

**IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF
THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 1976**

AND

**PURSUANT TO THE AGREEMENT BETWEEN THE GOVERNMENT OF THE
REPUBLIC OF INDIA AND THE REPUBLIC OF MOZAMBIQUE FOR THE
RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENT**

BETWEEN

PATEL ENGINEERING LIMITED

Claimant

and

THE REPUBLIC OF MOZAMBIQUE

Respondent

CLAIMANT'S SUBMISSION ON COSTS

18 August 2023



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I. INTRODUCTION

- 1 Claimant submits its Submission on Costs pursuant to Section 3 of Procedural Order No. 7 dated 23 December 2022 and the Tribunal’s correspondence A 62 dated 11 July 2023.¹ Claimant respectfully requests that the Tribunal use its discretion under Article 40 of the UNCITRAL Rules and order Respondent to bear all of Claimant’s reimbursable costs, which include: 1) Claimant’s share of the Tribunal’s fees and all the expenses totalling USD 850,000 and EUR 100,000; 2) PEL’s reasonable costs for counsel, expert witness and other expenses [REDACTED] and 3) a success fee [REDACTED].
- 2 *Chorzow Factory* requires the Tribunal to place PEL in the situation it would have been in absent Respondent’s breaches of the BIT.² To be made fully whole, PEL must be reimbursed for the sums it spent vindicating its rights. While the BIT is silent regarding the allocation of costs in an Investor-State dispute,³ under the UNCITRAL Rules⁴ the Tribunal has discretion to allocate costs approved or incurred by the Tribunal and the PCA (“**Arbitration Costs**”),⁵ as well as allocating reasonable “*costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings*” (“**Other Costs**”).⁶ For both of these categories of expenses, the Tribunal should assess “*the circumstances of the case*”⁷ including, *inter alia*, the success of the parties, their conduct,⁸ and the reasonableness of the expenditures given the relevant circumstances, including the legal and factual issues in dispute, the size of the pleadings filed, and the number of procedural issues that arose.⁹

¹ All capitalised terms, unless otherwise defined in this submission, have the meanings given to them in Claimant’s previous submissions.

² **CLA-174**, *The Factory at Chorzów (Claim for Indemnity) (The Merits) Germany v. Poland*, Judgment, 13 September 1928, p. 47.

³ Article 10(5) of the BIT discusses only allocation of costs in a State-to-State dispute.

⁴ See UNCITRAL Rules, Articles 38, 40(1), and 40(2).

⁵ UNCITRAL Rules, Articles 38 and 40(1). See also, e.g., **CLA-358**, *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela (I)*, Award on Costs, 30 August 2010 ¶ 18 (unofficial translation: “if there is a successful party, it ‘in principle’ should not have to pay the costs of arbitration. This principle should only be ignored if the Tribunal determines that the apportionment between the parties is ‘reasonable.’”).

⁶ UNCITRAL Rules, Articles 38(e) and 40(2).

⁷ Compare *Id.* at Article 40(1) (“[T]he costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.”) with Art. 40(2) (“With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.”). See also, e.g., **CLA-359**, *Serafin García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-03, Award, 26 April 2019 ¶¶ 558-559; **CLA-360**, *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, PCA Case No. 2016-07, Final Award, 21 December 2020 ¶ 2020 (“[I]n comparison with Article 40(1), Article 40(2) of the UNCITRAL Rules appears to afford the Tribunal a greater measure of discretion with respect to the allocation of the Legal Costs. Nevertheless, the Tribunal is of the view that the general principle that the ‘costs follow the event,’ save for exceptional circumstances, applies equally with respect to the Legal Costs.”)

