INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON D.C.

IN THE PROCEEDING BETWEEN:

AZPETROL INTERNATIONAL HOLDINGS B.V.
AZPETROL GROUP B.V.
AZPETROL OIL SERVICES GROUP B.V.

Claimants

- and -

THE REPUBLIC OF AZERBAIJAN

Respondent

(ICSID Case No. ARB/06/15)

AWARD

Members of the Tribunal

Judge Florentino P. Feliciano, *President*
Judge Charles N. Brower, *Arbitrator*
Sir Christopher Greenwood, CMG, QC, *Arbitrator*

Secretary of the Tribunal

Ms Martina Polasek

For Claimants:
Ms Juliet Blanch and
Mr Andy Moody,
McDermott Will & Emery UK LLP
London, United Kingdom

Ms Camilla Bingham and
Mr Peter Leaver QC,
One Essex Court

For Respondent:
Mr Stephen Jagusch,
Mr Anthony Sinclair,
Mr Jeffrey Sullivan,
Ms Lucia Raimanova, and
Mr Matthew Hodgson,
Allen & Overy LLP
London, United Kingdom

Mr Graham Dunning QC,
Essex Court Chambers

Date of Dispatch to the Parties: September 8, 2009

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AWARD

I Introduction

1. The present proceedings were brought by three companies: Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. ("the Claimants") against the Republic of Azerbaijan ("the Respondent") for alleged breaches of the Energy Charter Treaty ("ECT"). The Respondent lodged a preliminary objection in which it contested the jurisdiction of the Tribunal and hearings on that objection were held in London in the week beginning 30 June 2008. Those hearings were adjourned in circumstances described below. On 19 December 2008 the parties notified the Tribunal that they had reached "an in principle settlement" of the case. The Claimants subsequently denied that a binding agreement to settle the case had been concluded. The Respondent disagreed and applied for an Order dismissing the proceedings by reason of binding settlement ("the Settlement Application"). This Award is concerned only with that Application.

2. For the reasons set out below, the Tribunal concludes that, in December 2008, the parties concluded a binding settlement agreement in the form of an exchange of emails on 16 December and 19 December 2008. Accordingly the Tribunal holds that there is no jurisdiction to hear the claim under the ECT and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").

II Procedural History and Background

3. The Claimants, companies incorporated in the Netherlands but beneficially owned by a national of Azerbaijan, commenced these proceedings by a Request filed with the International Centre for Settlement of Investment Disputes ("ICSID") on 13 July 2006. The request alleged that the Respondent's treatment of the Claimants' investment in Azerbaijan had amounted to an expropriation in

violation of Article 13 of the ECT to which both the Netherlands and Azerbaijan were parties. The Claimants also alleged violations of Articles 10, 14 and 22 of the ECT.

4. The Tribunal was initially established in 2007 with the appointments of Judge Charles Brower (appointed by the Claimants) and Professor Christopher Greenwood (appointed by the Respondent) as arbitrators and Sir Arthur Watts, KCMG, QC, as President (appointed by agreement of the co-arbitrators). Ms Martina Polasek of the ICSID Secretariat was appointed as Secretary of the Tribunal. The Tribunal, thus constituted, held a procedural hearing in London on 2 April 2007. That hearing laid down a timetable for the filing of pleadings on the preliminary objections to jurisdiction and admissibility made by the Respondent.

5. Following the death of Sir Arthur Watts in November 2007, the Tribunal was reconstituted on 1 February 2008 with Judge Florentino P. Feliciano as President (appointed by agreement of the parties). Oral hearings on the preliminary objections were scheduled for the week beginning 30 June 2008.

6. On 1 July 2008, Mr Peter Booster, a director of the Claimant companies, gave evidence. In the course of cross-examination, he testified that he had provided funds to bribe officials in Azerbaijan in early 2006. His evidence was that these bribes were paid in order to protect unnamed individuals in Azerbaijan. Following that testimony, the parties jointly applied, on 2 July 2008, for a general adjournment of the proceedings. The Tribunal granted that adjournment by its Procedural Order No. 4 of 2 July 2008.

7. On 28 August 2008, the Respondent filed an Application to dismiss the proceedings on grounds of international public policy ("the Bribery Application").[1] The Tribunal laid down in a procedural order a timetable for the

[1] The Bribery Application made clear that the Respondent had referred to the prosecuting authorities in Azerbaijan the statements made by Mr Booster in his evidence. While counsel for the Claimants referred to the Respondent as "persecuting" Mr Booster (*see*, e.g., Claimants' Reply, 14 January 2009, para. 54(a)), the Tribunal does not see this reference to the prosecuting authorities, or the conduct of those authorities in approaching the relevant authorities in the Netherlands and the United Kingdom, as "persecution", given the very serious nature of the admissions made by Mr Booster at the hearing on 1 July 2008, notwithstanding Mr Booster's subsequent claim that his evidence had not been truthful (as to which, see para. 17, below).

parties to file pleadings in relation to the Bribery Application. It is unnecessary to set out the details of that timetable except to note that the Claimants were due to file their Counter-Memorial on 19 December 2008.[2]

8. On 19 December 2008 counsel for the Claimants sent a letter to ICSID stating:

> "Azpetrol writes to notify the Tribunal that the parties have agreed an in principle settlement of the arbitration. The parties have therefore agreed an immediate procedural standstill until close of business in London on 31 December 2008 in order to finalise the in principle agreement."

Later that day, counsel for the Respondent wrote to the Tribunal confirming the contents of that letter. The background to these communications is set out in paragraphs 16 to 31, below.

9. On 31 December 2008, counsel for the Respondent wrote to the Tribunal stating that the Respondent had waived the requirement for further documentation of the settlement agreement and requesting that the Tribunal terminate the proceedings in accordance with ICSID Arbitration Rule 43(1). Counsel for the Claimants responded on the same date by an email to the secretary of the Tribunal stating that "we do not accept that there is a valid settlement agreement between the parties and we do not agree to the Respondent's request for a discontinuance".

10. On 2 January 2009 (the first working day in London after the exchange described in the preceding paragraph), counsel for the Respondent lodged the Settlement Application requesting that the Tribunal note the conclusion of a binding settlement agreement and order the discontinuance of the proceedings in accordance with ICSID Arbitration Rule 43(1). The Settlement Application also requested, in the alternative, that the Tribunal find that it lacked jurisdiction on the ground that the settlement meant that there was no longer a legal dispute between the parties as required by Article 25(1) of the ICSID Convention.

11. The Claimants filed a Counter-Memorial to the Settlement Application on 14 January 2009. The Respondent filed a Reply on 10 February 2009 and the Claimants, in turn, filed a Rejoinder on 1 May 2009. On 19 May 2009, the

[2] The Claimants subsequently filed the Counter-Memorial on 6 January 2009.

Respondent filed two witness statements in response to evidence served by the Claimants on 1 May.

12. In addition to these pleadings, there was a separate exchange of pleadings regarding an Application by the Respondent for the production of documents on the grounds of waiver of privilege ("the Disclosure Application").

13. The Tribunal held hearings on the Settlement and Disclosure Applications on 6 and 7 June 2009. At these hearings, the parties were represented as follows:

Claimants
Miss Camilla Bingham, barrister, One Essex Court;
Miss Juliet Blanch, solicitor, McDermott, Will & Emery UK, LLP;
Mr Andrew Moody, solicitor, McDermott, Will & Emery UK, LLP; and
Mr Jan Hendrik Siemsson, representative of the Claimants.

Respondent
Mr Graham Dunning QC, barrister, Essex Court Chambers;
Mr Stephen Jagusch, solicitor, Allen & Overy LLP;
Mr Anthony Sinclair, solicitor, Allen & Overy LLP;
Mr Jeff Sullivan, solicitor, Allen & Overy LLP; and
Mr Roman Alloyarov, Omni Law Firm.

14. The hearings were held at the offices of the World Bank in Washington, D.C.

15. The Tribunal heard evidence from Mr Stephen Jagusch, Mr Anthony Sinclair, Mr Jeff Sullivan and Ms Juliet Blanch. Mr Andrew Moody submitted a witness statement but was not called for cross-examination.

III The Communications between the Parties

16. It is necessary to set out in some detail the communications between the parties following the adjournment of the hearings on 2 July 2008.

