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ARBITRATION INSTITUTE

OF THE STOCKHOLM CHAMBER OF COMMERCE

Box 16050, 103 21 Stockholm, Sweden

Phone: +46 8 555 100 50, Fax: +46 8 566 316 50

www.sccinstitute.com

FINAL AWARD

Made on 19 August 2010

Seat of arbitration: Stockholm, Sweden

Arbitration No.: V (080/2009)

Claimant:	**MIR'S LIMITED** of Haji Yaqoob Square, Shah-e-Now, Kabul, Afghanistan
Claimant's Counsel:	**Geoffrey J. Hill, Esq.** 110 Chestnut Ridge Rd. #325, Montvale, N.J. 07645, U.S.A.
Respondent:	**Joint Stock Company TECHNOPROMEXPORT,** 18/1 Ovchinnikovskaya nab, Moscow 115324, Russia
Respondent's Counsel:	**Igor V. Zenkin**, Professor, Advocate, 79/1-37 Aviatsionnaya str. Moscow 1115324, Russia **Ekaterina W. Smirnova**, Advocate, 79/1-37 Aviatsionnaya str. Moscow 1115324, Russia
Arbitral Tribunal	**Per Runeland**, SJ Berwin LLP, 10 Queen Street Place, London EC4R 1BE (chairman) **Yasmine Lahlou**, Chaffetz Lindsey LLP, 1350 Avenue of the Americas, 8th Floor, New York, NY 10019, U.S.A. **Alexey A Kostin**, International Commercial Arbitration Court, 6 Ilyinka Street, Moscow 103684, Russia

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1. INTRODUCTION

1.1 The Parties

MIR's LIMITED (the "Claimant" or "Mir's") is a legal entity registered under the laws of Afghanistan. Its registered address is at Haji Yaqoob Square, Shah-e-Now, Kabul, Afghanistan.

The Claimant has been involved in international development projects.

The Claimant is represented in this arbitration by Counsel Geoffrey J. Hill of 110 Chestnut Ridge Rd. #325, Montvale, N.J. 07645, U.S.A.

Joint Stock Company TECHNOPROMEXPORT (the "Respondent" or "TPE") is a company incorporated in Russia. Its registered address is at 18/1 Ovchinnikovskaya naberezhnaya, Moscow, 115324 Russia.

The Respondent is engaged in, principally, the construction of electric power plants.

The Respondent is represented in this arbitration by Igor V. Zenkin and Ekaterina W. Smirnova, advocates of the Moscow Regional Bar Association, 79/1-37 Aviatsionnaya str. Moscow 1115324, Russia.

1.2 Final Award on merits

This Award contains the Tribunal's decision on the merits. In rendering its Award the Tribunal has taken into account all pleadings, documents and testimony produced and admitted in this case.

2. SUMMARY OF THE PROCEDURE

2.1 Beginning of the Arbitration; the Arbitration Agreement

On 14 April 2009, the Claimant's counsel filed a Request for Arbitration (the "Request") with the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC Institute") pursuant to Article 2 of its Rules ("SCC Rules") against the Respondent. The Request concerned a dispute arising out of an agreement entered into between the Claimant as the "Agent" and the Respondent on 11 July 2005 (the "Agreement").

In the Request the Claimant invoked Article 7 of the Agreement (the "Arbitration Clause") which provides:

> *"Article 7*
>
> ***Settlement of Disputes***
>
> *7.1 The Parties shall make every effort to resolve amicably all disputes, disagreements or claims that may arise out of in connection with the present Agreement, including those related to its execution, breach, termination or invalidity.*
>
> *7.2 Should the Parties fail to come to an agreement, such disputes, differences or claims, without jurisdiction at General courts, are subject to settlement in the Arbitration «ad hoc » in accordance with the Rules of Arbitration of the Stockholm Chamber of Commerce by three Arbitrators to be appointed as per the aforementioned Rules.*
>
> *The venue of the Arbitration shall be Stockholm, Sweden.*
>
> *Arbitration language shall be English.*
>
> *The present Agreement shall be governed by the Substantive Law of Russia.*

Arbitration judgment shall be final and binding upon the both Parties to this Agreement.

7.3 The decision of Arbitration shall be final and binding upon both Parties.

On 8 May 2009, the SCC Institute informed the Respondent that arbitration had been initiated and requested the Respondent to submit an Answer pursuant to Article 5 of the SCC Rules by 22 May 2009.

On 26 May 2009, the Respondent submitted its Answer to the SCC Institute and nominated Professor Alexey A. Kostin as arbitrator.

On 27 May 2009, the SCC Institute transmitted the Answer to the Claimant inviting it to comment.

On 2 June 2009, the Claimant responded to the SCC Institute's invitation to comment on the Answer.

By email of 5 June 2009, the Claimant nominated Yasmine Lahlou as arbitrator.

On 2 July 2009, the SCC Institute informed the parties that the SCC Board had appointed Per Runeland as chairperson of the Tribunal. The parties were also informed that the advance on costs had been determined at EUR 129,000 to be paid by the parties in equal shares after which the SCC Institute would refer the case to the Tribunal.

On 29 July 2009, the SCC Institute referred the case to the Arbitral Tribunal, having received the advance on costs from the parties.

2.2 Initial Stages of the Arbitration

On 4 August 2009, the Tribunal wrote to the parties informing them that it was preparing detailed directions and asked the Claimant to submit its full Statement of Claim pursuant to Article 24(1) of the SCC, by 7 September 2009.

On 10 August 2009, the Tribunal issued, for consideration by the Parties, a draft Procedural Order No. 1 and a Preliminary Timetable.

By letter dated 12 August 2009, the Respondent confirmed its acceptance of the draft Procedural Order No. 1 and informed the Tribunal of the names of its counsel.

By letter dated 14 August 2009, the Claimant submitted its comments on the draft Procedural Order No. 1 and the Preliminary Timetable.

On 26 August 2009, the Respondent's counsel submitted their comments on the draft Procedural Order No. 1.

On 1 September 2009, the Claimant wrote to the Tribunal requesting an extension of time for submitting its Statement of Claim until 8 September 2009.

On 8 September 2009, the Tribunal acknowledged receipt of the Claimant's Statement of Claim and confirmed that the Respondent's Statement of Defence and Counterclaim (if any) was to be submitted on or before 9 October 2009.

Following receipt of comments on the Draft Procedural Order No. 1 and the Preliminary Timetable, the Tribunal issued these in final form on 23 September 2009. Under the Timetable the Claimant would submit its Reply to the Statement of Defence and Counterclaim, if any, on or before 29 October 2009 together with any witness statements. The Respondent would submit its Rejoinder on or before 19 November 2009 together with any witness statements. A planning meeting by telephone was scheduled for November 2009 with the main hearing to be held in

December 2009/January 2010. The Timetable also indicated that the SCC had fixed 29 January 2010 as the latest date for rendering the final award.

Procedural Order No. 1 gave directions on the following matters, in particular:

- that the language of the arbitration shall be English;
- the applicable rules of the arbitration are the Rules of the SCC Institute (2007);
- the seat of arbitration is Stockholm, Sweden;
- extension of time limits;
- the format of written memorials;
- the format of exhibits and any translated documents;
- the procedure for evidence of witnesses and experts;
- a hearing on merits will be held; and
- the procedure for varying orders.

On 9 October 2009, the Respondent submitted its Statement of Defence.

By email dated 19 October 2009, the Claimant sought and was subsequently granted an extension of time by the Tribunal to submit its Reply on 5 November 2009.

On 5 November 2009, a procedural conference was conducted by telephone with the participation of counsel for the parties and the arbitrators. On the same day, the Claimant submitted its Reply to the Statement of Defence by e-mail.

By email dated 13 November 2009, the Respondent sought and was subsequently granted an extension of time from the Tribunal for submitting its Rejoinder to 17 December 2009, and a Rejoinder dated 17 December 2009 was duly filed.

2.3 **The hearing on merits**

The hearing was held in Stockholm, Sweden on 19 and 20 January 2010. Present at the hearing were:

Members of the Tribunal:

Yasmine Lahlou, Alexey A Kostin and Per Runeland.

On behalf of the Claimant:

Geoffrey J Hill (Counsel),

Party representative, also giving evidence:

Nasir Shansab

On behalf of the Respondent:

Yury Volkov (Legal adviser), Igor Zenkin (Counsel), Ekaterina Smirnova (Counsel), Valery Kuznetsov (Deputy Director)

Witnesses called by the Respondent:

Sergey Tatarnikov (Former Regional Director of TPE)

Ivan Grosse (Deputy Head of TPE branch in Afghanistan)

The hearing began on 19 January 2010 with opening statements from Counsel for both parties. Mr Shansab was examined by the Claimant's Counsel, and cross-examined by the Respondent's Counsel. There followed the examination, cross-examination and questioning of Mr Grosse. At 5.30 p.m. the hearing was adjourned for the day.

The hearing continued on the morning of 20 January 2010. The examination, cross-examination and questioning of Mr Tatarnikov, the Respondent's witnesses, took place during this session, which ended with counsel for the parties summing up and responding to questions from the Tribunal. The hearing concluded with the Tribunal directing that the Claimant submit documents concerning its legal status and that both parties submit cost claims within a specified period.

The members of the Tribunal met on 20 January 2010 in order to deliberate on the merits of the dispute.

3. FURTHER PROCEDURAL ISSUES FOLLOWING THE HEARING

3.1 Extensions of time granted by the SCC Institute; closing of proceedings

On 17 November 2009, the Tribunal wrote to the SCC Institute, following revision of the timetable, to request an extension of time for rendering the award until 28 February 2010. On the same date the SCC Institute extended the time for rendering the award until 28 February 2010.

Following the hearing held on 19 and 20 January 2010, the parties were required to make certain further submissions in February. Accordingly, the parties agreed to an extension of time for rendering the award. On 29 January 2010 the Tribunal requested an extension of time for rendering the award until 31 March 2010. The SCC Institute granted an extension of time until 31 March 2010.

On 12 March 2010, the Tribunal requested the SCC Institute to grant it a further of extension of time for rendering the award until 30 April 2010.

On 12 March 2010 the SCC Institute wrote to the Tribunal confirming the grant of an extension of time for rendering the award until 30 April 2010.

The Tribunal closed the proceedings on 26 March 2010 following receipt of additional materials from the parties. On 27 April 2010 the Tribunal wrote to the SCC Institute to inform it that it needed a further six weeks for deliberations and the preparation of the award. Accordingly, the Tribunal requested a further extension of time until 15 June 2010.

On 29 April 2010 the SCC Institute granted an extension of time for rendering the award until 15 June 2010.

On 11 June 2010, the Tribunal wrote to the SCC Institute to request a further extension of time for rendering the award until 15 July 2010 as a result of a delay caused by unexpected correspondence and applications from the Respondent. The request was granted the same day.

On 13 July 2010, the Tribunal wrote to the SCC Institute to request a further extension of time for the rendering the award until 16 August 2010 as a result of the Respondent's unforeseen procedural and substantive submissions. The request was granted on 15 July 2010. On 9 August 2010, following a request by the Tribunal, the SCC Institute decided that the final award should be made by 6 September 2010.

3.2 Party Activity and Procedural Orders

By letter dated 28 January 2010, the Claimant wrote to the Tribunal to confirm the continued existence and registration of Mir's Limited by attaching a letter from Tamim Shansab, President of Mir's Limited, in response to the Tribunal's inquiry at the hearing.