⁸ See, e.g., **CLA-358**, *Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela (I)*, Award on Costs, 30 August 2010, ¶ 28 (Spanish original: “Teniendo en cuenta estas consideraciones, ¿cuáles son “las circunstancias del caso” a las que se refiere el artículo 40(2) del Reglamento CNUDMI que pueden ser consideradas por el Tribunal? Los tribunales internacionales han considerado un número de factores, incluyendo los siguientes: (a) la naturaleza de las partes; (b) el éxito de las partes; (c) la conducta de las partes; y (d) la dificultad de las cuestiones.”); **CLA-361**, *OOO Manolium Processing v. The Republic of Belarus*, PCA Case No. 2018-06, Final Award, 22 June 2021 ¶ 721 (“Typically, tribunals consider under this category aspects such as the conduct of each party throughout the proceedings or the complexity and novelty of the questions raised.”).

⁹ See, e.g., **CLA-359**, *Serafin García Armas and Karina García Gruber v. Venezuela*, Award, 26 April 2019 ¶¶ 558-570.

3 All these factors warrant an allocation in PEL’s favour of all of PEL’s Arbitration Costs and Other Costs. PEL is the successful party: this Tribunal has jurisdiction; Respondent breached the Treaty; and PEL is entitled to reparation for Mozambique’s internationally wrongful conduct. Further, even if the Tribunal finds that PEL is not entirely successful, Mozambique’s conduct in this arbitration, including its repeated attempts to circumvent and frustrate this Tribunal’s jurisdiction and offset any award it renders, nevertheless warrants a costs award in PEL’s favour. PEL’s Other Costs are also reasonable, especially considering Respondent’s choices to raise a myriad of frivolous procedural, legal, and factual arguments that PEL was required to address. Indeed, given Respondent’s conscious choice to drive up all costs in this matter, PEL’s reasonable costs of legal representation and assistance include third-party funding (“TPF”) costs.

II. PEL IS THE SUCCESSFUL PARTY

4 Under the UNCITRAL Rules, a claimant is the successful party for purposes of a costs allocation when it “*generally prevailed in the overall outcome*” of the claim, even if not every claim succeeded.¹⁰ Here, PEL has proven that this Tribunal has jurisdiction over PEL’s treaty claims,¹¹ that Mozambique violated the BIT,¹² and that PEL is entitled to compensation.¹³ Thus, even if the Tribunal awards less compensation than PEL originally sought, PEL is “*in general the successful party*” for purposes of the UNCITRAL Rules as it “*has prevailed in the majority of the jurisdictional objections and the Tribunal has found a breach*” of the BIT.¹⁴

III. EVEN IF PEL WERE UNSUCCESSFUL, RESPONDENT’S CONDUCT WARRANTS COSTS TO BE ALLOCATED IN PEL’S FAVOUR

5 Should for some reason the Tribunal issue an award wherein PEL cannot be considered the “*successful party*”, or the Tribunal considers PEL only partially successful, Respondent’s conduct makes it “*reasonable*” to depart from any “*loser pays*” or “*costs follow the event*” presumption and award PEL all its reimbursable costs. “*Apportionment based on the conduct of the parties has occurred under a variety of circumstances.*”¹⁵ For example, in the *Serafin*

¹⁰ **CLA-362**, *Gramercy Funds Management LLC, and Gramercy Peru Holdings LLC v. The Republic of Peru*, ICSID Case No. UNCT/18/2, Final Award, 6 December 2022 ¶ 1389. See also e.g., **CLA-363**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)*, PCA Case No. 2012-07, Final Award, 23 December 2019, ¶ 584 (“*Having prevailed on jurisdiction, and most of his claims on liability, and having been awarded a sum of damages, albeit significantly lower than the amount claimed, Mr Bahgat is to be considered the ‘successful party’.*”).

¹¹ See, e.g., Claimant’s Post-Hearing Brief (“**Claimant’s PHB**”), Section II and sources cited therein.

¹² *Id.* at Section IV and sources cited therein.

¹³ *Id.* at Section V and sources cited therein.

