
>
> *Whereas, the results of additionally conducted cost examination regarding the equipment confirm that there exists a possibility to decrease its cost (the appendix is invalid without seal).*
>
> *In a letter No.16 – 843 dated 20.05.2009 Goscomgeology informs that "The contracts for the equipment supply, service execution, CAW cannot be produced at the present moment since they are not concluded", which contradicts the requirements of the Decree mentioned above.*
>
> *Taking into account everything stated above, the final statement regarding MFERIT can be issued progressively as the recommendations mentioned above are implemented and the project FS, complying with the requirements of the Provision, validated by the Decree mentioned above, is produced."*

579. On 21 May 2009, WAI produced a further amendment to the WAI Phase 2 Bankable Feasibility Study (see above paras. 544 and 545), called ***'Stage I Amendment to the June 2008 Sulphide Project Bankable Feasibility Study',*** to consider a lower initial capital start-up cost of the Phase 2, addressing the difficulty in finding financing and lowering the risks associated with the Project's implementation (hereinafter "Phase 2 Final Feasibility Study") (Exhs. C-334/R-933_10).

580. On 11 June 2009, AGF held an Extraordinary General Meeting of Shareholders. During this Meeting, Mr. Watts was asked to inform the shareholders of the

'*Status of AGF JV and on anticipated production and financial parameters for 1 Quarter 2009.*' In this regard, the Minutes of the Meeting provide as follows (Exh. C-302) (Claim. SoC. 17.09.2012, para. 340):

> *"*[…] *Mr. Watts informed the Meeting on the production parameters for 5 months 2009 saying that they won't really change for the first 6 months as the operations have been suspended. For 5 months 2009 the following quantities of metals were produced: gold – 163 kg, silver 4,167 kg; product has been sold for the amount of US$6,386,000.*
>
> *Mr Watts informed the Shareholders on the status of the mine. On 8 June redundancy notices were issued to approximately 475 employees. Management of AGF plans to resume production of anodes when the Company is confident that the loan will be granted.*
>
> *Mr. Mavlyanov noted that today sales of silver are the only source of income for the Company and obtaining a loan should not be linked to production of anodes. The requested loan is UZS21 billion and to produce 4 tonnes of anodes will require US$21,000.*
>
> *Mr R Wilkins informed the Meeting that all issues and problems of the Company cannot be considered separately and should be resolved simultaneously. They are production of anodes, receipt of a loan, VAT returns and obtaining of the mining license for Sarybatyr deposit.* […]*"*

581. On 24 June 2009, Mr. Watts of AGF wrote to Mr. Mavlyanov, Chairman of Goskomgeology, requesting assistance in connection with AGF's application to renew its Mining Licence, which was still pending with Sanoat (see above paras. 415, 499, 503) (Exh. C-319).

582. On the same day, Mr. Hill of AGF, referring to Mr. Mamadaliev's letter of 24 March 2009 (see above para. 575), wrote to Mr. Azimov, Deputy Prime Minister, requesting the latter's assistance with the approval of the Phase 2 Final Feasibility Study and explaining the situation as follows (Exh. C-336):

> *"*[…]
>
> *At present we have positive conclusions from all Uzbek Authorities, except for MFER&T as AGF have not presented Contracts for services, supplies, construction for present moment.*
>
> *There are several reasons for that:*
>
> *l. As Clause 5 cites the Procedure of bids, approved in Uzbekistan, by Cabinet of Ministers Decree of 03.07.2003 N^{0}302. "Tender could be only practical, when tender object is maintained by financing, being approved by required documentation (Loan contract, Bank reference, List of Construction activities, State Authority Decree et al."*

2. *Mandatory for finalizing of loan facility from foreign banks is an approval of Feasibility Study.*

This situation is "catch 22" and request introduced by MFER&T is impossible.

In order not to disrupt implementation of the project the following is proposed:

1. *AGF will accept MFER&T recommendations in terms of costs optimization for the total amount of $5.8M and adjust FS.*
2. *As equipment, selected in Feasibility is mostly imported, contracting for manufacturing and supplies with detailization of supplies conditions, assemblage could be effected after financing availability, at a stage of development of Detailed Design, with mandatory submission of all these contracts to MFER&T.*

We kindly solicit for solution options."

583. On 14 July 2009, by ***Letter No. NN-01/06-4763***, MinFERIT informed Goskomgeology that it could not recommend the Phase 2 Final Feasibility Study for approval because, among other things, the proposed costs exceeded the costs approved in the Preliminary Feasibility Study (USD 261,2 million compared to USD 99,8 million), required parameters concerning necessary equipment was still missing, and no funds had been arranged to finance the Project (Exh. R-235).

584. On 17 July 2009, AGF submitted to Goskomgeology the Feasibility Study of industrial development of Sarybatyr gold fields (see reference in Exh. C-683).[22]

585. On 17 August 2009, Mr. Mvalyanov of Goskomgeology wrote to Sanoat[23] requesting the examination of AGF's request for issuance of the Sarybatyr License (see above para. 547) (Exh. C-683).

586. On 26 August 2009, Mr. Mamaladiev, Chief of the Information and Analytical Department of the CabMin, wrote to Mr. Unsunov from AGF regarding the latter's request for the granting of the Mining License. He stated as follows (Exh. C-508):

> *"With regard to your letter dated August 25 2009, No. 585, we report that the documents for the extension of the license for the type activity carried out by JV "Amantaytau Goldfields" – mining of precious metals is under*

[22] No copy of this Feasibility Study has been filed.
[23] The specific addressee of the document is not identifiable.

examination at the Cabinet of Ministers' Commission on licensing of the mining of precious and rare metals, precious stones."[24]

587. On 21 December 2009, Mr. Hill from AGF sent a letter to Mr. Mavlyanov as Chairman of Goskomgeology, concerning the Feasibility Study for Sarybatyr (Exh. R-1135). In his letter, Mr. Hill stressed that preparing a complete Feasibility Study was very cumbersome and that for this reason and "[a]*fter positive conclusions of the due diligence authorities are obtained and the license is issued a final feasibility study for use* [of] *the sub-soil area shall be prepared within the established procedure*."

588. On 8 February 2010, Mr. Salamatin, General Director of AGF, sent a letter to Goskomgeology requesting the renewal of the Renewed Exploration License, which was due to expire on 7 August 2010 (Exh. C-324) (see above para. 529) (Claim. SoC. 17.09.2012, para. 363; Resp. SoD.Class. 04.04.2013, para. 268).

1.4.5 The 2009 Tax Regime Changes

589. On 12 December 2008, an Uzbek newspaper issued a report about an upcoming modification of the Tax Code. These modifications included a new Article 212 (Exh. C-342), according to which the "*the zero rate VAT is introduced for the turnover of cotton and lint and canceled for the turnover on precious metals for export.*" According to Claimant, it is through this news report that it heard for the first time about the intended change in the VAT regime (Claim. PHB I. 21.07.2014, para. 60).

590. On the same day, in view of the upcoming change of the VAT regime, Mr. Wilkins wrote to the UK Ambassador, Mr. Hartley Booth, and Mr. Harry Eustace Sr. wrote to the US Ambassador, Mr. Norland, for assistance and to make clear that the envisaged VAT changes would jeopardize the financing of the AGF Project (Exhs. C-343/C-344, see also Exh. C-691) (Claim. SoC. 17.09.2012, para. 380):

> "[…]
>
> *We urgently need clarification that this law, if introduced, will at least not apply to AGF, as an existing foreign investor. The Foreign Investment Laws should protect Oxus as a foreign investor from any adverse changes in tax that materially and negatively impact the economics of the investment. This will clearly apply in this case. Also I believe there is a 'most favoured nation' clause in the UK-Uzbek Bilateral Investment Treaty. Since this law, if introduced, will only affect AGF (both NMMC and AMMC do not export*

[24] Although the sentence is obviously incomplete, it reflects the exact translated wording as in Exh. C-508..

but sell their precious metals to the Uzbek State), it could be argued that AGF is being prejudiced against when compared to Uzkek entities.

Forcing AGF to sell its metal to the Uzbek State (presumably payable in Uzbek Soums even if at the world price) will render international finance impossible to obtain.

This is very serious and could mean that AGF is out of business early next year. […]"

591. On 15 December 2008, UK Ambassador Booth wrote to Mr. Elyor Ganiev, his Uzbek counterpart at MinFERIT and the Co-Chairman of the Uzbek-British Trade & Industry Council (hereinafter "UBTIC"), asking confirmation that the VAT changes would not apply to AGF (Exh. C-345):

> *"It has come to the attention of Oxus that the proposed changes to the Uzbek tax code, which still have to pass through final ratification before becoming law with effect from 1 January 2009 onwards, contain a provision that amends section 212 of the tax code such that the status of precious metals exports will be changed from 'zero rated' to 'standard rated'. If this proposed change becomes effective, and if it applies lo AGF, it will mean that AGF may have to pay over to the Uzbek State the equivalent of 20% VAT on the value of all precious metals exports, despite the fact that in practice AGF will not be able to receive this VAT from the purchaser of its precious metals (currently Standard Bank in London). This would be extremely damaging to AGF's business and is also likely to jeopardise the international financing currently being negotiated with the Royal Bank of Scotland with regard to the proposed underground mine.*
>
> […]
>
> *I would be very grateful if you could make the appropriate enquiries and, hopefully, be able to give Oxus clarification on this matter and confirmation that its investment in Uzbekistan will not be adversely affected by this proposed change in the tax code.* […]*".*

592. On 15 December 2008, Mr. Wilkins and Mr. Polikashin from Oxus met with Mr. Tursunov, Deputy Minister of Finance, to discuss the upcoming changes in the VAT regime (indirect reference in Exh. C-540 and Transcripts of 2 May 2014, 1103:9-17 and 1104:6-14).

593. On 18 December 2008, Mr. Wilkins of Oxus wrote a letter to Mr. Tursunov, Deputy Minister of Finance (Exh. C-540), following up on their meeting of 15 December 2008 and concluding as follows as concerns the VAT issues:

> *"I am grateful to you for indicating that AGF will not be required to pay the export VAT and that it will be offset in some way against the import VAT. It is very important that we can understand the precise mechanism by which*

this offset will work in practice, and that AGF will not be required to pay the inevitable excess of export VAT over import VAT, since this excess, if required to be paid, would itself represent a significant additional tax on AGF. We note, and indeed you mentioned, that we are protected by the Foreign Investment Laws against material and adverse changes in tax, but nonetheless, given the possible imminent introduction of this change (from 1 January 2009) it would be extremely helpful to understand how it is proposed to be implemented."

Mr. Wiklins also asked for a meeting in January 2009 to discuss the various other issues affecting AGF's operations, including AGF's cash flow problems, the USD 5 million VAT owed by AGF, the USD 15 million in metal value stockpiled at AMGK and on site at AGF due to the alleged lack of capacity of AMGK to refine silver doré bars, the USD 25 million owed by AGF to Oxus as shareholder loan, the USD 10 million owed by Oxus under the Special Dividend Agreement. In this regard, Mr. Wilkins reiterated his previous requests that some of these amounts be offset with the VAT debt in order to unlock the situation (see above paras. 557 and 558).

594. On 22 December 2008, Mr. Narziev, AGF's Chief accountant, sent a letter to Mr. Watts as General Director of AGF, copying Mr. Yunusov and Mr. Sadikov both directors of AGF. In his letter, Mr. Narziev warned Mr. Watts concerning various financial liabilities and concluded his letter as follows (Exh. R-916):

"On 18 Dec 2008 the cash from the sale of precious metals was transferred to bank account of company opened in Barclays bank.

I have come to you and reported all problems related to our liabilities and debts. […]

I and you together are responsible persons of joint venture, and each operation conducted in Barclays Bank AGF account must be in correspondence to the Law of Republic of Uzbekistan, no payments should be done without our requisition for payment. In the middle of 2009 we are waiting for a general inspection by state authorities. The tax committee first of all will check all cash flows and movement of it in AGF account at Barclays bank for last three years (2006-2008), for each of this operation we will be responsible.

This is an official warning notification. Please warn authorized persons in OXUS that all cash operations must be done according our requisition and in correspondence of the Laws of Uzbek Republic. In case of next such transformations I will have to apply to authorized bodies in order to protect myself."

595. On 1 January 2009, the new VAT regime applicable to the sales of precious metals for export entered into force (Exhs. C-438/C-439). While sales of precious metals for export were previously subject to a "zero rated" VAT treatment (i.e.,

exemption from paying VAT on exports and reimbursement on VAT paid on import of raw materials), the changes revoked this privileged treatment by repealing favorable treatment of gold producers regarding the import of raw materials (exemption of VAT on exports remained applicable, the reimbursement of VAT paid on import of raw materials was revoked) (Resp. SoD.Class. 04.04.2013, paras. 286 fol.).

596. <u>On 21 January 2009</u>, Mr. Wilkins of Oxus wrote to Mr. Mirzayev, Deputy Minister of Finance, asking for clarification and assistance as to how Claimant and AGF should account for the impact of the new VAT regime as follows (Exh. C-346):

> *"We understand that, with effect from 1 January 2009, the VAT status for precious metals exporting companies has been changed from 'zero-rated' to 'exempt'. AGF would appear to be the only company directly affected by this change. We are extremely disappointed that we were neither consulted on this matter, nor that anyone from the Government has yet attempted to explain the impact of this change on AGF* […].
>
> *Oxus is currently in the process of arranging a $170 million project finance facility from a consortium of international banks in order to fund the development of an underground mine at AGF. This underground mine is expected to increase AGF's gold production to 8-10 tonnes per year. I am sure you will appreciate the difficulties we are facing in the current economic climate. The banks and insurance companies (including MIGA, the World Bank insurance company) are currently in possession of vast amounts of data relating to the project, including a sophisticated economic model, which is based on the Uzbek tax regime which existed in 2008. It would be potentially disastrous to the financing process if we have to change this data now.*
>
> *At this time in particular, Governments around the world are taking special steps to protect their local economies and businesses. We welcome the recent decree which suggests that the Uzbek Government wishes to do the same, especially regarding export orientated companies, and we confirm that we wish to cooperate in the spirit of this decree as far as possible. We therefore urgently need advice as to how AGF should account for the impact of this change in VAT, and we assume that it is not intended to increase our capital and operating costs by the imposition of a 20% irrecoverable VAT charge on our imports and our local purchases. We also need to clarify the position regarding the VAT which was recoverable by AGF as at 31 December 2008, and we assume that we will not be asked to write this amount off. We further note that we have rights as a foreign investor under the laws on Foreign Investment, and via the UK-Uzbek Bilateral Investment Treaty.*
>
> […]

> *I hope you will agree that AGF makes a significant contribution to the Uzbek economy. We hope that this contribution will increase substantially over the coming years. Please may I request that you arrange a meeting for me with your appropriate specialists for the week beginning 2 February, when I shall next be in Tashkent. I confirm that Oxus is ready to cooperate with the Ministry of Finance in order to ensure that an appropriate resolution is reached with regard to the above VAT issues in order that out business may continue to the mutual benefit of all.*"

597. On 29 April 2009, Mr. Wilkins of Oxus sent a letter to Mr. Turdimov, Khokim of Navoi Region (Exh. C-306; see above para. 520), requesting the right to offset AGF's claim for reimbursement of VAT with money owed under the collection orders and indicating that the State Tax Committee had already agreed to this procedure.

598. On 29 May 2009, upon Oxus' request and recommendation of the State Tax Committee, Mr. Tursunov, Deputy Minister of the MinFin, sent a letter to AGF agreeing to offset approx. USD 3,7 million of a total amount of USD 11,181,379 (USD 10,866,379 plus accrued interest). However, Mr. Tursunov's offer was conditioned upon the payment of the remaining USD 7,473,700 by 10 June 2009. This payment was never made (Exh. C-373) (Resp. SoD.Class. 04.04.2013, para. 310).

1.4.6 New Hopes Regarding Financing

599. On 3 September 2009, Claimant and the CITIC Consortium signed an initial term sheet entitled ***Convertible Loan Notes Termsheets*** (hereinafter "Convertible Loan Notes Termsheets") (Exh. C-347) setting out the basic terms of the parties' agreement to provide part of the financing through USD 60 million of convertible loan notes, the proceeds of which were to be used for the general working capital and working expenditures for the initial production of 450,000 tons per annum AGF underground sulphide mine project (i.e., Phase 2). On the same day, CITIC Consortium also agreed a Warrants Subscription Termsheet for the value of GBP 12.12 million (Exh. C-348) (Claim. SoC. 17.09.2012, para. 388).

600. On 30 September 2009, Mr. Wilkins of Oxus sent a letter to Mr. Azimov, First Deputy Prime Minister and Minister of Finance, in which he acknowledged the "*amount owing under the* [Special Dividend] *Agreement is $10,866,379, excluding penalty interest*" and making further suggestions to offset part of the debt with outstanding VAT reimbursement owed to AGF and defer the remainder of debt (Exh. C-367) (Claim. SoC. 17.09.2012, para. 404).

601. On 29 October 2009, AGF held an Extraordinary General Meeting of Shareholders (Exh. C-368), which dealt among others with the ***'Approval of***

payment of the special dividend in the amount of US$5 million to the Ministry of Finance' in accordance with the suggestions that Mr. Wiklins had made in his letter to the Ministry of Finance of 30 September 2009 (see above para. 600).

602. On 2 November 2009, following an approval by the shareholders of AGF to make a payment of USD 5 million under the Special Dividend Agreement, AGF made the first instalment payment of USD 1 million to the MinFin (Exhs. C-368/C-369).

603. At some point in November 2009, Mr. Li Peixing, Chairman of Baiyin Non Ferrous Group Co. Ltd. as leader of the CITIC Consortium, wrote to the Board Members of Oxus regarding the financing of the Project by CITIC as follows (Exh. C-681):

> *"We regret that our regulatory approval process has taken longer than originally expected. However, we can confirm that we are now in the final stages of obtaining the relevant approvals and therefore expect the transaction to be in a position to complete during December 2010, thereby enabling the initial investment of approximately $85 million to be advanced to Oxus.*
>
> *We remain very supportive and positive of our relationship with Oxus and in particular to assisting you to significantly increase gold production at the Amantaytau Goldfields project in Uzbekistan, through expansion of the existing open pit heap leach operations and construction of a new underground mine. We also hope that you will continue to work closely with the relevant Uzbekistan government authorities to resolve the major regulatory issues including the mining licenses and approvals as well as in securing their agreement for various protections that you have previously presented to protect our substantial forthcoming investment, and we are happy to help with this process where you consider appropriate. Please maintain constructive communication with the relevant authorities so that we can reach a mutually beneficial solution necessary to deploy the invested funds in the further development of Amantaytau Goldfields."*

604. On 30 November 2009, Mr. Tian Wei, Vice Chairman of CITIC Construction Co. Ltd, sent a letter to Mr. Leggard of Fairfax and Mr. Shead of Oxus Gold (Exh. C-680) regarding the ***'Extension of the Irrevocable Undertaking and Other Related Matters'***. In this letter, Mr. Tian Wei identified a series of "*Critical Issues* "*which need to be resolved, or have mechanisms in place to mitigate such risks, if we are to complete the Proposed Investment in a timely fashion*." Theses critical issues included among others the following issues:

> *"1. Licenses – We noted there are numerous critical issues with the various licenses that are required including:*
>
> *a) AGR's operating license expired on November 27, 2006;*

> b) *The existing mining licenses may be subject to termination due to failure of satisfaction of certain conditions including no positive response from Geology Committee in relation to submitted feasibility studies for two mining fields;*
>
> c) *The existing mining licenses are going to expire on 7 August 2012;*
>
> d) *The sulphide project's feasibility study needs to be approved. In addition, a new underground mining license as well as a license to construct and operate underground mining shafts needs to be issued; and*
>
> e) *AGF's land use rights are not complete.*
>
> *2. Taxes – In addition to the resolution of the outstanding tax disputes with the tax authority, we need to seek assurance and preferential treatments or exemptions of certain taxes such as property tax, VAT, import duties, withholding tax, excess profit tax in order to operate AGF profitably.*
>
> *3. Currency – We need to seek exemption or reduction for mandatory foreign currency conversion*.
>
> *4. Refining capacity – We need to obtain assurances on refining capacity within Uzbekistan or permission to export for refining.*
>
> *5. Infrastructure – We need assurances on the supply of electrical power and* [technical] *water at AGF."*

605. On 6 January 2010, Oxus and the CITIC Consortium signed a GBP 34,380,000 ***'Equity Subscription Agreement'*** (Exh. C-351). Under this Agreement, the CITIC Consortium would invest in Oxus by the subscription of new ordinary shares, subject to various warranties and the fulfilment of various conditions, with a longstop date of 31 December 2010 for the finalization of the funding agreement (Claim. SoC. 17.09.2012, para. 391). This Agreement was subject to various conditions (Article 2), among which were (i) CITIC's ability to obtain all necessary Chinese State authority approvals, (ii) AGF's right "*of ownership, lease, temporary or permanent use (as the case may be) for all of the existing land plots used by AGF in the Tomdi and Kontimeh Distribts of the Navoi Region*", and (iii) the execution of a Foreign Investment Agreement ("FIA") between Oxus, the CITIC Consortium, AGF, and the Uzbek Government by 30 June 2010 (Claim. SoC. 17.09.2012, para. 392).

606. On 27 January 2010, Mr. Wilkins of AGF wrote to Mr. Azimov, First Deputy Prime Minister and Minister of Finance, announcing that "*the transaction, by which the CITIC Group will provide up to $185 million in financing to Oxus, was formally approved.*" Mr. Wilkins made suggestions on how to use these loans with regard to AGF and the amounts owed under the Special Dividend Agreement and requested a meeting with Mr. Azimov to discuss this (Exh. C-352) (Claim. SoC. 17.09.2012, para. 393).

607. On 4 and 23 March 2010, Mr. Wilkins wrote to Mr. Azimov, First Deputy Prime Minister and Minister of Finance, and to Mr. Ganiev, Deputy Prime Minister and Minister of MinFER, referring to his earlier letter of 27 January 2010 (see above para. 606) and requesting again a meeting with Mr. Azimov to discuss how to use the CITIC financing with regard to AGF and the amounts owed under the Special Dividend Agreement (Exhs. C-353 and C-355, C-461) (Claim. SoC. 17.09.2012, para. 394; Resp. SoD.Class. 04.04.2013, para. 296).

608. On 30 March 2010, by ***'Instruction No. 06/104-57'***, Deputy Prime Minister Azimov forwarded Claimant's proposal to the Ministries of Finance, Economy and Justice, and to NMMC and Goskomgeology, with instructions to review the proposal and to revert with a conclusion, in accordance with the established procedure (Exh. R-319) (Resp. SoD.Class. 04.04.2013, para. 297).

609. In April 2010, various Ministries, including the Ministry of Justice and the Ministry of Economy, as well as Goskomgeology rejected Mr. Wilkins' proposal regarding the terms of the loan between ORC and AGF (see above paras. 606 and 607). They took issue, among others, with (i) the proposed interest rate of LIBOR, (ii) the fact that it was not possible to assess the second and larger tranche of the loan, because of missing information on commercial terms, (iii) Claimant's proposal to capitalize debt as a contribution to AGF's Charter Fund, because Decree No. 266 and AGF's Charter required Claimant to make any additional contribution to the Charter Fund in cash, and (iv) Claimant's proposal for various tax privileges (Exhs. R-320, R-321, R-405).

610. In or around April 2010, Oxus purchased an Atlas Copco drill rig for the amount of USD 2,562,599, which was made available for use by AGF for purposes of improved exploration (see Claim. Am.Reply. 23.08.2013, para. 1339 and references to this purchase in Exhs. C-692-C-694).

611. On 14 May 2010, Mr. Willkins sent a ***'Draft Foreign Investment Agreement'*** ("FIA") (which was required under the Equity Subscription Agreement, see above para. 605) to the CabMin. Mr. Wilkins forwarded it further to the Minister of Economy, the Minister of Justice and the MinFin, as well as to the Chair of the State Tax Committee, the Acting Chair of Goskomgeology (Mr. Turamuratov) and the Director General of NMMC (Mr. Sanakulov) requesting comments thereon (Exhs. C-356-C-360; R-662, R-386/R-387) (Claim. SoC. 17.09.2012, para. 396). According to Respondent, this draft FIA did not take into account the comments made by the various Ministries and Goskomgeology on the loan terms proposed by Claimant (Resp. SoD.Class. 04.04.2013, para. 300).

612. On 29 May and 1 June 2010, the State Tax Committee and the Ministry of Justice provided various suggestions and comments[25] on the draft FIA (Exhs. C-361/C-362).

613. On 8 June 2010, the CITIC Consortium and Oxus entered into a ***'Deed of variation and waiver between Oxus Gold plc and CITIC Consortium'***, under which the CITIC Consortium dropped the requirement of the FIA (Exh. C-363) (Claim. SoC. 17.09.2012, para. 398).

614. On 9 June 2010, Oxus announced the amendment of the financing agreement with CITIC so that its completion was "conditional only upon receipt of the regulatory approvals from the Chinese Government and admission of the new ordinary shares to trading on AIM by 31 December 2010." (see references in Exh. C-396,).

615. At some point in August 2010, upon request of CITIC, the Northwest Institute for Mining and Metallurgy issued at ***'Study Report for Feasibility of Project for Developing the Severny and Centralny Sulphide Ores'*** (Exh. C-486). It evaluted the Project as follows:

> *" **1.2.14 Combined evaluation conclusions of project***
>
> *Centralny and Severny underground sulphide ore development is a key of AGF company's future survival and development. This area is high in ore grade, relatively centralized in resource, dense in exploration engineering, high in ore body control level, and also the core of benefits produced by AGF company. The construction of project investment has better effects. The construction of underground sulphide ore project can not only create good economic benefits for the company but also drive the rapid development of local economy, increae local taxation, solve the employment problems of local residents, and create good economic and social benefits. In a word, the execution of this project can not only get better economic beneifits but also excellent social benefits. The project is feasible in technology and reasonable in economy, so it's quickly recommended to perform this project".*

At the same time, the Report also pointed out the following problems :

> *"1.4 Existing problems and advices*
>
> *The development and construction of this project are facing some problems, mainly including:*
>
> *1. Political and policy risks for overseas investment.*

[25] These suggestions and comments appear at first sight rather minor, but the deficient quality of the translation does not entitle a full appreciation thereof.

2. Current technical and economic analysis is fully based on reality and reliability of geological data submitted by the former Soviet Union and OXUS company, who haven't carried out any engineering certification to this area. Meanwhile, it must be pointed out that a lot of prospecting works in the pits for Centralny and Severny underground construction during the period of former Soviet Union are required to apply the secondary delineation of ore bodies controlled by this partial project during the next initial design to ensure the reliability of reserves.

3. Complex technical conditions of ore body mining, mainly including the following aspects: poor rock stability, complex orebody shape, most branched small ore bodies.

4. The communication difficulties caused by languages or cultural environment must be overcome.

[…]

616. On 6 September 2010, Mr. Shead of Oxus sent a letter to Mrs Guskova of the MinFin, referring to the latter's letter of 28 August 2010, and explaining why AGF had not been in a position to pay the amounts according to the Special Dividend Agreement. He made reference to Oxus' earlier correspondence (see above paras. 597, 598, 600) suggesting new payment plans, and making renewed suggestions concerning the payment, by partial set-off, of the owed amount (Exh. R-888).

617. On 20 September 2010, upon request from the MinFin, Mr. Wilkins wrote to Mr. Gulyamov of the MinFin attaching a signed ***'Payment Reconciliation Deed'*** of the amount due under the Special Dividend Agreement, by which Oxus acknowledged its liability of USD 10,841,256.16 to Respondent (Claim. SoC. 17.09.2012, para. 408) (Exhs. R-888, 889 and C-464).

1.5 2010-2012 : The Escalation Leading to Oxus Departure from Uzbekistan and Declaration of *Force Majeure*

1.5.1 The Uzbek Court Proceedings Regarding the Special Dividend Agreement

618. On 23 September 2010, the MinFin launched a lawsuit against Oxus (with AGF participating as third party) before the Economic Court of Tashkent requesting payment of USD 10,8 million under the Special Dividend Agreement (Exh. C-378) (Claim. SoC. 17.09.2012, para. 409; Resp. SoD.Class. 04.04.2013, para. 314).

619. On 27 September 2010, the Tashkent Economic Court set a court hearing date of 18 October 2010 (Exh. C-379). Claimant contends that it only received the MinFin's Statement of Claim itself in London on 6 October 2010 (Claim. SoC. 17.09.2012, para. 410).

620. On 12 October 2010, AGF's counsel submitted a petition to the Tashkent Economic Court requesting the postponement of the court hearing by ten days (Exh. C-382). According to Claimant, the court judge explained to AGF's counsel that such request would have to be filed on 18 October 2010 (Claim. SoC. 17.09.2012, para. 412).

621. On 18 October 2010, the hearing before the Tashkent Economic Court took place, during which AGF's counsel requested the postponement of the hearing. According to Claimant, although the MinFin did not object, the Court rejected the postponement, which left counsel for AGF and Oxus with no other choice than to plead on the spot only arguments they were able to present then and there (Claim. SoC. 17.09.2012, para. 415).

622. On the same day, the Tashkent Economic Court rendered its Judgment ruling as follows (Exh. C-386):

> *"*[…] *the court*
>
> *HAS RULED OUT AS FOLLOWS:*
>
> 1. *The application of the defendant and the third party for adjourning the hearing on the case for another day shall be rejected.*
> 2. *The claim of the Ministry of the Finance of the Republic of Uzbekistan shall be satisfied.*
> 3. *Oxus Gold plc shall be surcharged in favour of the Ministry of Finance of the Republic of Uzbekistan US$10.841,256-16.*
> 4. *Oxus Gold plc shall be surcharged the state fee in the amount of US$108,412 and UZS 5,000 of mail expenditures.*
> 5. *The writ of execution shall be issued after this resolution becomes enforced."*

623. On 11 November 2010, Mr. Wilkins of Oxus wrote a letter to Mr. Azimov of the MinFin. Mr. Wilkins acknowledged Oxus' determination in paying the amount owed under the Special Dividend Agreement as follows (Exh. C-395):

> *"I* […] *wish to reassure you that Oxus has every intention of paying the Special Dividend in the amount of $10.8 million which is owed to*

the Ministry of Finance as a result of the 2004 agreement relating to hedged gold sales. Oxus is in the process of completing a major financing with a consortium of Chinese investors. I attach a letter from the consortium confirming that funds are expected to be made available to Oxus next month. These funds will enable us to pay our liability to the Ministry of Finance and to make significant further investments into Uzbekistan for the purposes of developing the business of AGF.

[…] *We* […] *have presented our proposal to the AGF shareholders for consideration and discussion. I also attach a copy of these proposals for your information, which include an offer to capitalise $25 million of Oxus' shareholder loans into the AGF Charter Fund, and the creation of a Zrafshan Community Development Fund, to be funded by Oxus, using its shares on the London Stock Exchange*. […]"

This letter was forwarded by Mr. Azimov on 13 November 2011 to Ministry of Finance (Exh. R-1409):

624. On 2 December 2010, Oxus appealed against the judgment of the Tashkent Economic Court of 18 October 2010 (Exhs. C-388/C-416) (see above para. 622).

625. On 19 July 2011, Uzbekistan started an action before the UK High Court for enforcement of the judgment of the Tashkent Economic Court against Oxus in relation to the Special Dividend Agreement.

626. On 10 September 2012, the Parties agreed to stay the litigation concerning payment under the Special Dividend Agreement during the pendency of this arbitration (Exh. C-503).

1.5.2 The Failure to Obtain Financing

627. On 17 November 2010, Oxus published a regulatory statement, confirming that it had been informed that "*the most critical of the approvals necessary to give effect to the financing* [by CITIC] *has been granted by the relevant Chinese authority* [the Chinese National Development and Reform Commission (hereinafter "NDRC")], *while the other two largely administrative approvals are also being processed without any known issues*" and stating that "[t]*he Directors of Oxus remain confident that the financing will be completed during December 2010*" (Exh. C-396) (Wilkins II para. 122).

628. On 30 December 2010, i.e. one day before expiry of the deadline provided under the Equity Subscription Agreement between Oxus and CITIC Consortium for finalization of the funding agreement (see above paras. 605 and 613), the CITIC

Consortium informed Oxus by email that the Chinese Embassy in Tashkent had been unable to give financial clearance to the Chinese Ministry of Commerce, and thus the final regulatory approvals could not be signed off. Rather than extend the deadline, the CITIC Consortium allowed the arrangement to lapse on 31 December 2010 (Exh. C-398). According to Claimant, this made it impossible for AGF to move forward with the development of Phase 2 (Claim. SoC. 17.09.2012, para. 433).

1.5.3 Challenges Regarding the Renewal of the Cyanide and Renewed Exploration License

629. On 19 August 2010, by ***Letter No. 11-1310***, referring to AGF's application for extension of its Renewed Exploration License (see above para. 588), Goskomgeology informed the CabMin that AGF had failed to conduct its previous exploration works. In particular, only 4.5% of the exploration plan had been carried out in 2009 and the terms and conditions of the subsoil use had not been observed. Nonetheless, Goskomgeology explained the need for an extension of the Renewed Exploration License in order to "*complete the projected geological exploration at the projects of 2010* […] *of Sarybatyr and Nukrakon fields and exploration of deep layers at Severny Amantaytau field*" and to conduct "*follow-up exploration of gold ore areas of Severny Asaukak, Aksay, Seredinny, Takazgan, Severny Daugyzau and Yasaul blocks*" in 2011 (Exh. R-874) (Resp. SoD.Class. 04.04.2013, para. 269).

630. On 22 September 2010, Mr. Salamatin of AGF sent a letter to the CabMin explaining that the Cynanide License (see above para. 472) was expiring on 23 September 2010 and that, because of negligence on behalf of AGF, all the renewal documents had not been prepared on time. Mr. Salamatin thus raised the following request: "*Given the strategic importance of our products and to avoid disruption of public works contracts in 2010 we urge you to keep for the license renewal period our right to transportation, storage and use of high-toxic substances.*" (Exh. R-846).

631. On the same day, Mr. Salamatin of AGF also sent a letter to Goskomgeology reiterating AGF's request for prolongation of the Renewed Exploration License (see above para. 588; see reference in Exh. R-1138).

632. On 23 September 2010, Mr. Yunusov from Goskomgeology replied to Mr. Salamatin informing him that the extension of the Renewed Exploration License was still under review and that in the meantime Sanoat permitted to AGF the "*use, transportation and storage of toxic agents at [its own] risk and subject to compliance with license requirements.*" (Exh. R-1138).

633. On the same day, AGF's Cyanide License expired (see above para. 472) (Claim. SoC. 17.09.2012, para. 365).

634. On 24 September 2010, by ***Letter No. 974***, AGF submitted an amended Preliminary Feasibility Study (Exh. R-140) in support of its application filed on 16 January 2009 to obtain the Sarybatyr License (see above para. 548).

635. In the following days, AGF submitted an application to Sanoat and the CabMin for renewal of its Cyanide License (Exh. C-330, only indirect evidence) (Claim. SoC. 17.09.2012, para. 366).

636. On 5 October 2010, by ***Letter No. 29-02/15559***, Sanoat informed AGF that the Cyanide License had expired on 23 September 2010 and that a *"license prolongation application was not made in time."* Sanoat ordered AGF to proceed as follows (Exh. R-215):

> *"The management of JV "AGF" CJSC is to take urgent measures on license prolongation and find out the defaulters for drawing them to disciplinary liability. Copy of the order on punishment is to be submitted to* [Sanoat] *by 10.11.2010."*

637. On 2 February 2011, notwithstanding that AGF's Cyanide License had expired, Sanoat allowed AGF to use, transport, and store poisonous substances for a limited time period until 20 February 2011 (Exh. R-217) (Resp. SoD.Class. 04.04.2013, para. 270).

638. On 7 April 2011 and 6 June 2011, notwithstanding that AGF's Cyanide License had expired, Sanoat extended AGF's ad hoc permission to use, transport, and store poisonous substances for a limited time period until 1 June 2011 and 1 September 2011 respectively (Exh. R-219 & R-222) (Resp. SoD.Class. 04.04.2013, para. 270).

639. On 2 February 2012, notwithstanding that AGF's Cyanide License had expired, Sanoat, upon AGF's request (Exh. R-223), extended again AGF's ad hoc permission to use, transport, and store poisonous substances for a limited time period until 1 June 2012 (Exh. R-222) (Resp. SoD.Class. 04.04.2013, para. 270).

1.5.4 The 2011 Tax Changes

640. On 30 November and 3 December 2010, the Uzbek Parliament and the Senate adopted ***Law No. ZRU-274*** 'On Introduction of Amendments and Additions to Several Legislative Acts of the Republic of Uzbekistan in Connection with Adopting the Main Vectors of Tax and Budget Policy for 2011' providing for

further changes in the VAT regime and which was to come into effect on 1 January 2011 (Exh. C-715).

641. On 1 January 2011, the VAT regime under the Tax Code was modified, whereby the exemption from payment of VAT on precious metal sales granted by the Tax Code was abolished (Exh. C-1140). The effect of this further change to the tax regime was that AGF's precious metals export sales would be "standard rated" for VAT purposes at 20%.

1.5.5 AGF's Uzbek Shareholders' Request for Liquidation of AGF

642. On 16 September 2010, Mr. Sanakulov of NMMC and Mr. Turamuratov of Goskomgeology each wrote a letter to the members of the Supervisory Board of AGF requesting to convene an extraordinary General Meeting of Shareholders of AGF and asking to include in the agenda the issue of voluntary liquidation of JV Amantaytau Goldfields AO (Exhs. C-390 and R-251).

643. On 19 October 2010, Mr. Turamuratov, Chairman of Goskomgeology, wrote to the Supervisory Board of AGF complaining about not having received its dividends for a long time, proposing to hold a Meeting of the Supervisory Board and to convene an extraordinary General Meeting of AGF, including the issue of voluntary liquidation of AGF in the agenda of this Meeting (Exh. C-391) Claim. SoC. 17.09.2012, para. 421).

644. On 21 October 2010, Mr. Wilkins of AGF met with Mr. Turamuratov of Goskomgeology and then wrote to the latter and Mr. Sanakulov of NMMC, challenging the position of Goskomgeology and NMMC as unreasonable and explaining that in view of the USD 185 million financing that Claimant was seeking to secure, it made no sense to liquidate AGF, and that in any event, as a listed company, Oxus could not take any such decision without first calling its own Extraordinary General Meeting (Exh. C-392) (Claim. SoC. 17.09.2012, para. 423).

645. On 10 December 2010, Mr. Shead of Oxus sent a letter to Mr. Turamuratov of Goskomgeology and Mr. Sanakluov of NMMC addressing their request for voluntary liquidation of AGF as follows (Exhs. C-18, see also C-397) (Claim. SoC. 17.09.2012, para. 428):

> "[…] *In the letters dated 19 October and 16 September, you indicated that the reason for requesting the voluntary liquidation of AGF was due to the failure of AGF to pay dividends. We note that the dividend to NMMC has since been paid.*

The feasibility study for the Phase 1 open pit project envisaged that AGF would pay dividends totalling $37.4 million to each of the Uzbek parties and Oxus. In fact only $4.6 million has been declared to each party to date, of which $0.9 million is still outstanding to Goskomgeology, and $3.3 million to Oxus. However, the feasibility study also envisaged that AGF would pay taxes in a total amount of $13.9 million. In fact AGF has paid $53.1 million to date. If taxes and dividends are therefore taken together, the Uzbek State is $5.5 million better off, whilst Oxus is $36.1 million worse off. Since 2006, when AGF's tax privileges were removed, AGF has paid 24.7% of its gross cash flow to the Uzbek State in taxes. It is therefore clear that Oxus' investment has been materially affected by the changes in tax and VAT regimes imposed on AGF since Oxus made its original investment. As a result of this Oxus is still owed approximately $31.6 million by AGF. Furthermore, the change in VAT regime was unilaterally imposed on 1 January 2009 without any prior consultation with Oxus. At the time Oxus was in the process of arranging a $150 million project financing from the Royal Bank of Scotland in order for AGF to develop the Phase 2 underground project. This VAT change, which increases certain of AGF's capital and operating costs by 20%, contributed to the failure of RBS to ultimately provide the finance to AGF, and has forced Oxus to seek the funds elsewhere, which inevitably has resulted in a delay in financing Phase 2.

Nevertheless, Oxus remains of the view that AGF should not be liquidated. AGF has produced 17 tonnes of gold and 86 tonnes of silver to date (against a forecast of 20 tonnes of gold and zero tonnes of silver). AGF is ahead of target for 2010 and is operating profitably. AGF can continue to operate profitably provided the appropriate licenses are issued and AGF's tax regime can be stabilised. AGF (with the mining contractor) employs some 225 people, and this number will increase substantially when the underground mine is built. Oxus is in the process of completing a financing package of $185 million with a consortium of Chinese Investors. This amount is primarily intended to be made available by Oxus to AGF, provided Oxus can obtain an appropriate return on investment. Oxus expects to complete the financing within the next 4-5 weeks […]".

Mr. Shead then concluded his letter by offering to buy Goskomgeology and NMMC's combined 50% shareholding in AGF, or else to sell Oxus own 50% shareholding to the Uzbek shareholders:

"Oxus hereby offers to buy or sell 50% of AGF for an amount equal to:

- *50% of the value of AGPs existing balance sheet, at book value accounted for in accordance with Uzbek GAAP, adjusted as appropriate to reflect specific amounts due to particular shareholders, payable in cash no later than 31 March 2011; plus*
- *A 'production royalty' of $50 per ounce of gold and $2 per ounce of silver for each future ounce produced from deposits within AGF's existing 192 square kilometre 'Project Territory', payable in cash within 30 days of the end of the calendar quarter of production."*

646. On 15 December 2010, an ***'Extraordinary Meeting of the Supervisory Board'*** of AGF was held, attended in particular by Mr. Turamuratov of Goskomgeology (chairing the Meeting), Mr. Tursunov of NMMC, Messrs. Wiklins, Polikashin and Hill of AFG/Oxus. As concerns Mr. Shead's proposal of 10 December 2010, Mr. Turamuratov announced that the Uzbek Parties were interested only in the option of purchasing Oxus' share in AGF, whereby they disagreed with the royalties to be paid to Oxus finding those to be excessive. Mr. Turamuratov further mentioned that the purchase of Uzbek share in AGF was not a possibility. Mr. Wilkins strongly objected to this stating that it was a "nationalization of AGF" and added that new investors in Oxus were ready to invest cash in expansion of AGF.