On 2 February 2010, the Claimant submitted an English translation of a document it had previously provided to the Tribunal.

On 16 February 2010, the Claimant submitted further documents in response to the Tribunal's direction concerning documentation regarding the Claimant's corporate existence.

On 24 February 2010, the Claimant submitted additional documents relating to the Claimant's existence.

On 11 March 2010, the Respondent sent an email to the Tribunal to comment on the documents submitted by the Claimant.

By Procedural Order No. 2, the Tribunal acknowledged the Respondent's email of 11 March 2010 and directed that it provide hard copies of the attachments. The Tribunal noted in the Order that it had not decided if, and to what extent, the numerous submissions made by the Respondent would be admissible at that stage of the arbitration. The Tribunal also invited the Claimant to comment on the Respondent's email and attachments by 22 March 2010.

On 24 March 2010, the Claimant made submissions in which it indicated that it also intended to submit further exhibits styled C 152 and C 153.

By Procedural Order No. 3 dated 26 March 2010, the Tribunal acknowledged the Claimant's submission of 24 March 2010 and directed that there be no further submissions made by either party except by leave of the Tribunal. This direction included the submission of the Exhibits referred to by the Claimant in its submission of 24 March 2010.

On 21 May 2010, the Respondent applied for permission to submit a number of applications made outside of this arbitration but concerning evidence given in it. The Respondent alleged that evidence had been forged. By email of the same date, the Tribunal asked the Respondent to state what evidence it was alleged that the Claimant had forged.

In response to the Tribunal's request for clarification with respect to the Respondent's allegation of forgery, the Respondent sent an email to the Tribunal on 27 May 2010. In that email the Respondent explained that the Claimant had forged the evidence in the arbitration proceedings during the course of the hearing by the Claimant's witness, Mr Shansab, stating that:

(a) the company Mir's Limited was founded around 1970s and had an experience of participation in the World Bank projects (for example, road maintenance and irrigation in 1970s);

(b) there were about 20 employees in the company; and

(c) the annual turnover of the company reached up to 10 million US dollars per year.

The Respondent contended that the information provided by Mr Shansab was a forgery because the Claimant Company, Mir's Limited, was founded in 2003 and at the time of the hearing the Claimant did not have a business license, its office was closed and no one could be employed by it. Further, the Respondent was of the opinion that the Claimant Company could not have any turnover as it did not have a business license.

By Procedural Order No. 4 dated 30 May 2010, the Tribunal underlined that the Respondent's reply indicated that its allegations concerning the information given as oral testimony could have been challenged by Respondent in cross-examination. The Tribunal found that the Respondent's application failed to establish any exceptional circumstances that were sufficient to justify a reopening of the proceedings, and consequently the Tribunal denied it.

On 25 June 2010 the Respondent wrote to the Tribunal stating that it had mistakenly understood the Tribunal's request of 21 May 2010 for clarification of forged evidence as referring to the oral

testimony. The Respondent communication then proceeded to refer to the documents that it alleged had been forged by the Claimant. These included:

(a) A letter from the Ministry of Finance of Afghanistan regarding the assignment of the taxpayer identification number which has no date;

(b) Document entitled "Mir's Limited General Assembly Resolution" dated 1 December 2007;

The Respondent requested that the Tribunal should recognize the presentation of the second document "at this stage as inadmissible".

By email of the same date, the Chairman of the Tribunal referred the Respondent to Procedural Order No. 3 which required parties to obtain permission from the Tribunal in advance of making further submissions. The Respondent had made a submission without permission, and consequently it could not be considered.

On 28 June 2010, the Respondent wrote to the Tribunal stating that the aim of its communication of 25 June 2010 was not to make a new submission but to respond to the Tribunal's request for clarification sent on 21 May 2010.

The Tribunal issued Procedural Order No 5 on 3 August 2010 whereby, in particular, it acknowledged the Respondent's submissions regarding allegedly forged documents and denied the Respondent's request that certain documents should be deemed inadmissible. The Tribunal underlined that the decision did not imply any assessment of the significance, if any, of the documents for the determination of the dispute.

4. RELIEF SOUGHT BY THE PARTIES

4.1 The Claimant

The Claimant seeks the following relief (later amended in the course of the arbitration, as set out below):

(a) an award of, as finally specified during the hearing, US$1,627,150 equal to 5% commission of the Naghlu Contract price of US$32,543,005 plus interest at 8.75 % p.a. from 31 October 2006 and running

(b) costs and counsel fees;

(c) a lien on all monies paid, due and which may come due from the World Bank on the Naghlu Rehabilitation project;

(d) relief against the performance bond posted by the Respondent;

The Claimant has further requested any other alternative relief deemed equitable, just and appropriate by the Tribunal, including but not limited to relief for damages for the Respondent having taken the Claimant's services including but not limited to quantum meruit and/or unjust enrichment and/or implied contract and any other statutory or common law relief available.

The Claimant reserved the right to seek immediate temporary relief prohibiting the World Bank from paying any more monies on the Naghlu Rehabilitation project to the Respondent or others, and/or prohibiting the Respondent and/or the Afghan Ministry of Energy and Water from receiving any monies from the World Bank or any third parties regarding the Naghlu Rehabilitation project.

4.2 The Respondent's Reply to the Claimant's Prayer for Relief

The Respondent objects to the Tribunal's jurisdiction to hear this claim, and requests a bifurcation of the proceedings in order to first determine whether it has jurisdiction.

Additionally, the Respondent objects to each claim and request for relief put forward by the Claimant. In particular, the Respondent contends that a number of the Claimant's claims are outside the scope of this arbitration and cannot be determined by this Tribunal on the basis that they are in respect of third parties who are not parties to the arbitration agreement. In this context, the Respondent underlines that the claims include:

(a) *"...a lien on all monies paid, due and which may come due from the World Bank on the Naghlu Rehabilitation project"*

(b) "immediate *temporary relief prohibiting the World Bank from paying any more monies on the Naghlu Rehabilitation project to TPE or others and/or prohibiting TPE and/or the MEW from receiving any monies from the World Bank*"

(c) "relief against the performance bond posted by TPE".

The Respondent requests the Tribunal to:

(a) Declare that it has no jurisdiction to entertain the Claimant's claim;

(b) Dismiss the claims of the Claimant; and

(c) Award the Respondent legal and other costs incurred by it in the course of defending its rights in this arbitration.

5. SUMMARY OF FACTS

5.1 The Agreement

In or around February 2005, Mr Nasir Shansab, of the Claimant and its American affiliate, American Central Asian Trading Company ("ACATCO"), commenced negotiations with Mr Sergey Tatarnikov of the Respondent about the possibility of the Claimant serving as the Respondent's representative and possibly sub-contractor in a project for which tenders were invited. The project was administered by the Afghan Ministry of Energy and Water ("MEW") and the World Bank and related to the rehabilitation of Afghanistan's Naghlu hydro-electric power station.

On 11 July 2005, the Claimant and the Respondent executed the Agreement. Under the Agreement the Claimant is defined as the "Agent".

The provisions of the Agreement relevant to this dispute provide as follows:

> "***Article 1***
>
> ***Subject of the Agreement***
>
> *TPE entrust and the Agent undertakes to render maximum assistance to TPE on the exclusive basis in participating in Tender for Rehabilitation of "Naghlu" HEPS, as well as in signing and performance of the relevant Contract, hereinafter referred to as the "Contract", with Afghanistan Employer under the credit of the World Bank."*
>
> ***Article 2***
>
> ***Liabilities of the Agent***
>
> *2.1 Aiming to execute successfully the assignment as per Article 1 of this Agreement, the Agent shall render the following services to TPE on the territory of Afghanistan:*
>
> *2.1.1 Render assistance in establishing contacts and arranging negotiations with the Ministry of Energy and Water of Afghanistan, hereinafter referred to as the "Employer", in connection with participation of TPE in Tender for Rehabilitation of "Naghlu" HEPS in Afghanistan.*

2.1.2 Render all necessary assistance in the elaboration of tender offer for Rehabilitation of "Naghlu" HEPS in Afghanistan.

2.1.3 Render assistance in receiving by TPE legislation and other regulation documents of Afghanistan in the English language (on commercial and legal questions), concerning Tender for Rehabilitation of "Naghlu" HEPS in Afghanistan as well as signing and execution of the relevant Contract.

2.1.4 Render assistance in positive consideration by the World Bank, Consultant of the Employer and the Employer tender offer of TPE for "Naghlu" HEPS in Afghanistan.

2.1.5 In case of awarding the Contract to TPE, render assistance in prompt signing of the Contract with the Employer on the terms and conditions, acceptable to TPE and coming the Contract into force.

2.1.6 Render assistance in the execution of consular, visa and other required formalities when sending TPE's representatives to Afghanistan in case of participation of TPE in tender, negotiation, signing the Contract and its execution.

2.1.7 Render assistance in settlement of disputes with the Employer, World Bank and Consultant of the Employer, local subcontracted firms and/or foreign organizations/firms as well as the other concerned organizations of Afghanistan during the process of signing the Contracts and its execution.

2.1.8 Render assistance in solving the problems concerned with due performance by TPE of the Contract, including if necessary: customs clearance, payment of local taxes and fees, obtaining required permissions, licences and other documents from state organizations of Afghanistan, World Bank, problems connected with the rent of living and office accommodation etc.

2.1.9 Render assistance in providing timely payments due to TPE under the Contract signed between TPE and the Employer as well as in settlement of other financial issues arising during implementation of the Contracts, including timely opening Ls/C on the terms and conditions accepted by TPE, releasing Bank Guarantees issued by TPE, etc.

2.2 The Agent shall take all possible measures to defend TPE's interests and create the most favourable conditions for TPE's activity.

2.3 The Agent shall carry out his obligations under this Agreement on the exclusive basis and shall have no right directly or indirectly render assistance or help to any other natural persons and legal entitles, who are interested in obtaining order for rehabilitation of "Naghlu" HEPS in Afghanistan.

2.4 The Agent has no any right/authority to disclose any information regarding Tender to any other firms without prior written consent of TPE.

2.5 The Agent shall strictly observe all industrial and commercial confidential information of TPE, which become known to him during execution of this Agreement.

2.6 The Agent has no right/authority directly or indirectly to create or undertake any obligations on behalf of TPE without prior written consent of the latter.

2.7 During execution of his obligations under this Agreement the Agent has to observe the Legislation of Afghanistan.

2.8 The Agent shall render assistance, if necessary, in engaging local companies and manpower for the performance of civil works under the Contracts.

2.9 The Agent regularly but not less than once a quarter shall submit written report to TPE on progress of work.

Article 3

Liabilities of TPE

3. TPE shall ensure payment of Agent services under the present Agreement in accordance with the provisions of this Agreement.

Article 4

Terms of Payment

4.1 TPE shall pay to the Agent for the services rendered by him under this Agreement, as a full compensation of all his expenses of any nature connected with execution of this Agreement, a commission to the extent of 5% (five percent) of the full amounts actually received by TPE in foreign currency under the Contract.

4.2 The commission shall be paid to the Agent by bank remittances to his bank account mentioned therein pro rata and upon receipt by TPE of relevant payments stated in it. 4.1 hereof from the Employer within 30 days from the date of crediting TPE's account...Payments shall be made in foreign currency, received from the Employer against appropriate invoices duly drawn up by the Agent to the extent of 5%(five percent) of the amount of each payment actually received by TPE from the Employer."

