

EXHIBIT A

COUR PERMANENTE D'ARBITRAGE



PERMANENT COURT OF ARBITRATION

**CERTIFICATION OF COPY OF
AWARD ON THE MERITS DATED 1 APRIL 2014**

RE: PCA CASE N° 2010-7 – BALKAN ENERGY (GHANA) LIMITED V. THE REPUBLIC OF GHANA

I, Dirk Pulkowski, Senior Legal Counsel of the Permanent Court of Arbitration ("PCA"), which acts as Registry in the above-referenced matter, hereby CERTIFY that the document annexed hereto (Award on the Merits dated 1 April 2014) is a true and authentic copy of the original document kept in the PCA's archives.

Signed, this 15th day of November 2016, at The Hague, the Netherlands:

Dirk Pulkowski
Senior Legal Counsel
Permanent Court of Arbitration
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The Netherlands

THE REPUBLIC OF GHANA

The undersigned has been duly authorized to sign this document on behalf of the Government of Ghana.

AWARD ON THE MERITS

By the Award

Professor Professor Dr. J. van der Ziel, Chairman of the Arbitral Tribunal

Judge Professor Dr. J. van der Ziel

Judge Professor Dr. J. van der Ziel

Witness

Permanent Court of Arbitration

IN THE MATTER OF AN ARBITRATION
BEFORE A TRIBUNAL CONSTITUTED IN ACCORDANCE WITH THE POWER
PURCHASE AGREEMENT BETWEEN THE GOVERNMENT OF GHANA, ACTING BY
AND THROUGH ITS MINISTER FOR ENERGY, AND BALKAN ENERGY (GHANA)
LIMITED ON OSAGYEFO POWER BARGE AND ASSOCIATED FACILITIES, EFFASU
PROJECT, DATED JULY 27, 2007
("PPA")

-and-

THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
RULES OF ARBITRATION AS ADOPTED IN 1976 ("UNCITRAL Rules")
ADMINISTERED BY THE PERMANENT COURT OF ARBITRATION ("PCA")
PCA CASE NO. 2010-7

-between-

BALKAN ENERGY (GHANA) LIMITED

(the "Claimant")

-and-

THE REPUBLIC OF GHANA

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

AWARD ON THE MERITS

By the Tribunal

Professor Francisco Orrego Vicuña (Presiding Arbitrator)
Judge Stephen M. Schwebel
Judge Thomas A. Mensah

Registry

Permanent Court of Arbitration



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ANNEX: THE POWER PURCHASE AGREEMENT

GLOSSARY OF DEFINED TERMS / LIST OF ABBREVIATIONS

2005 Ansaldo Report	A report on the Barge produced by its manufacturer, Ansaldo Energia S.p.A.
ABB	A company based in Zurich, Switzerland, specialising in power and automation technologies
Agreed Chronology of Events	Chronology prepared by the Parties and submitted to the Tribunal on 26 March 2013
Ansaldo	Ansaldo Energia S.p.A., the original manufacturer of the Barge
Arbitration Agreement	Arbitration clause contained in the PPA
Balkan Nevada	Balkan Energy LLC, incorporated in Nevada, United States, and successor-in-interest to Syntek West and Balkan Wyoming
Balkan UK	Balkan Energy Limited, incorporated in the United Kingdom
Balkan US	BEL's purported parent company, incorporated in the United States and with its principal place of business in Dallas, Texas
Balkan Wyoming	Balkan Energy Corporation Wyoming, LLC, incorporated in Wyoming, United States, and subsidiary of Syntek West until 2009
Barge	One hundred and twenty-five megawatt (125MW) dual fired (diesel and gas) Osagyefo Power Barge in Effasu in Ghana's western region
BEL	The Claimant, Balkan Energy (Ghana) Limited
BNI	Ghana's Bureau of National Investigation
BSG	Black Start Generator, used during commissioning and testing when larger quantities of electrical energy are required
CISG	United Nations Convention on Contracts for the International Sale of Goods (1980)

Claimant	Balkan Energy (Ghana) Limited
Claimant's 5 November 2010 Submission	Claimant's Answers to Questions Posed to the Parties by the Arbitral Tribunal at the Hearing of 15 October 2010, dated 5 November 2010
Claimant's Answers	Claimant's Answers to Questions Posed to the Parties by the Arbitral Tribunal, dated 14 September 2010
Claimant's June 7 Letter	Claimant's submission to the Tribunal of 7 June 2013 and its 1 July 2013 supplement, answering to the Tribunal's letter of 7 May 2013
Claimant's Post-Hearing Submission	Claimant's Post-Hearing Closing Brief, dated 26 August 2013
Completion Date	Pursuant to the PPA, the day upon which both parties certify that the Power Station, capable of operating in accordance with the Operating Parameters, has successfully completed its testing and commissioning
Constitution	Constitution of the Republic of Ghana (1992)
DCCP	Dutch Code of Civil Procedure
DCS	Distributed Control System
Effective Date	Effective Date of the Power Purchase Agreement
First Fire	A purported milestone of the "commissioning and testing" phase for the Power Station
FSFL	Full Speed Full Load—the last milestone of the commissioning and testing phase for the Power Station, signaling that electricity can be generated on a continual basis
FSNL	Full Speed No Load—a milestone of the commissioning and testing phase that involves firing up the turbines to full speed, controlling the situation, and bringing the turbines back down to zero
G-NITS	Ghana's National Interconnected Transmission System

GT	Gas Turbine
Ghana	The Respondent, the Republic of Ghana
Ghana High Court	High Court of Justice (Commercial Division), Accra, Ghana
Ghana High Court Order	Order for Interlocutory Injunction, 25 June 2010, High Court of Justice (Commercial Division), Accra, Ghana
Ghana High Court Ruling	Ruling, 6 September 2010, High Court of Justice (Commercial Division), Accra, Ghana
GIPC	Ghana Investment Promotion Center
Grid Connection Process Agreement	Agreement between BEL and the VRA, signed on 17 June 2008
GRIDCo	Entity related to the VRA
Hearing Transcript	Transcript of the hearing held in London, England, on 15 October 2010
Information Paper	Document issued in July 2013 to Parliament by the Minister of Finance and Attorney General to assist Parliament
ILC Articles	Draft Articles on the Responsibility of States for International Wrongful Acts, adopted by the International Law Commission of the United Nations in 2001
Inter-Ministerial Committee Report	Report, dated 8 August 2009, drafted by the Inter-Ministerial Committee after its June 2009 site visit to the Barge
Interim Submission on Supreme Court Judgment	Claimant's Interim Submission with Respect to the Ruling of the Supreme Court of Ghana, dated 21 June 2012
Letter of Credit	Letter of Credit issued by Stanbic Bank Ghana Limited to BEL on 24 August 2007
Letter of Intent	Letter Provided to Mr. Elders (per his request) on 21 June 2007 by

	the Ministry of Energy
MicroSCADA	Micro Supervisory Control and Data Acquisition System
MOU	Memorandum of Understanding of 16 May 2007, signed between Ghana's Minister of Energy, the Honourable Mr. Joseph K. Adda, and Mr. Phillip Elders, Senior Vice President for Balkan US
National Grid	Ghana's national grid
New York Convention	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958
Notice of Arbitration	Notice of Arbitration, dated 23 December 2009, in the Matter of an Arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), Balkan Energy (Ghana) Limited v. The Republic of Ghana, acting as the Government of Ghana and, more in particular, through its Ministry of Energy
Parties	The Claimant and the Respondent
PCA	Permanent Court of Arbitration
Power Station	Osagyefo Power Barge and associated facilities
PPA	Power Purchase Agreement Between the Government of Ghana, Acting by and through its Minister of Energy and Balkan Energy (Ghana) Limited on Osagyefo Power Barge and Associated Facilities Effasu Project
ProEnergy	ProEnergy Services LLC and ProEnergy Services International, Inc. a contractor on the Barge
ProEnergy Litigation	Legal proceedings initiated in February 2009 by Balkan Energy LLC against ProEnergy in the United States District Court for the Western District of Missouri
Project Site	Site at which the Barge is located

Proposal	Detailed Technical and Commercial Proposal submitted by Claimant to Respondent in 2007
PURC	Ghana's Public Utilities Regulatory Commission
Rejoinder	Respondent's Rejoinder, dated 20 December 2012
Reply	Claimant's reply to Statement of Defense, dated 6 September 2012
Respondent	The Republic of Ghana
Respondent's 10 July Letter	Respondent's submission to the Tribunal, dated 10 July 2013, answering to the Claimant's submission to the Tribunal dated 7 June 2013 and its 1 July 2013 supplement
Respondent's Post-Hearing Submission	Respondent's Post-Hearing Memorial, 3 September 2013
RTU	Remote Terminal Unit on the Barge
SFC	Static Frequency Converter
Stanbic Bank	Stanbic Bank Ghana Limited
Statement of Claim	Claimant's Statement of Claim, dated 15 October 2011
Statement of Defense	Respondent's Statement of Defense, dated 26 April 2012
Substation	Control substation for the Power Station
Supreme Court Judgment	Judgment by the Supreme Court of Ghana, dated 16 May 2012
Syntek West	Syntek West, Inc., incorporated in the United States
Taurus	Taurus Power & Controls Inc., incorporated in the United States
Terms of Appointment	Terms of Appointment, dated 2 July 2010
Tolling Fees	Charges as detailed in Clause 11 of the PPA

Tower 1	Last tower on the Project Site
Tower 3	Tower just outside the Project Site
Transmission Lines	Essiama Transmission Line and Elubo Transmission Line
Tribunal	Arbitral Tribunal in the present arbitration
Turbines	The two turbines at the Power Station
Turning Gear	A first milestone in the commissioning process, which entails getting the Turbines to turn very slowly) to test if they work mechanically
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law of 1976
US District Court	United States District Court for the Western District of Missouri
VRA	Ghana's Volta River Authority

DRAMATIS PERSONAE

Mr. Moro Adama	Employee at Ghana's Bureau of National Investigation Divisional Headquarters in Elubo from September 2008 to September 2010
Honourable Joseph K. Adda	Ghana's Minister of Energy from 2006-2008
Mr. Nana Amo	Local Ghanaian consultant hired by BEL to assist Mr. Elders with the negotiation of the PPA
Mr. Eric Asare	Employee at the Volta River Authority from 1998 to the present
Mr. Richard Badger	Director of Thermal Power Generation at the Volta River Authority from 2009 to the present.
Mr. William Berkenbile	Mechanic for ProEnergy Services LLC (BEL's subcontractor) from 2007-2010; currently the Maintenance Manager at BEL
Mr. John Bryant	Project Manager at ProEnergy Services LLC "at the times relevant to this arbitration" (C-36, at 1); currently their Director of Technical Services
Mr. Neil Crouch	Vice President and Chief Financial Officer at BEL
Mr. Phillip Elders	Chief Executive Officer of BEL and Balkan US
Mr. Timothy Everhart	Employee at BEL from January 2008 to the present
Mr. Peter A. Fairhurst	Project and Site Manager for the Power Generation Division of Parsons Brinckerhoff
Ms. Vivien Gadzekpo	Legal Counsel, Ghana's Ministry of Energy
Mr. Max Gyamfi	Director of Petroleum, Ghana's Ministry of Energy
Mr. John Agyekum Kufuor	President of Ghana from 2001-2009
Mr. Robert MacDonald	Employee at BEL from September 2008 until the present
Mr. Isaac Darfour Manu	Technical Manager at the Volta River Authority from 2007 to 2010; employee since 1998; currently their Operations Manager since May 2010
Mr. Emmanuel Osafo	Construction Manger for the Project Implementation Unit of the West African Power

	Pool Project, which constructed the first extra high voltage facility in Ghana; currently the Deputy Director of Power at Ghana's Ministry of Energy since 2010
Mr. Lonnie Peters	Plant Manager at BEL
Mr. Gene Phillips	Sole shareholder of Syntek West Inc. and other companies which invested in Balkan US and BEL; Majority shareholder in BEL
Mr. Gabriel Quain	Deputy Director of Power, Ghana's Ministry of Energy
Mr. Pierantonio Savio	Manager of Ansaldo Energia S.p.a., the manufacturer of the Barge
Mr. KK Sey	BEL's Ghanaian lawyer who assisted Mr. Elders in concluding the PPA
Mr. Peter A. Watson	Chief Protection Engineer for the Power Networks Transmission Division of Parsons Brinckerhoff
Mr. Joseph Wiafe	Chief Executive Officer of GRIDCo from July 2007 to September 2009
Mr. Henri Winches	Local Ghana Representative for Ansaldo Energia S.p.A.

I. INTRODUCTION

A. THE PARTIES

1. The Claimant in this arbitration is Balkan Energy (Ghana) Limited (the “**Claimant**” or “**BEL**”), a limited liability company incorporated in Ghana, with its registered office at Fidelity House, 20 Ring Road Central, Accra, Ghana. According to the Claimant, BEL’s sole shareholder is Balkan Energy Limited, a company incorporated in the United Kingdom (“**Balkan UK**”), which in turn is wholly owned by a parent company incorporated in the United States (“**Balkan US**”) on 15 October 2008. The Claimant is represented by Mr. Mitchell Madden, Law Offices of Mitchell Madden, Montfort Place, 13800 Montfort Dr., Suite 160, Dallas, Texas 75240 USA; Mr. Gerard J. Meijer, NautaDutilh N.V., P.O. Box 1110, 3000 BC Rotterdam, and Weena 750, 3014 DA Rotterdam, the Netherlands; and Mr. Ace Anan Ankomah, Bentsi-Enchill, Letsa & Ankomah, 4 Barnes Close, Education Loop (off Barnes Road), P.O. Box GP1632, Accra, Ghana.
2. The Respondent is the Republic of Ghana (the “**Respondent**” or “**Ghana**”). The Respondent is represented by the Honourable Marietta Brew Appiah-Oppong, Attorney-General and Minister of Justice, Attorney-General’s Department, Post Office Box MB 60, Accra, Ghana; Mr. Jonathan D. Siegfried and Ms. Kiran Gore, DLA Piper LLP, 1251 Avenue of the Americas, 27th Floor, New York, NY 10020-1104, United States; Mr. Fui S. Tsikata, Ms. Ekua Hayfron-Benjamin and Ms. Zoe Phillips, Reindorf Chambers, Legal Practitioners, 20 Jones Nelson Road, P.O. Box 821, Adabraka, Accra, Ghana.

B. BACKGROUND TO THE DISPUTE

3. The present dispute concerns a Power Purchase Agreement (the “**PPA**”) entered into by the Parties on 27 July 2007, with an effective date of 31 October 2007 (the “**Effective Date**”).¹ Faced with a severe power shortage, in 2007, Ghana entered into negotiations with Balkan US for the refurbishment and commissioning of the Osagyefo Power Barge (the “**Barge**”) a one hundred and twenty-five megawatt (125MW) dual fired (diesel and gas) Power Barge and associated facilities (the “**Power Station**”) in Effasu in the Western Region of Ghana, which

¹ Power Purchase Agreement Between the Government of Ghana, Acting by and through its Minister for Energy and Balkan Energy (Ghana) Limited on Osagyefo Power Barge and Associated Facilities Effasu Project July 2007 (“**PPA**”); Notice of Arbitration, 23 December 2009 (“**Notice of Arbitration**”).

was then unused.² Under the PPA, BEL was to commission the Barge within ninety (90) working days of the Effective Date; convert it into a combined cycle power plant by the addition of certain facilities; upgrade the capacity of the Barge; and invest in infrastructure to enable natural gas to be supplied to the Barge.³ For its part, Ghana was to ensure that all electricity necessary for the refurbishment and commissioning of the Barge was provided; facilitate the acquisition of government approvals, visas, and equipment; construct and install the transmission line required to connect to Ghana's national grid (the "National Grid"); and take and pay for all electricity thereafter generated by the Power Station.⁴

4. Each Party alleges that the other has failed to perform its obligations under the PPA. The Claimant contends that the Respondent has failed to provide adequate site electricity;⁵ failed to provide a connection to the National Grid through a proper transmission line;⁶ and failed to comply with its obligation to facilitate the acquisition and installation of a piece of equipment, known as a Remote Terminal Unit (the "RTU"), on the Barge.⁷ The Claimant further contends that, under Clause 11.9 of the PPA, it is owed tolling fees ("Tolling Fees") since 28 October 2008, the date on which it alleges that the Power Station would have been completed but for the Respondent's failure to provide an adequate transmission line and interconnection facilities.⁸ The Tolling Fees are meant not only to cover the cost of electricity but also remunerate the Claimant for its investments. The Claimant states that it has, since 25 November 2008, sent the Respondent invoices totaling over USD 50 million in respect of Tolling Fees.⁹
5. For its part, the Respondent contends that it has fulfilled its obligations, and that the Power Station has never been operational because of breaches of the PPA by the Claimant.¹⁰ The Respondent asserts that none of the arguments raised by the Claimant justifies the Claimant's failure to complete the commissioning of the Barge.¹¹ By letter dated 28 August 2009, Ghana's

² PPA, Preamble; Notice of Arbitration, paras. 24-25; Respondent's Brief Regarding Procedural Order No. 1, 14 September 2010 ("Respondent's Brief"), at 3.

³ PPA, Preamble, at 1; PPA, paras. 2.1-2.4; PPA, First Schedule.

⁴ PPA paras. 2.5-2.10, 3.3.

⁵ Notice of Arbitration, paras. 45-48.

⁶ Notice of Arbitration, paras. 49-57.

⁷ Notice of Arbitration, paras. 58-60.

⁸ Notice of Arbitration, paras. 61-69.

⁹ PPA, paras. 65, 79.3; Notice of Arbitration, Exhibits 23 (invoice of 25 November 2008), 24 (twelve monthly invoices, from 25 November 2008).

¹⁰ See e.g., Respondent's Brief, at 4-5.

¹¹ Statement of Defense, para. 74.

Ministry of Energy stated that Ghana had provided BEL with grid connectivity via the transmission line and interconnection facilities, and asserted that the fact that the Power Station was not operational was due to BEL's own inability to complete the facilities.¹² The Respondent also claims that the upgrading of certain necessary equipment on the Barge was not undertaken by BEL. Relying on statements made by BEL and document production in a lawsuit filed in a United States District Court against a subcontractor on the Barge (ProEnergy Services LLC), the Respondent describes the Claimant's assertion that the Barge was operational as fraudulent.¹³ The Respondent also disputes the Claimant's invoices for Tolling Fees referred to above.¹⁴

6. Following challenges raised by the Respondent to the validity of the arbitration clause (the "Arbitration Agreement") in the PPA, and generally to the arbitrability of the dispute, the Tribunal issued an interim award on jurisdiction (the "Interim Award") on 22 December 2010, in which it affirmed its competence to decide the present dispute.
7. The central issue before the Tribunal in this merits phase of the arbitration is whether the Claimant achieved the "milestone events" set forth in the Third Schedule of the PPA (most notably, testing and commissioning of the Power Station within ninety (90) working days of the Effective Date) or, in the alternative, whether the Claimant has demonstrated that it is entitled to Tolling Fees under Clause 11.9 of the PPA or any other form of damages. The Tribunal must also decide on the Respondent's counterclaims for breach of contract.¹⁵

II. PROCEDURAL HISTORY

8. On 23 December 2009, the Claimant commenced arbitration against the Respondent pursuant to Article 22.2 of the PPA and Article 3 of the United Nations Commission on International Trade Law of 1976 (the "UNCITRAL Rules"). Under the PPA, the dispute shall be governed by the laws of the Republic of Ghana.
9. On 15 January 2010, the Claimant appointed Judge Stephen M. Schwebel as the first arbitrator and, on 12 March 2010, the Respondent appointed Judge Thomas A. Mensah as the second

¹² Notice of Arbitration, Exhibit 3.

¹³ Respondent's Brief, at 4-5; Rejoinder, para. 4.

¹⁴ Notice of Arbitration, Exhibit 25.

¹⁵ Statement of Defense, paras. 169-182.

arbitrator. On 1 April 2010, the Co-arbitrators selected Professor Francisco Orrego Vicuña as the President of the Tribunal.

10. The Tribunal's Interim Award of 22 December 2010 recounts in detail the procedural history of the arbitration from its commencement up until the date that Award was issued. The Tribunal will therefore principally focus on developments since December 2010.
11. Shortly after the issuance of the Interim Award, the Tribunal fixed the schedule for the filing of the Parties' written pleadings on the merits as follows: 15 July 2011 for the Claimant's Statement of Claim, 15 January 2012 for the Respondent's Statement of Defense, 15 April 2012 for the Claimant's Reply, and 15 July 2012 for the Respondent's Rejoinder.
12. On 22 June 2011, the Claimant notified the Tribunal and the PCA that it had retained Mr. Mitchell Madden to act as co-counsel and requested an extension of "no more than 180 days and no less than 120 days" to submit its Statement of Claim. By letters dated 23 and 27 June 2011, the Respondent advised that it had no objection to the requested extension, provided that the remaining dates fixed by the Tribunal were also adjusted to reflect the prior symmetry in each Party's respective deadlines.
13. On 29 June 2011, the Tribunal granted a 90-day extension for the submission of the Statement of Claim and amended the schedule for filing of the Parties' written pleadings on the merits as follows: 12 October 2011 for the Claimant's Statement of Claim, 12 April 2012 for the Respondent's Statement of Defense, 12 July 2012 for the Claimant's Reply, and 12 October 2012 for the Respondent's Rejoinder.
14. On 17 October 2011, the Claimant submitted a part of its Statement of Claim, with supporting materials to follow the next day. Claimant's counsel explained that the transmission of the Statement of Claim "was delayed in material part, due to an apparent misapprehension [he] had with respect to settlement negotiations that were (unbeknownst to [him] until late Friday, Dallas time) scheduled to occur in Dallas, Texas on Monday October 17, 2011", and which were subsequently cancelled.
15. On 18 October 2011, the Tribunal confirmed electronic receipt of the Statement of Claim and reaffirmed that the Respondent was to submit its Statement of Defense on 12 April 2012.
16. On the same date, the Respondent wrote to the Tribunal advising that it had not yet received the exhibits and supporting materials referenced in the Statement of Claim and that the "information which came to [Claimant's] counsel's attention 'late Friday, Dallas time' – would have been

after the Statement of Claim was due to be filed” on 12 October 2011. The Respondent did not object to “the late and/or incomplete filing”, but requested that the Tribunal “grant the Government a similar grace period, should it become necessary, measured from the date on which the Government receives Balkan’s fully submitted Statement of Claim with supporting documents”. On 19 October 2011, the Tribunal informed the Parties that it was open to granting a limited extension along the lines envisaged in the Respondent’s letter, if such an extension became necessary. The Tribunal also instructed the Claimant to proceed without delay in the event that its full Statement of Claim had not yet been transmitted electronically and by courier to the Respondent’s counsel.

17. On 26 October 2011, the Tribunal acknowledged receipt of the Statement of Claim (the “**Statement of Claim**”). Since the Claimant had made arrangements with a courier service for its delivery to Respondent’s counsel on 19 October 2011, the Tribunal informed the Parties that it would use 19 October 2011 as the date for calculating any “grace period” to be afforded to the Respondent to submit its Statement of Defense, should it become necessary. The Tribunal also reminded the Claimant of its duty, pursuant to Section 2.1.2 of the Tribunal’s Procedural Order No. 2, dated 27 July 2010, to provide the Tribunal, the opposing Party and the Registry with hard copies of all exhibits and attachments.
18. On 9 February 2012, the Claimant provided hard copies of all of the exhibits referenced in its Statement of Claim.
19. By letter dated 13 March 2012, the Respondent requested that Paragraph 4.1 of Procedural Order No. 2 be modified to allow for early document disclosure of certain technical documents prior to the submission of its Statement of Defense.
20. On 14 March, the Tribunal invited the Claimant’s comments on the Respondent’s proposal for early document production by 20 March 2012.
21. By e-mail dated 20 March 2012, the Claimant notified the Tribunal of its objection to the Respondent’s request for early document disclosure and requested an extension until 23 March 2012 in which to provide a formal response. By e-mail dated 21 March 2012, the Tribunal granted the Claimant’s extension request.
22. On 23 March 2012, the Claimant submitted its formal objection to the Respondent’s request of 13 March 2012, “based upon the inequal process that the requested modification to the scheduling order would occasion to [*sic*] and because the Government’s request and the

argument in support of its request, demonstrate the reasonableness and underlying rational of the procedure as outlined in Section 4.1 of the order". On 26 March 2012, the Respondent countered that there was no issue of fairness or unequal treatment, and reiterated its request that the Tribunal modify Procedural Order No. 2 so as to permit targeted discovery before Ghana was required to submit its Statement of Defense.

23. On 27 March 2012, upon careful consideration of the Parties' arguments, the Tribunal decided to maintain the schedule as provided in Paragraph 4.1 of Procedural Order No. 2 and ruled that both Parties would "have the opportunity to request production of any documents no later than 15 days after the submission of the Statement of Defense."
24. On 9 April 2012, the Respondent requested an additional one-week extension, until 26 April 2012, in which to file its Statement of Defense due to the Easter holiday.
25. The next day, the Claimant advised that it had no objection to the requested extension.
26. By letter dated 10 April 2012, the Tribunal granted the one week extension, thereby amending the schedule for the filing of the Parties' written pleadings on the merits as follows: 26 April 2012 for the Respondent's Statement of Defense, 26 July 2012 for the Claimant's Reply, and 26 October 2012 for the Respondent's Rejoinder.
27. On 26 April 2012, the Respondent submitted its Statement of Defense (the "**Statement of Defense**").
28. On 10 May 2012, the Respondent wrote to the Tribunal to request that it fix a date by which Ghana should make its request to the Claimant for the production of documents pursuant to Paragraph 4 of Procedural Order No. 2. By letter of the same date, the Tribunal directed the Parties to make any requests for production of documents from the other Party by 18 May 2012.
29. By e-mail of the same date, the Respondent requested a thirty-day adjournment to the document production timetable on account of the dissolution of its lead counsel's firm. On 15 May 2012, the Claimant wrote to the Tribunal to express its consent to the requested extension.
30. By letter dated 16 May 2012, the Tribunal advised the Parties to exchange any document production requests they may have on 18 June 2012. To accommodate the new timetable for document production, the Tribunal further advised that the calendar for the Parties' remaining substantive submissions would be revised as follows: 6 September 2012 for the Claimant's Reply and 5 December 2012 for the Respondent's Rejoinder.

31. On 23 May 2012, the Respondent notified the Tribunal of the Supreme Court of Ghana's decision in the *Attorney General v. Balkan Energy Ghana et al.* matter rendered on 16 May 2012 (the "**Supreme Court Judgment**"), and inquired whether the Tribunal wished to receive the Parties' respective views on the impact of the Judgment on the present arbitration. On 25 May 2012, the Tribunal invited the Parties to offer any comments they wished to make on the Judgment, by simultaneous submission on 8 June 2012.
32. By letter dated 30 May 2012, the Tribunal proposed to hold the hearing on the merits from 24 to 30 April 2013 at the Peace Palace in The Hague.
33. On 1 June 2012, the Claimant wrote to the Tribunal to request an extension until 20 June 2012 to submit comments on the Supreme Court Judgment, in order to allow it time to request a review of the decision from the Ghana Supreme Court. On 4 June 2012, the Tribunal invited the Respondent to comment on the Claimant's request by 6 June 2012. On 6 June 2012, the Respondent wrote to the Tribunal, agreeing to the Claimant's extension request and additionally requesting a different schedule for the subsequent proceedings in the event that the Claimant decided to make an application before the Ghana Supreme Court to review the Supreme Court Judgment.
34. By letter dated 8 June 2012, the Tribunal approved the Claimant's requested extension and directed the Parties to simultaneously submit their views, or communicate that they had no comments on the matter at this stage, on 20 June 2012. The Tribunal further noted that it did

not intend to take a decision on the implications of this Judgment (or any subsequent decisions that may be issued) until after the hearing on the merits. Consequently the Respondent's request to open up a period for comments, reply and rejoinder, and attach to it a different schedule depending on whether further submissions are made to the Ghana Supreme Court, does not meet with the Tribunal's approval at this stage.

The Tribunal also ruled that the Parties were free to submit additional comments on the matter in the scheduled Reply and Rejoinder submissions.

35. Having consulted with the Parties, by letter dated 13 June 2012, the Tribunal confirmed that the hearing would be held on 24 to 30 April 2013, with 1 and 2 May 2013 held in reserve in the event that additional time is required. The Tribunal also confirmed that, in view of the earlier agreement between the Parties, the hearing would be held in London.
36. On 14 June 2012, the Claimant informed the Tribunal of its wish to place on the record that, while it had no objection to holding the merits hearing in London as directed by the Tribunal in

its 13 June correspondence, choosing London as a hearing venue should not affect the Parties' agreement that The Hague, the Netherlands be the place of arbitration.

37. By letter dated 18 June 2012, the Tribunal noted that, pursuant to Article 16 of the UNCITRAL Rules which governs this proceeding, the establishment of an arbitral seat does not preclude the Tribunal or the Parties from holding hearing or meetings in another location. Recalling Articles 6.1 and 6.3 of the Terms of Appointment, which restate an agreement reached by the Parties and communicated to the Tribunal in a letter dated 8 June 2010, the Tribunal confirmed "that The Hague is the place of arbitration (seat) for the present proceedings, whereas London shall be the place at which the hearings will be held".
38. On the same date, the Claimant submitted its Request for Production of Documents to the Respondent.
39. On 19 June 2012, in response to the Tribunal's 8 June 2012 letter, the Respondent informed the Tribunal that it would present its arguments with respect to the effect of the Supreme Court Judgment in its Rejoinder. The Respondent further noted "that the Claimant apparently chose not to seek review of the Supreme Court Judgment, and that the 30 day period provided in the Rules for filing such an application has now lapsed". On the same date, the Claimant submitted its Interim Submission with respect to the Supreme Court Judgment (the "**Interim Submission**").
40. By letter dated 21 June 2012, the Tribunal reiterated that it would "not take a decision on the implications on the Supreme Court Judgment (or any subsequent decisions that may be issued) until after the hearing on the merits at which time it [would] take into consideration the Parties' views on the matter", including those expressed by the Parties in their respective letters dated 20 June 2012 and any additional views expressed in the Parties' forthcoming substantive submissions.
41. On 6 September 2012, the Claimant submitted its Reply to the Statement of Defense (the "**Reply**").
42. On 8 November 2012, with the consent of the Claimant, the Respondent requested a two-week extension, 20 December 2012, to file its Rejoinder due to the hurricane that hit the northeast coast of the United States. By letter dated 9 November 2012, the Tribunal granted the requested extension. On 20 December 2012, the Respondent submitted its Statement of Rejoinder (the "**Rejoinder**").

43. On 28 January 2013, the Tribunal informed the Parties that it wished to hold a Procedural Conference with the Parties by telephone on 7 February 2013, the results of which would be recorded in a Procedural Order No. 3. To that end, the Tribunal circulated a draft of Procedural Order No. 3 for the Parties' advance review. On 7 February 2013, the Parties and the Tribunal participated in a procedural teleconference. On 12 February 2013, upon consideration of the Parties' comments and discussions at the procedural teleconference, the Tribunal issued Procedural Order No. 3.
44. By letter dated 4 March 2013, the Claimant requested that Section 2 of Procedural Order No. 3, as well as the order of the Tribunal dated 16 May 2012, be modified to allow it to submit a rebuttal expert opinion from a new expert witness. The Claimant also requested that it be able to reserve the right to request further document production from the Respondent. On 5, 12 and 14 March 2013, the Respondent contested the Claimant's requests.
45. By letter dated 18 March 2013, the Tribunal denied the Claimant's application for leave to file a rebuttal expert report. The Tribunal concluded "that the procedural calendar has provided the Parties with ample time to gather and file any evidence in support of their case, and [that] the submission of a further expert report at this stage would risk jeopardizing the Parties' and the Tribunal's orderly preparation for the hearing." The Tribunal also noted that, pursuant to Section 3.4 of Procedural Order No. 3, it looked forward to receiving a joint scheduling proposal from the Parties, including their views on the order and grouping of witnesses and experts, by 25 March 2013. To assist the Parties in their consultations, the Tribunal identified in general terms, in an Annex to this letter, the topics on which it wished to hear testimony of witnesses and experts at the hearing. The Tribunal requested that the Parties attempt to group testimony on related topics, though it acknowledges that it might not be feasible to maintain a strict grouping by topics in respect of all witnesses/experts. Finally, the Tribunal took note of the Claimant's indication that it might wish to request the production of further documents in the possession of the Respondent and that, if required, the Tribunal would be prepared to decide any such application by the Claimant after appropriate consultation of the Respondent.
46. On 21 March 2013, the Claimant requested the Tribunal's assistance in relation to the preparation of an agreed Chronology of Facts, attaching its draft Chronology of Facts as provided to the Respondent. On the same date, recalling its direction in Section 2.1 of Procedural Order No. 3 – that the Parties "endeavor to produce an agreed Chronology of Facts, to be filed with the Tribunal by March 25, 2013", with any differences on certain facts indicated in the same document – the Tribunal advised the Parties that it would be best assisted by a 3-5

page document that lists, in a tabular form and in chronological order, the major material events underlying the present arbitration.

47. On 22 March 2013, the Respondent requested that the Tribunal disregard the Claimant's draft Chronology of Facts, and that it should not constitute part of the record, since it was not a joint submission, as required by Section 2.1 of Procedural Order No. 3.
48. On 26 March 2013, the Claimant requested that the due date for the agreed Chronology of Facts be postponed until 26 March 2013.
49. On the same date, the Tribunal informed the Parties that it would not have regard to the Claimant's draft Chronology, which it understood had been attached to the Claimant's 21 March 2013 letter for purely illustrative purposes.
50. By letter dated 3 April 2013, the Respondent submitted an amended version of Mr. Watson's expert report stating that Mr. Watson was able to "be more specific regarding a statement contained in ¶ 5.22 of his opinion based upon his recent trip to Ghana".
51. On the same date, the Claimant notified the Tribunal and the Respondent of the new address of its counsel and requested, with the consent of the Respondent, an extension of time for the submission of an agreed scheduling proposal.
52. On 5 April 2013, the Tribunal confirmed that the Parties might submit their agreed scheduling proposal pursuant to Section 3.4 of Procedural Order No. 3, as well as any other information that was to be provided by 3 April 2013 pursuant to Procedural Order No. 3, by 8 April 2013.
53. By letter dated 8 April 2013, the Respondent informed the Tribunal about the results of the Parties' consultations pursuant to Procedural Order No. 3, attaching a proposed schedule of witnesses and experts for the hearing and advising that it would be necessary and appropriate to make provision for Post-Hearing Memorials. The Claimant proposed that the Parties simultaneously submit Post-Hearing Memorials on 17 June 2013, followed by simultaneous Replies on 2 July 2013. The Respondent, however, proposed that there be only one round of Post-Hearing Memorials, and suggested that the Claimant file its Memorial by 3 June 2013, with the Respondent's Memorial to follow by 2 July 2013.
54. On 12 April 2013, the Tribunal confirmed the hearing arrangements regarding hearing bundles and the schedule of proceedings. The Tribunal further noted that at the hearing it would discuss

with the Parties “(a) the amount of time to be allocated to each witness and (b) the modalities for the submission of Post-Hearing Briefs.”

55. By letter dated 17 April 2013, the Respondent submitted its list of attendees for the upcoming hearing. On the same date, the Claimant transmitted its list of hearing attendees.
56. On 19 April, the Claimant submitted its core hearing bundle, pursuant to the Tribunal’s direction in its 12 April 2013 letter.
57. On 22 April 2013, the Claimant supplemented its list of attendees, informing that counsel for ProEnergy would attend the examination of Mr. John Bryant.
58. On 23 April 2013, the Claimant submitted additional calculations of Tolling Fees, in which it sought to draw a distinction between the period leading up to 1 January 2014 and the period thereafter. Some elements in the additional calculations, such as the discount rate, appeared to be new or different, but the bulk of the additional calculations appeared to be an elaboration on calculations that the Claimant had previously filed as evidence.
59. The Hearing on the Merits was held on 24 April to 2 May 2013 in London. Present at the Hearing were:

The Tribunal

Professor Francisco Orrego Vicuña
Judge Stephen M. Schwebel
Judge Thomas A. Mensah

For the Claimant

Mr. Gene Phillips
Mr. Phil Elders
Mr. Robert MacDonald
Balkan Energy

Mr. Mitchell Madden
Ms. Shawnte Kinney
Law Offices of Mitchell Madden

Prof. Gerard Meijer
Mr. Blazej Blasikiewicz
NautaDutilh N.V.

Mr. Ace Ankomah
Ms. Gloria A. Cofie
Bentsi-Enchill, Letsa & Ankomah

Mr. Robert W. Russell
Kempton & Russell
(Counsel to ProEnergy Services)

For the Respondent
Ms. Amma Gaisie
Ms. Grace Ewoah
Attorney General's Department

Ms. Vivienne Gadzekpo
Ministry of Energy

Mr. Jonathan Siegfried
Ms. Kiran N. Gore
Mr. Kevin Henry
Mr. David Webb
DLA Piper

Mr. Fui Tsikata
Ms. Alexa Fleischer
Ms. Zoe Phillips Takyi Appiah
Reindorf Chambers

Dr. Jacomijn van Haersolte-van Hof
HaersholteHof B.V.

Mr. Peter A. Fairhurst
Parsons Brinckerhoff Power Generation Group

Fact Witnesses

Mr. Gene Phillips
Mr. Phillip Elders
Mr. Gabriel Quain
Ms. Vivienne Gadzekpo
Mr. John Bryant
Mr. Lonnie Peters
Mr. Timothy Everhart
Mr. Eric Asare
Mr. Emmanuel Osafo
Mr. Joseph Wiafe
Mr. Richard Badger
Mr. Isaac Manu
Mr. Moro Adama
Mr. Ruben Yao Dugah
Mr. Neil Crouch

Expert Witnesses

Mr. Peter Watson
Mr. Peter Fairhurst

For the PCA

Mr. Dirk Pulkowski

Court Reporter

Mr. Trevor McGowan

60. By letter dated 7 May 2013, the Tribunal confirmed the post-hearing arrangements discussed toward the end of the hearing on 2 May 2013. First, the Tribunal requested that the Parties consult with each other in respect of any corrections to the transcript of the hearing that they wish to make, and to inform the Tribunal of their proposed corrections by 24 May 2013. Second, the Tribunal invited the Claimant to provide the following additional information by 31 May 2013:

- Information as to whether ProEnergy has any financial interest in the outcome of the present arbitration proceedings, under the terms of the settlement agreed with the Claimant or otherwise.
- Confirmation of, and information about the dates of, the incorporation/registration of the Claimant's parent company in Nevada as well as a copy of the certificate of incorporation or an excerpt from the corporate register.
- A revised listing of expenses that the Claimant has incurred in connection with the performance of the PPA, broken down within the following categories:
 - a) Commissioning expenditures, including any payments to contractors for commissioning activities; payments for parts, material or fuel; personnel costs; generator and other equipment rental; maintenance costs; costs of commissioning-related meetings and travels.
 - b) Interest.
 - c) Any other expenses not specifically for commissioning that the Claimant believes to be related to the performance of the PPA.

To the extent that the connection of certain expenses with the performance of the PPA is not evident, the Claimant may add a brief explanation to its listing.

The costs of the present arbitral proceedings or the costs of legal proceedings with contractors should not be included within the listing.

Third, the Tribunal invited the Respondent to provide any comments on the additional information submitted by the Claimant by 28 June 2013, with the understanding that any such comments must be limited to factual aspects and could not include legal arguments. Finally, the Tribunal directed that each Party submit a post-hearing submission, not exceeding 50 pages, by 31 July 2013. The Tribunal emphasized that “[n]o new evidence shall be admissible at this stage.”

61. On 21 May 2013, upon the request of the Parties, the PCA made the audio recordings of the hearing in London available to the Parties.

62. By letter dated 23 May 2013, the Respondent requested, with the Claimant's consent, "an extension to 4 June 2013 for the submission of errata designations to the Tribunal", and informed that the Parties had "agreed to consult with each other on 3 June 2013 concerning their errata designation in advance of the submission of same to the Tribunal and the PCA".
63. On 24 May 2013, the Tribunal granted the Respondent's request for an extension of time to file its corrections to the transcript.
64. By letter dated 30 May 2013, the Claimant requested, with the Respondent's consent, an extension to 7 June 2013 in which to submit the additional information the Tribunal had requested by 31 May 2013 in its 7 May 2013 letter. The Claimant also requested that the deadline for the Respondent's comments to the additional information submitted by the Claimant be extended until 10 July 2010 [2013]. Finally, the Claimant asked that the deadline to submit post-hearing submissions be extended to 2 August 2013. By e-mail dated 3 June 2012, the Tribunal granted the requested extensions.
65. On 4 June 2013, the Parties submitted their proposed changes to the transcript of the Hearing on the Merits.
66. By letter dated 7 June 2013, the Claimant provided its submission in response to the Tribunal's letter of 7 May 2013 (the "**Claimant's 7 June Letter**"), setting out the following: (i) whether ProEnergy has any financial interest in the outcome of the present arbitration proceeding, under the terms of the settlement agreed with plaintiff, or otherwise; (ii) details regarding the incorporation/registration of the Claimant's parent company in Nevada; and (iii) a revised listing of expenses that the Claimant has incurred in connection with the performance of the PPA, broken down into subcategories.
67. By e-mail dated 11 June 2013, the Respondent identified inconsistencies between the Claimant's descriptions of supporting documents to the information provided in its 7 June 2013 letter and the actual contents of certain attachments. By e-mail of the same date, the Claimant's counsel submitted revised attachments to the Claimant's 7 June Letter.
68. By e-mail dated 19 June 2013, the Respondent wrote to the Claimant, copying the PCA, reminding the Claimant that the "purpose of the Tribunal's request to Balkan for a further financial submission was to seek clarification of the information that Balkan previously submitted to the Government and the Tribunal". The Respondent went on to assert that the Claimant's 7 June Letter "adopted an entirely different system for identifying those same

documents, which hinders the ability to properly analyze Balkan's response to the Tribunal". The Respondent emphasized that it was essential that it receive from the Claimant revised versions of certain attachments to its 7 June 2013 Letter which incorporate references to the correct Bates Numbers.

69. On 1 July 2013, the Claimant, copying the PCA, provided the Respondent with revised versions of the attachments to the Claimant's 7 June Letter.
70. On 10 July 2013, the Respondent provided its response to the Claimant's 7 June Letter (the "**Respondent's 10 July Letter**"). In this letter, the Respondent provided its comments with regard to ProEnergy's financial interest in the outcome of the present arbitration proceeding; pointed out several perceived inconsistencies in Balkan's corporate structure as detailed in the Claimant's 7 June Letter; and pointed out several perceived deficiencies in Balkan's expenses as detailed in the Claimant's 7 June Letter.
71. On 26 August 2013, the Claimant submitted its Post-Hearing Closing Brief (the "**Claimant's Post-Hearing Submission**"). The Respondent submitted its Post-Hearing Memorial on 3 September 2013 (the "**Respondent's Post-Hearing Submission**").
72. By letter dated 26 August 2013, the Claimant notified the Tribunal that it had "discovered that in July 2013 the Minister of Finance and Attorney General issued to Parliament an 'Information Paper to assist Parliament on the modifications required under Article 181 of the Constitution' (the "**Information Paper**")." The Claimant inferred that "this Information Paper will evidence a clear concern on the part of the Government and the Attorney General for the impact that the Supreme Court's decisions have had and request that in response the Parliament act to undo the decisions of the Supreme Court that are relied upon by Ghana in these proceedings." The Claimant informed the Tribunal that it had "attempted to access this Information Paper for the Tribunal's reference, but [was] unsuccessful because the document [had] been marked as 'secret'". The Claimant requested that the Tribunal "order Ghana to produce the relevant Information Paper subject, if necessary, to confidentiality and limited access of that document".
73. By letter dated 28 August 2013, the Claimant affirmed that the Respondent had performed "quite a serious departure from the instructions from the Tribunal with respect to the parties' post-hearing brief regarding page limitations and formats", entailing that the Respondent had "enjoyed far more total pages of submission than that afforded to the Claimant." By letter dated 29 August 2013, the Tribunal requested the Respondent to re-file the Respondent's Post-Hearing Submission, by 4 September 2013, in accordance to the formatting restrictions ordered

by the Tribunal in its letter dated 7 May 2013. By e-mail dated 3 September 2013, the Tribunal invited the Respondent to comment on the Claimant's letter by 10 September 2013.

74. By letter dated 3 September 2013, the Respondent filed a new version of the Respondent's Post-Hearing Submission with the amendments required by the Tribunal in its letter dated 29 August 2013.
75. By letter dated 3 September 2013, the Respondent objected to "the introduction of several hundred pages of new exhibits by [the Claimant] in its post-hearing submission". According to the Respondent, the Claimant had introduced new evidence concerning damages and its corporate structure. The Respondent recalled the Tribunal's order that "no new evidence was to be included in the parties' post-hearing submissions" as expressed both during the hearings and in the Tribunal's Order dated 7 May 2013. The Respondent requested "that the Tribunal strike the documents ... and direct that they not constitute part of the record of these proceedings", and that "the Tribunal disregard and or strike evidence from this documents that is cited in Balkan's Post-Hearing Closing Brief ... and that it order such other and further relief as the Tribunal deems appropriate in the light of Balkan's knowing violation of its Orders". By e-mail dated 5 September 2013, the Tribunal invited the Claimant to comment on the Respondent's letter by 12 September 2013.
76. By letter dated 10 September 2013, the Respondent submitted its comments on the Claimant's letter dated 26 August 2013.
77. By letter dated 12 September 2013, the Claimant submitted its comments on the Respondent's letter dated 3 September 2013 regarding the alleged introduction of new evidence by the Claimant and made observations on the Respondent's letter dated 10 September 2013.
78. By letter dated 16 September 2013, the Respondent submitted comments on the Claimant's letter dated 12 September 2013.
79. By letter dated 18 September 2013, the Tribunal reverted to the Parties in respect of the matters originating in their letters of 26 August 2013, 3 September 2013, as well as the Parties' comments of 10 September 2013, 12 September 2013 and 16 September 2013. First, the Tribunal informed the Parties that the Claimant's request for the production of the Information Paper was denied. The Tribunal recalled that it had "made it clear that it is not willing to admit any new evidence after the hearing". The Tribunal stated that "[t]he same principle holds true, *a fortiori*, for evidence requested to be adduced after the Parties have submitted their post-hearing

submissions. Admitting any such evidence into the record would be inconsistent with the orderly conduct of the arbitral proceedings and would compromise the right of defense of the opposing Party.”

Second, the Tribunal decided not to take into consideration any new evidence pertaining to damages that was submitted with the Claimant’s Post-Hearing Submission. The Tribunal reiterated its ruling on the non-admissibility of new evidence and observed that “the Claimant had ample opportunity to provide evidence in support of its damages calculation during the course of the arbitration. Admitting such documents into the record would compromise the right of defense of the opposing party.”

Third, the Tribunal decided to “consider the information provided by the Claimant in its June 7, 2013 submission [Claimant’s 7 June Letter]” relating to its corporate structure, as had been specifically requested by the Tribunal on 7 May 2013, but that it would not “have regard to any new evidence adduced with the Claimant’s Post-Hearing Submission”. According to the Tribunal, “such information was to be provided in a separate stage, well in advance of the post-hearing submissions, so as to enable the opposing Party to comment on such information and draw out its legal significance in its post-hearing submission.” In the Tribunal’s view, “adherence to this process is essential to uphold the right of defense of the opposing Party.”

80. By letter dated 8 October 2013, the Tribunal noted that there were several incorrect cross-references in paragraph 152 of the Claimant’s Post-Hearing Submission. The Tribunal requested the Claimant “to provide the appropriate cross-references as a point of formal correction.” The Tribunal stressed that “no further changes to the Post-Hearing Brief will be allowed or taken into consideration.” By letter dated 10 October 2013, the Claimant provided the formal corrections requested by the Tribunal.

III. THE PARTIES’ REQUESTS

A. THE CLAIMANT’S REQUESTS

81. Neither the Statement of Claim nor the Reply provides a comprehensive summary of the Claimant’s request for relief in this arbitration. Rather, the Tribunal notes that, at various junctures throughout its submissions, the Claimant makes the following requests for relief, under the following heads of damages (so prescribed by the Claimant):

a) Damages for Breach of Contract¹⁶

i. Tolling Fees under Clause 11.9 of the PPA;¹⁷

1. "Since the first invoice of 25 November 2008, BEL has sent to [Ghana] monthly Tolling Fees invoices for an average amount of USD 4 million. So far not one of these invoices has been paid and the outstanding invoiced amount therefore to date exceeds USD 72 million."¹⁸
2. "The Claimant seeks damages for [Ghana's] failure to pay Tolling Fees after demand and invoice pursuant to the provisions of 11.9 [of the PPA] in an amount as currently calculated by Phillips [*sic*] Elders and referenced in Exhibit C-38; Attachment 233 and in the invoices attached as C-52. In so doing, the Claimant notes that these Tolling Fees are ongoing under the terms of the Contract and reserve[s] the right to supplement this request prior to the time of final hearing."¹⁹

ii. Repudiation Damages;²⁰

"In addition, or in the alternative to Tolling Fees, and/or to the extent it is determined that [Ghana] has abandoned or wrongly terminated the PPA then in that event, the Claimant seeks the discounted value of the total Tolling Fees that would otherwise be due under the provisions of 11.9 [of the PPA] as is calculated in the alternative in Exhibit C-38; Attachment 234 to the Witness Statement of Phil Elders."²¹

iii. Restitution Damages under Clause 7.4 of the PPA;²²

"In the alternative to the foregoing and to the extent it is determined that the PPA is unenforceable or that the Claimant has failed to fulfill the necessary conditions to Tolling Fees under Paragraph 11.9 of the PPA (which is specifically denied) then in that event the Claimant's request that the alternative award of restitution damages ...

¹⁶ See Statement of Claim, paras. 312, "Breach of Contract", and 337, "Damages".

¹⁷ Statement of Claim, para. 338.

¹⁸ Statement of Claim, para. 286 (emphasis added).

¹⁹ Statement of Claim, para. 338 (emphasis added).

²⁰ Statement of Claim, para. 339.

²¹ Statement of Claim, para. 339 (emphasis added).

²² Statement of Claim, para. 340.

or as directly authorized by Paragraph 7.4 [of the PPA]. These damages are in an amount as referenced to the attachments to the Witness Statement of Neil Crouch (C-37) and include the total amount of US Dollars (C-37; Attachment 18) or Ghanaian Cedis expended by [BEL] through Zenith Bank (C-37; Attachment 57), together with monies spent or incurred by [BEL's] parent as reflected by the documents annexed to Neil Crouch Witness Attachment ... and the open and/or disputed payables as reflected in Witness Statement of Neil Crouch (C-37; Attachment 56)."²³

iv. Incidental Direct Damages;²⁴

"In addition to the foregoing damages the Claimant also seeks damages for the direct incidental damages that it has sustained and in particular with respect to the unavailability of site electricity for fuel generation, equipment and transformers in an amounts [*sic*] as reflected in the correspondence dated 21 July 2008 from Phil Elders (C-38; Attachment 109) and in ¶ 15 and 16 and the documents related thereto of the Witness Statement of Lonnie Peters (C-40)."²⁵

b) "Additional or Alternative Relief for Breach of the Arbitration Agreement"²⁶

"The Claimant has been directly damaged by [Ghana's] breaches of its duty to act reasonably and fairly in connection with the arbitration agreement. ... Claimant has been required to litigate around the world and incur additional expenses and fees in so doing. ... Claimant reserves the right to supplement this statement ... These fees and expenses amount to USD 136,217.17.²⁷ Claimant herein seeks these sums, as well as all additional damages caused by the continued or future breaches of the arbitration agreement."²⁸

c) "Claims in the Alternative to Contract Claims"²⁹

i. Unjust Enrichment / Restitution;³⁰

²³ Statement of Claim, para. 340 (emphasis added).

²⁴ Statement of Claim, para. 341.

²⁵ Statement of Claim, para. 341 (emphasis added).

²⁶ Statement of Claim, para. 355.

²⁷ Claimant cites Exhibit C-37: Witness Statement of Neil Crouch, para. 19.

²⁸ Statement of Claim, para. 353.

²⁹ Statement of Claim, para. 361.

³⁰ Statement of Claim, para. 364.

“[I]f the PPA required Parliamentary approval and if is [*sic*] therefore null and void (which Claimant denies) then [Ghana] has been unjustly enriched by all monies spent by Claimant in connection with the barge. The Claimant herein seeks restitution damages of such sums which are in excess of USD 40 million.”³¹

ii. Tort Claims;³²

a. Fraud or Deceit [*sic*];³³

“As a result of the deceit of [Ghana], [BEL] suffered damages in the amount it was to receive under the PPA or, in the alternative, the amount it has spent on the Osagyefo Barge project.”³⁴

b. False Arrest;³⁵

“[BEL] should be compensated for the damages proximately caused to its operations under the PPA by Mr. Everhart’s arrest.”³⁶

c. Conversion / Trespass to Goods;³⁷

“Ghana’s seizing [BEL’s] DCS was both a conversion and a trespass of BEL Ghana’s rights in the DCS. As a proximate result of those torts, [BEL] has to replace both the hardware and software of [the] DCS, which will cost 2,586,000,000 euro [*sic*].”³⁸

82. In its Reply, the Claimant requests that the Tribunal deny the Respondent’s counterclaims.³⁹

83. In its Interim Submission of 20 June 2012, the Claimant further requests that the Tribunal reconsider its request for an anti-suit injunction in light of the Supreme Court Judgment on the basis that the Tribunal’s finding “that the Arbitration Agreement is not an international business

³¹ Statement of Claim, para. 368.

³² Statement of Claim, para. 371.

³³ Statement of Claim, para. 373.

³⁴ Statement of Claim, para. 377.

³⁵ Statement of Claim, para. 378.

³⁶ Statement of Claim, para. 381.

³⁷ Statement of Claim, para. 382.

³⁸ Statement of Claim, para. 386.

³⁹ Rejoinder, para. 166.

transaction removes any question or concern regarding comity that the Tribunal may have had with respect to its jurisdiction, or the Ghanaian court's acknowledgement of that jurisdiction".⁴⁰ In the alternative, the Claimant requests that the Tribunal give no weight to the Supreme Court Judgment.⁴¹

84. In its 7 June Letter, the Claimant clarified that it requested the following relief:

- a) USD 37,164,863.25 for its "[c]ommissioning expenditures, including any payments to contractors for commissioning activities; payments for parts, material or fuel; personnel costs; generator and other equipment rental; maintenance costs; costs of commissioning-related meetings and travels", of which USD 10,934,199.66 are expenses incurred "by the parent company", USD 12,732,524.05 are expenses incurred by BEL through its account at Zenith bank;⁴²
- b) USD 2,945,577.16 in interest owed by BEL to Zenith bank;⁴³ and
- c) USD 2,657,825.64 for "other expenses not specifically for commissioning that the Claimant believes to be related to the performance of the PPA".⁴⁴

85. In its Post-Hearing Submission, the Claimant restated its request in the following terms:⁴⁵

- a) "[award] damages based on the findings described in Chapters V-VI in the amounts as indicated in paragraphs 126-129", which consist in:
 - i. For the period until 1 January 2014, damages under Clause 11.9 of the PPA, amounting to USD 238,059,973.00 excluding interest, and USD 248,993,202.00 including interest;⁴⁶ or, in the alternative, if "Ghana's arguments as to Balkan's statements made in the ProEnergy case are afforded any merit in the present arbitration", damages under Article 11.9 PPA

⁴⁰ Claimant's 20 June 2012 Interim Submission with respect to the Supreme Court Judgment, para. 56.

⁴¹ Claimant's 20 June 2012 Interim Submission with respect to the Supreme Court Judgment, para. 56.

⁴² Claimant's 7 June Letter, at 6., Attachments III.1, III.2.

⁴³ Claimant's 7 June Letter, at 6., Attachments III.3, III.4.

⁴⁴ Claimant's 7 June Letter, at 6., Attachments III.5.

⁴⁵ Claimant's Post-Hearing Submission, para. 152 [corrected by Claimant's letter dated 10 October 2013].

⁴⁶ Claimant's Post-Hearing Submission, para. 126. *See* sheets 1 and 2 of the attachment to Claimant's letter dated 23 April 2013.

amounting to USD 205,407,075.00 excluding interest, and USD 213,510,647.00 including interest”,⁴⁷ and

- ii. For the period starting on 1 January 2014, “a return on Balkan’s investment until the end date of the PPA, i.e. 31 October 2027” in the amount of USD 259,691,080.00;⁴⁸ or, should the Tribunal take account only of the investment actually made to date, “the net present value of the return on investment for the period 1 January 2014 through 31 December 2027” amounting to USD 81,247,665.91”,⁴⁹ and
- b) For the Respondent’s breach of the Arbitration Agreement, “[award] damages based on the findings described in Chapter VII in the amounts as indicated in paragraph 130”, that is USD 956,587;⁵⁰ and
- c) For the unjustified and unlawful arrest of Tim Everhart, “[award] damages based on the findings described in Chapter VIII in the amounts as indicated in paragraph 133”, that is, an amount of monetary restitution as the Tribunal sees fit;⁵¹ and
- d) For “the conversion of/trespass to goods” and the subsequent replacement of “hardware and software of the DCS”, “[award] Balkan damages based on the findings described in Chapter VIII in the amounts as indicated in paragraphs 134-136”, amounting to USD 2,586,000.00;⁵² and
- e) In the alternative to a), “[award] Balkan damages based on the findings described in Chapter[s] V-VI in the amounts as indicated in paragraph 146”, consisting of general and special damages “sustained as a result of the false opinion that was issued by the Attorney General on behalf of Ghana”,⁵³ which had led BEL to make expenditures that “should be refunded (...) under this claim if the Tribunal decides not to do so

⁴⁷ Claimant’s Post-Hearing Submission, para. 127. See sheets 3 and 4 of the attachment to the Claimant’s letter dated 23 April 2013.

⁴⁸ Claimant’s Post-Hearing Submission, para. 128.

⁴⁹ Claimant’s Post-Hearing Submission, para. 129.

⁵⁰ Claimant’s Post-Hearing Submission, para. 130.

⁵¹ Claimant’s Post-Hearing Submission, paras 131-133.

⁵² Claimant’s Post-Hearing Submission, para. 136.

⁵³ Claimant’s Post-Hearing Submission, para. 141.

under the other sections or headings”⁵⁴ and general damages for fraud,⁵⁵ which altogether amount to USD 34,708,337.8 excluding interest, and USD 44,459,491 including interest.⁵⁶

f) In the alternative to a) and e), “[award] Balkan damages based on the findings described in Chapters V-VI in the amounts as indicated in paragraph 151”, that is restitution damages for unjust enrichment.

g) In addition to all the foregoing claims, “[award] statutory post-award interest to Balkan on the amounts recovered based upon any of the aforementioned claims, in accordance with the applicable law.”⁵⁷

B. THE RESPONDENT’S REQUESTS

86. In its Statement of Defense, the Respondent requests that the Tribunal:

- a) Deny the Claimant’s claims in their entirety;
- b) In the event the PPA is determined to be valid, terminate the PPA and award the Respondent damages of USD 300,000 plus USD 10 million per year commencing 31 October 2013, until the PPA is terminated,⁵⁸ and
- c) Award it damages in an amount to be determined based upon the Claimant’s fraud.⁵⁹

87. In its Rejoinder, the Respondent reiterates its first two requests for relief, but withdraws its claims for damages based on alleged fraud and misrepresentation (c) above) on the basis that “neither Mr. Elders nor Balkan’s parent are parties to the arbitration agreement.”⁶⁰ The Respondent submits that it “will pursue its fraud claims against these parties in the High Court of Ghana which has jurisdiction over all of the defendants.”⁶¹

⁵⁴ Claimant’s Post-Hearing Submission, para. 143.

⁵⁵ Claimant’s Post-Hearing Submission, para. 144.

⁵⁶ Claimant’s Post-Hearing Submission, para. 145. The Claimant indicates that these amounts comprise commissioning expenses and other PPA-related expenses.

⁵⁷ Claimant’s Post-Hearing Submission, para. 152 (g).

⁵⁸ Rejoinder, para. 161.

⁵⁹ Statement of Defense, para. 183.

⁶⁰ Rejoinder, para. 160.

⁶¹ Rejoinder, para. 160.

88. In its Post-Hearing Submission, the Respondent reiterates its first request for relief but withdraws its claim for damages of USD 10 million per year commencing on 31 October 2013, until the PPA is terminated⁶² (second cumulative request in b) above). The Respondent submits that "(...) the Government seeks an order terminating the PPA by reason of Balkan's material breach and repudiation of the PPA and an award of damages in the amount of USD 300,000, the maximum amount permitted under Clause 14.2 of the PPA."⁶³

IV. STATEMENT OF FACTS

A. NEGOTIATION AND CONCLUSION OF THE PPA

1. Undisputed Facts

89. In May 2007, Mr. Phillip Elders, visited Ghana in search of a business opportunity.⁶⁴ Mr. Elders, an American citizen, has been the Chief Executive Officer of BEL and the Senior Vice-President of Balkan US since 2007, prior to which he "worked for 12 years as an engineering salesman with a specialty in power projects".⁶⁵ Since late 2006, Ghana had been experiencing a severe energy crisis due to drought and its reliance on hydropower for the production of electricity.⁶⁶ As a result, Ghana's power system was running at subpar reliability reserve margins estimated to be in a 20% deficit of the projected demand.⁶⁷ As a step towards addressing the crisis, Ghana engaged in negotiations with Balkan US in order to conclude an agreement for Balkan to refurbish and recommission the Barge and Power Station. The

⁶² Respondent's Post-Hearing Submission, para. 200.

⁶³ Respondent's Post-Hearing Submission, para. 198.

⁶⁴ Statement of Claim, para. 58; Statement of Defense, para. 26; Exhibit C-38: Witness Statement of Phillip Elders, para. 8; In May 2007, the Claimant also submits that it first learned of the protections for foreign investors provided by the Ghana Investment Promotion Center ("GIPC"), created in 1988 and which provides both domestic and foreign investors with information on and access to investor registration forms, start up procedures, a land bank database, and general and sector-specific laws and regulations (*see* Statement of Claim, paras. 66, 30; Exhibit C-4: "Ghana Investment Promotion Centre Act, 1994 (ACT 478)"; Exhibit C-38, Attachment 224: "Index of GIPC documents"; *see also* Exhibit C-38, Attachments 225-231 and Exhibit C-35: Witness Statement of Gene Phillips, para. 13). According to the Claimant, since late 2004, the GIPC has functioned as a "'one-stop shop' to eliminate some of the bureaucratic obstacles investors face." The Claimant asserts that the foreign investment protections seemingly fostered by the GIPC "was a definite consideration in moving forward with an interest in opportunities in Ghana in general and in particular with the Barge Project (*see* Statement of Claim, para. 66; Exhibit C-38: Witness Statement of Phillip Elders, para. 23).

⁶⁵ Exhibit C-38: Witness Statement of Phillip Elders, paras. 2-3.

⁶⁶ Statement of Claim, para. 58; Statement of Defense, para. 26; Exhibit C-38: Witness Statement of Phillip Elders, para. 8; PPA, Preamble.

⁶⁷ Statement of Claim, paras. 51, 54; Statement of Defense, para. 26.