17. Both Mr Jagusch and Ms Blanch testified that Ms Blanch (who had the conduct of the case on behalf of the Claimants) had first raised the possibility of a settlement in conversations with Mr Jagusch (who had the conduct of the case for

the Respondent). In her witness statement, Ms Blanch testified that she had initiated these conversations because the Claimants were concerned about the testimony which Mr Booster had given and which he now wished to retract on the basis that it had not been true.[3] Ms Blanch stated in her witness statement that "I was quite clear in my mind that any settlement would need to contain safeguards both for [Mr Booster] and for others within and outside Azerbaijan".[4] She also accepted that "largely in consequence of the complications caused by Mr Booster's testimony, we understood that if any agreement were to be reached, it was unlikely that Azpetrol would be receiving any compensation".[5] Accordingly, both Ms Blanch and Mr Jagusch seem at this stage to have assumed that a settlement would be based upon what they described as a "drop-hands" approach.[6] Nevertheless, Ms Blanch testified that some form of safeguard for Mr Booster and the unnamed other persons who might be at risk of prosecution was very much in her mind as a necessary feature of such a settlement.

18. There was some difference as to the precise dates on which these conversations had occurred but it is unnecessary to resolve that difference. The witnesses agreed that the last such conversation took place in the middle of October 2008.

19. Thereafter there was an important shift in the way in which settlement discussions were carried on. At the same time as the Respondent was involved in the present proceedings, it was also defending a separate set of proceedings, *Fondel Metal Participations B.V.* v. *The Republic of Azerbaijan* (ICSID Case No. ARB/07/01), ("the *Fondel* proceedings"). Although the *Fondel* proceedings were separate from the present case, the claimant in *Fondel* was ultimately owned by the same beneficial owner as the Claimants in the present case.

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[3] On 18 November 2008, Mr Booster wrote a letter to the Tribunal in which he stated that the evidence he had given regarding bribing officials in Azerbaijan had been untrue and that he wished to retract it. The Tribunal wishes to make clear that this letter does not amount to testimony; it was not set out in a witness statement with the normal declaration of truth and Mr Booster has not been cross-examined upon it. The Tribunal had not decided what action, if any, to take regarding the letter when the Settlement Application was made.

[4] Blanch WS, 17 April 2009, para. 11.

[5] Blanch WS, 17 April 2009, para. 21.

[6] A colloquial expression used to describe an agreement under which proceedings are discontinued without any payment, either by way of compensation or contribution to costs, by either side.

20. On 20 November 2008, Mr Toby Landau QC, counsel for the claimant in *Fondel*, had a without prejudice conversation with Mr Jagusch regarding the possibility of settling both cases. Following that conversation, Mr Michael Swangard, a partner of Clyde and Co, LLP, the solicitor representing the *Fondel* claimant, wrote to Mr Jagusch a letter headed "without prejudice save as to costs",[7] in which he stated:

> "We note that as a condition precedent to any substantive settlement discussion your client would like any opening offer from our client to be put into writing. This is, of course, not unreasonable and we trust that what is set out below will allow your client to discuss with you the basis on which it is prepared to settle one or both sets of proceedings (although we assume that from your conversation [sc with Mr Landau] that the Government's preference is to draw a line under both sets of proceedings)."

After reviewing the two claims, the letter concluded:

> "In summary, therefore, the offer which is being made is settlement in return for payment of US$34 million on Fondel and US$23 million on Azpetrol."

21. Ms Blanch testified that her clients had authorized the making of this offer and that, thereafter, she had been instructed that negotiations would be conducted by Mr Swangard and Mr Landau on behalf of both the *Fondel* claimant and the Claimants in the present case. She stated, however, that all communications regarding the present case were discussed with her beforehand and that she approved any position taken with regard to the present case.[8]

22. On 2 December 2008, Mr Jagusch sent an email to Mr Landau regarding the 28 November letter in which he stated that –

> "We must await instructions but I can confidently expect a rejection. That is not to say that a solution cannot be found but further to the previous approach (via Juliet [Blanch]) the client is expecting a drop-hands approach. Although I expect I could push towards a nuisance payment re

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[7] Most of the subsequent communications were similarly headed and the Tribunal is of the view that the entirety of the correspondence and the conversations conducted were on a without prejudice basis, although it does not consider that this makes any difference for present purposes since it accepts the Respondent's submission that without prejudice communications are admissible where the issue is whether or not those communications led to a settlement agreement; see the decision of the High Court of England and Wales in *Brown* v. *Rice* [2007] EWHC 625, para. 10. The role of English law as the governing law on the issues determined in this award is discussed at Section (V), below.

[8] "We had discussions to work out what Clyde & Co should be saying, so that when Clyde & Co made their positions to Allen & Overy, they were on the basis of what had been agreed with me." (Transcript, pp. 356-7)

> Fondel the client will unlikely part with a penny re Azpetrol. But these are my expectations, not my instructions. I will convey the instructions when I can."

23. Mr. Landau replied on 4 December that the *Fondel* claimant was keen to "wrap up this matter sooner rather than later". He was concerned that the *Fondel* claimant had a deadline of 22 December for filing a substantial pleading which, according to Mr Jagusch and Ms Blanch, was very far from ready. The Claimants in the present case also had a deadline (19 December) to meet but Ms Blanch's evidence was that this was not a concern as they were ready to file in any event.

24. There followed some routine emails to which no reference is needed. Then, on 10 December 2008, Mr Jagusch sent the following message to Mr Landau –

> "I have just this afternoon heard from the client. I am able formally to confirm that the offer contained in Clyde & Co's recent letter [9] is not taken as serious, and is rejected. I have sought a mandate to negotiate a settlement however that requires approval which may not be forthcoming for several days. Unless and until such a mandate is forthcoming I am not in a position to make any counter-offer and any further offers requiring consideration by Azerbaijan will take several days to be considered. As an interim measure, however, I can advise what Azerbaijan's legal team would recommend that Azerbaijan accept in settlement of the Azpetrol and Fondel claims. That would be an offer that the Azpetrol and Fondel claims be withdrawn with Azerbaijan agreeing to make a nominal/nuisance payment in respect of the Fondel claims, such payment to reflect the likely saving in legal costs that a settlement at this time would likely achieve (it being recognized that costs recovery against any of the Claimants is unlikely). We would need to agree boilerplate settlement language but Azerbaijan would require at least that it be able to disclose that there was no admission of liability on its part in either case and that the Fondel claims were withdrawn in consideration of a nominal/nuisance payment and that no payment was made with respect to the Azpetrol claims.
>
> "If your client(s) were able to produce such an offer it would be recommended by the legal team and would have therefore a reasonable prospect of acceptance. (I could probably agree an immediate procedural standstill upon receipt of such an offer in the expectation that settlement was a real prospect.)"

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[9] *See* para. 20, above.

25. Following a telephone conversation between Mr Jagusch and Mr Swangard on 12 December 2008, Mr Swangard wrote Mr Jagusch a letter on 15 December which contained the following passage –

> "We have now received instructions, and can confirm that, on the basis that an immediate procedural standstill is agreed in both arbitrations, Azpetrol and Fondel are willing to negotiate on the basis of the email exchange between Messrs Landau and Jagusch, with a view to formalising a final agreement."

26. Mr Jagusch replied the same day with an email which stated –

> "I have had to take instructions because, once again, the contents of your letter were unexpected. It was not a concrete counteroffer. Our client's current position is that it is not prepared to agree any standstill of either proceeding absent a written offer along the lines of the email exchanges to which you refer. If the main points (including a figure) can be agreed, we can agree standstills as necessary in order to negotiate and draft the small print etc. But there must first be agreement in principle (including the figure)."

27. Mr Swangard replied on the morning of 16 December with an email, the relevant part of which stated that –

> "The letter of yesterday's date was intended to expressly agree to the terms set out in your emails and we were not under the impression that specific agreement on a figure etc was a pre-requisite for a standstill.
>
> "In any event, if you do require agreement in principle on the main points (including the figure) we propose the following:
>
> - Azerbaijan requires that the general provisions regarding confidentiality of any final agreement be varied in order that it can disclose that there was no admission of liability in either case and that no payment was made in relation to Azpetrol and that a nominal payment was made in relation to Fondel. This seems to us uncontroversial and is agreed in principle, subject, of course, to the wording of any final agreement.
> - Putting a figure on the Government's savings of costs going forward is rather more difficult without knowing Allen & Overy's fee structure and costs of the disbursements which are being incurred. Nevertheless, in order to move matters forward and provide you with the offer you require, it seems to us that should settlement be achieved before the end of January (and an immediate standstill be agreed this week) a reasonable figure for costs saved through to the end of the hearing in the

> Fondel matter including disbursements and post hearing work would be in the region of US$ 2 million."

