EXHIBIT 1

PCA Case No. 2020-33

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE CONTRACT FOR CONSULTANT'S SERVICES NO. NPA/MEW/96/CS-1825/QCBS, SIGNED ON 19 JANUARY 2019

(the "Contract")

and

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (AS REVISED IN 2013)

(the "UNCITRAL Rules")

- between -

UNICON LIMITED

(the "Claimant" or "UNICON")

- and -

MINISTRY OF ENERGY AND WATER OF THE ISLAMIC REPUBLIC OF AFGHANISTAN

(the "Respondent" or the "MEW", and together with Claimant, the "Parties")

FINAL AWARD

Sole Arbitrator
Mr. Mohamed Shelbaya

Registry
Juan Ignacio Massun
Permanent Court of Arbitration

17 February 2023

page left intentionally blank

TABLE OF CONTENTS

LIST OF ABBREVIATIONS & DEFINITIONS

TERM	DEFINITION
Afghanistan	The Islamic Republic of Afghanistan
AGASP	The Afghanistan Gas Project
AITL	Afghanistan Income Tax Law, dated 18 March 2009
Appointing Authority	Dr. Mohamed Abdel Raouf
ARD	Afghanistan Revenue Department
ATAL	Afghanistan Tax Administration Law, dated 18 November 2015
BRT	Business Rate Tax
Claimant	UNICON Limited
Constitution	The Constitution of the Islamic Republic of Afghanistan, ratified 26 January 2004
Contract	The Contract for Consultant's Services No. NPA/MEW/96/CS-1825/QCBS, signed On 19 January 2019
Contractual Claims	The Claimant's claims arising from the Respondent's alleged breached the Contract
ECT	Energy Charter Treaty
ECT Claim	The Claimant's claim that the Respondent the Energy Charter Treaty
ESRA	Energy Services Regulatory Authority
Experts	The capitalised term "Expert" and "Experts" refer to the individuals engaged by the Claimant to perform the services under the Contract
FIDIC	Fédération Internationale des Ingénieurs-Conseil
FTS	Fixed Tax Scheme
GCC	The General Conditions of Contract, which form section II of the Contract
Hearing	Hearing held by videoconference on 8 April 2022
LIBOR	London Interbank Offered Rate
MEW	The Ministry of Energy and Water of the Islamic Republic of Afghanistan

MoMP	The Ministry of Mines and Petroleum of the Islamic Republic of Afghanistan
Notice of Arbitration	The Claimant's Notice of Arbitration, dated 7 January 2020
Notice of Dispute	Written notice of the existence of a dispute arising out of or in connection with the Contract
Parties	The Claimant and the Respondent
PCA	The Permanent Court of Arbitration
PIT	Personal Income Tax
Reply	The Claimant's Statement of Reply, dated 12 October 2021
Respondent	The Ministry of Energy and Water of the Islamic Republic of Afghanistan, which after February 2020 was succeeded by the Energy Services Regulation Authority
Respondent's Stay Application	The Respondent's Application to Stay the Proceedings, dated 18 August 2021
Response to Notice	The Respondent's Response to the Claimant's Notice of Arbitration, dated 20 September 2020
SCC	The Special Conditions of Contract, which form Part III of the Contract
Statement of Claim	The Claimant's Statement of Claim, dated 29 January 2021
Statement of Defence	The Respondent's Statement of Defence, dated 23 April 2021
TIN	Afghan Tax Identification Number
Tort Claims	Relief requested by the Claimant in request (g) of its Updated Prayer for Relief of 2 May 2022
UNCITRAL Rules	The Arbitration Rules of the United Nations Commission on International Trade Law (as revised in 2013)
UNICON	UNICON Limited
WBG	The World Bank Group

I. INTRODUCTION

A. THE PARTIES

1. The claimant in these arbitration proceedings is UNICON Limited, a company registered in England and Wales under registration number 05987994, located at 85 Great Portland Street, London W1W 7LT, United Kingdom (the "**Claimant**" or "**UNICON**"). The Claimant is represented in these proceedings by:

> **Mr. Rustam Davletkhan**
> 85 Great Portland Street
> London W1W 7LT
> United Kingdom
> Email: rustam@unicon-international.com

2. From 14 September 2020 to 25 May 2021, the Claimant was also represented in these proceedings by Mr. Lee Marler, from Pavocat Chambers. From 25 May 2021 onwards, the Claimant has been represented by Mr. Rustam Davletkhan, from UNICON Limited.

3. The respondent in these proceedings is the Ministry of Energy and Water of the Islamic Republic of Afghanistan ("**MEW**") located at Darulaman Road, Sanatoruim, Kabul, Islamic Republic of Afghanistan (the "**Respondent**", and together with the Claimant, the "**Parties**").

4. As is common ground, the Ministry of Energy and Water was reorganized into two independent agencies in February 2020: the Energy Services Regulation Authority ("**ESRA**") and the National Water Affairs Regulation Authority. The successor agencies were both located at the same address as the MEW. As discussed later in this Final Award,[1] the Arbitrator finds that ESRA is the successor to the named Respondent, the MEW of Afghanistan.

5. Until 18 August 2020, the Respondent was represented in these proceedings by DLA Piper UK LLP. From 18 August 2020 to 11 September 2021, the Respondent was represented in these proceedings by Mr. Dennis H. Tracey III and Ms. Irina Goga from Hogan Lovells US LLP, together with, from 18 August 2020 to 21 June 2021, Mr. Kieron O'Callaghan and Mr. Michael Taylor from Hogan Lovells International LLP.

6. After the withdrawal by the Respondent's counsel from the current proceedings on 11 September 2021, all correspondence was sent by email to the Respondent, with the individuals listed below (disclosed by the Claimant and by the Respondent's withdrawing counsel) in copy.[2] Key correspondence was sent to the Respondent via three means of communication: email as previously mentioned, courier, and delivery to the Embassy of the Islamic Republic of Afghanistan in The Hague. The Respondent's addressees for email correspondence were as follows:

   - The following MEW officials were copied on all email correspondence: Mr. Muhmmad Abrahim Abram (abrahim.abram@mew.gov.af; abrahim.abram@gmail.com) the Procurement Director at MEW according to the Claimant; Mr. Muhammad Gul Khulmi (khulmi@mew.gov.af; Khulmi@outlook.com), the Deputy Minister at MEW at the time of conclusion of the Contract. Both Mr. Abram and Mr. Khulmi are named as contacts in the

---

1 *See* Part V.C below.

2 Procedural Order No. 5, ¶ 41.

Contract. Correspondence was also sent to Mr. Khan Mohammad Takal (khan.takal@gmail.com) who according to the Claimant at the time of the Claimant's correspondence was the then-current Deputy Minister at MEW.

- The following ESRA officials were copied on all email correspondence: Mr. Hamidullah Fahim (hfahim200@gmail.com), the Director of Energy Programs at ESRA, and Dr. Dawood Mirzaee (dmirzaee@gmail.com), the presumed former Director General at ESRA, both of whom were designated by the Respondent's resigning counsel as their last contacts at ESRA. Correspondence was also addressed to ESRA's institutional email address (info@esra.gov.af).

- The Respondent's resigning counsel also indicated that they were originally instructed on behalf of MEW by Mr. Kabir Isakhel (kabir.isakhel@aop.gov.af; kabirisakhel@googlemail.com), the Legal Advisor to the President of Afghanistan. Correspondence was also therefore sent electronically to Mr. Isakhel.

- From 9 December 2021, correspondence was also sent to Mr. Hematullah Aminzay who (at least at the time) was, according to the Claimant, the incumbent Chief of Staff at the Ministry of Energy and Water. The Arbitrator agreed to include Mr. Aminzay to the distribution list following a request from the Claimant to the same effect on 7 December 2021.

7. Following the withdrawal of the Respondent's counsel on 11 September 2021, correspondence in this arbitration was delivered by courier to the Embassy of the Islamic Republic of Afghanistan in the Netherlands, at Amaliastraat 16, 2514 JC, The Hague, Netherlands. Correspondence was sent to the Embassy to facilitate service on the Respondent and was not a pre-emption of the Arbitrator's decision on the status of the Respondent or on whether the Government of Afghanistan may be deemed a party to these proceedings.[3]

8. Correspondence was attempted via facsimile to the number provided for in the Contract: +93 (0) 788082208). It is noted that the facsimile or fax number provided for in the Contract, i.e. +93 (0) 788082208, refers to a mobile number that, as such, is unable to receive facsimile correspondence.

9. Following the withdrawal of the Respondent's counsel on 11 September 2021, and until 9 December 2021, physical delivery by courier was attempted at the addresses confirmed by the Respondent in its Response to the Notice of Arbitration: Dullahan Senatorium, Kabul, Islamic Republic of Afghanistan.[4]

10. However, all of these attempts were unsuccessful at the street address of the Respondent stated in the Contract due to the inability of courier companies to operate in Afghanistan. Consequently, after 9 December 2021 no further attempts were made to deliver correspondence in Afghanistan, and thereon all courier correspondence was delivered exclusively to the Afghan Embassy in The Hague, as described above.

11. Until the withdrawal of the Respondent's counsel on 11 September 2021, the Respondent actively participated in the proceedings. Thereon, despite the Respondent being kept notified by email and courier of any and all communications from the Arbitrator in the proceedings (as described

---

3 Procedural Order No. 5, ¶ 41.

4 Response to Notice of Arbitration, ¶ 3; *see also* Notice of Arbitration, ¶ 2.2.

above), no comment or reply was received from the Respondent from 11 September 2021, to this day included.

12. Notwithstanding the Respondent's silence from 11 September 2021 onwards, the Arbitrator is satisfied that the Respondent was kept notified of all relevant steps in the proceedings and that it was afforded a reasonable opportunity to present its case, as required by Article 17(1) of the UNCITRAL Rules.

B. THE ARBITRATION AGREEMENT

13. The Parties concluded the Contract on 19 January 2019. Clause 49(1) of the General Conditions of Contract (the "**GCC**"), which form section II of the Contract, provides:

> "*Any dispute between the Parties arising under or related to this Contract that cannot be settled amicably may be referred to by either Party to the adjudication/arbitration in accordance with the provisions specified in the SCC.*"

14. Clause 49 of the Special Conditions of the Contract (the "**SCC**"), which form section III of the Contract, provides in its relevant part:

> "*Disputes shall be settled by arbitration in accordance with the following provisions:*
>
> 1. *Selection of Arbitrators. Each dispute submitted by a Party to arbitration shall be heard by a sole arbitrator or an arbitration panel composed of three (3) arbitrators, in accordance with the following provisions:*
>
> (a) *Where the Parties agree that the dispute concerns a technical matter, they may agree to appoint a sole arbitrator or, failing agreement on the identity of such sole arbitrator within thirty (30) days after receipt by the other Party of the proposal of a name for such an appointment by the Party who initiated the proceedings, either Party may apply to* ***The Federation Internationale des Ingenieurs-Conseil (FIDIC)*** *of Lausanne, Switzerland for a list of not fewer than five (5) nominees and, on receipt of such list, the Parties shall alternately strike names therefrom, and the last remaining nominee on the list shall be the sole arbitrator for the matter in dispute. If the last remaining nominee has not been determined in this manner within sixty (60) days of the date of the list,* ***The Federation Internationale des Ingenieurs-Conseil (FIDIC)*** *of Lausanne, Switzerland shall appoint, upon the request of either Party and from such list or otherwise, a sole arbitrator for the matter in dispute.*
>
> [...]
>
> 2. *Rules of Procedure. Except as stated herein, arbitration proceedings shall be conducted in accordance with the rules of procedure for arbitration of the* ***United Nations Commission on International Trade Law (UNCITRAL)*** *as in force on the date of this Contract.*
>
> 3. *Substitute Arbitrators. If for any reason an arbitrator is unable to perform his function, a substitute shall be appointed in the same manner as the original arbitrator.*

4. *Nationality and Qualifications of Arbitrators. The sole arbitrator or the third arbitrator appointed pursuant to paragraphs 1(a) through 1(c) above shall be an internationally recognized legal or technical expert with extensive experience in relation to the matter in dispute and shall not be a national of the Consultant's home country or of the Government's country. For the purposes of this Clause, "home country" means any of:*

   (a) the country of incorporation of the Consultant; or
   (b) the country in which the Consultant's principal place of business is located; or
   (c) the country of nationality of a majority of the Consultant's shareholders; or
   (d) the country of nationality of the Sub-consultants concerned, where the dispute involves a subcontract.

5. *Miscellaneous. In any arbitration proceeding hereunder:*

   *(a) proceedings shall, unless otherwise agreed by the Parties, be held in **Dubai, UAE**;*
   (b) the English language shall be the official language for all purposes; and
   (c) the decision of the sole arbitrator or of a majority of the arbitrators (or of the third arbitrator if there is no such majority) shall be final and binding and shall be enforceable in any court of competent jurisdiction, and the Parties hereby waive any objections to or claims of immunity in respect of such enforcement."

C. PROCEDURAL RULES, LANGUAGE, AND PLACE OF ARBITRATION

15. Pursuant to Clause 49.2 of the SCC, the arbitration shall be conducted under the Arbitration Rules of the United Nations Commission on International Trade Law as in force on the date of the Contract. The version in force on the date of the Contract is the 2013 revision of the Rules (the "**UNCITRAL Rules**").

16. In accordance with Clause 49.5(b) of the SCC, the language of the proceedings is English.

17. As established by Clause 49.5(a) of the SCC, the place of arbitration is Dubai, United Arab Emirates.

18. Pursuant to Article 42(1) of the United Arab Emirates' Federal Law No. (6) of 2018 on Arbitration, the Parties are free to agree on any time limit for the issuance of awards, setting aside the non-mandatory statutory time limits therein provided. In paragraph 11.2 of Procedural Order No. 1, the Parties agreed that "*the Sole Arbitrator shall have the right to extend this time limit* [of six months from the hearing] *if, at his sole discretion, he considers that additional time will be required to issue any Final Award.*"

19. As is evident from the time that elapsed between the hearing and the issuance of this Final Award, the Arbitrator deemed it necessary to use the discretion afforded to him by paragraph 11.2 of Procedural Order No. 1 to rely on more than six months to draft and issue this Final Award.

20. The Arbitrator further notes that this six-month time limit from the hearing expired on 8 October 2022. No Party made any reference to this milestone during the proceedings, nor to any allegedly applicable time limit on the issuance of an award. Thus, any supposed non-compliance with any

time limit allegedly applicable to the issuance of the Final Award is deemed waived pursuant to Article 32 of the UNCITRAL Rules.

D. GOVERNING LAW

21. Clause 1.1(a) of the SCC provides that:

> "*This Contract shall be construed in accordance with the law of Government of Islamic Republic of Afghanistan.*"

E. SUMMARY OF THE DISPUTE

22. In January 2019, the Parties entered into the Contract, a consultancy agreement under which the Claimant was to provide consultancy services in relation to the construction of a gas pipeline from Sheberghan to Mazar-e-Sharif, for the delivery of natural gas from the Sheberghan fields.

23. The dispute relates to the personal income tax ("**PIT**") liability for the Claimant's Experts working on the above project. The Claimant asserts that the Respondent has withheld payment on a series of invoices issued by the Claimant for services performed under the Contract as part of a scheme to solicit bribes from the Claimant. The Claimant contends that the Respondent has no right to withhold any amounts of PIT and in doing so has breached the Contract.

24. For its part, the Respondent alleges that the Claimant refused to pay the full amount of PIT owed under the Contract. The Respondent argues that it therefore withheld the PIT directly from the payments it made to the Claimant against its invoices. The Respondent argues that the law of Afghanistan empowers the Respondent to withhold PIT in this manner and thus that the Tribunal should dismiss all of the Claimant's claims. It is the Respondent's position that the Claimant's allegations as to the solicitation of bribes are without merit.

25. In addition to this arbitration, the Claimant and the Respondent are also presently parties to PCA Case No. 2021-07 (formerly AA796) before Mr. Mohamed Shelbaya as Arbitrator. The present case and PCA Case No. 2021-07 are based on the same arbitration agreement and are between the same Parties.[5]

---

[5] PCA Case No. 2021-07 is being conducted in parallel with this arbitration. For the avoidance of doubt, the merits of PCA Case No. 2021-07 are not addressed here and they have not been taken into account by the Arbitrator in issuing this decision, as each dispute constitutes a distinct and separate matter. In deciding the claims and defences before it in this arbitration, the Arbitrator has not taken into account any arguments or evidence on the record of PCA Case No. 2021-07 unless the same arguments or evidence were independently raised in or admitted to the record of this arbitration. By way of exception to the foregoing, the Arbitrator considered all evidence of corruption in PCA Case No. 2021-07.

II. PROCEDURAL HISTORY

A. COMMENCEMENT OF THE ARBITRATION

26. The Claimant notified the Respondent of a dispute pursuant to Clause 48.2 of the GCC on 3 December 2019 (the "**Notice of Dispute**").

27. The Claimant filed its Notice of Arbitration on 7 January 2020 (the "**Notice of Arbitration**").

B. APPOINTMENT OF THE ARBITRATOR

28. In its Notice of Arbitration, the Claimant contended that the dispute is of a "*technical nature*", as it turns primarily on the issue of whether the Respondent is permitted to withhold PIT from sums that it owes to the Claimant. As a result, the Claimant stated that the Contract's provisions for the appointment of a sole arbitrator apply and suggested the appointment of Mr. Patrick M Norton.

29. On 17 January 2020, the Parties agreed that the dispute concerns a "*technical matter*" for the purposes of SCC Clause 49.1(a).[6]

30. On 6 March 2020, pursuant to SCC Clause 49(1)(a), the Claimant requested that the Fédération Internationale des Ingénieurs-Conseil (the "**FIDIC**") of Lausanne, Switzerland, provide a list of prospective arbitrators for the Parties' consideration.

31. On 30 March 2020, the FIDIC advised the Claimant that it does not offer arbitrator appointment or nomination services.

32. On 21 May 2020, the Claimant submitted a request to the Secretary General of the Permanent Court of Arbitration (the "**PCA**") for the designation of an appointing authority pursuant to Article 6(2) of the UNCITRAL Rules.

33. On 22 May 2020, the PCA invited the Claimant to clarify whether its request was also made pursuant to Article 6(4) of the UNCITRAL Rules and invited the Respondent to comment on the Claimant's request and any further clarifications provided by the Claimant.

34. On 27 May 2020, the Claimant advised that its request was made pursuant to both Articles 6(2) and 6(4) of the UNCITRAL Rules. The Claimant also indicated that it intended to seek to amend its existing Notice of Arbitration to include a further claim against the Respondent. It further indicated that if the Respondent subsequently took the view that such amendment of the Notice of Arbitration rendered the dispute beyond that of a technical matter, such that clause 49(1)(a) of the SCC no longer applied, then the Claimant would "*pursue the Ministry for the economic harm* […] *in separate arbitral proceedings*".[7]

35. On 3 June 2020, the Respondent wrote in reference to the PCA's invitation of 22 May 2020, seeking an extension to allow counsel to receive instructions, citing difficulties caused by restrictions in Afghanistan related to the COVID-19 pandemic.

36. On 8 June 2020, the PCA requested that the Respondent provide an update as to its comments on the Claimant's request.

---

6 Claimant's Letter, 27 May 2020, Attachment 1, Respondent's Letter to Claimant, 17 January 2020; Claimant's Request to Designate the Appointing Authority, 21 May 2020, ¶ 3.2.

7 Claimant's Letter, 27 May 2020, ¶ 2.3.

37. On 9 June 2020, the Respondent's counsel indicated that the MEW was not open and working as usual and explained that there were significant difficulties in obtaining instructions from responsible individuals at that time. The Respondent thereby requested a further extension to respond to the Claimant's request.

38. On 15 June 2020, the Respondent provided its comments, arguing that Article 6(2) of the UNCITRAL Rules had no application and that the Secretary General of the PCA had the power to designate an appointing authority pursuant to Article 6(4) of the UNCITRAL Rules. It requested that the Secretary General of the PCA provide a list of potential appointing authorities for the Parties to comment on before any designation. Responding to the Claimant's announced intention of amending its Notice of Arbitration, the Respondent indicated that:

> "*the Secretary General of the PCA has no jurisdiction to designate an appointing authority in respect of those new matters in circumstances where they do not form a part of the current arbitration between the parties.*"[8]

39. On 18 June 2020, the Claimant indicated that it disagreed with the Respondent's view that the PCA should solicit the Parties' comments on a list of potential appointing authorities. The Claimant also indicated that it had decided to commence separate arbitral proceedings against the Respondent regarding the matters for which it had previously intended to amend its Notice of Arbitration.

40. On 1 July 2020, the Secretary General of the PCA designated Dr. Mohamed Abdel Raouf as appointing authority in the present arbitration and for all purposes under the UNCITRAL Rules (the "**Appointing Authority**"). His contact details are as follows:

> Dr. Mohamed Abdel Raouf
> **Abdel Raouf Law Firm**
> Polygon-Sodic West
> Building 7, Unit C2
> Kilo 38 Cairo-Alexandria Desert Road
> Sheik Zayed 12588
> Giza, Egypt
> Email: mohamed@abdelraouf.com

41. On 9 July 2020, the Claimant requested that the Appointing Authority appoint a sole arbitrator in this dispute.

42. On 13 July 2020, the Appointing Authority sought the Parties' comments on their desired profile for the arbitrator in this case and indicated his intention to follow the "*alternating strike*" list procedure set out in Clause 49.1(a) of the SCC:

> "*Where the Parties agree that the dispute concerns a technical matter,* [...] *either Party may apply to* [the Appointing Authority] *for a list of not fewer than five (5) nominees and, on receipt of such list, the Parties shall alternately strike names therefrom, and the last remaining nominee on the list shall be the sole arbitrator for*

---

[8] Respondent's Letter, 15 June 2020, ¶ 7.

the matter in dispute."[9]

As SCC Clause 49.1(a) is silent as to which party initiates the strike procedure, the Appointing Authority indicated his view that the Claimant should proceed first.

43. After receiving and considering the Claimant's and the Respondent's comments of 16 and 20 July 2020, respectively, the Appointing Authority provided the Parties a list of five prospective sole arbitrators for the "*alternating strike*" list procedure, inviting the Claimant to proceed first. On 3 August, 4 September, 7 September, and 9 September 2020, the Parties each made two strikes.

44. On 18 August 2020, counsel for the Respondent resigned and notified the Arbitrator that the Respondent would now be represented by counsel from Hogan Lovells US LLP.

45. On 10 September 2020, the Appointing Authority appointed Mr. Mohamed Shelbaya as Arbitrator in the present proceedings and communicated this decision to the Parties on the same day. His contact details are as follows:

Mr. Mohamed Shelbaya
Gaillard Banifatemi Shelbaya Disputes
22 rue de Londres
75009
Paris, France
Email: mshelbaya@gbsdisputes.com

C. TERMS OF APPOINTMENT AND INITIAL DEVELOPMENTS

46. On 11 September 2020, the Arbitrator acknowledged receipt of the PCA's letter of 10 September 2020, advising him of his appointment in this case. The Arbitrator also proposed that the PCA act as registry in the case and invited the Parties to provide their comments. On 12 and 14 September 2020, the Parties confirmed their agreement for the PCA to serve as registry.

47. On 16 September 2020, the Arbitrator circulated draft versions of the Terms of Appointment and Procedural Order No. 1 to the Parties and directed the Parties to provide their comments and to confirm their availability for a first procedural hearing.

48. On 17 September 2020, the Claimant's counsel indicated that he would be unable to receive instructions from the Claimant until 21 September 2020 and that he would endeavour to provide comments that day.

49. On 18 September 2020, the Arbitrator granted an extension to both Parties to provide their comments.

50. On 21 September 2020, the Claimant submitted its comments on the draft Terms of Appointment and Procedural Order No. 1. On the same day, the Respondent, represented by new counsel, requested an extension to provide comments by a later date. The Claimant indicated that it had no objection to the Claimant's request.

51. On 22 September 2020, the Arbitrator granted the requested extension and invited the Parties to indicate, by the same date, whether a procedural hearing was needed.

---

9 Contract for Consultant's Services, Preparation of Mazar-e-Sharif Gas-to-Power Project, 19 January 2019, SCC, Clause 49.1(a) (**Exhibit C-2**).

52. On 30 September 2020, the Respondent provided its comments on the draft Terms of Appointment and Procedural Order No. 1. It also requested that the Parties be granted a further two weeks before a procedural hearing was held, during which the Parties could comment on the Respondent's proposed amendments ahead of a procedural hearing.

53. On 30 September 2020, the Arbitrator invited the Parties to consult and revert with an agreed set of comments on the procedural documents or with separate comments where no agreement was reached. The Arbitrator also indicated that he would determine upon receipt of these comments whether a procedural hearing was necessary.

54. On 12 October 2020, the Claimant requested an extension for the Parties to submit their comments, explaining that the Parties had reached an agreement on the Terms of Appointment and that only one issue of contention was remaining concerning Procedural Order No. 1.

55. On 19 October 2020, the Claimant wrote to the Arbitrator submitting a draft of the Terms of Appointment and Procedural Order No. 1 that had been agreed upon by both Parties.

56. On 23 October 2020, the Arbitrator circulated to the Parties the finalised Terms of Appointment for the Parties' signatures. The Arbitrator also invited the Parties to comment on the potential length of an evidentiary hearing in this case, without prejudice to his decision on whether such hearing would be held, and their views on holding an evidentiary hearing in February 2022.

57. On the same day, the Claimant indicated that, prospectively, five days should be reserved for an evidentiary hearing and confirmed its availability in February 2022.

58. On 28 October 2020, the Respondent agreed with the Claimant's proposal that five days be reserved for an evidentiary hearing but indicated that it was not available for a hearing until the final week of March 2022.

59. On 26 and 27 October 2020, the Parties returned signed copies of the Terms of Appointment to the Arbitrator.

60. On 28 October 2020, the Arbitrator acknowledged receipt of the signed Terms of Appointment and invited the Parties to consult one another and provide their joint availabilities for a hearing during April and May 2022.

61. On 28 October 2020, the PCA circulated the Terms of Appointment executed by the Parties and the Arbitrator. The PCA also indicated the Arbitrator's proposal that the file-sharing platform *Box* be used to file electronic submissions and create an online registry for the arbitration. The Parties were invited to provide their comments on this proposal.

62. On 29 and 30 October 2020, the Parties agreed to the Arbitrator's proposal to use the *Box* file-sharing platform in these proceedings.

63. On 4 November 2020, the Respondent indicated that the Parties, having conferred on the question of scheduling an evidentiary hearing, were available for a one-week evidentiary hearing in April or May 2022, excluding certain weeks.

64. On 6 November 2020, the Arbitrator issued Procedural Order No. 1, which, *inter alia*, fixed the procedural calendar.

65. On 20 November 2020, the Respondent filed its Response to the Notice of Arbitration (the "**Response to Notice**") in accordance with paragraph 3.1 of Procedural Order No. 1.

D. CLAIMANT'S STATEMENT OF CLAIM AND THE RESPONDENT'S STATEMENT OF DEFENCE

66. On 7 January 2021, the Claimant requested a two-week extension to file its Statement of Claim in light of an increase in the intensity of the COVID-19 pandemic in the United Kingdom and elsewhere.

67. On 11 January 2021, the Arbitrator granted the Claimant's requested extension and a corresponding extension to the Respondent.

68. On 12 January 2021, the Arbitrator issued Procedural Order No. 2, updating the procedural calendar in light of the extensions granted to the Parties.

69. On 29 January 2021, the Claimant filed its Statement of Claim (the "**Statement of Claim**") together with exhibits C-1 to C-38, witness statements CWS-1 to CWS-6, and expert witness statements CEWS-1 and CEWS-2.

70. On 23 April 2021, the Respondent submitted its Statement of Defence ("**Statement of Defence**"), along with its accompanying exhibits R-1 to R-5, legal authorities RLA-1 to RLA-7, and witness statements RWS-1 to RWS-3.

E. PARTIES' PROOF OF POWER OF ATTORNEY AND DOCUMENT REQUESTS

71. On 3 May 2021, the Arbitrator invited the Parties to provide the powers of attorney or letters of representation granted to their representatives pursuant to Article 5 of the UNCITRAL Rules.

72. On 6 May 2021, the Claimant submitted proof of its power of attorney.

73. On 13 May 2021, the Respondent filed its document production requests with the PCA pursuant to Procedural Order No. 2, which were subsequently forwarded to the Claimant.

74. On 14 May 2021, the Claimant indicated that it does not seek disclosure of any documents from the Respondent.

75. On 17 May 2021, the Respondent requested a two-week extension to provide proof of the power of its representatives. On the same date, the Arbitrator granted the Respondent's request.

76. On 25 May 2021, counsel for the Claimant resigned and the Claimant enclosed a power of attorney for Mr. Davletkhan.

77. On 26 May 2021, the Claimant filed its objections to the Respondent's document production requests, pursuant to Procedural Order No. 2.

78. On 28 May 2021, at the suggestion of the Claimant, the Respondent indicated it would submit its response to the Claimant's objections to the document production requests one week early.

79. On the same date, the Claimant requested permission to submit an application of an unspecified nature based on new information "*jeopardising and undermining Claimant's position*".

80. On the same date, the Arbitrator accepted the Respondent's offer to submit its responses to the objections to the document production requests one week early.

81. On 29 May 2021, the Arbitrator responded to the Claimant's email of 28 May 2021, permitting the Claimant to submit its application.

82. On 31 May 2021, following a request from the Respondent for an additional extension of the time limit for providing a copy of the power of attorney granted to its counsel, the Arbitrator invited the Respondent to explain the need for such an extension and to indicate the date by which it expected to be in a position to provide a copy of the relevant power of attorney.

83. On 1 June 2021, in response to the Arbitrator's email of 29 May 2021, the Claimant submitted an application to abridge the procedural timetable. On the same date, the Arbitrator requested the Respondent's comments thereon.

84. On 2 June 2021, in response to the Arbitrator's request of 31 May 2021, the Respondent stated that the recent restructuring of the MEW made it difficult to identify and contact the appropriate individual to execute the required power of attorney.

85. On the same date, the Claimant requested permission to comment on the Respondent's request for a further extension to provide proof of the power of its representatives. On the same date, the Arbitrator approved the Claimant's request to comment on the Respondent's request for an extension.

86. On 3 June 2021, the Claimant submitted its comments on the Respondent's request for an extension.

87. On 8 June 2021, the Respondent requested a 24-hour extension to provide its response to the Claimant's application to abridge the procedural timetable. On the same date, the Arbitrator approved the request.

88. On 9 June 2021, the Respondent submitted its response to the Claimant's application to abridge the procedural timetable.

89. On the same date, in response to the Respondent's response of the same date, the Claimant informed the Arbitrator that it had always rejected absolute confidentiality of the proceedings.

90. On 16 June 2021, the Claimant requested that the Arbitrator consider suspending Hogan Lovells as the Respondent's counsel in PCA Cases Nos. 2020-33 and 2021-07.