The Minutes of the Meeting then provide that "Members of the Supervisory Board unanimously AGREED that specific proposals and arguments of each party regarding future activities of AGF will be considered at the General Meeting of Shareholders of AGF." (Exh. C-300). Mr. Turamuratov then proposed to convene an extraordinary General Meeting of Shareholders on 26 January 2011 to deal with (i) changes to the members of the Supervisory Board, and (ii) voluntary liquidation of AGF. Mr. Wilkins noted that inclusion of these issues in the agenda of the General Meeting of Shareholders of AGF would lead to a requirement of a public statement from Oxus and therefore suggested to re-word the second item in order not to expressly mention "liquidation", but rather "re-structuring".

The Supervisory Board however made the following decision:

> *"Members of the Supervisory Board* ***AGREED*** *as follows:*
>
> *1.1. An extraordinary General Meeting of Shareholders of AGF shall be convened on 26 January 2011 at 3 pm at the premises of Goskomgeology;*
>
> *1.2. Due to majority of votes of the members of the Supervisory Board the following issues shall be included in the agenda of the extraordinary General Meeting of Shareholders of AGF:*
>
> *3. On changes to the members of the Supervisory Board.*

4. On voluntary liquidation of AGF."

647. On 26 January 2011, the scheduled Extraordinary General Shareholders Meeting of AGF was re-secheduled for 24 February 2011 (Exh. R-408). In the letter rescheduling the Meeting, Mr. Turamuratov specified that "[i]*n relation to conduction of the extraordinary general meeting of the shareholders of CJSC "Amantaytau Goldfields", we ask you to send an authorized representative(-s) on behalf of "OXUS RESOURCES CORPORATION*"."

648. On 21 February 2011, Mr. Shead on behalf of Oxus sent a letter to Mr. Turamuratov of Goskomgeology asking to re-schedule the General Meeting planned on 24 February 2011 to 3 March 2011 "[d]*ue to the unavailability of the authorised representative of Oxus Resources Corporation"* (Exh. R-409), a request granted by Mr. Turamuratov on 28 February 2011 (Exh. R-410).

649. On 3 March 2011, the scheduled AGF Extraordinary General Shareholders Meeting should have taken place, but was rescheduled to 23 March 2011 due to the fact that Oxus's representatives failed to attend (Exh. R-411; Resp. SoD.Class. 04.04.2013, para. 321).

650. On the same day, Oxus' legal counsel wrote a letter to President Karimov, to First Deputy Prime Minister and Minister of Finance Azimov, to Acting Chairman of Goskomgeology, Mr. Turamuratov, and to General Director of NMMC, Mr. Sanakulov, explaining the difficult position Oxus had been put in by Respondent's actions and making clear that any further attempt to liquidate AGF contrary to the interests of its shareholders would oblige Claimant to commence legal proceedings in order to protect its interests (Exh. C-12) (Claim. SoC. 17.09.2012, para. 442).

1.5.6 The 2011 Audit and the Thereto Related Escalation of the Situation

651. On 1 February 2011, by ***Letter No. CB/13-03-32-18/6***, the MinFin requested permission from the Republican Council for Coordination to conduct an unscheduled inspection of AGF in February and March 2011 (Exh. R-666).

652. On 16 February 2011, the Republican Council for Coordination issued ***'Order No. 15'*** authorizing representatives of the MinFin, as well as specialists from the State Tax Committee, Goskomgeology, and Sanoat, to perform an unscheduled inspection of AGF as follows (Exhs. R-663/C-402):

> *"To control the observance of requirements of legislative documents and pursuant to the article 12 of the Law of Republic of Uzbekistan "State control of business entities' activities" the Ministry of Finance*

is permitted when required to engage employees of State Tax Committee, State Geological Committee and state inspection "Sanoatgeocontechnazorat" in February-March 2011 with the condition not to exceed duration of inspections more than 30 days to perform unscheduled inspection on the basis of the program for additional inspection at the joint venture "Amantaytau Goldfields" (№. 202196034)." (Exh. R-663)

653. On the same day, Prime Minister, Mr. Mirziyoev, issued an order to proceed with the Audit from 21 February to 22 March 2011 (hereinafter the "Audit 2011"), for a period of no more than 30 days (Exh. C-403). The purpose of the inspection was stated to be "*to control observance of current legislative acts requirements and in order to audit financial statements and verify observance of tax legislation requirements.*"

654. <u>On 23 and 26 February 2011</u>, Mr. Hill of ORC wrote to the Board of Directors of Oxus and to Mr. Shead complaining about the Audit and its potential consequences. In its email of 26 February 2011 to Mr. Shead (Exh. C-493), Mr. Hill reported the opinion of an unspecified ORC staff as follows:

> *"The stated purpose of the current audit of the financial and economic activities of AGF is twofold: audit of the rational (or reasonable) use of sub-soil and audit of the rational (or reasonable) use of cash, especially hard currency. Usually an audit like this is carried out when a company is being liquidated (typically after the liquidation or before, if they need to make sure that billions of soums are not missing, but usually after the liquidation is announced, which means that in this case, in their minds, the liquidation is imminent). The reason is to get a full picture of AGF's operations and Oxus's involvement in managing AGF. There is definitely no evaluation of the assets taking place.*
>
> *The real purpose is to get as much evidence of violations of Uzbek laws, criminal and/or just negligent mismanagement which will allow the state to carry out forceful liquidation of the company in case the foreign shareholders will not agree to volutary liquidation. Based on the result of the report the prosecutor's office will pitch up at the minesite, seize the assets and start numerous criminal cases against former and current management of AGF whose signatures are under documents against which cash was transferred abroad. Their main accusation is conspiracy in pumping hard currency out of the country and that's why they are scrutinizing every service contract including contracts with BCM and MAED and also flow of cash from all AGF's USD bank accounts. At the same time they are scrutinizing all Oxus'*

loans and their purposes and necessity and comparing Oxus's cashflow from AGF against Oxus's liability to the Ministry of Finance trying to find out whether Oxus could have paid the specifical dividend in 2008 to 2010.

There is no doubt that the information gathered will be used against AGF/Oxus. In the best case, it can be used for quantifiying the mismanagement and lead to reducing the proposed Oxus' share sale number or, in the worst case, it will be used to prepare a case for taking the assets away without any payment."

655. <u>In or around February / March 2011</u>, Respondent alleges that Oxus' representative staff fled Uzbekistan (see Resp. PHB I. 21.07.2014, para. 81) and that AGF failed paying any taxes thereafter.

656. <u>On 18 March 2011</u>, Oxus wrote two letters, one to AGF and one to Goskomgeology and NMMC complaining about the nature and scope of the 2011 Audit and **declaring *force majeure*** as follows (Exhs. C-406, C-408):

> *"*[…] *We hereby notify that we have become subject to a Force Majeure event specified in section 7.2 of the Agreement.*
>
> *As a result of the actions taken by the Government of the Republic of Uzbekistan, ongoing operations of the Company are now impossible. We have experienced a series of events, which are beyond our reasonable control, which have made it impossible for us to comply with any of our obligations under the Agreement, specifically to perform any of the Services specified in section 2.3 of the Agreement.*
>
> *Members of the government-led audit commission at the Company have communicated to members of staff of the Company that they may be subject to arrest for non-compliance with norms and directives. On 15 March 2011 the General Director of the Company nominated by us was informed by his assistant that she could no longer send information to him or communicate with him by telephone. The lack of access to information has made it impossible for us to provide the Company with technical and consultancy services relating to corporate and project management, the arrangement, organisation, coordination and management of construction, production and other operations relating to the Project.*
>
> […]*".* (Exh. C-406, letter to AGF)
>
> *"We hereby notify you that we have become subject to a Force Majeure event specified in section 17.1(c) of the Charter.*

As a result of the actions taken by the Government of the Republic of Uzbekistan, ongoing operations of the Company are now impossible. We have experienced a series of events, which are beyond our reasonable control, which have made it impossible for us to comply with our obligations under the Charter. Specifically we are unable:

(i) *to participate in managing the Company in accordance with the procedures established by the Charter and Uzbek law (section 7.2(b) of the charter); and*

(ii) *to fulfil other responsibilities as a shareholder including but not limited to, payment obligations (section 17.1 of the Charter).*

[…]

In accordance with section 17.2(c) of the Charter we propose that the following steps are taken immediately to mitigate the Force Majeure:

- immediate release of Mr. Ashurov from prison;

- removal of the audit commission from the Company; and

- removal of the orders blocking our bank accounts.

[…]. (Exh. C-408, letter to Goskomgeology and NMMC)

657. On 20 March 2011, Sanoat issued a ***'Deed'*** (Exh. R-218) concluding as follows regarding its findings upon the Audit:

" ***Conclusions:***

During the inspection it was found out that the condition of industrial safety, ecological state and conditions of subsurface resources management are unsatisfactory.

Due to the fault of the administration of JV CJSC "Amantaytau Goldfields" some gross violations of the Law in the sphere of Environmental and Industrial Safety and in the sphere of Subsurface Resources Management were effected.

Proposal for the Administration:

1. It is necessary to consider and discuss the present Deed at the meeting of technical engineering personnel under control of the General Director.

2. General Director of the enterprise shall take some urgent measures for elimination of specified in this Deed violations of the Law of the Republic of Uzbekistan that may influence life and health of people and environment.

3. In accordance with article 9, paragraph 4 of the Occupational Safety and Health Law of the Republic of Uzbekistan it is necessary to suspend enterprise work till violations rectifying." (Exh. R-218)

658. On 22 March 2011, the Ministry of Finance issued its own findings regarding financial irregularities discovered during the Audit 2011 (Exh. R-96). Its 227 pages report, including appendices, identified alleged breaches by Claimant and AGF of legislative and contractual obligations.

659. On 22 March 2011, ORC[26] sent a letter to Mr. Turamuratov of Goskomgeology and Mr. Sanakulov of NMMC confirming its opposition to the efforts to liquidate the company and reasserting its declaration of *force majeure* (Exh. C-409). The letter contained in particular the following statements:

> *"*[…]
>
> *We further note that we consider the proposal to liquidate the Company, for which there are neither legal nor commercial grounds, to be a part of the campaign of the Uzbek authorities to harass us and our holding company, Oxus Gold plc and expropriate its investment in the country.*
>
> *Accordingly, any attempt to continue arrangements for the Meeting is a continuation of the campaign and an aggravation of the dispute under the* [BIT].
>
> *The notice of dispute and proposal to enter into appropriate negotiations under the* [BIT] *was communicated to the President of Uzbekistan on 10 March 2011.*
>
> […]
>
> *We also note, that we oppose the convocation of the Meeting, and any and all motions and proposals related to it. We will not attend the Meeting and therefore the Meeting will be inquorate and not legally effective.* […]*."*

660. On 30 March and 8 April 2011, an exchange of correspondence took place between ORC and Goskomgeology, in which ORC complained again against the 2011 Audit and the fact that it was prevented from operating. Goskomgeology insisted that an Extraordinary General Meeting of AGF be conveyed to discuss the liquidation of the joint venture (Exhs. C-22, C-412).

661. On 20 April 2011, the State Tax Committee issued its ***'Report on the audit on compliance with tax laws and other regulations at CJSC Amantaytau***

[26] Specific signatory not identifiable.

Goldfields' (hereinafter "2011 Audit Report") (Exhs. C-404/R-479) listing the various financial and operational irregularities discovered during the Audit.

662. On 11 May 2011, the State Tax Committee issued a ***Decree no. 09/1-2837 'On eliminating the breaches of the tax legislation'*** ordering Claimant to pay financial penalties based on the finding of the 2001 Audit Report (Exhs. C-426/R-481) (Resp. SoD.Class. 04.04.2013, para. 324).

663. On 30 May 2011, the Zarafshan City Tax Committee filed a claim with the Navoi Regional Economic Court for recovery of the fine imposed in the 2011 Audit of UZS 16,014,427,700 (Claim. SoC. 17.09.2012, para. 457). According to Claimant, it was not notified of this claim, which was only notified to AGF (Exh. C-415).

664. On 30 June and 29 July 2011, hearings were held before the Navoi Regional Economic Court for recovery of the fine imposed in the 2011 Audit. It is disputed to what extent Oxus was informed of such hearings (Exh. R-673).

665. On 30 September 2011, a further hearing was held before the Navoi Regional Economic Court. By letter of 19 September 2011, ORC had requested that such hearing be adjourned based on the fact that ORC had not yet received the Statement of Claim filed by Zarafshan City Tax Committee (Exh. R-673). It seems that the hearing nevertheless took place, though the judge adjourned the hearing to 18 November 2011 due to the absence of ORC (Exh. R-676).

666. On 18 November 2011, the Navoi Regional Economic Court held a hearing and issued its ***'Decision No. 21-1103/7987'*** ruling in favour of the Zarafshan City Tax Committee and ordered ORC to pay USD 8,5 million of fine (Exh. C-366):

> "[…] *the Court*
>
> ***HAS DECIDED:***
>
> *To satisfy the applicant's petition in full.*
>
> *To impose financial penalties to "Oxus Resources Corporation" on ground of Article 113 of the Tax Code of the Republic of Uzbekistan, in the amount of 16,014,427,700 Uzbek Soums.*
>
> *To collect from "Oxus Resources Corporation" the amount of state duty 497,350 Uzbek Soums to be payable to republic's budget, Fund for Development of Judiciaries and Justice Bodies.*
>
> *To collect from "Oxus Resources Corporation" the cost of postal fees 3,500 Uzbek Soums payable to State Tax Inspectorate of Zarafshan city.*

The parties who do not agree with this decision are entitled to appeal it, and the Prosecutor may file his protest, within ten days to the Appellate Panel of the Navoi Economic Court."

1.5.7 The Filing for Arbitration

667. On 24 May 2011, Claimant notified Respondent of its intention to start arbitration and to ultimately file a notice of arbitration on 31 August 2011 (Claim. SoC. 17.09.2012, para. 456).

668. On 31 August 2011, Claimant filed its Notice of Arbitration.

1.5.8 The Criminal Investigations Against Claimant's Staff

669. Around March-April 2011, according to Claimant, Mr. Salamatin, a former Director General of AGF, was forced to flee Uzbekistan because of persecution by Respondent.

670. On 6 March 2011, Mr. Ashurov, AGF's former Chief Metallurgist, was arrested allegedly attempting to remove classified information from the Republic of Uzbekistan relating to its mineral reserves. He was prosecuted by the National Security Service, an agency of the Ministry of Internal Affairs, before a military tribunal.

671. In May 2011, the Zarafshan Procurator's Office for the Navoi Region began criminal investigations against Mr. Yunusov, AGF's Deputy General Director and acting General Director, and Mr. Salamatin in relation to the tax payment and accounting irregularities found in the 2011 Audit Report (Exh. R-534) (Resp. SoD.Class. 04.04.2013, para. 327).

672. On 2 August 2011, Mr. Chinkulov, the Prosecutor, decided to include Mr. Narziev in the criminal investigation and, during the interview that day, Mr. Narziev confessed to the crime of tax evasion (Exhs. R-536, R-537) (Resp. SoD.Class. 04.04.2013, para. 328).

673. On 24 August 2011, Mr. Chinkulov also filed charges of tax evasion against Mr. Yunusov, AGF's Deputy General Director and acting General Director (R-542) (Resp. SoD.Class. 04.04.2013, para. 329). On the same day, Mr. Yunusov confessed to the crime of tax evasion and promised to indemnify the State for the damage caused by AGF's illegal conduct (Exhs. R-543, R-544) (Resp. SoD.Class. 04.04.2013, para. 329).

674. On 21 September 2011, as AGF failed to indemnify the State as promised by Mr. Yunusov, Mr. Chinkulov was granted a warrant for Mr. Yunusov's arrest from the Navoi City Court (Exhs. R-548-R-551) (Resp. SoD.Class. 04.04.2013, para. 330).

675. On 4 October 2011, Mr. Chinkulov charged Messrs Narziev and Yunusov with neglect of office under Article 207 of the Criminal Code and both confessed to this crime (Exhs. R-554, R-555) (Resp. SoD.Class. 04.04.2013, para. 330).

676. On 25 November 2011, Mr. Yunusov petitioned the Court to be released on bail and was released on bail on the same day (Exh. R-563) (Resp. SoD.Class. 04.04.2013, para. 331).

677. On 30 November 2011, Mr. Yunusov died of a stroke, hypertension and cerebral haemorrhaging (Exh. R-568).

678. On 14 December 2011, on application of Mr. Narziev, the Navoi Court granted him amnesty and dropped the charges against him (Exh. R-567) (Resp. SoD.Class. 04.04.2013, para. 331).

679. On 25 January 2012, Mr. Chinkulov filed criminal charges *in absentia* against Mr. Salamatin for, among other things, embezzlement in violation of Article 167 of the Criminal Code and petitioned the court to enter a warrant for Mr. Salamatin's arrest, which the court granted (Exhs. R-568-R-572) (Resp. SoD.Class. 04.04.2013, para. 332). Mr. Salamatin not being in Uzbekistan, the warrant could thus not be executed in Uzbekistan.

1.5.9 The Liquidation of AGF

680. On 27 August 2012, JSC Zarafshan-Shakhtastroy (hereinafter "Shakhtastroy"), a sub-contractor of AGF hired to perform underground works and whose invoices were unpaid – filed an application to commence involuntary bankruptcy proceedings against AGF (Exh. R-339) (Resp. SoD.Class. 04.04.2013, para. 334).

On 21 September 2012, the Navoi Regional Economic Court accepted Shakhtastroy's application and placed AGF under supervision, during which time a debtor's property is secured and its financial situation is analysed to determine the most appropriate course of action (Exh. R-340).

681. On 26 September 2012, the Navoi Regional Economic Court appointed Mr. Narzullayev as both interim manager and acting General Director of AGF, who proceeded with the liquidation proceedings (Exh. R-342). On 30 April 2013, Mr. Kazakov replaced Mr. Narzullayev as Liquidation Manager (Exhs. C-706 and C-

760) and ultimately on 4 March 2014, Mr. Bozorov was appointed as Liquidation Manager (Exh. C-760).

682. As of 10 November 2012, Claimant and the successive Liquidation Managers exchanged a number of letters concerning the liquidation proceedings of AGF as well as first, whether or not Claimant's Atlas Copco drill rig formed part of AGF's assets to be liquidated and second, how could Claimant then recuperate the drill rig (see Exhs. C-704-C-707 and C-740-C-767).

683. Further correspondence was exchanged between the Parties, which will be examined where necessary in the Tribunal's analysis.

IV. The AGF Claims in a Nutshell

1. Claimant's Claims

684. In short, Claimant claims that it did everything it could to make the AGF Project a success and invested millions of US dollars. However, Respondent unduly interfered with AGF's operations and prevented Claimant from running AGF profitably, in particular through the following key interferences:

(i) **Special Dividend Agreement of 2004**: Once Claimant found financing for Phase 1, which included the hedging of gold to Standard Bank at a price of USD 320 per ounce, Respondent forced Claimant into concluding the 'Special Dividend Agreement' under which Oxus had to reimburse Respondent *via* regular payments of 50% of the difference between the hedged price of gold and the higher spot price of gold of USD 410 by paying this amount into a 'Reserve Fund'. Until the signing of this Agreement, Claimant was prevented from exporting any precious metal. Claimant had an unconditional right to export gold as guaranteed in various legal instruments, and thus Respondent's refusal to recognize the validity of the hedged price of gold was illegal, as was Respondent's blocking of exports of AGF's gold so as to unduly pressure Claimant into agreeing to the Special Dividend and absorbing the price difference. Respondent eventually filed court proceedings to enforce the amount due under the Special Dividend Agreement of over USD 10,8 million, although it agreed to stay these proceedings during the conduct of the arbitration proceedings (Claim. PHB II. 21.08.2014, para. 99 and thereto included references to earlier submissions).

(ii) **Refusal to approve the Feasibility Study for Phase 2 and to renew necessary licenses**: After the completion of Phase 1, Claimant worked on a Feasibility Study for Phase 2, which was eventually issued by WAI in June 2008. According to Claimant, Respondent refused to approve this Feasibility Study, among others, because it claimed the financing of Phase 2 was not sufficiently laid out in the Feasibility Study. However, this put Claimant in a catch-22 position, because Claimant could not obtain financing without first getting its Feasibility Study approved. Thus, Respondent's refusal to approve the Feasibility Study prevented Claimant from obtaining advantageous financing. In addition, after modifying the regime applicable for issuing mining licenses by **Decree No. 76**, Respondent refused to renew Claimant's Exploration, Mining and Cyanide Licences, which caused additional difficulty in obtaining financing and planning for Phase 2. This refusal to issue or renew relevant licenses were all the more serious as Respondent knew that it was hampering Claimant's chances of securing financing for Phase 2 (Claim. PHB II. 21.08.2014, paras. 103 fol., and thereto included references to earlier submissions).

(iii) **Changes in 2006, 2009 and 2011 of the Tax Regime**: Claimant further complains that Respondent modified the applicable tax regime by revoking AGF's exemption of VAT tax and other privileges through the **Decrees No. 477, No. 266, No. 74 and No. 133**. By revoking these privileges, Respondent breached prior commitments, including the stabilization clause, and made it impossible for Claimant to operate AGF profitably. As concerns the 2006 changes, Respondent's contentions that these privileges were not limited in time and could therefore be limited, or that the revocation of such privileges was justified by Claimant's alleged underperformance, are artificial and post-factum arguments without legal or factual basis (Claim. PHB II. 21.08.2014, para. 108, and thereto included references to earlier submissions). As concerns the 2009 changes, which affected the VAT regime, these changes were also in breach of the stabilization clause and were further discriminatory as they *de facto* applied only to Claimant (Claim. PHB II. 21.08.2014, paras. 109 fol., and thereto included references to earlier submissions). As concerns the 2011 changes, these changes were done without providing legitimate justification and made it impossible for CITIC or any other potential financier to feel comfortable in supporting the investment (Claim. PHB II. 21.08.2014, para. 112, and thereto included references to earlier submissions).

(iv) **Interference with operations through the 2006 and 2011 State Audits and unjustified Court Proceedings:** Claimant complains that Respondent unduly interfered with AGF's operations by conducting two complex and time-consuming audits, which were partly without legal basis and the conclusions of which were unfounded. After the first State Audit in 2006, the State Tax Committee imposed a fine on AGF and Oxus of over USD 225 million. While Claimant appealed against this finding and eventually succeeded in annulling most of them, AGF's assets were frozen by the court and AGF was thereby prevented from operating and paying its suppliers and other sub-contractors. This caused major damage to AGF and Claimant (Claim. PHB II. 21.08.2014, para. 100 and thereto included references to earlier submissions). The second State Audit, conducted in 2011, i.e. only two days after the new tax regime came into effect on 1 January 2011, had no legal basis and was conducted under undue pressure on AGF's employees, including disproportionate searches, abuse of AGF employees, aggressive interrogations, intimidation and threats of imprisonment. In addition, it had the result of turning off financial institutions which were potentially interested in financing Phase 2, including RBS, Nedbank and the CITIC Consortium. These events eventually caused Claimant to declare *force majeure* on 18 March 2011, shortly before several expatriate employees of AGF had to leave Uzbekistan out of fear for their safety (Claim. PHB II. 21.08.2014, paras. 114 fol., and thereto included references to earlier submissions).

(v) **Interference with operations by forcing AGF to sub-contract the Silver Refining to AMGK**: Respondent forced AGF to refine silver at AMGK's Silver Refinery, even though AMGK was not able to comply with the requested quality standards and refine sufficient quantities of silver. While Claimant found a company, Metalor of Switzerland, which could refine the doré bars of AGF, Respondent refused that Claimant do so and requested that it first organize a cumbersome tender, which could not take place within the time frame requested. Even where AGF was under heavy financial pressure, Respondent refused that Claimant proceed with a one-off sale of certain silver quantities without organizing first a tender for the sale of such silver (Claim. PHB II. 21.08.2014, para. 102 and thereto included references to earlier submissions).

(vi) **Initiation of criminal investigations against AGF staff**: After the issuance of the 2011 Audit Report, the prosecutor of Navoi Region, Mr. Chinkulov, started criminal investigations against three employees of AGF, Mr. Yunusof, AGF's Deputy Director, Mr. Narziev, AGF's Chief Accountant and Mr. Salamatin. While Mr. Yunusof and Mr. Narziev were forced to confess to certain crimes, Mr. Salamatin fled to Kazakhstan and then to his home country, Russia, out of fear for his safety. Mr. Yunusof died a few days after having been released on bail. According to Claimant, these investigations were part of an intimidation scheme organized by Respondent (Claim. PHB II. 21.08.2014, paras. 115 fol., and thereto included references to earlier submissions).

(vii) **Undue pressure to voluntarily liquidate AGF and the initiation of formal liquidation proceedings**: Claimant further complains that it was put under undue pressure by Goskomgeology and NMMC to liquidate AGF, whilst most of the debt of AGF was actually owed to Claimant itself. After Claimant resisted the pressure to put AGF into voluntary liquidation, Respondent arranged for an Uzbek sub-contractor of AGF, Shakhtastroy, to commence bankruptcy proceedings. These liquidation proceedings were and are still conducted irregularly and eventually deprived Claimant of its investment in AGF (Claim. PHB II. 21.08.2014, paras. 113 and 119, and thereto included references to earlier submissions).

685. According to Claimant, these acts and omissions of Uzbekistan have led to the unlawful expropriation, or equivalent measure thereto, or alternatively to the unlawful creeping expropriation of Claimant's investment in AGF, and in any event to an expropriation or a measure equivalent thereto without prompt, adequate, and effective compensation, in breach of Article 5 of the BIT (Claim. Am.Reply. 23.08.2013, para. 1266; Claim. PHB II. 21.08.2014, para. 64).

686. Alternatively, Claimant contends that each of these acts and omissions constitutive of expropriation or equivalent thereto also constitute individually, let alone collectively, a breach of the following obligations of Respondent under the BIT (Claim. Am.Reply. 23.08.2013, paras. 1267 fol.):

(i) Breach of the FET standard for breach of Claimant's legitimate expectations, lack of transparency and breach of good faith obligations;

(ii) Breach of the obligation not to impose unreasonable and arbitrary measures on Claimant;

(iii) Breach of the obligation to provide full protection and security for Claimant's investments;

(iv) Breach of the umbrella clause through the failure to observe specific undertakings towards Claimant, in particular in connection with the revocation of tax privileges and the refusal to issue and renew AGF's licenses;

(v) Breach of the obligation not to impose discriminatory measures on Claimant, in particular with regard to the revocation of tax privileges and Special Dividend Agreement.

687. Finally, Claimant also contends that separate breaches of these obligations have also been committed by Respondent in relation to (i) the Guarantee Letters and the Special Dividend Agreement, (ii) the purchase of the silver refinery, (iii), the purchase of the drill rig, and further give rise to separate and additional claims (Claim. Am.Reply. 23.08.2013, para. 1268).

688. Based thereon, Claimant requests a total amount of approx. **USD 552 million**, composed of the following sub-parts (see above para. 133):

(i) USD 431,8 million as compensation for the loss suffered in relation to the AGF Deposit Phase 1 and Phase 2 (this claim is based on a valuation date as of the date of the award and a full expropriation scenario; Claimant has filed various alternative claims set out above in para. 133);

(ii) USD 2,562,599.99 as compensation for expropriation of the Atlas Copco drill rig;

(iii) USD 752,385.47 for the silver refinery purchased from Italy;

(iv) USD 117 million for loss sustained by Claimant due to its deprivation of the exploration area adjacent to the AGF Deposit; and

(v) USD 2 million for moral damages.

2. Respondent's Defense and Counter Claims

689. In contrast, Respondent rejects all of Claimant's claims.

690. Firstly, Respondent contends that the Arbitral Tribunal does not have jurisdiction over Claimant's claims in respect to the AGF Project, which is grounded in

misrepresentation, fraud, illegality or bad faith (Resp. SoD.Class. 04.04.2013, para. 354; Resp. Am.Rej. 21.02.2014, para. 865; Transcripts of 28 April 2014, 185:24 - 186:2; Resp. PHB II. 21.08.2014, paras. 7 fol.). According to Respondent, Claimant procured its investment in AGF (i) by misrepresenting its financial capacity to finance Phase 1 of the AGF Project through its own or raised funds without burdening AGF with interest-bearing loans, (ii) through funds that it obtained as ill-gotten gains from securities fraud, in violation of its duties of good faith, disclosure, and candor, as well as applicable currency laws, and (iii) once the State approved its investment in AGF, Claimant then caused the investment to fail and unjustly enriched itself and its affiliates through self-dealing, fraud, and other serious violations of Uzbek law (Resp. Am.Rej. 21.02.2014, para. 848). For all these reasons, the Arbitral Tribunal should find that it does not have jurisdiction over this dispute and that all of Claimant's claims are inadmissible.

691. Secondly, Claimant's claims would fail on the merits because Respondent was fully justified, either as a result of Claimant's own failures or violations of law, or for other valid reasons, in carrying out all of the acts about which Claimant now complains:

(i) Claimant structured the JV so that it could manage AGF inefficiently and it would profit from inflated, related-party transactions (Resp. SoD.Class. 04.04.2013, paras. 140 fol., 176 fol.). As a result, Claimant and its affiliates made significantly more money than Claimant projected in its Feasibility Study, without making any substantial investment, while Respondent made far less money than Claimant projected and only approximately half of what Claimant made. Claimant thus enjoyed the full benefit of its alleged investment (Resp. PHB II. 21.08.2014, para. 11).

(ii) AGF's privileges and benefits, including its stabilization guarantee, were conditioned on its compliance with Uzbek law, as well as on its proper implementation of the Project. However, AGF repeatedly failed to comply with the approved technical and economic parameters of the Project, and thus was in default of the obligations on which its privileges and benefits were conditioned. The State thus determined that AGF's privileges and benefits no longer were justified and should be revoked (Resp. PHB II. 21.08.2014, para. 14, Transcript of 1 May 2014, 834:20 – 836:11 [Mrs. Malkina]).

(iii) AGF's failures are not attributable to Respondent, but rather to Claimant's own self-dealing, fraud, theft and mismanagement (Resp. PHB II. 21.08.2014, para. 11).

692. As concerns the legal arguments brought forward by Claimant:

(i) *As concerns Claimant's claim for expropriation*: Respondent did not expropriate any investment of Claimant in AGF, because Claimant's investment in AGF was its 50% shareholding, which Claimant continues to hold today. Respondent's actions, moreover did not deprive Claimant of the management, use, control, or value of its investment. Claimant, through its management and control of AGF, fully exhausted all of the easily accessible and close-to-surface oxide ores Phase 1, and caused AGF to go bankrupt. In respect to Phase 2, Claimant never presented an economically acceptable and Bankable Feasibility Study, and thus never obtained any rights to develop Phase 2 (Resp. Am.Rej. 21.02.2014, para. 866).

(ii) *As concerns Claimant's claim for breach of FET and arbitrary and unreasonable measures*: Respondent did not violate its obligations because all of Respondent's actions were reasonable and justified in the circumstances, and complied fully with Uzbek law (Resp. Am.Rej. 21.02.2014, paras. 887 fol.).

(iii) *As concerns Claimant's claims for discriminatory treatment*: Claimant's claims of unreasonable and arbitrary measures fail, because, in taking the corrective measures that it took with respect to AGF, Respondent acted in all respects within its legal rights, for rational reasons, and did not act disproportionately or contrary to the rule of law. In addition, Claimant failed to establish that the incriminated measures were directed specifically against Claimant by reason of its nationality (Resp. Am.Rej. 21.02.2014, paras. 913 fol.).

(iv) *As concerns Claimant's claim for breach of the FPS standard*: This standard concerns the host State's obligation to exercise reasonable care in protecting the investment from the actions of third parties, and applies essentially "*when the foreign investment has been affected by civil strife and physical violence*" (see *Saluka v. Czech Republic*, para. 483 (Exh. RL-291)) In the present case, this standard does not apply, because Claimant has not alleged, not has there been, any physical seizure or physical interference with its investment in AGF by a third party (Resp. Am.Rej. 21.02.2014, paras. 922 fol.).

(v) *As concerns Claimant's claim for breach of the umbrella clause* : The umbrella clause is not applicable because Claimant is not a party to any of the instruments on which it relies for its umbrella clause claims. The obligations assumed in these instruments run only to AGF, and not to Claimant. In other words, there is no undertaking to be honored by Respondent with respect to Claimant in those instruments. In addition, the concerned matters are of purely contractual nature and do not rise to the level of treaty claims (Resp. Am.Rej. 21.02.2014, paras. 927 fol.).

693. As concerns Claimant's damage claim, Respondent contends that it should be rejected for it is speculative and further based upon flawed data and analysis (Resp. PHB II. 21.08.2014, paras. 58 fol.). In addition, Claimant's claim for moral damage is without legal or factual basis (Resp. Am.Rej. 21.02.2014, paras. 972 fol.).

694. Respondent further raises a counter-claim in the amount of USD 109 million in compensation for damages caused by Claimant's misconduct, including (i) Claimant's misrepresentations as to financing of the AGF Joint Venture; (ii) Claimant's waste of natural resources; (iii) Claimant's breach of the Special Dividend Agreement; (iv) Claimant's engagement in self-dealing and related-party transactions; and (v) Claimant's currency law violations and corresponding failure to provide promised foreign currency and other benefits. Respondent requests that this Counter-claim be set off with any award of damages granted to Claimant (Resp. PHB II. 21.08.2014, paras. 61 fol.).

V. The Arbitral Tribunal's Analysis

1. The Key Issues

695. In view of the Parties' positions, the Arbitral Tribunal considers the following questions to be key in assessing Claimant's claims over the AGF Project:

(i) With regard to Claimant's claims:

(1) Are Claimant's claims admissible?

(2) If so, do the above-mentioned alleged key interferences by the Uzbek State amount to an expropriation, either direct or indirect, in the sense of Article 5 of the BIT?

(3) (a) If expropriation, was this expropriation justified or not? What are the consequences of such finding on the duty to compensate?

(b) If no expropriation, do these interferences individually or collectively constitute a breach of (i) the FET under Article 2 of the BIT including the prohibition of unreasonable, arbitrary or discriminatory action, (ii) the FPS standard under Article 2 of the BIT, and/or (iii) the umbrella clause of Article 2(2) *in fine* of the BIT?

(4) If breach of the BIT, what is the appropriate measure of damages to be afforded to Claimant? And, in particular, is Claimant entitled to moral damages ?

(ii) With regard to Respondent's counter-claims:

(5) Does the Arbitral Tribunal have jurisdiction over Respondent's counter-claims? If so, are these counter-claims well founded?

(6) If so, what is the appropriate amount of damage to be afforded to Respondent and to what extent can this amount be set-off with the amount of damages, if any, to be afforded to Claimant?

(7) In case of damages awarded to Claimant, what interests – if any – apply thereon ?

2. With Regard to Claimant's Claims

2.1 Issue No. 1: Admissibility of Claimant's Claims

2.1.1 The Parties' Positions

2.1.1.1 Respondent's Position

696. According to Respondent, Claimant's claims with respect to the AGF Phase 1 should be rejected on jurisdictional and admissibility grounds (Transcripts of 28 April 2014, 185:24 - 186:2; see Resp. PHB I. 21.07.2014, section III and Resp. PHB II. 21.08.2014, section IV; Resp. Am.Rej. 21.02.2014, paras. 840 fol.).

697. Respondent justifies its position based on the following four main arguments:

(i) *Claimant made its alleged investment in AGF through misrepresentations and its IPO fraud* (Resp. PHB II. 21.08.2014, paras. 23 fol.): Claimant misrepresented to Respondent that the entire AGF Project would be financed by Oxus through equity financing and by providing AGF with interest-free loans without attracting bank debt financing. Claimant breached this commitment, which was contemplated in Decree No. 266, by concluding a loan agreement with Standard Bank, which did not require equity, and instead resulted in onerous lending conditions, including hedging for AGF. In addition, Claimant also made its investment through securities fraud and violation of the UK securities regulations, as established by the judgment of the High Court of Justice of England and Wales of 27 April 2006 (Exh. R-500).

(ii) Claimant obtained ill-gotten profits and deprived AGF and Respondent of foreign currency revenue through fraudulent self-dealing (Resp. PHB II. 21.08.2014, paras. 29 fol.): The Uzbek State never received from AGF the dividends and economic benefits that Claimant promised. According to Respondent, Claimant represented that based on the Amended Phase 1 Feasibility Study of 24 January 2003 (see above para. 427), the State would receive USD 37,54 million in dividends during Phase 1, based on projected revenues of USD 223.30 million. Although AGF earned USD 314,58 million during Phase 1 – USD 91 million more than projected – AGF declared only USD 4,60 million in dividends for the Uzbek parties, and paid only USD 3,66 million of that amount. While Claimant thus made many millions of dollars, without investing any cash, AGF struggled to maintain solvency under Claimant's management. According to Respondent, this was the result of Claimant's exaggerated management fees which arose out of Claimant's self-dealing with related entities such as MAED, BCM and BDO Isle of Man.

(iii) *Claimant obtained ill-gotten profits and deprived AGF and Respondent of foreign currency revenue through the MRT slush fund* (Resp. PHB II. 21.08.2014, para. 43 fol.)*:* The relationship between AGF and MRT was a related-party relationship and the MRT Consulting Contract concluded between them a sham contract serving to divert foreign exchange revenue from AGF and Respondent into a slush fund for Claimant. Claimant used this fund to pay bonuses to insiders and not to provide legitimate services to AGF under the MRT Consulting Contract, which Claimant moreover failed to submit to the General Meeting of the Shareholders for approval or to register with an authorized bank as required under Uzbek law. In addition, payments made to MRT exceeded the maximum value contemplated by the MRT Consulting Contract and its amendments, an irregularity which was spotted during the 2006 Audit (see above paras. 484, 535) and which

Claimant tried to hide by attempting to destroy relevant invoices from MRT (see Wilkins, Transcripts of 29 April 2014, 384:3 - 384:6).

(iv) *Claimant operated AGF in violation of Respondent's currency laws* (Resp. PHB II. 21.08.2014, para. 52)*:* Before Decree No. 266 was issued, granting Claimant any right to participate in the AGF Joint Venture, Claimant was notified and understood the restrictions of Uzbek law regarding AGF's use of its foreign currency as contemplated in the Law on Currency Regulations (see above para. 38) and expressed in the Central Bank's communications (see above para. 50, 406 and 556). Notwithstanding these restrictions, Claimant continued to manage its foreign currency and in particular the Barclays Bank Account in violation of thereof, namely by paying itself and its affiliates for imported goods and services through this offshore bank account, rather than through an authorized Uzbek bank as required by law.

698. In light of Claimant's substantial violation of law which relate directly to the manner in which Claimant obtained and implemented its investment in AGF, and in particular taking into account the duration and scope of unlawful activity, as well as the harm caused to the State, Claimant cannot invoke Treaty protection for its illegality-infused investment based on the following main legal principles (Resp. PHB II. 21.08.2014, para. 59; Resp. Am.Rej. 21.02.2014, paras. 841 fol.):

(i) An investment procured in violation of host State law or in violation of the fundamental requirements of good faith and fair dealing is not entitled to the protections of investment treaties and international arbitration, even where the applicable treaty does not contain an express legality clause requiring compliance with host State law (see e.g. *Quiborax v. Bolivia* and *Metal-Tech v. Uzbekistan*). In casu, although the BIT does not expressly provide for a legality clause, it does in Article 2(1) of the BIT recognize the importance of host State law and the Republic's Law on Foreign Investment further expressly conditions the extension of benefits and protections on the investor's compliance with host State law. Thus, consistent with international law and public policy, the Republic's regime for the protection of foreign investment is available only to investments that are obtained in accordance with Uzbek law (Resp. Am.Rej. 21.02.2014, para. 844); and

(ii) A claimant with unclean hands may not seek relief for claims arising out of its own unlawful conduct.

699. Under similar circumstances, numerous tribunals in commercial and investment treaty arbitrations have rejected claims grounded in misrepresentation, fraud, illegality or bad faith (see *Phoenix Action v. Czech Republic*; *Plama v. Bulgaria*; *Inceysa v. El Savlador*; *World Duty Free v. Kenya*; *SIREXM v. Burkina Faso;*

Hamester v. Ghana; *SAUR v. Argentina; Quiborax v. Bolivia*) (Resp. Am.Rej. 21.02.2014, paras. 843 fol.).

700. For all these reasons, the Arbitral Tribunal lacks jurisdiction over Claimant's AGF claims (as Respondent did not consent to arbitrate disputes arising out of investments that were made or operated in violation of its laws) and/or those claims are inadmissible (Resp. PHB II. 21.08.2014, para. 7; Resp. PHB I. 21.07.2014, para. 22).

2.1.1.2 Claimant's Position

701. Claimant rejects Respondent's factual and legal allegations underlying its jurisdictional objections.

702. *As concerns the argument of misrepresentatio*n, Claimant contends that this argument is artificial as it was raised long after the fact and was never raised by Respondent during the implementation of the Project or even in the early written legal submissions. Thus, this argument should be dismissed right away. In addition, in order to succeed with this argument, Respondent would need to establish that the alleged misrepresentation actually related to a 'material fact', which was intended to induce Respondent to host an investment that it otherwise would not have accepted, and that Respondent actually relied on the misrepresented information when making its decision to allow Claimant to become a majority shareholder of the joint venture. However, Respondent failed in the very first step of this test, as it has not shown that Claimant ever represented that it would finance Phase 1 exclusively through equity and not through any other means. In fact, it arises out of various key documents, such as the Decree No. 266, the Decree No. 477, the AGF Charter, AGF Minutes of General Shareholders Meetings, public statements made in Claimant's AIM listing prospectus, State correspondence (e.g. Exhs. C-597, R-1096. R-421, R-422) that Respondent was well aware that Claimant intended to use debt finance and Respondent never once raised this as an issue or claimed that it had been deceived into allowing the investment on the basis of any purported misrepresentation (Claim. PHB II. 21.08.2014, paras. 68 fol.).