28. This email produced a reply from Mr Jagusch at 17.25 on the same day (16 December 2008). This reply is the most important document in the sequence and, despite its length, needs to be reproduced in full. It consisted of a covering email and an appendix of seven numbered paragraphs, as follows:

> "Thank you for your email of earlier today. Our client appreciates the efforts being made but requires certainty in relation to the headline terms (of course we will need time for drafting). As to the settlement figure you have proposed something 'in the region of' US$ 2 million.
>
> "Our client counteroffers as set out below. Upon receipt of your acceptance (which should expressly state your authority on behalf of all Fondel and Azpetrol claimants) Azerbaijan is prepared immediately to inform the Fondel and Azpetrol Tribunals that a standstill is agreed until 31 December 2008. The settlement is conditional upon on [sic] all documentation being executed by 31 December 2008, such condition being for the benefit of (and thus can only be waived by) Azerbaijan."

The email then set out the numbered points of the counteroffer as follows:

> **"1. Withdrawal of claims**
>
> *(a) Withdrawal of Azpetrol proceedings by the Claimants*
>
> - All parties to bear their own costs; any outstanding costs of ICSID and the Tribunal to be divided 50% Claimants, 50% Respondent
>
> *(b) Withdrawal of Fondel proceedings by the Claimant and withdrawal of Counter-claim by Azerbaijan*
>
> - Each party to bear its own costs; any outstanding costs of ICSID and the Tribunal to be divided 50% Claimants, 50% Respondent
>
> **"2. Nuisance payment by Azerbaijan of US$1,500,000 in respect of the Fondel claim**
>
> **"3. No admission of liability by Azerbaijan**
>
> **"4. Confidentiality**
>
> - Azerbaijan to be able to disclose publicly the terms of this settlement (in addition to or separately from a joint press release confirming no admission of liability)

"5. Scope of settlement – claims

- The settlement is in full and final settlement of any claim, counter-claim, demand, cause or right of action or proceedings, whether at law or in equity, of whatsoever nature and howsoever arising, in any jurisdiction whatsoever, whether secured, proprietary, by way of tracing, priority or otherwise, whether by way of contribution or subrogation or otherwise, whether known or unknown to the parties, whether or not presently known to the law and whether arising before, on or after, the date of this agreement arising in any way whatsoever from any matter connected directly or indirectly with the subject matter of the Fondel and Azpetrol actions

"6. Scope of settlement – parties

- The settlement shall be executed by: (1) McDermott Will and Emery, for and on behalf of and representing Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V., together with any of their direct or indirect subsidiary, parent, sister, or affiliated companies, as well as their employees, directors, officers, consultants, agents, trustees, representatives and ultimate beneficial owner(s); and (2) Clyde & Co for and on behalf of and representing Fondel Metal Participations B.V., together with any of its direct or indirect subsidiary, parent, sister, or affiliated companies, as well as their employees, directors, officers, consultants, agents, trustees, representatives and ultimate beneficial owner(s).

"7. Allegations concerning personal or professional conduct

- [There then followed a clause providing for the withdrawal and non-repetition of allegations of conflict of interest and personal and professional misconduct against certain individuals and firms. This clause was to remain confidential in all circumstances.]"

29. Having received no immediate reply to this message, Mr Jagusch sent Mr Swangard and Mr Landau a further email at 18.49 on Thursday 18 December 2008, forwarding the email set out in the preceding paragraph with a covering message which stated:

> "After a couple of hectic days in meetings I have a client seeking an update on the settlement discussions. Of course we are inching closer to deadlines in both the Azpetrol and Fondel matters, not to mention Christmas etc. So it occurred to me that perhaps you didn't get this email, or perhaps (far more likely) there is a delay in your obtaining instructions. But either way I

> thought it useful to touch base and see where you are at; perhaps you could let me know.
>
> "I am generally around this evening … if that helps, and tomorrow."

30. Mr Swangard responded by email at 10.27 on Friday 19 December in the following terms:

> "I refer to your email dated 16 December 2008 containing your without prejudice offer of settlement on both the Fondel and Azpetrol arbitrations.
>
> "I can now confirm that we hereby accept the offer set out in your 16 December 2008 email.
>
> "As you can see Juliet Blanch who has conduct of the Azpetrol matter has been copied in on this email and, for the avoidance of doubt, will confirm Azpetrol's acceptance by separate email.
>
> "The next steps are for Clyde & Co and Allen & Overy to write a joint letter informing the Fondel Tribunal that a standstill is agreed until 31 December 2008 and for McDermott, Will & Emery and Allen & Overy to write to the Azpetrol Tribunal confirming that a standstill is similarly agreed."

31. Fifteen minutes later, Ms Blanch sent Mr Jagusch a one line email stating "I confirm the Azpetrol companies accept the offer set out in your email of 16 December 2008 to Clyde & Co". This email was sent as a reply to all of the recipients of the email from Mr Swangard set out in paragraph 30, above.

32. A few minutes later there was a light-hearted exchange of emails between Mr Jagusch and Ms Blanch, which it is unnecessary to set out, in which each expressed regret that they would not now have the opportunity to argue the Bribery Application. On the afternoon of 19 December, Mr Moody, of the Claimants' lawyers McDermott, Will & Emery, met Messrs Sinclair and Sullivan, of the Respondent's lawyers Allen & Overy, for a drink. Messrs Sinclair and Sullivan testified that this was a "celebration" to mark the settlement of the case. Mr Moody denied that and testified that "at that stage I believed that it was highly likely that the parties would conclude a settlement but I did not (and do not now) believe that they had already done so".[10]

33. Later on 19 December 2008, McDermott, Will & Emery sent the Secretary of the Tribunal a letter (the entire text of which has already been quoted at paragraph 8,

[10] Moody WS of 17 April 2009, para. 5.

above) informing the Tribunal that an "in principle settlement" had been agreed and that the parties had "therefore" agreed a standstill until 31 December 2008. Allen & Overy emailed the Secretary that they confirmed the content of that letter. Similar letters were sent by Clyde & Co and Allen & Overy to the Secretary of the *Fondel* Tribunal.

34. On the morning of 23 December 2008, Mr Swangard emailed Mr Jagusch (copying in Ms Blanch) in the following terms:

> "We look forward to receiving the draft Settlement Agreements in order to proceed and finalise before 31 December 2008. I think it would be helpful when drafting the agreements to take note of the following points:
>
> "1. The two sets of proceedings were initiated separately (at separate times) and were pursued independently of each other. We therefore envisage two agreements, one between Fondel and the Government and the second between Azpetrol and the Government. It may well be that these agreements will largely be identical so there should not be any actual duplication. There are however some crucial differences. Aside from the obvious payment by the Government on Fondel (presumably the Government will want to have a separate and discreet [sic] agreement to which it can point and under which no payment was made to Azpetrol) there is the issue of Fondel withdrawing certain assertions regarding [ ] and it seems to me much more straightforward to have this type of wording in an agreement which Azpetrol is not part of.
>
> 2. The second broad area of concern for Fondel (and I believe for Azpetrol) is the authority on which a member of the Government is entering into the Settlement Agreement. Can you please advise whether it will be Deputy Minister Jabbarov or indeed the Minister for Economy himself who will be signing both Settlement Agreements on behalf of the Government. Additionally we will need to ensure that the relevant Minister (or Deputy Minister) will have the requisite authority to bind the Government to the agreements."

35. To that email, Mr Jagusch responded the same day in the following terms:

> "There is a single agreement that we will be sending you. Only one is required. We do not see the issue of [ ] and [ ] to be a justification for this as substantially similar allegations were made against them in both sets of proceedings).
>
> "In relation to your second point, as previously agreed, the settlement will be signed by the lawyers. I hold a power of attorney from the Government authorising me to conclude this settlement agreement."

36. Later that day, Mr Sinclair, of Allen & Overy, sent a draft to Mr Swangard and Ms Blanch under cover of the following email:

> "Please see the attached draft settlement agreement by which we have sought to document the settlement of the two cases as agreed in principle below.[11] We are available during this week and next for any discussion. Otherwise we look forward to receiving your comments, or confirmation of the text."

The attached draft is too long to be reproduced here but, in view of its importance, it is set out in full in Annex 1 to this Award.

37. On 29 December and 30 December 2008, Mr Jagusch emailed Mr Swangard and Ms Blanch chasing their approval of the draft. No written reply was received but on the evening of 30 December, Mr Swangard telephoned Mr Jagusch. According to Mr Swangard's attendance note, which has been disclosed to the Tribunal, Mr Swangard told Mr Jagusch (*inter alia*) that "our new instructions are that Azpetrol no longer wishes to pursue settlement" although Fondel still wanted a settlement. Mr Jagusch reacted with consternation, telling Mr Swangard that there was already a binding agreement.

