

EXHIBIT 1



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AWARD

**INTERNATIONAL CHAMBER OF COMMERCE (ICC)
INTERNATIONAL COURT OF ARBITRATION**

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ICC INTERNATIONAL COURT OF ARBITRATION

CASE No. 19299/MCP

- 1. GUJARAT STATE PETROLEUM CORPORATION LIMITED (India)**
- 2. ALKOR PETROO LIMITED (India)**
- 3. WESTERN DRILLING CONTRACTORS PRIVATE LIMITED (India)**

vs/

- 1. REPUBLIC OF YEMEN (Yemen)**
- 2. THE YEMENI MINISTRY OF OIL AND MINERALS (Yemen)**

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

ICC ARBITRATION No. 19299/MCP

10 JULY 2015

1. GUJARAT STATE PETROLEUM CORPORATION LIMITED (India)
 2. ALKOR PETROO LIMITED (India)
 3. WESTERN DRILLING CONTRACTORS PRIVATE LIMITED (India)
- Claimants

v.

1. REPUBLIC OF YEMEN (Yemen)
 2. THE YEMENI MINISTRY OF OIL AND MINERALS (Yemen)
- Respondents

FINAL AWARD

Arbitral Tribunal

Philippe Pinsolle
Bernard Rix
Laurent Lévy (President)

Administrative Secretary to the Arbitral Tribunal

Rahul Donde

TABLE OF CONTENTS

TABLE OF ABBREVIATIONS	4
I. INTRODUCTION	6
A. The Parties and the Tribunal	6
1. The Claimants.....	6
2. The Respondents	7
3. The Tribunal.....	8
B. Summary of the Main Facts	8
1. The Claimants' investment in Yemen	8
2. The PSA terms	9
3. Declaration of Force Majeure and Termination of the PSAs	11
C. Procedural History	13
1. The Constitution of the Tribunal and the Appointment of the Secretary	13
2. The Written Phase	14
3. The Oral Phase.....	16
4. The Post-Hearing Phase.....	17
II. POSITIONS OF THE PARTIES AND RELIEF REQUESTED	18
A. The Claimants' Position	18
B. The Claimants' Request for Relief	19
C. The Respondents' Position	20
D. The Respondents' Request for Relief	20
III. ANALYSIS	21
A. Preliminary Matters	21
1. Preliminary Issues	22
2. Parties to the PSAs.....	24

3. Interpretation of the PSAs.....	29
4. Evidence of Witnesses	31
5. Adverse Inferences from Non-Production of Documents.....	34
B. Termination of the PSAs for Force Majeure	40
1. Did Force Majeure event(s) occur?.....	41
2. Where did the Force Majeure event(s) occur?.....	64
3. How long did the Force Majeure events(s) last?.....	67
4. Did the Force Majeure event(s) cause the Claimants' non-performance?	70
5. Is the Claimants' Notice of Termination valid?	88
C. Reimbursement of Bonuses	89
D. Counterclaims	92
1. Procedural Background	92
2. Legal Framework	96
3. Analysis	97
E. Costs.....	118
IV. DECISION	123

TABLE OF ABBREVIATIONS

Alkor	Alkor Petroo Limited
Answer	Respondents' Answer to the Request for Arbitration and Counterclaims of 9 May 2013
Art.	Article
Blocks	Blocks 19, 28 and 57
C-	Claimants' Exhibits
Claimants' Costs Submissions	Claimants' Costs Submissions of 14 November 2014
Claimants' Reply Costs Submission	Claimants' Reply Costs Submissions of 12 December 2014
Commerzbank	Commerzbank AG, Germany
C-PHB	Claimants' Post-Hearing Submission of 31 October 2014
Declaration	Declaration of a State of Emergency on 18 March 2011
ER	Expert Report
Fugro	Fugro Robertson Limited
GSPC	Gujarat State Petroleum Corporation Limited
Hearing	The evidentiary hearing held in Paris from 8 – 12 September 2014
IBA Rules	IBA Rules on the Taking of Evidence in International Arbitration (2010)
IBY	International Bank of Yemen
ICC Rules	ICC Rules of Arbitration of 2012
IDBI	IDBI Bank Limited, India
Ministry	Yemeni Ministry of Oil and Minerals
PEPA	Petroleum Exploration and Production Authority
PO 1	Procedural Order No.1 of 15 September 2013

PO 2	Procedural Order No.2 of 31 January 2014
PSAs	The three Production Sharing Agreements entered into between the Claimants and the Ministry in respect of the Blocks
R-	Respondents' Exhibits
Rej.	Respondents' Rejoinder and Reply to Defence to Counterclaim Submissions of 23 April 2014
Rej. CC.	Claimants' Rejoinder on the Counterclaims of 27 May 2014
Reply	Claimants' Reply and Defence to Counterclaim of 21 March 2014 (as revised on 24 April 2014)
Request / RfA	Claimants' Request for Arbitration of 25 February 2013
Respondents' Costs Submissions	Respondents' Costs Submissions of 14 November 2014
Respondents' Reply Costs Submission	Respondents' Reply Costs Submissions of 12 December 2014
R-PHB	Respondents' Post-Hearing Submission of 31 October 2014
SBLC	Standby Letters of Credit (No. STBY/LC.034/2008, No. STBY/LC.036/2008, and No. STBY/LC.037/2008) issued by IBY on 9 August 2008
SoC	Claimants' Statement of Claim of 28 October 2013
SoD	Respondents' Statement of Defence of 2 December 2013
ToR	The Terms of Reference dated 12 September 2013
Tr.page:line	Transcript of the Hearing (page:line)
WDCPL	Western Drilling Contractors Private Limited
WP&B	Work Program and Budget
Yemen / Republic	Arab Republic of Yemen

I. INTRODUCTION

A. THE PARTIES AND THE TRIBUNAL

1. The Claimants

1. Claimant 1 is Gujarat State Petroleum Corporation Limited ("GSPC"), a company duly organized and existing under the laws of India and 96% owned by the Government of Gujarat, India. Its registered office is:

GSPC Bhavan
Behind Udhog Bhavan
Sector 11
Gandhinagar - 382 010
Gujarat, India

2. Claimant 2 is Alkor Petroo Limited ("Alkor"), a company duly organized and existing under the laws of India. Its registered office is:

Alkor Petroo Limited
M-22/3RT, Vijaynagar Colony
Hyderabad - 500 057
Andhra Pradesh, India

3. Claimant 3 is Western Drilling Contractors Private Limited ("WDCPL"), a company duly organized and existing under the laws of India. Its registered office is:

Western Drilling Contractors Private Limited
Plot No. 1A
Sector 16A
Institutional Area
Noida - 201 301
Uttar Pradesh, India

4. Claimants 1, 2 and 3 (collectively referred to as "the Claimants"), are all engaged in the business of exploration and production of oil and natural gas.

5. The Claimants are represented in this arbitration by:

Markus Burianski
Nandan S. Nelivigi
Christian M. Theissen
Daniel Eckstein
White & Case LLP

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60323 Frankfurt
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Tel: +49 (0)69 29994 1664
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Email: nnelivigi@whitecase.com
mburianski@whitecase.com
ctheissen@whitecase.com
deckstein@whitecase.com

2. The Respondents

6. Respondent 1 is the Arab Republic of Yemen (“Yemen” or “the Republic”) having its official address at:

Republic of Yemen
Prime Minister of the Republic of Yemen
Sana'a
Republic of Yemen

7. Respondent 2 is The Yemeni Ministry of Oil and Minerals (“the Ministry”) having its official address at:

The Yemeni Ministry of Oil and Minerals
Zubairi Street 1 PO Box 81
Sana'a
Republic of Yemen

8. Respondent 1 and Respondent 2 (collectively “the Respondents”) are represented in this arbitration by:

Benjamin Knowles
Darcy Beamer-Downie
Milena Szuniewicz-Wenzel
Ian Hopkinson
Clyde & Co LLP
The St. Botolph Building
138 Houndsditch
London
EC3A 7AR
England
Tel: + 44 20 7876 5000
Fax: + 44 20 7876 5111
Email: ben.knowles@clydeco.com
darcy.beamer-downie@clydeco.com
milena.szuniewicz@clydeco.com
ian.hopkinson@clydeco.com

3. The Tribunal

9. The Arbitral Tribunal is composed of:
 - Chair: Dr. Laurent Lévy, Lévy Kaufmann-Kohler, Rue du Conseil-Général 3-5, P.O. Box 552, 1211 Geneva 4, Switzerland;
 - Arbitrator jointly nominated by the Claimants: Philippe Pinsolle, Quinn Emanuel Urquhart & Sullivan LLP, 25 rue Balzac, 75008 Paris, France;
 - Arbitrator jointly nominated by the Respondents: Sir Bernard Rix, 20 Essex Street Chambers, 20 Essex Street, London WC2R 3AL, United Kingdom.
10. With the consent of the Parties, the Arbitral Tribunal appointed as Administrative Secretary to the Tribunal:
 - Mr. Rahul Donde, Lévy Kaufmann-Kohler, Rue du Conseil-Général 3-5, P.O. Box 552, 1211 Geneva 4, Switzerland.

B. SUMMARY OF THE MAIN FACTS

11. The following summary gives an overview of the present dispute. It does not include all facts which may be of relevance, particularly as they emerged from the extensive evidence gathered at the hearings. Where necessary, the relevant factual aspects will be discussed in the context of the Tribunal's analysis of the disputed issues.

1. The Claimants' investment in Yemen

12. As mentioned above, the Claimants are all companies engaged in petroleum exploration and production. In 2006, they decided to engage in hydrocarbon activities in Yemen, particularly in the Third International Bid Round.
13. The Claimants submitted bids for three blocks 19, 57 and 28 ("the Blocks"). On 9 December 2006, the Blocks were awarded to them. Two years later, on 13 April 2008, the Ministry of Oil and Minerals (referred to in the PSAs as "Ministry" or "MINISTRY"), on the one hand, and GSPC, Alkor, WDCPL, and the Yemen

General Corporation for Oil and Gas,¹ collectively constituting the "Contractor"² on the other hand, entered into three almost identical Production Sharing Agreements ("PSAs") for the Blocks.³ Almost a year later, on 17 March 2009, the PSAs were ratified by the President of Yemen. The PSAs are governed by Yemeni law, and are also themselves laws of Yemen.⁴

14. The PSAs divided the exploration and production activities to be conducted thereunder into an Exploration Period, which, in case of a commercial discovery of oil, was to be followed by a Development Period. The Exploration Period was itself divided into a First Exploration Period of four years, and, at the election of the Contractor, a Second Exploration Period of two years. Only the First Exploration Period is relevant for the present dispute. This period commenced on 17 March 2009, the date on which the PSAs came into effect.⁵

2. The PSA terms

15. The PSAs are identical except for their commercial terms and their respective Work Program and Budget. Pursuant to their provisions, the Claimants were to carry out reprocessing and interpreting existing seismic data; acquiring, processing and interpreting new 2D and 3D seismic data; and drilling work in Yemen during the First Exploration Period. Their obligations have been summarized as under:⁶

¹ The Corporation, wholly-owned by the Republic of Yemen and controlled by the Ministry, is a mandatory partner. As it is a "formal" partner, it does not participate in the present dispute. RfA, §11.

² Unless the context otherwise requires, the capitalized terms and abbreviations used in this Award are those stipulated in the PSAs.

³ Exh. C-1 (PSA Block 19); Exh. C-2 (PSA Block 28); Exh. C-3 (PSA Block 57).

⁴ Laws No. 6, No.7 and No. 9 of 2009 (Exhs. R-1-3).

⁵ Art. 1.22 of the PSAs.

⁶ SoD §27.

Block 19	Block 28	Block 57
Reprocess available seismic data (US\$ 500,000)	Reprocess available seismic data (US\$ 500,000)	Reprocess available seismic data (US\$ 500,000)
Conduct, acquire, process and interpret 800 km of 2-D seismic data (US\$ 1.5m)	Conduct, acquire, process and interpret 1,000 km of 2-D seismic data (US\$ 1.5m)	Conduct, acquire, process and interpret 1,200 km of 2-D seismic data (US\$ 1.5m)
Conduct, acquire, process and interpret 400 km sq of 3D seismic data (US\$ 2m)	Conduct, acquire, process and interpret 200 km sq of 3D seismic data (US\$ 2m)	Conduct, acquire, process and interpret 100 km sq of 3D seismic data (US\$ 2m)
Drill 4 exploration wells (US\$ 12m)	Drill 3 exploration wells (US\$ 9m)	Drill 3 exploration wells (US\$ 9m)
Total: US\$ 16m	Total: US\$ 13m	Total: US\$ 13m

16. Pursuant to the PSAs, the Claimants undertook a Minimum Work Obligation (or "MWO") supported by a Minimum Expenditure Obligation. This Minimum Expenditure Obligation was guaranteed by irrevocable Standby Letters of Credit ("SBLCs") in the total amount of US\$ 42 million issued by the International Bank of Yemen ("IBY") in favor of Respondent 2. The SBLCs were accompanied by a chain of corresponding counter-guarantees:⁷ the SBLCs themselves were backed by counter-guarantees issued by Dresdner Bank (now Commerzbank AG, Germany ("Commerzbank")), which in turn received counter-guarantees from IDBI Bank Limited, India ("IDBI"). The counter-guarantees by IDBI were secured by back-to-back guarantees issued by the Claimants.
17. In practice, the cost of performing the Minimum Work Obligation would likely exceed the Minimum Expenditure Obligation.⁸ Consequently, in order to assess the real cost of the work, Article 4.3 of the PSAs provided that the Claimants were to produce an annual Work Program and Budget ("WP&B") for approval by

⁷ For the sake of convenience, the Tribunal uses the generic term "guarantees", which should not be construed as a determination of the nature of the relationship between the concerned entities. The Tribunal also recalls that the "guarantees" between the IBY and the Respondents were in the form of SBLCs.

⁸ SoD §29.

the Ministry. Once approved, a WP&B could not be substantially revised or modified without the Ministry's approval.⁹

18. On 17 September 2009, the Claimants submitted their first WP&B indicating their planned work and expenditure for the remaining period of 2009 and for 2010. The technical arm of the Ministry, the Petroleum Exploration and Production Authority ("PEPA"),¹⁰ approved that WP&B (amounting to US\$ 35.5 million) in May 2010.¹¹ In November 2010, the Claimants submitted their second WP&B for 2011 amounting to US\$ 53.04 million. Finally, on 24 January 2012, the Claimants submitted the WB&P for 2012 but only for Blocks 19 and 28 amounting to US\$ 40.29 million. The last two WP&Bs were not approved by the Respondents, although they contend that they would have been approved in substantially the form submitted.¹²
19. On 3 September 2010, the Claimants appointed Fugro Robertson Limited ("Fugro"), a specialized external service provider to analyze the existing data and to conduct a "Prospectivity Review" of the Blocks. On 24 March 2011, the Claimants received the results of Fugro's analysis ("the Fugro Reports").
20. The Claimants contend that they encountered several obstacles in the performance of their obligations under the PSAs: relevant data was not provided to them by the Respondents, landmines existed in Block 19, and the coordinates of Block 19 were incorrect. All of these are contested by the Respondents. To the extent necessary to resolve the issues in dispute, these matters are addressed in the analysis below.

3. Declaration of Force Majeure and Termination of the PSAs

21. From January 2011, the security situation in Yemen seems to have begun to deteriorate. A number of events took place the occurrence of which has not been disputed: issuance of travel advisories by a number of governments, tribal clashes, attacks, kidnappings etc. On 18 March 2011, the Government declared a State of Emergency. On 23 March 2011, the Yemeni House of

⁹ Article 4.3 of the PSAs ("the Contractor shall not substantially revise or modify the Work Program and Budget without the approval of the Ministry").

¹⁰ PEPA acts as agent of Respondent 2. See WS Al Humaidy I §§12-15.

¹¹ WS Al Humaidy I §§12-15.

¹² SoD §§33, 35.

Representatives approved the State of Emergency, which lasted for 41 days. Various other events took place; these are discussed below where relevant.

22. According to the Claimants, these events fell within the definition of Force Majeure events contained in Article 22.2 of the PSAs:

“Force Majeure’, within the meaning of this Agreement, shall be any order, regulation or direction of the GOVERNMENT, or (with respect to the CONTRACTOR) of the government of the country in which any of the entities comprising the CONTRACTOR is incorporated, whether promulgated in the form of law or otherwise, or any acts of God, insurrection, riot, war, strike (or other labor disturbances), fires, floods or any cause not due to the fault or the negligence of the Party invoking Force Majeure, whether or not similar to the foregoing, provided that any such cause is beyond the reasonable control of the party invoking Force Majeure.”

23. On 10 April 2011, the Claimants sent a Force Majeure notice to the Respondents under Article 22.1 of the PSA. It is the Claimants' case that by their declaration of Force Majeure, the SBLCs were automatically suspended by virtue of their terms:

"5. Suspension:

During the Force Majeure the Letter of Credit shall be suspended and continue in force thereafter during such period of Force Majeure.

If the Force Majeure event continues for a period of six (6) Months and the CONTRACTOR terminates its obligations in accordance with the PRODUCTION SHARING AGREEMENT this Letter of Credit shall automatically be cancelled according to its terms.

We hereby guarantee the payment of all amounts not having been reduced in accordance with the above within ten (10) Days of receipt by us of your written notice, without further juridical procedures."

24. The Claimants' notice was denied by the Respondents on 13 April 2011. Through subsequent correspondence and meetings, the Parties reiterated their positions. In May 2012, representatives of the Claimants discussed the issue with the Minister of Oil and Minerals. According to the Claimants, at the meeting, the Minister advised them that they would be allowed to exit the Blocks if they could show that the Blocks had no prospectivity. Since the Minister was subsequently removed from his office, the Claimants' contend that this "negotiated solution" did not work out.

25. On 4 February 2013, another meeting took place between the Claimants and PEPA. The Claimants were purportedly informed that if they did not submit the WP&Bs for 2013 for the Blocks by 15 February 2013, the SBLCs would be invoked.
26. On 13 February 2013, the Claimants terminated the PSAs purportedly under Article 22.4 of the PSAs:

"If the Force Majeure event occurs during either the First Exploration Period or the Second Exploration Period or any extension(s) thereof and continues in effect for a period of six (6) Months, thereafter the CONTRACTOR shall have the option upon ninety (90) Days' prior written notice to the MINISTRY to terminate its obligations hereunder without further liability of any kind except for those payments accrued under this Agreement."

C. PROCEDURAL HISTORY

1. The Constitution of the Tribunal and the Appointment of the Secretary

27. In the Request for Arbitration of 25 February 2013 ("Request" or "RfA"), the Claimants jointly nominated Mr. Philippe Pinsolle as their party-appointed arbitrator.
28. In their Answer to the Request for Arbitration and Counterclaims of 9 May 2013 ("Answer"), the Respondents jointly nominated Sir Bernard Rix as their party-appointed arbitrator.
29. On 31 May 2013, in accordance with Article 13(2) of the ICC Rules of Arbitration of 2012 ("ICC Rules"), the Secretary General of the ICC Court confirmed Mr. Pinsolle as arbitrator upon the Claimants' nomination and Sir Bernard as arbitrator upon the Respondents' nomination.
30. On 9 July 2013, in accordance with Article 13(2) of the ICC Rules, the Secretary General of the ICC Court confirmed Dr. Laurent Lévy as the jointly nominated Chair by the co-arbitrators.
31. On 12 July 2013, the Chair of the Tribunal confirmed to the Parties that the Tribunal was duly constituted and issued some initial procedural directions in this arbitration.

32. In their communications of 14 and 17 July 2013, the Parties consented to the Tribunal's proposal to appoint Mr. Rahul Donde as the Administrative Secretary to the Tribunal.

2. The Written Phase

33. In the course of this arbitration, the Parties filed several written submissions as well as exhibits, witness statements and expert reports. On its part, the Tribunal issued several procedural rulings. Some of these submissions and rulings are summarized below:
- On 15 July 2013, the Claimants replied to the Respondents' Counterclaims;
 - On 9 July 2013, the Claimants submitted a "Request for Interim Relief" to which the Respondents replied on 14 July 2013, filing their own "Cross Application for Interim and Conservatory Measures". Subsequently, further submissions were made by the Parties on each other's applications,
 - On 12 September 2013, an in-person hearing was held on the Parties' respective interim measures applications. The Terms of Reference, the Procedural Rules and the Procedural Time-Table were finalized at the hearing;¹³
 - On 15 September 2013, the Tribunal sent the Parties an unsigned advance copy of the dispositive part of its decision on the Parties' applications for interim relief. On the next day, the Tribunal sent the Parties the signed copy of its decision ("PO 1");
 - On 20 September 2013, the Tribunal confirmed in writing the Parties' agreements and the Tribunal's decisions on the various issues discussed in the course of the hearing. In particular, the Tribunal reproduced certain insertions which were to form part of the Terms of Reference although not expressly mentioned therein. The Tribunal also conveyed the Procedural Time-Table and the Procedural Rules;
 - On 10 October 2013, the Tribunal took on record the List of Issues agreed on by the Parties reiterating that the issues to be determined by the Tribunal would be those arising from the Parties' submissions, and that the award

¹³ The procedural background of the Parties' respective applications is more fully described in PO 1.

- would deal with the relevant issues as the Tribunal identified them at that time;
- On 28 October 2013, the Claimants filed their Statement of Claim (“SoC”) including exhibits, witness statements and expert reports;
 - On 7 November 2013, the Tribunal conveyed the reasoning for its decision on the Parties’ applications for interim relief;
 - On 2 December 2013, the Respondents submitted their Statement of Defence and Counterclaim (“SoD”) including exhibits, witness statements and expert reports;
 - On 16 December 2013, the Parties filed requests to produce documents;
 - On 7 January 2014, the Parties filed answer’s to each other’s requests;
 - On 10 January 2014, the Respondents requested the Tribunal to decide whether Respondent 1 is a party to the arbitration proceedings;
 - On 14 January 2014, the Tribunal ruled on the Respondents’ request, finding that it was inapposite to decide on its jurisdiction over Respondent 1 at that juncture and observing that as the evidentiary hearing was a few months away, the Tribunal did not deem it necessary to alter the procedural calendar;
 - On 14 January 2014, the Parties filed their replies;
 - On 31 January 2014, the Tribunal issued its decision on document production in the form of Procedural Order No.2;
 - On 21 March 2014, the Claimants submitted their Reply and Defence to Counterclaim with further exhibits, witness statements and expert reports. A revised version was filed on 24 April 2014 (“Reply”);
 - On 23 April 2014, the Respondents submitted their Rejoinder and Reply to Defence to Counterclaim Submissions (“Rej.”) with further exhibits, witness statements and expert reports;
 - On 27 May 2014, the Claimants submitted their Rejoinder on the Counterclaims (“Rej. CC”) with further exhibits, witness statements and expert reports;
 - On 4 June 2014 and subsequent correspondence (as well as a pre-hearing conference call), the Tribunal issued several directions for the hearing on the merits;

- On 25 July 2014, the Respondents requested the Tribunal to vary PO 1 to which the Claimants replied on 6 August 2014, making their own requests. Further submissions were then made by the Parties;
- On 18 August 2014, the Tribunal issued its ruling on the Parties' requests, modifying PO 1 to the extent mentioned in its ruling.

3. The Oral Phase

34. The hearing on merits was held in Paris, France on 8-12 September 2014 ("the Hearing"). In addition to the members of the Tribunal and the Administrative Secretary to the Tribunal, the following persons attended the hearing:

- For the Claimants:

- Mr. Sandeep Dave, GSPC;
- Mr. Manish Verma, GSPC;
- Mr. S. Ramachandran, Alkor;
- Mr. Vikash Jain, WDCPL;
- Mr. S. Mahadevan (representative of Jubilant Bhartia Group, the 100% parent of WDCPL);
- Mr. Markus Burianski, White & Case; and,
- Mr. Christian Theissen, White & Case.

- For the Respondents:

- Dr. Mohamed Al Maklafi, His Excellency the Minister of Legal Affairs;
- Mr. Ahmed Abdullah Dares, His Excellency the Minister of Oil and Minerals;
- Mr. Sakr Ahmed Al Wajeih, His Excellency the Minister of Finance;
- Mr. Rashad Ahmed Al Rasas, His Excellency the Minister for Parliament and Al Shura Council;
- Mr. Abdullah Ahmed Zaid, Advisor to His Excellency the Minister of Legal Affairs;
- Mr. Saeed Sulaiman Al Shamasi, Assistant Deputy Minister for Finance and Administrative Affairs;
- Mr. Abdulbaset Al Huraibi, General Manager of Legal Department at the Ministry of Oil and Minerals;

- Mr. Mohammed Al Maktari, Deputy Minister of Legal Affairs;
- Mr. Abdullah Al Atash, General Manager of Data Bank;
- Mr. Tarek Al Sharafi, General Manager of the Minister of Finance Office;
- Mr. Nasr Al Homaidi, Chairman of PEPA;
- Mr. Benjamin Knowles, Clyde & Co LLP;
- Ms. Darcy Beamer-Downie, Clyde & Co LLP;
- Ms. Milena Szuniewicz-Wenzel, Clyde & Co LLP;
- Mr. Hiba Mahmud, Clyde & Co LLP; and,
- Ms. Rebecca Sabben-Clare QC, 7 King's Bench Walk.

35. In the course of the hearing, the Tribunal heard evidence from the following witnesses and experts:
- On behalf of the Claimants: Sandeep Dave, Samir Biswal, Debasish Saha, Vipul Agarwal, Abdulla Luqman, Daniel Johnston and Matthias Wieser.
 - On behalf of the Respondents: Nassr Ali Al Humaidy, Tawfik Noaman M. Al-Nabhani, Todd Studer, Mohammed Ali Ahmed Al Maqtari, Gehane Sileem and Rashad Ahman Al-Rassas
36. A verbatim transcript of the Hearing was taken and distributed to the Parties and the Tribunal at the end of each day.
37. On 4 May 2015, the Tribunal closed the proceedings pursuant to Article 27 of the ICC Rules.

4. The Post-Hearing Phase

38. As agreed by the Parties at the Hearing, on 19 September 2014, the Respondents filed their submissions in respect of amending their prayers for relief. On 26 September 2014, the Claimants' objected to the Respondents' submissions contending that the Respondents' submissions were "new claims" in the context of Article 23(4) of the ICC Rules. In subsequent correspondence, the Parties reiterated their positions.
39. In its rulings of 1, 17, 21 and 24 October 2014 the Tribunal addressed the issue. On the basis of the Parties' agreement, it invited the Claimants to make

submissions on the Respondents' "new claims" of 19 September 2014. These submissions were made on 10 November 2014.

40. On the next day, the Tribunal expressed its understanding that the Parties had completed their submissions in respect of their claims and counterclaims, and advised the Parties that it may request further input from the Parties on any matter it deems necessary in the course of its deliberations.
41. On 31 October 2014, the Parties filed their post-hearing submissions ("C-PHB" and "R-PHB" respectively).
42. On 14 November 2014, the Parties filed their costs submissions, and on 12 December 2014, their replies to each other's costs submissions.
43. In accordance with Article 30(1) of the ICC Rules, the ICC Court fixed 31 December 2014 as the time limit for rendering the final award. In accordance with Article 30(2) of the ICC Rules, the Court extended this time limit as follows:
 - At its session of 11 December 2014, to 27 February 2015 (the Secretariat's letter of 16 December 2014);
 - At its session of 12 February 2015, to 29 May 2015 (the Secretariat's letter of 25 February 2015);
 - At its session of 21 May 2015, to 31 July 2015 (the Secretariat's letter of 29 May 2015).

II. POSITIONS OF THE PARTIES AND RELIEF REQUESTED

A. THE CLAIMANTS' POSITION

44. The Claimants' arguments in so far as they are relevant and necessary to resolve the issues in dispute have been reproduced prior to the Tribunal's analysis of each disputed issue. For the sake of clarity, the Tribunal emphasizes that it has not provided a summary of each and every specific objection raised by the Claimants in their submissions, as it would be both repetitive and unnecessary. The Tribunal has reproduced only what it views as the most important arguments for its decision. Even if not explicitly reproduced, it goes without saying that the Tribunal has considered all of the Claimants' arguments.

B. THE CLAIMANTS' REQUEST FOR RELIEF

45. In their post-hearing brief, the Claimants sought the following relief:

"In consideration of the above, Claimants respectfully request that the Tribunal:

(a) declare that an event of Force Majeure continuing for six months existed;

(b) declare that the PSAs have been validly terminated by Claimants;

(c) if the request for relief (b) is granted, and if IBY pays USD 42 million to the Respondent 2 in connection with Respondent 2's drawdown on the Standby Letters of Credit, order Respondents to pay USD 42 million to Claimants, with cost and interests;

(d) declare that Respondents were and are not entitled under the PSAs to draw on the related Standby Letters of Credit issued in their favor by the International Bank of Yemen;

(e) order Respondents to withdraw the drawing on the Standby Letters of Credit referred to in paragraph (d);

(f) order Respondents to pay USD 4.19 million to Claimants;

(g) order Respondents to pay to Claimants any damages, costs and expenses (including, but not limited to, legal fees and expenses) incurred by Claimants in connection with Respondents' drawing on the Standby Letters of Credit referred to in paragraph (d) as well as in connection with Claimants' extension of the SBLCs;

(h) order Respondents to pay all costs and expenses (including, but not limited to, costs payable to the ICC, legal fees and expenses, and fees and expenses of experts, consultants and others) incurred by Claimants in connection with the preparation for and conduct of this arbitration;

(i) order Respondents to pay interest in an appropriate amount to be determined by the Tribunal on all sums awarded to Claimants, including interest running from any arbitral award until final payment of any sums due under any such award;

(j) declare that the award will be provisionally enforceable;

(k) grant Claimants such other and further relief as the Tribunal deems appropriate under the circumstances; and

(l) dismiss Respondents' counterclaims in their entirety with cost."