Article 8

Miscellaneous

8.5 If the Agent fails to perform any of his obligations under this Agreement, TPE in such case if the Agent fails to respond to written demand, has the right to terminate this Agreement unilaterally without any obligations on his part, informing the Agent thereof in the written form."

5.2 **Origin of dispute**

From March 2005 the parties were in regular contact regarding the project. In or around May 2005, the Respondent submitted its bid to the MEW/World Bank. The Respondent's bid to the MEW/World Bank was valid up to 3 December 2005. In the meantime, the parties continued communicating about the project and worked towards finalising their agreement which was subsequently signed on 11 July 2005.

By letter dated 20 July 2005, the Respondent complained to the Claimant that despite on 22 April 2005 having given the Claimant authority to represent its interests in the tender for the Naghlu project, it had not received a single piece of information regarding its tender offer or measures taken by the Claimant to make the offer successful.

By letter dated 25 November 2005, the Respondent wrote to ACATCO, for the attention of Mr Shansab, reminding him that the offer on the Naghlu project was due to expire on 3 December 2005 but that it had not received any information on this either from the Claimant or the MEW and requested that it be provided with information on the situation regarding consideration of its bid offer and the necessity of extending its validity. The validity of the bid was subsequently extended to 10 January 2006.

The Respondent wrote to ACATCO again by letter dated 23 December 2005 highlighting the fact that the offer was due to expire on 10 January 2005 and underlining that it had not received any information about the results of the consideration of the tenders of the bidders. The Respondent requested that it be informed of the steps required to secure a favourable decision by the MEW.

Mr Shansab of the Claimant responded by email dated 26 December 2005, informing the Respondent that a decision was unlikely to be taken before 10 January 2006, because of the holiday season and it might be that the MEW would request another extension and that, "[a]*t this point*" the Claimant's role in "*bringing about a decision*" was *"quite limited"*. Further, the Claimant stated that it considered that the price in the proposal was too high and that it had not been consulted on this but only received the price schedule after the bids had been submitted. In any event, the Claimant indicated that the delay in the decision was to the Respondent's advantage. The Claimant also said that the Respondent's decision not to trust it had severely restricted the Claimant's ability to represent it fully.

By letter dated 30 December 2005, the Respondent replied to Mr Shansab's email referring him to Article 2.1.4 of the Agreement requiring the Claimant to "*[r]ender assistance in positive consideration by the World Bank, Consultant of the Employer and the Employer tender offer of TPE for 'Naghlu' HEPS in Afghanistan.*". In this regard, the Respondent alleges that the Claimant had informed it in its above email that possibilities of bringing about a decision were quite limited. Accordingly, if the contract with the MEW was signed, it would not be the result of the Claimant's work in accordance with Article 2.1.4 of the Agreement. The Respondent then invited the Claimant to confirm that it would exclude this particular article from the list of its obligations.

In its email reply of the same date, the Claimant denied that it had admitted any inability to influence the decision of the MEW, emphasised that the operative words in its message were "[a]*t this point*" and explained further what its email of 26 December 2005 was meant to convey to the Respondent.

Thereafter, the Claimant and the Respondent consulted regarding a further extension of the validity of the bid, without any increase of the price. Subsequently, the validity of the bid was extended to 10 May 2006.

On 13 March 2006, Mr Shansab wrote to Mr Tatarnikov expressing his delight at the Respondent having extended the validity of its proposal once again. The Claimant also requested that it be kept informed of the Respondent's intentions.

By letter dated 12 April 2006, the Respondent wrote to ACATCO, for the attention of Mr Shansab, expressing the view that it did not consider the Claimant capable of influencing the decision of the World Bank or the Tender Committee in accordance with its obligations under Article 2.1.4 of the Agreement.

A few days later, the Respondent received from the MEW a Letter of Acceptance dated 17 April 2006 2005, notifying it that its bid for the execution of the Rehabilitation of the Naghlu Hydro Power Station had been successful.

Following receipt of the Letter of Acceptance, the Claimant and the Respondent worked on issues of taxation and duties to satisfy certain requirements for the supply contract between the Respondent and the MEW (the "Contract"). However, the parties' working relationship deteriorated, culminating in a letter from the Respondent dated 3 August 2006 purporting to exercise its right under Article 8.5 to unilaterally terminate the Agreement.

Against the foregoing background, the key points of dispute between the parties are:

(i) whether the Claimant has performed its obligations under the Agreement;

(ii) whether the Respondent was in breach of the Agreement in refusing to pay the Claimant's commission under the Agreement;

(iii) whether the Respondent was justified in unilaterally terminating the Agreement;

(iv) whether the Claimant's claim is time-barred by the Russian statute of limitations (three years); and/or

(v) whether any sum is due to the Claimant, considering the terms of payment and other terms of the Agreement.

6. SUMMARY OF THE PARTIES' SUBMISSIONS

6.1 The Statement of Claim

The following is a summary of the Claimant's position as set out in its Statement of Claim ("SoC"). The basic argument in support of the Claimant's case is that the Respondent has failed to comply with its obligation under the Agreement to pay the Claimant and that it has wrongfully terminated the Agreement.

The Claimant submits that it has been involved in a number of successful international development projects. It was hired by the Respondent to serve as its agent in Afghanistan to assist in preparing the bid for the Naghlu Hydroelectric Power Plant rehabilitation project and to negotiate with the World Bank's experts. The project was funded by the World Bank through the MEW.

When the project was announced for tender, the Claimant approached the Respondent, which was the original builder of the Naghlu power plant, with a proposal involving the Respondent's participation in the bid as the Claimant's sub-contractor. This was, however, deemed impossible by TPE on the basis that its status as a state-owned company would not permit it to be the Claimant's subcontractor. Accordingly, the Respondent suggested that it would itself have to be the primary contractor and the Claimant would act as its agent in Afghanistan. All work to be sub-contracted in Afghanistan was to be handled by the Claimant and/or ACATCO, the Claimant's affiliate.

The Claimant was responsible for the provision of all price and contractor information for the bid preparation. The bid by the Respondent included subcontracting work that ACATCO bid for.

It is alleged that in April 2005, the Respondent asked ACATCO to supply costs so that ACATCO could provide all subcontracting aspects of the project to include construction of living settlements, provision of security, buses, cars and drivers, communication facilities, food services, welders, turbine fitters, hydraulic generator fitters, generator winding fitters, electrical fitters and general workers, etc. In addition to providing these, ACATCO was supposed to contract with workers and bear responsibility for them. This, according to the Claimant, was all done on the basis that ACATCO was to be the subcontractor for these services and the services and costs were essential to the preparation of the bid.

It is the Claimant's position that the commission of 5 % of the total price of $32m under the Contract payable by the Respondent under the Agreement was separate from any monies to be owed to ACATCO as subcontractor for the goods and services it was to provide pursuant to the bid. At the time of execution of the bid, Mir's had already worked with the Respondent to prepare the bid for submission and continued to work over the course of the following year in its role as agent.

It is the Claimant's contention that as a result of its work as agent, the Respondent was awarded the Contract by the MEW in April 2006. The Respondent allegedly continued to rely on the Claimant's assistance on matters such as tax and duty information, provided by the Claimant upon the Respondent's request.

The Claimant submits that shortly after the Contract was awarded, the Respondent severed contacts with the Claimant and did not pay the Claimant its commission. Despite numerous attempts by the Claimant to get the Respondent to pay, the Respondent allegedly ignored the Claimant's payment demands. Prior to this, the Respondent is said to have refused any contact

with ACATCO and indicated that it wanted to invite new bids for what the Claimant contends was ACATCO's work.

Despite Respondent having been paid $5m after being awarded the Contract, the Claimant contends that the Respondent did virtually nothing to further the project.

On 5 August 2007, the Claimant's President, Nasir Shansab was able to secure a meeting with the Respondent's Mr Ivan Y. Grosse, MEW's Deputy Minister and the World Bank's Mr Rosham Dhakal. During the meeting, it was argued for the Respondent that there was no contract between it and the Claimant, an assertion which was allegedly dropped when the Claimant produced a copy of the Agreement. Mr Grosse is then said to have claimed that Ismail Khan, the minister at the MEW, had directed the Respondent to work with another company and not with the Claimant. Mr Grosse then claimed, in what the Claimant contends is a third contradictory representation, that the Respondent's personnel had been threatened by the Claimant which caused it to terminate its relationship with the Claimant under the Agreement.

The Claimant contends that the Respondent's allegations are untrue and states that throughout the parties' correspondence between 2005 and 2007 there was never a single mention of, or reference to, any alleged threats by the Claimant to the Respondent's personnel. According to the Claimant, the Respondent as a state entity was able to provide the security necessary for its personnel as other companies in Afghanistan routinely do.

The Claimant states that during the meeting on 5 August 2007 the Respondent did not declare that the Claimant had failed to perform its obligations under the Agreement.

Minister Ismail Khan reportedly wrote to the Afghan Minister of Interior, which oversees the police, alleging that the Claimant had threatened the safety of the Respondent's personnel.

By letter dated 29 September 2007, the Claimant wrote to Sergey Tatarnikov of the Respondent and made a final demand for payment.

The Claimant alleges that, on 24 October 2007, an intruder, purporting to be a postal worker, invaded its property in Kabul to deliver a letter. However, the envelope had no stamps and contained a letter dated 17 October 2007 from the Respondent. The letter provided that by letter dated 3 August 2007 and sent by courier to the Claimant, the Respondent had unilaterally terminated the Agreement and the Respondent considered itself free from any obligations including those relating to payment of the commission to the Claimant.

The Claimant contends that it has performed all its obligations under the Agreement and prepared the information for the winning bid on the Respondent's behalf. It is the Claimant's position that it continued to be responsive to the Respondent's requests after it received the Letter of Acceptance from the MEW.

6.2 The Respondent's Defence

In its Statement of Defence ("SoD") the Respondent notes that the Claimant refers continuously to ACATCO in its Statement of Claim, making it apparent that in order to examine its claims the Tribunal will have to examine the relationship between three parties. The Respondent disputes the jurisdiction of the Arbitral Tribunal on the basis that it lacks jurisdiction to examine the relationship between the Respondent and ACATCO because ACATCO is not a party to the Agreement. Accordingly, the Respondent requests bifurcation of the proceedings to allow the Tribunal to first determine whether it does have jurisdiction.

What follows is a summary of the Respondent's position as set out in its Statement of Defence. The basic argument in support of the Respondent's case is that the Claimant failed to perform its obligations under the Agreement and that, accordingly, the Respondent was justified in unilaterally terminating the Agreement pursuant to its Article 8.5.

The Respondent contends that the Claimant tries to mislead the Tribunal by including ACATCO in its claim. As far as the Respondent is concerned, its relationship with ACATCO is irrelevant to these proceedings and it asks the Tribunal to disregard all references by the Claimant to ACATCO.

The Respondent disagrees with the Claimant's reference to the Agreement as the "agency" agreement and contends that such designation is not a true reflection of the circumstances of the case.

The Respondent also disagrees with the Claimant's assertion that it had agreed to pay the Claimant a 5% commission of the total Contract price of $32m if the Respondent was awarded the project. According to the Respondent, the commission was payable to the Claimant as compensation for costs it incurred in connection with performance of the Agreement and not simply by virtue of the conclusion of the Contract.