38. The following morning, 31 December 2008, Mr Jagusch wrote to Mr Swangard and Ms Blanch in the following terms:

> "As you are aware, a settlement agreement between the parties was reached by exchange of emails on 16 and 19 December 2008. We agreed to spend the period between 19 December 2008 and today to memorialise that agreement in a single document. We sent you a draft on 23 December but have not yet had any response. Please inform us as to your position with respect to the document by no later than 3.00 p.m. today."

39. At 16.11 that afternoon, Allen & Overy (presumably having received no reply to their earlier email) wrote to Ms Blanch and Mr Swangard as follows:

> "As you are aware, a settlement agreement between the parties was reached by exchange of emails on 16 and 19 December 2008.
>
> "In our client's offer, it was stated: *'[t]he settlement is conditional upon on [sic] all documentation being executed by 31 December 2008, such condition being for the benefit of (and thus can only be waived by) Azerbaijan*'. Our client hereby fully and finally waives that condition. The

[11] The email quoted here was part of an email stream which included Mr Jagusch's email of 16 December 2008 and Mr Swangard's reply of 19 December which the Respondent maintains constitute the agreement.

settlement is therefore effective. The parties must now proceed to request the Tribunals in the above-referenced proceedings to discontinue their proceedings, pursuant to the parties' settlement. We shall shortly be writing to the Tribunals accordingly and expect you to do likewise.

…"

40. At the same time as this email was sent, Ms Blanch emailed Allen & Overy as follows:

"Thank you for your letter of 31 December 2008.[12]

"It is not correct that a final settlement agreement which is binding on our clients was reached by the exchange of emails on 16 and 19 December 2008. The agreement reached was on a standstill of both arbitrations while the parties sought to negotiate a final settlement. The draft agreement which you sent on 23 December 2008 goes substantially beyond the terms attached to your 16 December email and as such constitutes a counter offer.

"The draft agreement is in substantially different terms from those contained in your 16 December 2008 email. We enumerate below the specific clauses which are either amendments to the wording in the 16 December email or are additional clauses which go well beyond 'boiler plate' clauses.

"**Clause 1** – The wording of this clause appears to be based on the wording at point 5 in the 16 December email. However, additional wording excluding criminal proceedings which was not expressed in the 16 December email has been added which constitutes a material change and widening of the scope of point 5 in the 16 December email.

"**Clause 4** – This clause goes well beyond the wording at point 6 in the 16 December email.

"**Clauses 5-7 and 15** - These clauses is [sic] not 'boiler plate' and was not envisaged or referred to in the 16 December email and thus constitutes a variation/extension of the basis on which the parties agreed to negotiate.

"**Clause 21** – We would note that a clear requirement to any settlement would be needed for Azerbaijan to waive all immunity. Otherwise any agreement or necessary judgment or award in relation to the agreement might not be enforceable against it. In any event this clause directly undermines, for example, clause 18 since without a full waiver there would be no prospect of securing injunctive or specific relief against Azerbaijan. Once again, this clause was not included in the 16 December email and thus constitutes another variation/extension of the basis on which the parties agreed to negotiate.

"For the reasons set out above, the Azpetrol Claimants reject Azerbaijan's counter offer and conclude they must resume the proceedings."

[12] This appears to refer to the first letter, set out in para. 38, above.

41. A similar letter was sent to Allen & Overy by Clyde & Co on the same day.

42. Allen & Overy replied later on 31 December 2008 in a letter sent to both McDermott, Will & Emery and Clyde & Co. The reply stated that the points made in the letter set out at paragraph 40, above, and in the similar letter from Clyde & Co., were "legally and factually irrelevant given our client's waiver of the condition that the parties memorialise their settlement in a single document" and concluded that there was a binding agreement between the parties on the terms set out in the 16 December 2008 email.

43. Finally, on 31 December 2008 Allen & Overy wrote to both Tribunals noting that the Respondent had waived the requirement that the settlements be memorialised in a single document, stating that a binding settlement had been agreed in respect of each case and requesting the Tribunals to discontinue the cases in accordance with ICSID Arbitration Rule 43(1). Later that day, Ms Blanch wrote to the Tribunal in the present case denying that there had been a settlement agreement and rejecting the request for discontinuance.

IV The Issues to be Decided

44. We have set out the communications between the parties in some detail because, as will be seen, the parties differ markedly in their reading of these letters and emails. In summary, the Respondent considers that its email of 16 December 2008 was an offer to conclude a legally binding settlement subject to a condition subsequent – the conclusion of a formal document memorialising the agreement – a condition which could be waived by the Respondent but not by the Claimant. That offer was accepted by the Claimants by their email of 19 December 2008. According to the Respondent, when it waived the condition subsequent on 31 December 2008, the settlement agreement became effective and there was no scope for the Claimants to withdraw.

45. By contrast, the Claimants assert that the emails of 16 and 19 December agreed only upon a standstill to give time for the negotiation of a settlement agreement. According to the Claimants, they had no intention of entering into a binding

settlement agreement at that stage and were free to withdraw from the negotiations at any time, as they did on 31 December 2008. The evidence tendered on behalf of the Claimants was to the effect that their representatives fully expected to conclude a settlement agreement following the exchange of emails but they were not committed to doing so and were free to withdraw.

46. The Tribunal considers these different positions in greater detail below. Before doing so, however, it is important to be clear as to the extent of the disagreement between the parties.

47. That disagreement is limited by the fact that three important issues are common ground. First, the parties agree that the Tribunal has jurisdiction to determine whether or not a settlement agreement was concluded. Secondly, they agree that English law is the applicable law as regards both the question whether such an agreement was concluded and, if so, what it meant. Thirdly, the parties agree that the email from Allen & Overy on 16 December and the emails accepting the offer it contained on 19 December gave rise to a legally binding agreement of some kind, though they differ over its scope, with the Respondent asserting that it was an agreement to settle the case with a consequent agreement on a standstill and the Claimants arguing that it was merely a standstill agreement to allow time for the parties to negotiate a settlement.

48. Moreover, this is, in one sense at least, a simple case. The offer is contained in a single email (that of 16 December 2008 from Mr Jagusch to Mr Swangard). Similarly, the acceptance is contained in Ms Blanch's email of 19 December 2008, read together with the email earlier that day from Mr Swangard. The 19 December emails were unequivocal in accepting the offer contained in the 16 December email, so this is not a case in which the terms of the acceptance are unclear or in which it is necessary to pore over numerous communications in order to ascertain whether an agreement was made. Instead, the issues before the Tribunal are essentially:

(1) did the offer contained in the email of 16 December amount to an offer to conclude a binding settlement of the proceedings?

(2) if so, were the requirements of English law for the formation of contracts, in particular, the requirements of a meeting of minds (*consensus ad idem*) and intention to create legal relations, satisfied?

V Applicable Law

49. Before examining those questions, however, it is necessary to say something about the applicable law. The Tribunal has already referred to the fact that the parties were in agreement that English law should be applied to determine whether there was a contract and, if so, on what terms. In accordance with Article 42(1) of the ICSID Convention, that choice is binding upon the Tribunal and the Tribunal will therefore apply English law in good faith, as both the Convention and ICSID jurisprudence require.[13]

50. The parties were also agreed that the content and application of English law, as well as the normal practices of English lawyers (so far as relevant), should be the subject of submissions by counsel, rather than expert evidence.

51. It is, therefore, appropriate to begin by briefly summarising the relevant principles of English law which have to be applied. For the most part, these principles were not disputed between the parties – it was their application to the facts of the case (a matter to which the Tribunal turns in Part (6) of this Award) which was controversial.

52. First, English law contains no special requirements for the conclusion of a contract to settle proceedings pending before a court or arbitral tribunal. The leading commentary on the settlement of actions, Foskett, *The Law and Practice of Compromise* (6th edition, 2005) states:

> "Since a compromise is merely a contract, the ordinary principles of the contract law apply with as much force as in other contractual contexts. Under the ordinary law a contract will not be found to have arisen unless:
>
> (i) consideration exists;
>
> (ii) an agreement can be identified which is complete and certain;

[13] See Claimants' Reply, para. 2 and Respondent's Rejoinder, paras. 5-6.

(iii) the parties intend to create legal relations; and

(iv) in some cases certain formalities have been observed." (Para. 3-01)

53. Secondly, for most purposes, including a settlement agreement of the kind said (by the Respondent) to exist here, English law requires no formalities. As a leading commentary on contract law, *Chitty on Contracts* ("Chitty") puts it, "the general rule of English law is that contracts can be made quite informally: no writing or other form is necessary".[14] Thus, a contract can be constituted by an exchange of emails and there is no need to reduce the agreement thus made to a single, formal document for it to be binding.[15] It all depends on whether the parties intended to be bound by the particular exchange or regarded that exchange as merely the preliminary step to achieving a binding agreement which would be embodied in a later, formal instrument.