91. On 18 June 2021, the Respondent submitted its responses to the Claimant's objections to the document production requests.

92. On 21 June 2021, the Arbitrator issued Procedural Order No. 3, (i) rejecting the Claimant's application to abridge the procedural calendar, (ii) rejecting the Claimant's request to suspend the Respondent's counsel, and (iii) ordering the Respondent to provide proof of its power of attorney as soon as reasonably practicable.

93. On 21 June 2021, the Respondent informed the Arbitrator that Mr. Kieron O'Callaghan and Mr. Michael Taylor would no longer be representatives of the Respondent in these proceedings.

94. On 22 July 2021, the Claimant accused the Respondent of misleading the Claimant and the Arbitrator by requesting (in its document production requests) documents from the Claimant that were in fact already within the Respondent's possession. The Arbitrator notes by way of background that the Respondent sought (and was subsequently granted) "*employment and/or service agreements and/or letters of engagement*" between the Claimant and its Experts.[10] The Claimant's complaint of 22 July 2021 was that (i) the Respondent "*pretended not to be in*

[10] Procedural Order No. 4, 12 August 2021, Annex A, p. 39.

possession of these documents" (i.e., the contracts between the Claimant and its Experts), when it filed its document production requests, but (ii) one such contract was already in the Respondent's possession as it was contained within the document exhibited by the Respondent as Exhibit R-1 (specifically, on pages 37 to 38 of the PDF) in the parallel arbitration PCA Case No. 2021-07. The Claimant submitted a more legible copy of the contract appearing on pages 37 to 38 of Exhibit R-1 in PCA Case No. 2021-07 on 24 July 2021.

95. On 25 July 2021, in response to the Claimant's emails of 22 and 24 July 2021, the Arbitrator noted that no action was being requested at this juncture and that the Claimant may make submissions on this issue in its Statement of Reply.

96. On 12 August 2021, the Arbitrator issued Procedural Order No. 4, deciding on the Respondent's document production requests.

F. DEVELOPMENTS IN AFGHANISTAN AND THE RESPONDENT'S STAY APPLICATION

97. On 13 August 2021, the Claimant filed an application requesting clarification as to "*the nature of the Respondent*" and its representation and requesting the Arbitrator to apply measures to safeguard the proceedings.

98. On 14 August 2021, the Arbitrator invited the Respondent to provide its comments on the Claimant's submission of 13 August 2021.

99. On 18 August 2021, in light of political disruptions in Afghanistan, the Respondent requested that the Arbitrator grant a 60-day stay of these proceedings to allow counsel time to identify the correct contacts within the new government and seek instructions (the "**Respondent's Stay Application**"). Counsel for the Respondent also indicated that they did not anticipate that they would continue to represent the Respondent.

100. On the same date, the Claimant accused the Respondent of delaying and planning its defence strategy around the anticipated fall of the former government of Afghanistan.

101. Also on 18 August 2021, in response to the Claimant's email of the same date, counsel for the Respondent rejected accusations that Hogan Lovells engaged in any bad faith and misrepresentation of fact.

102. On the same date, the Claimant responded to the second email of the Respondent of 18 August 2021. The Claimant objected to the Respondent's counsel's presentation of events and claimed that the Claimant was able to contact authorities in the Afghan government. Subsequently, the Claimant noted that it had spoken to the Director of ESRA to verify that counsel for the Respondent could indeed communicate with their client. According to the Claimant, the Director of ESRA confirmed that ESRA was not a client of Hogan Lovells, and that the Legal Department of the Office of the President was "*running the case*."

103. On 18 August 2021, the Arbitrator noted that he would issue a decision once he had had the opportunity to consider the Respondent's response to the two applications made by the Claimant on 13 August 2021.

104. On 26 August 2021, the Claimant offered to submit a political update and indicated to the Arbitrator that it was able to provide if requested contact details of individuals within the Respondent.

105. On the same date, the Respondent submitted its response to the Claimant's submission of 13 August 2021. The Respondent argued that the Tribunal should stay the arbitration proceedings for 60 days.

106. On 26 August 2021, the Claimant requested that the Arbitrator allow the Claimant to respond to the Respondent's Stay Application and to file a complaint against the Respondent for abuse of process.

107. On 3 September 2021, the Claimant submitted its requested documents in accordance with Procedural Order No. 4, as well as a summary titled "*Documents Produced by the Claimant.*"

108. On 11 September 2021, counsel for the Respondent advised the Tribunal and Claimant that it had received no communications from the Respondent since the fall of the prior Government of Afghanistan, and thereby it would withdraw as counsel in this matter.

109. On the same date, the Claimant alleged that the new Government of Afghanistan had reincorporated the MEW and that former staff, including Deputy Minister Khan Mohammad Takal, would continue their duties in this new administration. The Claimant offered to provide contact details.

110. On 13 September 2021, the Arbitrator asked Hogan Lovells to specify the name, position, and contact details of the individuals within the Respondent who had been instructing Hogan Lovells, as well as the individuals within the Respondent who had engaged Hogan Lovells, if different.

111. On the same date, the Arbitrator requested the Claimant to submit copies of the documents to which it referred in its email of 11 September 2021.

112. Also on 13 September 2021, Hogan Lovells provided the contact details of the individuals that it was communicating with within the Respondent, both from the ESRA and the former MEW. In response to Hogan Lovell's email of the same date, the Arbitrator asked Hogan Lovells to provide the relevant physical addresses of the contacts, if available. Hogan Lovells indicated that it was not aware of the physical addresses.

113. On 13 September 2021, in response to the Arbitrator's request of the same date, the Claimant submitted a report on the Respondent's contact details accompanied by 11 exhibits as evidence. The Claimant provided a physical address and further contacts details of officials of the Respondent.

114. By letter of 20 September 2021, delivered by courier to the Respondent on 21 September 2021, the Arbitrator issued Procedural Order No. 5, deciding, *inter alia*, to (i) reject the Claimant's Requests Nos. 1 and 2 of 13 August 2021, (ii) reject the Respondent's Stay Application, and (iii) clarify that the procedural calendar for this arbitration remained that established in Procedural Order No. 2. In light of the withdrawal of Hogan Lovells, Procedural Order No. 5 also instructed that correspondence was to be directed *inter alia* to the individuals listed in Hogan Lovells' email of 13 September 2021.

115. On 12 October 2021, the Claimant requested a one-week extension to file its Statement of Reply (the "**Reply**"). On the same date, the Arbitrator accepted the Claimant's extension request and accordingly pushed all subsequent deadlines.

116. On 22 October 2021, the Claimant submitted its Reply, together with its accompanying exhibits C-39 to C-101, and legal authorities CLA-1 to CLA-10.

117. On 27 October 2021, the Claimant requested the Arbitrator's permission to dispatch hard copies of the Claimant's Reply to various embassies of Afghanistan. On 28 October 2021, the Arbitrator denied this request.

118. By letter of 28 October 2021, delivered by courier to the Respondent on 1 November 2021, the Arbitrator issued Procedural Order No. 6, reflecting the revised procedural calendar. The Arbitrator also requested the Claimant to provide proof of delivery or attempted delivery of its latest submission. The Arbitrator also noted that delivery by email and facsimile of his letter of 20 September 2021 to some of the Respondent's addressees had failed.

119. On 5 November 2021, the Claimant submitted proof of dispatch of its Reply by courier to the Embassy of Afghanistan in the Netherlands, the MEW, and ESRA.

120. On 7 December 2021, the Claimant submitted new contact details for individuals that it alleges are representatives or employees of the Respondent.

121. By letter of the same date, delivered by courier to the Respondent on 9 December 2021, the Arbitrator extended the time limit for the submission of the Respondent's Rejoinder. The Arbitrator also extended the time limit for the Parties to agree on the content of the hearing bundle(s).

122. On 9 December 2021, Mr. Mohammad Gul Khulmi of the Respondent requested not to be included in future correspondence as he is no longer associated with the Government of Afghanistan.

123. By letter of 9 December 2021, delivered by courier to the Respondent on 14 December 2021, in response to the Claimant's email of 7 December 2021, the Arbitrator decided to include the contact details for Mr. Hematullah Aminzay in all future communications for this arbitration.

124. By letter of 25 January 2022, delivered by courier to the Respondent on 27 January 2022, the Arbitrator noted that no correspondence had been received from the Respondent for an extended period, and that the Respondent had not submitted its Rejoinder within the extended time limit. The Arbitrator informed the Parties that, pursuant to Article 30(1) of the UNCITRAL Rules, the proceedings would continue notwithstanding the Respondent's non-participation. In the same letter, the Arbitrator informed the Parties that there would be no need for hearing bundles, and that, subject to their comments, the upcoming hearing would take place by videoconference.

G. THE HEARING

125. By letter of 30 March 2022, delivered by courier to the Respondent on 31 March 2022, the Arbitrator (i) noted the Parties' lack of objections to the remote format of the hearing, (ii) enclosed a draft Procedural Order addressing certain logistical aspects of the hearing, and (iii) invited their comments thereon. The draft Procedural Order fixed Friday, 8 April 2022, as the date of the hearing, during the week originally set aside by way of Procedural Order No. 1[11] (the "**Hearing**"), which was agreed between the Parties. By the same letter, the Arbitrator extended certain previously-expired procedural deadlines (i) for the Parties to notify one another of the other Parties' witnesses and experts they wish to call for examination at the Hearing, (ii) for the submission of an agreed list of issues, and (iii) for the filing of pre-Hearing submissions.

---

[11] Notwithstanding the revisions to the procedural calendar, the dates of the Hearing remained unchanged throughout subsequent Procedural Orders.

126. On 31 March 2022, the Claimant notified the Arbitrator of (i) the Respondent's witnesses and experts it wished to examine at the Hearing, while noting the availability of its own witnesses and experts should they be called for examination, and (ii) its position not to submit an agreed list of issues or pre-Hearing submissions, unless directed otherwise.

127. On 1 April 2022, the Claimant informed the Arbitrator that, despite its efforts in reaching out to the Respondent, it had received no reply. The Claimant noted that it had no comments on the draft Procedural Order circulated by the Arbitrator on 30 March 2022.

128. By 6 April 2022, the deadline for the Parties' comments on the draft Procedural Order circulated on 30 March 2022 had expired, with the Arbitrator only receiving such comments from the Claimant. The deadlines—as extended by the Arbitrator on 30 March 2022—for (i) notification of the other Parties' witnesses and experts to be examined at the Hearing, (ii) submission of an agreed list of issues, and (iii) filing of pre-Hearing submissions had all similarly all expired, with the Arbitrator again only receiving such comments from the Claimant. Having accorded the Respondent a reasonable opportunity to express its views on the foregoing matters or to request an extension, the Arbitrator issued **Procedural Order No. 7** on the same date, addressing certain logistical matters related to the Hearing. Procedural Order No. 7 directed *inter alia* the Parties to join the videoconference at least 10 minutes prior to the scheduled start time.[12]

129. On the same date, the connection details for the Hearing were circulated to the Parties, and delivered by courier to the Respondent on 7 April 2022, together with a hard copy of Procedural Order No. 7.

130. On 8 April 2022, the Hearing took place by videoconference, after the PCA previously circulated the connection details to the Parties and the Arbitrator.

131. The following persons were present at the Hearing:

Arbitrator
Mr. Mohamed Shelbaya

Claimant
Mr. Rustam Davletkhan

Registry: Permanent Court of Arbitration
Mr. Juan Ignacio Massun, Legal Counsel
Mr. Henry Off, Assistant Legal Counsel
Ms. Helen Griffin, Case Manager

132. The Arbitrator connected to the hearing at 12:00 PM Central European Time on 8 April 2022. The Arbitrator accorded the Respondent a further ten minutes to connect to the hearing as no representatives for the Respondent had connected at the hearing's outset. The Arbitrator commenced the hearing at 12:11 PM Central European Time in the absence of the Respondent. The Arbitrator was empowered to proceed with the hearing pursuant to Article 30(2) of the UNCITRAL Rules, given that the Respondent had been duly notified of the hearing pursuant to the UNCITRAL Rules, and did not seek to show sufficient cause for its failure to appear either before, during, or within a reasonable time after the Hearing.[13]

---

12 Procedural Order No.7, ¶ 4.1.

13 Transript, Hearing, 8 April 2022, p. 5:7-8. The Arbitrator notes that the timestamp appearing at Transcript,

133. The Arbitrator gave oral directions during the hearing as to post-Hearing matters:

a. In reference to Exhibit C-39 (a request from the Claimant to the Ministry of Finance, together with the Ministry of Finance's response to this request), the Arbitrator authorised the Claimant to submit into the record the tax payment certificates that are referenced in the Ministry of Finance's response, together with certified translations of the same. The Arbitrator also granted the Respondent an opportunity to comment on these certificates, once they were provided by the Claimant and submitted into the record.[14]

b. The Arbitrator directed the Claimant to file (i) an updated prayer for relief, and (ii) its statement of costs. The Arbitrator invited the Claimant to reflect on whether it wished to maintain its claims regarding (i) the additional works and (ii) the Claimant's defamation claim in this arbitration. The Arbitrator directed the foregoing to be filed by 29 April 2022.[15]

c. The Arbitrator granted the Respondent until 27 May 2022, to (i) file its response to the Claimant's comments mentioned in the prior paragraphs, and (ii) make any comments it had regarding the Tribunal's questions during the Hearing, once it received the Hearing transcript.[16]

H. POST-HEARING PROCEEDINGS

134. The Parties were notified of the draft hearing transcript on 19 April 2022 when it was uploaded to the Box file sharing platform, to which the representatives of both Parties had access, fulfilling the requirement under Article 33(6) of the United Arab Emirates' Federal Law No. 6 on Arbitration, whereby minutes of the Hearing are to be delivered to each Party.

135. On 21 April 2022, the Claimant filed original and translated tax certificates for the consultants it engaged to carry out the services under the Contract. The Claimant also made several procedural requests to (i) exhibit into the record the Respondent's response to the Exhibit C-40 and (ii) to explain its references to payments being made "*net of taxes*".

136. On 30 April 2022, the Claimant (i) filed an updated Prayer for Relief; (ii) filed comments on the status of the Respondent and its relationship with the Afghan State; (iii) filed comments on its damages from alleged tort and from other harmful acts; (iv) filed comments on the relevant interest rate (v) filed several factual exhibits and legal authorities accompanying (i) to (v); and (vi) refiled several legal authorities and factual exhibits omitted from its indices of factual exhibits and legal authorities due to an administrative error.

137. On 2 May 2022, the Claimant submitted an updated Prayer for Relief together with updated comments on the status of the Respondent and its relationship with the Afghan State. The Claimant also filed its costs submission.

138. On 2 May 2022, the Claimant withdrew its procedural requests of 21 April 2022.

Hearing, 8 April 2022, p. 5:1 is typographic error.

14 Transcript, Hearing, 8 April 2022, p. 19:13-18.

15 Transcript, Hearing, 8 April 2022, pp. 79:20-80:22.

16 Transcript, Hearing, 8 April 2022, p. 82:5-12.

139. On 12 August 2022, the Arbitrator issued directions (delivered by courier to the Respondent on 15 August 2022) which included *inter alia*:

a. Given that, *inter alia,* neither Party had sought leave to comment on the draft transcript available to them on the Box file sharing platform since 19 April 2022, the draft transcript would stand as the final transcript;

b. Directing the Claimant to file the Respondent's response to the correspondence exhibited as Exhibit C-40;

c. Directing the Claimant to indicate via email whether it seeks to maintain such claims in this arbitration that may overlap with those in the parallel arbitration (PCA Case No. 2021-07);

d. Requesting the Claimant to file certain documentation supporting its Submission on Costs; and

e. Granting the Respondent an opportunity to comment on all of the above.

140. On 25 August 2022, the Claimant provided its responses to the Arbitrator's letter of 12 August 2022, and submitted further documentation into the record.

141. By letter of 7 September 2022, delivered by courier to the Respondent on 8 September 2022, the Arbitrator noted that, in view of certain extensions requested by the Claimant and granted by the Arbitrator, the Respondent would be granted additional time to file its replies and comments concerning the Arbitrator's letter of 12 August 2022. Nevertheless, no comments or requests for an extension were received from the Respondent.

142. By letter dated 9 January 2023, delivered by courier to the Respondent on 10 January 2023, the Arbitrator requested from the Parties certain additional comments or observations before issuing the Final Award, and noted his intention to close the hearings according to Article 31(1) of the UNCITRAL Rules.

143. On 16 January 2023, the Claimant provided its comments in reply to the Arbitrator's invitation to do so by his letter of 9 January 2023. By the same date, no response of any kind from the Respondent was received.

144. The Arbitrator declared the hearings closed pursuant to Article 31(1) of the UNCITRAL Rules on 30 January 2023.

III. PRAYERS FOR RELIEF

145. By way of its updated prayer for relief filed on 2 May 2022, the Claimant requests that the Arbitrator:

> *"a. DECLARE that the Ministry of Energy and Water acted on behalf of the State and the actual Respondent in these arbitral proceedings is the State of Afghanistan (or the "Government" of Afghanistan, in the alternative);*
>
> *b. ORDER the Respondent to pay the Claimant the amount of unpaid invoices in the amount of USD 881,810;*
>
> *c. ORDER the Respondent to pay the Claimant compound interest on the amount of unpaid invoices from (b) above in the amount of USD 78,197;*
>
> *d. ORDER the Respondent to pay the Claimant the amount of unpaid environmental services provided under this Contract in the amount of USD 322,514;*
>
> *e. ORDER the Respondent to pay the Claimant the amount of unpaid services, within limits of this Contract, that could not have been invoiced exclusively due to actions of the Respondent in the amount of USD 328,990;*
>
> *f. ORDER the Respondent to pay the Claimant costs arising from "seeking to resolve the dispute amicably by mutual consultation" up to December 2019 in the amount of USD 354,044;*
>
> *g. ORDER the Respondent to pay the Claimant damages and compensations arising from its harmful actions, defamation, extortion and other damages caused to the Claimant in the amount of: (a) USD 7,572,768 or, in the alternative, (b) USD 4,772,146 or, in the alternative, (c) USD 2,893,586 or, in the alternative, (d) USD 1,015,573;*
>
> *h. ORDER that the Respondent pay all of the Claimant's costs incurred in relation to the proceedings, including legal and representative fees and expenses as listed in Claimant's Costs Submission;*
>
> *i. ORDER that the Respondent pay all of the costs of this arbitration, including Arbitrator's fees, PCA costs and other such expenses;*
>
> *j. ORDER the Respondent to pay the Claimant post-award compound interest at the rate of minimum 5% and maximum 12% until payment of the award; and*
>
> *k. ORDER such other relief as the Tribunal may deem appropriate."*[17]

146. The Respondent requests the Arbitrator to issue an award:

> *"(a) dismissing Unicon's claims in their entirety;*
>
> *(b) ordering Unicon to pay MEW damages (the sum of these damages to be*

---

17 Claimant's Updated Prayer for Relief, 2 May 2022, ¶ 16. (emphasis added)

quantified);

(c) *ordering Unicon to pay costs and expenses incurred by the Respondent in connection with this arbitration, including but not limited to:*

(i) *all professional fees, including the fees and disbursements of the Respondent's experts, if any;*
(ii) *all costs and expenses incurred by the Respondent's witnesses;*
(iii) *all fees and expenses of the Sole Arbitrator and of the PCA;*
(iv) *any other costs associated with these arbitration proceedings;*

(d) *ordering Unicon to pay pre- and post-award interest on such costs and expenses; and*

(e) *granting such further and/or other relief as the Sole Arbitrator in his discretion determines appropriate."*[18]

[18] Response to Notice, ¶ 19.

IV. FACTUAL BACKGROUND

A. FINANCIAL PROPOSAL AND NEGOTIATIONS

147. On 10 September 2017, the Islamic Republic of Afghanistan entered into the Afghanistan Reconstruction Trust Fund Grant Agreement with the World Bank Group (the "**WBG**") dedicated to the "*Preparation of the Mazar-e-Sharif Gas-to-Power Project*".[19] The WBG funding provided for under this agreement was intended to lay the groundwork for the Mazar-e-Sharif Gas-to-Power Project, which aimed to increase the capacity and reliability of Afghanistan's domestic power production.[20] The WBG-funded activities in support of the Mazar-e-Sharif Gas-to-Power Project were to be implemented through the MEW, with funding provided by the WBG.[21]

148. In order to implement this project, the Government of Afghanistan and the WBG invited requests for proposals for a consultancy contract for a "*Supervision Engineer*" to assess the delivery of natural gas from the Sheberghan gas fields in northern Afghanistan and to provide supervision, quality assurance, and technical support for the construction of a gas pipeline from Sheberghan to Mazar-e-Sharif, Afghanistan.[22] As financer of this project, the WBG also issued a data sheet setting out guidance for such proposals, which specified *inter alia* that bids were to comprise of both a technical and a financial proposal.[23] This WBG document also stipulates that "[a]*mounts payable by the Client to the Consultant under the contract* [are] *to be subject to local taxation*".[24] The document goes on to note that:

(a) "*The personnel of Consultant/Sub-Consultant (National and International Resident staff) shall be subject to income tax. The remuneration quoted shall include income tax and other personnel taxes as applicable in Afghanistan or outside Afghanistan. Income Tax and any other personal tax shall be included as part of remuneration. It shall not be included during contract negotiations. Non-resident foreign personnel (as defined in Afghanistan Income Tax Law) shall be identified in the Financial proposal. If not identified in the financial proposal, all foreign personnel shall be deemed to be treated as resident foreign personnel.*"

(b) "*The Financial proposal shall not include local taxes (Business Receipt tax (BRT)) and Income-tax on non-Resident Foreign Personnel (as defined in Afghanistan Income Tax Law). These taxes shall not be included for evaluation.*"

(c) "*Consultants are advised to follow the format given in Form FIN 2, while furnishing Estimate of the Indirect Local Tax under the suggested headings including income tax on non-resident experts.*"

---

19 Notice of Arbitration, p. 4; Afghanistan Reconstruction Trust Fund Grant Agreement, 10 September 2017 (**Exhibit CLA-12**).

20 Notice of Arbitration, p. 4; Contract (**Exhibit C-2**).

21 Contract (**Exhibit C-2**).

22 Statement of Defence, ¶ 6.

23 Statement of Defence, ¶¶ 6-7.

24 Witness Statement of Rustam Davletkhan, World Bank Group Data Sheet, Attachment 11, p. 146, ¶ 16.3 (**Exhibit CWS-6**).

(d) "*Consultants' attention is also invited to ITC Data Sheet Clause 25.1 which indicates how 'income tax on non-resident experts' will be treated during negotiations, if contract is awarded.*"[25]

149. The Claimant contends that these requirements for financial proposals were introduced by the WBG in 2018, and "*none of* [the] *contractors knew how to interpret it.*"[26]

150. Nonetheless, on 25 February 2018, the Claimant submitted its financial proposal along with its bid for the Contract.[27] While the Claimant contends that the figures and depictions in its financial proposal are "*null and void*", the Respondent argues that the financial proposal constitutes the Claimant's understanding of its tax obligations at the time of bidding for the Contract.[28] It is the Respondent's understanding that the Claimant's financial proposal clearly stipulated that the Claimant would charge the Respondent "*for PIT* [at a rate of 20%] *on the remuneration paid to its employees, and would, in accordance with Afghan law, withhold such PIT from the amounts paid to its employees, and remit it to the Government.*"[29] In its financial proposal, the Claimant submitted the following charts and comments, presenting its summary of costs:

COST COMPONENT	***USD***
Net Remuneration -	*1,855,200*
PIT	*436,450*
Grand Remuneration -	*2,291,650*
Reimbursable Expenses -	*668,500*
TOTAL COST, USD	***$2,960,150***

In accordance with [the Request for Proposals], *the Consultant has included PIT on its resident staff under the project in the fee rates. Therefore, our rates are inclusive of the above listed PIT. PIT is indicated here for illustrative purposes.*

Indirect Local Tax Estimates	
Business Receipt tax (BRT) – 7%	***$207,210***

In accordance with [the Request for Proposals], *it is Consultant's understanding that BRT will be added separately by the Client and be paid on behalf of the Consultant. It is Consultant's estimation that the above indicated BRT is the applicable tax to be paid by the Client.*"[30]

151. The Claimant maintains that the above breakdown in its financial proposal was for illustrative purposes only and without binding effect, as indicated by the above disclaimer. The Claimant believes that the Respondent was made aware of this fact from the financial proposal itself, as

---

25 Witness Statement of Mr. Davletkhan, Data Sheet, p. 147, ¶¶ 16.3.1-16.3.2 (**Exhibit CWS-6**).

26 Reply, ¶¶ 13-14.

27 Financial Proposal of UNICON Ltd., 25 February 2018 (**Exhibit R-1**).

28 Reply, ¶ 11; Statement of Defence, ¶ 19.

29 Statement of Defence, ¶ 19.

30 Financial Proposal, FIN-2 (**Exhibit R-1**).

well as during in-person and email negotiations held on 26 September and 23 October 2018.[31] The Arbitrator notes in this regard that this Final Award is without prejudice to any right the Respondent may have to claim for misrepresentation arising from the Claimant's financial proposals as to (*i*) the amount that will be paid by the Claimant to its Experts; (*ii*) the profit the Claimant was to derive from the Contract and (*iii*) the tax the Respondent expected would be collected under the Contract. Stated differently, the Arbitrator makes no express nor implied decision in this Award either accepting or rejecting misrepresentation on the basis of the foregoing.

152. The inaugural meeting to negotiate the Contract's terms took place on 26 September 2018.[32] The Parties agreed that the BRT would be added to the Claimant's price in the Contract at a rate of 7%, which would "*be paid by the Client directly to* [the Ministry of Finance]".[33] The meeting minutes note that the Parties agreed that "*PIT is included in consultant given price.*"[34] The Respondent's witness, Mr. Ahmad Maiwand Miakhel, also states that during the meeting, the Respondent "*simply reminded Mr. Davletkhan that the law of Afghanistan required the payment of PIT, that PIT was included in the consultant-given price, and that Unicon was responsible for managing PIT payments.*"[35] The Claimant alleges that the meeting resulted in the Parties agreeing on different arrangements for the BRT and PIT. As pertains to the PIT, the Claimant contends that it was agreed that the PIT would be included in the Contract's budgets, "*as experts were paid from* [the Contract's] *budgets and then paid PIT tax directly from their personal incomes.*"[36]

153. Before the final version of the Contract was signed, there were multiple draft versions of the Contract shared between the Parties on 26 September, 23 October, and 10 November 2018.[37] According to the Claimant, the Respondent attempted to grant itself powers to withhold PIT in the second draft of the Contract by listing PIT figures in Appendix C, and decreased the net value of the Contract to USD 2,291,650.[38] Objecting to what it believed to be a unilateral change by the Respondent to now include PIT in the net value of the Contract, the Claimant stated the following in an email on 23 October 2018:

> "*In our Financial Proposal, is says so – "PIT is indicated here for illustrative purposes". So that table cannot be copypasted into contract, as it is illustrative, it is not fixed. It shows how much each person will be paid at the end. Net rates, profits, taxes, etc. are responsibility of the Consultant Firm. What is of vital importance to MEW here is the final figure that needs to be paid by MEW against each individual – and that's the total price per expert.*
>
> *Since the World Bank and MEW insisted that PIT should be managed by Consultant on its own, then there is no reason for the contract between two parties (MEW+Unicon) to go into details that are beyond this contract and it seems that PIT is beyond this contract of two parties. Shall you still wish PIT to be part of the contract as a standalone item, even though we do not understand rationale of it, then*

---

31 Reply, ¶¶ 15-16.

32 Minutes of Negotiation, 26 September 2018, p. 1 (**Exhibit R-2**).

33 Minutes of Negotiation, 26 September 2018, ¶¶ 5-6 (**Exhibit R-2**).

34 Minutes of Negotiation, 26 September 2018, ¶ 5 (**Exhibit R-2**).

35 Witness Statement of Mr. Ahmad Maiwand Miakhel, 23 April 2021, ¶ 11 (**Exhibit RWS-3**).

36 Reply, ¶ 21.

37 Reply, ¶ 22, referring to Draft Contract 1, October 2018 (**Exhibit C-43**); Draft Contract 2, October 2018 (**Exhibit C-44**); Draft Contract 3, October 2018 (**Exhibit C-45**); Contract (**Exhibit C-2**).

38 Reply, ¶¶ 23-27, referring to Draft Contract 3, Appendix C (**Exhibit C-45**).

> *we need to engage our accountants now and make all proper calculations and only then finalise this contract. This will, undoubtedly, take some time of course. Let us know how you wish to proceed.*
>
> *At the same time, if you want to secure MEW against PIT issue, we have added below figures a statement that rates are inclusive of income tax. That way, MEW waives any responsibility for contract's PIT management.*"[39]

154. On 24 October 2018, the Respondent responded, stating that "[i]*t is worth mentioning that the PIT remain*[s] *as we discussed in* [the] *Negotiation Me*[e]*ting*".[40] Contrary to the Claimant's position, it is the Respondent's understanding that Appendix C of the second draft of the Contract was *not* a change in position on PIT.[41]

155. Concerning the Claimant's and the Respondent's emails of 23 and 24 October 2018 above, respectively, the Claimant maintains that the emails themselves established that the Parties agreed that (a) the figures of the financial proposal were "*null and void*"; (b) the PIT liability had not been calculated at that point in time and had to be determined by individual Experts in consultation with the tax authorities in Afghanistan; and (c) the Respondent was prohibited from being involved in PIT in any way.[42] Conversely, the Respondent maintains that the Claimant's email of 23 October 2018 *"did not in any way change the agreement that PIT was to be paid to Unicon as part of the contract price, and withheld by Unicon for payment to the Government."*[43] The Respondent states that "[a]*t no point did the* [P]*arties agree that PIT would not be included in* [the] *remuneration or that it would be calculated against a lesser amount. PIT was not discussed again until after the* [C]*ontract was signed.*"[44]

B. TAXATION UNDER THE CONTRACT

156. The Parties signed the Contract on 19 January 2019.[45] The Contract contains several provisions on taxation. GCC Clause 43 of the Contract stipulates as follows:

> "*43.1 The Consultant, Sub-consultants and Experts are responsible for meeting any and all tax liabilities arising out of the Contract unless it is stated otherwise in the SCC.*
>
> *43.2 As an exception to the above and as stated in the SCC, all local identifiable indirect taxes (itemized and finalized at Contract negotiations) are reimbursed to the Consultant or are paid by the Client on behalf of the Consultant.*"[46]

157. SCC Clause 41.2 of the Contract stipulates as follows:

---

39 Claimant's email, 23 October 2018, p. 1 (**Exhibit C-4**).

40 Respondent's email, 24 October 2018, p. 1 (**Exhibit R-3**).

41 Statement of Defence, ¶¶ 30-35.

42 Reply, ¶ 37.

43 Statement of Defence, ¶ 29.

44 Statement of Defence, ¶ 36.

45 Contract, p. 1 (**Exhibit C-2**).

46 Contract, Clause 43 (**Exhibit C-2**).

> "***The ceiling in foreign currency is**: USD 3,111,383 (Three Million One Hundred Eleven Thousand Three Hundred and Eighty Three US Dollars) inclusive of local indirect taxes.*
>
> ***The amount of such local indirect taxes (BRT 7%)** is USD 217,797 (Two Hundred Seventeen Thousand Seven Hundred and Ninety Seven US Dollars).*
>
> *The **local indirect taxes** chargeable in respect of this Contract for the Services provided by the Consultant shall be paid by the Client to the Ministry of Finance (MOF).*
>
> ***The net amount payable to Consultant is**: USD 2,893,586 (Two Million Eight Hundred Ninety Three Thousand Five Hundred and Eighty Six US Dollars).*"[47]

158. The Contract additionally provides a series of fee estimates on a per-Expert basis in Appendix C. This is accompanied by the following disclaimer:

> "*The rates indicated above are inclusive of personal income tax of contractors and represent Gross Rates and will be managed by Unicon Ltd.*
>
> *The BRT (7%) is calculated separately.*"[48]

159. It is the Respondent's understanding that pursuant to the Contract, the Claimant is liable to pay both BRT and PIT on its remuneration under the Contract charged to the Respondent while it is the Claimant's understanding that the Contract only renders it liable to pay BRT on its remuneration, and that the Experts instead are liable to pay PIT.[49] The Parties appear to have commenced performance of the Contract with these contrary understandings in mind, as it took little time after the commencement of performance for a dispute to emerge.

