

OXUS GOLD

vs

THE REPUBLIC OF UZBEKISTAN**Partially Dissenting Opinion**

I dissent from my distinguished colleagues in connection with the Tribunal's conclusion¹ that Respondent should bear no liability for the failure of the financing by CITIC which would have allowed AGF to have the means to complete Phase 1 and to proceed to Phase 2 of the AGF Project

In my view, Respondent was, concerning this event, in breach of the fair and equitable treatment provision under Article 2 of the BIT and should be liable for at least part of the damages resulting from the inability of Claimant to successfully conclude its negotiations with CITIC.

Not only was there from Respondent a lack of basic transparency and cooperation to which Claimant was entitled while these negotiations were taking place during 2010 but, during the most sensitive period of these negotiations, Respondent called for the voluntary liquidation of AGF, sued Claimant for payment of the Special Dividend, refused to issue or renew the mining activity license and the cyanide license which AGF required to carry on its operations and facilitate financing, and, finally, aggravated Claimant's VAT tax regime during the critical period when CITIC was carrying out its final due diligence.

The Tribunal has recognized that responsibility for the failure of the CITIC financing was a shared one when it wrote²: "As concerns CITIC, it is very likely that the tensions between Claimant and the State may have influenced CITIC's decision not to provide financing. However, this tension was the result of a complex factual matrix, in which Claimant and AGF bore part of the responsibility."

The Respondent itself has strongly argued in support of the doctrine of contributory fault³. It stated: "Alternatively, any amounts awarded to Claimant should be reduced in accordance with the doctrine of contributory fault. The doctrine of contributory fault is reflected in Article 39 of

¹ Para. 751, pp. 296-298 of the Final Award.

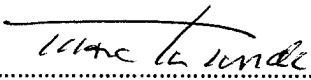
² Para.751, p.298 of the Final Award.

³ Respondent's Post-Hearing Reply, 21 August 2014, para. 67.

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 of negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought”.” In addition, Respondent quoted approvingly the tribunal’s statement in *Yukos v. Russia*⁴ to the effect that “an award of damages may be reduced if the victim of the wrongful act of the respondent State also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility”.

In the circumstances of the present case, I would have ordered Respondent to pay to Claimant 50% of the damages Claimant suffered as a result of its inability to conclude positively the CITIC financing and to proceed thereafter to the completion of Phase 1 and the undertaking of Phase 2 of the AGF Project. Bearing in mind the views of the majority of the Tribunal on this subject, there is no point in attempting to assess the exact amount which this would have represented.

Date:



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Hon. Marc Lalonde

Arbitrator

⁴ *Yukos Universal Ltd. (Isle of Man) v. The Russian Federation*, UNCITRAL Case No. AA 227, Final Award dated 18 July 2014