The Respondent considers the Claimant's assertions baseless. It accuses the Claimant of failing to adduce any evidence of its performance under the Agreement except for certain exhibits, which the Respondent contends reflected a one-time tax consultation at the Respondent's request, and the Respondent declares that the exhibits do not prove performance by the Claimant of any other actions in discharge of its obligations under the Agreement.

It is the Respondent's position that a letter from Mr Shansab of 8 April 2005, relied on by Mir's, refers to activity related to certain technical reports of accommodation of specialists which was not within the scope of the Claimant's obligations under the Agreement. The Respondent submits that the Claimant is trying to mislead the Tribunal by passing off the actions of a third party as its own actions allegedly performed under the Agreement. Accordingly, the Respondent considers that the letter should be excluded from evidence as it is irrelevant to the relationship between the Claimant and the Respondent and does not serve as proof of performance by the Claimant under the Agreement.

The Respondent considers that it is unclear what exactly the Claimant did under the Agreement to fulfil its obligations or to merit payment of $1.6m.

The Respondent reiterates that the Statement of Claim does not contain any information which proves performance of the Agreement by the Claimant apart from merely stating that the Claimant carried out activities as agent. According to the Respondent, all the Statement of Claim does is give a detailed description of the Claimant's attempts to get the Respondent to pay, but the Claimant fails to state what it is claiming the fee for. Except for the one-time consultation on tax legislation, the Claimant fails to cite examples of what exactly it did as agent under the Agreement.

Further, it is the Respondent's position that the Claimant breached the terms of the Agreement by failing to perform the obligations it assumed. In this respect, the Respondent cites Article 2.9 of the Agreement which required the Claimant to submit a written report to the Respondent, regularly and not less frequently than once a quarter, on progress of the work done. However, the Respondent contends that throughout the term of the Agreement the Claimant did not submit a single written report. The Respondent puts this down to the fact that there was nothing to report since the Claimant had taken no action to perform its obligations under the Agreement.

The Respondent submits that the Claimant was also in breach of Article 1008 of the Civil Code of the Russian Federation (the "RFCC") which provides that "*in the course of performance of the agency contract, the agent shall have the duty to provide the principal with reports in accordance with the procedure and within the time periods that are provided by the contract*". It is the Respondent's contention that the effect of the RFCC is to make the duty to submit reports a fundamental duty of the agent under the agency agreement.

According to the Respondent, it repeatedly requested the Claimant to perform its obligations under the Agreement. It cites its letter of 20 July 2005 and the Claimant's letter of 16 August 2005 as

evidence and examples of this. The Respondent also points out that rather than providing information to the Respondent regarding the project, it was the Claimant that received information from the Respondent.

In a letter dated 30 December 2005, the Respondent wrote to the Claimant citing the Claimant's alleged failure to comply with Article 2.1.4 of the Agreement and invited the Claimant to "waive" that part of its obligations under the Agreement. Although the Respondent notes that the Claimant refused to consent to such waiver, it considers that the Claimant had confirmed its inability to influence the situation and defend the Respondent's interests with respect to the Naghlu project when the Claimant said "*by the nature of things anyone's role in bringing about a decision in these matters will be limited.*"

The Respondent continued to express its dissatisfaction with the Claimant as agent through letters dated 12 April 2006 in which the Respondent told the Claimant that "*we have no opportunity to appreciate the results of your work as the agent capable to influence on the decision of the World Bank or Tender Committee*".

Further, it is the Respondent's contention that the Claimant failed to render any assistance to it with respect to the signing of the contract with the MEW following announcement of the results of the tender. Due to this, the Respondent submits that it wrote another letter to the Claimant dated 18 July 2006 in which it warned the Claimant that it would unilaterally terminate the Agreement in accordance with Article 8.5 if the Claimant failed to remedy the situation.

With respect to the tax information provided by the Claimant, it is the Respondent's contention that the Claimant failed to give a clear answer to the questions it had raised regarding tax, thus compelling it to direct the Claimant to seek advice from a company such as Price Waterhouse. In response to this request, according to the Respondent, the Claimant submitted a formal reply, one page long, as its advice to the Respondent on tax matters. However, the Respondent considered the Claimant's advice was not only inadequate but also incorrect, forcing the Respondent to send its employees to the Ministry of Finance between 1 May 2006 and 6 May 2006 to ascertain the real rates of local duties and taxes.

After the Letter of Acceptance was received by the Respondent, the Claimant violated the terms of the Agreement by acting against its interests in trying to prevent the signature of the contract between the Respondent and the MEW. In this respect, the Respondent points to the letter from the Claimant dated 31 May 2007 in which the Claimant said that it would "*submit this matter to your Government Representative in Kabul, but also the World Bank and Afghan Government...such an incident could, and most likely would, bring what we (our two companies) have worked hard to conclude successfully to an uprapt* [sic] *end and could make it for you impossible to deal in future with such international organizations as the World Bank*". Subsequently, the Claimant is said to have filed a complaint against the Respondent with the representative of the Embassy of the Russian Federation in Kabul, Mr Mishin.

The Claimant sent another letter to the Respondent dated 4 June 2006 in which it warned the Respondent that, "*I fear that once the matter comes to the attention of the institutions involved, the contract we have worked hard to get may be cancelled*". The Respondent contends that the Claimant intended to put the contract at risk by raising complaints with third parties against the Respondent.

On 14 June 2006, the Respondent wrote to the Claimant pointing out that it had violated its obligations under the Agreement and requested it not to act against the Respondent failing which the Respondent would terminate the Agreement pursuant to Article 8.5. However, on 22 July 2006, the Claimant wrote to the MEW and the Ambassador of the Russian Federation in Afghanistan complaining about the Respondent.

It is the Respondent's position that such actions by the Claimant constitute breaches of Articles 2.2, 2.4 and 5 of the Agreement which require the Claimant to defend the Respondent's interests, refrain from disclosing any information regarding the tender to any other firms without the written consent of the Respondent and refrain from divulging any confidential information to any third party without written consent.

The Claimant's actions were, according to the Respondent, designed to put at risk not only the Respondent's implementation of the Naghlu project, but also the Respondent's activities internationally. The Respondent contends that by submitting false information about its conduct, the Claimant has caused damage to the goodwill of the Respondent.

In the light of the above, the Respondent wrote to the Claimant on 3 August 2006 to inform it that it had unilaterally terminated the Agreement. The Respondent does not consider itself liable for any amount of compensation towards the Claimant because it is of the view that the Claimant did not perform its obligations under the Agreement and also breached the Agreement by acting against its interests. Quite to the contrary, the Respondent considers that as the injured party it is entitled to claim compensation.

It is the Respondent's contention that the Statement of Claim contains numerous factual inaccuracies, to which it responds as follows.

The Respondent denies that it hired the Claimant to assist it in preparing the project bid and to negotiate with the World Bank's experts. The Respondent contends that it never authorised the Claimant to take any steps to prepare the project bid or any legal steps to negotiate. According to the Respondent, the Claimant's interpretation of Article 1 is misleading.

In denial of a sentence in the Statement of Claim the Respondent asserts that it never promised or made any guarantees that ACATCO would be selected as subcontractor for any MEW contract. In this respect, the Respondent refers to its letter to ACATCO dated 15 March 2005 in which it stated that "*we have no objections to employ your company to works as our subcontractor on the competitive basis.*" It also refers to its letter dated 22 April 2005 and contends that it only officially acknowledged the "*involvement of company C/O MIR'S Ltd. as an agent*" of the Respondent.

The Respondent submits that the Agreement does not provide that the Claimant was responsible for provision of all price and contractor information relating to Afghanistan and that there was no "TPE/Mir's bid" as asserted by the Claimant and exhibits the bid form as evidence of this fact.

The fourth sentence of paragraph ii.4 of the Statement of Claim i.e. "*As part of the TPE/Mir's bid preparation, in April 2005, TPE had asked ACATCO to supply costs for ACATCO to provide TPE all subcontracting aspects of the large project*" is also denied. The Respondent points out that firstly, there was no "TPE/Mir's bid" and secondly, in a letter dated 11 April 2005 the Respondent asked ACATCO "*to submit us your technical and commercial offer as per following items*". This request does not constitute an obligation on the part of the Respondent to buy anything from ACATCO. The Respondent denies ever confirming its intention to take up ACATCO's offer or to include it in its bid.

On the basis that ACATCO's prices were too high, the Respondent denies accepting a single offer put forward by ACATCO.

The Respondent maintains that the Claimant did nothing as agent and denies that the Claimant had anything to do with it winning the bid.

It is the Respondent's contention that the only question it asked the Claimant was the one on taxes, and the answer was inadequate.

The Respondent maintains that it terminated the Agreement prior to conclusion of its Contract with the MEW and denies ever receiving instructions from the MEW to replace the Claimant as agent.

The Claimant's assertions in its Statement of Claim about the Respondent's failure to carry out any work on the Naghlu project are denied by the Respondent. The Respondent points out that in any event, the issue of its performance of a contract with a third party, in this case the MEW, is irrelevant for the purposes of this arbitration.

The Respondent submits that the Claimant did not prepare the information for the winning bid as suggested by the Claimant. In support of this, the Respondent cites the Claimant's letter of 26 December 2005 in which the Claimant states that "*when your colleagues were preparing your offer, we were not consulted...We never received a copy of your complete offer*".

The Respondent disagrees with the Claimant's version of what happened on 5 August 2007 during the meeting attended by the representatives of the MEW, the World Bank and the Respondent. The Respondent contends that the meeting was arranged by the Claimant under false pretences. Mr Grosse of the Respondent was under the impression that he had been invited to a meeting with the Deputy Minister of the MEW to discuss issues of the project implementation. The Respondent asserts that issues relating to its agreement with the Claimant were outside the scope of Mr Grosse's competence.

The Respondent accuses Mr Shansab of the Claimant of having directed insulting remarks at Mr Grosse, the Respondent and the Russian Federation during the meeting, and relies on a witness statement by Mr Grosse..

The Respondent does not understand why the Claimant seeks to mislead the Tribunal by suggesting that it had not received the letter of termination from the Respondent until October. It is the Respondent's position that the letter of termination was sent by courier to the Claimant on 4 August 2006 and a reply was sent by the Claimant on 9 August 2006, followed by another reply on 22 August 2006.

6.3 **The Claimant's Reply**

The following is a summary of the Claimant's Reply to the SoD, given in the form of an extensive witness statement by Mr Shansab. In brief, Mr Shansab's witness statement argues that the Tribunal does have jurisdiction to hear this claim; the Claimant performed properly its obligations, which led to the success of the bid; and the termination of the Agreement was improper.

Mr Shansab states that he became aware of the Naghlu project in or around the winter of 2004-05. He was, at the time, the vice president of the Claimant. He wrote to Mr Valeri Ivanov, Head of the Russian Trade Mission in Kabul, in February 2005 and explained the nature of the project. Mr Ivanov is said to have then introduced Mr Shansab to the Respondent.

By letter dated 28 March 2005, the Respondent wrote to ACATCO for the attention of Mr Shansab in which it said, "*We suggest you as our subcontractor preparing offer for the construction of the above settlement and submitting it to us*".

Subsequently, Mr Shansab went to Moscow and met with members of the Respondent, including Mr Tatarnikov. This led to negotiations regarding an agreement between the parties.