C. WITHHOLDING OF INVOICES

160. The Claimant contends that the Respondent created an artificial tax dispute in March 2019 in order to pressure the Respondent into capitulating to the Respondent's alleged solicitation of illicit payments.[50] Conversely, it is the Respondent's view that the PIT issue is merely a dispute arising from a disagreement on whether and how PIT under the Contract is payable, as well as the quantity of PIT required to be paid.[51]

161. After commencing services under the Contract, the Claimant submitted its first two invoices to the Respondent in March 2019.[52] Shortly thereafter, the Respondent requested proof from the Claimant that the Claimant had paid PIT on its remuneration indicated in the first two invoices.[53] The witness statement of Mr. Davletkhan, which the Claimant contends "*should be read as* [a] *continuation of the Statement of Claim*",[54] states that this request was part of a corrupt scheme

---

47 Contract, SCC, Clause 41.2 (**Exhibit C-2**).

48 Contract, Appendix C (**Exhibit C-2**).

49 Statement of Defence, ¶ 2; Statement of Claim, ¶ 4.3.

50 Statement of Claim, ¶ 5.1.

51 Statement of Defence, ¶ 77.

52 Witness Statement of Mr. Fazal Wali Aziz, ¶ 4 (**Exhibit RWS-2**).

53 Statement of Defence, ¶ 38; Witness Statement of Mr. Davletkhan, ¶ 193 (**Exhibit CWS-6**).

54 Reply, ¶ 13.

authored by the Respondent since the Claimant did not possess an Afghan Tax Identification Number ("**TIN**"), a license that was necessary, in the Claimant's view, for it to be possible for the Claimant to withhold tax.[55] The Claimant did not initially provide evidence of payment of PIT and instead informed the Respondent of its position that the Claimant was not responsible for PIT.[56] The Respondent therefore decided to withhold PIT from the remuneration charged by the Claimant to the Respondent in its invoices and pay it directly to the Ministry of Finance, the same manner by which the Respondent collected BRT.[57] However, documents obtained from the Afghan Revenue Department show that the Claimant's Experts paid PIT on their own income for at least most of 2019.[58] The Respondent became aware of this and adjusted the amount withheld on account of PIT accordingly.[59]

162. The Claimant contends that as at mid-May 2019, it had received no payments whatsoever in respect of the work it had performed. The Claimant demobilised from Afghanistan on 17 May 2019 until 17 July 2019. The Claimant maintains that it departed because of the Respondent's refusal to pay the Claimant for its services under the Contract, and that it provided the Respondent and the World Bank Group with several warnings before doing so.[60] The Claimant also indicated that work continued "*unabated and unaffected from other locations*" during this period of demobilisation, but by 17 July 2019 remote work was no longer possible.[61] However, the Respondent refused to pay the Claimant for work allegedly performed during this period and also subsequently brought a counterclaim based on the Claimant's departure from Afghanistan during this period.[62]

163. While the Parties remained at an impasse on PIT, the Claimant continued to provide its services and the Parties continued to liaise with one another in an attempt to resolve the dispute. The Claimant places some emphasis on an exchange occurring in September 2019, wherein the specific amounts of PIT allegedly owed became a disputed point. The Claimant asserts that on 17 September 2019, "[i]*n order to accommodate* [the] *Respondent's* […] *desire to get involved in the PIT tax withholding*," the Claimant offered to disclose its sub-contracts with the Experts to the Respondent, so that the Respondent could calculate the PIT against the amounts paid to the Experts individually.[63] The Respondent came to the understanding that the Claimant was paying its Experts less than the remuneration amounts indicated in the invoices to the Respondent, and calculating PIT according to the lower salary amount.[64] On 18 September 2019, the Respondent wrote to the Claimant explaining its position that "*PIT will be deduct*[ed] *on what* [the] *company claim*[s] *in their invoices*[,] *not what* [the] *company pays to their consultants*".[65] The Claimant replied on 21 September 2019, expressing its disagreement with the Respondent's understanding,

---

55 Witness Statement of Mr. Davletkhan, ¶¶ 193, 198 (**Exhibit CWS-6**).

56 Witness Statement of Mr. Aziz, ¶ 5 (**Exhibit RWS-2**); Witness Statement of Mr. Davletkhan, ¶ 194 (**Exhibit CWS-6**).

57 Statement of Defence, ¶ 40.

58 Tax certificates for the Experts (**Exhibit C-107**).

59 Statement of Defence, ¶ 41.

60 Statement of Claim, ¶¶ 6.1-6.2; Notice of Arbitration, p. 7.

61 Notice of Arbitration, p. 7.

62 Response to Notice, ¶ 16.

63 Reply, ¶¶ 41-43; Claimant's email to the Respondent, 17 September 2019, p. 1 (**Exhibit C-53**).

64 Statement of Defence, ¶ 42; Witness Statement of Mr. Aziz, ¶ 6 (**Exhibit RWS-2**).

65 Respondent's email, 18 September 2019, p. 1 (**Exhibit C-54**).

and asserting that PIT is calculated against the actual salaries that the Claimant pays to its Experts, not the amounts the Claimant bills the Respondent.[66]

164. In October 2019, the Claimant requested confirmation from the Ministry of Finance that PIT liabilities arising from the Contract for 11 individuals had been paid.[67] On 12 November 2019, the Ministry of Finance responded that "*tax on Unicon consultants' salaries* [PIT] *has been paid in full from January to September 2019 individually.*"[68]

165. The Respondent summarises the balance of payments and invoices over the course of the Contract as follows:

> "*MEW received invoices from Unicon totalling $1,616,579 for services rendered from January 2019 to February 2020. For those invoices, MEW paid Unicon $1,360,871.64. For the invoices from January 2019 to October 2019, MEW withheld both BRT and PIT from its payments to Unicon. However, for the invoices from November 2019 to February 2020, MEW only withheld BRT from payments to Unicon. The PIT for these 4 invoices totalled $76,882.09 and is still owed by Unicon. The Ministry of Finance has received $38,005.83 in PIT paid directly by Unicon's staff. This amount was subtracted from Unicon's overall tax liability. Therefore[,] Unicon still owes $38,876.26 in PIT.*"[69]

166. Concerning invoices for services undertaken during March and July 2020, the Claimant asserts that the Respondent has received and destroyed the Claimant's invoices and all supporting documents accompanying them.[70] At the time of filing its Statement of Defence, it was the Respondent's view that the Parties are disputing whether the Respondent ever received such invoices.[71]

167. The Claimant contends that out of the USD 2,893,586 that the Parties agreed to in the Contract, it has received USD 1,360,272.[72]

D. ALLEGED CORRUPTION SCHEME

168. It is the Claimant's understanding that it has been subjected to two forms of retaliation for its refusal to pay bribes: (a) the withholding of its invoices as indicated above; and (b) the failure to award the Claimant either an extension of the Contract or the Afghanistan Gas Project ("**AGASP**") contract.[73]

169. From August 2019 onwards, while the Parties were in discussions concerning the extension of the Contract for an "*additional scope of works*", the Claimant asserts that the Ghazanfar family, acting allegedly in collusion with the Respondent, attempted to solicit bribes from the Claimant.[74] On one occasion in particular, the Claimant alleges that Mr. Ismail Ghazanfar requested, on 25 August

---

66 Claimant's email, 21 September 2019, p. 2 (**Exhibit C-55**).

67 Reply, ¶ 8; Translation of Claimant's Letter Exchange with Ministry of Finance, p. 1 (**Exhibit C-39**).

68 Reply, ¶ 8; Translation of Claimant's exchange with MOF, p. 2 (**Exhibit C-39**).

69 Statement of Defence, ¶ 43; Summary of Claimant's Invoices (**Exhibit R-5**).

70 Reply, ¶¶ 85-89.

71 Statement of Defence, ¶ 43.

72 Reply, ¶ 171.

73 Statement of Claim, ¶ 3.11.

74 Statement of Claim, ¶ 3.7; Witness Statement of Mr. Davletkhan, ¶¶ 199-225.

2019, that the Claimant submit a financial proposal for the additional scope of works valued at about USD 1,000,000 more than the actual net cost of the undertaking, which was valued at USD 3,800,000.[75] The Claimant maintains that it refused this request, as well as similar requests,[76] and thus, according to Mr. Davletkhan, the Respondent then ensured that the Claimant would not be awarded an additional scope of works by way of an amendment extending the Contract's scope.[77]

170. On 3 December 2019, the Claimant then served the Respondent with a Notice of Dispute indicating that it would initiate the present arbitration.[78] Mr. Davletkhan states that, thereafter, Mr. Ismail Ghazanfar, allegedly acting on behalf of the Respondent, notified the Claimant that the Respondent will award the Claimant the additional scope of works and shift the disputed PIT amounts of about USD 400,000 to the extended Contract on the condition that the Claimant discontinues its arbitration proceedings against the Respondent.[79] Nonetheless, the Claimant filed its Notice of Arbitration initiating the present arbitration on 7 January 2020.[80]

171. In December 2019, the Claimant was then invited by the Ministry of Mines and Petroleum of Afghanistan (the "**MoMP**") to bid for another contract, the AGASP contract, for the same, or materially similar, services, as would have been awarded to the Claimant through the Contract amendment extending the scope to include additional works.[81] The Claimant submitted its bid for the AGASP contract, but claims that the Respondent influenced the MoMP to ensure that the Claimant would be unsuccessful. Notably, in January 2020, the Respondent provided a reference letter concerning the Claimant to the MoMP, which in the Claimant's view contained false remarks about the Claimant and was calculated at ensuring that the Claimant's bid failed.[82] It is the Claimant's belief that the Respondent submitted this reference letter out of retribution and malice due to the Claimant's commencement of arbitration proceedings and refusal to pay bribes.[83] These events form, in part, the basis for the Claimant's claim in the parallel arbitration proceedings between the Parties in PCA Case No. 2021-07.

172. The Claimant also alleges that this was not the first occasion on which bribe solicitation attempts have been made against it by the Respondent's personnel. In 2013, the Claimant won a tender with the Respondent for a consulting project known as "*CASA-1000*". Prior to the contract being awarded, Mr. Muhamad Daud wrote to the Claimant on 30 July 2013 as follows:

> "*Dear Rustam*
> *dear i want to tell you something series* [sic] *that i want to issues RFP only to your firm for CASA1000 project , I mean that CQS process will be done to your firm for this project, if you agree about my below condition than* [sic] *i will put your firm name for CQS process. only and only your firm will submit the financial and technical.*
> *note: in financial you have to submit 300000usd for me in your financial. if agree please inform me today because* [I] *want to give your name otherwise* [I] *will select*

---

75 Statement of Claim, ¶ 3.7; Witness Statement of Mr. Davletkhan, ¶¶ 203-205 (**Exhibit CWS-6**).

76 Witness Statement of Mr. Davletkhan, ¶ 225 (**Exhibit CWS-6**).

77 Statement of Claim, ¶ 3.8; Witness Statement of Mr. Davletkhan, ¶ 213 (**Exhibit CWS-6**).

78 Notice of Dispute, 3 December 2019.

79 Witness Statement of Mr. Davletkhan, ¶ 218 (**Exhibit CWS-6**).

80 Notice of Arbitration, p. 1.

81 Statement of Claim, ¶¶ 3.2, 3.8, 3.10.

82 Statement of Claim, ¶¶ 3.10, 5.31.2.

83 Statement of Claim, ¶¶ 3.10-3.11, 5.31.5.

another firm."[84]

173. Mr. Davletkhan wrote to Mr. Amin Lashkari of the Respondent on 24 January 2014 complaining about this and other attempts by other of the Respondent's personnel to solicit bribes. Mr. Davletkhan indicated in this email that he had audio recordings of such attempts to solicit unlawful payments,[85] however such recordings have not been exhibited into the record of this arbitration. Mr. Lashkari responded on 26 January 2014 apologising for this conduct.[86]

E. ALLEGED DEFAMATION

174. While these events occurred, on 6 November 2019, Mr. Farhad Mahoody of the Respondent sent an email addressed to the Claimant's counsel at the time, Mr. Lee G. Marler, with several other individuals in copy.[87] The Claimant contends that this email constitutes defamation in that it accused Mr. Marler of:

a. Intentionally ventilating unrelated issues;

b. Attempting to misrepresent/mislead the Claimant;

c. Attempting to misrepresent/mislead the Respondent to cause it harm and to obtain a financial benefit; and

d. Ventilating irrelevant issues to prolong the dispute and obtain money from the Claimant.[88]

175. On 13 November 2019, Mr. Marler emailed Mr. Mahmoody, seeking an apology.[89] On 19 November 2019, Mr. Mahmoody responded that Mr. Marler is avoiding questions, prolonging communication, and stated that "*the treats* [sic] [that] *you are sending us* [are] *fraudulent and coercive practices, which* [is] *called corruption in Afghanistan as well as in the Procurement Regulation of the World Bank.*"[90]

F. DEATHS OF MR. KERRY WALLS AND MR. ASSADULLAH NOORI

176. The Claimant also notes the death of Mr. Kerry Walls, a director and shareholder of the Claimant, on 17 November 2020.[91] The Claimant contends that the stress resulting from Mr. Walls' dealings with the Respondent led him to suffer a serious of strokes in 2020 leading to his death from a heart attack.[92]

---

84 Email from Muhamad Daud to Rustam Davletkhan dated 30 July 2013, Witness Statement of Mr. Davletkhan, Attachment 23, p. 173 of the pdf (**Exhibit CWS-6**).

85 Email from Rustam Davletkhan to Amin Lashkari, 24 January 2014, Witness Statement of Mr. Davletkhan, Attachment 24, p. 174 of the pdf (**Exhibit CWS-6**).

86 Email from Amin Lashkari to Rustam Davletkhan, 26 January 2014, Witness Statement of Mr. Davletkhan, Attachment 25, p. 176 of the pdf (**Exhibit CWS-6**).

87 Respondent's email to Claimant, 6 November 2019, p. 1 (**Exhibit C-34**); Witness Statement of Mr. Davletkhan, ¶ 80 (**Exhibit CWS-6**).

88 Statement of Claim, ¶ 6.4, referring to Respondent's email, 6 November 2019 (**Exhibit C-34**).

89 Claimant's email to Respondent, 13 November 2019, p. 1 (**Exhibit C-35**).

90 Respondent's email to Claimant, 19 November 2019 (**Exhibit C-36**).

91 Statement of Claim, ¶ 8.1.6(b).

92 Statement of Claim, ¶ 8.1.6(b); Reply, ¶ 186.

177. Furthermore, based on witness evidence from Mr. Davletkhan, the Claimant argues that the death of Mr. Assadullah Noori on 14 March 2020, the Respondent's contract manager responsible for the Contract, was due to stress caused by the dispute.[93]

93 Witness Statement of Mr. Davletkhan, ¶ 499 (**Exhibit CWS-6**).

V. PRELIMINARY ISSUES

A. THE PARTIES' REPRESENTATION AND PARTICIPATION IN THIS ARBITRATION

178. From the outset of this arbitration until the Parties' first exchange of pleadings, both Parties were represented by experienced counsel. Counsel for both the Claimant and Respondent withdrew after the filing of the Claimant's Statement of Claim and the Respondent's Statement of Defence respectively. These changes in the Parties' representation and participation throughout the course of this arbitration required the Arbitrator to take several additional steps to ensure that the Parties' procedural rights were duly protected. These measures will be briefly outlined below for the Claimant and the Respondent in turn.

179. ***Withdrawal of Counsel for the Claimant.*** Counsel for the Claimant, Mr. Lee Marler, withdrew on 25 May 2021, and the Claimant was henceforth represented by its director, Mr. Davletkhan. Mr. Davletkhan henceforth held a dual role in these proceedings, acting as counsel whilst also giving witness testimony on behalf of the Claimant. This warrants several remarks.

180. *First,* procedural proprietary necessitates a distinction be made between the role of an advocate and the role of a fact witness. The Arbitrator thus reminded Mr. Davletkhan at the outset of the hearing of 8 April 2022 to plead in his role of counsel and not to assume his role as witness unless and until the Arbitrator so requested.[94] The Arbitrator was satisfied that Mr. Davletkhan understood this distinction and followed it in good faith.

181. *Second,* the Arbitrator understood Mr. Davletkhan to be a consultant and businessman rather than a lawyer. Mr. Davletkhan's oral pleadings at the hearing presented the Claimant's case as to the facts with clarity. For a party representative without (as is the Arbitrator's understanding) formal legal training, Mr. Davletkhan made a commendable effort in pleading the Claimant's case on the law. At times, the Arbitrator saw it necessary to direct questions to Mr. Davletkhan to clarify—as opposed to assist or advance—the Claimant's case on the law. The Arbitrator was mindful to neither favour nor disfavour the Claimant with such questioning and did so without any prejudgment of any of the matters in contention.

182. The Arbitrator considered that his duty to assist a litigant unrepresented by counsel was of a limited nature in light of the circumstances surrounding the present case. There is no suggestion that the Claimant continued from 25 May 2021 without counsel due to impecuniosity or was otherwise unable to engage replacement counsel; indeed, the Claimant's former Counsel indicated that he withdrew because of "*personal reasons*",[95] and the Claimant indicated in its Reply that it had received strong operational profits from recent contracts in Afghanistan.[96] The Claimant's decision to proceed unrepresented by external counsel appears to have been a voluntarily decision.

183. ***Withdrawal of Counsel for the Respondent.*** As mentioned above, Afghanistan underwent a significant change in government in the course of this arbitration. Counsel for the Respondent withdrew on 11 September 2021, stating that it had received no communications from the Respondent since the change in government. This again warrants several remarks.

184. *First,* additional steps were taken to keep the Respondent apprised of the proceedings, as set out in Procedural Order No. 5 of 20 September 2021. In light of these steps, the Arbitrator finds that the Respondent was duly notified of all material procedural developments, and was accorded a

---

94 Transcript, Hearing, 8 April 2022, pp. 5:17-6:5, 6:14-17.

95 Email from Mr. Marler to the Parties and to the Arbitrator, 25 May 2021.

96 Reply, ¶ 186.

sufficient opportunity to choose to participate in each phase of these proceedings that followed the withdrawal of its counsel.

185. *Second*, the Arbitrator was sensitive as to the difficulties faced by the Respondent following its governmental transition. The Arbitrator sought to address this issue by granting the Respondent (and also the Claimant, in the interest of equality in treatment) more generous procedural deadlines than would normally be appropriate. It was incumbent upon the Arbitrator to strike the correct balance between granting the Respondent reasonable allowances in light of its circumstances, and respecting the Claimant's right to have its claims heard and determined expeditiously. In this regard, the Arbitrator considered that granting the Parties more time to meet procedural deadlines to be the most appropriate and just balance between the aforementioned competing rights in view of all of the circumstances.

186. *Third*, the Arbitrator took it upon himself to test the Claimant's evidence as much as possible, and exercised his discretion to ask the Claimant for its response as to arguments that could have been expected to have been raised by the Respondent had it participated in the proceedings. In putting such questions to the Claimant, the Arbitrator was mindful not to favour the Respondent, and the Arbitrator did so without any prejudgment of any of the matters in contention.

187. *Fourth,* given that the Respondent's counsel withdrew after the document production phase but before the second round of submissions, and as the Arbitrator was copied on all document production, the Arbitrator decided to make no distinction between documents produced in document production and documents exhibited as factual exhibits. The Arbitrator considered that the particular circumstances of the case necessitated the Arbitrator to exercise his broad evidentiary discretion to review certain documents produced by the Claimant in the course of document production. In this regard, the Arbitrator considered that the duty to resolve disputes expeditiously was not compromised given the targeted nature of the Respondent's document production requests and that the volume of documents the Claimant produced was not excessive. The Arbitrator additionally recounts that the Claimant did not seek any document production from the Respondent.

188. *Fifth,* as explained below,[97] the Arbitrator considered in his analysis of the Claimant's corruption claim the submissions and evidence relating to corruption that had been tendered into the record of PCA Case No. 2021-07. The withdrawal of counsel for both Parties was a factor that contributed to the Arbitrator's decision to exercise his evidentiary discretion to consider material from the parallel arbitration relating to corruption.

B. ARBITRATOR'S RELIANCE UPON WITNESS AND DOCUMENTARY EVIDENCE

189. Given that no witnesses or experts other than Mr. Davletkhan appeared at the hearing, and that many provide testimony of limited scope, the Arbitrator will provide his assessment of the Parties' witnesses and experts in the section of this Award to which such testimony relates, where the Arbitrator considers it necessary to do so in order to decide upon the Parties' claims and counterclaims. The Arbitrator here will instead make limited comments on Mr. Davletkhan's witness statement.

190. Given that Mr. Davletkhan has acted as counsel for the Claimant as well as providing witness evidence, the Arbitrator considered it necessary to treat certain aspects of Mr. Davletkhan's witness statement with particular care.

---

97 *See* Paragraph 365 below.

191. Specifically, certain statements in Mr. Davletkhan's witness statement took the form of arguments that might appear in pleadings, taking for instance positions on matters of Afghan tax and contract law. The Arbitrator recalls that the purpose of witness statements is to provide evidence of matters of fact, and that arguments providing the legal basis for a claim must be set forth only in the Parties' written and oral pleadings. The Arbitrator was careful to exclude statements in Mr. Davletkhan's witness statements that were not statements of fact but were akin to submissions.

192. In addition, the Arbitrator also exercised care with respect to assertions made by Mr. Davletkhan in his witness statement that were not directly corroborated by other evidence on the record.

193. The Arbitrator also noted that certain of the Claimant's exhibits contained *ex post facto* commentary and analysis provided by the Claimant (for example, pages 1 to 2 of Exhibit C-3). The Claimant's commentary on factual evidence is not in itself factual evidence and should not have been filed as a factual exhibit. The Arbitrator was careful to exclude such commentary from consideration.

194. With its Reply, the Claimant exhibited an email from the Respondent's counsel to the Claimant's counsel labelled "*without prejudice*".[98] Given that it was apparently subject to privilege and that the Respondent's consent to the introduction of this email has not been provided to the Arbitrator, the Arbitrator considers that it was not appropriate for this email to have been submitted into the record. This email and references to it in the Claimant's Reply are considered struck from the arbitral record and have not been taken into account by the Arbitrator.

C. SUCCESSION

195. The arbitration was initiated against the Ministry of Energy and Water.

196. As accepted by both Parties, the Ministry of Energy and Water was reorganised in early 2020. The Claimant stated on 13 August 2021 that "*the Ministry of Energy and Water* [...] *went into re-organisation in early 2020 at President's decree and according to the Respondent.*"[99] On 26 August 2021, the Respondent explained that Ministry for Energy and Water's successor agency was the Energy Services Regulatory Authority ("**ESRA**"):

> "*Respondent notes that it was Claimant who named the Ministry of Energy and Water as the Respondent in this matter, and that Claimant did so because Ministry of Energy and Water was the party that executed the SMPL agreement containing the arbitration provision. Since that time, MEW has been administratively replaced by ESRA, which is the successor agency and thus the Respondent in this arbitration.*"[100]

197. The Arbitrator therefore finds that the Energy Services Regulatory Authority is the successor to the Ministry of Energy and Water under the Contract.

---

98 Email exchange between Respondent's counsel, Claimant's counsel, and Mr. Davletkhan dated 9 and 11 March 2020, exhibited as Exhibit C-61 but struck from the arbitral record.

99 The Claimant's Request to Clarify the Respondent and Representation, 13 August 2021, ¶ 4.

100 The Respondent's Response to Claimant's Requests, 26 August 2021, ¶ 5.

VI. MERITS

198. The Arbitrator will approach the Parties' claims and counterclaims in the following order:

a. The Claimant's claim for amounts withheld on account of PIT (**Part A**);

b. The Claimant's Tort Claims (**Part B**);

c. The Claimant's corruption allegations, and several other claims and/or arguments raised by the Claimant (**Part C**); and

d. The Respondent's demobilisation counterclaim (**Part D**).

199. All arguments raised by the Parties have been considered, even if not expressly mentioned in this Final Award. To the extent that any argument or issue has not been expressly addressed in this Award, the argument or issue in question has been rejected.

A. PAYMENT OBLIGATIONS AND SETTLING OF INVOICES

1. The Claimant's Position

(i) Tax Obligations of the Claimant

200. The Claimant contends that, pursuant to both the Contract and the law of Afghanistan, it is not liable to withhold any PIT from payments to its Experts and that any amounts that the Respondent has itself withheld from the Claimant ostensibly on account of PIT must be paid to the Claimant.[101]

201. The Claimant relies on SCC Clauses 43 and 41 to argue that the Parties have agreed that "*any imposition (e.g. PIT tax), other than BRT tax, is to be reimbursed to the Claimant by the Respondent in accordance with SCC* [Clause] *43 to ensure that the Claimant is paid an agreed 'net amount* [of] *USD 2,893,586' without deductions from this value.*"[102] It is the Claimant's position that based on the Contract and basic principles of taxation, PIT is a matter concerning the Experts themselves individually, and not a matter concerning the Claimant.[103]

202. The Claimant contends that, in contract negotiations, the Respondent agreed that it would not become involved in the management and payment of PIT. Specifically, the Claimant understood that the Respondent agreed that it would not collect and withhold PIT for payment to the Ministry of Finance.[104] The Claimant alleges that this position is supported by (a) the Respondent being made aware that PIT values in the financial proposal were for illustrative purposes only; and (b) the Respondent specifically agreeing "*in writing on 23 and 24 October 2018 that it would not seek to withhold PIT on amounts that it owed to the Claimant and that the collection of PIT fell outside of the Contract.*"[105] Accordingly, the Claimant contends that the Respondent's assurance that it would not collect PIT led to the Claimant altering its position in reliance thereon, thus giving rise to a promissory estoppel under Islamic law.[106]

---

101 Reply, ¶¶ 93, 95.

102 Reply, ¶ 93, referring to Contract, SCC Clauses 41, 43 (**Exhibit C-2**).

103 Statement of Claim, ¶¶ 5.3, 5.9.

104 Statement of Claim, ¶ 4.4.2.

105 Statement of Claim, ¶ 4.4.3, referring to Parties' emails, 23 October 2018 (**Exhibit C-4**).

106 Statement of Claim, ¶¶ 4.4.3, 4.4.6.

203. Aside from the question of whether or not the Respondent had any right to withhold amounts from the Claimant on account of PIT, the Claimant denies that it had any obligation to withhold amounts from its Experts on account of PIT. The Claimant argues that it was prevented by the law of Afghanistan from collecting any PIT directly from its Experts because it did not possess a TIN.[107] The Claimant contends that in order to be issued a TIN, it would have to be a locally registered company, which it is not, and therefore, the Claimant argues that it was effectively rendered exempt from collecting PIT.[108]

204. The Claimant further contends that its position that it is not liable to collect PIT from its Experts is consistent with the governing tax legislation in Afghanistan.[109] The Claimant relies on reports from accounting and auditing firms Grant Thornton and Baker Tilly of 25 March 2019 and 4 April 2019 which state that:

a. a 7% fixed tax is imposable on amounts invoiced by the Claimant to the Respondent, to be withheld by the Respondent from its payments to the Claimant;

b. the Claimant is not obliged to obtain a business license;

c. the Claimant is not obliged to withhold any PIT from payments to its freelancers and subcontractors under the Contract;

d. the individuals and subcontractors under the Contract are responsible for their own tax obligations; and

e. the Claimant is not responsible to submit to the Respondent any supporting documentation concerning taxation in order to receive payment amounts on invoices.[110]

205. According to the report authored by Grant Thornton, the Claimant is liable to pay tax levied at a rate of 7% as a fixed tax scheme ("**FTS**", which the Arbitrator understands as a "Fixed Tax" under Chapter 11 of the Afghan Income Tax Law of 2009[111], *i.e.* the "**AITL**") on the gross amounts owed to it under the Contract, in lieu of income tax and BRT (which the Arbitrator understands arise *inter alia* under Chapter 10 of the AITL). This is because, in the view of Grant Thornton, the Claimant is engaged in commercial activities and falls under Article 72 of the AITL:

> "*(1) Persons who, without a business license or contrary to approved by- law, provide supplies materials, construction and services under Contract to government agencies, municipalities, state entities, private entities and other persons shall be subject to 7 percent fixed tax in lieu of income tax. This tax is withheld from the gross amount payable to the Contractor.*"[112]

206. The report authored by Baker Tilly reached a similar result concerning the FTS, apparently also relying on Article 72 of the AITL. Baker Tilly opined that:

---

107 Statement of Claim, ¶ 5.11.

108 Statement of Claim, ¶ 5.11.

109 Reply, ¶¶ 94-97.

110 Reply, ¶ 55, referring to Grant Thornton, Queries on Afghanistan Registration and Tax Obligations Thereof, 25 March 2019, ¶ 4 (**Exhibit C-12**).

111 Income Tax Law 2009 (**Exhibit RLA-1**), chapter 11.

112 Grant Thornton Report, ¶¶ 3.5-4 (**Exhibit C-12**); Afghanistan Income Tax Law, Official Gazette No. 976, 18 March 2009, Art. 72 (**Exhibits CLA-1**, **RLA-1**).