46. This request for relief substantially repeated the requests for relief in the Claimants' earlier submissions.¹⁴

C. THE RESPONDENTS' POSITION

47. The Respondents' arguments in so far as they are relevant and necessary to resolve the issues in dispute have been reproduced prior to the Tribunal's analysis of each disputed issue. For the sake of clarity, the Tribunal emphasizes that it has not provided a summary of each and every specific objection raised by the Respondents in their submissions, as it would be both repetitive and unnecessary. The Tribunal has reproduced only what it views as the most important arguments for its decision. Even if not explicitly reproduced, it goes without saying that the Tribunal has considered all of the Respondents' arguments.

D. THE RESPONDENTS' REQUEST FOR RELIEF

48. On 8 October 2014, the Respondents submitted their "Reply to the Claimants' Submission dated 26 September 2014", "set[ting] out [...] their claims for damages as the Respondents would like them to appear in the decision part of the award". The Respondents sought the following relief:

"Relief Sought

2. The Respondents seek the following orders:

- a) The Respondents are entitled to draw down on the SBLCs for US\$42million, pursuant to Article 2.1.4(b); and;
- b) The Respondents are additionally entitled to damages for the Claimants' breach of the Minimum Work Obligation, which are to be assessed as the cost of performance of the work, namely [insert figure]; and/or
- c) The Respondents are additionally entitled to damages for the Claimants' breach of obligation to perform the 2011 WP&Bs, which are to be assessed as [insert figure].

3. The Respondents' primary case is that the figures to be inserted in (b) and (c) should reflect the cost of performance now of the work, because this reflects their actual loss. This means that the figure in (b) should be at

¹⁴ SoC §325.

least US\$147m (covering all of the Exploration Work). The figure in (c) should be US\$133m (covering acquisition of the required 2D and 3D data). Alternatively, the figures should both be at least US\$49.47m, as the 2011 WP&B figure for acquiring the new seismic data.

4. The Respondents recognise that they are not entitled to recover more than the largest of (a) to (c) above. Thus, as and when they succeed in drawing down on the SBLCs, the sums due for other heads of damages will reduce commensurately.

5. In the alternative to the claims set out in paragraph 2, if the Tribunal were to hold that Force Majeure intervened from 11 March 2011, then the Respondents seek an Award which states that the Claimants were in breach of the PSAs by failing to perform the work set out in the 2010 WP&Bs. It would follow that the Claimants are liable to pay the Respondents the cost of performing the 2010 WP&Bs. The claim is for US\$111million (at today's costs of acquiring new 2D seismic data) or US\$32.46m (the actual amount of the 2010 WP&Bs, net of paid bonuses and taxes)."

49. In their post-hearing brief, the Respondents sought the following relief:

"223. Accordingly, the Tribunal is asked to:

223.1.Reject the Claimants' claim;

223.2.Hold that the Respondents are entitled to drawdown on the SBLCs forthwith;

223.3.Hold that the Claimants were and are in breach of the PSAs by their failure to perform the Minimum Work Obligation and/or the WP&Bs;

223.4.Award the Respondents damages of US\$147m (or such other sum as the Tribunal may see fit, and inclusive of interest / damages reflecting the date of performance as the Tribunal may see fit);

223.5.Direct that the Claimants pay the costs of the arbitration and the Respondents' costs."

50. This request for relief included requests for relief made in the Respondents' earlier submissions.

III. ANALYSIS

A. PRELIMINARY MATTERS

51. Prior to entering into a discussion on the merits of the Parties' positions, the Tribunal will address certain preliminary issues (III.A.1), the Parties to the PSAs (III.A.2), the interpretation of the PSAs (III.A.3) and some evidentiary matters (III.A.4-5).

1. Preliminary Issues

a. Arbitration Agreement

52. It is not disputed that the jurisdiction of the Tribunal is based on Article 23 of the PSAs which provides as follows:

- “23.1 Except to those matters which are expressly agreed hereunder to be settled by an expert, in case a dispute arises under this Agreement between the MINISTRY and the CONTRACTOR with respect to interpretation, application or its validity, the Parties to the dispute shall use their good faith efforts to settle their differences by mutual agreement. Otherwise, the said Parties shall submit their dispute to arbitration as provided in this Article (23).
- 23.2 Unless otherwise agreed by the Parties to the dispute, the arbitration shall be held in Paris, France, and conducted in the English language in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the “Rules”). In the event of no specific provisions being provided under the Rules, the arbitration tribunal shall establish their own procedure.
- 23.3 The arbitration shall be initiated by either Party to the dispute (“First Party”) giving written notice to the other Party to the dispute (“Second Party”) that it elects to refer the dispute to arbitration and has appointed an arbitrator who shall be identified in said notice. The Second Party shall notify First Party in writing within forty-five (45) Days identifying the arbitrator that has been selected and appointed by such Party.
- 23.4 If the Second Party does not so appoint its arbitrator, the First Party shall have the right to apply to the Court of Arbitration of the International Chamber of Commerce to appoint a second arbitrator. The two (2) arbitrators shall, within thirty (30) Days, select a third arbitrator failing, which the third arbitrator shall be appointed by the Court of Arbitration of the International Chamber of Commerce at the request of either the First Party or the Second Party.
- 23.5 The third arbitrator shall not be a citizen of the ROY or of a country in which any of the entities comprising the CONTRACTOR is incorporated, but shall be a citizen of a country which has diplomatic relations with the aforesaid countries, and shall not have any economic interest in the oil business of the ROY or of any party to the dispute.
- 23.6 The Parties hereto shall extend to the arbitration tribunal all facilities (including access to the Petroleum Operations) for obtaining any information required for the proper determination of the dispute. The absence or default of any Party to the arbitration

shall not be permitted to prevent or hinder the arbitration proceeding in any or all of its stages.

- 23.7 Pending the decision or award of the arbitration tribunal, the Petroleum Operations or activities which have given rise to the arbitration need not be discontinued. In the event the decision or award recognizes that the complaint was justified, provisions may be made therein for such reparation as may be appropriately made in favor of the complainant.
- 23.8 Judgment the award rendered may be entered in any court having jurisdiction or application may be made to such court for a judicial acceptance of the award and an order of enforcement, as the case may be.
- 23.9 The provisions of this Agreement relating to arbitration shall continue in force notwithstanding the expiration or termination of this Agreement.
- 23.10 The Parties hereto base their relationship under this Agreement on the principles of goodwill and good faith. The interpretation and application of the provisions of this Agreement with respect to the Arbitration shall be in accordance with the Yemeni laws that are outlined in Article 24 of the Agreement."

- 53. The Respondents' argument that Respondent 1 is not a party to the PSAs (and consequently that the Tribunal has no jurisdiction over Respondent 1) is considered below [section III.A.2].

b. Place of Arbitration

- 54. In accordance with Article 23.2 of the PSAs, the place of the arbitration is Paris, France.

c. Applicable Law

- 55. Article 23.10 of the PSAs provides in relevant part that:

"The interpretation and application of the provisions of this Agreement with respect to the Arbitration shall be in accordance with the Yemeni laws that are outlined in Article 24 of the Agreement."

- 56. Article 24 of the PSAs, in turn, provides that:

"This Agreement, its Annexes, and any modification, will be governed and interpreted according to Yemeni laws, except the laws which are inconsistent with this Agreement."

57. In sum, the law applicable in this proceeding is the law of the Republic of Yemen, "except the laws which are inconsistent with (the PSAs)". As already indicated, the PSAs are themselves laws of Yemen.

d. Applicable Procedural Rules

58. Article 23.2 of the PSAs provides in relevant part that:

"Unless otherwise agreed by the Parties to the dispute, the arbitration shall be held in Paris, France, and conducted in the English language in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the "Rules"). In the event of no specific provisions being provided under the Rules, the arbitration tribunal shall establish their own procedure."

59. Thus, on the basis of the Parties' agreement, this arbitration is governed by the ICC Rules of Arbitration of 2012 ("the ICC Rules") and the Procedural Rules issued by the Tribunal. If none of the above addresses a specific procedural issue, the issue shall be determined by agreement between the Parties or, in the absence of such agreement, by the Tribunal. Further, in accordance with paragraph 44 of the Procedural Rules of 20 September 2013, the IBA Rules on the Taking of Evidence in International Arbitration (2010) ("the IBA Rules") shall serve as a guide to the Parties and the Tribunal but will not bind the Tribunal.

2. Parties to the PSAs

a. The Respondents' position

60. According to the Respondents, no claim lies against Respondent 1, which is not even a contracting Party to the PSAs. They point out that Yemeni law is to be applied to determine who is a Party to the PSAs, not French law or international arbitration doctrine. Under Yemeni law, the Ministry is a separate legal entity from the State. For instance, under Article 2 of Decree No. 40 of 2000, the Ministry has delegated authority to enter into PSAs, which indicates that it can act independently of the Republic of Yemen, and enter into contracts itself. This position is reinforced by the Preamble and other provisions of the PSAs.

Further, on their face, the PSAs are contracts between Respondent 2, i.e. the Ministry, and the Claimants.

61. The Respondents also submit that the Claimants' submissions are misguided. If, as the Claimants contend, the Ministry contracted as agent for the Republic of Yemen, then it would follow that only the Republic of Yemen (i.e. Respondent 1) is a party to the PSAs, not that both the Republic and the Ministry are parties.

b. The Claimants' position

62. The Claimants dispute the Respondents' submissions, and insist that Respondent 1 is a party to the PSAs. They submit that the question of whether the Tribunal has jurisdiction over Respondent 1 is governed by French law. On several occasions, the *Cour de cassation* (and other international tribunals), have found that where an arbitration agreement is entered into by a state organ, the state is bound by the agreement. They invite the Tribunal to reach the same conclusion in the present case.
63. The Claimants submit that the Tribunal has jurisdiction over Respondent 1 for principally two reasons. First, relying on provisions of the Yemeni Constitution and general Yemeni law, they contend that both Respondents are effectively the same. The only authority cited by the Respondent – Decree No. 40 – does not say that the Ministry has separate legal personality. It says exactly the opposite – that the Ministry has no separate legal personality; and that it is a mere organ/sub-department of the Republic. Thus, the Republic, just like the Ministry, is bound by contracts (such as the PSAs) concluded by the Ministry.
64. Second, the Claimants contend that even if the Respondents were considered two distinct legal persons, the Tribunal would still have jurisdiction over Respondent 1 because the Ministry entered into the PSAs both in its own name and in the name of the Republic.¹⁵ According to the Claimants, "Respondent 2 is merely an organ of the state and acted also for and on behalf of Respondent 1 when it entered into the PSAs and the arbitration agreements."¹⁶ In support, they point to "numerous references" to Respondent 2 representing Respondent 1 for the purposes of the PSAs. They also contend that as Yemen's natural

¹⁵ C-PHB §770.

¹⁶ SoC §318.

resources belong to the State, the Ministry could not grant rights under the PSAs without acting as a representative of Respondent 1 and binding Respondent 1. In sum, the Claimants contend that Respondent 1 could not have granted rights under the PSAs if it was not party to them.

65. The Claimants further contend that it is not correct for the Respondents to rely on the fact that on their face the PSAs say that they are concluded with Respondent 2. After all, the PSAs also say that they relate to the “Republic of Yemen”. Further, it is also not correct for the Respondents to say that Decree No. 40 states that the Ministry would be the sole contracting party. The Decree does not say any such thing, and should, in fact, be interpreted to reach the opposite conclusion.
66. Finally, the Claimants disagree that if the Ministry acted as agent for the Republic, then only the Republic should be a party to the PSAs and the arbitration agreements, not both the Ministry and the Republic. According to the Claimants, provisions of the PSAs and arbitral case law all stand for the proposition that an entity can act simultaneously in its own interest and as an agent of governmental authorities.¹⁷

c. Analysis

67. The jurisdiction of the Tribunal is based on Article 23 of the PSAs which provides in relevant part:

23.1 Except to those matters which are expressly agreed hereunder to be settled by an expert, in case a dispute arises under this Agreement between the MINISTRY and the CONTRACTOR with respect to interpretation, application or its validity, the Parties to the dispute shall use their good faith efforts to settle their differences by mutual agreement. Otherwise, the said Parties shall submit their dispute to arbitration as provided in this Article (23).

23.2 Unless otherwise agreed by the Parties to the dispute, the arbitration shall be held in Paris, France [...].”

68. The difference between the Parties lies in the law applicable to determine the parties to the PSAs. The Respondents insist that Yemeni law should apply, while the Claimants insist that French law is applicable.

¹⁷ C-PHB §780.

69. If – as the Respondents insist – Yemeni law is to apply, then the Tribunal notes that the Ministry of Oil and Minerals (Respondent 2) and the Republic of Yemen (Respondent 1) are effectively the same. Under Yemeni law, the Ministry forms a part of the Republic of Yemen:

- Article 129 of the Yemeni Constitution¹⁸ states that the Council of Ministers together forms the government of Respondent 1:

“The Council of Ministers is the government of the Republic of Yemen, and it is the highest executive and administrative authority of the state. All state administrative organisations, agencies, corporations, without exception, are under the directives of the Council of Ministers.”

- Article 130 of the Yemeni Constitution declares that the government itself is composed of the Prime Minister, his deputies and the Ministers:

“The government is composed of the Prime Minister and his deputies and Ministers who together shall form the Council of Ministers. The law defines the general basis for organising ministries and the various bodies of the State.”

- The Respondents have not produced any cogent authority supporting their position that Respondent 2 has an independent legal personality. The authority relied on by the Respondents – Decree No. 40 of 200 – does not contain any provision conferring separate legal personality to Respondent 2.¹⁹ In fact, the Decree supports the position that the Ministry functions as a part of Respondent 1.²⁰

70. In the circumstances, as the Ministry forms a part of the Republic of Yemen, and as the Respondents have not cogently established how the Ministry has an independent legal personality such that only the Ministry should be considered a party to the PSAs, especially in circumstances where the PSAs themselves

¹⁸ Exh. CL-17.

¹⁹ In their Rej. C.C, the Claimants specifically noted that the Respondents had not identified a provision in Decree No. 40 that would grant the Ministry separate legal personality. Despite having the opportunity to do so, the Respondents did not clarify its position on the issue.

²⁰ See, for instance Art. 3 of the Decree which provides that the “Minister shall administer the Ministry [...] in accordance with the Constitution;” Art. 3(5) of the Decree which provides that the Minister shall “submit reports [...] to the Cabinet;” Art. 3(10) of the Decree which provides that the Minister shall “issue the laws and rules in connection with the oil and mineral operation [...] and the other laws with regard to the industrial operation;” Art. 26 of the Decree which provides that the “ministry and its departments shall [...] channel revenues to the public treasury.”

confer rights on the Republic of Yemen,²¹ it follows that the Republic of Yemen (i.e. Respondent 1), is party to the PSAs. In any event, the Tribunal notes that Article 1.37 of the PSAs provides that the Ministry represents the “State” with respect to the PSAs.²² Further, Article 3.1 of the PSAs provides that the “State” has granted rights to the Ministry and the Claimants to conduct petroleum operations.²³ Thus, at the very least, the Ministry represents the Republic of Yemen in respect of the PSAs (which are also to be approved by the Yemeni Parliament as laws of Yemen²⁴), which the Respondents’ legal expert appears to agree.²⁵ In these circumstances as well, the Republic of Yemen would also be a party to the PSAs.²⁶

71. If – as the Claimants insist – French law is to apply, then the Tribunal notes that pursuant to Articles 23.1 and 23.2 of the PSAs, the Claimants and Respondent 2 have agreed to arbitrate, and have further agreed that the place of arbitration shall be Paris, France. Nonetheless, the French law on arbitration would not apply by virtue of this choice only. The parties have to select French law.²⁷
72. In PO 1, the Tribunal noted the Claimants’ argument that French law grants the Tribunal the authority in respect of interim measures. This argument was not disputed by the Respondents. Further, the Respondents have generally

²¹ See, for instance Article 21.1. of the PSAs which provides that the “Government” i.e. the Republic of Yemen has the right to “cancel” the PSAs. See also Article 9.1.1 (a) of the PSAs which provides that taxes are to be paid to the “ROY” i.e. the Republic of Yemen.

²² Article 1.37 of the PSAs provides: ““MINISTER” means the Minister of Oil and Minerals or any other Minister designated from time to time by the Ministry to represent the STATE with respect to this Agreement”. Article 1.60 of the PSAs defines “State” as ““YEMEN” or “ROY” or “STATE” means the Republic of Yemen [...]”.

²³ Article 3.1 of the PSAs provides: “The STATE hereby grants to the CONTRACTOR” and the MINISTRY the exclusive right to conduct Petroleum Operations in the Agreement Area subject to the terms, covenants and conditions set out in this Agreement.”

²⁴ Article 33 of the PSAs and Article 292 of the Yemeni Constitution.

²⁵ WS Al Maqtari I §21 (“The essence of a PSA is that the State, through the Ministry, grants the Contractor a potential opportunity to earn substantial revenues from oil produced from the Block [...]”).

²⁶ In reaching this conclusion, the Tribunal is aware of the Respondents’ argument that “if as the Claimants contend, the Ministry contracted as agent for the Republic of Yemen, then it would follow that only the Republic of Yemen (i.e. Respondent 1) is a party to the PSAs not that both the Republic and the Ministry are parties.” The Tribunal is unable to agree. Besides making a general statement in this respect, the Respondents have not substantiated why this should be the case. By contrast, the Claimants’ legal expert, Mr. Luqman testified that both the Ministry and the Republic of Yemen could be parties even in cases where the Ministry represents the Republic of Yemen (Luqman ER I p.2 et. seq; ER II p.1-2, ER III, q.17).

²⁷ E. Gaillard, P. de Lapasse, “Commentaire analytique du décret du 13 janvier 2011 portant réforme du droit français de l’arbitrage”, *Cahiers de l’arbitrage/Paris Journal of International Arbitration*, 2011-2, pp. 263-329.

recognised French law as the law of this arbitration.²⁸ Both Parties therefore seem to consider that French law on arbitration has relevance which can be viewed as a selection of French law.

73. In France, an arbitration agreement is valid if the consent of the parties is established and if it does not result in a violation of international public policy (“ordre public international”). Further, in the general experience of French Courts, a ministry ordinarily appears to be the same entity as the state.²⁹ Applied to this case, this would mean that if the Ministry has entered into a valid arbitration agreement, then, unless there are reasons to the contrary, that agreement will bind the State.
74. Here, the validity of the arbitration agreement in Article 23 of the PSAs has not been challenged. Further, as above, the Ministry forms a part of the Republic of Yemen. Thus, as the Ministry has entered into a valid arbitration agreement, and as the Ministry is a part of the Republic of Yemen, the Tribunal believes that the arbitration agreement binds the Republic of Yemen. In effect, this means that the Republic of Yemen is party to the PSAs.
75. In the circumstances, irrespective of whether Yemeni law or French law applies, the outcome would be the same: the Tribunal finds that the Republic of Yemen (Respondent 1) is a party to the PSAs.

3. Interpretation of the PSAs

76. In the course of the proceeding, the Parties' legal experts agreed that the PSAs were “special” laws i.e. they constituted Yemeni law as well as contracts,³⁰ a position with which the Tribunal agrees. The experts also agreed on some of the principles governing the interpretation of the PSAs. On the basis of the provisions of the PSAs, the agreement of the Parties' experts, and its own

²⁸ Rej. §161.

²⁹ Exh. CL-94 Cour d'appel de Paris (1ère Chambre Section G), *Creighton vs Ministère des Finances de l'Etat du Qatar*, 12 December 2001 (“[t]he State is a single legal entity which enters into contracts and initiates legal proceedings – this legal unity not being challengeable on the basis of the [State's] administrative fragmentation into various ministerial departments.”); Exh. CL-41 *République islamique d'Iran et autres v société Framatome et autres / O.E.A.I et autres v Eurodif et autres*, Cour de cassation (1 Ch. Civile), 20 March 1989, *Rev. Arb.* 1989, p. 653.

³⁰ *Al Maqtari WS I §20, Lquman WS II question 1.*

analysis, the Tribunal has kept the following points in mind while interpreting the PSAs:

- i. The PSAs are laws of Yemen;³¹
- ii. The PSAs are governed by Yemeni law;³²
- iii. The PSAs are meant to be the exclusive source of the Parties' respective rights and obligations as to their subject-matter;³³
- iv. The PSAs are to be interpreted and applied in accordance with Yemeni law;³⁴
- v. If the wording of a provision in the PSAs is clear, the words must be given effect.³⁵ In giving effect to the words, the common meaning of the words as well as the Yemeni law meaning of the words may be considered;
- vi. The PSAs prevail over general principles of law in so far as they make specific provision for particular matters;³⁶
- vii. Both the Arabic and English versions of the PSAs are to be referred to for interpretation.³⁷ It follows that if a word has several meanings, then that meaning which is common between Arabic and English should be preferred;
- viii. If the PSAs are silent on a particular matter, or if the provisions of the PSAs are unclear, then, for purposes of interpretation, reference may be

³¹ Laws No. 6, No.7 and No. 9 of 2009. See Exhs. R-1-3.

³² Art. 24 ("This Agreement [...] will be governed [...] according to Yemeni laws, except the laws which are inconsistent with this Agreement.")

³³ Article 18.2 of the PSAs ("Interests, rights and obligations of the GOVERNMENT that are represented by the MINISTRY and of the CONTRACTOR [...] shall be solely governed by the provisions of this Agreement and may be altered or amended only by the mutual agreement of the Parties, which will be subject to approval by a law to be issued according to the constitutional procedures in the ROY.") See also SoD §18-19, Reply §370.

³⁴ Art. 23.10 ("The Parties hereto base their relationship under this Agreement on the principles of goodwill and good faith. The interpretation and application of the provisions of this Agreement with respect to the arbitration shall be in accordance with the Yemeni Laws that are outlined in Article 24 of this Agreement.")

³⁵ Luqman ER II §1.5. See also Article 212 of the Civil Code ("If the contract provisions are clear, no interpretation may be allowed on the basis of wishing to know the parties intentions").

³⁶ Article 24 of the PSAs ("This Agreement, its Annexes, and any modification, will be governed and interpreted according to Yemeni laws, except the laws which are inconsistent with this Agreement.")

³⁷ Article 32 of the PSAs ("This Agreement is written in the Arabic and English Languages both of which shall have equal legal force and effect, provided, however, before GOVERNMENT authorities in the ROY, the Arabic version shall be referred to in interpreting this Agreement; and in any arbitration proceedings under this Agreement the Arabic and English versions shall be referred to in interpreting this Agreement.")

made to the Commercial Code, the Civil Code, Sharia principles and general customs.³⁸ In such circumstances, the principles of good will and good faith may be used to ascertain the intention of the Parties at the time they entered into the PSAs.³⁹

77. On a related matter, the experts initially disagreed on the existence of the *contra proferentem* principle of interpretation in Yemen.⁴⁰ This difference was resolved at the hearing, with the Respondents' expert Mr. Al Maqtari agreeing that the rule does exist in Yemen.⁴¹

4. Evidence of Witnesses

- a. Evidence of witnesses and experts not called to testify at the hearing

78. The Tribunal notes that the Parties have made submissions on the conclusions that the Tribunal should draw in respect of the evidence of witnesses that were not called for examination at the hearing. For instance, in respect of Mr. Bartholomew's testimony, the Respondents submit that "the Claimants chose not to cross-examine Mr. Bartholomew because they did not want the Tribunal to hear his evidence"⁴² and that "adverse inferences are to be drawn."⁴³ Similar submissions were made in respect of the Claimants' witnesses Messrs Roy Chowdhury and Tejinder Pal Singh.

79. The Tribunal recalls that Paragraph 22 of Procedural Order No.1 provides that:

"The facts contained in the written statement of a witness whose cross-examination is not requested shall not be deemed established by the sole fact that no cross-examination is requested. Unless the Tribunal determines that the witness must be heard, it will assess the

³⁸ Luqman ER II §1.3 relying on Articles 4, 5 and 6 of the Commercial Code.

³⁹ Tr.1036:19-1037:23 ("MS SABBEN CLARE: But you [and Mr. Al Maqtari] also say that if [the PSAs are] unclear then you can look into Article 212 [of the Commercial Code] which refers to good faith and good will [...] What does good faith and trust mean? Let me put a suggestion to you that might be easier. Does it mean that you ask yourself what is the bargain that the parties made when they agreed this contract, they must be held to that bargain. DR LUQMAN: I can go with that.")

⁴⁰ Al Maqtari WS II §22 contending that there is no such rule in Yemeni law.

⁴¹ Al Maqtari Amendment to WS I, Tr.1141:13-23.

⁴² R-PHB §26.

⁴³ R-PHB §28.

weight of the written statement taking into account the entire record and all the relevant circumstances.”

80. In its decision below, the Tribunal has determined the weight of witness and expert testimony in light of all the evidence on record, the Parties’ submissions, and the applicable rules. It does not see any reason to depart from this principle which the IBA Rules also edict.⁴⁴

b. Characterization of Mr. Al Maqtari’s testimony

81. Another issue that arose in the course of the arbitration was the characterization of Mr. Al Maqtari’s evidence as witness or expert evidence. The Claimants submit that “Mr. Al Maqtari is not a neutral expert, but a witness evidently in Respondents’ camp”.⁴⁵ By contrast, the Respondents contend that “Mr. Al Maqtari is a qualified Yemeni lawyer and is indeed proffered by the Respondents as an expert.”⁴⁶
82. Ordinarily an expert is a person who is independent of the party appointing him/her. In the course of his examination, Mr. Al Maqtari stated that “I am the Deputy Minister, which is a state Ministry involved in defending the State, the interests of the State and the rights of the State.”⁴⁷ Thus, the Tribunal believes that he is not an “expert” as is commonly understood. That being said, there is no applicable rule which obliges the Tribunal to give more (or less) weight to testimony simply because it emanates from an expert or a witness of fact. In all circumstances it is for the Tribunal to determine the weight of any evidence, a principle which is recognised by the IBA Rules as well.⁴⁸ Thus, Mr. Al Maqtari’s lack of independence from the Respondents is one of the factors that the Tribunal has borne in mind in weighing his evidence.⁴⁹

⁴⁴ Art. 4.8 of the IBA Rules (“If the appearance of a witness has not been requested pursuant to Article 8.1, none of the other Parties shall be deemed to have agreed to the correctness of the content of the witness statement.”)

⁴⁵ C-PHB §45.

⁴⁶ Rej. §345.

⁴⁷ Tr.1129:1-4.

⁴⁸ Art. 9.1 of the IBA Rules (“The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence.”).

⁴⁹ The Tribunal’s reference to Mr. Al Maqtari’s written statements as witness statements in this award should not be understood as the acceptance of a particular characterization by the Tribunal.

c. Admissibility of Mr. Bartholomew's Testimony

83. The Tribunal resolved a number of procedural issues as they arose in the course of the arbitration.⁵⁰ After the hearing, the Tribunal specifically asked the Parties to raise any further procedural objections they may have.⁵¹ In their responses, the Parties indicated that they had no procedural objections.⁵² The Respondents however reiterated their earlier objections in respect of Mr. Bartholomew's evidence.⁵³ Therefore, for the sake of completeness, the Tribunal addresses this issue below.
84. The Tribunal recalls that the Claimants objected to certain statements made by Mr. Bartholomew in his witness statements on the basis that those statements, "concerning information obtained during [Mr. Bartholomew's] tenure at Control Risks / as embedded security manager with Schlumberger, Control Risks' client", contravened a contractual confidentiality obligation between Mr. Bartholomew and Control Risks. The Respondents opposed this position, and contended that there was no breach of confidentiality. According to them, the applicable confidentiality clause only referred to trade secrets, and no such secrets were disclosed in Mr. Bartholomew's evidence. They insist that his evidence must be accepted.
85. In its ruling of 23 June 2014, the Tribunal observed:
- "According to the Tribunal, on the basis of the evidence presently before it, at this juncture, it would not be appropriate to exclude evidence on the basis of a contractual confidentiality obligation that is external to the dispute before the Tribunal, especially when the evidence in question appears to be relevant. The Tribunal does not believe it to be correct to exclude the evidence at this stage of the proceedings. As mentioned above, the Claimants are free to challenge the evidence in whatever manner they deem fit, whether at the forthcoming hearing and/or through their post-hearing briefs. *What weight (if any) is to be given to the evidence will be determined*

⁵⁰ See, for instance, the Tribunal's ruling of 23 June 2014 in which it addressed the Claimants' objections concerning certain portions of Mr. Bartholomew's and Mr. Al Humaidy's evidence. Needless to say, the Tribunal has kept its earlier rulings in mind in reaching its decisions in this award.

⁵¹ Tribunal's letter of 18 September 2014.

⁵² The Claimants' subsequently objected to the conclusion of the hearing on the basis of the "new claims", an issue which the Tribunal has addressed in the course of its analysis of the Respondents' counterclaims.