54. Thirdly, the requirement that an agreement must be sufficiently certain and effective to constitute a contract does not preclude the parties from concluding a contract in an informal manner and leaving certain matters to be worked out later. Thus, the parties may, if they so intend, conclude a binding contract orally or in other informal ways while agreeing that a formal document embodying their contract will be concluded at a later date.[16] An example is the case of *Morton* v. *Morton* [1942] 1 All ER 273, in which the parties in maintenance proceedings compromised the proceedings outside court on terms set out in a document entitled "Heads of Agreement" signed by their solicitors. These terms were later to be embodied in a formal document but no such document was ever drawn up. The Court nevertheless held that the parties were bound by the Heads of Agreement. The critical question is whether parties intended the future document to be merely the formal record of the contract already made or the contract itself, with the prior informal agreement being no more than an agreement to negotiate.

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[14] *Chitty on Contracts* (2008 edition), vol. I, para. 4-001.

[15] *See*, e.g., *NBTY (Europe) Ltd.* v. *Nutricia International B.V.* [2005] EWHC 734 (Comm), [2005] 2 Ll. Reps. 350.

[16] Foskett, para. 3-56.

As Foskett points out, "it is the significance attached by the parties to the future act which is the crucial factor".[17]

55. On the other hand, whatever the intentions of the parties, there will be no binding contract if the agreement between them leaves so much to be worked out in the future that it is incapable of being applied as it stands. [18] However, the courts in England have been willing to hold that a contract which the parties intended to be legally binding is complete even if quite significant matters (such as the price of goods in a contract of sale) have not been agreed; as Chitty puts it, "an agreement may be complete although it is not worked out in meticulous detail".[19]

56. In particular, an agreement may constitute a binding contract (if that is what the parties intended) even though it is made subject to a condition subsequent. Moreover, where the relevant condition is expressly, or by clear implication, inserted for the benefit of one party to the contract, that party may waive the condition, in which event he can sue and be sued on the contract as if the condition had not been included.[20]

57. This area of English law was summed up by the Court of Appeal, in a decision on which both parties in the present case relied, in the following terms:

> "It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced, then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the Court regards as important, as opposed to a term which the Court regards as less important, or as a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the judge, 'the masters of their contractual fate'. Of course, the more important the term, the less likely it is that the

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17 Foskett, para. 3-56. The fact that an agreement is stated to be "subject to contract" is a clear indication that it is not intended to be legally binding and that the parties will be bound only when the formal contract document has been drawn up and agreed.

18 Chitty, paras. 2-112 to 2-114.

19 Chitty, para. 2-113.

20 Chitty, para. 2-157.

> parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'."[21]

58. Fourthly, it follows from the above that the requirements which English law prescribes for the conclusion of a binding contract are few. There must be an intention to create legal relations but this is fairly readily presumed. Chitty states that:

> "In the case of ordinary commercial transactions, it is not normally necessary to prove that the parties to an express agreement in fact intended to create legal relations. The onus of proving that there was no such intention 'is on the party who asserts that no legal effect is intended, and the onus is a heavy one.' In deciding whether that onus has been discharged, the courts will be influenced by the importance of the agreement to the parties, and by the fact that one of them acted in reliance upon it."[22]

There must be consideration (the existence of which is obvious in an agreement to settle a case and is not in dispute here). Lastly, there must be a meeting of minds (a *consensus ad idem*).

59. In deciding whether the parties have actually reached agreement, English law applies an objective test.

> "Under this test, once the parties have to all outward appearances agreed in the same terms on the same subject-matter, then neither can, generally, rely on some unexpressed qualification or reservation to show that he has not in fact agreed to the terms to which he had appeared to agree. Such subjective reservations of one party therefore do not prevent the formation of a contract."[23]

60. It follows that where a reasonable observer would assume that an offeree had accepted an offer advanced by an offeror, under the objective test an agreement has been concluded, even if the offeree's actual state of mind was such that he or she did not intend to accept the offer and did not consider that they had done so. However, the objective test is qualified in that if the offeror is in fact aware of the offeree's actual state of mind in such a case, then the offeror cannot rely upon the

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21 *Pagnan SpA* v. *Feed Products Ltd.* [1987] 2 Ll. Reps. 601 at 619 (Lloyd LJ).

22 Chitty, para. 2-159, quoting *Edwards* v. *Skyways Ltd.* [1964] 1 WLR 349 at 355.

23 Chitty, para. 2-002.

outward appearance of acceptance.[24] English law is less clear about the case where an offeror simply does not turn his or her mind to the question whether the offeree intended to accept or not. Chitty states that this situation has given rise to a conflict of judicial opinion but considers that the better view is that there is no contract in such a case.[25] The Tribunal will have to return to this situation later.

61. Finally, in interpreting a contract, contemporary English law has few technical rules. The approach was summarised by Lord Hoffmann in *Investors Compensation Scheme Ltd.* v. *West Bromwich Building Society* in the following terms:

> "I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v. Simmonds* [1971] 1 W.L.R. 1381, 1384-1386 and *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows.
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal

[24] Chitty, para. 2-004.
[25] Loc. cit.

interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201:

> 'if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.'"

62. In most respects, the approach set out above by Lord Hoffmann is similar to that prescribed by international law for the interpretation of treaties but there are two important differences. First, according to Lord Hoffmann's third principle, English law specifically precludes reference to the negotiating history of an agreement as an aid to interpretation. The rationale for this rule was spelled out by Lord Wilberforce in the earlier case of *Prenn* v. *Simmonds*:

> "There were prolonged negotiations between solicitors, with exchanges of draft clauses, ultimately emerging in clause 2 of the agreement. The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience, (though the attempt to admit it did greatly prolong the case and add to its expense). It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the

> final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back: indeed, something may be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to. It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true: the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact. Cardozo J. thought so in the *Utica Bank* case. And if it can be shown that one interpretation completely frustrates that object, to the extent of rendering the contract futile, that may be a strong argument for an alternative interpretation, if that can reasonably be found. But beyond that it may be difficult to go: it may be a matter of degree, or of judgment, how far one interpretation, or another, gives effect to a common intention: the parties, indeed, may be pursuing that intention with differing emphasis, and hoping to achieve it to an extent which may differ, and in different ways. The words used may, and often do, represent a formula which means different things to each side, yet may be accepted because that is the only way to get "agreement" and in the hope that disputes will not arise. The only course then can be to try to ascertain the "natural" meaning. Far more, and indeed totally, dangerous is it to admit evidence of one party's objective - even if this is known to the other party. However strongly pursued this may be, the other party may only be willing to give it partial recognition, and in a world of give and take, men often have to be satisfied with less than they want. So, again, it would be a matter of speculation how far the common intention was that the particular objective should be realised."[26]

63. This exclusion of prior negotiations is, of course, in marked contrast to international law where the *travaux préparatoires* of a treaty are a well recognized aid to interpretation.[27]

64. Secondly, English law does not normally admit reference to the subsequent conduct of the parties as an aid to the interpretation of a contract.[28] Again, this is in marked contrast to the approach taken by international law, in which the subsequent practice of the parties can be of the utmost importance in the interpretation of a treaty.[29]

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26 [1971] 1 WLR 1381 at 1384-5.

27 Vienna Convention on the Law of Treaties, 1969 ("Vienna Convention"), Article 32.

28 See *L. Schuler AG* v. *Wickman Machine Tools Sales Ltd.* [1974] AC 235 at 252.

29 Vienna Convention, Article 31(3)(a) and (b).

65. It is important to note, however, that the view that the negotiating history and the subsequent practice of the parties are not admissible as an aid to interpretation in English law has not gone unchallenged. In a lecture in 2005, Lord Nicholls of Birkenhead, one of the members of the House of Lords Appellate Committee,[30] criticised this approach as unrealistic and illogical. Moreover, the exact extent of the exclusionary principle is unclear, even if one leaves aside that criticism. The negotiating history of a contract is not admissible as an aid to interpretation but may be considered in order to determine the aims and objectives of the parties. The distinction is far from straightforward.

66. As will become clear, the question whether the Tribunal could take account of the correspondence leading up to the exchange of emails on 16-19 December 2009 and the dealings of the parties subsequent to that exchange assumed some importance at the hearing of the Settlement Application. The Tribunal sets out its view on that matter in paragraph 90, below.

VI Did the Parties conclude a Binding Agreement to Settle the Present Case?