> "*The* [Claimant] *is not required by Law to establish an entity or obtain any type of business license/registration as its tax obligations are effectively fulfilled by accepting to have 7% fixed tax withheld by the Ministry under the Contract. The* [Claimant] *is not required to withhold/pay any taxes on behalf of the hired freelance experts (foreign or national) who are engaged by the company under this contract.*"[113]

207. The Claimant also alleges that it was discriminated against "*by both the Ministry, as an arm of the Government of Afghanistan, and the World Bank Group*". The Claimant contends that this alleged discrimination arose in the context of the relationship between its competitor, RTE France, and DABS, another entity that "*forms part of Afghanistan's executive*". According to the Claimant, RTE and DABS entered into a materially similar World Bank Group financed contract. The Claimant asserts that DABS withheld PIT, but the World Bank intervened and brokered more favourable commercial terms to off-set the amount withheld, treatment which the Claimant says it was not accorded.[114]

(ii) Withholding of Invoices

208. Notwithstanding its position on tax obligations under the Contract, the Claimant accepts that the Respondent may have interpreted the Contract as requiring the Claimant to collect PIT on the remuneration paid to its Experts, pay that PIT to the Ministry of Finance, and receive reimbursements of that PIT paid in respect of its Experts who are foreign nationals.[115] However, in accordance with the Claimant's view that it is not liable to collect PIT in the first place, the Claimant contends that the Respondent is not entitled to withhold PIT from amounts that it owes to the Claimant.[116] The Claimant relies on the expert witness statement of Mr. Paul Davies, who found that "[t]*here is clearly no role in law or via Contract NPA/MEW/96/CS-1825/QCBS for MEW to withhold payment in this way*."[117]

209. The Claimant also argues that the Respondent is estopped from withholding PIT from amounts owed as this constitutes involvement in the tax obligations under the Contract.[118]

210. The Claimant seeks on this basis USD 881,810 for unpaid pending invoices,[119] together with compound interest on this amount. The Claimant contends that the Respondent's withholding of this amount is part of the Respondent's scheme to extort corrupt payments from the Claimant.[120]

211. The Arbitrator wrote to the Parties on 9 January 2023 to ask for comments on whether (*i*) compound interest was consistent with Sharia law and/or the place of arbitration's conception of international public policy. The Claimant provided responses on 16 January 2023 indicating that compound interest was permissible at the place of arbitration, and submitting LIBOR data into the record and commenting on the manner in which interest should here be calculated.

---

113 Baker Tilly, Opinion on the Issues of Business Registration and Taxation in Afghanistan, 4 April 2019, p. 3 (**Exhibit C-13**).

114 Notice of Arbitration, p. 8.

115 Statement of Claim, ¶ 5.10.

116 Statement of Claim, ¶ 5.10.

117 Expert Statement of Mr. Paul Davies, 6 January 2021, ¶ 9 (**Exhibit CEWS-1**).

118 Statement of Claim, ¶ 5.14.

119 Reply, ¶ 171.

120 Statement of Claim, ¶¶ 5.14-5.35.

(iii) Amount of PIT arising from the Experts' engagement

212. Notwithstanding its position that the Respondent was not entitled to withhold any invoiced amounts on account of PIT, the Claimant contends that the Respondent is mistaken as to the amount of PIT that would be payable to the Ministry of Finance and has withheld an excessive amount on account of PIT.[121] The Claimant alleges that the Respondent calculated the amount it withheld on account of PIT in reference to the amount the Claimant invoiced the Respondent, and not in reference to the amounts that the Claimant actually paid its Experts.[122] Accordingly, the Claimant argues that the amount of PIT arising from the actual remuneration paid to its Experts would be USD 38,005.83, an amount which the Claimant claims has already been paid by the Experts to the Ministry of Finance.[123]

(iv) Environmental services

213. Mr. Davletkhan described in his witness statement that accompanied the Claimant's Statement of Claim that:

a. The Claimant's Environmental Expert named in the Contract, Mr. Mohsin Almaji, became unavailable in early January 2019;

b. The Claimant proposed Mr. Pho Nguyen Bui as a replacement Environmental Expert;

c. Several of the Respondent's staff agreed with Mr. Pho's replacing Mr. Almaji;

d. Documents formalising the replacement were submitted to the Respondent, but were never signed due to the tax dispute;

e. The Claimant, via Mr. Pho and others, fulfilled their obligation to provide environmental services under the Contract and their work product formed part of the reports that were submitted to the Respondent; and

f. The Respondent never signed the instrument formalising the replacement, and the Claimant therefore has not submitted an invoice.[124]

214. The Claimant included in its Reply an additional claim for "Environmental Services". The Claimant claims USD 322,514 for works performed by Mr. Pho that were not invoiced. The Claimant argues that it delivered these services in reliance on the Respondent's promise to pay for them.[125] The Claimant contends that Mr. Pho contributed to four expert reports, namely the (*i*) Environmental and Social Scoping Report (March 2019), (*ii*) Environmental and Social Impact Assessment Report (May 2019), (*iii*) Resettlement Action Plan (June 2019); (*iv*) Environmental and Social Impact Assessment Report No. 2 (February 2020).[126] The Claimant has not sought interest on this amount.

---

121 Statement of Claim, ¶ 5.12.

122 Statement of Claim, ¶ 5.12.

123 Statement of Claim, ¶ 5.13.

124 Witness statement of Mr. Rustam Davletkhan, ¶¶ 501-503 (**Exhibit CWS-6**).

125 Reply, ¶¶ 171-175; Witness Statement of Mr. Davletkhan, ¶¶ 501-503 (**Exhibit CWS-6**).

126 These reports are exhibited as **Exhibits C-91** to **C-94**.

(v) Other unpaid services

215. The Claimant argued in its Reply that it was entitled to an amount of USD 328,990 for "*other unpaid services*". The Claimant argued that it "*has provided all of the services required from it under SMPL Contract*" but that it was prevented by "[t]*he Respondent's artificial barriers* […] *from submitting the invoice*".[127] The Claimant contends that the Respondent created "*artificial barriers*" for the submission of invoices, and indicated that invoices were to be submitted once the Contract was extended to include the additional scope of works.[128]

2. The Respondent's Position

(i) Tax Obligations of the Claimant

216. Relying on both the law of Afghanistan and the Parties' agreement, it is the Respondent's position that the Claimant is liable to pay PIT, and that PIT was to be calculated by the amounts that the Respondent paid the Claimant under the Contract, as opposed to the amount that the Claimant paid the Experts. The Respondent relies on Article 2(1) of the AITL, which states that, at a rate of 20% for entities or companies:[129]

> "[t]*ax shall be imposed on all income of natural and legal persons derived from Afghan sources in and out of the country, and on the income of residents of Afghanistan derived from non Afghan sources and from out of Afghanistan in accordance with the provisions of this Law.*"[130]

217. In accordance with Article 64 of the AITL, the Respondent argues that the law of Afghanistan additionally imposes BRT on all transactions by legal entities in Afghanistan, regardless of the residence status of the parties thereto.[131]

218. The Respondent—via its expert, Mr. Gul Maqsood Sabit—also appears to suggest that when the Parties referred to "*local indirect taxes (BRT 7%)*",[132] the Parties intended for Article 72 of the AITL to apply, or alternatively recognised that Article 72 of the AITL would apply.[133] Article 72 falls within a chapter of the AITL dealing with "fixed taxes", and relevantly provides as follows:

> "*Withholding tax on contractors (1) Persons who, without a business license provide supplies, materials, construction and services under contract to government agencies, municipalities, state entities, private entities and other persons shall be subject to 7 percent fixed tax in lieu of income tax. This tax is withheld from the gross amount payable to the contractor.* […]
>
> *(3) The tax mentioned in paragraph (1) and (2) of this Article shall be withheld by the payer from payment and shall be transferred to the relevant account within ten days. Contractors subject to this Article shall be required to, upon signing the*

---

127 Reply, ¶ 176.

128 Reply, ¶ 171.

129 AITL, Art. 4(1) (**Exhibits CLA-1, RLA-1**).

130 AITL, Art. 2(1) (**Exhibits CLA-1, RLA-1**).

131 Statement of Defence, ¶ 46, referring to AITL, Art. 64 (**Exhibits CLA-1, RLA-1**).

132 Contract, SCC, Clause 41.2 (**Exhibit C-2**).

133 Expert Report of Mr. Gul Maqsood Sabit, ¶ 8.

contract, send a copy thereof to the relevant tax administration."[134]

219. The Respondent considers that, because the Claimant provides services to the Government of Afghanistan under a Contract without a business license, it is subject to a FTS levied at 7% in lieu of income tax and BRT, pursuant to the AITL.[135] (The Arbitrator recalls that Grant Thornton, and apparently also Baker Tilly, appeared to agree that the Claimant is liable to pay a fixed tax of 7% under Article 72.[136] Although nothing turns on this, it appears implicitly that on both Parties' cases the use of the term "*BRT*" in the Contract is a misnomer—the 7% tax rate is applicable to the Claimant by virtue of the FTS.)

220. However, the Respondent contends that the FTS does not at all affect an employer's obligation, under Article 58 of the AITL, to withhold PIT from the incomes of its contractors and employees.[137] Accordingly, the PIT rate for individual income over USD 1,200 per month is 20%, a rate which the Respondent deems to be applicable to virtually all the employees of the Claimant.[138] Relying on its Expert Witness Mr. Gul Maqsood Sabit and taxation documents produced by the Government of Afghanistan, the Respondent contends that the law of Afghanistan interprets the term "*employee*" broadly based on the nature and circumstances of the individual's services with the employer so as to include independent contractors who meet the criteria.[139] The Respondent further considers the Claimant's Experts to be employees of the Claimant.[140]

221. Furthermore, the Respondent maintains that the law requires the Claimant, like all taxpayers, to obtain a TIN, and that the Respondent's failure to obtain a TIN does not exempt it from paying taxes.[141] In fact, the Respondent contends that failure to pay taxes carries a fine of 10% of the unpaid tax in addition to penalties for failing to comply with tax payments and reporting obligations.[142] To date, the Government of Afghanistan has imposed a fine on the Claimant of USD 261.44 for failure to obtain a TIN.[143]

222. Concerning the Claimant's tax obligations specifically under the Contract, the Respondent contends that the Claimant attempted to vary the Parties' agreement unilaterally and evade its tax obligations thereunder.[144] The Respondent maintains that, from the beginning of the proposal and

---

134 AITL, Art. 72 (**Exhibits CLA-1, RLA-1**).

135 Statement of Defence, ¶¶ 47-48; AITL, Arts. 68, 72(1); Afghanistan Revenue Department Tax Guide, No. 19, Fixed Taxes on Commercial Activities, 19 March 2012, p. 5 (**Exhibit RLA-2**); Afghanistan Revenue Department Tax Guide, No. 21, Withholding Tax on Contractor Services, 21 March 2012, pp. 1-2 (**Exhibit RLA-5**).

136 Grant Thornton Report, ¶¶ 3.5-4 (**Exhibit C-12**); Baker Tilly, Opinion on the Issues of Business Registration and Taxation in Afghanistan, 4 April 2019, p. 3 (**Exhibit C-13**).

137 Statement of Defence, ¶ 48, referring to AITL, Art. 58 (**Exhibits CLA-1, RLA-1**); Afghanistan Revenue Department Tax Guide, No. 05, Wage Withholding Tax, 3 May 2012 (**Exhibit RLA-3**).

138 Statement of Defence, ¶ 48, referring to AITL, Art. 4(3) (**Exhibits CLA-1, RLA-1**).

139 Statement of Defence, ¶ 49, referring to Expert Report of Mr. Gul Maqsood Sabit, 22 April 2021, ¶ 8; Tax Guide, No. 05 (**Exhibit RLA-3**); Afghanistan Revenue Department, Public Ruling 1385/5, Income Tax: Employee or Independent Contractor for the Purposes of Wage Withholding Tax, 25 July 2006 (**Exhibit RLA-4**).

140 Statement of Defence, ¶¶ 48-49.

141 Statement of Defence, ¶ 50, citing AITL, Art. 86 (**Exhibits CLA-1, RLA-1**).

142 Statement of Defence, ¶ 52, citing Afghanistan Tax Administration Law, Official Gazette No. 01198, 18 November 2015, Art. 36 (**Exhibits RLA-7**).

143 Statement of Defence, ¶ 72.

144 Statement of Defence, ¶ 53.

negotiation process, the Claimant, among other bidders, was informed that it would be liable to pay both BRT, calculated against the total Contract value during negotiations, and PIT, calculated against remuneration and included in the financial proposal.[145]

223. Because the Claimant would not register in Afghanistan, the Respondent argues that the Parties agreed that the BRT was calculated at a rate of 7% against the Claimant's proposed value of the Contract, and the Respondent would withhold BRT against this amount from its payments to the Claimant and pay it directly to the Ministry of Finance.[146]

224. Unlike the collection of the BRT, the Respondent agrees that the collection of PIT requires an employer to have a TIN.[147] However, the Respondent maintains that it is unaware of the reasons why the Claimant did not obtain a TIN in order to withhold PIT.[148] It is the Respondent's position that the Parties agreed at the proposal stage that PIT would be levied at 20% against the remuneration paid to the Experts, as this was included in the Claimant's financial proposal.[149] The Respondent contends that this arrangement was confirmed through the negotiation phase and indicated in the minutes of the 26 September 2018 negotiation meeting, the Parties' email exchanges of 23 and 24 October 2018 and in Appendix C of the Contract itself.[150] The Respondent also argues and highlights that the Contract explicitly states in Appendix C that PIT "*will be managed by Unicon Ltd.*"[151]

(ii) Withholding of Invoices

225. The Respondent contends that upon requesting evidence from the Claimant of fulfilling its PIT obligations on the first invoice, the Claimant suddenly claimed to have a completely different understanding of its obligations, asserting it did not need to provide proof of payment of PIT and that PIT would nonetheless be a lower amount than represented in its financial proposal.[152] Accordingly, the Respondent notes that the Afghanistan Revenue Department therefore invoked its authority under the Afghanistan Tax Administration Law (the "**ATAL**") to collect the unpaid PIT from a third party, the Respondent, by withholding PIT from amounts due to the Claimant and crediting the withheld amounts toward the Claimant's tax liability.[153] Article 16(1) of the ATAL stipulates as follows:

> "***Collection of a taxpayer's unpaid tax from third parties***
>
> *(1) The taxation administration may, without the consent of the taxpayer, by*

---

145 Statement of Defence, ¶ 54.

146 Statement of Defence, ¶¶ 58-59.

147 Statement of Defence, ¶ 61.

148 Statement of Defence, ¶ 61.

149 Statement of Defence, ¶ 64, referring to Financial Proposal (**Exhibit R-1**).

150 Statement of Defence, ¶¶ 64-67, referring to Minutes, 26 September 2018 (**Exhibit R-2**); Claimant's email, 23 October 2018 (**Exhibit C-4**); Respondent's email, 24 October 2018 (**Exhibit R-3**); Contract, Appendix C, p. 100 (**Exhibit C-2**).

151 Contract, Appendix C, p. 100 (**Exhibit C-2**).

152 Statement of Defence, ¶ 68.

153 Statement of Defence, ¶ 69, citing ATAL, Art. 16(1) (**Exhibit RLA-7**).

notice in writing collect any unpaid tax from third parties."[154]

226. The Respondent contends that this method is identical to how BRT is collected under the Contract and that it is a common means used in Afghanistan for other similar projects and contracts for tax collection.[155] Therefore, the Respondent maintains that it withheld PIT lawfully and appropriately in accordance with the Contract, the ATAL, and the Afghanistan Revenue Department.[156]

(iii) Amount of PIT Payable

227. The Respondent states that some of the individual Experts of the Claimant paid PIT directly to the Ministry of Finance, which was credited toward the overall PIT amounts owed by the Claimant.[157] However, the Respondent contends that these individual contributions are much lower than the PIT amounts owed by the Claimant under the Contract.[158] As noted above, the Respondent was of the understanding that PIT would be levied at 20% against the remuneration paid to the Experts indicated in the Claimant's financial proposal. Accordingly, expert witness for the Respondent, Mr. Sabit, states that:

> "[s]*ince* [the Afghanistan Revenue Department] *would not have access to Unicon's payroll data, 20% of gross remuneration under the contract to cover all unpaid withholding obligations would be within common practice. This seems especially reasonable in this case since 20% is the top tax rate for PIT[.] PIT was discussed at length in the negotiation of the contract, both Unicon's cost proposal and invoices show payroll as far and away the largest project expense, and since the Unicon cost proposal includes over $400,000 in PIT.*"[159]

228. In short, the Respondent calculated PIT against the gross remuneration indicated in the financial proposal and the Contract as payable from the Claimant to the Respondent. In contrast, the Claimant contends that PIT should have been calculated against what the Claimant actually pays its Experts, which is a lower amount.

229. Regarding the Arbitrator's invitation of 9 January 2023 for the Parties to comment on the Claimant's claim for compound interest, the Respondent did not comment on compound interest and the manner in which interest (compound or simple) ought to be calculated.

(iv) Environmental services

230. The factual basis for the Claimant's claim for environmental services was provided for in Mr. Davletkhan's witness statement, filed with the Claimant's Statement of Claim. No response was provided to these factual allegations in the Respondent's Statement of Defence.

231. The Claimant's claim for environmental services was only articulated in the Claimant's Statement of Reply, which was filed after the Respondent ceased participating in the arbitration.

---

154 ATAL, Art. 16(1) (**Exhibit RLA-7**).

155 Statement of Defence, ¶ 69, referring to Minutes of Negotiation, 26 September 2018 (**Exhibit R-2**).

156 Statement of Defence, ¶¶ 68-70; Expert Report of Mr. Gul Maqsood Sabit, ¶ 9.

157 Statement of Defence, ¶ 70; Response to Notice, ¶ 12.

158 Statement of Defence, ¶ 70.

159 Expert Report of Mr. Gul Maqsood Sabit, ¶ 10.

(v) Other unpaid services

232. The Claimant's claim for "[o]*ther unpaid services*" was raised for the first time in the Claimant's Statement of Reply. Given that the Respondent ceased participating in the arbitration before the Claimant filed its Reply, the Respondent has not provided a defence to this claim.

* * *

233. The Respondent seeks an order dismissing the Claimant's claims in their entirety and thus rejects the Claimant's position on damages.[160] The Respondent also argues that the payment which it has withheld from the Claimant does not offset the sums that the Claimant still owes to the Ministry of Finance in full.[161] The Respondent contends that the Claimant still owes USD 38,876.26 in PIT, as well as a sum of USD 261.44 in penalty fees imposed by the Ministry of Finance for failing to fulfil BRT and PIT obligations and not obtaining a TIN.[162]

3. The Arbitrator's Analysis

234. There are two broad categories of claims relating to the Respondent's payment obligations before the Arbitrator. The first are claims for amounts that were withheld on account of PIT. The second are other claims for sums allegedly due and owing to the Claimant under the Contract. The first category of claims is addressed in **Parts (i)** to **(iii)** below. The second category is addressed in **Parts (iv)** and **(v).** Specifically, **Part (iv)** address the Claimant's claim in respect of environmental services, and **Part (v)** addresses the Claimant's claim for other unpaid services. **Part (vi)** considers damages and interest.

235. The Arbitrator approaches the first category of claims as follows:

a. Question 1: does the Contract impose tax liability on the Claimant over and above what is provided for under Afghan tax law? (**Part (i) below**).

b. Question 2: Did Unicon or its Experts fail to pay the required amount of tax? (**Part (ii) below**).

c. Question 3: if Unicon or its Experts failed to pay the required amount of tax, can the Respondent withhold payments from under the Contract on account of unpaid PIT? (**Part (iii) below**).

236. The Arbitrator is mindful that there is a large gulf between (*i*) the monthly payments per Expert as indicated in the financial proposal and in the Contract and (*ii*) the actual amounts the Experts were paid; and also between (*i*) the PIT amounts listed in the financial proposal, and (*ii*) the PIT amounts that the Expert actually paid. The Arbitrator makes no determination as to whether the foregoing gives rise to the basis for a claim of deceit or misrepresentation against the Claimant. The Arbitrator notes that his decisions on Questions 1, 2 and 3 are without prejudice to any right that the Respondent may have to bring a claim for deceit and/or misrepresentation, as will be explained below.

---

160 Response to Notice, ¶ 19; Statement of Defence, ¶ 77.

161 Response to Notice, ¶ 15.

162 Response to Notice, ¶¶ 13-15.

(i) Question 1: does the Contract impose tax liability on the Claimant over and above what is provided for under Afghan tax law?

237. Two distinct sub-issues arise from this question:

a. First, did the Parties purport to modify contractually who is responsible for collecting PIT? Stated differently, does the Contract purport to implement a different collection regime than Afghanistan's taxation legislation?

b. Second, did the Parties modify the amount of PIT payable, imposing for instance a higher amount than that which would be due under Afghanistan's taxation legislation?

238. Both questions will be considered below.

239. The Parties appear to be in broad agreement on the basic characteristics of PIT. The Respondent provided the following description of PIT under the Income Tax Law:

> "*PIT is personal income tax that is levied at 20% against income received by individual, natural persons. PIT can be collected in a variety of different ways. PIT may be paid directly by the individual, who must obtain a TIN and pay their taxes directly to the MOF. Alternatively, the employer can withhold PIT from the individual's pay check and then pay PIT directly to the MOF*[.]"[163]

240. As the Respondent has acknowledged, PIT is not levied at precisely 20%.[164] Both Parties appear to have used the figure 20% in their pleadings for convenience.[165] PIT liability is calculated on a monthly basis, in reference to the following graduated income brackets:[166]

Income bracket	Tax payable
AFS 0 – AFS 5,000	0
AFS 5,001 – AFS 12,500	2%
AFS 12,501 to AFS 100,000	10% plus a fixed amount of AFS 150
AFS 100,000 and over	20% plus a fixed amount of AFS 8,900

241. In considering if the Contract purports to displace or modify the statutory framework for PIT, the Arbitrator first considers the negotiation history of the terms of the Contract relating to PIT, before considering the precise obligations such terms place upon the Parties.

242. ***The Financial Proposal***. The Respondent places some emphasis on the Financial Proposal, submitted by the Claimant to the Respondent on 25 February 2018 in the course of the Respondent's tender for the Contract.[167]

---

163 Statement of Defence, ¶ 61.

164 Statement of Defence, fn. 20.

165 *See e.g.* Statement of Claim, p. 3, List of Abbreviatons.

166 Income Tax Law (2009), Art 4(3) (**Exhibit RLA-01**).

167 Claimant's Financial Proposal, 25 February 2018 (**Exhibit R-1**).

243. PIT is mentioned in a number of sections of the Claimant's Financial Proposal. Table "*FIN-2 SUMMARY OF COSTS*" contains the following breakdown:

COST COMPONENT	USD
Net Remuneration -	1,855,200
PIT	436,450
Grand Remuneration -	2,291,650
Reimbursable Expenses -	668,500
TOTAL COST, USD	**$2,960,150**

244. Immediately following this table, the Claimant stated as follows:

> "*In accordance with RFP, the Consultant has included PIT on its resident staff under the project in the fee rates. Therefore, our rates are inclusive of the above listed PIT. PIT is indicated here for illustrative purposes.*" [168]

245. Table "*FIN-3 BREAKDOWN OF REMUNERATION*" provides as follows:

Key Experts	Name	Man-months	Rate	Total, USD	PIT	Gross total with tax
Project Director	Sergey Burnacv	3.00	$16,000	48,000	$11,664	$59,664
Team Leader	Andrei Medvedev	18.00	$20,000	360,000	$87,480	$447,480
Gas Field Operations Expert	Gennadiy Istomin	18.00	$16,000	288,000	$69,984	$357,984
Pipeline Construction Expert	Oleksii Zatvornytskyi	18.00	$16,000	288,000	$69,984	$357,984
Technical Specialist-1	Vadim Zinchenko	18.00	$14,000	252,000	$61,236	$313,236
Technical Specialist-2	Timofey Agafon	18.00	$14,000	252,000	$61,236	$313,236
Environmental Expert	Mohsin Almaji	18.00	$11,000	198,000	$48,114	$246,114
Social expert (local)	Abdul Majid Labib	18.00	$3,400	61,200	$14,872	$76,072
Local experts (5*18)	Local	90.00	$1,200	108,000	$11,880	$119,880
TOTAL				$1,855,200	$436,450	$2,291,650

246. This table sets out monthly rates of "*remuneration*" for each "*Key Expert*". The column entitled "*PIT*" appears to have been calculated in reference to the total remuneration in column "*Total, USD*". The Claimant's calculations do not rely on a fixed figure of 20% for PIT. For the Experts listed in the first eight rows, the figure in the column "*PIT*" is 24.3% of the amount listed in "*Total, USD*". In the ninth row (*i.e.*, the row for "*Local experts (5 * 18)*") the figure in the column "*PIT*" is 11% of the total. The Arbitrator notes that, of the "*gross total with tax*" of USD 2,291,650, an amount of USD 436,450 is allocated to PIT.

247. Finally, it is pertinent to note that in its cover letter the Claimant states that "[o]*ur Financial Proposal shall be binding upon us subject to the modifications resulting from Contract*

168 Claimant's Financial Proposal, 25 February 2018, p. 1 (**Exhibit R-1**).

negotiations, up to expiration of the validity period of the Proposal, i.e.[,] *before the date indicated in Clause 12.1 of the Data Sheet.*"[169]

248. ***Pre-contractual negotiations***. Following the Financial Proposal, PIT appears to have been next discussed between the Parties in a meeting held on 26 September 2018.[170] This meeting was held between Mr. Davletkhan of the Claimant and a "*Negotiation Committee*" of five persons representing the Respondent. The object of this meeting was the "*Negotiation*" of a number of commercial terms of the Contract, including *inter alia* "*the clarification of the Consultant's tax liability in the Client's country and how it should be reflected in the Contract*".[171]

249. The minutes indicate that PIT featured minimally in this negotiation. Next to Item 5, the Minutes state as follows:

> "*As per Fin-1* [s]*ubmitted by the Consultant, the Consultant has shown tis* [sic] *price excluding of local indirect taxes. In addition,* [i]*n accordance with RFP, indirect local taxes must be calculated and added to the Consultant price during negotiation stage. The Client together with Consultant has made the following calculation of the tax*
> *Total Proposal* *USD 2,893,586*
> *BRT Tax (7%):* *USD 217,797*
> *Total Contract:* *USD 3,111,383*
>
> *The indirect local tax (BRT) was added to the contract and the total contract value is USD 3,111,383* [...] *In case that the company is not registered in Afghanistan therefore the BRT tax has taken 7%.*
> *And PIT is included in consultant given price.*"[172]

250. In the adjacent column, the minutes reflect that "[b]*oth parties agreed.*"

251. The Parties now take different positions as to what precisely was agreed upon.

252. Mr. Davletkhan's testimony did not mention any specific agreement being reached as to the Claimant's payment of PIT. His recollection was simply that "*it was agreed that the MEW will not engage itself in the PIT – neither on technical side nor administrative, i.e. PIT is not an issue of concern to MEW*".[173]

253. The Respondent's witness Mr. Maiwand Miakhel testified that the agreement was for the Claimant to be "responsible" for paying PIT itself. Mr. Miakhel stated as follows:

> "*We also briefly discussed PIT. We simply reminded Mr. Davletkhan that the law of Afghanistan required the payment of PIT, that PIT was included in the consultant-given price, and that Unicon was responsible for managing PIT payments. We all agreed that Unicon would be responsible for paying this tax. The minutes of the negotiations clearly reflect this agreement, stating "And PIT is included in*

---

169 Claimant's Financial Proposal, 25 February 2018, p. 4 (**Exhibit R-1**).

170 Minutes of Negotiation, 26 September 2018 (**Exhibit R-2**).

171 Minutes of Negotiation, 26 September 2018, p. 2 (**Exhibit R-2**).

172 Minutes of Negotiation, 26 September 2018, p. 4 (**Exhibit R-2**).

173 Witness Statement of Rustum Davletkhan, ¶ 49, (**Exhibit CWS-6**). (emphasis added)

consultant given price."[174]

254. Mr. Miakhel's testimony is silent as to whether the Parties, in this meeting, reached any agreement as to whether (*i*) PIT would be calculated in reference to the amounts the Respondent paid the Claimant or (*ii*) PIT would be calculated in reference to the amount the Claimant paid the its Experts. Instead, Mr. Miakhel's testimony could mean one of two things. Either his testimony is that the Claimant would assume responsibility for ensuring that PIT was paid in respect of the Experts. Or his testimony is that the Claimant agreed to pay PIT itself. The Arbitrator considers the former preferable, being consistent with both the written record of the meeting and Mr. Davletkhan's testimony.