Claimant's key contacts at Ghana's Ministry of Energy were Mr. Max Gyamfi (Director of Petroleum), Ms. Vivien Gadzekpo (Legal Counsel), and Mr. Gabriel Quain (Deputy Director of Power).⁶⁸

90. On 2 May 2007, Mr. Elders conducted his first visit to the Barge to ascertain "whether the primary equipment appeared to be in good shape."⁶⁹
91. On or around 8 May 2007, Mr. Elders met with officials of Ghana's Ministry of Energy. The Claimant submits that the Ministry of Energy provided Mr. Elders with a report on the Barge produced by its manufacturer Ansaldo Energia S.p.A. ("**Ansaldo**") "2-3 years earlier" (the "**2005 Ansaldo Report**").⁷⁰
92. On 10 May 2007, Mr. Elders, on behalf of Balkan US, submitted an expression of interest letter to the Ministry of Energy of Ghana (the "**Expression of Interest**"), proposing to construct "a fully functioning power plant including a fuel supply system and substation" and promising to complete a technical proposal for the commissioning of the Barge.⁷¹ In return, Mr. Elders requested that Ghana's Minister of Energy, the Honourable Mr. Joseph K. Adda, provide him with a letter of intent, which the Minister did on 11 May 2004.⁷²
93. In furtherance of Balkan US's negotiations with Ghana's Ministry of Energy, on 12 May 2007, Mr. Elders visited the Barge to inspect the site and establish the condition of the Power Station.⁷³ The Claimant contends that "there were intensive discussions on the question of this project"⁷⁴ and that he specifically had "intensive discussions with representatives from the [Ministry of Energy], and submitted several versions of a proposal for work on the Barge which ... also set out various questions that he had".⁷⁵

⁶⁸ Statement of Claim, para. 75.

⁶⁹ Statement of Claim, para. 62.

⁷⁰ Statement of Claim, para. 63.

⁷¹ Statement of Claim, para. 64; Statement of Defense, para. 27; Exhibit C-38, Attachment 3: "BE[L] Expression of Interest".

⁷² Statement of Claim, para. 64; Exhibit C-38, Attachment 4: "MOE letter re: Expression of Interest".

⁷³ Statement of Claim, para. 70; Statement of Defense, para. 28.

⁷⁴ Statement of Claim, para. 69.

⁷⁵ Statement of Claim, para. 65.

94. On 14 May 2007, Mr. Elders submitted a "Master Energy Plan and Report of Site Survey" to the Ministry of Energy, which detailed Balkan US's initial views on commissioning the Power Station.⁷⁶
95. On 16 May 2007, a Memorandum of Understanding (the "MOU") was signed between Mr. Elders, on behalf of Balkan US, and the Minister for Energy of Ghana, Mr. Adda.⁷⁷ Mr. Elders prepared the first draft of the MOU and circulated it to the Ministry for discussion.⁷⁸ The recitals in the MOU confirmed that Balkan US was aware of Ghana's acute power shortage, and Balkan US assured the Ministry that it would be able to give immediate assistance by making the Barge operational within ninety (90) working days from the execution date of the PPA.⁷⁹
96. Pursuant to the MOU, Balkan US submitted, on 24 May 2007, a Detailed Technical and Commercial Proposal (the "**Proposal**"), wherein it undertook to refurbish and commission the Barge in ninety (90) working days, and sketched out the "milestone events", which were eventually included in the PPA as the Third Schedule to the PPA.⁸⁰
97. On 30 May 2007, the Respondent confirmed receipt of the Proposal and requested an extension of time until 6 June 2007 to evaluate the Proposal.⁸¹
98. On 1 June 2007, Mr. Elders requested further information about the Barge from the Ministry of Energy. By letter dated 8 June 2007, the Ministry responded by forwarding Mr. Elders the 2005 Ansaldo Report.⁸² Shortly thereafter, Mr. Elders met with Ansaldo representatives, Messrs. Pierantonio Savio (Manager) and Henri Winches (Local Ghana Representative).⁸³ As a result of

⁷⁶ Statement of Claim, para. 71; Exhibit C-38, Attachment 5: "Site Plan".

⁷⁷ Statement of Claim, para. 69; Statement of Defense, para. 28; Exhibit C-38, Attachment 6: MOU.

⁷⁸ Statement of Claim, para. 72.

⁷⁹ Statement of Defense, para. 29; Exhibit C-38, Attachment 6: MOU.

⁸⁰ Statement of Defense, paras. 28, 71; Exhibit C-38, Attachment 7: "Technical and Commercial Proposal" ("**Proposal**"); In its Proposal, the Claimant submits it described the commissioning steps as including "the addition of a permanent liquid fuel supply system. ... A temporary liquid supply system will be put in place to assure meeting the 90 working day commission schedule". The Claimant further submits that the Proposal "further elaborated on BE[L]'s pathway to the commissioning of the Barge, including many issues relating to the Barge itself but also issues relating to the site, such as security, access and building renovations."

⁸¹ Statement of Claim, para. 73; Exhibit C-38, Attachment 8: "MOE Letter acknowledging receipt of Proposal"; Attachment 9: "BE[L] responsive letter to 5/30/07".

⁸² Statement of Claim, para. 76; Exhibit C-38: Witness Statement of Phillip Elders, para. 41; Exhibit C-38, Attachment 10: "MOE letter forwarding Ansaldo report".

⁸³ Statement of Claim, para. 77; Exhibit C-38: Witness Statement of Phillip Elders, para. 42.

this exchange, the Claimant submits that it engaged a local Ghanaian consultant, Mr. Nana Amo, to assist Mr. Elders with his negotiations with the Ministry of Energy and Ghana's Public Utilities Regulatory Commission (the "PURC").⁸⁴

99. On 14 June 2007, Mr. Elders submitted a "Tariff Analysis Report" to the Ministry of Energy and to the PURC.⁸⁵ On or around 21 June 2007, the Claimant received comments on its "draft PPA", (the Tribunal assumes that this is a reference to the Tariff Analysis Report from Ghana's Volta River Authority (the "VRA")).⁸⁶ According to the Claimant, the VRA "was an important stakeholder in this deal, given that it is the administrative body in charge of power generation."⁸⁷
100. At Mr. Elders request, on 21 June 2007, the Ministry of Energy provided him with a letter of intent (the "Letter of Intent"), which proposed a lower tariff rate for the Tolling Fees.⁸⁸
101. Other international companies were also being considered for the Barge project at the time. These included AES Electric, Globeleq and Aldwych.⁸⁹ According to the Claimant the Ministry of Energy "pressed upon Elders the importance of a quick commissioning process for the Balkan group to be a successful bidder",⁹⁰ and informed Mr. Elders that Globeleq was willing to match any bid submitted by Balkan US.⁹¹ For its part, the Respondent asserts that each of Balkan US's competitors in the bidding process "had indicated that it would take a year or more to commission the Barge."⁹² The Respondent emphasises that Balkan US "was selected for the project based on its representation, as set forth in the MOU, that it would operationalize the Barge within ninety (90) working days."⁹³

⁸⁴ Statement of Claim, para. 78; Exhibit C-38: Witness Statement of Phillip Elders, para. 43.

⁸⁵ Statement of Claim, para. 79; Exhibit C-38: Witness Statement of Phillip Elders, para. 44; Exhibit C-38, Attachment 11: "Tariff Analysis Report".

⁸⁶ Statement of Claim, para. 82.

⁸⁷ Statement of Claim, para. 82.

⁸⁸ Statement of Claim, para. 81; Statement of Defense, para. 32; *see also* Agreed Chronology of Events, at 1.

⁸⁹ Statement of Claim, para. 68: identifying AES and Globeleq; Statement of Defense, para. 29: identifying Aldwych and AES.

⁹⁰ Statement of Claim, para. 67; Exhibit C-38: Witness Statement of Phillip Elders, para. 24.

⁹¹ Statement of Claim, para. 68; Exhibit C-38: Witness Statement of Phillip Elders, para. 26.

⁹² Statement of Defense, para. 29.

⁹³ Statement of Defense, para. 29; Witness Statement of Vivienne Gadzekpo, para. 7.

102. On 28 June 2007, the VRA provided Mr. Elders with comments on the draft PPA.⁹⁴ Discussions also continued between Mr. Elders and PURC, which, on 5 July 2007, prompted BEL to submit a revised fee compensation structure for its commissioning of the Power Station.⁹⁵
103. On 9 July 2007, PURC expressed support to the Ministry of Energy for the selection of Balkan US to take on the Barge project.⁹⁶ The Claimant contends that, when it met with the Ministry of Energy in June 2007, a representative of the Ministry, “Mr. Jonathon Donkor denied ever having received the PURC’s recommendation letter, and then once Elders provided it to him, claimed not to recognize the signature on the letter. He told Elders that they could not proceed any further until he could ‘authenticate’ the signature.”⁹⁷ On 11 July 2007, Messrs. Elders and Amo met with Ghana’s President at the time, Mr. John Agyekum Kufuor, to discuss the recent obstacle Balkan US had encountered in its discussions with the Ministry of Energy.⁹⁸ According to the Claimant, President Kufuor “said he ‘knew what was going on’ and would solve the problem”.⁹⁹ The Claimant further asserts that President Kufuor then contacted Mr. Gene Phillips (Balkan US’s and BEL’s principal investor) “for an overview of Balkan’s interest in the Barge project”, and also “attempted to call the then Minister for Energy, Mr. Adda”.¹⁰⁰ The Claimant asserts that President Kufuor’s conversation with Mr. Phillips was “key to [Mr. Phillips’] decision to make a substantial investment in Ghana.”¹⁰¹ The Respondent does not address this exchange in its submissions.
104. On 12 July 2007, Messrs. Elders, Amo and KK Sey (Balkan US’s Ghanaian lawyer) met with representatives of the Ministry of Energy, including the Minister himself, Ms. Gadzekpo, Messrs. Quain and Gyamfi and Ms. Chinery-Hesse (President Kufuor’s Chief of Staff).¹⁰² The

⁹⁴ Statement of Claim, para. 82; Exhibit C-38, Attachment 14: “VRA Comments to PPA”.

⁹⁵ Statement of Claim, para. 83; Exhibit C-38, Attachment 16: “BE[L] letter re: O&M Fee Structure”.

⁹⁶ Statement of Claim, para. 83; Exhibit C-38, Attachment 17: “PURC Letter re: PPA and O&M Fee Structure”.

⁹⁷ Statement of Claim, para. 84; Exhibit C-38: Witness Statement of Phillip Elders, para. 52.

⁹⁸ Statement of Claim, para. 85; Exhibit C-38: Witness Statement of Phillip Elders, para. 53.

⁹⁹ Statement of Claim, para. 86; Exhibit C-38: Witness Statement of Phillip Elders, para. 54.

¹⁰⁰ Statement of Claim, para. 86; Exhibit C-38: Witness Statement of Phillip Elders, para. 54.

¹⁰¹ Statement of Claim, para. 87; Exhibit C-35: Witness Statement of Gene Phillips, para. 15.

¹⁰² Statement of Claim, para. 88; Exhibit C-38: Witness Statement of Phillip Elders, para. 55.

Claimant submits that “as a testament to what was discussed in this meeting, the [P]arties put together an Understanding”.¹⁰³

105. Article 12 of Ghana’s Energy Commission Act, 1997 (Act 541) requires that all companies that wish to obtain a license to supply bulk energy in Ghana must be incorporated in Ghana.¹⁰⁴ To meet this requirement, on 16 July 2007, BEL was formed, with the agreement of the Government of Ghana, and registered under Ghana’s Companies Code, 1963 (Act 179) as a locally incorporated company.¹⁰⁵
106. On 20 July 2007, Mr. Elders met again with Ghana’s Minister for Energy and his staff, along with several representatives from the VRA and PURC.¹⁰⁶ According to the Claimant, Ms. Chinery-Hesse announced that Balkan US had agreed to take on the Barge project and that the Ministry of Energy should make best efforts to execute the PPA as quickly as possible, as due diligence had already been conducted and “PURC had confirmed that the deal was commercial.”¹⁰⁷
107. On 23 July 2007, discussions with respect to the PPA commenced at the office of the Ministry of Energy.¹⁰⁸ In attendance were approximately 10 representatives from the Ministry of Energy, the Attorney General’s Department, the VRA and its related entity “GRIDCo”.¹⁰⁹ According to the Claimant, the attendees reviewed each clause of the PPA on a large video screen, “working through the intent and meaning of every clause”, implementing their agreed changes along the way.¹¹⁰
108. The PPA and associated lease agreement were signed by representatives of both Parties on 27 July 2007.¹¹¹

¹⁰³ Statement of Claim, para. 89; Exhibit C-38: Witness Statement of Phillip Elders, para. 56; Exhibit C-38, Attachment 19: “Understanding reach btw BOE and GOG”.

¹⁰⁴ Ghana Energy Commission Act of 1997 (Act 541), Art. 12, submitted with Claimant’s Answers as Exhibit C-30.

¹⁰⁵ Statement of Claim, para. 92; Exhibit C-38, Attachment 44 “Index of BE[L] Corporation Documents”; *see also* Exhibit C-38, Attachments 45-52.

¹⁰⁶ Statement of Claim, para. 90; Exhibit C-38, Attachment 26: “MOE and BE[L] meeting”.

¹⁰⁷ Statement of Claim, para. 90; Exhibit C-38: Witness Statement of Phillip Elders, para. 58.

¹⁰⁸ Statement of Claim, para. 91.

¹⁰⁹ Statement of Claim, para. 91; Exhibit C-38, Attachment 29: “MOE and BE[L] Meetings”, which Claimant contends shows the attendees of the 23 July 2007 meeting.

¹¹⁰ Statement of Claim, para. 91; Exhibit C-38; Witness Statement of Phillip Elders, para. 58.

¹¹¹ PPA, at 26.

109. BEL gained work access to the site (the “**Project Site**”) on 3 August 2007,¹¹² and official access at a handing-over ceremony on 22 August 2007.¹¹³ While BEL’s subcontractors were provided continuous access to the Project Site, the Claimant submits that “the turnover of the site and departure of the Government security team did not occur until 24 August 2007.”¹¹⁴
110. Sometime in August 2007, the Respondent approved the Claimant’s request for a letter of credit (the “**Letter of Credit**”) and, on 24 August 2007, it was issued by Stanbic Bank Ghana Limited (the “**Stanbic Bank**”).¹¹⁵
111. On 26 October 2007, the Minister of Justice and Attorney-General of Ghana, the Honourable Joseph Ghaty, issued two legal opinions. The first opinion stated:

After examining the attached documents we are satisfied that . . .

. . . the power producer, Balkan Energy (Ghana) Limited (BE[L]) is a locally incorporated company and as a result the PPA does not come under the ambit of Article 181(5) of the 1992 Constitution which stipulates that an international business or economic transaction to which the Government is a party should be submitted to Parliament for approval. In the Supreme Court case of Attorney General versus Faroe Atlantic Co. Ltd. (2005-2006) . . . the Supreme Court held that international business or economic transaction means international business or international economic transaction. This clearly excludes the project hereof which involves a local company in a local transaction with the Government.

In light of the above a Parliamentary approval would not be required for the effectiveness of the Agreement.¹¹⁶

The second legal opinion stated:

I have examined executed copies of the [PPA and Project Site Lease (“Project Agreements”)] and such other documents as I have considered necessary or desirable to examine in order that I may give this opinion. . . .

I am of the opinion that:

(i) [Ghana] has the power to enter into the Project Agreements and to exercise its rights and perform its obligations there under, and execution of the Project Agreements on behalf of [Ghana] by the person(s) who executed the Project Agreements was duly authorised;

¹¹² Statement of Claim, para. 138; Exhibit C-38: Witness Statement of Phillip Elders, para. 106; Exhibit C-38, Attachment 88: “MOE letter allowing access to site”.

¹¹³ Statement of Claim, para. 138; Exhibit C-38: Witness Statement of Phillip Elders, para. 106; Exhibit C-38, Attachment 89: “Handover Invitation Letter”.

¹¹⁴ Statement of Claim, para. 140; Exhibit C-38: Witness Statement of Phillip Elders, para. 111; Exhibit C-38, Attachment 88: “MOE letter allowing access to site”, Attachment 91: “VRA letter terminating Security”.

¹¹⁵ Statement of Facts, para. 139.

¹¹⁶ Operationalising the Osagyefo Barge, Legal Opinion by the Attorney-General, 26 October 2007 (Notice of Arbitration, Exhibit 8).

(ii) all acts, conditions and things required by the laws and constitution of the Republic of Ghana to be done, fulfilled and performed in order (a) to enable [Ghana] lawfully to enter into, exercise its rights under and perform the obligations expressed to be assumed by it in the Project Agreements, (b) to ensure that the obligations expressed to be assumed by it in the Project Agreements are valid and enforceable by appropriate proceedings and (c) to make the Project Agreements admissible in evidence in the Republic of Ghana, have been done, fulfilled and performed in compliance with the laws and constitution of the Republic of Ghana;

(iii) The obligations of [Ghana] under the Project Agreements are legal and valid obligations binding on [Ghana] and enforceable in accordance with the terms of the Project Agreements;

(iv) [Ghana] is not entitled under the terms of the Project Agreements to claim any immunity from suit, execution, attachment or other legal process in the Republic of Ghana and such waiver is legal and binding on [Ghana] and enforceable in accordance with the terms of the Project Agreements; and

(v) The sanctity of contract is recognised under the laws of Ghana and consequently the validity of the Project Agreements and the binding nature of the obligations of the parties there under are constitutionally safeguarded.¹¹⁷

112. On 30 October 2007, Ghana's Minister for Energy, Mr. Adda, noted in a communication to Mr. Elders that, as per the conditions precedent in Article 7 of the PPA, Ghana had: issued a legal opinion as to the validity, enforceability and binding effect of the PPA; issued to BEL a standby letter of credit, as required by Article 11.7; and provided BEL with construction power at the Project Site. Mr. Adda also acknowledged that BEL had submitted to Ghana: copies of BEL's Certificate of Incorporation, Certificate to Commence Business, and Regulations of BEL; copies of resolutions adopted by BEL's Board of Directors authorizing the execution, delivery and performance by BEL of the PPA; and copies of a resolution adopted by BEL shareholders authorizing the execution, delivery and performance by BEL of the PPA, certified by the BEL Secretary.

113. The Parties agree that the Effective Date of the PPA was 31 October 2007.¹¹⁸

114. Under the PPA, the Parties agreed that, whereas Ghana had an urgent need for additional electricity generation to meet its power supply deficiencies, BEL, bearing all costs, estimated at USD 40 million, would lease the Power Station from Ghana, and commission it. In particular, pursuant to the PPA and the Milestone Schedule attached as the Third Schedule to the PPA, BEL was obligated to have the Power Station ready for "Final Testing and Commissioning" –

¹¹⁷ Legal Opinion, Power Purchase Agreement Between the Government of Ghana and Balkan Energy (Ghana) Limited, 26 October 2007 (Notice of Arbitration, Exhibit 8).

¹¹⁸ Statement of Claim, para. 142; Exhibit C-38, Attachment 94: "MOE letter affixing Effective Date"; Statement of Defense, para. 37.

meaning ready for commercial operation – as a one hundred and twenty-five megawatt (125 MW) Power Station within ninety (90) days of the Effective Date of the PPA.¹¹⁹

115. The Parties further agreed that BEL, bearing all costs, estimated at USD 100 million, would convert the Power Station into a combined cycle power plant by the addition of a heat recovery steam generator with an incremental capacity of approximately sixty megawatts (60MW), a steam turbine, an electric generator and associated facilities within nine (9) months of the Effective Date of the PPA; that BEL, at an estimated cost of USD 250 to 300 million, would privately invest and bring two more combined cycle barge mounted systems, with capacity of approximately one hundred and eight-five megawatts (185 MW) each, to the site within thirty-six (36) months of agreement on a tolling fee for the systems; that BEL would, subject to satisfactory conclusion of supply agreements with other source providers and at an estimated cost of USD 100 million, invest in infrastructure to enable natural gas to be supplied to the Power Station within three (3) years of the Effective Date of the PPA; and that BEL would provide all fuel to the Project at cost.¹²⁰

116. Under the PPA, the Parties also agreed that Ghana would ensure that all necessary site electricity was provided, at BEL's cost, and made available as reasonably required by BEL; that Ghana would promptly facilitate the acquisition of governmental approvals for the duty-free importation and transportation of equipment to the site, for operating permits, licenses and approvals for the project, and for visas and work permits for foreign personnel and for full compliance with all local and other regulations; that Ghana thereby guaranteed that BEL would have the exclusive right to generate electricity from the site subject to meeting the agreed timetable; that Ghana would facilitate the acquisition of all governmental approvals required for the leasing, equipping and operation of the Power Station, including relevant environmental permits from the Environmental Protection Agency; that Ghana would construct, install and connect the transmission line and relay protection equipment necessary to connect the Power Station to the National Grid, except that BEL would be responsible, at its own cost, for provision of adequate transmission cables to the point of interconnection with Ghana's national electricity grid; that Ghana would take and pay for all electricity generated by the Power Station during the term of the Agreement.¹²¹

¹¹⁹ Statement of Defense, para. 37.

¹²⁰ PPA, Preamble; paras 2.1-2.4; First Schedule.

¹²¹ PPA, paras. 2.5-2.9, 3.3.

117. Under the PPA, the Parties also agreed that they would mutually collaborate with each other in order to achieve the objectives of the Agreement and the performance by each Party of its obligations (a process referred to as “dovetailing” by the Claimant), and that Ghana would provide full and timely cooperation in connection with BEL’s efforts to finance the Power Station on a non-recourse, project finance basis, including, without limitation, responding to all requests for information on and certification of Ghana’s authority and the status of the PPA.¹²²
118. The PPA further provides that, should BEL be unable to commence testing of the Power Station as a result of Ghana’s failure to provide an adequate transmission line and interconnection facilities for the Power Station, Ghana would be obligated to commence paying Tolling Fees to BEL on the thirtieth day after BEL certified to Ghana that the Power Station was complete or would have been complete except for Ghana’s non-performance.¹²³

2. Disputed Facts

(a) The Claimant’s Position

119. The Claimant asserts that after submitting its Proposal, Mr. Elders immediately sensed “some reluctance on the part of the [Ministry of Energy] to hammer out an agreement”, followed by “many unnecessary delays”.¹²⁴ The Claimant further states that the Ansaldo representatives “indicated to Elders that if he were able to negotiate a PPA it would ‘be a miracle’.”¹²⁵
120. According to the Claimant, the “incorporation of BE[L] Ghana had at that time nothing whatsoever to do with issues of the Ghanaian [C]onstitution or parliamentary approval but were motivated entirely by Mr. KK Sey’s correct observation that in order to become licensed pursuant to the applicable laws of Ghana governing power generation and transmission it was necessary to have a license and that the statutes of Ghana required that that license might only be obtained through a Ghanaian entity.”¹²⁶ According to the Claimant BEL obtained the license on 1 October 2007.¹²⁷

¹²² PPA, para. 2.10.

¹²³ PPA, para. 11.9.

¹²⁴ Statement of Claim, para. 75.

¹²⁵ Statement of Claim, para. 77; Exhibit C-38: Witness Statement of Phillip Elders, para. 42.

¹²⁶ Statement of Claim, para. 92; *see also* Exhibit C-4: “Ghana Investment Promotion Centre Act, 1994 (Act 478)”.

¹²⁷ Statement of Claim, para. 92, fn. 23.

121. The Claimant submits that Mr. Elders “does not recall being informed of having negotiations with respect to potential constitutional requirements of parliamentary approval.”¹²⁸ The Claimant further asserts that the Ministry of Energy was fully aware of Balkan US’s interest in BEL and the reasons for the incorporation of BEL in Ghana, and corresponding “final vesting of the PPA in that entity”.¹²⁹

(b) The Respondent’s Position

122. The Respondent alleges that throughout the Claimant’s Statement of Claim, it “repeatedly casts aspersions upon the officials conducting the negotiations [of the PPA], implying or inferring some hidden motive that delayed the negotiations.”¹³⁰ The Respondent denies these allegations. It asserts that “what separated the parties were the economics of Balkan’s proposal, not the hidden motives of government officials.”¹³¹

123. The Respondent contends that none of the Claimant’s representations in the MOU turned out to be true. First, the Claimant represented that it was a private corporation duly organized and existing under the laws of the Netherlands; however, it later came to light that the Claimant is not in fact registered in the Netherlands. Second, the Claimant stated that it had “the experience and capability of operating liquid/gas fired power plants”; however, the Claimant did not have the experience and capability it claimed, particularly with respect to commissioning the turbines.¹³²

B. DESCRIPTION OF THE POWER STATION / BARGE

124. The Tribunal has carefully reviewed the detailed technical descriptions of the Power Station and Barge as provided by the Parties. These descriptions have been the subject of much discussion during this merits phase of the arbitration. The Tribunal will now address the technical aspects of the commissioning process—particularly those that are in dispute between the Parties—to the extent necessary for the present Award.

¹²⁸ Statement of Claim, para. 94.

¹²⁹ Statement of Claim, para. 94.

¹³⁰ Statement of Defense, para. 30.

¹³¹ Statement of Defense, para. 30; Witness Statement of Vivienne Gadzekpo, para. 10.

¹³² Statement of Defense, para. 35; Exhibit R-7: “Deposition of Phillip Elders, *ProEnergy Services, LLC v. Balkan Energy Co.*, No. 09-4026.”

125. The Power Station is mounted on the Barge, which is located in a large man-made pond in a remote area of Ghana's western region.¹³³ Approximately 50 meters from the pond is "Tower No. 1" of the spur grid that connects the Power Station to the two substations in the near-by villages of Essiama and Elubo, namely, the "Essiama Transmission Line" and the "Elubo Transmission Line", (collectively referred to as the "Transmission Lines").¹³⁴
126. Built by Ansaldo, the Power Station consists of two V.64.3A turbines ("Turbine 1" and "Turbine 2", collectively the "Turbines"), each with its own generator,¹³⁵ together with a control substation (the "Substation").¹³⁶ The Turbines and generators produce power at eleven kilovolts (11 kV), which is then 'stepped-up' to one hundred and sixty-one kilovolts (161 kV) by the transformers on the Substation.¹³⁷
127. The Remote Terminal Unit (the "RTU") is a piece of equipment on the Barge whose primary function is to transmit data to and from the Micro Supervisory Control and Data Acquisition System (the "MicroSCADA") installed on the Barge. The RTU, MicroSCADA and the Distribution Control System (the "DCS") permit an operator in the control room on the Barge to monitor and control equipment in the Substation.¹³⁸

1. The Claimant's Position

128. According to the Claimant, Ghana's National Interconnected Transmission System (the "G-NITS") is operated at one hundred and sixty-one kilovolts (161 kV) (the Tribunal assumes that the term G-NITS used by the Claimant is the same as the 161 kV electrical system referred to by the Respondent).¹³⁹ The normal unit operator start-up for the Barge requires that both the G-NITS and the Substation be energized to 161 kV, which subsequently energizes the 161 kV transformers to bring power to both the open generator breaker and the auxiliary transformer.¹⁴⁰

¹³³ Statement of Claim, para. 101, fn. 25; see Exhibit C-38, Attachments 69-86 for photographs of the Barge and Power Station; see Exhibit C-38, Attachment 76 for aerial photographs of the Barge site; see esp. Expert Report of Parsons Brinckerhoff, at 4, for basic diagram of the primary facilities on the Barge.

¹³⁴ Statement of Claim, para. 102.

¹³⁵ The Respondent often refers to the Turbines and the generators collectively as the "turbine-generators".

¹³⁶ Statement of Claim, para. 103; Exhibit C-38: Witness Statement of Phillip Elders, para. 70.

¹³⁷ Expert Report of Parsons Brinckerhoff, para. 4.1(b).

¹³⁸ Witness Statement of Vivienne Gadzekpo, para. 28, citing the witness statements of Emmanuel Osafo and Eric Asare; Statement of Claim, para. 115.

¹³⁹ Statement of Claim, para. 104; Exhibit C-38: Witness Statement of Phillip Elders, para. 71.

¹⁴⁰ Statement of Claim, para. 106; Exhibit C-38: Witness Statement of Phillip Elders, para. 73.

129. The Claimant asserts that final commissioning cannot be achieved without the final connection to the G-NITS “because it is the source of power to start the combustion turbine, and also the source of load to test the turbine during performance testing activities”.¹⁴¹

2. The Respondent’s Position

130. The Substation is equipped with, *inter alia*, a one hundred and sixty-one kilovolt (161 kV) electrical system, which includes the gantry, the 161 kV GIS switchgear, two main 161/11 kV ‘step-up’ transformers, the earthing/grounding system and the protection relays.¹⁴² The function of the 161 kV electrical system is to take power generated from the power-generation equipment located on the Barge (including the Turbines and generator) and, in a controlled manner, allow that power to pass onto the Transmission Lines connected to the Barge at the gantry.¹⁴³ The 161 kV GIS switchgear controls both the export of electricity out to the Transmission Line and the import of energy, if any is required, from the Transmission Lines to the Barge.¹⁴⁴

131. According to the Respondent, the 161 kV electrical system must be fully commissioned and properly functioning before the Power Station can be connected to the National Grid. If it is not, the transformers and the 161 kV GIS switchgear could face severe damage when fired up.¹⁴⁵

C. THE COMMISSIONING PROCESS

132. The Claimant contends that, in order to fully commission the Barge under the PPA, four major “milestones” had to be achieved: (a) turning gear; (b) first fire; (c) full speed no load; and (d) full speed full load.¹⁴⁶ The Claimant submits that “the total power plant commissioning process involves commissioning multiple minor and major systems to reach each major milestone,” as well as synchronizing each system through the DCS.¹⁴⁷ To explain its position, the Claimant adopts the description of the commissioning phases provided by Mr. Elders in his witness

¹⁴¹ Statement of Claim, para. 113; Exhibit C-38: Witness Statement of Phillip Elders, para. 80.

¹⁴² Rejoinder, para. 58, referring to Expert Report of Parsons Brinckerhoff, para. 4.1(b).

¹⁴³ Rejoinder, para. 58, referring to Expert Report of Parsons Brinckerhoff, para. 5.7.

¹⁴⁴ Rejoinder, para. 58, fn. 24, referring to Expert Report of Parsons Brinckerhoff, para. 4.1(b).

¹⁴⁵ Rejoinder, para. 59, referring to Expert Report of Parsons Brinckerhoff, para. 5.6.

¹⁴⁶ Statement of Claim, para. 100.

¹⁴⁷ Statement of Claim, para. 116.

statement. In further support for its version of the commissioning process, the Claimant makes reference to the witness statements of Messrs. Robert MacDonald and Lonnie Peters.¹⁴⁸

133. To explain its position, the Respondent makes reference to the witness statement of Mr. Robert Badger,¹⁴⁹ the Commissioning Book for the Tema Thermal Power Project¹⁵⁰ (both of which were submitted with its Statement of Defense) and the Expert Report of Parsons Brinckerhoff (submitted with its Rejoinder).¹⁵¹ Pursuant to the witness statement of Mr. Badger, the five necessary steps to commission the Turbines are: (a) pre-commissioning checks and tests; (b) mechanical testing of the turbine-generator to full speed no load; (c) electrical testing of the generator to full speed full load; (d) turbine-generator performance testing; and (e) declaration of the commercial operation date. While not expressly incorporated into the Rejoinder itself, the Tribunal has reviewed the Expert Report of Parsons Brinckerhoff, according to which the commissioning of a barge requires the completion of eight steps, described in further detail below.¹⁵²
134. In its Reply, the Claimant objects to the Respondent's characterization of the commissioning process as set out in Mr. Badger's witness statement. The Claimant asserts that "Mr. Badger's examples of the standard of conduct between an owner and a contractor with regard to commissioning of a thermal power plant are inapplicable to the relationship between BE[L] and the [Respondent] under the PPA" because "BE[L] was under no obligation and the [Respondent] had no right to participate in the recommissioning process, utilizing [Mr. Badger's] steps, through final mechanical testing at [FSNL]."¹⁵³

¹⁴⁸ Statement of Claim, para. 116; Exhibit C-39: Witness Statement of Robert MacDonald, paras. 7-9; Exhibit C-54: Supplemental Witness Statement of Robert MacDonald, paras. 72-83; Exhibit C-40: Witness Statement of Lonnie Peters, paras. 6 et seq.; Exhibit C-56: Supplemental Witness Statement of Lonnie Peters, paras. 3 et seq.

¹⁴⁹ Witness Statement of Robert Badger, paras. 8 et seq.

¹⁵⁰ Statement of Defense, para. 73, referring to Exhibit R-37: "GE Energy, Tema Thermal 1 Power Project, Commissioning Book", dated 2 March 2007.

¹⁵¹ Expert Report of Parsons Brinckerhoff.

¹⁵² Expert Report of Parsons Brinckerhoff, at 6-8, para. 4.3(a)(i)-(viii).

¹⁵³ Reply, paras. 102-103.

1. The Claimant's Position

(a) Milestone I: Turning Gear

135. According to the Claimant, the first milestone, "**Turning Gear**", entails getting the Turbines to turn very slowly, at approximately one hundred and thirty to one hundred and fifty rotations per minute (130-150 RPM) to test if they are working mechanically.¹⁵⁴ The purpose of this step is to allow the Turbine blades to cool down slowly, so as to "avoid warping, after they have been soaked at full speed".¹⁵⁵ The cooling process can take up to 48 hours due to the temperatures reached at full speed, thus "[e]lectricity from the grid is usually and customarily necessary for these processes which require the Turbines to turn at a low RPM for longer periods of time."¹⁵⁶ This step also tests whether all lubrication systems and fluid filtration systems are operating correctly through the DCS.

(b) Milestone II: First Fire

136. At "**First Fire**", the Static Frequency Converter (the "**SFC**") speeds up the Turbines to approximately two hundred rotations per minute (200 RPM) before they are ignited.¹⁵⁷ Accomplishing this milestone proves: that the ignition systems are sequencing properly; that the natural gas system necessary for igniting the liquid fuel is fully operational; that the fuel to air ratio is correct; that the damper system controlling fresh and return air is operating correctly; and that the liquid fuel system can supply the necessary amounts of fuel, at the proper time, to ignite the Turbines.¹⁵⁸ After the Turbines reach speeds above one thousand eight-hundred rotations per minute (1800 RPM), the SFC "drops out" and the Turbines are propelled by liquid or natural gas combustion.¹⁵⁹

(c) Milestone III: Full Speed No Load

137. In the Full Speed No Load ("**FSNL**") phase, the Turbines are ignited to full speed – approximately five thousand four hundred rotations per minute (5400 RPM) – this speed is

¹⁵⁴ Statement of Claim, para. 117; Exhibit C-38: Witness Statement of Phillip Elders, para. 84.

¹⁵⁵ Statement of Claim, para. 117; Exhibit C-38: Witness Statement of Phillip Elders, para. 84.

¹⁵⁶ Statement of Claim, para. 117; Exhibit C-38: Witness Statement of Phillip Elders, para. 84.

¹⁵⁷ Statement of Claim, para. 118; Exhibit C-38: Witness Statement of Phillip Elders, para. 85.

¹⁵⁸ Statement of Claim, para. 118; Exhibit C-38: Witness Statement of Phillip Elders, para. 85.

¹⁵⁹ Statement of Claim, para. 118; Exhibit C-38: Witness Statement of Phillip Elders, para. 85.

maintained, and then slowed down to a stop.¹⁶⁰ According to the Claimant, “[t]his is internationally acknowledged as the most important milestone, as it indicates that all systems are not only individually working but that the Power Station including all of these systems is also able to function as a whole.”¹⁶¹ Achieving this milestone entails “tuning” the Turbines at low speeds – less than one thousand five hundred rotations per minute (1500 RPM) – several times per day and for long periods of time.¹⁶² The PPA allows for approximately thirty (30) days of “tuning” to accomplish this final commissioning step.¹⁶³

(d) Milestone IV: Full Speed Full Load

138. The final milestone, Full Speed Full Load (“FSFL”), signals the completion of the commissioning process, whereby “the equipment is gradually loaded with back feed from the National Grid, indicating that the systems can handle the load.”¹⁶⁴ According to the Claimant, “a considerable amount of tuning is also required to finalize this process.”¹⁶⁵

2. The Respondent’s Position

139. According to the Respondent the Claimant’s “[I]labelling [of FSFL] as a ‘milestone’... is a clever misnomer.”¹⁶⁶ It asserts that the ‘Milestones’ the Claimant must achieve under the PPA in order to be entitled to payment are set forth in the Third Schedule to the PPA, and “[n]owhere in that Schedule is [FSFL] listed as a Milestone.”¹⁶⁷

140. The Respondent does not expressly set out its version of the commissioning process in its entirety either in its Statement of Defense or in its Rejoinder, but it emphasizes instead that the key ‘milestone’ the Claimant “was obligated to achieve under the PPA in order to earn Tolling Fees was ‘Complete Final Testing and Commissioning’ of the Barge within 90 days of the Effective Date (PPA Clause 11.4)”; or, “[a]lternatively, Balkan could demonstrate a right to Tolling Fees under Clause 11.9 of the PPA if it could show that all of the systems on the Barge

¹⁶⁰ Statement of Claim, para. 119; Exhibit C-38: Witness Statement of Phillip Elders, para. 86.

¹⁶¹ Statement of Claim, para. 119; Exhibit C-38: Witness Statement of Phillip Elders, para. 86.

¹⁶² Statement of Claim, para. 119; Exhibit C-38: Witness Statement of Phillip Elders, para. 86.

¹⁶³ Statement of Claim, para. 114; Exhibit C-38: Witness Statement of Phillip Elders, para. 81.

¹⁶⁴ Statement of Claim, para. 120; Exhibit C-38: Witness Statement of Phillip Elders, para. 87; *see also* Exhibit C-39: Witness Statement of Robert MacDonald, para. 13.

¹⁶⁵ Statement of Claim, para. 120; Exhibit C-38: Witness Statement of Phillip Elders, para. 87.

¹⁶⁶ Statement of Defense, para. 62.

¹⁶⁷ Statement of Defense, para. 62.

were ready for Final Testing and Commissioning subject only to the installation of a Transmission Line connecting the Barge to the National Grid.”¹⁶⁸ In its Rejoinder, the Respondent draws support for its assertion that the Claimant did not complete the commissioning of certain systems (that it alleges could have been commissioned without connecting to the National Grid) from the Expert Report of Parsons Brinckerhoff, which claims that the standard procedure for the commissioning process consists of the following eight steps:

The first stage is to carry out a thorough survey of all the equipment and prepare a full assessment of equipment condition, availability of spares and the necessary skilled personnel to install these replacements. From this survey Balkan should have produced a very detailed (Level-3) schedule of the work required to repair, refurbish and commission the Power Station. [Footnote omitted]

The second stage of the process is to purchase, deliver and install all the identified items that required replacement and/or refurbishment. Once these have been installed, initial tests must be conducted, such as pressure tests in piping systems, resistance, continuity tests and loop checks of the control circuits in electrical systems all of which are necessary before anything can be energised. This work, and the work in stages three and four below, can be undertaken using any available medium or low voltage power supply. Because the Barge was equipped with a Black Start Generator (“BSG”), the opportunity should be taken at this stage to make it operational for the latter stages of commissioning and testing when larger quantities of electrical energy will be required to rotate and accelerate a gas turbine.

The third stage of the process involves running plant auxiliaries, such as pumps and control valves, to circulate the necessary fluids such as lubricating oil, fuel and cooling water and checking that the designed flow rates and pressures are being achieved. Once this stage has been completed, and the plant parameters recorded, the gas turbine can be put onto barring round to provide an assurance that the rotor blades are not causing a rub on the stator that could indicate a bowed rotor on a turbine that has not been regularly rotated.

Also at this stage the plant controls, and the control logic, can be tested to prove that they can start and stop the various auxiliary drives, and where there is duty and standby plant, the auto changeover from duty to standby can be accomplished. The safety trips and alarms for the plant distributed control system (“DCS”) should also be proven and witnessed at this stage. These test results are normally required by the plant insurers if a claim is needed. In the case of the gas turbine it is particularly important to ensure that all the automatic turbine safety trips are operational before a first fire is attempted.

Electrically, the generator static tests (tests with the generator stationary) can be completed, and the 11 kV and 161 kV GIS switchgear functionally tested (in a de-energised state) along with their associated protection systems, to ensure that they are fully operational and that electrical safety is assured.

The fourth stage leads up to and includes first firing of the gas turbine and is significant as this is the first time that the turbine is accelerated up to firing speed (but not full speed) using the turbine control system. Particular care has to be taken with liquid fuelled turbines to ensure that any unburned liquid fuel does not accumulate in the combustion chamber but does drain into the false start fuel drain tank before the next start attempt. [Footnote omitted]

The first fire commissioning milestone also indicates that the fuel supply and the pilot ignition systems are both functioning. First fire is of necessity a short duration event to prove the firing and rotational capability of the turbine and its starting system, that the bearings remain cool and that there are no unexpected mechanical noises from the rotating

¹⁶⁸ Statement of Defense, para. 62.

machinery. This stage also requires powering up the static frequency converter (SFC) which energises the electrical generator thus using it as a starter motor to accelerate the turbine to firing speed.

The fifth stage: Once first firing is completed and any malfunctions corrected, the next stage of commissioning entails accelerating the turbine to full speed no load (“FSNL”) and maintaining this speed whilst a number of checks are carried out on the combustion and control performance and to allow the turbine to “heat soak”.¹⁶⁹ Depending upon the turbine type, FSNL requires around 25% of the full load fuel consumption as the gas turbine drives its own compressor. Sustained FSNL is a necessary pre-requisite to prove the various mechanical and electrical auxiliary systems and to allow dynamic testing to be completed on the generator and the synchronizing equipment. As detailed below, in our opinion Balkan never successfully achieved a recognized sustained FSNL milestone during the commissioning process.

The sixth stage: If a BSG is available, this may now be used to start the Barge auxiliaries, energise the static frequency converter, start the Gas Turbine (“GT”) and accelerate up to FSNL. Once sustained FSNL is achieved, the GT generator should be dynamically commissioned and tested, and when all is proven, the BSG and GT generator are synchronized and the BSG is then shut down. [Footnote omitted]

The seventh stage: The GT generator may now be synchronized with the 161 kV Transmission Line. At this point, Full Speed *Full* Load (“FSFL”) commissioning commences. This involves incrementally adding load to the GT generator until it is operating at full load.

The eighth stage: Once full load operation is achieved on both GT generators, final performance testing is conducted to prove that the power station is operating in accordance with its design parameters and is ready for commercial operation.

D. USE OF, AND UNITED STATES PROCEEDING AGAINST, SUBCONTRACTORS

Background to the United States proceedings

141. The Claimant employed several subcontractors on the Barge, including ProEnergy Services LLC (“ProEnergy”), ABB Group (“ABB”) and Ansaldo.
142. Since many of the undisputed facts related to the commissioning work completed by the Claimant, as well as the Respondent’s factual assertions with regards to certain disputed facts,¹⁷⁰ are established by documents procured from the ProEnergy Litigation (*infra*), the Tribunal finds it instructive, in setting out the Statement of Facts, to give a brief summary of the ProEnergy Litigation.
143. In September 2007, the Claimant subcontracted ProEnergy to assist it in commissioning the Power Station. Two legal proceedings were subsequently commenced between these parties:

¹⁶⁹ Expert Report of Parsons Brinckerhoff, at 6, fn. 5: “As discussed below, there are internationally recognized standards defining the parameters for FSNL. *See e.g.*, R-51 at Clause 6.3.11 for guidance as to turbine test requirements. Turbine manufacturers also have their own commissioning procedures.”

¹⁷⁰ *See e.g.*, Statement of Defense, paras. 14, 15, 23, 24, 38-55; Rejoinder, paras. 2-6, 56, 63.

first, on 18 February 2009, ProEnergy brought a suit against Balkan US in the US District Court for non-payment of its invoices, amounting to over USD 750,000.¹⁷¹ On 8 January 2010, Balkan US instituted action against ProEnergy and its affiliates in the Texas State Court. These proceedings are collectively referred to as the “**ProEnergy Litigation**”).¹⁷²

144. The Respondent points out that the Claimant’s Notice of Arbitration in the present arbitration alleges that it “could have charged Tolling Fees already since July 2008”, based on its claim that it had achieved “First Fire” for the Turbines as of that date, but notes that the Claimant does not include this assertion in its Statement of Claim.¹⁷³ The Respondent further relies on the deposition of Mr. Elders on 1 March 2010 in the ProEnergy Litigation, in which he stated that, as of 28 October 2008, ProEnergy was in breach of its contract with BEL/Balkan US and, as a result of its negligence and incompetence, ProEnergy was not “even close” to commissioning the Barge or completing its commissioning work.¹⁷⁴
145. Sometime thereafter, Ghana commenced proceedings against ProEnergy in the US District Court to obtain documents regarding the work ProEnergy performed on the Power Station, as well as documents relating to litigation filed against it by Balkan US.¹⁷⁵ The Claimant intervened in that proceeding to oppose Ghana’s application for discovery, but the US District Court granted Ghana’s application in Orders dated 7 February and 6 June 2011.¹⁷⁶ Both BEL’s/Balkan US’s motion to intervene and application for reconsideration of the 7 February 2011 Order were rejected by the US District Court.¹⁷⁷

¹⁷¹ Exhibit R-5: “Petition for Damages, Answer and Counterclaim, First Amended Answer to Defendant’s Counterclaim, *ProEnergy Services, LLC v. Balkan Energy Co.*, No. 2:09-cv-04026”.

¹⁷² Statement of Defense, para. 14, fn. 5; Exhibit R-4: “Plaintiff’s First Amended Petition, *Balkan Energy Co. v. ProEnergy Services, Int’l, Inc.*, et al., No. 09-01944”.

¹⁷³ Statement of Defense, para. 40, fn. 11, citing BEL’s Notice of Arbitration, ¶ 63. Respondent indicates that this allegation is in Balkan US’s Statement of Claim in the *ProEnergy* Litigation, para. 63, but does not provide it as an exhibit to its Statement of Defense.

¹⁷⁴ Statement of Defense, para. 39; Rejoinder, para. 3; Exhibit R-7: “Deposition of Phillip David Elders, *ProEnergy Services, LLC v. Balkan Energy Co.*, No. 09-4026”, at 179:25-180:4, 183:7-16.

¹⁷⁵ Statement of Defense, para. 14.

¹⁷⁶ Statement of Defense, para. 14; Exhibit R-3: “Order, *In re Government of Ghana*, No. 11-9002 (W.D. Mo. Feb. 7, 2011)”, Exhibit R-2: “Order, *Government of Ghana v. ProEnergy Servs., LLC*, No. 11-9002, 2011 WL 2652755 (W.D. Mo. June 6, 2011)”.

¹⁷⁷ Exhibit R-6: “Balkan Energy Limited (Ghana)’s Motion to Intervene and for Reconsideration of February 7, 2011 Order Granting the Government of Ghana’s Application for Discovery Pursuant to 28 U.S.C. § 1782 and for Emergency Stay, *In re Government of Ghana*, No. 11-9002.” The US District Court’s dismissal decision of that motion is not provided by Respondent as an exhibit.

146. The Respondent contends that after it apprised the Tribunal of the ProEnergy Litigation, Balkan US settled its action against ProEnergy, thereby terminating further discovery in those proceedings.¹⁷⁸ The Respondent asserts that both Balkan US and ProEnergy have since refused to disclose the terms of the settlement and have opposed the Respondent's application for their production.¹⁷⁹

E. COMMISSIONING WORK ON THE POWER STATION COMPLETED BY THE CLAIMANT IN 2008

1. Preliminary Commissioning Steps: Turning Gear and First Fire

(a) Undisputed Facts

147. According to the Claimant, it achieved the first milestone of Turning Gear on Turbine 1 on 22 April 2008, and on Turbine 2 on 9 November 2008.¹⁸⁰

(b) Disputed Facts

i. The Claimant's Position

148. The Claimant submits that, in June 2008, it achieved First Fire on Turbine 2 and, on 5 July 2008, it reached First Fire on Turbine 1.¹⁸¹

149. In its Reply, the Claimant contends that the Respondent, via Mr. Badger's witness statement, "confuses certifications that BE[L] achieved a fire of both turbine generators to [FSNL], with the contention that BE[L] claimed to have completed final mechanical testing of both generators at [FSNL]".¹⁸²

ii. The Respondent's Position

150. According to the Respondent, the Claimant was only able to attain First Fire of the Turbines at FSNL for a few seconds or minutes.¹⁸³ It contends that the Claimant "did so by forcing control

¹⁷⁸ Statement of Defense, para. 15.

¹⁷⁹ Statement of Defense, para. 15.

¹⁸⁰ Agreed Chronology of Events, at 1.

¹⁸¹ Statement of Claim, para. 258; *see also* Agreed Chronology of Events, at 2.

¹⁸² Reply, para. 101, *see also* para. 104.

¹⁸³ Rejoinder, para. 70.

logic and disabling the trip and protection controls that would have caused the turbines to trip prior to their ever reaching full speed”.¹⁸⁴

151. In its Post-Hearing Submission, the Respondent refers to Mr. Elders’ witness testimony and the ProEnergy Commissioning Report of 5 July 2008¹⁸⁵ to argue that BEL “did not achieve First Fire until July 28”,¹⁸⁶ that “only one of the two Turbines was fired, that the Turbine caught fire during the test, and that it only did not experience serious damage because a “trained firefighting brigade was present”.¹⁸⁷

2. Commissioning Steps Not Completed by the Claimant Allegedly Due to Inadequate Site Electricity

(a) Undisputed Facts

152. While it is clear that the Claimant faced a number of challenges in the commissioning process from late 2007 through to 2009, the reasons for these challenges are disputed by the Parties. In particular, the Parties disagree as to whether the provision of inadequate site electricity by the Respondent made commissioning more difficult or more costly.

153. On 3 September 2007, Mr. Elders agreed or certified that “electricity has been supplied at the required Voltage and Frequency and is available for the express use of Balkan [...] in executing [its] obligations in the [PPA]”.¹⁸⁸

154. To compensate for the alleged lack of site electricity that ensued, the Claimant purchased and rented various power generators sometime in 2007. On 17 November 2007, two such generators, each having power capacity of 200 kVA, broke down and were replaced by new ones of a different brand.¹⁸⁹

155. On 14 December 2007, Mr. J.D. Robinson from ProEnergy wrote to Mr. Elders at BEL requesting “three separate generators to supply various systems to the barge”.¹⁹⁰ In his reply,

¹⁸⁴ Rejoinder, para. 70; *see also* Agreed Chronology of Events, at 2: “07/05/2008: Balkan claims to have reached milestone of First Fire – disputed by Government.”

¹⁸⁵ C-38, Attachment 109.

¹⁸⁶ Respondent’s Post-Hearing Submission, para. 29.

¹⁸⁷ Respondent’s Post-Hearing Submission, para. 35.

¹⁸⁸ Exhibit R-38; Hearing on the Merits Transcript, Day 3 (Cross-examination of John Bryant), 173:2-8.

¹⁸⁹ Exhibit R-114; Hearing on the Merits Transcript, Day 3 (Cross-examination of John Bryant), 173:23-174:13.

¹⁹⁰ Exhibit R-25; Hearing on the Merits Transcript, Day 3 (Cross-examination of John Bryant), 175:1-6.

Mr. Elders questioned Mr. Robinson's need for the additional generators, adding that "[t]his is a total overkill. Your load for the barge is less than 500 amps."¹⁹¹

(b) Disputed Facts

i. The Claimant's Position

156. The Claimant contends that it required a capacity of 2,000 kVa for site electricity.¹⁹² It states that, as a result of the Respondent's failure to make this amount of electricity available to the Barge, it was obliged to purchase a 1,000 kVa transformer costing USD 30,000 in March 2008.¹⁹³

157. The Claimant points out that the Respondent does not dispute the Claimant's assertion that the 33 kV line running from the local electricity distribution network to the Barge was not operational in April or May 2008.¹⁹⁴ But at the same time, the Claimant also states that it rejected ProEnergy's requests for additional generators in December 2007 precisely because "Elders had recently been advised and, in fact verified that the 33 kV line had been connected and was operational."¹⁹⁵

ii. The Respondent's Position

158. The Respondent alleges that the Claimant's assertions as to the time when the 33 kV line became operational are "factually incorrect." In this regard the Respondent points to the evidentiary record, which shows that Mr. Elders had verified and certified that the 33 kV line was both operational and sufficient on 3 September 2007.¹⁹⁶ Accordingly, the Respondent reiterates that, on December 2007 when the Claimant admits it rejected ProEnergy's request for additional generators because the 33 kV line linking the local electricity distribution network to the Barge "had already been in operation for three months and work at the Site by ProEnergy was well underway".¹⁹⁷ By so doing, the Respondent states that the Claimant "trips over its own

¹⁹¹ Exhibit R-25.

¹⁹² Statement of Claim, para. 151.

¹⁹³ Statement of Claim, para. 154. *See also* Claimant's Post-Hearing Submission, para. 54.

¹⁹⁴ Reply, para. 78.

¹⁹⁵ Reply, para. 81; Rejoinder, para. 111.

¹⁹⁶ Rejoinder, para. 113; Exhibit R-38: "Ministry of Energy, Supply of Electricity to the Site (Construction Power), Work Completion Form".

¹⁹⁷ Rejoinder, para. 113.

inconsistent positions” in its Reply by first alleging that the 33 kV line was not operational until May 2008, but then, in December 2007, asserting that it had indeed been connected and was operational.¹⁹⁸

159. As will be discussed in greater detail below in addressing the Parties’ Arguments, the Respondent asserts that the position originally taken by the Claimant in its Statement of Claim “confusingly runs several concepts together”.¹⁹⁹ In particular, the Claimant’s position:

(i) confused the capacity of the 33 kV line with the capacity of the transformer on the Barge, (ii) was contrary to the position it took with ProEnergy in denying ProEnergy’s requests for additional generators, (iii) was legally inconsistent with [the Claimant’s] claim in the *ProEnergy* Litigation that ProEnergy could and should have completed the Power Station by March 2008, and (iv) at best, extended Balkan’s time to complete the commissioning to October 2008.²⁰⁰

160. On 17 June 2008, Mr. Elders and his team met with the Minister of Energy and his team, to discuss the progress of the Project.²⁰¹ During this meeting, Mr. Elders made clear to the Minister that while he had indeed certified that Ghana had provided site electricity to the Barge on 4 May 2008, on 5 May 2008 the power went out five times. Similar power outages continued to occur thereafter, normally in the early hours of the morning. In particular, Mr. Elders complained that there was no way that the existing 200 kVa transformer could meet the Barge’s power needs, since at least 1,000 amps of power was required at any one time – an amount of power which the 200 kVa transformer could not support. Mr. Elders further advised the Minister that Balkan was spending over USD 4,000 on extra generators to provide sufficient site electricity to continue their commissioning efforts on the Barge. The video recording of this meeting shows that the Minister agreed to provide more reliable site electricity.

¹⁹⁸ Rejoinder, para. 110.

¹⁹⁹ Statement of Defense, para. 76.

²⁰⁰ Rejoinder, para. 109; *see also* Statement of Defense, paras. 76-84.

²⁰¹ Exhibit C-38, Attachment 42, Video of 17 June 2008 Meeting.

3. Commissioning Steps Not Completed by the Claimant Allegedly Due to Inadequate or Insufficient Grid Connectivity

(a) Did the Claimant Achieve Mechanical Testing of the Turbines at FSNL?

i. Undisputed Facts

161. Notwithstanding Ansaldo's initial reports certifying to the contrary (*infra*), it appears to be undisputed between the Parties that the Claimant was never able to achieve mechanical testing of the Turbines at FSNL.²⁰²
162. In ProEnergy's daily report dated 5 to 15 June to BEL, it described the status of the turbines as follows, in the relevant part:

Mechanical Work Performed Today:

1. Train 1 and 2 turbine, gearbox and generator exhaust fans, dampers and louvers require replacement because of severe corrosion [...].
 11. WEATHER REPORT: As we are in the rainy season, it tends to rain almost every day; not your normal rain; tropical down pours that clearly show you what roofs leak and which ones do not. We have a major issue on the barge with every single roo[f] that we have; we leak water into the gas turbine enclosures, both units [...].²⁰³
163. In its next daily report to BEL for the period 16 June to 6 July 2008, ProEnergy described the condition of the Turbines as follows, in relevant part:

05JUN08

We managed to manually first fire Unit 1 on Saturday; ignition gas valves, ignitors and LF fuel injection control valves were manually manipulated. The unit responded fairly well with the exception of catching on fire as we has [*sic*] a lot of liquid fuel in the turbine that we had rinsed with water but collected in various places inside and outside the turbine; we did not experience any damage as we have a trained fire fighting brigade. The DCS logic is simply not complete and I do not have a clue as to how Ansaldo fired this unit as they have told me; as I have stated before, I will testify that these units have never fired simply because nothing works.

[...]

10. DCS: DCS Logic is a Farce; Ansaldo has repeatedly told me that this barge has first fired both gas turbines; I do not believe this and can prove it in a court of law; 10% of the automated logic is functional and that is being very nice; most of the logic does not work, even when all conditions are satisfied. Site personal [*sic*] including Eric Wolters of Ansaldo

²⁰² Reply, para. 100; Rejoinder, para. 70; *see also* Claimant's Post-Hearing Submission, para. 61.

²⁰³ Exhibit C-36, Attachment 4 (also marked Exhibit R-88) "ProEnergy Daily Reports dated June 5-15, 2008".

and Todd Dorsch of ProEnergy and J.D. Robinson simply did not have the skill sets available to re-program this entire barge [...].²⁰⁴

164. In the meantime, on 7 July 2008, Ansaldo wrote as follows to BEL, copying the Barge's Site Director, Mr. J.D. Robinson:

Following your request, we are pleased to submit our best offer for the supplies and supervision activities that will be necessary to rehabilitate the Turbogenerator Unit of the Osagyefo Barge power station (N. 2 Gas Turbines V64.3A and N.2 Generators type WY18Z-066LLT) and update the related GTCMPS systems, in order to make the Units ready for proper and reliable operation.

The rehabilitation activities will be performed on the basis of previous inspections performed in January 2005 and following the activities carried out on Unit 1 finalised to start it at Full Speed no Load.²⁰⁵

The scope of the work to be done was stated to include:

- 1.1 Supply of material for Rehabilitation of Turbogenerator Units (N.2 Gas Turbines V64.3A and N. 2 Generators type WY18Z-066LLT) as defined in the paragraph 3.1 of our Technical Specification [Annex 1 to the letter].
- 1.2 Supervisors and Specialists for Rehabilitation of Turbogenerator Units and commissioning assistance during commissioning phase.
- 1.3 Supply of the Updated Hardware and Software of the on-site existing GTCMPS Systems, and retrofit of protection and control system.
- 1.4 Supervisors for Upgrading of Hardware and Software of the on-site existing GTCMPS Systems, and retrofit of protection and control system.²⁰⁶

Delivery of the main supplies was foreseen in 24 months for Unit 1 and 30 months for Unit 2, considering the order date within July 2008.²⁰⁷ Further, the offer was based on the execution of the rehabilitation activities within the periods of August 2010-October 2010 for Unit 1 and February 2011-April 2011 for Unit 2.²⁰⁸

165. The prices for rehabilitating Turbogenerator Unit 1 were stated as being € 5,840,000, € 3,808,000 for Turbogenerator Unit 2, € 1,552,000 for supervision, and € 2,402,000 for the updated hardware and software GTCMPS systems, as well as the retrofit of protection and control system.²⁰⁹

²⁰⁴ Exhibit C-36, Attachment 4 (also marked Exhibit R-18) "ProEnergy Daily Reports dated June 16-July 6, 2008".

²⁰⁵ Exhibit C-38, Attachment 165 "Letter from Ansaldo transmitting report (3505-3520)", at 1.

²⁰⁶ Exhibit C-38, Attachment 165, at 1.

²⁰⁷ Exhibit C-38, Attachment 165, at 3.

²⁰⁸ Exhibit C-38, Attachment 165, at 3.

²⁰⁹ Exhibit C-38, Attachment 165, at 3-4.

166. BEL wrote to the Ministry of Energy on 2 September 2008, asking it to confirm that it wanted to go ahead with operating the Barge on liquid fuel, even though the costs would be extremely high.²¹⁰ In that regard, BEL confirmed "its readiness to start its first power generation starting on 1st November, 2008" and advised that it needed "to confirm [its] high grade fuel supply, storage and site delivery schedules to enable [it to] go commercial on [the] scheduled date."²¹¹ BEL further stated that, due to the unavailability of high grade diesel fuel for power production on the local market, it had been forced to test run the barge on lower volumes of jet fuel, which is even more expensive.²¹² BEL thereby advised the Ministry that they should "do everything possible to get natural gas to the barge as soon as possible."²¹³

167. In its daily report to BEL for the period 30 August to 5 September 2008, ProEnergy provided the following status updates with regard to the firing of Turbine 1:

August 31, 2008

- d. Unit 1 fired and run up to 4000rpm. The unit tripped on over speed protection. Grounding of speed sensors to isolated ground carried out.
- e. Unit 1 refired and run up to 3450 rpm. Unit shut down due to extreme temperature on outer casing, thermocouple feed back did not trip the unit. On investigation of thermocouples it was found that the feed back had been by-passed in the DCS, this has now been corrected. A fire occurred inside of the turbine but extinguished. No damage occurred.

[...]

September 01, 2008

- b. Unit 1 fired and run up to 3800 rpm; the unit was shut down due to high exhaust temperatures.
- c. We continue to encounter speed sensor problems; further trouble shooting is on-going.

[...]

September 02, 2008

- e. Unit 1 re-fired at 16H03 and tripped on over speed. Sensor 103, 103 and 106 failed.

[...]

- i. Ganz continue with installation of the new motors and coupling terminations on the GIS.

[...]

September 04, 2008

²¹⁰ Exhibit C-38, Attachment 121 "Balkan letter to Ministry of Energy dated Sept. 2, 2008, re: Power Generation Consumption".

²¹¹ Exhibit C-38, Attachment 121, at 1.

²¹² Exhibit C-38, Attachment 121, at 2.

²¹³ Exhibit C-38, Attachment 121, at 2.

f. Fired Unit 1 at 14H13. Unit tripped on flame failure. Gas supply has been exhausted.
[...]

September 05, 2008

d. Unit fired, tripped on flame failure. There is a sequence in the logic, if the speed sensors are faulty and the unit does not trip, then a flame failure is activated. Our efforts to by-pass the speed sensor trip would seem to have been in vain.

[...]

Conclusion:

The speed sensors are preventing further progress on Unit 1 [...].²¹⁴

168. In its daily report to BEL for the period 20-26 September 2008, ProEnergy reported the following with respect to Turbine 1:

g. Start Unit 1, unit trip on "flame failure". Investigated failure and found flame scanner lens coated with soot. Cleaned and replaced lens.

h. Restart Unit 1, at 1800RPM the SFC tripped "max amps on bridge rectifier". Reset trip.

i. Restart Unit 1 again and same trip on SFC occurred. Attempt to contact Ansaldo SFC engineer. No response.

[...]

September 24, 2008

e. Attempt to fire Unit 1, continuous trips related to fuel valve. The new HSS cards (Not Ansaldo Issue) were installed after wiring modifications were carried out. We reverted back to the old cards and wiring configurations and will carry out testing on the fuel valves. It would seem that the new HSS cards need to be programmed by Ansaldo.

f. During continuity checks between the GIS and synchronization panels we have found that GIS 1 wiring goes to Sync panel 2 and GIS 2 wiring goes to Sync panel 1. Sync panel 1 is connected to the DCS. In essence we have no DCS to GIS 1 for Unit 1. This is an original wiring configuration from Ansaldo. We are currently looking at the best course of action to go forward.

[...]