⁵³ Respondents' email of 26 September 2014.

by the Tribunal in light of all the relevant circumstances at a later stage.”

86. The Tribunal does not see any reason to alter its ruling of 23 June 2014. No new circumstances have been relied on by the Respondents that would cause the Tribunal to reconsider its ruling. It is true that despite having additional opportunities to call Mr. Bartholomew for examination at the hearing, the Claimants chose not to do so. Further, it may be that the evidence on record supports Mr. Bartholomew's testimony – an issue on which the Tribunal expresses no opinion at present. However, this does not mean that Mr. Bartholomew's evidence should be accepted as it is. Above [§§79-80], the Tribunal has established the rules that apply to evaluate the testimony of witnesses that were not called to testify at the hearing. The same rules would apply to Mr. Bartholomew; the Tribunal does not see any reason to treat his evidence any differently.

5. Adverse Inferences from Non-Production of Documents

87. The Tribunal notes that the Claimants' "primary" submission is that they do not need to prove that Force Majeure events occurred for a period of at least six months between March 2011 and February 2013 "because the Tribunal should draw adverse inferences from Respondents' failure to produce all [responsive] documents."⁵⁴ In the circumstances, the Tribunal believes that it would be advisable to address this issue at the outset.

a. The Claimants' position

88. The Claimants insist that the Tribunal should draw adverse inferences from the Respondents' failure to produce all documents responsive to Procedural Order No. 2 of 31 January 2014 ("PO 2").⁵⁵ Specifically, they request the Tribunal to draw three adverse inferences: "(1) Terrorist activities occurred in all mentioned governorates between early 2011 and early 2013 and would have created significant risks for Claimants; (2) Mutiny, defections and insurrections occurred

⁵⁴ Reply §15.

⁵⁵ C-PHB §41.

in the Yemeni military during the relevant period and decreased Respondents' ability to protect oil and gas exploration and production activities; (3) Oil and gas companies and subcontractors were subject of attacks during the relevant period, which would have created significant risks for Claimants."⁵⁶ For the Claimants, these inferences should lead the Tribunal to conclude that "(i) a Force Majeure event as defined in Art. 22.2 of the PSAs (ii) occurred for more than six months, even until just before the termination, with regard to all three Blocks."⁵⁷

89. The Claimants submit that this is the ideal case in which adverse inferences should be drawn because all the necessary criteria stipulated in the relevant legal authorities are met. First, the Claimants themselves have submitted all accessible evidence in support of their allegations concerning the deterioration of the security situation from early 2011 until February 2013. Second, unlike the Respondents, the Claimants do not have access to internal documents and reports of Respondent 1's ministries and institutions. Third, the adverse inferences to be drawn are corroborated by the disclosed evidence.⁵⁸
90. The Claimants point out that the Respondents' submission – that national security considerations prevented production of the relevant documents – was rejected in PO 2 for lack of proper substantiation. National laws are generally not sufficient to justify a refusal to disclose relevant and material documents.⁵⁹ Further, it is not correct for the Respondents to submit that they are not in possession of the relevant documents, as Respondent 1 is a party to these proceedings "and the documents at issue are in the possession of the Parliament or the ministries, organs/institutions of Respondent 1".⁶⁰
91. The Claimants deny the Respondents' submission that Yemen has an oral culture. After all, Respondent 1's Ministry of Defense and Interior Ministry did not state that no responsive documents exist, they stated that the existing documents cannot be disclosed. They also deny the Respondents' submission that adverse inferences should not be drawn because the Respondents had produced some documents that were adverse to the Respondents' interest or

⁵⁶ Reply §27.

⁵⁷ Reply §29.

⁵⁸ Rej. C.C. §67.

⁵⁹ Rej. C.C. §71.

⁶⁰ Reply § 25.

because they had produced some documents that dealt with the topic. If the Respondents' arguments are followed, "document production would become worthless".⁶¹

92. Finally, the Claimants submit that Respondent 1 is obliged to produce the requested documents under PO 2 even if the Tribunal later finds that it has no jurisdiction over it. PO 2 does not distinguish between the two Respondents such that certain disclosure obligations are to be met by Respondent 1 and others by Respondent 2. In any event, Respondent 2 is an organ of Respondent 1 and therefore obliged to involve Respondent 1 to meet Respondent 2's production obligation.⁶²

b. The Respondents' position

93. The Respondents contend that the Claimants' invitation to the Tribunal to draw adverse inferences from the Respondents' alleged non-production "is a blatant and unjustified attempt to avoid discharging the heavy burden of proof the Claimants otherwise bear."⁶³ They point out that they have produced a large number of documents which were adverse to their interests, and submit that "[t]here is no basis whatever for concluding that the Respondents are deliberately covering up the truth and impeding the Tribunal's investigation of the facts."⁶⁴
94. The Respondents object to the Claimants' reliance on the IBA Rules, pointing out that the Rules are not part of the ICC Rules. In any event, they submit that Article 9.5 of the IBA Rules only applies if a party has failed to produce documents without any explanation. Here, the Respondents had explained that the documents in question were confidential in nature, and the Ministers were bound to refuse to produce them under the applicable Yemeni laws. Moreover, the Respondents point out that issues of national security are never discussed in an open forum in the Yemeni Parliament and are, instead, subject to secret sessions.

⁶¹ Rej. C.C. §73.

⁶² Rej. C.C. §77.

⁶³ Rej. §332.

⁶⁴ Rej. §341.

95. The Respondents further submit that Yemen has an oral culture as a result of which there are few written reports from Parliamentary or Cabinet sessions. Matters of security, in particular, are resolved through negotiations and discussions on the ground. Even where matters of national security are discussed in the Cabinet, a member of the High Security Commission (which is the body responsible for overseeing the security in Yemen) usually addresses Cabinet members orally.
96. Furthermore, the Respondents submit that they made a “further plea” to the Parliament and the Head of the Parliament to provide responsive documents. The documents produced as a result of their enquiry relate to issues that are irrelevant to this arbitration.

c. Analysis

97. The Tribunal recalls that in Annex A to Procedural Order No. 2, it ordered Respondents to produce the following:

“All internal reports, memoranda, analyses, and similar documents as defined in the IBA Rules on the Taking of Evidence (hereinafter: “documents”) (i) prepared for or by the Yemeni Ministry of Interior, the Yemeni Ministry of Defense or (ii) presented to the Yemeni Parliament or the President of Yemen, reporting about the security situation with regard to

1.1 AQAP and other terrorist activities;

1.2 Mutiny, defections, insurrections or other forms of group disobedience in the Yemeni military and clashes between military factions;

1.3 Attacks against oil and gas companies, subcontractors or other oil or gas-related activities (at least regarding the Governorates Sana’a, Marib, Al-Jawf, Amran, Hadhramaut, and Shabwa) between 1 January 2011 and 13 February 2013.”

98. In doing so, it noted:

“The Tribunal notes that the Respondents have objected to the request on the basis of national and international security. However, they have not indicated how all the responsive documents (some of which are over two years old) would contravene their security concerns.”

99. It further stated:

“The Tribunal understands that its decisions may require the disclosure of documents that may be protected on grounds of

national and/or international security. Should this be the case, the Tribunal invites the Respondents to advise the Claimants and the Tribunal accordingly, describing the documents in question, specifying the nature and extent of the protection claimed and indicating how that protection applies to the documents in question. In consultation with the Parties, the Tribunal will then issue appropriate directions.”

100. Further, in its communication of 5 March 2014, in response to the Parties’ communications concerning document production by the Respondents, the Tribunal observed:

“[T]he Tribunal believes it to be sufficient to emphasize that its decisions on document production should be fully complied with particularly keeping in mind that the Republic of Yemen is currently a party to the present arbitration, and that the Respondents’ arguments concerning national security were dealt with in PO 2. Those decisions impose a continuing obligation (as and when responsive documents are made available to one of the Parties, they should be supplied to the other). In this regard, the Tribunal notes with satisfaction the Respondents’ awareness that it must comply with its disclosure obligations pursuant to PO 2, Annex A. No. 1.”

101. As mentioned above, the Tribunal may be guided by the IBA Rules. The Tribunal agrees with the Respondents that the IBA Rules are not as such part of the ICC Rules. However, they have gained acceptance in international arbitration. Arbitral tribunals, whether sitting under the ICC or under other arbitration rules, widely use them because they represent best practices in the matters they cover. Article 9.5 of the IBA Rules provides in this regard:

“If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party.”

102. The Tribunal believes that Parties to an arbitration have a good faith obligation to cooperate in procedural matters. In an ICC arbitration such as this, parties undertake to comply with any order made by the arbitral tribunal.⁶⁵ Here, under the Tribunal’s directions, reports that were to be presented to the Yemeni Parliament were to be produced. However, despite honestly admitting that

⁶⁵ Art.22(5) of the ICC Rules.

such reports exist,⁶⁶ the Respondents only produced publicly available summaries of the reports but not the reports themselves. Further, the Respondents also candidly admitted that their production is incomplete.⁶⁷ The reasons cited by the Respondents for doing so – that the documents were confidential in nature because of security concerns – were expressly dealt with in PO 2. There, the Tribunal – while noting that the Respondents had not explained why some responsive documents that were over two years old would affect national security – nevertheless gave the Respondents an opportunity to explain their position. The Respondents did not do so. In the circumstances, if it seems to the Tribunal to be justified to complement otherwise available evidence in the record, the Tribunal may be prepared to draw appropriate inferences from the Respondents' apparent non-production of documents. This follows Article 9(5) of the IBA Rules, as well as a number of cases in which tribunals have stated that they would draw inferences from non-production.⁶⁸

103. The Tribunal is aware of the Respondents' argument that because the Claimants failed to call evidence from Mr. Farooqui (Claimant 1's nominated General Manager), Mr. Ray (Claimant 1's managing director) or those who were charged with the matter at the time for Claimants 2 and 3, adverse inferences should be drawn. Further, the Respondents contend that "the factual witnesses who were produced by the Claimants had little first-hand knowledge of the matters in issue."⁶⁹
104. According to the Tribunal, it is for the Parties to present evidence that they deem sufficient to prove their claims. Each Party bears the burden of proving the facts relied on in support of its claim or defence. That relevant witnesses

⁶⁶ Respondents email of 27 February 2014 ("So far and aside from the YLNG report that has been provided to the Claimants our clients were unable to identify any other documents that were presented to the Parliament concerning the security issue, but we understand that some of these sessions may have been sessions that were held in secret and as such no reports from those session can be disclosed.").

⁶⁷ Respondents email of 27 February 2014 ("As regards responses from Parliament, the Ministry of Interior, the Ministry of Defense, etc. with their disclosure the Respondents disclosed letters that were sent to the various bodies requesting compliance with the Claimants' disclosure request and the Tribunal's order. Our clients and we are working to chase these requests with a view to providing any further disclosure if such disclosure exists.") See also Rej. §339 ("The Respondents' lawyers and delegates (i.e. the Committee) have at all times sought to comply with the Tribunal's orders but have come up against ministerial decisions (founded upon Yemen laws) over which they have no power.").

⁶⁸ See for instance cases cited in Exhs. CL-58, 59.

⁶⁹ R-PHB §43.

that may have had knowledge of the matters under discussion have not been presented is a factor that the Tribunal has kept in mind in its overall evaluation of the evidence on record.

B. TERMINATION OF THE PSAs FOR FORCE MAJEURE

105. Article 22 of the PSAs provides that:

“Article 22
FORCE MAJEURE

- 22.1 The non-performance or delay in performance by the MINISTRY or the CONTRACTOR of any obligation under this Agreement other than the obligation to pay any amounts due or giving notices shall be excused if, and to the extent that, such non-performance or delay is caused by Force Majeure. The period of any such non-performance or delay, together with such period any may be necessary for the restoration of any damage done during such delay shall be added to the time given in this Agreement for the performance of any obligation dependent thereon and consequently, to the term of this Agreement, but only if the extension of this Agreement is relevant to the performance of such obligation.
- 22.2 “Force Majeure” within the meaning of this Agreement, shall be any order, regulation or direction of the GOVERNMENT, or (with respect to the CONTRACTOR) of the government of the country in which any of the entities comprising the CONTRACTOR is incorporated, whether promulgated in the form of law or otherwise, or any act(s) of GOD, insurrection, riot, war, strike (or other labor disturbances), fires, floods or any cause not due to the fault or negligence of the Party invoking Force Majeure, whether or not similar to the foregoing, provided that any such cause is beyond the reasonable control of the party invoking Force Majeure.
- 22.3 Without prejudice to the foregoing provisions and except as may be otherwise provided herein, neither the GOVERNMENT nor the MINISTRY shall incur any responsibility whatsoever to the CONTRACTOR for any damages, restrictions or loss arising in consequence of such cause of Force Majeure.
- 22.4 If the Force Majeure event occurs during either the First Exploration Period or the Second Exploration Period or any extension(s) thereof and continues in effect for a period of six (6) Months, thereafter the CONTRACTOR shall have the option upon ninety (90) Days’ prior written notice to the MINISTRY to terminate its obligations hereunder without

further liability of any kind except for those payments accrued under this Agreement.”

106. The Claimants case is that they were entitled to terminate the PSAs for Force Majeure under Article 22.4 of the PSAs. They submit that the prerequisites for termination are clearly set forth in Art. 22 of the PSAs: “(1) the force majeure event Article 22.2 of the PSAs for six months (2) non-performance Art. 22.1 and (3) causation again Art. 22.1.”⁷⁰ On their part, the Respondents submit that “in order to establish Force Majeure, the Claimants would have to show that: “(i) they would have performed their Minimum Work Obligations but for the alleged Force Majeure events; (ii) the events relied on were unforeseeable at the time of contracting; (iii) the events made performance impossible, not just harder; (iv) the events fall within the contractual definition of Force Majeure; and (v) there was a continuing state of Force Majeure in the 6 months immediately preceding the Claimants’ notice of purported termination.”⁷¹
107. In the discussion below, the Tribunal analyses the Parties’ arguments in respect of Article 22 of the PSAs namely: the definition of Force Majeure ((1) below), the location and duration of the alleged Force Majeure event(s) ((2)-(3) below), the causal link between the alleged Force Majeure event(s) and the Claimants’ alleged non-performance ((4) below). It then analyses the Respondents’ submissions concerning the validity of the Claimants’ termination of the PSAs ((5) below).

1. Did Force Majeure event(s) occur?

108. The Tribunal recalls that Article 22.2 of the PSAs defines Force Majeure as follows:

“Force Majeure’, within the meaning of this Agreement, shall be any order, regulation or direction of the GOVERNMENT, or (with respect to the CONTRACTOR) of the government of the country in which any of the entities comprising the CONTRACTOR is incorporated, whether promulgated in the form of law or otherwise, or any acts of God, insurrection, riot, war, strike (or other labor disturbances), fires, floods or any cause not due to the fault or the negligence of the Party invoking Force Majeure, whether or not similar to the foregoing,

⁷⁰ Tr.15:24-16:3.

⁷¹ Rej. §5, SoD §148.

provided that any such cause is beyond the reasonable control of the party invoking Force Majeure.”

109. The Parties agree that this provision sets out certain requirements that should exist to constitute Force Majeure under the PSAs. Certain so-called “additional requirements” have been proposed by the Respondents. Accordingly, the Tribunal first analyses the uncontested requirements ((i)), before proceeding to analyse the so-called “additional” requirements ((ii)).

(i) Uncontested Requirements

110. It is uncontested that Article 22.2 lists several events as Force Majeure events: (a) direction of the Government, (b) riot, (c) insurrection, and (d) events “not due to fault or negligence” which are “beyond reasonable control”. If the Tribunal finds that any one of these listed events occurred in the parts of Yemen that would have been relevant for the Claimants’ performance between March 2011 and February 2013, and that that event prevented the Claimants’ performance, it need not then determine whether the other listed events also occurred and whether they would have had the same effect. Put differently, if the Tribunal were to find that “riots” in the sense of Article 22.2 of the PSAs occurred for the necessary duration at the relevant location and prevented the Claimants’ performance, then the Tribunal need not determine whether other listed events (“direction of the Government”, “insurrection” etc.) occurred, and whether they too would have prevented the Claimants’ performance. The consequence of the listed events is the same. What is important is the prevention of performance of obligations. Whether this is because of “riot”, “insurrection” or any other defined Force Majeure event would not matter. Thus, the analysis of one event in and of itself would suffice.

111. For the reasons mentioned below, the Tribunal believes that a Force Majeure event (event (d) above, i.e. “not due to fault or negligence” and “beyond reasonable control”) occurred in the parts of Yemen that would have been relevant for the Claimants’ performance between March 2011 and February 2013, and that that event prevented the Claimants’ performance. As a result, the Tribunal need not examine the Parties’ submissions on the other Force

Majeure events listed in Article 22.2 of the PSAs.⁷² In the section below, the Tribunal first reproduces the Parties' arguments and then explains its reasoning.

i. The Claimants' Position

112. The Claimants submit that “the extreme risk of crime and kidnapping (in Sana’a and most Block regions as well as between Sana’a and the different areas) and the extreme risk for any kind of transport and logistics activities related to the Blocks” as well as the unavailability of subcontractors qualify as “any cause” in the sense of Art. 22.2 of the PSAs.⁷³ They note that other international oil companies justified their extension requests or Force Majeure notices based on the very same reasons as the Claimants.⁷⁴
113. According to the Claimants, the defined Force Majeure events in Art. 22.2 of the PSAs provide guidance to the interpretation of the catch-all clause and clearly lead to the conclusion that the events covered by the catch all clause do not have to be similar to the non-exhaustive examples listed in Article 22.2 of the PSAs. For the Claimants, for an event to fall within the catch-all “any cause” clause, only two pre-requisites must be satisfied: (i) the event must not be caused by the fault or the negligence of the party invoking force majeure, and (ii) the event must lie beyond the reasonable control of such party. According to them, this understanding is in line with the common international understanding of Force Majeure and international jurisprudence.⁷⁵ By contrast, the Respondents have not provided any explanations why the Yemeni law requirements of unforeseeability and impossibility should apply.

ii. The Respondents' Position

114. The Respondents submit that “[t]he only issue of law which arises in relation to these words is whether they are subject to the requirements of unforeseeability and impossibility [...] Even if the Claimants are correct that specific terms used

⁷² Nevertheless, out of an abundance of caution, the Tribunal has analyzed the Parties' submissions on some alleged Force Majeure events [§123 et seq.].

⁷³ SoC §266.

⁷⁴ Reply §383.

⁷⁵ Reply §382.

in Article 22.4 such as “riot” and “insurrection” are independent of other Yemeni law concepts (which they are not), the same certainly cannot be said of “any other causes”.⁷⁶ They also point out that the Claimants have not submitted a “focused analysis” consisting of a list of alleged events, the dates when those events occurred or an explanation of how the events prevented the Claimants’ performance.⁷⁷

iii. Analysis

115. The Tribunal recalls that Article 22.2 of the PSAs defines Force Majeure to include a “catch-all” provision as follows:

“Force Majeure’, within the meaning of this Agreement, shall be [order, riot, war, strike etc.] or any cause not due to the fault or the negligence of the Party invoking Force Majeure, whether or not similar to the foregoing, provided that any such cause is beyond the reasonable control of the party invoking Force Majeure.”

116. The catch-all provision contains only two requirements for an event to be classified as a “Force Majeure” event for the purposes of the PSAs. First, the event must not be due to the fault or the negligence of the party claiming Force Majeure. Second, the event should be beyond the reasonable control of such party.⁷⁸ In the present case, the Claimants rely on the unavailability of subcontractors, “the significant quantitative and qualitative increase in security events” and specific transport and logistics difficulties.

117. The Tribunal believes that the security situation deteriorated in the parts of Yemen that would have been relevant for the Claimants’ performance between March 2011 and February 2013. In particular, the Tribunal notes that during this period:

- The Republic declared a State of Emergency and, importantly, that was all around the Republic based *inter alia* on a state of riots in some cities

⁷⁶ Rej. §302.

⁷⁷ Rej. §303.

⁷⁸ Not every event that satisfies these two criteria would justify a termination of the PSAs. Indeed, the event must have occurred at the relevant place and time, and must have caused non-performance of the Claimants’ obligations. These other requirements are considered below. For the present purposes, the Tribunal is only considering whether a Force Majeure event (as defined in the PSAs) occurred.

of Yemen.⁷⁹ It was the first nationwide State of Emergency issued since the civil war in Yemen in 1994, and it lasted for 41 days (exceeding the usual 30 days⁸⁰);

- The Yemeni Cabinet met on several occasions to discuss “national security” issues⁸¹ including fights against Al Qaeda terrorists, “escalating operations” being carried out by “forces opposed to security, stability and general peace”, “armed protests from the capital Sana’a” as well as several other incidents;⁸²
- Several States issued travel advisories, advising their citizens to leave Yemen.⁸³ Some advisories specifically noted the “dangerous” situation in Yemen. Numerous companies referred to these travel advisories in stopping their activities in Yemen,⁸⁴
- The United Nations Security Council issued two Resolutions expressing concern about the “worsening security situation”. It demanded that all actions aimed at undermining the government “and continued attacks on oil, gas and electricity infrastructure” be ceased;⁸⁵
- Numerous companies declared “Force Majeure” citing the deteriorating security situation;⁸⁶
- Various newspapers reported the deteriorating situation.⁸⁷

118. The Claimants’ expert submitted an ‘Incident Chronology’ outlining numerous security incidents in Yemen.⁸⁸ The Claimants too submitted a detailed schedule

⁷⁹ Exh. CL-18 (“After review of the Constitution of the republic of Yemen, on the private law related to the state of emergency, and given that riots have interrupted [sic] in a number of Yemeni cities, [...] Article 1: we declare the state of emergency as of Friday 13 Rabea Al Thani (Hijri date) corresponding to 18 March 2011 *all around the Republic* for a period of 30 days” (emphasis supplied)).

⁸⁰ Tr.1250:18-21.

⁸¹ As mentioned above, the Respondents objected to the production of documents on the basis of “national security”.

⁸² Exh. C-118.

⁸³ Exhs. C-15, 16, 142.

⁸⁴ Exh. C-126.

⁸⁵ Exh. C-13, 14.

⁸⁶ Exh. C-111.

⁸⁷ Exh. C-40.

⁸⁸ Wieser ER I, p.50.

chronicling the security situation in Yemen from 2011 to 2013.⁸⁹ A report produced by the Respondents' witness also confirms that the country was close to civil war in mid-2011.⁹⁰ None of the events mentioned in these documents were caused by the fault or negligence of the Claimants, nor were they within the reasonable control of the Claimants. Indeed, it can hardly be said that social and tribal unrest, sectarian clashes, crimes, kidnapping and other incidents affecting peace and security took place because of the Claimants' lapses. In fact, the Respondents themselves do not appear to make such a submission.⁹¹ Rather, they make two arguments, which are considered below.

119. First, the Respondents contend that the requirements of unforeseeability and impossibility should be read into the catch all provision. This argument is discussed in the course of the Tribunal's analysis of the "additional requirements" below [§135 et seq.]. As mentioned there, the Tribunal believes that Art. 22.2 of the PSAs is clear, setting out all of the requirements of Force Majeure for the purposes of the PSAs. The provision does not mention unforeseeability and/or impossibility, and, as a result, there is no reason to add these requirements into Article 22.2 of the PSAs. Thus, this argument cannot be sustained.
120. Next, the Respondents object that the Claimants have not provided a list of events falling within the catch-all provision, explaining how the events prevented performance. This argument is not concerned with the definition of Force Majeure as such. For the sake of completeness however, the Tribunal notes that this argument cannot be sustained. Along with their submissions before the Hearing, the Claimants had submitted numerous documents, which, according to them, referred to incidents qualifying as Force Majeure events.⁹² In addition, they had submitted two expert reports of Mr. Matthias Wieser of Control Risks.

⁸⁹ Exh. C-171. Further, the Respondents' witness introduced a report which also pointed to a worsening situation in Yemen (Exh.R-133) ("intensification of existing risks" "[i]n early 2011, the security situation deteriorated further").

⁹⁰ Exh. R-133, which the Respondents have described as a "balanced and neutral account of the risk situation in Yemen since 2006" (Respondents' Overview Note §47).

⁹¹ Rej. §302 ("[t]he *only issue* of law which arises in relation to these words is whether they are subject to the requirements of unforeseeability and impossibility").

⁹² See, for instance, Exhs. C- 12, 40, 56 etc. In addition, along with their post-hearing submission, the Claimants submitted Exh.C-171 an "accumulated, non-exhaustive list of the (known) Force Majeure events in the areas relevant for this case". The list refers to documents already on record prior to the Hearing, and the Respondents did not object to its introduction.

This evidence was never adequately challenged. Thus, while a list of the nature envisaged by the Respondents may not have been produced, the relevant evidence was on record. Further and in any event, the Tribunal recalls that in their request to produce documents, the Claimants had requested the Respondents to produce “all lists, overviews, evaluations, analyses, and reports [...] of shootings, bomb attacks and killings”. The Respondents objected to the production of such documents because they “lack[ed] sufficient relevance to the case or materiality to its outcome.” The Tribunal finds that there is some tension in the situation where the Respondents object on the basis that the Claimants have not produced documents, and where the documents sought by the Respondents are the same as those which the Respondents themselves believed to be irrelevant and immaterial. Therefore, the Tribunal believes that it is entitled to discount the objection. It is satisfied that the defined events occurred.

121. In the circumstances, the Tribunal concludes that events which it has characterized as Force Majeure events occurred on numerous occasions and in multiple places, including at the relevant places in Yemen from March 2011 to February 2013. These events were beyond the reasonable control of the Claimants who did not cause them by their fault or negligence. They were susceptible of preventing the Claimants’ performance of the PSAs. In effect, the Tribunal concludes that a Force Majeure event in the sense of Art. 22.2 of the PSAs occurred.
122. The Tribunal is aware that the Respondents have opposed the Claimants’ position on fuel shortages,⁹³ and one incident of kidnapping.⁹⁴ Additionally, they submit that “terrorism was not as bad [as the Claimants make out].” Above, the Tribunal has found that several incidents not due to the fault or the negligence of the Claimants and beyond the reasonable control of the Claimants occurred. Thus, because it is not required to do so, the Tribunal does not analyze the Parties opposing submissions on these two issues. Indeed, whether or not there were fuel shortages or serious incidents of terrorism, it remains that several other incidents not caused by the Claimants and not within their control

⁹³ Rej. §304.

⁹⁴ WS Al Humaidy II §14 et seq.

occurred – a position which the Respondents do not themselves appear to be able to dispute.

123. For the reasons mentioned above [§110], the Tribunal need not determine whether other events listed in Article 22.2 of the PSAs occurred. However, for the sake of completeness, the Tribunal briefly reviews the Parties' submissions on the other events listed in Article 22.2 namely (a) direction of the Government, (b) riot, and (c) insurrection. For the reasons mentioned below, except item (a), the Tribunal believes that these Force Majeure events also occurred on numerous occasions at the relevant places in Yemen.
124. For (a), in respect of the declaration of a State of Emergency on 18 March 2011 ("the Declaration"), the Claimants submit that the Declaration is the "typical" example of an "order, direction or regulation" in the sense of force majeure clauses.⁹⁵ The Respondents oppose this position. The Tribunal recalls that the Declaration was binding in nature, something which the Respondents do not dispute. Further, the Declaration was not limited to a few areas of Yemen, rather it was based on a state of riots in some cities of Yemen.⁹⁶ Thus, the Tribunal believes that the Declaration is a Force Majeure event under Article 22.2 of the PSAs. Having reached this conclusion, the Tribunal does not find it necessary to determine whether the Travel Advisories would equally qualify as being "directions of the Government" and, thus, Force Majeure events.
125. For (b), "riots", the Claimants submit that "riot" is a commonly used term which should be interpreted by applying the linguistic understanding of the term in both English and Arabic. In English a "riot" is "an unlawful disturbance of the peace by a number of people." In Arabic, a "Shaghab", the word mentioned in Art. 22.2 of the Arabic version of the PSAs, means "any civil disturbance or civil unrest, regardless of reason or cause."⁹⁷ In any event, even if, as the Respondents contend, Yemeni law applied to the interpretation of the term "riot", a legal protest as opposed to a riot would need prior approval, and the Respondents had not produced any such approval.

⁹⁵ SoC §232.

⁹⁶ Exh. CL-18 ("After review of the Constitution of the republic of Yemen, on the private law related to the state of emergency, and given that riots have interrupted [sic] in a number of Yemeni cities, [...] Article 1: we declare the state of emergency as of Friday 13 Rabea Al Thani (Hijri date) corresponding to 18 March 2011 *all around the Republic* for a period of 30 days (emphasis supplied)").

⁹⁷ SoC §243.