67. The Tribunal now turns to the two questions identified in paragraph 48, above. Whatever the position may once have been, by the time of the hearings in June 2009 it was common ground between the parties that a binding contract of some kind was concluded between them and that the terms of that contract were contained in the email from Mr Jagusch to Mr Swangard of 16 December 2008 (quoted in full in paragraph 28, above) – the offer – and the replies from Mr Swangard and Ms Blanch on 19 December 2008 (quoted in paragraphs 30 and 31, above) – the acceptance.

68. It is therefore necessary to begin by analysing the language of the offer. According to the Respondent, that language makes clear that, irrespective of what may have been discussed previously, this was an offer to conclude a binding settlement agreement on the terms set out in the numbered points in the email. The offer included a condition subsequent, namely that the terms were to be

[30] At the time of the cited case, the Appellate Committee was the highest court in the English legal system.

embodied in a larger, formal document to be executed by both parties not later than 31 December 2008, but that condition could be waived by the Respondent.

69. By contrast, the Claimants maintained that the offer was of a standstill until 31 December to allow time to negotiate the terms of a settlement. The numbered points in the 16 December email represented nothing more than "an agreement in principle" which was not legally binding. The Claimants maintained that the language of the 16 December email supported that interpretation but it also advanced several other arguments, each of which it submitted was sufficient to defeat the Respondent's case. These arguments may be summarised as follows:

(1) there was no intention to create legal relations beyond the conclusion of a standstill agreement;

(2) there was no meeting of minds on anything other than a standstill agreement;

(3) the offer and acceptance were incomplete since they did not include terms which the parties regarded as essential to the conclusion of a settlement agreement;

(4) both the record of negotiations and the subsequent conduct of the parties showed that the exchange of emails on 16 and 19 December was not intended to amount to a binding agreement to settle.

A *The Language of the 16 and 19 December Emails*

70. The Tribunal considers that the language of the 16 December email is that of an offer to settle the proceedings by binding agreement. It is not an offer of a standstill with a non-binding agreement on principles of settlement. Several factors lead inexorably to that conclusion:

(1) The 16 December email states that "our client counteroffers as set out below". The terms set out below, in the seven numbered paragraphs, are those of a settlement of the proceedings. That the email was understood in that way by those acting on behalf of the Claimants is clear from the language of their acceptance emails. Mr Swangard's email of 19 December stated that –

> "I refer to your email dated 16 December 2008 *containing your without prejudice offer of settlement* on both the Fondel and Azpetrol arbitrations.

> "I can now confirm that we hereby *accept the offer set out in your 16 December 2008 email.*" (Emphasis added)

Mr Swangard had been acting as agent for Azpetrol in these negotiations as well as for Fondel. Ms Blanch confirmed in her evidence to the Tribunal that she and Mr Swangard had discussed the content of the messages sent by Mr Swangard to Mr Jagusch and that these represented positions agreed between them. In these circumstances, Mr Swangard's email was itself sufficient to act as acceptance of the offer by Azpetrol. However, Mr Swangard added that "for the avoidance of doubt" Azpetrol's acceptance would be confirmed by Ms Blanch. Ms Blanch's email, written after she had been copied in on Mr Swangard's email, stated "I confirm the Azpetrol companies accept the offer set out in your email of 16 December 2008 to Clyde and Co."

(2) The 16 December email clearly treated the standstill as contingent upon the acceptance of the offer of settlement. Immediately after stating that "our client counteroffers as set out below", that email continued –

> "Upon receipt of your acceptance … Azerbaijan is prepared immediately to inform the Fondel and Azpetrol Tribunals that a standstill is agreed until 31 December 2008." (Emphasis in the original.)

This sentence makes clear that the standstill followed from the agreement to settle. The language of the sentence is incompatible with the suggestion that the standstill was the purpose of the offer (and, indeed, the only part thereof intended to lead to a binding agreement).

(3) The next sentence of the 16 December 2008 email is also more readily reconciled with the Respondent's interpretation of the email than with that suggested by the Claimants. It provides –

> "The settlement is conditional upon on [sic] all documentation being executed by 31 December 2008, such condition being for the benefit of (and thus can only be waived by) Azerbaijan." (Emphasis in the original.)

If that sentence had stopped with the date, it would have been compatible with either reading but it did not. The provision that the condition – that all documentation had to be executed by 31 December 2008 – was waivable by – and only by – Azerbaijan would be meaningless if, as the Claimants argue, the

email was offering only a non-binding agreement as to settlement. If that had been the case, then either party would have been able to insist in negotiation that a particular deadline be observed and could have made that a condition of its agreement. Nor can this sentence be explained away by reference to the standstill provision in the preceding sentence.[31] The standstill was expressly stated to expire on 31 December 2008 in any event. Had the Claimants wanted an extension, the Respondent could have refused it even if there had been no provision about the need for all documentation to be completed. On the other hand, the reference to a requirement of complete documentation which could be waived only by the Respondent becomes perfectly comprehensible if the email is seen as offering a binding agreement subject to a condition subsequent.

71. The Tribunal therefore concludes that the natural meaning of the words actually used in the offer supports the interpretation advanced by the Respondent and not that put forward by the Claimants.

72. This is supported by the language of the acceptance emails of 19 December. As explained in paragraph 70(1), these accept without qualification what the email from Mr Swangard describes as an offer of settlement.

73. The Tribunal turns, therefore, to the other arguments advanced by the Claimants.

B *Was there an Intention to Create Legal Relations?*

74. The argument that there was no intention to create legal relations is not persuasive. The Claimants rightly recognized that, in accordance with the principle set out in paragraph 58, above, the burden of proof is on them and that the burden is an onerous one. The Claimants argued that the fact the agreement was described as an "agreement in principle" supported their submission that there was no intention to create legal relations beyond the conclusion of an agreement for a standstill. Their counsel argued that "agreement in principle" is a term of art in English law and is used to refer to a non-binding agreement. Ms Blanch gave evidence that this was its normal usage. The Respondent disagreed

[31] One of the submissions made by the Claimants.

and Mr Jagusch gave evidence that the use of this term did not necessarily imply that an agreement was not intended to be legally binding.

75. The Tribunal does not accept the Claimants' submissions on this point. It is not persuaded that the term "agreement in principle" is inevitably used in English law and in the practice of English lawyers to refer to a non-binding agreement. The Claimants did not produce any authority which went that far. The authorities on which they relied[32] show that the term *can* be used in that way but those cases concerned agreements for the sale of land, one of the rare cases in which English law provides that a contract must be evidenced in writing in order to be binding, and they do not suggest that the term is invariably used in that way. Similarly, the leading commentary[33] does not, in the Tribunal's view, sustain the broad principle advanced by the Claimants.

76. More important, though, is the fact that neither the offer email of 16 December 2008 nor the acceptance emails of 19 December employ the phrase "agreement in principle". It is true that it is used in other communications – e.g. the notification to the Tribunal refers to the parties having agreed "an in principle settlement" – but the Tribunal does not consider that sufficient to counter the various indications in the language used in the emails which actually constitute the agreement that that agreement was intended to be legally binding.

77. A further material consideration is that the Claimants now accept that the exchange of emails on 16-19 December constituted a binding agreement on a standstill. They thus accept that there was an intention to create legal relations on the part of both parties. The argument is thus not about whether there was an intention to create legal relations but about how far that intention went. Once that is recognized, the dispute between the parties really becomes one of interpretation rather than one about the presence or absence of an intention to create legal relations.

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[32] *Attorney-General of Hong Kong and Another Appellant* v *Humphreys Estate (Queen's Gardens) Ltd*, [1987] AC 114; and *Cobbe* v *Yeoman Management LTD.*, [2008] UKHL 55.

[33] Chitty, para. 2 – 116.

C *Was there a "Meeting of Minds"?*

78. We therefore turn to the Claimants' next argument, that there was no true meeting of minds on anything other than an agreement for a standstill. As explained in paragraphs 59-60, above, in determining whether there was such a meeting of minds, English law looks primarily not to the actual intentions of the parties but to the objective test of whether a reasonable observer would conclude that they had agreed upon something. If one applies that test here, then for the reasons set out above the Tribunal considers that the reasonable observer looking at the exchange of emails on 16-19 December[34] would conclude that the parties had intended to conclude a binding agreement to settle the proceedings on the basis set out in the email of 16 December. A consequence of that agreement was that there would be a standstill until 31 December. Moreover, the agreement to settle was to be documented in a fuller and more formal instrument by 31 December 2008, although Azerbaijan was entitled to waive that requirement if it chose to do so.