Conclusion:

The new HSS cards have been received on site; however we have not been able to check their functionality as we have encountered various other problems on the unit [1 Turbine]. The fuel oil shuts off valves started responding intermittently, some of the solenoids had failed; we had sufficient spares on site to correct the problem. The SFC has started tripping on various causes; we have investigated the BSDG as that seemed to be the source of the problem. We are unable to access the SFC program to enable further trouble shooting. Balkan Energy should consider the return of Ansaldo controls engineer and Ansaldo [*sic*] SFC engineer [...].

169. In its daily report to BEL for the period 27 September to 3 October 2008, ProEnergy remarked on the progress of commissioning Turbine 1 as follows:

September 28, 2008

²¹⁴ Exhibit C-36, Attachment 4 "ProEnergy Daily Reports dated Aug. 30-Sept. 5, 2008".

c. The hydraulic block and regulating valves have been stripped from Unit 2 and installed on Unit 1. All systems were normalized and the unit engaged on turning gear. Unit 1 turning gear is now back to normal and running at 145RPM. (2 complete sets of hydraulic blocks, regulating valves and gauges to be ordered, plus a spare set of regulating valves).

d. Started Unit 1, unit tripped on SFC/BSDG related problem, it is also thought that we could be starving the unit of air as we have installed the primary air filters. Again we had a fire inside of the turbine which self-extinguished.

[...]

October 01, 2008

c. Start unit 1, load BSDG to enable trip for the purpose of diagnosing the fault on the BSDG. The unit tripped at 1690RPM and 205 deg C. Trip was SFC/BSDG related. Yet another fire inside of the turbine 900deg C. Fire self-extinguished.

[...]

October 02, 2008

e. Open combustion chamber and carry out a nozzle inspection. The nozzles appear to be in a good state. However the 1st stage turbine blades have sustained damage and would need to be changed out. This unit can no longer be fired under current condition, the damage sustained by the unit can only deteriorate further.

170. On 9 July 2009, Ansaldo certified in the following terms that both Turbines had reached FSNL:

This letter is to certify that the two Gas Turbines (V64.3A) located on the Osagyefo Power Barge have successfully completed the milestone of Full Speed No Load (FSNL). This accomplishment was reached without electrical grid connectivity.

The two turbines have reached this milestone under the supervision and witnessing of Ansaldo Energia, the Equipment Manufacturer of these units.

Properly designed electrical grid connectivity is mandatory to finalize any further commissioning milestones.²¹⁵

171. On 2 October 2009, Mr. Savio from Ansaldo submitted a Memorandum of Understanding to Ghana's Ministry of Energy,²¹⁶ which commented on the state of the Turbines as follows, in relevant part:

Certification: Both parties certify that the two V64.3A Ansaldo Turbines have accomplished the milestone of Full Speed No Load. This accomplishment was certified in writing by Ansaldo Energia S.p.A to Balkan Energy (Ghana) Limited on July 9, 2009. This milestone was made possible only by the direct supervision and work performance of Ansaldo Energia S.p.A. The final commissioning can only be completed when electrical grid connectivity and energization is provided.

Ansaldo Energia SpA Scope:

...

3. Make modifications and repairs of turbines (V64.3A) as necessary to operate with natural gas.

²¹⁵ Exhibit C-38, Attachment 157 "Ansaldo letter: Full Speed No Load", dated 9 July 2009.

²¹⁶ Day 2 Merits Hearing Transcript, at 1243:23-124:2: "Now here is a letter written in October to the Ministry of Energy directly, because apparently the Ministry of Energy, unbeknownst to us, had gone to Ansaldo and asked them to do a technical and financial audit of Balkan."

4. Complete final commissioning with full speed full load for natural gas operation.²¹⁷

172. On 30 July 2010, Ansaldo wrote to the Ministry of Energy, putting its certification of the Turbines at FSNL in context. The relevant part of the letter reads as follows:

3. We take the occasion to remark that 2 years ago BE[L] ordered AEN to perform whatever activity needed until FSNL was reached on both GT units and nothing else, highlighting that fact that, from a technical point of view, the FSNL condition is only but a first step in the much longer process of other necessary activities to be undertaken like the actual refurbishment up to real operational readiness of the Osagyefo Barge Power Plant. Among others, but not limited to: Control systems TCS and AVR elements replacement, cabinets and cabling completion and testing; generators complete inspection and tests without and with load; GT's TMR needed implementation; full auxiliaries functional checks and complete final units recommissioning among the unavoidable major steps yet to be performed, before Full Speed Full Load conditions can be reached.

We are very sorry about the misleading verbal information given by Ansaldo Energia Sales Engineer during the meetings held last year and this year in Your premises. We confirm all needed internal actions have been taken at his regards, informing that all future desirable relationships will be kept by another qualified AEN sales engineer.

The same wrong information received from the Ansaldo Sales Engineer lead also our Country Representative Mr. Henri JM Wientjes to equivocal conclusions, unfortunately slowing all progress on the matter of the barge recovery.²¹⁸

ii. Disputed Facts

The Claimant's Position

173. In its Statement of Claim, the Claimant initially alleged that it attained FSNL on both turbines on 30 June 2009.²¹⁹ The Claimant explained that “[h]aving realized that no grid energization was to be expected anytime soon, Elders decided to try and see how far BEL would get in reaching their next milestone [FSNL] with mimicking [*sic*] grid connectivity”; with “the added challenge of having to mimick [*sic*] back feed with site electricity.”²²⁰

174. However, in its Reply, the Claimant concedes that it did not in fact achieve mechanical testing of the turbines at FSNL.²²¹ The Claimant maintains that in order to conduct “final mechanical testing” at FSNL, it needed “full grid connectivity.”²²²

²¹⁷ Exhibit C-38, Attachment 159 “Memorandum of Understanding dated Oct. 2, 2009”, at 1.

²¹⁸ Exhibit C-38, Attachment 160 “Ansaldo letter dated July 30, 2010, re: Ansaldo letter of 7/9/09 with Proposal (3469-3470)”, at 1-2.

²¹⁹ Statement of Claim, paras. 224, 258.

²²⁰ Statement of Claim, para. 258.

²²¹ Reply, para. 100.

²²² Reply, para. 100. *See also* Claimant's Post-Hearing Submission, para. 61.

175. The Claimant also argues that Ansaldo had recommended against the use of the “**Black Start Generator**” for commissioning, and that the Claimant was entitled to rely on the manufacturer’s advice.²²³ In its letter to BEL dated 13 January 2009, Ansaldo advised as follows, in the relevant part:

Commissioning activities using the Black Start Generator – The Black Start Generator is not utilized to perform activities of long duration like commissioning. There are significant difficulties and risks associated with attempting to commission the power plan with the black start generator. Therefore, it is preferable that Grid Connectivity be utilized for the entire commissioning process.²²⁴

The Respondent’s Position

176. The Respondent counters that grid connectivity only becomes “an essential and necessary condition of the commissioning process ... when a Transmission Line is required to provide sufficient Load on the turbines so that they can be tested through FSFL”.²²⁵ Alternatively, the Respondent submits that the Claimant could have used the Black Start Generator on the Barge to achieve mechanical testing of the turbines at FSNL – a procedure which ProEnergy described in a memorandum to the Claimant.²²⁶ The Respondent finds further support in the expert testimony of Mr. Fainhurst, who testified that he had personally performed FSNL tests on turbines without grid connectivity using a Black Start Generator.²²⁷

177. The Respondent asserts that the Turbines “were in a complete state of disrepair in August 2008 when the Essiama Transmission Lines were energized.”²²⁸ The Respondent refers to several exchanges between the Claimant and ProEnergy, obtained in the discovery of documents from the ProEnergy proceedings, which show that there were problems with the DCS logic, including fuel injection, piping and wiring which prevented the Turbines from achieving FSNL.²²⁹ In particular, the Respondent emphasizes that, by the Claimant’s own admission, ProEnergy

²²³ Exhibit C-38, Attachment 153; *see also* Hearing on the Merits Transcript, Day 5 (Cross examination of Mr. Osafo), 44:7-20.

²²⁴ Exhibit C-38, Attachment 153, at 1.

²²⁵ Rejoinder, para. 69.

²²⁶ Rejoinder, para. 71; Expert Report of Parsons Brinckerhoff, paras. 5.16, 5.18; Exhibit C-36, Attachment 13: “Letter to Phil Elders from J.D. Robinson [of ProEnergy]”, excerpted in Rejoinder, para. 72.

²²⁷ Respondent’s Post-Hearing Submission, para. 134.

²²⁸ Rejoinder, para. 74; Respondent’s Post-Hearing Submission, para. 130

²²⁹ Rejoinder, para. 74.

irreparably damaged the rotor blades of Turbine 2 in October 2008 when it unsuccessfully sought “over a hundred times” to start the generator.²³⁰

(b) The Condition of the Essiama and Elubo Transmission Lines Prior to Being Energised on 8 August and 13 November 2008, Respectively

178. As it appears from the Parties’ explanation at the Hearing, there are three connection points on the Barge to the 161 kVa GIS: a first bay that connects to the Essiama substation, a second bay that connects to the Elubo substation and a third bay that “was for future work”. Each bay could be operated in isolation or in combination with each other, depending on the route through which power should be evacuated.²³¹

179. Currently, the Elubo substation is not able to receive back-feed from the Barge. It needs to be energised through the Essiama line, which extends to Tower 3. The Claimant’s position is that the Essiama substation could not take the full load from the Barge, and that Ghana had to energise the Elubo Transmission Line as well.²³² The Respondent contends that the Essiama line alone suffices to power the Barge.

i. Undisputed Facts

180. It is undisputed between the Parties that BEL complained to Ghana about “regular and dense tree overgrowth of the [Transmission] lines all along the route”, noting that such overgrowth “would cause short circuiting to appear as soon as the transmission line would be charged with electricity.”²³³ According to the Claimant, Mr. Elders “made a helicopter flight (on 25 November 2007) from the Power Station to the regional stations at Elubo in the [e]ast and Essiama in the west” and took photos of the alleged tree overgrowth along the route of the Transmission Lines.²³⁴

²³⁰ Rejoinder, para. 74, referring to R-8, at 46:19-47:4, R-4, para. 5.17(I), and R-9.

²³¹ Hearing on the Merits Transcript, Day 2, 65:1-6; 65:16-19.

²³² See e.g. Hearing on the Merits Transcript, Day 2, 70:13-16.

²³³ Statement of Claim, para. 162.

²³⁴ Statement of Claim, para. 162.

181. On 27 November 2007, Mr. Elders wrote to the then Minister of Energy, Mr. Adda, reporting the Claimant's concerns about the "jungle overgrowth on the transmission lines and the work required on the two regional stations."²³⁵
182. Having received no response from the Respondent, Mr. Elders again wrote to the Ministry of Energy on 17 December 2007, suggesting that the Respondent "focus on one of the two regional stations, the one at Elubo, first ... [because] it seemed designed for the full capacity of the Power Station and could thus, if necessary, operate on its own."²³⁶
183. On 4 April 2008, a site visit of the Barge was conducted by the Respondent, at which time the Claimant asserts Mr. Elders "brought up the other matter that was slowing down the reliable and adequate national grid connectivity: tree growth on the transmission lines."²³⁷
184. On 28 July 2008, the Respondent advised the Claimant in writing that it would soon energise the Essiama Transmission Line and that it was prepared to connect the Power Station to the National Grid using this line.²³⁸
185. On 29 July 2008, the Claimant responded to this notification with a series of concerns that it claimed would prevent the Essiama Transmission Line from being energised.²³⁹
186. On 12 August 2008, the Respondent wrote back to the Claimant, indicating that its concerns had been addressed and that it saw no obstacle to energizing the Essiama Transmission Line.²⁴⁰
187. On 8 August 2008, the Respondent energised the Essiama Transmission Line to Tower 3 (the tower just outside the Project Site) and informed the Claimant that it was ready to connect the Barge to the National Grid.²⁴¹ The Essiama Transmission Line has a capacity of 365 MVA, which is the maximum output of the Power Station, pursuant to the requirements specified in

²³⁵ Statement of Claim, para. 162, referring to Exhibit C-38, Attachment 115: "BE[L] Letter to MOE."

²³⁶ Statement of Claim, para. 162, referring to Exhibit C-38, Attachment 116: "BE[L] re: lack of grid connectivity."

²³⁷ Statement of Claim, para. 172.

²³⁸ Statement of Defense, para. 91.

²³⁹ Statement of Defense, para. 92, referring to Exhibit R-26: "Letter from Phillip Elders to the Minister of Energy, Re: Grid Connection Process, Visual Inspection of VRA Audit Results."

²⁴⁰ Statement of Defense, para. 93, referring to Exhibit R-27: "E-mail chain between Joseph Wiafe, Isaac Nyantakyi, and Phillip Elders, Re: Fw: line clearance and ground details (typical)."

²⁴¹ Statement of Defense, para. 93, referring to Exhibit R-27: "E-mail chain between Joseph Wiafe, Isaac Nyantakyi, and Phillip Elders, Re: Fw: line clearance and ground details (typical)."

the Fourth Schedule to the PPA.²⁴² Mr. Elder's testimony at the Hearing was that Ghana energised the Essiama Transmission Line by simply putting "a jumper on it to the other side of the transmission tower and backfed the Elubo substation."²⁴³

188. The Claimant states that the VRA cleared the tree overgrowth from the Transmission Lines in October 2008.²⁴⁴

189. On 13 November 2008, the Respondent energised the Elubo Transmission Line to Tower 3.²⁴⁵

ii. Disputed Facts

The Claimant's Position

190. In its Reply, the Claimant appears to maintain its position that the Essiama and Elubo Transmission Lines were not fully commissioned and rehabilitated, but does not expressly refute the facts described above.²⁴⁶ However, in its Post-Hearing Submission, the Claimant refers to Mr. Osafo's testimony, which affirmed that, at the dates referred to, the Elubo line was energised but was not ready.²⁴⁷ Mr. Osafo's testimony made reference to the logs produced at the time, which suggest that the attempted energization resulted in a general fault in the line.²⁴⁸

191. Also, there is a suggestion in the Claimant's pleadings that it had somehow documented that, even after the Essiama Transmission Line was energised in August 2008, it was unreliable and frequently could not carry the requisite energy to power the Barge, notwithstanding its purported capacity of 365 MVA. However, the Tribunal is unable to find any Barge status reports or other express documentation to that effect. In its Post-Hearing Submission,²⁴⁹ the Claimant makes reference to the pictures and report of inspection of the Essiama substation conducted by Mr. Robinson, which suggest that the Essiama substation required equipment modifications and recalibration to interconnect with the Barge.²⁵⁰ The Claimant adds that, in

²⁴² Statement of Defense, para. 95.

²⁴³ Statement of Defense, para. 96.

²⁴⁴ Statement of Claim, para. 190.

²⁴⁵ Hearing on the Merits, Day 2, 70:20-22; *see also id.*, 69:18-20.

²⁴⁶ Reply, para. 22.

²⁴⁷ Claimant's Post-Hearing Submission, para. 75; Hearing on the Merits Transcript, Day 5, 10:25 to 12:11.

²⁴⁸ *See* Appendix A-18 to the Claimant's Post-Hearing Submission.

²⁴⁹ *See* Claimant's Post-Hearing Submission, para. 76.

²⁵⁰ Claimant's Post-Hearing Submission, para. 76.

order to connect to the substation on the Barge, both the Essiama and the Elubo substations would have had to coordinate relay protection,²⁵¹ which it argues was never completed.²⁵²

192. The Claimant further argues that “it is clear when viewed in the context of the timeline and the meetings and agreements between the parties, that Mr. Wiafe [the Chief Executive Officer of GRIDCo] instructed Isaac Nyantakyi [Technical Manager at the VRA] to energise the lines despite the recognized deficiencies in the transmission lines and transmission towers in order to claim that the Government had complied with its obligations under paragraph 3.3 of the PPA.”²⁵³ The Claimant also contends that “[w]orks on the power plant, transmission line and substations to evacuate power from the power plant are still in progress” today.²⁵⁴

The Respondent’s Position

193. In reply to the Claimant’s contentions, the Respondent points out that the Essiama and Elubo Transmission Lines were energised on 8 August and 13 November 2008, respectively.²⁵⁵ However, BEL “could not have connected the Power Station to either the Essiama or Elubo Transmission Lines when they were energised because BEL had yet to complete the 161 kV electrical system on the Barge.”

4. The RTU / MicroSCADA²⁵⁶

194. The Parties’ diverging factual assertions and associated arguments raise the following factual questions for the Tribunal’s determination: (a) who had the responsibility to commission the RTU / MicroSCADA?; and (b) is the RTU / MicroSCADA necessary for the Claimant to connect to the National Grid and complete the commissioning process?

²⁵¹ Hearing on the Merits Transcript, Day 5, 130:6 to 131:10.

²⁵² Hearing on the Merits Transcript, Day 6, 4: 13-15; 25:1-29:5.

²⁵³ Reply, para. 29.

²⁵⁴ Reply, para. 27.

²⁵⁵ Rejoinder, para. 78.

²⁵⁶ Discussed in Statement of Claim, paras. 115, 192-194, 201, 204, 216; Reply, paras. 30-77; Statement of Defense, paras. 100-112; Rejoinder, paras. 80-108.

(a) Who Had the Responsibility to Commission the RTU / MicroSCADA?

i. Undisputed Facts Related to Whether the Claimant Assumed Responsibility to Commission the RTU

195. According to an internal e-mail dated 28 April 2008,²⁵⁷ Mr. Elders stated that “[t]he challenge is to find an organization that can help us get the [RTU / MicroSCADA] system upgraded without utilizing Ansaldo and ABB ... Unfortunately, Ansaldo and ABB are so busy that they don’t have [BEL] as a priority.”²⁵⁸ In this search ProEnergy, as the Claimant’s contractor, sought proposals from various third parties to commission the RTU on the Barge.²⁵⁹
196. On 29 May 2008, the Claimant, through ProEnergy, obtained a proposal from ABB to upgrade the existing RTU on the Barge.²⁶⁰
197. On 13 June 2008, Mr. Scott Kinney, owner of ProEnergy, solicited from Mr. J.D. Robinson, the manager at Taurus Power & Controls Inc. (“**Taurus**”) at that time, a proposal to commission the RTU.²⁶¹ It appears that Taurus was contacted by ProEnergy without coordination with BEL.
198. At the meeting held on 17 June 2008, discussions between the Parties resulted in an agreement between them on a grid connection process for the Barge (the “**Grid Connection Process Agreement**”),²⁶² whereby the Respondent was to use its contacts with ABB to request a proposal from ABB, on the understanding that BEL would pay for the costs of commissioning charged by ABB.
199. On 2 July 2008, Taurus e-mailed to ProEnergy its evaluation of the RTU on the Barge, together with its commissioning options.²⁶³

²⁵⁷ Procured by the Respondent in the *ProEnergy* Litigation.

²⁵⁸ Statement of Defense, para. 103; Exhibit R-30: “Email from Phillip Elders to Curly Baca, Re: DCS for Power Barge in Africa”, dated 27 April 2008.

²⁵⁹ See e.g., Rejoinder, para. 88; Reply, para. 18.

²⁶⁰ Reply, para. 33; Statement of Defense, para. 103; Exhibit R-29: “ABB, S/S Barge – Effasu 161 kV (Ghana), Retrofit plan for Protection and Control System, Technical Description”, dated 29 May 2008.

²⁶¹ Reply, para. 39; see Exhibit R-31: “Email from Scott Kinney to J.D. Robinson”, dated 18 June 2008.

²⁶² Reply, para. 35; Exhibit C-54: Supplemental Witness Statement of Robert MacDonald, para. 24; Statement of Defense, para. 90; Exhibit R-52: “Osagyefo Power Barge Grid Connection Process Agreement”, dated 17 June 2008.

²⁶³ Rejoinder, para. 91; Exhibit R-83: “Email from Scott Kinney to J.D. Robinson and others, Re: 161KV GIS Switchgear Status”, dated 2 July 2008.

200. On 7 July 2008, Taurus advised ProEnergy and the Claimant that the Barge had “an existing old RTU200 system from ABB that is obsolete and all the software has been lost”, Taurus promised that it would submit a quote to replace the RTU.²⁶⁴
201. On 11 July 2008, Taurus presented its proposal (and quote) to replace the existing RTU / MicroSCADA on the Barge with an entirely new system.²⁶⁵
202. On 11 August 2008, Taurus wrote to ProEnergy regarding its price for the installation and start up of the RTU / MicroSCADA.²⁶⁶
203. During this time, the Claimant also requested GRIDCo to assist it in obtaining a proposal and quote from ABB for the RTU / MicroSCADA.²⁶⁷ GRIDCo agreed to solicit said proposal,²⁶⁸ which it subsequently forwarded to the Claimant.²⁶⁹
204. On 7 September 2008, ProEnergy wrote to Taurus to inquire when it would be installing the RTU / MicroSCADA.²⁷⁰
205. On 30 September 2008, Taurus wrote to ProEnergy:

I am quite happy working for ProEnergy. I don't know how much more [BEL] will use me but I would like to get this SON-OF-A-BITCH running.²⁷¹

206. On 9 October 2008, Mr. Robert MacDonald (employed at BEL since September 2008),²⁷² wrote to Mr. Elders, advising him that the responsibility for commissioning the RTU / MicroSCADA

²⁶⁴ Statement of Defense, para. 105; Exhibit R-32: “Email from Scott Kinney to J.D. Robinson, Re: Osagyefo Power Barge system”, dated 7 July 2008.

²⁶⁵ Statement of Defense, para. 106; Rejoinder, para. 92; Exhibit R-33: “Letter from Scott Kinney to J.D. Robinson, Re: Barge Power 161 kV remote control and data acquisition system (SCADA)”, dated 11 July 2008.

²⁶⁶ Rejoinder, para. 93; Exhibit R-102: “Email from Scott Kinney to J.D. Robinson, Re:”, dated 11 August 2008.

²⁶⁷ Statement of Defense, para. 109; Witness Statement of Joseph Wiafe, paras. 10, 16.

²⁶⁸ Statement of Defense, para. 110: Respondent asserts GRIDCo's agreement to obtain a proposal and quote from ABB is reflected in Phillip Elders' “plan of action” (Exhibit C-38, Attachment 102: “GRIDCo/BE[L] Letter Agreement re: RTU”, dated 24 October 2008).

²⁶⁹ Statement of Defense, para. 110; Exhibit C-38: Witness Statement of Phillip Elders, para. 230; Statement of Claim, para. 247.

²⁷⁰ Rejoinder, para. 94; Exhibit R-84: “Email from Scott Kinney to J.D. Robinson, Re:”, dated 7 September 2008.

²⁷¹ Rejoinder, para. 96; Exhibit R-85: “Email from Vincent Jones to Scott Kinney and Jeff Canon, Re:”, dated 30 September 2008.

²⁷² Exhibit C-39: Witness Statement of Robert MacDonald, para. 1; Rejoinder, para. 95: Respondent states that Robert MacDonald arrived in Ghana sometime in September.

on the Barge fell to the Government, not BEL.²⁷³ Thereafter, the Claimant insisted that the Respondent should commission and pay for the installation of the RTU / MicroSCADA on the Barge.²⁷⁴

ii. Disputed Facts on Whether the Claimant Assumed Responsibility for Commissioning the RTU

The Claimant's Position

207. In its Reply, the Claimant explains that it only solicited proposals from various third parties to commission the RTU so as to “apprise [itself] of the breadth and scope of the necessary commissioning work” so that the work could be “coordinate[d]”, or “dovetaile[d]”, with the Respondent.²⁷⁵

208. The Claimant states that the Respondent’s assertion that BEL avoided employing Ansaldo or ABB to install and commission the RTU is “incorrect” and that, “[j]ndeed ABB and/or its vendors or subcontractors provided numerous works and commissioning of their components on the [B]arge both before and after May 2008.”²⁷⁶

209. According to the Claimant, the Grid Connection Process Agreement (signed by the Parties on 17 June 2008) was the “first exchange” between the Parties with respect to the installation and commissioning of the RTU / MicroSCADA and “clearly” provides that the Respondent’s contractors, Forclum and Norlec, and not BEL, were responsible for installing and commissioning a new MicroSCADA system.²⁷⁷ The Claimant further contends that the Grid Connection Process Agreement states that Norlec will carry out all “work with respect to the power line carrier including but not limited to: 1) line traps; 2) CVTs; and 3) the ‘new ABB SCADA system’. Again, on the [B]arge this unit was the RTU / MicroSCADA functions”.²⁷⁸

²⁷³ Reply, para. 54; Rejoinder, para. 97; Exhibit C-54, Attachment 54: “October 9, 2008 Robert MacDonald email to Elders”; Exhibit C-54: Supplemental Witness Statement of Robert MacDonald, para. 43.

²⁷⁴ Rejoinder, para. 97; *see e.g.* Statement of Claim, para. 193: “regardless of the clear terms of the PPA and the ... Grid Connection [Agreement], Elders still had to keep emphasizing [the Government of Ghana]’s responsibilities regarding the control and protection systems that had to be installed in order for the grid connection to comply with the safety requirements and the PPA.”; *see also* para. 194: “Elders proposed that BE[L] would volunteer in paying for the commissioning of the RTU at the [S]ubstation on the Barge if [the Government of Ghana] would take care of the rest of the RTU system.”

²⁷⁵ Reply, para. 18.

²⁷⁶ Reply, para. 33, referring to Statement of Defense, para. 103.

²⁷⁷ Reply, para. 38; Exhibit C-54: Supplemental Witness Statement of Robert MacDonald, para. 27.

²⁷⁸ Reply, para. 35.

210. The Claimant submits that the law of Ghana places the obligation to commission the RTU on the Government, through GridCo, as a NITS operator. Even if the Grid Code was not finally promulgated until October 2009, that is, two years after the conclusion of the PPA, the Claimant contends that the existing law and prudent industry practice existing in Ghana at the time of the conclusion of the contract show that the Respondent was responsible for the RTU.²⁷⁹ The Claimant argues that the 2007 version of the Grid Code was the final version that was circulated and applied, because unlike the April version it was not entitled “draft” and also because regulation 3 of LI 1937, passed on 5 June 2008, was drafted on the basis of the said Grid Code.²⁸⁰

The Respondent's Position

211. The Respondent asserts that the Claimant always recognized that installing and commissioning the RTU on the Barge was its responsibility.²⁸¹ From December 2007 – when it assumed control of the Barge – to April 2008, the Claimant unsuccessfully sought to find a sub-contractor other than ABB or Ansaldo to install and commission the RTU.²⁸² For instance, in December 2007, the Claimant sought and obtained a site survey report from ABB regarding the status and condition of various ABB systems on the Barge, including the original RTU that ABB had installed on the Barge when it was first delivered to Ghana.²⁸³ The Respondent rejects the Claimant’s assertion that it was merely apprising itself of the necessary commissioning work to be done on the RTU so that it could divide the work between itself and the Respondent. The Respondent asserts that the Claimant “never forwarded any of the proposals to the Government. Instead, what the evidence shows that after ProEnergy solicited these proposals, it sought to commence the installation of the RTU through Taurus.”²⁸⁴

212. The Respondent further challenges the Claimant’s reliance on Ghana’s National Electricity Code, which the Respondent notes was not adopted until October 2009 – well after the events at

²⁷⁹ Claimant’s Post-Hearing Submission, paras. 79-80.

²⁸⁰ Claimant’s Post-Hearing Submission, paras. 81-82.

²⁸¹ Statement of Defense, para. 102.

²⁸² Statement of Defense, para. 103; Exhibit R-30: “Email from Phillip Elders to Curly Baca, Re: DCS for Power Barge in Africa”, dated 27 April 2008.

²⁸³ Statement of Defense, para. 103; Exhibit R-28: “ABB, Survey Intervent System Offshore GTPP in Ghana”; Statement of Claim, para. 49: the Barge was first brought to Ghana from Italy on 13 October 2002, where it remained on Ghana’s naval base in Sekondi until it was dragged to Effasu on 7 March 2005.

²⁸⁴ Rejoinder, para. 88.

issue in this arbitration.²⁸⁵ The Respondent further submits that, at the time the Code was adopted, it “made clear that it was not intended to alter pre-existing contractual obligations, and did not prevent the Government from imposing a requirement upon a Grid Participant, Asset Owner or Wholesale Supplier, such as Balkan, to install and commission an RTU at a power plant as a condition to becoming a Grid Participant, Asset Owner or Wholesale Supplier.”²⁸⁶

iii. Undisputed Facts Regarding Commissioning of the RTU after 24 October 2008

213. On 24 October 2008, the Parties entered into an agreement whereby the Claimant would commission and pay for the RTU.²⁸⁷
214. On 8 November 2008, the Claimant drafted and sent bid guidelines to ABB for the RTU commissioning.²⁸⁸ Therein, the Claimant only listed BEL personnel as “authorized to participate in communication between it and ABB regarding the RTU commission.”²⁸⁹ After some apparent delay on the part of ABB,²⁹⁰ the Claimant directed ABB on 10 February 2009 to redraft its proposal to commission the RTU / MicroSCADA to meet certain specifications.²⁹¹ The resulting proposal from ABB in response to the Claimant’s bid guidelines identifies BEL as the

²⁸⁵ Statement of Defense, para. 111, fn. 24; Exhibit R-72: “Excerpts from the Republic of Ghana’s National Electricity Grid Code.”

²⁸⁶ Statement of Defense, para. 111, fn. 24; Exhibit R-72 (also C-46): “Excerpts from the Republic of Ghana’s National Electricity Grid Code”, at para. 4.18; Witness Statement of Vivienne Gadzekpo, para. 28; Respondent’s Post-Hearing Submission, paras 140-143.

²⁸⁷ Rejoinder, para. 98; Reply, para. 59; Exhibit C-54: Supplemental Witness Statement of Robert MacDonald, para. 48: “MacDonald was advised by Mr. Elders that he would meet with Joseph Wiafe at GRIDCO to obtain an agreement with respect to RTU commissioning” (see Exhibit C-54, Attachments 61-63).

²⁸⁸ Rejoinder, para. 98; Reply, para. 59; Exhibit C-54: Supplemental Witness Statement of Robert MacDonald, para. 49.

²⁸⁹ Rejoinder, para. 98; Exhibit C-54, Attachment 64: “November 8, 2008 Bid Guidelines with attachments.”

²⁹⁰ Rejoinder, para. 98: “Ironically, the record shows that Balkan then experienced the same frustration and delay that caused ProEnergy to switch the commissioning of the RTU from ABB to Taurus the previous June. (See C-54, Attachment 72[; February 10, 2009 Robert MacDonald email to Moeller]”; Reply, para. 62: “After his review, MacDonald immediately reached out directly to Mr. Moeller of ABB by email dated 10 February 2009 in which he pointed out that the BE[L] bid guidelines issued to [ABB] were not complied with”; see also Reply, para. 63.

²⁹¹ Statement of Defense, para. 110; Exhibit R-36: “Email from Robert MacDonald to Christian Moeller, Re: Technical Review of Osagyefo Barge RTU/SCADA”, dated 10 February 2009.

“Customer”,²⁹² and bears the same tender number as ABB’s proposal of May 2008 to the Claimant.²⁹³

215. In April 2009, ABB sent the Claimant a revised proposal with the delivery schedule for the RTU at 15 weeks from the time of order, plus a further 30 days for installation and commissioning.²⁹⁴

iv. Disputed Facts Regarding Commissioning of the RTU after 24 October 2008

The Claimant’s Position

216. The Claimant contends that, by October 2008, it became concerned that the Respondent “was attempting to ‘offload’ its obligations and responsibilities with respect to commissioning of the SCADA system and the RTU Micro/SCADA” based upon the correspondence between the VRA, ABB, Forclum and Norlec (the Respondent’s contractors).²⁹⁵ The Claimant states that “BE[L] volunteered to help with the costs of commissioning and to assist in defining an appropriate bid proposal in concert with their efforts to obtain the work through their contractors Forclum, Norlec and ABB.”²⁹⁶ However, the Claimant maintains that it never agreed that commissioning the RTU was within its scope of work.²⁹⁷ Moreover, it contends that “all of the preliminary correspondence and communications with respect to the proposals were generated vis-à-vis communications between Isaac [Nyantakyi of the VRA] and representatives of Norlec[,] Forclum and ABB[,] and not BE[L].”²⁹⁸ Specifically, the Claimant makes reference to a letter sent by Mr. Nyantaki to Ansaldo to enquire whether Ghana could “grid energise the

²⁹² Rejoinder, para. 99; Exhibit C-54, Attachment 76: “February 25, 2009 ABB Retrofit Plan Technical Description.”

²⁹³ Rejoinder, para. 99; Exhibit R-29: “ABB, S/S Barge – Effasu 161 kV (Ghana), Retrofit plan for Protection and Control System, Technical Description”, dated 29 May 2008.

²⁹⁴ Statement of Defense, para. 111; Exhibit R-67: “ABB, S/S Barge – Effasu 161 kV (Ghana) Retrofit of RTU and SCADA Control System”; Exhibit R-67A: “ABB, S/S Barge – Effasu 161 kV (Ghana), Retrofit plan for RTU and SCADA Control System, Technical Description”.

²⁹⁵ Reply, para. 64; Exhibit C-58: Supplemental Witness Statement of Phillip Elders, para. 29.

²⁹⁶ Reply, para. 66 (without emphasis in the original); Exhibit C-58: Supplemental Witness Statement of Phillip Elders, para. 31.

²⁹⁷ Reply, para. 67; Exhibit C-58: Supplemental Witness Statement of Phillip Elders, para. 32; *see also* Exhibit C-54, Attachments 44-60.

²⁹⁸ Reply, para. 67 (without emphasis in the original); Exhibit C-58: Supplemental Witness Statement of Phillip Elders, para. 32.

Power Station without the RTU and Scada being commissioned as [they] [had] difficulty getting that done soon.”²⁹⁹

The Respondent’s Position

217. According to the Respondent, the Claimant “presents no evidence to the Tribunal that it ever completed the commissioning of the RTU with ABB or, if it did, when.”³⁰⁰ The Respondent asserts that, since 24 October 2008, the Claimant never notified it that the RTU was installed or asked to be connected to the National Grid so as to complete the commissioning process.³⁰¹

(b) Is the RTU / MicroSCADA Necessary for the Claimant to Connect to the National Grid and Complete the Commissioning Process?

218. Regardless of who had responsibility for the commissioning of the RTU / MicroSCADA, the Parties also disagree as to whether such a system was technically required to complete the commissioning process.

i. The Claimant’s Position

219. According to the Claimant, the RTU “is critical to the communications and [relay] protection systems designed by the manufacturer” and “must be commissioned before the electrical grid can be energized and back feed to the [B]arge.”³⁰² The Claimant asserts that the Respondent failed to install the RTU and that, without it, the main control center lies 250 km from the Barge.³⁰³

220. In its Reply the Claimant, while conceding that (by incorporating Mr. Elder’s witness statement into its Statement of Claim) it had incorrectly referred to the RTU / MicroScada as part of the relay protection device, rather than a systems control device, nevertheless asserts that Mr. Elders “correctly noted that the RTU Micro/SCADA system was part of the overall coordination and

²⁹⁹ Claimant’s Post-Hearing Submission, para. 85, referring to Exhibit C-38: Witness Statement of Phillip Elders, para. 155.

³⁰⁰ Rejoinder, para. 100.

³⁰¹ Rejoinder, para. 100; Respondent’s Post-Hearing Submission, para. 154.

³⁰² Statement of Claim, para. 115; Exhibit C-38: Witness Statement of Phillip Elders, para. 82; *see also* Reply, para. 68, where the Claimant states that the most important part of the 24 October Agreement with respect to the RTU/MicroSCADA “was BE[L]’s firm position that in order to attain grid connectivity, first the RTU Micro/SCADA system on the [B]arge had to be commissioned.”

³⁰³ Statement of Claim, para. 115; Exhibit C-38: Witness Statement of Phillip Elders, para. 82.

communication system that supports grid connectivity for the barge to the [National Grid]³⁰⁴ maintained by GRIDCo and VRA.”³⁰⁵ However, the Claimant then contends that “the Government fails entirely to note the importance and significance of these systems [referring to the RTU / MicroSCADA] for relay protection.”³⁰⁶ The Claimant argues that the Respondent mischaracterizes the equipment on the Barge in its submissions and, in particular, “fail[s] to acknowledge that the RTU/MicroSCADA is an integral component of the overall operations of the [B]arge as it relates to its connection to the [National Grid]³⁰⁷ and that it must be coordinated with telecommunications and relay protection in order to identify the scope associated with the ‘shared milestone’”.³⁰⁸

ii. The Respondent’s Position

221. The Respondent contends that the Claimant “makes a number of misstatements about the function of the RTU and unrelated work on the grid”.³⁰⁹
222. While the Respondent acknowledges that “it would be preferable to have the RTU in place for the commissioning, it states that it is not essential.”³¹⁰ The Respondent asserts that the Claimant could have connected to the National Grid and operated the 161 kV GIS switchgear on the Barge from the local control cubicles on the Substation.³¹¹
223. According to the Respondent, the RTU allows the Power Station operator (the Claimant) to remotely monitor and control the 161 kV electrical system on the Barge and to remotely control its 161 kV circuit breakers from the main control room on the Barge.³¹² For the RTU to do its

³⁰⁴ Specifically, the Ghana National Interconnected Transmission System or “G-NITS”.

³⁰⁵ Reply, para. 30, referring to Exhibit C-38: Witness Statement of Phillip Elders, para. 170; Statement of Claim, para. 193; In its Reply, paras. 30-31, the Claimant emphasizes that it relies primarily on the Exhibit C-54, the Supplemental Witness Statement of Robert MacDonald, with respect to the appropriate definition and function of the RTU/MicroSCADA. The Claimant cut-and-pastes Robert MacDonald’s explanation of the RTU into its Reply, paras. 71-73.

³⁰⁶ Reply, para. 70; Exhibit C-54: Supplemental Witness Statement of Robert MacDonald, para. 54.

³⁰⁷ Again, the Claimant refers to the National Grid as the “NITS”.

³⁰⁸ Reply, para. 69.

³⁰⁹ Statement of Defense, para. 112.

³¹⁰ Rejoinder, para. 105.

³¹¹ Rejoinder, para. 105; Expert Report of Parsons Brinckerhoff, para. 5.34; Rejoinder Witness Statement of Eric Asare, para. 8; *see also* R-84: “Email from Scott Kinney to Vincent Jones, Re:”, dated 7 September 2008, wherein, according to Respondent, “Taurus made this very point to ProEnergy”.

³¹² Rejoinder, para. 102; Expert Report of Parsons Brinckerhoff, paras. 5.29-5.30; Rejoinder Witness Statement of Eric Asare, para. 6.

job, a functioning 161 kV electrical system must be in place; otherwise, “there is no electrical system for Balkan to remotely operate from the Main Control Room on the Barge and no information regarding the electrical system to be sent to [the GRIDCo Control Centre in] Tema”.³¹³

224. The Respondent reiterates its assertion that the Claimant was still performing work on the 161 kV electrical system when the Essiama Transmission Line was energised on 8 August 2008, as well as when the Elubo Transmission Line was energised on 13 November 2008.³¹⁴ According to the Respondent, “until the 161 kV electrical system on the Barge was operational, there was no function for the RTU to perform”;³¹⁵ thus, prior to October 2008, commissioning the RTU was a “non-issue” for all practical purposes.³¹⁶ Moreover, if, after October 2008 (the Effective Date of the PPA), the Claimant had completed its commissioning of the 161 kV electrical system, the Respondent submits that the Claimant could then have connected the Barge to the National Grid to complete the commissioning, irrespective of whether or not the RTU was in place.³¹⁷

5. The Extent of the Claimant’s Progress in Reaching the Final Testing and Commissioning Milestone at the End of 2008

(a) Undisputed Facts

225. On 28 July 2008, the Respondent wrote to the Claimant to confirm that the Essiama Transmission Line was ready to be energised.³¹⁸ The Respondent requested that its “nominated representatives witness and sign off all the commissioning tests of the 161 kV equipment and protection relays,” or “[i]n the event that the commissioning tests had already been done ... that [the Claimant] forward the test results for [the Respondent’s] review.”³¹⁹ The Claimant did not respond to the Respondent’s request for the 161 kV commissioning tests.

³¹³ Rejoinder, para. 103; Expert Report of Parsons Brinckerhoff, para. 5.31; Rejoinder Witness Statement of Eric Asare, para. 6; *see also* Exhibit R-84: “Email from Scott Kinney to Vincent Jones, Re:”, wherein Respondent states “[t]his same point was made by Taurus to ProEnergy in September 2008.”

³¹⁴ Rejoinder, para. 104.

³¹⁵ Rejoinder, para. 104.

³¹⁶ Rejoinder, para. 106 ; Respondent’s Post-Hearing Submission, para. 138.

³¹⁷ Rejoinder, para. 105.

³¹⁸ Rejoinder, para. 62; Exhibit R-53.

³¹⁹ Rejoinder, para. 62; Exhibit R-53.

226. In October 2008, the Claimant informed the Respondent that the Power Station would be ready for Final Testing and Commissioning as of 28 October 2008 and ready to start generating power on 1 November 2008.³²⁰ The Claimant informed the Respondent that all that remained to be done was to connect the Transmission Line from the National Grid to the Power Station in order to (a) run final tests of all systems prior to commissioning, and (b) off-take power from the Barge onto the National Grid.³²¹
227. On 21 November 2008, the Respondent conducted a site visit to the Barge.³²²
228. It appears that work on the 161 kV electrical system on the Barge continued through June 2009.³²³
229. The following are Balkan US's allegations against ProEnergy in the ProEnergy Litigation with respect to certain failures to perform under the terms of the contract, as excerpted in the Statement of Defense:³²⁴
- (i) Develop a Commissioning Plan "for start-up and commissioning of the project."
 - (ii) Review and implement a Project Safety Plan.
 - (iii) Develop System Start-Up Boundaries for operating tests and system by system commissioning/ start-up.
 - (iv) Develop Component Test Standards for the "mechanical, electronic and I&C system components installed at the Project."
 - (v) Develop System Commissioning Procedures for each plant system.
 - (vi) Develop System Turnover Packages.
 - (vii) Perform an Operability/Commission Review to determine potential safety issues, system maintainability and operability of plant systems and controls.
 - (viii) Support plan testing on Unit 1 of the generator.
 - (ix) Demonstrate that power cables had been properly tested.
 - (x) Demonstrate the "loop checks from the DCS to the electrical breakers."
 - (xi) Commission the DCS system or get it to perform properly.
 - (xii) Commission Turbine Unit 1 switchgear and other electrical equipment.
 - (xiii) Commission the turn-off breaker for Turbine Unit 1.

³²⁰ Statement of Defense, para. 38; Exhibit C-38, Attachment 121: "BE[L] letter re: Power", Attachment 124: "BE[L] letter to MOE submitting invoice".

³²¹ Statement of Defense, para. 38; Exhibit C-38, Attachment 122: "BE[L] letter to MOE", Attachment 123: "BE[L] Progress report and Inspection letter", Attachment 124: "BE[L] letter to MOE submitting invoice".

³²² Statement of Defense, para. 53.

³²³ Rejoinder, para. 64.

³²⁴ Statement of Defense, para. 44.

- (xiv) Commission Turbine Unit 2.
- (xv) Follow commissioning procedures for the turbines.
- (xvi) Commission the vibration system for both Turbine Units 1 and 2.
- (xvii) Engineer numerous systems in compliance with industry standards.
- (xviii) Complete turn-over commissioning packages for over 60% of the systems.
- (xix) Properly commission the voltage switchgear.
- (xx) Replace fire dampers for the turbine compartments that had been removed.
- (xxi) Produce electrical drawings that would reflect wiring changes on the Barge and at the site in general.
- (xxii) Properly commission the supply fuel line for Turbine 1.
- (xxiii) Properly wire switches in the control room.
- (xxiv) Properly supervise and manage the work of subcontractors.
- (xxv) Properly control the liquid fuel levels in the combustion chamber resulting in turbine damage.³²⁵

230. In the context of the ProEnergy Litigation, a variety of e-mail exchanges, the existence or authenticity of which are not disputed between the Parties, were uncovered. These exchanges took place in 2008 between representatives of BEL and ProEnergy. They are restated in the following as quoted by the Respondent:³²⁶

(i) E-mail exchange of February 1, 2008 between J.D. Robinson (the on-site ProEnergy Project Manager) and Phil Elders of Balkan regarding Balkan's failure to procure materials on time and ProEnergy's failure to commission the Barge within 90 working days.³²⁷

J.D. Robinson:

I've attached the material tracking source document; we have spent a lot of time getting this document updated; how long do we wait for the Accra office to respond before we out source to Bob? You keep pushing for 10MAR08 [the Completion Date under the PPA]; we have to have 100% procurement support to meet any schedule or deadline. . . .

To which Elders responds:

Don't give me these weak excuses for not making March 10. Excuses, excuses. . . first it was hotel, then food, then mosquitos, then snakes, and on and on. You need to overcome the poor performance of Pro Energy's promises and start and get the job done.

Let's find a reason why and how you and your team can meet a milestone. . . .

Stay focussed and get the job done. There has been way too much talk and emails and words. It's way past time to do something significant. Otherwise, your just an average Joe marking time and blaming life on other people.

³²⁵ Statement of Defense, para. 43; Exhibit R-4: "Plaintiff's First Amended Petition, *Balkan Energy Co. v. ProEnergy Servs. Int'l, Inc.*, et al., No. 09-01944", para. 5.17; Exhibit R-10: "ProEnergy Services, Proposal Presented to Balkan Energy Company for Start-up & Commissioning Effasu Power Barge", at 4-9.

³²⁶ The Respondent's parenthetical references have been replaced by footnotes in order to include the description of the exhibit provided by Respondent.

³²⁷ Statement of Defense, para. 45(i), citing Exhibit R-11: "E-mail exchange between J.D. Robinson and Phil Elders, Re: Site Urgent Material Request: Must Have From the USA" (Errors in the original).

To which Robinson replies:

Pro Energy Services has not performed poorly at any level on the Osagyefo Power Barge Project; on the contrary; if you'll take note of the attached documents; you can clearly see who has performed poorly and it is certainly not Pro Energy Services. A successful project is only successful if all participants have the same common goal; a successful project needs an accurate and responsive material supply chain, especially in a third world country; and last but certainly not least, a project like this one needs proper and responsive funding when requested. You have not fulfilled any of the project requirements. . . .

(ii) Another example from April 2008 discussing procurement problems and project delays;³²⁸

J.D. Robinson:

I have tried for several months to reiterate the critical nature of a stream lined supply chain to facilitate our schedule of first firing Unit 1; to date, our supply chain, our purchase order request to receipt of purchase order, our wire transfer request to positive confirmation of receipt of wire to specific vendor is sub standard and continues to impact the project. One example; Ansaldo has not been paid the Euro 57,500.00 that was sent in to Balkan on 27Feb08 . . .

(iii) On August 10, 2008, another in a series of these e-mails between the onsite ProEnergy Manager and Elders regarding Balkan's slow payment of invoices and their impact on the schedule.³²⁹

J.D. Robinson:

Yes, I'm back; please explain what your message means, does it mean that I will receive the PO on Monday or will it be like all of the other PO's and payments that are made out of the Balkan office in Ghana. I have been trying to get Sud Chemie paid for over five weeks; I have been trying to get Alpha Standard paid for over five weeks and there are other simple examples. This is Project Execution and it is not being performed at any level of normality for this type of project.

To which Elders responds:

Stop your crap! I am tired of seeing these crappy emails. I have a long long long list of crap I could publicize on Pro Energy total failure and incompetence and you know what I mean. Especially having the premix and diffusion piping wrongly piped for more than a month while you and others tried futilely to make that crap work. . . now that is total incompetence that has cost us untold amounts of money.

So cool your heals [sic] and get this thing started and stop the blasting on emails.³³⁰

(iv) And on October 1 and September 25, 2008, respectively, Vincent Jones who was working on site at the time, wrote:³³¹

³²⁸ Statement of Defense, para. 45(ii), citing Exhibit R-12: "Email chain between Phil Elders and J.D. Robinson, Re: First Fire Requisitions" (Errors in the original).

³²⁹ Statement of Defense, para. 45(iii), citing Exhibit R-13: "E-mail chain between Phil Elders and J.D. Robinson, Re: ProEnergy Services Vibro-Meter, Inc. Proposal #2008022125" (Errors in the original).

³³⁰ Statement of Defense, para. 45(iii), fn. 15, Respondent asserts that "Balkan's failure to pay the invoices of third-party vendors is a constant refrain of ProEnergy and others", citing Exhibit R-79: "Various e-mails" (Errors in the original).

The saga here continues:

After changing out fuel supplies we had to rerun the return line as well. Attempted to fire the unit 3 times, 3 trips[.] After tripping we had serious fire inside of the turbine +/- 900 deg C. Tomorrow Phil's motley crew is going to start the stripdown on the BSDG (god help them).

I continue to advise the client regarding my concerns and he continuously ignores my advise. Today I have strongly advised against the stripping of the BSDG and have also advised that Balkan Need a Combustion Engineer on site as soon as possible.

* * *

We also require Saft back on site. You know the situation here "Balkan Policy, rig it". I have repeatedly mentioned this to Elders, to date nothing has happened. Tim paid a visit to Ansaldo, guess what. They want cash on the table before they will entertain any further discussions regarding the barge.

(v) E-mail of May 21, 2008 from J.D. Robinson.³³²

About two months ago, while Phil Elders was at site, one of our transfer switches blew up and caught fire; root cause analysis revealed that loose connections were the cause and Phil Elders was involved in this process as he tries with every body while he is on site. Louis and Phil got into a huge argument of this fact; the wires were loose as I checked them myself. The issue went away; last week, we were changing these same cables to replace the wiring to ensure we have reliability; well, here's where the story really begins; when they installed the new transfer switch for the one that blew up, they wired completely wrong; this was fine as they wired the two inputs and the one output wrong so, all worked fine. When they rewired it the second time, they wired one of the inputs per the diagram and left the other input and output wired wrong. So, when they energized the switch, it applied 400 VAC between neutral and Phase A; you cannot imagine the damage that occurred in less than 3 seconds; every laptop power supply, every printer, seven televisions and all kinds of various electrical and electronic equipment blew up.

(vi) Reflecting ProEnergy's frustration with getting the Turbines up to first fire and the lack of adequate documentation to achieve Full Speed No Load, Robinson wrote the manufacturer, Ansaldo, on June 11, 2008:³³³

I have been assured by persons in Italy and in Ghana that the gas turbines on this barge were fire and brought to FSNL. Having lived with this machine for the last six months of my life and having personally inspected every single component on the barge including the combustion chambers and fuel nozzles of the turbines, I fully believe, based on my experience, that these machines have never been fired or if they were, it was for less than 10 seconds; SMOKE OUT OF THE STACK! My position is also supported by the lack of functional logic for critical areas of the barge; one in particular is the LF Injection Skid Bypass Control Valves. Carlo, you are somewhat aware of some of the issues that we have encountered; the software and wiring were setup for LVDT and yet we have 4 to 20 made transducers; the list goes on and on

³³¹ Statement of Defense, para. 45(iv), citing Exhibit R-14: "Email from Vincent Jones to Jeff Canon, Re: Barge update"; Exhibit R-15: "Email from Vincent Jones to J.D. Robinson, Re: PO 102034" (Errors in the original).

³³² Statement of Defense, para. 45(v), citing Exhibit R-16: "Email from J.D. Robinson to Skeeter Warakomski, Re: Let's Talk" (Errors in the original).

³³³ Statement of Defense, para. 45(vi), citing Exhibit R-17: "Email chain between J.D. Robinson and Ansaldo Employees, Re: Config, IMMHS03" (Errors in the original).

I would really appreciate some immediate feedback on my problem as I'm taking a lot of crap from this client about the lack of information flow between site and Ansaldo and at this point in time, I cannot defend myself. I need to talk with the GURU about how this machines is supposed to work during a start cycle and I need documents clearly define startup and FSNL Sequence.

(vii) Then, on June 16, 2008, ProEnergy wrote the following progress report regarding its attempt to first fire Unit 1:³³⁴

We managed to manually first fire Unit 1 on Saturday; ignition gas valves, ignitors and LF Fuel injection control valves were manually manipulated. The unit responded fairly well with the exception of catching on fire as we has a lot of liquid fuel in the turbine that we had rinsed with water but collected in various places inside and outside of the turbine; we did not experience any damage as we have a trained fire fighting brigade. The DCS logic is simply not complete and I do not have a clue as to how Ansaldo fired this unit as they have told me; as I have stated before, I will testify that these units have never fired simply because nothing works.

(viii) On August 10, 2008, ProEnergy wrote Ansaldo:³³⁵

Let me say this; with everything that we are finding, including speed pickups, flame scanner failures, LF Fuel Injection problems, HSS Module problems, TSA Modules problems and so on and so on; I maintain my account that this machine never fired.

(ix) And on August 12, 2008, one of the subcontractors on the site, Scott Kinney from Taurus Power, wrote in part:³³⁶

Now I hear that [Phil Elders] is blaming ProEnergy for finding a problem that was hurting the project. All we have been doing for the last six weeks is to find problems. Whether it is corroded fittings, bad speed probes, failed HSS cards, everyday there are new problems. I suppose that Phil could blame every single problem on ProEnergy and why you don't know exactly what is wrong before it actually fails.

I also don't appreciate his using my name as any part of blaming ProEnergy or anyone for problems found on the Barge. The Barge is a wealth of problem and none of them were created by ProEnergy.

As soon as a manager starts blaming his people for his problems he loses my respect. There he is in the meeting begging us to get the machine running no matter what. And when we find failed parts and obsolete equipment he asks us to find ways to work around them. So what if the pipes were backwards its just one of a hundred problems we have had to work through.

(x) Finally, ProEnergy described the condition of the facility in its Daily Report of September 27-October 3, 2008 – just days before Balkan now claims the Power Station was ready for Final Testing and Commissioning:³³⁷

³³⁴ Statement of Defense, para. 45(vi), citing Exhibit R-18: "ProEnergy Progress Report" (Errors in the original); Respondent indicates at fn. 16 that "Balkan attached an incomplete unorganized set of progress reports as C-36, Attachment 4: "MOE letter re Expression of Interest".

³³⁵ Statement of Defense, para. 45(vi), citing Exhibit R-19: "Understanding reach btw BOE and GOG" (Errors in the original).

³³⁶ Statement of Defense, para. 45(ix), citing Exhibit R-20: "BE[L] letter to President Kufuor" (Errors in the original).

- Complete DCS system shutdown during change over. PCV lost and fuel oil stop valve controls lost. Shutdown DSC and reboot system. DCS normalized.
- Restart Unit 1, unit tripped at 1750RPM due to SFC/BSDG failure. A fire occurred inside of the turbine, the fire self extinguished.
- I have expressed my concerns to Balkan Energy regarding the continuous starting and tripping of the unit. It would appear that we are starting to see degradation on the equipment. I have advised Balkan Energy that Ansaldo personnel need to be mobilized to site as soon as possible to assist in overcoming the current glut of problems that we are encountering. It is also advisable to mobilize a service specialist from Paxman to inspect the BSDG.

* * *

- Unit 1 turning gear is deteriorating on a daily basis, today we are at 28RPM down from 38RPM last night.

* * *

- Balkan third party diesel mechanics suspect an injector problem with the BSDG.
- I have again strongly advised Balkan Energy that a combustion engineer is required on site.

(b) Disputed Facts

i. The Claimant's Position

231. The Claimant asserts that the Power Station was capable of generating power on 1 November 2008, subject only to final testing and commissioning on 28 October 2008, which it claims it was ready for.³³⁸ However, the Claimant contends that it was unable to complete the commissioning within ninety (90) days of the Effective Date (March 2008) due to the alleged breaches of the PPA by the Respondent.³³⁹

ii. The Respondent's Position

232. The Respondent maintains that the Power Station was not ready for final testing and commissioning in October 2008 and, thus, was not ready to generate power on 1 November 2008.³⁴⁰ In support of its assertions in this regard, the Respondent makes reference to Balkan US's pleadings and testimony in the ProEnergy Litigation and the e-mail exchanges between

³³⁷ Statement of Defense, para. 45(x), citing Exhibit R-21: "ProEnergy Daily Report" (Errors in the original).

³³⁸ Exhibit C-38, Attachments 121, 124.

³³⁹ Statement of Claim, paras. 332-336.

³⁴⁰ Statement of Defense, para. 23, Respondent's Post-Hearing Submission, paras. 61-65.

representatives of BEL and ProEnergy, quoted above. The existence and authenticity of these documents are not disputed by the Claimant.

Balkan US's Pleadings and Testimony in the ProEnergy Litigation

233. The Respondent avers that the Balkan US's pleadings and testimony in the ProEnergy Litigation show that "the Power Station could not have been ready for Final Testing and Commercial Operation as of October 28, 2008, regardless of whether there was grid connectivity or not".³⁴¹ Consequently, the Respondent argues that the Claimant failed to commission the Power Station in 2008.
234. The Respondent further asserts that, notwithstanding the Claimant's claims in this arbitration that Ghana is to blame for its inability to complete the commissioning within ninety (90) days of the Effective Date (March 2008), "Balkan's unwavering position in the ProEnergy Litigation, some three years later, was just the opposite, that ProEnergy could, and should, have completed the commissioning of the Power Station by March, 2008, pursuant to the terms of its contract with Balkan."³⁴² In support, the Respondent relies on the documents it obtained as a result of the US District Court's Orders dated 7 February and 6 June 2011, drawing attention to certain contradictions between the Claimant's pleadings in this arbitration and the position it took in the ProEnergy Litigation.³⁴³ The Respondent emphasizes that, in the ProEnergy Litigation, Balkan US "details ProEnergy's failures at length," failures which it argues "are wholly inconsistent with the claim ... that it is entitled to [T]olling [F]ees from November 1, 2008 forward and that the Barge was ready for Final Testing and Commissioning as of October 28, 2008".³⁴⁴ In particular, according to Balkan US in the ProEnergy Litigation, the stationary rotor blades of one of the two turbines essential for operation of the Power Station were damaged after ProEnergy unsuccessfully tried "for the one hundred and second time" to start the generator.³⁴⁵

³⁴¹ Statement of Defense, para. 44.

³⁴² Statement of Defense, para. 55; see Exhibit R-8: "Deposition of Gene E. Phillips, *ProEnergy Services, LLC v. Balkan Energy Co.*, No. 09-4026", at 45:21-46:24; Exhibit R-22: "Defendant's Responses and Objections to Plaintiff's First Set of Interrogatories, *ProEnergy Servs., LLC v. Balkan Energy Co.*, No. 09-4026", at Ans. To Interrogatory 3, paras. 16-18, Ans. To Interrogatory 5; R-4: "Plaintiff's First Amended Petition, *Balkan Energy Co. v. ProEnergy Servs. Int'l, Inc.*, et al., No. 09-01944", at paras. 5.06-5.16, 5.18-5.19.

³⁴³ Exhibit R-2: "Order, *Government of Ghana v. ProEnergy Servs., LLC.*, No. 11-9002, 2011 WL 2652755 (W.D. No. June 6, 2011)", Exhibit R-3: "Order, *Government of Ghana v. ProEnergy Servs., LLC.*, No. 11-9002 (W.D. Mo. Feb. 7, 2011)".

³⁴⁴ Statement of Defense, para. 40.

³⁴⁵ Statement of Defense, para. 42, fn. 12; Exhibit R-9: "Email from Lonnie Peters to Phillip Elders, Re: Fw: Unit 1 Pictures First Stage Blades".

Balkan US further argued that “[t]hese stationary blades will have to be replaced which means that the entire turbine housing will have to be disassembled and the rotor pulled”, costing approximately USD 4 million.³⁴⁶

Documents Produced from the ProEnergy Litigation

235. The Respondent contends that the documents produced from the ProEnergy Litigation demonstrate “a deteriorating relationship between Balkan and ProEnergy with each accusing the other for the delays and failure to commission the Power Station on schedule”.³⁴⁷
236. The Respondent further submits that, in addition to the problems with the Power Station and its systems, both Messrs. Phillips and Elders testified in the ProEnergy Litigation that ProEnergy site personnel were unqualified, ill-equipped and incompetent to perform the commissioning of the Barge.³⁴⁸ Mr. Elders testified at his deposition, *inter alia*, that the ProEnergy workers “don’t know what they’re doing. We’ve got people showing up on this job site that ... have never even worked for ProEnergy”.³⁴⁹ With respect to the pipes leading from the fuel tanks, Mr. Elders testified that “ProEnergy disassembled it, reassembled it wrong – we spend about six weeks ... trying to start this barge with the fuel going through the wrong side”.³⁵⁰ According to Elders, after ProEnergy left the job site in November 2008, Balkan had to go back and correct ProEnergy’s work on multiple systems.³⁵¹

³⁴⁶ Statement of Defense, para. 41; Exhibit R-4: “Plaintiff’s First Amended Petition, *Balkan Energy Co. v. ProEnergy Servs. Int’l, Inc.*, et al., No. 09-01944”, para. 5.17(1).

³⁴⁷ Statement of Defense, para. 45, fn. 14; Respondent submits that a “representative sample of these documents is attached for the Tribunal’s review as exhibits”, but as there were approximately 17,000 documents produced, “[l]east Balkan claim that the Government has merely cherry-picked a few documents – rather than a representative sample – the Government is prepared to provide the Tribunal with the entire production should the Tribunal wish.”

³⁴⁸ Statement of Defense, para. 46; *see* Exhibit R-7: “Deposition of Phillips David Elders, *ProEnergy Services, LLC v. Balkan Energy Co.*, No. 09-4026”, at 34:9-18; 36:14-37:2; 38:22-39:6; 44:13-45:4; 48:13-21; 127:3-132:21; 148:3-149:9; 159:18-160:13; 183:21-184:24; 189:23-190:11; *see also* R-8: “Deposition of Gene E. Phillips, *ProEnergy Services, LLC v. Balkan Energy Co.*, No. 09-4026”, at 37:12-23; R-4: “Plaintiff’s First Amended Petition, *Balkan Energy Co. v. ProEnergy Servs. Int’l, Inc.*, et al., No. 09-01944”, paras. 5.08-5.17.

³⁴⁹ Statement of Defense, para. 46, citing Exhibit R-7: “Deposition of Phillips David Elders, *ProEnergy Services, LLC v. Balkan Energy Co.*, No. 09-4026”, at 45:22-46:5.

³⁵⁰ Statement of Defense, para. 48, citing Exhibit R-7: “Deposition of Phillips David Elders, *ProEnergy Services, LLC v. Balkan Energy Co.*, No. 09-4026”, at 148:25-149:9.

³⁵¹ Statement of Defense, paras. 49, 51, citing Exhibit R-7: “Deposition of Phillips David Elders, *ProEnergy Services, LLC v. Balkan Energy Co.*, No. 09-4026”, at 184:8-24, 190:10-11.

237. The Respondent also draws attention to Mr. Elders' testimony that ProEnergy continually represented to Balkan that they would and could complete this project on or before early March 2008, being the Completion Date under the PPA. When asked whether the commissioning was "even close to being complete" at the time when ProEnergy left the work site in November 2008, Mr. Elders replied that it was not.³⁵²

238. According to the Respondent a site visit was conducted by the Respondent on November 21, 2008 and this "confirmed Elders' testimony that commissioning of the Barge as of that date was not even 'close to being complete'".³⁵³

F. EXCHANGES BETWEEN THE PARTIES AND COMMISSIONING WORK ON THE POWER STATION COMPLETED BY THE CLAIMANT IN 2009

1. Undisputed Facts

239. As already mentioned above, the Claimant sent the Respondent an invoice for Tolling Fees on 25 November 2008.³⁵⁴ In response, the Respondent wrote to the Claimant on 19 February 2009 to request that the Parties meet to discuss the Tolling Fees and commissioning progress at the Barge, which they did on 24 February 2009.³⁵⁵ At this meeting, the Respondent requested that the Claimant withdraw its invoices and that it should propose an action plan to operationalize the Barge.³⁵⁶

240. On 25 February 2009, the Claimant wrote to the Respondent, again claiming entitlement to Tolling Fees due to lack of grid connectivity, as well as proposing amendments to the PPA and the commissioning process.³⁵⁷

241. On 6 April 2009, the Respondent, via an Inter-Ministerial Committee set up to review the PPA and the commissioning process, conducted a site visit to the Project Site.³⁵⁸ Thereafter, the

³⁵² Statement of Defense, para. 52, citing Exhibit R-7, at 179:25-180:4, 183:7-16.