By letter dated 11 April 2005, the Respondent wrote to ACATCO, requesting information. Mr Shansab points out that there was no qualifying language in that letter. Following receipt of that letter, Mr Shansab states that he gathered the information necessary for ACATCO to respond to the Respondent's requests. In this respect, it is understood that the Claimant had agreed to contract the local workers and assume the full management of their living arrangements.

It is Mr Shansab's contention that the Respondent did not express any other concerns about the costs quoted by Mir's/ACATCO apart from suggesting that the cost of feeding a Russian worker in Afghanistan per day seemed high.

By email dated 16 April 2005, Mr Shansab states that the Claimant provided more information to the Respondent, including that it would contract local workers and be responsible for them. The Claimant would also build the camp turnkey (with water well, pump, indoor plumbing) and manage the camp. It was also confirmed that all local workers, including service personnel, would be ACATCO's responsibility.

Mr Shansab submits that without the Claimant's/ACATCO's assistance, the Respondent would not have had the means to prepare the bid by the May 2005 deadline. It is understood that the Claimant was hired primarily to assist the Respondent in securing the Naghlu contract because of its past experience and expertise in such projects in return for a commission under the Agreement.

Mr Shansab points to the numerous communications between "ACATCO" (not Mir's) and the Respondent indicating that it was understood between the parties and accepted by the Respondent that ACATCO was the subcontractor. According to Mr Shansab, between March 2005 and April 2006 there was a constant and unequivocal discussion between the parties that ACATCO would perform the subcontracting work.

Mr Shansab submits that the Respondent was in no position to conduct meaningful competitive bids on local contracting works in Afghanistan as most Afghans are illiterate and the Respondent had no way of checking out whether they were bona fide contractors. On the other hand, Mr Shansab alleges that the Claimant was in a position to research which country would offer the best trained people at the least cost because it recognised that it needed to hire a number of technical personnel from abroad. It also undertook research on what laws applied for the workers concerned and under what conditions Afghan law would grant them working visas. Accordingly, it is the Claimant's position that without it or ACATCO, the Respondent had no ability to implement the project in a timely fashion as it did not have the mechanism to assemble a workforce in Afghanistan if and when it received a Letter of Acceptance.

Mr Shansab states that the Claimant and ACATCO were induced by the Respondent to do the work without which the Respondent could not have prepared the bid. The Claimant is also said to have provided valuable guidance and assistance in preparing the bid and maintained contact with the relevant decision makers after submission of the bid and was instrumental in assisting the bid gaining favourable consideration.

It is denied that the Respondent did not use Mir's/ACATCO's subcontracting costs as part of its bid. It is alleged that the Respondent divided up the costs and built part of them into its portion of the bid as it had no other basis for evaluating what anything cost in Afghanistan.

By letter dated 2 July 2005, Mr Shansab wrote to the Respondent about the agreement relating to subcontracting, setting out the Claimant's expectations. It is submitted by Mr Shansab that at that time the Respondent did not disagree with its proposition and even referred to ACATCO as its subcontractor. It was not until after it had met with the MEW in May 2006 that the Respondent allegedly changed its mind about using ACATCO as its subcontractor. Mr Shansab indicates that this was because the Respondent intended to do business with another party due to directions given by the MEW.

Mr Shansab denies claims by the Respondent that the Claimant did not do its job and submits that the Claimant successfully prepared the bid and there was nothing further that the Claimant could have done more favourably for the Respondent.

Mr Shansab submits that the Respondent had no idea of how to prepare a World Bank bid and that was the main reason it formed a relationship with the Claimant. The bid that was submitted by the Respondent had been drafted in the Claimant's offices in Kabul, during a three-week period in the spring of 2005 when the Claimant provided the Respondent with all the necessary facilities and support. The bid was then printed out at the Claimant's offices.

It is Mr Shansab's contention that he guided the Respondent on all aspects of the bid preparation and advised closely as to the language and composition of the bid as preferred by the World Bank. Further, it is alleged that the pricing of the bid was dependent on the Claimant's input. Otherwise the Respondent would not have submitted a bid on a "turnkey" basis. However, Mr Shansab states that the Respondent kept from the Claimant certain information underlying the bid. Whilst the Claimant was aware of the gross amount of the Respondent's bid, the Respondent did not break down the information for the Claimant. This is said to have limited the Claimant's ability to ascertain the full picture.

The Claimant, through ACATCO, allegedly supplied the costs for inland transportation, accommodation of Russian and non-Russian employees, security and complete management for over 40 months. The costs of all local works and Mir's/ACATCO-related work for the 40 months is said to have totalled approximately $6m (including one-off construction costs). The Respondent was not prepared to take on or manage non-Russian personnel. However, the vast majority of workers were Afghan. Accordingly, the Claimant and ACATCO had agreed to take that responsibility. The Claimant submits that it had also drawn up plans for the working and living settlement.

Mr Shansab stresses that the Claimant's role in the preparation of the bid was crucial. He submits that it took the Claimant and the Respondent's experts three weeks of daily work to complete the bid documents in time for the May 2005 deadline. Mr Shansab submits that the Respondent fails to acknowledge that any of this happened and points only to the period after, and not before, the bid was submitted. It is Mr Shansab's contention that without the Claimant's assistance, including the information supplied through ACATCO, the Respondent would not have been able to submit its bid by May 2005.

Mr Shansab submits that the Respondent's periodic communications to the Claimant following submission of the bid included complaints about the length of time the decision was taking, suggesting that the Claimant should do something to make the World Bank and the MEW rule more quickly on the competitive bids. In this respect, Mr Shansab refers to, *inter alia*, the Respondent's communication dated 12 April 2006 stating that "*Unfortunately, up to now we have no opportunity to appreciate the results of your work as the agent capable to influence on the decision of the World Bank or Tender committee...*". According to Mr Shansab, these communications were based on a sense of impatience and a fundamental lack of understanding of the World Bank tender process. The Respondent allegedly expected the Claimant to exert some kind of improper influence over the decision makers. According to Mr Shansab, trying to do so would have been fatal to the bid and telling the customer that it was taking too long to evaluate bids was simply nonsensical. It is the Claimant's contention that the Respondent failed to understand this.

Mr Shansab agrees that the World Bank deliberations on the bids took longer than expected. Once the bid was submitted there was little that the Claimant could do to bring about a decision by the MEW/World Bank. This was even more so as the Claimant indicates that the delay was caused by the Minister of Energy and Water, Ismail Khan. Minister Khan is said to have initially insisted on having his ministry do the evaluation of the project bids in order to keep the process under his control and safeguard his potential interests. However, Minister Khan may have given up his attempt to evaluate the bids due to a lack of necessary expertise and language capability amongst his staff. Subsequently, it is alleged that Minister Khan sent the documents to Germany to consultants hired by the World Bank, and they took responsibility for evaluating the bids. Accordingly, it is the Claimant's position that the delays were outside its control and that its approach was the correct and diplomatic approach in the circumstances.

Mr Shansab states that he respected the bid process in his interactions with the MEW/World Bank hence his email of 17 May 2005 to Mr Finley indicating that he had not asked for information about

the other bidders. Mr Shansab updated the Respondent who did not object at the time or assert that the Claimant's report was insufficient.

Mr Shansab denies the Respondent's contention that the Claimant was unhelpful after the Letter of Acceptance was issued. In particular, the Claimant submits that with respect to the taxes, nobody knew for certain how this was to be handled as it was the first time that this process had been implemented. This was ultimately resolved by a team from USAID and the cost of taxes was added to the project cost. Mr Shansab refers to the exchange of numerous letters and messages between TPE and Mr Shansab during April 2006 to illustrate what the Claimant did to assist the Respondent with respect to the issue of taxes etc. Additionally, the Respondent allegedly attempted to increase the price of the total bid and in doing so created problems with the World Bank/MEW which the Claimant successfully helped to diffuse. Subsequently, the Claimant wrote to the Respondent requesting that it keep the Claimant informed of its intentions in order to avoid the need for the Claimant to employ unnecessary pressure on the World Bank/MEW.

It is alleged that the Respondent failed to understand that it was required to sign the contract provided to it as the winning party, which failure is made clear by its requirement that the Claimant assist it in drafting a contract "acceptable to it". The Respondent reportedly refused to accept that, as part of the tender process, the World Bank had already drafted the contractual documents. According to Mr Shansab, this demonstrates the lack of substance behind the Respondent's allegation that the Claimant was not "doing its job".

Mr Shansab also states that the Respondent had agreed with the Claimant that the Claimant would be a subcontractor for the works through its affiliate, ACATCO. However, about a month after the Respondent had received the Letter of Acceptance it wrote to the Claimant by letter dated 29 May 2006 indicating that it had not decided to go with ACATCO as its subcontractor but that subcontractors would be chosen on a competitive basis. The Claimant responded pointing out that the Respondent would have found it impossible to prepare and submit an ultimately successful bid if it had not been for the Claimant. It also asserted that it would consider the Respondent's actions of negotiating with other parties as a breach of their agreement.

Despite their disagreements, the parties continued working together on issues arising out of the Contract, as evidenced by the communications between them. However, the Claimant wrote to the Respondent on 10 July 2006 inviting it to resolve their differences and requesting the Respondent's answer within a few days. On 17 July 2006, the Claimant wrote again to the Respondent stating that it had not received a response to its various offers to resolve their differences and indicated that it was making its final proposal and invited the Respondent to confirm the agreement to subcontract works on or before 19 July 2006, failing which the Claimant promised to contact the Russian Ambassador in Kabul to inform it of the parties' disagreement. Further, the Claimant provided that, should informing the Russian Ambassador fail to persuade the Respondent to adhere to its agreements, the Claimant would, on 22 July 2006, inform Mr Robert Finely and Mr Alex Werner at the MEW of the situation. Should the Respondent fail to give its unqualified confirmation on or before 24 July 2006, the Claimant intended to contact the World Bank on 25 July 2006 and inform it of the situation.

Mr Shansab states that the Claimant did not receive letters dated 12 and 18 July 2006 from the Respondent. This is confirmed in the Claimant's letter to TPE of 9 August 2006. In the letters, Respondent had requested the Claimant to assist the Respondent with issues regarding the Contract with the MEW/World Bank and also reiterated its position on subcontracting as stated in it letter of 29 May 2006. The Respondent also warned the Claimant that if it persisted with this issue before the Respondent executed its future contract with the MEW/World Bank, it would have to inform the authorities including those mentioned in the Claimant's communication of 17 July 2006 that it had no relations with the Claimant regarding the Naghlu project and that it would withdraw its letter of authorisation dated 22 April 2005.

Mr Shansab contacted the Russian Ambassador on 20 July 2006 and by letter dated 22 July 2006, he wrote to the MEW's procurement specialist informing them of the dispute between the parties.

By letter dated 3 August 2006, the Respondent wrote to the Claimant informing it that it had unilaterally terminated the Agreement. In response, the Claimant pointed out that the Respondent had to negotiate a financially acceptable separation as the Claimant's work had to be properly compensated. The Claimant continued to write to the Respondent and even asked for its share of the advance payment received by the Respondent but it received no response.

Mr Shansab states that by letter dated 29 September 2007 the Claimant made its final demand for payment from the Respondent. In that letter, it expressed its concern at the lack of payment from the Respondent in the light of information it had allegedly received that the Respondent was seeking to withdraw from the Contract. It also referred to the meeting held on 5 August 2007 at the office of the Deputy Minister of the MEW where Mr Grosse of the Respondent allegedly made some contradictory remarks concerning its failure to pay the Claimant's commission. One of those remarks accused the Claimant of having threatened the Respondent. The Claimant denies the allegations.