703. *As concerns Respondent's reliance on other purported illegalities, including securities fraud and related-parties transactions,* even if – arguendo – the Arbitral Tribunal were to consider that there were illegalities in the making of Claimant's investment (which Claimant denies), then Respondent still failed to establish that any of these alleged wrongdoings took place at the inception of Claimant's Uzbek investment or were instrumental in securing the investment so as to deprive the Arbitral Tribunal of competence or render the claims inadmissible under the very high "illegality threshold" (Claim. PHB II. 21.08.2014, para. 74).

704. In particular:

(i) The UK High Court decision did not make any finding of securities fraud, nor did any other financial institution make such finding, nor for that matter White & Case who were back then involved as representatives of Zeromax (Claim. PHB II. 21.08.2014, paras. 73 fol.).

(ii) As concerns the allegations of exaggerated management fees, these fees charged by Oxus were discussed and agreed with Respondent (Exh. C-606) and in any event they were not "exorbitant", but rather were the necessary and reasonable result of having to adapt to the increased costs of producing gold when, after the start of production, it became clear that the quality of the ore was not what it was expected to be, thus triggering higher operating costs which are not in any way the result of alleged and uproven self-dealing. Claimant had no incentive whatsoever to inflate AGF's operating costs, as this would be very short-sighted and naturally hamper bringing Phase 2 into life, and thus harm Claimant's interest in the investment in the same way as it would harm Respondent's (Claim. PHB II. 21.08.2014, para. 79).

(iii) As concerns the allegations of self-dealing with MAED, the payment irregularities were discussed and settled at AGF's General Shareholders Meeting of October 2003 (see above para. 436). As concerns Respondent's allegations with regard to BDO, they would be simply unfounded (see Claimant's letter of 25 July 2014; Claim. PHB II. 21.08.2014, para. 80 and 81; Claim. Am.Reply. 23.08.2013, paras. 508 fol.).

(iv) As concerns the allegations with regard to the MRT 'slush fund' they are also unfounded. The dealings with MRT were legitimate contractual arrangements designed to allow AGF to employ expatriate workers required for the Project, and occasional overpayment issues were dealt with and settled between the shareholders at the Shareholders Meeting of 15 June 2006 (Exh. C-626) (see Wilkins, Transcripts of 29 April 2014, 382:24 - 383:15; Claim. Am.Reply. 23.08.2013, paras. 536 fol.).

(v) As concerns the allegations that Claimant operated AGF in violation of Respondent's foreign currency laws, this issue was also settled between the Parties, in particular through the letter of the Central Bank of 7 March 2008. Even if the Arbitral Tribunal considered that there was some instance of illegality or impropriety by Claimant, it also fell to the State, represented by the Uzbek Parties, as the 50% shareholder to cooperate with and assist Claimant to manage AGF in compliance with Uzbek law. However Respondent failed to provide such assistance. Finally, any finding of impropriety could in any event not be used to invalidate Claimant's claims since they do not go to the making of the investment, but rather to the measure of damages to which Claimant would be entitled to (Claim. PHB II. 21.08.2014, paras. 84 fol.; Claim. Am.Reply. 23.08.2013, paras. 552 fol., 698 fol.).

2.1.2 The Arbitral Tribunal's Findings

2.1.2.1 The Applicable Legal Standard

705. Respondent's jurisdictional and admissibility objections are based on three main arguments relating to (i) Claimant's alleged misrepresentation regarding the means of financing of the AGF Project, (ii) Claimant's obtaining of allegedly ill-gotten profits through illegal self-dealings and transactions aimed at increasing operating costs and reducing tax revenue, as well as (iii) Claimant's breach of relevant currency regulations. Under these circumstances, Respondent contends that Claimant's investment does not qualify for protection under the BIT and that the Tribunal therefore either lacks jurisdiction or that Claimant's claims are inadmissible.

706. The Arbitral Tribunal agrees with the analysis made in *Phoenix Action v. Czech Republic* (Exh. RL-280, paras. 101 fol.), *Plama v. Bulgaria* (Exh. RL-281, paras. 138 fol.), *Inceysa v. El Salvador* (Exh. RL-251, paras. 229 fol.), *Hamester v. Ghana* (Exh. RL-242, para. 123), *SAUR v. Argentina* (RL-292, para. 308) that an investment may not qualify for protection under a BIT, where such investment was made in breach of relevant laws and regulations, including international treaties but also national law of the host State.

707. In order to lose the protection under the BIT, it is however necessary, as largely agreed in the above cited cases, that the illegality affects the "making", i.e. arises when initiating the investment itself and not just when implementing and/or operating it (see in particular *Hamester v. Ghana* (Exh. RL-242, para. 127) and *Inceysa v. El Salvador* (Exh. RL-251, para. 239)).

2.1.2.2 The Application of the Legal Standard to the Present Case

708. Among the three types of reproaches formulated by Respondent, only the first one, i.e. the misrepresentation regarding the type of financing that Oxus would resort to, relates to the period before or during which Oxus made its investment, i.e. acquired its shares in AGF.

709. As such, the Arbitral Tribunal finds that only this argument is relevant to determine whether Claimant's investment qualifies for protection under the BIT. As concerns Respondent's contentions regarding allegedly ill-gotten profits through the unlawful operation of AGF and the violation of currency regulations, they are irrelevant for the issue of jurisdiction or admissibility. They may nevertheless be relevant when assessing the justifiable character of certain of Respondent's actions, which Claimant claims are in breach of the BIT protection standards or as an element of the evaluation of damages and will thus, to the extent necessary, be examined in such contexts (see below para. 714).

710. The relevant period for the question of admissibility of Claimant's claim is therefore the period extending from August 1999 (see above para. 47 when ORC entered into the share purchase agreement with Lonrho to July 2001, when Oxus acquired all of ORC's share capital (see above para. 57) after ORC signed the Revised AGF Charter (1) with the Uzbek Parties in July 2000 (see above para. 52).

711. When examining the relevant documents issued and signed during this period, it appears that whilst such evidence shows an intent of Oxus to use equity financing as important means of financing, Claimant did not provide a formal commitment to only resort to such kind of financing. On the contrary, various relevant documents expressly refer to "loans" and "debt financing" as alternative ways of financing:

(i) AGF's internal documents expressly referred to both types of financing as follows:

- Clause 2.2 lit. (β) (c) of the Revised AGF Charter (1) provided as one of the activities of the Joint Venture "to provide equity capital from the shareholders and **loan finance from international financial institutions and commercial banks** required in connection with the objectives of the activity of the Company" (emphasis added) (see above para. 52) (Exh. C-212);

- The Minutes of the AGF's General Shareholders'Meeting of 28 July 2000, during which Mr. Turner reported about "the situation with bankable feasibility study (FS) of AGF for the Stage 1 and proposed work program for completion of the FS and **debt financing"** and expressly referred to **the need to obtain "debt financing"**, (see above para. 457) (Exh. R-400).

- The CSMA Bankable Feasibility Study for Phase 1 of 11 August 2000 provided that "[u]ngeared, the cash cost of production per ounce is $112, the direct production cost is $177.24, and the total (taxed) cost is $202. This implies a break-even gold price for the Project of approximately $225 per ounce, **if contingency is allowed for shareholder or bank loan interest**." (Exhs. R-281/C-526, emphasis added) (see above para. 408).

(ii) Various documents issued by Respondent also referred to the possibility of resorting to loan financing:

- Decree No. 477 of 22 September 1994 envisaged in Article 2 that "the creation of the enterprise will be carried out by subscriptions of foreign participants and **bank credits** which are obtained by the Joint Venture" and Article 4 further provided the Joint Venture the right "**to receive and repay credits** in freely convertible currency, and to **secure such credits** with the Joint Venture's property in accordance with the Legislation of the Republic of Uzbekistan" (emphasis added) (Exh. C-215; see above para. 39);

- Decree No. 266 of 11 July 2000 provided in Article 4 that as concerns the implementation of the Project "the capital costs at the first stage represent 53.1 million US dollars and can be made by Oxus Resources Corporation in the form of direct investments from its own **and attracted funds**" (Exh. C-213; emphasis added), whereby it shall be noted that Respondent's translation of this document refers to "raised funds" instead of "attracted funds" (Exh. R-573). The Arbitral Tribunal does not consider this difference in wording to be crucial, since even the terms "raised funds" may include loan financing. This is all the more so, as Mr. Maksudov's letter of 1 August 2000 addressed to ORC and AGF (see above para. 408) and interpreting Decree No. 266 specifically stated that: "[Decree No. 266] does not restrict [AGF] in obtaining loans from a third party provided any such loans obtained to conduct the JV activity at stage I are arranged by [ORC] and do not require guarantees of the Government of the Republic of Uzbekistan." (emphasis added) (Exh. C-597).

(iii) Various correspondence with the Uzbek Government also included mentions of debt financing:

- Goskomgeology's letter of 18 June 2001 to the CabMin reported about the status of financing of the Project and provided that "[t]*he negotiations with Barclays Bank and Société Générale Bank* ***on the loan for the project*** *are in the final stage (issues of the bank interest rate for the loan are being discussed)"* and "[s]*o far, the Ministry of Finance and the State Tax Committee are pending the Provision on taxation of "Amantaytau Goldfields" JV,* ***which is required to be submitted to the banks for obtaining loans****.*" (emphasis added) (Exh. R-1096) (see above para. 412).

- The CabMin's letter of April 2002, referring to Decree No. 266 and Oxus' listing in June 2001, informed the Prime Minister, Mr. Sultanov, on various financing issues and stated among others as follows: "[t]*o arrange implementation of I Stage of the project, which envisages construction of facilities to process 1 million tonnes of oxides and average production rate of 2.1 tonnes of gold a year,* ***the investor has negotiated to get a loan*** *from Société Générale Bank in the amount of US$31 million. On 2 April this year SocGen signed a written commitment to give the JV US$31 million loan"* (emphasis added) (Exh. C-421).

712. Referring to this correspondence, it is noteworthy that none of the evidence submitted by the Parties reflect any contemporaneous complaint by Respondent regarding such debt financing. Respondent either directly or through the Uzbek Parties was aware of the loan financing, and yet it did not raise this as an issue. Thus, even if there had been an expectation on Respondent's side that Claimant would resort solely to equity financing (which does not appear as being the case), Respondent has in any event failed to establish that it relied on such expectation. Respondent had certainly a reasonable expectation to make profit out of the AGF Project and it is undisputed that this expectation was ultimately not met, for which Respondent partly blames the heavy loan financing between Oxus and AGF. However, this does not affect the 'legality' of the investment as such, and is a question that relates to how Claimant was operating AGF and to whether such operation may have justified certain interventions by Respondent which Claimant contends constitute breaches of the BIT protection standards. As such, the question of the appropriateness of the ways in which Claimant operated AGF is a question which relates to the merits of the case and not to the issues of jurisdiction or admissibility.

2.1.3 Conclusion

713. In conclusion, Respondent's jurisdictional and admissibility objections towards Claimant's AGF claims are unfounded and hereby rejected. Claimant's AGF claims are admissible and the Tribunal has jurisdiction thereover.

2.2 Issue No. 2: Do Respondent's Actions and Omissions Amount to an Expropriation in the Sense of Article 5 of the BIT?

2.2.1 The Parties' Positions

2.2.1.1 Claimant's Position

714. According to Claimant, Uzbekistan commited a textbook unlawful expropriation of Claimant's investement in AGF, in breach of Article 5 of the BIT.

715. Claimant contends that the February-March 2011 Audit alone constituted a decisive act of *de facto* expropriation under international law, let alone when assessed with the other acts and omissions that occurred, be it during the prior six months period, or throughout the longer preceding period of the Audit, as it led to the cessation of work and deprived Claimant of the use, enjoyment and value of its property – and this irrespective of whether this was intended and/or in compliance with domestic laws (Claim. Am.Reply. 23.08.2013, para. 1270; Claim. PHB I. 21.07.2014, para. 137). These acts included in particular the following elements (Claim. Am.Reply. 23.08.2013, para. 1271):

(i) The decision to conduct the 2011 Audit was not duly motivated by the relevant State organs and thus in breach of Article 12 of Law No. 717-1;

(ii) The failure of Respondent to issue and/or renew Claimant's licenses, which led Claimant to a state of incapacity to conduct its mission and which constitutes *de facto* expropriation (*Metalclad v. Mexico (CL-93) & Tecmed v. Mexico (CL-80)*);

(iii) The failure of Respondent to provide Claimant with good faith assistance to close financing and the acts it committed during the relevant period, i.e., September to December 2010, which led to the failure of the Project financing by CITIC.

716. These acts led to the 18 March 2011 declaration of *force majeure*, namely Claimant's deprivation of the management, use, control and value of its investment in AGF, and justifies in and of itself a finding of expropriation against Respondent. It is irrelevant under international law whether the above acts by Respondent were driven by bad intentions. The same applies as to whether or not these acts comply with local laws. What matters is international law, which considers the impact of the acts in question, which in the present case have clearly deprived Claimant of the use, enjoyment and value of its investment (Claim. Am.Reply. 23.08.2013, para. 1272; Claim. PHB I. 21.07.2014, paras. 137 fol.).

717. This finding of an unlawful expropriation is moreover reinforced if considered in the light of Respondent's other acts and omissions which occurred during the previous period. Respondent's earlier breaches of the BIT progressively weakened Claimant's position from all perspectives, including legally, financially and commercially, at the time it came to be confronted with Respondent's acts and omissions occurring during the September 2010 to March 2011 period and thus reduced the possibility, if any, of mitigation thereof or resistance thereto (Claim. Am.Reply. 23.08.2013, para. 1273).

718. Alternatively, Claimant submits that Respondent, through its acts and omissions during the September 2010 to March 2011 period taken together with the prior acts and omissions, namely those occurred from 2004 to 2010, and in particular those in 2006 (see Claim. PHB I. 21.07.2014, paras. 120 fol.) committed an unlawful creeping expropriation, which justifies a finding of expropriation under Article 5 of the BIT. In other words, the cumulative effect of these acts and omissions was the substantial deprivation of the management, use, control and value of Claimant's investment by March 18, 2011, the date of Claimant's declaration of *force majeure*.

719. These acts and omissions include *inter alia* the following (Claim. Am.Reply. 23.08.2013, paras. 1274 fol.):

(i) MinFin's objections against the hedging provision in the Amended Hedged Gold Offtake Agreement and the blocking of the export of gold pending a decree on this matter, which led Claimant to default on its payment obligations under the Amended Hedged Gold Offtake Agreement and to incur further debts and losses;

(ii) MinFin's imposing of the Guarantee Letters and Special Dividend Agreement upon Claimant, and NMMC's and Goskomgeology's failure to assist in this regard;

(iii) The failure or refusal of Sanoat in 2006 to renew AGF's Mining License after its expiry on November 27, 2006, as required under Article 8 of Decree No. 266, Section 7.2I of the AGF Charter, and under its obligations of good faith, cooperation and loyalty, as well as its specific undertakings under the BIT, and NMMC's and Goskomgeology's failure to assist in this regard;

(iv) The issuance in 2006 by the CabMin of Decree No. 74 and Decree No. 133 revoking the special privileges and exemptions under previous Decrees No. 477 and No. 266, as confirmed by Regulation No. 76;

(v) The carrying out of the Complex State Audit 2006, and imposing on AGF an extraordinary, idiosyncratic, arbitrary, nonsensical and grossly unjust liability of approximately USD 225 million, which caused much disruption to AGF's operations as well as financial losses, and the pursuit by the State Tax Committee and the Uzbek judiciary of the enforcement of this unjust liability, and NMMC"s and Goskomgeology's failure to assist in this regard;

(vi) The unreasonable insistence by Goskomgeology and NMMC in 2007 that AGF's unrefined silver be refined in Uzbekistan, thereby forcing it to contract with AMGK, an unsuitable and costly refining partner lacking the required refining capacity;

(vii) Goskomgeology's failure or refusal to ensure the granting of the Sarybatyr License for the mining of the gold desposit in Sarybatyr in 2008;

(viii) Respondent's refusal to allow Claimant or AGF to export unrefined silver in contradiction notably with Claimant's legitimate expectations, based on Respondent's specific undertakings under Article 4 of Decree No. 477, Article 10 of the Foreign Investment Law, and Article 2(2) of the BIT, causing cash flow problems and suspending mining activities;

(ix) The Uzbek Parliament's amendment of particular articles of the Tax Code in 2009 to remove AGF's "zero rating" and replace it with "exempt status" for VAT purposes, which increased certain of AGF's capital and operating costs by 20% and further weakened its legal and financial position, thus jeopardizing the advanced project financing transaction contemplated for Phase 2 with RBS as Claimant had warned Respondent;

(x) MinFERIT's refusal to approve the Phase 2 Feasibility Study, submitted in February 2009, on the unjustified grounds that AGF had not yet provided executed contracts for financing, services and supplies;

(xi) The failures caused by the above acts and omissions of Respondent on the RBS and Nedbank financing that collapsed in 2009 as a result of the above;

(xii) MinFin's continual refusal to accept any offset or substitute payment proposed by Claimant since 2009 for its USD 10,8 million liability under the Special Dividend Agreement and NMMC's and Goskomgeology's failure to assist in this regard;

(xiii) MinFin's decision to initiate proceedings on September 23, 2010 before the Tashkent Economic Court against Claimant for payment of Claimant's USD 10,8 million liability under the Special Dividend Agreement and Respondent's denial of justice with regard to the conduct of these proceedings;

(xiv) The refusal by the liquidation managers of AGF to return the Atlas Copco drill rig worth USD 2.5 million to Claimant (Claim. Am.Reply. 23.08.2013, paras. 1339 fol.; Exh. C-699 and compare to C-765).

720. These acts and omissions "directly caused both direct monetary damages, adverse consequences to AGF's cash flow and ultimately the inability of Claimant to secure the funding on behalf of AGF in order to proceed with the lucrative second phase of underground mining." (Claim. PHB I. 21.07.2014, para. 118). The acts of Respondent listed above "combined to force the result that operations were ceased and Claimant was obliged to declare *force majeure*, thus depriving Claimant of its use, enjoyement and value of its investment" (Claim. PHB I. 21.07.2014, para. 137).

721. According to Claimant, even if the acts and omissions of Respondent and its organs constituted a lawful rather than an illegal expropriation, then Claimant would still be entitled under Article 5 of the BIT to "*prompt, adequate and effective compensation*", amounting to the "*genuine value of the investment expropriated.*" Yet, Respondent has not paid any compensation, let alone prompt adequate and effective compensation amounting to the genuine value of its investment., and has thus breached Article 5 of the BIT (Claim. Am.Reply. 23.08.2013, para. 1278).

2.2.1.2 Respondent's Position

722. According to Respondent, there is no dispute between the Parties regarding the circumstances in which an expropriation will be deemed lawful under the BIT, nor is there any dispute that an expropriation may be direct, indirect, or creeping. Respondent however underlines that the determination of whether an expropriation has occurred, must be made with reference to specific facts of the case (Resp. Am.Rej. 21.02.2014, para. 866).

723. Respondent contests that an expropriation did take place in the case at hand for the following key reasons (Resp. Am.Rej. 21.02.2014, paras. 866 fol.):

(i) In order to constitute an indirect expropriation, the measures taken by the State must effectively destroy the economic benefit of the investment, resulting in the "*neutralization, radical deprivation, irretrievable loss, inability to use, enjoy or dispose of the property*." (*National Grid v. Argentina* (RL-271); *Electrabel v. Hungary* (RL-234); *Archer Daniels Midland v. Mexico* (RL-207); *LG&E Energy v. Argentina (*RL-257)). In contrast, measures which simply render the investment less profitable do not amount to an expropriation of that investment (*Burlington v. Ecuador* (RL-219); *Paushok v. Mongolia* (RL-277));

(ii) A finding of expropriation futher requires that the substantial deprivation, in fact, was caused by acts attributable to the State, rather than by the investor's own actions or by economic conditions outside the control of either party (*Tecmed v. Mexico* (RL-40); *Link-Trading v. Moldova* (RL-259); *Jan Oostergetel v. Slovak Republic* (RL-249)).

724. These conditions are not met in the present case because (i) Respondent's actions did not destroy the economic benefit of Claimant's investment, or otherwise substantially interfered with that investment; rather, (ii) Claimant itself caused AGF to go bankrupt through its own unlawful misrepresentations, self-dealing, fraud, theft, mismanagement, and inability to implement the Project as promised. Respondent's actions were fully justified in taking corrective measures to address the harm that Claimant and AGF caused through their repeated failures and serious violations of the law. In addition, none of these corrective measures caused AGF to go bankrupt, or "*placed Claimant in a state of incapacity to carry out its investment and fulfil its obligations to the joint venture*."

725. As concerns the specific actions subject to Claimant's claims, Respondent's position is in summary as follows (Resp. Am.Rej. 21.02.2014, paras. 869 fol.,

paras. 884 fol.; Resp. PHB I. 21.07.2014, paras. 60-114; Resp. PHB II. 21.08.2014, paras. 11-47):

(i) Respondent's refusal to register the Hedged Gold Offtake Agreement and the conclusion of the Special Dividend Agreement were justified and consistent with Uzbek Law, in particular Decree No. 988 (see above para. 411). Indeed, under Uzbek law, the Ministry of Foreign Economic Relations, Investment and Trade could not register AGF's Hedged Gold Offtake Agreement to export gold at below-market prices. Thus, the problem was not that much the hedging itself, but rather the price of the contract, which did not conform with the market price as of the date of the contract's signing in January 2004 or the date when the Agreement was submitted for registration in March 2004;

(ii) The Special Dividend Agreement cannot be constitutive of an expropriation, as Claimant only paid USD 1 million thereunder as the MinFin agreed to postpone, offset and accept substitute payment for Claimant's remaining obligations thereunder;

(iv) The Complex Audit 2006 was carried out in accordance with the law and, in any event, the Uzbek courts overturned the vast majority of the financial penalties resulting from the Complex Audit 2006. In this regard, it should also be noted that the Complex Audit 2006 did not prevent AGF to continue its operations and to pay out substantial dividends to Claimant in 2007. As such, the imposition of such penalties cannot form a basis for Treaty violations;

(v) As concerns the various tax privileges revoked in 2006, Respondent contends that they were lawfully revoked to the extent that they were conditioned on AGF's proper implementation of the Project and on its compliance with Uzbek law, which were carefully monitored by the CabMin and by other Uzbek entities. To the extent that AGF failed to live by its commitments and to fulfil the legal requirements, it had no right to continue benefiting from these privileges. In addition, the revocation of such privileges in 2006 did not materially affect AGF's operations, since the Uzbek Government agreed to defer AGF's additional tax obligations, which were in any event minimal.

(vi) The rejection of Claimant's proposal to refine AGF's silver doré outside Uzbekistan could not have substantially deprived Claimant of its investment in AGF, because Claimant and AGF had agreed at the outset of the Project that AGF would refine all silver doré in the Republic of Uzbekistan. In this regard, Article 4 of Decree No. 477 does not grant AGF the right to export semi-finished products, such as doré, offshore, but only the finished silver and gold products. In addition, the problems arising out of the refining of the silve doré bars were primarily due to the inadequate levels of impurities contained in the doré bars delivered by AGF, and not a lack of competence on behalf of AGMK. As concerns the purchase of a refinery, the AGF shareholders agreed during the General Shareholders Meeting of 29 September 2008 (see above para. 518) to postpone consideration of Claimant's proposal until AGF's financial situation had stabilized, which it never did;

(vii) The 2009 and 2011 VAT changes, moreover, did not violate AGF's stabilization clause, as that guarantee had been lawfully revoked in 2006 by Resolutions Nos. 74 and 133. In any event, by the time the Government amended its VAT regime in 2009 and 2011, and conducted the Audit 2011, Claimant already had voluntarily shut down AGF's CIP plant, as planned and for unrelated reasons. Thus, the 2011 VAT change had no impact on AGF's operations. As concerns the 2009 VAT changes they could not be expropriatory, because they did not target any particular company and were introduced in response to the global economic crisis;

(viii) The Audit 2011 was conducted in full compliance with the law and authorized by the National Council for Coordination of Supervisory Activities. Unscheduled audits are permitted under Law No. 717-I in certain circumstances, and in the present case it was conducted upon request of the Ministry of Finance pursuant to Order No. 015 dated 16 February 2011 (see above para. 652, Exh. R-663/C-402) and Order No. 06-4157 of 22 March 2011 of the National Council for Coordination of Supervisory Activities (no exhibit on file). In addition, this Audit 2011 never prevented Claimant from pursuing its activities in AGF, and instead confirmed that AGF had committed multiple violations of Uzbek law, thereby obstructing AGF's ability to operate normally. Claimant itself abandoned AGF in the middle of the Audit 2011 on false pretenses after stealing over USD 2 million in foreign currency revenue from AGF's bank accounts (Exh. R-583_5). Further, Claimant maintained control over AGF's offshore bank account at Barclays Bank, which was never frozen and which Claimant operated in violation of Uzbek law on foreign currency;

(xi) Notwithstanding the fact that certain licenses were not renewed, for reasons attributable to Claimant, the Uzbek Government nevertheless permitted Claimant to operate while its application for renewal of licenses were pending:

726. As concerns the different licences, the Respondent states the following:

- As concerns the Cyanide License (see above para. 472, 629, 635), Claimant requested its renewal only after it had expired (Resp. PHB I. 21.07.2014, para. 95).

- As concerns the Renewed Exploration License (see above paras. 533 and 588), it was denied because Claimant had failed to carry out exploration works under its previous exploration license and had failed to substantiate the necessity of prolonging its exploration works (see in particular Bayzitova WS, para. 7).

- As concerns the Mining License (see above paras. 415, 476, 498, 499-503), the renewal of such license was never approved by the Deputy Chairman or the Chairman of the Committee of the CabMin, but this did not prevent Sanoat from allowing AGF to continue its mining operations while the license renewal application was pending despite the fact that AGF repeatedly violated the terms of the Mining License (Resp. PHB I. 21.07.2014, paras. 90 fol.).

- As concerns the Sarybatyr Licence (see above paras. 548, 585, 587, 634), Claimant did not apply for the license until 2009 and did not submit a complete application until 24 September 2010, by which time the Uzbek Parties had already called for a voluntary liquidation of AGF (Resp. PHB I. 21.07.2014, paras. 92 fol.). In addition, Claimant did not have a secured right to develop Sarybatyr (Resp. PHB II. 21.08.2014, para. 30).

As such, Claimant's investment in AGF suffered no harm from any issues relating to licensing. In particular, unlike in *Metalclad v. Mexico* or *Tecmed v. Mexico*, Claimant was not deprived of the economic or commercial value associated with its operations and activities in AGF as a result of any licensing issues.

727. As concerns Phase 2, Claimant's failure to obtain financing for Phase 2 through CITIC is attributable only to Claimant and not to any acts or omissions of

Respondent for the following reasons (Resp. Am.Rej. 21.02.2014, paras. 880 fol.; Resp. PHB I. 21.07.2014, paras. 115 fol.):

(i) Respondent contends that Claimant never presented an economically acceptable Feasibility Study in line with the requirements set forth under Decree No. 110, and thus never obtained any rights to develop Phase 2 (Resp. Am.Rej. 21.02.2014, para. 866 *in fine*; Resp. PHB I. 21.07.2014, para. 116). As to Claimant's arguments regarding its alleged "catch-22" position, they are unfounded, as evidenced by the testimony of Mr. Pringle and Mr. Tyler, who both confirmed that financing could be secured on a conditional basis and that the prior obtention of the licenses were therefore not indispensable (Transcript of 2 May 2014, 1240:18 – 1241:10 and Transcript of 30 April 2014, 709:17-21).

(ii) Respondent was justified in rejecting Claimant's Phase 2 proposal, because Claimant offered an unacceptably high interest rate and administrative fee for the first proposed loan tranche, provided no assurance that the second loan tranche would be concluded on reasonable terms, and demanded certain privileges which did not accord with Uzbek law.

(iii) Claimant itself endangered the financing of Phase 2 by its fraudulent and self-serving financial transactions, including the payment of a USD 65.7 million dividend in 2007 (see above para. 555).

(iv) CITIC based its proposed financing on a smaller scale project than that which Claimant submitted to the Government in February 2009 (see above para. 571) and thus Claimant would in any case have needed to submit a new Feasibility Study and obtain approval thereof (Resp. Am.Rej. 21.02.2014, paras. 880 fol.; Resp. PHB I. 21.07.2014, para. 126).

(v) Claimant failed to establish any link between Goskomgeology's and NMMC's requests for voluntary liquidation of AGF and CITIC's decision not to finance Phase 2. Rather, one of AGF's suppliers initiated bankruptcy proceedings against AGF, which still are ongoing in accordance with Uzbek law.

(vi) The abolishment of the VAT exemption for precious metals sales, effective as of 1 January 2011, did not target AGF or cause the collapse of the CITIC financing.

(vii) The initiation of litigation against Claimant for payment of the amount owed under the Special Dividend Agreement could equally not have caused the collapse of the CITIC financing, all the more that the Ministry of Finance agreed to postpone, offset, and accept substitute payment for Claimant's obligations under the Special Dividend Agreement. Thus, Claimant has not proffered any evidence that this litigation led to the collapse of the CITIC financing, or resulted in the neutralization, radical deprivation, or irretrievable loss of Claimant's investment in AGF.

728. As concerns the Atlas Copco drill rig, Claimant appears to have withdrawn its allegation that its drill rig is being considered as part of AGF's assets and that it is being sold by AGF's liquidation manager. AGF's liquidation manager has repeatedly explained that AGF has to bear the expense of re-exporting the drill rig, but is not in a financial situation to pay such expenses. That AGF's liquidation manager is unable to fulfil a contractual obligation between AGF and Claimant has no bearing on Claimant's claim for breaches of the State's international obligations under the BIT (Resp. PHB I. 21.07.2014, para. 114).

729. With regard to Claimant's alternative claim of "creeping expropriation", Respondent contends that all of Respondent's actions were lawful and justified, and further did not divest Claimant of any legal rights or otherwise deprive Claimant of the management, use, control, or value of its investment in AGF (Resp. Am.Rej. 21.02.2014, paras. 884 fol.).

2.2.2 The Arbitral Tribunal's Findings

2.2.2.1 The Applicable Legal Basis (Reminder) and Standards

730. <u>Article 5 of the BIT</u> provides as follows (Exh. CL-20):

> *"ARTICLE 5*
>
> *Expropriation*
>
> *(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting*

> *Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.*
>
> *(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares."*

731. As mentioned previously (see above para. 297), Article 5(1) provides that the State is entitled to proceed with the expropriation of an investment under five cumulative conditions: (i) expropriation, or any measure having equivalent effect, must be justified by a public purpose; (ii) it must be effected on a non-discriminatory basis; (iii) it must be accompanied by adequate compensation to be calculated based on the "*value of the investment expropriated immediately before the expropriation*", including interest; (iv) be effected "without delay"; and (v) the expropriation or the valuation of the compensation shall be subject to review by a judicial or other independent authority

732. The situation of an expropriation of "assets" of a company which is constituted under the law of Uzbekistan, i.e. AGF, is expressly contemplated in para. 2 of Article 5, which further provides that the foreign shareholder of such company, i.e. Claimant, shall be entitled to the same treatment as described in para. 1 as concerns the expropriation of its investment in such company.

733. There is no dispute between the Parties that an expropriation under Article 5 of the BIT can take two main forms, i.e. a direct expropriation or an indirect expropriation, including a so-called 'creeping' expropriation.

734. Respondent further seems to largely agree with Claimant's presentation of the theoretical standards to apply in order to determine the existence of a direct or indirect expropriation (Resp. Am.Rej. 21.02.2014, para. 866; Resp. SoD.Class. 04.04.2013, para. 377 referring to Claim. SoC. 17.09.2012, para. 478):

(i) Referring to Newcombe/Paradell,[27] Claimant defines 'direct expropriation' as the straightforward taking of an investment by the State which "involves the investor being deprived of property and a

[27] A. Newcombe and L. Paradell, Law and Practice of Investment Treaties: Standards of Treatment, Kluwer Law International 2009, p. 340.

corresponding appropriation by the state, or state-mandated beneficiary, of specific property rights." (Claim. SoC. 17.09.2012, para. 479).

(ii) Referring still to Newcombe/Paradell,[28] Claimant defines then indirect expropriation and "creeping expropriation":

- "indirect expropriation may occur when measures result in the effective loss of management, use or control, or a significant depreciation of value, of the assets of a foreign investor" (*Spyridon Roussalis v. Romania*, para. 327).

- creeping expropriation is thus "an indirect expropriation that occurs as a result of a series of measures taken over time that cumulatively have an expropriatory effect, rather than a single measure or group of measures that occur at one time." In this regard, citing also *Generation Ukraine v. Ukraine*, Claimant relies on the following statements of this tribunal (Claim. SoC. 17.09.2012, paras. 480 and 481): creeping expropriation is "a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property." (*Generation Ukraine v. Ukraine*, para. 20.22). Claimant further relies on similar statements of tribunals in *Spyridon Roussalis v. Romania*, *Rumeli v. Kazakhstan*, and others.

735. Respondent however stresses two main points:

(i) that "it also is well established that, in order to constitute an indirect expropriation, measures taken by the State must interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated." (Resp. SoD.Class. 04.04.2013, para. 278 relying on *Starrett Housing v. Iran*, p. 154 (RL-299)) so that the "measures thus must effectively destroy the economic benefit of the investment, resulting in the neutralization, radical deprivation, irretrievable loss, inability to use, enjoy or dispose of the property." (Resp. SoD.Class. 04.04.2013, para. 377 relying on *National Grid v. Argentina*, para. 149 (RL-271) and *Electrabel v. Hungary*, para. 6.62 (RL-34)), and

[28] A. Newcombe and L. Paradell, Law and Practice of Investment Treaties: Standards of Treatment, Kluwer Law International 2009, p. 343.

(ii) that there can be no expropriation unless acts attributable to the State are responsible for extinguishing "*the investment's continuing capacity to generate a return.*" (Resp. SoD.Class. 04.04.2013, paras. 378 fol. Relying among others on *Burlington v. Ecuador*, para. 399 (RL-219.

736. The Parties further disagree on whether these standards are met under the circumstances of the case at hand.

737. The key question at stake is thus whether any of the actions and omissions of Respondent about which Claimant complains, taken separately or as a whole, may be constitutive of an expropriation in the sense of Article 5 of the BIT, either in the form of a direct expropriation or through "measures having equivalent effect", i.e. an indirect or a "creeping" expropriation.

2.2.2.2 The Relevancy of Article 5 and Relevant Legal Standards in the Present Case

738. As concerns a direct expropriation, Claimant does not allege that Respondent has appropriated its 50% shareholding in AGF. Indeed, although AGF was put in liquidation, there is no allegation that the Uzbek State has taken away the legal rights of Claimant in AGF. The allegations made by Claimant rather aim at arguing that, through its actions and omissions, Respondent has *de facto* deprived Claimant of the control, use and enjoyment of its investment and has annihilated the value of such investment. As such, the relevant legal standard to apply in the present case is the standard of indirect expropriation.

739. The Arbitral Tribunal largely agrees with the various cases cited by the Parties and considers that an indirect expropriation, in particular in the form of a creeping expropriation, exists under the following circumstances:

740. Contrary to what happens with a direct expropriation, where the goal of the legal act performing the expropriation is precisely to take a property, in case of indirect expropriation, there is a State law or regulation, or sometimes some behaviour, – the purpose of which was not to take the property but the effect was just that. Such indirect expropriation can result from a single act or a series of acts. In this latter case, it is considered as a creeping expropriation, which is a process extending in time and comprising a succession of measures that, taken separately, do not have the effect of dispossessing the investor but when taken together do lead to such a result.

741. As a matter of principle, general regulations, even if having negative effect on an investor's property, are not to be considered as expropriatory.

742. Several arbitral tribunals have restated this fundamental principle. For example, in *Feldman v. Mexico*, the ICSID arbitral tribunal said that:

> *"Governments must be free to act in the broader public interest through protection of the environment, **new or modified tax regimes**, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.*
>
> […] *not all government regulatory activity that makes it difficult or impossible for an investor to carry out a particular business, change in the law or change in the application of existing laws that makes it uneconomical to continue a particular business, is an expropriation ... Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations ... those changes may well make their activities less profitable or even uneconomic to continue."* (*Feldman*, paras. 103 and 112; emphasis added)

743. The clearest and strongest assertion of the principle can be found in the *Saluka v. Czech Republic* award, an UNCITRAL investment arbitration under a BIT:

> *"It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare."*(*Saluka v. Czech Republic*, para. 255).

744. This general principle has, of course, exceptions and a general regulation can be expropriatory if it is unreasonable or if it violates specific commitments given by the State to the investor. This has been aptly summarized by the tribunal in the *Methanex* case:

> *"In the Tribunal's view, Methanex is correct that an intentionally discriminatory regulation against a foreign investor fulfils a key requirement for establishing expropriation. But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alias, a foreign investor or investment is not deemed expropriatory and compensable **unless specific commitments had been given** by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."* (*Methanex*, para. 7 of Part IV - Chapter D; emphasis added).

745. As far as the effect of such regulation – unreasonable or in contradiction with specific commitments – is concerned, it must be **equivalent to the effect of a direct expropriation** in order to be qualified as expropriatory. The Tribunal agrees with the summary presented by the *El Paso v. Argentina* tribunal concerning the effect necessary for an act to be considered expropriatory:

> *"The Tribunal considers that at least one of the essential components of the property rights must have disappeared for an expropriation to have occurred. It emphasises that the overwhelming majority of investment arbitration cases stand for the proposition that an expropriation usually implies a "removal of the ability of an owner to make use of its economic rights."* *[reference omitted]* *It is generally accepted that the decisive element in an indirect expropriation is the "loss of control" of a foreign investment, in the absence of any physical taking. " (El Paso v. Argentina*, para. 245*).*

746. Claimant's claim for expropriation is based on a two-fold approach, consisting in claiming first that specific events, such as the Audit 2011 or the actions taken by the State in 2006, are of a nature to constitute in themselves an indirect expropriation. Alternatively, Claimant argues that all the actions and omissions of Respondent taken together would in any event amount to a creeping expropriation of Claimant's investment.

747. Thus, in principle, the Arbitral Tribunal would need to first examine the specific events alleged to constitute a separate act of expropriation, and, if the Arbitral Tribunal finds that this is not the case, it would need to look at all the actions and omissions of the State taken together to appreciate whether such combination could amount to a creeping expropriation.

748. In the present case, however, the Arbitral Tribunal does not consider it necessary to enter into such step by step analysis because it is of the opinion that Claimant has generally failed to establish two key components of an indirect expropriation: (i) the effective destruction of the value of the investment; and/or (ii) the causality link between the loss of such value and an act attributable to the State.

749. None of the events prior to 2007 reach, either separately or collectively, the threshold of depriving Claimant of its investment. The fact that the State actions taken in 2006, including the Complex Audit 2006 and the change in the VAT regime, may have had adverse effects on AGF's operations and profit is *per se* not sufficient to constitute an "expropriation". This is clearly evidenced by the fact that Claimant paid out in 2007 a dividend of US$ 65.7 million to its shareholders as a result of its operations in Uzbekistan (see above para. 555).

750. Equally, none of the events which occurred between 2007 and late 2010 reach that threshold either. This is largely evidenced by Mr. Wilkins letter of 10 December 2010 (Exh. C-18), in which he tried to convince the Uzbek Parties not to liquidate the Joint Venture and expressed the opinion that "*AGF is ahead of target for 2010 and is operating profitably*", it "*can continue to operate profitably provided the appropriate licenses are issued and AGF's tax regime can be stabilised"* and that Oxus *"wishes to invest significant amounts of additional capital, and to clear its debt to the Ministry of Finance*." In this letter, Mr. Wilkins then further offered on behalf of Oxus to purchase the Uzbek Parties' shares or to sell Oxus' shares to the Uzbek Parties at "*50% of the value of AGF's existing balance sheet*" plus a production royalty. These statements do not accord with Claimant's position that it had by then already been expropriated of the value of its investment. If that had been the case, Claimant would not have approached the liquidation of AGF in the way it did in Mr. Wilkins' letter.

751. The remaining question is thus whether the events which occurred from late 2010 to 2012, including in particular the failure of the financing, the Audit 2011, the criminal investigations and the liquidation proceedings could be seen as the culmination of a series of events imputable to the State which eventually caused the total loss of value of AGF. The Arbitral Tribunal does not consider this to be the case for the following reasons:

- As of 2009, Claimant had already stopped the gold processing operations and the Uzbek Parties had been requesting liquidation for some time, not least because of the operational problems and the little amount of dividends that had been distributed by then. Indeed, financial problems were not new and while Claimant continued to make money through the AGF Management and Services Agreement and the AGF General Administration Agreement, as well as kept control over large amounts of foreign currencies through the Barclays account, the Uzbek Parties were not seeing the money they had legitimately been expecting under the Phase 2 Preliminary Feasibility Study and had reasons to be unsatisfied.

- Claimant's claim of creeping expropriation is also largely based on the contention that it is the actions of the Uzbek State which led to the failure of the financing, first by RBS and then by CITIC. However, the Arbitral Tribunal is not convinced that there was such a direct link with RBS's or CITIC's decision not to provide the financing. As concerns RBS's decision, it was discussed internally among the management of Claimant and AGF and, whilst Claimant disagreed with the reasons given by RBS, there was no direct link with State's actions in Uzbekistan at that time (see above paras. 562-566). As concerns CITIC, it is very likely that the tensions between Claimant and the State may have influenced CITIC's decision not to provide the financing. However, this tension was the result of a complex factual matrix, in which Claimant and AGF bore part of the responsibility. As such, CITIC's decision not to provide the financing cannot be deemed to be the mere result of Respondent's refusal to issue certain licenses or to otherwise support AGF in terms of tax treatment.

- By 2011, operations at AGF had almost completely ceased. As such, the Arbitral Tribunal is of the opinion that the Audit 2011, the criminal investigations and the liquidation proceedings were more a reaction to an already catastrophic situation, rather than the cause of such situation. Indeed, by the end of 2010, the financial and operational difficulties encountered by AGF were significant, including the failure to find financing for Phase 2. It is thus not surprising that these difficulties triggered certain reactions from the Uzbek Parties and the State. Whether or not such reactions were in line with some of the State's obligations under the BIT is a separate question.