126. By contrast, the Respondents submit that the term must be interpreted in a way that is consistent with Yemeni law. For the Respondents, “riot” means “protests which are illegal, not protests which fall within the legitimate right to protest or demonstrate enshrined in the Yemeni Constitution.”⁹⁸ Relying on Mr. Al Maqtari’s testimony, the Respondents contend that the term “riot” has “a technical meaning”, associated with protests “which the police disperse following a declaration for open fire.”⁹⁹
127. The Tribunal has specified the principles governing the interpretation of the PSAs above [§76]. If the wording of a provision in the PSAs is clear, the words must be given effect. Further, in giving effect to the words, the common meaning of the words as well as the Yemeni law meaning of the words may be considered. What is relevant however is always what the Parties intended at the time they entered into the PSAs. While a dictionary meaning or specific definitions in Yemeni law if there are any, is one way to look for that intent, one should recall that the Parties probably did not refer to a dictionary at the time or look for specific meanings under Yemeni law, and thus would rather think of a common (ordinary/plain) meaning of terms.
128. The Tribunal believes that the common meaning of the term “riot” is a disturbance of peace and order by several people acting together. This meaning satisfies both the Arabic¹⁰⁰ and the English¹⁰¹ versions of the PSAs. Understood in this manner, the Tribunal believes that “riots” under Article 22.2 of the PSAs took place in the parts of Yemen that would have been relevant for the Claimants’ performance between March 2011 and February 2013.¹⁰² In any event, even if the Respondents’ position – that the term should be given its Yemeni law meaning – is adopted, it would not alter the Tribunal’s determination. First, there is no legal definition of riot under Yemeni law,¹⁰³ and the Respondents have not cogently explained why the incidents in question would not constitute riots if the Yemeni law meaning of the term is applied.

⁹⁸ Rej. §294.

⁹⁹ Rej. §297.

¹⁰⁰ “An incitement to do evil” (Al Maqtari WS II §38, relying on Exh. RL-16).

¹⁰¹ “A violent disturbance of the peace by a crowd” Exhs. CL-19, 29.

¹⁰² See incidents at Exh. C-171.

¹⁰³ Al Maqtari WS II §38; Luqman ER I, question 4.

Relying on Law No. 29 of 2003 concerning Demonstrations and Marches,¹⁰⁴ the Respondents appear to argue that if an application is made to a competent authority prior to a demonstration, then it would not constitute a riot.¹⁰⁵ If this is the case, then the Tribunal notes that the Respondents have in any event not produced any applications in respect of the incidents that the Claimants allege constitute riots. By the Respondents' own arguments therefore, the incidents in question should constitute riots under Article 22.2 of the PSAs.

129. The Respondents also appear to rely on Ministerial Decree No. 35 of 2002 Concerning the Police Authority to argue that riots have a technical meaning in Yemeni law, which is associated with protests that the police disperse following a declaration of open fire. First, the Tribunal notes that the Decree does not expressly define what a riot is, rather it elaborates the powers of the police in case a riot has already occurred. Second, it is counter-intuitive to suggest that a protest can be a riot only if the authorities attempt to disperse it. If this was the case, then it would mean that in situations where the relevant authorities have ceased to function, there could be no "riots" at all; likewise, if the authorities, in their discretion consider that dispersing a "riot" would possibly do more harm to the public interest and safety than letting it run its course, there would be no riot either. This cannot be correct. Third, what the Respondents effectively suggest is that it is a police commander – not the court or other relevant authority – who decides whether there is a riot or not (by opening fire). This too cannot be correct.
130. Finally, the Respondents argue that the Claimants have not provided a list of the locations and occasions on which riots took place, and that the Claimants have failed to show how riots prevented their performance. These arguments are not concerned with the definition of riots and are discussed elsewhere. Thus, even if the Respondents' arguments are considered, it remains that riots within Art. 22.2 of the PSAs occurred.
131. For (c), insurrection, the Claimants submit that like "riots", the term "insurrection" should be given its plain meaning as "a situation in which someone refuses the obedience of an order, regularly paired with the aim to

¹⁰⁴ Al Maqtari WS II §39.

¹⁰⁵ Annex E, WS Luqman II, Article 4 ("Anyone wishing to organize a demonstration or march must [...] notify the competent authority in writing at least three days prior [...]").

weaken the position of an established authority regardless of the means.” In Arabic, “insurrection” / “Esysan” also refers to disobedience against the established authority or government, whether or not arms are used.¹⁰⁶ The Claimants deny the Respondents’ submission that the term “insurrection” has to be given a “Yemeni law meaning”.¹⁰⁷

132. By contrast, the Respondents submit that like riots, the term “insurrection” too has to be interpreted in accordance with Yemeni law. Legal demonstrations would not fall within the Yemeni law meaning of this term.¹⁰⁸ For an act to constitute an “insurrection”, it should fall within one of the acts of the Yemeni Penal Code. According to the Respondents, there can be three types of “insurrection” under Yemeni law: (i) armed insurrection, (ii) the incitement of an armed insurrection by either the involvement of the military or the arming of the populace and (3) opposition to a military leader by military personnel in the carrying out of military duties, none of which the Claimants had established.
133. On the basis of its reasoning above [§127 et seq.], the Tribunal believes that the term “insurrection” is to be understood in its common meaning, which satisfies both the English and Arabic versions of the PSAs. Insurrection means a violent revolt against authority or government.¹⁰⁹ The Tribunal believes that “insurrection” under Article 22.2 of the PSAs took place in the parts of Yemen that would have been relevant for the Claimants’ performance between March 2011 and February 2013.¹¹⁰ As with the case of riots, here too, if the Tribunal were to adopt the Respondents’ position that the term is to be given its Yemeni law meaning, it would not change the Tribunal’s determination. Like riot, there is no definition of insurrection under Yemeni law,¹¹¹ and the Respondents have not cogently explained why the incidents in question would not constitute insurrection if the Yemeni law meaning of the term is applied. Further, like in the case of riots, the Respondents have not produced any approval for the incidents

¹⁰⁶ Exh. C-171.

¹⁰⁷ Reply §378.

¹⁰⁸ SoD §198.

¹⁰⁹ CL-19. See also CL-35 (“an act or instance of revolting against civil authority or an established government”). The Arabic term “Esysan” describes any kind of disobedience against authority or government whether or not arms are used (SoC §255).

¹¹⁰ See incidents at Exh. C-171.

¹¹¹ Al Maqtari WS II §44.

in question¹¹² that would otherwise (on the Respondents' own case), constitute insurrection. Indeed, the events in question would fall within the provisions of the Yemeni Civil Code and would satisfy even the three types of insurrection identified by the Respondents. A review of the minutes of the meetings of the Yemeni Cabinet also confirms insurrection in Yemen.¹¹³

134. Thus, the Tribunal concludes that Force Majeure event(s) in the sense of Article 22.2 of the PSAs occurred. The so-called "additional requirements" proposed by the Respondents are considered below.

(ii) Additional Requirements

135. The Respondents submit that the definition of Force Majeure under the PSAs is not exhaustive, and "must be read with Yemeni law concepts in mind".¹¹⁴ On this premise, they insist that Art. 22.2 of the PSAs should be read as requiring a Force Majeure event to be something that "was not foreseen or expected at the time of contracting"¹¹⁵, and something that is impossible to overcome, a position which the Claimants oppose. The Parties' arguments on the other "additional requirements" are considered below.

a. The Claimants' Position

136. According to the Claimants, it is undisputed that a contract cannot be interpreted where the language is clear. The wording of the PSAs is exhaustive and must be given effect.¹¹⁶ The PSAs contain a clear definition of Force Majeure in which the Parties chose to retain certain elements of force majeure under general Yemeni law ("beyond the control"), but not others. Further, unlike other PSA clauses, the Parties did not mention any recourse to Yemeni law in Article 22 of the PSAs. To the Claimants, this "clearly proves the parties' intent

¹¹² Exh. C-171.

¹¹³ Exh. C-118, pp.25-27 ("[i]nsurgents' terrorist plans aimed at economic and essential interests"; "protecting [the Republic] from terrorist activity of Al Qaeda insurgents"; "ongoing war with insurgents of the terrorist organization Al-Qaeda").

¹¹⁴ Rej. §170.

¹¹⁵ R-PHB §185.2.

¹¹⁶ Reply §370.

to design a bespoke Force Majeure clause.”¹¹⁷ On this basis, they claim that they are not required to show anything else other than that the criteria set forth in Art. 22 of the PSAs are met.

137. In support of their arguments, the Claimants also rely on Articles 18.2 and 24 of the PSAs under which a Contractor’s right to invoke Force Majeure and, eventually, to terminate the PSAs for Force Majeure is a right solely governed by the PSAs. According to them, a law requiring a more extensive showing for Force Majeure would contain “an additional requirement” to those requirements provided in the PSAs and, thus, would be inconsistent with the PSAs.
138. Finally, relying on the principle of *contra proferentem*, the Claimants submit that any ambiguity in the interpretation of Article 22.2 of the PSAs should be to the detriment of Respondents. This means that it is sufficient for the Claimants to show that the requirements of Article 22.2 of the PSAs are satisfied. The other requirements of general Yemeni law are irrelevant.¹¹⁸

b. The Respondents’ Position

139. The Respondents submit that the PSAs are “Yemeni law contract[s] and, therefore, the whole of Article 22 must be read with Yemeni eyes, and with the Yemeni law concepts in mind.”¹¹⁹ Article 22 of the PSAs does not contract out of the Yemeni law concept of Force Majeure that requires proof that the events were unforeseen and that performance has become impossible. The PSAs do not contain, or say that they contain, an exhaustive statement of all the applicable rules on Force Majeure.¹²⁰ They point out that the Parties’ experts agree that the Yemeni law concept of Force Majeure requires unforeseeability and impossibility, and rely on *National Oil Company v. Sun Oil Company of Libya* to conclude that force majeure provisions in a production sharing contract cannot be interpreted independently of the applicable law.¹²¹
140. The Respondents also point out that the Claimants’ legal expert testified that principles of good faith and good will apply to both interpretation and

¹¹⁷ C-PHB §437.

¹¹⁸ Reply §523.

¹¹⁹ Rej. §160.

¹²⁰ Rej. §160.

¹²¹ Rej. §§162-3.

performance of contracts. For the Respondents this means that “Art. 22.2 should be read as requiring a Force Majeure event to be something that was not foreseen or expected at the time of contracting, and is beyond the control of the parties.”¹²²

141. Finally, the Respondents submit that the Claimants’ own position is “consistently confused”.¹²³ While the Claimants say that the PSAs are “exhaustive” of their legal commitments and must be interpreted without regard to any other legal material, the Claimants nevertheless invite the Tribunal to consider non-Yemeni legal materials for guidance as to the meaning of the Force Majeure provisions.¹²⁴

c. Analysis

142. The Respondents first submit that as the PSAs are Yemeni law contracts, Yemeni law principles (such as unforeseeability and impossibility) should be implied into their terms. The Tribunal is unable to agree with this position. The Parties’ experts agree that when the provisions of a contract are clear, they should be given effect.¹²⁵ For the reasons mentioned below, the Tribunal believes that Article 22.2 of the PSAs is clear. As such, there is no scope or need for implying Yemeni law requirements into the provision.

143. Article 22.2 starts by saying “Force Majeure within the meaning of this Agreement, shall be”. The literal translation of the phrase in the Arabic version of the PSAs is “what is meant by the terms [force majeure] within the meaning of this Agreement is [...]”. The Article then goes on to provide a list of events which would constitute Force Majeure events for the purposes of the PSAs. These events include commercial matters (strike, labor disturbances), political matters (insurrection, riot, war and acts of the Government), and natural events (acts of God, floods) etc. These events are specific and accurate. They also have common features: all of the events listed in Article 22.2 are “beyond the reasonable control” of the party relying on them and are not caused by that

¹²² R-PHB §185.

¹²³ Rej. §15.

¹²⁴ Rej. §15.

¹²⁵ See Tr. 1132, 1133 (Al Maqtari testifying that “if the terms in the PSA are clear then we do not need to interpret the intentions of the contracting parties and this is very clear by the law.”).

party's fault or negligence (which Art. 22.2 itself mentions). None of the listed events imply either unforeseeability (or impossibility) in the manner alleged by the Respondents. Further, the Parties included some requirements of general Yemeni law on force majeure ("beyond reasonable control"), while leaving out others (unforeseeability).

144. In the Tribunal's view, the language of the clause makes clear that the Parties agreed to their own custom-made definition of Force Majeure for the PSAs. The clause is self-contained and clear. The Claimants' expert, Mr. Luqman's testimony on this point was illustrative:

"MR LUQMAN: I see the force majeure Article quite clear. If the parties wanted to apply the rules of force majeure they would have said in the event of force majeure then the party would be excused from execution but they did not say that and they went into giving specific events forming force majeure and once that event has occurred or persisted, then the definition is clear. I can further elaborate. For example, the parties wanted to give a wider definition in favour of the party wishing to rely on force majeure. An example of that, when they talk about direction and order and words, they could have used one word but they have used different words and, in my view, it was there to widen the scope of application of the clause. Another example in the clause is where I think it was discussed maybe yesterday, an order by the Government, I think was in agreement by a promulgate by a law or otherwise. This "otherwise" to me opens the door wider in favour of the party relying on force majeure because it could be a Government order which is issued by law or otherwise. Otherwise to me could be a mere announcement as an example or publication or an article. So I feel that the Article was not only clear of what it was designed to do but also it attempted to open the door wider than what was actually spelt out even in it."¹²⁶

By contrast, Mr. Al Maqtari testified that Art. 22.2 was unclear and ambiguous:

"MR AL-MAKTARI: Article 22 is composed of different paragraphs, 1, 2, 3, 4. I think that the force majeure is not defined in a clear manner here. There are only specific events that are considered to be force majeure events but the definition of the force majeure is not clear in this Article. It has given some cases or events such as riots, insurrections, fire, floods. So it has defined them as force majeure events if they happen and even for riots and insurrection we do not have a definition of them. This is unclear and this is ambiguous and this is why we have to go, to resort to other things to be able to interpret them. This is the first ambiguity that I find in this Article, in all its paragraphs. Another thing, it has said that the period for ending the agreement is not clearly set. So

¹²⁶ Tr.1320-1321.

there is no definite period of time. This is why we need here to apply the immediacy principle and this is why we needed more clarity. Thank you.¹²⁷

145. The Tribunal is unable to agree with this position.
146. First, Mr. Al Maqtari testifies that some of the terms used in Article 22.2 are not clear (riots, insurrection etc.) because they have not been defined. According to the Tribunal, simply because a provision does not define all the terms contained in it, it does not – by virtue of that fact itself – make the provision ambiguous. Several provisions of the PSAs do not define all of the terms they contain. It would not be correct to characterize all of them as being ambiguous. Moreover, even if some words in a particular provision are ambiguous, ascertaining the true meaning of those words would be limited to interpreting those words themselves, and not by introducing additional words into the provision that are unrelated to the ambiguous words. Mr. Al Maqtari has not explained why ambiguity (if any), in the definition of the terms “riot”, “insurrection” etc. should lead the Tribunal to introduce the unrelated legal requirement of unforeseeability (or impossibility) into Article 22. With respect, the Tribunal finds it difficult to agree with Mr. Al Maqtari on this point.
147. Mr. Al Maqtari next submits that Article 22 of the PSAs is ambiguous because “the period for ending the agreement is not clearly set.” It appears that Mr. Al Maqtari’s comments were directed towards Article 22.4 of the PSAs which provides the time for termination of the PSAs. They are of less importance here where the Tribunal is considering the definition of Force Majeure events in Art. 22.2 of the PSAs. In any event, the Tribunal cannot agree with Mr. Al Maqtari’s views (whether in relation to Art. 22.2 or otherwise). Indeed, even if the time for termination of the PSAs is ambiguous, the Tribunal cannot see why this would require an additional, unrelated requirement of unforeseeability (or impossibility) to be added into the PSAs. The ambiguity, if any, in respect of the time of termination of the PSAs would be resolved in accordance with principles mentioned above [§76]. That is an altogether different matter from inserting an additional, unrelated requirement of unforeseeability (or impossibility) which has not been expressly contemplated by the Parties. Ambiguity in one provision cannot serve to insert additional, unrelated requirements in another provision,

¹²⁷ Tr.1319:3-24.

and no cogent explanation has been furnished as to why this should be the case. This is all the more so in circumstances where Art. 22.2 is self-contained, and where the insertion of the additional requirements would impose an additional burden on the Claimants.

148. For all these reasons, the Tribunal believes that the provisions of Article 22.2 are clear.
149. This position is reinforced by looking at the other terms of the PSA. For instance, Article 11.6 provides “[i]n the course of performing the Petroleum Operations, the Contractor [...] shall comply with [...] the laws, decrees and other rules and regulations.” Thus, when the Parties wanted to introduce general Yemeni law, they used specific language to do so. The Tribunal recalls that the parties that entered into the PSAs come from countries that have different legal traditions. It is not surprising therefore that they clearly intended their rights and obligations under the PSAs to be solely governed by the PSAs themselves,¹²⁸ which are also Yemeni laws. The Parties clearly intended the PSAs to be self-contained (Article 18.2¹²⁹), with limited (and specific) references to other Yemeni laws (Art. 11.6). In fact, the PSAs show an intent of the Parties to exclude reference to Yemeni law when Yemeni law should prove to be inconsistent with the PSAs (Article 24). The presumption is thus that the Tribunal should be slow in turning to Yemeni laws to interpret the PSAs as this would require proving first that there is a need for clarifying a contractual provision (which is not the case here) and then that the applicable Yemeni law provisions do not contradict the common intent of the Parties.
150. Further, the Tribunal notes that Art. 2 of Republican Decree No. 23 of 2007 relied on by the Respondents contains an express “unforeseeability” requirement. The PSAs were drafted by the Respondents, and negotiated in 2007 and 2008. Thus, if the Respondents wanted to introduce other requirements into the definition of Force Majeure in the PSAs and the Claimants agreed to that introduction, they could have done so. This is all the more so in

¹²⁸ Art. 18.2 of the PSAs.

¹²⁹ Article 18.2 of the PSAs (“Interests, rights and obligations of the GOVERNMENT that are represented by the MINISTRY and of the CONTRACTOR [...] shall be solely governed by the provisions of this Agreement and may be altered or amended only by the mutual agreement of the Parties, which will be subject to approval by a law to be issued according to the constitutional procedures in the ROY.”).

the present case where some requirements of general Yemeni law have been introduced (“beyond reasonable control”) into the definition of Force Majeure by the Parties. For these reasons as well, the Tribunal believes that the additional requirements proposed by the Respondents should not be read into Article 22.2 of the PSAs.

151. The Respondents also submit that if the Claimants’ arguments are followed, it would mean that any act which is outside the control of the Parties (such as Hurricane Katrina) would fall within the definition of Force Majeure in the PSAs. Since that cannot be the case, it means that one has to turn to the general requirements of Yemeni law while interpreting Article 22 of the PSAs. The Tribunal is unable to agree. Article 22 sets out the scheme applicable in cases of Force Majeure: Article 22.2 defines Force Majeure, Article 22.1 excuses non-performance of only those obligations that have been caused by Force Majeure and Article 22.4 contemplates termination in case of Force Majeure persisting for six months. While it may be that when read in isolation Article 22.2 of the PSAs could be interpreted to include any Act of God, such an interpretation in isolation would not be helpful. The party intending to rely on any act for suspending (or terminating) its obligations would have to show how that act caused its non-performance. Reading the provisions of the same article in the same agreement together to ascertain how those provisions operate is not the same as implying into those provisions unrelated elements of law, especially in circumstances where those unrelated elements do not clarify the operation of the provisions in question but rather serve to impose an additional burden on the party seeking to rely on those provisions. The Tribunal therefore cannot sustain this argument.
152. In support of their case, the Respondents rely on the decision in *National Oil Company v. Sun Oil Company of Libya*.¹³⁰ The Tribunal believes that the decision has limited persuasive value because the case concerned an altogether different contract and an altogether different applicable law. It is true that the tribunal in that case found that the force majeure provision in the contract in question could not be interpreted independently of the applicable

¹³⁰ Exh. RL-8.

law.¹³¹ However, the Tribunal notes that in that case force majeure was defined as follows: “Force Majeure shall include, without limitation Acts of God, insurrection, riots war, and any unforeseen circumstances and acts beyond the control...”. In its analysis, the tribunal found the clause to be non-exhaustive (“not as constituting per se events of force majeure”), and vague. It also observed that because the clause was drafted in a particular manner, if it was not interpreted to include the requirement of impossibility of performance under the applicable Libyan law, any circumstance beyond the control of the parties would excuse non-performance subject to the sole condition that such circumstance was not foreseen. The tribunal found that this could not have been the intention of the contracting parties as it would result in the enforceability of contractual obligations being challenged on the occurrence of the slightest difficulty. For these reasons, the tribunal turned to the applicable Libyan law. The force majeure definition in *Sun Oil* is in stark contrast with the definition of Force Majeure under the PSAs (“Force Majeure [...] shall be”). Unlike in *Sun Oil*, where the tribunal found the force majeure clause to be non-exhaustive and vague, here, the Tribunal has found that the force majeure definition is clear and conclusive. This alone is sufficient to distinguish the present case from that in *Sun Oil*. Further, the result in *Sun Oil* – that since impossibility of performance was not mentioned in the clause, any event, however trivial, would qualify as a force majeure event – would not apply for the PSAs. Indeed, the Parties here agree that Article 22.1 of the PSAs requires that the Force Majeure event in question must have caused non-performance of the Claimants’ obligations.¹³² Finally, the Tribunal notes that the tribunal in *Sun Oil* identified a trend in long term international contracts to define force majeure less strictly than under domestic contracts and that it noted that “[t]he fact that the Parties felt it necessary to include [...] a force majeure clause, demonstrates that they were not satisfied with the mere application of the rules in the [applicable law]”.¹³³

153. In the circumstances, the Tribunal is unable to agree with the first limb of the Respondents’ argument that the additional requirements (of unforeseeability or

¹³¹ Exh. RL-8, Chapter 3, §§1.6-1.9.

¹³² Tr.117:24-Tr.119:10.

¹³³ Exh. RL-8, Chapter 3, §1.6.

impossibility) should be implied into Article 22 of the PSAs because they are Yemeni law contracts.

154. The Respondents also argue that general Yemeni law applies unless there is something that contracts out of it.¹³⁴ Here too, the Tribunal cannot agree. First, this argument is contrary to the Respondents' (and their expert's) position that a contractual provision is not subject to interpretation if the wording of the provision is clear. Second, the Tribunal recalls that Article 11.6 of the PSAs contains a specific and detailed invocation of Yemeni law. Thus, when the Parties wanted Yemeni law to apply, they clearly knew how to manifest their intention. The Respondents have not furnished any reason why Yemeni law should apply to insert additional obligations on a party when the provision in question itself does not, unlike other provisions of the PSAs, contemplate the application of Yemeni law. For all of these reasons, this contention cannot be sustained.
155. The Respondents next submit that the additional requirements should be implied into the PSAs because of the principles of good faith and good will. The Tribunal surmises that the argument is based on the provisions of Article 23.10 of the PSAs. Here too, the Tribunal cannot agree with the Respondents' position. Article 23.10 of the PSAs provides that "[t]he Parties hereto base their relationship under this Agreement on the principles of goodwill and good faith. The interpretation and application of the provisions of this Agreement with respect to the Arbitration shall be in accordance with the Yemeni laws that are outlined in Article 24 of the Agreement." The first sentence of Article 23.10 specifies that the principles of good will and good faith are to assist the Parties in determining what they are to do under the PSAs. The second sentence then provides that in matters of interpretation and application of the PSAs, Yemeni laws mentioned in Article 24 are to apply. Article 24 does not refer to principles of good will and good faith. Thus, it appears that these principles cannot directly be used as a tool of interpretation by virtue of Article 23.10. Rather, they are to be used in determining the appropriate manner in which the Parties should act in a given situation. Mr. Luqman's testimony on this point was illustrative:

"THE PRESIDENT: You said that good faith and goodwill means that the party must have the intent to perform. My question is then what do

¹³⁴ Rej. §160.

goodwill and good faith add to the fact that the parties anyway has the obligation to perform? What does it add? what is the added value to those principles?

DR LUQMAN: [...] Good faith and good intent or goodwill is often relied on when things do not go exactly as set out in the contract. [...] What it adds, it adds probably a smooth way forward in the event of a deadlock.

THE PRESIDENT: Second question: when it comes again to the operation of good faith and goodwill, does it go to the interpretation of the contract, namely, when you look for the intent of the parties or of each party, I do not know, but when you look for the intent of the parties to determine what the exact obligations of the parties are, do you use the good faith and the goodwill or do you use the good faith or the goodwill principle? That is one. Do the good faith and goodwill principles have another role, alternatively or cumulatively, which is when the parties do perform their obligations which are not as such in) question, do they have also to perform in good faith and according to goodwill? You understand my question?

DR LUQMAN: Yes. I believe that I agree with both your questions.”¹³⁵

156. In sum, the Tribunal believes that it cannot directly or principally rely on the principles of good will and good faith mentioned in Article 23.10 of the PSAs as a tool to interpreting Article 22.2 of the PSAs. In that context, those principles are more concerned with the determination of the Parties’ intent to ascertain their obligations or with the determination of the performance of the Parties’ obligations under the PSAs. Good faith and good will are useful to interpret the will of the Parties or to apply the contract as Article 23.10 of the PSAs provides because each Party has to accept in good faith what its consent implied. These principles are however not meant to enable arbitrators to second-guess what the Parties could have added to their common understanding, including, if that should be the case, by reference to provisions of Yemeni law to which the Parties did not refer, not even impliedly. In any event, it is unlikely that Yemeni law would operate in a manner such that general principles of good will and good faith will apply to introduce additional legal requirements into carefully negotiated provisions. The Respondents have not advanced any cogent reasoning why this should be the case.

¹³⁵ Tr. 1031-1033. See also Tr. 1030:9-15 (“MS SABBEN-CLARE: What does good faith and goodwill mean under Yemeni law, please?” DR LUQMAN: It means the literal translation in Arabic. It means having the good intent, having good intention to act in accordance with the obligations of the contract, for example.”)

157. It is however possible that the principles of good will and good faith apply to interpretation through the applicable Yemeni law (i.e. to the extent these principles are recognised by the Commercial Code, the Civil Code, Sharia principles and general customs). However, as mentioned above [§76], these sources would apply only if the provisions of the PSAs are unclear – something which is not the case for Article 22.2 of the PSAs.
158. In the circumstances, the Tribunal denies the Respondents' submissions that additional requirements (whether of unforeseeability or impossibility) should be read into Article 22.2 of the PSAs. The PSAs provide a self-contained definition of Force Majeure.
159. In any event, even if the Yemeni law requirement of unforeseeability is introduced into Article 22 of the PSAs (whether because of Yemeni law or because of good faith), it would not alter the Tribunal's decision. The Respondents argue that the types of risk that the Claimants allege amount to Force Majeure under the PSAs already existed at the time of entering into the PSAs. The risks were not unforeseeable, and hence the Claimants are not entitled to rely on them.¹³⁶ The Tribunal cannot agree with this position. Merely because a risk existed at the time of entering into a contract does not preclude a party from relying on an increase in that risk to exclude its obligations in the course of the contract. Indeed, if this was not the case, it would mean that a party intending to rely on an increased risk under a contract would be unable to do so simply because the existence of the risk was contemplated at the time of contracting. This cannot be correct. Put differently, the Respondents' argument means that if numerous labor strikes occur, then the party wishing to rely on the strikes as a force majeure event would be unable to do so because strikes, *per se*, existed at the time of contracting (as it was mentioned in the contract). This cannot be correct. Rather, what is more appropriate is an analysis of whether there was a significant and sharp increase in risk beyond what was contemplated by the Parties at the time of contracting. If that is the case, then any "foreseeability" requirement would be met.¹³⁷ The Tribunal believes that there was such a significant increase in risk in the parts of Yemen that would have been relevant for the Claimants' performance between March 2011 and

¹³⁶ R-PHB §185.

¹³⁷ Luqman ER II, q.5.

February 2013. After all, as recounted above [§117], at the time, the Republic declared a State of Emergency, Cabinet Meetings to discuss “national security” issues were held almost on a weekly basis, several States issued travel advisories and the United Nations Security Council had also issued two Resolutions about the worsening security situation.¹³⁸ The number of security incidents and their seriousness reflected in these developments could not have been foreseen at the time of contracting and there is no valid reason to say that they were. The unexpected and severe nature of the security incidents was also reflected in internal correspondence between PEPA and Respondent 2. For instance, on 4 March 2012, PEPA’s Undersecretary for Exploration Affairs wrote to the PEPA Chairman acknowledging that KNOC, the operator of Block 4 (a production block in Shabwa governorate) had been unable to work because of “[...] the critical circumstances in the last period.”¹³⁹ A day later, the PEPA Chairman wrote to Respondent 2 attributing the operator’s inability to function to “the exceptional situation of the country within the last year”.¹⁴⁰ The unexpectedness of the deteriorating situation was also mentioned by several oil companies in their correspondence with Respondent 2.¹⁴¹ Besides, the Claimants’ expert, Mr. Wieser, reviewed the situation in Yemen and in the Blocks, and concluded that there was a change in the risk level from for some risk types (“tribal unrest”, “crime and kidnapping”, “transport and logistics”) from 2010 to February 2013.¹⁴² His testimony on this issue was not convincingly rebutted.

160. Similarly, if the Yemeni law requirement of impossibility is introduced into Article 22 of the PSAs (whether because of Yemeni law or because of good faith), it too would not alter the Tribunal’s decision. At the Hearing, Mr. Al Maqtari stated that “impossibility” in the context of force majeure meant that it was not possible

¹³⁸ To a limited extent, the Respondents appear to agree with this position (“As to the risk of armed clashes in rural areas, to the extent that such clashes involved tribal unrest and tensions, the Respondents accept that the general risk was somewhat greater in 2011 than it had been at the time of contracting but not in a way which made oil exploration work impossible (emphasis supplied)”(SoD §173)).