Mr Shansab states that on 21 October 2007 the Claimant was summoned by the criminal division of the police in Afghanistan on a matter concerning the Respondent. This was followed, says Mr Shansab, by receipt of a letter from the Respondent dated 17 October 2007 attaching a copy of the letter of 3 August 2006 purporting to unilaterally terminate the Agreement between the parties. Mr Shansab contends that the way this letter was delivered to the Claimant was unconventional because the man who delivered it interrupted the Claimant's dinner party. According to Mr Shansab, the message intended to be conveyed to the Claimant by the Respondent was: "*we know where you live; we can reach you whenever we want; we can do whatever we want*". The Claimant believes that both the Respondent and Minister Khan attempted to intimidate it by using the police.

Mr Shansab disagrees with the Respondent's account of what happened at the meeting of 5 August 2007, and, in particular, with the Respondent's assertion that Mr Grosse was not competent to speak on matters raised at the meeting of 5 August 2007. As far as Mr Shansab is concerned, Mr Grosse had sufficient knowledge to state that the MEW had instructed the Respondent not to work with the Claimant.

It is Mr Shansab's contention that the Respondent is unjustly enriched by keeping the Claimant's commission. Further, he submits that the "compensation provision" (Article 4.1) in the Agreement is not subject to the "termination provision" (Article 8.5) and that accordingly, the two must be read together. He further submits that the termination of the Agreement was based upon false grounds and therefore improper.

Mr Shansab denies that he has been disrespectful to the Russian Federation or that he has something against Russians. He points to the fact that it was he who sought out a Russian company for this project and that he did all he could to promote the Respondent.

Mr Shansab denies the Respondent's allegation that the Claimant violated the confidentiality provision (Article 5) of the Agreement. He submits that this provision is far narrower than suggested by the Respondent and that it applies only to information submitted under the Agreement and the originator of the information is not obliged to keep anything confidential. In any event, Mr Shansab denies that the Claimant or ACATCO received or shared confidential information from the Respondent and submits that the Respondent has not given any specific examples of such violations. Mr Shansab states that ACATCO's communications to parties other than the Respondent did not include any confidential information about it; the communications discussed information that ACATCO was entitled to share with anyone it pleased; and the

communications were directed to persons who were already involved, i.e. the Russian Mission, the MEW and the World Bank.

Mr Shansab denies the Respondent's allegation that its goodwill was damaged.. He contends that the Respondent has failed to illustrate existence of any goodwill or any damage to the alleged goodwill. It is Mr Shansab's position that the Claimant helped the Respondent gain the Letter of Acceptance and provided it with the necessary assistance to get the Contract with the MEW/World Bank.

With respect to the Respondent's allegation of lack of jurisdiction, Mr Shansab states that the Claimant disagrees with this position. He submits that the Claimant has not asked the Tribunal to award separate damages to ACATCO but rather submits that the Respondent breached the Agreement with the Claimant because it was trying to back away from its subcontracting arrangement with ACATCO. Accordingly, the Claimant seeks payment of its commission.

Mr Shansab submits that the Tribunal cannot disregard references to ACATCO, the World Bank or the MEW as they are part of the fact pattern.

Mr Shansab disagrees with the Respondent's contention that the Claimant was trying to "pass off" ACATCO's involvement as its own. He submits that it was part of the Claimant's role as agent to utilise its contacts to support a viable bid/project. Accordingly, it made no difference with whom the Claimant coordinated its efforts because its activity would still be the Claimant doing its job as an agent.

Mr Shansab also disagrees with the Respondent's contention that the Claimant did not prepare "reports". He submits that the Respondent did not specify the form required for "reports", nor did the Respondent complain to the Claimant that any particular communication from the Claimant/ACATCO was insufficient.

6.4 **Respondent's Rejoinder**

Here follows a summary of the Respondent's Rejoinder to the Claimant's Reply.

The Respondent denies that it only learnt about the Naghlu project through the Claimant or that it was through the Claimant's assistance that the Respondent was able to win the tender. It is the Respondent's contention that it found out about the project through browsing the World Bank's website, something which the Respondent regularly does. It also argues that it was impossible for the Respondent to be unaware of the project as two years previously it had entered into a contract with the MEW for the supply of spare parts for equipment installed at the Naghlu plant. The Claimant is also said to have been aware of this fact as it is referred to in Mr Shansab's witness statement.

Additionally, the Respondent furnishes evidence that it has vast experience of working in international markets both in Asia generally and in Afghanistan in particular. It contends that there is no proof of the Claimant's alleged over 30 years' experience in international development.

The Respondent submits that the Claimant was not the only one approaching it with an offer to co-operate on the Naghlu project. It was approached by another company, before the Claimant did, and the Respondent chose its agent amongst several possible agents.

The Respondent denies that it needed an agent because it lacked operational experience in the field or that it was unable to prepare the tender documentation. It submits that it needed a competent local representative in Afghanistan in the conclusion and implementation of the expected contract with the MEW/World Bank.

With respect to the preparation of the bid, the Respondent maintains that the Claimant's functions were very limited, contrary to what was stated in Mr Shansab's witness statement. The

Respondent asserts that the Claimant provided information regarding just a small part of the subject matter, i.e. the cost of construction of the workers' settlement and transport services.

It is the Respondent's position that transportation and accommodation of personnel were not functions that were at the top of the list of works expected to be performed under the Agreement. To illustrate this, the Respondent has exhibited a copy of part of Section IX of the Bid Schedule which contains a list of subcontracts. The Respondent points out that ACATCO was not on that list, and the Claimant became aware of this fact only after the Letter of Acceptance was issued. Accordingly, the Respondent disagrees with the Claimant's contention that it took an active part in the preparation of the bid.

The Respondent denies Mr Shansab's contention that the Claimant guided the Respondent on all aspects of the bid preparation and advised closely as to language and composition of the bid. The Respondent refers to the Claimant's email of 26 December 2005 in which it states that "*when your colleagues were preparing your offer, we were not consulted*" to demonstrate that the Claimant was not aware of the contents of the bid and was accordingly not involved in its preparation.

The Respondent denies that the bid was drafted in the Claimant's offices in Kabul during a three-week period. It alleges that two of the Respondent's employees were in Kabul on a business trip but spent only three days, not three weeks, there. The purpose of the trip to Kabul was to hold negotiations with an Iranian contractor. The Respondent submits that a tender for the project cannot be prepared from scratch in three days.

With respect to the issue of taxation, the Respondent agrees with Mr Shansab's contention that the project was exempt from tax at the time the project was announced. The requirement for tax to be paid was mentioned for the first time in the Letter of Acceptance. However, the Respondent turned to the Claimant for assistance on this issue and the Respondent maintains that the Claimant failed to provide qualified assistance as required by Articles 2.1.3 and 2.2 of the Agreement. The Respondent compares the difference between what was provided by the Claimant by way of advice on taxes and what was actually incorporated into the Contract and concludes that the difference in tax is almost two and a half times. The Respondent maintains that this is an illustration of how the Claimant failed to perform its role as agent under the Agreement.

It is the Respondent's contention that the Claimant was indifferent towards its role as agent. The Claimant failed to properly perform its role during the evaluation process and the performance of the Contract. The Claimant was not supposed to assist the Respondent in familiarisation with the World Bank procedures and principles of bid preparation, which the Respondent knows very well from its previous experience of working with the World Bank. According to the Respondent, the Claimant was supposed to assist it in communicating with the MEW in order, *inter alia*, to secure timely payment of the Respondent's invoices. The Claimant was to earn its high commission through the performance of services and not for the submission of information, which in any event proved to be false or inapplicable to the Respondent.

The Respondent maintains that it had to keep writing letters to the Claimant to get it to properly perform its functions as agent. However, the Claimant did not inform the Respondent that it had any contacts with the MEW and failed to report on the progress of the consideration of the bid.

The Respondent questions why the Claimant did not earlier provide the Respondent with its analysis of the position in as much detail as described in Mr Shansab's witness statement. According to the Respondent, it received only short formal replies from the Claimant, saying that there was not much to report on at the time. The Respondent disagrees with the Claimant's position that it did not give the explanations in detail because the Respondent "*never asked for more detailed information*". It submits that it was the Claimant's obligation pursuant to Article 2.9 of the Agreement to submit written reports on a regular basis to the Respondent and not an obligation on the Respondent to ask for such reports.

The Respondent contends that it knew nothing about the alleged interest of the MEW in delaying the evaluation process. If the Claimant knew about this, it was obliged at least to inform the Respondent so as to give it the opportunity to assess the situation.

With respect to the issue of the increase of the bid price by the Respondent alluded to by the Claimant, the Respondent explains that a sharp rise in market prices for construction materials and spare parts meant that the bid made by the Respondent no longer included the expected margin of profit. The Letter of Acceptance was issued in April 2006, but the approval process lasted until December 2006 when the Contract was signed. During this time the Respondent submits that it incurred losses due to the price increase. It found it impossible to conclude contracts with sub-contractors. As such, by the time the Contract was signed in December 2006 the Respondent was ready to refuse it. The reason it felt obliged to go ahead with the Contract was not only its commercial aspect, but also the political one. The Respondent submits that signing the Contract was an example of Russian-Afghan co-operation, seeing that the Respondent's major shareholder is the Russian state and the Respondent was obliged to take into consideration the Russian state's interests.

The Respondent contends that the Claimant failed to perform its duties under Article 2.2 of the Agreement to defend the Respondent's interests by trying to persuade the World Bank of the necessity to at least consider the Respondent's request for a price increase. In failing to explain the Respondent's position to the World Bank, the Claimant has caused direct damage to the Respondent's interests.

The Respondent accuses the Claimant of only being interested in securing a signature on the Contract, despite the terms being disadvantageous to the Respondent. This, the Respondent submits, was a violation of the terms of the Agreement by the Claimant. The Respondent also cites the Claimant's choice of payment terms in the tender as a further demonstration of the Claimant's failure to uphold the Respondent's interests. The Claimant allegedly did nothing to help the Respondent despite the Respondent's letter of 12 July 2006 requesting the Claimant's assistance on the issue of payment terms.

The Respondent maintains that the Claimant is not entitled to any commission in the light of its performance under the Agreement. The Claimant's performance was destructive and did not properly represent the Respondent's interests. The Respondent contends that the Claimant acted more for the benefit of the World Bank than for the Respondent. As an example of the Claimant's failure to act for the benefit of the Respondent, the Respondent refers to Mr Shansab's trip to the USA in April 2006 immediately following receipt of the Letter of Acceptance. This was a time when close interaction between the World Bank/MEW and the Claimant should have been effected in order to negotiate the final terms of the Contract with a view to executing it speedily. Although the Agreement was between the Respondent and the Claimant, the Respondent submits that it knew only Mr Shansab from the Claimant, and as far as it was aware there was no other qualified employee at either Mir's or ACATCO.

The Respondent asserts that Mr Shansab represented to it that Mir's and ACATCO were the same company and points to the fact that the Claimant's submissions in this arbitration refer to both Mir's and ACATCO although the Agreement was signed by Mir's only.

The Claimant's references to ACATCO as subcontractor in its submissions are considered irrelevant for the purposes of the present case because the Agreement in dispute is between Mir's and the Respondent.