752. In summary, the Arbitral Tribunal finds that the loss of control over and the loss of the value of Claimant's investment did not occur before 2011 and that, at that stage, a considerable number of diverse problems had affected AGF's operations. Indeed, as arises out of the underlying facts and evidence, the degradation of Claimant's investment was the result of a process of several years during which Respondent took certain actions directed at AGF and/or Oxus, whereby one cannot say that the degradation of Claimant's investment is the direct result of Respondent's actions. In fact, AGF suffered from internal management problems and incurred substantial operational delays for which AGF, and thereby Claimant, bear part of the responsibility, such as (1) AGF's delivery of doré bars with inadequate levels of impurities which subsequently gave rise to issues in refining the silver doré bars, (2) the fact that AGF was not fully compliant with all tax, foreign currency and customs law, in particular with regard to the way AGF managed foreign currency through its Barclays Bank account and (3) in relation to the Cyanide License, Claimant's failure to carry out exploration works under its first exploration license which resulted in the refusal for a renewed Exploration License.

753. As such, the Arbitral Tribunal finds that Claimant has failed to establish the necessary causal link between the incriminated actions of Respondent and Claimant's alleged deprivation of its investment, and that its claims for direct or indirect or creeping expropriation therefore fail.

754. Lastly, Claimant also claims that it was expropriated of the Atlas Copco drill rig (see above para. 133, Claims No. 1583.9). The Arbitral Tribunal finds that Claimant's claim in this respect is unfounded for the following reasons:

755. Claimant argues that in 2010 it purchased an Atlas Copco Diamec U-6 drill rig for the amount of USD 2,562,599 which was made available for use by AGF for purposes of improved exploration and that it has been unable to obtain the return of this drill rig or at least formal assurances that it may collect the drill rig withoutt being improperly or unlawfully hindered (Claim. Am.Reply. 23.08.2013, para. 1339). It then argues that by including the sale of the "Atlas Copco Diamec U-699 drill rig" in the agenda of the meeting for the liquidation of AGF (C-6999), Mr Kazakov and subsequently Respondent have "*de facto expropriated the rig*" (Claim. Am.Reply. 23.08.2013, paras 1340-1341).

756. In contrast, Respondent argues that there is a confusion on the part of Claimant concerning the designation of the drill rig and that there were in fact two drill rigs in operation for AGF, one being the Atlas Copco Diamec U-6 drill rig which belonged to AGF and was sold at auction in the liquidation process and an Atlas Copco Explorac 220 RC drill rig which was bought by Claimant for use by AGF.

757. According to one of the liquidator's letter of 16 October 2013 to counsel for Claimant, that drill rig was kept in AGF's customs warehouse for storage and Claimant was entitled to re-export it upon compliance with the Respondent's customs laws (Res. Am. Rej., para. 806 fol.). Concerning the nature of the drill rig at issue, the Arbitral Tribunal concludes that Claimant has based its claim on a wrong designation of that drill rig. The Arbitral Tribunal notes that, in its Amended Reply, Claimant refers to letters by Mr. Shead and by its counsel but neither these documents makes a specific description of that rig (Claim. Am.Reply. 23.08.2013, para. 1339.1342). On the other hand, Respondent has produced a Witness Statement from Mr. Kasakov and an abstract from Mr. Wilkins' diary entry dated 27 January 2011 which mentions Claimant's Explora 220RC drill rig (WS-Kazakov, para. 12-13 ; R-689_410). The Arbitral Tribunal has seen no evidence to the contrary from Claimant and Claimant did not call Mr. Kazakov for cross-examination. In any event, whatever is the right designation of that rig, the Arbitral Tribunal finds that Claimant has not succeeded in demonstrating that there had been a *de facto* expropriation of its rig. In its letter of 16 October 2013 to counsel for Claimant, Mr. Kazakov pointed out specifically that, in AGF's view (Exh. R-957), Claimant was legally entitled to re-export its equipment from the territory of Respondent and described in detail the procedure to be followed for equipment re-export. None of the conditions). None of the conditions mentioned by Mr. Kazakov appear to the Arbitral Tribunal to be abnormal circumstances. Moreover, in his letter, Mr. Kazakov gives a reasonable explanation as to why Claimant's first approach by a representative of a shipping company retained by Claimant could not be accommodated and Claimant has

provided no evidence to the effect that it subsequently attempted to meet these conditions. Claimant's claim for compensation relating to the drill rig is therefore rejected.

2.2.3 Conclusion

758. In conclusion, Claimant's claims for expropriation under Article 5 of the BIT, in particular Claimant's AGF Claims No. 1 to 7 are rejected, as well as Claim No. 10 to the extent it is based on an alleged expropriation.

759. This finding is without prejudice as to whether the factual basis underlying Claimant's claims for expropriation may be constitutive of a breach of standards applicable under Article 2 of the BIT, which is examined in the next section.

2.3 Issue No. 3: Do Respondent's Actions and Omissions Amount to Any Other Violation of the BIT?

2.3.1 With Regard to the FET Standard, Including the Prohibition of Arbitrary, Unreasonable or Discriminatory Treatment

2.3.1.1 The Parties' Positions

(a) Claimant's Position

760. According to Claimant, Respondent's actions and omissions during the 2004-2011 period as well as the liquidation proceedings were not consistent with Claimant's legitimate expectations, were not transparent, and were in breach of the State's good faith obligations, and/or were arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory or lacking due process (Claim. Am.Reply. 23.08.2013, paras. 1281 fol.). As such, these actions breached the FET standard under Article 2 of the BIT as well as the "*standard of reasonableness*" thereunder, which Claimant contends "does not have a different meaning from the [FET standard]" and also includes the standard of protection against arbitrariness (Claim. Am.Reply. 23.08.2013, para. 1308).

761. As concerns the specific events, Claimant argues mainly as follows:

762. *Changes in the tax regime*: Claimant's claim of breach of Article 2 of the BIT in relation to the changes in the Uzbek tax regime has three sub-sets: (i) the revocation of tax privileges under Decrees No. 477, No. 127-20 and No. 266 and of the stabilization clauses in 2006, (ii) the VAT regime modifications in 2009, and (iii) the changes to the VAT regime in 2010 (Claim. Am.Reply. 23.08.2013, paras. 1281 fol.). The impact on Claimant of these three separate changes to the tax regime applicable to AGF are threefold: (i) they resulted in monetary losses to AGF by causing the JV to pay significantly higher taxes; (ii) they impaired the cash flow of the JV by forcing it to divert funds that would otherwise have been used to pay the costs of running the business or meet liabilities, and (iii) they adversely impacted the perception of AGF as a safe investment, Oxus as a secure investor in Uzbekistan and Uzbekistan as a safe host State for investment.

(i) Revocation of tax privileges and changes in July 2006: The tax law changes, in particular *via* Decrees No. 74 and 133 in May and July 2006 respectively (see above paras. 478 and 479), had as effect that AGF was no more exempt from payment of income taxes, customs duties and property tax, payment allocations, payments for depreciation of fixed assets and taxes on dividends and payments under credits chargeable when transferring money abroad. Thus, it made AGF liable to pay significantly more taxes than it had bargained for when it made its investment into AGF. These changes were clearly in breach of the stabilization clause which had a ten-year validity (i.e. until 1 July 2010) and the specific tax privileges granted to Claimant were defined as being valid for the life of the Project. Therefore, Respondent's arguments as to needing to limit these privileges in time or as being justified because of alleged "underperformance" by AGF are unfounded. Whereas a State may modify its tax regime, Claimant contends that the State must honor stabilization clauses and the specific privileges that it grants to the investor. Absent a stabilization clause, the State's power is "*not without limits, which includes the principles of proportionality and rationality*" (*Tza Yap Sum v. Peru*, (CL-171)). Also, no taxation can be discriminatory (*Burlington v. Ecuador*, RL-219) (Claim. PHB I. 21.07.2014, paras. 21 fol.; Claim. PHB II. 21.08.2014, paras. 107 fol.). Claimant's expert, Mr. Haberman, estimates the monetary impact of such change as causing losses to Claimant of USD 14,1 million as at 30 June 2012, and USD 13,3 million as at 18 March 2011 (Claim. PHB I. 21.07.2014, para. 44; Haberman II, para. 6.5). In addition, Claimant's claim an amount of USD 2,7 million for the withholding of AGF's input VAT.

(ii) Changes in VAT regime in 2009: On 1 January 2009, the VAT treatment of the production, sale and export of precious metals was changed from "zero-rated" to "exempt" (see above para. 595). Through this change, AGF was no longer entitled to have the VAT reimbursed that it paid on goods and services it purchased in Uzbekistan, or on imports into Uzbekistan. No warning or advance notice was provided to Claimant at the time, in particular no mention was made by Respondent about the need to swap the VAT treatment of gold v. cotton, as now alleged by Respondent. Respondent has failed to prove that these changes were needed to further the Government's aim of supporting and stimulating the Uzbek cotton industry. This VAT change, beyond the adverse financial impact it had, conveyed in this context the wrong message to lenders that the country and/or the Project was at risk, particularly in light of the previous acts and omissions of Respondent. Thus, it is telling that it is precisely after the entering into force of this VAT change that RBS and Nedbank withdrew their interests (Claim. Am.Reply. 23.08.2013, paras. 1010 fol.). In addition, *de facto*, AGF was the only company adversely affected by this change, which was thus 'discriminatory', and in any event unfair and unreasonable (Claim. Am.Reply. 23.08.2013, paras. 1029 fol.; paras. 1317 fol.; Claim. PHB I. 21.07.2014, paras. 28 fol.; Claim. PHB II. 21.08.2014, paras. 109 fol.). Claimant's expert, Mr. Haberman, estimates the monetary impact of such change as causing losses to Claimant of USD 39 million as at 30 June 2012, and USD 35,5 million as at 18 March 2011; as to the cumulative adverse impact of this tax change (including also the 2006 tax changes) on AGF's cash flow for the period 2007 to 2011, it amounted to USD 25,5 million (Claim. PHB I. 21.07.2014, para. 71; Haberman II, paras. 6.5 and 6.6).

(iii) Changes in VAT regime in 2011: On 1 January 2011, the VAT treatment of the production, sale and export of precious metals was changed from "exempt" to "standard rated", i.e. at 20% (see above para. 641). These changes, which became effective upon the expiry of the stabilization clause, were unfair and inequitable, as well as discriminatory to the extent that they *de facto* impacted Claimant only. The adverse financial impact of this change on Claimant's cash flow has been quantified by Mr. Haberman in the amounts of USD 66,8 million if calculated as of 30 June 2012, or USD 45,7 million if calculated as of 18 March 2011 (Haberman II, para. 6.5). These changes put even further beyond doubt for any bank or financing company, that the political risk associated with Uzbekistan was far too high to consider providing a loan for the AGF Project. No explanations, let alone legitimate explanations, were given for these changes (Claim. Am.Reply. 23.08.2013, paras. 1139 fol.; paras. 1317 fol.; Claim. PHB I. 21.07.2014, paras. 31 fol.; Claim. PHB II. 21.08.2014, para. 112). Claimant's expert, Mr. Haberman, estimates the monetary impact of such change as causing losses to Claimant of USD 51,1 million as at 30 June 2012, and USD 32,5 million as at 18 March 2011 (Claim. PHB I. 21.07.2014, para. 77; Annex 2 to Claimant's letter of 6 June 2014, p. 3, para. 6.5). Mr. Haberman further calculates the cash flow impact of this regulatory change on AGF as amounting to USD 11,1 million for 2011 alone (Haberman II, para. 6.6)

763. *Alleged undue refusal to issue and/or renew licenses*: This claim concerns in particular four licenses, i.e. (i) the general Mining License, which expired in 2006 (see above para. 499), (ii) the license for Sarybatyr (see above paras. 548 and 585), (iii) the Cyanide License (see above paras. 472 and 629) and (iv) the Renewed Exploration License (see above paras. 533 and 588). According to Claimant, AGF had an exclusive right to explore, develop and mine the Amantaytau Goldfields for 30 years, as per Decree No. 477, and these licenses were required for operations, and thus for the very use, enjoyment and value of such investment (see *Metalclad v. Mexico*, CL-93) and they were material to securing the required financing. The procedure for the renewal and/or issuance of licenses was not in accordance with the procedure set out in Decree No. 112, not transparent nor one that an investor would legitimately expect; nor was the procedure handled in good faith (Claim. Am.Reply. 23.08.2013, paras. 1290 fol.; Claim. PHB I. 21.07.2014, paras. 85 fol.; Claim. PHB II. 21.08.2014, paras. 103 fol.). As concerns the Mining License, Claimant rejects Respondent's, and in particular Mr. Maysupov's explanations (see Transcripts of 2 May 2014 1061:11 - 1063:4) for the absence of approval of the Mining License, namely AGF's failure to meet its annual targets and the alleged violation of Uzbek law. These explanations are contradicted by contemporaneous evidence in particular by the expert conclusions prepared by Sanoat in December 2005 and May 2008, which confirmed that the conditions for license renewal were met (Exhs. C-635 and 636, see above paras. 473 and 541) (Claim. PHB I. 21.07.2014, paras. 100 fol.). As concerns the Sarybatyr License, Claimant contends that the Sarybatyr gold deposit had proven to contain profitable gold reserves, which could have stabilized the unfavourable financial situation of AGF in 2009. However, Claimant never received a formal approval nor was duly informed of the status of this application. According to Claimant, therefore, the failure to grant the required licenses is in breach of Article 2.2 of the BIT, as well as of Claimant's legitimate expectations (See *Metalclad v. Mexico*, paras. 93, 97, 100, CL-93 ; *Tecmed v. Mexico*, paras. 165-166, CL-80) (Claim. PHB I. 21.07.2014, paras. 107 fol.). This led to Claimant's deprivation of the opportunity to mine the Sarybatyr deposit, quantified by Mr. Haberman as causing a loss in the range of USD 27,6 million to USD 31,7 million (Haberman II, para. 6.5).

764. Allegedly unfair prevention to export gold and the unfair and inequitable imposing of the Guarantee Letters and Special Dividend Agreement: Respondent's demand that Claimant compensate it under the Guarantee Letters and Special Dividend Agreement for the use of hedging, which were unfair and inequitable. In particular, the entering into the Guarantee Letters and the Special Dividend Agreement was done under coercion and duress and was arbitrary, inflicted as a result of the ban on the export of gold until signature by Claimant of the Guarantee Letters. The use of hedging in the Financing Agreement had been approved by all of AGF's shareholders and registered with the Central Bank, and such hedging was "legitimate, lawful and fully-authorized" (Claim. PHB II. 21.08.2014, para. 99). Claimant had an "unconditional right to export gold as guaranteed in various legal instruments", including Article 4 of Decree No. 477 and AFER's letter of 20 February 2004 (see above para. 444). However, notwithstanding the fact that hedging was common practice and also lawful and authorized, the Ministry of Finance nonetheless blocked the export of AGF's gold. This blocking was illegal and in turn led AGF to default on its first two gold shipments due on 27 February and 31 March 2004 under the HGOA, to suffer severe cash flow problems, and breach its obligations under the Financing Agreement. This liability imposed by Respondent on Claimant was also discriminatory, as it specifically targeted Claimant, as opposed to AGF and/or the other State shareholders. Further, by refusing to accept or even consider any of the numerous good faith alternative proposals made by Claimant for the payment of the Special Dividend liability, Respondent acted unreasonably, unfairly, and inequitably towards Claimant. As concerns the legal proceedings, which were initiated to enforce the liability under the Special Dividend Agreement upon Claimant, Claimant was denied justice as it was prevented from presenting its case (Claim. Am.Reply. 23.08.2013, paras. 1294 fol. and 1298 fol.; paras. 1317 fol.; paras. 1322 fol.; Claim. PHB II. 21.08.2014, para. 99).

765. *Allegedly unfair Respondent's demand that all silver be refined by AMGK and the issue with Claimant's refinery*: Respondent's imposition of AMGK to refine silver as opposed to a foreign competitor that was more qualified and less expensive, was unfair, inequitable, arbitrary and unreasonable, notably under Article 4 of Decree No. 477, Article 10 of the Law on Foreign Investment, and Article 2(2) of the BIT. In addition, imposing AMGK as the sole refiner as opposed to a foreign competitor that was more qualified and less expensive than AMGK, such as Metalor, was also discriminatory. Respondent furthermore also unduly refused to allow AGF to use the silver refinery purchased from Italy. Claimant contends that AGF's shareholders had agreed to the purchase of this refinery due to the problems relating to the refining of silver through AMGK, and that Claimant thereafter proceeded to the purchase of this refinery. Claimant further contends that it informed Respondent thereof, in Mr. Wilkins' letter of 18 December 2008 to Mr. Tursunov, Deputy Minister of the Ministry of Finance, stating as follows: "[…] I believe it would be helpful to inform you of the following: […] Approx

$15 million in metal value is stockpiled at AMMC and on site at AGF due to the lack of capacity of AMMC to refine AGF's silver doré on a timely basis. AGF is building its own silver refinery, as you know, but this refinery is unlikely to be in operation before July 2009. It is therefore essential that AGF is granted a permit to make a once-off shipment of silver doré for refining overseas, in order to turn this metal into cash." (Exh, C-540). However, Respondent unduly refused this once-off shipment, as well as the purchase of a refinery, which had to be abandoned and after having been left idle until February 2013, was finally sold by Claimant, although at a significant loss (Exh. C-677) (Claim. Am.Reply. 23.08.2013, paras. 1335 fol.; Claim. PHB II. 21.08.2014, para. 101).

766. *Allegedly unfair refusal to approve the Feasibility Study for Phase 2:* The refusal of Respondent to approve Claimant's Feasibility Study was unfair and inequitable, because the procedure was not transparent as the comments and criticisms thereto made by Respondent were not communicated in full to Claimant. Also, Respondent was not acting consistently or fairly by refusing to approve the study prior to financing whereas this was inconsistent with industry financing practice and against Claimant's legitimate expectations, as confirmed by Goskomgeology's letter of 20 May 2009 (Exh. R-234), as well as by the process of feasibility study approval that was followed during Phase 1 (Claim. Am.Reply. 23.08.2013, paras. 1296, and paras. 929-1009). Respondent's undue refusal to approve the Feasibility Study for Phase 2 prevented Claimant from obtaining financing and caused a loss of USD 127,8 million according to Mr. Haberman's calculation (Haberman II, para. 4.24).

767. *The Audits 2006 and 2011 and the thereto associated legal and criminal proceedings*: According to Claimant, these audits and proceedings were arbitrary, grossly unfair, unjust and idiosyncratic (Claim. Am.Reply. 23.08.2013, paras. 1303 fol.).

(i) The first Complex Audit 2006 and its nonsensical finding of a liability of approximately USD 225 million, was followed by an enforcement action in the Uzbek court accompanied by the issuing of freezing and collection orders on AGF's bank accounts, fixed assets and finished products, the results of which included AGF's default on its payment obligations towards contractors and a severe cash flow problem that jeopardized operations. This resulted in the sale of 16% of Oxus, at a very low price. This finding, although ultimately overturned in its near totality, resulted in damages, and left Oxus, as a listed company with a record of having an at-risk investment (Claim. Am.Reply. 23.08.2013, para. 1304; Claim. PHB II. 21.08.2014, para. 100);

(ii) The second Audit 2011 was even more arbitrary as it led to the harassment, threats, intimidation and arrest of AGF's executives, and

ultimately to the declaration of *force majeure* by Claimant (Claim. Am.Reply. 23.08.2013, para. 1305).

768. *The liquidation of AGF*: As concerns the liquidation process, Claimant at first contended that it was deprived of a reasonable opportunity to participate thereto given the consequences of the Audit 2011 and the fact that Claimant was not notified of the court procedure (Claim. Am.Reply. 23.08.2013, para. 1306). In its Post-Hearing Brief, however, Claimant states as follows (Claim. PHB I. 21.07.2014, para. 148): "*Claimant addresses this question regarding the AGF liquidation procedure out of its desire to respond fully to the Tribunal's questions. However, Claimant emphasises that in order to succeed on the merits of its claims, its case does not depend in any way upon Respondent's pathological failings in respect of the AGF liquidation procedure*", and further (para. 183) :

> *"In conclusion, the liquidation proceedings lacked judicial propriety, due process and transparency, in breach of international law, and failed to meet the procedural requirements set out in the Uzbek Bankruptcy Law, in particular with respect to the provision of notifications as well as with respect to the duties of the court managers towards both creditors of AGF and the debtor itself. These breaches caused Claimant to suffer further harm. Although force majeure had already been declared, the bankruptcy proceedings confirmed to outside observers that Claimant's investment – which was by then fully in the hands of Respondent – was a no-go zone. Other specific quantifiable harm, over and above the damages assessed by Claimant's quantum experts, has not been evaluated and Claimant repeats as it did at the outset of this section that its case does not depend in any way upon Respondent's pathological failings in respect of the AGF liquidation procedure, in order for the Tribunal to be in a position to render a decision in Claimant's favour regarding the merits of its claim."*

(b) Respondent's Position

769. In general, Respondent contends that the FET standard is not designed to serve as investment insurance, and does not protect the investor from the State's exercise of its legitimate right to regulate in the public interest, or from reasonable State action taken in response to the investor's own misconduct or wrongdoing. With regard to the role of legitimate expectations of the investor, these legitimate expectations are not subjective expectations of the specific investor, but rather those that are grounded in objective factors flowing from representations made by the State to the investor, in light of all relevant circumstances prevailing at that time, and that the assessment of an investor's legitimate expectations thus must take into account the investor's own conduct in obtaining and implementing the investment. Accordingly, an investor is not entitled to claim that its legitimate expectations were frustrated by any corrective measures taken by the host State to address harm caused by the investor (Resp. Am.Rej. 21.02.2014, paras. 887 fol.).

In this regard, Respondent contends that Claimant fully exhausted all of the oxide ores during Phase 1, and caused AGF to fail through its own self-dealing, fraud, theft, mismanagement, and inability to implement the Project as promised. As such, the various acts about which Claimant complains, were fully justified in the circumstances, either as a result of Claimant's own failures or other legitimate considerations, and did not cause AGF's insolvency (Resp. PHB I. 21.07.2014, para. 60).

770. In addition, with respect to denial of justice, Respondent demonstrated that the FET standard is not an open invitation to second-guess the decisions of the host State's courts, but relates to the failure of the host State's legal system as a whole to accord justice. Thus, a claimant alleging a denial of justice bears a particularly heavy burden of proof and there can be no denial of justice until local remedies have been exhausted, and a failure to do so is *per se* sufficient to exclude the State's responsibility (Resp. Am.Rej. 21.02.2014, para. 889, relying in particular on *Alps Finance v. Slovak Republic*, para. 215, RL-204, and *Loewen v. USA*, para. 154, RL-260).

771. Respondent's approach is similar with regard to the alleged breach of the standard of reasonableness: The appropriate standard of measure is "*a reasonable and proportionate reaction to objectively verifiable circumstances*." (*Ulysseas v. Ecuador*, para. 319, RL-303*; Enron v. Argentina*, para. 281, RL-235). Thus, there can be no unreasonableness or arbitrariness in the present case because, in taking the corrective measures that it took with respect to AGF, Respondent acted in all respects within its legal rights, for rational reasons, and did not act disproportionally or contrary to the rule of law (Resp. SoD.Class. 04.04.2013, para. 451; Resp. Am.Rej. 21.02.2014, para. 913).

772. As concerns the standard of protection from discriminatory treatment, Respondent contends that Claimant would need to show that certain measures adopted by Respondent were directed specifically against Claimant by reason of its nationality, and that comparable entities in similar-situated position were treated more favorably. However, Claimant has failed to adduce such evidence (Resp. Am.Rej. 21.02.2014, paras. 914, 919).

773. In summary, the actions that Respondent took in the present case with respect to AGF comported with Uzbek law and were undertaken for rational reasons to address AGF's continued failures and serious violations of law. In particular, Respondent denies a breach of any standard under Article 2(2) of the BIT based on the following key arguments:

774. *As concerns the changes in tax benefits and VAT regimes*: According to Respondent, AGF's tax benefits and privileges, including the stabilization guarantee, were expressly conditioned on its proper implementation of the Project and on its compliance with Uzbek law. These benefits and privileges were justifiably revoked through Decrees No. 74 and No. 133, as a result of AGF's repeated failures to comply with the approved technical and economic parameters of the Project, as well as its serious violations of Uzbek law. For example, AGF failed year after year to fulfil its production obligations, AGF also maintained all of its foreign currency revenue offshore, without repatriating the promised hard currency, dividends and taxes that were the basis for obtaining its privileges and benefits. Thus, the stabilization clause was lawfully revoked by Decrees No. 74 and No. 133. In addition, certain privileges were in any event intended to remain in effect only for a limited period of time and had Claimant implemented Phase 1 and Phase 2 in a timely manner, AGF's privileges relating to VAT and profit tax would have lapsed according to their own terms in 2006 and the stabilization clause would have lapsed on 1 July 2010 with no right of AGF to obtain an extension thereof. The same applies to the stabilization guarantee included in the Law on Foreign Investment (see above para. 44): This stabilization clause which applied to "foreign investments within ten years of the date of investment" was not extended when Claimant replaced Lonrho in July 2002, and thus expired according to its own terms in September 2004, i.e. ten years after AGF's establishment on 22 September 1994. Further, the revocation of AGF's tax privileges in 2006 did not have a significant impact on AGF's operations, as the Working Group established pursuant to Decree No. 74 agreed to defer AGF's additional tax obligations and Claimant's special dividend obligations, thus ensuring that AGF's operations were not harmed by the revocation of AGF's privileges (see above para. 550). As concerns the VAT changes in 2011, they occurred after the stabilization clause elapsed on 1 July 2010 and had no impact on AGF's operations, since AGF had already left Uzbekistan in March 2011 and did not pay any taxes in 2011. The 2009 and 2011 VAT changes did further not target or discriminate against Claimant, but applied generally to all producers of precious metals operating in Uzbekistan, and were thus not discriminatory (Resp. Am.Rej. 21.02.2014, paras. 892-898; Resp. PHB I. 21.07.2014, paras. 73 fol.; Resp. PHB II. 21.08.2014, paras. 14 fol.);

775. *As concerns the non-issuance or non-renewal of licenses*: Respondent rejects a breach of the FET standard for the same reasons as it rejected a claim for expropriation (see above para. 725 (xi)). According to Respondent, the non issuance/non-renewal of licenses was linked to reasons attributable to Claimant, in particular AGF's failure to submit timely and/or complete applications and its repeated violations of Uzbek mining and safety laws. In any event, the non-issuance of such liceneses did not prevent Claimant from operating since the Government actually allowed Claimant to operate during the renewal process. As such, the Arbitral Tribunal is not convinced that the alleged non-issuance or non-

renewal of AGF's licenses had any causal impact on AGF's operations, nor is there any evidence that it directly impacted Claimant's efforts to obtain financing for Phase 2 (Resp. Am.Rej. 21.02.2014, paras. 899-901; Resp. PHB I. 21.07.2014, paras. 90 fol.; Resp. PHB II. 21.08.2014, paras. 22 fol.).

776. *As concerns the silver refining*: Respondent contends that AGF agreed at the very outset of the silver project to refine all silver in Uzbekistan according to Respondent's recognized public policy of exporting only refined precious metals. In addition, the problems with the silver refining were attributable to AGF's incapacity to deliver silver doré of sufficient purety, and not to any alleged lack of experience and expertise of AGMK. Further, as Claimant itself admitted (Claim. Am.Reply. 23.08.2013, para. 852), silver processing was not initially incorporated as part of Claimant's AGF's plan, so Claimant could not have had legitimate expectations with respect to AGF's silver operations, much less any expectation that Respondent would permit AGF to refine its doré offshore, in contravention of its policy (Resp. Am.Rej. 21.02.2014, para. 902; Resp. PHB I. 21.07.2014, paras. 86 fol.). As concerns Claimant's purchase of its own refinery, AGF's shareholders unanimously agreed to postpone consideration of Claimant's proposal until AGF's financial situation had stabilized, which it never did. As such, there was no "refusal" or "unfair, inequitable interference with the management", but rather Claimant acted on its own initiative and at its own risk (Resp. PHB I. 21.07.2014, para. 89).

777. *As concerns the Guarantee Letter and the Special Dividend Agreement*: These agreements were reasonable and justified and the result of Claimant's own wrongdoing, i.e. its conscious decision not to register the April 2003 Gold Offtake Agreement as required by Decree No. 988 (see above para. 411) and the misrepresentation of its financial capacity. The problem was not the hedging, but rather the price of the contract, which did not conform to the market price as of the date of the HGOA's signing in January 2004 or the date when the HGOA was submitted for registration in March 2004 (see above paras. 441 fol.). While the Ministry of Foreign Economic Relations Investment & Trade could not register the Hedged Gold Offtake Agreement, because it violated Uzbek law, the Ministry of Finance nonetheless agreed to allow AGF to export gold at a below-market hedged price on the condition that Claimant would reimburse the State for its share of any lost revenue up to a capped amount. Moreover, Claimant actually willingly entered into the Special Dividend Agreement and repeatedly recognized its debt thereunder. It is actually undisputed that Claimant paid only USD 1 million under the Special Dividend Agreement, and that its outstanding liability as of 6 September 2010 was USD 10,841,256.16. Contrary to Claimant's allegations, Respondent did not refuse to consider alternative payment terms, as Claimant erroneously asserts. In 2007, Respondent agreed in good faith to defer Claimant's payment obligations by two years, without interest (see above para. 550). In 2009, Respondent agreed to Claimant's proposed three-party agreement to transfer the

special dividend liability to AGF, and to offset that liability against VAT reimbursements owed to AGF (Tursunov II, para. 6, 12-13; Tursunov I, para. 18). However, according to Mr. Hill's testimony, AGF refused because the Special Dividend Agreement concerned Claimant and not AGF (Hill I ¶ 110). Thus, it is Claimant, not Respondent who acted in bad faith (Resp. Am.Rej. 21.02.2014, paras. 906-909; Resp. PHB I. 21.07.2014, paras. 61 fol., 70).

778. As concerns Claimant's allegations of discriminatory treatment in respect of the Special Dividend Agreement, they are unfounded. Claimant bore the obligations under the Special Dividend Agreement not on account of Claimant's UK nationality, but because Claimant – and not AGF or the Uzbek Parties – negotiated the loan with Standard Bank, which obligated AGF to sell its gold at hedged prices, in violation of Uzbek law. In such circumstances, it was entirely reasonable for the Government to require Claimant to reimburse the State, through the Ministry of Finance, for its share of any lost revenue. The Guarantee Letters and Special Dividend Agreement as well as the Deed of Reconciliation were thus not discriminatory, but rather the direct result of Claimant's own conduct. (Resp. Am.Rej. 21.02.2014, para. 920).

779. Further, as concerns the legal proceedings initiated in order to enforce the debt under the Special Dividend Agreement, Claimant failed to exhaust all local remedies by not appealing the decision of the Court of Appeal to the Supreme Court of the Republic of Uzbekistan (Resp. Am.Rej. 21.02.2014, paras. 906-909).

780. *As concerns the Audits 2006 and 2011*: Respondent rejects the claim in relation to the Audits 2006 and 2011, for the same reasons it rejected Claimant's claim for expropriation (see above para. 725): According to Respondent, these Audits were in full compliance with the law and actually identified wrongdoings by Claimant (Resp. Am.Rej. 21.02.2014, para. 910; Resp. SoD.Class. 04.04.2013, paras. 439 fol.).

(i) As concerns the Complex Audit 2006, Claimant's complaints are directed mainly at the result of the Audit which led to penalties imposed upon AGF. However, these penalties were subject to judicial review and were largely overturned. Claimant does not dispute that the levy of AGF's bank accounts complied fully with Uzbek law, or that it was lifted in December 2006, merely two months after it was imposed. In the absence of any evidence of arbitrariness or impropriety, the State's lawful exercise of its right to assess taxes and penalites, and the Court's subsequent control of those taxes and penalites, cannot give rise to any Treaty violation (Resp. PHB I. 21.07.2014, paras. 83 fol.).

(ii) As concerns the Audit 2011, as explained in the context of the expropriation claim (see above para. 725), Respondent's position is that the Audit 2011 was ordered and conducted in full compliance with the law and authorized by the Republic Council for Coordination. Claimant has failed to demonstrate that the Audit 2011, and the manner in which it was conducted, deprived Claimant of the use, enjoyment, or value of its investment (Resp. PHB I. 21.07.2014, paras. 96 fol. ; Resp. PHB II. 21.08.2014, paras. 32 fol.).

781. *As concerns the non-approval of the Phase 2 Feasibility Study*: As already mentioned above with regard to the expropriation claim (see above para. 727), Respondent contends that it did not approve the Phase 2 Feasibility Study because Claimant failed to meet the applicable requirements. In particular, the Phase 2 Feasibility Study exceeded the previously approved costs by USD 100 million and failed to provide requested information regarding equipment costs and financing (Resp. SoD.Class. 04.04.2013, para. 278). These requirements were imposed by Uzbek law, namely Decree No. 110, and were based on valid and reasonable policy reasons. To the extent that AGF failed to fulfil these requirements, the refusal by Respondent to approve the Phase 2 Feasibility Study was in accordance with Uzbek law. In addition, contrary to Claimant's assertions regarding a lack of transparency, Claimant did monitor and was aware of the Government's review process, and was fully aware of the objections of each Ministry to its Feasibility Study (Resp. Am.Rej. 21.02.2014, paras. 903-904).

782. *As concerns the liquidation proceedings*: According to Respondent, the Uzbek Parties' requests for voluntary liquidation were fully justified in the circumstances and were based on, among other things, AGF's failure to meet its production obligations, its failure to pay dividends, and its lack of solvency. Moreover, Claimant refused to participate in any shareholders meeting and the Uzbek Partners thus could and did never take any action to put AGF into voluntary liquidation (Resp. Am.Rej. 21.02.2014, para. 905). As to the bankruptcy proceedings, they were initiated by a third party and neither by the Uzbek Partners nor by the State. In addition, the bankruptcy proceedings could not have resulted in any harm to Claimant or to AGF, because, at the time these proceedings began, Claimant, through its management and control of AGF, already had fully exhausted all of the oxide ores during Phase 1; had never presented an economically acceptable and Bankable Feasibility Study to obtain the right to develop Phase 2; had caused AGF to go bankrupt through its own self-dealing, fraud, theft, mismanagement, and inability to implement the Project as promised, and had abandoned AGF and had lef Uzbekistan more than one year earlier on pretextual grounds. It should further be noted that Claimant failed to make use of its right to appeal the bankruptcy decision, notwithstanding that, contrary to Claimant's assertions, it had been informed of the date, time and location of all the creditors' Committee Meetings in advance of each meeting, and has been

expressly requested to send an authorized representative to participate, but, to date, had failed to do so (Resp. Am.Rej. 21.02.2014, para. 911; Resp. PHB I. 21.07.2014, paras. 103 fol.; Resp. PHB II. 21.08.2014, paras. 35 fol.) As concerns the drill rig, Respondent's position is as described above in para. 728.

783. *As concerns the criminal proceedings:* Contrary to Claimant's assertions, there is no evidence that the criminal investigations and subsequent prosecutions initiated by the Prosecutor's office in May 2011, after the 2011 Audit, were designed to pressure Claimant or to prevent it from returning to Uzbekistan, after it had abandoned AGF on pretextual grounds in March 2011. Nor is there any evidence of any torture, abuse, or other mistreatment by the criminal authorities in this case. To the contrary, the criminal proceedings were initiated on the basis of evidence of criminal wrongdoing and carried out in full accordance with Uzbek law. The criminal proceedings, moreover, could not have harmed Claimant or AGF, because, at the time they began in May 2011, Claimant already had abandoned AGF (Resp. PHB I. 21.07.2014, paras. 100 fol.; Resp. PHB II. 21.08.2014, paras. 45 fol.).

2.3.1.2 The Arbitral Tribunal's Findings

(a) The Applicable Legal Basis (Reminder)

784. As quoted above (para. 312), Article 2(2) of the BIT provides as follows:

> *" (2) Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.* […]*"*

785. For the reasons mentioned above (see paras. 319 fol.), the Arbitral Tribunal considers that the duty to refrain from unreasonable or discriminatory measures as provided in Article 2(2) of the BIT are subsumed under the broader FET standard and that a behavior which is unreasonable or discriminatory in the sense of Article 2(2) would at the same time constitute a breach of the FET standard. This is not to say that both standards are fully equivalent, in particular – as explained above (para. 323) – the FET standard may have a broader scope than the more specific duties to act in a reasonable and non-discriminatory way.

786. As set out above (see paras. 319 fol.), the FET standard as contemplated by Article 2(2) must be understood as a means to guarantee justice to foreign investors, and when doing so, for the States' actions to give due regard to an investor's legitimate expectations by refraining from taking measures which are not justified under the circumstances, i.e. which are unreasonable, disproportionate or discriminatory.

787. As such, and considering that the factual basis for Claimant's claims for breach of FET as well as of breach of the prohibition of arbitrary, unreasonable or discriminatory treatment under Article 2(2) is the same, theses claims will be examined together.

(b) The Key Issue

788. The key question is thus whether any of the main actions or omissions of Respondent taken as a whole can be deemed to have breached the FET standard or any of the thereto related standards provided for in Article 2(2) of the BIT.

789. When examining this question, the Arbitral Tribunal will proceed in a largely chronological analysis of the key events, with some exceptions however in order to re-group related issues which spread over a longer period of time.

(c) As Concerns the Allegedly Unfair Prevention to Export Gold and the Allegedly Unfair and Inequitable Imposing of the Guarantee Letters and the Special Dividend Agreement:

790. It arises out of the evidence at stake that:

- On 31 May 2002, an AGF Extraordinary General Meeting of Shareholders decided to enter into a loan agreement with Société Générale for USD 31 million, providing for a security in the form of a hedging offtake agreement (see above para. 418);

- On 17 July 2002, ORC and AGF entered into the Credit Agreement with Société Générale and other banks, which provided in Article 12.24.1 that AGF would "enter into and maintain in full force and effect each Hedging Agreement." (see above para. 419) (Exhs. C-496 / R-1026);

- On 2 April 2003, Société Générale was replaced by Standard Bank according to the Financing Agreement (Exh. C-219), but the hedging principles of the Credit Agreement remained in place (see above para. 430);

- On 15 April 2003, AGF and Standard Bank entered into the Original Gold Offtake Agreement (Exh. C-222), which provided for the sale to Standard Bank of 263,096 ounces of gold at a hedged price of USD 323,35 per ounce (which corresponded to the market price of gold as of 15 April 2003) (see above para. 432).

- It is undisputed that this Original Gold Offtake Agreement was not filed for registration with the relevant Uzbek authorities, although it arises out of the record that the Uzbek authorities were aware of the hedging provisions (see for example above paras. 431 and 433).

- On 20 January 2004, AGF and Standard Bank entered into the Hedged Gold Offtake Agreement (Exh. C-225) which provided for the same hedging principle and price as the Original Gold Offtake Agreement. This Agreement was then submitted to AFER for registration and licensing a few days later (see above paras. 440-441).

- On 16 February 2004, Mr. Nazhimov of MinFERIT informed AGF that although the export of gold was not subject to a special license, the Hedged Gold Offtake Agreement was subject to registration "in the manner prescribed by law." (see above para. 442).

- Further correspondence then followed regarding the registration of the Hedged Gold Offtake Agreement, and in particular the fact that the agreed hedged price of USD 323,35 per ounce did not correspond to the market price in January 2004, but was substantially lower (see above paras. 443 fol.).

- It is further undisputed that the Uzbek Government allowed the export of gold by AGF only after Oxus signed a Guarantee Letter on 13 March 2004 and two Amended Guarantee Letters on 1 and 2 April 2004 (see above para. 451 and 461). Permission to export the gold was granted on 6 April 2004 through the Decree No. 213 (see above para. 462) and took place after the registration of the Hedged Gold Offtake Agreement by the National Bank and the State Customs (see above para. 463).

- This delay in the export of the gold produced by AGF caused AGF to default on the delivery terms of gold shipments to

Standard Bank (see above paras. 447 and 459), which caused financial damage to AGF.

- The terms of the three Guarantee Letters of March and April 2004 were further re-stated in the Special Dividend Agreement of 12 July 2004 (Exh. C-252). Under this Agreement, Oxus undertook to pay to the Uzbek Ministry of Finance "Additional Income" corresponding to the difference between the current world price of the gold on the date of sale and the hedged gold price pursuant to the Hedged Gold Offtake Agreement. The date for repayment was 31 October 2008 (see above para. 466).

- Enforcement of the Special Dividend Agreement in 2010.

791. The key question here is whether Respondent's refusal to let AGF export the gold and its requirement to enter into the Guarantee Letters and Special Dividend Agreement constitute a breach of the standards under Article 2(2) of the BIT.

792. The Arbitral Tribunal does not consider this to be the case for the following reasons:

(i) Decree No. 988, in force at the time of entering into both the Original Offtake Agreement and the Hedged Gold Offtake Agreement, provides that export-import contracts require registration with the Ministry of Foreign Economic Relations and that in order to obtain such registration, it is necessary, among others, that "*prices specified in the contract correspond to average international prices and existing state of the market*" (Exh. R-239; see above para. 411). Whilst it is true that Decree No. 477 grants AGF the right to sell gold at world prices and to secure credits, Decree No. 477 cannot be understood as providing an unconditional right to do so and, in particular, gives no indication regarding the relevant time for the determination of "world prices". As such, Decree No. 988 is not in conflict with Decree No. 477.

(ii) It is undisputed that AGF only filed for official registration of the Hedged Gold Offtake Agreement in January 2004, whereby the agreement still contained the hedged prices of USD 323,35 per ounce corresponding to the market price in April 2003. In January 2004, the market price for gold had however reached USD 410. As such, the price of the Hedged Gold Offtake Agreement did not conform with the market price in the sense of Decree No. 988. As a result, the Hedged Gold Offtake Agreement did not fulfill the legal requirement for registration.