255. A draft version of the agreement was also circulated on the same day. It is unclear whether this draft was circulated before or after the meeting. This draft does not mention PIT. The draft set out the rates for the Experts as follows:[175]

APPENDIX C – REMUNERATION COST ESTIMATES

Key Experts		Mnth	Rate, USD	Total, USD
Project Director	Field	1	19,888.00	19,888
	Home	2	19,888.00	39,776
Team Leader	Field	16	24,860.00	397,760
	Home	2	24,860.00	49,720
Gas Field Operations Expert	Field	16	19,888.00	318,208
	Home	2	19,888.00	39,776
Pipeline Construction Expert	Field	16	19,888.00	318,208
	Home	2	19,888.00	39,776
Technical Specialist-1	Field	16	17,402.00	278,432
	Home	2	17,402.00	34,804
Technical Specialist-2	Field	16	17,402.00	278,432
	Home	2	17,402.00	34,804
Environmental Expert	Field	16	13,673.00	218,768
	Home	2	13,673.00	27,346
Social expert (local)	Field	18	4,226.22	76,072
	Home	-	-	-
Local experts (5*18)	Field	90	1,332.00	119,880
	Home	-	-	-
Total, USD				**2,291,650**

256. On 23 October 2018, Mr. Maiwand Miakhel emailed the Claimant with a revised draft of the Contract.[176] This version of the contract incorporated a draft of Appendix C which specifically set out amounts of PIT that would be paid in respect of each employer:[177]

---

174 Witness Statement of Ahmad Maiwand Miakhel, ¶ 11. (emphasis added)

175 Draft SMPL Contract version 1 circulated 26 September 2018, p. 101 (**Exhibit C-43**).

176 Email exchange between Respondent and Claimant, 23 October 2018 (**Exhibit C-48**).

177 Draft SMPL Contract version 2 as edited by the Respondent on 23 October 2018 (**Exhibit C-44**).

APPENDIX C – REMUNERATION COST ESTIMATES

Key Experts	Name	Man-months	Rate	Total USD	PIT	Gross total with tax
Team leader	Anderi Medvidev	18.00	$20,000	360,000	$ 87,480	$447,480
Gas Field Operations Expert	Gennadiy Istomin	18.00	$16,000	288,000	$69,984	$357,984
Pipeline Construction Expert	Oleksii Zatvornyskyi	18.00	$ 16,000	288,000	$69,984	$357,984
Technical Specialist-1	Vadmin Zinchenko	18.00	$ 14,000	252,000	$61,236	$313,236
Technical Specialist-2	Timofey Agafon	18.00	$ 14,000	252,000	$61,236	$313,236
Environmental Experts	Mohsin Almaji	18.00	$ 11,000	198,000	$48,114	$246,114
Social Expert (local)	Abdul Majid Labib	18.00	$ 3,400	61,200	$ 14,872	$76,072
Local Experts (5*18)	Local	90.00	$ 1,200	108,000	11,880	$119,880
TOTAL				**$1,807,200**	**$424,786**	**$2,231,986**

257. Mr. Davletkhan responded on the same day, protesting against several of the changes the Respondent had made in its draft of 23 October 2018:

> "*In our Financial Proposal, is* [sic] *says so – "PIT is indicated here for illustrative purposes". So that table cannot be copypasted into contract, as it is illustrative, it is not fixed. It shows how much each person will be paid at the end. Net rates, profits, taxes, etc. are responsibility of the Consultant Firm. What is of vital importance to MEW here is the final figure that needs to be paid by MEW against each individual – and that's the total price per expert.*
>
> *Since the World Bank and MEW insisted that PIT should be managed by Consultant on its own, then there is no reason for the contract between two parties (MEW+Unicon) to go into details that are beyond this contract and it seems that PIT is beyond this contract of two parties. Shall you still wish PIT to be part of the contract as a standalone item, even though we do not understand rationale of it, then we need to engage our accountants now and make all proper calculations and only then finalise this contract.* [...] *Let us know how you wish to proceed*[.]"[178]

258. Mr. Davletkhan then appeared to provide an alternative to "*engag*[ing] *our accountants now*":

> "*At the same time, if you want to secure MEW against PIT issue, we have added below figures a statement that rates are inclusive of income tax. That way, MEW waives any responsibility for contract's PIT management.*"[179]

259. Mr. Davletkhan attached a revised draft of the Contract to his email to the Respondent. This draft removed the column for PIT from Appendix C, and added text below the table stating that "[t]*he*

---

178 Email exchange between Respondent and Claimant, 23 October 2018 (**Exhibit C-48**). (emphasis added)

179 Email exchange between Respondent and Claimant, 23 October 2018 (**Exhibit C-48**).

rates indicated above are inclusive of personal income tax of contractors and represent Gross Rates and will be managed by Unicon Ltd.":[180]

APPENDIX C – REMUNERATION COST ESTIMATES

Key Experts		Mnth	Rate, USD	Total, USD
Project Director	Field	1	19,888.00	19,888
Rustam Davletkhan / Sergey Burnaev	Home	2	19,888.00	39,776
Team Leader	Field	16	24,860.00	397,760
Andrei Medvedev	Home	2	24,860.00	49,720
Gas Field Operations Expert	Field	16	19,888.00	318,208
Maksym Yelistratov	Home	2	19,888.00	39,776
Pipeline Construction Expert	Field	16	19,888.00	318,208
Oleksii Zatvornytskyi	Home	2	19,888.00	39,776
Technical Specialist-1	Field	16	17,402.00	278,432
Vadim Zinchenko	Home	2	17,402.00	34,804
Technical Specialist-2	Field	16	17,402.00	278,432
Timofey Agafon	Home	2	17,402.00	34,804
Environmental Expert	Field	16	13,673.00	218,768
Mohsin Almaji	Home	2	13,673.00	27,346
Social expert	Field	18	4,226.22	76,072
Abdul Majid Labib	Home	-	-	-
Local expert 1	Field	18	1,332.00	23,976
Mohammad Haneef Heneefi	Home	-	-	-
Local expert 2	Field	18	1,332.00	23,976
Habibullah Mirza Abdul Razaq	Home	-	-	-
Local expert 3	Field	18	1,332.00	23,976
Gholam Sadiq Niazi	Home	-	-	-
Local expert 4	Field	18	1,332.00	23,976
Hekmatullah Hekmat Nekyad	Home	-	-	-
Local expert 5	Field	18	1,332.00	23,976
Javed Darwesh	Home	-	-	-
Total, USD				**2,291,650**

The rates indicated above are inclusive of personal income tax of contractors and represent Gross Rates and will be managed by Unicon Ltd.

The BRT (7%) is calculated separately.

260. On 24 October 2018, Mr. Noori sent to the Claimant a revised version of the Contract. Appendix C had been edited to remove the three months of time budgeted for "*Project Director*". However, the Respondent had otherwise accepted the Claimant's amendments of 23 October 2018 to Appendix C.[181]

180 Draft Contract 3, Appendix C (**Exhibit C-45**).

181 Email of 24 October 2018 from the Respondent to the Claimant attaching draft Contract, p. 103 (of the pdf) (**Exhibit R-3**).

APPENDIX C – REMUNERATION COST ESTIMATES

Key Experts		Mnth	Rate, USD	Total, USD
Team Leader	Field	16	24,860.00	397,760
Andrei Medvedev	Home	2	24,860.00	49,720
Gas Field Operations Expert	Field	16	19,888.00	318,208
Maksym Yelistratov	Home	2	19,888.00	39,776
Pipeline Construction Expert	Field	16	19,888.00	318,208
Oleksii Zatvornytskyi	Home	2	19,888.00	39,776
Technical Specialist-1	Field	16	17,402.00	278,432
Vadim Zinchenko	Home	2	17,402.00	34,804
Technical Specialist-2	Field	16	17,402.00	278,432
Timofey Agafon	Home	2	17,402.00	34,804
Environmental Expert	Field	16	13,673.00	218,768
Mohsin Almaji	Home	2	13,673.00	27,346
Social expert	Field	18	4,226.22	76,072
Abdul Majid Labib	Home	-	-	-
Local expert 1	Field	18	1,332.00	23,976
Mohammad Haneef Heneefi	Home	-	-	-
Local expert 2	Field	18	1,332.00	23,976
Habibullah Mirza Abdul Razaq	Home	-	-	-
Local expert 3	Field	18	1,332.00	23,976
Gholam Sadiq Niazi	Home	-	-	-
Local expert 4	Field	18	1,332.00	23,976
Hekmatullah Hekmat Nekyad	Home	-	-	-
Local expert 5	Field	18	1,332.00	23,976
Javed Darwesh	Home	-	-	-
Total, USD				**2,231,986**

The rates indicated above are inclusive of personal income tax of contractors and represent Gross Rates and will be managed by Unicon Ltd.

The BRT (7%) is calculated separately.

261. ***The terms of the Contract.*** Signed on 19 January 2019, the Contract features several provisions relevant to taxation. The first is Clause 43 of the General Conditions of Contract. This provides as follows:

> "*43.1 The Consultant, Sub-consultants and Experts are responsible for meeting any and all tax liabilities arising out of the Contract unless it is stated otherwise in the SCC.*
>
> *43.2 As an exception to the above and as state in the SCC, all local identifiable indirect taxes (itemized and finalized at Contract negotiations) are reimbursed to the Consultant or are paid by the Client on behalf of the Consultant.*"[182]

262. Further detail is provided in the Special Conditions of Contract. Clause 41.2 SCC provides as follows in respect of "*local indirect taxes*":

---

182 Contract, Art. 43 (**Exhibit C-2**).

> "*The amount of such local indirect taxes (BRT 7%) is USD 217,797 (Two Hundred Seventeen Thousand Seven Hundred and Ninety Seven US Dollars).*
>
> *The local indirect taxes chargeable in respect of this Contract for the Services provided by the Consultant shall be paid by the Client to the Ministry of Finance (MOF).*" [183]

263. Clause 43.1 and 43.2 of the SCC provides for a limited reimbursement obligation as follows:

> "*The Client warrants that the Client shall reimburse the Consultant, the Sub-consultants and the Experts any indirect taxes, duties, fees, levies and other impositions imposed, under the applicable law in the Client's country, on the Consultant, the Sub-consultants and the Experts in respect of:*
>
> *(a) any payments whatsoever made to the Consultant, Sub-consultants and the Experts (other than nationals or permanent residents of the Client's country), in connection with the carrying out of the Services;*
>
> *(b) any equipment, materials and supplies brought into the Client's country by the Consultant or Sub-consultants for the purpose of carrying out the Services and which, after having been brought into such territories, will be subsequently withdrawn by them;*
>
> *(c) any equipment imported for the purpose of carrying out the Services and paid for out of funds provided by the Client and which is treated as property of the Client;*
>
> *(d) any property brought into the Client's country by the Consultant, any Sub-consultants or the Experts (other than nationals or permanent residents of the Client's country), or the eligible dependents of such experts for their personal use and which will subsequently be withdrawn by them upon their respective departure from the Client's country, provided that:*
>
> > *(i) the Consultant, Sub-consultants and experts shall follow the usual customs procedures of the Client's country in importing property into the Client's country; and*
> >
> > *(ii) if the Consultant, Sub-consultants or Experts do not withdraw but dispose of any property in the Client's country upon which customs duties and taxes have been exempted, the Consultant, Sub-consultants or Experts, as the case may be, (a) shall bear such customs duties and taxes in conformity with the regulations of the Client's country, or (b) shall reimburse them to the Client if they were paid by the Client at the time the property in question was brought into the Client's country.*"[184]

264. PIT is only mentioned in Appendix C, which is identically-worded to the draft of Appendix C circulated by the Respondent on 24 October 2018 and reproduced above. As with the Respondent's draft of 24 October 2018, Appendix C lists the Expert's rates and states that "[t]*he rates indicated above are inclusive of personal income tax of contractors and represent Gross*

---

183 Contract, SCC, Art. 41.2 (**Exhibit C-2**).

184 Contract, SCC, Art. 43.1, 43.2 (**Exhibit C-2**).

Rates and will be managed by Unicon Ltd".[185] From this language in the Contract, the Arbitrator considers that the Contract does not expressly require the Claimant to withhold PIT from payments to the Experts. The Arbitrator considers that the language "*managed by Unicon*" is not synonymous with "*shall be withheld by Unicon*", or, to quote the language the Parties used in Clause 41.2 SCC in respect of the 7% withheld on account of BRT, "*shall be paid by the* [c]*lient to the Ministry of Finance*".[186] The Claimant is therefore not obliged to withhold tax, but is instead intended to ensure that the Experts pay the PIT required under applicable law (and as will be explained in the following section, it appears that the Experts indeed paid such PIT).

265. ***Whether statutory PIT liability was modified by the Contract.*** In view of the foregoing, the answer to the questions posed at the beginning of this section is that the Parties did not purport to contractually modify who is responsible for collecting PIT, nor did the Parties purport to modify the amount of PIT payable. The Parties did not, for instance, agree to impose a higher amount of PIT than that which would be due under Afghanistan's taxation legislation. This is clear based on the negotiation history set out above as well as the final terms of the Contract that the Contract does not permit neither the Respondent nor the Claimant to withhold PIT from payments to the Experts. The Arbitrator does not consider that the language of the Contract does not alter the party responsible for collecting or paying PIT to the tax administration.[187] Neither the Claimant nor the Respondent are obliged to withhold amounts on account of PIT, but the Claimant is instead obliged to ensure that PIT is paid by its Experts. As will be explained in the following section, it appears that the Experts indeed paid such PIT.

266. The Respondent's position appears to be that the PIT was to be calculated not in reference to the remuneration actually received by the Experts from the Claimant, but in reference to the charge-out rates the Claimant billed to the Respondent under the Contract in respect of each Expert.

267. The Respondent's case faces several problems.

268. *First,* even assuming it is possible for two parties to agree in a contract to deviate from the Income Tax Law's PIT provisions, no such agreement occurred here. The negotiation record shows that no agreement was ever reached to contractually override or modify the legislative PIT framework. In the draft of the Contract the Respondent circulated on 23 October 2018, the Respondent sought to stipulate, in Appendix C, specific amounts of PIT payable in respect of each Expert. However, this proposal was rejected by the Claimant and omitted from the signed version of the Contract. In light of this, the Parties are not bound by the specific amounts of PIT set out in the Claimant's Financial Proposal, nor by the PIT amounts in the Respondent's draft of 23 October 2018. Nor did the Parties agree to the principle that PIT would be calculated in reference to amounts the Respondent paid the Claimant under the Contract, as opposed to amounts the Claimant paid its Experts.

269. The Arbitrator does not consider it necessary to decide whether, under Afghan law, two parties can validly enter into a contractual commitment for one to pay a higher level of PIT than that which is provided for under the Income Tax Law. This scenario does not arise on the facts.

270. *Second,* the Respondent's defence is inconsistent as to whether PIT is levied on payments made to legal or juridical persons, in addition to payments made to natural persons. The Respondent initially defines PIT as "*personal income tax that is levied at 20% against income received by*

---

185 Contract, Appendix C, p. 100 (**Exhibit C-2**).

186 Contract, SCC, Art. 41.2 (**Exhibit C-2**).

187 Contract, SCC, Art. 41.2 (**Exhibit C-2**).

individual, natural persons".[188] However, the Respondent elsewhere takes the position that PIT would be calculated and levied as "*as 20% of the remuneration Unicon billed to MEW*", with Unicon of course being a legal person rather than a natural person.[189] The Arbitrator considers the former proposition to be correct as a matter of Afghani law. As to the latter proposition, and as aforementioned, the Arbitrator finds that no agreement was ever reached to implement a PIT regime different to that under Afghani law, including with respect to levying PIT on payments received by juridical as opposed to natural persons.

271. An additional problem arising here is that if the Respondent were to believe that 100% of its payments for professional services were being passed through from the Claimant to the Experts, the Claimant would make no profit whatsoever under the Contract despite assuming some risk under it. Any expectation the Respondent held that 100% of the payments for professional services were being passed through was therefore not commercially realistic.

272. The Arbitrator again notes that the above findings are without prejudice to any claim that the Respondent may have for deceit and/or misrepresentation under the relevant law. The PIT figures in the Claimant's Financial Proposal were indeed incorrect, and by a significant magnitude. A clear explanation does not appear to have been proffered in these proceedings as to why the Claimant's PIT figures in its Financial Proposal were incorrect by such a magnitude. Nonetheless, the Arbitrator makes no findings as to whether a proper basis may exist for a claim for deceit and/or misrepresentation. The Arbitrator simply wishes to make clear that it would not be appropriate to implicitly or explicitly reject deceit and/or misrepresentation when the Respondent brought no counterclaim to this effect in these proceedings.

273. The Arbitrator recalls that one fleeting reference to an "*apparent*" misrepresentation exists in the Respondent's Statement of Defence, one that the Respondent characterised as "*surprising*".[190] This is insufficient to amount to a counterclaim for deceit and/or misrepresentation: despite having the benefit of an experienced counsel firm and an adequate opportunity to do so, the Respondent has not explained the elements of deceit and/or misrepresentation under the applicable law, nor provided evidence of the loss it suffered (as opposed to loss suffered by the Afghan Revenue Department). Nor does the Respondent ever contend in its Statement of Defence that it is maintaining any counterclaims in this proceeding in relation to deceit and/or misrepresentation. The Arbitrator also does not consider that this reference amounts to a standalone defence to the effect that the Contract is void due to deceit and/or misrepresentation: the Respondent has not explained how deceit and/or misrepresentation affects contract validity under the applicable law, nor how such a defence would be sustainable in light of the fact that the Respondent sought, in its Response to the Claimant's Notice of Arbitration, to enforce the Contract by way of its demobilisation counterclaim.[191]

(ii) Question 2: was the correct amount of PIT paid by or on behalf of the Claimant's Experts?

274. ***Amounts of PIT paid by the Claimant's Experts***. The Arbitrator finds it instructive to consider first the amount of PIT actually paid by the Claimant's Experts.

275. The evidence in this regard is incomplete, and demonstrates only the amounts that the Experts paid during January to September 2019. However, the Arbitrator considers that it was the

---

188 Statement of Defence, ¶ 61. (emphasis added).

189 Statement of Defence, ¶ 65.

190 Statement of Defence, ¶ 42.

191 Respondent to Notice of Arbitration, ¶ 17.

Respondent's burden to demonstrate that PIT was underpaid and that the amount the Respondent withheld from the Claimant was therefore legitimate. The Arbitrator further considers that, contrary to the Respondent's position, sufficient evidence was submitted by the Claimant to show that the Experts met in full their Afghanistan tax liabilities during January to September 2019, and an inference can be made that the same is the case for the remaining period.

276. There are two means before the Arbitrator of assessing whether the Claimant's Experts met their tax obligations in full during at least part of the relevant period.

277. The first is the letter of confirmation exhibited by the Claimant from the Afghan Revenue Department (the "**ARD**"). This letter, issued on 12 November 2019, indicates that PIT had been fully paid by each of the 11 Experts engaged for the SMPL Contract for the period of January 2019 to September 2019.[192]

278. Afghan law recognises the authority of the Ministry of Finance (of which the ARD is a part) to assess the tax liability of relevant persons and to issue tax clearance certificates stating their compliance or non-compliance with their obligation to pay taxes.[193] The ARD concluded that, in respect to the period of January to September 2019, the "*tax on Unicon consultants' salaries* [...] *has been paid in full*".[194] Due weight must be given to the ARD's determination in this regard, being the body designated under Afghan law to make this form of determination.

279. The second means available for the Arbitrator to assess the Experts' tax payments are their tax clearance certificates.

280. The Claimant exhibited a series of certificates that the ARD enclosed with its letter of 12 November 2019, designated collectively as Exhibit C-107, listing certain tax information for each Expert from January to September 2019.

281. To assist in the Arbitrator's verification of this information, the Claimant provided with its Statement of Reply example documentation for one of its Experts, Mr. Oleskii Zatvornsyski.[195] The Claimant exhibited Mr. Zatvornsyski's Consultancy Agreement, a special-purpose agreement signed for the SMPL Contract, for which Mr. Zatvornsyski was to receive a monthly fee of USD 5,000.[196] The Claimant also exhibited two bank documents evidencing payments to Mr. Zatvornsyski for the month of April 2019.[197] The Arbitrator is satisfied on the basis of the foregoing that Mr. Zatvornsyski's monthly fee was USD 5,000.

282. Finally, the Claimant produced in the course of document production the contracts of its ten other Experts engaged in connection with the SMPL Contract.[198]

283. The Arbitrator analysed the documentary evidence mentioned above to attain greater clarity as to the level of PIT paid by the Claimant's Experts. The Arbitrator found it instructive to compare (*i*)

---

192 ARD's confirmation of all PIT being paid in full and directly by the experts, 12 November 2019 (**Exhibit C-39**).

193 Tax Administration Law, Arts 4, 59 (**Exhibit RLA-7**).

194 ARD's confirmation of all PIT being paid in full and directly by the experts, 12 November 2019 (**Exhibit C-39**).

195 Consultancy Agreement between Claimant and its expert Mr. Oleskii Zatvornsyski (**Exhibit C-57**).

196 Consultancy Agreement between Claimant and its expert Mr. Oleskii Zatvornsyski, cl. 3 (**Exhibit C-57**).

197 Bank Transfer Wire, dated 10 June 2019 (**Exhibit C-58**); Claimant's Bank Statement Extract, dated June 2019 (**Exhibit C-60**).

198 Claimant's document production, Documents 12 to 22.

the monthly fee as stated in the contract for each Expert; (*ii*) the monthly fee as declared to the ARD and the amount of PIT paid (*i.e.* in Exhibit C-107); and (*iii*) the Claimant's own invoices for professional services issued to the Respondent under the Contract, which showed that the Claimant's monthly fees for the Experts as invoiced to the Respondent were often billed out for *portions* of the invoiced month (Exhibit C-3). As the tax documentation the Claimant obtained from the ARD featured AFN as their exclusive unit of currency, the Arbitrator applied a rate of AFN 78 to 1 USD, being approximately the average exchange rate across 2019,[199] to convert the afghani amounts listed in the ATA tax documentation into USD.

Analysis of Tax Certificates for Mr. Zatvornsyski (C-107)

Period	**A. Salary for Month as Declared to ARD** ***(C-107)***	**B. PIT Paid** ***(C-107)***	**C. PIT as % of Declared Income** ***(B / A * 100)***	**D. Proportion of month invoiced to Respondent** ***(C-3)***
Jan-19	USD 1,594.51 *AFN 124,196.00*	USD 176.39 *AFN 13,739.00*	11.06%	33% of full month
Feb-19	USD 4,346.13 *AFN 338,520.00*	USD 726.72 *AFN 56,604.00*	16.72%	91% of full month
Mar-19	USD 4,402.21 *AFN 342,888.00*	USD 825.01 *AFN 64,260.00*	18.74%	100% of full month
Apr-19	USD 4,546.16 *AFN 354,100.00*	USD 897.42 *AFN 69,900.00*	19.74%	100% of full month
May-19	USD 2,939.29 *AFN 228,941.00*	USD 450.25 *AFN 35,070.00*	15.32%	57% of full month
Jun-19	USD 5,179.11 *AFN 403,400.00*	USD 897.42 *AFN 69,900.00*	17.33%	100% of full month
Jul-19	USD 2,562.27 *AFN 199,575.00*	USD 377.46 *AFN 29,400.00*	14.73%	50% of full month
Aug-19	USD 5,037.24 *AFN 392,350.00*	USD 897.42 *AFN 69,900.00*	17.82%	100% of full month
Sep-19	USD 5,007.71 *AFN 390,050.00*	USD 897.42 *AFN 69,900.00*	17.92%	100% of full month

199 On 9 January 2023, the Arbitrator asked the Parties for their respective positions on the AFN-USD exchange rate in 2019. The Claimant submitted into the record a PDF printout from exchangerates.org showing the daily AFN to USD exchange rate throughout 2019. The Respondent never responded. The Arbitrator exported the Claimant's table into Excel and calculated the average exchange rate. The average rate was AFN 77.86 to 1 USD.

284. The Arbitrator has prepared a similar assessment for each of the Claimant's eleven Experts, referring to the contracts produced in document production. The Arbitrator's breakdown is below.

285. **1. Mr Andrei Medvedev**. Mr Medvedev's monthly payment according to his contract us USD 8,200.[200]

Period	**A. Salary for Month as Declared to ARD** *(C-107)*	**B. PIT Paid** *(C-107)*	**C. PIT as % of Declared Income** *(B / A * 100)*	**D. Proportion of month invoiced to Respondent** *(C-3)*
Jan-19	USD 2,615 AFN 203,681.00	USD 380 AFN 29,637.00	14.55%	33% of full month
Feb-19	USD 7,833 AFN 610,080.00	USD 1,296 AFN 100,916.00	16.54%	100% of full month
Mar-19	USD 7,934 AFN 617,952.00	USD 1,444 AFN 112,490.00	18.20%	100% of full month
Apr-19	USD 8,151 AFN 634,844.00	USD 1,542 AFN 120,100.00	18.92%	100% of full month
May-19	USD 4,820 AFN 375,462.00	USD 806 AFN 62,749.00	16.71%	57% of full month
Jun-19	USD 8,494 AFN 661,576.00	USD 1,510 AFN 117,640.00	17.78%	100% of full month
Jul-19	USD 1,093 AFN 85,099.00	USD 72 AFN 5,572.00	6.55%	13% of full month
Aug-19	USD 8,261 AFN 643,454.00	USD 1,500 AFN 116,820.00	18.16%	100% of full month
Sep-19	USD 8,213 AFN 639,682.00	USD 1,504 AFN 117,148.00	18.31%	100% of full month

286. **2. Mr Maksym Yelistratov**. Mr. Yelistratov's monthly payment according to his contract is USD 5,000.[201]

Period	**A. Salary for Month as Declared to ARD** *(C-107)*	**B. PIT Paid** *(C-107)*	**C. PIT as % of Declared Income** *(B / A * 100)*	**D. Proportion of month invoiced to Respondent** *(C-3)*

200 Claimant's document production, Document 12, Clause 3(a).

201 Claimant's document production, Document 13, Clause 3(a).

Jan-19	USD 1,595 AFN 124,196.00	USD 176 AFN 13,739.00	11.06%	33% of full month
Feb-19	USD 4,776 AFN 372,000.00	USD 813 AFN 63,300.00	17.02%	100% of full month
Mar-19	USD 4,838 AFN 376,800.00	USD 825 AFN 64,260.00	17.05%	100% of full month
Apr-19	USD 4,854 AFN 378,100.00	USD 897 AFN 69,900.00	18.49%	100% of full month
May-19	USD 2,939 AFN 228,941.00	USD 450 AFN 35,070.00	15.32%	57% of full month
Jun-19	USD 5,179 AFN 403,400.00	USD 897 AFN 69,900.00	17.33%	100% of full month
Jul-19	USD 2,562 AFN 199,575.00	USD 377 AFN 29,400.00	14.73%	50% of full month
Aug-19	USD 5,037 AFN 392,350.00	USD 897 AFN 69,900.00	17.82%	100% of full month
Sep-19	USD 5,008 AFN 390,050.00	USD 897 AFN 69,900.00	17.92%	100% of full month

287. **3. Mr Timofey Agafon**. Mr. Agafon's monthly payment according to his contract is USD 7,500.[202]

Period	**A. Salary for Month as Declared to ARD** *(C-107)*	**B. PIT Paid** *(C-107)*	**C. PIT as % of Declared Income** *(B / A * 100)*	**D. Proportion of month invoiced to Respondent** *(C-3)*
Jan-19	USD 2,392 AFN 186,293.00	USD 336 AFN 26,159.00	14.04%	33% of full month
Feb-19	USD 7,164 AFN 558,000.00	USD 1,290 AFN 100,500.00	18.01%	100% of full month
Mar-19	USD 7,256 AFN 565,200.00	USD 1,309 AFN 101,940.00	18.04%	100% of full month
Apr-19	USD 7,455 AFN 580,650.00	USD 1,417 AFN 110,400.00	19.01%	100% of full month
May-19	USD 4,409 AFN 343,411.00	USD 747 AFN 58,155.00	16.93%	57% of full month

202 Claimant's document production, Document 16, Clause 3(a).

Jun-19	USD 7,769 AFN 605,100.00	USD 1,417 AFN 110,400.00	18.24%	100% of full month
Jul-19	0	0	0%	0
Aug-19	0	0	0%	0
Sep-19	0	0	0%	0

288. **4. Mr Vadim Zinchenko**. Mr. Zinchenko's monthly payment according to his contract is USD 3,500.[203]

Period	**A. Salary for Month as Declared to ARD** *(C-107)*	**B. PIT Paid** *(C-107)*	**C. PIT as % of Declared Income** *(B / A * 100)*	**D. Proportion of month invoiced to Respondent** *(C-3)*
Jan-19	0	0	0%	0
Feb-19	USD 3,343 *AFN 260,400.00*	USD 526 AFN 40,980.00	15.74%	100% of full month
Mar-19	USD 3,386 *AFN 263,760.00*	USD 535 AFN 41,652.00	15.79%	100% of full month
Apr-19	USD 3,479 *AFN 270,970.00*	USD 585 AFN 45,600.00	16.83%	100% of full month
May-19	USD 2,057 *AFN 160,258.00*	USD 272 AFN 21,219.00	13.24%	57% of full month
Jun-19	USD 3,625 *AFN 282,380.00*	USD 585 AFN 45,600.00	16.15%	100% of full month
Jul-19	USD 1,794 *AFN 139,703.00*	USD 221 AFN 17,250.00	12.35%	50% of full month
Aug-19	USD 3,526 *AFN 274,645.00*	USD 585 AFN 45,600.00	16.60%	100% of full month
Sep-19	USD 3,505 *AFN 273,035.00*	USD 585 AFN 45,600.00	16.70%	100% of full month

289. **5. Mr Abdul Majid Labib**. Mr. Majid Labib's monthly payment according to his contract is USD 500.[204]

---

203 Claimant's document production, Document 15, Clause 3(a).

204 Claimant's document production, Document 17, Clause 3(a).

Period	A. Salary for Month as Declared to ARD *(C-107)*	B. PIT Paid *(C-107)*	C. PIT as % of Declared Income *(B / A * 100)*	D. Proportion of month invoiced to Respondent *(C-3)*
Jan-19	0	0	0%	33% of full month
Feb-19	USD 478 AFN 37,200.00	USD 34 AFN 2,620.00	7.04%	100% of full month
Mar-19	USD 484 AFN 37,680.00	USD 34 AFN 2,668.00	7.08%	100% of full month
Apr-19	USD 497 AFN 38,710.00	USD 36 AFN 2,771.00	7.16%	100% of full month
May-19	USD 294 AFN 22,894.00	USD 15 AFN 1,189.00	5.19%	57% of full month
Jun-19	USD 518 AFN 40,340.00	USD 38 AFN 2,934.00	7.27%	100% of full month
Jul-19	0	0	0%	0
Aug-19	0	0	0%	0
Sep-19	USD 501 AFN 39,005.00	USD 36 AFN 2,800.00	7.18%	100% of full month

290. **6. Mr Hekmatullah Nekyad**. Mr Nekyad's monthly payment according to his contract is USD 500.[205]

Period	A. Salary for Month as Declared to ARD *(C-107)*	B. PIT Paid *(C-107)*	C. PIT as % of Declared Income *(B / A * 100)*	D. Proportion of month invoiced to Respondent *(C-3)*
Jan-19	0	0	0%	0
Feb-19	USD 478 *AFN 37,200.00*	USD 34 *AFN 2,620.00*	7.04%	100% of full month
Mar-19	USD 484 *AFN 37,680.00*	USD 34 *AFN 2,668.00*	7.08%	100% of full month
Apr-19	USD 497	USD 36	7.16%	100% of full

205 Claimant's document production, Document 19, Clause 3(a).

	AFN 38,710.00	*AFN 2,771.00*		month
May-19	USD 294 *AFN 22,894.00*	USD 15 *AFN 1,189.00*	5.19%	57% of full month
Jun-19	0	0	0%	0
Jul-19	USD 247 *AFN 19,258.00*	USD 12 *AFN 896.00*	4.65%	50% of full month
Aug-19	USD 504 *AFN 39,235.00*	USD 36 *AFN 2,823.00*	7.20%	100% of full month
Sep-19	USD 501 *AFN 39,005.00*	USD 36 *AFN 2,800.00*	7.18%	100% of full month

291. **7. Mr Javed Darwesh**. Mr. Darwesh's monthly payment according to his contract is USD 500.[206]

Period	**A. Salary for Month as Declared to ARD** *(C-107)*	**B. PIT Paid** *(C-107)*	**C. PIT as % of Declared Income** *(B / A * 100)*	**D. Proportion of month invoiced to Respondent** *(C-3)*
Jan-19	0	0	0%	0
Feb-19	USD 478 *AFN 37,200.00*	USD 34 *AFN 2,620.00*	7.04%	100% of full month
Mar-19	USD 484 *AFN 37,680.00*	USD 34 *AFN 2,668.00*	7.08%	100% of full month
Apr-19	USD 497 *AFN 38,710.00*	USD 36 *AFN 2,771.00*	7.16%	100% of full month
May-19	USD 294 *AFN 22,894.00*	USD 15 *AFN 1,189.00*	5.19%	57% of full month
Jun-19	0	0	0%	0
Jul-19	USD 256 *AFN 19,958.00*	USD 12 *AFN 896.00*	4.49%	50% of full month
Aug-19	USD 504 *AFN 39,235.00*	USD 36 *AFN 2,823.00*	7.20%	100% of full month
Sep-19	USD 501 *AFN 39,005.00*	USD 36 *AFN 2,800.00*	7.18%	100% of full month