¹³⁹ Exh. C-111, pp. 290 et seq.

¹⁴⁰ Exh. C-111, pp. 299 et seq.

¹⁴¹ Exh. C-111, pp. 385, 804 etc.

¹⁴² Wieser ER I, p.6.

to perform an obligation in a practical way.¹⁴³ For the reasons mentioned below, the Tribunal believes that the Claimants were prevented from performing their obligations under the PSAs because of Force Majeure. Thus, even if the Respondents' arguments were accepted, it would not change the outcome.

161. In the circumstances, even if the additional requirements proposed by the Respondents are introduced into Article 22.2 of the PSAs (whether because of Yemeni law or because of good faith), the Tribunal finds that those requirements would be satisfied.

162. For all the reasons mentioned above, the Tribunal concludes that a Force Majeure event as defined in Article 22.2 of the PSAs occurred. The next issue to be addressed is the location of the Force Majeure events, which the Tribunal considers below.

2. Where did the Force Majeure event(s) occur?

163. Above, the Tribunal has determined that Force Majeure events as defined in Article 22.2 of the PSAs occurred. To determine whether these Force Majeure events prevented the Claimants' performance, the Tribunal must first determine the location at which the Claimants would have to perform their obligations.

164. The Claimants' Force Majeure case is not concerned with the entire territory of Respondent 1, rather the Claimants' position is that the security situation "in the regions relevant for the planned seismic surveys and the drilling of wells did not permit to carry out such surveys in the Blocks."¹⁴⁴ According to the Claimants, the security situation in Sana'a, Marib, Al-Jawf, Shabwa, and the border region

¹⁴³ Tr.1143 et seq. ("THE PRESIDENT: "What is absolute impossibility? What is the opposite of absolute impossibility? MR AL-MAKTARI: Absolute impossibility means that it is not possible to perform the obligation in a practical way and the contrary would be to perform the obligation. [...] DR BURIANSKI: [M]y question was, that in the English version of the force majeure clause in Article 2 at the last line it uses the word "impossible" and my question is is that the same impossible as in 347 or is this the same threshold, the same standard? MR AL-MAKTARI: I believe that that impossibility to perform means the same thing."); See also Tr.1041-1042 ("MS SABBEN-CLARE: The test is impossibility of performance. That requires you to show that it is impossible to perform, doesn't it? DR LUQMAN: Yes. MS SABBEN-CLARE: So merely showing that it is difficult to perform will not satisfy that test? DR LUQMAN: It should satisfy that test as well if it is difficult to perform. MS SABBEN-CLARE: I do not understand that. That is not the same thing as impossible. Which is the test: is it impossible to perform or difficult to perform? DR LUQMAN: I think it would be difficult to perform in the sense that you really require much more effort to perform as opposed to -- for example, the example you mentioned. If there is a fire in the Aden port, it is not impossible to perform because you could go to another port but it would be difficult").]

¹⁴⁴ Reply §33.

between Al-Jawf and western Hadramaut is relevant for the present dispute.¹⁴⁵ On their part, the Respondents submit that the Claimants must show that the relevant Force Majeure event occurred throughout the territories of each Block. They further submit that “[t]he security situation varies from block to block and the alleged experiences of one operator in one block cannot be equated with the likely experiences of a different operator in a different block”.¹⁴⁶ The Tribunal addresses this issue below.

165. The Tribunal recalls that:

- the territory of Respondent 1 is politically subdivided into the area of the capital Sana’a and several governorates. For the purpose of oil exploration and production, it is in part divided into blocks. A block may extend into one or more governorates;¹⁴⁷
- Block 19 measures around 8,400 sq. km. and touches on four different governorates (Sana’a, Marib, Al-Jawf, and Amran). Block 57 measures around 10,900 sq. km. and touches on three different governorates (Al-Jawf, Hadhramaut and Marib). Block 28 measures around 4,400 sq. km. and touches on two governorates (Shabwa and Hadhramaut).

166. Therefore, the Tribunal's examination must involve an examination of the conditions in the relevant parts of the relevant governorates in which the Blocks fall (Sana’a, Marib, Al-Jawf, Amran, Hadhramut, Shabwa).

167. In addition, the Tribunal recalls that the Respondents themselves emphasized the importance of the capital to the Claimants' operations, insisting that under the PSAs, the Claimants' staff should have been permanently stationed in Sana’a.¹⁴⁸ Thus, the Respondents appear to agree that besides the Blocks, Sana’a (city) too should be included in the Tribunal's analysis. The Tribunal believes that this is correct. The capital's airport would have been used to facilitate the movement of seismic crews and other personnel and equipment that would have worked in the Blocks (and for evacuation in cases of emergency). In addition, Mr. Dave's testimony – that oil companies operating in

¹⁴⁵ Reply §33.

¹⁴⁶ Rej. §189.

¹⁴⁷ SoC §14.

¹⁴⁸ Rej. §35 (the Respondents insist on Claimants' opening an office in Sana’a, and complaining that delay in opening the office resulted in a breach of the PSAs); §37 (the Respondents stress the importance of the General Manager having a permanent presence in Yemen).

Yemen need an office in the capital in order to interact with PEPA and that all exploration activity goes through Sana'a with material, personnel and equipment coming from the Sana'a office – was not expressly challenged. Thus, the Tribunal adds the capital city Sana'a to the relevant part of the relevant governorates in which the Blocks fall.

168. Finally, the Parties agree that the Claimants and their subcontractors would have to travel to the Blocks by road. In fact, in the course of their cross-examinations, the Respondents emphasized the importance of the approach roads that the Claimants' subcontractors would have to take to reach the Blocks. Indeed, the approach roads would have been essential *inter alia* for the mobilization of seismic crews. Thus, events taking place on the roads to the Blocks as well as roads within the Blocks would be relevant.
169. In sum, in analyzing the alleged Force Majeure events, the following locations are relevant: (i) the relevant part of the relevant governorates in which the Blocks fall (Sana'a, Marib, Al-Jawf, Amran, Hadhramut, Shabwa); (ii) the capital Sana'a and (iii) roads to the Blocks and within the Blocks. Further, it is not necessary that the alleged Force Majeure events must have taken place everywhere within these locations. Indeed, what is relevant is that the alleged Force Majeure events – even if isolated from each other – prevented the performance of the Claimants' obligations.
170. The Tribunal has reviewed the detailed schedule submitted by the Claimants chronicling the security situation in Yemen from 2011 to 2013¹⁴⁹ as well as the numerous other exhibits on record¹⁵⁰ keeping these points in mind. The Tribunal concludes that several incidents qualifying as Force Majeure event(s) occurred at these locations.¹⁵¹

¹⁴⁹ Exh. C-171. Further, the Respondents' witness introduced a report which also pointed to a worsening situation in Yemen (Exh.R-133) ("intensification of existing risks", "[i]n early 2011, the security situation deteriorated further").

¹⁵⁰ Wieser ER I, Exhs. C-12, 40, 56, 171 etc.

¹⁵¹ The Claimants have furnished maps indicating the location of the Force Majeure events (C-PHB §96 et seq.). These maps provide more detailed information as to the location of the Force Majeure events, and confirm the information already on the record on which the Tribunal has relied.

3. How long did the Force Majeure events(s) last?

a. The Claimants' position

171. According to the Claimants, all of the aforementioned Force Majeure events (except the State of Emergency), lasted for at least six months. But even if the Tribunal were to disagree with that position, they submit that “the Tribunal should consider all security events together and treat them as one comprehensive “other cause”, which continued to occur for more than six months.”¹⁵²
172. The Claimants deny the Respondents' submission that the relevant Force Majeure events were merely “episodic” – a term which the Respondents had themselves not defined. According to the Claimants, it is not necessary for a “riot” to exist day and night. What is relevant is that the riots in question created danger and insecurity such that a reasonable operator could not plan and execute its operations. The same is true for terrorism.¹⁵³ In any event, “riots”, “insurrection” and “terrorism” all occurred on multiple occasions between early 2011 until February 2013.
173. According to the Claimants, the Respondents' arguments are legally flawed. It is not correct to rely on a singular “event” in Article 22.4 of the PSAs (“*the Force Majeure event*”) because the singular simply means that “the Force Majeure status” or “situation” should continue for six months, not requiring each singular event to persist for six months. Inserting the plural instead of the singular form (i.e., “If the Force Majeure events occur [...]”) would make it seem as if the clause required more than one Force Majeure event to occur, which is not the case. Moreover, the rationale of the Force Majeure provision is to relieve the obligor of his duties in circumstances in which the working environment has become detrimental. For this, it does not matter whether it was a “riot” or an “insurrection” that prevented performance. What is relevant is the prevention of performance for six months.

¹⁵² C-PHB §209.

¹⁵³ Reply §491.

174. In any event, the Claimants submit that should any doubts remain in the correct interpretation of Article 22.2, the clause should be interpreted to the detriment of the Respondents, in accordance with the *contra proferentem* rule.

b. The Respondents' position

175. In contrast to the Claimants' submissions above, the Respondents characterise the Force Majeure events as "episodic", and incapable of preventing the Claimants' performance for a continuous period of six months.¹⁵⁴ Citing several examples, they submit that the security situation was much better from 27 February 2012 onwards.

176. According to them, it is wrong for the Claimants to contend as they do that if conditions of Force Majeure exist for six months but then revert to normal for 12 months (during which time the contractor is to perform its contractual obligations), the contractor can nevertheless terminate the contract at the end of the 12 months on the basis of the conditions which ended six months earlier.¹⁵⁵

177. The Respondents submit that the Claimants would be entitled to rely on only those Force Majeure events which occurred immediately prior to their notice of termination. The Claimants' contention that any six months period would suffice and, specifically that the period from mid-March 2011 and mid-September 2011 and between early October 2011 and early March 2012, "offends the obligation of good faith under the PSAs".¹⁵⁶ Besides, it is also wrong as a matter of construction of the PSAs.

c. Analysis

178. The Tribunal recalls that Article 22.4 of the PSAs provides that:

"If the Force Majeure event occurs during either the First Exploration Period or the Second Exploration Period or any extension(s) thereof and continues in effect for a period of six (6) Months, thereafter the CONTRACTOR shall have the option upon ninety (90) Days' prior written notice to the MINISTRY to terminate its obligations hereunder

¹⁵⁴ SoD §199.

¹⁵⁵ Rej. §17.

¹⁵⁶ Rej. §309.

without further liability of any kind except for those payments accrued under this Agreement.”

179. The Respondent contends that the Force Majeure events in question were “episodic” and as a result cannot be found to have prevented the Claimants performance for a continuous period of six months. The Tribunal is unable to agree. First, the word “continuous” does not appear in the text of Article 22.4 of the PSAs. The clause says that the Force Majeure event must “continue *in effect*” for six months. What is important therefore is that the effect of the Force Majeure event must continue for at least six months, not the event itself. Such an understanding is in line with the general purpose of a force majeure provision – the clause remedies a situation in which a party is unable to perform its contractual obligations not because of its own fault and/or negligence but because of circumstances beyond its control. The focus must be on the situation created by the event which prevents performance, rather than on the event itself. If that were not the case, it would mean that a party would be unable to claim force majeure on account of a flood/earthquake which lasted only one day, but whose effects were felt for a considerable time thereafter, for instance because it destroyed the facilities that party required for its performance.
180. Thus, the Tribunal believes that it must consider whether the effect of the Force Majeure events continued for six months. As above, the Tribunal has identified one of the Force Majeure event(s) to be the deterioration of the security situation in Yemen. The question therefore is whether the effect of this Force Majeure event continued for a period of six months.
181. On a review of the relevant exhibits in the record, the Tribunal believes this to be the case.¹⁵⁷ It appears to the Tribunal that numerous incidents of social and tribal unrest, sectarian clashes, crimes, kidnapping and other incidents affecting peace and security took place on numerous occasions at the relevant places in Yemen in the period March 2011 to February 2013. The effect of such incidents lasted for more than six months, as a result of which the Tribunal believes that this requirement of Article 22.4 of the PSAs is satisfied.

¹⁵⁷ Wieser ER I, Exhs. C-12, 40, 56, 171 etc.

182. The Tribunal is aware of the Respondents' argument that the Claimants must show that they were prevented from performance in the six months immediately preceding the notice of termination of 13 February 2013, and that any six month period from March 2011 to February 2013 would not suffice. Above, the Tribunal has found that the effect of the deteriorating security situation in Yemen lasted from March 2011 to February 2013 i.e. it was felt in the six months leading up to the Claimants' notice of termination of 13 February 2013. Thus, the Tribunal need not consider the Respondents' argument. However, for the sake of completeness, the Tribunal notes that it does not believe that a party that was prevented from performing its obligations for six months because of force majeure loses its right to rely on force majeure after the expiry of that six month period. Indeed, after the expiry of the six month period of force majeure, a party may choose to wait for some time, for instance in order to determine whether performance again becomes possible. If, at that time, it appears that performance is not to be possible, then that party should not be penalized for having waited rather than having terminated.

183. For the foregoing reasons, the Tribunal believes that the Force Majeure events lasted from March 2011 to February 2013.

184. Having thus found that Force Majeure event(s) occurred in the parts of Yemen that would have been relevant for the Claimants' performance for the relevant duration, the Tribunal now turns to the analysis of whether the Force Majeure event(s) caused the Claimants' non-performance.

4. Did the Force Majeure event(s) cause the Claimants' non-performance?

185. The Parties agree that Article 22.1 of the PSAs requires "causation". For the Claimants, this means "a sufficient link between the event and the consequence, nothing more."¹⁵⁸ By contrast, the Respondents submit that "causation" in Article 22.1 requires a "but-for" analysis.¹⁵⁹ Consequently, the Tribunal first examines the applicable test of causation ((a) below), and then

¹⁵⁸ C-PHB §220.

¹⁵⁹ SoD §151.

proceeds to determine whether the relevant events caused the Claimants' non-performance ((b) below).

a. The relevant test

i. The Claimants' position

186. According to the Claimants, since the PSAs do not provide a definition for "causation", it is a matter of interpretation under which circumstances Force Majeure can be considered to have "caused" non-performance.¹⁶⁰ For them, "causation" in Article 22.1 of the PSAs means "a sufficient link between the event and the consequence, nothing more."¹⁶¹ They oppose the Respondents' "but for" test of causation for several reasons. First, according to them, the "but for" test contradicts the wording of Art. 22.1 of the PSAs (*"if and to the extent that..."*) which "[shows that] the causation-test in the PSAs is not digital, [...] if other factors than Force Majeure intervene, non-performance can be excused to a given extent only."¹⁶² Second, the "but for" test would unfairly benefit the host state, that could profit from its own shortcomings in violation of the principle of *nullus commodum capere potest de iniuria sua propria*.

187. The Claimants also reject the Respondents' submission that they cannot rely on Force Majeure in a situation in which they have already breached an obligation under the PSAs. They submit that under the PSAs, it is enough if their performance was prevented, regardless of whether they would otherwise have performed.¹⁶³ According to them: "'Force Majeure" as a general legal concept is a superior intervention into the equilibrium of a contract. If a superior force intervenes, the equilibrium is destroyed, and debtors are for objective reasons no longer obliged to perform."¹⁶⁴ They point out that Article 22.1 of the PSAs itself assumes a situation of non-performance: the Article provides that Force Majeure can serve as an "excuse" if and to the extent it causes non-performance, which assumes that there can be non-performance that is

¹⁶⁰ Reply §399.

¹⁶¹ C-PHB §220.

¹⁶² C-PHB §223.

¹⁶³ Luqman ER II, q.6.

¹⁶⁴ C-PHB §228.

partially excused (“to the extent”) and partially non-excused. If the provision itself foresees that both, an excused and a non-excused part of non-performance can exist simultaneously, it is wrong to say that the contractor cannot rely on Force Majeure in a situation of breach.

ii. The Respondents’ position

188. The Respondents deny the Claimants’ submissions. According to them, Article 22 of the PSAs only applies if performance is prevented by Force Majeure, which can only be the case if the contracting party would have performed but for the alleged Force Majeure events.¹⁶⁵ They submit that “it was the Claimants own delayed and unstructured approach to performance coupled with their inability to resolve the ongoing dispute with their joint venture partners that in fact prevented performance in this case.”¹⁶⁶ In sum, the Respondents contend that the Claimants’ performance was not prevented by Force Majeure.¹⁶⁷

189. The Respondents point to the words used in Article 22.1 of the PSAs (“non-performance or delay...caused by Force Majeure”) and submit that the text “clearly” implies that the “but for” causation is required. Alternatively, they submit that the “but for” test is the only construction of Article 22.1 which is consistent with the principles of good faith and good will, principles that apply to both the interpretation and the performance of contracts.¹⁶⁸

iii. Analysis

190. The Tribunal recalls that Article 22.1 of the PSAs provides that:

“The non-performance or the delay in performance by the MINISTRY or the CONTRACTOR of any obligations under this Agreement other than the obligation to pay any amounts due or giving notices shall be excused if, and to the extent that, such non-performance or delay is caused by Force Majeure.”

¹⁶⁵ Rej. §113.

¹⁶⁶ Rej. §114.

¹⁶⁷ R-PHB §4.

¹⁶⁸ R-PHB §158.

191. Thus, the provision does not define causation for the purposes of Article 22 of the PSAs. For the Claimants, the “causation” requirement of Article 22.1 is satisfied if there is a link between the Force Majeure event and the Claimants’ non-performance. On their part, the Respondents first contend that the Claimants cannot rely on Force Majeure in a situation in which they have already breached the PSAs. Next, they argue that the Claimants must show that they would have performed “but for” Force Majeure, and that the Claimants must also show that they were willing to perform. Each of these submissions is considered below.

(a) Force Majeure in case of breach

192. The Respondents’ expert contended that the Claimants cannot rely on Article 22.1 of the PSAs because by the time the Force Majeure events started, the Claimants had already breached the PSAs.¹⁶⁹ However, in their submission, the Respondents clarified that their argument was not that a prior breach automatically precludes reliance on Article 22 of the PSAs. Rather, their position was that the Force Majeure event, not some other factor must have caused non-performance.¹⁷⁰ The Tribunal understands this to be the Respondents’ “but for” argument, which is considered below. In any event, the Tribunal clarifies that a prior breach would not exclude reliance on Article 22 of the PSAs. Article 22.1 of the PSAs provides that non-performance is excused only to the extent it is caused by Force Majeure events. Thus, Article 22.1 excuses only the Force Majeure affected non-performance. It does not consider other non-performance – which non-performance may cause a breach of the provisions of the PSAs. The language of Article 22.1 of the PSAs does not appear to preclude the possibility of a party in breach of some obligations of the PSAs claiming Force Majeure in respect of its other obligations of the PSAs. It is therefore possible that a party that has breached a provision of the PSAs can rely on Article 22.1

¹⁶⁹ Al Maqtari WS I §36.

¹⁷⁰ SoD §151 (“For the avoidance of doubt, the Respondents’ argument in relation to causation is that the words of Article 22.1 explicitly excuse non-performance if but only if non-performance is “caused by Force Majeure”. The requirement that the Force Majeure event, not some other factor, must have caused the non-performance is, thus, part of the contractual term. Contrary to paragraphs 290-296 of the Statement of Claim, this is not an argument that a prior breach automatically precludes reliance on the Force Majeure clause. It is an argument of causation.”)

of the PSAs and claim Force Majeure events have prevented it from performing some other obligations of the PSAs. Thus, even if the Claimants had breached the PSAs in respect of their obligations at the time of the Force Majeure events, it remains that the Claimants would nevertheless be entitled to rely on Article 22.1 in respect of their other obligations under the PSAs.

(b) “But For” test

193. As mentioned above, the Respondents submit that “causation” in Article 22.1 requires a “but-for” analysis.¹⁷¹ The Tribunal finds it difficult to agree with this position. For the reasons mentioned above [§142 et seq.], the Tribunal believes that the PSAs set out a self-contained regime for Force Majeure, and for termination as a result thereof. Article 22.1 of the PSAs simply requires non-performance or delay to be caused by Force Majeure (“such non-performance or delay is caused by Force Majeure”). Thus, as long as there is an obligation that a party is prevented from performing because of Force Majeure, then, irrespective of whether some other event could have also caused non-performance, that party is entitled to rely on Article 22 of the PSAs to terminate the PSAs (provided the other conditions of Article 22 are satisfied). Put differently, for the purposes of Article 22.1 of the PSAs, the Tribunal does not believe that the Claimants have to show that Force Majeure was the *only* cause of their non-performance. This requirement is not found in the text of Article 22.1. Instead, what a party relying on Force Majeure is to show is that Force Majeure prevented its performance.

194. In the circumstances, the Tribunal need not analyze whether; (i) a “dispute among the JV partners” prevented the Claimants’ performance; (ii) there was some “other breach of obligations” that caused or could have caused the Claimants’ non-performance; (iii) “other reasons” were the “real reasons” for Claimants’ non-performance (such as the existence of landmines in the blocks, delay in provision of the correct block co-ordinates); and (iv) it would have been impossible for the Claimants to perform in the remaining time. Indeed, whatever be the outcome of these arguments, what is relevant for the purposes of

¹⁷¹ SoD §151.

termination of the PSAs under Article 22 is that the Claimants were prevented from performing their obligations because of intervening Force Majeure event(s).

(c) "Willingness to Perform"

195. The Tribunal also does not believe that Article 22.1 of the PSAs requires the party relying on Force Majeure to show its willingness to perform had the Force Majeure event not occurred. For the reasons mentioned above [§142 et seq.] additional requirements should not be introduced into Article 22.2 of the PSAs. This is all the more so in the case where the Parties' legal experts appear to agree that the "willingness to perform" requirement is not found in the PSAs or under general Yemeni law:

- In respect of the PSAs, Mr. Luqman testified that:

"DR LUQMAN: Causation, in my view, would be a link between the force majeure event and non-performance

DR BURIANSKI: Does causation depend on the willingness to perform?

DR LUQMAN: No, this is not what is in the contract. What is in the contract is causation causing non-performance. So there should be a sufficient link between the FM event and non-performance,"¹⁷²

- In respect of force majeure under general Yemeni law, in his written and oral testimony, Mr. Al Maqtari never mentioned the requirement of "willingness to perform".

196. Thus, the Tribunal does not believe that "willingness to perform" is a requirement of Force Majeure for the purposes of Article 22.2 of the PSAs.

197. A possible exception to this is the case if the Respondents establish that the Claimants had already determined that they would not perform before the Force Majeure events occurred. Indeed, if that were the case, the Claimants' performance would be prevented not because of Force Majeure, but because of other events that occurred prior to the occurrence of Force Majeure events. In such circumstances, Force Majeure would not cause the non-performance (the

¹⁷² Tr.1069:5-14.

non-performance would pre-exist the occurrence of the Force Majeure events). The Tribunal does not find this hypothetical situation to be present in this case. Prior to the Force Majeure events in March 2011, the Tribunal does not believe that the Claimants had manifested an intention not to perform. The PSAs entered into force in March 2009. In 2009 and 2010, the Claimants performed some of their obligations under the PSAs including setting up an office, interacting with the Respondents and other authorities with respect to obtaining and interpreting available data etc. Moreover, they paid bonuses amounting to over US\$ 9.112 million in those years. In 2011 too (or at least until March 2011), the Claimants continued to act on their obligations under the PSAs, corresponding with Fugro and Coral, preparing the tender documents etc.¹⁷³ In this year too they paid US\$ 3.577 million as bonuses. The Fugro Reports of 24 March 2011 relied on by the Respondents in their submissions did not recommend relinquishment of the Blocks. For Block 19, Fugro recommended the acquisition of 920 lines of 2D and 450 kilometres of 3D.¹⁷⁴ For Block 28, Fugro identified two possible areas of 2D seismic acquisition, one north in the block and one south.¹⁷⁵ For Block 57, Fugro identified an array of 2D seismic lines and places for potential wells but observed that an airborne magnetic and gravity acquisition survey may be carried out first.¹⁷⁶ In these circumstances, the Tribunal does not believe – and the Respondents have not established – that prior to the commencement of Force Majeure event(s) in March 2011, the Claimants had already decided that they would not perform.

198. The Tribunal is aware of the Respondents' related argument that the Claimants' non-performance was not caused by Force Majeure, but rather by a lack of cooperation from Alkor and WDCPL, and their decision not to fund the work.¹⁷⁷ As above, while "willingness to perform" is not a requirement under Article 22.2 of the PSAs, a possible exception to this rule is if the Claimants had already determined that they would not perform before the Force Majeure events

¹⁷³ The Tribunal is aware that the Respondents contest the adequacy of the Claimants' performance of their obligations under the PSAs. What is relevant for the present purpose however is only whether until March 2011, the Claimants had determined that they would not perform their obligations under the PSAs.

¹⁷⁴ C-119, p.50.

¹⁷⁵ C-120, p.57.

¹⁷⁶ C-121, p.35.

¹⁷⁷ R-PHB §§4,159.

occurred. Thus, in order to succeed with their argument, the Respondents would have to show that the disputes, if any, amongst the members of the Claimants' consortium were such that the Claimants were unwilling to perform before March 2011. The Tribunal does not believe that this is the case. As seen above, prior to the Force Majeure events in March 2011, the Claimants had not manifested an intention not to perform. Further, at the time the amount to be paid to Claimant 1 was approximately US\$ 848,828,¹⁷⁸ which is not a large amount when compared with the total value of the obligations undertaken by the Claimants under the PSAs. In any event, the amount was paid by January 2011, and further amounts were paid thereafter.¹⁷⁹

199. For all these reasons, the Tribunal believes that the test of causation for the purposes of Article 22.1 is that the Claimants must have been prevented from performing their obligations under the PSAs because of Force Majeure events.

200. In the next section, the Tribunal proceeds to determine whether the Claimants were so prevented from performing their obligations under the PSAs because of Force Majeure events.

b. Cause of the Claimants' non-performance

201. The Tribunal recalls that under the PSAs, the Claimants were to reprocess available seismic data, acquire new seismic data and drill exploratory wells. It is not disputed that in order to fulfil their obligation to acquire new seismic data, the Claimants would have to conduct a tendering process to select subcontractors to carry out the seismic acquisition work. Further, the Claimants would need to send their personnel on the ground to acquire seismic data, even if the actual work would be done by the subcontractors.¹⁸⁰

202. The Claimants contend that Force Majeure prevented the completion of the tendering process and prevented any actual work on the ground related to

¹⁷⁸ Reply §608.

¹⁷⁹ Reply §613; WS Dave II §14 seq.

¹⁸⁰ SoC §51 et seq., §240; Biswal WS III §13; Saha WS II §12; Saha WS I §7. See also Tr.41, 298-299, 541.

seismic data acquisition.¹⁸¹ The Tribunal need not consider both these arguments. Whether the Tribunal finds that Force Majeure prevented the Claimants from completing the tender process or whether it finds that Force Majeure prevented the Claimants from sending their personnel to Yemen for seismic data acquisition, the outcome would be the same – that Force Majeure prevented the Claimants from performing their obligations in respect of acquiring new seismic data. For the reasons mentioned below, the Tribunal has found that Force Majeure prevented the Claimants from sending their personnel on the ground in Yemen. In the circumstances, because it is not required to do so, the Tribunal need not analyze the Parties' submissions on the Claimants' alleged inability to complete the tender process.¹⁸² The Parties arguments on the Claimants' inability to send personnel to acquire new seismic data are analyzed below.

a) The Claimants' position

203. The Claimants argue that for technical reasons, it would have been necessary for them to have their personnel on the ground to supervise the acquisition of new seismic data by the subcontractor.¹⁸³ However, the Travel Advisories prevented them from sending personnel to Yemen. Besides, the other Force Majeure events (i.e. riots, insurrection, and other causes) "created an environment too dangerous even to try to initiate ground operations."¹⁸⁴ Risk mitigation measures would not have reduced the risks associated with ground work to a level acceptable to the Claimants. In sum, the Claimants submit that in view of the security situation, it would be appropriate to conclude that ground operations could not be conducted.

204. Citing a number of incidents, the Claimants deny the Respondents' submissions that the Claimants could have used the air strip in Block 18 or the Mukalla airport or port facilities for conducting their ground operations. According to the

¹⁸¹ C-PHB §217. They do not contend that Force Majeure prevented the re-processing of existing data but do claim that Force Majeure would have prevented them from drilling exploratory wells (C-PHB §216).

¹⁸² Nevertheless, out of an abundance of caution, the Tribunal has considered this issue [§220 et seq.].

¹⁸³ Rej. C.C. §154.

¹⁸⁴ C-PHB §286.

Claimants, given the situation at the time, “it would have been too dangerous to expose employees and valuable assets to the prevailing risks.”¹⁸⁵ Other oil companies were of the same view. In fact, no other comparable exploration company acquired new seismic data during March 2011 to February 2013.¹⁸⁶

205. The Claimants deny the Respondents’ submission that airborne gravity magnetic data gathering or remote sensing would have been an alternative to seismic surveys on the ground. According to them, airborne surveys were inappropriate for all the three Blocks.¹⁸⁷ Equally inappropriate for the Claimants was the Respondents’ comparison with production companies like Canadian Nexen. According to the Claimants, the security profile of production companies is different from that of exploration companies.