¹⁴ **CLA-361**, *Manoliium Processing v. Belarus*, Final Award, ¶¶ 725-726 (requiring the Respondent to “*reimburse Claimant the totality of Claimant’s contribution to the Arbitrators’ Fees and Expenses and the Tribunal’s Other Costs*”); See also, e.g., **CLA-362**, *Gramercy Funds Management and Gramercy Peru Holdings v. Peru*, Final Award, ¶¶ 1375, 1377, and 1385-1389 (finding that “*prima facie, Claimants are the successful party in this arbitration. Claimants have convinced the Tribunal that it has jurisdiction and that the Republic breached . . . the Treaty*” despite the fact that “*Claimants did not prevail on every argument in support of that Claim, but they prevailed sufficiently to prove the Main Claim and to be considered successful in that regard*” and “*the Republic has been successful in significantly reducing the compensation finally determined by the Tribunal.*”).

¹⁵ **CLA-359**, *Serafin García Armas and Karina García Gruber v. Venezuela*, Award, 26 April 2019 n. 996 (quoting David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed.), Oxford, 2013, p. 871-872) (omissions in original).

Garcia Armas v. Venezuela case, the tribunal found that Venezuela’s conduct warranted the full reimbursement of arbitration costs and the claimants’ legal fees “*even if some of the claimants’ claims were rejected in whole or in part.*”¹⁶ Like the present case, Venezuela’s conduct included repeated refusals to pay the PCA’s requested deposits, failure to disclose documents, multiple requests to stay the proceedings, allegations of fraud, and other incidents which “*as a whole, unduly affected the regular development of this Arbitration, significantly increasing its costs and duration.*”¹⁷ Other factors tribunals have considered include the respondent’s conduct necessitating the arbitration,¹⁸ as well as whether the respondent “*decided to pursue every possible argument . . . some of which sought to revisit even relatively well-established principles of investment treaty jurisprudence.*”¹⁹

- 6 From the outset, Mozambique has demonstrated a calculated strategy to increase the costs to PEL of pursuing its Treaty rights, to delay these proceedings, and to frustrate both this Tribunal’s jurisdiction and its ultimate award. Such conduct includes, *inter alia*:
- (a) launching a contractual arbitration in which Mozambique raises the same claims it has raised before this Tribunal;
 - (b) refusing PEL’s reasonable proposals to consolidate the two proceedings;
 - (c) attempting unsuccessfully to bifurcate the proceedings;
 - (d) three unsuccessful applications to stay these proceedings while advancing arguments intended to undermine this Tribunal’s jurisdiction, the latest of which was filed on the eve of the merits hearing;
 - (e) raising 12 manifestly untenable and frivolous objections to jurisdiction and admissibility;
 - (f) refusing to cooperate during the document production process (*e.g.*, Respondent voluntarily disclosed only three documents in response to the entirety of Claimant’s requests), including failing to produce critical documents that Mozambique was legally required to preserve such as recordings and minutes from the Council of Ministers’ meetings;

¹⁶ **CLA-359**, *Serafín García Armas and Karina García Gruber v. Venezuela*, Award, 26 April 2019 ¶ 565 (unofficial translation, Spanish Original: “*Con base en lo anterior, el Tribunal concluye que, aun cuando algunas de las pretensiones de los Demandantes fueron rechazadas, parcial o totalmente, la Demandada deberá asumir la totalidad de los costos de este arbitraje, los cuales se detallan como sigue.*”).

¹⁷ *Id.* at ¶¶ 560-565.

¹⁸ *See, e.g.*, **CLA-364**, *Sterling Merchant Finance Ltd v. Government of the Republic of Cabo Verde*, PCA Case No. 2014-33, Final Award, 27 November 2015 ¶ 269 (“[T]he Sole Arbitrator is also empowered to take into consideration the circumstances of the case. . . had the Respondent paid the Sixth Invoice as it should have, this arbitration could have been avoided.”).

¹⁹ **CLA-365**, *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Award, 11 September 2018 ¶ 442.

- (g) refusing to pay USD 350,000 of the PCA’s requested deposits; and
- (h) its most recent attempt to circumvent any award from this Tribunal by asking the Contract Tribunal to award an offset of any and all damages this Tribunal may award.

7 All of these deliberate choices by Respondent warrant an apportionment of all Arbitration and Other Costs in PEL’s favour.