The Respondent accuses the Claimant of having provided it with false information. It refers to a letter dated 15 June 2006 to the Claimant from the Respondent in which the Respondent requested the Claimant's assistance in exploring the procedures for opening up and registering project offices in various organisations in Afghanistan. In its response of 28 June 2006, the

Claimant informed the Respondent that it did not see the need to register with various organisations because having a contract with the government entitled it to work in the country. However, the Respondent found out that the Claimant's advice was erroneous on the basis that any person carrying out business in Afghanistan on a long-term basis is required to be registered at least with the tax authorities in Afghanistan.

In spite of the termination of the Agreement on 3 August 2006, the Respondent submits that it was prepared to resolve its differences with the Claimant when it wrote to the Claimant on 22 August 2006 welcoming the possibility of discussions in Moscow. However, the Claimant's response was to threaten the Respondent that it would file a lawsuit against it for breach of the Agreement and fraud.

The Respondent contends that the provisions providing for unilateral termination of the Agreement at Article 8.5 of the Agreement conform to the procedure of unilateral rescission of a contract under paragraph 3 of Article 450 of the RFCC. Thus, a contract may be rescinded unilaterally in circumstances where the parties have agreed to do so. The Respondent submits that Article 8.5 of the Agreement entitles it to terminate the agreement if the agent fails to perform "any of his obligations", "fails to respond to written demand" and notification of termination to the Agent is in "written form". The Respondent asserts that all these criteria were met.

With respect to "any obligations", the Respondent maintains that the Claimant violated the following provisions of the Agreement: Article 2.1.3 in failing to render assistance to the Respondent on legislation and other regulatory documents of Afghanistan; Article 2.1.4 in failing to render assistance in the furtherance of positive consideration by the World Bank; Article 2.1.5 in failing to render assistance in the prompt signing of the Contract with the MEW on the terms and conditions acceptable to the Respondent; Article 2.9 in failing to submit any written reports to the Respondent on the progress of the work; and Article 5 in failing to maintain confidentiality.

With respect to failure to "respond to written demand", the Respondent contends that it repeatedly asked the Claimant to remedy its failure to duly perform its obligations but the Claimant did not remedy the situation. The Respondent submits that it served a written notice to the Claimant by letter of 3 August 2006 terminating the Agreement in accordance with Article 8.5.

It is the Respondent's position that because Article 8.5 gives the Respondent "*the right to terminate this Agreement unilaterally without any obligation on his part...*" it follows that the Respondent is not obliged to pay any compensation or commission to the Claimant. Further, even if the Claimant was entitled to remuneration or commission following termination, the Respondent argues that such remuneration would be based on the amount actually received by the Respondent at the time of the termination of the Agreement because Article 4.1 of the Agreement provides that the Respondent "*Shall pay to the Agent for the services rendered by him under this Agreement...a commission to the extent of 5%...of the full amount actually received by TPE in foreign currency under the Contract*".

According to the Respondent, at the time of termination of the Agreement it had not received any payments under the Contract, and the Contract had not been signed. Receiving the Letter of Acceptance did not mean in itself that any contract would be executed. The Contract entered into force only four months after the Agreement was terminated.

The Respondent submits that the Agreement did not provide for payment to the Claimant after termination. In support of this contention, the Respondent cites Article 453 of the RFCC which provides "*upon rescission of a contract, the obligations of the parties shall be terminated*".

With respect to the relief sought by the Claimant, the Respondent contends that the Claimant is not entitled to seek relief against "*the performance bond posted by TPE*" or "*prohibiting the World Bank from paying any more monies...to ...others and/or prohibiting...MEW from receiving any money*

from the World Bank" because under the Agreement the Claimant was only entitled to payment of the commission from money which is credited to the Respondent's account and received from the MEW. Accordingly, the Claimant is not entitled to any other amounts.

7. THE PARTIES' POSITIONS AS DEVELOPED AT THE HEARING

At the hearing, Mr Hill, as Counsel for the Claimant, declared that the claims for interim relief and security were no longer being pursued. The Claimant's exact claim for damages or relief based on the other theories advanced was defined to be US$1,627,150 based on a Contract price of US$32,543,005. It was also explained that the Contract price net of tax was US$30,553,461. The interest claimed was specified as follows:

Mir's requests pre award/post award interest at the Russian discount rate of 8.35% p.a. or, in the alternative, a rate that this Tribunal deems just and appropriate. Mir's also seeks reimbursement of its advance on costs paid to the SCC institute, €64,500. Mr Hill further gave payment dates as per the terms of payment under the Contract. The first payment of US$6,944,677.27 was made on 3 October 2006, the next payment of US$4,735,007.23 was made on 4 August 2008 and a further US$3,156,671.49 was paid on 12 January 2009.

During the hearing the parties agreed that Swedish interest rates, meaning the interest provided for under the Swedish Interest Act were applicable to any sum awarded under the principal claim, with interest accruing from the date of the award.

In summing up, the Claimant's Counsel underlined that the termination of Claimant as agent under the Agreement had been wrongful and relied on RFCC article 978 under which, if a contract of commission is terminated before the commission is performed by the attorney in full, the principal shall compensate the attorney for the costs incurred when performing the commission and also pay remuneration commensurate with the work fulfilled by him. Therefore, in the Claimant's submission, if the termination was lawful, Claimant was still entitled to a commission. If it was wrongful, then Claimant is entitled to damages.

Counsel for the Respondent summed up by underlining that no money had been paid under the Contract by the time of the termination of the Agreement, so no commission could be due. After termination, the Claimant had no rights to receive any payment. This was directly provided for in Article 8.5. The Respondent also developed its theory with respect to the statute of limitations, now focusing on the circumstance that, in the Respondent's submission, the invalidity of the termination had not been claimed within the three years required under the applicable statute of limitations. When developing the legal arguments why Claimant could not be entitled to any commission, Counsel for the Respondent focused as a main argument on the submission that Claimant had breached the agreement by working against the principal. Further, Claimant, as opposed to Mr Shansab, had not demonstrated that it performed any work at all.

It was confirmed by both parties that the Agreement must be considered as a mixed contract of services and agency.

8. REASONS FOR THE AWARD

8.1 Applicable law; jurisdiction

It is common ground that, in accordance with Article 7.2 of the Agreement, Russian law is applicable as the substantive law. The Tribunal has not found any sufficient reason for the bifurcation of the arbitration and determines that it is competent to adjudicate the Claimant's claim against the Respondent. No claim has been advanced on behalf of ACATCO, and the Tribunal disregards all irrelevant facts regarding ACATCO and its expectations that have been introduced into the case.

8.2 The Claimant's status

The Tribunal is satisfied that the Claimant has been validly represented in these proceedings and is an existing legal entity able to bring the action which is now before the Tribunal.

8.3 **Was the Agreement terminated wrongfully?**

The Agreement was terminated after the Respondent had been accepted as the contractor for the rehabilitation of the Naghlu Hydro Power Station but before the Contract was signed. The Respondent has relied on the strong language of Article 8.5, which has been quoted above at paragraph 5.1, giving TPE the right to terminate the Agreement unilaterally if the Agent fails to perform any of his obligations and "fails to respond to written demand". In its termination letter of 3 August 2006 (the "Termination Letter"), TPE referred to a previous letter of 18 July 2006, which had been sent, as TPE formulated it, "to you through ACATCO". It is appropriate to note in this context that the Tribunal considers it irrelevant if communications were sent to or from Mir's, ACATCO or Mr Shansab. Both sides appear to have considered these options to be of equal usefulness and effect, which is unsurprising in view of Mr Shansab's position in each of Mir's and ACATCO. This conclusion implies that the distinction that the Respondent has tried to draw between the activities of Mr Shansab, ACATCO and Mir's (in particular concerning Mr Shansab and Mir's) has not been considered relevant for the resolution of this dispute. Reverting now to the Termination Letter, the Tribunal notes that, after citing certain provisions on the Agreement, TPE refers to its earlier letter of 18 July 2006, which contains a general statement that the addressee (ACATCO or Mr Shansab – the letter is addressed to ACATCO for Mr Shansab's attention) has failed to perform their obligations under the Agreement. The Termination Letter added to the general complaint by saying that "the Agent has also failed to perform his obligations as per Article 2.9 of the Agreement as since July 2005 TPE has not received a single written report on the progress of the Agent's work". The letter went on to complain that Mir's had acted to receive advantage by trying to get sub-contracts for the Project before there was any signed contract with the employer, which constituted a deliberately delaying action in respect of the signing of the Contract, bringing possible financial losses on TPE. The letter further concluded that the agent had taken actions directed against the interest of TPE, and consequently TPE declared the Agreement terminated as from the date of the letter. The Claimant has denied receiving any written demand from TPE requiring it to cure any failure to live up to all of its obligations. The letter of 18 July 2006 relied on by TPE is in any event formulated in too general terms for it to serve as a warning under Article 8.5. Nevertheless, the Tribunal will examine the breaches alleged by TPE in order to examine if they would justify the termination of the Agreement.

8.4 **Duty to provide a report**

Before turning to the additional grounds for termination that TPE has relied on in the arbitration, the Tribunal will examine whether the grounds relied on in the letters of 18 July and 3 August 2006 are valid grounds for termination of the Agreement. First, the Tribunal finds that the general statements made in the letter of 18 July 2006 are not specific enough to be used as grounds for termination of the Agreement. With respect to the reporting requirement, the Tribunal notes that the Agreement does not provide any detail as to the contents or format of the reports. During the arbitration, the Claimant has objected that TPE never requested any reports and did not specify any format, contents or timing in that context. At the same time, the materials submitted in the arbitration include a large number of communications from Mr Shansab or Mir's, which may qualify as reports on the progress of activities related to the Project. TPE has failed to analyse these communications in order to establish whether or not they should qualify as reports. Nor has TPE been specific in any objections as to the timing of the communications, i.e. whether they were regular and quarterly as at least nominally required by Article 2.9 of the Agreement. TPE's statement in the Termination Letter that "since July 2005 TPE has not received a single written report on the progress of the Agent's work" is factually incorrect if the written communications,

copies of which are in the record of this arbitration, are considered as "reports", and the Tribunal has not seen any evidence why they should not be.

In light of the generality of the Agent's obligation to provide reports, the lack of significance obviously attached by both parties to this provision while the Agreement was in force, and the existence of certain reporting in writing by the Claimant, the Tribunal concludes that the Respondent has not been justified in terminating the Agreement on the basis of any breach by the Claimant of its obligation to provide reports.

8.5 **Other breaches relied on by the Respondent**

The termination letter of 3 August 2006 also raised the question of the sub-contracts for the project and referred to the manner in which, as evidenced by other correspondence from the summer of 2006, Mr Shansab had tried to ensure that his organisations became involved as sub-contractors for the Project. It is clear that there could be a conflict between Mr Shansab's interests and those of TPE, and it needs to be determined if the activities undertaken on the Claimant's side could justify the termination of the Agreement. Here, the Tribunal takes the view that against the background of the history of the Project and the manner in which TPE and Mir's became involved as partners in it, it must be considered permissible for Mir's and Mr Shansab and ACATCO to take an active interest in being awarded sub-contracts on the basis of the cost estimates prepared by them on TPE's invitation. At the time when the estimates were prepared, TPE had not declared that the costing, the drawings and the general preparations for logistics and personnel facilities, etc. were not a genuine business enquiry but merely a costing exercise. TPE must therefore accept that Mir's and Mr Shansab pressed for a positive resolution, from their point of view, of the sub-contracts in question. This also excused the contacts which Mr Shansab and Mir's established with the Russian Embassy and the MEW. The Tribunal finds that there could be no relevant breach of confidentiality through the contacts initiated by Mir's with the Russian Embassy and MEW, which can hardly be considered as third parties in the context of the Project, and TPE has not demonstrated that the information divulged by Mir's was proprietary to TPE and not Mir's . It is also noteworthy that the subject matter raised by Mir's in that connection related not specifically to the Agreement but to the broader Project, for which Mir's had been invited by TPE to provide input as a potential sub-contractor, directly or through ACATCO, its affiliate. Moreover, Respondent not alleged it suffered any damage flowing from Claimant's alleged breaches.