³⁵³ Statement of Defense, para. 53; Exhibit R-50: "Progress Report Towards Operation of Osagyefo Power Barge"; Witness Statement of Isaac D. Manu, paras. 11-17.

³⁵⁴ Statement of Defense, para. 56; Exhibit C-38, Attachment 124: "BE[L] letter to MOE submitting invoice".

³⁵⁵ Statement of Defense, para. 56; Exhibit C-38, Attachment 202: "MOE letter requesting meeting".

³⁵⁶ Statement of Defense, para. 56.

³⁵⁷ Statement of Defense, para. 57; Exhibit C-38, Attachment 127: "BE[L] letter to MOE re: 2/24/09 meeting".

³⁵⁸ Statement of Claim, paras. 255, 259; Statement of Defense, para. 58; *see also* Agreed Chronology of Events, at 2.

Claimant emphasizes that it received “no formal written reaction” to its proposed amendments to the PPA and the commissioning process of 25 February 2009.³⁵⁹

242. The Parties met on or around 12 July 2009³⁶⁰ to discuss the Inter-Ministerial Committee’s findings from the site visit (the “**Inter-Ministerial Committee Report**”).³⁶¹ The Parties’ accounts of the substance of the meeting appear to coincide. The discussion focused on the lack of evidence adduced by the Claimant to support its contention that Turbine 1 had successfully been tested at FSNL, as well as on fuel supply issues.³⁶²
243. On 7 August 2009, the Respondent rejected the Claimant’s invoices and entitlement to Tolling Fees.³⁶³ The same day, the Claimant sent the Respondent a notice of breach of the PPA and informed that it would draw upon the Letter of Credit.³⁶⁴
244. On 28 August 2009, the Respondent wrote to the Claimant, denying any breach of the PPA and entitlement on the part of the Claimant to draw down on the Letter of Credit.³⁶⁵

2. Disputed Facts

(a) The Claimant’s Position

245. On 2 March 2009, the Claimant professes to have run a successful test of FSNL on Turbine 1, and on Turbine 2 on 12 July 2009.³⁶⁶ The Claimant asserts that, on 9 July 2009, Ansaldo certified that the milestone of FSNL had been reached, albeit “without electrical grid connectivity”.³⁶⁷ In its Post-Hearing Submission, the Claimant further clarifies that it was never able to complete full mechanical testing at FSNL due to the lack of grid connectivity, since, as

³⁵⁹ Statement of Claim, para. 256.

³⁶⁰ There is a small (but immaterial) discrepancy in the Parties’ submissions in respect of this date: According to the Agreed Chronology of Events the date is 12 July 2009; according to the Statement of Claim, para. 261, it is 13 July 2009; according to the Statement of Defense, para. 59, it is 10 July 2009.

³⁶¹ Statement of Claim, paras. 259, 261; Statement of Defense, para. 59; *see also* Exhibit C-38, Attachment 104; “MOE letter requesting meeting”.

³⁶² *See* Statement of Claim, paras. 264-265; Statement of Defense, para. 59.

³⁶³ Statement of Claim, para. 269; *see also* Agreed Chronology of Events, at 2.

³⁶⁴ Statement of Claim, para. 275; *see also* Agreed Chronology of Events, at 3. The Letter of Credit is discussed further below under Section IV.G of the Statement of Facts.

³⁶⁵ Statement of Claim, para. 276; *see also* Agreed Chronology of Events, at 3.

³⁶⁶ Statement of Claim, paras. 224, 258.

³⁶⁷ Statement of Claim, para. 260; Exhibit C-38, Attachment 157: “Ansaldo letter re: Full Speed No Load”.

certified by Ansaldo, “you could not conduct the type of continuous commissioning activities that mechanical testing at FSNL entailed using the Black Start Generator on the Barge”.³⁶⁸

(b) The Respondent’s Position

246. The Respondent reiterates its claim that that grid connectivity was available to BEL as early as July 2008.³⁶⁹ It also notes that, according to the Respondent’s expert, Peter Fairhurst, it is possible, and indeed appropriate, to run an FSNL without grid connectivity using the Black Start Generator.³⁷⁰ The Respondent goes on to state that, even if the Claimant indeed achieved FSNL for the Turbines, which Respondent disputes, it emphasizes that “running a turbine at [FSNL] does not demonstrate that it is possible to excite the generator to rated voltage or that the generators themselves are in operating condition or able to generate voltage or that a myriad of other mechanical and electrical systems are operational.”³⁷¹ In this regard, the Respondent contends that the Claimant’s “[I]abelling [of FSNL] as a ‘milestone’... is a clever misnomer.”³⁷² In particular, the Respondent draws support for its challenge of the Claimant’s assertion that it reached FSNL on the Turbines from the test results and letters from Ansaldo submitted by the Claimant, which the Respondent contends are “incomplete”, non-compliant with the International Organization for Standardization’s testing standards (“**ISO Testing Standards**”) for FSNL tests, “and were not approved or witnessed by the Government pursuant to Clause 6.1 of the PPA.”³⁷³

247. With respect to the testing of Turbine 1, the Respondent submits that Ansaldo’s 12 October 2009 “activity report”, which certified that Turbine 1 had achieved FSNL, was drafted “seven months after the [FSNL] test was performed in March 2009, and contains no contemporaneous testing data from the DCS”.³⁷⁴ The Respondent also contends that this report does not outline Ansaldo’s “performance standards against which to measure the test results”; “has no corroboratory signatures by Ansaldo or Balkan, nor any information as to who at Ansaldo conducted the test of his or her qualifications to do so”; that “the terms and conditions of this

³⁶⁸ Claimant’s Post-Hearing Submission, para. 61.

³⁶⁹ Statement of Defense, para. 44, fn. 13.

³⁷⁰ Respondent’s Post-Hearing Submission, para. 134.

³⁷¹ Statement of Defense, para. 61.

³⁷² Statement of Defense, para. 62.

³⁷³ Statement of Defense, para. 63, referring to Exhibit C-38, Attachment 193: “GT2 Full Speed No Load”, Attachment 194: “GT1 Full Speed No Load”.

³⁷⁴ Statement of Defense, para. 64.

performance test were not determined by the [P]arties”; and that “the Government received no advance notice of the test.”³⁷⁵ The Respondent further emphasizes that this report notes that the “Gas turbine trip[ped] after about 50 [seconds] at nominal speed”.³⁷⁶ Furthermore, the Respondent draws the Tribunal’s attention to the Claimant’s factual assertion in the ProEnergy Litigation that the rotor blades of Turbine 1 were irreparably damaged by ProEnergy, and that “[t]hose blades, according to Balkan, had not been replaced at the time of this test.”³⁷⁷

248. The Respondent draws further support for its counter-assertion that the Claimant did not successfully test the Turbines at FSNL from the report by ABB dated 30 June 2009, wherein ABB certified that Turbine 2 had successfully been tested at FSNL.³⁷⁸ The Respondent asserts that this report shows that the Claimant “had removed various inhibitors to prevent the turbine from tripping so as to artificially reach [FSNL]” and that “various inhibitors in the [Turbine] 1 software were ‘blocked’, and that there were differences between the software for [Turbines] 1 and 2 (although they are the exact same turbines and should have the same testing standards).”³⁷⁹ In this regard, the Respondent submits that the removal of the inhibitors contravenes ISO Testing Standards.³⁸⁰ Furthermore, the Respondent relies on excerpts of “notable statements in the report”³⁸¹ in support of its assertion that the Claimant and “ABB were able to reach [FSNL] only by disabling key aspects of the logic software and removing various inhibitors that would have tripped the [Turbine 2] and shut it down prior to its achieving [FSNL]”.³⁸²

249. Finally, the Respondent submits that the Claimant never tested the Turbines at FSNL, as was in fact conceded by one of the Claimant’s witnesses.³⁸³ The Respondent contends that what the Claimant had achieved was “but a first step in the much longer process of other necessary

³⁷⁵ Statement of Defense, para. 64.

³⁷⁶ Statement of Defense, para. 66.

³⁷⁷ Statement of Defense, para. 66, referring to Exhibit R-4: “Plaintiff’s First Amended Petition, *Balkan Energy Co. v. ProEnergy Servs. Int’l, Inc.*, et al., No. 09-01944”, para. 5.17(I).

³⁷⁸ Statement of Defense, para. 65.

³⁷⁹ Statement of Defense, para. 65.

³⁸⁰ Statement of Defense, para. 65, referring to Exhibit R-51: “ISO3977-8, “Gas turbines – Procurement – Part. 8: Inspection, testing, installation and commissioning”, § 6.3.11.

³⁸¹ See Statement of Defense, para. 69.

³⁸² Statement of Defense, para. 70; Respondent’s Post-Hearing Submission, para. 132.

³⁸³ Hearing on the Merits Transcript, Day 4, 91:12-16; Respondent’s Post-Hearing Submission, para. 131.

activities to be undertaken.”³⁸⁴ The Respondent finally submits that these activities were never performed.³⁸⁵

250. With respect to the functioning of other critical systems on the Barge, the Respondent similarly asserts that the Claimant provides no “documentation demonstrating that critical mechanical, electrical, and safety systems were, or are today, completed or successfully tested as per the Operating Parameters set forth in the PPA”, including “the DCS System, the Fuel Handling System, the Relay Protection System, the Water Cooling System, the Fire Protection System, the Barge Cathode Protection System, and a whole host of other systems essential to the operation of the Power Station.”³⁸⁶

G. THE LETTER OF CREDIT

1. Undisputed Facts

(a) Clause 11.7 of the PPA

251. The PPA defines “Letter of Credit” as “an irrevocable standby letter of credit provided to BE[L] by [Ghana] as provided in Clause 11.7 and also in the form set forth in the Tenth Schedule.”³⁸⁷ Clause 11.7 of the PPA provides as follows:

In order to provide BE[L] assurance of payments as will be required by its lenders, [Ghana] shall on or before the Effective Date provide a Letter of Credit in an amount equal to the sum of the Tolling Fees and fuel Cost payable over sixty (60) days based on the then current Contracted Capacity (subject to adjustment each Contract Year to reflect the then current Contracted Capacity) and assuming that the Power Station is operated at 125 MW each day for such sixty (60) day period (as adjusted from time to time the “Letter of Credit Amount”), issued by a financial institution reasonably acceptable to BE[L], as security for the timely payment of all sums due to BE[L] hereunder from [Ghana]. [Ghana] covenants and agrees to provide BE[L] no later than (30) days prior to the expiration of any existing letter of Credit a replacement Letter of Credit in an amount equal to the then current Letter of Credit amount. BE[L] shall be entitled to draw upon any Letter of Credit without further notice to [Ghana] for any payment due to BE[L] from [Ghana] that is overdue for at least fifteen (15) days. [Ghana] further covenants and agrees that upon the draw of funds by BE[L] under any Letter of Credit provided hereunder, [Ghana] shall provide to BE[L] an additional letter of Credit equal to the amount drawn under any such Letter of Credit. In the event that [Ghana] fails to arrange issuance and funding of any Letter of Credit required hereunder within fifteen (15) days after the obligation to provide any such Letter of Credit to BE[L] arises, such failure shall be deemed to be a flagrant disregard of its obligations hereunder and BE[L] shall be entitled (following prior written notice to [Ghana]) to (i)

³⁸⁴ Respondent’s Post-Hearing Submission, para. 135 referring to C-38, Attachment 157.

³⁸⁵ Respondent’s Post-Hearing Submission, para. 135.

³⁸⁶ Statement of Defense, para. 73.

³⁸⁷ Clause 1, Definition of Terms, PPA.

suspend deliveries of electricity hereunder until [Ghana] has cured the breach of its obligations under this Clause 11.7 and (ii) draw down the outstanding balance of any Letter of Credit previously provided to BE[L] by [Ghana]; provided that, so long as [Ghana] is current with all payments due to BE[L] under this Agreement, BE[L] shall not be entitled to suspend deliveries of electricity or draw down further amounts under any Letter of Credit, within sixty (60) days of the date the obligation to provide such Letter of Credit arises, or (ii) in the case of each replacement or additional Letter of Credit, within one hundred eighty (180) days of the date the obligation to provide any such Letter of Credit arises, then the provisions of Clause 17.1 shall apply. Subject to the laws of Ghana all payments made by [Ghana] shall be made free and clear of and without any deduction for or on account of any set-off, counterclaim, tax or otherwise and all such payments will be increased by the [Government of Ghana] as required in section 11.2. above.

(b) Chronology of the Letters of Credit Issued by the Respondent

252. On 24 August 2007, Stanbic Bank issued a Letter of Credit to the Claimant.³⁸⁸ On 28 January 2009, the Respondent issued a new Letter of Credit.³⁸⁹ On 23 January 2010, the Respondent issued a renewed Letter of Credit.³⁹⁰

2. Disputed Facts

(a) The Claimant's Position³⁹¹

253. The gist of the Claimant's factual assertions with respect to the Letter of Credit are that the Respondent: (i) delayed in providing the Claimant with a replacement Letter of Credit upon the expiration of the first one issued by Stanbic Bank on 24 August 2007;³⁹² (ii) did not respond to the Claimant's 15 December 2008 request to be informed of the status of the renewal process³⁹³ (albeit acknowledging that the Respondent issued a new Letter of Credit on 28 January 2009);³⁹⁴ (iii) did not formally approve the Claimant's invoices, thereby "rendering it impossible to comply with the [Letter of Credit]'s documentary requirements of presenting the issuing bank with an 'undisputed bill signed by [Ghana]";³⁹⁵ and (iv) did not provide another replacement Letter of Credit by 26 December 2009 – the date by which the Claimant alleges the Respondent

³⁸⁸ Statement of Claim, para. 290; *see* Agreed Chronology of Events, at 1.

³⁸⁹ Statement of Claim, para. 293; *see* Agreed Chronology of Events, at 2.

³⁹⁰ Statement of Claim, para. 297; *see* Agreed Chronology of Events, at 3.

³⁹¹ In its Statement of Claim, para. 288, the Claimant indicates that "a detailed index and copies of all the documents relating to BE[L] Ghana's Letter of Credit is attached to the Witness Statement of R. Neil Crouch (C-37) as **Attachments 2-15** and incorporated herein by reference" (emphasis in the original).

³⁹² Statement of Claim, para. 291; Claimant's Post-Hearing Submission, para. 57.

³⁹³ Statement of Claim, para. 292.

³⁹⁴ Statement of Claim, para. 293.

³⁹⁵ Statement of Claim, para. 295 (without emphasis in the original).

“should have provided a replacement” – instead of merely issuing a renewed Letter of Credit on 23 January 2010.³⁹⁶

254. The Claimant further states that it switched from Stanbic Bank to Zenith Bank, sometime in late 2007 or early 2008.³⁹⁷ According to the Claimant, the Respondent’s “failure to allow BE[L] to draw upon the [Letter of Credit] ... caused severe problems between BE[L] and its current lender, Zenith Bank,” including the freezing by the latter of BEL’s accounts as of 19 February 2010 due to the Letter of Credit issued by the Respondent on 23 January 2010 not being compliant with the PPA.³⁹⁸

(b) The Respondent’s Position

255. According to the Respondent, the essence of the Claimant’s “complaint appears to be that the Government has refused to certify, under the terms of the [Letter of Credit], that Balkan is entitled to Tolling Fees”.³⁹⁹ The Respondent contends that, as first drafted by it in 2007, the PPA contained a requirement in clause 46(a) that the Respondent shall certify any entitlement by the Claimant to Tolling Fees.⁴⁰⁰ In support of its contention, the Respondent refers to a letter to the Ministry signed by Mr. Elders on 29 October 2007, which according to the Respondent shows that this condition was accepted by the Claimant.⁴⁰¹ The Respondent further asserts that “[t]his condition was contained in each subsequent renewal” of the Letter of Credit.⁴⁰² According to the Respondent, it follows that since the Claimant is not entitled to Tolling Fees, the Respondent “is not in breach of the [Letter of Credit] or the PPA by reason of its refusal to provide a false certification to the Stanbic Bank”.⁴⁰³

³⁹⁶ Statement of Claim, para. 296.

³⁹⁷ Statement of Claim, para. 29.

³⁹⁸ Statement of Claim, para. 298; Claimant’s Post-Hearing Submission, para. 58.

³⁹⁹ Statement of Defense, para. 139.

⁴⁰⁰ Statement of Defense, para. 139.

⁴⁰¹ Statement of Defense, para. 139, citing Exhibits R-41: “Establishment of Letter of Credit – Power Purchase From Generation was Osagyefo Power Barge”, R-80: “Letter from Dr. M. Apiagyei Gyamfi to Balkan Energy Company LLC, Re: Power Purchase Agreement Between Government of Ghana and Balkan Energy Ghana Ltd – Letters of Credit”, R-81: “Letter from Phillip Elders to Dr. M. Apiagyei Gyamfi, Re: Power Purchase Agreement Between Government of Ghana and Balkan Energy Gh. Ltd. – Letter of Credit”.

⁴⁰² Statement of Defense, para. 139.

⁴⁰³ Statement of Defense, para. 139.

256. With reference to the Claimant's allegation that the replacement letters of credit were not always issued 30 days prior to the expiry of the one previously issued, the Respondent further submits that such claim must fail because (a) the PPA, in Clause 34.1.4.2, provides a 60-day grace period in case of default; (b) any claim for breach was waived by the Claimant when it accepted the replacement Letters of Credit without objection; (c) the Claimant suffered no damage since it never sought to draw upon a letter of credit when one was not in place; and (d) the obligation to provide a letter of credit is a contractual obligation under the PPA, which it claims is *void ab initio* and therefore unenforceable.⁴⁰⁴

H. EVENTS RELATED TO THE ARREST OF MESSRS. TIMOTHY EVERHART AND WILLIAM BERKENBILE AND TO THE SEIZURE OF THE DCS FROM THE PROJECT SITE

1. Undisputed Facts

257. Mr. Timothy Everhart – an employee at BEL – was arrested by Ghanaian authorities on 9 January 2010 on suspicion that he was stealing the DCS from the Project Site.⁴⁰⁵ He was subsequently released on 11 January 2010.⁴⁰⁶ Mr. William Berkenbile – a mechanic for ProEnergy Services LLC (BEL's subcontractor) – was also arrested and the DCS was seized by Ghanaian authorities "at about the same time."⁴⁰⁷

258. The circumstances of and reasons for the arrests and seizure are however subject to dispute between the Parties.

2. Disputed Facts

(a) The Claimant's Position⁴⁰⁸

259. According to the Claimant, Mr. Everhart was "stripped to his underwear, placed in jail and not allowed to contact attorneys or have contact with the American Embassy for in excess of 48 hours".⁴⁰⁹ The Claimant states that it reported these alleged violations to Ghana's Attorney

⁴⁰⁴ Respondent's Post-Hearing Submission, para 197.

⁴⁰⁵ Statement of Claim, paras. 302, 307.

⁴⁰⁶ Statement of Defense, para. 302; Not disputed by the Respondent in its submissions; *see also* Agreed Chronology of Events, at 3.

⁴⁰⁷ Statement of Defense, para. 305. Not disputed by the Respondent in its submissions, but not mentioned in the Agreed Chronology of Events.

⁴⁰⁸ The Timothy Everhart arrest is addressed by Claimant in its facts section at paras. 302-307 of its Statement of Claim and paras. 144-145 of its Reply.

⁴⁰⁹ Statement of Claim, para. 302.

General, but that “[d]espite almost two years of investigation ... Mr. Everhart still has not been exonerated.”⁴¹⁰ The Claimant further asserts that a representative of the US Embassy in Ghana made three unsuccessful attempts to visit Mr. Everhart while he was incarcerated, and even “filed a formal protest letter with Ghana after which they were allowed access to see him.”⁴¹¹ The Claimant also asserts that after he was released from jail two days after his arrest, Mr. Everhart was not permitted to travel and was investigated by the Ghanaian authorities for theft of computer equipment on the Project Site.⁴¹² The Claimant’s alleges that Mr. Everhart was only arrested because the Claimant had decided to institute arbitration proceedings against the Respondent.⁴¹³ In support of this assertion, the Claimant relies on Mr. Adama’s cross-examination, which in the Claimant’s view revealed that, at the time he (Mr. Adama) went to the site to arrest Mr. Everhart, he did not know who owned the alleged stolen items and that he had no evidence that the items had been removed without the consent of relevant authorities of Ghana.⁴¹⁴

260. With respect to the arrest of Mr. Berkenbile and seizure of the DCS on the Barge by the Ghanaian authorities,⁴¹⁵ the Claimant contends that these actions on the part of the Respondent “were likewise baseless”, as the DCS was “either owned by or in the rightful possession of BE[L]”.⁴¹⁶ From the Claimant’s point of view, the seizure constitutes the torts of conversion and trespass to chattels under Ghanaian law.⁴¹⁷

(b) The Respondent’s Position⁴¹⁸

261. The Respondent does not expressly deny that the arrests and seizure of the DCS took place, but offers several arguments why the Claimant’s claims for false arrest and conversion and trespass should be dismissed, as described below under the Parties’ Legal Arguments.

⁴¹⁰ Statement of Claim, para. 302.

⁴¹¹ Statement of Claim, para. 303.

⁴¹² Statement of Claim, para. 304.

⁴¹³ Claimant’s Post-Hearing Submission, para. 95.

⁴¹⁴ Claimant’s Post-Hearing Submission, para. 95; Hearing on the Merits Transcript, Day 6, 131:15-155:9.

⁴¹⁵ Statement of Claim, para. 305.

⁴¹⁶ Statement of Claim, paras. 304, 307.

⁴¹⁷ Claimant’s Post-Hearing Submission, para. 97.

⁴¹⁸ The Timothy Everhart arrest is addressed by Respondent in its argument section, under the headings “False Arrest” and “Conversion and Trespass”, at paras. 160-168 of its Statement of Defense, paras. 157-158 of its Rejoinder, and para. 196 of its Post-Hearing Submission.

I. THE TRIBUNAL'S ASSESSMENT AND CONSIDERATION OF THE FACTS

1. The Negotiation of the PPA

262. The facts noted above concerning the negotiation of the PPA, as well as the Parties' positions in that respect, shed an important light on the business BEL and the Government of Ghana intended to undertake and the terms on which they agreed to operate. Despite the massive amount of documentation and the extensive pleadings submitted in this arbitration, it is important not to lose sight of the essential commitments and undertakings of the parties during the negotiation of the PPA and the context in which these commitments and undertakings were made.
263. The MOU signed by the Parties on 16 May 2007 clearly reflects what the Parties expected to achieve by means of this understanding. While Ghana needed some mitigation of the acute power shortage that was affecting the country at the time, the Claimant was prepared to commit itself to make the Barge operational in a short period of time. To this end BEL proposed to make the Barge operational within ninety days from the execution of the PPA. This proposal outbid all other interested competitors for the project who had estimated longer periods to bring the Barge into operation. The Government of Ghana accepted BEL's proposal.
264. The proposals made by Mr. Elders were not based on theoretical considerations but followed a very specific technical study contained in the "Master Energy Plan and Report of Site Survey", submitted to the Ministry of Energy on 14 May 2007, which was followed on 24 May 2007 by a detailed Technical and Commercial Proposal. The ninety-day undertaking for the refurbishment and commissioning of the Barge is prominent in this proposal, as were a number of milestone events later to be included in the Third Schedule to the PPA.
265. It did not take long for the negotiations of the PPA to reach the crucial element of the fees that would be paid for accomplishing this project. The Tribunal notes that on 14 June 2007 Mr. Elders submitted to the Ministry of Energy a "Tariff Analysis Report", to be followed shortly thereafter by the Letter of Intent provided to him by the Ministry of Energy proposing a lower tariff rate for the Tolling Fees. At Mr. Elders request, on 21 June 2007, the Ministry of Energy provided him with a letter of intent which proposed a lower tariff rate for the Tolling Fees.
266. As from that point the negotiations were largely concerned with the question of Tolling Fees evidencing the disagreement of the parties about this element and other technical aspects of the project. As has been noted, a meeting was held on 11 July 2007 between Messrs. Elders and

Amo and Ghana's President at the time, Mr. John Agyekum Kufuor, seeking to unblock the obstacles that had impeded the progress of those negotiations. A further conversation was apparently held between the President and Mr. Phillips which the Claimant asserts was key to his decision to make the necessary investment for undertaking the project. Although there is no record or other evidence of these conversations, except for the witness statements of the Claimant's officials concerned, and there are no comments by the Respondent on these conversations, the fact that the PPA and related agreements were signed on 27 July 2007 indicate that the negotiations were in the end successful. The Effective Date of the PPA was agreed as 31 October 2007.

267. In the course of the negotiations on the PPA, BEL was registered as a locally incorporated company to comply with Ghana's legal requirements. This fact, together with the legal opinions issued by Ghana's Minister of Justice and Attorney General on 26 October 2007, is at the heart of the legal aspects of this dispute and as such will be examined further below.
268. While the Claimant suggests that the Respondent had hidden motives to delay the negotiations and to impede their successful conclusion, nothing in the factual record of this case so confirms or implies. In the Respondent's view such difficulties arose from the economic considerations underlying the various proposals. The facts discussed lead the Tribunal to believe that the latter was indeed the case. If there were other motives, these have not been supported by the evidence and are hence more a matter of speculation than of established fact.
269. Despite the difficulties the negotiations faced, in the end the agreed PPA established two sets of clearly defined obligations. For BEL it was to lease the Power Station from Ghana and have it ready for commercial operation, with the capacity to deliver 125 MW to the National Grid, within ninety days from the Effective Date of the PPA. A cost of USD 40 million was estimated at the time for this undertaking, with the additional important commitment that BEL would bear all costs of the commissioning. In addition, BEL would convert the Power Station into a combined cycle power plant, at the estimated cost of USD 100 million,. Other stages of the project included the addition of two more combined cycle barge mounted systems at an estimated cost of USD 250 to 300 million, investment in infrastructure for the supply of natural gas and BEL's commitment to provide all the required fuel to the Project and pay for its cost.
270. Ghana's responsibilities were equally clearly established. It would ensure that all necessary site electricity was provided; would construct, install and connect the transmission line and relay protection equipment to connect the Power Station to the National Grid, with BEL providing for adequate transmission cables to the point of interconnection with Ghana's national electricity

grid; and "take and pay" for all electricity generated by the Power Station during the term of the Agreement. Governmental approvals, administrative permits and other regulatory requirements would be ensured by Ghana.

271. An important aspect of the PPA was the Parties' commitment to ensure mutual collaboration to achieve the objectives of the Agreement and the performance of their respective obligations. As an additional safeguard it was further provided that should BEL be unable to commence testing of the Power Station as a result of Ghana's failure to provide an adequate transmission line and interconnection facilities for the Power Station, Ghana would be obligated to commence paying Tolling Fees to BEL in accordance with para. 11.9 of the PPA.
272. As is only too evident from the Parties' submissions in this case, the performance of each other in respect of these reciprocal commitments and obligations has been disputed. While the Claimant maintains that the reason why the project could not be completed on time was because of Ghana's failure to provide for the necessary electricity and power lines and other elements of non-performance, Ghana contends that all the assurances given by BEL in the course of the negotiations turned to be untrue as the latter had neither the capability or the experience to do the job. The Tribunal's task is to find out, on the facts of the case, which party is right or wrong in its contentions and attach the corresponding legal consequences, which will be addressed further below.

2. The Facts Concerning the Power Station and the Barge

273. Of the facts noted there are two that stand out as crucial for the resolution of the dispute between the Parties. The first concerns the point where the respective Parties have the responsibility for connecting the Barge to the national grid. It will be seen that the point where the Claimant's responsibility for the connection ends and that of the Respondent begins has been the matter of important debate. The second question concerns which Party has the obligation to pay for the RTU, MicroSCADA system and the DSC. While they are located on the Barge, these systems are also important for the proper functioning of the equipment in the Substation.
274. The Claimant contends that final commissioning cannot be achieved without the final connection to the G-NITS as it is the essential source of power for the operation of the turbines and the their testing. The Respondent, on the other hand, is of the view that the 161 kV electrical system must be fully operational before the Power Station can be connected to the Grid as it is the key element for allowing power to be exported from the Barge and energy

imported into it, as required. The allocation of the respective responsibilities will be examined further below.

3. The Facts Concerning the Commissioning Steps

275. The Parties also disagree on the steps that must be followed to achieve proper commissioning of the Power Station. The four "milestones" identified by the Claimant do not appear objectionable, and this is also true of the more detailed enumeration set out in Mr. Brinckerhoff's Expert Report and submitted by the Respondent. Both are descriptive of the sequence of events that are necessary to finalize commissioning. However, in the view of the Tribunal, what matters is not so much how many milestones have been achieved but the end result: that is to say whether the point has been reached at which the Power Station is generating the required amount of electricity and, subject to interconnection, ready to deliver to the National Grid. As has become evident from the facts discussed above the Power Station was not ready to generate and deliver the required amount at the date established in the PPA, and it is still not ready to do so, even though some of the required steps may have been achieved.
276. A related issue is whether the Parties were required to cooperate to achieve the final point of commissioning, whatever that might have been. While the Claimant maintains that the standards of conduct between owner and contractor to this end identified by Mr. Badger are inapplicable in this case because BEL had no obligations in this respect and the Respondent had no right to participate in the commissioning process, the Tribunal must recall that one of the essential elements of the PPA, as noted above in respect of the negotiation process, was the Parties' commitment to ensure mutual collaboration to achieve the objectives of the Agreement and the performance of their respective obligations. That the Parties should work in isolation from each other does not seem to be consistent with their commitments under the PPA.
277. The facts relating to the Turning Gear and First Fire of the Turbines as the preliminary commissioning steps are not difficult to establish. It is not disputed that such steps were attained in the course of 2008 although the precise dates are not entirely clear. But what matters is to establish whether these steps led ultimately to the steps necessary to reach the required operational capacity.
278. The answer to this question appears to be in the negative. The Respondent's contention is that First Fire was attained for a very short period of time, estimated in the seconds or minutes, and that this was done by manipulating certain functions of the control systems that were essential for a proper attainment of the steps to follow, including the closely related stage of FSNL. The

Tribunal considers that the contention of the Respondent is convincing having regard to the record of evidence chronicling the many difficulties that key pieces of equipment experienced. The evidence available shows that critical systems such as the Turbines, DCS, fuel tanks, 161kV GIS switchgear, transformer and relay protection devices had all been affected at one time or other by serious problems in their functioning. Given these shortcomings it is clear to the Tribunal that it would not have been possible to attain the steps required in a technically reliable manner, as will be discussed below.

4. The Facts on the Availability of Site Electricity

279. This is another aspect in respect of which the Parties have diametrically opposed views. The main issues are whether site electricity, i.e. the required capacity that ought to be supplied, was available, whether this was available at the appropriate time, and above all, whether in the end the commissioning process was negatively impacted and made more costly.
280. The Tribunal notes that although the Claimant has made contradictory assertions in some documents, submissions or depositions, with particular reference to Mr. Elders certification in 2007 that electricity had been supplied at the required voltage and frequency, there are also facts that point to the difficulties the Claimant faced in this connection. The Tribunal finds the Claimant's assertion that the supply of electricity was intermittent and was cut off for periods of hours and days, and its claim that generators had to be purchased to deal with this problem, to be credible. It is a situation which is not surprising in a rural setting and in remote villages of a developing country.
281. Whether the capacity supplied was adequate is also disputed, but there can be no doubt that the difficulties encountered had a negative effect on the commissioning process and indeed increased its costs. It is difficult to establish for how long this effect lasted but it can be safely noted that it did not extend beyond the point in time at which the generators became fully operational. Thus, it can safely be assumed that the following steps in the commissioning process could not have been impeded by this factor.

5. The Turbines Mechanical Testing at FSNL

282. The mechanical testing of the turbines at FSNL was not successful. The record is sufficiently clear as to the problems that plagued the rehabilitation of the equipment and its operation. The delivery of supplies was estimated to take up to 30 months and the rehabilitation would take until 2011, the dates varying for each turbine. The costs of rehabilitating were also estimated to

be significant. Among other factors compounding these difficulties was the question whether liquid fuel should be used for the power generation, and if so which kind and price, or whether natural gas should be used instead.

283. The Tribunal must also note that in the circumstances the certification made in 2009 by Ansaldo as to the turbines having completed the FSNL milestone is unrealistic, particularly if taken together with the Claimant's complaint that grid connectivity was not available. It must also be noted that after the Claimant asserted that it had attained that milestone, it later conceded that it had not attained the milestone because of the alleged lack of grid connectivity.
284. The Respondent, however, has argued that the transmission line was only necessary to attain the later milestone of FSFL, and that testing at FSNL could have been achieved using the Black Start Generator but that this could not be done because of the state of disrepair of the turbines. As this discussion is closely related to the issue of grid connectivity, this aspect of the dispute will be examined next in the light of the facts.

6. The Facts Concerning Grid Connectivity

285. The state of the connection and transmission lines to the Essiama and Elubo substations has been also much debated. It is not disputed, however, that as at present the Elubo substation cannot receive back-feed from the Barge. The Parties also disagree on whether the Essiama substation can take the full load from the Barge or whether the Elubo transmission line must be operational for this to happen.
286. The fact that these lines were not fully operational for the needs of the project at the time work on the Power Station was supposed to be progressing, particularly because of the dense tree overgrowth that interfered with the route of the lines, is well established. Photographic evidence in the record is convincing to this effect. Notwithstanding maintenance work occasionally carried out by the Respondent the problem appears to have endured. That the Essiama line was energised in mid 2008 is also a well established fact, but the question that remains is whether this was enough for handling the output of the Barge, assuming that this was available.
287. It is important to note in this connection that, in accordance to the Respondent's information, the Essiama Transmission Line to Tower 3 was in fact energised on 8 August 2008, and there is no reason to doubt the accuracy of this assertion. Whether this was enough to connect the Barge to the National Grid, as stated by the Respondent, is open to some doubt, in part because the capacity of the line was at the limit of the Barge's maximum output and in part because,

according to the Claimant, there were some technical issues concerning the backfeeding of the Elubo substation. The ability of the Elubo Transmission Line to deliver the required power and to handle the Power Station output is also somewhat doubtful. The Claimant's argument that both substations should be coordinated in their operation is convincing as otherwise there would have been no need for two transmission lines.

7. The Commissioning of the RTU/Micro Scada System

288. It is also a well established fact in the record that BEL, through ProEnergy acting as its subcontractor, requested several proposals from other parties to commission the RTU system on the Barge. From the exchanges with these other parties it appears that the work to be performed did not involve merely repair or even upgrading of the system but that an entirely new system would have to be installed with the corresponding cost. While in the "**Grid Connection Process Agreement**", concluded between the Claimant and the Respondent at a meeting held on 17 June 2008, the latter was to use its contacts to seek a proposal from ABB, it was nonetheless established that BEL would be responsible for this commissioning.

289. As a matter of fact, the Grid Connection Process Agreement (R-52) concluded between the Claimant and the VRA provided for the Claimant's obligations as to the commissioning of the RTU. These obligations were expressed as follows: "upon completion and review of the above pre-energization check list, **Balkan Energy will contract an Independent Third Party Testing Company to perform a complete installation, engineering and commissioning overview**: this will include review of the VRA Audit. Upon completion of the third party inspection, Balkan Energy and the VRA must agree jointly in acceptance and connection of the 161 kV Transmission Line to the Barge". Although the drafting of these terms was not as clear as would have been desired it is nonetheless reasonable to conclude that while the commissioning of the RTU was the Claimant's responsibility, this would be subject to an audit by the VRA and the process as a whole would then be further subject to the supervision of the contracted third party. It must also be noted that the text of the Agreement does not refer to the Respondent's obligation to seek a proposal from ABB.

290. Beginning in October 2008 BEL came to the view that payment for the system was Ghana's responsibility and that prior discussions with third parties to undertake such work were only meant to appraise itself of the scope of the work so that the Claimant could appropriately coordinate with the Respondent. In its view the Grid Connection Process Agreement had provided for Respondent's contractors Forclum and Norlec for commissioning the new

MicroSCADA system and that GridCo as the government operator of the National Grid was under the law of Ghana under the obligation to ensure and consequently pay for this commissioning.

291. While the Grid Code promulgated in 2009 does contain this provision which imposes the obligation on GridCo., it must be noted that this happened two years after the conclusion of the PPA, thus the terms of the Code are not dispositive of the issue under discussion. Even so the Claimant asserts that prudent industry practice and prior law still placed this obligation on Ghana at the time of the conclusion of the PPA, as reflected in the 2007 version of the Grid Code and its connection to the regulations passed in June 2008 drafted on the basis of that version. The fact remains, however, that the Grid Code was formally promulgated much later than the PPA and only became legally binding after the PPA has been concluded. It must also be noted, as the Respondent points out, that the Grid Code expressly states that it was not intended to alter pre-existing contractual obligations. Article 4.18 of the 2009 Grid Code in fact provides: "The Grid Code shall apply to all such existing contracts insofar as the Grid Code does not impair the obligations arising from the existing contract."
292. Still more important than the legal considerations is the actual discussion that took place between BEL and the third parties that would perform the work concerning the RTU system. The Respondent points out that the Claimant attempted to find a vendor for this work as soon as it assumed control of the Barge and never forwarded any of their proposals to the Respondent. Even the guidelines provided to ABB for this commissioning, which as noted were requested by intermediation of the Government, were drafted by the Claimant and, tellingly, provided that only the Claimant's listed personnel would be authorized to communicate with the subcontractor. Equally telling is the fact that ABB's proposal identified BEL as the "Customer". The Claimant asserts that this was only meant to facilitate the commissioning and that it volunteered to help with the costs but it never agreed that this task was within its responsibility. However, the fact remains that for all practical purposes it was the Claimant who appeared as the entity responsible for this mandate to subcontractors.
293. The facts thus point in the direction that it was the Claimant's responsibility to pay for the commissioning of the system. Yet, as the Respondent has also noted, the Claimant has provided no evidence that the work was completed or when, as it neither notified the Respondent that the RTU was installed and that connection to the National Grid was requested to complete the commissioning.

294. The Parties have also discussed the functions and requirements for the operation of the RTU/MicroSCADA system, particularly about its role in respect of the connection of the Power Station to the National Grid. There can be no doubt about the fact that this system is necessary for the appropriate operation of the connection to the National Grid as it would have been otherwise futile to include it in the works to be undertaken on the Barge and generally in the Grid Code and its background documents. The issue, however, is how decisive this factor is in ensuring that the commissioning of the Barge can be achieved. While the Claimant maintains that it is critical, the Respondent is of the view that it is preferable but not essential. The Respondent asserts that, in any event what is essential is that the 161kV electrical system on the Barge should be in place.
295. The Tribunal is convinced by the Claimant's arguments that the RTU system is necessary for the proper functioning of the interconnection to the National Grid and that the commissioning of the Barge would have been more difficult to attain without it. It is equally convinced, however, that, as noted by the Respondent, for any such functions to be properly handled the 161kV electrical system must be available as otherwise it appears to be immaterial that the control center would be on the Barge, close to it in the Substation or far away because there would have been nothing to monitor or control. It must be kept in mind that the RTU/MicroSCADA systems are monitoring and control devices for the connections to and from the Barge, the operation of which requires in the instant case the electrical output to monitor and control. But such an electrical system does not appear to have been completed and this would have in itself prevented the connection to the National Grid irrespective of the fact that the RTU was in place.
296. The Claimant also states that even if the RTU is commissioned, interconnection cannot occur unless "both sides exchange (coordinate) all of their separate 161 kV protective relay settings",⁴¹⁹ thus confirming that both the RTU and the 161 kV system are necessary to connect to the National Grid. The technical details submitted as Attachment 6 to Mr. MacDonald's affidavit⁴²⁰ demonstrate that the RTU 2,000 MicroScada is the source of automation for the GIS, which in turn is an essential element of the 161 kV electrical system. The same document also suggests that the RTU monitors not only the GIS but the whole Substation.
297. The Tribunal also recalls that although Ansaldo recommended not to use the Black Start Generator for commissioning and insisted on the need for grid connectivity to this end, the

⁴¹⁹ Claimant's Post-Hearing Submission, para. 86.

⁴²⁰ At pp. 15-16, and in particular p. 16 *in fine*.

validity of this opinion can be seriously put in doubt as the facts examined above suggest that the generator may well be capable of handling the commissioning tasks.

8. The Testing and Commissioning of the Barge at the End of 2008

298. In the course of the second half of 2008 it became noticeable that distrust had begun to characterize the relations between the Parties about the work each was supposed to perform. In July of that year the Respondent had written to BEL confirming that the Essiama Transmission Line was ready to be energised, while at the same time it requested the Claimant to witness and sign-off the commissioning tests of the 161 kV equipment and protection relays that the Claimant was to make available for the final commissioning of the Barge and its connection to the National Grid. As noted, no answer was received to these requests. For its part, the Claimant informed the Respondent in October 2008 that the Power Station would be ready for Final Testing and Commissioning at the end of that month and would be ready to start generating power on 1 November 2008. This was to be followed by the connection of the Transmission Line from the National Grid to the Power Station so as to test all systems on the Barge and deliver power to the National Grid. As discussed above, it appears that the work on the 161 kV electrical system had not been completed at that time and in the Respondent's view was never completed.
299. Another major source of conflict was the bad relationship that had developed between BEL and its subcontractor ProEnergy, which ended up in serious allegations being made by the former against the latter in the litigation they were involved in before the US courts. The exchanges that had taken place between these two entities in 2008 are very illuminating on the issue whether the work on the Barge had been completed and was ready for final testing and commissioning. They show that, in spite of the assurances given by Ansaldo and other persons that the turbines had reached FSNL, ProEnergy believed that this had never happened, or if it had it was for not more than ten seconds, with multiple incidents of electrical and mechanical failures in the process.
300. It is a fact that the Power Station was not ready to deliver energy on 1 November 2008. While the Claimant asserts that commissioning could not be completed on time because of the Respondent's breaches of the PPA, the fact remains that what BEL had announced i.e. that the Barge was ready to deliver power on 1 November 2008 was not the case. Again on this matter the allegations made in the US litigation, just as the testimony provided in those proceedings,

show that in BEL's view ProEnergy was liable for repeated failures in the discharge of the work entrusted to it.

9. The Facts Concerning the Parties' Negotiations of 2009

301. The discussion between the Parties continued into 2009 without any signs of improvement. The Claimant had invoiced the Respondent for an amount of Tolling Fees on 25 November 2008 and a meeting was held on 24 February 2009 to discuss this question and the commissioning at the Barge, but it did not go beyond the Respondent requesting the Claimant to withdraw the invoices and proposing a new plan for the Barge. Nevertheless an Inter-Ministerial Committee was set up to review the PPA and the commissioning process and a site visit was conducted. A further meeting was held on or about 12 July 2009 to discuss the question of FSNL, fuel supply and other matters, but no progress was made, as evidenced by the fact that on 7 August 2009 the Respondent again rejected the Claimant's invoices and denied the Claimant's entitlement to Tolling Fees. On the same day the Claimant delivered a notice of breach of the PPA and decided to draw upon the Letter of Credit.
302. The Claimant's position on the facts is that FSNL of Turbine 1 was attained on 2 March 2009 and of Turbine 2 on 12 July of that year, emphasizing that Ansaldo had certified this fact on 9 July 2009 and noting that this milestone had been achieved without electrical grid connectivity. The Tribunal must note in this respect that this contention confirms the fact discussed above that FSNL can be run without grid connectivity using the Black Start Generator, as the Respondent has argued, and that, in any event, as also noted, grid connectivity had been available much earlier, as asserted by the Respondent.
303. The Tribunal must also state that it is skeptical about the value of Ansaldo's certification of these facts, as the letters submitted by Ansaldo do not allow concluding that the proper tests were conducted by qualified experts. Moreover, these tests were not approved or witnessed by the Respondent in accordance with the requirements of the PPA, as the Respondent has pointed out. The information available from the ProEnergy Litigation is also not helpful to support the Claimant's assertions. In the ProEnergy Litigation, the Claimant argued that the rotor blades had been irreparably damaged by the subcontractor, and, as noted further above, ProEnergy had adamantly expressed its conclusions that the turbines had never been fired at FSNL, and that it was prepared to so testify. In any event, if the turbines had been fired at all this has been for few seconds or minutes and after bypassing the technical requirements for reaching proper functioning of the turbines.

10. The Facts Relating to the Letter of Credit

304. The facts concerning this other point of contention between the Parties are first that there was indeed an obligation for Ghana to make available a Letter of Credit to the Claimant under Clause 11.7 of the PPA, which would provide the necessary assurances to BEL's lenders. This obligation was satisfied by the Respondent on 24 August 2007 on Stanbic Bank issuing such a Letter, which was thereafter renewed in 2009 and 2010. The Letter of Credit under Clause 11.7 was for an amount equal to the sum of Tolling Fees and fuel cost payable over sixty days, on the basis of a certain output of power and other requirements. It is also quite evident that absent such a power output, entitlement to Tolling Fees would become moot and the Letter of Credit would be deprived of its legal basis under the Contract. It has also been established above that the necessary power output was never attained as the Power Station could not be commissioned on time.
305. Thus the issue of the Claimant's complaints about the fact that BEL was not issued with a replacement Letter of Credit are inextricably linked to the question whether entitlement to Tolling Fees was properly established. Such entitlement required formal approval by the Respondent of the Claimant's invoices, which, as noted above, never happened since the Respondent rejected the invoices in 2009. The Tribunal must also note that under Clause 11.7 of the PPA, the consequences of a breach by the Respondent would be that the Claimant could draw on the existing Letter and, above all, that it would suspend the delivery of electricity. There was thus an express link between the purpose of the Letter of Credit and the delivery of power from the Barge. While the Claimant complains that it could not present the issuing bank with an undisputed bill signed by the Respondent, the fact is that the bill was indeed disputed. The Claimant complains that BEL's situation became more difficult when it switched from Stanbic Bank to Zenith Bank because a Letter of Credit was not unavailable and this resulted in the latter Bank freezing BEL's accounts in 2010. But this does not change the fact that the absence of power delivery and consequential loss of BEL's entitlement to Tolling Fees meant that the requirements for issuing the Letter of Credit could not be met. As noted by the Respondent it would otherwise have issued a false certification to the bank.
306. In the Tribunal's assessment of the facts, the dispute about whether renewals were issued in time, whether there were tacit waivers by the Claimant or whether the Claimant could not draw on the Letter of Credit because there was no such Letter, and therefore no damage could be caused, is moot in light of the incontestible fact that power delivery was unavailable and the fact that this gave rise to the legal consequences noted. The Respondent has also argued that as

this is in any event an obligation under the PPA which it claims is void *ab initio*, there would be no obligation to enforce. The Tribunal shall examine the validity of the PPA below.

11. The Facts of the Arrests and Seizure of Equipment

307. It is also an established fact, not denied by the Respondent, that Mr. Timothy Everhart was arrested by Ghanaian authorities on 9 January 2010 and later released on 11 January 2010. Mr. William Berkenbile, an employee of ProEnergy was also detained for questioning at about the same time. The stated reason for these arrests was the suspicion that the affected persons were involved in misappropriating the DCS from the Project Site.
308. The Claimant asserts that Mr. Everhart was treated in an undignified manner and not allowed to contact attorneys or the United States' Embassy for over two days. While there is no evidence of physical ill-treatment, the assertion that undignified treatment occurred can well be considered credible (as might be the case in many countries, developed and less developed). The U. S. Embassy was ultimately contacted and it appears that it had to file a formal protest with the Respondent to ensure proper access to the detainee. Subsequently to his release Mr. Everhart was not permitted to travel and was investigated about the alleged theft of computer equipment, procedures that in the Claimant's view have not yet resulted in his exoneration.
309. While the Claimant alleges that the arrests took place because the Claimant had instituted arbitration proceedings, this would be difficult to establish. The arrests were undoubtedly related to the ongoing dispute between the Parties and the mutual accusations that were made at all levels. The fact, however, that these events coincided with the time arbitration proceedings were instituted does not allow the Tribunal to rule out the Claimant's allegations in this respect. As the DCS was BEL's property or BEL had the rightful possession of the equipment, in the Claimant's argument the seizure constitutes the torts of conversion and trespass to chattels under Ghanaian law, as will be discussed further below. In the Tribunal's view, Mr. Everhart's moving the DCS from one place to another within BEL's leased domain was not justifiable cause for his arrest.

V. THE PARTIES' LEGAL ARGUMENTS

A. THE CLAIMANT'S CORPORATE IDENTITY

310. While the Respondent acknowledges that the Claimant in this arbitration purports to be BEL, it asserts that BEL's corporate identity, and that of its parent companies, is unclear.⁴²¹ For its part, the Claimant maintains that it was incorporated in Ghana on 16 July 2007.⁴²²
311. During the negotiations that led up to the signing of the PPA, the Claimant represented to the Respondent that it was a company registered in the Netherlands.⁴²³ At the 15 October 2010 hearing on jurisdiction in this arbitration, the Tribunal requested that the Claimant describe its relationship to the Balkan Group.⁴²⁴ On 5 November 2010, the Claimant submitted that it is a wholly-owned subsidiary of Balkan Energy Ltd. (UK) ("Balkan UK"), which, in turn, is a wholly-owned subsidiary of Balkan US, "a company incorporated in Texas, United States."⁴²⁵ The Claimant also explained that "[a]t no stage have any of these entities been incorporated in the Netherlands."⁴²⁶ Similarly, the witness statements accompanying the Claimant's Statement of Claim reiterate that it is a subsidiary of Balkan US, a company "formed to bring private investment to developing countries with power generation needs".⁴²⁷
312. In its Statement of Defense, the Respondent submits that Balkan US is not registered with the records department of the Texas Secretary of State. The Respondent further submits that, when the Claimant was questioned about its corporate identity in a proceeding before the United

⁴²¹ Throughout Respondent's submissions, it refers to the Claimant as "Balkan".

⁴²² Agreed Chronology of Events, dated 26 March 2013 ("**Agreed Chronology of Events**"), at 1.

⁴²³ Exhibit C-38, Attachment 6: Memorandum of Understanding signed by Phillip Elders and representatives of Ghana's Ministry of Energy on 16 May 2007 ("MOU"); Statement of Defense, para. 9: The Respondent submits that BEL's identity "is ... one of the issues before the High Court of Ghana", namely "whether BE[L] was properly constituted, whether representations regarding its ownership were false, and whether Balkan fraudulently induced the Government to enter into the PPA by misrepresenting its ownership structure, capabilities, and ability to commission a power barge." The Respondent does not detail the findings by the High Court on those issues in its Rejoinder. In its Post-Hearing Submission, para. 7, the Respondent suggests that the Claimant "has offered conflicting versions of its corporate structure to the Tribunal as well as to various courts in the United States and regulatory agencies" and that the Claimant's "7, 2013 submission to the Tribunal [Claimant's 7 June Letter] only added to the confusion, raising additional questions about the accuracy of Balkan's public filings."

⁴²⁴ Statement of Defense, para. 5.

⁴²⁵ Claimant's Answers to Questions Posed to the Parties by the Arbitral Tribunal at the Hearing of 15 October 2010, 5 November 2010 ("**Claimant's 5 November 2010 Submission**"), at 4; Statement of Defense, para. 5.

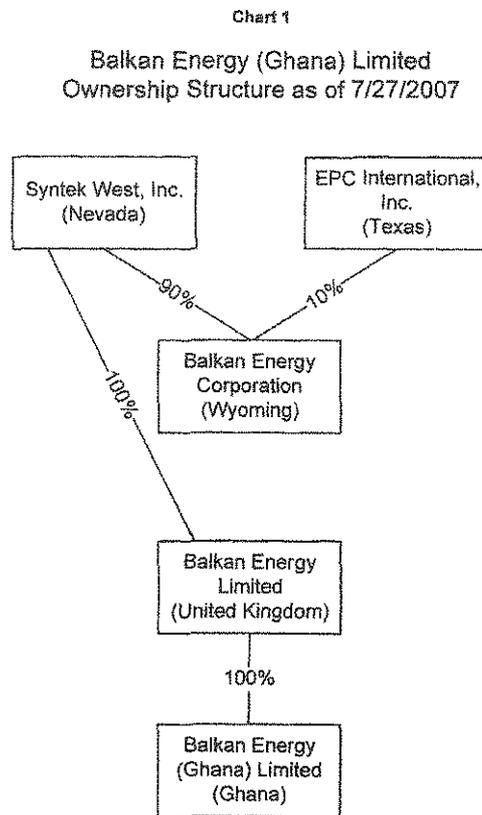
⁴²⁶ Claimant's 5 November 2010 Submission, at 4; Statement of Defense, para. 5.

⁴²⁷ Exhibit C-38: Witness Statement of Phillip Elders, paras. 2, 6; Exhibit C-35: Witness Statement of Gene Phillips, para. 6.

States District Court for the Western District of Missouri (the “US District Court”), Claimant’s counsel, Mr. Mitchell Madden, stated that Balkan US “was never formally formed”.⁴²⁸ The US District Court subsequently concluded that Balkan US’s “existence is somewhat suspect considering that it held itself out as a Texas corporation in the case before this Court when in fact it was not legally formed. ... [and that] Balkan’s briefing has not remedied the Court’s concerns regarding the existence of [Balkan US], but has further compounded the issue”.⁴²⁹

313. The Tribunal notes that the Claimant’s Reply does not respond to the Respondent’s concerns regarding BEL’s corporate status.

314. In the Claimant’s 7 June Letter, the Claimant provided the following chart, which it contends accurately reflects the organizational structure of BEL at the time of the signing of the PPA in July 2007:⁴³⁰

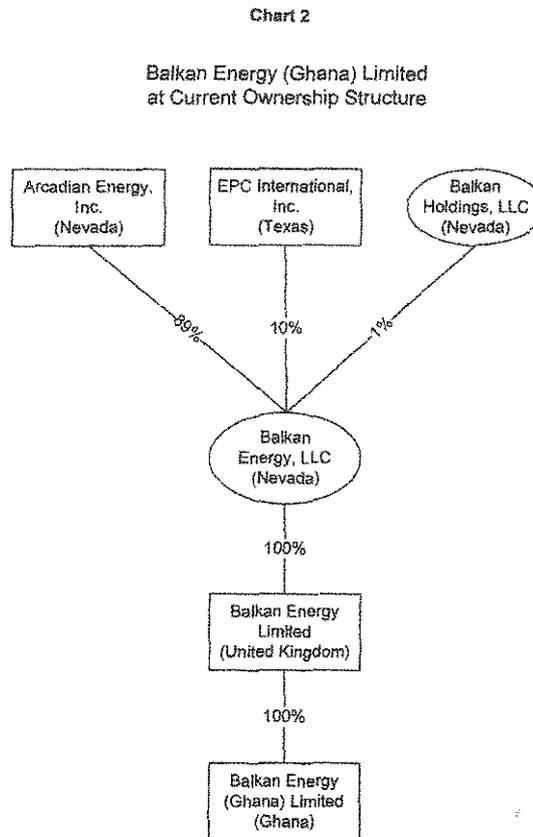


⁴²⁸ Statement of Defense, para. 8; Exhibit R-1: “Balkan Energy Limited (Ghana)’s Brief in Opposition to the Government of Ghana’s Supplemental Brief in Opposition to the Motion of Balkan Energy Limited (Ghana) to Intervene and for Reconsideration of the Court’s February 7, 2011 Order, In re Government of Ghana, No. 11-9002”, at 2.

⁴²⁹ Statement of Defense, fn. 3; Exhibit R-2: “Order, Government of Ghana v. ProEnergy Services., LLC, No. 11-9002, 2011 WL 2652755 (W.D. Mo. June 6, 2011)”, at 5-6.

⁴³⁰ Claimant’s 7 June Letter, at 3-4.

315. The Claimant contends that its ownership structure, shown above, was modified in February 2008 upon the creation of Balkan Energy, LLC Nevada (“**Balkan Nevada**”), and the transfer from Syntek West Inc.’s (“Syntek West”) subsidiary, Balkan Energy Corporation Wyoming (“**Balkan Wyoming**”). The Claimant submits that the following chart reflects BEL’s ownership structure at the time the present arbitration was filed in 2009 until present:⁴³¹



316. In its 10 July Letter, the Respondent notes that the Claimant has given five different versions of BEL’s corporate structure throughout the proceedings, and points out several discrepancies. First, the Claimant contends in its 7 June Letter that Syntek West transferred full ownership of Balkan UK to Balkan Wyoming in September 2007, whereas the UK annual returns filed by Balkan UK for 2009 and 2011 show that Syntek West still owned Balkan UK. Second, the Claimant alleges that Balkan Wyoming transferred full ownership of Balkan UK to Balkan Nevada in 2008,⁴³² whereas it also contends in a different document⁴³³ that the ownership was actually transferred to another entity, Balkan Energy LLP. Finally, the Claimant contends that

⁴³¹ Claimant’s 7 June Letter, at 5.

⁴³² Claimant’s 7 June Letter, p. 5.

⁴³³ Claimant’s 7 June Letter, Attachment II.7.

EPC International Inc., company owned by Mr. Elders, held a 10% of Balkan Wyoming in 2007 and another of Balkan Nevada in 2009, whereas the Texas Franchise Tax reports between 2006 and 2012 do not reflect this ownership.⁴³⁴ The Respondent concludes that the Claimant's June 7 Letter has not remedied the concerns about BEL's corporate structure, but has rather compounded the issue.

317. In its Post-Hearing Submission, the Claimant reaffirms the fact that "it has not offered inconsistent version of its ownership in this or any other proceedings"⁴³⁵ but concedes the point made by the Respondent⁴³⁶ that "Balkan UK Financial Reporting, as found on-line, incorrectly stated the history of Balkan UK's true corporate structure", as apparently, "the local agent failed to note the correct information in 2011". The Claimant suggests that the "unintentional 'discrepancies' only relate to the ownership of Balkan UK and *not* to the ownership of BEL" [emphasis added by the Claimant].⁴³⁷
318. In its Post-Hearing Submission, the Respondent concludes that the Claimant "has offered conflicting versions of its corporate structure to the Tribunal as well as to various courts in the United States and regulatory agencies", and highlights that "regardless of who Balkan's parent, grandparent or owners actually are, it is clear that, contrary to the representation contained in the Memorandum of Understanding (...) none of these Balkan entities had any prior experience in refurbishing a power plant, much less a power plant in Africa".⁴³⁸
319. The Tribunal finds that the information regarding the corporate identity of the Claimant company is indeed confusing, as claimed by the Respondent. During the negotiations leading to the conclusion of the PPA, the Claimant asserted that BET was a company registered in the Netherlands. Following the hearing on jurisdiction the Claimant explained that the company is a wholly owned subsidiary of Balkan US which it said was incorporated in the State of Texas. However, no records of the incorporation in Texas has so far been made available. It is also to be noted that, in the US proceedings, the US Court was informed that the company had not in fact been formally incorporated, and this led the US court to conclude that the situation was somewhat suspect. The information provided by the Claimant following the hearing on the merits shows that, at the time of the signing of the PPA in 2007, Balkan UK had Nevada, Texas

⁴³⁴ Respondent's 10 July Letter, p. 5.

⁴³⁵ Claimant's Post-Hearing Submission, para. 3.

⁴³⁶ See Respondent's 10 July Letter.

⁴³⁷ Claimant's Post-Hearing Submission, para. 4; Appendices A-1, A-2 and A-3.

⁴³⁸ Respondent's Post-Hearing Submission, paras. 7-8.

and Wyoming corporate entities among its controllers. By 2008 this structure had changed to include several Nevada corporations and one Texas corporation as the owners of Balkan UK. Different information was included, apparently by mistake, in the UK financial reporting for 2009 and 2011.

320. While this inconsistent information led the US District Court to express skepticism about the real corporate ownership of the Claimant company, this Tribunal must note that BEL was incorporated in Ghana on 16 July 2007 pursuant to the requirement of Article 12 of the Ghana Energy Commission Act which required all companies wishing to obtain a license to supply bulk energy in Ghana to be incorporated in the country, and that BEL was registered under Ghana's Companies Code, 1963 (Act 179) as a locally incorporated company.
321. The Tribunal also notes, as stated in the exposition of the facts concerning the negotiation of the PPA, that on 26 October 2007 the Minister of Justice and Attorney General of Ghana issued two legal opinions that have a strong bearing on this dispute. The first opinion dealt with the issue whether the PPA involved an international business or commercial transaction, and the opinion was that this was clearly not the case as it "involves a local company in a local transaction with the Government". This was followed by another opinion in which the Attorney General stated that all acts, conditions and things required by the laws and Constitution of Ghana had been done, fulfilled and performed in the light of the Project Agreement concluded between the Parties.
322. The Tribunal must also note that it is an accepted fact by both Parties that Balkan UK is the parent company of BEL. The discussion about the Claimant's corporate identity relates rather to a step further above concerning who controls or owns Balkan UK. While this discussion has importance in the context of the validity of the PPA and whether this Contract should have been submitted to Parliamentary approval because of its alleged international character, a matter to be discussed further below, the fact is that for the purposes of this arbitration the Claimant is a Ghanaian corporate entity properly constituted. In addition, the Tribunal recalls that issues of jurisdiction were already decided in the Interim Award and hence the question of corporate identity is not an obstacle for the decision on the merits.

B. THE PARTIES' CLAIMS

323. On the basis of the facts examined and the Parties' different understandings about their meaning, the Parties have laid down their legal claims. The Claimant alleges that the Respondent breached its obligations under the PPA by providing inadequate or unreliable site

electricity, failing to provide grid connectivity, and failing to install a new RTU / MicroSCADA on the Barge, which the Claimant argues, prevented it from completing the final testing and commissioning of the Power Station. The Claimant asserts that it is entitled to damages based on: (i) breach of contract, including incidental damages; (ii) breach of the Arbitration Agreement; and (ii) alternatively, based on unjust enrichment, fraud/deceit, false arrest and conversion/trespass.

324. The Respondent denies the claim of the Claimant for breach of contract on the following grounds: first, the PPA is void *ab initio* under Article 181(5) of the Constitution; and second, even if the PPA is enforceable, the Claimant is not entitled to any payments or damages under the terms of the PPA.⁴³⁹ According to the Respondent, even if the Tribunal finds that the PPA is valid and enforceable – which it contends it cannot by virtue of the Supreme Court Judgment of 16 May 2012 – the Claimant has failed to demonstrate that it is entitled to Tolling Fees under Clauses 11.4 and 11.9 of the PPA.⁴⁴⁰ Similarly, the Respondent contends that the Claimant has failed to establish that it is entitled to incidental damages relating to site electricity, grid connectivity, the RTU, or the Letter of Credit.⁴⁴¹

325. The Respondent also submits that it is the Claimant that is in breach of the PPA for its failure to commission the Power Station and, accordingly, the Respondent presents two counterclaims: first, for breach of contract; and second, for fraud and misrepresentation.⁴⁴²

C. SUPREME COURT PROCEEDINGS IN GHANA AND THE PARTIES' ARGUMENTS ON THE VALIDITY OF THE PPA

1. Introduction

326. The Tribunal shall consider now a key question of this arbitration, namely whether the PPA is valid and enforceable, a matter on which the Parties' have diametrically different views. To this end the Supreme Court proceedings in Ghana shall be examined first to be followed by the examination of the Parties' positions thereon, which in their aggregate set out the legal arguments surrounding this question. The discussion shall end with the Tribunal's findings and conclusions on the validity of the PPA.