IV. PEL’S OTHER COSTS ARE REASONABLE GIVEN THE CIRCUMSTANCES OF THE CASE

8 PEL’s Other Costs are reasonable, especially given Respondent’s calculated choice to raise manifestly untenable and frivolous jurisdictional objections, factual allegations, and procedural arguments to which PEL was forced to respond.

A. PEL’s Counsel Fees (Including Success Fees) Are Reasonable

9 Claimant’s counsel’s fees incurred to date ██████████
██████████ These counsel fees are reasonable given the complexity of this lengthy arbitration proceeding, Claimant’s burden of proof,²⁰ and Respondent’s conduct. “*While every party is entitled to its own legal strategy regarding the number of arguments to run and the depth of briefing to accord each argument, this strategy necessarily represents a choice, and the choice impacts the level of costs incurred.*”²¹ Here, Respondent’s conduct significantly increased PEL’s costs in pursuing this arbitration beyond the time and expense that normally would have been required to pursue an ISDS claim, including, by way of example only: (1) PEL devoted over 223 pages of its substantive pleadings, or 33% percent of the total, responding to Respondent’s frivolous jurisdiction and admissibility objections;²² (2) PEL had to engage a forensic expert to defend against Respondent’s false allegation that PEL’s hard copy MOIs were fraudulent,²³ including lengthy and costly discussions about potential protocols for the mutual exchange and examination of original documents, only to see Respondent withdraw its allegations of fraud after it opted not to produce its original documents; (3) to defend itself against Respondent’s spurious (and now withdrawn) corruption allegation, Claimant hired private investigators to retrieve documents from Mozambique as Claimant no longer has a presence there; (4) PEL’s counsel spent significant time drafting submissions and letters in

²⁰ CLA-107, *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 624 (“[I]t is not unusual for claimants to spend more on costs than respondents given, among other things, the burden of proof.”).

²¹ See, e.g., CLA-365, *Louis Dreyfus Armateurs SAS v. Republic of India*, PCA Case No. 2014-26, Award, 11 September 2018 ¶ 442 (“*While every party is entitled to its own legal strategy regarding the number of arguments to run and the depth of briefing to accord each argument, this strategy necessarily represents a choice, and the choice impacts the level of costs incurred.*”).

²² This includes the SoC (155 pages), Reply (332 pages), Rej. Jx (154 pages), and Cls. Add’l Quant. (25 pages).

²³ See, e.g., SoD ¶ 467 (claiming that PEL’s English MOI “was not what was agreed to or executed”).

response to Respondent’s unsuccessful procedural arguments, including Respondent’s attempts to bifurcate the proceedings, its multiple attempts to stay the proceedings (including on the eve of the Hearing), and its attempt to strike Claimant’s final pleading.

10 [REDACTED]

[REDACTED] Given that this success fee to CMS “is a fee that the Claimant[] ha[s] already incurred a legal obligation to pay”, was necessary to secure continued representation by PEL’s counsel in this proceeding, and is payable in full to CMS upon success in this proceeding, regardless of the proceeding in which the fees were incurred, the entire success fee is a “cost of legal representation” recoverable under the UNCITRAL Rules.²⁶ “Success fees have become common in international litigation and not considering them as costs for legal representation and assistance would deprive a party from finding adequate legal assistance.”²⁷

B. PEL’s Expert Witness Fees and Other Expenses Are Reasonable

11 PEL required the assistance of five expert witnesses to respond to Mozambique’s allegations—including its entirely unfounded arguments relating to the authenticity of the MOI. [REDACTED] These expert witness costs are reasonable in light of the complexity of the matters covered by each of the experts and accordingly, Claimant requests reimbursement in full.