8.6 **The statute of limitations**

TPE has relied on the time passing between the acts of TPE giving rise to the claim (the possibly wrongful termination) and the instigation of arbitration proceedings. However, the claim is not for a declaration concerning the right to terminate but for the payment of money, and the action has been brought by the Claimant within the relevant period of three years. Consequently, the defence based on the Russian statute of limitations fails.

8.7 **Has the Claimant performed sufficient work to satisfy the requirements of the Agreement?**

As a point of departure, the Tribunal notes that the Agreement has strong characteristics of agency, rather than services. This conclusion is based on the designation of the Claimant as the "Agent" and the form of remuneration, which is by a commission, which is characteristic of agency but not of service agreements. Furthermore, even when contemplating the termination of the Agreement, TPE referred to the Claimant as its Agent. For instance, in the termination letter, TPE writes: "We can no longer have your services as our Agent for the Project". The provisions in the Agreement are not specific in delineating the agent's duties. The focus is on the tender for the Project and the signing and performance of the Contract. Against this background, little significance can be attached to such locutions as "maximum assistance", "all necessary assistance" or "all possible measures".

According to the Respondent, the Claimant failed to perform its obligations. In particular, the Respondent submits that the Claimant failed to:

(a) adequately render assistance to it with respect to Afghan legislation and regulatory documents;

(b) render assistance in the furtherance of positive consideration by the World Bank;

(c) render assistance in the prompt signing of the contract on terms acceptable to the Respondent;

(d) defend its interests and create the most favourable conditions for TPE's activity;

(e) regularly submit written reports on progress of work; and

(f) maintain confidentiality.

With respect to the services provided, it is the Claimant's position that apart from providing the Respondent with information on taxes, it also supplied it with information on costs for inland transportation, accommodation of employees, security and management. In this regard, the Respondent maintains specifically that the Claimant failed to provide qualified assistance with respect to taxes in accordance with Article 2.1.3 and that the Claimant's contribution was generally limited to the provision of construction costs of the workers' settlement and transportation services.

The Tribunal has noted the Claimant's submission that it used its experience with the World Bank to guide the Respondent in all aspects of the bid preparation, including advising it as to the language and composition of the bid and providing the Respondent with all necessary facilities and support. It is also the Claimant's position that it maintained contact with the relevant decision makers after submission of the bid and was instrumental in the bid gaining favourable consideration. However, once the bid was submitted, there was little that it could do to bring about a favourable outcome for the Respondent.

The activities evidently undertaken by the agent up to the submission of the bid are, in the Tribunal's opinion, sufficient to demonstrate adequate performance by the Claimant of its duties as agent. With respect to the period between the submission of TPE's bid and the award of the Acceptance Letter, the Tribunal finds the Claimant's approach well considered, especially against the background of the fact that the Contract was ultimately awarded to TPE in spite of its demands for added interference by the Claimant in the evaluation process. It is true that during the period between the issuance of the acceptance letter and the termination of the Agreement, the conduct of the Claimant was tainted by the conflict over sub-contracts and the more extensive interest in the project that Mr Shansab contemplated. Nevertheless, no evidence has been found of any genuine agency duties that were left unfulfilled by the Claimant during this period. It has been noted that TPE expected more accurate or complete tax advice than was provided by the agent. On the other hand, it has been demonstrated by the materials submitted by the Respondent that specialist services were indeed required, and the taxation situation itself was fluid, so no justified criticism can be directed at the Claimant with respect to the limitations of its advice on taxes and duties.

8.8 **Compensation payable to the Claimant**

As noted above, the parties share the view that the Agreement is of a mixed nature, including elements of agency and a service agreement. The Respondent has underlined, correctly, that no commissions were yet due at the time of the termination. However, the termination deprived the Claimant of the right to earn a commission, payable when TPE was paid. The Tribunal finds that based on the wrongful termination, it must award damages to the Claimant, rather than require an accounting of commissions based on the terms of the Agreement. In evaluating the size of the damages, the Tribunal attaches importance to the objections raised by the Respondent based on

the extent of the services and assistance provided by the Claimant, and there is no doubt that the Claimant's resources were freed up for application to other business following the termination of the Agreement. The Tribunal finds it is justified in these circumstances not to award the entire sum claimed by the Claimant but to reduce it to a sum which reflects the limited services provided by the Claimant while also taking into account the fact that in an agency situation, the reward of an agent may appear to be generous in light of the limited activity required of the agent, but the agent also takes the risk that his considerable effort and involvement might be completely unrewarded in cases where the principal does not succeed in landing the business. Consequently, the Tribunal has determined that the proper remuneration of the Claimant in these circumstances shall be US$800,000.

8.9 **Interest**

Considering that the sum due to the Claimant could not be paid until determined through this arbitration, no pre-award interest will be awarded, but post-award interest will be due to the Claimant under the provisions of the Swedish Interest Act, which means that interest shall be payable at a rate corresponding to the official Swedish reference rate increased by 8 percentage points.

8.10 **Costs of the Arbitration**

Each party has requested the Tribunal to order the other party to compensate it for its costs in this arbitration including costs for legal representation and to bear, as between the parties, the arbitration costs including arbitrators' fees and the administrative fee of the SCC Institute.

Under Article 44 of the SCC Rules the Tribunal may, upon the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case and other relevant circumstances. In this case, the Claimant has been successful in establishing liability, but has been awarded approximately one half of the claimed sum. Both parties have submitted cost claims in reasonable amounts. Having regard to the outcome of the dispute, the Tribunal finds it reasonable that TPE, which has lost on liability and raised numerous non-productive issues after the end of the hearing, should bear its own costs of legal representation and reimburse Mir's one half of its costs, rounded to an appropriate sum. With respect to the costs of the arbitration under Article 43 of the SCC Rules, the Tribunal shall, as requested by the parties, apportion them between the parties, having regard to the outcome of the case and other relevant circumstances. In the light of the outcome of the case and the time spent by the Tribunal handling the several issues raised by the parties, the Tribunal rules that the parties shall share the costs of arbitration equally.

9. SPECIFIED CLAIMS FOR COSTS AND INTEREST

9.1 **The Claimant's claim for costs**

As mentioned, each party has requested the Tribunal to order the other party to compensate it for its costs in these arbitral proceedings including the advance paid to the SCC, costs for legal representation and to bear, as between the parties, the arbitration costs, including the arbitrators' fees.

The Claimant seeks the following legal expenses:

Date(s)	Activity	Time spent	Amount ($)
June 2007/March 2009	Intro/Initial Research	33 hours	9,900.00
	Correspondence	58 emails (at 15 mins)	4,350.00
April 14, 2009	Request for Arbitration	8 hours	2,400.00
May 2009 - Dec 2009	Correspondence	23 emails (at 15 mins)	1,725.00
September 7, 2009	Comments on Answer, timetable, Statement of Claim	9 hours	2,700.00
October 9, 2009	Statement of Defence	4 hours	1,200.00
November 5, 2009	Claimant's Reply/Witness Statement	80 hours	24,000.00
November 26, 2009	Supplemental Witness Statement	4 hours	1,200.00
December 17, 2009	Rejoinder	4 hours	1,200.00
Jan 5 – Feb 4 2010	Hearing/Prep/Travel/Post Hearing	120.5 hours	36,150.00
Total		**282.75 hours**	**84,825.00**

The Claimant seeks the following Arbitration costs:

Costs incurred by Mir's/N Shansab	Amount
SCC Institute	EUR 64,500
Hotel/food (including meals with counsel)	US$1,521.00
Airfare	US$1,025.00
Ground transport (taxi/train)	US$50.00
Costs incurred by Counsel and paid by Mir's	**Amount ($)**
Hotel food	1,270.85
Internet	207.08
Airfare	1,106.00
Ground transport	150.00
European cell phone rental	139.00
Phone calls	56.65

Subtotal	**2,929.58**
Arbitration/Hearing Preparation	**Amount (US$ unless specified otherwise)**
Enlargements/copying	144.00
Mailing (Claimant Reply)	354.00
Research materials	278.00
Subtotal	**776.00**
GRAND TOTAL	**6,301.85** **EUR64,500**

9.2 **The Respondent's claim for costs**

SCC Institute	**Amount (Rubles)**	**Amount (EUR)**
Advance on costs		64,500.00
Attorney Expenses	**Amount (Rubles)**	**Amount (EUR)**
Representation		61,350.00
Recovery of expenses including participation in hearing	89,034.55	2,117.35
Expenses for participation in hearing	**Amount (Rubles)**	**Amount (EUR)**
Air tickets and hotel accommodation	176,820.31	4,205.00
GRAND TOTAL	**265,854.86**	**132,172.35**

9.3 **Interest**

The Claimant seeks prejudgment interest in the sum of $357,617.16 for the period 31 October 2006 to 31 October 2009 and $32,365.08 for the period 1 November 2009 to 1 March 2010, and running, at the rate of 6% or at a rate that the Tribunal deems just and appropriate.

The Claimant has provided an alternative interest calculation, but this will not be set out here because the Tribunal has decided not to award pre-award interest. The foregoing claim is provided for completeness of the case.

10. AWARD

ON THE BASIS OF THE ABOVE,

THE ARBITRAL TRIBUNAL:

(1) Orders Joint Stock Company TECHNOPROMEXPORT to pay Eight Hundred Thousand (US$800,000) United States Dollars to Mir's Limited immediately, plus interest from the date of this Award until payment, computed at a rate equal to the Swedish official reference rate increased by eight percentage points;

(2) declares that the parties are jointly and severally liable for the payment of the costs of this Arbitration, which have been determined as follows:

The fee of Per Runeland, chairman, amounts to EUR 39,439 and compensation for expenses amounts to EUR 2,252 plus a per diem allowance of EUR 1,000.

The fee of Yasmine Lahlou amounts to EUR 23,663 and compensation for expenses amounts to EUR 2,143 plus a per diem allowance of EUR 1,500.

The fee of Alexey A. Kostin amounts to EUR 23,663 and compensation for expenses amounts to EUR 232 and SEK 495 plus a per diem allowance of EUR 1,500.

The Administrative Fee of the SCC amounts to EUR 14,947.

As between the parties, the arbitration costs shall be borne in equal shares. The arbitration costs will be drawn from the advances paid to the SCC.

(3) Orders Joint Stock Company TECHNOPROMEXPORT to bear its own costs of legal representation (fees and disbursements) and immediately to pay to Mir's Limited Forty-five Thousand United States Dollars (US$45,000) representing costs of legal representation including fees and disbursements.

(4) All other claims and requests are denied.

11. **HOW TO APPEAL IN RESPECT OF CERTAIN COSTS**

Under Section 41 of the Swedish Arbitration Act, a party may bring an action against the Award in respect of the remuneration of the arbitrators. A party having reason to challenge the Award in this