(iii) In addition, while the record shows that Oxus and AGF expressed serious concerns about the impact of Respondent's refusal to allow the export of gold and their view that the Government's approach towards the hedge price was unjustified, neither Oxus nor AGF objected to the Government's request to enter into the Guarantee Letters and/or the Special Dividend Agreement as being unfair or arbitrary (see above paras. 443-458). On the contrary, the record shows that Oxus repeatedly acknowledged the debt under the Special Dividend Agreement without reserving its rights (see e.g. above paras 513, 517, 557, 558, 593 and Exhibits C-291, C-365, C-540 and R-883, R-884 and R-1016).

(iv) As concerns the enforcement of the Special Dividend Agreement, the Arbitral Tribunal considers that the record shows a certain flexibility of the Uzbek Government, which was willing to defer payment and ultimately also to suspend the legal enforcement proceedings. As to the court proceedings themselves, the Arbitral Tribunal does not find that the threshold of a "denial of justice" is reached. As mentioned previously, Claimant repeatedly acknowledged the debt under the Special Dividend Agreement and as concerns the various procedural steps, the record shows that Claimant was aware of these main steps and requested various postponement of hearings, some of which were granted.

(v) It is nevertheless true that the process of obtaining the permission was not very smooth. It appears that Claimant and/or AGF had to write to various ministries and received partially contradictory information. Whilst AFER refused to register the Hedged Gold Offtake Agreement (see above para. 444), MinFERIT seemed to say that the contract was to be deemed a "loan agreement" rather than an export agreement, and would thus not be subject to registration by AFER, but rather by the Ministry of Finance and the Central Bank (see above para. 452). Ultimately, it appears that the Hedged Gold Offtake Agreement did not require separate registration by the Central Bank, but required supplementary registration with the Customs (see above paras. 454, 456, 463). However, such kind of "bureaucratic hurdle" is not uncommon in developing and strongly bureaucratic States, especially with regard to sophisticated agreements such as the Hedged Gold Offtake Agreement. Indeed, the qualification of such agreement as an export contract or a loan contract was not a straightforward exercise. Each ministry or department interpreted the Agreement and the relevant legal provisions in a self-centered way, without giving much regard to the overall situation. This is however, unfortunately, a common feature of bureaucracy, and is not peculiar to either Uzbekistan or AGF's specific situation. In addition, even if the process was not straightforward, one cannot disregard the fact that the Uzbek Government eventually intervened through the Cabinet of Ministers to resolve the situation within a couple of months by instructing the relevant departments to register the agreement and allow the export, in exchange of the signature of the Guarantee Letters and the Special Dividend Agreement. In other words, the Cabinet of Ministers looked for a solution which allowed to respect Uzbek law while keeping the Hedged Gold Offtake Agreement in effect.

(vi) Thus, whilst the Arbitral Tribunal understands that Oxus was under pressure to unlock the situation and may have agreed to enter into certain agreements without a strong power of negotiation, this pressure cannot be deemed as the result of "coercion" by the Uzbek Government but rather it is the result of the time elapsed between the first Original Offtake Agreement and the Hedged Gold Offtake Agreement for which Claimant and AGF bear responsibility and the fact that the Hedged Gold Offtake Agreement was not in compliance with Uzbek law.

793. As such, the Arbitral Tribunal is of the opinion that, giving due regard to the state of development of Uzbekistan, its legal and political framework as well as the sophistication of the Hedged Gold Offtake Agreement, the difficulties in getting it registered and obtaining the permission to export the gold and the conclusion of the Guarantee Letters and Special Dividend Agreement were not of a nature that reaches the threshold of a breach of the FET standard or of an arbitrary or unreasonable measure.

794. The remaining question is whether the requirement to enter into the Guarantee Letters and the Special Dividend Agreement adressed to Oxus, before granting permission to export the gold under the Hedged Gold Offtake Agreement could be deemed a discriminatory measure under Article 2(2) of the BIT. As explained above (paras 784-787), the standard of discrimination refers primarily to a discrimination based on nationality. In the present case, there is no indication that any such measure was taken based on Oxus' British nationality. Further, whilst it is true that Oxus had to bear the responsibility for the price difference alone, and that there would have been reasons to impose such responsibility on all of AGF's shareholders (given that the loan and hedging had been approved by all shareholders, see above para. 418), it is also true that it is Oxus which took the lead and had the know-how to negotiate and conclude such agreement and did not consult with the Uzbek Parties regarding the hedged price. In addition, under the SDA, Claimant is only required to bear 50% of the variation in the marked price. As such, the decision to request Claimant to bear such price difference cannot be seen as arbitrary, unfair or discriminatory in the sense of Art. 2(2) of the BIT.

795. Thus, in conclusion, Respondent's request that Claimant enter into the Guarantee Letters and the Special Dividend Agreement before granting permission to export the gold under the Hedged Gold Offtake Agreement is not in breach of the FET standard and cannot be deemed to constitute an arbitrary, unreasonable or discriminatory action under Article 2(2) of the BIT.

(d) As Concerns the Complex Audit 2006:

796. It arises the following out of the evidence at stake:

- In July 2006, the State Tax Committee conducted a Complex Audit at AGF concerning the latter's compliance with tax, currency and customs law (see above para. 482).

- In August 2006, the State Tax Committee and the State Customs Committee issued the result of their Audit in the form of the Complex Audit Report 2006 and the Inspection Act (see above para. 484) which identified various lack of compliance triggering fines and penalties in the amount of approx. USD 225 million (see above para. 484).

- In September 2006, the State Tax Committee initiated enforcement proceedings of these fines and penalties before the Navoi Economic Court and the Regional State Customs Department issued various collection orders, which were confirmed by the Navoi Regional Economic Court and led to the freezing of AGF's bank accounts, fixed assets and finished products in Uzbekistan (see above paras. 487 fol.).

- AGF strongly objected to the findings of the Complex Audit 2006 and appealed against the decision of the Navoi Regional Economic Court before the Board of Appeal of such Court. The Board of Appeal largely reversed the decisions of the lower court and reduced the fines and penalties to an amount of 16,954,600 soums, i.e. approx. USD 7,000 (see above para. 496). This decision was further confirmed by the Navoi Superior Economic Court (see above para. 497).

797. It appears that Claimant's claim with regard to the Complex Audit 2006 is directed primarily at the result of the Audit and the way it was enforced, rather then at the way the Audit was conducted.

798. The key question here is thus whether the result of the Audit was arbitrary or unfair, and/or whether it was enforced in an arbitrary or unfair manner in the sense of Article 2(2) of the BIT.

799. The Arbitral Tribunal does not consider this to be the case for the following reasons:

(i) It is undisputed that AGF was not fully compliant with all tax, foreign currency and customs law, in particular with regard to the way AGF managed foreign currency through its Barclays account. In fact, the record, in particular Mr. Narziev's letter of 13 September 2006 as well as the 2005 and 2006 AGF internal Audits (see above paras. 208, 225, 488), shows that Claimant was aware of such non-compliance. In particular, Mr. Narziev, AGF's chief accountant, notified Messrs Hill, Suter, Wilkins, Kipps and Boyjigitov that it was strictly forbidden for AGF to make payments from its Barclays Bank account under import contracts, and from receiving into that account foreign currency revenue from its export activities (Exh. R-176 ; see above para. 488). Nothwithstanding this warning, Claimant benefited from the money on the Barclays Bank account in disregard of the applicable restrictions.

(ii) As such, the Complex Audit 2006 and the way it was enforced could only be in breach of the protection standards provided for under Article 2(2) of the BIT, if it transpired that the fines and penalties imposed were in no proportion to the actual lack of compliance. The Arbitral Tribunal does however not consider such exercise to fall under its scope of competence where such fines and penalties were, as is the case here, subject to review by the national courts and the national courts actually drastically reduced the fines and penalties. Under such circumstances, the only question that the Arbitral Tribunal can review if whether the court proceedings themselves were in breach of the standards of protection under Article 2(2) of the BIT in the sense that it may be deemed to constitute a denial of justice.

(iii) The Arbitral Tribunal does not consider that the judicial process applied in the circumstances amounts to either a procedural or a substantive denial of justice. Upon appeal, AGF was granted a very significant reduction in the fines imposed by the lower tribunal and the Tribunal has received no evidence showing that this last decision was not justified.

800. In conclusion, the result of the Complex Audit 2006 and the way it was enforced by the Uzbek authorities is not in breach of the FET standard and cannot be deemed to constitute an arbitrary, unreasonable or discriminatory action under Article 2(2) of the BIT.

(e) As Concerns the Atlas Copco Drill Rig

801. As mentioned above (para. 755), the Arbitral Tribunal found that the circumstances surrounding Claimant's claims concerning the drill rig (Claimant No. 1583.9, see above para. 133) did not amount to an expropriation of the drill rig. For the very same reasons, the Arbitral Tribunal finds that these circumstances do also not amount to a breach of any of the protection standards provided for under Article 2(2) of the BIT.

(f) As Concerns Claimant's Silver Refining Plant:

802. It arises the following out of the evidence at stake:

- At some point, AGF decided to export the silver obtained through the treatment of doré bars, which it considered to be entitled to do under Decree No. 477 (see above para. 424).

- AGF was required to work with AMGK for the refining of the silver doré bars and they entered into the Silver Refining Agreement on 29 March 2007 (see above para. 507), although Claimant would have preferred to sub-contract the refining of silver to Metalor of Switzerland, which was apparently more experienced and cheaper (see above para. 506).

- AMGK's capacity was originally not sufficient and it increased such capacity on request of Goskomgeology (see above paras. 504-505).

- The refining of silver by AMGK did not meet the expected targets in terms of quality and production volume. It is disputed whether this resulted from AGF's failure to deliver doré bars of sufficient quality, or from AMGK's inability to adequately refine sufficient quantity of doré bars. In this regard, the record contains letters of complaint from AGF as well as letters of complaint from AMGK (see above para. 504).

- The original Silver Refining Agreement was amended in total 8 times, whereby the amendments focused on specifying the requirements as to the level of purity of the doré bars and their terms and modality of delivery by AGF (see above paras. 508, 512, No. 3, 519, 523, 525 and 528).

- Because of the insufficient silver refining, AGF accumulated stockpile of silver doré bars up to a value of approx. USD 15 million by November 2007 (see above para. 513). Whilst AGF requested the Uzbek Government to either set-off the stockpile with the debt under the Special Dividend Agreement, or to allow a one-off shipment of such silver doré bars abroad (i.e. for refining by and sale to Metalor) (see above paras. 513 and 517), the Uzbek Government did not agree to any of these options.

- Because of the dissatisfaction with the refining of silver by AMGK, Claimant suggested that AGF purchase its own silver refinery and submitted this proposal to the Annual General Shareholder Meeting of 28 September 2008. The Minutes of the Meeting provide that the shareholders resolved to consider such proposal after the financial situation of AGF would have improved. It is however disputed between the Parties whether this resolution reflects the true outcome of the discussion of the shareholders (see above para. 518). In any event, it appears that Claimant purchased a silver refinery from Italy for a price of USD 752,385.47 (see above para. 688), but that it was prevented from installing and using this refinery to refine the silver doré bars.

- At the same time that AGF and AMGK kept amending the Silver Refining Agreement, AGF also entered into an agreement with Metalor covering the refining of doré bars (see above para. 521). It appears that the Uzbek authorities considered this agreement to be in breach of Uzbek law because AGF had failed to conduct a tender required under Uzbek law (see above para. 522). This prevented AGF from implementing its agreement with Metalor and AGF had to continue working with AMGK.

803. The key question here is thus whether the Respondent's insistence that AGF work with AMGK for the refining of silver, Respondent's refusal to allow AGF to make a one-off shipment of the doré bars and/or to set-off the value of the doré bars with the debt under the Special Dividend Agreement and/or the fact that AGF was prevented from using the silver refinery purchased from Italy was in breach of the protection standards provided for under Article 2(2) of the BIT.

804. The Arbitral Tribunal does not consider this to be the case for the following reasons:

- Claimant relies on the standard of protection of Article 2(2) of the BIT to claim that Respondent's actions with regard to the silver refining were unfair, arbitrary, unreasonable and discriminatory and relies partly on Article 4 of Decree No. 477 and Article 10 of the Law on Foreign Investment. Respondent stresses that Article 4 of Decree No. 477 refers to the export of refined gold and silver and does not provide Claimant with a right to export unrefined gold or silver, i.e. silver doré bars. While the wording of Article 4 of Decree No. 477 is not crystal clear and refers, in Claimant's translation, to "*gold, silver and other products obtained from mining*", the letter from the CabMin of 23 August 2002 refers more precisely to "*gold, silver and other products obtained during the treatment of gold deposits*" (see above para. 424). The Arbitral Tribunal however considers it reasonable to interpret this provision, as Respondent does, as referring to refined products only. Indeed, it is legitimate for a State to require that the exploitation of its natural resources benefit the local industry and that relevant works be sub-contracted to local companies, provided that such companies are able to develop the necessary know-how and technology. In any event, Claimant has not expressly contested the fact that Article 4 of Decree No. 477 applies only to refined products.

- In fact, Claimant takes issue with the fact that AGF was prevented from resorting to more efficient ways of refining silver, be it through the use of a foreign refinery (Metalor) or its own refinery, is in breach of the protection standards under Article 2(2) of the BIT.

- However, there are several problems with this claim:

    - Claimant's claim is largely based on the assumption that the problems regarding the silver refining were due to AMGK's inability to refine silver in sufficient quantity and quality and that the other option would have been more efficient and profitable. However, the record does not allow to conclude that AMGK was solely responsible for the insufficient silver refining. In fact, the record instead shows that AGF also bore part of the responsibility. This is in particular established by the content of the various amendments to the Silver Refining

Agreement which aimed at improving the quality and modalities of the delivery of silver doré bars by AGF.

- In addition, in view of this shared responsibility, there is no certainty that a refining through Metalor or by AGF itself would have yielded better results, in particular in view of all other operational problems AGF was suffering from.

- Claimant's claim is further based on the assumption that Claimant had a legitimate expectation to be entitled to either sub-contract the refining of silver to a company abroad or to proceed with the refining of silver by itself. However, Claimant has failed to establish that it had such legitimate expectation, in particular given that it admitted that "*silver processing was not even initially incorporated as part of Claimant's AGF plan*" and that "*silver extraction was not addressed in the production schedule*." (see Claim. Am.Reply. 23.08.2013, para. 852).

- In addition, Claimant's claim further assumes that Claimant had a specific legitimate expectation to purchase and use its own refinery. However, Claimant's claim in this regard does not stand. Firstly, it is based on the assumption that the purchase of such refinery had been approved by at least a majority of the shareholders. However, the Minutes of relevant Shareholders Meetings do not support Claimant's position. As concerns the Minutes of the Shareholders Meeting of 24 April 2008 (see above para. 516), whilst they confirm an agreement in principle, such agreement was conditional upon the agreement of the Cabinet of Ministers and was given also in view of a potential use of the refinery in case AGF would obtain a license to mine Kosmanachi and Okjetpes silver deposits. Thus, the shareholders' resolution cannot be interpreted as an explicit approval of purchase of the specific silver refinery eventually purchased by Claimant. As concerns the Minutes of the Shareholders Meeting of 29 September 2008 (see above para. 518), they explicitly mention that "[c]*onstruction of the silver refinery shall be considered after the financial situation at AGF is stabilized and shall be at AGF's own expense*", and it is undisputed that AGF's financial situation did not subsequently improve. Whilst Claimant argues that Mr. Wilkins' unwillingly signed these Minutes, Claimant does not contest that Mr. Wilkins eventually signed the Minutes. In addition, Claimant does not contest that the sale of such refinery was subject to certain conditions and the record shows that

Claimant was very well aware of additional approval by the Uzbek Government (C-299). Secondly, the purchase and use of the refinery is primarily a matter under the competence of the shareholders of AGF, and to the extent that there was no clear agreement among the shareholders of AGF, it is unclear as to what extent the Uzbek Government could be blamed for not supporting such purchase. In other words, Claimant took the risk of purchasing the refinery notwithstanding that such sale had not been fully approved either by the Shareholders and/or by the Uzbek Government.

- Finally, as concerns the one-off sale, Claimant has failed to establish that it had a legitimate expectation to be granted the right to such one-off sale, given that it would have represented a deviation from the Government's legitimate requirement that silver be primarily refined in Uzbekistan. What Claimant was requesting from the Uzbek Government was more a "favour" than the respect of a pre-existing right or legitimate expectation, and the refusal of such "favour" cannot be deemed as a breach of any of the protection standards under Article 2(2) of the BIT.

805. Under these circumstances, the Arbitral Tribunal finds that Claimant has failed to establish that the requirement to refine silver through AMGK, the refusal to approve a one-off sale of doré bars to Metalor and/or the refusal by the Uzbek Parties to use the refinery purchased by Claimant from Italy is in breach of Article 2(2) of the BIT.

(g) As Concerns the Non-Issuance or Non-Renewal of Licenses:

806. Claimant's claim concerning the non-issuance or non-renewal of licenses concerns four different licenses, namely: (i) the general Mining License, which expired in 2006 (see above para. 499, (ii) the Sarybatyr License (see above paras. 548 and 585), (iii) the Cyanide License (see above paras. 472 and 629) and (iv) the Renewed Exploration License (see above paras. 533 and 588).

807. It arises the following out of the evidence at stake:

- The Mining License was first issued on 28 November 2001 (see above para. 415) for a duration of five years, i.e. until 27 November 2006. In December 2005 and January 2006, AGF filed for renewal of this Mining License first before the Deputy Prime Minister and then before Sanoat (see above paras. 474 and 476). As of 23 November 2006, AGF had not received any feedback from the Uzbek authorities (see above para. 499). On 24 November 2006, Mr. Saidov, the Head of Sanoat, informed AGF that the renewal of AGF's Mining License was under review, and that pending this review, AGF could continue its activities under the license until 28 December 2006 (see above para. 500). On 27 December 2006, Mr. Alibaev from Sanoat informed AGF again that AGF was permitted to continue its mining activities on the basis of the expired mining-activity license, without indicating the duration of such permission or the time it would take to decide on the renewal (see above para. 503). On 26 August 2009, Mr. Mamaladiev from the relevant department of the CabMin informed AGF that its request for issuance of the Mining License was under review (see above para. 586). It appears that the Mining License was never officially renewed, although the record does not contain any official refusal of such Mining License and that AGF was not prevented from continuing to perform its mining activities.

- The Cyanide License was first issued on 23 September 2005 (see above para. 472) for a duration of five years, i.e. until 23 September 2010. On 22 September 2010, Mr. Salamatin of AGF sent a letter to the CabMin explaining that the Cyanide License was expiring on 23 September 2010 and that because of negligence on behalf of AGF, all the renewal documents had not been prepared on time. Mr. Salamatin thus requested to be granted the right to continue the transportation and storage of cyanide to extract precious metals during the renewal appraisal period (see above para. 629). Thus, on 23 September 2010, the Cyanide License expired. In the following days, AGF submitted the relevant application documents (see above paras. 632 fol.) On 5 October 2010, Sanoat informed AGF that the Cyanide License had expired on 23 September 2010 and that a "license prolongation application was not made in time" and ordered AGF to take disciplinary action against the staff responsible for the oversight (see above para. 636). On 2 February 2011, Sanoat allowed AGF to use, transport, and store poisonous substances for a limited time period until 20 February 2011. This permission was renewed on 7 April 2011, 6 June 2011, and 2 February 2012 (see above paras. 637-639). No formal license was ever issued and there is no evidence that AGF was prevented from continuing to use, transport and store cyanide.

- The Renewed Exploration License was issued on 7 August 2007 (see above para. 533) for a duration of three years, i.e. until 7

August 2010. On 8 February 2010, AGF applied with Goskomgeology for the renewal of the Renewed Exploration License (see above para. 588). On 19 August 2010, Goskomgeology updated the CabMin regarding the status of the exploration works and the need for extension of the Renewed Exploration License (see above para. 629). This License was never renewed, although the record does not contain a formal refusal by the Uzbek authorities.

- As concerns the Sarybatyr License, AGF applied for it for the first time on 16 January 2009 before Goskomgeology (see above para. 548). On 17 July 2009, AGF submitted the required Feasibility Study to Goskomgeology (see above para. 584). On 17 August 2009, Goskomgeology followed up with Sanoat and requested the issuance of the Sarybatyr License (see above para. 585). It appears that the Sarybatyr License was never issued, although the record does not contain a formal refusal letter from the Uzbek authorities.

808. The key question here is thus whether the Respondent's non-renewal or non-extension of the above mentioned licenses was in breach of the protection standards provided for under Article 2(2) of the BIT.

809. The Arbitral Tribunal does not consider this to be the case for the following reasons:

(i) As concerns the Cyanide License, the Sarybatyr License and the Renewed Exploration License:

- The requests for renewal or extension of licenses were subject to the Law on Subsoil dated 23 September 1994 (Exh. C-263) as amended by the new regime implemented in June 2007 through Decrees No. PP-649 and No. 110 (see above para. 529 and 532). This regime subjected the obtaining of licenses to certain conditions, and also provided for the State's right to limit, suspend or terminate certain licenses (see e.g. Article 34 of the Law on Subsoil).

- In addition, the General License Agreement between the CabMin and AGF and each License was subject to specific terms and conditions (see above para. 416). As concerns the Renewed Exploration License, these conditions included in particular (i) to meet the requirements established by Articles 11, 12, 16, 33, 35, 36, 40, 43 and 45 of the Law on Subsoil, as well as (ii) "to provide production or exploration works on the action space of the JV in a strict compliance with the current regulations and standards of geologic exploration of mineral resources" and (iii) upon completion of the field works to do restoratory works to the surface mining developments and holes (see above para. 533).

- As concerns the Cyanide License, it is undisputed that AGF submitted its application for renewal after the expiry of the previous license due to a negligence of AGF itself. In addition, the record shows that Sanoat had complained in the past of lack of compliance by AGF with the terms of the license (see e.g. R-198).

- As concerns the Renewed Exploration License, it arises from the record that AGF failed to conduct previous exploration works as planned (see above para. 629; Goskomgeology's letter of 19 August 2010). In this regard, the Arbitral Tribunal has taken note of Claimant's challenges of Respondent's exhibits and witness statements, but is not convinced that this evidence suffers from the alleged deficiencies or irregularities. In addition, Claimant has failed to submit evidence showing that AGF had in the past complied with all the terms and conditions of the Renewed Exploration License and therefore fulfilled all the requirements for the renewal of the license.

- As concerns the Sarybatyr License, it was a first-time application by Claimant. At that time however, i.e., 16 January 2009, AGF was already in a very problematic state and had already stopped the operation of its gold processing plant (see above para. 547). In addition, it is undisputed that AGF did not submit a Pre-Feasibility Study for the mining of gold in Sarybatyr as required under Decrees PP-649 and No. 110 (see above para. 587).

(ii) As concerns the Mining License, Respondent's main argument is to say that Claimant repeatedly violated the terms of this license (see above para. 727; Resp. PHB I. 21.07.2014, paras. 90 fol.). However, the contemporaneous record does not show that Respondent complained about such violations. In particular, the correspondence from the Uzbek authorities granting permission to continue mining activities (see above para. 629) does not make any reference to such violations. However, it is also true that the Complex State Audit, which was issued in August 2006 identified serious non-compliances with various regulations, including on the operational level (see above para. 484). Even though the fines and penalties were drastically reduced by the Uzbek courts, the reasons therefore were largely procedural and did not amount to a reversal of the findings of such non-compliances.

810. As such, the Arbitral Tribunal considers that the mere fact that these four licenses were not renewed or issued can *per se* not be deemed to be in breach of the protection standards under Article 2(2) of the BIT, as Respondent had sufficient justifiable reasons not to renew or issue such licenses. The question remains however whether the fact that Respondent never officially rejected the applications can be seen in breach of such standards.

811. It is true that an informal permission to continue operating after the expiry of relevant licenses does not provide the investors with sufficient security to plan ahead, and it could also have an impact on the financing of a project. It is further true that the failure to render a formal decision on the applications is not in line with Decree No. 112 (see above para. 450), which provides that the relevant body shall inform the license applicant of the decision taken within 33 days as of the filing of the application (see Article 14 of Decree No. 112). However, the non-compliance with local regulations is *per se* not sufficient to trigger a breach of BIT standards and the question of a breach of the FET standard or other protection standards under Article 2(2) of the BIT must be examined based on the overall circumstances of the case at hand.

812. In the present case, given the amount and level of seriousness of the problems encountered by AGF, which undisputedly included issues of non-compliance with tax, currency and operational regulations, the Arbitral Tribunal considers that Respondent's non-renewal or non-issuance of the above licenses does not reach the required threshold. In fact, by informally allowing AGF to pursue its activities under the expired licenses, Respondent was trying not to shut a door without however providing rights that it considered unjustified. Thus, although this way of proceeding is not totally in line with best practice standards of transparency and due process, the Arbitral Tribunal considers that, in the present case, it does not reach the standard of breach of Article 2(2) of the BIT.

813. That being said, it is true that as concerns the Mining License, the decision upon its renewal was left open since 2006. That is a long time and it is true that if Respondent was going to let AGF continue to extract gold and silver, it should have provided for a clear legal instrument. As such, the non-renewal of the Mining License could be considered in breach of the FET standard under Article 2(2) of the BIT. However, to the extent that (i) this did not prevent Claimant from continuing the gold and silver extraction, (ii) that there is no record that Claimant further insisted on the issuance of such license after 2006 and (iii) that Claimant stopped the processing of gold in 2009 and would therefore have had problems to request for its renewal, as it had expired on 27 November 2006, the Arbitral

Tribunal is not convinced that the non-renewal of such Mining License is causal for the damages claimed by Claimant in this regard.

814. In addition, the refusal to finance does not seem to have been a decision of CITIC as such, but the result of a decision of a Chinese Ministry, which refused "an outbound investment". This arises our of the exchange of e-mails (Exh. C-511) between Richard Shead and Long March Capital (the entity monitoring the CITIC investment) in which the former requires "clarification from the Ministry on why the outbound investment was declined." Long March Capital replied that "to the best of our knowledge, of the various approvals required in their entirety for the proposed investment Oxus to proceed, **the approval from the Ministry of Commerce was not obtained**. Hence none of the Chinese parties was authorized to proceed with the investment. We have not received, nor have we requested, any written clarification of the reason from the Ministry in respect of why the approval was not provided. Long March Capital understands, although this is **not substantiated** with any official documentation, that this **may have had to do with unqualified political risks** associated with the proposed investment" (emphasis added). The Arbitral Tribunal fails to see the direct link between such "unqualified politival risks" and the non-renewal of the licenses.

815. In conclusion, the Arbitral Tribunal considers that the non-renewal or non-issuance of the Renewed Exploration License, the Cyanide License, the Sarybatyr License cannot be deemed to have constituted a breach of the protection standards afforded under Article 2(2) of the BIT, and that the non-renewal of the Mining License had no causal effect on the damages claimed by Claimant.

(h) As Concerns the Non-Approval of Phase 2 Feasibility Study:

816. It is undisputed between the Parties that Decree No. 110 required the submission by Claimant of a Preliminary Feasibility Study as well as a Final Feasibility Study for Phase 2 in order for Claimant to obtain the right to develop the Project. It is further undisputed that Claimant prepared and Respondent approved on 5 December 2007 Claimant's Phase 2 Preliminary Feasibility Study (see above para. 536). It is further undisputed that Respondent never approved Claimant's Phase 2 Final Feasibility Study. The disputed question is whether Respondent's non-approval of Claimant's Phase 2 Final Feasibility Study was in breach of the protection standards of Article 2(2) of the BIT.

817. In this regard, Claimant's main contention is that Respondent's refusal was inappropriate because it put Claimant in a catch 22 position: In order to provide detailed information on the financing of Phase 2, Claimant needed the Phase 2 Final Feasibility Study to be approved; however, in order to approve the Phase 2 Final Feasibility Study, Respondent required specific information on the financing

terms. Claimant further contends that Respondent chose to apply the requirements of Decree No. 110 with unnecessary strictness. These requirements put Claimant in an impossible position and eventually prevented Claimant from obtaining the necessary financing causing a loss of USD 127,8 million according to Mr. Haberman's calculation (Haberman II, para. 4.24). In contrast, Respondent contends that Claimant's Phase 2 Feasibility Study largely deviated from the parameters of its Preliminary Feasibility Study and did not contain key information regarding financing and sub-contracting, and therefore failed to fulfil the legal requirements for approval for reasons imputable to Claimant itself.

818. It arises the following out of the evidence at stake:

- Para. 17 (Article III) and para. 18 (Article IV) of Annex 1 of Decree No. 110 provides as follows with regard to the approval of the required Final Feasibility Study (Exh. R-236)[29]:

*"**III. Order of development, execution of expert examination and approval of PFS (PTEC) of investment projects.***

[…]

17. On the basis of parameters of the approved PFS (PTEC) of the project, including limits of financing by types of expenses, initiator of the project in the prescribed order:

a) determines and approves sources of financing;

b) develops tender documentation for determination of contractors and suppliers of purchased process equipment for the project.

IV. Order of development, execution of expert examination and approval of FS (TEC) of investment projects

18. On the basis of the approved by the head of the appropriate complex of the Cabinet of ministers of the Republic of Uzbekistan [Preliminary Feasibility Study] *(PTEC) of the project, offers of process and other equipment selected as a result of tender bidding taking into account studied sources of and terms of financing the initiator of the project develops FS (TEC) of the investment project according to the structure according to the Attachment no. 5 to the present Regulations.*

[…]"

- As such, Decree No. 100 required the approval of a Final Feasibility Study to rely on the parameters approved in the

[29] The Arbitral Tribunal has taken note of Exh. C-337, which provides for a slightly different translation of the wording of the relevant provisions. However, the Arbitral Tribunal did not consider these differences to be material.

Preliminary Feasibility Study and to contain information about "*sources of financing*" as well as "*tender documentation for determination of contractors and suppliers*";

- Claimant does not contest that the Phase 2 Final Feasibility Study exceeded the Phase 2 Preliminary Feasibility Study by approx. US$ 100,000, that it did not provide detailed information about the equipment to be used and purchased, and the specific terms of financing. Indeed, these elements are duly established by the factual record (see above paras. 570 fol.). Instead, Claimant contends that Respondent's attitude was unfair and unreasonable because (i) it failed to consider that it also provided significant advantages to AGF, relating to the additional 750,000 tonnes of ore that was to be mined, the additional 3.2 tonnes of gold and 0.22 tonnes of silver in the form of finished product that was to be produced, the additional 662 local jobs that were to be created and the additional profit of nearly USD 580 million that was to be made, as well as the USD 443.2 million in taxes and obligatory payments the Government would be receiving (see Claim. Am.Reply. 23.08.2013, para. 965-967), (ii) it applied the requirements of Decree No. 110 in an unnecessary strict way, and (iii) it put Claimant in a catch-22 position with regard to financing.

819. As mentioned above (see para. 317), the FET standard as contemplated by Article 2(2) must be understood as a means to guarantee justice to foreign investors, and when doing so, for the States' actions to give due regard to an investor's legitimate expectations by refraining from taking measures which are not justified under the circumstances, i.e. unreasonable, disproportionate or discriminatory. With regard to the way in which national laws and regulations are applied, a breach of the standards of protection under Article 2(2) does not occur just because the relevant laws and regulations may be interpreted or applied in a different way. Instead, the threshold may only be reached where such laws or regulations have been applied in a way that is contrary to good faith, fairness or legitimate expectations by Claimant.

820. The Arbitral Tribunal finds that this threshold is not met in the present case, in particular for the following reasons:

- The legal requirements that a Final Feasibility Study be based on approved parameters of the Preliminary Feasibility Study and provide specific information concerning costs, equipment and financing are legitimate;

- It is undisputed that the Phase 2 Final Feasibility Study deviated with regard to key parameters from the Preliminary Feasibility Study, as the scope of the Project had been substantially revised;

- A true dialogue took place between AGF and the Uzbek Government and AGF was aware of what it needed to obtain the approval of the Phase 2 Final Feasibility Study, but was not in a position to meet these requirements and therefore disagreed with the appropriateness of these requirements;

- Claimant's argument concerning the catch-22 problem fails to convince, given that it is established that RBS refused to finance the Project long before the issue arose with the approval of the Final Feasibility Study (see above para. 565) and that Claimant has failed to establish a causal link between the lack of liceneses and the Chinese Ministry's refusal of financing (see above para. **Erreur ! Source du renvoi introuvable.**). In addition, whilst more difficult, it is not impossible to obtain conditional financing without such approval (See Mr. Larroque's and Mr. Pingle's testimony,Transcripts of 2 May 2014, 1198:7 - 1204:22; 1217:24 - 1224:1; 1290:4 – 17; 1306:14 - 1307:12, 1307:13 - 15;

- In 2009, the operational challenges encountered by AGF, the low amount of dividends paid out to the Uzbek Parties, the problems with the financial management of AGF leading to non-compliance with currency and tax laws justified that the Uzbek government would be more insistent on issues such as terms of financing.

821. In summary, the Arbitral Tribunal finds that Claimant's criticism towards Respondent's attitude as concerns the approval of the Phase 2 Final Feasibility Study failed to reach the threshold necessary for a breach of Article 2(2) of the BIT.

(i) As Concerns the Tax Regime Modifications in 2006, 2009 and 2011:

822. Claimant's claim of breach of Article 2 of the BIT in relation to the changes in the Uzbek tax regime has four sub-sets: (i) the revocation of tax privileges granted under Decrees No. 477, No. 127-20 and No. 266 and stabilization clauses in 2006, (ii) the non-reimbursement of VAT between 2007 and 2009, (iii) the changes to the VAT regime modifications in 2009 and (iv) the changes to the VAT regime as of 2011 (Claim. Reply. 23.08.2013, paras. 1281 fol.).

823. It arises the following out of the evidence at stake:

- AGF benefited of the following tax privileges:

  - Decree No. 477 of 22 September 1994 *'On the creation of the Joint Venture "Amantaytau Goldfields" and measures to ensure its effective functioning'* (C-215) provided the following tax privileges to AGF (see above para. 39):

    (i) exemption from paying income tax during five years as of registration of AGF (i.e. as of 12 December 1994, i.e. until 12 December 1999),

    (ii) exemption from paying taxes on customs and property,

    (iii) exemption of foreign shareholders and foreign lenders from taxes on dividends and loan-service payments transferred abroad,

    (iv) exemption of taxes or charges on amortisation of fixed assets.

    (v) In addition, Clause 7 of Decree No. 477 provided for the following "stabilization clause" : "In the event of changes during the next ten years in the tax law of the Republic of Uzbekistan which adversely affect the activities of the Joint Venture, to provide the application of legal and other normative acts valid at the time of signing of the statute documentation for the Joint Venture." This stabilization clause was to be valid for 10 years as of signing of the "statute documentation" of AGF, i.e. as of 24 November 1993 (see above para. 39) and until 24 November 2003..

    It is to be noted that to the exception of (iii), all privileges were granted to the JV, including the tax stabilisation clause which only was applicable if the change in tax "adversely affect the activities of the Joint Venture."

    Also, it has to be indicated that in para.6, the taxes which had to paid were mentioned, among them the "payment for the use of subsoil (royalties) during the period of exemption from paying income tax, 2,5 percent and after the period of exemption from paying income tax, 6 percent of all revenue receivedby the Joint Venture from the sale of mineral resources less expenses incurred …"

- Decree No. 127-20 of 30 March 1996 (C-218; see above para. 42) provided that the tax privileges granted to AGF would "be valid for the whole mine life period of the joint venture if any concrete timing is not established."

- The Law on Foreign Investment of 30 April 1998 provided for the following stabilization clause:

  "If the subsequent legislation of the Republic of Uzbekistan makes worse investment conditions, than legislation current on the date of investment is applied to foreign investments within ten years of the date of investment. The foreign investor has the right at his own discretion to apply those provisions of a new legislation which make better conditions of his investment.

  Worsening conditions of investments refer to changes and amendments to the legislation current on the date of investment or adoption of the new legal acts, providing:

  - *increase in the rate of tax on incomes, received as dividends, paid to the foreign investor;* […]*"* (Exh, 277, Art. 2)

  This stabilization clause provided for a duration of "ten years of the date of investment", i.e. as of the establishment of AGF on 22 September or 12 December 1994 until 22 September or 12 December 2004 (depending on whether one relies on the conclusion of the AGF Original JV Agreement or the Original AGF Charter, see above para. 37 and 40).

- Decree No. 266 of 11 July 2000 'On additional measures to organize the operation of the Joint Venture "Amantaytau Goldfields"' (C-213) provided in Clause 6 (see above para. 53) that "[a]ll the rights, privileges, conditions of taxation and guarantees that have been granted to the project's participants by the decrees of the Cabinet of Ministers of the Republic of Uzbekistan, which were adopted earlier, shall be reserved" and with regard to the stabilization clause of Decree No. 477, Clause 7 of Decree No. 266 provided that "Clause 7 of Decree No. 477 of the Cabinet of Ministers of Republic of Uzbekistan, dated 22 September 1994, came into effect as of the date of this Decree" and that "a tax for the use of subsoil will be collected from the JV "Amantaytau Goldfields" in the amount established by current legislation, i.e. 2.8 per cent of the amount of the proceeds gained by the joint venture from selling the extracted precious metals and other associated products." In other words, Decree No. 266 had the effect to renew the ten year stabilization clause of Decree No. 477 until 10 July 2010. I should be noted that the duration of the exemption of income tax was not extended, which means that in principle the income tax exemption had lapsed on 12 December 1999. In fact, the Claimant does not seems to invoke this exemption as a basis for a complaint. Moreover, the next Decree seems to have considered that the exemption had not lapsed, as will be indicated.

- o According to Decree No. 76 of 10 August 2001 '*On Taxation, Accounting and Reporting for Amantaytau Goldfields Joint Venture*' (C-217) (see above para. 414), "[t]*he JV shall commence paying income (profit) tax upon expiry of five years from the moment (date) of completion of one of the events as follows; - sale of the first lot of the Product; - State acceptance of the processing plant for the oxide ore to be mined by open pit methods.*" This is also the first legal document concerning the JV dealing expressly with VAT. According to Clause 15, "*JV shall be exempt from Value Added Tax in respect of imported materials and equipement, works and services which are used for construction*" during Phase I. At that point in time, AGF was therefore subject to a "zero rated VAT" regime, meaning that AGF was exempt from paying VAT on exports and received reimbursement for VAT paid on import of raw materials or in-country goods or services. In addition, Decree No. 76 confirmed the stabilization clause's validity as follows: "*In the event of adverse changes in the tax regime of the Republic of Uzbekistan, which worsen conditions of JV's functioning, the legal acts valid as at 1 July 2000, including this Regulation, shall remain in force until 1 July 2010.*"

As far as stabilization clauses are concerned, it is the view of the Tribunal that such a clause in a law or a general regulation does not give a vested right to the investor, as the State can always modify its laws and general regulations. The situation is different when a stabilization clause is included in a contract or a regulation specifically directed at the investor, as in the present case, where the different Decrees all concerned expressly Amantaytau Goldfields Joint Venture. The Tribunal will thus considers the extent of the protection granted by these Decrees to the Joint Venture. In summary, under these Decrees, AGF was granted three types of relevant tax privileges: (i) specific privileges in the form of exemptions from specific taxes, such as the income tax (but not VAT tax) for the duration of the "whole mine life period", (ii) a specific stabilization clause under Decree No. 477 valid until 1 July 2010, as well as (iii) a "zero-rated" treatment for VAT valid until 1 July 2010.

- In 2006, these privileges were revoked as follows:

- o By Decree No. 74 of 1 May 2006 '*On Additional Measures To Increase An Incentive Role Of Privileges Granted To companies With Foreign Investments*" (C-255) (see above para. 478), all privileges that had been granted with no specific time limit were "cancelled". According to

Respondent's interpretation of this provision, this included the privileges that had been granted by Decree No. 127-20 for the "whole mine life period." The main concern of Uzbekistan in adopting this decree was to improve the efficiency of tax exemptions, as its title indicates and to limit in time the exemptions granted. In fact, a special group was to be created in order to review the different exemptions and consider to grant them again but for limited periods of time. Clauses 3 and 4 provide:

> "3. From 1 June 2006 all privileges on paying taxes, customs and other compulsory paiements earlier granted by Government resolutions which have not been envisaged by legal documents and which are without time limit shall be cancelled.
>
> 4. In order to secure detailed consideration of issues of necessity an efficiency of further granting of additional privileges and preferences to existing companies with foreign investments which are part of an industry or are implementing projects recognized by laws as priority projects, a special group shall be created … and this group shall be instructed as follows:
>
> All aspects of appeals by individual companies with foreign investments which were granted additional privileges on paying taxes, duties, customs and other compulsory paiements without time limit by earlier Government resolutions shall be considered;
>
> Based on the results of consideration of appeals relevant substantiated proposals on setting up for individual companies with foreign investments, which earlier had privileges without time limit, of substantiated privileges on paying taxes, duties, customs and other compulsory paiements for a clearly defined term followed by further conclusion of investment agreements with foreign investors …

- As concerns Decree No. 133 of 7 July 2006 *'On Entering of Amendments and Invalidations of Some Resolutions of the Government of the Republic of Uzbekistan'* (C-256) (see above para. 479) it cancelled Clauses 5 to 7 of Decree No. 477 and Clauses 6 and 7 of Decree No. 266, thereby cancelling the stabilization clause.

In summary, Decree No. 74 and Decree No. 133 cancelled all tax privileges granted to AGF by Decree No. 477, Decree No. 127-20 and Decree No. 266. They did not however at this stage affect yet AGF's VAT privileges.

- As concerns the VAT treatment, as per 1 January 2009, the changes introduced to the Uzbek Tax Code changed the zero-rated VAT regime for import and export applicable to AGF by cancelling the exemption of VAT tax on imports. In other words, AGF was not able anymore to receive reimbursement of the VAT paid on import of raw materials. The exemption of VAT tax on exports of gold and silver however remained in place (see above paras. 595 fol.). As per 1 January 2011, the remaining favourable treatment, i.e. the exemption of VAT on export of gold and silver, was cancelled, thereby subjecting these exports to a standard VAT of 20% (see above para. 630).

824. Thus, the key question is whether these revocations of privileges and/or changes in the applicable VAT regime were in breach of the protection standards of Article 2(2) of the BIT. In order to answer this question, the Tribunal starts from the premise that, whereas a State may modify its tax regime, it must honor stabilization clauses and the specific privileges that it grants to investors.