12 PEL’s other expenses in prosecuting this arbitration include [REDACTED] [REDACTED] for travel and accommodation for legal counsel, experts, and fact witnesses,

[REDACTED]

²⁶ See, e.g., **RLA-123**, *Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd.*, PCA Case No. 2011-09, Award, 2 March 2015 ¶¶ 445-449 (“Although this is not a fee that has been ‘incurred’ to date as required by Article 40(2)(e) of the UNCITRAL Rules, it is a fee that the Claimants have already incurred a legal obligation to pay. The Tribunal thus finds that it is recoverable under this same provision. Moreover, creating a distinction between “incurred and paid” fees and fees for which the liability has been incurred seems artificial, given that the Tribunal could, in theory, render a partial award on liability and quantum, followed by a separate costs award that would include the paid success fee. The same conclusion was reached in *Siag v Egypt*.”).

²⁷ **CLA-363**, *Mohamed Abdel Raouf Bahgat v. Egypt (I)*, Final Award, 23 December 2019 ¶ 588.

translation costs, printing costs, courier services, IT services, and costs for retrieving documents and information from Mozambique where PEL has no current presence.

13 In addition, PEL’s costs of legal representation and assistance include a portion of the salaries of Mr Kishan Daga and his assistant, Mr Swapnil Jugal. As explained by PEL’s HR department, for almost six years, Mr Daga and Mr Jugal have been managing this dispute for PEL. Their duties have included managing PEL’s relationship with its various external counsel, locating documents, and assisting with the preparation of Claimant’s pleadings. In addition, Mr Daga spent significant time preparing his witness statements and in preparing to attend the hearing as PEL’s representative and to testify at that hearing. [REDACTED]

V. PEL IS ENTITLED TO THE COSTS OF THIRD-PARTY FUNDING UNDER THE CHORZOW STANDARD AND THE UNCITRAL RULES

14 [REDACTED]

15 To fully satisfy the *Chorzow* factory standard of full reparation,³¹ PEL is entitled to a costs award that includes all of the amounts due to [REDACTED] should the Tribunal award PEL damages at the lower range of the options PEL has presented to the Tribunal.³² [REDACTED]

²⁸ See **Exhibit C-409**, Letter from Mr Sonal Raj, Add’l Vice President HR, Patel Engineering to Tribunal dated 1 August 2023. Note that Mr Jugal’s time also included traveling to Porto and assisting Mr Daga during the Hearing.

³¹ **CLA-174**, The Factory at Chorzów (Claim for Indemnity) (The Merits) *Germany v. Poland*, Judgment, 13 September 1928, p. 47 (“[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.”)

³² See, e.g., Claimant’s PHB, Section V.

[REDACTED]

[REDACTED]

16 In line with *Chorzow*, the UNCITRAL Rules permit the Tribunal to consider the amounts as costs that can be apportioned between the Parties. Article 38(e) of the UNCITRAL Rules allows the Tribunal to apportion “*cost of legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings. . . to the extent that the arbitral tribunal determines that the amount of such costs is reasonable*”. Here, the premiums that PEL is required to pay [REDACTED] are a reasonable “*cost of legal representation and assistance*” that PEL has claimed from the outset of these proceedings.

17 First, these TPF costs are costs of legal representation and assistance. PEL promised to pay these amounts [REDACTED] to secure funding to pursue its claims and to access justice. As noted by the *Bahgat* tribunal, “[t]he wording ‘*costs for legal representation and assistance*’ [in Article 38(e)] is open for interpretation; it all depends whether such fees are being promised in connection with legal representation or assistance.”³⁴ While the *Bahgat* tribunal was speaking in the context of a solicitor’s success fee, its interpretation of Article 38(e) applies equally to third-party costs. Indeed, the ICC has taken the position, with similar reasoning behind it as the *Chorzow* standard, that “*the [successful] party should not be out of*

[REDACTED]

³⁴ CLA-363, *Mohamed Abdel Raouf Bahgat v. Egypt*, Final Award, 23 December 2019, ¶ 588.

pocket as a result of having to seek adjudication to enforce or vindicate its legal rights” and a tribunal can include in its costs award the successful party’s costs of capital, including success fees or uplifts due to third party funders, as long as the Tribunal finds that the “cost was incurred specifically to pursue the arbitration, has been paid or is payable, and was reasonable”.³⁵ Similarly, in *Essar*, the tribunal noted *inter alia* that “it was difficult to see the difference between, on the one hand, allowing a party to recover pre-judgment on the interest on costs, which is routinely Awarded ... and allowing a party to recover the interest it has had [itself] had to pay to the third party to cover those pre-judgment legal fees on his behalf.”³⁶