⁴³⁹ Statement of Defense, para. 114-168.

⁴⁴⁰ Statement of Defense, para. 121.

⁴⁴¹ Statement of Defense, para. 136.

⁴⁴² Statement of Defense, paras. 170-182.

327. On 25 June 2010, after the appointment of the Arbitral Tribunal and four days before the First Procedural Meeting between the Parties was scheduled to take place on 29 June 2010, the Respondent applied for and was granted an interlocutory injunction against the arbitral proceedings by the High Court of Justice (Commercial Division) in Accra, Ghana. The injunction restrained the Claimant from, *inter alia*, taking any further steps in the arbitration proceedings pending final determination of the suit before the Ghana High Court. The Respondent alleged, in its suit before the High Court, that the PPA and the arbitration clause, which is part of the PPA, are void for lack of prior Parliamentary approval.⁴⁴³ On 6 September 2010, the Ghana High Court issued a ruling confirming the Order and dismissing the Claimant's application for a stay of proceedings.⁴⁴⁴
328. On 3 November 2010, the Respondent moved for an expedited reference of the constitutional issues involving the validity of the PPA to the Supreme Court of Ghana.⁴⁴⁵ The Claimant opposed the application.⁴⁴⁶ When the matter came before the Supreme Court, the Claimant again opposed the expedited reference.⁴⁴⁷ Upon the Supreme Court's granting of the expedited reference,⁴⁴⁸ the Respondent contends that the Claimant "sought to further delay the briefing and oral argument of the matter before the Supreme Court" and "succe[eded] in delaying the Supreme Court's consideration of the constitutional issue."⁴⁴⁹ Final argument was held on 20 March 2012, after which the Court adjourned the matter for judgment to 16 May 2012.

⁴⁴³ Order for Interlocutory Injunction, 25 June 2010, High Court of Justice (Commercial Division); Claimant's Answers, Exhibit C-27.

⁴⁴⁴ Ruling, 6 September 2010, High Court of Justice (Commercial Division); Claimant's Answers, Exhibit C-41.

⁴⁴⁵ Statement of Defense, para. 12; Exhibit R-44: "Motion of the Government of Ghana in the Superior Court of Judicature in the High Court of Justice (Commercial Division), BDC/32/10".

⁴⁴⁶ Statement of Defense, para. 12; Exhibit R-45: "Affidavit in Opposition to Application Under Article 130(2) of the 1992 Constitution, In the Superior Court of Judicature in the High Court of Justice (Commercial Court), BDC/32/10".

⁴⁴⁷ Statement of Defense, para. 12; Exhibit R-47: "Notice by Interested Parties of Intention to Reply on Preliminary Objection, In the Superior Court of Judicature in the Supreme Court of Ghana, J5/34/2011".

⁴⁴⁸ Statement of Defense, para. 12; Exhibit R-48: "Ruling, In the Superior Court of Judicature in the Supreme Court of Ghana, J5/34/2011".

⁴⁴⁹ Statement of Defense, para. 12; Exhibit R-49: "Motion on Notice for Extension of Time within Which to File an Answer to Plaintiff's Statement of Case, In the Superior Court of Judicature in the Supreme Court, JS/34/2011".

329. With respect to the procedure before the Supreme Court, the Claimant notes that “except for the affidavits offered by counsel for the parties, no evidentiary hearing was held and, accordingly, no factual record was developed”.⁴⁵⁰

2. The Supreme Court Judgment of 16 May 2012

330. The Supreme Court referred two issues to itself:

1. Whether or not the [PPA] constitutes an international business transaction within the meaning of Article 181(5) of the Constitution.
2. Whether or not the arbitration provisions contained in clause 22.2 of the [PPA] constitutes an international business transaction within the meaning of Article 181(5) of the Constitution.⁴⁵¹

331. Regarding the first issue referred to it, the Supreme Court concluded that the PPA “constitutes an international business transaction within the meaning of Article 181(5) of the Constitution.”⁴⁵²

332. With respect to the second issue, the Supreme Court stated that the “arbitration provisions contained in clause 22.2 of the [PPA] does not constitute an international business transaction within the meaning of Article 181(5) of the Constitution”.⁴⁵³ However, in the same paragraph, the Supreme Court went on to conclude that:

An international commercial arbitration draws its life from the transaction whose dispute resolution it deals with. We therefore have difficulty in conceiving of it as a transaction separate and independent from the transaction that has generated the dispute it is required to resolve.⁴⁵⁴

333. Ultimately, the Supreme Court remits the case to the High Court for its consideration in light of this interpretation of Article 181(5) of the Constitution.⁴⁵⁵ The Supreme Court also requests that Parliament enact a Bill indicating what modifications it wishes to make to Article 181(5) of the Constitution, stating that “[t]his step would bring greater certainty and clarity to the law.”⁴⁵⁶

⁴⁵⁰ Claimant’s Interim Submission, 20 June 2012, para. 14.

⁴⁵¹ Supreme Court Judgment, at 2, referring to Supreme Court Ruling of 2 November 2011.

⁴⁵² Supreme Court Judgment, at 40-41.

⁴⁵³ Supreme Court Judgment, at 41; *see also* Claimant’s Interim Submission, 20 June 2012, paras. 15, 22.

⁴⁵⁴ Supreme Court Judgment, at 41; also quoted in Claimant’s Interim Submission, 20 June 2012, para. 23.

⁴⁵⁵ Supreme Court Judgment, at 41; also quoted in Rejoinder, para. 24.

⁴⁵⁶ Supreme Court Judgment, at 41.

3. The Nature of the PPA under the Constitution of Ghana

334. Article 181(5) of the Constitution provides as follows:

This article shall, with the necessary modifications by Parliament, apply to an international business or economic transaction to which the Government is a party as it applies to a loan.

335. At the outset, the Supreme Court found that the wording of the constitutional provision “should not lead necessarily to the result that only agreements between entities resident abroad and the Ghana Government can be embraced within the meaning of the term.”⁴⁵⁷ It went on to opine that the substance of the transaction rather than the form should prevail when the transaction is of “such a clear international nature”, even if the party contracting with the Government is resident in Ghana.⁴⁵⁸

336. Regarding the meaning of “international” in Article 181(5), the Supreme Court found it necessary to combine “both the *nature of the business or economic transaction* criterion and the *parties’* criterion proposed by the plaintiff.”⁴⁵⁹

337. The Supreme Court then acknowledged the “need to formulate a clear criterion for distinguishing transactions between the Government and Ghanaian entities that fall under Article 181(5) from others with Ghanaian entities which do not fall in the category of Article 181(5) despite their “foreign connections.”⁴⁶⁰ Noting that the examples given by the Claimant in its submissions illustrate “a *reductio ad absurdum*”, it acknowledged that “it would be impractical for Parliament to scrutinize and approve every single business transaction with international ramifications entered into by the Executive.”⁴⁶¹

338. Thus, pursuant to a purposive interpretation of the Constitution, the Supreme Court found that “there is need to imply into Article 181(5) an understanding that only *major* international business or economic transactions are to be subject to its provisions”; while noting that

⁴⁵⁷ Supreme Court Judgment, at 30.

⁴⁵⁸ Supreme Court Judgment, at 31.

⁴⁵⁹ Supreme Court Judgment, at 31.

⁴⁶⁰ Supreme Court Judgment, at 31.

⁴⁶¹ Supreme Court Judgment, at 34-35: At this stage of its analysis, the Supreme Court also rejected the Claimant’s argument that the Article 181(5) of the Constitution was inoperative without legislative “modifications” on the part of Parliament, based on the *Faroe* precedent and on a purposive interpretation of the constitutional provision: “The framers could have hardly intended that Parliament should be able to stultify their purpose of achieving transparency in the Executive’s international business deals through simple inaction.”

Parliament should exercise its legislative power in relation to article 181(5) and clarify which transactions are to be viewed as major.”⁴⁶²

339. The Court further elaborated on the reasons underlying its interpretation. As “one of the values of the [Constitution] is the promotion of probity and accountability”,⁴⁶³ reading in the term “major” was in accordance with the objective purpose of the Constitution.⁴⁶⁴ Specifically, the Court explained that “Parliamentary scrutiny of major transactions entered into by the Executive is likely to be a powerful spur to probity in such transactions. That is why it is unlikely that the framers would have intended to give to Parliament the veto power implied in the defendants’ interpretation of article 181(5).”⁴⁶⁵ At the same time, the framers of the Constitution could not have intended “the obvious and foreseeable paralysis from overload in Parliament that would ensue from interpreting the provision as covering every single business or economic transaction with an international dimension”.⁴⁶⁶

340. Reiterating that it was “imperative” that Parliament give “greater certainty and clarity as to [the] categories of international business or economic transactions,”⁴⁶⁷ the Supreme Court states that “[i]n the interim, a certification from the Attorney-General [before a dispute has arisen] that an international business transaction to which the Government is a party is ‘major’ or not should be accorded great weight by the courts.”⁴⁶⁸

341. The Supreme Court then reads into the definition of an “international” transaction the requirement that the “nature of the business which is the subject matter of the transaction ... [have] a significant foreign element or the parties to the transaction (other than the Government) have a foreign nationality or reside in different countries, or in the case of companies, the place of their central management and control is outside Ghana”⁴⁶⁹ with the word ‘significant’ said to denote the qualitative assessment necessary to make the determination, where the assessment is “in relation to the purpose of article 181(5)”.⁴⁷⁰

⁴⁶² Supreme Court Judgment, at 34 (emphasis in the original).

⁴⁶³ Supreme Court Judgment, at 35.

⁴⁶⁴ Supreme Court Judgment, at 36.

⁴⁶⁵ Supreme Court Judgment, at 36.

⁴⁶⁶ Supreme Court Judgment, at 36.

⁴⁶⁷ Supreme Court Judgment, at 36.

⁴⁶⁸ Supreme Court Judgment, at 37; *see also* Claimant’s Interim Submission, 20 June 2012, paras. 27, 38.

⁴⁶⁹ Supreme Court Judgment, at 37.

⁴⁷⁰ Supreme Court Judgment, at 37.

342. With respect to the purpose of Article 181(5), the Supreme Court opines that the subjective or objective purpose of the framers of the Constitution was not to subject to Parliamentary approval “transactions of ordinary commerce”.⁴⁷¹ In applying this test for “international business transaction” to the PPA, the Supreme Court concludes that the PPA falls within the ambit of Article 181(5). The Court further states that it viewed the term “transaction” to mean “a series of agreements or acts united by their purpose of attaining the project objective of the parties to it”.⁴⁷² The Court also notes that it “view[ed] the transaction in the round, without resorting technically to the piercing of the corporate veil doctrine”. The Court considers the transaction in question as “a foreign investment by a US investor in a power generation project”⁴⁷³ based on the cumulative effect of the following five circumstances: i) The PPA resulted from negotiations between a foreign investor (Mr. Elders) and the Government; ii) BEL is wholly-owned by a foreign entity; iii) the managing director of BEL is a foreigner, Mr. Elders, “and control of the management of [this Ghanaian company] is in foreign hands”; iv) the PPA contains an international arbitration clause; and v) the PPA contains other clauses “usually associated with foreign transactions, such as the waiver of sovereign immunity”⁴⁷⁴ and Clause 29.2 (containing an exemption from taxes and foreign exchange controls).

(a) **The Claimant’s Position**

343. In the Claimant’s view, the PPA is legally valid. In this regard, the Claimant argues that the Tribunal should give no weight to the Supreme Court of Ghana’s analysis of Article 181(5) of the Constitution and its impact on the PPA.⁴⁷⁵ The Claimant also requests that the Tribunal reconsider the determination in its Interim Award regarding the “importance of and consideration to be given [to] the Ghanaian Supreme Court’s determination of the substantive issues of the application of Article 181(5) of the Constitution of Ghana to the PPA”.⁴⁷⁶ The Claimant insists the PPA is not an international business transaction and that such a

⁴⁷¹ Supreme Court Judgment, at 38; Claimant suggests this phrase “[a]rguably refer[s] to ordinary commerce in Ghana,” Claimant’s Interim Submission, 20 June 2012, fn. 28.

⁴⁷² Supreme Court Judgment, at 39.

⁴⁷³ Supreme Court Judgment, at 39.

⁴⁷⁴ Supreme Court Judgment, at 40.

⁴⁷⁵ Claimant’s Interim Submission, 20 June 2012, para. 56.

⁴⁷⁶ Claimant’s Interim Submission, 20 June 2012, paras. 17. Also, in para. 21: “Alternatively, the Tribunal, while affording deference to the rulings of the Ghanaian courts, it should not [...] refer, rely upon or give weight to the determinations arising out of the Ghanaian court proceedings [...]”

determination “can only be made after a full evidentiary hearing on the merits” by this Tribunal.⁴⁷⁷

344. The Claimant submits that the Supreme Court’s analysis does not take into account the totality of the facts and circumstances engaged in this dispute, as well as the conduct of the Parties.⁴⁷⁸ The Claimant argues that Article 185(5) should not apply in the absence of enabling legislation from the Ghanaian Parliament, but rather, “the analysis should be limited to the bright line approach originally announced by the Ghanaian Supreme Court in its *Faroe* opinion.”⁴⁷⁹ The Claimant emphasizes that “parties contracting with the Government of Ghana should not be held ... to an after-the-fact scrutiny of the constitutionality of an agreement, acknowledged by the Government and prosecuted by the Government for years,” as the uncertainty is due to the Respondent’s failure to seek Parliamentary approval and to clarify the application of the constitutional provisions in question.⁴⁸⁰
345. In the event that the bright line test of *Faroe* does not apply, the Claimant submits that the applicable test should be one of “totality of the circumstances”.⁴⁸¹ The Claimant explains that, as employed under U.S. law,⁴⁸² this test involves “the identification of multiple criteria that are then accorded relative weight based upon the underlying facts and circumstances”⁴⁸³. Applying the “totality of the circumstances test” to the present case, the Claimant submits that “this would involve consideration of Balkan’s place of business and the place of the parties’ performance under the agreement”.⁴⁸⁴ The latter are, according to the Claimant, “well-known concepts with clear rules and standards of interpretation,” most notably pursuant to the United Nations Convention on Contracts for the International Sale of Goods (1980) (the “CISG”).⁴⁸⁵ In

⁴⁷⁷ Claimant’s Interim Submission, 20 June 2012, para. 37.

⁴⁷⁸ Claimant’s Interim Submission, 20 June 2012, para. 31.

⁴⁷⁹ Claimant’s Interim Submission, 20 June 2012, para. 32.

⁴⁸⁰ Claimant’s Interim Submission, 20 June 2012, para. 32.

⁴⁸¹ Claimant’s Interim Submission, 20 June 2012, para. 33; Claimant’s Post-Hearing Submission, para. 19.

⁴⁸² Claimant’s Interim Submission, 20 June 2012, para. 34. The Claimant explains that under U.S. law, this test is employed in anti-suit injunction applications.

⁴⁸³ Claimant’s Interim Submission, 20 June 2012, para. 34. The Claimant gives example of weighing of factors in the case *Hellenic Lines*.

⁴⁸⁴ Claimant’s Interim Submission, 20 June 2012, para. 35.

⁴⁸⁵ Claimant’s Interim Submission, 20 June 2012, para. 35 referring to Article 10 CISG and acknowledging Ghana is a signatory to the CISG but has not ratified it yet.

particular, the Claimant asserts that “there is overwhelming cognizance that the place of business is where the centre of the business activity directed to the participation is located.”⁴⁸⁶

346. The Claimant also submits that the Supreme Court’s reasoning “does not provide a definitive criterion to employ in analyzing the facts presented by this case”.⁴⁸⁷ In this regard, the Claimant contends that the Supreme Court’s determination of the nature of the party was limited to the ownership aspects of Balkan and its determination of the nature of the transaction focused on “certain limited provisions of the PPA”.⁴⁸⁸ According to the Claimant, the place of performance, and the actual performance of the Parties, should also have been considered and accorded greater weight under the “totality of the circumstances test”. In particular, the Claimant argues that the Supreme Court should have considered the Claimant’s place of business (which was Ghana since incorporation and throughout the first two years under the PPA), as well as the place of performance (which was exclusively in Ghana).⁴⁸⁹ The Claimant draws attention to what it considers to be an absence of any reference to either the place of business or the Parties’ performance under the PPA in the statement of facts in the Supreme Court Judgment.⁴⁹⁰ Moreover, the Claimant asserts that there is no discussion by the Supreme Court “of the conditions precedent provisions of the PPA”, such as the Respondent’s “continuing obligation to obtain all necessary approvals under their agreement with Balkan”.⁴⁹¹
347. In its Post-Hearing Submission, the Claimant makes reference to two more circumstances that the Supreme Court should have considered (and therefore the Tribunal should consider) under the “totality of the circumstances test”. A first circumstance is the inconsistency of the Supreme Court’s ruling with Ghanaian income tax laws.⁴⁹² According to the Claimant, the purpose of Article 181 of the Ghanaian Constitution is to promote government accountability and prevent

⁴⁸⁶ Claimant’s Interim Submission, 20 June 2012, para. 35 (without emphasis in the original), citing Allison E. Butler, “Interpretation of ‘Place of Business’: Comparison between provisions of the CISG (Article 10) and Counterpart Provisions of the Principles of European Contract Law” [full citation not provided].

⁴⁸⁷ Claimant’s Interim Submission, 20 June 2012, para. 31. See also para. 24 prefacing the Claimant’s summary of the judgment: “[...] the Ghanaian Supreme Court’s determination of the applicability of Article 181(5) of the Ghanaian Constitution to the PPA is result-oriented, ignores altogether key facts, relies upon stated criteria which themselves are undefined, and relies upon definition by anecdote or example.”

⁴⁸⁸ Claimant’s Interim Submission, 20 June 2012, para. 36.

⁴⁸⁹ Claimant’s Interim Submission, 20 June 2012, para. 36.

⁴⁹⁰ Claimant’s Interim Submission, 20 June 2012, para. 36.

⁴⁹¹ Claimant’s Interim Submission, 20 June 2012, para. 37; *see also* Statement of Claim, paras. 319-320: where Claimant argues that the PPA is “local in nature”, “governed by Ghanaian law” and Respondent never intended that the PPA be an international business transaction.

⁴⁹² Claimant’s Post-Hearing Submission, paras. 20-21.

the executive branch from transferring the country's limited financial resources overseas. The Claimant points out that the PPA was concluded between Ghana and a Ghanaian entity, meaning that any income would be taxable in Ghana.

348. The second additional circumstance that, according to the Claimant, the Tribunal must take into account is the fact that there have been four other similar power purchase agreements between independent power producers and Ghana, all of which involved a "major foreign investment". Ghana chose not to take these four agreements to Parliament. Not one other agreement was the subject of any court proceedings.⁴⁹³
349. Based on the foregoing, the Claimant contends that the Supreme Court Judgment should be accorded no weight by the Tribunal on account of its reasoning being "result-oriented" and based on undefined factors.⁴⁹⁴ The Claimant argues that "the failure of the ... Supreme Court to offer clear criteria that do not ... beg more questions than they answer and its failure to distinguish between the examples given and the actual facts and circumstances presented by this case."⁴⁹⁵ In particular, the Claimant submits that the Supreme Court failed to identify what criteria determine if a transaction is "major", stating only that a certification by the Attorney General "should be accorded great weight by the courts" in this determination.⁴⁹⁶
350. The Claimant also criticizes the Supreme Court Judgment for "ignor[ing] the fact that Balkan ... obtained such a pre-dispute certification from the Attorney General" and queries why this certification was not given any weight by the Supreme Court.⁴⁹⁷
351. According to the Claimant, the Supreme Court also failed to identify what criteria should be used to ascertain whether a transaction has "a significant foreign element."⁴⁹⁸ The Claimant notes that the only explanation provided by the Supreme Court Judgment is in response to the Claimant's example of the purchase of a British Airways ticket, which the Supreme Court observed is not international, but "in ordinary commerce." The Claimant asserts that the Judgment does not, however, offer any further definition or other criterion of "transactions in

⁴⁹³ Claimant's Post-Hearing Submission, para. 22.

⁴⁹⁴ Claimant's Interim Submission, 20 June 2012, para. 43.

⁴⁹⁵ Claimant's Interim Submission, 20 June 2012, para. 43.

⁴⁹⁶ Claimant's Interim Submission, 20 June 2012, paras. 38 and 40; Claimant's Post-Hearing Submission, para 19.

⁴⁹⁷ Claimant's Interim Submission, 20 June 2012, para. 39. *see also* Statement of Claim, paras. 320-323 and Interim Award, para. 37.

⁴⁹⁸ Claimant's Interim Submission, 20 June 2012, para. 41 referring to Supreme Court Judgment, Exhibit BE[L]-14 at p. 38.

ordinary commerce”.⁴⁹⁹ The Claimant further points out that the analysis of that flight ticket is hardly reconcilable with the facts of the present case, arguing that “[i]f, as the Supreme Court suggests, the sale of a fleet of foreign-manufactured automobiles would not be international or major in nature, how is it that a contract which contemplates that a Ghanaian entity lease a barge located in Ghana and commission and operate a power station to provide power to the national grid in Ghana under a license issued by the Government of Ghana, employing hundreds of Ghanaians, is an international business transaction?”⁵⁰⁰

352. In the Post-Hearing Submission, the Claimant also refers to a decision issued by the Supreme Court on 19 July 2013, in which the Supreme Court established that, in general, Article 181(5) does not apply to agreements between foreign investors and governmental agencies. The Claimant contends that the *ratio decidendi* of the Court was an argument advanced by the Claimant in its case before the same Court, namely that “Parliament would be sucked into unnecessary minutiae if it were to have the function of approving every international business or economic transaction.” The Claimant contends that in the Claimant’s case the Court overcame this difficulty by inventing the additional qualifier “major” to be applied artificially to the constitutional concept of “international transaction”.⁵⁰¹
353. The Claimant maintains that the Supreme Court did not assess the Respondent’s compliance with the conditions precedent of the PPA and the establishment of the Effective Date. In particular, the Claimant argues that if Article 181(5) is applicable to the PPA, the Respondent had the obligation to seek parliamentary approval under the terms of the PPA,⁵⁰² and having not done so, is in breach of the PPA,⁵⁰³ in particular, Clause 7.4.⁵⁰⁴

⁴⁹⁹ Claimant’s Interim Submission, 20 June 2012, para. 42.

⁵⁰⁰ Claimant’s Interim Submission, 20 June 2012, para. 43.

⁵⁰¹ Claimant’s Post-Hearing Submission para. 24.

⁵⁰² Claimant’s Post-Hearing Submission, para. 22; Hearing on the Merits Transcript, Day 3, 5:11.

⁵⁰³ Claimant’s Interim Submission, 20 June 2012, para. 47.

⁵⁰⁴ Claimant’s Interim Submission, 20 June 2012, para. 46. For the Tribunal’s convenience, Clause 7.4 of the PPA provides as follows:

If, on or before the target dates on the Milestone Schedules (Third Schedule), or such later date as the parties hereto may agree, the Effective Date has not occurred and the Parties agree to terminate the Project, GoG shall reimburse and indemnify BE[L] for all costs and liabilities incurred by BE[L] in respect of its obligations under Clause 3 if the GoG is the defaulting party. However, if BE[L] is the defaulting party, no cost incurred shall be recovered from GoG. GoG’s obligations under this Clause 7.4 shall be effective notwithstanding that the Effective Date has not occurred or that all or any of the conditions precedent set out in Clauses 7.2 and 7.3 have not been satisfied or waived. GoG may, upon reasonable notice to BE[L] conduct an audit with respect to any indemnity claimed by BE[L] pursuant to this Clause 7.4 for the

354. In support of its claim that the Respondent is in default under the PPA, the Claimant contends that “for the purpose of constitutional scrutiny, the provisions of the conditions precedent and compliance with law section, in particular, the Respondent’s obligation to seek and obtain requisite approvals (including if necessary, parliamentary approval), are not [...] international business transactions”.⁵⁰⁵ According to the Claimant, the contrary will lead to the *reductio ad absurdum* that the Supreme Court wished to avoid, and would entail that the Respondent could avoid liability for an obligation to seek approval for an agreement involving an international business transaction by merely breaching that obligation.⁵⁰⁶
355. In this regard, the Claimant refers to the cross-examination of Ms. Gadzekpo at the hearing, who stated in relation to the PPA that “*it was [initially] a valid agreement*” because “*it was performed by the parties and seen as valid*,”⁵⁰⁷ since the Attorney General had confirmed that the PPA did not come under the ambit of Article 181(5) of the Constitution.⁵⁰⁸ The Claimant denies the Respondent’s assertion that the reason for the Attorney General’s change of mind was the Supreme Court’s decision, as the Respondent’s position that the PPA was void *ab initio* was presented to the Tribunal in 2010.⁵⁰⁹ The Claimant highlights that Ms. Gadzekpo claimed that she was entitled to change her mind about whether the PPA was valid.⁵¹⁰
356. According to the Claimant’s reading, the Supreme Court Judgment did not declare the PPA to be void,⁵¹¹ and instead merely refers the matter back to the High Court “to dispose of the case in accordance with this determination as far as relevant to the case before it.”⁵¹² On this basis, the Claimant argues that the High Court could decide that the Respondent had a continuing

purpose of determining if the amount of the BE[L]’s claim for reimbursement has been computed in accordance with the provisions of this Agreement.

⁵⁰⁵ Claimant’s Interim Submission, 20 June 2012, para. 48.

⁵⁰⁶ Claimant’s Interim Submission, 20 June 2012, para. 49; Claimant also emphasizes that this leads to a situation where “the Government of Ghana, through its executive, legislative and now judicial branches reserving unto themselves a ‘king’s x’ with respect to its legitimate obligations under an otherwise binding agreement.”

⁵⁰⁷ Claimant’s Post-Hearing Submission, para. 23; Hearing on the Merits Transcript, Day 3, 5-11.

⁵⁰⁸ Claimant’s Post-Hearing Submission, para. 16.

⁵⁰⁹ Claimant’s Post-Hearing Submission, para. 17.

⁵¹⁰ Claimant’s Post-Hearing Submission, para. 18.

⁵¹¹ Claimant’s Interim Submission, 20 June 2012, para. 50.

⁵¹² Claimant’s Interim Submission, 20 June 2012, para. 50 (emphasis added).

obligation to seek Parliamentary approval and is therefore liable in accordance with the Claimant's request for equitable relief.⁵¹³

357. With regard to the Supreme Court's decision, the Claimant finally contends that the wording of Article 181(5) of the Constitution clearly suggests that the determination as to which international transactions should be taken to the Parliament for approval may only be made by Parliament itself, and not by the Supreme Court.⁵¹⁴ The Claimant further submits that it was in recognition of this reality that the Parliament drafted a proposal to clarify which transactions are exempted from the requirements of Article 181(5).⁵¹⁵ This proposal could exempt the Claimant *ex-post facto*, but the Claimant points out that the document is marked as "secret."
358. Finally, the Claimant contends that whatever the situation under Ghanaian domestic law might be, the Claimant may still invoke the PPA against Ghana, as the application of Ghanaian law is in this case conditioned by well-established principles of international law.⁵¹⁶ The Claimant first submits that the contents of the contract show that the Parties wished to have Ghanaian municipal law applied only as conditioned by public international law.⁵¹⁷ The Claimant also maintains that these international principles must be applied (1) because the issue is addressed in the course of an international arbitration proceeding; (2) because the rules of equity and customary international law are among the main legal sources of the Ghanaian legal system according to Article 11(2) of the Constitution; and (3) because (in the Claimant's view) the Tribunal affirmed in its Interim Award that the principles of international law governing responsibility of States for internationally wrongful acts (embodied in the ILC Articles) are applicable to the present case.
359. The Claimant points to Article 7 of the ILC Articles, which it considers to embody these principles by precluding a State from taking refuge behind provisions of its internal law. With this in mind, the Claimant adduces the principles of good faith and the sanctity of contracts to affirm that it was entitled to rely on the representation made by the Respondent that the PPA was a valid and binding agreement to which no constitutional impediment applied.⁵¹⁸

⁵¹³ Claimant's Interim Submission, 20 June 2012, para. 51.

⁵¹⁴ Claimant's Post-Hearing Submission, para. 26.

⁵¹⁵ Claimant's Post-Hearing Submission, para. 27.

⁵¹⁶ Claimant's Post-Hearing Submission, paras. 29-31.

⁵¹⁷ Claimant's Post-Hearing Submission, para. 30.

⁵¹⁸ Claimant's Post-Hearing Submission, para. 30 *in fine*.

(b) The Respondent's Position

360. The Respondent submits that the Tribunal must follow the determination in the Supreme Court Judgment and declare the PPA invalid, as well as that the Supreme Court Judgment is a final pronouncement on the issue of invalidity of the PPA. Accordingly, Balkan's contractual claims must be denied and the Tribunal has to decide only Balkan's alternative non-contractual claims for damages.⁵¹⁹
361. The Respondent submits that "the Tribunal is bound to follow the law of Ghana as applied by Ghana's highest court to the PPA and hold that the PPA is void *ab initio*,"⁵²⁰ and that "[t]here is no conceivable basis" to hold otherwise.
362. With respect to the criticism of the Supreme Court Judgment that the Claimant develops in its Interim Submission, the Respondent submits that this "merely recycle[s] the legal positions that [the Claimant] took, and lost, before the Supreme Court."⁵²¹
363. Starting from the premise that the Tribunal is bound to apply the laws of Ghana to the issue of validity of the PPA pursuant to Clause 23 of the PPA and Article 33 of the UNCITRAL Rules,⁵²² the Respondent proceeds to explain why the Tribunal has to follow the Supreme Court Judgment. First, the Parties agree that the Supreme Court of Ghana has original and exclusive jurisdiction over all matters relating to the enforcement or interpretation of the Constitution, pursuant to Article 130(1)(a) of the Constitution.⁵²³ Additionally, arbitral tribunals do not have power to enforce or interpret national constitutions, except for considerations of transnational public policy inapplicable in this case.⁵²⁴

⁵¹⁹ Rejoinder, para. 51.

⁵²⁰ Rejoinder, para. 18; also paras. 19 and 36.

⁵²¹ Rejoinder, para. 38; Respondent's Post-Hearing Submission, para. 84.

⁵²² Rejoinder, para. 25 also referring to Claimant's Submission regarding Procedural order No. 1, paras. 40 and 188; Respondent's Post-Hearing Submission, para. 85.

⁵²³ Rejoinder, para. 27, referring to Ghana's Brief Regarding Procedural Order No. 1, at 5-10 and Balkan's Brief Regarding Procedural Order No. 1, para. 162.

⁵²⁴ Rejoinder, para. 28 and note 11 citing Final Award in ICC case No. 6320 (1992), para. 3.3.

364. Second, relying on arbitral decisions and doctrinal sources,⁵²⁵ the Respondent asserts that it is a “fundamental principle of international law and arbitration that arbitral tribunals should recognize and defer to judgments [...] with force of *res judicat*.”⁵²⁶ It will also be beyond the scope of the powers of the Tribunal to “disregard settled authority if there is ‘sufficient support’ for doing so”, when it has not been empowered by the parties to arbitrate *ex aequo et bono*.⁵²⁷ Further, failure to follow the constitutional interpretation of the Supreme Court will, according to the Respondent, be ground for refusing recognition and enforcement of the arbitral award under Article V.2(b) of the New York Convention.⁵²⁸
365. Third, the international law principle of deference to *res judicata* is consistent with Dutch law. Specifically, pursuant to Article 236 of the Dutch Code of Civil Procedure, the Supreme Court Judgment will be found to have the force of *res judicata*.⁵²⁹ Additionally, the principle of *res judicata* applies equally to an arbitration in which Dutch law is the *lex loci arbitri*⁵³⁰ and doctrinal sources emphasize the risk of setting aside an award which deviates from a preceding court decision.⁵³¹
366. The Respondent maintains that the Supreme Court Judgment is not open to future determination. Contrary to the Claimant’s argument regarding the lack of finality of the Supreme Court’s determination concerning the validity of the PPA, the Respondent asserts that “[a] determination as to the validity of the PPA under the laws of Ghana has ... been made by the Supreme Court of Ghana.”⁵³² The Respondent rejects the Claimant’s view that remitting the case to the High Court means that the Supreme Court Judgment is “open to further

⁵²⁵ *AMCO v. Indonesia*, ICSID Resubmitted Case Decision on Jurisdiction, Case No. ARB/81/1 (1988); Phillip de Ly, Audley Sheppard, *ILA Interim Report on Res Judicata and Arbitration*, Arbitration International, Vol. 25, No. 1 (2009), p. 55; Bernard Hanotiau, *The Res Judicata Effect of an Arbitral Award Rendered in Connected Arbitration Arising from the Same Project*, Ch. VIII, Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions (2005) at para. 512; Gary Born, *International Commercial Arbitration*, Vol. 2 (2009), p. 2963.

⁵²⁶ Rejoinder, para. 31.

⁵²⁷ Rejoinder, para. 32 citing Gary Born, *International Commercial Arbitration*, Vol. 2 (2009), pp. 2963-2964.

⁵²⁸ Rejoinder, para. 33.

⁵²⁹ Rejoinder, para. 34.1. referring to Ernst Gras, “Res Judicata and lites finitri oportet according to Dutch law,” in *European Review of Private Law* (1998), at 124-129.

⁵³⁰ Rejoinder, para. 34.2.

⁵³¹ Rejoinder, para. 34.3, citing Claimant’s Dutch counsel, Gerald J. Meijer, *Overeenkomst tot Arbitrage 959* (2011).

⁵³² Rejoinder, para. 16.

interpretation”,⁵³³ contending that a further determination by the High Court – to the effect that the PPA is not void *ab initio* - would be contrary to the Constitution of Ghana and binding precedent.⁵³⁴

367. In further support of its position on finality of the Supreme Court Judgment, the Respondent emphasizes that the Claimant did not apply for review, as it had the right to do within one month from the date of the judgment, pursuant to Rules 54-56 of Ghana’s Supreme Court Rules.⁵³⁵
368. With respect to the constitutional constraints on the Ghanaian High Court, the Respondent emphasizes that courts are bound to comply with the decisions of the Supreme Court. In particular, Article 129(3) of the Constitution provides that “all other courts shall be bound to follow the decisions of the Supreme Court on questions of law”⁵³⁶ and Article 130(2) provides that “[t]he Court in which the question arose shall dispose of the case in accordance with the decision of the Supreme Court.”⁵³⁷
369. With respect to binding precedent, the Respondent submits that in *Faroe*, a decision that the Parties agree is still an authoritative statement of the law,⁵³⁸ the Supreme Court “held that a contract subject to Article 181(5) is void *ab initio* in all cases absent Parliamentary approval.”⁵³⁹ The Respondent emphasizes that such an agreement is unenforceable pursuant to Holding 6 of *Faroe*: “[e]ven though the defendant had, by summary judgment been finally adjudged as having breached the power purchase agreement, the court would refuse to award any damages for the breach because the agreement or contract was unconstitutional for non-compliance with article 181(5) of the 1992 Constitution.”⁵⁴⁰
370. The Respondent concludes that there is no authority supporting Balkan’s position that the High Court might find the PPA enforceable.⁵⁴¹ Also, with respect to the possibility of relief contended

⁵³³ Rejoinder, paras. 19, 37, 39, 42, 48.

⁵³⁴ Rejoinder, para. 37.

⁵³⁵ Rejoinder, para. 39.

⁵³⁶ Cited in Rejoinder, para. 40.

⁵³⁷ Cited in Rejoinder, para. 41, also referring to Section 2(4) and 3(2) of the Courts Act, 1993.

⁵³⁸ Rejoinder, para. 42.

⁵³⁹ Rejoinder, para. 42.

⁵⁴⁰ Rejoinder, para. 45 citing Holding 6 of *Faroe*. See also para. 46, citing Dr. Date-Bah JSC’s opinion on Holding 6 : “the contract in *Faroe* was not an illegal contract but was rather a contract which is null and void and unenforceable for constitutional reasons.”

⁵⁴¹ Rejoinder, para. 48.

by the Claimant, the Respondent submits that “neither the Tribunal nor the High Court could breathe life into a contract that is void *ab initio* or order the Parliament to approve the PPA even if it were submitted to it.”⁵⁴²

371. The Respondent adds that “every legal definition of void *ab initio*”⁵⁴³ contradicts the Claimant’s argument that the PPA can be enforced by the High Court, given that the concept refers to nullity from the moment of conclusion of the agreement.

372. The Respondent also seeks to counter the argument made by the Claimant at the hearing⁵⁴⁴ that clauses 2.6, 2.7 and 18 of the PPA may survive because they cannot be considered part of an international business transaction. According to the Respondent, the argument was rejected at by the Supreme Court, as the definition of “international transaction” encompassed the whole PPA, not just certain provisions.⁵⁴⁵

373. Finally, the Respondent contends that public international law is not applicable to the case but only the laws of Ghana. The Respondent sees no legal basis for the application of international law⁵⁴⁶ – it submits that the Supreme Court has unequivocally affirmed that Ghana is a dualist state in which principles of public international law are not incorporated into the law of Ghana if they are inconsistent with the Constitution or statutes of Ghana as interpreted by its Supreme Court.⁵⁴⁷

(c) The Tribunal’s Findings and Conclusions on the Validity of the PPA

374. The Tribunal recalls that in its Interim Award on Jurisdiction it determined that the arbitration agreement between the Parties was valid and that accordingly it had jurisdiction to decide on the substance of this dispute under the PPA. At the same time the Tribunal expressed its highest respect for the courts of Ghana and established a long schedule for the written submissions of the Parties and the timing of the hearing on the merits so as to be able to take into full consideration what the Supreme Court of Ghana could have decided on this matter in the light

⁵⁴² Rejoinder, fn. 20.

⁵⁴³ Rejoinder, para. 50 referring to Black’s Law Dictionary, Halsbury’s laws of England, and *Guinness Mahon & Co. Ltd. V. Kensington and Chelsea Royal London Borough Council* [1999] QB 215, per Robert Walker L.J. at 236.

⁵⁴⁴ Hearing on the Merits Transcript, Day 1, 48:1-6.

⁵⁴⁵ Respondent’s Post-Hearing Submission, para. 89.

⁵⁴⁶ Respondent’s Post-Hearing Submission, para. 91.

⁵⁴⁷ Respondent’s Post-Hearing Submission, para. 92.

of the proceedings before the courts of that country. The Tribunal must reiterate at this point its respect for Ghanaian judicial processes.

375. This Tribunal could not presume to decide an issue of constitutional interpretation in Ghana when the highest courts of the country have considered the matter under their respective jurisdictions. While international arbitration is not subordinated to the views of national courts it nonetheless can consider to the fullest extent possible how to conduct its own jurisdiction in a framework of compatibility and not of confrontation, particularly when national courts are both independent and professionally competent. There are cases in which these fundamental factors are either non-existent or subject to serious doubt and then the role of international arbitration might be different, but this is certainly not the case here.
376. From the arguments of the Parties and the judgment of the Supreme Court on this case it is not difficult to realize that there are two aspects to be considered in succession. The first concerns the determination of the nature of the PPA while the second concerns the effects of such determination in the specific circumstances of this dispute. The Supreme Court rightly identified that the essential determination it had to make was whether or not the PPA constitutes an international business transaction under Article 181(5) of the Constitution, with the Court having answered this question in the affirmative. The Supreme Court then proceeded to remit the case to the High Court for its consideration in light of the interpretation made, a proceeding which is still pending before this last court. The Supreme Court did not decide on the effects of its determination which is a task that falls on the High Court.
377. In determining that the PPA is an international business or economic transaction for the purpose of Article 181(5) of the Constitution, the Supreme Court also recognized that the matter had not been free from doubt. Three determinations of the Supreme Court reflect this uncertain situation. It first indicated in its judgment that Parliament should consider enacting a Bill indicating what modifications it wishes to make to Article 181(5) of the Constitution so as to provide “greater certainty and clarity to the law.” The Court then proceeded to acknowledge the “need to formulate a clear criterion for distinguishing transactions between the Government and Ghanaian entities that fall under Article 181(5) from others with Ghanaian entities which do not fall in the category of Article 181(5) despite their foreign connections...”, an acknowledgment which again evidences that the guiding criterion under the Constitution for the purpose of Article 181(5) was not clear enough.
378. The third determination by the Supreme Court was to introduce a distinction that had not been expressly made in that Article so as to implicitly understand that only major international

business or economic transactions are to be subject to the provisions of the Article in question. In so determining the Supreme Court further noted that Parliament should exercise its legislative power in relation to article 181(5) in order to clarify which transactions are to be viewed as major, again evidencing in this respect that the matter was not settled. In view of this uncertainty the Supreme Court also advised that “[i]n the interim, a certification from the Attorney-General [before a dispute has arisen] that an international business transaction to which the Government is a party is ‘major’ or not should be accorded great weight by the courts.”

379. On examining the Supreme Court judgment here considered, this Tribunal notes that the views held by both the Plaintiff and the Defendant before that court are plausible and could not be held to be legally wrong. In fact, as the Court pointed out, the constitutional provision discussed should not necessarily be read as embracing only agreements between the Government and entities resident abroad, thus reasoning that a party resident in Ghana might be subject to the constitutional requirement if the substance rather than the form of the transaction and other relevant criteria shows a clear international nature of such agreement. At the same time the Court noted that it would be impractical for Parliament to scrutinize every single transaction with international ramifications entered into by the Executive, the bright line separating these different transactions being the distinction between “major” transactions and those done in “ordinary commerce”.
380. There can be no doubt about the fact that the PPA embodies the existence of significant foreign components which is what in the end convinced the Supreme Court in reaching the conclusion it did. It is quite true that the PPA viewed as a whole, “in the round” as described by the Court, contains several international components, such as the nature of the business and the related investments made or the waiver by the Government of sovereign immunity. The Claimant’s arguments as to the fact that BEL was organized as a Ghanaian company in compliance with the applicable legislation are, however, equally true, and thus the foreign ownership of the company or the foreign nationality of its executives should not necessarily be an obstacle to concluding that the PPA does not qualify as the kind of agreement subject to the requirement of Article 181(5) of the Constitution. The management and control of the company does not lose its connection to Ghana in spite of the foreign interests involved nor is this a consequence of its owners residing abroad. As has been noted above, and as the Claimant rightly notes, this is not a case brought under a foreign investment treaty. Doubts expressed by the Supreme Court about the intended meaning of Article 181(5) are well taken. This Tribunal notes in particular that the Supreme Court rightly considered the provisions of paragraph 5 in the context of Article 181 as

a whole, the main concern of which, as stated in its paragraph 1, is that an agreement entered into by the Government for the granting of a loan out of public funds or public accounts must be authorized by Parliament. Paragraph 5 then applies this requirement concerning loans to an international business or economic transaction, calling Parliament to do this "with the necessary modifications". These modifications were never introduced. The provision of paragraph 5 as it stands today could be interpreted to the effect that Parliamentary approval is required when an international business or economic transaction is somewhat akin to a loan, which is not the case here, or else that it would have to be specifically modified so as to apply to situations different from a loan, which has not been done.

381. Ghana's Attorney General requested the Commercial Division of the High Court in Accra in June 2010 to declare that the PPA was an international business transaction that needed Parliamentary approval and not having obtained such approval it was thus unenforceable. This same argument was raised by the Respondent in the arbitration proceedings with which this Award is concerned. The Tribunal must note, however, that these views were expressed over a year after the dispute between the Parties had arisen. Before that the issue had not been raised and the Parties had only discussed the meaning of the PPA but had never questioned its validity. If the materialization of the dispute can be ascertained in mid-2009, as per the facts explained above, this would be the critical date to take into account as to the pertinence of the legal arguments and anything thereafter must be considered as views relating rather to the litigation in progress than to the essence of the Parties' understandings on the PPA.
382. The arguments of the Attorney General before the Ghanaian courts have relied on the broad definition of international arbitration under the ICC Arbitration Rules and other international instruments, as well as on the interpretation of the English Arbitration Act 1996 and statutes on arbitration from Singapore and Ghana, so as to establish that the nature of the PPA is constitutive of an international business or economic transaction. While this Tribunal will discuss the arguments concerning international arbitration further below, the issue is now moot in view of the Supreme Court ruling in its judgment that the provisions of the PPA on this matter do not constitute an international business or economic transaction. The conclusions of this Tribunal in its Interim Award on the validity of the arbitration clause of the PPA have thus been reaffirmed by the Supreme Court, although some difference of views apparently persists on the question of the arbitration clause being separate and severable from the contract.
383. The identification of a number of internationally related components of the PPA made by the Attorney General and accepted by the Supreme Court do not alter the fact that the company was

incorporated in Ghana as required by the Ghanaian legislation and regulations. The case is thus different from a situation in which a foreign company or an agency thereof operates in a certain country without a proper legal registration therein. The Supreme Court has rightly refused in this context to follow the Attorney General's request to pierce BEL's corporate veil, an alternative that is open in case of fraud, bad faith or other irregular behavior, but which is not the case here where no irregularities have been alleged in respect of the Claimant's incorporation in Ghana, as the Claimant has correctly argued before that Court.

384. The Tribunal has also discussed above the difference between this case and one governed by the protection of foreign investments under treaties and other international instruments. In this context it is nonetheless noteworthy that the Attorney General has indicated the relevance of the Ghana-UK Bilateral Investment Treaty as one of the factors listed to support its argument that BEL's incorporation in Ghana is insignificant and irrelevant because the sole shareholder of BEL is Balkan UK. While this argument is understandable in the context of arguing that the PPA is an international business or economic transaction requiring Parliamentary approval in spite of BEL being incorporated in Ghana, it nonetheless might lead to the conclusion that the company could be entitled to international legal protection under that Treaty, which contradicts the position of the Respondent that international arbitral tribunals have no jurisdiction in this dispute.
385. The Tribunal is also mindful that the case *Attorney-General v Faroe Atlantic Co. Ltd*, decided earlier by the Supreme Court, has figured prominently in the discussion of the Parties and the judgment of the Court. In that case the Supreme Court decided that an international business or economic transaction includes business between the Government and a company incorporated abroad, noting however that the fact that Parliament had not made the necessary specifications in pursuance of Article 181(5) did not render that Article inoperable.
386. The Respondent asserts in this respect that as there is no constitutional provision proscribing Ghanaian companies from entering into international business or economic transactions with the Government the clause in question should equally apply to such Ghanaian companies. The Claimant argues to the contrary that under relevant international conventions a transaction may be considered international only if it meets strict criteria, such as an agreement between two or more countries, involving parties residing in different countries or involving the crossing of national borders, none of which are present in this case. The Claimant further asserts that none of these elements is defined in the Constitution which cannot be then interpreted as having settled the framework for the application of the provision without the necessary modifications.

387. The Supreme Court's interpretation of this provision is as noted above plausible but it is only one possible alternative. The views of the Parties are equally well argued, the Court having so recognized in stating that in determining these issues "we have been greatly assisted by the painstaking Statements of Case filed by the Plaintiff and the Defendants". It must also be noted that the Court's interpretation is largely based on the values of probity and accountability that the drafters of Article 181 of the Constitution had emphasized, having found that in this light it is justifiable to read into the provision the implicit requirement of it being applicable also to Ghanaian registered entities and not just to foreign based companies.
388. At this point and with due deference and respect, after having considered the Supreme Court's judgment in detail, the Tribunal must depart from the conclusion reached by that Court. The Tribunal is convinced by the Claimant's views on the need to apply a test taking into account the "totality of the circumstances" as the guideline for determining whether a given agreement is subject to the Constitutional provisions discussed. It is not enough to identify the foreign components of the PPA, which as noted do exist, but also the fact that the PPA was entered into by a Ghanaian company registered in Ghana cannot be ignored. Among other features arising from this fact there is the evidence that BEL's principal place of business is in this country, the production envisaged under the PPA is to supply the domestic electrical market and payments were to be made in Ghana, thus meaning that performance under the PPA was entirely a domestic business. Questions of taxation in Ghana have also been invoked by the Claimant as evidence that the business was considered a domestic venture. Moreover, even if in international arbitration and international principles of commercial law there is a rather liberal view to broadly consider what is to be regarded as international, this is not unlimited, as the Claimant noted citing the United Nations Convention on Contracts for the International Sale of Goods (1980).
389. The Tribunal has also noted above that Article 181 of the Constitution is inextricably related to the question of government loans that might entail the transfer of public funds abroad, a purpose not evidently applicable to international business or economic transactions without introducing the necessary modifications to its paragraph 5, as envisaged under this very provision and requested from Parliament on more than one occasion by the Supreme Court. The PPA does not involve the transfer of funds abroad in the sense that a loan does and thus the need for Parliamentary approval is not self-evident either. The fact noted by the Claimant to the effect that four other similar power purchase agreements between private companies and the Government involving some form of foreign investment have not been submitted to Parliamentary approval by the Government, except for one made after the Balkan judgment was

issued, suggests that the constitutional requirement is not as mandatory as it would appear at first sight.

390. The discussion about the nature of the PPA, however, is not the end of the matter as the Tribunal has still to determine the proper legal effects of the Supreme Court's judgment. While for the Respondent this judgment means that the PPA is void *ab initio* and not enforceable, and consequently cannot give place to an award of contractual damages, the Tribunal must note that the Supreme Court did not go that far and left in the hands of the High Court the disposition of the specific dispute between the Parties. Although it is theoretically possible that the High Court could reach a determination that the PPA is valid and enforceable, it does not appear to be likely that this will be the case. The Respondent believes that the principle of *res judicata* would necessarily require the High Court to follow the interpretation of the Supreme Court particularly in view that under Article 130(2) of the Constitution lower courts shall dispose of the case in accordance with the decision of the Supreme Court. The Respondent also invokes in support of its view the fact that in *Faroe* the Supreme Court held that a contract subject to Article 181(5) is void *ab initio* absent Parliamentary approval.
391. Even if that were to be the conclusion of the High Court, this Tribunal is convinced that that would not necessarily dispose of the dispute between the Parties. The Claimant has made a convincing argument to the effect that the constitutionality of a contractual agreement between a party and the Government should not be subject to an after-the-event scrutiny when that agreement has been acknowledged and prosecuted by that very Government for years, particularly if any uncertainties are due to the Government's failure to seek any necessary Parliamentary approval and to clarify the application of the constitutional provisions in question.
392. The Tribunal recalls at this point the legal opinions issued on 26 October 2007 by Ghana's Minister of Justice and Attorney-General. In the first opinion it was noted that *Faroe* "clearly excludes the project hereof which involves a local company in a local transaction with the Government" and that in "light of the above a Parliamentary approval would not be required for the effectiveness of the Agreement". The second opinion was still more illuminating of the Government's view on this question as the Attorney General stated that "all acts, conditions and things required by the laws and constitution of the Republic of Ghana to be done, fulfilled and performed" had been indeed satisfied "in compliance with the laws and constitution of the Republic of Ghana". It then reached its final determination that Ghana's obligations under the PPA "are legal and valid obligations binding on [Ghana] and enforceable in accordance with the

terms of the Project Agreements”, further reaffirming that the “sanctity of contract is recognised under the laws of Ghana and consequently the validity of the Project Agreements and the binding nature of the obligations of the parties there under are constitutionally safeguarded”. In the view of this Tribunal, Ghana cannot be heard subsequently to argue the contrary.

393. Irrespective of *Faroe* and a later decision of the Supreme Court of 19 July 2013, the latter not being considered by the Tribunal as the Parties have not had the chance to properly discuss it at the hearing, it is evident that the Respondent cannot ignore in the context of this dispute the opinions issued by its highest legal officer at the time of the negotiation of the PPA. The Respondent has argued that the fact that those opinions had to be issued indicated that there were doubts about the legal status of the PPA under the Constitution, but even if this were the case it is perfectly legitimate for a Party to have such doubts and request their clarification by the proper Governmental authorities. Furthermore, in the very terms of the PPA it is the obligation of the Respondent to obtain all necessary approvals for the implementation of the PPA, a provision with which the Respondent has declared itself to be in full compliance. If Parliamentary approval was not sought because rightly or wrongly it was believed unnecessary, the Respondent’s failure to seek Parliamentary approval of the PPA cannot be held today against the Claimant. The question is governed not only by principles of estoppel but by fundamental considerations of good faith.
394. While the Parties disagree on whether international law applies to the merits of the dispute, the Tribunal considers that the issue here is different for under both international law and the domestic law of Ghana, as emphasized by the second opinion of the Attorney General, it is a well recognized general principle of law that no party can take advantage of its own wrongdoing or omission to the detriment of the rights and interests of another party.
395. The Tribunal notes that the Government had at all relevant times before the commencement of litigation understood and assured the Claimant that the PPA did not require Parliamentary approval and that this view was specifically certified to the Claimant prior to the conclusion of the PPA. The Tribunal also notes that submission of the PPA to Parliament for consideration and approval could only be at the instance of the Respondent and the Claimant had no role or competence in the matter. The Tribunal further notes the request of the Supreme Court that Parliament should clarify which agreements having the nature of international business and commercial transaction are required to be submitted to Parliament for approval, and the Supreme Court’s suggestion that, pending such clarification, a certification by the Attorney General, given before litigation has commenced, on whether the nature of a transaction falls or

does not fall under Article 181(5) of the Constitution, should be given great weight by the courts. In the view of the Tribunal, this is what the Attorney General did in 2007 before the PPA was concluded.

396. The outcome of the Supreme Court's decision, and the Parliamentary clarification suggested by the Court, might well result in the need to submit future agreements similar to the PPA to Parliament for approval but, in the view of the Tribunal, this cannot derogate retroactively from the legitimate rights and expectations of a party, especially where such party is acting on the basis of a considered view of the Government solemnly given at the time when the agreement was being negotiated. Accordingly, the Tribunal does not consider that it is sustainable to argue that the PPA can be so affected *ab initio*. Such a position would be difficult to explain in legal terms.
397. On the basis of the above considerations the Tribunal concludes that, in the particular circumstances of this case, the Claimant had reasonable expectation that the Respondent had accepted the validity of the Agreement and was, therefore, entitled to rely on the PPA and to expect that the Respondent would fulfill the obligations that it had assumed thereunder. In this connection the Tribunal observes that the principle that a reasonable and legitimate expectations of a party can give rise to a benefit that cannot be denied to that party is a well-acknowledged principle of the common law and is, as such, part of the laws of the Republic of Ghana.

D. BURDEN OF PROOF

(a) The Respondent's Position

398. Pursuant to Sections 12 and 17 of Ghana's Evidence Decree, 1976 and the Ghanaian decision, *Majolagbe v. Larbi & Ors*,⁵⁴⁸ the Respondent submits that, under Ghanaian law, the party asserting a fact has the burden of producing evidence to prove that fact; the burden of proof requires proof by a "preponderance of probabilities".⁵⁴⁹ The Respondent submits that Article 24(1) of the UNCITRAL Rules also provides that each party *has the burden* of proving the fact relied on to support its claim or defense.⁵⁵⁰ Thus, according to the Respondent, the Claimant has the burden of proving that it fulfilled all the necessary conditions to justify Tolling Fees under

⁵⁴⁸ *Majolagbe v. Larbi & Ors*. [1959] G.L.R. 190 ("*Majolagbe*"), at 192, cited at Statement of Defense, paras. 130-134; Sections 10-17 of Ghana's Evidence Decree, 1975.

⁵⁴⁹ Statement of Defense, para. 133, citing *Majolagbe*, at 192, in relevant part: "Proof, in law, is the establishment of fact by proper legal means; in other words, the establishment of an averment by admissible evidence"; Rejoinder, para. 10.

⁵⁵⁰ Rejoinder, para. 13.

Clause 11.9 of the PPA, as well as the burden of proving all of the facts which support its other damages claims.⁵⁵¹

(b) The Claimant's Position

399. The Claimant objects to the Respondent's reliance on Ghana's Supreme Court decision in *Majolagbe* for the burden of proof, emphasising instead that it is the Arbitration Agreement, the UNCITRAL Rules and the IBA Rules on the Taking of Evidence in International Arbitration (2010) that inform the applicable burden of proof in these proceedings.⁵⁵²

(c) The Tribunal's Findings on the Burden of Proof

400. The Tribunal finds no difficulty in concluding that Respondent's arguments are correct in respect of the issue of the burden of proof. Under any relevant rule governing evidence a party that asserts a fact must prove it. The question here is whether, as the Respondent argues, the "preponderance of probabilities" is the appropriate test to satisfy the evidentiary requirements or a more stringent standard should apply. Given the uncertainties surrounding some of the facts of this case as examined above, particularly in respect of the technical elements required to set the Power Station in operation, the Tribunal considers that the "preponderance of probabilities" test will serve as a guideline to establish whether an argument concerning a fact or a situation is more likely than the other.

401. In any event, even if the 2010 IBA Rules on the Taking of Evidence that the Claimant maintains are to be relied on is considered the appropriate guideline, it must be noted that its main evidentiary requirements are satisfied in this case. The Parties have produced abundant documents, witnesses have been called to testify, experts have made their reports and the evidentiary hearing exhausted all possible angles to establish whether a certain fact has or has not been proved so as to convince the Tribunal in reaching its conclusions on the merits. It must also be kept in mind that, as the Parties have invoked contrasting constructions of fact to support their respective arguments about the discharge of obligations under the PPA, it is for each Party to provide convincing evidence of the facts relied on. It is accordingly not just for the Claimant to prove its claim but also for the Respondent to prove its own assertions that it has complied with the obligations under the PPA.

⁵⁵¹ Rejoinder, para. 14.

⁵⁵² Reply, paras. 149-151.

402. The Parties have made important evidentiary arguments based on the facts that came to light as a consequence of discovery in the ProEnergy litigation. The Tribunal must note in this respect that it is not its function to rely on the proceedings of a separate dispute between BEL and ProEnergy, one of its principal subcontractors, which was submitted to the United States' courts. The fact, however, that the Respondent has obtained access to such proceedings and their supporting documents by means of a document production request submitted to and granted by that jurisdiction, and that these documents have been introduced in the record of this arbitration, provides justification for the Tribunal to consider some of the allegations made in that other litigation if they shed light on the facts of the dispute before it.

403. The ProEnergy litigation was settled and some information on this agreement has been provided by the Claimant in response to the Tribunal's request to explain whether ProEnergy has any financial interest in this arbitration.⁵⁵³ In the Respondent's view, the information provided does not reflect the complete terms of such settlement and from the attachments produced it can be seen that there are financial interests involved, which, the Respondent argues, cast doubt on the testimony of a witness presented by the Claimant.⁵⁵⁴

E. THE CLAIMANT'S BREACH OF CONTRACT CLAIM

404. Pursuant to Clause 23 of the PPA, Ghanaian law governs this claim.⁵⁵⁵ The Claimant submits that the basic applicable tenets of contract law are set out in Ghana's Supreme Court Opinion *Ghana Ports and Harbors Authority v. Issoufou (1993-1994)*,⁵⁵⁶ which in turn relies on the English Court of Appeal decision in *Denmark Productions Ltd. v. Boscobel Productions Ltd.*⁵⁵⁷ ⁵⁵⁸ The Claimant reproduces lengthy excerpts from these decisions in its Statement of Claim.⁵⁵⁹

405. According to the Claimant, its version of the facts "chronicles a phenomal [*sic*] level of achievement on behalf of BE[L] ... and its commissioning efforts", including the achievement of FSNL.⁵⁶⁰ Taking into account the totality of its performance under the PPA, the Claimant

⁵⁵³ Claimant's 7 June Letter, p. 2.

⁵⁵⁴ Respondent's 10 July Letter, p. 2.

⁵⁵⁵ Statement of Claim, para. 312.

⁵⁵⁶ *Ghana Ports and Harbors Authority v. Issoufou (1993-1994)*, 1 GLR 24.

⁵⁵⁷ *Denmark Productions Ltd. v. Boscobel Productions Ltd.* [1969] 1 QB 699 CA, at 731.

⁵⁵⁸ Statement of Claim, para. 312.

⁵⁵⁹ Statement of Claim, paras. 312-314.

⁵⁶⁰ Statement of Claim, para. 330.

states that Clause 7.3 of the PPA “clearly provides that any delays by BE[L] ... in meeting milestone target dates that are caused by [Ghana’s] inability to provide ‘start up electricity’ shall result in a day to day delay in the completion date of the Power Station”.⁵⁶¹ The Claimant further asserts that since “start-up electricity” necessarily includes both site electricity and grid connectivity (citing Clauses 2.5, 2.8, 3.3, and the Fourth Schedule in support), then “not one day has yet run” on its “milestone schedule or toward the completion date”.⁵⁶²

I. Entitlement to Tolling Fees Under Clause 11.9 of the PPA

406. For convenience, the Tribunal restates the particulars of Clauses 11.4 and 11.9 of the PPA, which will be referred to in the Parties’ arguments under this issue, as well as under the issue of grid connectivity, below.

407. Under Clause 11.4, BEL is entitled to Tolling Fees for each month following “the Completion Date”.⁵⁶³ The Completion Date is defined in the PPA as

the day upon which both parties certify that the Power Station, capable of operating in accordance with the Operating Parameters, has successfully completed its testing and commissioning. However, if BE[L] has completed its tests and [Ghana’s] infrastructure is not ready, the Completion Date shall be deemed to have occurred.⁵⁶⁴

408. Clause 11.9 of the PPA provides that Tolling Fees are payable to BEL if it is “unable to commence testing of the Power Station (on the date nominated by BEL) as a result of [Ghana’s] failure to provide an adequate Transmission Line and interconnection facilities for the Power Station”; it goes on to state that

then in any of such events, [Ghana] shall be obligated to commence making payments of Tolling Fees to BE[L] on the thirtieth (30th) day after BE[L] certifies to [Ghana] that the Power Station is complete or would have been complete except for the nonperformance as listed in (i) above. The capacity for the purposes of calculating the Tolling Fees payable under this Clause shall be deemed to be the Nominal Capacity.⁵⁶⁵

(a) The Claimant’s Position

409. The Claimant maintains that it is entitled to Tolling Fees under the PPA because “as early as October or November of 2008, but without a doubt by the completion of the [FSNL] milestones

⁵⁶¹ Statement of Claim, para. 329.

⁵⁶² Statement of Claim, para. 329.

⁵⁶³ Clause 11.4 of the PPA.

⁵⁶⁴ Clause 1.0 of the PPA.

⁵⁶⁵ Clause 11.9 of the PPA.

[sic] in 2009[,] BE[C] ... has demonstrated that it has fulfilled conditions precedents to the Tolling Fees under [Clause] 11.9".⁵⁶⁶

410. In its Reply, the Claimant denies the Respondent's assertion that the Claimant has not provided any documentary evidence in this arbitration to support its claim to Tolling Fees. The Claimant relies on the principle in the *Majolagbe* decision which states that averments should be supported by evidence where such corroborating evidence should exist. The Claimant further asserts that "the Respondent has failed to clear the hurdle it sets for itself".⁵⁶⁷ The Claimant asserts that the Respondent's Statement of Defense "offers scant reference to authorities or prior precedent".⁵⁶⁸
411. In its Post-Hearing Submission, the Claimant reviews the documentary evidence that supports its claims for Tolling Fees, namely the money expended,⁵⁶⁹ the daily logs and the periodic reports,⁵⁷⁰ several pictures of the Barge obtained from both Parties⁵⁷¹ and the certifications provided by Ansaldo.⁵⁷² With regard to the latter, the Claimant points to three letters written by Messrs. Pierantonio Savio and Marco Squadrone that certify that the PPA Clause 11.9 milestone was achieved.⁵⁷³
412. Finally, the Claimant rejects the Respondent's assertion that it is not liable under Clause 11.9 PPA because BEL lacked the qualification to embark upon the commissioning efforts and because it undertook an unrealistic time schedule to commission the Barge. The Claimant contends that all of its workers and subcontractors had the necessary expertise to fulfill their commitments.⁵⁷⁴ While the Claimant concedes that the schedule was aggressive, the Claimant maintains that, had the Respondent performed its obligations on time, it would not have been overly ambitious.⁵⁷⁵

⁵⁶⁶ Statement of Claim, para. 331.