206 Claimant's document production, Document 18, Clause 3(a).

292. **8. Mr Habibullah Abdul Razaq**. Mr. Abdul Razaq's monthly payment according to his contract is USD 500.[207]

Period	A. Salary for Month as Declared to ARD *(C-107)*	B. PIT Paid *(C-107)*	C. PIT as % of Declared Income *(B / A * 100)*	D. Proportion of month invoiced to Respondent *(C-3)*
Jan-19	0	0	0%	0
Feb-19	USD 478 *AFN 37,200.00*	USD 34 *AFN 2,620.00*	7.04%	100% of full month
Mar-19	USD 484 *AFN 37,680.00*	USD 34 *AFN 2,668.00*	7.08%	100% of full month
Apr-19	USD 497 AFN 38,710.00	USD 36 AFN 2,771.00	7.16%	100% of full month
May-19	USD 294 AFN 22,894.00	USD 15 AFN 1,189.00	5.19%	57% of full month
Jun-19	0	0	0%	0
Jul-19	USD 256 *AFN 19,958.00*	USD 12 *AFN 896.00*	4.49%	50% of full month
Aug-19	USD 504 *AFN 39,235.00*	USD 36 *AFN 2,823.00*	7.20%	100% of full month
Sep-19	USD 501 *AFN 39,005.00*	USD 36 *AFN 2,800.00*	7.18%	100% of full month

293. **9. Mr Mohammad Haneef.** Mr Haneef's monthly payment according to his contract is USD 500.[208]

Period	A. Salary for Month as Declared to ARD *(C-107)*	B. PIT Paid *(C-107)*	C. PIT as % of Declared Income *(B / A * 100)*	D. Proportion of month invoiced to Respondent *(C-3)*
Jan-19	0	0	0%	0
Feb-19	USD 478 *AFN 37,200.00*	USD 34 *AFN 2,620.00*	7.04%	100% of full month

207 Claimant's document production, Document 21, Clause 3(a).

208 Claimant's document production, Document 22, Clause 3(a).

Mar-19	USD 484 *AFN 37,680.00*	USD 34 *AFN 2,668.00*	7.08%	100% of full month
Apr-19	USD 497 *AFN 38,710.00*	USD 36 *AFN 2,771.00*	7.16%	100% of full month
May-19	USD 294 *AFN 22,894.00*	USD 15 *AFN 1,189.00*	5.19%	57% of full month
Jun-19	0	0	0%	0
Jul-19	USD 256 *AFN 19,958.00*	USD 12 *AFN 896.00*	4.49%	50% of full month
Aug-19	USD 504 *AFN 39,235.00*	USD 36 *AFN 2,823.00*	7.20%	100% of full month
Sep-19	USD 501 *AFN 39,005.00*	USD 36 *AFN 2,800.00*	7.18%	100% of full month

294. **10. Mr Gholam Sadiq Niazi**. Mr. Sadiq Niazi's monthly payment according to his contract is USD 500.[209]

Period	**A. Salary for Month as Declared to ARD** *(C-107)*	**B. PIT Paid** *(C-107)*	**C. PIT as % of Declared Income** *(B / A * 100)*	**D. Proportion of month invoiced to Respondent** *(C-3)*
Jan-19	0	0	0%	0
Feb-19	USD 478 *AFN 37,200.00*	USD 34 *AFN 2,620.00*	7.04%	100% of full month
Mar-19	USD 484 *AFN 37,680.00*	USD 34 *AFN 2,668.00*	7.08%	100% of full month
Apr-19	USD 497 *AFN 38,710.00*	USD 36 *AFN 2,771.00*	7.16%	100% of full month
May-19	USD 294 *AFN 22,894.00*	USD 15 *AFN 1,189.00*	5.19%	57% of full month
Jun-19	USD 256 *AFN 19,958.00*	USD 12 *AFN 896.00*	4.49%	0
Jul-19	0	0	0%	50% of full month

209 Claimant's document production, Document 20, Clause 3(a).

Aug-19	USD 504 *AFN 39,235.00*	USD 36 *AFN 2,823.00*	7.20%	100% of full month
Sep-19	USD 501 *AFN 39,005.00*	USD 36 *AFN 2,800.00*	7.18%	100% of full month

295. There are some variations in the above data. The amounts declared to the ARD often do not exactly match the monthly payment for services due under each of the contracts between the Claimant and its Experts. However, the Arbitrator considers the variations to have been minor, and insufficient to support the contention that the Experts were under-declaring, of which there is no evidence. Turning to the example of Mr. Zatvornsyski's tax compliance, the Arbitrator considers that two main factors account for the inconsistencies between his monthly payment for services (which to recall is USD 5,000) and the amounts declared to the ARD:

a. In its monthly invoices issued under the Contract (Exhibit C-3), the Claimant often did not charge the Respondent for a full month's time in respect of certain of its Experts (such as for January, February, May and July above in the case of Mr. Zatvornsyski). The tax certificates exhibited as Exhibit C-107 indicate that monthly payments the Claimant made to its Experts were similarly pro-rated. Taking Mr. Zatvornsyski's declared income for January 2019 above as an example, we see that Mr. Zatvornsyski was paid roughly one-third of USD 5,000 (Column A in Mr. Zatvornsyski's table above), and that the Respondent in turn was invoiced by the Claimant for 33% of a full month of Mr. Zatvornsyski's time.

b. Exchange rate variations also account for discrepancies in the data presented above. Such discrepancies will arise naturally when applying an average annual exchange rate. Exchange rate variations would account, for instance, for the months of June, August and September, where it would appear from the USD figures listed in Column A that Mr. Zatvornsyski was paid a higher amount than his monthly fee.

296. Accordingly, even if it were appropriate for the Arbitrator to go beyond the ARD's conclusion that "*tax on Unicon consultants' salaries* [...] *has been paid in full*",[210] the Arbitrator would consider that the PIT actually paid (Column B above) to be sufficiently close to the figures that the graduated tax brackets set out in Article 4(3) of the Income Tax Law would be expected to attain.[211] The Arbitrator therefore considers that the Claimant has proven to the requisite standard that the PIT was paid by its Experts in full. The Arbitrator does not consider it necessary in the present circumstances to model more precisely the PIT each Expert owed. This finding is, again, without prejudice to any claim for deceit and/or misrepresentation the Respondent may have under the relevant law.

(iii) Question 3: if Unicon or its Experts failed to pay the required amount of tax, can the Respondent withhold payments from under the Contract on account of unpaid PIT?

297. Given that the correct amount of PIT was paid, this question is moot and no set-off should arise. The Arbitrator addresses it merely in the interests of completeness.

---

210 Afghan Tax Authority's confirmation of all PIT being paid in full and directly by the experts, 12 November 2019 (**Exhibit C-39**).

211 Income Tax Law (2009), Art 4(3) (**Exhibit RLA-1**).

298. The Respondent contends that it was acting under statutory authority when it withheld payments from the Claimant on account of PIT. The Respondent quotes Article 16(1) of the Tax Administration Law, in support of the proposition that "*the government of Afghanistan is empowered to 'collect any unpaid tax from third parties.'* [...] *This is precisely what happened here*."[212]

299. Article 16(1) of the Tax Administration Law states as follows:

> "*The taxation administration may, without the consent of the taxpayer, by notice in writing collect any unpaid tax from third parties*".[213]

300. The Respondent has not clearly alleged that it was instructed to withhold tax by the Ministry of Finance or that its actions were directed by *fait du prince*, but this argument is addressed briefly here anyway.

301. Article 16(1) requires notice to be issued by the Ministry of Finance to the Respondent for the Respondent to withhold amounts on account of tax. The Respondent has not even alleged that such a notice with issued to it by the Ministry of Finance, so this argument can be rejected without any further consideration.

* * *

302. In sum, the Arbitrator finds that the Respondent had no right to withhold amounts on account of PIT from the Claimant's invoices, and acted in breach of its obligations when it purported to withhold amounts from the Claimant on account of PIT. The Arbitrator therefore considers that the Claimant has established its entitlement to the USD 881,810 it claims in respect of the amounts that were duly invoiced to the Respondent but have not been paid.[214]

303. In light of the Arbitrator's finding that the Respondent's withholding of properly invoiced amounts was in breach of the Contract, it is not necessary to consider the Claimant's alternative argument that the Clamant nonetheless has a contractual right to recover PIT under Clauses 43.1 and 43.2 of the Contract's SCC.[215]

(iv) Environmental services

304. As mentioned above, the Claimant claims USD 322,514 for Environmental Services. To recount, the Contract required the Claimant's work product to include certain Environmental Services, and Mr. Mohsin Almaji was nominated in the Contract as the main Expert responsible for such services. Mr. Mohsin Almaji became unavailable, and Mr. Pho Nguyen Bui performed these services instead. In addition, the Claimant has exhibited several environmental reports (which indeed mention Mr. Pho as the expert),[216] as well as comments the Respondent provided on these

---

212 Statement of Defence, ¶ 62.

213 Tax Administration Law 2015, Art. 16(1) (**Exhibit RLA-7**).

214 Compilation of invoices issued under the Contract, p. 2, Table 3, (**Exhibit C-3**).

215 Transcript, Hearing, 8 April 2022, p. 54:6-21.

216 Claimant's Updated Environmental and Social Scoping Report, March 2019, p. 101 (of the pdf) (**Exhibit C-91**); Claimant's Environmental and Social Impact Assessment Report, May 2019, p. 97 (of the pdf) (**Exhibit C-92**); Claimant's Environmental & Social Impact Assessment Report-2, February 2020, p. 117 (of the pdf) (**Exhibit C-94**).

reports,[217] so the Arbitrator accepts that these services were in fact performed. The Arbitrator considers that the Claimant's claim give rises to three questions:

a. May the Respondent rely upon the fact that it never gave written consent for the substitution of Mr. Pho for Mr. Almaji to refuse payment?

b. May the Respondent rely upon the absence of an invoice for the Environmental Services to withhold payment?

c. Subject to the Arbitrator's decision on (a) and (b) above, what amount is the Claimant entitled to on account of the Environmental Services?

305. ***The absence of written consent from the Respondent.*** Clause 30 GCC governs changes to the Key Experts (which includes Mr. Almaji) during the Contract's term. Clause 30 states as follows:

> "*30.1 Except as the Client may otherwise agree in writing, no changes shall be made in the Key Experts.*
>
> *30.2 Notwithstanding the above, the substitution of Key Experts during Contract execution may be considered only based on the Consultant's written request and due to circumstances outside the reasonable control of the Consultant, including but not limited to death or medical incapacity. In such case, the Consultant shall forthwith provide as a replacement, a person of equivalent or better qualifications and experience, meet eligibility requirements, and at the same rate of remuneration.*"[218]

306. Clause 30 above thus requires the MEW to "*agree in writing*" to changes to the Experts.

307. The Respondent received substantial environmental work product from the Claimant that noted expressly that the Expert was Mr. Pho, the first dating early in the engagement in March 2019. The Respondent evidently engaged with the Claimant's reports as it sent back questions. From the evidence before the Arbitrator, it does not appear that the Respondent ever objected to Mr. Pho acting as Expert in place of Mr. Almaji.[219] The Arbitrator considers that the Respondent's contextualised silence constitutes acquiescence on the part of the Respondent. In addition, the Arbitrator considers that the Respondent is estopped from relying upon Clause 30 to deny the Claimant payment for the environmental services. The Claimant and Mr. Pho proceeded with the Environmental Services in reliance upon the Respondent's lack of objection, and it would be unjust for the Respondent to go back on this representation, especially given that the Respondent has received the benefit of the Environmental Services, in the form of the reports.

308. ***The absence of an invoice for Environmental Services.*** The second question arising from the Claimant's claim is whether the Claimant's failure to issue an invoice bars the Claimant from claiming for Mr. Pho's remuneration. Commercial contracts often adopt one of two mechanisms for determining amounts due under them. The first mechanism is that the issuance of a contractually-conformant invoice is a mere formality, and the existence of an underlying contractual debt is not contingent on the payee's compliance with said formality. The second mechanism is that the contractual debt itself only arises if and when a contractually-conformant invoice is issued.

---

217 Respondent's comments on Claimant's environmental reports, 27 November 2019 (**Exhibit C-95**).

218 Contract, Clause 30 GCC (**Exhibit C-2**).

219 Witness Statement of Mr. Rustam Davletkham, ¶ 501 (**Exhibit CWS-6**).

309. The Arbitrator considers that the Contract falls within the first category. Clause 42 of the Contract's GCC states that "[t]*he Client shall pay to the Consultant (i) remuneration that shall be determined on the basis of time actually spent by each Expert*".[220] Payments are thus conditioned on the Claimant's provision of services, rather than on the provision of an invoice.

310. Clause 40 is similarly more consistent with the counterpart for payments being the provision of services, as opposed to the issuance of a conformant invoice: "[i]*n consideration of the Services performed by the Consultant under this Contract, the Client shall make such payments to the Consultant and in such manner as is provided by GCC* [Part] *F below.*"[221] The Arbitrator therefore considers that the Contract's invoicing provisions go only to modalities of payment and the accrual of interest rather than the existence of the debt.

311. ***Quantum***. While the *existence* of a debt is not conditioned upon the issuance of a valid invoice, invoices under the Contract carry evidentiary value as to the *amount* of debt owed. Each invoice represents the Claimant's statement as to the proportion of the month in question each Expert spent working on the Project.

312. Mr. Pho's time does not appear on the invoices themselves.[222] The Claimant's explanation is that it could not invoice Mr. Pho's time to the Respondent as the Contract variation including Mr. Pho as a substitute Expert had not been approved by the Respondent. The Claimant instead arrives at the amount it seeks for Mr. Pho's services by adding (i) the "*estimate*[]" listed in Appendix C for the amount the Claimant would charge the Respondent for Mr. Almaji's professional services (i.e., the original Environmental Expert) and (ii) the "*estimate*[]" in Appendix D of the Contract for Mr. Almaji's expenses and disbursements.[223]

313. The Arbitrator accepts the Claimant's explanation as to why it did not include Mr. Pho's time in the invoices. However, the Claimant is not remunerated on a lump sum basis under the Contract, but on account of "*time actually spent*".[224] Relying on the *estimate* for the Environmental Expert rather than on time spent would be contrary to the agreed pricing. In circumstances where the Claimant had instructed Mr. Pho to perform the environmental services with the expectation that the Respondent would, at some date in the future, agree to the substitution of Mr. Pho for Mr. Almaji and thereby provide the Claimant with a contractual basis for invoicing all of Mr. Pho's time to the Respondent, it would have been prudent for the Claimant to have kept a timesheet or other contemporaneous work record in anticipation of the Respondent's approval of Mr. Pho, so that the Claimant could then generate accurate invoices in respect of Mr. Pho's time. No such record has been produced for the Arbitrator's benefit. The Arbitrator also notes that the Claimant accomplished the Project with better cost efficiency than was estimated in Appendix C and D. It has not been demonstrated that Mr. Pho was any less efficient than the Claimant's other Experts.

314. In the absence of evidence detailing the time Mr. Pho spent on the Project and given that the Respondent has not alleged that the Claimant's Environmental Services were deficient (the Respondent having had the opportunity to do so in its Response to Notice of Arbitration or in its Statement of Defence), the Arbitrator considers that an appropriate figure may be arrived at by multiplying the fees and expenses estimated for Mr. Almaji (USD 322,514) by the cost efficiency achieved by the other Experts (*i.e.*, their actual fees and expenses as a percentage of their

---

220 Contract, clause 42, (**Exhibit C-2**).

221 Contract, clause 40.1, (**Exhibit C-2**).

222 Compilation of invoices issued under the Contract (**Exhibit C-3**).

223 Reply, fn. 155.

224 Contract, clause 42.1, (**Exhibit C-2**).

estimated fees and expenses), which amounts to 87.2%.[225] Multiplying the estimated amount for Environmental Services (USD 322,514) by 87.2% yields USD 281,232.20.

315. ***Alternative basis for claim.*** The Arbitrator also considers that the Claimant would also be entitled to compensation for the environmental services it performed by virtue of GCC Clause 47 ("*Good Faith*"). GCC Clause 47 obliges the Parties to "[t]*he Parties undertake to act in good faith with respect to each other's rights under this Contract and to adopt reasonable measures to ensure the realization of the objectives of this Contract.*" Where Experts became unavailable through no fault of the Claimant, the Arbitrator considers that GCC Clause 47 places upon the Respondent an obligation to accept a reasonable substitution. In light of the circumstances described above, and especially the assurance the Respondent's representatives gave the Claimant that the substitution of Mr. Pho for Mr. Almaji would not be problematic, Mr. Pho was indeed a reasonable substitution. By refusing to formally consent to Mr. Pho's appointment as substitute Expert, the Respondent breached this obligation. The damage the Claimant incurred through this breach was its loss of the monthly fees for environmental consultancy expertise under the Contract, *i.e.* the same amount as the Claimant seeks as a contractual debt. Framing this claim as an action for damages would only lead to a different quantification than if framed as debt if interest was taken into account, however none is claimed here.

* * *

316. The Arbitrator therefore considers that the Respondent owes USD 281,232.20 to the Claimant on account of Mr. Pho's services.

(v) Other unpaid services

317. The only remaining claim for unpaid amounts under the Contract is the Claimant's claim for USD 328,990 for "*Other Unpaid Services*". This is a claim for a contractual debt, however the Claimant provides no invoices or evidence in support of this specific amount. Rather, the Claimant considers that it is entitled to this amount as it "*provided all of the services required from it*".[226]

318. No explanation has been proffered as to how the Claimant reached the figure of USD 328,990. The Arbitrator considers that the Claimant reached this figure as follows:

a. The total professional fees stated in Appendix C is USD 2,231,986, and the total of anticipated expenses stated in Appendix D is USD 661,600. Added together, this comes to (**A**) USD 2,893,586.

b. (**B**) USD 1,360,272 has already been paid to the Claimant.[227]

---

225 The actual fees and expenses incurred by the Experts (excluding Mr. Almaji, for whom no time was billed) was USD 2,242,082, excluding BRT. The estimated fees for the other Experts is USD 1,985,872 (i.e., the total of USD 2,231,986 minus USD 246,114 for Mr. Almaji). The estimated expenses/disbursements for the other Experts is USD 585,200 (i.e., the total of USD 661,600 minus USD 76400 for Mr. Almaji). A total of USD 2,571,072 was therefore estimated for the other experts, excluding BRT. The actual fees and expenses (USD 2,242,082) was 87.3% of the estimated fees and expenses (USD 2,571,072).

226 Reply, ¶ 176.

227 Compilation of invoices issued under the Contract, p. 2, Table 3 (**Exhibit C-003**).

c. The Claimant claims a further (**C**) USD 881,810 in respect of the amounts that were duly invoiced to the Respondent but have not been paid (i.e., USD 2,242,082 invoiced minus USD 1,360,272 has already been paid).[228]

d. The Claimant claims a further (**D**) USD 322,514 amount for un-invoiced environmental services.[229]

e. If the various amounts (*i*) paid by and (ii) claimed from the Respondent is subtracted from the total of fees and expenses in Appendices C and D of the Contract, a residual amount of USD 328,990 remains. Stated differently, (A) the full estimated amount of the contract, namely USD 2,893,586, minus (B) USD 1,360,272, which was paid by the Respondent to the Claimant, minus (C) USD 881,810, which was invoiced by unpaid, minus (D) USD 322,514 non-invoiced environmental services, comes to the amount of USD 328,990 that is claimed.

In other words, the premise underlying this claim appears to be that the Claimant is entitled to the full *estimated* amount under the Contract, namely USD 2,893,586.

319. The problem with the Claimant's argument is that the Claimant's entitlement to payments under the Contract is not on a 'lump sum' basis. This is clear, for instance in Clause 42.1 of the GCC: "*[t]he Client shall pay to the Consultant (i) remuneration that shall be determined on the basis of time actually spent by each Expert in the performance of the Services* [...] *(ii) reimbursable expenses that are actually and reasonably incurred by the Consultant*", and Clause 41.1 of the GCC: "*An estimate of the cost of the Services is set forth in Appendix C (Remuneration) and Appendix D (Reimbursable expenses).*"[230]

320. In the Arbitrator's view, the Claimant has not provided satisfactory evidence showing that "*Other Unpaid Services*" were in fact performed. The Claimant similarly failed to demonstrate that the Respondent presented "*artificial barriers preventing the Claimant from submitting the invoice*" for these services, which is in any event a moot argument because the Claimant cannot issue invoices for work that it did not in fact perform.

321. The Claimant's claim for USD 328,990 is therefore rejected.

(vi) Damages and interest

322. The Arbitrator therefore awards the Claimant the following amounts:

a. An amount of USD 881,810 for unpaid pending invoices.[231]

b. An amount of USD 281,232.20 on account of Environmental Services rendered by the Claimant and not paid by the Respondent.

323. ***Starting date for interest***. Invoices are due within 60 days, and interest starts to accrue if the payment is not made in full within a further 15 days.[232]

---

228 Compilation of invoices issued under the Contract, p. 2, Table 3 (**Exhibit C-3**).

229 Reply, ¶ 171.

230 Contract, GCC, Clauses 41.1 and 42.1 (**Exhibit C-2**). (emphasis added)

231 Reply, ¶ 171.

232 Contract, GCC, Clauses 45.1(c), 46 (**Exhibit C-2**).

324. ***Applicable LIBOR rate***. SCC Clause 46.1 provides for an amount of "*LIBOR rate per annum + 2%*" for unpaid invoices.[233] On 9 January 2023, the Arbitrator asked the Parties to comment on which applicable LIBOR rate ought to be used as a reference, given that LIBOR publishes multiple rates. The Claimant submitted that "LIBOR rate per annum" ought to mean "*12-Month LIBOR rate*".[234] No comments were received from the Respondent. The Arbitrator in any event considers that it is appropriate to apply the 12 month LIBOR rate.

325. ***Simple or compound interest.*** On 9 January 2023, the Arbitrator invited the Parties to comment on whether the Claimant's claim for compound interest was permissible under Sharia law or under the international public policy of the place of arbitration. The Claimant responded on 16 January 2023, explaining that, in its position, compound interest was compatible with public policy in the place of arbitration, Dubai. The Claimant explained that "*where substantive law is foreign (Afghan) and the Parties are not domiciled in the UAE, the Claimant's view is that compound interest does not violate international public policy of arbitrations with seat in Dubai.*"[235]

326. The Claimant submitted the IBA Arbitration Committee Arbitration Guide for the United Arab Emirates in support of its position. This document relevantly states:[236]

> *Arbitrators typically award simple interest provided that the amount of interest does not exceed the principal amount of damages. Awards of compound interest, or interest exceeding the principal amount of damages, may be permitted in limited circumstances, depending on the seat of the arbitration and the nature of the dispute. For example, compound interest on commercial loans is permitted before the Dubai courts, even if the total amount of interest exceeds the principal amount of the loan. By contrast, the Abu Dhabi courts neither permit awards of compound interest nor allow the total amount of interest awarded to exceed the principal amount.*

327. No comments were received from the Respondent.

328. The Arbitrator is unable to accept the Claimant's claim for compound interest. The Arbitrator considers that compound interest is inconsistent with Sharia law, and in any event, this case does not concern a "*commercial loan*" and thus does not fall within the category of case law indicated above.

329. The Arbitrator has therefore calculated the interest due on the Claimant's claim without any compounding, *i.e.*, on a simple basis.

330. ***Methodology.*** The Arbitrator sought on 9 January 2023 the Parties' input on how the applicable LIBOR rate ought to be applied to principal amounts owed under the Contract. This is because, as the Claimant noted in its comments of 16 January 2023, "*Libor rates change on daily basis*".[237]

331. The Claimant submitted in its comments of 16 January 2023 that "*the applicable LIBOR rate for the entire delay-period is the rate as of the day of the award, i.e., the day when the payment must*

---

233 Contract, SCC, Clause 46.1 (**Exhibit C-2**).

234 Claimant's Comments on the Arbitrator's Questions, 16 January 2023, p. 2.

235 Claimant's Comments on the Arbitrator's Questions, 16 January 2023, p. 2.

236 International Bar Association Arbitration Committee, Arbitration Guide, United Arab Emirates, Updated December 2019, submitted by the Claimant on 16 January 2023, p. 19.

237 Claimant's Comments on the Arbitrator's Questions, 16 January 2023, p. 3.

be made",[238] yielding a rate of 5.482%. The Arbitrator is unable to accept this. This interpretation would give the Claimant a windfall in light of the current (high) LIBOR rates.

332. The Arbitrator considers, in his discretion as to the award of interest, that it would be more appropriate to calculate an average of the relevant LIBOR rate over the full period in which the principal amount was outstanding. The Arbitrator considers that an appropriate methodology is (*i*) to determine the annual average of the applicable LIBOR interest, plus 2%; (*ii*) to multiply the annual average by the principal amount (prorated for the first year by the number of days remaining in the year after the expiry of the 75 day grace period, and prorated in the final year by the number of days in 2023 prior to the issuance of the final award); and (*iii*) finally, adding together the amount of interest that accrued in each year in order to calculate the total amount of interest. Interest calculated pursuant to step (ii) would not be added back into the principal, in order to avoid compounding.

333. Pursuant to the first step, the Arbitrator relied on the 12-month LIBOR data submitted by the Claimant on 16 January 2023, following the Arbitrator's invitation of 9 January 2023 to both Parties for such data to be submitted into the record (the Respondent did not respond to the Arbitrator's invitation). The annual average of the 12-month LIBOR rates for the periods in question are below:

Year	**LIBOR rate per annum[239]**	**LIBOR rate + 2%**
2020	0.77%	2.77%
2021	0.30%	2.30%
2022	3.38%	5.38%
2023 *(up until 13 January 2023)*	5.45%	7.45%

334. Regarding the second step, in its Updated Prayer for Relief, the Claimant suggested a simplified approach to interest, which was to consider that the USD 1,360,272 actually paid by the Respondent as satisfying the Claimant's first 12 invoices in full, and partially satisfying the Claimant's 13th invoice.[240] The Claimant's methodology is conservative: interest would otherwise be owing from the very first invoice, but it is unnecessary to calculate interest on every invoice under the Claimant's approach.

335. The Arbitrator welcomes the Claimant's approach of simplifying this aspect of the dispute and has chosen to adopt the Claimant's methodology. Pursuant to the Arbitrator's calculations, simple interest starts to accrue on invoice DN13 (the unpaid portion only) and invoices DN14 to DN19 (the full amount) 75 days after the issuance of the invoice. The Arbitrator exercises his discretion on interest such that pre-award interest runs through until 28 February 2023.

---

238 Claimant's Comments on the Arbitrator's Questions, 16 January 2023, p. 3.

239 Historic LIBOR rates submitted by the Claimant on 16 January 2023.

240 Claimant's Updated Prayer for Relief, 2 May 2022, ¶¶ 12-15.

336. ***Application***. Applying SCC Clause 46.1 on the basis described above yields the following:

Invoice Number	Invoice Date[241]	Date from which interest accrues[242]	Amount overdue (USD)	Interest as at 28 February 2023 (USD)
DN13	02/02/2020	18/04/2020	107,638[243]	10,782
DN14	03/03/2020	18/05/2020	144,732	14,168
DN15	15/07/2020	29/09/2020	143,632	12,600
DN16	15/07/2020	29/09/2020	142,582	12,508
DN17	15/07/2020	29/09/2020	143,332	12,573
DN18	15/07/2020	29/09/2020	142,582	12,508
DN19	31/07/2020	16/10/2020	57,312	4,958
		TOTAL	**USD 881,810**	**USD 80,095.91**

337. The Arbitrator therefore awards the Claimant **USD 881,810** on account of unpaid, invoiced amounts plus **USD 78,541** in pre-award interest.

338. The Arbitrator does not award interest in respect of the claim for Environmental Services of USD 281,232.20. The Claimant's Prayer for Relief only seeks interest on its claim for unpaid invoices.[244] In any event, even had the Claimant claimed for interest, none would be due here since the services were never invoiced.

339. The Claimant seeks "*post-award compound interest at the rate of minimum 5% and maximum 12% until payment of the award*". The Arbitrator declines to award post-award interest on a compound basis for the reasons stated above. The Arbitrator therefore awards post-award interest on a simple basis at a rate of 5% per annum that will start to run on the date mentioned in the *dispositif* of this Final Award.

B. THE CLAIMANT'S TORT CLAIMS

340. By way of Request (g) in its Updated Prayer for Relief of 2 May 2022, the Claimant requests as follows:

---

241 Compilation of invoices issued under the Contract, pp. 40-60 (**Exhibit C-3**).

242 Table entitled "Q-4(3) interest" submitted by the Claimant on 16 January 2023, Column E, as verified by the Arbitrator.

243 The Claimant paid a total of USD 1,360,272. Invoices DN1 to DN12 inclusive amount to USD 1,322,528. The first USD 37,744 of invoice DN13 is excluded from the interest calculations.

244 Updated Prayer for Relief, 2 May 2022, ¶ 16(c).

> "*g) ORDER the Respondent to pay the Claimant damages and compensations arising from its harmful actions, defamation, extortion and other damages caused to the Claimant in the amount of: (a) USD 7,572,768 or, in the alternative, (b) USD 4,772,146 or, in the alternative, (c) USD 2,893,586 or, in the alternative, (d) USD 1,015,573;*"

341. The Arbitrator shall refer to the claims the Claimant has put forward to establish its entitlement to the relief requested in request (g) as the Claimant's Tort Claims (the "**Tort Claims**"). This shorthand reference is for convenience only, and is not to be taken as a finding by the Arbitrator as to the precise legal characterisation of each claim under the applicable law. After summarising the Claimant's and the Respondent's positions (**1** and **2** respectively), the Arbitrator provide his reasoning and decision on the Tort Claims (**3**).

1. The Claimant's Position

342. In request (g) of its updated prayer for relief, the Claimant seeks several alternative amounts (ranging from USD 7,572,768 million in its primary case, to USD 1,015,573 in its third alternative case) on account of "*harmful actions, defamation, extortion and other damages caused to the Claimant*".[245] Cross-references the Claimant included in the footnotes to request (g) are to paragraphs 187 to 189 of the Claimant's Statement of Reply, which fall within Part VII.C, entitled "*Damages from Tortious and Other Liabilities*".