206. The Claimants also deny the Respondents’ reliance on Mr. Bartholomew’s statements that new seismic data could be obtained. According to the Claimants, these statements were diametrically opposed to other statements that had been made by him at the relevant time. Further, the company Mr. Bartholomew worked for at that time, “WesternGeco”, had not carried out any seismic operations in Yemen since March 2011, and, in fact, suspended their operations when the security situation deteriorated. Moreover, Mr. Wieser, who was Mr. Bartholomew’s superior at the time, explained in detail how seismic operations were impossible at the time in Yemen.

b) Respondents’ position

207. The Respondents deny the Claimants’ submissions and point out that the Claimants had not gotten to the stage of field operations. Since the Claimants had not reached that point, it was not correct for them to invoke Force Majeure.¹⁸⁸ Moreover, even if the events alleged by the Claimants had occurred, the correct remedy would have been for the Claimants to ask for more time by way of an extension.¹⁸⁹

¹⁸⁵ Reply §447.

¹⁸⁶ Reply §§456-482.

¹⁸⁷ Reply §453.

¹⁸⁸ R-PHB §§169-170.

¹⁸⁹ R-PHB §171.

208. In any event, the Respondents submit that the Claimants could have acquired seismic data on the ground. They point to a number of oil companies that acquired such data during the relevant period. MedcoEnergi for instance acquired new 3D-seismic data in block 83 during 2011 and 2012 and moved the equipment to block 82 to commence survey work there in 2013.¹⁹⁰ They also note that between March 2011 and 13 February 2013, production was interrupted only by pipeline explosions, which would not affect seismic acquisition work. According to the Respondents, “if production could be maintained [...] it was possible to acquire new seismic data too.”¹⁹¹
209. The Respondents rely on Mr. Bartholomew’s expert report to deny the Claimants’ submission that the workforce on the ground cannot be adequately protected. According to them, teams on the ground can assist each other, and the workforce can be protected as long as an adequate number of security personnel are employed.
210. The Respondents oppose the Claimants’ submission that even if they would have accepted one of the bids, the security situation would have prevented the acquisition of seismic data and the drilling of wells. Simply because other contractors served force majeure notice in the relevant period does not prove that these activities could not be performed in the Claimants’ blocks. The Claimants could have engaged the Yemen Geological Survey and Mineral Resource Board to undertake field work, something which would not have required the presence of the Claimants on the ground since it would be conducted by Yemeni nationals. Further, conducting satellite imaging or a gravity and magnetic survey would have required minimal presence in Yemen and, being airborne, would be largely unaffected by the security issues on the ground.¹⁹² Further, expat employees of Canadian Nexen and other companies remained in Yemen at all material times.

¹⁹⁰ SoD §191.

¹⁹¹ R-PHB §6.

¹⁹² Rej. §178.

c) Analysis

211. The Tribunal must analyse whether the deterioration of the security situation in Yemen from March 2011 to February 2013 prevented the Claimants from sending their employees in Yemen, and therefore prevented the Claimants from performing their obligations under the PSAs.

212. The Tribunal finds this to be the case. For the reasons mentioned above [§117], the Tribunal has found that the security situation deteriorated substantially from March 2011, and to an extent that could not be foreseen. The quality and quantity of the security incidents in Yemen dramatically increased in the relevant areas under consideration. The situation in Yemen at the time was one in which, in the Claimants' expert Mr. Johnston's words, the oil industry "draws a line":

"Yes, there is a lot of work done in dangerous places but if it is so dangerous that the danger cannot be dealt with the properly [sic] and mitigated substantially then people do not go in. It is when they have almost no control and they are really placing their personnel at risk, that is where the industry draws the line."¹⁹³

213. In the situation of social and tribal unrest, armed clashes, terrorist attacks, road blockages, kidnappings and other security concerns, the Tribunal accepts that it would not have been prudent for the Claimants to send their personnel to Yemen. After all, at the time, the Indian government had issued two travel advisories that Indian citizens should leave the country,¹⁹⁴ and had put evacuation measures in place.¹⁹⁵ Irrespective of whether or not these advisories were binding on the Claimants, it remains that it would not have been prudent to send personnel into Yemen at the very time the government advises its citizens "to exit the country through whatever commercial means available".¹⁹⁶ In fact, some of Claimant 1's employees even quoted the security situation to object against travels to Yemen.¹⁹⁷ Other employees in Yemen sought repatriation. One of the subcontractors' employees, Mr. Roy Chowdhury was kidnapped on 11

¹⁹³ Tr. 1122:19-25.

¹⁹⁴ Exh. C-19, 20.

¹⁹⁵ Tr. 28; Biswal WS II §14.

¹⁹⁶ Exh. C-20.

¹⁹⁷ Saha WS I § 27.

December 2011 on his way to scout the Blocks.¹⁹⁸ Several operators complained of risks to their personnel working on the ground, and the reluctance of subcontractors to travel to oil exploration/production blocks due to the insecure situation.¹⁹⁹ A number of these issues were also discussed in the meetings of the Yemeni Cabinet.²⁰⁰ In light of these events, the Tribunal finds that the Claimants could not be expected to send their personnel to Yemen to acquire seismic data. In fact, it is arguable that had they done so, they would have violated applicable Indian law,²⁰¹ and Sharia principles.²⁰²

214. The Respondents argue that if the Claimants had adopted appropriate risk mitigation tools, such as PRIAM (Project Risk Identification, Assessment and Mitigation), they could have performed their obligations. This argument is especially based on the expert report submitted by Mr. Lajtha. However, the Tribunal notes that in his report, Mr. Lajtha does not testify that applying the PRIAM methodology would have permitted Claimants to perform. Further, in his second expert report, the Claimants' expert, Mr. Wieser, using the PRIAM methodology assessed whether seismic operations could have been made possible by adopting risk mitigation measures. He concluded that "[t]he prevailing risk levels over the relevant period lie outside the [Claimants'] risk tolerance levels and risk mitigation measures would not have brought the residual risk levels below the MEDIUMHIGH tolerance rating."²⁰³ These findings were not expressly and in any case not convincingly challenged in the Respondents' submissions or in their examination of Mr. Wieser. In these circumstances, the Tribunal is unable to agree with the Respondents that performance could have been made possible by adoption of risk mitigation tools. Indeed, it appears that even by applying the tools suggested by the Respondents, the Claimants would not have been able to perform.

215. The next argument advanced by the Respondents is that performance was not impossible because the Claimants could have performed their obligations with

¹⁹⁸ WS Roy Chowdhury.

¹⁹⁹ Exh. C-111.

²⁰⁰ Exh. C-118.

²⁰¹ C-PHB §288 inter alia relying on case law and provisions of the Factories Act, 1948.

²⁰² Luqman ER II, question 4 in which he cites two Sharia principles ("*And do not throw yourselves into destruction*"; "*No harm and do no harm*").

²⁰³ Wieser ER II, p.7.

the assistance of the Yemeni military. Here too, the Tribunal is unable to agree. From a review of the incidents that took place at the time, it appears to the Tribunal that Yemeni military was not fully functional then. Problems plaguing the military were the subject of several discussions of the Yemeni Cabinet.²⁰⁴ Further, several companies complained about the military inaction or the inability of the military to protect them.²⁰⁵ In fact, in some instances, the military itself posed a threat to the operations of some companies in Yemen.²⁰⁶ In these circumstances, the Tribunal cannot agree with the Respondents that the Claimants should have approached the military for assistance in performing their obligations, especially in circumstances where the Respondents have themselves not indicated what assistance the military could have provided at the time and even less made such an offer contemporaneously.

216. Relying on Mr. Bartholomew's testimony, the Respondents submit that it is wrong for the Claimants to contend that new seismic data could not be obtained. The Tribunal recalls that it is sufficient if the party relying on force majeure establishes that it was prevented from performing its obligations "in a practical way".²⁰⁷ While Mr. Bartholomew is of the view that seismic operations could be conducted, he also maintains that this would require "appropriate logistical and security planning and support",²⁰⁸ which would come at a substantial price.²⁰⁹ For the reasons mentioned above [§159], the Tribunal has found that the events that took place in Yemen during the relevant period were unforeseeable. The Tribunal wonders whether it would be "practical" in that sense and context to expect the Claimants to incur substantial additional expenses to address risks that were not contemplated at the time that they entered into the PSAs. In any event, it is not clear that even by employing the

²⁰⁴ Exh. C-118 ("kidnappings carried out by forces of the First Armoured Division which defected from the National Army"; "the ongoing escalation of acts of sabotage attacking public and private property carried out by rebellious elements of the First Armoured Division", "achieving the integration of the armed forces within a unified, professional and national command structure within the framework of the rule of law.")

²⁰⁵ Exh. C-111.

²⁰⁶ Exh.C-117.

²⁰⁷ Tr.1143-1144, 1041 et seq.. This also appears to be in line with the Respondents' earlier submissions, where they rely on "insurmountability" (SoD §§6(iii), 181).

²⁰⁸ WS Bartholomew I §20.

²⁰⁹ WS Bartholomew II §26 ("With appropriate plans, personnel and assets in place seismic operations are conducted securely in numerous high risk environments. This often requires considerably more security personnel (which is quite expensive) than actual seismic crews.")

additional security measures suggested by the Respondents, the Claimants would have been adequately able to protect their personnel, which results into an impossibility that goes beyond the qualified “practical impossibility”. In fact, the examples relied on by the Respondents relate to production blocks. The security profile of exploration blocks is different from that of production blocks,²¹⁰ not the least because while production is localized, seismic acquisition camps have to move from place to place.²¹¹ Further, even though exploratory wells may be drilled at scattered locations in production blocks, this too would not equate the security profile of production blocks to exploration blocks. After all, such exploratory wells would be drilled within a production block, and the block itself is likely to have a security infrastructure in place.²¹²

217. The Respondents also submit that the Claimants could have engaged the Yemen Geological Survey and Mineral Resource Board to undertake “field work”, and that they could have conducted satellite imaging or gravity and magnetic surveys which would be unaffected by the security issues on the ground.²¹³ The Tribunal is unable to agree. It is not clear what is meant by “field

²¹⁰ The Parties’ experts appear to agree on this point. See Wieser ER I, pp. 3, 45 and Bartholomew WS I §25. See also Tr.998 (“MR STUDER: Yes. My understanding is on an exploration block you have higher risks in some ways and less risks in other ways because you are typically going to have a mobile security platform so ... THE PRESIDENT: It is a different ballgame altogether. Matters of security, when it comes to safety measures or security measures you can take when it comes to exploration and to production are different. MR STUDER: I am not a security expert. My sense would be that the principles would be the same and the various different manners that you implement those might change, you know, versus mobile versus fixed. THE PRESIDENT: Yes, but when it comes to exploration it is not something which is stable, localised and remaining in the same place. By definition they move. They move from one place to the other when you have some exploration. MR STUDER: Yes. THE PRESIDENT: So it cannot be exactly the same process of security. MR STUDER: That may be correct.”)

²¹¹ Tr. 1411-1412. (“You try to put up a layer of protection. What you have is as soon as you go into mobile, you know, these layers of protection they become blurred. You have a base camp, which is the first more or less stationary element that you have and then you go out into the field. This could be tens of kilometers, sometimes even hundreds of kilometers, that you have to drive crews out to gather the data. This could be crews that carry cable, that carry the geo-fans, it could be vibrator trucks crews that go out and these could be --stayed together in crews. Basically, they are crews that take the data in and then later can take it back to the camp for processing. They are constantly on the move. You cannot have any fortifications put in place. You do not have barbed wire, you do not have to dig trenches to stop a vehicle from accessing it [...]).

²¹² Tr. 1393-1394 (“MS SABBEN-CLARE: I put to you and I think you agreed that the wells in block 18 are at scattered locations. So if you are drilling a new exploratory well, by definition that is something that is not right by your existing facility, is it not?” MR WIESER: It depends how a block is organised. Some blocks have got, you know, perimeter fencing around the entire block and they drill within that perimeter fencing. MS SABBEN-CLARE: But an exploratory well means looking somewhere to see whether you will be able to produce oil in the future from which you are not producing all now. MR WIESER: That is correct but still within the block.”)

²¹³ Rej. §178.

work” that the Yemen Geological Survey and Mineral Resource Board would have been ready and able to perform and whether that work would have satisfied the Claimants’ contractual obligations. As mentioned above, the Claimants were to acquire seismic data. In order to do so, the Claimants would have had to send their personnel to Yemen. It has not been sufficiently made out how by conducting field work or other surveys the Claimants would have fulfilled their PSA obligation to acquire seismic data. Further, no suggestion to this effect appears to have been made by the Respondents at the relevant time.

218. The other arguments advanced by the Respondents – that operations continued on the ground in Yemen from 2011 to 2013, and that if production could be maintained with all of its attendant logistical challenges, then it follows that it was possible to acquire new seismic data too²¹⁴ – are equally unconvincing. First, it is the Respondents’ own case that “[t]he security situation varies from block to block and the alleged experiences of one operator in one block cannot be equated with the likely experiences of a different operator in a different block”.²¹⁵ Thus, the fact that operators of other blocks were able to conduct ground operations would not, in and of itself, be sufficient to conclude that ground operations could be conducted in the Blocks. Second, more importantly, the Tribunal notes that in support of their argument, the Respondents cite examples of ground operations in production blocks. Even if it is assumed that ground operations did take place at the relevant time in these blocks, as above, the security profile for production blocks is different from that of exploration blocks. Merely because some ground operations took place in some production blocks would not automatically mean that seismic data could be acquired in the Blocks in question. In fact, the Tribunal recalls that no exploration company (with the exception of Medco in one block in 2012) acquired new seismic data after April 2011 until February 2013. No exploratory wells were drilled by exploration companies after March 2011.²¹⁶ PEPA’s website too shows that no major exploration or production activities took place between January 2011 and 17 March 2013.²¹⁷

²¹⁴ R-PHB §6(3).

²¹⁵ Rej. §189. See also R-PHB §40 (“Documents relating to other Blocks are of no probative value...”).

²¹⁶ Tr. 787:20-23.

²¹⁷ C-PHB §385.

219. In sum, it does appear that the security situation in Yemen at the relevant time had deteriorated to a level that the Claimants were prevented from sending their personnel to Yemen to acquire new seismic data.

220. For the reasons mentioned above [§202], the Tribunal need not determine whether the Claimants were prevented from completing the tendering process because of Force Majeure. However, even if it were to consider the issue, it would not lead to a different outcome. The Tribunal recalls that on 16 May 2011, the Respondents instructed the Claimants to issue tenders in accordance with the applicable tender laws.²¹⁸ Art. 8 of Ministerial Decree No.1 requires a minimum of three tenders.²¹⁹ On 21 August 2011, the Claimants requested approval for tender documents in respect of Blocks 19 and 28.²²⁰ PEPA confirmed its agreement for the Claimants to issue its invitation to tender on 24 August 2011.²²¹ On 12 September 2011, the Claimants issued their invitation to tender.²²² Several companies advised the Claimants that they were unwilling to tender because of the security situation.²²³ After several extensions, the Claimants received only two bids per block (“Terraseis” and “Shiv-Vani” for Block 19 and “Shiv-Vani” and “Alphageo” for Block 28). On 6 September 2012, the Claimants advised PEPA that they had received only two bids for each Block, which was insufficient according to the Ministerial Decree.²²⁴ No solution was advanced by PEPA. In the circumstances, on reviewing the response received from the subcontractors that the Claimants had approached, the Tribunal believes that the security situation prevented the Claimants from receiving the requisite number of tenders. In effect, the Tribunal believes that Force Majeure prevented the successful completion of the Claimants’ obligation to acquire new seismic data.

²¹⁸ Exh. C-96

²¹⁹ Art. 8 of Ministerial Decree No.1, Exh. C-95 (“The operator shall adhere to carrying out competitive tenders for the entire operations of purchase, supply, and performance of works and services in connection with and required by oil operations in the relevant block, with existence of at least three competing contractors per each tender.”)

²²⁰ Exh. C-89.

²²¹ Exh. R-109.

²²² Exhs. C-90, C-91.

²²³ Exh. C-126.

²²⁴ Exh. C-97.

221. The Tribunal is aware of the Respondents' argument that Mr. Al Humaidy could have dispensed with the three-bidder requirement. First, it has not been established that the requirement could actually have been dispensed with.²²⁵ However, even if this were possible, it would not further the Respondents' case. After all, the possibility of a waiver was not communicated to the Claimants at the relevant time: in their communication of 16 May 2011 in which they instructed the Claimants to issue tenders in accordance with the tender laws, the Respondents did not indicate that they had the power to waive the three bidder requirement.²²⁶ In their letter of 6 September 2012 (i.e. after receipt of insufficient bids despite several extensions), the Claimants pointed out that they had received only two bids for each Block, which was inadequate according to the Ministerial Decree which required "at least three technically and financially competitive bidders." They asked PEPA "to suggest and advice [them] for [their] next course of action."²²⁷ In their response of 12 September 2012, the Respondents did not mention PEPA's powers to waive the three-bidder requirement. Further, the possibility of a waiver would not alter the fact that a number of subcontractors refused to bid because of the prevailing security situation.
222. The Tribunal is also aware of the Respondents' argument that the Claimants could have found more bidders to perform seismic work if they would have tried harder. The Tribunal is unable to agree. First, it has not been cogently made out that even if Claimants had tried harder, it would have led to more valid bids. Second, on reviewing the record, it appears to the Tribunal that the Claimants did make sufficient efforts to attract bidders. For instance, they replied to queries raised by some of the bidders and extended the bid submission deadlines on several occasions.
223. It is true for that for Block 57 no tenders were issued. However, this would not affect the outcome either. As mentioned above, PEPA approved the tenders for

²²⁵ Mr. Luqman's testimony on this point was not convincingly contested. See Luqman ER II, question 16 ("Article (34) requires the Chairman to first analyse and evaluate whether the conditions for an execution of discretionary powers are met, i.e. if the bid satisfies the terms, specifications plus all the other criteria stipulated in the tender invitation, and the bid is within the estimated cost and valid market price. Hence, only if the bid is in conformity with the technical specification, pricing, all the above other criteria and main conditions of the tender invitation, then discretion may be exercised").

²²⁶ Exh. C-96.

²²⁷ Exh. C-97.

Blocks 19 and 28 in August 2011. Non-submission of a tender for Block 57 was not raised at the time, or in subsequent correspondence. The Claimants' witness Mr. Biswal testified that given the security situation and logistical issues involved, the Claimants expected even less a response regarding Block 57,²²⁸ and that the Claimants would first pursue Block 19 and then move the seismic crew on to Block 57.²²⁹ It has not been established why the formal non-issuance of a tender in Block 57 would alter the Force Majeure situation in the Block 57 in Yemen, especially in circumstances where the Claimants' personnel would be required for seismic data acquisition, and where the Claimants had already given several Force Majeure notices citing problems in going ahead with their operations.²³⁰

224. The Tribunal concludes that the Claimants were unable to send their personnel to Yemen because of Force Majeure. As a result, they were unable to perform their obligations under the PSAs. Their inability began in March 2011 and continued at least until February 2013, when they issued their Notice of Termination.

5. Is the Claimants' Notice of Termination valid?

225. Article 22.4 of the PSAs does not expressly provide a period of time following the expiry of the six-month period of Force Majeure during which the notice of termination is to be served. As was already pointed out, it merely says that if a Force Majeure event "continues in effect for a period of six (6) months, *thereafter* the CONTRACTOR shall have the option [...] to terminate its obligations". In their submissions, the Respondents contended that the right of termination must be exercised promptly and that in February 2013 it was too late for the Claimants to exercise a right of termination which had accrued at least 11 months earlier.²³¹ By contrast, the Claimants submit that their termination of the PSAs because of Force Majeure was "in time." They submit

²²⁸ Biswal WS I, §21; Biswal WS II §16.

²²⁹ Tr.431 et seq. This appears to be aligned with industry practice. See Exh. C-116. See also Tr.768-769.

²³⁰ See e.g. Exh. R-111.

²³¹ Rej. §309.

that Force Majeure occurred over a period of at least six months, and until February 2013.

226. For the reasons mentioned above, the Tribunal believes that Force Majeure event(s) occurred at the relevant locations over a period of six months extending to February 2013. In the circumstances, the Tribunal need not consider the Parties' submissions on whether the Claimants' termination was declared in time. Indeed, Force Majeure would have accrued again and again (the last six-month period being August 2012 to February 2013), with the completion of each six-month period, until February 2013. The Claimants' notice of termination of 13 February 2013 was therefore after the last six-month period, and "in time" for the purposes of Article 22.4 of the PSAs.

C. REIMBURSEMENT OF BONUSES

a. The Claimants' position

227. The Claimants point out that despite the declaration of force majeure, they made annual bonus payments to the Respondents of US\$ 4.19 million. Article 22.1 of the PSAs merely obliged them to pay the amounts that were due. As the PSAs were suspended during the time of Force Majeure, the payments made by them never became due. As the Claimants were not obliged to make the bonus payments but nevertheless made them, the Respondents should thus reimburse the Claimants.²³²

228. The Claimants submit that the Respondents' argument that the bonuses accrued during a period in which the PSAs were in force is irrelevant. They point out that Force Majeure extends the Exploration Periods, and therefore, the longer the period during which Force Majeure lasts, the more bonuses Respondents would earn, which was not correct. In sum, according to the Claimants, bonuses cannot become due in periods of Force Majeure as it would unjustly enrich the Respondents.²³³

²³² SoC §§306-309.

²³³ Reply §659.

b. The Respondents' position

229. The Respondents contend that the bonuses accrued during the period when the PSAs were in force. Even if the Claimants' arguments were correct, the PSAs were terminated with effect from April 2013, not any earlier date. As such, the bonuses are not returnable now.
230. According to them, the effect of the Claimants' declaration of Force Majeure did not suspend the payment obligation, "it merely excuse[d] performance caused thereby. That performance does not, on any view, extend to the obligation to make bonus payments and the Claimants cite no authority for such a proposition. No question of unjust enrichment arises."²³⁴ They contend that the fact that bonuses remain payable despite Force Majeure is consistent with the fact that these sums are payable without any chance of redemption.
231. Finally, the Respondents submit that the Claimants are estopped from denying that they were liable to make the bonus payments and/or are prevented by the contractual requirements of good faith from claiming these sums. After all, the Claimants did not exercise their right to terminate for 18 months, during which time they acted as if they were performing the PSAs and bound by them. It would be unfair to require the Respondents to reimburse the bonus payments which were paid during this period because the Claimants chose to delay exercising their alleged right to terminate. In effect, the Claimants were asking the Respondents to pay the costs of the Claimants' delay, which should not be accepted.

c. Analysis

232. The Tribunal recalls that at the time of signing the PSAs, the Claimants paid a signature bonus of US\$ 3.75 million to the Respondents.²³⁵ Annual bonuses amounting to US\$ 2.095 million were paid in 2009 and in 2010.²³⁶ No claim is made in respect of these payments. The Claimants' claim is limited to the bonuses paid in 2011 and 2012, which collectively amount to US\$ 4.19 million.

²³⁴ Rej. §320.

²³⁵ WS Dave I §23; Exh. C-34.

²³⁶ Id.

233. Article 7.2 of the PSAs states that:

“In addition to any non-recoverable costs and expenses provided for in this Agreement or in the Accounting Procedures in Annex “F” of this Agreement, the below-mentioned costs and expenses are not recoverable from Cost Recovery Petroleum or otherwise under the Agreement:

[...]

Bonuses paid to the STATE or to the MINISTRY.”

234. Article 9 of the PSAs provides that taxes and bonuses have to be paid at certain specified intervals.

235. Art. 22.1 of the PSAs states that the Claimants are obliged to pay amounts that are due:

“The non-performance or delay in performance by the MINISTRY or the CONTRACTOR of any obligation under this Agreement other than the obligation to pay any amounts due [...] shall be excused if, and to the extent that, such non-performance or delay is caused by Force Majeure.”

236. Article 22.4 of the PSAs provides that:

“[...] the CONTRACTOR shall have the option [...] to terminate its obligations [under the PSAs] without further liability of any kind except for those payments accrued under this Agreement.”

237. Thus, the Claimants were bound to pay bonuses under the PSAs (Article 9). Once paid, these bonuses would not be recoverable under the PSAs (Article 7.2). Further, non-performance or delay in paying amounts due under the PSAs would not be excused because of Force Majeure (Article 22.1). Finally, once the PSAs are terminated there is “no further liability of any kind.”

238. The Claimants submit that they were not obliged to pay the bonuses, and hence the Respondents should reimburse them. The Tribunal is unable to agree. As seen above, the PSAs were validly terminated by 15 May 2013 at the latest. The termination does not have – and the Claimants do not claim that it has – any retrospective effect. Thus, until 2013, the PSAs were in full force and effect, except those obligations which were suspended because of Force Majeure. The Claimants’ Force Majeure declaration of April 2011 did not suspend all of their obligations under the PSAs because of Force Majeure. Quite to the contrary, Article 22.1 expressly provides that obligations to pay amounts due are not suspended because of Force Majeure. Thus, until termination of the PSAs in

2013, the Claimants were obliged to pay the bonuses, which they did. By paying the bonuses, the Claimants were merely complying with the contractual obligations they voluntarily undertook in the PSAs. In the circumstances, the Tribunal does not see any valid reason to require the Respondents to reimburse monies to which they were legitimately entitled under the PSAs. Accordingly, the claim is dismissed.

239. In dismissing the claim, the Tribunal is aware of the Claimants' argument that the Respondents will be "unjustly enriched" because the longer the period during which the Force Majeure occurs, the more the bonuses the Respondents would earn. The present dispute before the Tribunal concerns whether the Claimants should be reimbursed for bonuses paid in 2011 and 2012. It is not a case where bonuses have been paid for a considerable period of time because the Force Majeure period keeps extending (whether because of one party or otherwise), but never for a period of six months. Therefore, as it is not required to resolve the dispute presently before it, the Tribunal does not consider the Claimants' argument. Indeed, the Claimants have not shown how (which provisions of Yemeni law etc.) a (possible) difficulty in applying the clause in a hypothetical scenario would operate to alter the existing provisions of the PSAs.

D. COUNTERCLAIMS

1. Procedural Background

240. At the outset, the Tribunal recalls the procedural history of the counterclaims as under:

- In the Terms of Reference, the Respondents' counterclaims were reproduced as:

"58. The Respondents also ask the Tribunal to declare and/or order as may be appropriate that:

- a. The Claimants are in breach of the PSAs by failing to perform all their obligations, inter alia: (i) their Minimum Work Obligation for the First Exploration Period, as set out in Annex C; and/or (ii) the work set out in their annual Work Programs and Budgets.

[...]

d. The Claimants are liable to pay damages to the Respondents for breach of the PSAs in at least the amount of the 2011 Budget (US\$53.04m) and/or of the Minimum Expenditure obligation (US\$42m).

e. The Claimants are to pay interest on such damages for a period and at a commercial rate to be assessed.

f. The Respondents are entitled to drawdown on the Standby Letters of Credit issued in their favour by the International Bank of Yemen.”

- On the basis of discussions with the Respondents during the hearing, the Tribunal gave them the opportunity to amend their prayers for relief;
- On 19 September 2014, the Respondents submitted a “Note on Quantum”;
- In their reply of 26 September 2014, the Claimants contended that the claims in the Respondents’ submission were “new claims” in the context of Article 23(4) of the ICC Rules, and were inadmissible;
- On 1 October 2014, the Tribunal requested the Respondents to comment on the Claimants’ reply. In particular, the Respondents were directed to “state their claims as they are now, namely how they wish to read the decision part (“dispositif”, “order”) of the Award”;
- On 8 October 2014, the Respondents submitted their “Reply to the Claimants’ Submission dated 26 September 2014”, “set[ting] out [...] their claims for damages as the Respondents would like them to appear in the decision part of the award”. The Respondents sought the following relief:

“Relief Sought

2. The Respondents seek the following orders:

a) The Respondents are entitled to draw down on the SBLCs for US\$42million, pursuant to Article 2.1.4(b); and;

b) The Respondents are additionally entitled to damages for the Claimants’ breach of the Minimum Work Obligation, which are to be assessed as the cost of performance of the work, namely [insert figure]; and/or

c) The Respondents are additionally entitled to damages for the Claimants’ breach of obligation to perform the 2011 WP&Bs, which are to be assessed as [insert figure].

[...]

4. In the alternative to the claims set out in paragraph 2, if the Tribunal were to hold that Force Majeure intervened from 11 March 2011, then the Respondents seek an Award which states that the Claimants were in breach of the PSAs by failing to perform the work set out in the 2010 WP&Bs. It would follow that

the Claimants are liable to pay the Respondents the cost of performing the 2010 WP&Bs. The claim is for US\$111million (at today's costs of acquiring new 2D seismic data) or US\$32.46m (the actual amount of the 2010 WP&Bs, net of paid bonuses and taxes)."

- On 21 October 2014, the Tribunal advised the Parties that whether or not the Respondents' counterclaims were classified as "new" claims in the context of Article 23(4) of the ICC Rules, what was necessary was that the Claimants were given an opportunity to respond to the counterclaims. Accordingly, the Tribunal gave the Claimants the opportunity to make submissions and/or lead evidence on the Respondents' counterclaims;
- On 10 November 2014, the Claimants filed their "Reply to Respondents' Reply Note on Quantum" along with the fourth expert report of Mr. Luqman. In their submission, the Claimants contended that they were not contesting the admissibility of the Respondents' claim for damages in respect of the MWO or the WP&B. Rather, they were contesting (i) the Respondents' claim of US\$ 147 million instead of the earlier amount of US\$ 53.04 million; and, (ii) the justification of the increase by reference of the concept of "value of performance";²³⁷
- On 11 November 2014, the Tribunal advised the Parties that it understood that the Parties had completed their submissions in respect of the claims and counterclaims. The Tribunal would request further input from the Parties if necessary.