⁵⁶⁷ Reply, para. 153.

⁵⁶⁸ Reply, para. 147.

⁵⁶⁹ Claimant's Post-Hearing Submission, para. 37.

⁵⁷⁰ Claimant's Post-Hearing Submission, para. 38.

⁵⁷¹ Claimant's Post-Hearing Submission, para. 38, referring to Appendix 11 to the Submission.

⁵⁷² Claimant's Post-Hearing Submission, paras. 42-48.

⁵⁷³ Claimant's Post-Hearing Submission, para. 47, referring to Appendices 12, 13 and 14 to the Submission.

⁵⁷⁴ Claimant's Post-Hearing Submission, para. 49.

⁵⁷⁵ Claimant's Post-Hearing Submission, paras 49-50.

(b) The Respondent's Position

413. According to the Respondent, the Claimant must demonstrate a right to be paid Tolling Fees under Clauses 11.4 or 11.9 of the PPA.⁵⁷⁶ The Respondent asserts that the evidence presented by the Claimant fails to demonstrate such a right.⁵⁷⁷ The Respondent further asserts that, "with one of its two turbines in disrepair, there is no way that Balkan can claim the Power Station was ready for Final Testing and Commissioning, or that Balkan is entitled to Tolling Fees under Clause 11.9 of the PPA."⁵⁷⁸ In particular, the Respondent argues that the Parties never jointly certified that the Power Station is capable of operating in accordance with the Operating Parameters, defined in the PPA,⁵⁷⁹ and that the Claimant fails to present evidence of such joint certification.⁵⁸⁰

414. With respect to Clause 11.4 of the PPA, the Respondent counters that the Claimant has failed to present any evidence that it successfully completed its testing and commissioning of the critical systems on the Barge, either by the Effective Date of the PPA (March 2008) or thereafter.⁵⁸¹ The Respondent asserts that the Claimant ignored Clause 6.1 of the PPA, which provides as follows:

BE[L] shall give to [Ghana] not less than fourteen (14) days' notice, or such lesser period as the parties hereto may agree of its intention to commence any testing and commissioning. ...[Ghana] shall provide assistance to BE[L] to obtain any permit or other Governmental Approval required for testing and commercial operation of the Power Station.⁵⁸²

415. The Respondent further submits that the Claimant has not produced any tests demonstrating that the Power Station systems were successfully tested against the Operating Parameters.⁵⁸³ Specifically, the Respondent asserts that the FSNL tests submitted by the Claimant are incomplete and do not demonstrate that the Turbines were capable of performing within Operating Parameters set forth in the PPA.⁵⁸⁴ The Respondent argues that the Claimant also fails

⁵⁷⁶ Statement of Defense, para. 121.

⁵⁷⁷ Statement of Defense, para. 121; Claimant's Post-Hearing Submission, para. 167.

⁵⁷⁸ Statement of Defense, para. 41.

⁵⁷⁹ Clause 1.0 of the PPA defines "Operating Parameters" as "the operating parameters of the Power Station described in the Second Schedule."

⁵⁸⁰ Statement of Defense, para. 124.

⁵⁸¹ Statement of Defense, para. 125.

⁵⁸² Clause 6.1 of the PPA.

⁵⁸³ Statement of Defense, para. 126.

⁵⁸⁴ Statement of Defense, para. 126, referring to the FSNL tests submitted as Exhibit C-38, Attachments 193-194.

to proffer evidence of successful Operating Parameters tests for other critical operating systems, including the generator, the Substation, the fuel handling facilities and delivery systems, the fire protection system, the relay protection system, the MicroSCADA, the water cooling system and the cathode protection system.⁵⁸⁵

416. With respect to its obligations under Clause 11.9 of the PPA, the Respondent asserts that it provided an adequate Transmission Line (as defined by the Fourth Schedule of the PPA), which it energised on 8 August 2008, “at least three months before Balkan began charging Tolling Fees in November 2008”.⁵⁸⁶ The Respondent further submits that the Claimant has provided no evidence that the Power Station systems “were ready for Final Testing and Commissioning but for Grid Connectivity as of November 2008 or any time thereafter”.⁵⁸⁷ In its Rejoinder, the Respondent emphasizes that “once the Government energized this line, Balkan’s ability to claim Tolling Fees under Clause 11.9 was extinguished.”⁵⁸⁸
417. The Respondent argues that the Claimant has not produced documents sufficiently establishing its entitlement to Tolling Fees under the PPA, and it has therefore failed, on a “preponderance of the probabilities”, to satisfy the burden of proof prescribed under Ghana’s Evidence Decree, 1975 and the landmark Ghanaian case, *Majolagbe v. Larbi & Ors.*⁵⁸⁹ The Respondent further asserts that what documentary proof does exist demonstrates that the commissioning was never completed, the Turbines were damaged and other critical systems were inoperable.⁵⁹⁰ In support, the Respondent relies on the ProEnergy Litigation documents, wherein Balkan US details ProEnergy’s failures at length; failures which the Respondent argues are wholly inconsistent with the Claimant’s claim in this arbitration that it is entitled to Tolling Fees from 1 November 2008 forward and that the Barge was ready for Final Testing and Commissioning as of 28 October 2008.⁵⁹¹
418. In its Rejoinder, the Respondent asserts that “[e]ven if the Supreme Court had held the PPA to be valid, Balkan has still failed to demonstrate any right to Tolling Fees under Clause 11.9 of

⁵⁸⁵ Statement of Defense, para. 126.

⁵⁸⁶ Statement of Defense, para. 129; Respondent’s Post-Hearing Submission, para. 103.

⁵⁸⁷ Statement of Defense, para. 126; Respondent’s Post-Hearing Submission, para. 109.

⁵⁸⁸ Rejoinder, para. 54; *see also* Respondent’s Post-Hearing Submission, para. 112.

⁵⁸⁹ Statement of Defense, paras. 130-134; Sections 10-17 of Ghana’s Evidence Decree, 1975; *Majolagbe*, at 192.

⁵⁹⁰ Statement of Defense, para. 135.

⁵⁹¹ Statement of Defense, para. 40.

the PPA.”⁵⁹² According to the Respondent, by its express terms, the Claimant may only claim Tolling Fees under Clause 11.9 “if the Government fails to provide a Transmission Line meeting the Specifications set forth in the Fourth Schedule of the PPA, and then only if Balkan has completed as much of the commissioning as it could absent a Transmission Line”.⁵⁹³ The Respondent is of the view that the Claimant “fails both tests”.⁵⁹⁴

419. Further, the Respondent submits that, in its Reply, the Claimant “continues to proffer excuses purporting to justify its refusal to connect to the National Grid on August 8, 2008 when the Essiama Transmission Line was energized”. The Respondent asserts that the Claimant’s “excuses” are without merit and that the Tribunal need not consider the Claimant’s arguments in this regard because, as the ProEnergy Litigation documents show, the Claimant never reached the stage in the commissioning process where it could have connected the Power Station to the Essiama Transmission Line when it was energised (or for that matter the Elubo Transmission Line when it was energised three months later).⁵⁹⁵
420. In particular, the Respondent asserts that the ProEnergy documents demonstrate the Claimant’s “ongoing failure to commission the 161 kV electrical system”, which the Respondent contends “had to be completed and tested before the Power Station could be connected to the National Grid”;⁵⁹⁶ and that the Claimant “failed to reach commissioning milestones for other critical power generation systems for which no grid connectivity is required”.⁵⁹⁷
421. In its Rejoinder, the Respondent contends that the Claimant also failed to demonstrate that it was prevented from commissioning other systems for which no grid connectivity was required.⁵⁹⁸ In particular, the Respondent draws support from the Expert Report of Parsons Brinckerhoff, which opines that “[i]t is only absolutely necessary to have a connection to the 161 kV Transmission Lines that are part of the National Grid in the seventh and eighth commissioning stages.”⁵⁹⁹ The Report explains that “[t]he [National] Grid connection then provides the electrical load for the generator and ‘locks in’ the generator to the Grid

⁵⁹² Rejoinder, para. 52.

⁵⁹³ Rejoinder, para. 53.

⁵⁹⁴ Rejoinder, para. 53.

⁵⁹⁵ Rejoinder, para. 55.

⁵⁹⁶ Respondent’s Post-Hearing Submission, para. 106.

⁵⁹⁷ Rejoinder, para. 56.

⁵⁹⁸ Rejoinder, para. 68.

⁵⁹⁹ Expert Report of Parsons Brinckerhoff, at 8.

frequency”;⁶⁰⁰ “[t]he Transmission Line is then used to conduct Performance Testing of the complete Power Station.”⁶⁰¹

422. The Respondent further asserts that the Claimant: (i) failed to achieve mechanical testing of the Turbines at FSNL;⁶⁰² (ii) intentionally misrepresented the condition of the Turbines and the generators to the Respondent at the time the Transmission Lines were energised;⁶⁰³ and (iii) has failed to provide documentary evidence verifying that it successfully commissioned still other systems, such as the DCS, the Turbines’ controls and panels, the two generators and associated phase isolated bus ducts and the Turbines’ rotor blades.⁶⁰⁴

(c) The Tribunal’s Findings on Claimant’s Entitlement to Tolling Fees

423. The examination of the facts concerning the state of the Power Station at the Barge at the time the dispute between the Parties erupted by mid-2009 shows, as discussed above, that the real situation was far from what the Claimant describes as evidence of a “phenomal [*sic*] level of achievement on behalf of BE[L] ... and its commissioning efforts.” Phenomenal efforts were indeed done to get the Power Station to a satisfactory operating condition, but these were not on the whole successful. In particular the Tribunal is mindful of the discussion concerning achievement of FSNL, which in spite of those efforts was never attained at a sustainable level lasting beyond seconds or minutes before the system broke down. As will be discussed below, it is true as Claimant asserts that there were repeated problems with the Respondent’s provision of start up electricity and these no doubt caused added difficulties and partial delays, but the Tribunal does not find that these were inextricably related to a delay so major as to prevent the testing and commissioning of the Power Station indefinitely. What the evidence does indicate, however, is that the Claimant appears not to have done an adequate due diligence of the state of the equipment on site when making its technical reports at the time of the negotiation of the PPA and submitting its proposal for a ninety-day completion of the commissioning process.
424. The delay of the completion date envisaged under Clause 7.3 of the PPA, which could be triggered by the lack of electricity, has not been shown to have had a causal connection with such problems. The fact that the Power Station has not been tested and commissioned so as to

⁶⁰⁰ Expert Report of Parsons Brinckerhoff, at 8.

⁶⁰¹ Rejoinder, para. 69; Expert Report of Parsons Brinckerhoff, para. 4.3(a)(vii).

⁶⁰² See Rejoinder, paras. 69-73.

⁶⁰³ See Rejoinder, paras. 76-77.

⁶⁰⁴ See Rejoinder, para. 77.

be ready to supply electricity to the National Grid until this very day is due rather to the technical and mechanical failures of the Barge, including the fact noted by the Respondent regarding the state of disrepair of one of the Turbines, which proves that critical milestones could not be achieved irrespective of the lack of adequate supply of site electricity and grid connectivity. The Claimant's argument that "not one day has yet run" on its milestone schedule or toward the completion date because of Respondent's failure to satisfy its obligations does not find support in the facts set out above.

425. A convincing argument in this respect is that, as the Respondent points out, the Claimant's view that it was entitled to charge Tolling Fees since July 2008 because it had achieved the milestone of "First Fire" at that time is contradicted by Mr. Elders' deposition of 1 March 2010 in the ProEnergy litigation, in which it was asserted that the subcontractor was in breach of contract as a result of negligence and incompetence with the consequence that the commissioning of the Barge was not even close to completion.
426. It is also significant that there is an essential requirement associated to the Completion Date under Clause 11.4 of the PPA which has not been satisfied. The Clause provides that it is for both parties to certify that the Power Station is capable of operating in accordance with the Operating Parameters and has successfully completed its testing and commissioning. This joint certification was never done.
427. The Claimant has also argued that since Ghana failed to provide the adequate Transmission Line and interconnection facilities for the Power Station it was unable to commence testing and it is accordingly entitled to charge Tolling Fees under Clause 11.9 of the PPA. The Claimant asserts that it fulfilled conditions precedent to the Tolling Fees under this Clause in October or November 2008 and certainly on reaching FSNL in 2009. The Tribunal has no reason to doubt that monies were spent by the Claimant, great efforts were made, reports produced and pictures shot, as documentary evidence shows, but these are not conclusive as to the state of the Barge or that it has reached the stage of commissioning. The joint certification is still the decisive element missing. The Tribunal, moreover, is not convinced of the accuracy of Ansaldo's certification. The letters written by Messrs. Savio and Squadrone certifying that the Clause 11.9 milestone had been achieved do not find support in relevant tests and are squarely contradicted by the documentation in the ProEnergy litigation. The continuous quarrelling between the Claimant and its subcontractors also does not help to establish that progress at the Barge was satisfactory, and in any event shows, as the Respondent notes, that the time schedule indicated by the Claimant was unrealistic. Despite the Claimant having notified the relevant authorities of

Ghana that testing and commissioning would be ready on 28 October 2008 and supply of power could begin on 1 November 2008, this proved not to be a feasible proposition.

428. Although little in this case appears to be characterized by absolute certainty, in relying on the “preponderance of the probabilities” test suggested by the Claimant as governing the burden of proof the Tribunal can only conclude that the conditions precedent for the charging of Tolling Fees were not met. As the Respondent maintains, the Claimant never reached the stage in the commissioning process where it could have connected the Power Station to the transmission lines. Various systems associated to the mechanical testing of the turbines at FSNL, including some not dependent upon connection to the Transmission Lines, could not achieve commissioning either. The Tribunal finds that on the whole the Expert Report of Mr. Parsons Brinckerhoff is credible as reflecting the true state of the situation of the Power Station, including the fact that connection to the Transmission Lines is only necessary at the late stages of commissioning in order to conduct Performance Testing of the complete Power Station.

2. Entitlement to Incidental Damages

429. The Claimant further claims incidental damages. These claims turn on the Parties’ disagreement as to whether the Respondent provided the Claimant with adequate site electricity and grid connectivity to enable commissioning, as owed under the PPA.

(a) Difficulties Related to Site Electricity

i. The Claimant’s Position

430. The Claimant contends that it required a capacity of 2,000 kVa for site electricity.⁶⁰⁵ As a result of this alleged deficiency in power supply, the Claimant argues that, in March 2008, it was forced to purchase a 1,000 kVa transformer costing USD 30,000.⁶⁰⁶

431. The Claimant’s Reply does not address the Respondent’s assertion that the Claimant is not entitled to incidental damages relating to site electricity, grid connectivity, the RTU / MicroSCADA or the Letter of Credit.⁶⁰⁷

⁶⁰⁵ Statement of Claim, para. 151.

⁶⁰⁶ Statement of Claim, para. 154; *see also* Claimant’s Post-Hearing Submission, para. 54.

⁶⁰⁷ *See also* Rejoinder, para. 152.

ii. The Respondent's Position

432. The Respondent's position is that it complied with its obligation under Clause 2.5 of the PPA to provide site electricity to the Barge.⁶⁰⁸ It asserts that from the Effective Date of the PPA, it ran a 33 kV lines from the local electricity distribution network to the Barge.⁶⁰⁹ The Respondent submits that the Claimant "confusingly runs several concepts together" in order to suggest that it did not in fact provide adequate site electricity.⁶¹⁰ According to the Respondent, the Claimant's real complaint appears to be that there was only a 200 kVA transformer on site when it took over the Barge.⁶¹¹ In this regard, the Respondent submits that if the Claimant concluded it needed additional transformers on site, under Clause 2 of the PPA, it had the obligation to acquire the equipment at its own cost; which the Respondent emphasizes the Claimant concedes it did in March 2008.⁶¹²
433. The Respondent also argues that the damages sought by the Claimant for the alleged breach of the obligation on the Respondent to provide site electricity are costs attributable to the Claimant under the PPA.⁶¹³ Specifically, the Respondent cites Clauses 3.3(i), 9.2, 2.1, 2.2 and 3.1 of the PPA in support of its assertion that the costs of fuel are to be borne by the Claimant, as well as the cost of any equipment that BEL required on site to commission the Power Station (generator and transformers included).⁶¹⁴
434. To counter the Claimant's contention that it required a capacity of 2,000 kVA, the Respondent refers to an e-mail dated 14 December 2007 from Mr. Elders to ProEnergy (obtained in the ProEnergy Litigation discovery), wherein he stated that 350 kVA of site electricity was sufficient for ProEnergy to do its job, thereby refusing ProEnergy's request for additional generators to provide site electricity.⁶¹⁵ Similarly, the Respondent refers to Mr. Elder's deposition in the ProEnergy Litigation, in which he testified that the Claimant provided power

⁶⁰⁸ Statement of Defense, para. 77.

⁶⁰⁹ Statement of Defense, para. 77; Witness Statement of Emmanuel Osafo, para. 39.

⁶¹⁰ Statement of Defense, para. 76.

⁶¹¹ Statement of Defense, para. 79.

⁶¹² Statement of Defense, para. 79.

⁶¹³ Statement of Defense, para. 137.

⁶¹⁴ Statement of Defense, para. 137.

⁶¹⁵ Statement of Defense, paras. 80-81; Exhibit R-25: "Email from J.D. Robinson to Jeff Canon and Phil Elders, Re: BARGE POWER ISSUE".

“way beyond what [ProEnergy] asked”.⁶¹⁶ The Respondent submits that while the Claimant contends in this arbitration that inadequate or unreliable site electricity prevented it from commissioning the Power Station within ninety (90) days of the Effective Date (thus by 10 March 2008), in the ProEnergy Litigation, Balkan US claimed that ProEnergy could indeed have completed the Power Station by that date.⁶¹⁷ The Respondent also highlights the Claimant’s affirmation that the generators it purchased compensated any shortfalls in site electricity from the 33 kV line.⁶¹⁸

435. The Respondent further notes that the Barge, as equipped by its manufacturer Ansaldo, came with a 2,800 kVA Black Start Generator, capable of a 250 kW emergency load in the event electricity from the grid was not available.⁶¹⁹

436. Alternatively, the Respondent asserts that even if the Tribunal finds that there was insufficient site electricity when the Claimant commenced work, it would still not excuse the Claimant’s failure to complete the work, as, pursuant to Clause 7.3 of the PPA, any delay in providing site electricity resulted in a day-to-day extension of the Completion Date.⁶²⁰ Accordingly, the Respondent asserts that,

even if the Completion Date were extended by 90 working days from March 2008 when Balkan claims it purchased the generator to supply site electricity, or from May 2008 when it claims the Government resolved the problem, [BEL] would still have been obligated to have the Power Station ready for Final Testing and Commissioning by October 2008.⁶²¹

iii. The Tribunal’s Findings on the Provision of Site Electricity

437. The Tribunal has concluded above on examining the facts concerning the supply and availability of site electricity that the Claimant’s complaints about Respondent’s discharge of this obligation have merit. What is not quite clear is which power capacity is required for the

⁶¹⁶ Statement of Defense, para. 83; Exhibit R-7: “Deposition of Phillip David Elders, *ProEnergy Services, LLC v. Balkan Energy Co.*, No. 09-4026”, at 169:21-24.; Respondent’s Post-Hearing Submission, para. 160.

⁶¹⁷ Statement of Defense, para. 83; Exhibit R-8: “Deposition of Gene E. Phillips, *ProEnergy Services, LLC v. Balkan Energy Co.*, No. 09-0426”, at 37:12-23, 61:6-20; Exhibit R-7: “Deposition of Phillip David Elders, *ProEnergy Services, LLC v. Balkan Energy Co.*, No. 09-4026”, at 21:5-22:23, 44:10-46:6, 76:10-77:12, 91:3-8, 107:1-109:23; 115:13-116:4, 116:10-117:5; Exhibit R-4: “Plaintiff’s First Amended Petition, *Balkan Energy Co. v. ProEnergy Servs. Int’l, Inc.*, et al., No. 09-01944”, at para. 5.18-5.19.

⁶¹⁸ Respondent’s Post-Hearing Submission, para. 160.

⁶¹⁹ Statement of Defense, para. 82; Witness Statement of Emmanuel Osafo, para. 44.

⁶²⁰ Statement of Defense, para. 84.

⁶²¹ Statement of Defense, para. 84, referring to Claimant’s arguments at paras. 153-154 of its Statement of Claim.

Barge's needs. The Claimant argues that it needed a capacity of 2,000 kVa for site electricity and that it had to purchase in 2008 a 1,000 kVa transformer at a cost of USD 30,000. The Respondent maintains that it had made available as from the Effective Date of the PPA a 33 kV line, with stated capacity of 6,000 kVa when transformed,⁶²² from the local electricity distribution network to the Barge, and with this, it had complied with its obligations under Clause 2.5 of the PPA.

438. The Parties' discussion on this matter is inseparable from their views concerning the question of the transformers and generators on site. As argued by the Respondent, the Claimant's real complaint appears to be that there was only a 200 kVA transformer on site when it took over the Barge. However, the Tribunal notes the Respondent's argument to the effect that in Mr. Elder's deposition in the ProEnergy litigation he attested that the Claimant provided power "way beyond what [ProEnergy] asked."
439. The Tribunal has also noted in discussing the facts of this matter that while there is no doubt that the Respondent supplied site electricity, the Claimant's view that this was faulty because of the interruptions that continuously affected that supply is credible. This is what made the purchase of the generators inevitable as the Claimant had to compensate for those shortfalls.
440. The Respondent argues that it is the Claimant's obligation under Clause 2 of the PPA to acquire the necessary equipment at its own cost, citing also the provisions of Clauses 3.3(i), 9.2, 2.1, 2.2 and 3.1 of the PPA in support of its assertion that the costs of fuel are to be borne by the Claimant, as well as the cost of any equipment that BEL required on site to commission the Power Station, including generators and transformers. However, this does not mean that these provisions can be used as an excuse for the defective supply of site electricity which is a clearly an obligation of the Respondent. Hence to the extent that such additional equipment was necessary to compensate for the defective supply, the Respondent is liable for its cost and any incidental damages.
441. This conclusion must be related to the conclusion that the Tribunal reached above on the fact that the Claimant could not finalize the testing and commissioning of the Power Station at any relevant time. Although the Claimant asserts that this was due, among other factors, to the lack of supply of adequate site electricity, the Tribunal has not found a causal relationship between such defects in the electricity supply and the Claimant's inability to comply with its main obligation under the PPA, which was due to different reasons. It cannot be doubted that the

⁶²² Statement of Defense, para. 78.

shortages in site electricity caused delays in the commissioning process, but these were not impediments to the necessary progress that ought to have been made in the ninety-days following the Effective Date, particularly if BEL believed, as claimed in the ProEnergy litigation, that the subcontractor could have completed the Power Station by that date.

442. In any event, as the Respondent notes, the Claimant maintained in the ProEnergy litigation that the generators it purchased compensated for any shortfalls in site electricity from the 33 kV line. As noted above, in an e-mail dated 14 December 2007 to ProEnergy, Mr. Elders stated that 350 kVA of site electricity was sufficient for ProEnergy to do its job, and consequently refused ProEnergy's request for an additional generator to provide site electricity. While it can be assumed that occasional shortages could be corrected with generators coming into operation their use would not be on the whole an adequate substitute for a fully reliable supply of site electricity. But even then it is difficult to argue as Claimant does that testing and commissioning were indefinitely delayed because of this reason, for even if electricity problems could have caused some degree of disruption this could have been corrected by the day-to-day extension of the Completion Date as envisaged in Clause 7.3 of the PPA. It is also to be noted that in the Respondent's argument the Barge, as equipped by its manufacturer Ansaldo, came with a 2,800 kVA Black Start Generator, capable of a 250 kW emergency load in the event electricity from the grid was not available.

(b) Difficulties Related to Grid Connectivity

i. The Claimant's Position

443. The Claimant asserts that the Respondent failed to provide grid connectivity and, that this failure made it impossible for it to perform a final test on the critical systems and commission the Power Station.⁶²³ The Claimant states that the Respondent agreed to provide BEL with a transmission line knowing that it would not be ready by the agreed date (31 December 2007).⁶²⁴ It further contends that although the Elubo transmission line, which the Respondent claims could provide grid connectivity starting on 8 August 2008, was energised it was nonetheless not ready, and an attempt to energise it resulted in a general fault of the line.⁶²⁵ Finally, the Essiama transmission line required modifications, recalibration and coordination of the relay protection

⁶²³ Statement of Claim, para. 284.

⁶²⁴ Claimant's Post-Hearing Submission, para. 73.

⁶²⁵ Claimant's Post-Hearing Submission, para. 75; Hearing on the Merits Transcript, Day 5, 10:25 to 12:11.

with the Elubo line to provide grid connectivity to the Barge.⁶²⁶ On the whole, the Claimant alleges that this lack of grid connectivity entitles it to Tolling Fees from the Respondent, pursuant to Clause 11.9 of the PPA.

ii. The Respondent's Position

444. The Respondent argues that the Claimant's allegations regarding grid connectivity are contradicted by the written record.⁶²⁷ The Respondent asserts that adequate grid connectivity has been available since August 2008, hence, the Claimant's purported entitlement to Tolling Fees under Clause 11.9 of the PPA "is without merit since that clause only permits Balkan to charge Tolling Fees if the systems and the Barge are already complete but the Government has failed 'to provide an adequate Transmission Line'".⁶²⁸

445. As detailed in the Statement of Facts above, the Respondent points to its letter to the Claimant dated 28 July 2008, wherein it advised that the 161 kV Transmission Line was in place to connect the Power Station to the National Grid, pursuant to Clause 2.8 of the PPA,⁶²⁹ the Fourth Schedule⁶³⁰ and, most importantly, the Grid Connection Process Agreement^{631 632}. The Respondent further refers to the subsequent exchanges between the Parties dated 29 August and 12 August 2008, in which the Claimant expressed its alleged concerns for why the Transmission Line could not yet be energised and, in turn, the Respondent replied that there was no obstacle to energizing the Line.⁶³³ According to the Respondent, the Essiama and Elubo Transmission Lines were in good condition and were energised "well before Balkan (a) completed the 161 kV electrical system on the Power Station, (b) rectified what it claimed were the substantial

⁶²⁶ Claimant's Post-Hearing Submission, para. 76.

⁶²⁷ Statement of Defense, para. 87.

⁶²⁸ Statement of Defense, para. 98.

⁶²⁹ Clause 2.8 of the PPA provides that the Respondent "shall construct, install and connect the Transmission Line as required under the Fourth Schedule provided, however, that BE[L] will be responsible, at its own cost, for the provision of adequate transmission cable to the point of interconnection to the National Grid."

⁶³⁰ The Fourth Schedule of the PPA provides that the 161 kV Transmission Line "be capable of taking the maximum output of the Power Station."

⁶³¹ Exhibit R-52: "Osagyefo Power Barge Grid Connection Process Agreement", signed 17 June 2008.

⁶³² Statement of Defense, paras. 88-91; Exhibit R-53: "Letter from Isaac Nyantakyi to Phillip Elders, Re: Osagyefo Power Barge Grid Connection Process"; Exhibit C-38, Attachment 101: "VRA letter re: line connectivity".

⁶³³ Statement of Defense, paras. 92-95; Exhibit R-26: "Letter from Phillip Elders to the Minister for Energy, Re: Grid Connection Process, Visual Inspection of VRA Audit Results"; R-27: "Email chain between Joseph Wiawe, Isaac Nyantakyi, and Phillip Elders, Re; Fw: line clearance and ground details (typical)".

inadequacies it found when ProEnergy left the Project Site at the end of October 2008, or (c) first achieved what it claims was a firing of the turbines up to FSNL in March and July 2009”.⁶³⁴

446. Accordingly, the Respondent submits that, by 8 August 2008, 365 MVA, “the maximum output of the Power Station, as per the requirements specified in the Fourth Schedule to the PPA for the Transmission Line” was “energized and in service ready for connection to the Barge”.⁶³⁵ As bonus grid connectivity, in addition to this “adequate Transmission Line”, the Respondent says it energised the Elubo Transmission Line to Tower 3 on 13 November 2008.⁶³⁶ Moreover, the Respondent contends that the Claimant “has refused to allow the Government to enter the Project Site to energise either Transmission Line from Tower 3 to the Barge”.⁶³⁷
447. According to the Respondent, the ProEnergy Litigation documents also show that, upon the Government energizing the Transmission Line, the Claimant became concerned that the Government “could ‘call a default’” on account of the failure of BEL and ProEnergy to complete the refurbishment of the Power Station on schedule.⁶³⁸

iii. The Tribunal’s Findings in Respect of Grid Connectivity

448. The Parties’ discussions on the question of grid connectivity mirror to a meaningful extent their discussions on site electricity. For the Claimant the lack of adequate grid connectivity is one further cause that prevented it from achieving the final testing and commissioning of the Power Station, while the Respondent maintains that it duly discharged its obligations under the PPA by enabling the Transmission Lines properly energised with enough anticipation.
449. The Tribunal has no doubt about the fact that the Essiama and the Elubo Transmission Lines were energised by the times indicated by the Respondent, beginning in August 2008. The Respondent’s letter to the Claimant dated 28 July 2008 shows that the 161 kV Transmission Line required to connect the Power Station to the National Grid was in place. Maintenance and reparation works on the lines was also done following the concerns expressed by the Claimant on the readiness of such lines. As the Respondent notes, all these tasks were completed well before BEL had installed the 161 kV electrical system on the Power Station and rectified the

⁶³⁴ Statement of Defense, para. 93.

⁶³⁵ Statement of Defense, para. 95; Witness Statement of Emmanuel Osafo, para. 25.

⁶³⁶ Statement of Defense, para. 96; Witness Statement of Emmanuel Osafo, para. 26.

⁶³⁷ Statement of Defense, para. 97; Witness Statement of Emmanuel Osafo, para. 27.

⁶³⁸ Statement of Defense, para. 99; Exhibit R-8: “Deposition of Gene E. Phillips, *ProEnergy Services, LLC v. Balkan Energy Co.*, No. 09-4026”, at 44:23-45:2.

problems found when ProEnergy left the Project Site at the end of October 2008, just as it was in anticipation of what the Claimant describes was the firing of a turbine at FSNL.

450. The Tribunal thus finds that the Respondent's assertion that by 8 August 2008 the line required for the 365 MVA transmission, the maximum output of the Power Station, was energised and in service ready for connection to the Barge is credible, as also is the explanation that it energised the Elubo Transmission Line to Tower 3 on 13 November 2008. Additional difficulties arose between the Parties concerning the work to energise either Transmission Line from Tower 3 to the Barge, which has also been a matter of reciprocal complaints.
451. That the lines were energised does not mean, however, that they were exempt from problems. The Claimant's arguments to the effect that at points there were general faults of the line, with particular reference to the Elubo Transmission Line, or that various modifications, recalibrations and coordination of the relay protection of the Essiama line with the Elubo line were necessary is equally credible. As noted, most of the reparation and maintenance work of the lines, including the problems of jungle overgrowth, were prompted by the Claimant's expressions of concern in that respect.
452. But, as was also concluded in respect of site electricity, the difficulties caused by these problems do not have a causal relationship with the fact that the Power Station was not ready for final testing and commissioning at any relevant point in time. As it was concluded above, this situation finds its roots in other factors that cannot be attributed to the Respondent. From the ProEnergy Litigation documents made available by the Respondent it appears that the Claimant was aware that the Government might have considered calling a default on account of the failure of BEL and ProEnergy to complete the refurbishment of the Power Station on schedule, a consideration that would have been hardly possible if the reason for such failure was attributable to the Respondent's failure to provide adequate Transmission Lines in working condition. To the extent, however, that the difficulties caused by the Transmission Lines resulted in expenditures and delays for the Claimant they could well lead to incidental damages due to the Claimant, a matter to be considered further below.

(c) The RTU

453. Much of the Parties' argument relating to "grid connectivity", in turn, centers on the condition and availability of the RTU / MicroSCADA, and in particular the question of which party had the responsibility to commission this system and whether the RTU/MicroSCADA was a pre-requisite to establishing grid connectivity.

i. Boundary Definitions

454. The respective responsibilities of the Parties are laid out in the definitions section of the PPA, which provide, in part, as follows:

“Dead End Tower” shall mean the last tower on the Site or such other points as may be agreed upon by the Parties.

“Delivery Point” shall be the dead end tower where responsibilities for the equipment by [Ghana] and the BE[L] are demarcated.

“Transmission Line” means the 161 kV voltage transmission line(s), transmission towers, substations and other items necessary to transmit electricity from the outgoing gantry of the switching facility within the Site to the National Grid as further described and having the specifications set out in the Fourth Schedule.

The Claimant’s Position

455. The Claimant relies on the definition of the “Dead Tower” under the PPA and, in particular, that it may be defined by “such other points as may be agreed upon by the Parties.”⁶³⁹ According to the Claimant, the Parties agreed upon such other point as including the RTU because it is implicitly part of the Transmission Line.⁶⁴⁰

The Respondent’s Position

456. The Respondent contends that since the RTU is located on the Barge, and the Respondent’s responsibility for providing equipment ends at the Dead End Tower outside of the Barge,⁶⁴¹ that responsibility for the RTU necessarily falls to the Claimant. In the Respondent’s view, the Claimant’s argument that the RTU is part of the Transmission Line is “incorrect” because the “function of the RTU is to control and monitor equipment on the Power Station”.⁶⁴²

457. In the alternative, even if the Tribunal were to find that the RTU was part of the Transmission Line, because the RTU is located in the Substation’s control room on the Barge, the RTU would nevertheless be outside the area where the definition says the Transmission Line terminates (“from the outgoing gantry”).⁶⁴³

⁶³⁹ Reply, para. 11.

⁶⁴⁰ Reply, paras. 11, 14.

⁶⁴¹ Statement of Claim, para. 101; Rejoinder, para. 82.

⁶⁴² Rejoinder, para. 84; Rejoinder Witness Statement of Eric Asare, paras. 4-5; Expert Report of Parsons Brinckerhoff, para. 5.30.

⁶⁴³ Rejoinder, para. 84; Rejoinder Witness Statement of Eric Asare, para. 11.

458. In response to the Claimant's assertion that "the entirety of the substation located on the [B]arge ... were [sic] the responsibility and obligation of the Government",⁶⁴⁴ the Respondent points out that the Claimant acknowledged its responsibility to commission all of the other systems on the Substation, including the 161 kV GIS switchgear, the transformers, the relay protection devices and the GIS control cabinets.⁶⁴⁵

The Tribunal's Findings on the Boundary Point Separating the Parties' Responsibilities

459. The PPA's definition of the "Dead Tower" is in the Tribunal's reading clear enough. "Dead End Tower" is defined as the last tower on the Site or such other points as may be agreed upon by the Parties. The location of this last tower is not disputed so the question is whether there was a different point agreed to between the parties where responsibilities of the Parties' would be demarcated in terms of the provision of equipment necessary for the connection to the Transmission Lines. Although the Claimant maintains that such was the case because the RTU was implicitly a part of the Transmission Line, the Tribunal's reading is different. As the Respondent notes, this equipment is on the Barge and Respondent's responsibilities end at the Dead End Tower outside the Barge. It follows that responsibility for the RTU system will belong to the Claimant as there is no basis for extending the Respondent's responsibility further into the Barge. The Claimant's assertion that the entirety of the Substation is the responsibility of the Respondent is misplaced, particularly considering that, as the Respondent has also noted, every other system on the Barge has been understood by the Claimant as falling under its own responsibility.

460. Moreover, as the Respondent has also argued and the Tribunal has discussed above on examination of this question on the facts, the main function of the RTU/Micro SCADA system is to control and monitor equipment on the Power Station, a function which quite naturally will be related to the information the system will be receiving from the operations of the Transmission Lines but which is separate from such lines. This interpretation is further confirmed by the fact that "Transmission Line" is defined as the 161 kV voltage transmission line(s), transmission towers, substations and other items necessary to transmit electricity from

⁶⁴⁴ Reply, para. 15.

⁶⁴⁵ Rejoinder, para. 85; *See e.g.*, R-33: "Letter from Scott Kinney to J.D. Robinson, Re: Barge Power 161 kV remote control and data acquisition system (SCADA)", R-83: "Email from Scott Kinney to J.D. Robinson and other, Re: 161 kV GIS Switchgear Status", R-84: "Email from Scott Kinney to Vincent Jones, Re:", R-98: "Email from J. D. Robinson to Neil Crouch and other, Re: Verification of Transfer"; R-99: "ProEnergy Barge Commissioning Weekly Report", R-100: "Email from Scott Kinney to J.D. Robinson, Re:", R-102: "Email from Scott Kinney to J.D. Robinson, Re:".

the “outgoing gantry of the switching facility within the Site” to the National Grid, a definition which does not cover equipment located further to the inside of that outgoing point.

- ii. Was Commissioning of the RTU / MicroSCADA a Pre-Requisite to Grid Connectivity?

The Claimant's Position

461. The Claimant's position is that the Barge could not be connected to the National Grid until after installation and commissioning of the RTU on the Barge.⁶⁴⁶ The Claimant advances the view that “a fully operating properly commissioned RTU” was a pre-requisite to grid connectivity.⁶⁴⁷ The Claimant asserts that it repeatedly drew the Respondent's attention to its responsibilities regarding the control and relay protection systems on the Barge.⁶⁴⁸ The Claimant submits that the installation of the RTU is a “clear example of ... dovetailing”, whereby the Respondent was required to complete its physical work on the Essiama and Elubo Transmission Lines in order for the Claimant to be able to reach FSNL.⁶⁴⁹

462. The Claimant argues that the Substation “could not be integrated into” the grid system without the RTU.⁶⁵⁰

The Respondent's Position

463. The Respondent is of the view that the RTU is not a pre-requisite to grid connectivity, asserting that “numerous substations are connected to the grid and integrated into its communication system without an RTU.”⁶⁵¹ The Respondent also contends that “[the Claimant's] arguments regarding the RTU in these proceedings are... premature and irrelevant.”⁶⁵² The function of the RTU is, amongst others, to monitor and control the GIS, which in turn is the a pre-requisite to grid connectivity. As the GIS was not operational when the lines were allegedly energised on

⁶⁴⁶ Statement of Claim, para. 115.

⁶⁴⁷ Statement of Claim, para. 216; Exhibit C-39: Witness Statement of Robert MacDonald; Exhibit C-38: Witness Statement of Phillip Elders, paras. 70, 198

⁶⁴⁸ Statement of Claim, para. 193; Exhibit C-38: Witness Statement of Phillip Elders, para. 70.

⁶⁴⁹ Statement of Claim, para. 193.

⁶⁵⁰ Statement of Claim, para. 334.

⁶⁵¹ Statement of Defense, para. 138; Witness Statement of Eric Asare, para. 9.

⁶⁵² Respondent's Post-Hearing Submission, para. 138.

8 August 2008, the Respondent submits that the Claimant could not have connected to the Grid regardless of the status of the RTU.⁶⁵³

The Tribunal's Findings on the RTU as a Prerequisite to Grid Connectivity

464. The discussion on this matter follows closely that examined above on the facts and the legal arguments do not change the conclusions there reached. That the RTU system is necessary for the proper functioning of the interconnection to the National Grid is true but this assumes that the testing and commissioning of the Power Station has been finalized. Once this last stage has been satisfied the RTU will make the interconnection possible. Before that there will be no power generation to be integrated into the National Grid. As the Respondent has noted, if the GIS electrical system was not operational there could have been no connection possible irrespectively of the RTU. It follows that while the RTU is necessary for grid connectivity, it is in turn dependant on the 161 kV electrical system of the Barge. If the latter is unavailable there is no role for the RTU to perform or power to be transmitted.

- iii. Which Party had the Obligation to have the RTU / MicroSCADA Installed and Commissioned?

The Claimant's Position

465. The Claimant submits that the installation and commissioning of the RTU fell within the ambit of the Respondent's obligations under the PPA and the Grid Connection Process Agreement.⁶⁵⁴
466. The Claimant further submits that Ghana adopted a National Electricity Grid Code to create a Commission to promulgate uniform rules concerning the National Grid and that, pursuant to the Code, GRIDCo was required to install and commission the RTU on the Barge.⁶⁵⁵ At the Hearing on the Merits, the Claimant placed particular emphasis on this argument, asserting that Ghana's Grid Code and other relevant legislation – particularly LI 1934, enacted by the board of the Energy Commission on 4 June 2008,⁶⁵⁶ and entered into force on 23 October 2008⁶⁵⁷ (the same day the October 2008 version of the Grid Code was circulated)⁶⁵⁸ – inform the interpretation of

⁶⁵³ Respondent's Post-Hearing Submission, para. 138.

⁶⁵⁴ Statement of Claim, para. 193; Exhibit C-38: Witness Statement of Phillip Elders, paras. 70.

⁶⁵⁵ Statement of Claim, paras. 45, 115.

⁶⁵⁶ Hearing on the Merits Transcript, Day 1, 17:7-8.

⁶⁵⁷ Hearing on the Merits Transcript, Day 1, 22:11.

⁶⁵⁸ Hearing on the Merits Transcript, Day 1, 22:14-16.

the PPA because it shows that high-voltage substations form part of the NITS, and therefore fall within the grid operator's responsibility.

467. In its opening Statement at the Hearing on the Merits, the Claimant first submits that

LI 1934 clearly defined what was to be considered the NITS in Ghana. This is found in Rule 3, which simply states that the NITS is any equipment regardless of ownership, which is designed to function or operate at any voltage higher than 36 kV. Thus [...] any reference to equipment that operates at a high voltage, for example 161 kV, is considered by this provision of Ghana law to constitute part of Ghana's NITS.⁶⁵⁹

468. Second, the Respondent contends that the specific obligations of the

utility as it relates to matters in these proceedings, Rule 5(3)(h) of LI 1934 required the utility – which is GridCo, which was established in 2006 – to plan, develop, install and maintain an adequate supervisory control and data acquisition system, which was specifically defined to include both telecommunications and remote terminal units at transmission substations and generating stations.⁶⁶⁰

469. Third, the Respondent submits that Rule 7(c) of LI 1934 provides that GridCo was to be “responsible for coordinating the design, installation and maintenance of protection systems to ensure the timely disconnect of faulty facilities and equipment”.⁶⁶¹

470. Fourth, “and very relevant to these proceedings” the Claimant submits “Rule 8 [of LI 1934] provides that for a person to become a wholesale supplier, that person was required to design, install and maintain its plan and equipment to meet the requirements of a document called the Connection Sub-Code, and other relevant regulations.”⁶⁶²

471. Fifth, the Respondent points to Rule 11 of LI 1934, which mandates the Energy Commission to issue and prepare a Grid Code to govern the technical operation of the NITS.⁶⁶³ According to the Claimant, “if it is true that no Grid Code had been formally put into place as of the date of enactment of LI 1934, there are provisions in that LI that placed an obligation on existing grid participants – such as the Claimant and the Respondent – to comply with these rules immediately upon their coming into force.”⁶⁶⁴

⁶⁵⁹ Hearing on the Merits Transcript, Day 1, 11:23-12:6.

⁶⁶⁰ Hearing on the Merits Transcript, Day 1, 12:7-15.

⁶⁶¹ Hearing on the Merits Transcript, Day 1, 12:16-19.

⁶⁶² Hearing on the Merits Transcript, Day 1, 12:20-25.

⁶⁶³ Hearing on the Merits Transcript, Day 1, 13:5-8.

⁶⁶⁴ Hearing on the Merits Transcript, Day 1, 13:21-14:2.

472. The crux of the Claimant's argument appears to be that "[n]o time is given for any transition from one system or form of existence to the other. Rather, persons in the position of the Claimant were in the interim subjected to what the LI called 'existing rules and Prudent Utility Practice'".⁶⁶⁵ Rule 33 of LI 1934 defines Prudent Utility Practice to mean "generally accepted design practices, methods and operation of a power system ... to meet utility and industry codes, standards and regulations".⁶⁶⁶ It follows, according to the Claimant, that "LI 1934's reference to 'existing rules and Prudent Utility Practice' is a reference to the April 2007 draft, the July 2007 version, the [23] October 2008 version,⁶⁶⁷ and all other versions that came into existence within that period."⁶⁶⁸ The Claimant emphasizes that it is no coincidence that the Grid Connection Process Agreement about the RTU was concluded between the Parties on 24 October 2008, just one day after LI 1934 came into force.⁶⁶⁹

The Respondent's Position

473. The Respondent contends that the installation and commissioning of the RTU was the obligation of the Claimant under Clauses 2 and 3 of the PPA, citing the following excerpts in support.⁶⁷⁰

- BEL is responsible for "equipping, completion, testing, commissioning and financing of the Power Station."⁶⁷¹
- "all costs ... in connection with the equipping of the Power Station ... shall be borne by BEL."⁶⁷²

474. The Respondent also draws attention to the term "Delivery Point", defined in Clause 1 of the PPA as the "dead end tower where responsibilities for equipment by [Ghana] and BE[L] are demarcated", and the term "Dead End Tower", defined as the last tower on the site (Tower 1).⁶⁷³

⁶⁶⁵ Hearing on the Merits Transcript, Day 1, 14:2-6.

⁶⁶⁶ Hearing on the Merits Transcript, Day 1, 14:11-16.

⁶⁶⁷ Exhibit C-46.

⁶⁶⁸ Hearing on the Merits Transcript, Day 1, 16:13-17.

⁶⁶⁹ Hearing on the Merits Transcript, Day 1, 22:9-23.

⁶⁷⁰ Statement of Defense, para. 138.

⁶⁷¹ Clause 3.1 of the PPA.

⁶⁷² Clause 2.2 of the PPA.

⁶⁷³ Statement of Defense, para. 101, citing Clause 1 of the PPA (without emphasis added by Respondent); Respondent's Post-Hearing Submission, para. 144.

In this regard, the Respondent submits that “all equipment heading away from Tower [1] and the Project Site towards Tema are the responsibility of the Government. All the equipment heading away from Tower [1] and throughout the Project Site are the responsibility of Balkan.” It follows, argues the Respondent, that “[s]ince the RTU is inside the Project Site, it is the responsibility of Balkan just like every piece of equipment on the Barge, such as the turbines, the DCS, the MicroSCADA, the switchgear, the relay protection devices, etc.”⁶⁷⁴

475. The Respondent asserts that, as of December 2007, the Claimant acknowledged that commissioning the RTU / MicroSCADA was its obligation, as is evidenced by the fact it sought and obtained proposals from ABB and Taurus for this work.⁶⁷⁵ In particular, the Respondent points to an e-mail dated 2 February 2009 from Mr. Robert MacDonald, on behalf of BEL, to Mr. Christian Moeller from ABB, after the Claimant had received ABB’s proposal for installing and commissioning the RTU / MicroSCADA.⁶⁷⁶ The Respondent also points to the declarations made by Mr. Elders at the hearing, in which he makes reference to this same proposal.⁶⁷⁷ The Respondent asserts that “[a]s Balkan’s response to ABB makes clear, Balkan understood that the commissioning and upgrade of the control system, including the RTU on the Barge, was its responsibility, not the Government’s, and in fact, directed ABB to redraft the proposal to meet Balkan’s requirements and specifications.”⁶⁷⁸

476. The Respondent advances the view that none of the Claimant’s assertions with respect to the RTU / MicroSCADA “can obscure the simple fact that the RTU was equipment on the Barge that Balkan had the responsibility to install and commission. Its failure or delay in doing so represents a further default on its part under the PPA, and not a basis upon which it can claim an entitlement to Tolling Fees under the PPA.”⁶⁷⁹

477. The Respondent argues that the Claimant’s arguments related to the Grid Code should be disregarded, asserting that the Code was not promulgated until October 2009, and thus has no bearing on the Parties’ respective responsibilities under the PPA and, specifically, on the issue

⁶⁷⁴ Statement of Defense, para. 101.

⁶⁷⁵ Statement of Defense, paras. 138, 102; *see also* 103-107, 109-111.

⁶⁷⁶ Statement of Defense, para. 110; Exhibit R-36: “Email from Robert MacDonald to Christian Moeller, Re: Technical Review of Osagyefo Barge RTU/SCADA”.

⁶⁷⁷ Respondent’s Post-Hearing Submission, para. 148, referring to Hearing on the Merits Transcript, Day 2, 127:7-13.

⁶⁷⁸ Statement of Defense, para. 110; Exhibit R-36: “Email from Robert MacDonald to Christian Moeller, Re: Technical Review of Osagyefo Barge RTU/SCADA”.

⁶⁷⁹ Statement of Defense, para. 112.

of responsibility for the RTU.⁶⁸⁰ The Respondent emphasizes that the Grid Connection Process Agreement entered into by the Parties on 24 August 2008 confirms that BEL would commission and pay for the RTU.⁶⁸¹ The Respondent relies on the testimony of Mr. Wiafe,⁶⁸² who said that he expressly rejected Mr. Elders' assertion that refurbishment of the RTU on the Barge was the Respondent's responsibility under the Grid Code.⁶⁸³

The Tribunal's Findings on the Obligations to Install and Commission the RTU/MicroSCADA System

478. Again on this matter the Parties' legal arguments relate closely to the facts on the very same question that has already been examined above, that is, who was responsible for installing and commissioning the RTU/MicroSCADA system on the Barge. The Tribunal concluded then that it was the Claimant's responsibility to pay for the commissioning of the system. The Claimant's legal argument, however, submits that the installation and commissioning of the RTU fell within the ambit of the Respondent's obligations. In the Claimant's view this was so because under the various preliminary versions of the Grid Code preceding its final enactment in October 2009, as well as under law LI 1934, enacted by the board of the Energy Commission and in force since October 2008, GRIDCo was the entity responsible for installing and commissioning this equipment on the Barge as a part of substations operating at a voltage higher than 36 kV, which is the case here. Other provisions of LI 1934 envisaged Gridco's mandate as including the responsibility to install, maintain and supervise and control data acquisition systems.

479. Although the Claimant accepts the fact that the Grid Code was not in force at the time the PPA was executed, it argues nevertheless that under LI 1934 there were obligations to comply with its rules immediately upon entering into force and no time was given for a transition between one system and the other. Existing rules and Prudent Utility Practice, also defined in that Law, led directly to the application of the draft versions of the Grid Code beginning in April 2007 until its final version and entry into force. The very Grid Connection Process Agreement about the RTU was as noted concluded between the Parties on 24 October 2008, just one day after LI 1934 came into force.

⁶⁸⁰ Cross-examination of Vivienne Gadzekpo, Hearing on the Merits Transcript, Day 7, 108:17-25.

⁶⁸¹ Rejoinder, para. 98.

⁶⁸² Hearing on the Merits Transcript, Day 5, 79:15-25; 91:11-17.

⁶⁸³ Respondent's Post-Hearing Submission, para. 149.

480. The Claimant's arguments are well put and would be quite convincing were it not for the fact that they encounter two equally powerful legal arguments on the side of the Respondent. The first is that responsibility for the equipping of the Power Station and all its costs are clearly to be borne by the Claimant under Clauses 2 and 3 of the PPA. These clauses do not refer specifically to the RTU but do envisage all the equipment required for the operation of the Power Station. The second argument is that the Dead End Tower that demarcates the Parties' responsibilities is defined as the last tower on the site and while everything heading outwards from that Tower is Respondent's obligation everything heading inwards to the Power Station is the responsibility of the Claimant. It is of course well established that the RTU is located inside the Project Site. The Tribunal must note, however, that although the respective areas of responsibility are not always well demarcated and may depend on specific arrangements this does not detract from its conclusion concerning responsibility for the RTU.
481. The Tribunal also discussed on the facts that the Claimant at first acknowledged its obligations in respect of this system, as is well reflected in the correspondence between BEL and prospective subcontractors, particularly ABB and Taurus. There was no doubt in this correspondence as to which was the entity responsible for the installation and commissioning of the RTU. As noted above, a similar understanding was reflected in the Grid Connection Process Agreement of 24 August 2008 and also confirmed by Mr. Wiafe's testimony.⁶⁸⁴
482. The Tribunal is mindful that its task is to decide the dispute between the Parties principally as a matter of contractual interpretation under the PPA. The terms of the PPA must accordingly govern its reasoning and conclusions. In this light, the PPA itself and also the supplementary agreement between the parties on the Grid Connection Process, clearly show that the installation and commissioning of the RTU and its costs are to be borne by the Claimant. The understanding of the Parties as expressed in the various exchanges noted also confirms this interpretation. The Grid Code came later and it expressly envisaged that it shall not derogate from contractual agreements. However many earlier drafts of the Grid Code there might have been none of these earlier drafts can derogate from the terms of the contractual obligation as the Grid Code itself provides that it does not. Accompanying legislation, which in itself is not clear enough, is not dispositive of this matter. The Tribunal concludes that the Respondent prevails in this matter.

⁶⁸⁴ Witness Statement of Joseph Wiafe, para. 13; Hearing on the Merits Transcript, Day 5, 79:17-25 and 82:5-85:22.

(d) **Other Contractual Breaches: the Letter of Credit**

i. The Claimant's Position

483. The Claimant also alleges the Respondent failed to comply with its obligations regarding the Letter of Credit and that it did not obtain the necessary approvals, permits and licenses called for under the PPA.⁶⁸⁵ The Claimant does not elaborate further on its allegations in this regard.

ii. The Respondent's Position

484. The Respondent asserts that the Claimant's additional claims under the "Other Breaches" heading are "so general and non-specific as not to warrant a response".⁶⁸⁶ With respect to the Letter of Credit, it understands the Claimant's "complaint to be that the Government refused to certify, under the terms of the [Letter of Credit], that Balkan is entitled to Tolling Fees".⁶⁸⁷ The Respondent's position is that, since it does not owe the Claimant Tolling Fees, it is not in breach of the Letter of Credit or the PPA "by reason of its refusal to provide a false certification to the Bank".⁶⁸⁸ Alternatively, should the Tribunal consider that the Claimant is entitled to Tolling Fees, the Respondent refers to the Claimant's assertion that the replacement letters of credit were not always issued 30 days prior to the expiry of the one previously issued. The Respondent submits that such claim must fail because (a) the PPA –Clause 34.1.4.2.- provides a 60 day grace period in case of default; (b) any claim for breach was waived by the Claimant when it accepted the replacement Letters of Credit without objection; (c) the Claimant suffered no damage since it never sought to draw upon a letter of credit when one was not in place.⁶⁸⁹

iii. The Tribunal's Findings Concerning the Obligations Pertinent to the Letter of Credit

485. Both the factual findings made above on this other matter and the legal arguments developed by the Parties lead to the same conclusion. The Claimant argues that the Respondent did not

⁶⁸⁵ Statement of Claim, para. 335.

⁶⁸⁶ Statement of Defense, para. 139.

⁶⁸⁷ Statement of Defense, para. 139; *see also* Rejoinder, para. 154.

⁶⁸⁸ Statement of Defense, para. 139; *see also* R-41: "Establishment of Letter of Credit – Power Purchase From Generation on the Osagyefo Power Barge"; R-80: "Letter from Dr. M. Apiagyei Gyamfi to Balkan Energy Company LLC, Re: Power Purchase Agreement between Government of Ghana and Balkan Energy Ghana Ltd – Letters of Credit", R-81: "Letter from Phillip Elders to Dr. M. Apiagyei Gyamfi, Re: Power Purchase Agreement Between Government of Ghana and Balkan Energy Gh. Ltd. – Letter of Credit".

⁶⁸⁹ Respondent's Post-Hearing Submission, para 197.

comply with its obligations in respect of the Letter of Credit without much further elaboration, except to point out that the Respondent refused to certify in the terms of the Letter of Credit that Claimant was entitled to Tolling Fees.

486. Since the Tribunal has concluded that no Tolling Fees were owed to the Claimant in view of the fact that the Power Station never came to the stage of completing its full and final testing and commissioning, the basis for the issuance of the Letter of Credit was no longer available and Respondent's argument to the effect that it could not certify an untrue fact is persuasive. The Parties' discussion about whether other requirements concerning the replacement of the letters of credit within certain deadlines were met is therefore moot.

487. Although the Claimant has also raised the question that it incurred in financial costs in connection with its operations and bank accounts with Zenith Bank, with particular reference to the Letter of Credit, such costs, even if incurred, are not attributable to the Respondent.

F. THE CLAIMANT'S CLAIM OF BREACH OF THE ARBITRATION AGREEMENT

1. Introduction

488. The Claimant contends that since the Tribunal issued its Interim Award concluding that the Arbitration Agreement was valid and enforceable, the Respondent has nevertheless continued to take actions in breach of the Parties' Arbitration Agreement.⁶⁹⁰ First, the Claimant argues that the Respondent's commencement of the proceeding before a US District Court to obtain discovery from ProEnergy was improper.⁶⁹¹ Second, the Claimant submits that the Respondent's continued pursuit of its referral of the constitutionality of the PPA to the Supreme Court of Ghana constitutes a breach of the Arbitration Agreement.⁶⁹²

489. The Respondent counters that the Claimant's claim for breach of the Arbitration Agreement on the basis of the United States and Ghanaian litigations is "without merit".⁶⁹³ In its Rejoinder, the Respondent maintains this position in light of the Supreme Court Judgment of 16 May 2012.⁶⁹⁴

⁶⁹⁰ Statement of Claim, para. 349; Claimant's Post-Hearing Submission, para. 93.

⁶⁹¹ Statement of Claim, para. 350; Statement of Defense, para. 141.

⁶⁹² Statement of Claim, para. 351; Statement of Defense, para. 141.

⁶⁹³ Statement of Defense, para. 140.

⁶⁹⁴ Rejoinder, para. 155.

2. The Proceeding Against ProEnergy for Discovery

(a) The Claimant's Position

490. The Claimant argues that the Respondent's *ex parte* application before a US District Court for, what the Claimant characterizes as "broad discovery" from ProEnergy, violates the Parties' Arbitration Agreement.⁶⁹⁵ The Claimant submits that due to the Respondent's actions in this regard, it was forced to file submissions in an attempt to intervene in the United States proceeding.

(b) The Respondent's Position

491. The Respondent asserts that the proceeding it initiated in the United States was pursuant to United States Statute 28 U.S.C. § 1782,⁶⁹⁶ and was brought against ProEnergy, not BEL or Balkan. The Respondent emphasizes that the Claimant "voluntarily chose to intervene in that proceeding rather than rely on ProEnergy's objection" and, as such, "had a full and fair opportunity to express its view to the US District Court regarding the discovery application, including its view that § 1782 should not apply where an arbitration is pending".⁶⁹⁷ The Respondent further contends that the Claimant "cites no authority, UNCITRAL Rules, or Arbitration Tribunal which has ever held that it is a breach of an Arbitration Agreement for a party to seek discovery of a third party, such as ProEnergy, which is not a party to an arbitration and not subject to the jurisdiction or discovery orders of the Arbitration Tribunal".⁶⁹⁸

(c) The Tribunal Findings in Respect of the Discovery in the ProEnergy Proceedings

492. It is a fact that Respondent's application for discovery before a US court concerned ProEnergy as the defendant and not BEL or Balkan. That the Claimant in this case decided to intervene and file submissions in respect of that application is quite natural as the discovery concerned documents of relevance for this arbitration. The Tribunal is of the view that none of these steps

⁶⁹⁵ Statement of Claim, para. 350; Exhibit C-48: "Application for Government of Ghana Discovery".

⁶⁹⁶ Statement of Defense, para. 143, Respondent states that "section 1782(a) enables foreign litigants to petition United States courts in order to assist them in obtaining discovery of evidence in the United States. Section 1782(a) provides, in relevant part: 'The district court of the district in which a person resides or is found may order him to ... produce a document or other thing for use in a proceeding in a foreign or international tribunal ... The order may be made pursuant to ... the application of any interested person'".

⁶⁹⁷ Statement of Defense, paras. 142, 146.

⁶⁹⁸ Statement of Defense, para. 145.

can be considered to amount to a breach of the arbitration agreement. Had the Respondent applied to this Tribunal for discovery of documents produced in litigation before the US courts it is quite likely that it would not have succeeded for want of jurisdiction as ProEnergy is not a Party to this arbitration.

493. The fact that the Claimant had the opportunity to be heard in the discovery proceedings, including in respect of its argument that discovery could not be granted when there were arbitration proceedings pending, is well established and thus the Claimant has not been put to any disadvantage in the context of such discovery application. Respondent's arguments to the effect that there are no rules preventing discovery from a third party while the arbitration is pending is correct. It would be of course different if the discovery proceedings were to interfere with the conduct of the arbitration, for example because of an injunction or suspension order, but that is not the case here.
494. Just as the Tribunal granted a prolonged schedule for submissions so as to take into account what could be the decision of the Ghanaian courts, it can equally take into account other relevant documents produced in discovery to the extent that they are helpful to decide the dispute before it. And the actual fact is that these documents were of importance in respect of many issues before the Tribunal.

3. The Ghanaian Court Proceedings

(a) The Claimant's Position

495. The Claimant asserts that the Respondent has also violated the Arbitration Agreement "by continuing to prosecute litigation in the Ghanaian courts", which, consequently, has again required the Claimant to respond.⁶⁹⁹ As set out above in the Statement of Facts, the Claimant emphasizes that the Respondent took the following additional steps to advance its interests before the Ghanaian courts:

- "While the trial was yet to commence in the High Court of Ghana, [Ghana] filed an application with the Ghanaian Supreme Court to determine whether the PPA and the Arbitration Agreement constitute international business transactions within the meaning of the Ghanaian Constitution."⁷⁰⁰

⁶⁹⁹ Statement of Claim, para. 351.

⁷⁰⁰ Statement of Claim, para. 351.

- “In May 2011 the Ghanaian High Court denied referral of the questions to the Ghanaian Supreme Court.”⁷⁰¹
- “In July 2011, the [Government of Ghana] filed a Motion on Notice to Invoke Supervisory Jurisdiction of the Supreme Court in the Supreme Court of Ghana challenging the High Court’s ruling denying referral.”⁷⁰²

(b) The Respondent’s Position

496. The Respondent counters the Claimant’s assertion that the proceedings before the Ghanaian courts violate the Arbitration Agreement. First, the Respondent argues that had “the Tribunal viewed those proceedings as a breach of the arbitration agreement, it presumably would have granted, rather than denied, Balkan’s request for an injunction of those proceedings”.⁷⁰³ Second, the Respondent argues that the schedule for this arbitration set by the Tribunal expressly allowed for a reference of the constitutional issue to the Supreme Court.⁷⁰⁴ In its Interim Award, the Tribunal noted its willingness to adjust the schedule of this arbitration “to consider and take fully into account the views of the Ghanaian courts on the issues raised with regard to the applicability of Article 181(5) of the Ghanaian Constitution”.⁷⁰⁵ Third, the Respondent submits that the Ghanaian proceedings “involve additional parties who are not parties to the Arbitration Agreement and are, as such, not subject to the jurisdiction of this Tribunal”.⁷⁰⁶ Finally, the Respondent asserts that it has not misrepresented this Tribunal’s Interim Award before the United States or Ghanaian courts, “as Balkan did to the U.S. Court, in the discovery proceedings against ProEnergy”.⁷⁰⁷

497. In its Rejoinder, the Respondent further submits that, while the Supreme Court Judgment states that “the Arbitration Agreement was not an international business transaction within the meaning of Article 181(5) of the Constitution”,⁷⁰⁸ there was no finding that the proceedings in

⁷⁰¹ Statement of Claim, para. 351; Exhibit C-49: “Ruling of High Court”.