18 Second, both PEL’s decision to obtain litigation financing [REDACTED] and the premiums due [REDACTED] are entirely reasonable.³⁷ Reasonableness is not dependent upon whether other forms of funding were available to PEL, but rather whether “the recourse to this kind of funding was reasonable in the circumstances”.³⁸ Given the inherent risks in bringing claims of this type, [REDACTED], it was reasonable for PEL to seek non-recourse funding from the TPF market to pursue its claims.³⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

19 Third, PEL repeatedly put Respondent on notice that its claim was funded. PEL disclosed its relationship [REDACTED] at the outset of the case when the Parties were negotiating the Tribunal’s Terms of Appointment.⁴² Respondent has repeatedly requested a costs award against PEL’s “litigation funder.”⁴³ While this request is entirely meritless given that this Tribunal has no jurisdiction over [REDACTED] and Respondent has provided no legal basis for a

³⁵ CLA-366, ICC Commission Report: Decision on Costs in International Arbitration ¶¶ 86 and 92.

³⁶ CLA-367, *Essar Oilfields Services Limited v. Norscot Rig Management Limited* [2016] EWHC 2361 (Comm) ¶ 33 (quoting from the arbitrator’s decision).

³⁷ See CLA-368, *Katanga Contracting Services (KCS) S.A.S v. Tenke Fungurume Mining (TFM) S.A.*, ICC Case No. 25063/TO/AZR/SPN (C-25064/TO), Final Award, 26 August 2021. ¶ 411 “As appears from the legal authorities discussed above, the principal issue that the Tribunal needs to decide in relation to the claimed funding costs is whether they are “reasonable” in two respects: as to the principle of the Claimant having recourse to this type of funding and as to the amount.”).

³⁸ See, e.g., CLA-369, *Tenke Fungurume Mining (TFM) S.A. v. Katanga Contracting Services (KCS) S.A.S.*, [2021] EWHC 3301 (Comm) ¶71 (“The issue for the Tribunal was whether the recourse to this kind of funding was reasonable in the circumstances, not whether KCS could have obtained funding from other sources”).

³⁹ [REDACTED]

⁴⁰ CLA-368, *KCS v. TFM*, Final Award ¶ 414. [REDACTED]

⁴¹ [REDACTED] See also CLA-368, *KCS v. TFM*, Final Award ¶ 417 (“the Respondent’s expert’s report is of some assistance insofar as it indicates that although there is no rule of thumb as to the cost of litigation funding, multiple returns on funding range from 1 to 5. He also confirms his agreement with the views of Mr Blick, the funding specialist who testified in the *Essar* case, who referred to multiples of 3, 4 or 5, sometimes less or sometimes more, depending on whether the case to be funded is a ‘difficult case.’”)

⁴² Exhibit C-411, Claimant’s Correspondence C-3 dated 10 July 2020.

⁴³ See, e.g., SoD, Section X.

costs award against a litigation funder as a matter of international law or the UNCITRAL Rules,⁴⁴ Respondent's request evidences that it was fully cognizant of PEL's arrangements [REDACTED] from the outset of this arbitration.