241. It follows from the above that the Respondents' counterclaims to be decided by the Tribunal are as under:

"Relief Sought

2. The Respondents seek the following orders:

- a) The Respondents are entitled to draw down on the SBLCs for US\$42million, pursuant to Article 2.1.4(b); and;
 - b) The Respondents are additionally entitled to damages for the Claimants' breach of the Minimum Work Obligation, which are to be assessed as the cost of performance of the work, namely [insert figure];
- and/or

²³⁷ Claimants' submission of 10 November 2014, §7.

c) The Respondents are additionally entitled to damages for the Claimants' breach of obligation to perform the 2011 WP&Bs, which are to be assessed as [insert figure].

[...]

4. In the alternative to the claims set out in paragraph 2, if the Tribunal were to hold that Force Majeure intervened from 11 March 2011, then the Respondents seek an Award which states that the Claimants were in breach of the PSAs by failing to perform the work set out in the 2010 WP&Bs. It would follow that the Claimants are liable to pay the Respondents the cost of performing the 2010 WP&Bs. The claim is for US\$111million (at today's costs of acquiring new 2D seismic data) or US\$32.46m (the actual amount of the 2010 WP&Bs, net of paid bonuses and taxes)."

242. These counterclaims were framed somewhat differently in the Respondents' PHB as under:

"223. Accordingly, the Tribunal is asked to:

[...]

223.2. Hold that the Respondents are entitled to drawdown on the SBLCs forthwith;

223.3. Hold that the Claimants were and are in breach of the PSAs by their failure to perform the Minimum Work Obligation and/or the WP&Bs;

223.4. Award the Respondents damages of US\$147m (or such other sum as the Tribunal may see fit, and inclusive of interest / damages reflecting the date of performance as the Tribunal may see fit)

[...]"

243. It also appears that the Claimants do not object to the admissibility of the Respondents' claim for damages in respect of the MWO or the WP&B. Rather, they contest the increase in the amounts claimed by the Respondents, as well as the manner in which that increase has been calculated. The Claimants' objections would have to be considered only in the event the Tribunal finds that the counterclaims succeed on the merits. For the reasons given below, none of the counterclaims succeed. Thus, the Tribunal need not analyze the Claimants' admissibility objections.

2. Legal Framework

244. The Respondents rely on Articles 333 and 347 of the Yemeni Civil Code for their counterclaim. These provisions state:

“A person who owes an obligation must perform it by specific performance or compensate for its value, if specific performance was not possible”.²³⁸

“If specific performance by the obligor is impossible, the judge will hold him liable for compensation for non-performance unless the obligor proves that the impossibility of performance arose due to a foreign reason not attributed to him.”²³⁹

245. In addition, Article 351 of the Yemeni Civil Code which provides the rules applicable to determine how damages are to be assessed is also relevant:

“If the amount of compensation was not agreed by contract or by law, it shall be determined by the judge based on the ‘actual/tangible damage’ suffered by the obligee, provided that the damage is a natural consequence of nonperformance or delay in performance of the obligation. The damage shall be considered a natural consequence if the obligee was unable to reasonably mitigate its effects. If the damage originated from a contract, the obligor who did not commit fraud or gross negligence, would only be liable for damage which was foreseeable at the time of contracting.”

246. The Tribunal now proceeds to examine each of the counterclaims. In doing so, the Tribunal is mindful that, for each counterclaim, the Respondents have to show that an obligation exists, that the obligation has been breached, and that the breach has caused damage.²⁴⁰

²³⁸ Art. 333 of the Civil Code.

²³⁹ Art. 347 of the Civil Code.

²⁴⁰ The Respondents agree. See “Issues of Yemeni Law/Construction of the PSAs” §14 (“In order to claim damages for breach of contract under Yemeni law, the aggrieved party must demonstrate: (a) the existence of a contract; (b) A breach of that contract; (c) Loss suffered as a result of that breach”). See also Respondents “Overview Note” §17.3.

3. Analysis

a. Drawdown of the SBLCs

247. The Respondents alleged entitlement to drawdown on the SBLCs is set forth in Art.2.1.4(b) of the PSAs:

“If, at the end of the First Exploration Period or the Second Exploration Period or at the termination of this Agreement, the CONTRACTOR has failed to fulfill its Minimum Work Obligation for the applicable period, and neither the CONTRACTOR nor the bank under the applicable Letter of Credit has paid the entire amount corresponding to the amount of the applicable Letter of Credit (reduced as provided below), then the MINISTRY shall be entitled to draw the amount of said Letter of Credit against the bank in accordance with its terms.”

248. Thus, the Respondents are allegedly entitled to drawdown the SBLCs if the Claimants have failed to perform the MWO at the end of the First Exploration Period or at termination of the PSAs. In the absence of Force Majeure, the First Exploration Period would have expired on 17 March 2013. However, as above, the Tribunal has found that Force Majeure intervened in March 2011. Thus, the Claimants’ obligations (at least in respect of acquiring new data and drilling wells) were suspended.²⁴¹ Hence, the First Exploration Period was suspended from March 2011 onwards. It effectively ended on 15 May 2013 at the latest (i.e. 90 days after the Claimants’ notice of termination of 13 February 2013). Thus, the Respondents may be entitled to drawdown the SBLCs if they can establish that the Claimants had failed to perform their MWO at the latest by 15 May 2013.

249. The MWO itself consists of three obligations: (i) reprocessing available data, (ii) acquiring new 2D and 3D-seismic data, and (iii) drilling wells.²⁴² Thus, in order for the Respondents to succeed, they must establish that the Claimants have not fulfilled these obligations by 15 May 2013 at the latest.

250. Article 22.1 of the PSAs (reproduced above) excuses the Claimants from performance of their obligations if the non-performance is caused by Force Majeure. For the reasons mentioned above, the Tribunal has concluded that the Claimants were unable to fulfill their obligations in respect of acquiring new

²⁴¹ Article 22.1 of the PSAs.

²⁴² Exhs. C-1 - C-3, Article 1.36 and Annex C.

seismic data and, consequently, drilling of wells because of Force Majeure. Thus, the Claimants are excused from performing these obligations from March 2011 onwards. Therefore, the Claimants' obligations to acquire new seismic data and drill wells were suspended as of March 2011. Their obligations being so suspended, the Claimants could not have breached these obligations by 15 May 2013 when the First Exploration Period effectively ended. The Respondents' counterclaims in this respect are, therefore, rejected.

251. The Claimants' obligation to reprocess available data however, was not affected by Force Majeure.²⁴³ Thus, if the Respondents can establish that by 15 May 2013 at the latest, the Claimants had breached their obligation to reprocess available data then the Respondents may be entitled to drawdown the SBLCs insofar as the SBLCs relate to this obligation. The Parties' arguments on this issue are considered below.

i. Respondents' Position

252. The Respondents submit that they complied with their obligations under the PSAs by making all the data which they had been provided by previous operators available to the Claimants at the databanks. To the extent that such data was found to be lacking or of poor quality, that was a risk which the Claimants assumed at the time of contracting. The Respondents did not undertake to provide the data in any particular format. Nor did they guarantee its extent.²⁴⁴

253. The Respondents further submit that the Claimants already had most of the available data for the Blocks prior to entering into the PSAs. The Claimants would have reviewed the data before deciding whether to bid for the Blocks, something which is also borne out from the fact that the Claimants' prospectivity reports for the Blocks prepared in March-June 2010 refer to missing and poor

²⁴³ C-PHB §216 ("Claimants' case is that Force Majeure in the sense of Art. 22.2 of the PSAs prevented the performance of 2D- and 3D seismic surveys and the drilling of exploratory wells in the Blocks. Claimants' case is not that Force Majeure prevented the first step of the PSAs' MWO, the *re-processing* of existing data. With regard to the MWO to reprocess existing data, Claimants' case is that performance was impossible because Respondents had not provided them with the necessary original data and support files").

²⁴⁴ SoD §§117-118.

quality data.²⁴⁵ In any event, once the PSAs were signed the Claimants could have enquired with PEPA / the Ministry as regards any other available data in relation to the blocks. The Claimants did not ask if any further data was available and to what extent the data previously acquired was in a readable format until February 2010.

254. The Respondents finally submit that it is wrong for the Claimants to contend that reprocessing was not possible. The Respondents had supplied data which was capable of being reprocessed. Even if this were not the case, the Respondents point out that the Claimants' inability to reprocess was not brought to the Respondents' attention. The Claimants had not produced a single study or report that performance of the reprocessing obligation was impossible. As the Claimants did not seek a variation of their PSA obligations, the obligation to reprocess remained, and the Claimants' failure to comply was a breach.

ii. Claimants' Position

255. On their part, the Claimants contend that it was impossible to perform the obligation to reprocess the available data.²⁴⁶ They submit that the obligation to reprocess "available data" attaches to original data only. The Claimants received this data only on 17 October 2010, and it was impossible for them to reprocess data before then. Even after that date, reprocessing was impossible. For Block 19, the Respondents did not provide the Claimants with "all supporting files" for the original data for the 27 lines supplied on 17 October 2010.²⁴⁷ Ms. Sileem, the Respondents' expert, had herself testified that these files were necessary for reprocessing. For Block 28, the reprocessible data supplied by the Respondents was outside the Block boundaries. While some of the data supplied fell within the Block, the Claimants submit that it would have been "futile" to reprocess this data because it would not have generated useful information.²⁴⁸ For Block 57, the Claimants point out that necessary relational

²⁴⁵ R-PHB §58.

²⁴⁶ C-PHB §676.

²⁴⁷ C-PHB §685.

²⁴⁸ C-PHB §697.

files were missing and this made it impossible for them to reprocess the available data for that Block.

256. In sum, the Claimants submit that reprocessing was impossible for Blocks 19 and 57, whereas reprocessing would have been useless for Block 28. If however, the Tribunal were to find otherwise, "then the Tribunal should find that Claimants are in breach only to the extent original data were made available to Claimants in relation to the far larger amount of objectively existing original data, which Respondents did not make available to Claimants."²⁴⁹

iii. Analysis

257. The Tribunal recalls that the Claimants were obliged to "reprocess available seismic data" related to the Blocks. This "available seismic data" was to be "made available" to the Claimants pursuant to Article 14.8 of the PSAs which provides in this respect:

"All available technical data concerning the Agreement Area including the geological, geophysical and drilling data and any rock or hydrocarbon rock samples shall be made available to the CONTRACTOR free of charge except of copying within thirty (30) Days from the Effective Date."

258. Thus, the Respondents were to "make available" "available technical data"²⁵⁰ to the Claimants, which the Claimants would then reprocess.

259. The Tribunal believes that in order to reprocess, the Claimants would need not only the raw data, but also certain support files. As Mr. Biswal testified:

"Two things are necessary for reprocessing of seismic data: the raw data and the support files. It is also important to have all the support files. In this regard, Ms Sileem's expert report is not precise. The table on page 27 lists many files which were provided for the 27 "Phillips" lines (block 19). These include tape labels, final report vibroseis seismic Survey, Preliminary test report, Dynamite report and recording summary. But all of these are not support files. These accessory parts are often called "Operational reports". They are helpful, but they are not support files and you cannot do any reprocessing with them.

²⁴⁹ C-PHB §705.

²⁵⁰ The Parties contest the translation of the Arabic equivalent for the word "available" used in the English version of Article 14.8. The Claimants submit that it means "existing", while the Respondents contend that it means "available". For the reasons mentioned subsequently, the Tribunal need not decide the issue. For the reasons mentioned subsequently, the Tribunal need not decide the issue. For the sake of convenience, the Tribunal uses the word "available" although it has not decided on the Parties' opposing views on the issue.

Support files include the "Observer Logs" which Ms Sileem mentions in paragraph 37.5. These support files were never provided to us for the block 19 lines."²⁵¹

260. This necessity of support files was also confirmed by the Claimants' witness Mr. Saha in his testimony:

"MR SAHA: Yes, we received the raw data only on 17 October 2010 and for confirmation which GSPC and DBDP also confirms that whatever raw data we received for block 19 without support file, that means reprocessing was not possible."²⁵²

"MS SABBEN-CLARE: Now, I want to know how long it took you to form the view that for some blocks, some lines at least, you did not have the raw data that you would need to make reprocessing possible. Did it take you a week, six months, a year? How long was it?

MR SAHA: I cannot understand your question because our understanding was from the beginning we were saying that we need raw data along with the support files."²⁵³

261. In her written expert testimony, Ms. Sileem stated that:

"The recorded seismic data in the field is called Pre-Stack data, field data and also called seismic traces. Their Identification records are called Observer logs or trace headers. It is necessary to have both complete data sets in order to process the Pre-Stack data."²⁵⁴

262. Finally, Medco, another oil and gas company operating in Yemen also established the need for support files:

"[t]he obstacle of reprocessing all seismic data is the lack of supporting data i.e. observer report, navigation files and some are not complete data record."²⁵⁵

263. Thus, it appears to the Tribunal that the Claimants could fulfill their obligation of reprocessing "available seismic data" only if they had both, the raw data and the support files. Both of these would have to be "made available" by the Respondents, who own all the data in respect of any block in Yemen.²⁵⁶ The

²⁵¹ WS Biswal III, §2.

²⁵² Tr.483 et seq.

²⁵³ Tr.471.

²⁵⁴ WS Sileem I §37.5.

²⁵⁵ Exh. C-116, p. 723.

²⁵⁶ All data obtained in respect of any block in Yemen is the property of the Ministry (SoD §94). The Respondents have not substantially made out a case that the Claimants should have created the support files themselves, or acquired them from other operators (if either of these were possible).

Claimants' case is that it was "impossible"²⁵⁷ to reprocess data for Blocks 19 and 57, and that it would be useless to reprocess data for Block 28.

264. For Block 19, it appears undisputed that there were 132 existing lines. Of these, the Respondents' expert explained that 27 seismic lines were provided to the Claimants. Thus, the Claimants' reprocessing obligation could have been performed only in respect of these 27 lines. However, as above, reprocessing of raw data is not possible in the absence of support files. On reviewing the evidence supplied by the Respondents, it appears that necessary support files were missing.²⁵⁸ For instance "Observer Logs" – which Ms. Sileem submitted were needed²⁵⁹ – were missing.²⁶⁰ Thus, reprocessing was not possible in respect of Block 19.
265. The Tribunal is aware that in the course of her examination, Ms. Sileem stated that it would have been possible to reprocess the original data for Block 19 based on the information contained in processed data and shot point location maps that were supplied to the Claimants in 2006. The Tribunal is not convinced by this testimony. First, Ms. Sileem relied on lists provided to her by the Respondents,²⁶¹ and only speculated that the relevant maps were actually provided to the Claimants.²⁶² Second, in her written testimony filed months prior to the hearing (and without the benefit of the Claimants' Rejoinder on the Counterclaim in which they emphasized the necessity of the relevant support files), she did not mention anything about using other information as a substitute for the support files. As above, her written testimony prior to the hearing was

²⁵⁸ Rej. §60(a), Exh. R-134.

²⁵⁹ WS Sileem I §37.5.

²⁶⁰ WS Biswal III §2.

²⁶¹ Tr.1203-1206: "DR BURIANSKI: So the basis of your report is a seismic data inventory prepared by Mr Galal from DBDP? MS SILEEM: Yes and there are other previous listings that I got. [1203] DR BURIANSKI: I think my question was unclear. My question was rather what did you do to verify whether this is a full inventory? Did you look at the (*sic*) at that time? Did you check the data or did you just work with lists that were provided to you? MS SILEEM: I worked with listings that were provided to me. [1204 et seq.] DR BURIANSKI: Okay. Please go to paragraph 62 of your report. I am reading from paragraph 62 and more specifically from the third sentence. It says: "I was put in [touch] with the data bank and managed to obtain a full and detailed data inventory of all the available data in respect of the three blocks and that the data bank say was provided to GSPC." In reality this [list] was based on information given to you by others. MS SILEEM: Yes indeed."

²⁶² Tr.1225: "DR BURIANSKI: Let me put my question differently so that we can save time. Have you verified whether these maps were actually provided to Claimants? MS SILEEM: It is very obvious when they say location map for seismic lines it is the shot point location map. It cannot be other."

categorical. Even more so, Medco, an independent operator, also largely came to the same conclusion as she did in her original testimony.

266. For Block 28, it appears undisputed that there were 43 existing lines. Of these, the Respondents' expert explained that 30 seismic lines were provided to the Claimants. Thus, the Claimants' reprocessing obligation could have been performed only in respect of these 30 lines. However, as above, reprocessing of the original raw data is not possible in the absence of support files. On reviewing the evidence supplied by the Respondents, it appears that support files were missing for 27 lines.²⁶³ Thus, reprocessing would be possible only in respect of three lines for which support files were present. However, the Respondents have not (expressly) challenged that of these three lines, one was outside the Block and the other two were partially within the Block boundaries (approximately 15 km). Further, the Respondents do not appear to dispute the Claimants' submission that there is no obligation to reprocess one line within the block because 2D seismic acquisition means that a grid is created and with one line you cannot create a grid. In his testimony, Mr. Biswal stated that it would not have been useful to reprocess the limited data in respect of Block 28:

"The 3 remaining lines of block 28 were not relevant. They were mostly outside the block area, as can be seen from the illustration below. One line was completely outside and one hardly reached into the block. Only the third and shortest line was to the majority inside the block:

[...]

Therefore the reprocessing and interpretation of these lines would have not provided much information for us. 2D seismic lines are shot in a grid. If you have several lines in a grid, you have two dimensions. If you do not have a grid, you cannot visualise the subsurface feature of the area."²⁶⁴

267. Mr. Biswal stated that reprocessing the few lines available in Block 28 would not be useful. Effectively, if the reprocessing was meant to serve an economic process, namely to collect useful information from the available data for the Block, reprocessing was impossible because it would not achieve that.

268. This testimony was not challenged by the Respondents. Besides, neither have the Respondents established the loss suffered by them as a result of the

²⁶³ Rej. §60(a), Exh. R-134.

²⁶⁴ WS Biswal III §§4, 5.

Claimants' non-processing of approximately 15 km of seismic lines. In the circumstances, the Respondents' claims in respect of Block 28 are rejected.

269. For Block 57, it appears undisputed that five seismic lines (out of a total of five lines) were provided to the Claimants. Thus, the Claimants could have reprocessed all five lines. However, as above, reprocessing of the original data is possible only if necessary support files are also present. It appears that necessary support files ("relational files" or ".x files") were missing. The Claimants' witnesses, Mr. Biswal and Mr. Saha testified that this was the case:

"Finally with regard to the 5 lines of block 57, it is correct that we received support files. But these were not complete. When we checked the data, we discovered that the relational files were missing.

Without the support files, the raw data cannot be processed."²⁶⁵

"With regard to block 57, the support files of those five lines were not complete because the relationship files were missing."²⁶⁶

270. This testimony was not challenged at the hearing. Neither was Mr. Saha's testimony that in a call between him and Mr. Cowgill from Fugro in late October 2010, FRL confirmed that they were unable to reprocess the data for Block 57 as well.²⁶⁷ Ms. Sileem's testimony that "all supporting files" would have been delivered is less useful because she admitted that she made this statement on the basis of lists supplied to her by the Respondents, and not on reviewing the actual data.²⁶⁸ In the circumstances, in the absence of the Respondents meeting the Claimants' case that it was not possible for them to perform their obligation to reprocess available seismic data in respect of Block 57, this counterclaim is also denied.

271. In sum, the Tribunal denies the Respondents' counterclaims insofar as they relate to the reprocessing of available data for the Blocks.

272. The Tribunal is aware that the Parties have differing views on the time at which the "available technical data" as contemplated in Article 14.8 of the PSAs was

²⁶⁵ WS Biswal III §8,9.

²⁶⁶ WS Saha III §7.

²⁶⁷ WS Saha III §7 ("With regard to block 57, the support files of those five lines were not complete because the relationship files were missing. We also forwarded the data to "Fugro" to have them check it. Mr Mark Cowgill from Fugro then told me during a call in the third or fourth week of October 2010 that they could not reprocess the data because the ".x"-relationship files were missing.").

²⁶⁸ Tr.1203-1206.

provided to the Claimants. The Tribunal believes that it need not resolve this issue. What is relevant for the present purposes is that necessary support files were missing, which rendered it impossible for the Claimants to fulfill their reprocessing obligations.²⁶⁹

273. The Respondents have also pointed out that the Claimants did not mention their alleged impossibility to perform their reprocessing obligations. The Tribunal is unable to agree with the Respondents' position. First, in the Exploration Advisory Committee meeting of 20 March 2010, the Claimants mentioned that the minimum commitment of US\$ 500,000 per Block towards reprocessing available data "may not be utilized in full due to lack of data availability and should be allowed for substitution".²⁷⁰ Further, in their communication of 22 June 2010, the Claimants advised PEPA that without supporting documents and processing reports, "reprocessing of the seismic data may not be possible."²⁷¹ The matter was then apparently not raised by either Party until 18 February 2012 when the Exploration Advisory Committee sought the Claimants' explanation on "re-processing previous information".²⁷² The Claimants responded on 17 March 2012 stating that the available seismic data was of "very poor quality". They further indicated that they would discuss with PEPA "about relevance of reprocessing of existing data".²⁷³ In these circumstances, the Respondents seem to have been on notice since at least March 2010 that the Claimants may be unable to fulfill their reprocessing obligation. Second, even if it is assumed that the Claimants did not timely advise the Respondents of their inability to perform their reprocessing obligation, it would not alter the outcome. Indeed, in the absence of support files, the Claimants' obligation to

²⁶⁹ The Respondents do not appear to contest this position, at least in so far as the Claimants would not be able to perform their reprocessing obligation in the event that the necessary supporting files are missing: ("The Claimants were obliged to reprocess "available" data. If there were only 5 lines with full supporting files, and if full supporting files were needed in order to be able to reprocess data, both as they now allege, then it follows that there was no content to this PSA obligation."). See also Tr.91:16-18 ("Thus if they did not have the requisite data, then they did not have to do anything.").

²⁷⁰ Exh. R-9.

²⁷¹ Exh. C-75.

²⁷² Exh. R-122.

²⁷³ Exh. R-122.

reprocess was impossible, and the Claimants cannot be said to have breached such an obligation. This seems to be the Respondents' position as well.²⁷⁴

b. Failure to perform the MWO

274. The Minimum Work Obligation was to be performed by the end of the First Exploration Period.²⁷⁵ For the reasons mentioned above [§248], the Tribunal has found that the First Exploration Period was suspended from March 2011 onwards. It effectively ended by 15 May 2013 at the latest (i.e. 90 days after the Claimants' notice of termination of 13 February 2013). Therefore, in order to succeed on their counterclaim, the Respondents would have to show that (a) the Claimants were under an obligation to perform their MWO at the latest by 15 May 2013; and (b) that they had failed to do so.

275. As mentioned above, the MWO itself was composed of three obligations: (i) the reprocessing of available data, (ii) the acquisition of new 2D and 3D-seismic data and (iii) the drilling of wells. The Claimants could not have been in breach of items (ii) and (iii) because of Force Majeure. In respect of item (i), i.e. the obligation to reprocess available data, the Tribunal has already found that the Claimants were unable to fulfill this obligation. Thus, even if the Respondents were to establish that the Claimants were under an obligation to perform their MWO at the latest, by 15 May 2013, they would, in any event, not succeed in establishing that the Claimants had breached such an obligation.

276. In the circumstances, the Tribunal rejects the Respondents' counterclaim in so far as it relates to the Claimants' alleged non-performance of its Minimum Work Obligation.

277. The Tribunal notes that the Respondents have also submitted that the Claimants are in breach of their obligations under the PSAs "to take steps so that the Minimum Work Obligation could be completed by the end of the First Exploration Period".²⁷⁶ The Tribunal is unable to agree. As mentioned above,

²⁷⁴ Tr.1464-5 ("[i]f your view is no support files, no reprocessing and you do not get any support files, and you are told by PEPA in no uncertain terms there is no more to come, then you know then that there is no reprocessing that you can do. Moreover, that does not put you in breach of the PSAs there is just no PSA reprocessing obligation. The PSAs require you to reprocess available data.").

²⁷⁵ Article 1.36 of the PSAs.

²⁷⁶ SoD §71.

the MWO is to be performed by the end of the First Exploration Period. There is no obligation – and the Respondents have not cogently submitted to the contrary – that the PSAs require certain steps to be taken towards fulfillment of the MWO, and especially that such steps would have to be taken prior to March 2011, when Force Majeure prevented performance of at least some of the Claimants' obligations.

278. The Tribunal also notes the Respondents' submission that "the Claimants delayed fulfilment of their contractual obligations and adopted such a haphazard approach to performance that (by April 2011 when they declared Force Majeure) they had put themselves in a position in which it had become impossible for them to fulfill their minimum obligations whether in the years to which they had committed in the WP&Bs or by the end of the First Exploration Period."²⁷⁷ The Tribunal is unable to agree. After all, the Respondents' case is that the 2011 and 2012 WP&Bs as submitted by the Claimants would have been approved. If this is the case, then it would appear that the Respondents too believed that it was possible for the Claimants to fulfill their obligations by the end of the First Exploration Period. The Respondents have the burden of proof on this issue of alleged impossibility for the Claimants to fulfill their minimum obligations by the end of the First Exploration Period. Nothing in the record convincingly establishes that.²⁷⁸ For instance, the Respondents do not establish how time of performance was an essential part of the PSAs, especially in circumstances where the PSAs themselves provide that the Claimants can 'elect' to enter into extensions, which extensions "shall not be unreasonably withheld"²⁷⁹ and where such extensions were granted to other operators in what appear to be similar circumstances.²⁸⁰ The Respondents thus resort to analyzing their own state of mind in respect of their prospective approval of the WP&Bs,²⁸¹ which is insufficient. The Respondents' reservations in this respect

²⁷⁷ SoD §129.

²⁷⁸ See also Reply §98 ("[The Claimants'] time scales are on any view ambitious given the size of the blocks and the inevitable challenges of working in Yemen.").

²⁷⁹ Articles 3.5.1(a) and 30.4 of the PSAs. See also Articles 3.5.1(c) of the PSAs.

²⁸⁰ See examples cited by the Claimants (C-PHB §§473-480). Mr. Al Humaidy also testified that extensions are granted ("we are happy to help the company and we give them extensions whenever, I mean we are so flexible" (Tr.790)).

²⁸¹ Rej. §100 ("Finally, the fact that the Respondents would, in November 2010, have approved the 2011 WP&Bs is in no way inconsistent with the Respondents' case. The Respondents' approach

do not appear to have been communicated contemporaneously to the Claimants. Neither have the Respondents established the actual loss they suffered by the Claimants' alleged delay in fulfillment of their contractual obligations. The Tribunal also notes that no specific damages are sought in respect of this claim.²⁸²

c. Failure to perform the WP&Bs

279. The Respondents submit that "[t]he Claimants were in breach of the obligation to perform the [WP&Bs], not "just" of the obligation to performance of the Minimum Work Obligation. Accordingly [...], there would still be a separate damages claim for breach of the obligation to perform the WP&Bs".²⁸³ As above, the Tribunal has found that Force Majeure prevented the performance of the Claimants' obligations from March 2011. In these circumstances, the Tribunal would have to decide the Respondents' counterclaims in respect of only the 2010 WP&Bs.²⁸⁴ The Parties' submissions are considered below.

i. Respondents' Position

280. The Respondents submit that the words used in the PSAs, especially in Articles 4.3. and 4.4 thereof should lead the Tribunal to conclude that the Claimants must perform the WP&Bs. Their contention is not that WP&Bs are in themselves contracts, or that the WP&Bs varied the PSA terms. Rather, their submission is principally that once approved under Article 4.3 of the PSAs, the WP&Bs must be performed and that the PSAs, by their own terms, require the

has always been to assume the validity of the timescales advanced in the WP&Bs and to approve these documents in order to enable the Claimants to proceed with performance as soon as possible. Any such approval would accordingly have been granted on the basis of an assumption that the timescales advanced therein were theoretically achievable and, in the event that the Claimants demonstrated their commitment to perform thereafter, in any event negotiable. In no way does the hypothetical approval of the 2011 WP&B amount to an acknowledgement either that performance by March 2013 was possible and/or that the Claimants were not already in breach").

²⁸² See "Reply to the Claimants' Submission dated 26 September 2014".

²⁸³ R-PHB §11(2).

²⁸⁴ See "Reply to the Claimants' Submission dated 26 September 2014" ("In the alternative to the claims set out in paragraph 2, if the Tribunal were to hold that Force Majeure intervened from 11 March 2011, then the Respondents seek an Award which states that the Claimants were in breach of the PSAs by failing to perform the work set out in the 2010 WP&Bs").