825. The Arbitral Tribunal finds that this was partly the case for the following reasons:

- It makes no doubt that Claimant relied on the various tax privileges granted by Decrees No. 477, No. 127-20 and No. 266 when deciding to become a shareholder of AGF and that these privileges were relied upon when calculating the financial needs and revenues of the AGF Project.

- Whilst Respondent contends that these privileges were revoked on justifiable grounds, namely due to Claimant's alleged deficient performance, this argument fails to convince. First, it is not supported by contemporary documentary evidence. Indeed, none of the documents relating to the revocation of such privileges established a connection between these revocations and Claimant's alleged deficient performance. In this regard, it is worth noting that none of the legislative acts which provided for the relevant privileges expressly provided that such privileges could be revoked in case of non-compliance with legal or contractual requirements. It takes more than disappointing project performance to justify revoking tax privileges subject to stabilization clauses, which had been re-confirmed two times.

- Based thereon, the Arbitral Tribunal considers that the tax changes implemented through Decrees 74 and 133 in 2006 breached Claimant's legitimate expectations and was contrary to the FET standard under Article 2(2) of the BIT. In this regard, Respondent's agreement to defer certain tax payments is not sufficient to repair such breach. It may however be considered when establishing the impact of such breach (see below paras. 865 fol.).

- The same applies to the VAT changes implemented in 2009. The Tribunal must however disagree with Claimant, which complained of violations of procedural due process, when it stated that "Oxus had neither been consulted nor had the reasoning behind the VAT change explained to it." States do not have an obligation to consult the taxpayers before modifying their fiscal legislation. The question whether these changes were also discriminatory in that they applied *de facto* only to AGF may remain open, given that Claimant has not established that a double breach of Article 2(2) of the BIT would impact the amount of damages claimed. On the contrary, the discriminatory treatment, if any, would be absorbed by the breach of the FET standard. As to Respondent's argument that these changes were justified by public policy grounds requiring to protect the cotton industry rather than the precious metal industry, it fails to convince. Even if the cotton industry needed special encouragement measures, Respondent has failed to sufficiently explain why would this require revoking privileges applying to the export of precious metals, especially where such privileges were subject to clear stabilization clauses.

- As concerns the VAT changes implemented in 2011, the Arbitral Tribunal considers that there was no breach of Article 2(2) of the BIT, because these changes were not covered anymore by the stabilization clause and, moreover, it appears that Claimant did no pay any taxes in 2011 and was not operating anymore. Thus, these changes could not have had any impact on Claimant's operations.

- As concerns the amount of USD 2.7 million claimed by Claimant for alleged withholding of VAT (see above para. 133, AGF Claim No. 9 (1583.8.7.1.2)), the Arbitral Tribunal considers that it is not sufficiently substantiated. Whereas Mr. Haberman has included this amount in his various reports and refers in this respect to "the Uzbek government's decision not to reimburse withheld VAT owed to AGF from 2007 onwards" (see e.g. Habermann II, para. 4.28, Table at para. 4.28), this claim and this amount has been barely touched upon by Claimant in its legal submissions. In particular, it is not clear to what extent, if at all, this withholding of VAT is the result of the 2006 tax changes, or whether it is the result of a separate and independent act of the State. It is further unclear whether AGF has ever initiated administrative proceedings before the relevant Uzbek authorities requesting the reimbursement of the claimed VAT reimbursement. Finally, the creditor of any VAT reimbursement would be AGF as the VAT debtor and not Claimant itself. The mere fact that Claimant requested that such VAT be off-set with payments requested by Respondent under the SDA and that such request was partially rejected, is *per se* not sufficient to trigger a breach of Art. 2(2) of the BIT.

(j) *As Concerns the Post-2011 Events, Including the 2011 Audit, the Criminal Investigations and the Liquidation Proceedings:*

826. As mentioned above in paras. 752-758, regarding Claimant's claims for expropriation, the Arbitral Tribunal considers that the 2011 Audit, the criminal investigations and the liquidation proceedings were more of a reaction to an already catastrophic situation, rather than the cause of such situation. As such, for the same reasons as mentioned above and even though the way in which the 2011 Audit, the criminal investigations and the liquidation proceedings were conducted may not be immune to criticism, the Arbitral Tribunal finds that there is no breach of Article 2(2) of the BIT.

2.3.1.3 Conclusion

827. The Arbitral Tribunal finds that Respondent shall be liable for a breach of Article 2(2) of the BIT in connection with the tax regime changes implemented in 2006 and in 2009.

828. As concerns all other Claimant's claims for breach of Article 2(2) of the BIT, they are rejected.

2.3.2 With Regard to the FPS

2.3.2.1 The Parties' Positions

(a) *Claimant's Position*

829. According to Claimant, Respondent and its organs, through their various acts and omissions, breached Respondent's obligation to provide Claimant's investment with full protection and security, in breach of Article 2(2) of the BIT for the following reasons (Claim. Am.Reply. 23.08.2013, paras. 1310 fol.; Claim. PHB I. 21.07.2014, paras. 22, 31, 182; Claim. PHB II. 21.08.2014, para. 118):

(i) Relying on *Occidental v. Ecuador*, Claimant contends that treatment that is not fair and equitable automatically entails an absence of full protection and security. Employment of physical force would not be a condition for the application of this standard.

(ii) Thus, all of Uzbekistan's acts and omissions (summarized above in para. 684) constitute a breach of the FPS standard to the extent that they also constitute a breach of the FET standard. This would in particular be the case for Respondent's omissions with regard to the 2006, 2009 and 2011 changes in the tax regime, the liquidation proceedings and the criminal investigations.

(iii) Even if the Arbitral Tribunal found that a breach of the FET standard did not entail an automatic finding of breach of FPS, each of Respondent's acts and omissions that constitute a breach of the FET standard, would also constitute individually, let alone collectively, a separate breach of the FPS standard. This is because instead of taking all measures and exercising reasonable care so as to protect Claimant's investment from injury by private or public action, Respondent and its organs took all measures available to them to deprive Claimant of its investment.

(b) Respondent's Position

830. According to Respondent, there is no dispute between the Parties that the FPS standard is one of due diligence. However, the FPS standard is not co-terminous with the FET standard and concerns primarily the host State's obligation to exercise reasonable care in protecting the investment from the actions of third parties, and applies essentially "when the foreign investment has been affected by civil strife and physical violence." (*Saluka v. Czech Republic*, para. 483, RL-291). Even where tribunals have extended this standard beyond physical security, the standard is limited and is met when the State "*provides adequate mechanisms and legal remedies for prosecuting the State organs or private parties responsible for the injury caused to the investor*." (*AWG v. Argentina*, para. 173) (Resp. Am.Rej. 21.02.2014, para. 922).

831. Claimant's position is based on the theory that a breach of the FET standard automatically entails an absence of full protection and security. This is incorrect. As such, Claimant has failed to establish a violation of the FPS standard, because Claimant has not alleged that Respondent failed to exercise due diligence to protect its investment against any interference by a third party, and thus has not even articulated a claim under the standard. In fact, most of the alleged actions or omissions about which Claimant complains were not taken by a third party; rather, they were taken directly by the State itself. Further, Claimant has also not alleged that Respondent failed to provide a legal framework enabling Claimant to take effective steps to protect its investment. (Resp. Am.Rej. 21.02.2014, paras. 922 fol.).

832. As concerns Claimant's argument that the actions of AGF's liquidation managers, even if not attributable to Respondent, violated the FPS standard, it is unfounded as the FPS standard is meant "*to protect more specifically the physical integrity of an investment against interference by use of force*." (*Saluka v. Czech Republic*,

para. 484, RL-291). However, there are no allegations of any interference by use of force against Claimant's investment.

833. Consequently, Claimant's full protection and security claims are unsubstantiated and without merit.

2.3.2.2 The Arbitral Tribunal's Findings

834. As already determined above, the Arbitral Tribunal is of the opinion that the FET standard and the FPS standard are not co-terminous but apply in a different context. The "*obligation of vigilance and due diligence*" of the FPS standard is not of the same nature and scope as the obligations arising out of the FET standard: Under the FPS standard, an investor may not expect a State to ensure that the investor be treated "fairly and equitably" by any third party, but instead the investor has the right to expect that the State takes reasonable measures within its power to prevent wrongful injuries by third parties, and where such injuries have already happened, to punish them. This is why the FPS standard is often referred to and applied in the context of "use of force" (see above para. 353 ; e.g. *Saluka v. Czech Republic*, para. 483; *Asian Agricultural Products Ltd (AAPL) v. Sri Lanka*, para. 26 A; *Wena Hotels v. Egypt*, para. 84; *Eastern Sugar v. Czech Republic*, para. 203; see also *Enron v. Argentina*, para. 286 and *Sempra v. Argentina*, para. 323).

835. Within the context of the AGF Project, the facts underlying Claimant's claims are mainly the changes in the tax regimes, the criminal investigations and the liquidation procedure (see above para. 829(ii)).

836. To the extent that these facts relate to actions or omissions of the Uzbek Government organs, claims based thereon fall outside the scope of the FPS standard. Thus, as concerns the AGF Project, the only element which enters into consideration is the liquidation process, as changes in the tax regime are designed and implemented by the Government and actions of a criminal prosecutor are also to be considered actions of the Government.

837. The question is thus whether the way in which the liquidation process was conducted amounts to a breach of the FPS standard.

838. It should at first be noted that Claimant does not raise any independent claim with regard to the liquidation process, although it does complain about the non-return of the drill rig and requests in this regard an amount of USD 2,562,599.99. Moreover, the Tribunal has already ruled that the liquidation process developed after Claimant's departure from Uzbekistan and closing of the mine and could not therefore affect its rights. However, for the sake of exhaustivity, the Tribunal will

examine the theoretical question of the merits of the claims relating to the liquidation process. It must however be underlined that Claimant has not articulated its claim in a very clear manner:

(i) In its Reply, Claimant argues that it is Respondent which "*prompts and drives the AGF liquidation*" (paras. 1214 fol.). In its Post-Hearing Brief, Claimant further contends that the actions of the Uzbek Parties and the liquidators are all imputable to Respondent (Claim. PHB I. 21.07.2014, paras. 173 fol.). However, to the extent that Claimant takes issue with omissions and actions of Respondent itself, such actions and omissions are covered by the FET standard and are thus irrelevant for the purpose of examining a breach of the FPS standard.

(ii) In its Post-Hearing Brief, upon being invited by the Arbitral Tribunal to further substantiate the specific irregularities allegedly affecting the liquidation process and their specific impact on Claimant's alleged damages (see above para. 117), Claimant responded stating that "*Claimant* […] *addresses this question regarding the AGF liquidation procedure out of its desire to respond fully to the Tribunal's questions. However Claimant emphasises that in order to succeed on the merits of its claims, its case does not depend in any way upon Respondent's pathological failings in respect of the AGF liquidation procedure*." (Claim. PHB I. 21.07.2014, para. 148).

839. As such, it is unclear to what extent Claimant actually still relies on the liquidation process as a factual basis for its claims. In addition, the way in which Claimant has put its claim for breach of FPS standard is not in line with the principle that such standard may only apply with regard to actions of third parties. To the extent that Claimant's claim is based on the premise that all the relevant actions and omissions by the Uzbek Parties and/or liquidators are "imputable to Respondent", they do not qualify as actions of third parties and thus fall beyond the scope of the FPS standard.

840. As concerns Claimant's claim over the drill rig, the Arbitral Tribunal finds that for the same reasons as mentioned above in connection with Article 5 of the BIT (para. 755), the way in which the liquidator dealt with the drill rig do also not amount to a breach of the FPS standard. The same applies to Claimant's silver refinery (see above para. 804).

841. As such, the Arbitral Tribunal finds that Claimant has failed to sufficiently substantiate its claim for breach of the FPS standard.

2.3.2.3 Conclusion

842. In conclusion, Claimant's claims for breach of the FPS standard are rejected.

2.3.3 With Regard to the Umbrella Clause

2.3.3.1 The Parties' Positions

(a) Claimant's Position

843. According to Claimant, through its acts and omissions and those of its organs and/or of the Uzbek Parties, Respondent breached its duty to honor its specifc obligations towards Claimant under the umbrella clause as set out in Article 2(2) BIT *in fine* (see above para. 312) leading to the declaration of *force majeure* and Claimant's forced departure and the loss of its investments (Claim. Am.Reply. 23.08.2013, para. 1314). In support of this contention, Claimant relies mainly on the following facts and arguments:

(i) By forcing Claimant to issue the Guarantee Letters (see above paras. 451 and 461) and conclude the Special Dividend Agreement (see above para. 466), Respondent breached Claimant's right to export and sell gold and silver as granted, among others, under Decree No. 477 (see above para. 39) and the Government's letter of 23 Aug 2002 (see above para. 424) (Claim. Am.Reply. 23.08.2013, para. 1314 a).

(ii) By revoking AGF's tax privileges, *via* Decrees No. 74 and 133 in May and July 2006 respectively (see above para. 478 and 479), and modifying the VAT regime in 2009 and 2011 (see above paras. 589 fol. And 640 fol.), Respondent breached its obligations under the stabilization clause granted under Article 7 of Decree No. 477 (see above para. 39), as extended by Article 7 of Decree No. 266 (see above para. 53) and restated by Article 34 of Regulation No. 76 (see above para. 414) (Claim. Am.Reply. 23.08.2013, para. 1314 b).

(iii) By refusing to issue and/or renew AGF's licenses, Respondent, through the Uzbek Parties, breached Art. 8 of Decree No. 266 (see above para. 53), section 7.2 of the Revised AGF Charter (1) (see above para. 52) and Article 1.1 of the AGF Services Agreement (see above para. 422) (Claim. Am.Reply. 23.08.2013, para. 1314 c; Claim. SoC. 17.09.2012, paras. 346 and 347).

(iv) By refusing to assist with the signing of a Foreign Investment Agreement requested by CITIC (see above para. 605), Respondent's organs, NMMC and Goskomgeology breached their obligations under Recital G of the Joint Venture Agreement (see above para. 37), namely to assist AGF to procure the loan financing required for its mining activities (Claim. Am.Reply. 23.08.2013, para. 1314 c; Claim. SoC. 17.09.2012, paras. 392-398).

844. Each of the above breaches by Uzbekistan of its undertaking had direct financial consequences quantified by Mr. Haberman (see ER-Haberman I, para. 4.75). They also bear the consequences of the overall failure to secure financing, including initially with RBS and Nedbank as well as later with CITIC (Claim. Am.Reply. 23.08.2013, para. 1316).

(b) Respondent's Position

845. According to Respondent, Claimant's claims for breach of the umbrella clause do not meet the necessary threshold for three main reasons (Resp. Am.Rej. 21.02.2014, paras. 927 fol.):

(i) The specific obligations Claimant refers to in Decrees No. 477 and 266 exist towards AGF and not towards Claimant, and there is thus no undertaking to be honoured by the Republic with respect to Claimant in those Decrees. In addition, the umbrella clause does not transform *ipso iure* municipal law obligations into treaty obligations, but rather prohibits the use of sovereign authority by the State to abrogate or otherwise interfere with contractual and other vested rights;

(ii) Claimant cannot sustain umbrella clause claims for any alleged breach of AGF's Charter or Joint Venture Agreement, as any alleged obligation contained therein was owed by Goskomgeology or NGMK to AGF, and not to Claimant. In addition, the alleged breaches of AGF's Charter and JV Agreement are mere contractual obligations, and thus cannot constitute violation of the umbrella clause. In this regard, Claimant fails to allege or demonstrate that the alleged breaches of AGF's Charter and Joint Venture Agreement were the result of any exercise of sovereign authority. Thus, they cannot constitute a violation of the umbrella clause;

(iii) In addition, NGMK is not a State organ, but a private party and thus its obligations cannot count as specific obligations of the State.

846. In any event, Respondent did 342ulfil its obligations under the relevant agreements and laws, in particular Decree No. 477, No. 266, the AGF Charter and the AGF JV Agreement (see Resp. PHB I. 21.07.2014, section V).

2.3.3.2 The Arbitral Tribunal's Findings

(a) The Applicable Legal Basis (Reminder)

847. Article 2(2) *in fine* of the BIT provides as follows:

> *"(2)* […] *Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."*

848. As mentioned in the context of the Khandiza Project (see above para. 364 fol.), for a claim to be based on an umbrella clause the claimant must establish, among others, that (i) the obligation which is alleged to be breached must exist., and (ii) the obligation at stake must have been entered into by the State or one of its organs towards the claimant specifically, i.e. not just by was of a general law and not just towards an affiliate or subsidiary of the claimant (privity requirement).

(b) The Relevancy of the Umbrella Clause in the Present Case

849. In order to decide on Claimant's claims, it is thus necessary to determine whether the Uzbek State has entered into obligations towards Claimant specifically, which it later on breached.

850. As concerns Claimant's reliance on the Guarantee Letters and the Special Dividend Agreement, to the extent that the Arbitral Tribunal ruled that the conclusion of these undertakings by Oxus did not breach the FET standard, Claimant has not sufficiently established to what extent these undertakings could – even if considered in breach of some of Respondent's obligations towards Claimant – breach the threshold required to transform a breach of national law or of a contractual undertaking under such law into a breach of the BIT.

851. As concerns Claimant's claim based on an alleged breach of its right to export gold and silver under Decree No. 477 and the Government's letter of 23 August 2002, it should be noted that:

- Decree No. 477 grants rights to the Joint Venture, i.e. to AGF, and not to Claimant. As such, the privity requirement is not met.

- The same applies to the Government's letter of 23 August 2002 to the extent that it refers to Decree No. 477. As concerns the reference to paragraph 4 of Article 12 of the Law on Foreign Investments, this paragraph provides as follows: "*the enterprises with foreign investments on their own account execute export-import operations observing the demands of the legislation of the Republic of Uzbekistan. Export of indigenously produced output is not liable to licensing and allocation*." However, as mentioned above, obligations contained in Law on Foreign Investments are general obligations not specifically entered into with Claimant. As such, they may not trigger Respondent's liability under the umbrella clause. In any event, the terms "*enterprises with foreign investments*" used in the Law and the terms "*enterprises with foreign capital*" used in the Government's letter refer to the local entity, i.e. AGF, and not to the foreign investor itself. As such, the privity requirement is also not met.

852. As concerns Claimant's claim regarding the revocation of tax privileges arising out of Decrees No. 266 and 477, all of the tax privileges granted thereunder are granted to AGF and not to Claimant. As such, the privity requirement is again not met. In addition, to the extent that the Arbitral Tribunal has ruled that certain modifications of the tax regime were in breach of the FET standard, this breach already consumes a potential breach under the umbrella clause and Claimant has not established to what extent a "double" breach would have a different impact on its claim for damages.

853. As concerns Claimant's claim for refusal to issue or renew relevant licenses, the relevant provisions Claimant relies on provide as follows:

- Article 8 of Decree No. 266 provides that "[t]he State Committee for Geology of the Republic of Uzbekistan shall issue to the JV "Amantaytau Goldfields", in a prescribed manner, a licence for the subsoil use granting the rights to carry out the exploration works and mining operations within the project area";

- The relevant part of Section 7.2 of the Revised AGF Charter, which is concluded between the shareholders of AGF, i.e. ORC, Goskomgeology and NMMC, provides that "[t]*he Shareholders shall have the following obligations:* […]€ […] *as long as the Company exists, to use their best endeavours to ensure that all appropriate rights, licences and permits to explore and develop the Gold Deposits and the Project Territory are obtained on a-timely basis";*

- Article 1.1 of the AGF Services Agreement, which is concluded between Goskomgeology and AGF, provides that

  "AGF shall instruct and Goskomgeology shall undertake rendering the following services to AGF: […]

  - *providing consultations and assistance in connection with obtaining of all necessary permits, consents and approvals which require to carry out AGF's activities, including, without limitation, […] licenses to use sub-soil and other types of licenses, […]*

  - *rendering assistance in extending terms of licenses and property rights; […]"*

854. It is clear from the wording and purpose of the relevant documents, that the obligations provided for in Decree No. 266 are obligations of Goskomgeology (acting here as State organ in charge of issuing licenses) towards the Joint Venture, i.e. AGF, and not towards Claimant itself. As for the AGF Services Agreement, it establishes an obligation of Goskomgeolgoy (acting here as private commercial partner, and not as State organ) towards AGF, and not towards Claimant. As such, these documents may not be used to establish a breach of the umbrella clause, failing to meet the privity requirement.

855. The only instrument which could provide for an obligation towards Claimant itself is the Revised AGF Charter, which was signed between ORC, Goskomgeology and NMMC. However, there are three hurdles which Claimant has failed to overcome:

(i) First, Claimant has not established to what extent Goskomgeology is acting as a "State organ" in the performance of the Revised AGF Charter;

(ii) Second, even if Goskomgeology could be considered as a State organ, the obligation stipulated in Section 7.2 is an obligation of "best endeavours", i.e. an "*obligation de moyens*" and not an "*obligation de résultat*". In this regard, while it is undisputed that certain licenses were not renewed, the record shows that Goskomgeology did undertake certain action to support Claimant's requests for renewal (see above para. 571 fol.). Claimant does not explain to what extent these actions were not sufficient and what further action Goskomgeology should have taken;

(iii) Third, the specific obligation of best endeavours of Goskomgeology to ensure the obtention of necessary permits and licenses refers logically to permits and licenses to be held by AGF for its operations, and not by Claimant.

856. Finally, to the extent that the Arbitral Tribunal ruled that the non-renewal or non-issuance of certain licenses did not breach the general protection standards of Article 2(2) BIT (see above para. 815), it is difficult to see how it could breach the umbrella clause..

857. As concerns Claimant's claim for failure by the Uzbek Parties to assist in the conclusion of the Foreign Investment Agreement requested by CITIC, Claimant relies on a breach of Recital G of the AGF Original JV Agreement which provides that "[t]*he Parties now wish to establish the JV Enterprise and following any decision to exploit the Gold Deposits, to assist the JV Enterprise to procure the loan finance required for its mining activities and also to provide to the JV Enterprise such management, technical and other services as it may require.*"

858. As mentioned with regard to the Revised AGF Charter, Claimant has not established to what extent the Uzbek Parties are acting as "State organ" in the performance of the AGF Original JV Agreement and/or the Revised AGF Charter. In addition, Recital G of the AGF Original JV Agreement is drafted in very broad terms and refer to assisting the "JV Enterprise", i.e. AGF, with assistance, not Claimant itself. Consequently, Claimant has failed to establish that this provision confers to Claimant the right it claims and fulfils the privity requirement.

859. In summary, Claimant's claims for breach of the umbrella clause fail either for not fulfilling the necessary requirements, or for the reason that they are subsumed under the claims for breach of the FET standard.

2.3.3.3 Conclusion

860. In conclusion, Claimant's claims for breach of the umbrella clause are rejected.

2.3.4 Conclusion Concerning Breach of Article 2(2) of the BIT

861. In conclusion, as concerns the various claims raised by Claimant listed above in para. 133 above and which the Arbitral Tribunal has numbered AGF Claims No. 1 to 16, the Arbitral Tribunal finds as follows:

- Claimant's AGF Claims No. 11, 12, 13, 14 and 15 (see above, para. 133, pp. 63-64) are rejected in full.

- Claimant's AGF Claim No. 9 is rejected as concerns sub-claims 1583.8.7.1.4, 1583.8.7.1.5, 1583.8.7.1.6, 1583.8.7.1.7 (see above, para. 133, p. 62).

- As concerns Claimant's AGF Claim No. 8 (see above, para. 133, p. 61) and No. 9 sub-claims 1583.8.7.1.1 to 1583.8.7.1.3 (see above, para. 133, pp. 61-62), they are granted to the extent specified below in section 0.

2.4 Issue No 4: Was There a Breach of MFN Clause ?

862. In its Post-Hearing Brief I, Claimant for the first time alleges a breach by Respondent "of a number of BITs ratified by Uzbekistan and applicable through the MFN clause of the Uzbek-UK BIT, to issue all the licenses necessary for the development of the Deposit, as this is required for the use and enjoyment of the right granted and moreover otherwise unfair and inequitable." (see Claim. PHB I. 21.07.2014, para. 109; see also Claim. PHB II. 21.08.2014, footnote 24 and para. 64).

863. As a preliminary remark, it is doubtful whether such claim of breach of the MFN clause is admissible at this late stage of the proceedings, though this question may however remain open. Indeed, as established above, the Arbitral Tribunal ruled that the non-issuance or non-renewal of certain licenses did not constitute an expropriation under Article 5 of the BIT (see above para. Xx) and was further not in breach of the protection standards afforded under Article 2(2) of the BIT (see above para. 815). In this regard, Claimant has in any event failed to establish to what extent the standard afforded under "a number of BITs" is stricter than the standards afforded under Article 2(2) of the BIT.

864. In conclusion, Claimant's claim for breach of the MFN clause shall be rejected.

2.5 Issue No. 5: What is the Appropriate Measure of Damages to be Afforded to Claimant?

2.5.1 Damages for Breach of Article 2(2) of the BIT

2.5.1.1 Claimant's Claimed Amount

865. To the extent that the Arbitral Tribunal has admitted a breach of Article 2(2) of the BIT with regard to the changes in the tax regime of 2006 and 2009, the question arises what compensation, if any, Claimant should be granted. In this respect, the following section will only address the amount of damages regarding the aforementioned breach.

866. Claimant claims the following amounts:

(i) As concerns the tax changes in 2006, Claimant claims an amount of USD 14,1 million as at 30 June 2012, and USD 13,3 million as at 18 March 2011 (see Claimant's AGF Claim No. 9, sub-claim 1583.8.7.1.1 and 1583.8.7.1.2 ; see above para. 133(i) and Claim. PHB I. 21.07.2014, para. 44; ER-Haberman II (12.08.2013), para. 6.5).

(ii) As concerns the VAT changes in 2009, Claimant claims an amount of USD 39 million as at 30 June 2012, and USD 35,5 million as at 18 March 2011 (see Claimant's AGF Claim No. 9, sub-claim 1583.8.7.1.3 ; see above para. 133 ii) ; see further Claim. Reply. 23.08.2013, paras. 1029 fol.; paras. 1317 fol.; Claim. PHB I. 21.07.2014, paras. 28 fol. ; Claim. PHB II. 21.08.2014, paras. 109 fol. ; ER-Haberman II (12.08.2013), paras. 6.6 and 6.7).

2.5.1.2 The Parties' Positions

(a) Claimant's Position

867. According to Claimant, the changes to the tax regime applicable to AGF have had three different impacts on Claimant (See Claim. PHB I. 21.07.2014, para. 41):

- The higher taxes caused monetary losses to AGF;

- The cash flow of the JV was impaired as it had to divert funds that would have been used for different purposes such as the costs of running the business or the meeting of liabilities; and

- The perception of AGF as a safe investment was adversely impacted. In fact, these acts gave the impression that the Government neither supported AGF nor Claimant, or any other foreign investors. Moreover, there were "aggravating circumstances" as Respondent knew that Claimant was a junior mining company and was even warned that this situation could adversely contribute to Claimant's ability to secure financing.

868. Claimant bases its damage claim mainly on the two expert reports of Mr. Haberman (ER- Haberman I (17.08.2012) and ER-Haberman II (12.08.2013)).

869. According to Claimant, Mr. Haberman's quantification of the damages caused by Respondent to Claimant is "very conservative" since it is only based on the revocation of AGF's profit tax exemption (See Claim. PHB I. 21.07.2014, para. 44).

870. According to Mr. Haberman, the losses suffered by Claimant as a result of the tax changes are as follows:

(i) USD 14,1 million as at 30 June 2012, and USD 13,3 million as at 18 March 2011 with regard to the tax changes 2006 (See Claim. PHB II. 21.08.2014, para. 108; ER-Haberman II (12.08.2013), para. 6.5);

(ii) USD 39 million as at 30 June 2012, and USD 35,5 million at as 18 March 2011 with regard to the VAT changes in 2009 (See Claim. PHB I. 21.07.2014, para. 71 ; Claim. PHB II. 21.08.2014, para. 111 ; ER-Haberman II (12.08.2013), paras. 6.5 and 6.6 and 4. 29)

871. Mr. Habermann further concludes to a cumulative adverse impact on AGF's cash flow amounting to USD 25,5 million from 2007 to 2011 (See Claim. PHB I. 21.07.2014, para. 72; ER-Haberman II (12.08.2013), para. 6.6).

872. Mr. Haberman's figures derive from the following main calculations and assumptions:

873. In his first expert report of 17 August 2012, Mr. Haberman carried out a series of separate calculations in order to explain the impact of each and every action of Respondent on Claimant, which he classified into ten separate actions (see ER-Haberman I (17.08.2012), para. 4.75) including the 2006 tax changes as 'Action 2' and the 2009 VAT changes as 'Action 6'.

- As concerns Action 2, i.e. the impact on Claimant of the 2006 tax changes for the period 2006 to 2010 (i.e. when the relevant privileges would have expired), Mr. Haberman's figure of USD 14.1 million corresponds to his estimated loss (based on a DCF valuation) of the value for AGF of the oxide and sulphide deposits of USD 4 and 10.1 million respectively as at 30 June 2012 (See Haberman I, para. 4.129, p. 57). As at 18 March 2011, the loss is estimated at USD 13,4, which consists of USD 4,1 million for the oxide deposits and USD 9,3 million for the sulphide deposits (see ER-Haberman I (17.08.2012) para. 4.129, p. 58).

- As concerns Action 6, i.e. the impact on Claimant of the 2009 VAT changes (for an indefinite period moving forward), Mr. Haberman's figure of USD 39 million corresponds to his estimated loss (based on a DCF valuation) of the value for AGF of the oxide and sulphide deposits of USD 13,6 million and USD 25,4 million respectively as at 30 June 2012 (see ER-Haberman I (17.08.2012), para. 4.129, p. 57). As at 18 March 2011, the loss is estimated at USD 35,5 million consisting of USD 13,1 million for the oxide deposits and USD 22,4 million for the sulphide deposits (see ER-Haberman I (17.08.2012), para. 4.129, p. 58).

874. In his second expert report of 12 August 2013, Mr. Haberman amended some of his calculations of the loss of value for Claimant of its AGF investments based on some additional information and instructions and provided additional explanations to his calculations (See ER-Haberman II (12.08.2013), para. 6.4). The calculations of these losses are set out in Appendix C to his second report (See ER-Haberman II (12.08.2013), para. 6.5).

- As concerns Action 2, i.e. the impact of the 2006 tax changes, Mr. Haberman explains that he bases his calculations on an alleged "worst case scenario" where all the tax exemptions would have expired on 1 July 2010 (see Haberman II, para. 4.18 and 4. 27). Decrees No. 74 and 133 revoked AGF's tax privileges in May and July 2006 and thus "*significantly increased AGF's tax burden for the rest of 2006 and for each subsequent year of the project, thereby reducing its profits and the value that could be ascribed to Oxus Gold's 50% interest in AGF*." In other words, Mr. Haberman's approach is that such reduction in profits and value of AGF affected Claimant's 50% interest in AGF (See Haberman II, para. 4.27). Mr. Haberman estimated that the reduction in Claimant's cash flow amounts to USD 8 million as the following table shows (see ER-Haberman II (12.08.2013), Table p. 39, para. 4.27):

	2007	2008	2009	2010	2011	Total
Cash flow reduction from Action 2	2.2	4.7	0.3	0.8	-	8.0

- As concerns Action 6, Mr. Haberman relies on the assumptions that the amendments to the Uzbek Tax Code in January 2009 "meant that AGF was not longer able to recover the VAT it paid on local purchases in Uzbekistan" and "this significantly increased AGF's capital and operation costs as they were now subject to VAT." Mr. Haberman assumed that this affected AGF's costs from 1 January 2009 onwards (up to 2011). According to Mr. Haberman this action resulted in a reduction of cash flow for Claimant of USD 25,5 million as the following table shows (see ER-Haberman II (12.08.2013), Table p. 40, para. 4.29):

	2007	2008	2009	2010	2011	Total
Cash flow reduction from Action 6	-	-	10.1	10.9	4.5	25.5

875. In paras. 6.5 and 6.6 of Mr. Haberman's second report, Mr. Haberman summarizes his position distinguishing between what he considers a "*loss suffered by Oxus Gold on its AGF investment*" and "*the impact of the individual actions of the Uzbek Government* […] *on Oxus Gold's interest in AGF*." As concerns the loss, Mr. Haberman arrives at the figures listed above of USD 14.1 million (per 30 June 2012) and 13.3 million (per 18 March 2011) for Action 2 and USD 39 million (per 30 June 2012) and 35.5 million (per 18 March 2011) for Action 6. As concerns the cash flow impact, Mr. Haberman arrives at the figures listed above of USD 8 million for Action 2 and USD 25.5 million for Action 6. With regard to the cash flow impact, Mr. Haberman explains that he considered the cash flow impact because "*several of the Uzbek government's actions, such as the production delay, did not have much effect on my valuation of Oxus Gold's loss but significantly reduced AGF and Oxus Gold's cash positions prior to the alleged expropriation*" and therefore calculated the total and cumulative effect o these actions on the cash flow (see ER-Haberman II (12.08.2013), para. 6.5 and 6.6, p. 47-48). The supporting calculations for Mr. Haberman's figures are included in Appendix C to his report.

876. In summary, Claimant claims for the loss of value to its investment as calculated by Mr. Haberman at USD 14,1 million as at 30 June 2012 or USD 13,3 million as at 18 March 2011 for the 2006 tax changes and USD 39 million as at 30 June 2012 or USD 35,5 million as at 18 March 2011 for the 2009 VAT changes. Claimant's requests for relief do not include a claim for payment of the cash flow impact calculated by Mr. Haberman.

(b) Respondent's Position

877. Respondent rejects Claimant's claims regarding the tax changes in 2006 and the VAT changes in 2009.

878. Respondent challenges both Mr. Haberman's approach, as well as his calculations, which Respondent considers "erroneous" and leading to amounts "grossly overstated" (See Resp. PHB I. 21.07.2014, para. 144).

879. According to Respondent, instead of proceeding with a DCF valuation as done by Mr. Haberman, Claimant's damages should be calculated by comparing the amounts that AGF actually paid with those it legitimately expected to pay based on the tax rates provided in the Feasibility Study 2003 (Resp. PHB I, para. 146; Resp PHB II, para. 60).

880. This is the approach adopted by Respondent's expert, Mr. Hart, in his three expert reports (see ER-Hart I (15.02.2013); ER-Hart II (20.02.2014); ER-Hart III (10.07.2014)). According to Mr. Hart, the net impact of the relevant tax law changes amount to USD 10,299,572 million (see Resp. PHB I. 21.07.2014, para. 144 ; Resp. PHB II. 21.08.2014, para. 60 ; Hart III, para. 39).

881. In addition, Mr. Hart voices the following main criticisms towards Mr. Haberman's analysis:

(i) Mr. Haberman's calculations include both phases of the AGF Project. However, according to Mr. Hart there is no basis for a damage claim relating to Phase II as Claimant was never allowed to implement said Phase in the first place. In addition, AGF never paid any taxes for Phase II as it never started (see Resp. PHB I. 21.07.2014, para. 145 ; Resp. PHB II. 21.08.2014, para. 60 ; ER-Hart II (20.02.2014), para. 234).

(ii) As concerns Phase I, Mr. Hart disagrees with the use of Haberman's own DCF models for valuation of the oxide ores. Mr. Hart alleges that these calculations are "fictitious" since they are not based on the amount of ore AGF actually mined, but on the mining operations which would have occurred. Consequently, they do not show if the taxes paid by AGF actually increased or not (see Resp. PHB I. 21.07.2014, para. 145; ER-Hart I (15.02.2013), para. 288; ER-Hart III (10.07.2014), para. 35).

(iii) As concerns Phase I, Mr. Hart further purports that Mr. Haberman's damage calculation is erroneous since it relies on the incorrect assumption that AGF actually paid USD 53.1 million in taxes (see Claim. Am.Reply. 23.08.2013, paras. 700 f.). However, according to Mr. Hart, this figure is unsupported.

(iv) In contrast, Mr. Hart proceeded as follows:

- Based on Claimant's own information, including Mr. Haberman's Exhibit 16 as well as Oxus Gold 2011 Annual Report and Accounts (Exh. R-508), the **actual amount of taxes paid for the years 2004 to 2010 for Phase 1 is USD 38,167,000** (including non-income taxes of USD 30,412 million, custom duties of USD 4,543 million and profit taxes of USD 3,212 million), with no taxes being paid in 2011.

- The 2003 Feasibility Study forecasted taxes in an amount of USD 13,927 million for Phase 1 based on expected revenue of USD 222,341 million. Considering that Phase 1 actually generated USD 315,977 milion in revenue, applying the tax rates provided for in the 2003 Feasibility

Study, **the amount of expected taxes should have been USD 17,567,856**.

- Thus, the impact of the tax changes should be determined based on the difference between the amount of expected taxes (USD 17,567,856) and the amount of taxes effectively paid (USD 38,167,000), i.e. USD 20,599,144 (See Resp. PHB I. 21.07.2014, para. 145 fol. ; Resp. PHB II. 21.08.2014, para. 60 ; ER-Hart III (10.07.2014), paras. 35 to 40).

- Oxus' share of this amount is 50%, i.e. USD 10,299,572.

882. In summary, as concerns the tax law amendments, Respondent rejects Claimant's claims and purports that, if the Arbitral Tribunal was to award a compensation for damages, the correct amount should be no more than USD 10,299,572 corresponding to Oxus' share of the difference between taxes expected under the 2003 Feasibility Study and taxes effectively paid by AGF.

2.5.1.3 The Arbitral Tribunal's Findings

883. As a first step, the Arbitral Tribunal must decide which of the two experts' approach is more appropriate to reflect the damage suffered by Claimant as a result of the tax changes implemented in violation of Article 2(2) of the BIT.

884. In this regard, the Arbitral Tribunal is not convinced by Mr. Haberman's approach. First of all, the Arbitral Tribunal agrees with Respondent, that a DCF approach is not a well suited method to assess damages where the only Treaty breach retained by the Arbitral Tribunal concerns taxes. Secondly, the Arbitral Tribunal shares Mr. Hart's view that the various figures relied upon by Mr. Haberman are largely hypothetical and fail to take into account what actually happened (see ER-Hart II (10.07.2014), para. 35 and ER-Hart II (20.02.2014), para. 43). In view of the Arbitral Tribunal's ruling that the only Treaty breach committed by Respondent is the undue revocation of various tax privileges granted to Claimant, the damage that Claimant suffers out of such breach consists in additional costs, *in casu* additional taxes. Thus, whilst relying on a DCF evaluation may have been appropriate in case of an expropriation in order to assess the total value of the expropriated investment, such method is not well suited in the present case because it does not account for the specific nature of the damage caused.

885. As such, the Arbitral Tribunal finds Mr. Haberman's approach generally unhelpful and instead largely agrees with the approach adopted by Mr. Hart, i.e. that the claimable damage consists in Claimant's share of the difference between the taxes actually paid by AGF and the taxes that AGF could legitimately expect

to pay when making its investment. This is the reason why the Arbitral Tribunal rejected by letter of 27 October 2015 (see above para. 122) Respondent's request to comment on the updated calculations of Mr. Haberman as contained in Annexes 4 and 5 to Claimant's Updated Prayer for Relief II of 6 June 2014. Indeed, since the Arbitral Tribunal will disregard Mr. Haberman's general approach, there is no need for Respondent to further comment on specific calculations of Mr. Haberman.

886. As laid out above (para. 881(iv)), Mr. Hart proceeded as follows:

- As concerns Phase 1 of the AGF Project, Mr. Hart relies on the tax rates provided in the Amended Phase 1 Feasibility Study (see above para. 427, R-289/C-527) to determine the tax rates that AGF could have legitimately expected to pay for Phase 1. He then applies such rates to the actual revenue for Phase 1 of USD 315,977 million contained in Mr. Haberman's Exhibit 16, and arrives at a total forecasted taxes of USD 17,567,856. He then compares this amount to the actual amount of taxes paid of USD 38,167,000, which he derives from Mr. Haberman's Exhibit No. 16 (adding up the amounts of 30,412 for taxes other then income taxes, 4,543 for customs duty on BCM equipment and 3,212 of profit taxes, see Table 1 in ER-Hart III, para. 36). The difference is USD 20,599,144, which Mr. Hart then divides by two to account for Claimant's 50% shareholding in AGF and thus arrives at a total additional tax amount of USD 10,299,572 for Phase 1;

- As concerns Phase 2, Mr. Hart contends that no taxes were paid in 2011 and that there is thus no damage for 2011.

887. To the extent that the Arbitral Tribunal generally agrees with Mr. Hart's approach, the remaining question therefore is whether the tax rates and revenue figures relied upon by Mr. Hart are reasonable, or whether there are justified reasons to deviate from Mr. Hart's underlying figures:

- As concerns Phase 1, the Arbitral Tribunal considers it appropriate to rely on the tax regime on which the Amended Phase 1 Feasibility Study was based (see R-289_108-109). It further notes that as concerns the actual revenue generated by AGF from 2004 to 2010, i.e. USD 31,977 million and the total amount of taxes paid during this period, i.e. USD 38,167,000, Mr. Hart relies on amounts contained in Mr. Haberman's own Exhibit No. 16. As such, the Arbitral Tribunal considers that Mr. Hart's calculations are sufficiently reliable and sees no reason to deviate therefrom. Consequently, the Arbitral Tribunal finds that the damage caused to Claimant by Respondent's violation of Article 2(2) of the BIT with regard to changes of the 2006 and 2009 tax regime amount to USD 10,299,572 for Phase 1.

- As concerns Phase 2, Mr. Hart relies on Oxus Gold 2011 Annual Report and Accounts (R-508) and the fact AGF operated for barely three months 2011 before Oxus' declaration of *force majeure* of 18 March 2011. The Arbitral Tribunal understands that Mr. Hart relied on Oxus' Annual Report to determine taxes paid by AGF because he had no access to AGF's own accounting books. Whilst this approach may not be beyond criticism, the Arbitral Tribunal nevertheless considers Mr. Hart's finding sufficiently reliable given that by 2011, operations at AGF had almost completely ceased and *force majeure* was declared on 18 March 2011. In addition, there is no further information in Mr. Haberman's reports as to taxes paid by AGF in 2011. As such, the Arbitral Tribunal considers it sufficiently credible that no taxes were paid by AGF in 2011, and that therefore no damage was incurred neither by AGF nor by OXUS in 2011 in relation to the 2006 and 2009 changes to the tax laws.