79. Nevertheless, as explained in paragraph 60, above, the objective approach is subject to one, and perhaps two, qualifications. First, it is clear that if an offeror is aware of the offeree's actual state of mind, the offeror cannot rely upon the objective appearance of agreement. The Tribunal considers that there is no persuasive evidence that the Respondent (or, to be more precise, its legal representatives) were aware of a lack of intention on the part of the Claimants (or, once more, to be more precise, their legal representatives) to conclude a binding agreement of settlement when the latter emailed that they accepted the offer in the 16 December email.

80. Secondly, it is suggested by Chitty and was argued forcefully by the Claimants' counsel at the hearing, that there is another exception if the offeree does not intend to be bound and the offeror does not turn his mind to what the offeree intends. Chitty suggests that this should be another exception because, so it suggests, the rationale for the objective test is that the law will protect an offeror

[34] The Claimants, of course, argue that the Tribunal should not look exclusively or even primarily at those emails but should rather consider the whole record of exchanges between the parties, both prior and subsequent to the 16-19 December exchange. The Tribunal considers this argument below.

who relies in good faith upon the appearance of an acceptance to be bound on the part of the offeree. An offeror who gives no thought to whether or not the offeree intends to be bound cannot be said to rely upon that appearance. Chitty acknowledges, however, that the English courts have given conflicting decisions on this issue.

81. The Tribunal considers that it does not have to resolve this difference of view regarding the content of English law. It considers that the evidence does not sustain the argument that Mr Jagusch and his colleagues did not turn their minds to whether Ms Blanch and her colleagues intended to conclude a binding agreement to settle. After reviewing all the evidence, the Tribunal concludes that, when he sent the 16 December 2008 email, Mr Jagusch intended to make an offer to conclude an immediate binding agreement to settle the proceedings and that he and his colleagues assumed, as they were entitled to do, that the acceptance of that offer was to be taken at face value.

D *Was the Agreement Incomplete?*

82. Under English law an agreement does not constitute a binding contract if it is incomplete. An agreement is incomplete for these purposes if either (a) it lacks some term or terms which are indispensable for it to be performed or enforced or (b) even if it is capable of being performed and enforced, it lacks some term or terms which the parties regarded as indispensable.

83. The Claimants originally contended that the agreement contained in the 16 and 19 December emails was incomplete in the first sense but their counsel abandoned this argument at the hearing and made clear that she accepted that the emails set out an agreement which was capable of being performed and enforced. She argued, however, that the agreement was incomplete in the second sense because the parties regarded as indispensable certain terms which were not included. She cited three such terms:

(a) a provision on governing law;

(b) a provision on dispute resolution; and

(c) a provision giving Mr Booster protection against prosecution for corruption in light of his testimony at the June 2008 hearing.

84. The Tribunal considers that there is no basis on which it could be said that the parties regarded either of the first two terms as indispensable. Agreements are frequently concluded in binding form without either a choice of law or disputes provision. In that event, the courts (and, in the present case, this Tribunal) are available to address any dispute which may arise and will determine, using ordinary conflict of laws principles, what is the proper law of the agreement. There is no basis in the evidence for thinking that either point was regarded as a prerequisite to the conclusion of a binding contract in the present case.

85. The suggestion that a clause regarding Mr Booster's situation would have been regarded as indispensable requires closer attention. Ms Blanch's evidence is that it was the testimony of Mr Booster at the June 2008 hearings which had led the Claimants to contemplate settlement and she says that she raised the question of some kind of contractual protection for Mr Booster when she first broached the possibility of settlement with Mr Jagusch in September 2008. That it was also a consideration for her in December is clear from an email from her to Mr Swangard on 12 December which was disclosed by the Claimants at the hearing.

86. Mr Swangard had sent Ms Blanch a draft of a letter which he proposed to send to Mr Jagusch on 15 December[35] and invited her comments. Ms Blanch's reply included the following passage –

> "I would recommend we should include in any settlement a provision that the government expressly recognises and confirms in writing that no bribes were paid and that Peter's retraction is accepted. Although this will no doubt have no validity in Azerbaijan (1) it will protect the companies and the directors/officers outside of Azerbaijan were any proceedings to be initiated or continued and (2) to the extent that the State sought to bring proceedings against any relevant personnel within Azerbaijan at least there would be the ability to challenge such proceedings in the [European Court of Human Rights] or other relevant forum outside Azerbaijan or in the media."

[35] An extract from the letter actually sent is set out in para. 25, above.

87. While this passage shows that Ms Blanch still hoped to obtain some form of contractual protection for Mr Booster (however limited its effectiveness), the language used scarcely suggests that a clause of this kind was regarded by Ms Blanch as indispensable. More important, however, is the fact that this exchange between Ms Blanch and Mr Swangard was, of course, completely unknown to Mr Jagusch and the Respondent. There is no evidence that Mr Swangard, who was conducting the negotiations on behalf of both the Claimants in the present case and the *Fondel* claimant,[36] sought in his negotiations with Mr Jagusch to include a clause of the kind that Ms Blanch envisaged. Indeed, there is a striking contrast between Ms Blanch's email to Mr Swangard and the email which Mr Swangard sent Mr Jagusch on 23 December 2008 (which is quoted extensively in paragraph 34, above). That email contained Mr Swangard's suggestions for inclusion in the formal document which Mr Jagusch and his team were preparing. While Mr Swangard made a number of suggestions as to what should be included, he conspicuously made no mention of a clause regarding the bribery issue or the position of Mr Booster.

88. In the Tribunal's opinion, the evidence does not support the Claimants' submission that a clause regarding Mr Booster was regarded by the parties as utterly indispensable and we therefore reject the submission that the agreement was incomplete. For the same reasons the suggestion – made at the oral hearings by counsel for the Claimants – that it would have been "utterly fantastic" for Ms Blanch to have agreed a settlement which did not contain some form of protection for Mr Booster[37] cannot succeed.

E *The Prior Correspondence and Subsequent Practice*

89. That leaves the Claimants' submission that the correspondence between the parties prior to 16 December 2008 and their conduct subsequent to 19 December point to a different and more restricted interpretation of the 16-19 December

[36] Mr Booster was a director of Fondel as well as of Azpetrol, so Mr Jagusch was entitled to assume that if his position had to be addressed in the settlement agreement, Mr Swangard would have said so. The Tribunal also recalls that Ms Blanch testified that Mr Swangard's communications with Mr Jagusch were based on positions agreed with her.

[37] English law does not require an interpretation of any contract which would lead to an "utterly fantastic" result; *See L. Schuler AG* v. *Wickman Machine Tools Sales Ltd.* [1974] AC 235 at 256.

email exchange. In particular, the Claimants have contended that the prior correspondence showed that the parties had proceeded throughout on the basis that there would be two stages to the agreement: first, a standstill agreement, possibly accompanied by some form of non-binding agreement regarding the main points of a settlement and, secondly and subsequently, an agreement to settle the proceedings. The Claimants also submit that the subsequent practice of the parties confirms that interpretation.

90. The Tribunal is far from satisfied that it is entitled to have regard to the evidence of the prior negotiations or subsequent practice of the parties. While these would be admissible under international law, the parties have agreed that the Tribunal should apply English law to determine whether or not there was a binding settlement agreement and the Tribunal is therefore bound to apply English law in good faith.[38] There is little doubt that the present position under English law is that recourse to the negotiations and the subsequent conduct of the parties is not admissible as an aid to the interpretation of their agreement. While that approach has been subjected to some telling criticism, the Tribunal's duty is to apply in good faith English law as it is, not as it ought to be or might become.

91. It is true that recourse to the negotiations is permitted for the very limited purpose of determining the aims and objectives of the parties but it is doubtful whether that assists the Claimants here. The objective of the negotiations was to settle the case. The fact that the parties may have contemplated achieving that settlement in two stages, rather than one, does not alter the fact that they were negotiating a settlement and the fact that at one stage they had clearly considered that the binding agreement to settle would come after the conclusion of the more urgent standstill agreement does not mean that everything that took place during the negotiations can be scrutinised with a view to seeing whether the agreement reached on 19 December 2008 (by acceptance of the 16 December offer) was an agreement to proceed in one step or two. To do so would be to go beyond the use of the negotiating history in order to determine the aims and objectives of the parties and do precisely what Lord Wilberforce in *Prenn* v. *Simmonds* and Lord

[38] *See* ICSID Convention, Article 42 and para. 49, above.

Hoffmann in *West Bromwich* considered should not be done. The ban on recourse to the subsequent practice of the parties is even more absolute than that on the use of their negotiating history.

92. In the end, however, the Tribunal considers that it does not matter whether the prior negotiating history and the subsequent conduct of the parties can be considered or not, because the Tribunal does not accept that they sustain the Claimants' argument.