343. The Claimant's Tort Claims are comprised of the following:

(i) The Claimant's position on corruption

344. The Claimant contends that the Respondent violated its obligations of good faith under GCC Clause 47.1 of the Contract by withholding payments to the Claimant and, additionally or alternatively, by engaging in a scheme to elicit corrupt payments from the Claimant.[246]

345. The Claimant contends that the Respondent has acted in bad faith, failing to respect the Claimant's rights and ensure the realisation of the objectives of the Contract pursuant to GCC Clause 47.1, by its actions concerning the tax dispute, withholding of payment, harassment, corruption, blackmail, and expulsion from Afghanistan in retaliation.[247]

346. The Claimant argues that the Constitution of the Islamic Republic of Afghanistan, 2004 (the "**Constitution**") provides that Islamic law overrides any inconsistent Afghani statute. The Claimant relies on Article 3 of the Constitution, which states that "[n]*o law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.*"[248] Furthermore, the Claimant relies on Article 130 of the Constitution, which stipulates that:

> "*In cases under consideration, the Courts shall apply provisions of this Constitution as well as other laws. If there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits*

---

245 Claimant's Updated Prayer for Relief, 2 May 2022, ¶ 16(g).

246 Statement of Claim, ¶¶ 5.36-5.37.

247 Reply, ¶¶ 98-100.

248 Reply, ¶¶ 104-106 (emphasis omitted), referring to Constitution of the Islamic Republic of Afghanistan, 26 January 2004, Art. 3 (**Exhibit CLA-6**).

set by this Constitution, rule in a way that attains justice in the best manner."[249]

347. The Claimant argues that the umbrella concept of good faith under Sharia law includes an Islamic law doctrine of promissory estoppel. According to the Claimant, this is drawn from a Surah of the Qur'an, which is applicable in the present arbitration:

> "*O believers! Why do you say what you do not do? How despicable it is in the sight of Allah that you say what you do not do!*"[250]

348. The Claimant also relies on the award in *Desert Line Projects LLC v. Republic of Yemen*, which stated:

> "*the mandatory implication of the fundamental general principle of law commonly known as the legal doctrine of estoppel, which originated over twelve centuries ago in the Islamic Jurisprudence under the name* [...], *the precise wording of which can be translated in English to read: "whoever tries to undo what he previously undertook, such act on his part shall be turned against him.*""[251]

349. Furthermore, the Claimant argues that good faith in Islamic law requires actors not to harm anyone in any way, a tenet which the Claimant argues has been violated by the Respondent since March 2019.[252]

(ii) Harm to the Claimant's business

350. The Claimant also claims for harm to the Claimant's reputation and the Claimant's loss of the opportunity to acquire other contracts within Afghanistan. The Claimant argues that it has been operating in Afghanistan since 2006, has held contracts for nearly USD 12 million with the Government of Afghanistan, and had established a reputation for itself as a highly competent and wholly reliable partner, exhibiting several letters of recommendation from Afghani clients.[253] The Claimant contends that it offered low budgets for its prior contracts with the Government, saving the Government of Afghanistan large sums of money and generating goodwill.[254] The Claimant argues that this reputation has become "*tarnished, if not irreparably damaged*" as a direct consequence of the Respondent's conduct—which includes such acts as the Respondent describing the Claimant as engaging in "*fraudulent practice*" and in being "*tax evader*" in a reference check requested by the MOMP[255]—and is subject to a "de facto *debarment or blacklisting within Afghanistan*".[256] The Claimant asserts, for instance, that it was "*inappropriately removed*" by the Afghan Government from a tender for a USD 2 million

---

249 Reply, ¶ 106, referring to Constitution, Art. 130 (**Exhibit CLA-6**).

250 The Qur'an, Surah 61, Ayat 2-3.

251 *Desert Line Projects LLC v. Republic of Yemen*, Award, 2008, ¶ 207 (**Exhibit CLA-5**).

252 Reply, ¶¶ 110-112.

253 Four Letters of Recommendation from Afghan Government Addressed to the Claimant (**Exhibit C-76**); Afghan Gas Enterprise's Letter of Appreciation No.1 addressed to Claimant for gas sector development performance, dated 19 March 2020 (**Exhibit C-83**); Afghan Gas Enterprise's Letter of Appreciation No.2 addressed to Claimant for gas sector development performance, urging Claimant's continued assistance, dated 22 March 2020 (**Exhibit C-84**); Afghan Gas Enterprise's Letter of Appreciation No. 3 addressed to Claimant for gas sector development performance, dated 26 March 2020 (**Exhibit C-85**).

254 Reply, ¶ 187.

255 Updated Prayer for Relief, 2 May 2022; email exchanges between the Respondent and the MoMP dated 8 January 2020 (**Exhibit C-56**).

256 Reply, ¶ 186.

contract,[257] and "*illegally removed from all AGASP Components*", and "*unofficial instruction of the Government to remove the Claimant from all contracts and tenders*".[258]

351. The Claimant also alleges that the profits it historically realised in Afghanistan—the Claimant considered its profit margin to be approximately USD 4,772,146 from the USD 12 million of Afghan contracts—were lower than what it could potentially have obtained in light of the Claimant's policy of applying "*significant financial discounts*" as "'*investments*'" into the Claimant's "*future dealings with* [the] *Afghan Government*".[259] The Claimant gave examples of this discount in the form of three tenders were the Claimant's winning bid was lower than the second-ranked firm by USD 1.5 to 3.1 million.[260]

(iii) Defamation of Mr. Marler

352. The Claimant relies on remarks made by a representative of the Respondent about the former counsel for the Claimant, Mr. Lee Marler. It is the Claimant's view that Mr. Mahmoody attacked the good character and reputation of Mr. Marler in a widely distributed email and Mr. Mahmoody's comments are false, libellous, and fall below the standards expected of Afghan civil servants.[261]

(iv) Passing of Mr. Walls

353. The Claimant argues that the death of Mr. Walls resulted from stress caused by the Respondent.[262] The Claimant argues that his passing has had "*a direct and adverse impact upon the Claimant's financial condition.*"[263] Mr. Davletkhan also attributes the death of Mr. Noori, the employee of the Respondent charged with managing the Contract, was also caused by the actions of the Respondent,[264] however the Claimant does not rely on this latter allegation to support its aggravated damages claim.

(v) Damages

354. The Claimant seeks an order for damages compensating it from "*harmful actions, defamation, extortion and other damages*" caused by or attributable to the Respondent.[265] The Claimant argues that it should be awarded compensation for reputational harm,[266] on the basis that the Respondent had allegedly *de facto* blacklisted it from future contracts in Afghanistan.[267]

355. The Claimant put forward four damages cases in respect of its Tort Claims.

---

257 Email exchange between National Procurement Authority of Afghanistan and Claimant dated 28 July 2020 and 11 August 2020 (**Exhibit C-98**).

258 Reply, ¶ 184.

259 Reply, ¶¶ 186, 187.

260 Reply, ¶¶ 186, 187.

261 Statement of Claim, ¶¶ 6.3-6.6.

262 Reply, ¶ 179.

263 Statement, of Claim, ¶ 8.1.6(b).

264 Witness Statement of Mr. Davletkhan, ¶ 499 (**Exhibit CWS-6**).

265 Reply, ¶¶ 184-189; Statement of Claim, ¶ 8.1.5.

266 Statement of Claim, ¶ 8.1.5.

267 Reply, ¶¶ 184-186.

356. *First,* the Claimant seeks an amount of USD 7,572,768.[268] This amount represents the savings Afghanistan state entities incurred by awarding three contracts to Unicon, instead of the second-place bidder in each of the three tenders. In the first tender, the Claimant states that its winning bid was USD 3,140,928 cheaper than the second place bidder. In the second tender, the Claimant states that it was USD 1,506,938 cheaper, and in the third, USD 2,924,902 cheaper.[269]

357. *Second,* the Claimant seeks USD 4,772,146, representing the profits it historically made from government contracts in Afghanistan in the period of 2013 to 2019. The Claimant explained that the contracts it signed with the Government of Afghanistan of had a total contract price of USD 11,930,336.[270]

358. *Third*, it sought USD 2,893,586 in reference to Clause SCC 24.1(a) of the Contract, which obliged the Claimant to maintain professional liability insurance with coverage for USD 2,893,586. The Claimant argues that:

> "[t]*he principle of fairness implies that, as the Respondent expected to be compensated USD 2,893,586 in professional damages should the Claimant have acted unprofessionally, the Claimant should have the same right in the same value. Given the conduct of the Respondent, it is fair to say that the Respondent is now liable for USD 2,893,586 compensation to the Claimant due to Respondent's unprofessional, unethical and illegal conduct that it maintained towards the Claimant.*"[271]

359. Although this amount of USD 2,893,586 is included in the Claimant's specific request for relief for its tort claims, the Claimant's reliance on Clause SCC 24.1(a) suggests that this claim sounds in contract rather than in tort. This claim is considered separately in Part VI.C for this reason.

360. *Fourth*, the Claimant additionally seeks an amount of USD 1,015,573. This amount represents the savings the Respondent incurred by awarding the Contract to the Claimant, as the Claimant's bid price was USD 1,015,573 cheaper than the Korean entity Byucksan that came second in the bid.[272]

2. The Respondent's Position

361. As the Respondent has not filed a Rejoinder and did not participate in the hearing, it has not responded to certain allegations the Claimant made in its submissions on its Tort Claims. As regards the corruption claim, the Respondent contends that the Claimant's above views are "*unsubstantiated accusations and conspiracy theories*" and asks the Arbitrator to ignore these claims and focus merely on whether and how much PIT the Government of Afghanistan can withhold from the Claimant.[273]

362. The Respondent has not provided comments on the following:

---

268 Reply, ¶ 187.

269 Reply, ¶ 187.

270 Reply, ¶ 186(a).

271 Reply, ¶ 188.

272 Reply, ¶ 189; Minutes of Financial Proposals Opening Session for SMPL Contract, 2 September 2018 (**Exhibit C-100**).

273 Statement of Defence, ¶ 74.

a. The alleged harm to the Claimant's business and the Claimant's alleged loss of the opportunity to acquire other contracts within Afghanistan.

b. the Claimant's claim for the USD 1,015,573 the Respondent allegedly saved in awarding the Contract to the Claimant as opposed to Byucksan.

363. Concerning the Claimant's allegations of defamation against Mr. Marler, the Respondent argues that "[n]*o legal standard is presented by which to gauge whether the comments at issue were even defamatory*" and emphasizes that the alleged defamation was against counsel for the Claimant rather than the Claimant itself.[274]

364. The Respondent rejects any causation on its part in the above-noted deaths of Mr. Walls and Mr. Noori and claims that the Claimant is attempting to take advantage of their deaths by making such accusations.[275]

3. The Arbitrator's Analysis

(i) Corruption

365. The Claimant has made serious allegations of corruption in PCA Case No. 2021-7, that relates to similar facts as are before the Arbitrator in these proceedings, and is based on the same arbitration agreement. While the Claimant has made its corruption allegations in both arbitrations, it seems to have developed the case further in the parallel arbitration, and the Additional Works claims that are before the Arbitrator in PCA Case No. 2021-7 are more central to the Claimant's corruption allegations than the PIT claims in this arbitration (the Claimant's case in PCA Case No. 2021-7 does also involve the PIT issue but the Arbitrator considers that it is less central to the Claimant's narrative). It should also be noted that the corruption matters do not affect any of the claims in this arbitration, such that the Arbitrator would be required to deal with in this arbitration in order to address the Claimant's other claims.

366. In light of the foregoing, and in light of the correspondence "*the Respondent to pay the Claimant damages and compensations arising from its harmful actions, defamation, extortion and other damages caused to the Claimant*",[276] the Arbitrator will address corruption and all of its elements in PCA Case No. 2020-7, and therefore dismisses the corruption claim in this arbitration.

(ii) Harm to Claimant's business

367. PCA Case No. 2021-07 involves the same Parties, the same or related underlying facts, and arises from the same contract. In PCA Case No. 2021-07, the Claimant seeks in its Statement of Claim "*Moral, Aggravated and/or Exemplary Damages*" in the amount of USD 4,772,146 on account of harm to its "*good name and reputation*",[277] and provided detailed pleadings in its Reply as to the "*Respondent's Negative Feedback*".[278] The Claimant seeks in PCA Case No. 2021-07 against an order for "*the Respondent to compensate the Claimant for tort (only in case the Tribunal does not order it under PCA Case No. 2020-33)*".[279]

---

274 Statement of Defence, ¶ 75.

275 Statement of Defence, ¶ 76.

276 Email from the Claimant to the Arbitrator, 26 August 2022, ¶ 2

277 Statement of Claim in PCA Case No. 2021/7, ¶¶ 6.7-6.8.

278 Reply in PCA Case No. 2021/7, Part VI.

279 Updated Prayer for Relief in PCA Case No. 2021/7, ¶ 2(f).

368. In light of the Claimant's correspondence of 26 August 2022 in this arbitration in which it stated "[s]*hall any claims in this case (i.e. Case No.2020-33) overlap with those of Case No.2021-07, then the Claimant does not seek to maintain such overlapping claims in 2020-33*",[280] the Arbitrator will address this claim in PCA Case No. 2021-07. The Arbitrator therefore dismisses this claim in this arbitration.

(iii) Alleged Defamation of Mr. Marler

369. The Arbitrator turns to the Claimant's defamation allegation, which, to recall, concerns two emails sent by Mr. Farhad Mahmoody to Mr. Lee Marler (copying various other persons) on 6 and 19 November 2019.[281]

370. The Claimant's claim gives rise to several questions:

a. What is the relevant legal standard for defamation under the applicable law or laws;[282]

b. Whether or not the statements in question are defamatory in reference to this standard;[283]

c. Whether Mr. Marler's right to sue may be imputed to the Claimant; and

d. The Arbitrator also notes that no evidence of loss or harm has been tendered.

371. The Arbitrator has considered the Parties' pleadings and evidence and concludes that he must reject the Claimant's defamation claim for two reasons.

372. *First*, the Claimant has not established how the alleged defamation—in respect of which, Mr. Marler is the alleged injured party—may be claimed for by the Claimant, or how the Claimant may bring a claim for it on Mr. Marler's behalf. There is no legal fiction through which an advocate is treated as the same legal entity as their client for the purposes of a defamation claim. Advocates have separate legal personality to the party that engaged them. This being the case, the Claimant may only bring a claim in respect of a legal wrong committed against an advocate if it can demonstrate that the legal wrong is committed against the Claimant itself, or if the Claimant is able to establish an exception to the doctrine of standing, which typically prevents an entity party to a litigation nor arbitration from raising the claims of a third party.

373. The Claimant has not demonstrated how a legal wrong in the nature of defamation against an advocate constitutes a legal wrong committed directly against the client itself. Advocates are granted authority to act upon their client's behalf for the limited purpose of the litigation or arbitration for which they are engaged, and may have the authority to bind their client to certain procedural acts. However, this authority is generally of a limited nature and it is qualified by the applicable law and rules of professional ethics, which allows advocates to act with a degree of independence from the clients not present in typical agent-principal relationships. The Claimant has not demonstrated the basis for it to bring an action in tort with respect to an action or omission that affects a third party (being Mr. Marler).

---

280 Email from the Claimant to the Arbitrator, 26 August 2022, ¶ 2.

281 Email from Mr. Mahmoody to Mr. Marler and others, 6 November 2019 (**Exhibit C-34**); Email from Mr. Mahmoody to Mr. Marler and others, 19 November 2019 (**Exhibit C-36**).

282 Statement of Defence, ¶ 75.

283 Statement of Defence, ¶ 75.

374. *Second,* to recall, the Respondent raised in its Statement of Defence its criticism that the relevant legal standard has not been put forward by the Claimant.[284] Despite having the opportunity to do so in its Statement of Reply, the Claimant has not articulated any standard under Afghani law that was breached by the statements of 6 and 19 November 2019.

375. In any event, the Arbitrator notes that under Article 776 of the Afghan Civil Code the Claimant to provide evidence of loss as a condition of liability in tort. No such evidence has been provided here.

376. The Arbitrator also rejects the Claimant's assertion that the conduct "*falls far below the standard expected of an Afghan civil servant*", and that Mr. Mahmoody ought to have faced "*disciplinary proceedings*",[285] as the Claimant has not demonstrated how such allegations amount to an actionable claim, nor how such a claim for a violation of public law would be arbitrable or within the Arbitrator's jurisdiction.

(iv) Passing of Mr. Walls

377. The Arbitrator turns to the passing of Mr. Walls, a director of the Claimant, and Mr. Noori, a representative of the Respondent. The Claimant contends that the passing of Mr. Walls is a factual circumstance giving rise to or supporting the Claimant's claim for damages set out in request (g) of its updated prayer for relief for "*damages and compensations arising from its harmful actions, defamation, extortion and other damages*".[286] The Claimant supports this allegation through witness evidence from Mr. Davletkhan.[287] The Respondent's position is that the Claimant has not produced sufficient evidence to establish that the Respondent was responsible for Mr. Walls' or Mr. Noori's passing.[288]

378. The Arbitrator accepts that the death of a director may cause economic loss to a company for which the director holds office. However, the Arbitrator agrees with the Respondent that there is no evidence on the record to establish that any act or omission of the Respondent played any role in Mr. Walls' passing, an allegation which ought to have been supported at the least by an expert opinion from a specialist medical practitioner. In the absence of sufficient proof of causation, the Arbitrator finds that the Claimant has failed to establish tortious liability on part of the Respondent. Similarly, given the Claimant's failure to establish the element of causation, the Arbitrator considers that it would be inappropriate to take the passing of Mr. Walls into account as a factual circumstance supporting the award of "*damages and compensations arising from its harmful actions, defamation, extortion and other damages*" to the Claimant.[289]

(v) Damages for the above claims

379. Having considered the totality of the evidence and arguments presented by the Parties, the Arbitrator rejects the Claimant's Tort Claims.

380. In light of this finding, the Arbitrator rejects each of the damages scenarios presented by the Claimant in paragraph 16(g) of its Updated Prayer for Relief.

---

284 Statement of Defence, ¶ 75.

285 Statement of Claim, ¶ 6.6 (emphasis added).

286 Statement of Claim, ¶ 8.1.6; Statement of Reply, ¶ 186; Updated Prayer for Relief, 2 May 2022, ¶ 16(g).

287 Witness Statement of Mr. Davletkhan, ¶¶ 493-495 (**Exhibit CWS-6**).

288 Statement of Defence, ¶ 76.

289 Updated Prayer for Relief, 2 May 2022, ¶ 16(g).

C. OTHER CLAIMS AND ISSUES

381. The Arbitrator addresses in this section several issues and claims put forward by the Claimant.

382. *First*, the Claimant alleges that the acts of the Ministry of Energy and Water are attributable to the State of Afghanistan, and seeks declaratory relief to this end:

> "*a) DECLARE that the Ministry of Energy and Water acted on behalf of the State and the actual Respondent in these arbitral proceedings is the State of Afghanistan (or the "Government" of Afghanistan, in the alternative);*"

383. *Second*, the Claimant alleges that the Respondent is liable for breaching the Energy Charter Treaty.

384. *Third*, the Claimant seeks USD 2,893,586 under Clause SCC 24.1(a) of the Contract, for "*unprofessional, unethical and illegal conduct*".

385. *Fourth,* the Claimant seeks USD 354,044 in relation to the contractual obligation to seek to resolve the dispute amicably. Request (f) of the Prayer for Relief provides as follows:

> "*f) ORDER the Respondent to pay the Claimant costs arising from "seeking to resolve the dispute amicably by mutual consultation" up to December 2019 in the amount of USD 354,044;*"

386. After summarising the Claimant's and the Respondent's positions (**1** and **2** respectively), the Arbitrator provides his reasoning and disposition on the above claims (**3**).

1. The Claimant's Position

(i) The Claimant's position on attribution

387. The Claimant seeks an order declaring that the Ministry of Energy and Water acted on behalf of the State and the actual Respondent is the Government of Afghanistan.[290] The Claimant considered the Ministry to be a *de facto* organ of the State of Afghanistan based on three factors. *First*, the Claimant relied on the following provisions of the Afghan Constitution:

> "***Article 71***
> *The Government shall be comprised of Ministers who work under the chairmanship of the President.* [...]
>
> ***Article 77***
> *The Ministers shall perform their duties as heads of administrative units within the framework of this Constitution as well as other laws prescribe.* [...]"[291]

388. *Second*, the Claimant relied upon the involvement of the Legal Advisor to the President. *Finally*, the Claimant relied upon the terms of the Afghanistan Reconstruction Trust Fund Grant Agreement, which was signed between the International Development Association and the State of Afghanistan. This Agreement designated the Ministry of Energy and Water as the entity responsible for implementing the Project.

---

290 Updated Prayer for Relief, 2 May 2022, ¶ 16(a); Reply, ¶ 196.

291 Reply, ¶¶ 132-134; Constitution, Arts. 71, 77 (**Exhibit CLA-6**).

(ii) The Claimant's claim for breach of the Energy Charter Treaty

389. The Claimant also contends that the Respondent's conduct breached investment guarantees under the Energy Charter Treaty. The Claimant argues that its undertakings in relation to and expenses incurred under the Contract can be considered the Claimant's "*investments*" in Afghanistan in accordance with Article 10(1) of the Energy Charter Treaty, requiring the Claimant to be accorded fair and equitable treatment without any unreasonable or discriminatory measures by the Respondent.[292] The Claimant therefore contends that:

> "[e]*verything that the Claimant had faced under* [the] *SMPL Contract at the hands of the Respondent is in violation of* [the] *Energy Charter Treaty obligations and, in particular, in violation of fair and equitable treatment. The Claimant was subject to arbitrary treatment, discrimination, harassment, and other numerous systemic bad faith actions undertaken by the Respondent on purpose since March 2019 to-date.*"[293]

(iii) The Respondent's alleged commission of internationally wrongful acts

390. The Claimant argues that Afghanistan retains state responsibility for an internationally wrongful act based on the fact that the project originated in grant funds from the WBG and the Contract covers international subjects with an arbitration seat in the United Arab Emirates.[294]

391. The Claimant argues that it should be awarded damages for such acts by reference to international compensatory standards.[295]

(iv) Claim for unprofessional, unethical and illegal conduct

392. The Claimant notes that under Clause SCC 24.1(a) of the Contract, it was obliged to maintain "*professional liability insurance*" with coverage for USD 2,893,586. The Claimant argues that:

> "[t]*he principle of fairness implies that, as the Respondent expected to be compensated USD 2,893,586 in professional damages should the Claimant have acted unprofessionally, the Claimant should have the same right in the same value. Given the conduct of the Respondent, it is fair to say that the Respondent is now liable for USD 2,893,586 compensation to the Claimant due to Respondent's unprofessional, unethical and illegal conduct that it maintained towards the Claimant.*"[296]

(v) The Claimant's claim for costs incurred in seeking to resolve the dispute

393. The Claimant claims USD 354,044 in relation to Clause 48.1 of the GCC, which obliges the Parties to "*seek to resolve the dispute amicably by mutual consultation.*"[297]

---

292 Reply, 116, citing the Energy Charter Treaty and Related Documents, September 2004, Art. 10(1) (**Exhibit CLA-8**).

293 Reply, ¶ 122.

294 Reply, ¶¶ 123-124.

295 Reply, ¶ 123.

296 Reply, ¶ 188.

297 Claimant's Updated Prayer for Relief, 2 May 2022, ¶ 16(f).

394. The Claimant asserts that the Respondent is "*the single party to blame for (1) creating; and (2) extending the dispute*", and its conduct "*prompt*[ed] *the Claimant to spend resources in search of* [an] *amicable solution*", which in the Claimant's case was in breach of Clause 48.1 of the Contract.[298] This claim relates to time and travel expenses incurred by Mr. Davletkhan in travelling to Afghanistan between March 2019 and December 2019.[299] The Claimant exhibited a breakdown of these costs as Exhibit C-96.

2. The Respondent's Position

395. As the Respondent has not submitted a Rejoinder, arguments and allegations advanced by the Claimant in its Reply have been left unaddressed. The Respondent maintained in its Statement of Defence that all of the Claimant's allegations and claims left unaddressed in the Respondent's Statement of Defence are denied and unfounded.[300] It reiterated that the dispute is simply about "*whether and how much PIT tax the* [G]*overnment of Afghanistan can withhold from Unicon.*"[301]

396. The Respondent has not commented on the following:

a. The Claimant's claims based on the ECT and in relation to Clause 48.1 of the Contract's General Conditions of Contract, which were raised in the Claimant's Reply;

b. On the Claimant's position on attribution;

c. The Claimant's argument or claim for internationally wrongful acts'

d. On the Claimant's claim for USD 2,893,586 in light of unprofessional, unethical and illegal conduct; or on

e. The Claimant's claim relating to the Parties' obligation to "*seek to resolve the dispute amicably by mutual consultation*".

3. The Arbitrator's Analysis

397. The Arbitrator sets out in turn his analysis of, and decisions on, the Claimant's claim for breach of the Energy Charter Treaty (***i***); the Claimant's argument that the Respondent was a *de facto* organ of the Afghan State (***ii***); the Claimant's claim for unprofessional, unethical and illegal conduct (***iii***); the Claimant's claim relating to the Parties' obligation to "*seek to resolve the dispute amicably by mutual consultation*" (***iv***).

(i) The Claimant's claim for breach of the Energy Charter Treaty

398. In its Reply, the Claimant argued that "[e]*verything that the Claimant had faced under SMPL Contract at the hands of the Respondent*" breached Article 10(1) of the Energy Charter Treaty ("**ECT**") (the Claimant's "**ECT Claim**").[302]

---

298 Reply, ¶¶ 181-182.

299 Reply, ¶ 182; Document entitled "Claimant's expenses incurred towards dispute resolution, March-December 2019" for March-December 2019, (**Exhibit C-96**).

300 Statement of Defence, ¶¶ 1, 74.

301 Statement of Defence, ¶ 74.

302 Reply, ¶¶ 116-122.

399. The Claimant's case is that the ECT Claim falls within the scope of the arbitration clause in the Contract in light of its breadth: "[a]*ny dispute* […] *arising under or related to this Contract*".[303] The Claimant indicated that claims under the ECT therefore fall within the Arbitrator's jurisdiction because they are related to the Contract.[304]

400. The ECT is a multilateral treaty concerning the energy sector and covers many aspects of energy activities. Part III of the ECT encompasses various guarantees extended by States Parties to investors. Part V, entitled "Dispute Settlement", contains an offer on the part of States Parties to resolve any dispute concerning such guarantees by arbitration. The investor must accept this offer in the manner provided for in Part V in order for mutual consent to form between the investor and the host State for the resolution of such disputes by arbitration.

401. The Arbitrator will first consider whether he has jurisdiction over the Claimant's ECT Claim before considering the Claimant's claim on its merits.

402. ***Jurisdiction over ECT Claims.*** As a preliminary point, the investment guarantees given to investors under the ECT are only enforceable by a tribunal having jurisdiction under Part V of the ECT. It is not possible to disassociate the substantive rights under the ECT from the procedural rights and obligations under Article 26 that attach, and are accessory, to such substantive rights. This is clear not only from the language of Article 26 of the ECT that will be examined below but also from the nature of the exclusive and exhaustive dispute resolution mechanism created by Article 26 which would be defeated if the substantive norms of the ECT may be adjudicated by fora other than those contemplated by Article 26. Given that the only fora that are able to enforce substantive rights under the ECT are those provided for in Article 26, the question arises as to whether the Arbitrator has jurisdiction under Article 26 of the ECT. Article 26 relevantly provides as follows:

> "***Article 26: Settlement of Disputes between an Investor and a Contracting Party***
>
> *(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.*
>
> *(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:*
>
> *(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;*
>
> *(b) in accordance with any applicable, previously agreed dispute settlement procedure; or*
>
> *(c) in accordance with the following paragraphs of this Article.*
>
> *(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to*

303 Contract, Clause 49 GCC (**Exhibit C-2**).

304 Transcript, Hearing, 8 April 2022, pp. 62:21-63:18.

international arbitration or conciliation in accordance with the provisions of this Article.

(b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Chapter II

of the ICSID Convention and for purposes of the Additional Facility Rules;

(ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention"); and

(iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

(7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State".

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards."

403. In view of the foregoing, the Arbitrator's jurisdiction to hear the ECT Claims will turn on whether the conditions of Article 26(2) are met.

404. In other words, this means determining whether the Arbitrator has jurisdiction as one of the three fora contemplated by Article 26 for the adjudication of the substantive rights given to investors under the ECT:

a. "*the courts or administrative tribunals of the Contracting Party party to the dispute*" (Article 26(2)(a)).

b. "*any applicable, previously agreed dispute settlement procedure*", pursuant to Article 26(2)(b).

c. arbitration under the ICSID Convention or pursuant to the ICSID Additional Facility Rules; ad hoc arbitration under the UNCITRAL Rules, or arbitration under the auspices of the SCC (Article 26(2)(c)).[305]

405. The Arbitrator considers it convenient to structure the analysis of ECT jurisdiction through addressing the following four questions:

a. did the Claimant invoke the arbitration provisions in Article 26(2) when it initiated this arbitration?

b. if the Claimant did not do so at the outset of this arbitration, could it invoke Article 26(2) while this arbitration was on foot?

c. Even if the Claimant can invoke Article 26 of the ECT mid-arbitration, can the Respondent be sued under Article 26 of the ECT?

d. Even if the Arbitrator had jurisdiction under the ECT, would the Arbitrator's ECT jurisdiction extend to the Claimant's contractual claims?

406. The Arbitrator will address each question in turn.

407. *First*, did the Claimant invoke the arbitration provisions in Article 26(2) when it initiated the arbitration? The answer is negative. As a preliminary point, the Claimant did not mention either Article 26 or the ECT in its Notice of Arbitration. The Claimant mentioned the ECT for the first time in its Reply.

408. Even disregarding the absence of explicit references to Article 26, one cannot deem these proceedings as one of the three fora provided in Article 26(2) of the ECT.

409. These proceedings are obviously not proceedings within the meaning Article 26(2)(a) since this Arbitrator is not an Afghan court or administrative tribunal.

410. These proceedings equally could not have been initiated under Article 26(2)(b). While the Contract contains an arbitration agreement, this agreement does not qualify as a "*previously agreed dispute settlement procedure*" for the purposes of Article 26(2)(b) for two reasons. *First,* the Afghan State is not a party to the Contract. Yet, for Article 26(2)(b) to apply, the relevant State must be party to the "*previously agreed dispute settlement procedure*". As will be explained below, rules of attribution are no avail in this situation as they do not serve to attribute obligations, but only wrongful conduct. *Second*, even assuming that the Afghan State were a party to the Contract, the Contract's arbitration clause would still not qualify as a "*previously agreed dispute settlement procedure*".[306] For an agreement to arbitrate to qualify as a "*previously agreed dispute settlement procedure*" for the purposes of Article 26(2)(b), the agreement to arbitrate must be an agreement to resolve "*Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment* [...], *which concern an alleged breach of an obligation of the former under Part III*", by arbitration. This is because the meaning of "*dispute*" in Article 26(2) is limited by Article 26(1). Stated differently, Article 26(2) does not record the States Parties' consent to resolve *any* dispute This being the case, the Arbitrator considers that no reasonable construction of the arbitration agreement would extend its scope to claims for breach of the ECT, because it

---

305 ECT, Arts. 26(2), 3) and (4) (**Exhibit CLA-8**).

306 Contract, Clause 49 GCC (**Exhibit C-2**).

only refers disputes "*under or related to this contract*" to arbitration. Thus, this agreement cannot amount to a dispute settlement procedure for the purposes of Article 26(2)(b).