888. The Arbitral Tribunal notes that Mr Hart did not provide any yearly calculations, but quantified Claimant's claim on the basis of the actual amount of taxes paid by AGF from 2004 through 2010 and of the forecasted taxes for the period 2004-2010. The Arbitral Tribunal will specifically address this point with regard to the question of the relevant interest rate (see below para. 987).

889. As concerns Mr. Haberman's calculations of the cash-flow impact, the Arbitral Tribunal notes that Claimant has not included the relevant amounts into its formal requests for relief. In any event, Claimant has not sufficiently substantiated or explained, not does it clearly arise from Mr. Haberman's analysis, on which basis and to what extent Claimant would be entitled to claim any damage relating to such cash-flow impact. As such, the Arbitral Tribunal has decided to disregard the cash-flow impact brought forward in Mr. Haberman's analysis.

2.5.1.4 Conclusion

890. In conclusion, the Arbitral Tribunal grants Claimant a compensation of USD 10,299,572 for the damage caused by Respondent's violation of Article 2(2) of the BIT with regard to the tax law changes of 2006 and 2009.

2.5.2 Moral Damages

2.5.2.1 Claimant's Claimed Amount

891. A further question is whether Claimant should be entitled to moral damages, as claimed by Claimant under its AGF Claim No. 16 for an amount of USD 2 million (see above para 133).

2.5.2.2 The Parties' Positions

892. According to Claimant[30], relying in particular on Article 31 of the ILC Articles on State Responsibility and on arbitral decisions principally in the *Lusitania* cases[31], on *France v. Venezuela (Antoine Fabiani case no. 1)*[32] and *Desert Line Projects v. Yemen*[33], investment treaties do not prevent a party from obtaining compensation for moral damages it has suffered and arbitral tribunals have long upheld the notion of moral damages. In its view, such compensation can relate to emotional harm, pathological harm and minor consequences of wrongful act.

893. Claimant alleges a campaign of persecution against it mostly relating to the aggressive 2011 State Audit, including charges of espionage and imprisonment of one of its employees and charges or a harassment campaign against other employees, all of which affected Claimant's reputation and finances (Claim. PHB I. 21.07.2014, paras. 115, 128, 134 and 135; Claim. PHB II. 21.08.2014, paras. 9 and 114; Claim. Am.Reply. 23.08.2013, paras. 88, 1163-1164, 1166, 1168-1170, 1173-1183, 1185-1186, 1193-1203, 1305, 1484-1485 and 1492 ; Claim. SoC. 17.09.2012, paras. 441, 449, 611, 625 and 717-720).

894. As to Respondent[34], it is of the view that Claimant is not entitled to moral damages, arguing that its request is unsupported in fact and as a matter of law and that moral damages are only rarely recoverable under international law, and only in extraordinary circumstances.

2.5.2.3 The Arbitral Tribunal's Findings

895. Moral damages have been considered admissible under international law and it is recognized that legal persons may be awarded moral damages, including for loss

[30] Claim. SoC. 17.09.2012, paras. 708-722; Claim. Am.Reply, 23.08.2013, paras. 1402-1418
[31] *U.S. v. Germany, Lusitania Cases,* November 1, 1923, VII Reports of International Arbitral Awards 32 (1923)
[32] *France v. Venezuela (Antoine Fabiani case no.1)*, Moore's International Arbitrations 4878 (1898)
[33] *Desert Line Projects LLC v. Republic of Yemen,* ICSID Case No. ARB/05/17, Award (February 6, 2008), http://italaw.com
[34] Resp. Am.Rej. 21.02.2014, paras. 972-976

of reputation, but the bar for recovery of such damages has been set high and they have been awarded only in exceptional circumstances; Claimant itself acknowledged as much[35] in quoting approvingly the *Desert Line Projects Projects v. Ukraine* award which stated: "(e)*ven if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages*"[36].

896. *Desert Lines Projects* is one of the rare cases in which such damages were awarded; the tribunal in that case noted that "the physical duress exerted on the executives of the Claimant, was malicious and is therefore constitutive of a fault-based liability"[37]. The claimant in that case referred in particular to a Government-led "siege with artillery"[38] and the "arrest and detention of the Claimant's personnel – including the son of the Claimant's chairman"[39].

897. In the *Lemire* case also quoted approvingly by Claimant[40], the tribunal held as follows:

> "*The conclusion which can be drawn from the above cases is that, as a general rule, moral damages are not available to a party injured by the wrongful acts of a State, but that moral damages can be awarded in exceptional cases, provided that*
>
> *-the State's actions imply physical threat, illegal detention or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;*
>
> *-The State's actions cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss or reputation, credit and social position; and*
>
> *-both cause and effect are grave and substantial*."

898. Similarly, in Waguib Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt[41], the Tribunal declared that "the recovery of punitive or moral damages is reserved for extreme cases of egregious behavior".

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[35] Claim. SoC. 17.09.2012, para. 714; Claim. Am.Reply, 23.08.2013, para. 1404
[36] *Desert Line Projects LLC v. Republic of Yemen,* para. 289
[37] Id. para.289
[38] Id. para. 166
[39] Id. para. 146
[40] *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Award of 28 March 2011, para.333; apparently, there is only one other case in which moral damages were awarded, which is *Benvenuti & Bonfant v. Democratic Republic of Congo,* ICSID Case No. ARB/772, 15 August 1980; this case however was decided *ex equo et bono* and it is difficult to recognize it precedential value.
[41] ICSID Case No. ARB/05/15, Award of 1 June 2009, para. 545

899. Finally, in *Tza Yap Shum v. Peru*[42], also mentioned by Claimant, a claim for moral damages was rejected and the tribunal endorsed the demanding criteria enunciated in *Lemire*.[43]

900. There is therefore little, if any, difference between the Parties concerning the legal criteria to be applied in relation to a claim for moral damages. The Parties divide as to whether Respondent's actions constituted such egregious behavior as to open the door to moral damages.

901. Upon careful review of the facts, the Arbitral Tribunal has come to the conclusion that Claimant is not entitled to such damages in the present case.

902. The Arbitral Tribunal has already ruled (see above para. 826) that the 2011 State Audit and the other events surrounding it could not be considered as the cause of the catastrophic situation in which Claimant found itself but rather as a consequence of it and, therefore, there could not have been a breach of Article 2(2) of the BIT.

903. As to the treatment by Respondent of some members of AGF's personnel (see above para. 893), the persons concerned (i.e. Messrs Ashurov, Narziev, Salamatin, and Yunusov) were employees of AGF, not of Claimant directly. In addition, whilst the treatment of such persons may be have been harsh, the Arbitral Tribunal has not received enough evidence to support a conclusion that the prosecutions initiated were not justified in the circumstances or were of such an egregious nature as to constitute a breach of Uzbek or international law.

904. As for Claimant's loss of reputation and credit, the Arbitral Tribunal has found that Respondent was liable for a very small part of the claims made by Claimant and Claimant itself has declared that, by the time of the declaration of *force majeure* on March 18, 2011, its share price had practically lost all value, trading at merely around GBP 0.01[44]. The Tribunal has also concluded that the 2011 State Audit was not proven to be in breach of the BIT or international law (see above para. 826). As to the prosecutions against some members of AGF's personnel, they concerned employees of AGF and not of Claimant, and most of them occurred well after the declaration of *force majeure* and the sharp decline in Claimant's share price. Moreover, the Arbitral Tribunal has ruled that it did not receive enough evidence to support that these prosecutions were not justified under the BIT or international law.

[42] ICSID Case No. ARB/07/6, Award of 7 July 2011, paras. 281, 285
[43] For a recent decision to the same effect, see *Quiborax v. Bolivia*.
[44] Claim. Am.Reply. 23.08.2013, para. 1415

2.5.2.4 Conclusion

905. In conclusion, AGF's Claim No. 16 for moral damages is dismissed.

3. With Regard to Respondent's Counter Claims

3.1 Issue No. 6: Does the Arbitral Tribunal have Jurisdiction over Respondent's Counter Claims and/or are the Counter Claims Admissible?

3.1.1 The Parties' Positions

3.1.1.1 Respondent's Position

906. In summary, Respondent contends that the Arbitral Tribunal can and should adjudicate the Counter-claims, which are based on Claimant's misconduct in its operation and management of AGF, in particular its misrepresentation, self-dealing, fraud, and other unlawful conduct, through which it not only systematically failed to perform its investment obligations but also enriched itself and its affiliates to the detriment of Respondent and the Uzbek Parties. Thus, Claimant should be held liable for the damage it thereby caused Respondent and should be ordered to pay compensation to Respondent in the amount of USD 117.54 million (Resp. PHB I. 21.07.2014, para. 3; Resp. Am.Rej. 21.02.2014, para. 977; Resp. SoD.Class. 04.04.2013, para. 529).

907. Respondent relies on the following main line of argument:

908. *(i) The Tribunal has jurisdiction over the Counter-claims*: Relying mainly on *Goetz v. Burundi* and *Roussalis v. Romania,* Respondent argues that when a State consents to arbitrate under a BIT pursuant to a certain procedural mechanism, that consent – along with the investor's acceptance of the offer to consent – must encompass counter-claims if the specified mechanism so provides (Resp. Am.Rej. 21.02.2014, para. 980; Resp. SoD.Class. 04.04.2013, paras. 530 fol.). Contrary to Claimant's assertion, Article 8 of the BIT does not exclude jurisdiction over counter-claims; on the contrary, by its reference to the UNCITRAL Arbitration Rules, Article 8(2) specifically endorses the State's consent to the UNCITRAL Arbitration Rules and therewith to the adjudication of counter-claims (Resp. PHB I. 21.07.2014, para. 150; Resp. Am.Rej. 21.02.2014, para. 978). Thus, based on Article 8 of the BIT and Article 21(3) of the UNCITRAL Arbitration Rules, which provides that a party may "*make a counterclaim or rely on a claim for the purpose of set-off provided that the arbitral tribunal has jurisdiction over it*", the

Arbitral Tribunal has jurisdiction to adjudicate the counter-claims raised by Respondent (Resp. PHB I. 21.07.2014, para. 149; Resp. Am.Rej. 21.02.2014, para. 980).

909. *(ii) The counter-claims are sufficiently connected to Claimant's claims:* According to Respondent, the Parties agree that a counter-claim is admissible if it has "a close connection to the primary claim." (Resp. Am.Rej. 21.02.2014, para. 982; Claim. Am.Reply. 23.08.2013, para. 1568; SoD; para. 532; *Saluka v. Czech Republic, Paushok v. Mongolia, Metal-Tech v. Uzbekistan*). Relying mainly on *Goetz v. Burundi* and *Klöckner v. Cameroun*, Respondent contends that such close connection is given where the entire investment operation shows a certain unity and where "reciprocal obligations" of the claimant and respondent arise from the same sources (Resp. Am.Rej. 21.02.2014, para. 983). The Parties further agree that a counter-claim is not sufficiently connected if it is based solely on alleged violations of a State's generally applicable domestic laws, rather than on rights and obligations that apply as a consequence of the investment (Resp. Am.Rej. 21.02.2014, para. 984, Claim. Am.Reply. 23.08.2013, para. 1574-1577, Resp. SoD.Class. 04.04.2013, para. 540-541, *Saluka v. Czech Republic*). However, according to Respondent, this is not to say that any involvement of local law in a dispute necessarily precludes adjudication of a counter-claim (Resp. Am.Rej. 21.02.2014, para. 984). Respondent contends that its counter-claims concern Claimant's breach of investment and international law obligations that do not solely derive from violations of domestic Uzbek law or fall within the exclusive jurisdiction of the Uzbek courts, but rather, the counter-claims are based on Claimant's violation of (i) investment obligations and general principles of international law, as well as (ii) Uzbek law, which arose specifically through Claimant's investment in AGF Joint Venture. Specifically, Claimant engaged in misrepresentations, self-dealing, fraud, and other unlawful conduct throughout its management and operation of AGF, thereby unjustly enriching itself and its related companies to the detriment of Respondent, in violation of, inter alia, specific investment obligations set forth in the relevant investment instruments (Resp. PHB I. 21.07.2014, paras. 151 fol.; Resp. Am.Rej. 21.02.2014, paras. 987, 989; Resp. SoD.Class. 04.04.2013, paras. 176-181). In addition, Claimant's actions also violated the principle of good faith as a matter of international law. (Resp. Am.Rej. 21.02.2014, para. 988; Resp. SoD.Class. 04.04.2013, para. 542). The mere fact that Claimant's misconduct also implicates certain violation of local law does not render them inadmissible. (Resp. Am.Rej. 21.02.2014, para. 989). Respondent underscores that all of its counter-claims arise directly out of Claimant's primary claims, and should be admitted on this basis.

910. For example, Respondent's counter-claim under the Special Dividend Agreement does not arise out of any general violation of Uzbek law, but rather is based on a contract concluded between Claimant and the Ministry of Finance, and arises directly out of Claimant's undisputed failure to comply with its payment

obligations thereunder. Even if the Arbitral Tribunal finds that it has no jurisdiction over Respondent's counter-claim under the Special Dividend Agreement, the Arbitral Tribunal nonetheless should admit this counter-claim as a set-off defense. According to Respondent, Article 23(1) of the UNCITRAL Arbitration Rules does not prevent an Arbitral Tribunal admitting a set-off defense arising from a claim to money falling outside its jurisdiction if that claim is liquid and undisputed. In the present case, Respondent's counter-claim under the Special Dividend Agreement is a claim to money that is both liquid and undisputed; it thus should be admitted as a set-off defense, regardless of the Arbitral Tribunal's finding with respect to jurisdiction. The same applies to the counter-claim for damages sustained by Claimant's unlawful use of AGF's Barclay's Bank account (Resp. PHB I. 21.07.2014, paras. 152 fol.; Resp. PHB II. 21.08.2014, paras. 64 fol.).

911. *(iii) The Counter-claims are properly asserted against Claimant:* Respondent rejects Claimant's cricisim that it has failed to properly address its counter-claims. Respondent contends that it has sufficiently demonstrated that Claimant's actions, through its operation and management of AGF, directly resulted in harm to Respondent, including that Claimant "fraudulently and unjustly enriched itself and its affiliated companies through misrepresentation, fraud, numerous illegal related-party transactions, and the systematic inflating of costs in its operation of AGF." To the extent that Claimant had *de facto* the total control and management of AGF, Claimant may not discharge itself by shifting the responsibility on its Uzbek partners (Resp. Am.Rej. 21.02.2014, para. 991; Resp. SoD.Class. 04.04.2013, para. 543).

912. *(iv) The counter-claims are sufficiently particular*: Respondent also rejects Claimant's criticism that it has failed to sufficiently develop or elaborate on its counter-claims to satisfy an analysis on the merits. Respondent contends that it has comprehensively detailed the grounds for its counter-claims in its Statement of Defense and Rejoinder and that there is no requirement for Respondent to detail the very same facts established in its defense to Claimant's claims in a separate heading called "Counterclaims" (Resp. Am.Rej. 21.02.2014, para. 993). According to Respondent, its treatment of the evidence in the factual sections of its submissions and Mr. Hart's report on the damage suffered by Respondent amply demonstrate Claimant's unlawful conduct in violation of its investment obligations, general principles of international law, and Uzbek law (Resp. Am.Rej. 21.02.2014, para. 993 referring to Resp. SoD.Class. 04.04.2013, para. 44-337 and Hart I and Hart II).

913. Based thereon, the Arbitral Tribunal should hold Claimant liable for the substantial damage that Respondent has suffered as a result of Claimant's unlawful conduct, including, in particular, Claimant's failure to pay sums admittedly owed to the Ministry of Finance under the Special Dividend

Agreement, the numerous self-interested transactions that Claimant caused AGF to enter into with Claimant and/or its affiliates, and its operation of AGF in violation of the Republic's currency laws, totaling USD 117.54 million (Resp. PHB I. 21.07.2014, para. 149, 154).

914. Alternatively, any amounts awarded to Claimant should be reduced in accordance with the doctrine of contributory fault reflected in Article 39 of the ILC Articles on State Responsibility, which provides that, "[i]*n the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.*" (Resp. PHB II. 21.08.2014, para. 67).

3.1.1.2 Claimant's Position

915. Claimant concludes that Respondent's counter-claims should be declared inadmissible and, in any event, be dismissed as a result of Respondent's failure to substantiate the basis for and to particularize its AGF counter-claims.

916. Claimant relies therefore on the following four main arguments:

917. *(i) The BIT does not allow counter-claims*: According to Claimant, the submission of counter-claims under Article 21(3) of the UNCITRAL Arbitration Rules is only conditionally permitted, "*provided that the arbitral tribunal has jurisdiction over* [the counter-claims]." Thus, Article 21(3) only permits counter-claims where the parties have consented to their submission. However, in the present case, no such consent was given. Article 8(1) of the BIT only authorizes the submission to international arbitration of "[d]*isputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled.*" Thus, *a contrario*, disputes concerning claims from a Contracting Party – in this case Uzbekistan – against a national or company of the other Contracting Party – in this case Claimant – are inadmissible. In that sense, Article 8 of the BIT differs in its wording from other BITs, such as the Belgo-Luxembourg – Burundi BIT on which the case *Goetz v. Burundi* is based, the Netherlands-Czech Republic BIT on which the *Saluka v. Czech Republic* case is based or the Germany-Ghana BIT on which the *Hamester v. Ghana* case is based. As such, these cases are of no avail to Respondent in the present case. Instead, Claimant refers to *Spyridon Roussalis v. Romania*, where Article 9(1) of the Greece-Romania BIT uses similar terms to Article 8(1) of the BIT. Consequently, under Article 21(3) of the UNCITRAL Arbitration Rules and Article 8(1) of the BIT, the Arbitral Tribunal only has jurisdiction over claims "*concerning an obligation of the* [State Party, i.e., Uzbekistan] *under this Agreement.*" Since Respondent's counter-claims do not relate to a dispute

concerning an obligation of Uzbekistan under the BIT, they fall outside the scope of the Treaty's dispute settlement provision, and the Arbitral Tribunal does not have jurisdiction to rule on these claims (Claim. PHB I. 21.07.2014, para. 187-192; Claim. Am.Reply. 23.08.2013, paras. 1530 fol.).

918. *(ii) Respondent's counter-claims fail the "close connection test"*: Even if the Arbitral Tribunal were to hold that counter-claims were not excluded under the terms of Article 8(1) of the BIT, Respondent's counter-claims would still be inadmissible as they do not satisfy the requirement, spelled out in the *Saluka v. Czech Republic* case in reference to the *Klöckner v. Cameroon* case, that investment treaty counter-claims must bear a close connection to the primary claims (Claim. PHB I. 21.07.2014, para. 193). In both *Saluka v. Czech Republic* and *Paushok v. Mongolia*, the Arbitral Tribunal held that such "close connection" is not given, where the counter-claims advanced by the respondent State are based on alleged breaches of this State's domestic law, that is the Arbitral Tribunal cannot entertain counter-claims which ought to be resolved in accordance with domestic law rather than *via* the terms of the BIT. In the present proceedings, Respondent's counter-claims arise out of Uzbek law and are therefore inadmissible (Claim. Am.Reply. 23.08.2013, paras. 1514 fol.). In this regard, Claimant underscores that Respondent has not substantiated or provided any explanation as to how Claimant's incriminated conduct – even if proven – would constitute a breach of "investment and international law obligations" (Claim. PHB I. 21.07.2014, paras. 193 fol.). Further, Respondent was unable to provide any terms in the BIT or case authority to support its position that the breach of the principle of good faith could give rise to a counter-claim under the BIT, as no such terms or authority exist. None of the awards referred to by Respondent, including *Phoenix Action v. Czech Republic* or *Plama v. Bulgaria*, address the issue whether counter-claims invoked by a host State for breach by an investor of the general principle of good faith may fall within the jurisdiction of the Arbitral Tribunal. Claimant stresses that a general principle as broad as that of good faith cannot be used, under just any BIT, as a valid cause of action by a host State against an investor (Claim. PHB I. 21.07.2014, paras. 197 fol.).

919. *(iii) Respondent's counter-claims are not properly addressed, as they are directed against AGF, instead of Claimant:* Respondent justifies its approach based on the argument that Claimant exercised total control over the AGF Joint Venture. However, Respondent firstly failed to establish that Claimant has ever exercised total managerial control over AGF. In any event, Claimant cannot possibly be deemed to have ever exerted sole control over AGF, as the State ultimately held a 50% interest in AGF and Respondent had a Ministry of Finance representative on AGF's Supervisory Board, on which the Chairman of Goskomgeology also held a controlling position. As such, Respondent's counter-claims cannot properly be directed against Claimant, whether these counter-claims be based on Claimant's purported mismanagement of AGF or on Claimant's purposed misuse of its

control over AGF. In either case, Respondent's counter-claims should have been directed against AGF. The only readily identifiable counter-claim which is directed at Claimant itself concerns the counter-claim based on the Special Dividend Agreement. However, such Agreement was imposed on Claimant under coercion and duress and constitutes a breach of the FET principle and/or prohibition of discriminatory treatment and may thus not give rise to a counter-claim of Respondent.

920. *(iv) Respondent has failed to sufficiently develop or elaborate on its counter-claims:* Claimant contends that in its Statement of Defense, Respondent spent only one paragraph outlining a few counter-claims "in cursory terms" before claiming an amount of USD 106,1 million in damages, referring to preceding submissions and Mr. Hart's report in guise of appropriate particulars. In its Rejoinder, Respondent then merely stated that it "*comprehensively detailed the grounds for its counterclaims in the Statement of Defense and had further elaborated those grounds in the Rejoinder and that there is no requirement for Respondent to repeat in detail the very same facts under a separate 'Counterclaims' heading*." By doing so, Claimant wonders whether Respondent is not trying to shift the burden of proof on Claimant. Respondent's counter-claims are plainly insufficiently developed to merit any substantial analysis by the Arbitral Tribunal (Claim. PHB I. 21.07.2014, paras. 204-208).

3.1.2 The Arbitral Tribunal's Findings

3.1.2.1 Preliminary Remarks

921. There are three key issues concerning Respondent's counter-claims, i.e. (i) whether the Arbitral Tribunal has jurisdiction over such counter-claims, (ii) whether they are well-founded, and – if so – (iii) what are their consequences in terms of monetary damages.

922. As the party raising a claim, the burden to establish that these three conditions are met lies on Respondent. This burden has various aspects, including (i) the burden to raise a sufficiently specific and clear claim, (ii) the burden to substantiate it by (a) setting out the relevant legal basis and its requirements, as well as (b) establishing the relevant underlying facts and how they meet the relevant legal requirements, and finally the burden to (iii) quantify it. Respondent contends having met such burden and in particular it contends that it has "*set out in full the facts underlying its counterclaims, as well as the basis for, and quantum of, the losses that is has suffered as a result of Claimant's unlawful conduct.*" (Resp. PHB II. 21.08.2014, para. 68). In contrast, Claimant contests that Respondent has met this burden.

923. Consequently, the Arbitral Tribunal will first identify Respondent's specific counter-claims, and to the extent they are sufficiently substantiated, it will rule on its jurisdiction over such Counter-claims.

3.1.2.2 Identifying Respondent's Specific Counter Claims

924. It is first noteworthy that in none of its submissions has Respondent articulated its counter-claims in formal 'Requests for Relief'. Instead, all of Respondent's written submissions end as follows: "*For all the reasons set forth above, Respondent respectfully requests that the Tribunal dismiss Claimant's claims in their entirety and issue a decision in 364otall of Respondent in respect of its Counterclaims*" (see Resp. SoD.Class. 04.04.2013, para. 547 ; Resp. Am.Rej. 21.02.2014, para. 999 ; Resp. PHB I. 21.07.2014, para. 155 ; Resp. PHB II. 21.08.2014, para. 69).[45] Thus, whilst Respondent is requesting "*a decision in* [its 364otall] *in respect of its Counter-claims*", it does not itemize what these counter-claims exactly consist in.

925. It is therefore necessary to study Respondent's submissions to identify the specific object of its "counter-claims" and, in this regard, it appears that Respondent's approach varies across its various submissions:

926. In its Response to the Notice of Arbitration, Respondent identified eight main factual bases for its counter-claims, i.e. (i) failure to perform investment obligations and introduce new technologies, (ii) failure to conduct exploration works and field developments, (iii) low efficiency of gold ore processing, (iv) failure to return export proceeds, (v) breach of financial standards and rules, (vi) violation of foreign currency regulations regarding payments under import contracts, (vii) breach of mining rules and labor protection requirements, (viii) breach of environmental regulations (Resp. RNoA. 30.09.2011, paras. 33-52). At the same time, Respondent specified however that its Response to the Notice of Arbitration "*does not set out each of Respondent's counter-claims in detail as* […] *such counterclaims will be elaborated in the Statement of Defense and other pleadings.*" (para. 28).

927. In its Statement of Defense of 4 April 2014, Respondent claimed damages of "*at least US$ 106.1 million*" arising out of alleged violations by Claimant of "*its investment obligations, general principles of international law and Uzbek law*" consisting in "*misrepresentation, self-dealing, fraud, and other unlawful conduct throughout its operation of AGF, and systematically failed to perform its investment obligations, thereby enriching itself and its affiliates to the detriment*

45 In its Response to the Notice of Arbitration, Respondent formulated its Request in a similar way, i.e.: "*An award in favour of the Respondents of compensatory damages, in an amount to be quantified in the proceedings.*" (p. 13, lit. iii).

*of Respondent and the Uzbek partie*s." (Resp. SoD.Class. 04.04.2013, para. 529). In this regard, Respondent relied on the expert reports of Messrs Hart and Rigby (see Hart I para. 45 n.10, para. 320, Table 8.1 and Exhibit 6, and Rigby I, para. 76, Table 5.4). Respondent further stressed that it "*does not seek payment of fees, taxes or other damage arising from non-compliance with the general laws of Uzbekistan. Rather, the counterclaims and attendant damages arise directly out of Claimant's misrepresentations and Claimant's unlawful and negligent conduct in exercising complete control over the operation and management of the AGF joint venture, the same investment at issue in the primary claims brought by Claimant*" (Resp. SoD.Class. 04.04.2013, para. 541). Respondent then argues that the basis for its counter-claims lies in the principle of good faith: "*A general obligation of good faith thus gives rise to the more specific obligation on the part of an investor to act in good faith in the conclusion, interpretation, and performance of its contracts, investment authorizations, and other similar legal instruments,* [reference omitted] *the failure of which provides the basis to bring counterclaims in an international arbitration. That is the case here, where Claimant made misrepresentations and acted fraudulently and in bad faith and abused the investment rights granted to it in good faith by Respondent, thereby causing Respondent significant damage. Claimant's inexcusable conduct, moreover, violates the Uzbek Civil and Criminal Code provisions prohibiting, among other things, fraud, bad faith, and unjust enrichment*" (Resp. SoD.Class. 04.04.2013, para. 542). Respondent relies in this regard on the Uzbek Civil Code, Arts. 123, 1023 et seq. (Exh. R-28) and the Uzbek Criminal Code, Arts. 167-68, 175, 178, 205, 207 (Exh. R-237).

928. *In its Amended Rejoinder of 22 February 2014*, Respondent claims for an amount of USD 109 million representing the damage caused by Claimant's "*misconduct in the operation and management of the AGF Joint Venture*" (Resp. Am.Rej. 21.02.2014, paras. 25, 27 and 29, and also 991) and are based on Claimant's violation of "*its investment obligations, general principles of international law and also Uzbek law*." (Resp. Am.Rej. 21.02.2014, para. 27, 993). Respondent then argues that "*Claimant's misconduct is more than sufficiently developed to enable the Tribunal to adjudicate the counterclaims arising from that misconduct.*" (Resp. Am.Rej. 21.02.2014, paras. 29 and 993).

929. In this regard, Respondent describes this misconduct as "including (i) Claimant's misrepresentations as to financing of the AGF Joint Venture; (ii) Claimant's waste of natural resources; (iii) Claimant's breach of the Special Dividend Agreement; (iv) Claimant's engagement in self-dealing and related-party transactions; and (v) Claimant's currency law violations and corresponding failure to provide promised foreign currency and other benefits." (Resp. Am.Rej. 21.02.2014, para. 30, see also para. 977). Respondent further substantiates these points as follows:

“996 […] *Respondent has clearly articulated, and supported with ample evidence, the factual basis for each of its counterclaims:*

- *Claimant’s Misrepresentations as to Financing of the AGF Joint Venture – Claimant misrepresented how it would finance the Joint Venture. In order to gain approval of its investment in AGF, Claimant represented that it would invest its own funds, in the form of equity or interest-free loans. Claimant failed to do this, and instead, negotiated an onerous financing deal with Standard Bank, which caused the State to lose money by detrimentally impacting profits and, thus, the taxes and dividend amounts that would have otherwise been distributed to the State. Moreover, Claimant also unjustly enriched itself by making interest-bearing loans to AGF which earned Claimant millions of dollars in interest. This further depressed AGF’s revenues and the level of funds available to pay out as dividends.*

- *Claimant’s Waste of Natural Resources – Claimant’s mismanagement and operation of AGF’s mining and processing operations resulted in wasted natural resources, including unprocessed ore, and significant levels of gold lost in unrecoverable tailings and silver locked within the heap leach facility. Claimant’s recovery of unacceptably low levels of gold and silver correspond to lost revenue for the Joint Venture detrimentally impacting both tax and dividend distributions to the State. Further, Claimant’s mining failures resulted in an additional cost to the State as millions of dollars must be spent to bring the mined pits at Vysokovoltnoye and Asaukak into compliance with Uzbek regulations – a requirement before any further mining can be conducted – and to rehabilitate Pit No. 1 at Centralny to permit access to the sulphide deposits.* [reference omitted]

- *Claimant’s Breach of the Special Dividend Agreement – Claimant was responsible for AGF’s entering into a financing arrangement and related hedging agreement with Standard Bank. In recognition of the harm caused to AGF and State by its actions, Claimant concluded the Special Dividend Agreement with the State pursuant to which it undertook to remedy the issue, and repay the State. As Respondent demonstrates, Claimant entered into this agreement freely, yet has never fulfilled its payment obligations to the State.* [reference omitted]

- *Claimant’s Engagement in Self-Dealing and Related-Party Transactions – Claimant directed AGF funds to itself, contractors who were shareholders of Claimant, and to parties closely related to Claimant and its Directors, including MAED, BCM, and MRT.* [reference omitted] *The links between Claimant and these related-parties created perverse incentives to increase costs, with the corresponding detrimental impact on revenue, negatively impacting taxes and resulting in little to no profits for the promised dividend payments to the State.*

- *Claimant’s Failure to Provide Promised Foreign Currency and Other Benefits – Claimant exercised complete control over AGF’s foreign exchange account at Barclays Bank, in gross violation of Uzbek law. Claimant failed to appropriately repatriate foreign currency generated* *by the Joint Venture and deposited into the Barclays Bank account, thereby detrimentally impacting the State's foreign exchange reserves, and reducing the tax revenue that otherwise would have been directed to the State as a result of the revenues generated by the Joint Venture.* *[reference omitted]*

997. *In both its Statement of Defense and above, Respondent has plainly demonstrated that Claimant's violations have caused financial damage to Respondent both in its capacity as the State, and as a shareholder of Goskomgeology and NGMK, shareholders in the AGF Joint Venture.*

998. *Finally, Respondent's expert, Mr. Hart, has calculated the minimum amount of damage that Respondent has suffered as a result of Claimant's misrepresentations, fraud, self- dealing, other violations of Uzbek law in the operation of AGF, and mismanagement of AGF. In his first report, Mr. Hart delineated and quantified Respondent's damages arising from Claimant's violations,* *[reference omitted]* *and he reiterates and updates his observations as to Claimant's actions herein.* *[reference omitted]* *Mr. Hart maintains that, at a minimum, Claimant's actions resulted in US$ 109 million in damages."*

930. Although Respondent largely relies on the conclusions of its expert Mr. Hart, the latter does not present these claims in a fully identical way. Instead, in section 9 of his report, Mr. Hart summarizes the counter-claims along eight themes, concluding as follows:

Table 9.1: Summary of Counterclaim Damages

Source: Hart First Report, Exhibit 6 (modified as detailed throughout Section 9)

Counterclaim	Amount (USD millions)	Alternate Amount (USD millions)
AGF Phase I wasted resources	$42.30	$42.30
Goods and services	4.35	4.35
Improper debt repayment	23.20	8.30
Management and administrative fees	1.46	1.46
Mining site restoration	23.50	23.50
Special Dividend	10.84	10.84
Unequal Dividends	0	0
Unspecified repayment to ORC	3.50	3.50
Total	**$109.15**	**$94.25**

931. Thus, according to Mr. Hart's conclusions, which form the underlying basis for Respondent's counter-claims, there would be seven separate counter-claims related to damages allegedly caused by (i) wasted resources due to Oxus' mismanagement of the AGF Project, (ii) payment to Oxus for goods and services without supporting accounting documents, (iii) the financing of AGF by Oxus through loans instead of equity and the improper repayment of such debts by AGF to Oxus, eliminating almost all distributable AGF profit, (iv) management and administration fees paid to Oxus in excess of the contractually agreed 5%, (v) the need to restore the mining site due to Oxus' improper methods of mining during Phase 1, (vi) the unpaid debt under the Special Dividend Agreement, and (vii) unspecified payments to ORC with no supporting documents.

932. Respondent considers Claimant responsible for this misconduct, because it had "*complete control of AGF's operations*" and was solely responsible for "*AGF's inefficiencies and failures.*" (Resp. Am.Rej. 21.02.2014, paras. 991 and 992).

933. In its Post-Hearing Brief of 21 July 2014, Respondent does not reiterate the factual or legal basis of its counter-claims, and instead insists that "[t]he Tribunal, moreover, can and should assert jurisdiction over Respondent's counterclaims based on Claimant's misconduct in its operation and management of AGF, and should order Claimant to pay damages to Respondent in the amount of USD 117.54 million." (Resp. PHB I. 21.07.2014, para. 3).

934. *In its Respondent's Post-Hearing Brief of 21 August 2014*, Respondent did not either reiterate the factual or legal basis for its claims, but merely summarized its position on the counter-claims as follows (para. 68): *"Respondent also has set out in full the facts underlying its counterclaims, as well as the basis for, and quantum of, the losses that it has suffered as a result of Claimant's unlawful conduct.*[reference omitted] *The Tribunal thus should hold Claimant liable for the substantial damage that Respondent has suffered as a result of Claimant's unlawful conduct, including Claimant's failure to pay sums admittedly owed to the Ministry of Finance under the Special Dividend Agreement, the numerous self-interested transactions that Claimant caused AGF to enter into with Claimant and/or its affiliates, and its operation of AGF in violation of the Republic's currency laws, 368otalling US$ 117.54 million."* As concerns the amount of USD 117.54 million, it is composed as follows (see Resp. PHB II. 21.08.2014 para. 68, footnote 299; see also Resp. PHB I. 21.07.2014, para. 71, 154, and footnote no. 591):

- USD 12,738.597 as of 21 July 2014 for the debt under the Special Dividend Agreement;

- USD 98.31 million for "*Respondent's remaining counterclaims* [i.e. other than that under the Special Dividend Agreement]" which are "*likewise* […] *based on Claimant's management and operation of AGF*";

- USD 4.42 million in payments to MRT; and

- USD 2,062,646.42 in silver sales that Claimant stole from AGF, which is likewise […] liquid and undisputed, and thus also should be admitted as a set-off defense."

935. Thus, whilst Respondent tends to describe its counter-claims in its submissions as generally arising out of Claimant's alleged misconduct, abuse of its investment rights and failure to comply with its investment obligations, it appears that its counter-claims can be split into three groups:

(i) Claims for general misconduct by Claimant/AGF for a total amount of USD 102.73 million (hereinafter the "Misconduct counter-claims");

(ii) Claims under the Special Dividend Agreement for an amount of USD 12,780,495 (hereinafter the "SDA counter-claims");

(iii) Claims arising out of the sale of silver for an amount of USD 2,062,646.42 (hereinafter the "Silver sale counter-claims").

936. Thus, the Arbitral Tribunal shall examine whether it has jurisdiction over these counter-claims and, if so, whether Respondent sufficiently established that they are well-founded.

3.1.2.3 Lack of Jurisdiction

937. Respondent's counter-claims are built on the following double premise:

(i) As concerns the factual premise of the counter-claims, Respondent contends that it duly substantiated the factual basis for its counter-claims, because it is the same as the factual basis on which it relies to defend on Claimant's claims. As such, Respondent would not need to substantiate these facts under a separate heading "Counter-Claims".

(ii) As concerns the legal basis, Respondent's counter-claims are built on the premise that, given that the claims and the counter-claims are based on the same factual basis, by rejecting Claimant's claims for breach of the BIT, the Arbitral Tribunal "*will have made all of the determinations* *necessary to decide Respondent's counterclaim, thereby demonstrating that the counterclaim is closely linked to Claimant's primary claim*." (Resp. PHB I. 21.07.2014, para. 152).

938. Based on the considerations below, the Arbitral Tribunal is of the opinion that these premises are erroneous.

939. Respondent has to establish *(i)* that the counter-claims fall under the jurisdiction *ratione materiae* of the Arbitral Tribunal, *(ii)* what are exactly the international obligations that Claimant is said to have breached, and *(iii)* what are the specific actions of Claimants which are in breach of such international obligations. As conceded by Respondent, a mere breach of domestic law is not sufficient to trigger an international liability of Claimant under the BIT.

940. As concerns the first requirement, i.e. the Arbitral Tribunal's jurisdiction, Respondent's counter-claims are built on the double premise that (i) Article 8 of the BIT combined with Article 21(3) of the UNCITRAL Arbitration Rules contemplate Claimant's consent to the adjudication of the counter-claims in the same proceedings as Claimant's claims, and that (ii) to the extent that "*Claimant's claims and Respondent's counterclaims both arise out of the same "transaction or occurrence",* and that *"Respondent's counterclaims* […] *are the direct counterpart to Claimant's claims under the BIT*", a sufficient "*close connection*" or "*nexus*" exists between Claimant's claims and Respondent's counter-claims to justify the admissibility of Respondent's counter-claims. (Resp. SoD.Class. 04.04.2013, para. 541; Resp. Am.Rej. 21.02.2014 paras. 983 fol.).

941. In other words, according to Respondent, to the extent that "Respondent's counterclaims are based on Claimant's violation of its investment obligations, general principles of international law, and also Uzbek law – and arise directly out of Claimant's misconduct in the operation and management of the AGF joint venture, the very same investment at issue in the claims brought by Claimant", they "are sufficiently connected to Claimant's claims, and the mere fact that Claimant's misconduct also implicates certain violations of local law does not render them inadmissible." (Resp. Am.Rej. 21.02.2014, para. 27).

942. According to Claimant, the BIT does not allow counter-claims. Whilst Claimant does not dispute that Article 21(3) of the UNCITRAL Arbitration Rules conditionally permits the submission of counter-claims by a respondent party, Claimant contends that the conditional element, i.e. "*that the arbitral tribunal has jurisdiction over* [the counter-claim]", is not met in the present case. This would be because Article 8(1) of the BIT only allows arbitration of claims "*concerning an obligation of the* [State Party] *under this Agreement*", i.e. only disputes concerning the obligations of Uzbekistan under the BIT may be considered by the

Arbitral Tribunal (Claim. Am.Reply 23.08.2013, paras. 1454 fol.). As a consequence, Respondent's counter-claims would be inadmissible as excluded by the terms of Article 8(1) of the BIT and thus also barred under Article 21(3) of the UNCITRAL Arbitration Rules. With regard to Respondent's arguments which rely on ICSID or ICC arbitration practice, Claimant contends that these are not applicable in the present case (Claim. Am.Reply 23.08.2013, para. 1472).

943. The Parties agree that the question of jurisdiction and admissibility of the counter-claims is to be determined based on Article 8(1) of the BIT and Article 21(3) of the UNCITRAL Arbitration Rules. The Parties' disagreement concerns the meaning and effect of these two provisions.

944. As concerns Article 21(3) of the UNCITRAL Arbitration Rules, the Arbitral Tribunal does not consider that this provision creates a jurisdiction where there is none. All it does is stating that counter-claims are admissible and can be submitted to the extent that they <u>already</u> fall under the scope of jurisdiction of the Arbitral Tribunal.

945. In the present case, the scope of jurisdiction of the Arbitral Tribunal is defined by Article 8(1) of the BIT. The key question is thus whether this provision makes room for counter-claims as the ones at hand.

946. As mentioned above (see para. 124 General Part), Article 8(1) provides as follows:

> *"(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification to a claim, be submitted to international arbitration if the national or company concerned so wishes."*

947. Thus, the wording of Article 8(1) refers only to disputes "*concerning an obligation of the latter* [i.e. the Contracting Party] *under this Agreement.*"

948. The wording of Article 8(1) of the BIT is for this Arbitral Tribunal a clear indication that the Parties' consent to arbitration under the BIT only cover claims from investors against the host State, but not claims from the host State against the investors, to the possible exception of counter-claims having a close connection with the investor's claims, as mentioned below (see below, para. 951).

949. Whilst it is true that several tribunals have in the past accepted the admissibility of counter-claims in investment arbitrations, the cases relied upon by Respondent are of no avail for different reasons.

950. For example, in *Saluka v. Czech Republic,* the arbitration clause contained in Article 8 of the BIT between the Kingdom of The Netherlands and the Czech and Slovak Federal Republic was very different from the present arbitration clause and referred to "[d]*isputes between one of the Contracting Parties and an investor of the other Contracting Party, arising in connection with realization of investments.*" As such, *Saluka v. Czech Republic* cannot serve as reference in the present case. In *Paushok v. Mongolia*, Article 6 of the BIT between Russia and Mongolia also provided for a broad jurisdictional clause referring to "[d]*isputes between one of the Contracting Parties and an investor of the other Contracting Party, arising in connection with realization of investments, including disputes concerning the amount, terms or method of payment of compensation* […]" In contrast, Article 8(1) of the BIT is very similar to the wording of Article 9 of the BIT between Greece and Romania, which formed the basis for the claims and counter-claims raised in *Spyridon Roussalis v. Romania*. Article 9 of the Greece-Romania BIT also referred to "[d]*isputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement*" and, in that case, the arbitral tribunal rejected its jurisdiction (with a dissenting opinion from Prof. Michael Reisman).