⁷⁰² Statement of Claim, para. 351; Exhibit C-50: “Motion on Notice to Invoke Supervisory Jurisdiction of the Supreme Court.”

⁷⁰³ Statement of Defense, para. 147; Interim Award, para. 190; *see also* Rejoinder, para. 155.

⁷⁰⁴ Statement of Defense, para. 147.

⁷⁰⁵ Statement of Defense, para. 147; Interim Award, paras. 63, 192; *see also* Rejoinder, para. 155.

⁷⁰⁶ Statement of Defense, para. 147.

⁷⁰⁷ Statement of Defense, para. 148; Exhibit R-42: “Order, *Government of Ghana v. ProEnergy Servs., LLC, et al.*, No. 11-9002”.

⁷⁰⁸ The Tribunal is mindful that the crux of the Respondent’s case is that the Supreme Court of Ghana labelled the PPA as an international business transaction within the meaning of Article 181(5) of the

Ghana themselves violated the Arbitration Agreement; “nor could it” because those proceedings involve parties not privy to the Arbitration Agreement to the PPA.⁷⁰⁹

**(c) The Tribunal’s Findings on the Breach of the Arbitration Agreement by
Virtue of the Ghanaian Court Proceedings**

498. The Tribunal does not consider that proceedings before the Ghanaian courts could be held to be in breach of the arbitration agreement, as argued by the Claimant. Had such proceedings or any decision adopted thereunder interfered with the progress of this arbitration or with the authority of this Tribunal to properly conduct its business the conclusion might have been different. But that was not the case and in fact, as the Respondent notes, in its Interim Award the Tribunal denied the Claimant’s request for an injunction of such proceedings because no such interference arose from the Ghanaian courts. In its Interim Submission of 20 June 2012 the Claimant has requested the Tribunal to reconsider its decision on anti-suit injunction, a request which the Tribunal denied.

499. It is also to be kept in mind that, as also noted by the Respondent, the schedule of this arbitration was longer than usual so as to allow prudent time for the Supreme Court to make its views on the constitutional issues of the case known. It should also be noted that if such views had not become available at a time compatible with the schedule of the arbitration it is quite likely that the Tribunal would have continued to move forward in the discharge of its duties, but this was not the case. As there has been no interference with this arbitration by the proceedings before the Supreme Court, nor any interference of this arbitration with the Ghanaian court proceedings, the arbitration agreement has been duly complied with. Accordingly there is no basis either for the Claimant’s request in the alternative made in the same Interim Submission that the Tribunal should give no weight to the Supreme Court judgment.

G. THE CLAIMANT’S ALTERNATIVE CLAIMS

1. Introduction

500. In the alternative to its breach of contract claims, the Claimant raises the following additional claims: (a) unjust enrichment;⁷¹⁰ (b) fraud or deceit;⁷¹¹ (c) false arrest;⁷¹² and (d) conversion and trespass.⁷¹³

Ghanaian Constitution, and therefore understands that the introduction of the word “not” at para. 155 of its Rejoinder is nothing but a mistake. This is confirmed, for instance, at paras 17 and 24 of the Rejoinder.

⁷⁰⁹ Rejoinder, para. 155.

501. The Respondent addresses each allegation in turn, asserting that the Claimant has not established any of these claims and, thus, is not entitled to any such damages.⁷¹⁴

2. Unjust Enrichment

(a) The Test

502. The Claimant submits that both Ghanaian and Dutch law subscribe to the principle of unjust enrichment. The Claimant goes on to cite Article 212 of the Dutch Code of Civil Procedure (the "DCCP"), which provides as follows:

1. A person who has been unjustifiably enriched at the expense of another is obliged, insofar as reasonable, to make good the other's loss up to the amount of his enrichment.
2. The enrichment shall not be taken into consideration to the extent that it is decreased by reason of circumstances for which the person enriched is accountable.
3. An enrichment shall be discounted to the extent that it is decreased during a period in which the person enriched could not reasonably be expected to recognize the existence of an obligation to make good the other's loss. In determining such decrease account must be taken of any expenditure which would not have been incurred but for the enrichment.⁷¹⁵

503. The Respondent endorses the definition of unjust enrichment set out by the Claimant.⁷¹⁶

(b) The Claimant's Position

504. If the PPA indeed required Parliamentary approval, and, as a consequence, is null and void, then the Claimant asserts that the Respondent has been unjustly enriched by all the money, in excess of USD 40 million, expended by the Claimant in connection with the Barge.⁷¹⁷ In this regard, the Claimant maintains that it "is entitled to restitution of all the money it has expended under the PPA under the foregoing principle of failure of consideration".⁷¹⁸

⁷¹⁰ Statement of Claim, paras. 364-370.

⁷¹¹ Statement of Claim, paras. 372-377.

⁷¹² Statement of Claim, paras. 378-381.

⁷¹³ Statement of Claim, paras. 382-386.

⁷¹⁴ Statement of Defense, paras. 150-168.

⁷¹⁵ Statement of Claim, para. 367; Article 12, Book 6 of the Dutch Civil Code.

⁷¹⁶ Statement of Defense, para. 150, referring to Statement of Claim, para. 367.

⁷¹⁷ Statement of Claim, para. 368.

⁷¹⁸ Statement of Claim, para. 370.

505. In further support of its unjust enrichment claim, the Claimant submits that Ghanaian law recognizes the following common law notions of equity, as paraphrased by the Claimant:

- “[W]here money has been paid under a transaction that is or becomes ineffective, the payer may recover the value of the money paid provided that the consideration for the payment has totally failed.”⁷¹⁹
- “If a contract is void ab initio for informality or incapacity, or if the contract is discharged automatically, as in the case of frustration, any payment or credit received made under the apparent contract is recoverable.”⁷²⁰

(c) The Respondent’s Position

506. In its Statement of Defense, the Respondent asserts that the Claimant’s claim for unjust enrichment should be denied for the following four reasons.⁷²¹ First, the Respondent submits that it has not received a benefit. In this regard, the Respondent emphasizes that to-date, “the Power Station remains unfinished and incapable of generating any power whatsoever for Ghana.”⁷²²

507. Second, the Respondent argues that the Claimant’s calculation of damages is improperly based “upon the wholesale submission of invoices it claims to have paid to ProEnergy and others”, which “fails to take into account any of its own allegations [in the ProEnergy Litigation] regarding improper invoicing, double billing, or corrective work”.⁷²³

508. Third, the Respondent asserts that the documents related to the Claimant’s settlement with ProEnergy in their US litigation “may well, in and of itself, demonstrate offsets to the amount Balkans [*sic*] seeks here”.⁷²⁴

⁷¹⁹ Statement of Claim, para. 369; *Chitty on Contracts*, 13th ed., Vol. 1, at 1869.

⁷²⁰ Statement of Claim, para. 369; *Chitty on Contracts*, 13th ed., Vol. 1, at 1873, para. 29-058, 1885, para. 29-074; *Kennedy v. Thomassen* [1929] 1 Ch. 426.

⁷²¹ Statement of Defense, para. 150.

⁷²² Statement of Defense, para. 151.

⁷²³ Statement of Defense, paras. 152-153; Exhibit R-7: “Deposition of Phillip David Elders, *ProEnergy Services, LLC v. Balkan Energy Co.*, No. 09-4026”, at 127:9-10, 184:8-12.

⁷²⁴ Statement of Defense, para. 154.

509. Fourth, the Respondent contends that the invoices submitted by the Claimant as attachments to the Witness Statement of Neil Crouch⁷²⁵ do not evidence any costs related to the commissioning of the Barge. Rather, the Respondent asserts that these invoices include the following:

- “payment made to an Elias Assouad in Lebanon in January 2011 which appear to be for a contract between Mr. Assouad’s company and Balkan ... U.S. for a success fee in this arbitration”,⁷²⁶
- “an unexplained wire transfer from Synteck West, Inc. to Control Risks in January 2010 (after Balkan, but its own admission, ceased all work on the Barge) and which contains no description of services”,⁷²⁷
- “payments to Curly Baca & Associates in June 2007 for hotel, meals and car rental in connection with their consulting advice to EPC International, Inc. in drafting BEL’s PPA (*i.e.*, an expense relating to the attempt to obtain the assignment [of the PPA from Balkan US to BEL])”,⁷²⁸
- “a payment to Tower Executive Suites in Sugar Land, Texas for Phillip Elders, as well as a payment for his laptop”,⁷²⁹ and
- “[o]ther exhibits simply consist of flights, hotels, and expenses with no specific information attributable to the commission process.”⁷³⁰

510. The Respondent does not address the Claimant’s unjust enrichment claim further in its Rejoinder.

511. In its opening statement at the Hearing on the Merits, the Respondent made its position clear: “If you’ve done work, you are entitled to be paid for that work; not under the contract damages, but you are entitled to be paid.”⁷³¹ However, the Respondent also submits that the

⁷²⁵ Exhibit C-37: Witness Statement of Neil Crouch.

⁷²⁶ Statement of Defense, para. 155; Exhibit C-37, Attachment 23: “Assouad – Ghana Invoices.”

⁷²⁷ Statement of Defense, para. 155; Exhibit C-37, Attachment 26: “Control Risks – Ghana Invoices.”

⁷²⁸ Statement of Defense, para. 155; Exhibit C-37, Attachment 28: “Curly Baca & Assoc – Ghana Invoices.”

⁷²⁹ Statement of Defense, para. 155; Exhibit C-37, Attachment 29: “Dell Marketing – Ghana Invoices”; Attachment 54: “Tower Executive – Ghana Invoices.”

⁷³⁰ Statement of Defense, para. 155; Exhibit C-37, Attachment 36: “First Bankcard – Ghana Invoices”, at 3. Respondent draws attention to this internal accounting e-mail to Phillip Elders, in which it is noted that “Phil does not respond to our request for receipts [*sic*] or descriptions of highlighted purchases.”

difficulty with Balkan's claim for unjust enrichment is that it utterly fails for want of proof. To prevail on a claim for unjust enrichment, Balkan was required, as part of its case in-chief, to present evidence as to the value of the benefit conferred. What did Balkan do? Balkan presented invoices and spreadsheets showing the money that it spent. [...] money spent does not necessarily equal benefit conferred.⁷³²

512. Specifically with respect to the invoices submitted by the Claimant in this arbitration, the Respondent asserts that,

under a best case scenario, approximately [USD] 20 million – not [USD] 56 million, not [USD] 60 million, not [USD] 140 million – approximately [USD] 20 million appears to be for invoices for work on the barge. A lot of invoices for iTunes and things like that. But when we talk about work on the barge, it's less than [USD] 20 million; and many of those [USD] 20 million consist of inflated and unjustified invoices that provided no benefit to the barge.⁷³³

513. The Respondent further remarked upon what it characterizes as “an extraordinary omission” of evidence as to the condition of the Barge today; particularly in light of the fact that the Claimant still retains control over the Barge today.⁷³⁴ The Respondent's position at the Hearing on the Merits was that, having exercised control over the Barge from the time of the signing of the PPA until today, the Claimant was “then charged with the obligation to maintain the systems that they say that they worked on; and there is no evidence – none – that Balkan has maintained those systems for the past four years since 2009 and since the commencement of this arbitration.”⁷³⁵ The Respondent emphasizes that “[w]e have no evidence as to the condition, and we have no evidence whatsoever – not one exhibit – that tells us about maintenance.”⁷³⁶

514. In support of its assertion regarding the lack of evidence, and its consequences on the determination of quantum, the Respondent draws the Tribunal's attention to Mr. Elder's 2007 PPA tariff analysis, attached to his witness statement in this arbitration, which explained to the Ministry of Energy why BEL should be paid what he indicates it should be paid, stating, in relevant part: “[t]he initial reports reveal that minimal to no maintenance and preservation efforts have been committed to the barge for an extended period of time. There are no maintenance and preservation records available.”⁷³⁷ Further, “[t]he constant exposure of critical

⁷³¹ Hearing on the Merits Transcript, Day 1, 117:13-17.

⁷³² Hearing on the Merits Transcript, Day 1, 117:18-118:3.

⁷³³ Hearing on the Merits Transcript, Day 1, 118: 10-18.

⁷³⁴ Hearing on the Merits Transcript, Day 1, 118:20-119:1.

⁷³⁵ Hearing on the Merits Transcript, Day 1, 119:11-18.

⁷³⁶ Hearing on the Merits Transcript, Day 1, 120: 4-6.

⁷³⁷ Hearing on the Merits Transcript, Day 1, 120: 18-21, referring to Exhibit C-38, Attachment 11 “PPA Tariff Analysis Report”, at 2.

equipment to salt water moisture without operation has resulted in major operation risk.”⁷³⁸ The Respondent goes on to quote several passages from the 2007 tariff analysis that speak to the decrepit state of the Barge in 2007,⁷³⁹ asserting that the Tribunal is now placed in a position “to decide an unjust enrichment claim based upon an incomplete presentation of equipment in a saltwater environment, with not only Ansaldo but Balkan itself telling you exactly what that environment can do, and with Balkan telling you why you need records that show that the equipment has been maintained pursuant to the manufacturer’s specifications”.⁷⁴⁰

515. The Respondent submits that on several occasions it sought to conduct site inspections at the Barge during 2008 and 2009, but “were either put off or they were denied or they were given limited access or they were unable to verify”.⁷⁴¹ The Respondent’s following line of argument appears to request that the Tribunal draw an adverse inference from the Claimant’s inability to furnish test results on the critical systems on the Barge – “the only reason that you don’t provide tests and that you don’t allow site visits and that you don’t agree to an independent person coming in to look is because you don’t have the tests, you can’t support the claim, you have something to hide”.⁷⁴²
516. The Respondent also points to ProEnergy’s daily reports (*e.g.* partially excerpted above in the Facts section), arguing that “those documents actually show how this commissioning effort went wildly astray from the start.”⁷⁴³
517. Finally, in its Post-Hearing Submission, the Respondent makes reference to a recent decision of the Supreme Court of Ghana,⁷⁴⁴ which provides that a contract that has been declared *void ab initio* for breach of a constitutional provision cannot create any rights, therefore precluding the grant of any restitutionary remedy.⁷⁴⁵

⁷³⁸ Hearing on the Merits Transcript, Day 1, 121:7-9, referring to Exhibit C-38, Attachment 11 “PPA Tariff Analysis Report”, at 2.

⁷³⁹ See Hearing on the Merits Transcript, Day 1, 121-123; Exhibit C-38, Attachment 11 “PPA Tariff Analysis Report”.

⁷⁴⁰ Hearing on the Merits Transcript, Day 1, 124:6-12.

⁷⁴¹ Hearing on the Merits Transcript, Day 1, 124:24-25.

⁷⁴² Hearing on the Merits Transcript, Day 1, 127:19-23.

⁷⁴³ Hearing on the Merits Transcript, Day 1, 128:19-20; for more detail on Respondent’s account of what went wrong see 128:21 *et seq.*

⁷⁴⁴ *Amidu v. Attorney General, Waterville Holdings, et al.*, No. JI/15/2012, 14th June 2013

⁷⁴⁵ Respondent’s Post-Hearing Submission, para. 170.

(d) **The Tribunal's Findings on Unjust Enrichment**

518. The fact that both Parties agree on the definition of unjust enrichment is helpful to the Tribunal as this is a concept that has lent itself to many interpretations some of which are imprecise. The essence of the concept is thus that a benefit has been conferred on the other party without compensation and where such compensation would be reasonably expected.
519. The Claimant's justification for its alternative claim on unjust enrichment is based on the premise that if the PPA is declared null and void then the Respondent would have been as a consequence unjustly enriched in the amount of money expended on the Barge. Restitution of such money would then be the appropriate remedy under the principle of failure of consideration. The fact of the matter, however, is that the Tribunal has found above that the PPA is "valid" and creates obligations for the Parties. Moreover, in the Respondent's view, no such benefit could have been received as the Power Station remains unfinished and incapable of generating energy. As the Tribunal has found above on the issue of testing and commissioning of the Power Station there is indeed no production capacity at present and accordingly no power is being delivered to Ghana. Were this a consequence of the Respondent's failure to comply with its obligations under the PPA, particularly in terms of grid connectivity, a benefit would have been readily identifiable, but the ultimate reason for this failure lies not fully with the Respondent.
520. The Parties are in any event in disagreement about the calculation and amount of damages. While the Claimant estimates such damages in excess of US\$ 40 million, the Respondent believes that the expenses were at most one half of that amount as many invoices submitted were questioned in the ProEnergy Litigation by Claimant itself, while other invoices are not related to the commissioning of the Barge. The Respondent has rightly noted in this respect that the evidence must be specifically related to the benefit conferred and not simply to the addition of expenses. The Parties have also disputed whether there was any proper maintenance of the systems on the Barge, which as the Tribunal has also found above was in the best of cases minimal and could hardly be considered as conferring a benefit to the Respondent. Requests for site inspections were not successful in many cases and thus the possibility of ascertaining the state of maintenance and repair has also remained in doubt.
521. While the Tribunal considers that this alternative claim suffers from a partial lack of proof of benefit conferred, this does not mean that damages are to be ruled out in the light of the fact that the Respondent also has responsibility for not having complied fully and timely with its obligations under the PPA concerning site electricity, grid connectivity and other matters. In

such case, however, damages are the consequence of liability for contract breach. The question of damages in this other context will be considered below but the Tribunal must note that Respondent's invocation of a recent decision of the Supreme Court of Ghana, establishing that a contract declared *void ab initio* for breach of a constitutional provision cannot create any rights, and therefore precludes the grant of any restitutionary remedy, is not to be sustained, partly because no such nullity was found by the Tribunal and partly because rights can even be created in such circumstances if the Government bears responsibility for such breach, as is the case here.

3. Fraud or Deceit

(a) The Test

522. The Claimant submits that the tort of deceit provides a civil remedy for a party who has relied on a false representation where the following elements of the tort are made out:

1. A party has made a representation to another party which is false;
2. The first party making the representation knew that it was false or was reckless as to the truth of the statement;
3. There was an intention to deceive;
4. The representation was acted upon; and
5. Loss is suffered as a consequence.⁷⁴⁶

523. The Claimant submits that this common law test for deceit is reflected in Article 162 of the DCCP, as well as in Ghanaian law by virtue of Article 11(1) of the Constitution.⁷⁴⁷

524. The Respondent does not contest the Claimant's characterization of the test for deceit.

(b) The Claimant's Position

525. The Claimant contends that it was "induced" to enter into the PPA based on its reliance on the representations provided by the then Attorney General, Mr. Ghartey, in two legal opinions dated 26 October 2007, in which he stated that Ghana had the power to enter into the PPA and Lease

⁷⁴⁶ Statement of Claim, para. 373; *Cavel USA Inc. v. Seaton Insurance Co.*, [2008] EWHC 3043 (Comm.); *Bradford Building Society v. Borders* [1941] 2 All E.R. 205, at 211; *R.F.V. Heustons Salmond on the Law of Torts*, 17th ed. ("**Salm**ond"), at 387, para. 140.

⁷⁴⁷ Statement of Claim, paras. 371-372; Article 162, Book 6 of the Dutch Civil Code.

of the Project Site.⁷⁴⁸ The Claimant further asserts that Ghana's conduct from 2007-2009 "represented and implied that BE[L] ... had a valid agreement going so far as to fix and demand BE[L] ...'s performance thereunder."⁷⁴⁹

526. The Claimant thereby contends that it is entitled to damages in the amount it would have received under the PPA or, alternatively, the amount it has actually spent on the Barge project.⁷⁵⁰

527. In its Reply, the Claimant asserts that the PPA "gave rise to an implied warranty or express obligation on the part of the Respondent", including the warranty that, under Clause 7.2(i) of the PPA, it "supply to BE[L] 'issuance of a letter from the Government of Ghana that all required approvals from the relevant authorities in Ghana had been obtained'".⁷⁵¹ Further, under Clause 2.6 of the PPA, the Claimant submits that the Respondent "obligated itself to promptly facilitate the acquisition of all government approvals for the project."⁷⁵²

528. The Claimant asserts that, despite these implied condition precedents at the charge of the Respondent, it understands the Respondent's position to be that "its Attorney General made a legal mistake of a matter of first impression ... and accordingly, no liability can attach." The Claimant further alleges that the Respondent has failed to present any other evidence that it indeed undertook steps to obtain the necessary Constitutional approval.⁷⁵³ In its Post-Hearing Submission, the Claimant makes reference to the testimony of Ms. Gadzekpo, who according to the Claimant impliedly confirmed that the Respondent made a deliberate decision not to seek parliamentary approval of the BEL PPA.⁷⁵⁴

529. The Claimant argues that to the extent that the Respondent contends that the Attorney General's opinion letters were not a warranty, the content of those letter constitute a statement of fact.⁷⁵⁵

⁷⁴⁸ Statement of Claim, para. 374; Notice of Arbitration, Exhibit 8: (1) "Operationalising the Osayefo Barge, Legal Opinion by the Attorney - General, 26 October 2007"; (2) "Legal Opinion, Power Purchase Agreement Between the Government of Ghana and Balkan Energy (Ghana) Limited, 26 October 2007"; Interim Award, para. 37.

⁷⁴⁹ Statement of Claim, para. 374.

⁷⁵⁰ Statement of Claim, para. 377.

⁷⁵¹ Reply, para. 156.

⁷⁵² Reply, para. 156.

⁷⁵³ Reply, para. 157.

⁷⁵⁴ Claimant's Post-Hearing Submission, para. 139. The Claimant does not refer to the page of the Hearing Transcript where this statement is made.

⁷⁵⁵ Reply, paras. 158-160; *Smith Land & House Property Corp.*, 1884, 28 Chancery Division 7.

The Claimant further submits that “U.K. law has long-recognized that matters of opinion that are reduced to warranties under a contract are actionable.”⁷⁵⁶

(c) The Respondent’s Position

530. The Respondent is of the view that the Claimant’s claims for fraud and deceit fail for the following two reasons.⁷⁵⁷ First, the Respondent argues that the former Ghanaian Attorney General’s opinion regarding the interpretation of Article 181(5) of the Constitution is not actionable as a matter of law.⁷⁵⁸ The Respondent also draws attention to Clause 31 of the PPA, in which the Parties acknowledge that in executing the PPA, each party “has relied solely on its judgment, belief, and knowledge, and such advice as it may have received from its own counsel and it has not been influenced by any representation or statements made by any other party or such party’s counsel”.⁷⁵⁹
531. In further support for its assertion that the Claimant’s alleged reliance on the opinion of the former Attorney General is of no consequence in this arbitration, the Respondent relies on the following authorities: *Airmotive Engineering Corp. v. United States*,⁷⁶⁰ *Tuffuor v. Attorney-General*,⁷⁶¹ *Attorney-General v. Faroe Atlantic Co. Ltd.*,⁷⁶² *United States v. Marine Shale Processors*,⁷⁶³ and *Rhyl Urban DC v. Rhyl Amusement Ltd.*⁷⁶⁴
532. Second, and in the alternative, the Respondent submits that “even if the Claimant were entitled to rely upon the opinion of the Attorney General, an action for deceit will not lie absent a showing that the Attorney General issued his opinion knowing it to be false at the time it was

⁷⁵⁶ Reply, para. 158; *Esso Petroleum Co., Ltd. v. Phillip Lionel Marden*, 1976 EWC Cov. 4 (6 February 1996).

⁷⁵⁷ Statement of Defense, para. 156.

⁷⁵⁸ Statement of Defense, para. 157; John Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, 56 n. 82 (2007): “the mistake or misrepresentation of the legal effect of an agreement might well continue not generally to be actionable since normally a party should take his own advice on the matter.”

⁷⁵⁹ Statement of Defense, para. 157; Clause 31 of the PPA; *see also* Respondent’s Post-Hearing Submission, para. 195.

⁷⁶⁰ *Airmotive Engineering Corp. v. United States*, 535 F. 2d 8, at 11 (Ct. Cl. 1976).

⁷⁶¹ *Tuffuor v. Attorney-General* [1980] G.L.R. 147, at 157.

⁷⁶² *Attorney-General v. Faroe Atlantic Co. Ltd.* [2005-2006] SCGLR 271, at 306.

⁷⁶³ *United States v. Marine Shale Processors*, 81 F. 3d 1329, at 1348 (5th Cir. 1996).

⁷⁶⁴ *Rhyl Urban DC v. Rhyl Amusement Ltd.* [1959] 1 W.L.R. 465, at 466 (citing *Westminster City Council v. Haywood (No. 1)*, [1998] Ch. 377, at 393).

made”, which it submits the Claimant has not shown.⁷⁶⁵ (The Respondent further emphasizes that the former Attorney General’s opinion was in line with the opinion of the Claimant’s current Ghanaian counsel.)⁷⁶⁶

533. In its Rejoinder, the Respondent contends that the Claimant’s “recast[ing]” of its fraud or deceit claim as one under the PPA for “implied warranty or express obligation”⁷⁶⁷ fails for four reasons.⁷⁶⁸ First, the Respondent reiterates its assertion that Claimant’s claims fail because the PPA is void *ab initio* as a result of the Supreme Court Judgment.⁷⁶⁹

534. Second, the Respondent argues that Clause 20 is the only provision of the PPA that refers to a “warranty” of any kind between the parties and in that clause it is only the Claimant that warrants to do certain things.⁷⁷⁰

535. Third, the Respondent draws attention to Clause 31 of the PPA, regarding “Joint Effort and Confidentiality”, which it argues “makes clear that Balkan was not entitled to rely upon the opinion of the Attorney General,” as each party acknowledges that it has relied solely on its own judgment in entering into the PPA.⁷⁷¹

536. Fourth, and finally, the Respondent reiterates its assertion that the Attorney General’s opinion is “not actionable as a matter of law”.⁷⁷²

(d) The Tribunal’s Findings Concerning the Claim for Fraud or Deceit

537. Again in this matter the Parties have agreed on the definition of fraud or deceit. The Tribunal has no reason to depart from the test stated and the essential characteristics that fraud or deceit involves a deliberate misrepresentation of the truth or the facts so as to induce another party to act to its detriment. Because the Tribunal has held the PPA does impose obligations on the parties thereto, a claim in the alternative to a finding of liability as a consequence of its breach does not have legal support.

⁷⁶⁵ Statement of Defense, para. 159.

⁷⁶⁶ Statement of Defense, para. 159.

⁷⁶⁷ Reply, para. 155.

⁷⁶⁸ Rejoinder, para. 156.

⁷⁶⁹ Rejoinder, para. 156; *see also* Respondent’s Post-Hearing Submission, para. 195.

⁷⁷⁰ Rejoinder, para. 156.

⁷⁷¹ Rejoinder, para. 156.

⁷⁷² Rejoinder, para. 156; *see also* Statement of Defense, paras. 156-158.

538. Even if this were not the case, it would hardly be conceivable that the two opinions of the Attorney General issued at the time of the negotiation of the PPA were done with the deliberate intention of misrepresenting the law or the facts to the Claimant. There is indeed no evidence of this and none has been argued by the Claimant. The two opinions were indeed relevant to the Claimant's decision to finalize the negotiation of the PPA and so was the continuing conduct of the Respondent to consider the PPA as a valid agreement. Accordingly, the Respondent's understanding that it had obtained all required approvals from the relevant authorities as provided for under Clause 7. 2 (i) of the PPA, and the commitment under Clause 2.6 that the Government would promptly facilitate the acquisition of all government approvals for the project, are devoid of any intention to commit fraud or deceit. At the most, as the Respondent maintains, it could be considered a legal mistake but not an intentional misrepresentation of the law or the facts.
539. The Respondent has also called attention to Clause 31 of the PPA in which each party acknowledges to have relied solely on the advice of its own counsel and has not been influenced by the opinions or statements of the other party or its counsel. The Tribunal does not understand this Clause to mean that the Parties could not have relied on the opinions of public officials or entities entrusted with the role of determining legal matters involved in their transactions. Neither do the allegations concerning implied warranties or express obligations alter the validity of the Government's legal officers' opinions. The Respondent maintains that the Attorney General's opinion on interpretation of the Constitution is not actionable as a matter of law, and that in any event the PPA is void as a result of the Supreme Court judgment. However, the Tribunal does not consider that this is the case, especially where the rights of investors are affected by such an opinion.

4. False Arrest

(a) The Test

540. The Claimant submits that "[f]alse arrest or false imprisonment is the act of arresting or imprisoning any person without lawful justification, or otherwise preventing him from exercising his right of leaving the place where he is."⁷⁷³ A defendant may be held liable in

⁷⁷³ Statement of Claim, para. 379; Salmond, at 123.

Ghana for this charge if it authorized or directed a particular arrest.⁷⁷⁴ The Respondent does not contest the Claimant's characterization in this regard.

(b) The Claimant's Position

541. The Claimant asserts that, shortly after it initiated this arbitration, the Respondent "had Tim Everhart, the General Manager of BE[L] ... arrested, stripped to his underwear, placed in jail, not allowed to contact an attorney, and initially not allowed to contact the American Embassy".⁷⁷⁵ Mr. Everhart was arrested on the suspicion that he was stealing the DCS from the Power Station.⁷⁷⁶ The Claimant contends that Mr. Everhart was merely directing the movement of BEL's own DCS from the Barge to a locked air-conditioned administrative office elsewhere on the Project Site.⁷⁷⁷ The Claimant further asserts that the "timing of the arrest ... on such frivolous grounds readily shows that it was in retaliation for BE[L] ... filing ... the arbitration proceedings".⁷⁷⁸ The Claimant argues that the arrest had a "chilling effect" on other BEL employees.⁷⁷⁹
542. The Claimant's Reply does not address the points raised by the Respondent in its Statement of Defense, described below.
543. In its Post-Hearing Submission, the Claimant cites the *Mogotey v. Asare* case,⁷⁸⁰ which details the factors to be taken into account in awarding general damages for false imprisonment. According to the Claimant, "substantial damages might be awarded for the injury to the plaintiff's dignity, discomfort or inconvenience even where there has been neither physical injury nor loss of pecuniary damages. The time, place and manner of the trespass and the conduct of the defendant might be taken into account."⁷⁸¹

⁷⁷⁴ Statement of Claim, para. 379; *Adejumo v. Abegunde* [1965] G.L.R. 499; *Yaw v. Bekoe* [1934] Div. Ct. 31-37, at 79.

⁷⁷⁵ Statement of Claim, para. 378.

⁷⁷⁶ Statement of Claim, para. 378.

⁷⁷⁷ Statement of Claim, para. 380.

⁷⁷⁸ Statement of Claim, para. 380.

⁷⁷⁹ Statement of Claim, para. 381.

⁷⁸⁰ *Mogotey v. Asare*, 2 GLR 77 (1989-90).

⁷⁸¹ Claimant's Post-Hearing Submission, para. 132.

(c) The Respondent's Position

544. The Respondent submits that the Claimant's claim for false arrest should be dismissed on the following three grounds. First, the Claimant has no standing to assert such a claim on behalf of Mr. Everhart, and does not refer to any legal authority to support its right to do so.⁷⁸²
545. Second, the Respondent contends that even if Mr. Everhart chose to pursue a personal claim, he is not a party to the Arbitration Agreement at issue in this arbitration, thus the Tribunal lacks jurisdiction in this regard.⁷⁸³
546. Third, Ghana's Bureau of National Investigation (the "BNI") had just cause "to believe that key equipment necessary for the operation of the Power Station was being removed from the premises" and, accordingly, "the officer acted under proper authority to make the arrest based upon his reasonable suspicion that property was being removed, or about to be removed".⁷⁸⁴
547. In its Rejoinder, the Respondent notes that the Claimant's Reply does not address any of the points the Respondent raised in its Statement of Defense, except to provide further statements from Messrs. Berkenbile and Everhart regarding the latter's arrest.⁷⁸⁵ The Respondent also relies on the Witness Statements of Messrs. Moro Adama and Reuben Yao Dugah, which purportedly shed further light on the events related to Mr. Everhart's arrest.⁷⁸⁶
548. In its Post-Hearing Submission, the Respondent notes that at the hearing the Claimant did not address the Respondent's argument that the Claimant lacks standing to assert a claim of false arrest on behalf of Mr. Everhart, nor did it introduce any evidence.⁷⁸⁷

(d) The Tribunal's Findings on False Arrest

549. In respect of this claim the Parties have also not disagreed on the definition of what constitutes false arrest but have strongly disagreed about the facts of the Claimant's allegations. It is an established fact, however, that officers of the Bureau of National Investigation arrested Mr. Tim Everhart, BEL's General Manager, shortly after the initiation of this arbitration. Mr. William

⁷⁸² Statement of Defense, para. 161.

⁷⁸³ Statement of Defense, para. 162.

⁷⁸⁴ Statement of Defense, para. 163.

⁷⁸⁵ Rejoinder, para. 157.

⁷⁸⁶ Rejoinder, para. 157.

⁷⁸⁷ Respondent's Post-Hearing Submission, para. 196.

Berkenbile was also detained on this occasion. Although the treatment Mr. Everhart received on being arrested has been to an extent disputed, it is also a fact that he was placed in jail, and was unable to contact an attorney and was without access to the United States consular official or some other official that could have intervened at that point.

550. The Respondent's explanation for this arrest was the BNI's suspicion that Mr. Everhart was removing or about to remove the DCS equipment from the Power Station, and that in any event the officer in charge acted under proper authority. The Claimant has disputed this assertion maintaining that Mr. Everhart was merely directing the movement of BEL's own DCS to a different location on the Project Site. The evidence on the circumstances of the arrest is not quite clear. While the witness statements of Messrs. Moro Adama and Reuben Yao Dugah reiterate the facts as explained by the Respondent, the Tribunal is not convinced that on moving the equipment there was any intention to illegitimately appropriate the equipment.
551. In addition, the Tribunal is uncomfortable with the fact that this arrest took place at a time that gives credibility to the Claimant's assertion that it was in retaliation for the Claimant filing the arbitration. Even though there is no specific evidence to link these two facts the mere circumstance that they coincided in their timing does not allow the Tribunal to reject the Claimant's allegations. It should also be noted that the assertion by the Respondent's witness that the officers involved had been instructed by their superiors in Accra and were therefore acting under proper authority⁷⁸⁸ necessarily rules out that this was the result of a mistake of an uninformed local officer.
552. Irrespective of this coincidence in time, it is equally regrettable that the arrests took place at all and in conditions that do not appear to have duly taken into account the rights of the accused or their dignity. The Claimant's reliance on the *Mogotey v. Asare* case as authority for the award of general damages for false imprisonment and the injury sustained by the affected persons in terms of his dignity, discomfort or inconvenience, even in the absence of physical injury or pecuniary loss, appears to the Tribunal to be a powerful statement of the law and is also reasonable.
553. The Tribunal will accordingly take these considerations into account on determining the issue of damages. In the view of the Tribunal, when the normal conduct of business is affected by such an arrest the question is no longer one that involves a personal claim by the person concerned. It is the business as a whole that suffers the consequences. The Respondent's assertion that

⁷⁸⁸ Hearing on the Merits Transcript, Day 6 (Cross-examination of Moro Adama), 136:13-137:25.

Mr. Everhart has no standing in this arbitration because he is not a party to the arbitration agreement will accordingly not be sustained by the Tribunal because what is at issue here is not only the personal inconvenience of the person arrested but also the interference with the ordinary conduct of the business of the Claimant. The Tribunal cannot disregard either of these considerations.

5. Conversion and Trespass

(a) The Test

554. The key elements of the tort of conversion are as follows:

1. Possession of good to which the defendant is not the owner; and
2. An intent to deny the owner's right or assert an inconsistent right.⁷⁸⁹

The Claimant submits that "even a temporary taking can constitute a conversion."⁷⁹⁰

555. The Claimant further submits that trespass "is defined as the immediate and authorized direct interference with another's goods". To prove trespass, a deliberate interference with another's goods must be established.⁷⁹¹

556. The Respondent does not object to the definitions and corresponding tests for conversion and trespass, respectively, set out by the Claimant.⁷⁹²

(b) The Claimant's Position

557. The Claimant contends that the Respondent seized the DCS from the Project Site and detained it for approximately five months.⁷⁹³ Without the DCS, the Claimant alleges that it could not control and operate the Power Station.⁷⁹⁴ The Claimant further alleges that the seizure compromised the integrity of the DCS, such that it could not be used after its return because the Claimant "had no way to ensure the integrity and safety of the programming on the DCS after it

⁷⁸⁹ Statement of Claim, para. 383; Salmond, at 95.

⁷⁹⁰ Statement of Claim, para. 383; Salmond, at 96.

⁷⁹¹ Statement of Claim, para. 384; Salmond, at 91.

⁷⁹² Statement of Defense, para. 150, referring to Statement of Claim, para. 367.

⁷⁹³ Statement of Claim, para. 382.

⁷⁹⁴ Statement of Claim, para. 382.

had been out of its possession".⁷⁹⁵ As a result, the Claimant argues that the Respondent's seizing of the DCS constitutes both a conversion and a trespass of the Claimant's rights in the DCS, which it asserts will cost USD 2.586 million to replace.⁷⁹⁶

558. The Claimant's Reply does not address the Respondent's arguments, described below. The Claimant's Post-Hearing Submission largely reproduces the arguments submitted in the Statement of Claim and adds a reference to the *Standard Chartered Bank* case, which provides a criterion to quantify the damages for trespass to goods.⁷⁹⁷

(c) The Respondent's Position

559. The Respondent asserts that the Claimant's claims for conversion and trespass fail as a matter of law under the applicable legislation in Ghana. In support, the Respondent refers to Section 94 of Ghana's Criminal Procedure Code, 1960 (Act 30), which empowers a police officer to seize, without a warrant, any property which he or she has reasonable cause to believe has been stolen.⁷⁹⁸ The Respondent also refers to Section 40 of the Security and Intelligence Agencies Act, 1996 (Act 526), which it says "gives officers of the BNI the same powers as those conferred on the police".

560. The Respondent further asserts that the Claimant's admitted attempt to remove the DCS from the Barge indeed "supports what BNI was told, [namely] that essential systems were being removed from the Power Station".⁷⁹⁹

561. The Respondent also notes that, as of late December 2009, the Claimant ceased all its efforts on the Barge.⁸⁰⁰ As a result, the Respondent submits that it had reasonable cause to believe that BEL "took the DCS ... from the Control System with the idea of removing it from the Project Site altogether, thus making it impossible for the Government to operate the Barge should Balkan lose the arbitration or abandon the site".⁸⁰¹

⁷⁹⁵ Statement of Claim, para. 382.

⁷⁹⁶ Statement of Claim, para. 386.

⁷⁹⁷ Claimant's Post-Hearing Submission, para. 134.

⁷⁹⁸ Statement of Defense, para. 165.

⁷⁹⁹ Statement of Defense, para. 166.

⁸⁰⁰ Statement of Defense, para. 167.

⁸⁰¹ Statement of Defense, para. 167.

562. With respect to the Claimant's assertion that the DCS was of questionable integrity upon its return, the Respondent points out that the Claimant "could have tested the system as it requested both ABB and Taurus to do in 2008".⁸⁰²
563. In its Rejoinder, the Respondent notes that the Claimant does not address this claim in its Reply, "presumably recognizing that the claim fails as a matter of law".⁸⁰³ The Respondent makes a similar observation in its Post-Hearing Submission, arguing that the Claimant did not introduce any new evidence or presented any new argument at the hearing.⁸⁰⁴

(d) The Tribunal's Findings Concerning Conversion and Trespass

564. The final alternative claim concerns Claimant's allegation of conversion and trespass on the part of the Respondent. Again here there is no disagreement between the Parties as to the meaning of these concepts. It is an established fact that the Respondent seized the DCS equipment at the at the time of the arrests discussed above. Whether this happened at the Project Site as argued by the Claimant or elsewhere is immaterial as it is also a fact that the Respondent kept this equipment for a period far too long to that needed to investigate who was the owner. It must be recalled that the reason offered by the Respondent for the arrests was that Mr. Everhart was removing property that did not belong to him or to BEL. The Claimant maintains that the DCS was kept by the Respondent for approximately five months. The precise period during which the Respondent retained the DCS is not clear but what is clear is that the equipment was tampered with to an extent that has no connection to the determination of the ownership of the equipment. This was most likely not done by the local police or investigative officers but by some institution higher up in the chain of command.
565. The Claimant's argument to the effect that it could not control and operate the Power Station without the equipment is formally true but as the Tribunal has found that the Power Station was nowhere close to completion the equipment could hardly have been a factor for the operation of the Power Station at the time. What is nonetheless convincing is the Claimant's assertion that manipulation of the equipment compromised its integrity and safety as its programming functions could no longer be relied upon. It is true that the Claimant could have tested the

⁸⁰² Statement of Defense, para. 168; Exhibit R-31: "Email from Scott Kinney to J.D. Robinson, Re: Osagyefo Power Barge"; Exhibit R-28: "ABB, Survey Intervent System Offshore GTPP in Ghana"; Exhibit R-29: "ABB, S/S Barge – Effasu 161 kV (Ghana), Retrofit plan for Protection and Control System, Technical Description".

⁸⁰³ Rejoinder, para. 158.

⁸⁰⁴ Respondent's Post-Hearing Submission, para. 194.

equipment as the Respondent argues but the fact of the matter is that confidence in its proper functioning could not be reestablished after such manipulation. The Claimant puts the replacement cost at USD 2.586 million. The Tribunal will discuss this damage further below with particular reference to the time period in which damages might be compensable.

566. The Respondent has argued in its defense that under the Ghanaian Code of Criminal Procedure a police officer is empowered to seize property without a warrant when it believes that it has been stolen or dishonestly received. Even if this had been the case, there still would be no justification for keeping the equipment for such a prolonged period of time. In the view of the Tribunal, the suggestion that BEL was attempting to remove the equipment to make it impossible for the Government to operate the Barge in case the arbitration was lost or Claimant abandoned the site is not credible. It appears to be a farfetched proposition without any supporting evidence.

H. THE RESPONDENT'S COUNTERCLAIM

567. The Respondent originally advanced two counterclaims in this arbitration: first, that the Claimant has breached the PPA; and second, that the Claimant made several material misrepresentations to it regarding its experience and capability of operating liquid/gas fired power plants and that it could commission the Power Station within ninety (90) working days of the Effective Date of the PPA.⁸⁰⁵ As noted above, the second counterclaim was withdrawn. Accordingly, the Tribunal will in the following only address the first counterclaim, which it is called to decide upon.

1. The Respondent's Position

568. If the Tribunal determines that the PPA is enforceable, notwithstanding the Supreme Court Judgment that it is void *ab initio*, the Respondent requests that the Tribunal declare the Claimant in default, terminate the PPA, and award the Respondent damages in the amount of USD 300,000 for breach of contract, pursuant to Clause 14.2 of the PPA.⁸⁰⁶

⁸⁰⁵ Statement of Defense, para. 173; *see also* paras. 28, 33; Exhibit C-38, Attachment 6: MOU; Attachment 7: Proposal.

⁸⁰⁶ Rejoinder, para. 159; *see also* Statement of Defense, paras. 170-172.

569. The Respondent reiterates that the Claimant was required to complete the commissioning of the Power Station by March 2008.⁸⁰⁷ The Respondent asserts that at no time did the Government declare a default or implicitly extend this March date under Clause 7.3 of the PPA in response to the Claimant's claims regarding site electricity.⁸⁰⁸ The Respondent emphasizes that the Claimant represented that it could complete the commissioning process within thirty days of connecting to the National Grid;⁸⁰⁹ however, this did not occur, even after the Respondent says it energized the Essiama and Elubo Transmission Lines, on 8 August 2008 and 13 November 2008, respectively.⁸¹⁰ Based on the foregoing, the Respondent asserts that the Claimant "could, and should, have completed its commissioning work and been ready for Final Performance Testing within thirty (30) days of either of those lines being energized".⁸¹¹ The Respondent purports that the Claimant, "by its own admission", "was still months away from even being able to fire the turbines" and, moreover, did nothing to make the Barge operational in 2009.⁸¹²

2. The Claimant's Position

570. The Claimant does not respond to the Respondent's counterclaim, save to assert that "the Respondent sets forth no precedent or legal authority to enunciate for the Tribunal the elements of proof for the referenced claims, nor an enumeration of the evidence it has adduced that could be claims to establish that element under the use at trial rule."⁸¹³

3. The Tribunal's Findings on Respondent's Counterclaim

571. The Respondent's remaining counterclaim concerns the alleged breach of the PPA by the Claimant. This counterclaim is also made in the alternative, as it can only stand in case the Tribunal finds the PPA to be enforceable, contrary to Respondent's main argument that the PPA is void *ab initio*. This is indeed what the Tribunal has found in this case.

⁸⁰⁷ Rejoinder, para. 159; *see also* Statement of Defense, para. 171, wherein the Respondent argues that "Balkan has failed to commission the Power Station within 150 working days after the Effective Date, even assuming, for sake of argument, that the Completion Date were extended based upon delays attributable to site electricity or the Transmission Lines."

⁸⁰⁸ Rejoinder, para. 159.

⁸⁰⁹ Rejoinder, para. 159; Exhibit C-38, Attachment 106: "BE[L] letter re: Commissioning Project"; Attachment 116: "BE[L] re: lack of grid connectivity"; Attachment 118: "BE[L] letter re: Grid Connectivity".

⁸¹⁰ Rejoinder, para. 159.

⁸¹¹ Rejoinder, para. 159.

⁸¹² Rejoinder, para. 159.

⁸¹³ Reply, para. 161.

572. The Respondent requests that in that case the Tribunal should declare that the Claimant is in default, terminate the PPA and award damages in the amount of USD 300,000 for breach of contract as provided for under Clause 14.2 of the PPA. The Claimant has not argued in response to this counterclaim although it points to the lack of evidence in support thereof.

573. Technically the Claimant is in default as it did not complete the final testing and commissioning of the Power Station by March 2008 or at any relevant time thereafter, nor was the date extended. But the situation was more complex than that. First there were objective problems concerning the availability of site electricity and the connectivity to the National Grid. While many such problems were gradually redressed and as discussed above were not the determinative cause for the non completion of the Power Station, still they represent a partial breach of the Respondent's obligations under the PPA. It would thus be inappropriate for the Tribunal to declare the default of one party in circumstances that both did not adequately or fully complied with the terms and obligations of the PPA.

4. Liability and Termination of the PPA

574. From the discussion of the facts and the legal arguments set out above the Tribunal can only conclude that both Parties are liable for breach of the PPA. The Claimant is liable for not having completed the testing and commissioning of the Power Station for reasons that are independent of the Respondent's breach of its own obligations. The latter breaches relate not only to the absence of site electricity and connectivity to the National Grid but also to the questions of false arrest, conversions and trespass and other issues that have been discussed. Although in the end the breaches by both Parties made the process of commissioning more difficult the respective liabilities are of a different kind, intensity and extent. These considerations will be next taken up by the Tribunal in determining damages.

575. When all the elements involved in this dispute are considered in the aggregate it becomes evident for the Tribunal that the PPA no longer serves a purpose and is incapable of governing the relations between the Parties so as to ensure its objectives. A decision of the Tribunal requiring enforcement of the PPA and strict compliance with its terms would, far from settling the dispute, give rise to continuing confrontation between the Parties. In this light the Tribunal's determination that the PPA is valid is accompanied by the final determination that in the circumstances it is nonetheless not enforceable.

576. The Tribunal accordingly finds that the termination of the PPA is the only reasonable alternative in the light of the extraordinary circumstances of this dispute and the bitter confrontation

between the Parties, taking into account in particular that the PPA is a long term contract the implementation of which would require the active cooperation of the Parties. The essential purpose of the Project embodied in the PPA is thus unattainable.

577. The Tribunal notes that both Parties are in agreement about this consequence of the breach of the PPA, albeit for different reasons. Indeed, in its letter of 23 April 2013, relating to the submission on damages, the Claimant considers the PPA terminated as of 1 January 2014, the estimated date of the Tribunal's Award, due to non-performance by the Respondent going forward. The Respondent also requests the termination of the PPA in the context of its counterclaim.

578. The Tribunal has found the PPA valid, but in view of the Parties profound disagreement, it concludes that the PPA has become impossible to be enforced. The Tribunal therefore decides that the PPA be terminated as at the date of this Award, without prejudice to the questions of damages as discussed below.

VI. DAMAGES AND OTHER RELIEF SOUGHT BY THE PARTIES

579. Cumulatively or in the alternative, the Claimant seeks damages for Tolling Fees, repudiation damages, restitution, and incidental direct damages.⁸¹⁴ As set out above, the Respondent argues that the Claimant has failed to establish it is entitled to damages under any of the aforementioned heads of damages. The Tribunal will now assess the damages due as a consequence of its finding that both Parties have liability for breach of the PPA, albeit to a different extent. The Tribunal has found the PPA valid but, in view of the Parties profound disagreements, concludes that it has become unenforceable. It thus finds the PPA to be terminated.

A. TOLLING FEES

1. The Claimant's Position

580. The Claimant seeks damages for the Respondent's failure to pay Tolling Fees to it pursuant to Clause 11.9 of the PPA. The Claimant submits that Tolling Fees are ongoing. It provided a preliminary accounting of USD 146,938,050⁸¹⁵ calculated by Mr. Elders from November 2008

⁸¹⁴ Statement of Claim, paras. 337-341.

⁸¹⁵ This amount is confirmed by Claimant in its letter dated 23 April 2013, at 2.

through the date of his witness statement of October 2011 as Attachment 233 to Exhibit C-39, inclusive, with related monthly invoices to the Respondent at Exhibit C-52.⁸¹⁶

581. In its letter dated 23 April 2013, with attached calculations, the Claimant provided the Tribunal with a “skeleton of its presentation” on the amount of damages.⁸¹⁷ Therein, the Claimant asserts that it considers the PPA terminated as of 1 January 2014 due to non-performance by the Respondent going forward.⁸¹⁸ According to the Claimant, it follows that a distinction must be made between the period leading up to 1 January 2014 and the period thereafter.⁸¹⁹ While the Claimant did not previously calculate its damages in two distinct periods, the Tribunal notes that Exhibit C-38, Attachment 234 did contemplate Tolling Fees for the whole duration of the PPA term (20 years) under the heading of Repudiation Damages.⁸²⁰
582. The Claimant amended its preliminary accounting of the Tolling fees – USD 146,938,050 – on account of not including the interest rate under Article 11.6 of the PPA. Thus, “[u]p to 1 January 2014, the claim would amount to approximately USD 238,059,975, again excluding interest [see Sheet 1 of the attachment to this letter]. With interest, the claim up to 1 January 2013 would amount to USD 248,993,202.00 (see Sheet 2).”⁸²¹ In the alternative, the Claimant asserts that even assuming that the Respondent’s arguments as to the Claimant’s statements made in the ProEnergy case are afforded weight in the present arbitration, the damages under Article 11.9 of the PPA would still amount to USD 205,407,075 without interest (see Sheet 3 to the 23 April 2013 letter), and USD 213,510,647, including interest (see Sheet 4). The Claimant clarifies that these amounts reflect the “Tolling Fees due from 9 July 2009 (see C38: [Attachment] 157), which is the date that Ansaldo certified ‘Full Speed No Load’ and noted that Grid Connectivity is necessary for future commissioning milestones”.⁸²²

⁸¹⁶ Statement of Claim, para. 338; *see also* Rejoinder, para. 126, fn. 39: “Balkan calculates the Tolling Fees in the first invoice as follows: Total kilowatt hours (125MW x 31 days x 24 hours x 90% capacity): 83,700,000 x Fee/kWH: .0497 = USD 4,159,890/month. Balkan then added the Tolling Fees (adjusted only for the number of days in the month), from November 2008 through the date of Mr. Elder’s [witness] statement of October 2011, for a total of USD 146,938,050, reserving the right to supplement its request prior to the final hearing.”

⁸¹⁷ Claimant’s letter dated 23 April 2013, at 1.

⁸¹⁸ Claimant’s letter dated 23 April 2013, at 1.

⁸¹⁹ Claimant’s letter dated 23 April 2013, at 2.

⁸²⁰ Statement of Claim, para. 339.

⁸²¹ Claimant’s letter dated 23 April 2013, at 2. The same figures are reproduced in the Claimant’s Post-Hearing Submission, para. 126.

⁸²² Claimant’s letter dated 23 April 2013, at 2.

583. The numbers set out in Sheets 1 to 4, attached to the 23 April 2013 letter, appear to be updates of the Claimant's calculations submitted on 15 October 2011 so as to extend them to periods not covered in the written submissions. However, the figures presented on 23 April 2013 are annual amounts, whereas Exhibit C-38, Attachment 233 presents monthly amounts. Taking the overlapping period November 2008 to June 2011, the following is a summary of the amounts submitted by the Claimant in its 15 October 2011 and 23 April 2013 submissions:

	November 2008 – June 2009	July 2009 – June 2010	July 2010 – June 2011
Exhibit C-38, Attachment 233	USD 32,608,170	USD 48,979,350	USD 48,979,350
Letter of 23 April 2013, Sheet 1	USD 32,652,900	USD 48,979,350	USD 48,979,350

584. As for the period from 1 January 2014 onwards, in its 23 April 2013 letter, the Claimant submits that it is entitled to its return on investment over the period from 1 January 2014 until the end date of the PPA, which amount to almost 13 years (until 31 October 2027).⁸²³ In order to show what BEL's return on investment would be, the Claimant explains that "one should look into the PPA. Article 11.1(ii) thereof provides that the return on investment for Balkan would at least be 15% per year."⁸²⁴ Moreover, the Claimant asserts that, using BEL's Tariff Analysis, which was confirmed by the Respondent in its Inter-Ministerial Committee Report,⁸²⁵ "the investment under the PPA is clearly established by the Parties, being USD 140 million."⁸²⁶ According to the Claimant, "[t]he above leads to a damages amount, covering 15% over USD 140 million from 1 January 2014 until 31 October 2027, of USD 280,000,000.00. The Net Present Value thereof is USD 259,691,080.00, applying a discount rate of 1.45% (LIBOR + 1%) (see Article 11.6 of the PPA). See Sheet 5."⁸²⁷

585. Finally, in its 23 April 2013 letter, the Claimant contends that

[i]f one took the investment actually made today, amounting to USD 55 million (see Mr. N. Crouch's (supplement to the) Witness Statements), as a basis for the calculations, the return on investment would be USD 114,125,000.00, covering 15% over USD 55 million from 1

⁸²³ Claimant's letter dated 23 April 2013, at 2.

⁸²⁴ Claimant's letter dated 23 April 2013, at 2.

⁸²⁵ Exhibit C-38, Attachment 11 "Balkan's Tariff Analysis"; Exhibit R-90 "Inter-Ministerial Committee Report"; see also Exhibit C-38, Attachment 17, Letter from PURC, dated 9 July 2007.

⁸²⁶ Claimant's letter dated 23 April 2013, at 2.

⁸²⁷ Claimant's letter dated 23 April 2013, at 2; the same figures are reproduced in the Claimant's Post-Hearing Submission, para. 128.

January 2014 until 31 October 2027. The Net Present Value thereof would be USD 102,021,496.00, applying a discount rate of 1.45% (LIBOR + 1%). See Sheet 6.⁸²⁸

2. The Respondent's Position

586. The Respondent submits that the Claimant's claim for Tolling Fees under the PPA fails for three independent reasons.⁸²⁹ First, the Respondent states that because the PPA is void *ab initio*, the Claimant's claim for Tolling Fees created by that contract must also fail as a matter of law.⁸³⁰

587. Second, even if the PPA is valid, the Respondent contends that the Claimant has failed to demonstrate that it is entitled to Tolling Fees under Clause 11.9.

588. Third, the Respondent asserts that the Claimant's claim for Tolling Fees fails as an "unenforceable penalty" under the law of Ghana.⁸³¹ The Respondent explains that, unlike liquidated damages, the Tolling Fees are not a reasonable pre-contractual estimate of the Claimant's loss.⁸³² The Respondent argues that the Tolling Fees "are not in any way tied to Balkan's actual loss in the event of a breach by the Respondent. Accordingly, they are a penalty".⁸³³

589. The Respondent goes on to elaborate on the Ghanaian law governing penalty, followed by its reasoning for why the Tolling Fees are an unenforceable penalty, namely:

First, the Tolling Fees do not take into account the month operation and maintenance costs which Balkan would incur in operating the Power Station. The calculation of Tolling Fees is based on gross revenue, rather than net profits and actual damage.

Second, the Tolling Fees do not compensate for actual loss because they do not take into account the additional financial expenditures that Balkan would be required to make to complete the commissioning process or make the Barge operational.

Third, the Tolling Fees do not compensate for actual loss because they are speculative. The PPA calls for further upgrades and investments over the 20-year period of the PPA, as well as resets in the Tolling Fee to be negotiated between Balkan and the Government. (*See e.g.* PPA Clauses 2; 8; 11.1 and First Schedule.) A 20-year award for Tolling Fees would clearly be a penalty because it would not be conditioned upon (a) Balkan making the investments to perform those upgrades; (b) Balkan's actual performance in achieving these

⁸²⁸ Claimant's letter dated 23 April 2013, at 2.

⁸²⁹ Rejoinder, para. 123; Respondent's Post-Hearing Submission, paras. 165-168.

⁸³⁰ Rejoinder, para. 124.

⁸³¹ Rejoinder, para. 126.

⁸³² Rejoinder, para. 126.

⁸³³ Rejoinder, para. 126.

upgrades; (c) renegotiating rates; or (d) any other requirement of performance or expense by Balkan under the PPA.⁸³⁴

590. In the alternative, the Respondent argues that even if the PPA were enforceable, and even if the Claimant could demonstrate entitlement to Tolling Fees under Clause 11.9, “the Tribunal would still be required to reject Balkan’s claim for Tolling Fees for the next 20 years under Clause 11.9 as an unenforceable penalty under Ghanaian law”.⁸³⁵

591. In its Post-Hearing Submission, the Respondent elaborates further on the third reason why it believes that Claimant’s claim for Tolling Fees fails. According to the Respondent, the Claimant “is not entitled to Tolling Fees after April 2009 ... [as the Claimant’s] failure to install the RTU and connect to the Grid after receiving ABB’s RTU proposal in April 2009 precludes its claim for Tolling Fees under Clause 11.9 of the PPA from and after that date.”⁸³⁶

3. The Tribunal’s Findings Concerning Damages for Non-payment of Tolling Fees

592. The Tribunal has concluded that because no power was ever produced by the Power Station, irrespectively of the questions concerning site electricity and grid connectivity, no Tolling Fees are owed by the Respondent on this count. Payment would only be due under the PPA if power were actually supplied or the Power Station was ready to supply it but could not do so for failure of grid connectivity attributable to the Respondent. None of the requirements were met as the Power Station was never finally tested and commissioned because of the reasons that have been examined, which are independent of the failures of the Respondent in respect of the compliance of its own obligations under the PPA.

593. It follows that for the Tribunal to award damages to the Claimant in respect of Tolling Fees it would need to hold that the Power Station was ready for delivering power. The evidence, however, does not prove that such was the case. On the contrary, Claimant’s submission that Tolling Fees were due at the very least from 9 July 2009, the date Ansaldo certified the Power Station running at Full Speed No Load, fails because the Tribunal has not found this certification to be credible or even properly done. Grid connectivity, while indispensable at the end of the commissioning process, was not shown to have been the main reason for such failure although as also found it would have been preferable and helpful to that end. Even if all such

⁸³⁴ Rejoinder, paras. 130.1-130.3.

⁸³⁵ Rejoinder, para. 131.

⁸³⁶ Respondent’s Post-Hearing Submission, para. 168.

Respondent's obligations had been fully complied with, the Power Station would still not have been able to deliver power.

594. The Claimant also demands damages on account of a return on investment of at least 15% per year as from 1 January 2014, the estimated date of this Award, and until the end date of the PPA on 31 October 2027, as provided for under the PPA Clause 11.1(ii). Such minimum return assumes, however, that the Power Station will be in full operation during that considerable period of years, as otherwise there would be an unproductive investment which could hardly justify that return .

595. While the Respondent's argument that no Tolling Fees are owed as a consequence of the PPA being void *ab initio* is unsustainable in the light of the Tribunal's findings, there is some merit in the Respondent's view that Tolling Fees are not in any way tied to Balkan's actual loss in the event of a breach by the Respondent, and would thus amount to an unenforceable penalty under Ghanaian law. In fact, the Tribunal will find below that the Claimant is entitled to compensation because of Respondent's breach of obligations under the PPA, but that finding is independent of the claim for Tolling Fees.

B. REPUDIATION DAMAGES

1. The Claimant's Position

596. In addition, in the alternative to Tolling Fees, and/or to the extent it is determined that the Respondent has abandoned or wrongly terminated the PPA, the Claimant seeks repudiation damages, which it submits are "the discounted value of the total Tolling Fees that would otherwise be due under ... [Clause] 11.9" as is calculated in the "Contract Revenue calculation" provided at Attachment 234 to Exhibit C-38.⁸³⁷ The Claimant makes no express reference to any claim for repudiation damages in its Post-Hearing Submission.

⁸³⁷ Statement of Claim, para. 339.

2. The Respondent's Position

597. The Respondent submits that the Claimant's claim for Tolling Fees on the basis of repudiation also fails.⁸³⁸ First, the Respondent argues that because the PPA is void *ab initio*, there can be no claim for repudiation as a matter of law.⁸³⁹
598. Second, and in the alternative, the Respondent contends that even if the PPA were valid, a claim of repudiation does not exist given the Claimant's alleged failure to perform under the PPA.⁸⁴⁰ According to the Respondent, if anyone has repudiated the PPA, it is the Claimant.⁸⁴¹
599. Third, the Respondent asserts that the Claimant "cannot and does not show 'an absolute refusal [by the Government] to perform [its] side of the contract prior to the commencement of this Arbitration'"; a necessary element to a successful repudiation claim cited by leading contract law authorities.⁸⁴² The Respondent argues that "[t]o the contrary, the evidence shows that on August 8, 2008, the Government provided a Transmission Line to the Project Site expressly so that Balkan could complete the commissioning of the Power station and conduct Final Performance Testing."⁸⁴³
600. The Respondent further asserts that it was only after the Claimant commenced this arbitration that the Respondent sought, and obtained, the Supreme Court Judgment declaring the PPA unconstitutional and void *ab initio*.⁸⁴⁴ In this regard, the Respondent submits that "an application to the court to determine the validity of a contract or the obligation of the parties does not constitute repudiation."⁸⁴⁵ The Respondent emphasizes that even after obtaining the Supreme Court Judgment, it took no steps to enforce the Judgment pending the outcome of this arbitration.⁸⁴⁶

⁸³⁸ Rejoinder, para. 132.

⁸³⁹ Rejoinder, para. 133; *Attorney General v. Faroe* (full citation not provided).

⁸⁴⁰ Rejoinder, para. 133.

⁸⁴¹ Rejoinder, para. 139.

⁸⁴² Rejoinder, para. 134, fn. 46; *Freeth v. Burr* (1878) LR 9 CP 209, at 123, as cited in *Chitty on Contracts*, 30th ed., at 24-018.

⁸⁴³ Rejoinder, para. 135.

⁸⁴⁴ Rejoinder, para. 136; Witness Statement of Vivienne Gadzekpo, para. 4.

⁸⁴⁵ Rejoinder, para. 137; *Chitty on Contracts*, 30 ed., at 24-019, citing *Spettabile Consorzio Veneziano di Armamento di Navigazione v. Northumberland Shipbuilding Co. Ltd.* (1919) 121 LT 628 and *Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd.* [1980] 1 WLR 277.