- 20 Fourth, PEL has repeatedly informed Respondent that it would seek reimbursement for all amounts due [REDACTED]. In every pleading starting with the NoA, PEL's Request for Relief has always included a request that this Tribunal award PEL the "*fees associated with third party funding.*"⁴⁵ Respondent has never raised any objection to this aspect of PEL's requests for relief.
- 21 Finally, Respondent's conduct is directly responsible for the increased multiples due [REDACTED] [REDACTED]. Respondent knew from the start that as a funded claimant, PEL had a limited budget for this arbitration. Yet Respondent chose to pursue a scorched earth strategy deliberately intended to drive up the costs of the arbitration and force PEL to either stop pursuing its claims or to increase the costs for it to do so. These tactics included refusing to consolidate its parallel claims, pursuing frivolous procedural arguments, raising legal arguments and accusations it knew would require extensive resources from PEL to defend against, and refusing to pay its share of the PCA's requested deposits. Respondent knew (or at the very least should have known) that its actions would cause PEL to seek additional funding [REDACTED] [REDACTED] or another funder on the market, and that any additional funding would require a higher return given the additional risks the funder would be taking on stemming directly from Respondent's conduct.⁴⁶
- 22 Indeed, Respondent was specifically notified of the higher returns PEL would be required to pay if Respondent did not alter its course. When Respondent failed, yet again, to pay its share of the Tribunal's requested deposits, PEL explicitly informed Respondent that it would be required to seek funding to cover Respondent's share of the deposit, that an additional tranche of funding would come at [REDACTED], and that Claimant would seek reimbursement for the full [REDACTED] as part of its cost award.⁴⁷ Fully on notice of the potential consequences, Respondent still declined to pay its share of the deposit.

⁴⁴ See, e.g., Reply, Section IX.

⁴⁵ NoA, ¶ 110(c). See also, e.g., SoC ¶ 483(d); Reply ¶ 1152(e); Rej. Jx. ¶ 527(e); Cls. Add'l Quant. ¶ 53(b).

⁴⁷ Exhibit C-412, Claimant's correspondence C-87, ¶ 9.

VI. PEL IS ENTITLED TO INTEREST ON ANY COSTS AWARD

23 Many tribunals have ordered the unsuccessful party to pay interest on the costs allocated to it.⁴⁸ Here, PEL has repeatedly requested that the Tribunal award interest on any costs allocated in PEL's favour.⁴⁹ As discussed in Claimant's PHB, the rate of interest could be either US prime plus 2%, or Respondent's cost of borrowing, as suggested at the Hearing.⁵⁰

VII. CONCLUSION

24 *Chorzow* requires that Respondent's breaches of the BIT be entirely wiped away and that PEL be made whole. The UNCITRAL Rules give this Tribunal the necessary discretion to do so. PEL can only be made whole if this Tribunal issues a costs award for all of the amounts that PEL has paid to the PCA as well as *all* of PEL's "*costs of legal representation and assistance.*" This means not just payments to attorneys and expert witnesses, but PEL's personnel costs and the amounts it promised to pay ██████ in exchange for funding its claim. These TPF costs are especially warranted in this case given Respondent's full knowledge of PEL's arrangement with ██████ and its conscious choices to significantly increase the costs of this arbitration at every opportunity.

VIII. PRAYER FOR RELIEF

25 For the reasons set out above (and in addition to Claimant's previous Requests for Relief), Claimant respectfully requests that the Tribunal:

- (a) **ORDER** Respondent to pay all the costs incurred by Claimant in connection with this arbitration proceeding, including the costs of the arbitrators' fees and of the PCA, legal costs and other expenses (including but not limited to those of counsel, experts, consultants, PEL's personnel, and the costs of third-party funding);
- (b) **ORDER** Respondent to pay pre- and post- award interest at a rate to be determined by the Tribunal on any compensation and/or arbitration costs and/or legal costs awarded to Claimant; and
- (c) **ORDER** such further relief as the Tribunal considers appropriate.

⁴⁸ See, e.g., **CLA-364**, *Sterling Merchant Finance Ltd v. Government of the Republic of Cabo Verde*, PCA Case No. 2014-33, Final Award, 27 November 2015 ¶ 272; **CLA-363**, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)*, PCA Case No. 2012-07, Final Award, 23 December 2019 ¶ 617.

⁴⁹ See, e.g., NoA ¶ 110(d). See also, e.g., SoC ¶ 483(e); Reply ¶ 1152(f); Rej. Jx. ¶ 527(f); Cls. Add'l Quant. ¶ 53(c).

⁵⁰ Claimant's PHB ¶ 75.

Respectfully submitted on 18 August 2023 by

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