Contractor to perform the WP&Bs.²⁸⁵ They point out that in case of any ambiguity, Article 212 of the Yemeni Civil Code applies, which means that the PSAs should be given a “commercial commonsense meaning”.²⁸⁶

281. The Respondents further submit that the approved WP&Bs define the content of the Minimum Work Obligation and Minimum Expenditure Obligation for the ensuing year. The First Exploration Period is apportioned in time, and the obligations under the WP&Bs are owed in respect of each apportioned period. They therefore disagree with the Claimants’ submission that their obligation is to complete the MWO by the end of the First Exploration Period. If that were the case, then it would mean that the Claimants could postpone their obligations at a higher cost, and then recover that greater sum from the Respondents. This could not have been the intention of the Parties at the time of contracting.²⁸⁷

282. The Respondents also disagree with the Claimants that the WP&Bs only have a “price tag” function. They submit that the provision is for work programs and budgets – not merely work budgets, which is the price tag element.²⁸⁸

ii. Claimants’ Position

283. On their part, the Claimants contend that the WP&Bs do not create any performance obligations in addition to the MWO.²⁸⁹ According to them, none of the PSA provisions relied on by the Respondents actually support the Respondents’ case. They point out that the Respondents’ claim is that the WP&Bs contain additional obligations that can be separately breached. However, Art. 18.2 of the PSAs limits the obligations of the Claimants to the PSAs. Further, Art. 30.2 of the PSAs contains an “Entire Agreement” provision according to which the PSAs can be modified only by written agreement, which also has to be ratified as a law. None of the WP&Bs was ratified as law.²⁹⁰

²⁸⁵ R-PHB §§198-201.

²⁸⁶ Rej. §25.

²⁸⁷ SoD §41.

²⁸⁸ Rej. §27.

²⁸⁹ C-PHB §739.

²⁹⁰ C-PHB §746.

284. The Claimants further submit that the WP&Bs do not create additional obligations because their purpose is to monitor the activities of a contractor and to enable the Respondents to limit the expenditure of the contractor so to limit the contractor's ability to claim expenses in case of a commercial discovery.²⁹¹
285. The Claimants' next submission is that the Respondents' own position is that the annual WP&Bs supersede each other. If this is so, then it is contrary for the Respondents to claim a breach of the 2010 WP&Bs because the Respondents themselves claim that the 2011 WP&Bs would have been approved. The 2011 WP&Bs would supersede the 2010 WP&Bs. They also submit that between the end of 2010, i.e. when Claimants were purportedly in breach of the 2010 WP&Bs, and April 2011, when Force Majeure intervened, Respondents never warned Claimants that they had not performed the 2010 WP&Bs.²⁹²
286. Finally, the Claimants submit that under Art. 22.4 of the PSAs, in order to claim damages, the Respondents would have "to show that their damages claim for non-performance of the 2010 WPB has accrued (i) by the time termination was declared and (ii) under [the PSAs]." As the Respondents' claim did not meet any of these conditions, it ought to be rejected.²⁹³

iii. Analysis

287. As mentioned above [§246], for each of the counterclaims, the Respondents have to establish that an obligation exists, that the obligation has been breached, and that the breach has caused damage. The first step is therefore to establish that there was an obligation i.e. each WP&B individually created a binding obligation on the Claimants. The Parties seem to agree that this is an issue of construction of the PSAs and that Yemeni law does not include any relevant rules.²⁹⁴
288. Article 1.27 defines Exploration Period as under:
"Exploration Period" [and "First Exploration Period" and Second Exploration Period] mean the periods of Exploration as defined in Article 3.5.1."

²⁹¹ C-PHB §747.

²⁹² C-PHB §761.

²⁹³ C-PHB §762.

²⁹⁴ R-PHB §198, Tr.1060.

289. Article 1.28 defines Exploration Work Program and Budget as under:

“Exploration Work Program and Budget means Work Program and Budget for Exploration as defined in Article 4 and described in Annex C.”

290. Article 1.58 defines Work Program and Budget as under:

“Work Program and Budget” means the annual work program and budget for Exploration and/or Development under this Agreement.”

291. Article 4.2 requires the Contractor (i.e. the Claimants) to produce a Work Program and Budget for approval by the Ministry:

“[...] CONTRACTOR shall prepare an Exploration Work Program and Budget for the Agreement Area setting forth the Exploration operations which the CONTRACTOR proposes to carry out during the ensuing Year. During each Exploration Period or extension, such Work Programs and Budgets taken together shall be at least sufficient to satisfy the CONTRACTOR’s Minimum Work Obligation and Minimum Expenditure Obligation for the period it covers, taking into account any credits for excess work previously carried out by the CONTRACTOR in prior portions of the Exploration Period.”

292. Article 4.3 provides that once approved by the Ministry, the WP&Bs cannot be modified:

“Following review by the Exploration Advisory Committee, the CONTRACTOR shall make such revisions as it thinks appropriate and submit the Exploration Work Program and Budget to the Ministry for its approval. Following such approval, the CONTRACTOR shall not substantially revise or modify the Work Program and Budget without the approval of the Ministry.”

293. It goes on to say that:

“Following such approval [by the Ministry], it is further agreed that: CONTRACTOR shall neither substantially revise or modify said Exploration Work Program and Budget nor reduce the approved budgeted expenditure without the approval of the MINISTRY.”

294. Article 4.4 of the PSAs provides:

“The CONTRACTOR shall be responsible for the preparation and performance of the Exploration Work Program and Budget which shall be implemented in a workmanlike manner [...].”

295. Furthermore, pursuant to Article 4.1(c), the Claimants were entitled to withdraw from the PSAs before the end of the First Exploration Period provided that they had *“fulfilled the Minimum Work Obligation for the applicable period in effect at*

the time of withdrawal". Pursuant to Article 4.1(d), excess work in any portion of the Exploration Period "may be carried forward to satisfy the work in a subsequent portion of the Exploration Period".

296. The Respondents effectively contend that the WP&Bs create binding obligations, which the Claimants oppose.
297. The Tribunal believes that none of the provisions extracted above provide either individually or even together that the WP&Bs themselves create an annual binding obligation. Articles 4.2. and 4.3 of the PSAs merely require the Contractor i.e. the Claimants to prepare and submit the WP&Bs. They do not provide that the obligations (voluntarily²⁹⁵) undertaken by the Claimants in the WP&Bs create binding obligations that would sound in damages unless there is a failure to meet the MWO at the end of the First Exploration Period. When the Parties wished to impose binding obligations on each other, they used clear language to do so. For instance, Article 4.1 of the PSAs provides that "*the Contractor agrees and commits to undertake in the Agreement Area during the Exploration Period a program of Exploration work as Minimum Work Obligation as set out in Annex C [...]*". The Parties also limited their obligations to those under the PSAs.²⁹⁶ As the express terms of the PSAs do not specify that the WP&Bs are binding in nature, the Tribunal cannot impose such obligations on the Claimants.
298. Further, as above, Article 4.4 of the PSAs merely provides that the Claimants "shall be responsible for the preparation and performance of the *Exploration Work Program and Budget*." Exploration Work Program and Budget is defined in Article 1.28 to mean "Work Program and Budget for Exploration as defined in Article 4 and described in Annex C." Article 4 is titled "WORK PROGRAM(S) AND BUDGET(S) FOR THE EXPLORATION PERIOD." "Exploration Period" refers to the First Exploration Period of four years, which, ordinarily would have ended on 17 March 2013. It does not contemplate an annual breakdown of the Claimants' obligations under the PSAs. Annex C – which is also referred to in Article 4.4 of the PSAs – contains the MWO only. It too does not contain a year-by-year breakdown of the MWO. Further, Article 4.3 provides that the Claimants

²⁹⁵ Subject to compliance with the Minimum Work Obligation (Annex C, Article 1.2) and Minimum Expenditure Obligation (Annex C, Article 1.3).

²⁹⁶ Article 18.2 of the PSAs.

are to prepare a WP&B, “setting forth the Exploration operations which the [they] propose to carry out during the ensuing Year.” It states that the WP&Bs taken together shall be at least sufficient to satisfy the MWO. The WP&Bs are thus meant to be proposals, and all such proposals, which shall be approved by the Respondents and then not be amended unless the Parties agree, taken together, should be sufficient to meet the MWO. The Tribunal does not find in these provisions any requirement that the WP&Bs taken individually contain binding obligations. Rather, these provisions seem to indicate that the annual WP&Bs must collectively lead up to the MWO, which, under the PSAs must be fulfilled by the end of the First Exploration Period. The PSAs use non-ambiguous wording: “the CONTRACTOR agrees and commits to undertake [...] a Minimum Work Obligation [...] [which] should be fulfilled notwithstanding the Minimum Expenditure Obligation.”²⁹⁷ The WP&Bs serve to break down the performance of such Exploration obligations year on year but the PSAs do not provide for any specific consequences if they should not be fulfilled: the failure to fulfill will only expose the Claimants to pay the shortfall in Minimum Work Obligation or Minimum Expenditure Obligation at the end of the concerned Exploration Period.²⁹⁸

299. The Tribunal finds some additional support for this view in Article 4.1(c) of the PSAs, which specifies the Claimants’ obligations in respect of the Second Exploration Period: “[a]ny shortfall in aggregate Exploration expenditure by the end of the Second Exploration Period [...] shall oblige the CONTRACTOR to pay the amount of such shortfall to the MINISTRY.” What is contemplated here is a shortfall at the *end* of the Second Exploration Period. The provision does not contemplate a scenario where amounts promised to be spent in one year are not spent. Rather, what it does is contemplate that all amounts spent during the Second Exploration Period are to be totaled at the end of the Second Exploration Period, and, if those amounts are found to be less than amounts promised to be spent under the PSAs, then the Claimants are to make up the shortfall. The accounting is done at the end of the PSAs, and not on a year-on-year basis. To the Tribunal this indicates that no obligations are owed on an

²⁹⁷ Article 4.1(a) of the PSAs.

²⁹⁸ *Id.*

annual basis, rather what is relevant is that at the end of the Exploration Period what has been promised is done.

300. The first part of Article 4.1(c) also supports this view. It provides that in case of withdrawal within the First Exploration Period (which terminates the PSAs), the Contractor must pay to the Ministry the difference between the Minimum Expenditure Obligation and the amounts expended until the time of withdrawal. This means that at the termination of the PSAs because of the Claimants' withdrawal, amounts spent during the First Exploration Period are added, and if that sum is less than the Minimum Expenditure Obligation, then the shortfall has to be made up. The accounting is done at the end of the PSAs, and not on a year-on-year basis and not on the basis of WP&Bs. The WP&Bs appear to be prospective instruments to define what the Claimants intend to do on the field and allow both Parties to monitor the actual performance; the Respondents must supply their acceptance, given the consequences if the forecast amounts are actually spent (repayment of the Claimants when oil is produced). The WP&Bs are not meant to operate as supplemental minimum expenditure or work obligations with the strict monetary lumpsum penalties attached to shortfall in their performance: such strict consequences would definitely have been clearly, in fact expressly, stipulated in the PSAs. To the Tribunal, this too indicates that no obligations are owed on an annual basis. Rather, all accounting is to be done at the end of the PSAs (or the end of the relevant Exploration Periods). Although they serve a different purpose, namely to define on a year by year what the Claimants will do by way of Exploration work and what expenses they may recoup when oil is produced, the WP&Bs also help to keep check that the Contractor is on track to fulfill the MWO, but do not impose annual binding obligations.

301. The Tribunal notes that the Respondents cite Article 4.1(c) in support of their arguments because the provision uses the word "applicable period".²⁹⁹ The Tribunal is unable to agree. When read in context, it is clear that the words "applicable period" in Article 4.1(c) refer to the First Exploration Period or any extensions thereto, and not period within the First Exploration Period.

²⁹⁹ Tr.85.

302. To the Tribunal, the terms of the PSAs are clear in that they do not impose any obligations on the Claimants in addition to the MWO (and MEO). In any event, even if the Respondents' case that the provisions are ambiguous is adopted, it would not lead to a different outcome. Indeed, in cases of ambiguity, the Respondents argue that the relevant provisions should be given a "commercial commonsense meaning".³⁰⁰ The Tribunal recalls Mr. Johnston's uncontroverted testimony of the use of WP&Bs in the oil and gas industry:

"Furthermore, I understand that the Respondents argue that the WPBs create binding obligations of the Contractor to perform the tasks outlined in the Work Programs in each of the given budget periods – as if these constitute a separate agreement or amendment of the contractual PSA obligations. During the past 33 years that I have worked in the international sector of the petroleum industry on projects all around the globe, I have never heard of this kind of interpretation before. Therefore this interpretation is definitely a contradiction to the global practice in the oil and gas industry in my experience."³⁰¹

"The budget process is for planning purposes and to allow the state a forum in which to oversee and control, to a certain extent, the technical direction of the petroleum operations and to protect the state from over expenditure. This will ensure that the state will be protected from excess cost recovery when production begins. This issue regarding costs is one of the greatest concerns that governments have; over expenditure, goldplating, transfer pricing or non-arms-length acquisition of goods and services."³⁰²

303. Mr. Luqman too supported this view,³⁰³ which the Tribunal believes is correct. A budget, *per se*, is always an estimate. Here, it is Claimants who prepare the WP&Bs. Their obligations are to make sure that the WP&Bs are at least sufficient to satisfy the Minimum Work Obligation.³⁰⁴ Thus, if the Claimants had to pay for the failure to meet the WB&Ps would they not be tempted to limit them to the minimum and do more on the field, which cannot be correct? What is more appropriate is that the annual work plans and budgets chart out how a contractor proposes to fulfill its overall obligations within the stipulated period. If it is unable to fulfill its obligations at the end of the period in question, then it can be said to be in breach of the applicable contractual provisions. Until that time

³⁰⁰ Rej. §25.

³⁰¹ Johnston ER §24.

³⁰² Johnston ER §19.

³⁰³ Tr.1066 et seq.

³⁰⁴ Article 4.3 of the PSAs.

however, the contractor is free to organize itself in the manner that it deems fit. The Respondents themselves appear to have accepted this position.³⁰⁵

304. The Tribunal believes that the principal purpose of the WP&Bs is that they assist in determining the amount the Claimants can recover once oil has been discovered. Exploration Expenditures incurred by the Claimants during the Exploration Phase are to be taken into account during the Production Phase, if any. The WP&Bs fix the value Claimants may recover during the Production Phase, thereby avoiding disputes over the (recoverable) value of the works performed prior to the discovery of oil.³⁰⁶
305. The Parties' performance of the PSAs also supports the view that the WP&Bs do not impose binding obligations. Article 4 of the PSAs does not provide a specific time at which the WP&Bs are to be approved. If the WP&Bs were to set out the binding obligations to be fulfilled by the Claimants on a year on year basis, then it would be reasonable to expect that they would be agreed prior to the commencement of the year. However, discussions on the 2011 WP&B continued well into 2012.³⁰⁷ It is counterintuitive to suggest that the Claimants would know of their binding obligations for a year only after the year had passed. Moreover, in 2010, the Respondents requested a reduction in the WP&B submitted by the Claimants for that year from US\$ 68.24 million to US\$ 35.5 million. If, as the Respondents contend, the Claimants were obliged to perform the WP&Bs in the sense that a specific compensation would be payable in case of breach, it would have been in the Respondents' interest to approve the WP&Bs as originally submitted, rather than require a reduction of US\$ 30 million. The fact that the Respondents required the reduction is further evidence that the WP&Bs did not impose binding obligations. Rather, as mentioned above, the WP&Bs merely set out the amounts that could be recovered in case of a discovery of oil. Finally, the Tribunal notes that most of the activities that the Claimants were to perform under the 2010 WP&Bs were

³⁰⁵ Tr.129-130 ("MS SABBEN-CLARE: [...] It might be helpful just to clarify that I do accept that year on year the work programs and budgets supersede each other. So what I cannot do is add up 2010 and 2011 and say you are in breach of both because in 2011 there was agreement about the cost of all the work that was going to be performed in 2011, which included in large part everything that should have been performed in 2010. There is a rollover. Each work program and budget becomes historical once you are into the next year.").

³⁰⁶ The Respondents appear to agree. See Answer fn.5.

³⁰⁷ See, for example, Exh. R-20.

repeated in the 2011 WP&Bs (which the Respondents say they would have approved). It would be contrary to the PSA requirement of good faith if a Party were to approve that certain activities be carried out in a coming year and then also claim damages because they were not carried out in preceding year.

306. The Tribunal believes that the counterclaim fails for another reason as well. Article 22.4 of the PSAs provides that if the PSAs are terminated under their terms, the termination is "*without further liability of any kind except for those payments accrued under this Agreement.*" For the reasons mentioned above, the PSAs were validly terminated. Thus, the Respondents would have to show that their damages claim for non-performance of the 2010 WP&Bs has accrued under "this Agreement"³⁰⁸ by the time of termination. However, the Respondents have themselves submitted that the WP&Bs supersede each other.³⁰⁹ Thus, the 2010 WB&P would have been substituted by the 2011 WP&B. If this is so – and especially because the Respondents contend that the 2011 and 2012 WP&Bs would have been approved³¹⁰ (effectively substituting the 2010 WP&Bs) – then it cannot be the case that the damages claim for non-performance of the 2010 WP&Bs had accrued at the time of termination in 2013. Indeed, on the Respondents' own argument, the 2010 WP&Bs would have been substituted by the 2011 and 2012 WP&B once approved (which the Respondents contend that it would have been).

307. In the circumstances, the Tribunal rejects the counterclaim in respect of the 2010 WP&Bs.

308. For the reasons mentioned above, the Tribunal has found that the WP&Bs do not impose any binding obligations on the Claimants. Thus, the counterclaims in respect of the 2009, 2011 or 2012 WP&Bs – to the extent they are still maintained³¹¹ – are also rejected.

³⁰⁸ Article 1.2 defines "Agreement" as "Agreement shall mean this production sharing agreement and the attached Annexes".

³⁰⁹ Tr.129 et seq. ("MS SABBEN-CLARE: [...] It might be helpful just to clarify that I do accept that year on year the work programmes and budgets supersede each other. So what I cannot do is add up 2010 and 2011 and say you are in breach of both because in 2011 there was agreement about the cost of all the work that was going to be performed in 2011, which included in large part everything that should have been performed in 2010. There is a rollover. Each work programme and budget becomes historical once you are into the next year.").

³¹⁰ SoD §33, 35; WS Al Humaidy II §81.

³¹¹ See "Reply to the Claimants' Submission dated 26 September 2014".

309. The Tribunal notes that the Respondents have also submitted that because by 2009, the Claimants had not (i) signed the Joint Operating Agreement, (ii) appointed a General Manager, (iii) opened an office, (iii) performed an Environmental Impact assessment, the Claimants had breached the relevant provisions of the PSAs. As seen above, the Respondents have sought relief only in respect of the SBLCs, MWO and/or the WP&Bs. No mention is made of these or other alleged breaches of the PSAs. Thus, the Tribunal believes that it need not decide the Respondents' allegations concerning the alleged breaches of the PSAs. The Tribunal needs only to decide the counterclaims in respect of the SBLCs, MWO and the WP&Bs, which it has done above.
310. Thus, for the foregoing reasons, all of the Respondents' counterclaims are rejected. Thus, the Respondents are not entitled to draw down/should refrain from drawing down the SBLCs. Neither are the Respondents entitled to damages for the Claimants' alleged breaches of the WP&Bs.

E. COSTS

311. As mentioned above, on 14 November 2014, the Parties filed their costs submissions ("Claimants' Costs Submission and "Respondents' Costs Submission" respectively), and on 12 December 2014, their replies to each other's costs submissions ("Claimants' Reply Costs Submission and "Respondents' Reply Costs Submission" respectively).
312. On 11 December 2014, the ICC Court fixed the global advance on costs at US\$ 1,055,000, which the Parties paid equally.
313. On 3 March 2015, the Claimants sent their revised costs submissions "containing the additional costs incurred in relation to the extension of the SBLCs and the counterclaims (amount in dispute and separate advances on costs)."
314. On 14 April 2015, the Tribunal advised the Parties that subject to any views to the contrary, it would close the proceedings without intending to cover the matter of costs and the possibility for the Parties to make further cost statements if necessary.

315. On 4 May 2015, the Tribunal closed the proceedings. The Parties were advised that they could make no further submissions nor produce evidence unless requested or authorized by the Tribunal.

316. On (or around) 27 May 2015, the Claimants extended the SBLCs until July 2015. Unlike the earlier extension in March, this extension was not accompanied by revised costs submissions. Accordingly, the Tribunal has proceeded on the basis of the Parties' submissions cited above

317. In their post-hearing submission, the Claimants requested the Tribunal to:

“(g) order Respondents to pay to Claimants any damages, costs and expenses (including, but not limited to, legal fees and expenses) incurred by Claimants in connection with Respondents' drawing on the Standby Letters of Credit referred to in paragraph (d) as well as in connection with Claimants' extension of the SBLCs;

(h) order Respondents to pay all costs and expenses (including, but not limited to, costs payable to the ICC, legal fees and expenses, and fees and expenses of experts, consultants and others) incurred by Claimants in connection with the preparation for and conduct of this arbitration”³¹².

318. The Tribunal notes that these two requests somewhat overlap. For instance, in their Costs Submission, the Claimants sought US\$ 5.5 million for “costs and expenses incurred by Claimants in connection with the preparation for and conduct of the arbitration” (i.e. request (h) above). The Claimants included in that amount a sum of US\$ 1.5 million for costs incurred due to extension of the SBLCs, and also a sum of US\$ 29,554 for costs for court proceedings in India (i.e. request (g)). Thus, in the discussion below, the Tribunal considers requests (g) and (h) together.

319. In their submission of 3 March 2015, the Claimants detailed their request for costs as under:

“Claimants respectfully request the Tribunal to order Respondents to pay:

(1) USD 5,957,109.42 (consisting of the already claimed USD 5,546,577.93 plus USD 341,767.44 and USD 68,764.05) for costs and expenses incurred by Claimants in connection with the preparation for and conduct of the arbitration;

³¹² C-PHB §791.

- (2) in any event, USD 77,627.79 for costs and expenses incurred by Claimants as a result of Respondents' two Notes on Quantum and particularly the subsequently required submission dated 10 November 2014;
- (3) in any event, USD 1,941,030.63 as compensation for costs incurred due to the unnecessary extensions of the SBLCs, which Respondents demanded even though they agreed that there was no legal argument requiring such an extension;
- (4) if Respondents do not succeed with their additional counterclaims (in the amount of USD 93,960,000), USD 68,764.05 for costs incurred by Claimants regarding correspondence with the ICC and Respondents regarding the amount in dispute and separate advances on costs."

320. In their post-hearing brief, the Respondents sought the following relief:

"223.5. Direct that the Claimants pay the costs of the arbitration and the Respondents' costs."

A "Schedule of Costs" was included with the Respondents' Costs Submission, in which the Respondents indicated their costs as under:

"Index and Summary of the Respondents' Schedule of Costs

Total Part A - Arbitration Fees & Costs incurred by Clyde & Co LLP, for and on behalf of the Respondent in respect of the underlying Arbitration (Excluding the Stand By Letters of Credit issue claimed within Part B of this document), claimed in Sterling GBP (£)	£1.774.716. 77
Total Part B -The Respondents Fees & Costs in respect of the Stand By Letters of Credit Issue ('SBLC') issue incurred by Clyde & Co LLP, for and on behalf of the Respondent, claimed in Sterling GBP (£)	£132.595.52
Total Part C* -The expenses paid directly by the Respondent in the defence of these Arbitral proceedings, claimed in United States Dollars USD (\$)	\$122.028.77
Total Part D* - ICC Fees & Expenses paid directly by the Respondent, claimed in United States Dollars USD (\$)	\$351.009.00

Summary of Respondent's Fees and Costs claimed in Sterling GBP (£) only	£1,907,312.29
Summary of expenses paid directly by the Respondent claimed in USD Dollars (\$) only	\$473,037.77"

321. At its session of 24 June 2015, the Court fixed the arbitrators' fees and the ICC administrative expenses which, together with the arbitrators' expenses, amount to US\$ 1,055,000.

322. The Tribunal recalls that Article 37 of the ICC Rules contains the rules applicable to the Tribunal's decision on costs:

"1 The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration."

[...]

4 The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

5 In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner."

323. These rules give the Tribunal broad discretion in deciding the costs of the arbitration. Further, it is generally understood that the Tribunal should give reasons for the solution it adopts (Article 31(2) of the ICC Rules).

324. A common method of deciding costs is to award costs to the prevailing party or, where no party clearly prevails, to allocate costs taking into account the relative success of the claims and defenses ("costs follow the event"). The Parties have agreed to the application of this method in the case, pointing out that each others' conduct in the course of the arbitration should also be taken into account.³¹³ On the basis of the Parties' agreement with which the Tribunal also agrees, the Tribunal proposes to apply the "costs follow the event" rule in the present case. Thus, the party that does not prevail is to bear all (or part) of the

³¹³ Claimants' submission of 14 November 2014.

costs of the proceedings, including those of the other party. As counsel on both sides conducted this arbitration with high professional standards, the Tribunal does not see any reason to mitigate the costs of the “winning” Party.

325. Here, the Claimants have succeeded on all their claims, with the exception of the claim of US\$ 4.19 million in respect of the bonuses. The Respondents have been unsuccessful on all their counterclaims. In the circumstances, and also because some of the Claimants’ costs are considerably higher than the Respondents’ (but not unreasonably high),³¹⁴ the Tribunal believes that it would be appropriate for the Respondents to bear 75% of the costs and expenses incurred by Claimants in connection with the preparation for and conduct of the arbitration,³¹⁵ with the exception of the costs and expenses incurred by the Claimants in extending the SBLCs, which are considered below. Thus, the Respondents are to pay to the Claimants 75% of US\$ 4,016,078.79 (US\$ 5,957,109.42 (total costs)³¹⁶ less US\$ 1,941,030.63 (costs for extending the SBLCs)) which is US\$ 3,012,059.09.

326. In respect of the costs and expenses incurred by the Claimants in extending the SBLCs (US\$ 1,941,030.63), the Tribunal notes the Respondents’ submission that the Claimants are not entitled to claim these costs under Article 37(1) of the ICC Rules.³¹⁷ The Tribunal is unable to agree. After all, the Tribunal ordered the extension(s) of the SBLCs so as to balance and protect the interests of both Parties while the arbitration was ongoing. In these circumstances, the Tribunal believes that the costs expended towards extending the SBLCs were costs incurred “for the arbitration” under Article 37(1) of the ICC Rules. Consequently, the Claimants are entitled to recover them in accordance with the principles set out above. However, the Tribunal notes that the Claimants have claimed amounts from February 2013, which may not be correct, especially in

³¹⁴ For instance, the costs and expenses of the Claimants’ experts.

³¹⁵ The Claimants have sought a total US\$ 5,957,109.42 for the following 11 items: (i) White & Case fees and expenses; (ii) Claimants’ expenses; (iii) Costs for prolongation of the SBLCs; (iv) Costs for court proceedings in India; (v) Yemeni counsel’s fees and expenses; (vi) Yemeni legal expert’s fees and expenses; (vii) Security expert’s fees and expenses; (viii) Industry expert’s fees and expenses; (ix) Costs for translators; (x) Advance on ICC costs; (xi) Hearing venue.

³¹⁶ The Tribunal understands that item (2) of the Claimants’ request for costs i.e. “[...] USD 77,627.79 for costs and expenses incurred by Claimants as a result of Respondents’ two Notes on Quantum and particularly the subsequently required submission dated 10 November 2014” is included in the US\$ 5,957,109.42. See Claimants’ Costs Submission §14.

³¹⁷ Respondents’ Reply Costs Submission §11.

circumstances where the PSAs expired at the latest on 17 May 2013. In the circumstances, keeping this in mind, the Tribunal believes that the Respondents should pay US\$ 776,412.25 (i.e. approximately 40% of US\$ 1,941,030.63) to the Claimants for the costs incurred by the Claimants in extending the SBLCs.

IV. DECISION

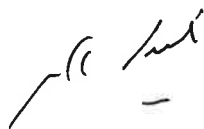
327. On the basis of the factual and legal considerations set forth above, the Tribunal:

- i. declares that it has jurisdiction over Respondent 1 i.e. the Republic of Yemen;
- ii. declares that an event of Force Majeure continuing for six months existed;
- iii. declares that the three Production Sharing Agreements entered into between the Claimants and the Ministry of Oil and Minerals in respect of Blocks 19, 28 and 57 in the Republic of Yemen have been validly terminated by the Claimants;
- iv. declares that the Respondents were and are not entitled under the Production Sharing Agreements mentioned above to draw on the related Standby Letters of Credit (No. STBY/LC.034/2008, No. STBY/LC.036/2008, and No. STBY/LC.037/2008) issued in their favor by the International Bank of Yemen on 9 August 2008;
- v. orders the Respondents to withdraw the drawing on the Standby Letters of Credit referred to in item (iv);
- vi. denies Claimants' request to order the Respondents to pay US\$ 4.19 million to Claimants;
- vii. orders the Respondents to pay to the Claimants:
 - a. US\$ 3,012,059.09 being 75% of the costs and expenses incurred by Claimants in connection with the preparation for and conduct of the arbitration. This amount includes 75% of the Claimants' share of the ICC administrative expenses and the arbitrator's fees and expenses which together amount to US\$ 1,055,000; and,
 - b. US\$ 776,412.25 being a part of the costs incurred by the Claimants in extending the SBLCs.

- viii. declares that the award will be provisionally enforceable;
- ix. dismisses the Respondents' counterclaims in their entirety; and,
- x. rejects all further requests and claims.

Place of arbitration: Paris (France)

Date: 10 July 2015



.....
Philippe Pinsolle



.....
Sir Bernard Rix



.....
Laurent Lévy