93. The Tribunal accepts that the correspondence between Mr Jagusch and Mr Swangard during the first two weeks in December did not contain terms which could – by themselves – have amounted to a binding settlement agreement and that, at one time, what was envisaged was a two-stage process in which there would first be a standstill and only subsequently a settlement agreement.

94. However, the Tribunal considers that the position changed with Mr Jagusch's email to Mr Swangard on 15 December.[39] That email stated that the Respondent required agreement on the principal elements of a settlement before it would agree to a standstill. A standstill could be of benefit only to the *Fondel* and Azpetrol claimants, whose deadlines for filing substantial arguments in the two cases were imminent, and Mr Swangard and Mr Landau had indicated that their clients were very keen to secure a standstill. Ms Blanch has testified that her clients, the Claimants in the present proceedings, were not concerned about their deadline since, unlike the *Fondel* claimants, they had their pleadings ready. However, there is nothing to indicate that Mr Jagusch was aware of that fact. Moreover, the whole basis on which the negotiations were being conducted was that the Respondent was demanding an agreement on both cases, so that if the *Fondel* claimant was to secure the standstill that it needed, then its representative, who was also negotiating on behalf of the Azpetrol Claimants, was going to have to agree to something which would satisfy the Respondent in respect of both cases.

[39] See para. 26 above.

95. It was at this point that Mr Jagusch, with the deadlines for filing only a few days away made his 16 December offer under which the price of a standstill included a detailed agreement on settlement. Not only was that offer far more detailed than anything which had gone before, it was couched (for the first time) in the language of contract, not of any kind of "gentlemen's agreement". This may have come as a surprise to Mr Swangard and Ms Blanch, but their acceptances were nevertheless of what Mr Swangard expressly described as "your offer of settlement".

96. The Tribunal considers that these negotiations fall into precisely the category referred to by Lord Wilberforce in his speech in *Prenn* v. *Simmonds* (quoted in paragraph 62, above), when he warned that –

> "By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the final document which records a consensus."

97. That is what happened here. The negotiating positions of the parties changed and the Tribunal considers that it makes no difference whether it takes account of the negotiating history or not, since that history does not lead to a different conclusion about the proper interpretation of the agreement concluded by the exchange of emails on 16 and 19 December 2008.

98. Nor does the subsequent practice of the parties alter the position. The Tribunal does not attach significance to either the light-hearted exchange of emails between Ms Blanch and Mr Jagusch or what transpired over drinks between Mr Moody and Messrs Sinclair and Sullivan on 19 December 2008. More important are the emails between Mr Jagusch and Mr Swangard on 23 December (*see* paragraph 34 to 35, above) which dealt with the formalities of the instrument to be executed and did not suggest that there were real issues of substance still to be agreed. Also of note is Mr Sinclair's covering email of the same date, which accompanied the draft formal agreement. In that email, Mr Sinclair spoke of "the attached draft settlement agreement by which we have sought to document the settlement of the two cases as agreed in principle below" (see paragraph 36, above). The Tribunal has already dealt with the argument that the phrase

"agreement in principle" necessarily implies that what has been agreed is not legally binding. Once that argument is rejected, the language used by Mr Sinclair is plainly compatible with the Respondent's argument that the parties had already concluded a settlement agreement and all that remained was to draft a formal instrument to document it.

99. The only other subsequent practice which requires comment is composed of the emails from Ms Blanch and Mr Swangard to Mr Jagusch on 31 December in which they set out, in substantially identical language, their reasons for disputing Mr Jagusch's view that the parties had already concluded a binding agreement from which they could not resile, and an exchange of emails between Mr Moody and Mr Swangard dated 9 January 2009, in which they discuss what the terms of the 16 December email from Mr Jagusch meant, in particular in the clause about further documentation.

100. The Tribunal considers that these emails cannot be accorded any weight. All of them were written after it was clear that there was a serious dispute between the Claimants and the Respondent over whether the case had been settled and after – as Ms Blanch testified – the Claimants had had a change of heart about whether they wished to settle the case on the terms of the 16 December email.[40] By the time that they were written, it must have been apparent to everyone that the Tribunal was going to be required to rule on that dispute. As a matter of principle, the Tribunal does not consider that such communications – any more than the parties' written and oral submissions – can themselves be part of the factual record to be taken into account in interpreting the agreement concluded between the parties.

101. In conclusion, the Tribunal considers that the 16 December 2008 email from Mr Jagusch was an offer of settlement subject to a condition subsequent that the terms of the agreement be embodied in a formal instrument. As in *Morton v. Morton,* the formal instrument was to be the documentation of an existing agreement not the agreement itself, although it was a condition, which could be waived by Azerbaijan but not by the Claimants, that the formal instrument be

[40] Transcript, pp. 410-412.

concluded by 31 December 2008. That offer was unequivocally accepted by the Claimants on 19 December and the condition subsequent was waived by Azerbaijan on 31 December. From that moment on, the parties were bound by the settlement agreement and neither side was free to withdraw from it.

VII The Appropriate Form of Disposition

102. The Respondent's Settlement Application sought the dismissal of the proceedings either on the basis of ICSID Arbitration Rule 43(1) concerning discontinuance or for lack of jurisdiction because there is no longer a "legal dispute" between the parties as required by Article 25(1) of the ICSID Convention.

103. Arbitration Rule 43(1) provides that "[i]f, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal [...] shall, at their written request, in an order take note of the discontinuance of the proceeding". The Rule thus prescribes that the parties must submit a joint request for discontinuance to the Tribunal, and that the Tribunal then simply issues an order of discontinuance of the proceeding without any award being rendered.

104. In this case, a request for discontinuance of the proceeding was made by the Respondent on 31 December, upon which the Claimants immediately objected to the request. Even if the Respondent's request were viewed as a unilateral request for discontinuance of the proceeding under Arbitration Rule 44, the Tribunal would need to secure an express or implied[41] agreement of the parties to discontinue the case. Regardless of whether or not the parties had concluded a binding settlement of their dispute, there was in this case clearly no agreement on the *discontinuance* of the proceeding.

105. The Tribunal has concluded that the parties reached a binding settlement agreement in the terms of the 16 December 2008 email from Mr Jagusch. The Respondent stated that the settlement agreement dealt with all issues in dispute

[41] A failure to object to the request for discontinuance within a specific time limit is deemed as acquiescence in the discontinuance, *see* ICSID Regulations and Rules, annotations to Arbitration Rule 44 in ICSID/4/Rev. 1 (1968).

between the parties, including the issue of costs.[42] Although the Claimants objected to the existence of a binding settlement, they did not contest that the terms of the settlement would have finally disposed of all matters in dispute. In these circumstances, the Tribunal concludes that there is no "legal dispute" between the Claimants and the Respondent as required by Article 25(1) of the ICSID Convention or "dispute" as required by Article 26(1) of the ECT and, consequently, no jurisdiction to hear the claim. The Tribunal must therefore, in accordance with ICSID Arbitration Rule 41(6), render an award to that effect.

VIII Costs

106. Both parties applied for the costs arising from the Settlement Application, including the fees and expenses of the hearings in June 2009 and the advance payments to ICSID. The parties exchanged schedules of costs according to which the Claimants had incurred GBP247,863.70 and the Respondent USD789,760.53 in connection with the Settlement Application. The Respondent further claimed costs relating to its preparation of a rejoinder to the Claimants' reply to the Bribery Application, which the Claimants had submitted on 6 January 2009 (*i.e.* after the conclusion of a binding settlement).

107. Neither the ICSID Convention nor the Arbitration Rules indicate that costs should follow the event. Under Article 61(2) of the Convention, the Tribunal has the discretion to allocate costs as it deems appropriate. In the circumstances of this case, the Tribunal decides that each party shall bear its own legal costs and expenses arising out of the Settlement Application, including other costs incurred subsequent to the conclusion of a binding settlement. The Tribunal further decides that the parties shall bear the costs of the arbitration (advances to ICSID) in equal shares.

[42] *See* points 1(a) and 5 of the 16 December 2008 counteroffer from Mr Jagusch, para. 28, above.

IX Award

On the basis of the forgoing, the Tribunal awards as follows:

(A) The case is dismissed for lack of jurisdiction;

(B) Each party shall bear its own legal costs arising from the Settlement Application and from other submissions subsequent to the conclusion of a binding settlement of the parties' dispute;

(C) The parties shall bear the costs of the arbitration relating to the Settlement Application in equal shares.

Judge Charles N. Brower
Date: 28 AUGUST 2009

Sir Christopher Greenwood, CMG, QC
Date: 2 September 2009

Judge Florentino P. Feliciano
Date: 27 August 2009