951. As for the other cases relied upon by Claimant and subject to the ICSID framework, they are equally not of assistance as the consent system under the ICSID Convention is peculiar and the jurisdictional clauses also differ from the present case. For example, in *Hamester v. Ghana*, the jurisdictional clause left certain ambiguity, which was interpreted by the arbitral tribunal as leaving sufficient room for counter-claims, though the arbitral tribunal eventually ruled that in the absence of proper submissions, it was "*unable to analyse whether it is capable, in accordance with Article 46 of the Convention, of falling within the parties' scope of constent.*"

952. Even, if the Arbitral Tribunal would adopt the position most favourable to the Respondent, in applying the general principle mentioned in *Saluka v. Czech Republic*, according to which there exists "**a general principle as to the nature of the close connection which a counterclaim must have with the primary claim if a tribunal with jurisdiction over the primary claim is to have jurisdiction also over the counterclaim**" (*Saluka v. Czech Republic*, para. 76), and consider therefore that as soon as it has jurisdiction over a claim, it has jurisdiction over a counter-claim closely linked to that claim, the Tribunal – in addition to the preliminary hurdle of the wording of Article 8(1) of the BIT – sees the following further hurdles to its jurisdiction.

953. The Arbitral Tribunal agrees with the general principles laid out in *Saluka v. Czech Republic* as just mentioned and reiterated in *Paushok v. Mongolia*, according to which:

> *"(i)n relation specifically to counterclaims, it is necessary that they must also satisfy those conditions which customarily govern the relationship between a counterclaim and the primary claim to which it is a response. In particular, a legitimate counterclaim must have a close connexion with the primary claim to which it is a response."*[46]
>
> and
>
> "*In considering whether the Tribunal has jurisdiction to consider the counterclaims, it must therefore decide whether there is a close connection between them and the primary claim from which they arose or whether the counterclaims are matters that are otherwise covered by the general law of Respondent."*[47]

954. Applied to the present case, this principle means that in order for the Arbitral Tribunal to have jurisdiction over the counter-claims, it is necessary that there be a close connection between them and the primary claim from which they arose in the sense that the counter-claims must be sufficiently connected to the claims, i.e. arise out of the investment and thereto relating obligations, and may not be matters merely covered by the general law of the Respondent.

955. *As concerns the misconduct and the silver sale counter-claims,* Respondent relies on general Uzbek law as well as the principle of good faith.

956. In this regard, the Arbitral Tribunal is not convinced that the misconduct and silver sale counter-claims show the necessary close connection. The reason is that the underlying factual matrix refers largely to the way in which AGF operated, not to the circumstances in which Claimant invested into AGF. Respondent tries to bridge this gap with the argument that Claimant had "total control" over AGF's operations. However, in order to succeed with this argument, it is not sufficient that Claimant had 'general control' over AGF; it is further necessary that Claimant had specific control over the very actions which are constitutive of such wrongdoings. The Arbitral Tribunal considers that Respondent has failed to establish such actual control. Besides having a 50% share in AGF, it is undeniable that the Uzbek Parties had an actual say in the way these operations were conducted. They played, for example, a determining role in the choice of the technology to be used or the silver refining process (see above paras. 515, 519, 523-525 and 528). The only relevant facts where Respondent convincingly

[46] *Paushok v. Mongolia*, para. 689 quoting *Saluka v. Czech Republic*, para. 61.
[47] *Paushok, v. Mongolia*, para. 693.

showed an actual control by Claimant is the misconduct relating to the alleged financial irregularities. Indeed, it is undisputed that Claimant had full control over the Barclays bank account and the funds arriving thereon. However, as concerns this alleged misconduct, it is largely based on the alleged violations of Uzbek law restrictions regarding foreign currency and other financial regulations, and the Respondent did not raise it as a counter-claim as such. In any event, it does not show the necessary "close connection".

957. *As concerns the SDA counter-claim*, it cannot be denied that the counter-claim under the Special Dividend Agreement bears a close connection to Claimant's claims. However, the obstacle to the Arbitral Tribunal's jurisdiction over this counter-claim is the forum selection and choice of law clause contained in the Special Dividend Agreement, which provides as follows:

> *"9. Settlement of disputes*
>
> *All disputes which cannot be settled by the Parties by way of negotiations shall be transferred to a court for a court judgment in accordance with the laws of the Republic of Uzbekistan.*
>
> *10. Applicable law and language of the Agreement*
>
> *This Agreement is* […] *guided by the laws of the Republic of Uzbekistan"* (Exh. C-252)

958. Thus, there are two additional specific hurdles to the Arbitral Tribunal's jurisdiction over this counter-claim:

(i) Respondent has not convincingly established that the non-payment of Claimant's debt under this Agreement constitutes more than a mere contractual breach subject to Uzbek law. In particular, a recourse to the umbrella clause of the BIT is not possible given the wording of such clause, which expressly refers to obligations of the host State only. Thus, Respondent may not rely on the umbrella clause to transform a breach of contract by Claimant into a breach of the BIT. Therefore, it is not clear how the non-performance of this contractual undertaking would trigger a liability of Claimant under international law.

(ii) Through the selection of court proceedings under Uzbek law as dispute resolution mechanism, the Parties have made an express choice for a specific dispute resolution mechanism. More than that, the dispute has effectively been brought before the chosen courts, which have confirmed their jurisdiction (see above section III.-1.5.1). Whilst it is true that the enforcement proceedings of the relevant court decisions have been stayed for the duration of the present arbitration (see above para. 626;

Resp. PHB I. 21.07.2014, para. 152), Respondent has not explained nor substantiated what effect an award covering the SDA counter-claim would have on the enforcement proceedings. In particular, Respondent has not argued that such award would bind the Uzbek courts. Under such circumstances, even if the SDA counter-claims would be seen as falling under the scope of Article 8(1) of the BIT, the Arbitral Tribunal considers that the forum selection clause contained in Article 9 of the Special Dividend Agreement constitutes a special agreement between the Parties by which they provided for a specific dispute resolution mechanism. This is further confirmed by the fact that (i) Respondent did initiate court proceedings and not arbitration proceedings to enforce the debt under the Special Dividend Agreement, and (ii) Claimant did not raise any objection to the jurisdiction of the Uzbek courts (see Exhs. C-384 and 388). Thus, through such special agreement, the Parties must be seen as having excluded their consent to adjudicate disputes arising out of the Special Dividend Agreement through the mechanism provided for in the BIT. In other words, this special dispute resolution clause constitutes a sort of carve-out from a potential jurisdiction under the BIT and deprives the Arbitral Tribunal of any jurisdiction over such counter-claims. The same solution has been adopted in *Saluka v. Czech Republic*, where the contract on which the counter-claim was based had a specific dispute settlement clause, which the tribunal considered it had to respect, citing in support the decision of the Ad hoc Committee in its decision on annulment in *Vivendi v. Argentina* :

> *"In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract."* (Decision of 3 July 2002, para. 55)

3.1.3 Conclusion

959. In conclusion, the Arbitral Tribunal finds that it lacks jurisdiction over Respondent's counter-claims.

3.2 Issue No. 7: Set-off

3.2.1 The Parties' Positions

3.2.1.1 Respondent's Position

960. Respondent contends that, in case the Arbitral Tribunal finds it has no jurisdiction over its counter-claims, the Arbitral Tribunal should still admit its counter-claims as a set-off defense. Respondent, quoting Mourre, contends that Article 23(1) of the UNCITRAL Arbitration Rules "*does not prevent an arbitral tribunal admitting a set-off defense arising from a claim to money falling outside its jurisdiction if that claum is liquid and undisputed*allows an arbitral tribunal to admit a set-off defense, even if it is based on a claim that falls outside of its jurisdiction over that claim, provided that said claim is both liquid and undisputed (Resp. PHB I. 21.07.2014, para. 153; Resp. PHB II 21.08.2014, para. 65).

961. Both the counter-claim under the Special Dividend Agreement as well as Claimant's damage due to the improper use of AGF's Barclay's Bank account consist of claims that are both liquid and undisputed and therefore should be admitted as a set-off defense (Resp. PHB I. 21.07.2014, para. 153; Resp. PHB II. 21.08.2014, para. 65).

962. Respondent quantifies its counter-claim under the Special Dividend Agreement at USD 10,841,256.16 and its counter-claim with regard to Claimant's unlawful use of the AGF's Barclay's Bank account at USD 2,062,646.42 (Resp. PHB I. 21.07.2014, para. 153; Resp. PHB II 21.08.2014, para. 65). Accounting for interest under Clause 3 of the Special Dividend Agreement, Respondent quantifies Claimant's debt under the Special Dividend Agreement to USD 12,780,495 (Resp. PHB II 21.08.2014, para. 65).

963. Respondent considers that alternatively, on the basis of the doctrine of contributory fault as reflected in Article 39 of the ILC Articles on State Responsibility, any amounts awarded to Claimant should be reduced (Resp. PHB II. 21.08.2014, para. 67).

3.2.1.2 Claimant's Position

964. Claimant does not address Respondent's set off arguments in detail; in its amended Prayer for Relief, Claimant submitted the following (see above para. 133):

> "*1583.18. [**Set-Off Claim**] Order Respondent to pay the above amounts outside of Uzbekistan without any right of set-off*;"

3.2.2 The Arbitral Tribunal's Findings

965. Article 21(3) UNCITRAL Rules provides as follows:

> "In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it."

966. It is undisputed between the Parties that Respondent, in its previous submissions, invoked a set-off of the counterclaims it claims to have against Claimant.

967. The Arbitral Tribunal notes that the UNCITRAL Rules specifically address the question of set-off, given that the abovementioned provision explicitly requires that the Arbitral Tribunal must have jurisdiction over the claim Respondent brings forth. Thus, they clearly decide a question that is often controversial under other arbitration rules.

968. In the present case, the Arbitral Tribunal decided that it did not have jurisdiction over the counterclaims invoked by Respondent, thus excluding the two specific counterclaims on which Respondent relies for the purpose of its set-off.

969. Admittedly, Respondent quotes an author according to whom there would be an exception in case a claim is liquid and undisputed. However, Respondent did not elaborate on the grounds that would justify such an exception and did not provide any further authorities supporting this position.

970. The Arbitral Tribunal first notes that the authority quoted by Respondent referred to Article 19(3) of the previous UNCITRAL Rules. This provision provided as follows:

> "In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off."

971. Contrary to the current Article 21(3) UNCITRAL Rules, this provision did not explicitly state that an arbitral tribunal may only admit a set-off defence if it has jurisdiction over the claim upon which a respondent relies for the purpose of its set-off. Accordingly, the authority quoted by Respondent does not offer any guidance with regard to the new UNCITRAL Rules.

972. In light of the clear wording of Article 21(3) UNCITRAL Rules, the Arbitral Tribunal considers that it cannot rely on a set-off defence in the present arbitration, given that the Arbitral Tribunal does not have jurisdiction over the claims upon which Respondent relies for the purpose of its set-off defence.

973. This is however without prejudice to the question of whether Respondent will be entitled to invoke set-off of its counterclaims during the enforcement proceedings; this question falls outside the scope of the Arbitral Tribunal's mandate.

3.2.3 Conclusion

974. In view of the above, the Arbitral Tribunal finds that Respondent cannot invoke a set-off defence against Claimant's claims.

4. With Regard to the Interests on the Award

4.1 The Parties' Positions

4.1.1 Claimant's position

975. Claimant submits that, since Article 5 of the BIT does not explicitly state the date from which interest is to be calculated, the date of the expropriation should be relevant, in accordance with the practice of other arbitral tribunals (Claim. SoC. 17.09.2012, para. 724).

976. Furthermore, Claimant argues that the Arbitral Tribunal should make an award of compound interest and adopt an interest rate of LIBOR + 2% compounded semi-annually, given that this qualifies as a "*normal commercial rate*" pursuant to Article 5 of the BIT (Claim. SoC. 17.09.2012, paras 725-728).

977. Claimant relies on the award in *Middle East Cement v. Egypt* (CL-92), in which it was held that compound interest, as opposed to simple, is the appropriate standard for expropriation cases under international law (Claim. SoC. 17.09.2012, para. 726).

978. Claimant's expert Mr. Haberman considers that it is appropriate to add interest from the dates at which Claimant was allegedly expropriated to the date of the award. The appropriate rate to apply to Claimant's losses should be an approximation of its corporate borrowing rate at the time. Given Claimant's size and its status as an investor in mining projects in Central Asia, the interest rate at which it could borrow would be considereably higher than risk-free. Accordingly, a rate of LIBOR + 2% corresponds to Claimant's corporate borrowing rate (ER Haberman II (12.08.2013), paras 2.15-2.18).

979. Mr. Haberman considers that, in any event, the amount of interest to be applied is a matter for the Arbitral Tribunal, in accordance with international law (ER Haberman II (12.08.2013), para. 2.19).

4.1.2 Respondent's position

980. Respondent disputes that there is any principle of international law entitling Claimant to seek an award of compound interest (Resp. SoD. Class. 04.04.2013, para. 527). Given that local law prohibits compound interest, the Arbitral Tribunal should consider applying simple interest, although Respondent's expert Mr. Hart considers that the issue is ultimately to be decided by the Arbitral Tribunal (ER-Hart I (15.02.2013), para. 327; ER-Hart II (20.02.2014), para. 318).

981. Respondent quotes, *inter alia*, the decision in *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (RL-207), where the arbitral tribunal held that there was no uniform rule of law in international arbitral practice as to the applicability of simple or compound interest.

982. Respondent's expert Mr. Hart agrees that it is reasonable to assume that interest should be payable from the expropriation date or from the date the pending expropriation was made public knowledge; the date from which interest is paid should coincide with the valuation date used in order to quantify the claimed amount (ER-Hart I (15.02.2013), para. 323).

983. Mr. Hart further disputes that LIBOR + 2% is an appropriate rate. In his view, given that interest is to be awarded on an amount in USD, the interest should also be based on a US risk-free rate, not at a commercial rate (ER-Hart (15.02.2013), paras 325-326; ER-Hart II (20.02.2014), para. 318).

4.2 The Arbitral Tribunal's Findings

984. The Arbitral Tribunal first notes that the Parties submitted diverging authorities as to the question of whether compound or simple interest are to be awarded.

985. The Arbitral Tribunal also acknowledges the agreement between the Parties' respective experts that interest is to be payable from the expropriation date.

986. In the case at hand, the expropriation effectively occurred when Claimant paid the taxes from which it expected to be exempted. Given that the taxes owed by Claimant are calculated at the end of each year, the interest will start running as of 31 December of each relevant year.

987. As mentioned above (see above para. 888), Mr. Hart did not provide any yearly calculations with regard to the taxes paid by AGF; Exhibit 16 to ER-Haberman (17.08.2012), upon which ER-Hart III (10.07.2014) is based, contains all the necessary information in order to quantify Claimant's yearly loss, based on the methodology described above (see above para. 886 and 887). The Arbitral Tribunal thus holds that it is for the Parties to determine Claimant's yearly loss and to apply the interest rate to said loss as of the 31 December of each relevant year.

988. The Arbitral Tribunal further considers that, in recent years, international arbitral tribunals deciding over investment claims have increasingly awarded compound interest. As held by the arbitral tribunal in *CME Czech Republic BV v. The Czech Republic*, which quoted extensive case law, this has been done in order to take into account the "*prevalent contemporary commercial reality that companies that borrow pay compound interest*"; the financing obligations of the investor have thus been considered to be circumstances justifying that compound interest are awarded (RL-223, para. 645; see also CL-81, para. 279; CL-153, para. 348; CL-154, para. 360;).

989. The Arbitral Tribunal also notes that, in Railroad Development Corporation (RDC) v. Republic of Guatemala, the arbitral tribunal held that "the determination of whether or not a compound interest rate is applicable needs to be justified by the Tribunal as any other determination. Given the length of these proceedings because of two jurisdictional phases in which the jurisdictional objections of Respondent were rejected, and several postponements in the procedural calendar at the Government's request, the Tribunal determines that compound interest is justified" (CL-81, para. 281). The length and complexity of the proceedings may thus also constitute an appropriate criterion in order to award compound interest.

990. The Arbitral Tribunal thus considers that, in light of the length and complexity of the proceedings and of the current arbitral practice, it is appropriate to adopt the interest rate of LIBOR + 2% proposed by Claimant, compounded annually.

4.3 Conclusion

991. The Tribunal rules therefore that Respondent shall pay to Claimant interests on the damages awarded to it at the rate of LIBOR + 2%, compounded annually.

992. The interest rate shall be applied to the loss suffered by Claimant as of the 31 December of each corresponding year from 2004 to 2010. The Parties shall calculate each yearly loss on the basis of the numbers provided by Mr. Hart in ER-Hart III (10.07.2014).

C. THE COSTS OF THE PROCEEDINGS

I. The Issue

993. The Arbitral Tribunal recalls the Parties' positions with regards to costs as determined in their respective Prayers for Relief.

994. Claimant stated in its Prayer for Relief (see above para. 133) the following claim on costs:

> *Order Respondent to pay Claimant the costs of this arbitration, including all expenses that it has incurred, and including all of the fees and expenses of the arbitrators, legal counsel, experts and consultants, as well as Oxus' own expenses in pursuing this arbitration.*

995. Respondent asserted in its Prayer for Relief (see above para. 134) the following conclusion with regards to costs:

> *Respondent furthermore respectfully requests that it be awarded all the expense and costs associated with defending against Claimant's claims.*

996. The Parties had the opportunity to put forth their conclusions on costs in their respective Statement of Costs submitted on 6 January 2015. They were also given the opportunity to respond to each other's Statement of Costs which they both did on 20 January 2015.

II. The Parties' Positions

1. Claimant's Position

1.1 The Amount Claimed

997. In its ***Statement of Costs*** (hereinafter "Cl. Cost. 06.01.2015"), Claimant requested the Arbitral Tribunal to order Respondent to bear all the fees, costs and expenses relating to the arbitration proceedings (Cl. Cost. 06.01.2015, para. 11).

998. It also requested the Arbitral Tribunal to order Respondent to reimburse all the costs with interest at a reasonable commercial rate accruing from the date of the final award (Cl. Cost. 06.01.2015, para. 11).

999. Claimant quantified its total arbitration costs directly incurred in present arbitration proceedings at **USD 9,546,369.53** (Cl. Cost. 06.01.2015, para. 2).

1000. Claimant detailed these costs as follows (Cl. Cost. 06.01.2015, para. 2):

(a) Costs and expense of Arbitral Tribunal:	USD 800,000.00
(b) Legal fees of counsel for Claimant:	USD 6,915,019.59
(c) Expenses of counsel for Claimant:	USD 1,078,293.26
(d) Fees, costs and expenses of experts and witnesses:	USD 624,494.48
(e) Costs and expenses incurred in preparation of the Hearing:	USD 128,562.10

1.2 The Justification

1001. With regards to the legal fees of counsel (b), Claimant notes that this category of costs includes not only the legal services and representation provided by Derains & Gharavi as of February 2012, but also invoices settled for legal services and advice provided by its former counsel, Amsterdam & Peroff (Cl. Cost. 06.01.2015, para. 4 et seq.). In addition, the category also covers the services of further legal counsel required for discrete issues regarding the dispute, as well as Osborne Clarke's advice regarding corporate aspects of financing the dispute, and Boyarkin & Partners, Inc.'s advice regarding Uzbek law (Cl. Cost. 06.01.2015, para. 6).

1002. Claimant further notes that out of the legal fees of counsel (b), USD 406,703.40 relate to the submissions on jurisdiction (comprised of legal fees of USD 314,986 and expenses of USD 25,717.40) (Cl. Cost. 06.01.2015, para. 8). At least USD 3,000,000 out of the total legal fees of USD 6,915,019.59 relate to the issues of fraud, misrepresentation and similar issues raised by Respondent in its inadmissibility defense and its associated counterclaims (idem).

1003. With regards to the expenses of counsel (c), this category of costs includes travel and accommodation expenses, data management costs and experts' expenses (Cl. Cost. 06.01.2015, para. 7).

1004. With regards to the fees, costs and expenses of experts and witnesses (d), this category covers the minority of such costs that were paid directly by Claimant and that were not part of the claimed expenses of counsel (c) (Cl. Cost. 06.01.2015, para. 9).

1005. With regards to the costs and expenses incurred in preparation of the Hearing (e), this category includes the following: Claimant's share of the costs for the Hearing venue; equipment; court reporters and interpreters; expenses for Claimant, counsel, witnesses and experts; printing and presentation aids (Cl. Cost. 06.01.2015, para. 11).

1.3 Objections to Respondent's Position

1006. Respondent requested that the Arbitral Tribunal order Claimant to bear all the costs incurred by Respondent (see below para. 1015). Claimant filed ***Claimant's Comments on Respondent's Statement of Costs*** in reply (hereinafter "Cl. Reply Cost. 20.01.2015").

1007. Claimant submitted that the UNCITRAL Arbitration Rules state in principle that costs shall be awarded to the successful party and grant the arbitral tribunal discretion to allocate costs as it deems appropriate based on the circumstances of the case (Cl. Reply Cost. 20.01.2015, para. 3). Claimant, however, relied on *Walter Bau v. Thailand* and *Rumeli v. Kazakhstan* and asserts that only limited assistance can be gained from one BIT arbitration for another, given that all fact situations are different and that, accordingly, tribunals should consider the circumstances of each case individually (Cl. Reply Cost. 20.01.2015, para. 3).

1008. Claimant asserted that, should it succeed on all or some of its claims on the merits (and their admissibility), the circumstances of the case justify that the Arbitral Tribunal order Respondent to pay Claimant's costs in full or in large part (Cl. Reply Cost. 20.01.2015, para. 6). To this effect, Claimant referred to *Veteran Petroleum v. Russia*, *Saar Papier Vertriebs GmbH v. Poland*, *SwemBalt v. Latvia* and *Gold Reserve v. Venezuela* (idem). In addition, it referred to *BG Group v. Argentina* as an example of awarding costs in proportion to the percentage of a claimant's successful claims (idem).

1009. Claimant requests that, even in the alternative that it should not succeed on some or all of its claims (including admissibility), it should not be held to pay Respondent's costs (Cl. Reply Cost. 20.01.2015, para. 4). Claimant did not only succeed regarding Respondent's objection that Claimant lacked standing (Cl. Reply Cost. 20.01.2015, para. 5), but counsel for Claimant had worked ably, diligently and efficiently in defense of the Claimant's interests. Claimant relied on *Romak v. Uzbekistan*, in which the tribunal stated that there was a general trend that had developed that arbitration costs should be equally apportioned between the Parties, irrespective of the outcome of the dispute, and that the claimant's diligent and efficient conduct did not justify shifting costs against it (Cl. Reply Cost. 20.01.2015, para. 4).

1010. In addition, Claimant asserted, based on *EnCana v. Ecuador*, that in cases where a claimant's BIT claims were unsuccessful, it would be just and equitable for the respondent State to bear the costs of the arbitration, with each party bearing its costs of representation (Cl. Reply Cost. 20.01.2015, para. 4).

1011. Furthermore, Claimant reiterated that its costs are reasonable given the complexity of the dispute, which is in many respects the result of Respondent's strategy (Cl. Reply Cost. 20.01.2015, para. 7). Moreover, Respondent's comments concerning the reasonableness of Claimant's costs must be analyzed bearing in mind that Respondent's costs significantly exceed those of Claimant (Cl. Reply Cost. 20.01.2015, para. 9).

1012. Finally, Claimant submitted that Respondent, rather than Claimant, caused the dispute to be complex and costly (Cl. Reply Cost. 20.01.2015, para. 10). In particular, Claimant stated the following:

- Respondent's arguments that it incurred additional costs in order to address all of Claimant's allegations boils down to the mere complaint that it had to defend itself against Claimant's allegations (Cl. Reply Cost. 20.01.2015, para. 11).

- Respondent makes a number of misrepresentations (relating to the Soviet Studies, Claimant's development rights in the Khandiza Deposit, an alleged admission by Mr. Kipps), which do not entitle it to any recovery of costs (Cl. Reply Cost. 20.01.2015, paras. 13–15).

- Claimant's alleged violations of procedural obligations were in fact fully explained and justified to the Arbitral Tribunal (Cl. Reply Cost. 20.01.2015, para. 16).

- Respondent's concerns about Claimant's conduct with regards to witnesses and the submission of an expert report as a factual exhibit is misplaced (Cl. Reply Cost. 20.01.2015, paras. 17).

- Respondent’s tactics of attrition, disproportionately voluminous submissions and unnecessary applications regarding confidentiality and documents privilege complicated the proceedings unnecessarily (Cl. Reply Cost. 20.01.2015, para. 18). In the same vein, Respondent caused the costs resulting from Claimant’s necessary application for the disqualification of White & Case as counsel for Respondent and the exchanges regarding the submission of confidential documents by Respondent (Cl. Reply Cost. 20.01.2015, para. 19).

- Respondent’s allegations of fraud, corruption and illegality did not meet the required threshold and its counter-claims were without merit and consistency, for which it lacked standing (Cl. Reply Cost. 20.01.2015, para. 20).

- Respondent and its expert, Mr. Pringle. failed to fully disclose the close links between them, which resulted in his expertise and independence being seriously questioned at the Hearing (Cl. Reply Cost. 20.01.2015, para. 21).

2. Respondent’s Position

2.1 The Amount Claimed

1013. In ***Respondent’s Statement of Costs*** (hereinafter “Resp. Cost. 06.01.2015”), Respondent requested that the Arbitral Tribunal order Claimant to bear all of the costs and expenses incurred by Respondent in connection with the arbitration (Resp. Cost. 06.01.2015, paras. 1 and 30).

1014. Respondent quantified its total costs incurred in the present arbitration proceedings at **USD 15,672,698.10** and **EUR 28,852.50** (Resp. Cost. 06.01.2015, para. 1).

1015. Respondent detailed the costs as follows (Resp. Costs. 06.01.2015, para. 1):

(a) Cost and expenses of Arbitral Tribunal:	USD 799,976
(b) Fees and expenses of counsel for Respondent:	USD 11,657,301.95
(c) Fees and expenses for experts:	USD 2,465,265.13
(d) Expenses of witnesses and client representatives for the Hearing:	USD 136,435.75 and EUR 28,852.50
(e) Expenses for translation:	USD 613,719.27

2.2 The Justification

1016. Given the Treaty's silence on the issue, Respondent submitted that the Arbitral Tribunal has discretion to allocate costs as it deems appropriate under Articles 40 and 42 of the UNCITRAL Arbitration Rules (Resp. Cost. 06.01.2015, para. 5). Relying on Article 42 of the UNCITRAL Arbitration Rules and the decisions in *Yukos v. Russia*, *Tembec v. United States*, *Alps Finance v. Slovak Republic*, *Plama v. Bulgaria* and *Eastern Sugar v. Czech Republic* and with reference to *Libananco v. Turkey*, Respondent submitted that costs should be allocated in accordance with the principle that "costs follow the event" or "the loser pays", i.e. that a prevailing party is entitled to be awarded its reasonable costs in an amount proportionate to its relative success (Resp. Cost. 06.01.2015, para. 5–10).

1017. In application of the principle that "costs follow the event", Respondent requested, based on *Alps Finance v. Slovak Republic*, *Phoenix Action v. Czech Republic* and *Plama v. Bulgaria*, that Claimant be ordered to bear all costs for its claims denied on grounds of lack of jurisdiction and admissibility (Resp. Cost. 06.01.2015, para. 11).

1018. In the event that the Arbitral Tribunal finds that it has jurisdiction, that Claimant's claims are admissible and that Claimant succeeds on the merits regarding none or merely a small minority of its claims, Respondent requested *arguendo* that Claimant should bear a significant majority of Respondent's costs, relying on *Thunderbird v. Mexico* (Resp. Cost. 06.01.2015, para. 12).

1019. Respondent submitted that its costs are reasonable (Resp. Cost. 06.01.2015, para. 13–22). Based on the factors to assess the reasonableness a tribunal's fees expenses contained in Article 41(1) of the UNCITRAL Arbitration Rules, in particular the amount in dispute and the complexity of the subject matter (Resp. Cost. 06.01.2015, para. 13–16), Respondent submitted that its claimed costs are reasonable in light of the following:

- Considering the amount claimed by Claimant in alleged damages, USD 1.2 billion, previous arbitral tribunals under similar circumstances have awarded costs ranging from USD 5 to 15 million (Resp. Cost. 06.01.2015, para. 17).

- Claimant's claims cover in fact two projects, Khandiza and AGF, and relate to five separate heads of claims (Resp. Cost. 06.01.2015, para. 18).

- The scope of the case spanned approximately six decades and implicated a wide range of actors (Resp. Cost. 06.01.2015, para. 19).

- The extensive document record of the present arbitration demonstrates the magnitude of the case (Resp. Cost. 06.01.2015, para. 20).

- Significant expenses were incurred for Respondent's witnesses travelling from Uzbekistan to Paris (Resp. Cost. 06.01.2015, para. 21). In addition, the Parties also had to arrange and pay for the Hearing facilities (idem).

- The majority of Respondent's documents had to be translated from Russian or Uzbek into English and simultaneous interpretation also had to be arranged at the Hearing (Resp. Cost. 06.01.2015, para. 22).

1020. Respondent further contends that Claimant's conduct throughout the proceedings significantly increased the costs and that, based on *Alps Finance v. Slovak Republic* and *Generation Ukraine v. Ukraine*, the Arbitral Tribunal should order Claimant to bear the costs of the arbitration (Resp. Cost. 06.01.2015, para. 23). In particular, Respondent asserted the following:

- Claimant argued its case in an unnecessarily complex and disorganized fashion and submitted contradictory claims on a number of occasions (Resp. Cost. 06.01.2015, paras. 23–26).

- Claimant presented its damages claims in an disorganized and piecemeal manner involving multiple amendments, which resulted in Respondent incurring additional, unnecessary costs for its rebuttals (Resp. Cost. 06.01.2015, paras. 27–28).

- Claimant erroneously submitted an expert report as a factual exhibit, repeatedly changed its list of individuals it intended to call for examination and declined to call one of its witnesses after Responded had prepared to cross-examine him (Resp. Cost. 06.01.2015, para. 29).

2.3 Objections to Claimant's Position

1021. Respondent commented on Claimant's position in ***Respondent's Reply Statement of Costs*** (hereinafter "Resp. Reply Cost. 20.01.2015").

1022. Respondent reiterated that costs in UNCITRAL proceedings shall in principle be awarded to the successful party in an amount proportionate to its relative success (Resp. Reply Cost 20.01.2015, para. 2).

1023. Respondent further reiterated that its costs were reasonable, given the high stakes and the complexity of the dispute (Resp. Reply Cost. 20.01.2015, para. 3). Respondent's costs are slightly higher than Claimant's, given that the latter unnecessarily increased complexity and cost of the dispute through its disorganized presentations and given that it is "more time-consuming and costly to rebut false allegations than it is to make them" (Resp. Reply Cost. 20.01.2015, para. 4).

1024. Respondent further asserted that Claimant's costs are "unsubstantiated or unrecoverable" in the following way (Resp. Reply Cost. 20.01.2015, para. 5):

- Even though Respondent alone had to bear the interpretation costs pursuant to Procedural Order No. 16, Claimant claims their recovery as part of its Hearing expenses (Resp. Reply Cost. 20.01.2015, para. 6). Respondent enclosed two interpretation service contracts with its Reply Statement of Costs indicating that it was Respondent who contracted and paid the interpreters. In addition, given that Claimant relied on the interpreters, in particular for the cross-examination of Respondent's witnesses, it should have to reimburse Respondent for these costs (idem).

- Claimant contended that its expenses for Crowe Clarke Whitehill form part of experts' expenses when it had previously insisted that Crowe Clarke Whitehill's report was to be characterized as a factual exhibit (Resp. Reply Cost. 20.01.2015, para. 7).

- Claimant's alleged costs incurred in relation to the financing of the dispute are unprecedented and should not in any case be borne by Respondent (Resp. Reply Cost. 20.01.2015, para. 8).

- Expenses alleged by Claimant regarding factual witnesses paid directly by Claimant itself rather than its counsel should only be covered to the extent that they are travel expenses, in order to avoid casting further doubt on the credibility of Claimant's witnesses (Resp. Reply Cost. 20.01.2015, para. 9).

- Claimant's argument that at least USD 3,000,000 of counsel for Claimant's legal fees relates to Respondent's claims on fraud, misrepresentation and the similar claims is not reflected in its submissions and is therefore doubtful (Resp. Reply Cost. 20.01.2015, para. 10).

III. The Arbitral Tribunal's Findings

1. The Legal Basis

1025. The Arbitral Tribunal recalls Articles 40 and 42 of the UNCITRAL Arbitration Rules are the relevant provision regarding costs:

1.1 Definition of costs

Article 40

1. *The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.*
2. *The term "costs" includes only:*
   - *(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;*
   - *(b) The reasonable travel and other expenses incurred by the arbitrators;*
   - *(c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;*
   - *(d The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;*
   - *(e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;*
   - *(f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.*
3. *In relation to interpretation, correction or completion of any award under articles 37 to 39, the arbitral tribunal may charge the costs referred to in paragraphs 2 (b) to (f), but no additional fees.*

1.2 Allocation of costs

Article 42

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision.

1026. In light of the present arbitration and Article 40 of the UNCITRAL Arbitration Rules, the Arbitral Tribunal notes that the costs of this arbitration will comprise the following:

1. The Arbitral Tribunal's reasonable fees and expenses;

2. The Parties' reasonable legal fees and expenses; including reasonable expenses incurred for factual witnesses and experts.

2. The Arbitral Tribunal's Fees and Expenses

2.1 The Legal Basis

1027. The Arbitral Tribunal recalls that the relevant provision under the UNCITRAL Arbitration Rules with regards to arbitrators' fees and expenses is Article 41, in particular its first paragraph:

1. The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2.2 The Arbitral Tribunal's Fees and Expenses in the Case at Hand

1028. The Arbitral Tribunal regularly submitted its statements of account to the Parties when requesting the necessary advances on costs. As of 30 November 2015, the Arbitral Tribunal's total fees and expenses amounted to USD 2,297,768.70 (see Annex 1).

1029. In the present case, the values at stake were very high.In addition, as confirmed by the Parties, the subject matter of the case was particularly complex and required extensive submissions from both sides (Cl. Reply Cost. 20.01.2015, para. 7; Resp. Cost. 06.01.2015, para. 20), which lead to an increase in the amount of time and effort invested as well as of costs also for the Arbitral Tribunal. Given the complex nature of the procedure, the Arbitral Tribunal issued 18 procedural orders and issued a separate decision on jurisdiction (see above para. 81).

1030. Accordingly, the Arbitral Tribunal's fees and expenses are reasonable if measured against the criteria of Article 41(1) of the UNCITRAL Arbitration Rules. This conclusion was in any case not put in question by either Party.

3. The Parties' Fees and Expenses

1031. Claimant claims total fees and expenses (including those for witnesses and experts and its Hearing expenses) of USD 9,546,369.53 (see above para. 999). Respondent's total fees and expenses (including those for witnesses, experts, translation and the Hearing) amount to USD 15,672,698.10 and EUR 28,852.50 (see above para. 1014).

1032. Both Parties claim that their fees and expenses are reasonable (Cl. Reply Cost. 20.01.2015, para. 7–9; Resp. Cost. 06.01.2015, para. 13–22). The question whether or not this is the case can be left open in light of the Arbitral Tribunal's decision on the allocation of costs that will be taken further below (see below para. 1046).

4. The Allocation of Costs

4.1 The Legal Basis

1033. The Arbitral Tribunal recalls that the relevant provision of the UNCITRAL Arbitration Rules with regards to the allocation of costs is Article 42:

> 1. *The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*
>
> 2. *The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.*

1034. The Parties agree that, pursuant to the UNCITRAL Arbitration Rules, costs should be awarded "following the event", with a discretion of the Arbitral Tribunal to allocate costs differently based on the circumstances of the case (Cl. Reply Cost. 20.01.2015, para. 4; Resp. Cost. 06.01.2015, para. 5–10; Resp. Reply Cost. 20.01.2015, para. 2).

1035. The Arbitral Tribunal considers that this understanding is already reflected in the wording of Article 42(1) of the UNCITRAL Arbitration Rules. The same principle is also confirmed by the cases referred to by both Parties (*Veteran Petroleum v. Russia*, para. 1867 et seq.; *SwemBalt v. Latvia*, para. 49; *Tembec v. United States*, para. 139; *Alps Finance v. Slovak Republic*, para. 263).

1036. As noted by Respondent, in cases where there is not a clear winner and loser, i.e. where both parties prevail with regard to some of their claims and/or defenses, the principle of "costs follow the event" requires that the costs be awarded taking into account the parties' relative success (*Eastern Sugar v. Czech Republic*, para. 6; *Thunderbird v. Mexico*, paras. 219 fol.; cf. Resp. Cost. 06.01.2015, para. 9).

1037. Claimant's submission concurs with this conclusion insofar as it was Claimant who referred to *Veteran Petroleum v. Russia* and *SwemBalt v. Latvia* (Cl. Reply Cost. 20.01.2015, para. 6).

1038. As one of the circumstances that justify awarding costs differently than "following the event", a party that caused an unnecessary aggravation of costs through its conduct in the proceedings (e.g. deficiencies in its presentation of the case or obstructive behavior) may be required to bear costs in deviation from this principle. This is confirmed by cases relied upon by Claimant (*Romak v. Uzbekistan*, para. 251; cf. Claim. Reply Cost. 20.01.2015, para. 4) and Respondent (*Alps Finance v. Slovak Republic*, para. 265; cf. Resp. Cost 06.01.2015, para. 23).

1039. The Arbitral Tribunal's position is not altered by Claimant's reference to *EnCana v. Ecuador* (Claim. Reply Cost. 20.01.2015, para. 4), in which the arbitral tribunal decided that it would be just and equitable for Respondent state to bear the costs of the arbitration, with each party bearing its respective costs of representation (*EnCana v. Ecuador*, para. 202). The Arbitral Tribunal sees no reason to draw inferences from this decision on costs, given that it was rendered with explicit reference to "*the events giving rise to* [that] *proceeding*" (idem) and that Claimant has not substantiated in any way how the present case might be comparable to the facts of *EnCana*. In any case, it was Claimant who emphasized that arbitral tribunals should "consider the circumstances of each case individually and apportion costs as appropriate" (Claim. Reply Cost. 20.01.2015, para. 3).

1040. Considering the wording of Article 42(1) of the UNCITRAL Arbitration Rules and the cases discussed above, the Arbitral Tribunal therefore considers that costs should in principle be awarded “following the event”, i.e. taking into account the parties’ relative success regarding their claims and defenses. In limited circumstances, a party’s conduct during the proceedings such as deficiencies in its presentation of the case or obstructive behavior may justify a deviation from that principle.

4.2 The Application of the Principle to the Case at Hand

1041. An application of the standard outlined above requires an assessment of the Parties’ relative success regarding their claims and defenses.

1042. In the present case, Respondent failed with its attempted jurisdictional defense against Claimant’s standing (see above para. 81). In addition, the Arbitral Tribunal also rejected Respondent’s further jurisdictional and admissibility objections (see above para. 713). Claimant’s claims, however, were rejected for their essential part (see above paras 303, 347, 382, 392, 400, 758, 828 and 842), as were Respondent’s counterclaims (see above paras 959 and 974).

1043. Taking a global view of the Parties’ respective success (or lack thereof) regarding their claims and defenses, the Arbitral Tribunal considers that success and defeat are equally distributed between the Parties of the case at hand. Accordingly, as the most appropriate application of the principle that “costs follow the event”, the Arbitral Tribunal decides that the Parties shall pay the Arbitral Tribunal’s fees and expenses in equal shares, with each Party bearing its own fees and expenses (including those for witnesses and experts).

1044. This conclusion is also appropriate taking into account the circumstances that gave rise to the present case: The Parties undertook and shared a significant risk.

1045. Furthermore, the Arbitral Tribunal considers that it is not justified to alter this conclusion based on either Party’s conduct during the arbitration. Claimant and Respondent each accused their respective counterparty of having rendered the case unnecessarily complex and costly through its conduct (Cl. Reply Cost. 20.01.2015, para. 10–21; Resp. Cost. 06.01.2015, para. 23–29). To the extent that complexity and costs of the case were unnecessarily aggravated by party conduct, the Arbitral Tribunal considers that both Parties are responsible for such aggravation. Accordingly, its decision regarding the distribution of costs taken above remains unchanged by the Parties’ conduct in the arbitration.

IV. Conclusion

1046. In conclusion, each Party shall pay half of the Arbitral Tribunal's fees and expenses and shall bear its own fees and expenses, including those for witnesses and experts.

AWARD

For the reasons set forth above, the Arbitral Tribunal decides the following, with the Arbitrator Hon. Marc Lalonde dissenting in part (see Annex 2):

1. ***Respondent's jurisdictional and admissibility objections towards Claimant's AGF claims are unfounded and hereby rejected. Claimant's AGF claims are admissible and the Tribunal has jurisdiction thereover.***

2. ***Respondent is liable for a breach of Article 2(2) of the BIT in connection with the tax regime changes implemented in 2006 and in 2009.***

3. Respondent owes an amount of USD 10,299,572 for the damage caused by Respondent's violation of Article 2(2) of the BIT with regard to the tax law changes of 2006 and 2009.

4. Respondent shall pay an interest of LIBOR + 2% to be compounded annually on the amount mentioned above. The interest rate shall be applied to the loss suffered by Claimant as of the 31 December of each corresponding year from 2004 to 2010.

5. ***The Arbitral Tribunal finds that it lacks jurisdiction over Respondent's counter-claims.***

6. ***Each Party shall pay half of the Arbitral Tribunal's fees and expenses and shall bear its own fees and expenses, including those for witnesses and experts.***

7. ***All other claims are rejected.***

Place of Arbitration: Paris, France

Date : __________________

For the Arbitral Tribunal :

Prof. Pierre Tercier
Chairman

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Prof. Brigitte Stern
Arbitrator

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Hon. Marc Lalonde
Arbitrator

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