411. The Claimant also cannot treat these proceedings as being under Article 26(2)(c). The Claimant did not file its Notice of Arbitration on the basis of Article 26(2)(c), but on the basis of the arbitration agreement in the Contract. Two arbitration agreements might of course provide for the same forum (for instance, arbitration pursuant to the UNCITRAL rules). This does not, however, mean that the two arbitration agreements would then become the same agreement. Further, as noted above, Article 26(2)(c), much like Article 26(2)(b), only relates to claims for alleged breaches of the ECT; something the Claimant did not allege either in its Notice of Arbitration or its Statement of Claim.

412. Thus, this arbitration was not initiated on the basis of the Article 26 of the ECT, and the Arbitrator therefore did not have jurisdiction under the ECT at the outset of the arbitration.

413. This resolves the first question posed above.

414. The second question above is whether the Claimant could invoke Article 26(2) while this arbitration was on foot, even if it did not invoke Article 26(2) at the outset of this arbitration? Here too, the answer is negative. It is an established rule of international law (the law applicable to ECT claims) that jurisdiction is assessed at the outset of the proceedings, and cannot be supplemented or expanded midway through the arbitration. As the ICSID tribunal held in *Bayindir v Pakistan* (ICSID Case No. ARB/03/29), "*the arbitral tribunal's jurisdiction which, according to the long-established jurisprudence of international tribunals of all kinds, is fixed as of the time the proceedings are commenced and is not subject to ex post facto alteration*".[307] *Bayindir* arose under the Turkey-Pakistan BIT rather than under the ECT, but the same principle applies here equally.

415. *Third*, even if the Claimant can invoke Article 26 of the ECT mid-arbitration, can the Respondent be sued under Article 26 of the ECT? Here too the answer is negative.

416. Even if it was permissible to change or supplement the jurisdictional basis for this arbitration midway through the proceedings, this would not give the Arbitrator jurisdiction over the ECT Claims because the Afghan State is not a party to the arbitration. It is not disputed that MEW has a legal personality that is separate from the State. Although the Claimant has said that "[i]*t would be right to say that the Respondent in this arbitration is the Government of Afghanistan* […], *represented by the Ministry*",[308] it has never sought to serve the State, nor add the State as co-respondent or to substitute the MEW for the State as sole respondent. However, it is the Afghan State, and not the Respondent, that is bound by the obligation to arbitrate under the ECT. The Claimant is not assisted here by the rules of attribution: the doctrine of attribution attributes *liability* and not *obligations*. In other words, rules of attribution may serve to attribute to the Afghan State the conduct of the Respondent, but they would never transfer obligations of the Respondent to the Afghan State let alone, as would be required by the Claimant's case, transfer

---

307 *Bayindir v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶ 178. The Arbitrator wrote to the Parties on 9 January 2023 indicating that he was considering relying on the Decision on Jurisdiction of 14 November 2005 in *Bayindir v Pakistan* and several other authorities in relation to the Claimant's ECT Claims, and invited the Parties to submit any comments by 16 January 2023. The Claimant replied on 16 January 2023 indicating that it "*has no comments or objections*" (Claimant's Comments of 16 January 2023, p. 4). No comments were received from the Respondent in the timeframe provided for by the Arbitrator.

308 Updated Prayer for Relief, 2 May 2022, ¶ 2.

to the Respondent the obligation to arbitrate undertaken by Afghan State under the ECT.[309] Similarly, while agency has not been clearly pleaded by the Claimant, even if it had, it would not have overcome the jurisdictional hurdle the Claimant is facing. While agency, unlike attribution, serves to transfer obligations, and not just responsibility for conduct, it is the principal that is bound by the obligations undertaken by the agent and not vice versa. In other words, if the Respondent was acting, as suggested by the Claimant, as an agent on behalf of the Afghan State, the natural course would be to sue the principal, the Afghan State. In short, the obligation to arbitrate cannot be transferred to the Respondent via attribution or agency as this is simply not how either doctrine operates.

417. The present scenario might be contrasted to ICC Case No. 9762, on which the Claimant relies. Unlike here, the claimant in ICC Case No. 9762 properly joined the "Government of Z" to the arbitral proceedings, as well as two successor agencies of the ministry with whom the claimant signed the contract containing the arbitration clause.[310] This has not occurred here. ICC Case No. 9762 does not, therefore, assist the Claimant.

418. *Fourth*, even if the Arbitrator had jurisdiction under the ECT, would the Arbitrator's ECT jurisdiction extend to the Claimant's contractual claims?

419. A number of claims before this Tribunal are, on the Claimant's own case, for breach of the Contract. These claims are namely: (*i*) the Claimant's claim for amounts outstanding under invoices it issued, which concerns the Respondent's obligation under the Contract to pay for work performed; *(ii)* the Claimant's claim for environmental services, which again at essence concerns the Respondent's payment obligations under the Contract; (*iii*) the Claimant's claim for other unpaid services, which again concerns the Respondent's payment obligations under the Contract; (*iv*) the Claimant's claim for alleged unprofessional, unethical and illegal conduct under Clause SCC 24.1(a) of the Contract; and (v) Claimant's claim for USD 354,044 on the basis of Clause GCC 48.1, which requires the Parties to "*seek to resolve the dispute amicably by mutual consultation*" (the "**Contractual Claims**"). The essential basis of all of the Contractual Claims is the performance (or non-performance) of the Parties' obligations under the Contract.

420. In respect of the Contractual Claims above, the Claimant has not shown what conduct of the Respondent breaches the ECT, other than the breach of contract itself. This being the case, the Arbitrator considers that all such claims fall exclusively within the jurisdiction of the arbitration agreement in the Contract, and outside of the arbitration agreement in the ECT. This is because

---

309 *See e.g. EDF (Services) Limited v Romania,* ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶¶ 318-319 ("*318. It is unclear whether Claimant relies on the attribution to the State of certain acts and conduct of AIBO and TAROM on the assumption of their being in breach of the ASRO Contract or the SKY Contract in order to impute to the State the responsibility for such breach. If so, this construction of the umbrella clause would be incorrect since the attribution to Respondent of AIBO's and TAROM's acts and conduct does not render the State directly bound by the ASRO Contract or the SKY Contract for purposes of the umbrella clause.*

319. Attribution does not change the extent and content of the obligations arising under the ASRO Contract and the SKY Contract, that remain contractual, nor does it make Romania party to such contracts.") The Arbitrator wrote to the Parties on 9 January 2023 indicating that he was considering relying on the Award of 8 October 2009 in *EDF (Services) v Romania* and several other authorities in relation to the Claimant's ECT Claims, and invited the Parties to submit any comments by 16 January 2023. The Claimant replied on 16 January 2023 indicating that it "*has no comments or objections*" (Claimant's Comments of 16 January 2023, p. 4). No comments were received from the Respondent in the timeframe provided for by the Arbitrator.

310 ICC Case No. 9762, Final Award, 22 December 2001, 29 Y.B. INT'L COM. ARB. 26, 2004 (**Exhibit CLA-11**).

the Claimant and the Respondent entered into a binding and detailed commitment as to the precise standards governing the performance of the Contract, including remedies for any breach thereof. The Arbitrator considers that the Contract thus forms a *lex specialis* to the exclusion of treaty protection in respect of disputes arising from the performance of the Contract. If treaty protection in respect of performance of the Contract was not so excluded, the investor would have two norms that it could apply at its discretion to the legal relationship at hand and two fora from which to choose at its discretion; such that it could circumvent the *lex specialis* by going 'above' the Parties' agreement and claiming under an investment treaty.

421. ***Merits***. Even if the Arbitrator had jurisdiction over the ECT Claim, the Arbitrator would find that the claims fail on the merits.

422. *First,* only sovereign conduct by a State is capable of breaching an international obligation under an investment treaty. The ICSID tribunal constituted in *Duke Energy v Equador* (ICSID Case No. ARB/04/19) explained that sovereign conduct was conduct that no private party could engage in:

> "*in order to prove a treaty breach, the Claimants must establish a violation different in nature from a contract breach, in other words a violation which the State commits in the exercise of its sovereign power.*"[311]

423. All of the Contractual Claims relate to non-payment of amounts due under a contract, namely the SMPL Contract. As such, they could not possibly be deemed sovereign.

424. Thus, even if the Arbitrator had jurisdiction over the ECT Claims, no breach would be established as none of the acts in question have been demonstrated to involve the exercise of sovereign power.

425. *Second,* the Contractual Claims do not concern any legitimate expectations that are protected at the international level. The only expectations at play in the Claimant's Contractual Claims are expectations arising from the terms of the Contract itself. To state it differently, the Claimant's case on the Contractual Claims is that its expectation was that the Contract would be performed pursuant to its terms and that such expectation was breached by the Respondent's breach of contract; such that its case on a breach of the fair and equitable treatment standard turns entirely on a finding that the Contract was breached.

426. Absent specific language in the treaty providing otherwise (which is not the case in the ECT), an investment treaty only protects expectations which are given by the State for the purposes of inducing an investor to make an investment, and on which the investor relies in making an investment. These expectations cannot arise from a mere commercial contract, even if the State is party to it, and certainly cannot arise from a commercial contract to which the State itself is not a party.

427. This is consistent with the reasoning of the ICSID tribunal in *Franck Charles Arif v. Republic of Moldova* (ICSID Case No. ARB/11/23):

> "*the relationship between legitimate expectations and domestic law is important in*

---

311 *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador* (ICSID Case No ARB/04/19) Award, 18 August 2008, ¶ 345 (emphasis added). The Arbitrator wrote to the Parties on 9 January 2023 indicating that he was considering relying on the Award of 18 August 2008 in *Duke Energy v Ecuador* and several other authorities in relation to the Claimant's ECT Claims, and invited the Parties to submit any comments by 16 January 2023. The Claimant replied on 16 January 2023 indicating that it "*has no comments or objections*" (Claimant's Comments of 16 January 2023, p. 4). No comments were received from the Respondent in the timeframe provided for by the Arbitrator.

> *this case. The Tribunal has already noted that certain expectations, such as those arising pursuant to a contract, are properly dealt with in domestic law and do not amount to expectations protected at the international level.*"[312]

428. The Arbitrator therefore finds that the Claimant has failed to establish that any of the Contractual Claims constitute breaches of any legitimate expectations that are protected by the ECT.

429. *Third,* the Arbitrator does not consider the Claimant to have established a breach of the fair and equitable treatment standard through its allegations of discrimination, based on DABS' conduct in respect of RTE France, the Claimant's alleged competitor.[313] A finding of discrimination requires a finding that a State has treated two investors differently (*i*) who are in like circumstances, (*ii*) who could have legitimately expected to have been treated in the same way and (*iii*) without a valid reason. As the ICSID tribunal constituted in *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24) found, discrimination "*entail*[s] *like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds*".[314]

430. In this case, given that the Claimant and RTE France operate in different industries, and are subject to different contracts (even if many of their terms are similar) with different scopes of work,[315] there could not be a finding of discrimination, given that there could not have been any legitimate expectation as to consistency of treatment accorded to each of them.

431. *Fourth*, the Claimant's Tort Claims and other claims would similarly fail even if the Arbitrator had jurisdiction over them and even if the Respondent was the correct party as the Claimant simply has not shown how the alleged conduct constitutes a breach of any international obligation held either by the MEW or by the Islamic Republic of Afghanistan.

(ii) Attribution

432. The Claimant argues that the Respondent is a *de facto* organ of the Afghan State and seeks declaratory relief to the same effect.

433. The Arbitrator considers that it is unnecessary to address the Claimant's arguments on attribution. The Arbitrator's ultimate disposition on any of the Claimant's claims and on the Respondent's counterclaim would be no different if the Respondent was a *de facto* organ of the Afghan State.

---

312 *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 539. The Arbitrator wrote to the Parties on 9 January 2023 indicating that he was considering relying on the Award of 8 April 2013 in *Frank Charles Arif v Moldova* and several other authorities in relation to the Claimant's ECT Claims, and invited the Parties to submit any comments by 16 January 2023. The Claimant replied on 16 January 2023 indicating that it "*has no comments or objections*" (Claimant's Comments of 16 January 2023, p. 4). No comments were received from the Respondent in the timeframe provided for by the Arbitrator.

313 Reply, ¶ 70-82.

314 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 184. The Arbitrator wrote to the Parties on 9 January 2023 indicating that he was considering relying on the Award of 27 August 2008 in *Plama v Bulgaria* and several other authorities in relation to the Claimant's ECT Claims, and invited the Parties to submit any comments by 16 January 2023. The Claimant replied on 16 January 2023 indicating that it "*has no comments or objections*" (Claimant's Comments of 16 January 2023, p. 4). No comments were received from the Respondent in the timeframe provided for by the Arbitrator.

315 Contract between RTE International and Da Afghanistan Breshna Sherkat (DABS), June 2019 (**Exhibit C-70**).

In other words, the adjudication of all of the claimant's claims or arguments is not impacted by whether or not the Respondent is a *de facto* organ of the Afghan State.[316]

434. The Arbitrator therefore dismisses the Claimant's request for declaratory relief as moot and therefore inadmissible, as the Claimant does not have a sufficient legal interest in seeking the relief it requests.

(iii) The Respondent's alleged commission of internationally wrongful acts

435. To the extent it constitutes a discrete claim as opposed to an argument (which is unclear), the Arbitrator rejects the Claimant's claim for internationally wrongful acts. The Claimant has not:

a. shown how an arbitral tribunal constituted pursuant to an arbitration clause in a contract governed by domestic law would have jurisdiction over such claims;

b. shown how the Respondent has legal personality under international law such that claims against it (as opposed to against the State) for internationally wrongful acts are actionable;

c. shown how the Claimant has standing to pursue such claims;

d. identified an obligation arising under or recognised by international law has been breached (as opposed to obligations arising under a domestic law contract);

e. identified a standard providing the measure as to whether or not the aforementioned obligation has been breached;

f. precisely articulated what conduct breaches the aforementioned obligation.

436. Accordingly, the Claimant has not established that the Arbitrator jurisdiction over this claim, and even assuming that the Arbitrator could have jurisdiction and that the MEW was the correct party against which to bring the claim, the Claimant's Contractual Claims could not prevail as they concern obligations arising under a contract governed by domestic law, as opposed to international law. The Claimant's Tort Claims and other claims would similarly fail even if the Arbitrator had jurisdiction over them and even if the Respondent was the correct party as the Claimant simply has not shown how the alleged conduct constitutes a breach of any international obligation held either by the MEW or by the Islamic Republic of Afghanistan.

(iv) Claim for unprofessional, unethical and illegal conduct

437. The Claimant notes that under Clause SCC 24.1(a) of the Contract, it was obliged to maintain "*professional liability insurance*" with coverage for USD 2,893,586. The Claimant argues as follows:

> "[t]*he principle of fairness implies that, as the Respondent expected to be compensated USD 2,893,586 in professional damages should the Claimant have acted unprofessionally, the Claimant should have the same right in the same value. Given the conduct of the Respondent, it is fair to say that the Respondent is now liable for USD 2,893,586 compensation to the Claimant due to Respondent's unprofessional, unethical and illegal conduct that it maintained towards the*

316 *See e.g.* Paragraph 416 above.

Claimant."[317]

438. To the extent that this is an independent claim, it is rejected by the Arbitrator. Clause GCC 24.1 obliges the Consultant to "*take out and maintain* […] *insurance against the risks, and for the coverage specified in the SCC*" and "*shall provide evidence to the Client showing that such insurance has been taken out and maintained*".[318] Clause SCC 24.1(a) sets out the particulars of the insurance coverage the Claimant was required to "*take out and maintain*": "[p]*rofessional liability insurance with a minimum coverage of the total ceiling amount of the* [c]*ontract*", together with four other heads of insurance coverage.[319]

439. There is no express nor implicit obligation in this clause for the Respondent to refrain from "*unprofessional, unethical and illegal conduct*". Rather, this clause is breached if the Claimant fails to take out and maintain the insurance coverage set out therein. The Arbitrator therefore rejects this claim.

(v) The Claimant's claim relating to the Parties' obligation to "seek to resolve the dispute amicably by mutual consultation"

440. The Arbitrator turns next to the Claimant's claim for USD 354,044 on the basis of Clause 48.1 GCC of the Contract, which requires the Parties to "*seek to resolve the dispute amicably by mutual consultation.*"[320]

441. Clause 48.1 falls within Part H of the General Conditions of Contract. Part H reads as follows:

> "***H. Settlement of Disputes***
>
> ***48. Amicable Settlement*** *48.1 The Parties shall seek to resolve any dispute amicably by mutual consultation.*
>
> *48.1 If either Party objects to any action or inaction of the other Party, the objecting Party may file a written Notice of Dispute to the other Party providing in detail the basis of the dispute. The Party receiving the Notice of Dispute will consider it and respond in writing within fourteen (14) days after receipt. If that Party fails to respond within fourteen (14) days, or the dispute cannot be amicably settled within fourteen (14) days following the response of that Party, Clause GCC 49.1 shall apply."*
>
> *"**49. Dispute Resolution***
> *49.1 Any dispute between the Parties arising under or related to this Contract that cannot be settled amicably may be referred to by either Party to the adjudication/arbitration in accordance with the provisions specified in the SCC.*"[321]

442. The nature of the breach alleged by the Claimant appears two-pronged:

---

317 Reply, ¶ 188.

318 Contract, GCC, cl. 24 (**Exhibit C-2**).

319 Contract, SCC, cl. 24.1(a), (**Exhibit C-2**).

320 Claimant's Updated Prayer for Relief, 2 May 2022, ¶ 16(f).

321 Contract, GCC, cls. 48-49 (**Exhibit C-2**).

a. The Claimant asserts that the Respondent's "*ill-motivated dispute had no resolution and the Respondent is simply draining Claimant's time and resources*".[322] The Claimant appears to be arguing that either (i) Clause 48.1 provides a right of recovery of expenses for a Party facing "*ill-motivated*" claims and/or (ii) that the Respondent should have capitulated earlier, thereby saving the Claimant time and resources.

b. The Claimant also asserts that the Respondent is "*the single party to blame for (1) creating; and (2) extending the dispute*".[323] The Claimant's argument seems to be that Clause 48.1 provides a right of recovery for resources expended in seeking an amicable resolution in circumstances where that Party is without "*blame*" for the emergence and prolongation of the dispute.

443. It is instructive to first consider the nature and purpose of Clause 4 GCC 8.1. In requiring the Parties to "*seek to resolve any dispute amicably by mutual consultation*", Clause GCC 48.1 does not bind the Parties to reach a particular outcome, but instead requires the Parties to follow a particular process: consulting one another, in the hope that such interaction may avoid the need for arbitration. The procedural nature of this clause is evident from the use of the expression "*seek to resolve*" within Clause GCC 48.1, from the broader mechanism in Part H to which Clause GCC 48.1 forms a part, and from the common commercial usage of such clauses. The procedural nature of this clause also implies that it will not be breached if the Parties do not reach an amicable resolution, or if the Respondent does not offer any concessions in the course of pre-arbitral discussions.

444. The Arbitrator therefore considers that Clause GCC 48.1 does not place any obligations on the Parties but instead places a condition on the Parties' right to initiate arbitration under Clause GCC 48.2. In circumstances where the Claimant incurred over USD 350,000 (as it now claims) in fees for services and travel expenses in the course of engaging with the Respondent's representatives,[324] it seems clear that both Parties have engaged in "*mutual consultation*" with an aim of avoiding arbitration, such that this condition has been fulfilled.

445. The wording and purpose of Clause GCC 48.1 does not support the Claimant's interpretation that Clause GCC 48.1 provides it with a costs recovery mechanism where a dispute is "*ill-motivated*" or where the other party is "*to blame*" for the dispute, or that the Respondent should have provided "*a resolution*".

446. The Arbitrator would also expect express language to be present if the Parties had intended for Clause 48.1 to create an additional mechanism for cost recovery outside of or in addition to Articles 40 to 42 of the UNCITRAL Rules. Express language would similarly be expected if the Parties sought to modify or supplement the definition of costs in Article 40 of the UNCITRAL Rules, or to restrain the Arbitrator's costs discretion.

447. The Arbitrator therefore rejects the Claimant's claim on the basis of Clause GCC 48.1.

D. THE RESPONDENT'S DEMOBILISATION COUNTERCLAIM

448. The Respondent's counterclaim arises from the agreed fact that the Claimant demobilised and departed Afghanistan for the period between 17 May 2019 and 17 July 2019. The Arbitrator sets

---

322 Reply, ¶ 181.

323 Reply, ¶ 182.

324 Reply, ¶¶ 181-182; Claimant's expenses incurred towards dispute resolution, March-December 2019 (**Exhibit C-96**).

out in turn a summary of the Respondent's counterclaim and the Claimant's defence, before providing the Arbitrator's analysis and decision.

1. The Respondent's Position

449. The Respondent alleges in its Response to Notice of Arbitration that the Claimant breached the Contract when it departed from Afghanistan on 17 May 2019 for a period of eight weeks until 17 July 2019.[325]

450. The Respondent submits that it is "*entitled to refuse*[] *to pay fees charged by Unicon during the period in which it demobilised and departed Afghanistan in breach of Contract.*"[326]

451. As is typical for a notice of arbitration or a response thereto, only a high-level explanation of the counterclaim was provided, and the Respondent did not, for instance, particularise which clause of the Contract was breached. The Respondent similarly did not provide evidence of its alleged loss, stating that this was to be quantified in due course.[327]

452. In its Statement of Defence, the Respondent did not mention demobilisation, nor did it provide any particulars of this counterclaim nor evidence or quantification of loss.

2. The Claimant's Position

453. The Claimant explained that the demobilisation occurred because "*the Respondent had not settled, as it was required to do, any of its invoices over a four-month period and had made it known to the Claimant that it did not intend to* [do so]".[328] The Claimant's position was that work continued "*unabated and unaffected from other locations*" during the demobilisation, and that the Claimant's staff returned to Afghanistan when it was no longer possible to work remotely.[329] The Claimant also argues that delay *"(if any)*" in its provision of the services under the Contract that might have occurred during this period is attributable solely to the Respondent.[330]

454. The May to June 2019 demobilisation featured minimally in the Claimant's Statement of Reply, potentially due to the absence of any mention of demobilisation in the Respondent's Statement of Defence.

3. The Arbitrator's Analysis

455. The Arbitrator finds that the Respondent's counterclaim is unsustainable for several reasons.

456. *First*, despite having at the time the benefit of experienced external counsel, the Respondent neither provided any particulars of this counterclaim in its Statement of Defence nor even expressly asserted that it was maintaining this counterclaim. Such particulars are of course necessary to provide the Claimant with sufficient clarity as to the counterclaim to enable the Claimant to put forward a response. The Arbitrator therefore finds the counterclaim to have been waived by the Respondent.

---

325 Response to Notice of Arbitration, ¶ 16.

326 Response to Notice of Arbitration, ¶ 16.

327 Response to Notice of Arbitration, ¶ 17.

328 Statement of Claim, ¶ 6.1.

329 Statement of Claim, ¶ 6.2.

330 Statement of Claim, ¶ 6.2.

457. *Second*, the Arbitrator notes that Appendix B of the Contract provides a "*time-input estimate*", that contemplates service being performed not just "*full-time in Afghanistan*" but also "*part-time home office*" and "*full-time home office*", which the Arbitrator understands to mean outside of Afghanistan.[331] Even if the counterclaim had not been waived, the Respondent has demonstrated neither the nature or extent of the obligation to work on site, nor how a period of remote work breaches this obligation.

458. *Third,* the Respondent has provided no evidence of loss. The onus lies on the party seeking relief to establish the fact and quantum of loss. The Claimant has provided witness evidence to the effect that the demobilisation did not affect the Claimant's performance of its scope of work.[332] The Respondent tendered no evidence rebutting this. The consequence of the foregoing is that even if this counterclaim was not waived, the counterclaim would in any event be rejected.

459. The Respondent's counterclaim is therefore dismissed.

---

331 Contract, Appendix B, p. 46 (of the pdf) (**Exhibit C-2**).

332 Witness Statement of Mr. Davletkhan, ¶ 284 (**Exhibit CWS-6**).

VII. COSTS

A. THE CLAIMANT'S POSITION

460. The Claimant contends that the Respondent should pay all costs and expenses incurred by the Claimant in connection to these arbitration proceedings, including:

a. all professional fees of the Claimant, including legal and expert fees;

b. all costs and expenses incurred by the Claimant's witnesses;

c. all fees and expenses of the PCA and Arbitrator; and

d. all other costs associated with these arbitration proceedings.[333]

461. In response to the Arbitrator's invitation, the Claimant filed a submission on costs on 2 May 2022. The Claimant's main submissions were:

a. That the costs incurred by the Claimant were reasonable.[334]

b. That the Respondent's conduct was unreasonable.[335]

c. That a presumption is recognised in international arbitral case law to the effect that the successful party is entitled to its costs of the arbitration.[336]

d. That currency conversion to USD should be at average exchange rates throughout the proceeding.[337]

462. The Claimant also provided a detailed breakdown of its (i) legal costs (ii) its expert fees and (ii) the arbitration fees.

463. In the covering email accompanying this submission, the Claimant also stated that Mr. Davletkhan "*is not an employee of the Claimant*", "*and is only engaged by the Claimant when specifically needed* [...] *through case-by-case letters of engagement on hourly rates*".[338]

B. THE RESPONDENT'S POSITION

464. It is the Respondent's position that the Claimant should pay all costs and expenses incurred by the Respondent in connection to these arbitration proceedings, including the enumerated costs and expenses listed above, as well as pre-award and post-award interest on these costs and expenses.[339] The Respondent did not provide post-hearing costs submissions within the time provided for by the arbitrator.

---

333 Statement of Claim, ¶ 8.1.5; Reply, ¶ 190.

334 Claimant's Submission on Costs, ¶¶ 4-8.

335 Claimant's Submission on Costs, ¶¶ 6-7.

336 Claimant's Submission on Costs, ¶¶ 11-14.

337 Claimant's Submission on Costs, ¶ 3.

338 Email from the Claimant to the Tribunal and the Respondent, 2 May 2022.

339 Statement of Defence, ¶ 77; Response to Notice, ¶ 19.

C. THE ARBITRATOR'S ANALYSIS

465. The Arbitrator begins by fixing the costs of the arbitration pursuant to Article 40(1) of the UNCITRAL Rules. The Arbitrator's fees amount to USD 114,765. The PCA's fees are USD 22,098.83. Other costs of the arbitration, including courier charges, banking charges, court reporting fees, and telecommunication and technology costs, amount to USD 3,136.17. These fees and costs total USD 140,000, and therefore there is no unexpended balance from the costs deposit. Pursuant to Article 45(5) of the UNCITRAL Rules, after 30 days from the issuance of this Final Award, the PCA shall render an accounting to the Parties regarding the disbursements made.

466. The Claimant's arbitration costs, including the fees of its legal representation and the designating and appointing authorities, and the fees of the Experts retained, but excluding the advance deposits made, total USD 867,522.5.[340] The Respondent did not disclose any arbitration costs, despite being invited to do so.

467. Concerning the allocation of these costs, the Arbitrator has taken into account all arguments raised in the Claimant's Submission on Costs dated 29 April 2022. Although the Respondent did not provide a costs submission within the timeframe set by the Arbitrator or thereafter, the Arbitrator gave due consideration to the costs arguments the Respondent would have likely raised had it actively participated in the final phase of the proceedings. The Arbitrator finds as follows.

468. *First,* the Arbitrator rejects the Claimant's claim for its legal and arbitration costs. The Arbitrator considers an apportionment of costs more appropriate given the circumstances of this case. If the Claimant's claims were limited to its claim for amounts withheld due to PIT, the Claimant would have a reasonably strong basis for a claim for legal and arbitration costs. However, the Claimant put forward a number of claims on which it did not succeed, and some of which, in the Arbitrator's opinion, had no reasonable prospects of success. The Arbitrator considers that this factor ought to carry particular weight in his allocation of costs. The Arbitrator also considers that the manner in which the Claimant has pleaded its case unnecessarily increased its costs. For instance, it was not necessary for the Claimant to plead its tort claims in parallel in both arbitrations. It would be unreasonable to pass such costs on to the Respondent.

469. *Second,* the Arbitrator rejects the Claimant's claim for the costs of the tax opinions of Grant Thornton and Baker Tilly. These costs were incurred prior to the commencement of this arbitration and fall outside the generally accepted bounds of recoverable costs.

470. *Third,* the Arbitrator rejects the Claimant's claim for costs incurred in pre-arbitration meetings between the Parties' respective representatives.[341] Such costs fall outside the generally accepted bounds of recoverable costs, and are simply costs that the Parties commit themselves to expending when they entered into a condition precedent to arbitration requiring the Parties to first "*seek to resolve any dispute amicably by mutual consultation*".[342]

471. In consideration of the above and of the broader circumstances of this case, the Arbitrator considers that the interests of justice require legal fees and arbitration fees to lie where they fall. Stated differently, the Arbitrator considers that each Party must bear its own legal fees and arbitration costs.

---

340 Claimant's Submission on Costs, ¶ 3.

341 Claimant's Updated Prayer for Relief, 2 May 2022, ¶ 16(f).

342 Contract, GCC, cl. 49 (**Exhibit C-2**).

472. The Arbitrator considers that each Party should bear an equal share of the fees and expenses of the PCA as registry, and of the Arbitrator, including any expense met from the advance deposit. Given that the Claimant has paid USD 140,000 as advance costs deposits and the Respondent has paid nothing, this will require a payment of USD 70,000 from the Respondent to the Claimant.

VIII. DISPOSITIF

473. For the reasons set forth above the Arbitrator decides the following:

a. In relation to the Claimant's claim for unpaid unvoiced amounts, the Respondent shall pay the Claimant **USD 881,810.00** plus pre-Award interest in the amount of **USD 80,095.91**.

b. In relation to the Claimant's claim for unpaid environmental services, the Respondent shall pay the Claimant **USD 281,232.20**.

c. In relation to the Parties' arbitration costs, the Respondent shall pay the Claimant **USD 70,000.00**.

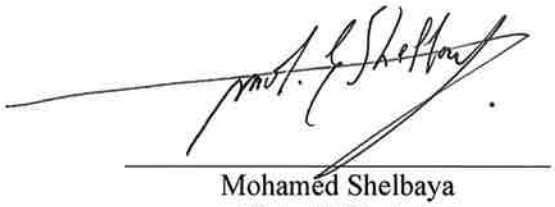
d. In relation to the Claimant's claim for post-award interest, the Arbitrator awards the Claimant post-award simple interest on all amounts awarded in (a), (b) and (c) at an annual rate of 5% running from Saturday 1 April 2023 (inclusive).

e. All other claims and counterclaims are rejected.

[*signature page follows*]

So ordered by the Arbitrator.

Place of Arbitration: Dubai, United Arab Emirates



Mohamed Shelbaya
(Sole Arbitrator)