⁸⁴⁶ Rejoinder, para. 138.

3. The Tribunal's Findings Concerning Repudiation Damages

601. The Tribunal is not of the view that repudiation damages are warranted as an alternative to Tolling Fees or because the Respondent abandoned or wrongly terminated the PPA. Nor is there room for Respondent's argument that the PPA is void *ab initio* and thus there could be no repudiation damages as a matter of law.
602. The situation is altogether different as explained above. Both Parties have requested the Tribunal to declare the PPA terminated in the light of the breach of the other Party's obligations. Termination is therefore not the result of either Party having wrongfully terminated the PPA but rather the result of the Tribunal's conclusion to bring an end to the dispute, on the basis of the Parties' respective requests, and the recognition by the Tribunal that performance under the contract would serve no purpose at this stage. In the view of the Tribunal, neither Party has fully complied with its obligations under the PPA.
603. The nature of this state of non-performance is different for each Party. While the Claimant has not finally tested and commissioned the Power Station for reasons not attributable to the Respondent and is thus not in the position to generate and deliver power, the Respondent's performance failures emerge from the issues concerning site electricity and grid connectivity, among other that have been discussed. The Tribunal is convinced that neither of the Parties has refused to perform its obligations, which would be a key factor in establishing repudiation. The Tribunal has rather found that performance has been materially unattainable in the Claimant's case and that the Respondent has only partly discharged its own obligations, in an untimely manner and in the face of technical difficulties that do always not appear to have been satisfactorily corrected.
604. The Tribunal is also of the view, as argued by the Respondent, that applying to the courts in respect of the validity of the PPA does not amount to repudiation. The Tribunal must also note the Respondent's assertion that even after obtaining the Supreme Court Judgment it took no steps to enforce the Judgment pending the outcome of this arbitration. In the Tribunal's view, there is room for a determination by the Ghanaian judiciary that is consistent with the conclusions of this Award.
605. Repudiation damages are accordingly denied.

C. RESTITUTION DAMAGES

1. The Claimant's Position

606. In the alternative to Tolling Fees and/or repudiation damages, and/or to the extent the Tribunal determines that the PPA is unenforceable, the Claimant seeks restitution damages.⁸⁴⁷ It claims that its restitution damages exceed USD 40 million, comprising the total amount it claims to have spend through Zenith Bank, together with monies allegedly spend or incurred by Balkan US.⁸⁴⁸

607. In its Post-Hearing Submission, the Claimant sets out three elements that must be fulfilled in a claim for unjust enrichment and elaborates on why each of them is satisfied in the present case:⁸⁴⁹

a) The Respondent has been enriched or received a benefit: the Claimant contends that this element is fulfilled insofar as the Barge has been enhanced by BEL and its value has increased.⁸⁵⁰

b) The enrichment is at the expense of the claimant: according to the Claimant, the said enhancement and benefit has been at the Claimant's expense.⁸⁵¹

c) The enrichment is unjustified: the Claimant submits that this element has been satisfied because the Claimant relied on the Respondent's opinion that parliamentary approval was not required and invested in the Barge.⁸⁵²

2. The Respondent's Position

608. The Respondent asserts that the Claimant has not provided sufficient evidence of the expenses it purports to have incurred for work it completed; a mere spreadsheet listing its purported expenses and wire transfer payments was attached to its Statement of Claim and only three

⁸⁴⁷ Statement of Claim, para. 340.

⁸⁴⁸ Statement of Claim, para. 340; Exhibit C-37: Witness Statement of Neil Crouch; Exhibit C-37, Attachment 18: "US Expenses", Attachment 56: "Unpaid or Disputed Payables", Attachment 57: "Cumulative Detailed Zenith Bank Statements".

⁸⁴⁹ Claimant's Post-Hearing Submission, para. 148.

⁸⁵⁰ Claimant's Post-Hearing Submission, para. 150.

⁸⁵¹ Claimant's Post-Hearing Submission, para. 150.

⁸⁵² Claimant's Post-Hearing Submission, para. 149.

months of invoices (October 2008 to January 2009) were provided with its Reply.⁸⁵³ The Respondent further argues that the Claimant has failed to demonstrate how the alleged expenses it incurred enriched the Respondent.⁸⁵⁴

609. The Respondent states that the principle of unjust enrichment requires that:

- the Respondent has been enriched by the receipt of a benefit;
- this enrichment is at the expense of the Claimant;
- the retention of the enrichment is unfair; and
- there is no Defense or bar to the claim.⁸⁵⁵

610. The Respondent goes on to assert three reasons why the Respondent has failed to prove its unjust enrichment claim.⁸⁵⁶ First, the Respondent contends that the Claimant has not demonstrated “that its alleged expenses resulted in *any* value to the Government, the fundamental element of an unjust enrichment claim.”⁸⁵⁷ In support, the Respondent reiterates its assertions that the Power Station remains incapable of generating any power and that the Claimant has not furnished any evidence of successful commissioning and testing of any of the critical systems on the Barge (the turbines, generator, DCS, fuel tanks, 161 kV GIS switchgear, transformer, relay protection devices).⁸⁵⁸

611. Second, the Respondent submits that the Claimant “cannot ignore its own admission that ProEnergy overbilled for the work it did, and that much of the ProEnergy’s work had to be redone.”⁸⁵⁹ In the absence of any evidence presented by the Claimant that systems on the Barge have been successfully tested, the Respondent similarly questions the Claimant’s invoices for work done after ProEnergy left the Project Site.⁸⁶⁰

612. Third, the Respondent argues that the Claimant has failed to demonstrate that many of the expenses for which it seems reimbursement are linked to the Barge. It insists that “[w]ithout

⁸⁵³ Rejoinder, para. 141; Exhibit C-57, Attachments 61, 62, 63.

⁸⁵⁴ Rejoinder, para. 143.

⁸⁵⁵ Rejoinder, para. 141.

⁸⁵⁶ Rejoinder, paras. 148-151.

⁸⁵⁷ Rejoinder, para. 148.

⁸⁵⁸ Rejoinder, para. 148.

⁸⁵⁹ Rejoinder, para. 149; Exhibit R-7: “Deposition of Phillip David Elders, *ProEnergy Services, LLC v. Balkan Energy Co.*, No. 09-4026”, at 184:8-14.

⁸⁶⁰ Rejoinder, para. 149.

appropriate backup documentation, neither the Tribunal nor anyone else could reach a reliable conclusion regarding the validity of the expense occurred.”⁸⁶¹

613. In response to the Claimant’s 7 June Letter, the Respondent denies that any interest expenses or general PPA-related expenses can be recovered as restitutionary damages because they are loss-based.⁸⁶² As regards commissioning expenses, the Respondent argues that these are loss-related expenses and that, since none of the systems of the Barge is actually operable, no benefit has been conferred to the Respondent.⁸⁶³ The Respondent also alleges several errors in the Claimant’s damages calculations.⁸⁶⁴ Finally, the Respondent submits that the Claimant is not entitled to any restitutionary damages for expenses incurred after July 2009, as the Claimant performed no further commissioning work on the Barge after that date.⁸⁶⁵

3. The Tribunal’s Findings Concerning Restitution Damages

614. The Tribunal has concluded that the PPA cannot be enforced in the present circumstances and thus there is a legal basis to examine the claim for restitution damages. It is a fact that the Claimant has spent a significant amount of money in its efforts to get the Power Station to an operational state. Although the Claimant invokes unjust enrichment to justify its claim under this heading, the Tribunal does not consider this to be the appropriate legal basis as it has been concluded above that the requirements for unjust enrichment are not met in this case. In fact as long as there is no power generation and delivery, the essential purpose and objective of the PPA, the Respondent cannot be considered to have unjustly enriched itself at the expense of the Claimant in an unjustified manner.
615. It is true that in principle, as the Claimant asserts, the value of the Barge has to an undetermined extent increased in view of the work done and the equipment introduced and this would be at the disposal of the Respondent for any future project related thereto. This is, however, marginal to the value of the project as a whole and thus could not justify damages on the basis of unjust enrichment. The Tribunal is mindful, however, that the Respondent bears some degree of responsibility for the failure of the Project, not decisive as the Claimant argues but sufficient for the Tribunal to take it into account in assessing damages.

⁸⁶¹ Rejoinder, para. 150.

⁸⁶² Respondent’s Post-Hearing Submission, paras. 189, 190.

⁸⁶³ Respondent’s Post-Hearing Submission, para. 191.

⁸⁶⁴ Respondent’s Post-Hearing Submission, para. 192.

⁸⁶⁵ Respondent’s Post-Hearing Submission, para. 193.

616. Having considered the Respondent's non-performance of its obligations in a fully satisfactory manner, the incidence this has had in not facilitating the final testing and commissioning of the Power Station that would have been desirable and the eventual increase in costs this situation has created, the Tribunal will grant to the Claimant a measure of restitution damages on the basis of the Respondent's liability.
617. The evidence submitted by the Claimant in respect of the amount of such damages is difficult to assess. The Respondent has rightly commented that spreadsheets and wire transfers are not in themselves evidence of the damages sought, that not all expenses listed can be attached to the work on the Barge and that even Claimant argued that ProEnergy had overbilled for the work purportedly done. It is also to be noted that general PPA expenses should not be considered as a part of restitution damages. In addition, the Respondent notes that to the extent that work at the Barge stopped in mid-2009 there could be no justifiable expenses after this date.
618. The Tribunal has carefully considered the revised information submitted by the Claimant on this count of damages—in particular, the documentation submitted as Exhibit C-59, Attachment 66, and the lists of alleged expenditures submitted on 1 July 2013 as Attachments III.1(a), III.2(a) and III.5(a)—and the comments thereon in the Respondent's 10 July Letter with a view to determining which amounts can be linked to actual work on the Barge or reasonably related thereto, and which should be excluded as a result of being general expenses that could have at best a remote connection to the work on the Barge. In the Tribunal's view, the Claimant must be compensated for expenditures that are directly linked to the existence of the PPA; that have plausibly contributed to the advancement of the commissioning of the Barge; and that are sufficiently justified by evidence.
619. The Tribunal has reviewed records of payment falling within the following broad categories: Purchase of materials or other items to be incorporated into the Barge; payments to contractors other than Pro-Energy; payments to Pro-Energy; payroll of BEL's workers directly engaged in the commissioning of the Barge; payments for fuel, fuel tanks, site electricity and site internet; generator rental; maintenance; costs of BEL's facilities at Effasu; accommodation and food; inspections of the Barge, the surrounding facilities and transmission lines by BEL; shipping costs, freights, and customs charges of goods delivered to Effasu; flights to and from Ghana; helicopter charter; permit fees; project insurance; other insurance covering professional risks relating to the project operation; payroll administration for BEL's administrative personnel at the Accra Office; Accra office expenses; Accra office furniture, laptop computers, etc; Accra office lease and other office-operating expenses (electricity, telephone, cleaning materials,

printing cartridges, office supplies); other Accra office expenses (security fence, business cards); consultancy fees; public relations expenditures; taxes; other expenditures.

620. It is evident that not all of these categories of expenditures meet the test established above. Some expenditures are not even directly linked to the existence of the PPA but appear to have been made in furtherance of the Claimant's other business activities. Many expenditures cannot plausibly be said to have contributed to the advancement of the commissioning of the Barge. In the Tribunal's view, only the following categories of expenditures can qualify in principle for restitution:

- Purchase of materials or other items to be incorporated into the Barge;
- Payments to contractors other than Pro-Energy;
- Payroll of BEL's workers directly engaged in the commissioning of the Barge;
- Payments for fuel, fuel tanks, site electricity and site internet;
- Generator rental;
- Maintenance; costs of BEL's facilities at Effasu;
- Reasonable expenses for accommodation and food;
- Inspections of the Barge, the surrounding facilities and transmission lines by BEL;
- Shipping costs, freights, and customs charges of goods delivered to Effasu;
- Permit fees; and
- Project insurance.

621. Within each of these categories, the Tribunal had to satisfy itself that the Claimant has met its onus to prove that such expenses were actually incurred, and payments made, in the amounts alleged by the Claimant. The documentation submitted by the Claimant in this regard was often inadequate. It suffices to describe some of the difficulties encountered by the Tribunal here: Many payments were not supported by copies of invoices; instead payment slips from banks (typically Zenith Bank) were provided. In spite of these evidentiary shortcomings the Tribunal has accepted such evidence to the extent that it was persuaded that a payment was in fact made, the addressee of the payment was discernible, and the purpose of the payment was apparent.

622. In respect of other, sometimes very substantial payments, the only evidence submitted was a bank ledger that did not allow the Tribunal to trace the addressee of the payment or appreciate the goods or services that were provided in exchange for it. In such cases, the Tribunal could not be certain that the payment was in fact made to the company, and/or for the purposes, contended by the Claimant. Moreover, in reviewing the bank ledger submitted as Exhibit C-59, Attachment 70, the Tribunal found that a number of the Claimant's allegations of expenditures supported by this document were questionable because of the identification of duplicate claims—several alleged payments in the same amount, made to different entities, appear to have been justified by reference to the same entry of that bank ledger.
623. Other evidence that the Tribunal did not find satisfactory included hand-written notes by an unidentified person or entity confirming payment, in lieu of an actual invoice or bank statement.
624. Consistently with its findings above, that the present dispute crystallized in mid-2009 and no significant commissioning activities took place as of that date, the Tribunal has excluded from the scope of recoverable restitution damages any expenditures that were incurred as of mid-2009. The Tribunal is convinced that, as of that time, BEL's personnel was primarily concerned with preparing legal action against Ghana and its technical work concentrated on preservation rather than improvement of the Barge.
625. On the basis of its review of the evidence, the Tribunal concludes and decides that the amounts owed by the Respondent to the Claimant as restitution damages are USD 7 million and CEDI 7.5 million, the latter being roughly equivalent to USD 5 million, totaling USD 12 million.⁸⁶⁶
626. The Tribunal must note, finally, that the Claimant's claim for damages was, as indicated, much higher than that awarded by the Tribunal, in significant part due to the fact that the damages claimed included BEL's payment of interest for loans in US\$ and CEDI to Zenith Bank. It is not unusual that an investment will be financed by means of loaned funds on which interest will be due—a situation that indeed occurred in this case, as explained by Mr. Crouch's witness statement.⁸⁶⁷ While under principles of common law it is possible for a tribunal to allow interest as a head of damage when damages are awarded for breach of contract, a claimant must not be at fault insofar the breach of contract is concerned. In this case the Claimant has been found to have a degree of responsibility in the breach of the PPA, just as the Respondent has. It follows that it is not justified for the Tribunal to award damages for financial costs as might be the case

⁸⁶⁶ In converting the CEDI amount to USD, the Tribunal has had regard to the historical interbank foreign exchange rate for USD purchases on 1 July 2009.

⁸⁶⁷ Transcript, Day 7 (Hearing on the Merits), 81:18-81:25.

if the breach of contract is wholly the result of the default of the respondent. In addition, it is quite impossible to determine which part of those financial costs relate to expenditures for commissioning pursuant to the PPA and which relate to expenditures for which the Tribunal has decided not to award damages. This claim for financial costs cannot be considered by the Tribunal in the circumstances of the case.

D. INCIDENTAL DAMAGES

1. The Claimant's Position

627. In support of its claim for incidental damages, the Claimant submits a letter written by Mr. Elders to the Ministry of Energy on 21 July 2008. In that letter, Mr. Elders summarized the expenses BEL allegedly incurred as a result of the alleged unavailability of site electricity, totaling USD 2,482,000.⁸⁶⁸

2. The Respondent's Position

628. The Respondent asserts that the Claimant's claim for incidental damages fails because it is unsubstantiated.⁸⁶⁹ In this regard, the Respondent contends that the Claimant "fails to submit any invoices which would permit the Tribunal to verify that the expenses were indeed incurred or that the ProEnergy reports are reliable in light of Balkan's prior admissions that ProEnergy engaged in improper invoicing, double billing and corrective work".⁸⁷⁰

3. The Tribunal's Findings in Respect of Incidental Damages

629. The Tribunal has concluded on the facts of the claim that site electricity was faulty, experiencing frequent interruptions or unavailability for hours and even days. The Tribunal accepts the Claimant's position that it was indispensable in these circumstances to have additional generation capacity available on site to support its commissioning and testing efforts, including the running of the RTU system (in fact, it bears recalling that ProEnergy had even requested the purchase of a second generator to this end). The Tribunal would also note that there is no dispute between the Parties that some expense was indeed incurred by BEL for purchasing and renting generators to improve site electricity. Given the Tribunal's conclusion

⁸⁶⁸ Statement of Claim, para. 341; Exhibit C-38, Attachment 109: "BE[L] letter re: Barge (First Fire)"; Exhibit C-40: Witness Statement of Lonnie Peters, paras. 15-16.

⁸⁶⁹ Rejoinder, para. 153.

⁸⁷⁰ Rejoinder, para. 153.

above, that the Respondent bears responsibility for the failure to make adequate site electricity available, the Tribunal is in principle minded to grant the Claimant's claim for incidental damages.

630. According to the Claimant, the amount of USD 2,482,000 claimed as incidental damages is constituted by expenditures for power generation equipment purchase and rental, fuel, maintenance and repair of equipment and the labour cost that BEL expended during periods in which it could not be productive due to power outages.⁸⁷¹ In its review of the voluminous documentation provided by the Claimant in support of its restitution claim, the Tribunal encountered several cost items, and accompanying evidence of payments, relating to each of these categories—equipment purchase and rental (including generators), jet fuel, repair and maintenance works and payroll expenditures. To the extent that such payments were sufficiently supported by evidence, the Tribunal has taken these expenditures into consideration as commissioning expenditures. The Claimant will therefore be compensated for such expenditures under the heading of “restitution damages”.

631. It is evident that the Claimant cannot doubly recover its expenditures resulting from power shortfall *both* as restitution damages *and* incidental damages. Any amounts restituted to the Claimant as commissioning expenditures would need to be deducted from the amount of incidental damages to be awarded. However, the evidence submitted in these proceedings does not permit the Tribunal to determine whether there are any expenditures resulting from power shortfall that do not at the same time constitute commissioning expenditures (and may thus entitle the Claimant to restitution damages). Generally, it seems to the Tribunal that BEL's commissioning expenditures also include such additional costs as it incurred as a result of the power conditions on site.

632. In the absence of any more specific evidence from the Claimant to the contrary, the Tribunal therefore concludes that any incidental damages that the Claimant may be entitled to as a result of power shortfall on site are adequately compensated by the award of restitution damages pursuant to Paragraph 625.

E. OTHER DAMAGES

633. The Claimant has also submitted a claim in the amount of US\$ 2,586,000 as the cost of replacement of the DCS in the context of its claim for conversion and trespass. While the

⁸⁷¹ Exhibit C-38, Attachment 109.

Tribunal would normally regard compensation for the disruption of the ordinary course of business as justified, in finds that this claim has not been supported by adequate evidence about the damage allegedly caused. There is no documentation in the record as to whether a new DCS had in fact been purchased as a consequence of the alleged damage to the equipment on site and there is thus no evidence supporting a conclusion to grant compensation for a replacement value.

634. The Tribunal must also note that in any event any expenditure relating to this claim would have been made later than mid-2009, the cut-off period after which the Tribunal has concluded that no significant commissioning work was undertaken. A new DCS would accordingly not be necessary if commissioning had in fact entirely stopped and its purchase would thus find no justification in the light of the Claimant's general duty to minimize damages.

635. The issue concerning the arrest of Mr. Everhart is one that, aside any personal claims by the affected person, results in interference with the ordinary course of business. The Claimant leaves the determination of the damage owed to the discretion of the Tribunal. The Tribunal decides that the amount of USD 50,000 is appropriate in the context of this interference with BEL's conduct of business. The Tribunal in any event expects that Ghana will put an end to any claims pursued against the Claimant's officers.

F. THE COUNTERCLAIM FOR DAMAGES

636. The Respondent has also requested in its Counterclaim that the Tribunal orders Claimant to pay USD 300,000 for its liability in terms of breach of contract. The Tribunal accepts this counterclaim in the light of Clause 14.2 of the PPA. Such amount shall be deducted from the damages owed by the Respondent to the Claimant.

G. INTEREST

637. The Tribunal has established that the Claimant is entitled to restitution damages under this Award in respect of selected expenditures up to mid-2009. Accordingly, interest shall accrue on the amount owed to the Claimant as restitution damages as of 1 July 2009, until the date of full payment.

638. In view that the compensation awarded as a result of the arrest of the Claimant's officer Mr. Everhart attends in essence to his personal inconvenience and corporate interference and not to pecuniary damages, the Tribunal shall not award interest for the payment owed.

639. In determining the appropriate interest rate, the Tribunal has had regard to the Parties' views, expressed in the PPA, in respect of the interest rate that is to apply in case of a default of payment by either Party. According to Clause 11.6 of the PPA, interest is set at a rate corresponding to the Six-Month LIBOR plus one percent (1%) per annum in case of a failure by the Respondent to make payment "in respect of fees or otherwise", whereas Clause 12.3 of the PPA fixes the same rate "if any amount payable by [the Claimant] is not paid on or before the due date". The Tribunal considers that this rate reflects the expectations of both Parties at the time of the conclusion of the PPA in the event of any delayed payment, and the Tribunal sees no reason to deviate from this interest rate set by the Parties in the context of the present Award. Interest shall be compounded annually.

H. COSTS OF ARBITRATION

640. In accordance with Article 38 of the UNCITRAL Rules, the costs of the arbitration are fixed as follows:

Arbitrator Fees and Expenses

Professor Francisco Orrego Vicuña: **USD 352,271.35**

Fees: USD 326,700.00

Expenses: USD 25,571.35

Judge Stephen M. Schwebel: **USD 254,799.72**

Fees: USD 234,920.00

Expenses: USD 19,879.72

Judge Thomas A. Mensah: **USD 193,900.00**

Fees: USD 193,900.00

Expenses: USD 0

Registry Fees of the PCA: **USD 114,168.05**

Expenses (including for travel, accommodation, court reporting, room hire, express courier, bank charges and telephone conferences): **USD 87,550.17**

TOTAL COSTS OF THE ARBITRATION USD 1,002,689.29

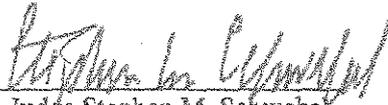
641. The Tribunal is mindful that under Clause 22.2 of the PPA each Party is to bear its own costs of legal representation, and both Parties shall share the costs of the arbitration equally. Given that the Parties reached an agreement on costs that pre-dates this arbitration, the Tribunal does not find it necessary to make an order in this regard. The Tribunal accordingly shall follow the agreement reached by the Parties on costs. The costs of the arbitration are thus to be shared equally by the Parties. Given that the Claimant has paid USD 30,000 more than the Respondent the Tribunal shall order that such amount be reimbursed by the Respondent to the Claimant.

VII. DISPOSITIF

642. For the foregoing reasons, the Tribunal decides and orders as follows:

1. The PPA shall be terminated as at the date of this Award.
2. The Respondent shall pay the Claimant the amount of USD 12 million, in consideration of the Claimant's commissioning works at the Power Station.
3. The Claimant shall pay the Respondent the amount of USD 300,000 for its own breach of contract as per the Respondent's counterclaim.
4. The Respondent shall pay the Claimant an additional amount of USD 50,000 in respect of the arrest of one of the Claimant's officers.
5. The Respondent shall pay the Claimant interest on the amounts awarded in subparagraph 2 at a rate corresponding to the Six-Month LIBOR plus one percent (1%) per annum. The Claimant shall also pay the Respondent interest at the same rate on the amount awarded to the latter in subparagraph 3. Interest shall start to accrue on 1 July 2009. Interest shall be compounded annually.
6. All other claims by the Claimant are dismissed.
7. Each Party shall pay half of the costs of this arbitration, which total USD 1,002,689.29. The Respondent shall reimburse the Claimant the amount paid by the latter in excess in the amount of USD 30,000.

Done at the place of arbitration, The Hague, the Netherlands, on 1 April 2014


Judge Stephen M. Schwebel


Judge Thomas A. Mensah


Professor Francisco Orrego Vicuña
Presiding Arbitrator



ANNEX

**POWER PURCHASE
AGREEMENT**

BETWEEN

**THE GOVERNMENT OF GHANA, ACTING BY AND
THROUGH ITS MINISTER FOR ENERGY**

AND

BALKAN ENERGY (GHANA) LIMITED

ON

**OSAGYEFO POWER BARGE
AND ASSOCIATED FACILITIES**

EFFASU PROJECT

JULY 2007

Power Purchase Agreement Between
&

GoG

REC
GH052007

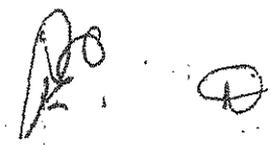


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Power Purchase Agreement Between

GoG

&
i

BEC
GH052007

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ATTACHMENT

Lease Agreement

Handwritten initials/signature

This Agreement is made and entered into this 27 day of July 2007 by and between:

THE GOVERNMENT OF GHANA acting through its duly authorized representative, The Minister for Energy hereinafter referred to as ('GoG');

and

BALKAN ENERGY (GHANA) LIMITED, a limited liability company, duly incorporated and existing under the laws of Ghana with its registered office at Fidelity House, 20 Ring Road Central, Accra hereinafter referred to as ('BEC')

WHEREAS,

- (i) ~~The Government of Ghana has an urgent need for additional electricity generation capacity to meet its power supply deficiencies; and~~
- (ii) BEC has agreed to lease a one hundred and twenty-five megawatt (125MW) dual fired (diesel and gas) power barge, named the Osagyefo Barge from the GoG with the further understanding of the parties that the facility shall be placed in service by BEC under the terms and conditions of this Agreement
- (iii) BEC shall commission a one hundred twenty five megawatt (125 MW) power barge, named the Osagyefo Barge and associated facilities ('the Power Station') within 90 working days of the Effective Date of this Agreement.
- (iv) BEC shall convert the Power Station into a combined cycle power plant by the addition of a heat recovery steam generator (HRSG) with an incremental capacity of approximately 60MW within nine (9) months of the Effective Date.
- (v) BEC shall privately invest and bring two more combined cycle barge mounted systems to the Site within thirty-six (36) months of agreement with GoG on a Tolling Fee for these systems. These systems will each have a similar capacity of approximately 185 megawatts. This investment will bring the Site generation capacity to more than 550 megawatts. The Tolling Fee for these additional systems will be agreed prior to their mobilization.
- (vi) BEC shall, subject to the satisfactory conclusion of supply agreements with other source providers, invest in infrastructure to enable natural gas to be supplied to the Power Station within three (3) years of the Effective Date.
- (vii) BEC shall provide all fuel to the Project at Cost.

NOW THEREFORE in view of the foregoing premises and in consideration of the mutual covenants and agreements hereinafter set forth and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto hereby agree as follows:

This Agreement is made and entered into this 27 day of July 2007 by and between:

THE GOVERNMENT OF GHANA acting through its duly authorized representative, The Minister for Energy hereinafter referred to as ('GoG');

and

BALKAN ENERGY (GHANA) LIMITED, a limited liability company, duly incorporated and existing under the laws of Ghana with its registered office at Fidelity House, 20 Ring Road Central, Accra hereinafter referred to as ('BEC')

WHEREAS,

- (i) ~~The Government of Ghana has an urgent need for additional electricity generation capacity to meet its power supply deficiencies; and~~
- (ii) BEC has agreed to lease a one hundred and twenty-five megawatt (125MW) dual fired (diesel and gas) power barge, named the Osagyefo Barge from the GoG with the further understanding of the parties that the facility shall be placed in service by BEC under the terms and conditions of this Agreement
- (iii) BEC shall commission a one hundred twenty five megawatt (125 MW) power barge, named the Osagyefo Barge and associated facilities ('the Power Station') within 90 working days of the Effective Date of this Agreement.
- (iv) BEC shall convert the Power Station into a combined cycle power plant by the addition of a heat recovery steam generator (HRSG) with an incremental capacity of approximately 60MW within nine (9) months of the Effective Date.
- (v) BEC shall privately invest and bring two more combined cycle barge mounted systems to the Site within thirty-six (36) months of agreement with GoG on a Tolling Fee for these systems. These systems will each have a similar capacity of approximately 185 megawatts. This investment will bring the Site generation capacity to more than 550 megawatts. The Tolling Fee for these additional systems will be agreed prior to their mobilization.
- (vi) BEC shall, subject to the satisfactory conclusion of supply agreements with other source providers, invest in infrastructure to enable natural gas to be supplied to the Power Station within three (3) years of the Effective Date.
- (vii) BEC shall provide all fuel to the Project at Cost.

NOW THEREFORE in view of the foregoing premises and in consideration of the mutual covenants and agreements hereinafter set forth and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto hereby agree as follows:

"Contract Period" means the period of twenty (20) years from the Effective Date as the same may be extended from time to time pursuant to the terms hereof;

'Cost' means all costs incurred by BEC in supplying fuel to the Power Station for its operations at equal price to fuel delivered to the Takoradi Thermal Power Station for like fuels adjusted to take into account any discount or tax relief granted by the GoG to the said Takoradi Thermal Power Station or BEC. This pricing with associated index (Platts) will, in the event of a switch by the Takoradi Thermal Power Station to other fuels, still be applied.

"Dead End Tower" shall mean the last tower on the Site or such other points as may be agreed upon by the Parties

"Delivery Point" shall be the dead end tower where responsibilities for equipment by GoG and BEC are demarcated.

~~"Downtime" shall have the meaning given to it in the Fifth Schedule;~~

"Effective Date" means the date on which GoG and BEC certify that all the conditions precedent contained in this Agreement, have been fulfilled or waived to the satisfaction of GoG and fulfilled or waived to the satisfaction of BEC as the case may be.

"Environmental Permit" means a permit issued to BEC for the Project, based on the Specifications, by the Environmental Protection Agency and any other district or regional Governmental Authority or agency, regulating the emissions and discharge from the Project to the atmosphere;

"Force Majeure" shall have the meaning specified in Clause 16.1;

"Forced Outage" shall have the meaning given to it in the Fifth Schedule;

"Governmental Approval" means any authority, consent, approval, license or exemption of any Governmental Authority;

"Governmental Authority" shall mean the government or any political subdivision of the Government of the Republic of Ghana, any agency, department or any other administrative authority thereof;

"Government Instrumentality" shall have the meaning specified in Clause 18;

"Lease Fee" the annual fee payable by BEC to the GoG for the leasing of the Osagyefo Power Barge and the 239 acre site, including buildings, facilities, berthing and docking space for the barges.

"Letter of Credit" means an irrevocable standby letter of credit provided to BEC by GoG as provided in Clause 11.7 and also in the form set forth in the Tenth Schedule;

"Major Overhaul" means, in relation to the major components of the Power Station, each overhaul following 45,000 Operating Hours;

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"Milestone Schedule" means the schedule of milestone dates for development permitting, construction, testing and completion of the Power Station set forth in the Third Schedule;

"National Grid" means any generating station and other generating transmission or distribution system facilities through which the net electrical output of the power station will be distributed.

"Nominal Capacity" means 125 MW for the Osagyefo Power Barge with its increase to 185 MW after conversion to combined cycle operation and 185 MW for each of the additional 2 Combined Cycle Barge mounted systems.....

"Operating Hours" means, in respect of the Power Station or any generator thereof, any hour, or part thereof, during which the Power Station or any such generator is dispatched and exporting electricity;

~~"Operating Parameters" means the operating parameters of the Power Station described in the Second Schedule;~~

"Power Station" means the 125 MW Osagyefo Power Barge and associated facilities and the diesel oil/gas fired electric generating facilities to be developed and commissioned at the Site pursuant to Clause 2.1 as further described in the First Schedule;

"Project" means the financing, equipping, completion, testing, commissioning, operation and maintenance of the Power Station, including, but not limited to, the future conversion to a combined cycle plant by the addition of a heat recovery steam generator (HRSG); and steam turbine generator as well as two combined cycle barge mounted systems;

"Project Scope" means the scope of the supply of work of BEC in connection with the Power Station as described in the First Schedule;

"Scheduled Outage" shall have the meaning given to it in the Fifth Schedule;

"Site" means the site for the Power Station as more particularly described in the First Schedule which will include approximately 239 acres of land including the Osagyefo Barge, buildings and any facilities and docking and berthing space for the power barges;

"Specifications" means the specifications of the Power Station described in the First Schedule;

"Start Up Charges" shall have the meaning given to it in the Seventh Schedule;

"System Dispatch Center" shall mean the entity within the National Grid responsible for coordinating the evacuation of energy from the operators

"Target Completion Date" means _____, 2007; as such date may be extended in accordance with the terms and conditions of this Agreement;

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"Tolling Fees" means fees payable by GoG to BEC, other than fuel used in operating the Power Station, in respect of the capital investment, operation and maintenance costs of the electricity delivered as provided in Clause 11 as such fees are further defined in the Seventh Schedule;

"Transmission Line" means the 161 kV voltage transmission line(s), transmission towers, substations and other items necessary to transmit electricity from the outgoing gantry of the switching facility within the Site to the National Grid as further described and having the specifications set out in the Fourth Schedule

Any reference in this Agreement to a "Clause" or a "Schedule" is a reference to a clause hereof or a schedule hereto. Any reference to a Section is a reference to a Section in the relevant Schedule.

In this Agreement:

- (i) "\$" and "dollar(s)" denote ~~lawful currency of the United States of America;~~
- (ii) "MW" denotes a megawatt;
- (iii) "kW" denotes a kilowatt; and
- (iv) "KWh" denotes a kilowatt hour.

2.0 The Project

Obligations of BEC

- 2.1 BEC shall finance, develop, equip, complete, test and commission at the Site, the Osagyefo Barge and associated facilities within the Operating Parameters and in accordance with the Specifications, the Project Scope and the other terms and conditions of this Agreement. Additionally, BEC shall, at its own cost, within a period of nine (9) months after the Effective Date, convert the Power Station into a combined cycle by the addition of a heat recovery steam generator (HRSG), a steam turbine, an electric generator and associated facilities in order to improve the efficiency of the Power Station and add additional power to the National Grid. Additional combined cycle systems shall be added to the Site by BEC subject to agreement with GoG on a Tolling Fee for these additional systems
- 2.2 Except as otherwise provided herein all costs of BEC in connection with the equipping of the Power Station as provided in Clause 2.1 shall be borne by BEC.
- 2.3 Immediately after the Effective Date, BEC shall commence the testing and equipping of the Osagyefo Barge and provide a fuel supply system for short-term and long term project needs. The fuel will be provided by BEC at Cost
- 2.4 BEC shall expand the capacity of the Power Station with the addition of multiple combined cycle systems..

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Obligations of GoG

- 2.5 GoG shall ensure that all necessary electricity is provided, at BEC's cost, and made available at the Site as reasonably required by BEC.
- 2.6 GoG shall promptly facilitate the acquisition of all Governmental Approvals for the duty-free importation and transportation of equipment to the Site, and ~~for operating permits, licenses and approvals for the Project,~~ and for visas and work permits for foreign personnel and for full compliance with all local and other regulations and GoG hereby guarantees that BEC shall have the exclusive right to generate electricity from the Site subject to meeting the Milestone Schedule in Schedule 3.
- 2.7 GoG shall facilitate the acquisition of all Governmental Approvals required for the leasing, equipping and operation of the Power Station including ~~without limitation the application to the Environmental Protection Agency for~~ the relevant environmental permits.
- 2.8 GoG shall construct, install and connect the Transmission Line as required under the Fourth Schedule provided, however, that BEC will be responsible, at its own cost, for the provision of adequate transmission cable to the point of interconnection to the National Grid.
- 2.9 GoG shall take and pay for all electricity generated by the Power Station during the term of this Agreement.
- 2.10 The Parties hereto shall mutually collaborate with each other in order to achieve the objectives of this Agreement and the performance by each of the parties hereto of its respective obligations hereunder. GoG covenants to and agrees with BEC that it will provide its full and timely cooperation in connection with BEC's efforts to finance the Power Station on a non-recourse, project finance basis including without limitation, responding to all requests for information on and certification of GoG authority and the status of this Agreement.

3. Equipping of the Power Station

- 3.1 BEC shall be responsible for the technical assessment, equipping, completion, testing, commissioning and financing of the Power Station and shall commence this work in accordance with the Milestone Schedule as shown on the Third Schedule.
- 3.2 In pursuance of its obligations under Clause 3.1 BEC shall have the full right at its sole discretion, among other things, to:
 - (i) call for tenders and award contracts with or without tender;
 - (ii) arrange for the preparation of the detailed designs and approve or reject the same;

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- (iii) appoint and remove consultants and professional advisers;
- (iv) purchase new and/or vendor overhauled equipment including the turbines and generators;
- (v) appoint, organize and direct staff, manage and supervise the Project;
- (vi) enter into contracts for the supply of materials and services, including contracts with GoG and
- (vii) Do all other things necessary or desirable for the completion and operation of the Power Station in accordance with the Specifications and generally accepted engineering standards.

Except that in the case of 3.2 (ii) and 3.2 (iv) BEC shall notify GoG in writing.

3.3 GoG shall ensure that all adequate electricity necessary for the completion operation and maintenance of the Power Station are provided in accordance with the Specifications by the dates indicated in the Milestones Schedules and accordingly shall, at BEC's cost, inter alia:

- (i) ensure that there is provided to the Site adequate electricity and at the times set out in Milestone Schedules, the cost of utilization of which and normal fees shall be for BEC's account; and
- (ii) ensure that there is installed and connected, but not later than sixty (60) days after the Effective Date, the Transmission Line and relay protection equipment necessary to connect the Power Station to the National Grid and which is capable of operating within the specifications set out in the Fourth Schedule.

4. Specifications and Operating Parameters

- 4.1 The Power Station shall be constructed and equipped in accordance with the Project Scope and specifications set out in the First Schedule.
- 4.2 Following the Completion Date the Power Station shall be capable of operating within the Operating Parameters set out in the Second Schedule;

5. Equipping and Commissioning Timetable

- 5.1 The parties shall work together in order to achieve the timely completion of the Project in accordance with the timetable listed in the Third Schedule.
- 5.2 BEC shall implement the Project in accordance with the timeline shown in the Third Schedule.
- 5.3 Upon completion of the Power Station, BEC shall carry out commissioning and performance tests to be determined by the Parties to certify that the Power Station has successfully completed its testing and commissioning and that accordingly the Completion Date has occurred.

6. Testing and Commissioning

6.1 BEC shall give to GoG not less than fourteen (14) days' notice, or such lesser period as the parties hereto may agree of its intention to commence any testing and commissioning. The GoG shall provide assistance to BEC to obtain any permit or other Governmental Approval required for testing and commercial operation of the Power Station

6.2 All Costs related to the fuel to be supplied by BEC pursuant to Clause 6.1 shall be for GoG's account.

7. Conditions Precedent

BEC

7.1 ~~It shall be a condition precedent to the continuing obligations of GoG under this Agreement that within fourteen days of execution of this Agreement or such later date as the parties hereto may agree, the following are supplied to GoG by BEC, each in form and substance satisfactory to GoG or that such condition is waived by GoG.~~

- (i) copies of the certificate of incorporation, certificate to commence business and Regulations of BEC as certified by the company secretary of BEC.
- (ii) copies of resolutions adopted by BEC's Board of Directors authorizing the execution, delivery and performance by BEC of this Agreement certified by the company secretary of BEC.
- (iii) copies of a resolution adopted by the shareholder of BEC authorizing the execution, delivery and performance by BEC of this Agreement certified by the company secretary of the shareholder of BEC.

GoG

7.2 It shall be a condition precedent to the continuing obligations of BEC under this Agreement that within 14 days after the execution of the Agreement or such later date as the Parties hereto may agree, the following are supplied to BEC by GoG, each in form and substance is satisfactory to BEC or that such condition precedent is waived by BEC:

- (i) Issuance of a letter from the Government of Ghana that all the required approvals from the relevant authorities in Ghana have been obtained.
- (ii) A legal opinion of the Attorney General of the Republic of Ghana as to the validity, enforceability and binding effect of this Agreement in form and substance satisfactory to BEC.

- 7.3 Any delay in meeting the target dates in the Milestone Schedules caused by GoG's inability to provide start up electricity shall result in a day to day delay in the Completion Date of the Power Station.
- 7.4 If, on or before the target dates on the Milestone Schedules (Third Schedule), or such later date as the parties hereto may agree, the Effective Date has not occurred and the Parties agree to terminate the Project, GoG shall reimburse and indemnify BEC for all costs and liabilities incurred by BEC in respect of its obligations under Clause 3 if the GoG is the defaulting party. However, if BEC is the defaulting party, no cost incurred shall be recovered from GoG. GoG's obligations under this Clause 7.4 shall be effective notwithstanding that the Effective Date has not occurred or that all or any of the conditions precedent set out in Clauses 7.2 and 7.3 have not been satisfied or waived. GoG may, upon reasonable notice to BEC conduct an audit with respect to any indemnity claimed by BEC pursuant to this Clause 7.4 for the purpose of determining if the amount of the BEC's claim for reimbursement has been computed in accordance with the provisions of this Agreement.

8. Operation of the Power Station

- 8.1 BEC shall, at its own cost, be responsible for the management, operation, maintenance and repair of the Power Station during the Contract Period. BEC shall also be responsible for the safety and security of the Power Station.
- 8.2 Without limiting the generality of Clause 8.1, it is understood and agreed by GoG that BEC shall be entitled to periods of Downtime as provided in the Fifth Schedule.
- 8.3 In pursuance of its obligations under Clause 8.1 BEC shall have the right at its sole discretion, among other things, to:
- (i) enter into contracts for the supply of materials and services, including, contracts with GoG;
 - (ii) appoint and remove consultant and professional advisors;
 - (iii) purchase replacement equipment;
 - (iv) Appoint, organize and direct staff, manage and supervise the Power Station.
 - (v) Establish and maintain regular inspection, maintenance and overhaul procedures; and
 - (vi) Do all other things necessary or desirable for the running of the Power Station within Operating Parameters.
- 8.4 Subject to Clause 18, BEC shall operate the Power Station in accordance with all environmental and other Ghana and local laws and regulations in force as of the date of this Agreement and shall comply with any changes in such laws and regulations and with any new laws and regulations. However, BEC shall have the right to recover from GoG any additional costs it may be required to expend as a result of changes in Ghana laws after the date hereof. Such costs shall be recovered through a review of the Tolling Fee.

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9. Supply of Fuel and Start up Electricity

9.1 Throughout the Contract Period, BEC shall at all times supply and deliver all fuel, required by BEC and necessary for the Power Station to generate the electricity required to be produced by it pursuant to Clause 10..

9.2 ~~The cost of fuel to be supplied by BEC pursuant to Clause 9.1 shall be for GoG's account.~~

9.3 All fuels (diesel or natural gas) for the operation of the Power Station shall be the responsibility of BEC under contract with separate companies during the term of this twenty (20) year Agreement. It shall be the responsibility and complete obligation of GoG to pay the Power Station fuel invoices in full and in the required time period to assure the operation of the Power Station at full capacity. ~~There shall be semi-annual tests to establish the fuel consumption rate of the Power Station. If the fuel consumption of the Power Station falls within $\pm 5\%$ of the established fuel consumption rate, GoG shall pay for the actual fuel used. GoG shall only pay for the fuel costs which fall within $\pm 5\%$ of the established fuel consumption rate. If the fuel consumption falls outside $\pm 5\%$ of the established fuel consumption rate, there will be a review of the consumption rate.~~

10. Supply of Electricity

10.1 BEC agrees to produce electricity and GoG agrees to take and pay for in accordance with Clause 11 all electricity produced by BEC.

10.2 In the event that GoG cannot take delivery of electricity generated by the Power station in a given month, the minimum invoice payable shall be for ninety percent (90%) of the capacity of the Power Station for that month

10.3 The place for delivery of the electricity shall be the Delivery Point.

10.4 In the event GoG is in payment default under this Agreement, BEC shall have the right to sell electricity available from the Power Station to any third parties after giving notice to GoG in writing and BEC shall be permitted to transmit such electricity via the National Grid subject to the payment of approved Transmission Charges

11. Tolling Fees and Lease Payment

11.1 In respect of each Billing Month BEC shall deliver to GoG an invoice in respect of Tolling Fee and fuel Cost for as described in the Seventh Schedule, such Billing Month calculated as provided below and GoG shall pay to BEC the amount of such invoice within forty-five (45) days after the delivery of such invoice.

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The Tolling Fees approved by the Public Utilities Regulatory Commission (PURC) for this Agreement will be as follows:

- (i) a fee equal to 4.97 US Cents/kWH of all power produced during the first 5 years of the term of this Agreement.
 - (ii) There shall be a review by the Public Utilities Regulatory Commission after each five (5) year period of the term of this Agreement. The Tolling Fee resulting from these reviews will not be less than 3.5 US cents per kWh. These reviews will however ensure a return on investment for BEC of not less than 15% per annum.
 - (iii) BEC shall pay GoG an annual lease payment of US\$10 million from the beginning of Year 6 to Year 20 inclusive for a total of the last 15 years of the term of this Agreement.
 - (iv) All fees payable in this Agreement are exclusive of VAT.
- 11.2 All fees payable to BEC pursuant to this Clause 11 shall be paid against invoices submitted by BEC to GoG. GoG shall assist BEC to obtain all relevant tax exemptions
- 11.3 BEC shall provide all operating and maintenance (O&M) services as well as fuel supply required for the generation of power from the Power Station.
- 11.4 GoG shall pay BEC Tolling Fees of each Billing Month or portion thereof on a pro rata basis, if any, from the Completion Date.
- 11.5 In respect of each Billing Month, BEC shall deliver to GoG an invoice in respect of Tolling Fees and fuel Cost pursuant to the foregoing Clauses 11.4 for such Billing Month and GoG shall pay to BEC in immediately available funds, the full amount of such invoice within forty-five (45) days of the delivery of such invoice.
- 11.6 If any amount payable by GoG hereunder whether in respect of fees or otherwise is not paid on or before the due date GoG shall pay interest thereon, calculated at the Six Month LIBOR plus one percent (1%) per annum from the date upon which it was due until the date upon which such amount is received by BEC.
- 11.7 In order to provide BEC assurance of payments as will be required by its lenders, GoG shall on or before the Effective Date provide a Letter of Credit in an amount equal to the sum of the Tolling Fees and fuel Cost payable over sixty (60) days based on the then current Contracted Capacity (subject to adjustment each Contract Year to reflect the then current Contracted Capacity) and assuming that the Power Station is operated at 125 MW each day for such sixty (60) day period (as adjusted from time to time the "Letter of Credit Amount"), issued by a financial institution reasonably acceptable to BEC, as

security for the timely payment of all sums due to BEC hereunder from GoG. GoG covenants and agrees to provide BEC no later than (30) days prior to the expiration of any existing Letter of Credit a replacement Letter of Credit in an amount equal to the then current Letter of Credit Amount. BEC shall be entitled to draw upon any Letter of Credit without further notice to GoG for any payment due to BEC from GoG that is overdue for at least fifteen (15) days. GoG further covenants and agrees that upon the draw of funds by BEC under any Letter of Credit provided hereunder, GoG shall provide to BEC an additional Letter of Credit equal to the amount drawn under any such Letter of Credit. In the event that GoG fails to arrange issuance and funding of any Letter of Credit required hereunder within fifteen (15) days after the obligation to provide any such Letter of Credit to BEC arises, such failure shall be deemed to be a flagrant disregard of its obligations hereunder and BEC shall be entitled (following prior written notice to GoG) to (i) suspend deliveries of electricity hereunder until GoG has cured the breach of its obligations under this Clause 11.7 and (ii) draw down the outstanding balance of any Letter of Credit previously provided to BEC by GoG, provided that, so long as GoG is current with all payments due to BEC under this Agreement, BEC shall not be entitled to suspend deliveries of electricity or draw down further amounts under any Letter of Credit, in either case, pursuant to this sentence. In the event GoG fails to provide any Letter of Credit to BEC (i) in the case of the initial Letter of Credit, within sixty (60) days of the date the obligation to provide such Letter of Credit arises, or (ii) in the case of each replacement or additional Letter of Credit, within one hundred eighty (180) days of the date the obligation to provide any such Letter of Credit arises, then the provisions of Clause 17.1 shall apply. Subject to the laws of Ghana all payments made by GoG hereunder shall be made free and clear of and without any deduction for or on account of any set-off, counterclaim, tax or otherwise and all such payments will be increased by the GoG as required in section 11.2 above

- 11.8 If GoG disputes the amount specified in any invoice it shall so inform BEC and GoG shall pay the undisputed amount on or before the due date of such invoice. The disputed amount shall be resolved pursuant to Clause 22.
- 11.9 Notwithstanding any other term or provision of this Agreement, if BEC is unable to commence testing of the Power Station (on a date nominated by BEC) as a result of:
- (i) GoG's failure to provide an adequate Transmission Line and interconnection facilities for the Power Station;

then in any of such events, GoG shall be obligated to commence making payments of the Tolling Fees to BEC on the thirtieth (30th) day after BEC certifies to GoG that the Power Station is complete or would have been complete except for the nonperformance as listed in (i), above. The capacity for the purposes of calculating the Tolling Fees payable under this Clause shall be deemed to be the Nominal Capacity.

12. Time and Place of Payment

- 12.1 All sums payable to BEC, including without limitation the full amount of all Tolling Fees, shall be payable in US dollars in Accra, Ghana in same-day funds not later than 2:00 p.m., Ghana time, on the day when payment is due, to the account of BEC with a bank in Ghana or elsewhere that BEC shall specify to GoG in writing from time to time.
- 12.2 ~~All sums payable by BEC to GoG shall be payable in same-day funds not later than 2.00p.m., Ghana time, on the day when payment is due, to the account of GoG with a bank in Ghana that GoG shall specify.~~
- 12.3 If any amount payable by BEC is not paid on or before the due date, BEC shall pay interest thereon, calculated at the Six Month LIBOR Rate plus one percent (1%) per annum, from the date that it was due until, the date upon which such amount is received by GoG.

13. Insurance

- 13.1 BEC covenants and agrees to ensure that there is effected insurance as provided in the Eighth Schedule. The proceeds of claims against such insurance (except third party liability and workman's compensation insurance) shall be used by BEC for the reinstatement of the Power Station subject to the terms of any loan agreements provided in connection with the Project.
- 13.2 All policies of insurance (except Workmen's Compensation Insurance) required to be obtained by BEC pursuant to the Eighth Schedule shall include GoG and its employees as additional insured's as their interests may appear.
- 13.3 Each of GoG and BEC shall cause its insurers to waive all rights of subrogation against the other party and the other party's employees (and contractors working directly in connection with the Project) & respect of a claim arising under its insurance policies, unless such claim arises from the willful misconduct or gross negligence of the other party or the other party's employees or contractors.
- 13.4 Certificates of insurance, binders (if applicable), or a letter from a licensed broker or independent insurance consultant certifying compliance or documenting the status of attempts to comply with the requirements of the Eighth Schedule, shall be submitted not less than thirty (30) days prior to the Completion Date, and not less than thirty (30) days prior to any policy termination or expiration dates which arise during the term of this Agreement and any extensions. Complete copies of policies, including all declarations, terms, conditions, endorsements and exclusions, shall be made available for inspection by GoG and remain available for inspection by GoG or its insurance consultant as certification of coverage not less than ninety (90) days after the Completion Date and any policy expiration dates which arise during the term of this Agreement and any extensions.

13.5 If at any time through mutual agreement of GoG and BEC due to insurance market conditions, changes in legal requirements; or changes in the liability environment, the provisions of the Eighth Schedule are deemed obsolete, or inappropriate, those provisions may be amended.

14. Operation of Power Station

14.1 GoG shall give immediate access to the Power Station to BEC immediately after execution of this Agreement. BEC shall be the sole operator of the Power Station during the Contract Period.

14.2 In the event that BEC defaults in compliance with its obligations to commission the Osagyefo Barge within 90 working days after the Effective Date, and if the default extends beyond 120 working days, BEC shall pay liquidated damages of US\$10,000.00 per day of default and which shall not exceed US\$300,000.00 in total. ~~If, 150 working days after the Effective Date,~~ there is no progress in accordance with the project milestone as indicated in the Third Schedule, GoG shall have the right to terminate this Agreement.

14.3 In the event that BEC defaults in compliance with its obligations to install and commission the steam turbine component to complete the combined cycle within 9 months after the Effective Date, and if the default extends beyond 12 months BEC shall reduce the fuel Cost per kWh to the equivalent of the combined cycle fuel cost. If, 18 months after the Effective Date, there is no progress in accordance with the project milestone in respect of the steam turbine as indicated in the Third Schedule, GoG shall have the right to terminate this Agreement.

14.4 In the event that BEC is unable to procure the two (2) remaining combined cycle systems within 5 years from the Effective Date, GoG shall have the right to repossess portions of the undeveloped Site.

15. Liability and Indemnification

15.1 GoG shall indemnify and hold BEC, its officers and employees harmless against any claim of any who directly or indirectly suffers as a result of an interruption of electricity supply or any disruption or surge of electricity supply arising out of or in connection with this Agreement and any of BEC's, its officers' or employees' actions or omissions in connection with the same except if such claim is due to BEC's or BEC's officers or employees gross negligence or intentional misconduct.

15.2 Subject to Clause 15.1, BEC shall hold GoG, its officers and employees free of and harmless from any claims, or suits of any third party, other than claims for economic loss, arising from BEC's operation of the Power Station, except if such claim is due to GoG's or GoG's officers or employee's gross negligence or intentional breach of this Agreement.

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- 15.3 Without prejudice to Clause 15.2, BEC shall indemnify and hold harmless GoG (and its officers and employees) from and against all damages, losses and reasonable expenses, suffered or paid by GoG as a result of any and all claims for personal injury, death or property damage to third parties due to an event occurring before the termination of this Agreement and arising directly out of the construction, operation or maintenance of the Power Station and resulting from any act or omission of BEC or its agents or employees. Notwithstanding anything to the contrary contained in the preceding sentence, nothing in this Clause 15.3 shall apply to any loss, damage, cost or expense in respect of which, and to the extent that, GoG (or its officers and employees) is otherwise compensated pursuant to the terms of any other agreements entered into with BEC with respect to the Project or any insurance.
- 15.4 Without prejudice to Clause 15.1, GoG shall indemnify and hold harmless BEC (and its officers and employees) from and against all damages, losses and reasonable expenses, suffered or paid by BEC as a result of any and all claims for personal injury, death or property damage to third parties due to an event occurring before the termination of this Agreement and resulting from any act or omission of GoG or its agents or employees. Notwithstanding anything to the contrary contained in the preceding sentence, nothing in this Clause 15.6 shall apply to any loss, damage, cost or expense in respect of which, and to the extent that, BEC (or its officers and employees) is otherwise compensated pursuant to the terms of any other agreements entered into with GoG with respect to the Project or any insurance.
- 15.5 Each party (or its officers or employees, as the case may be) (each an "Indemnified Party") shall promptly notify the other Party (the "Indemnifying Party") of any claim or proceeding in respect of which it is entitled to be indemnified under this Clause 15. Such notice shall be given as soon as reasonably practicable after the relevant Indemnified Party becomes aware of such claim or proceeding.
- 15.6 Any Indemnified Party shall have the right, but not the obligation, to contest, defend and litigate (and to retain legal advisers of its choice in connection therewith) any claim, action, suit or proceeding by any third party alleged or asserted against it arising out of any matter in respect of which it is entitled to be indemnified hereunder, and the reasonable costs and expenses thereof shall be subject to the said indemnity; provided, that the Indemnifying Party shall be entitled, at its option, to assume and control the defense of such claim, action; suit or proceeding at its expense and through legal advisers of its choice if it (i) gives notice of its intention to do so to the Indemnified Party, (ii) acknowledges in writing its obligation to indemnify the Indemnified Party to the full extent provided by the relevant Clause, and (iii) reimburses the Indemnified Party for the reasonable costs and expenses previously incurred by the Indemnified Party prior to the assumption of such defense by the Indemnifying Party. No Indemnified Party shall settle or compromise any claim, action, suit or proceeding in respect of which it is entitled to be indemnified by the Indemnifying Party without the prior written consent of the Indemnified Party.

15.7 Except where otherwise stated in this Agreement, the duties, obligations and liabilities of the parties hereto are intended to be several and not joint or collective and nothing contained in this Agreement shall be construed to create an association, trust, partnership or joint venture amongst the parties hereto and each party shall be liable individually and severally for its own obligations under this Agreement.

16. Force Majeure

16.1 No failure or omission to carry out or observe any of the terms, provisions or conditions of this Agreement shall give rise to any claim by any party hereto against the other party hereto, or be deemed to be a breach of this Agreement if the same shall be caused by or arise out of:

(a) (other than as referred to in paragraph (b) below), any war, declared or not, or hostilities, or of belligerence, blockade, revolution, insurrection, riot, public disorder, ~~expropriation, requisition, confiscation~~ or nationalization, export or import restrictions by any governmental;

(b) authorities, closing of harbours, docks, canals, or other assistance to or adjuncts of the shipping or navigation of or any place, rationing or allocation, whether imposed by law, decree or regulation by, or by compliance of industry at the insistence of any governmental authority, or fire, unusual flood, earthquake, storm, typhoon, lightning, tide (other than normal tides), tidal wave, perils of the sea, accidents of navigation or breakdown or injury of vessels, accidents to harbours, docks, canals, or other assistance to or adjuncts of the shipping or navigation, epidemic, quarantine, strikes or combination of workmen, lockouts or other labor disturbances, or any other event, matter or thing, wherever occurring, which shall not be within the reasonable control of the party affected thereby; war, declared or not, or hostilities involving the Republic of Ghana, or of belligerence, blockade, revolution, insurrection, riot, public disorder, expropriation, requisition, confiscation or nationalization by or involving the Republic of Ghana, export or import resections by any governmental authorities of or within the Republic of Ghana, closing of harbors, docks, canals, or other assistance to or adjuncts of the shipping or navigation of the Republic of Ghana, rationing or allocation, whether imposed by law, Each of the foregoing events, matters or things being called "Force Majeure" in this Agreement.

16.2 Notwithstanding Clause 16.1 GoG shall not be relieved of its obligation to make payments of Tolling Fees and fuel Costs as provided in Clause 11.1 by the occurrence of any Force Majeure mentioned in sub-paragraph (b) of Clause 16.1 whether affecting GoG or BEC. BEC shall likewise not be relieved of it's obligation to make Lease Fee payments as provided in Clause 11 by the occurrence of any Force Majeure mentioned in subparagraph (b) of Clause 16.1 whether affecting GoG or BEC.

16.3 The party invoking Force Majeure shall:

(a) notify the other party as soon as reasonably possible by fax, e-mail, and official letter of the nature of the Force Majeure and the extent to which the Force Majeure suspends the affected party's obligations under this Agreement; and

~~(b) resume performance of its obligations as soon as the Force Majeure condition no longer exists.~~

16.4 If Force Majeure applies prior to the Completion Date the parties will meet to discuss a revised timetable for the completion of the Project. The Contract Period shall be extended by a period equal to that during which the effect of the Force Majeure applies.

16.5 ~~If a Force Majeure which applies pursuant to the terms of sub-paragraph (a) of Clause 16.1 prevents, or it is apparent that such Force Majeure will prevent, BEC from constructing the Power Station or operating the Power Station for a continuous period of more than twenty four (24) months or if the cost to reinstate or complete the building of, as the case may be, the Power Station exceeds the proceeds of claims against the insurance carried by BEC pursuant to Clause 13 and the Ninth Schedule (except third-party liability and workmen's compensation insurance) by more than \$5,000,000, then, in either case, BEC shall not be obliged to reinstate the Power Station.~~

16.6 The parties hereto will consult with each other and take all reasonable steps to minimize the losses of either party resulting from Force Majeure.

17. Term:

This Agreement shall be for a period of 20 years from the Effective Date.

18. Change in Circumstances

In the event that:

(a)(i) as a result of any laws or regulations of the Republic of Ghana or any governmental instrumentality, agency or other body under the control of the Government of Ghana or any regional or municipal authority thereof (collectively, "Governmental instrumentality"), coming into effect after the date hereof, or

(ii) as a result of any such laws or regulations (including any official interpretation thereof which BEC has relied upon in entering into this Agreement) in force at the date hereof being amended, modified or repealed or any action or failure to act by any Governmental Instrumentality, or

(vii) as a result of any approvals, consents, registrations, exemptions or other requirements of the Republic of Ghana or any Governmental Instrumentality, coming into effect after the date hereof, or

(ii) as a result of approvals, consents, registrations, exemptions or other requirements (including such approvals, consents, registrations, exemptions or other requirements provided for in Clauses 7.2 and 7.3 and the Eighth Schedule which BEC has relied upon in entering into this Agreement) of the Republic of Ghana or any Governmental Instrumentality being withdrawn, rescinded or amended or any new required extension, approval, consent, registration or other requirement of the Republic of Ghana or any Governmental Instrumentality cannot be obtained, the interest of BEC in the Project or the Power Station and/or BEC's economic return (net of tax (other than income tax imposed on BEC) or other imposition) on its investment is materially reduced, prejudiced or otherwise adversely affected (including without limitation any restriction on the ability to remit funds in U. S. dollars outside of Ghana) then the parties hereto shall meet and endeavor to agree to review and amend this Agreement as appropriate.

19. Assignment

19.1 Neither Party may assign nor transfer all or any part of its rights, benefits or obligations hereunder without the written consent of the other Party.

20. Warranty

BEC hereby warrants that neither it nor its representatives have offered any government officer and/or GoG official or employee any consideration or commission for this Agreement nor has it or its representatives exerted or utilized any corrupt or unlawful influence to secure or solicit this Agreement for any consideration or commission; that BEC shall not knowingly subcontract any portion or portions of the scope of the work of the Agreement awarded to any official or employee of GoG or to the relatives within the third degree of consanguinity or affinity of GoG officials who are directly or indirectly involved in contract awards or project prosecution and that if any commission is being paid to a private person, BEC shall disclose the name of the person and the amount being paid and that any violation of this warranty shall constitute a sufficient ground for the revision or cancellation of this Agreement or the deduction from the contract price of the consideration or commission paid without prejudice to the filing of civil or criminal action under applicable laws against BEC and/or its representatives and GoG's officials and employees.

22.2 If any dispute arises out of or in relation to this Agreement and if such matter cannot be settled through direct discussions of the Parties, the matter shall be referred to binding arbitration at the Permanent Court of Arbitration, Peace Palace, Carnegieplein 2, 2517 KJ in The Hague, The Netherlands. Unless the Parties to this Agreement agree otherwise, the arbitrator shall not have the power to award nor shall he/she award any punitive or consequential damages (however denominated). Each side shall pay its own attorneys fees and costs no matter which side prevails and each Party shall share equally in the cost of any mediation or arbitration. Applications may be made to such court for judicial recognition of the award and/or an order of enforcement as the case may be. Arbitration shall be governed by and conducted in accordance with UNCITRAL rules.

23. Law

~~This Agreement shall be governed by and construed in accordance with the laws of the Republic of Ghana.~~

24. Jurisdiction

To the extent that GoG may in any jurisdiction claim for itself or its assets or revenues immunity from suit, execution, attachment (whether in aid of execution, before judgment or otherwise) or other legal process and to the extent that in any such jurisdiction there may be attributed to GoG or its assets or revenues such immunity (whether or not claimed) GoG agrees not to claim and irrevocably waives such immunity to the full extent permitted by the laws of such jurisdiction.

25. Severability

A holding of any court of competent jurisdiction that any provision of this Agreement is invalid shall not result in invalidation of the entire Agreement. Instead, this Agreement shall be construed, if possible, in a manner to give effect by means of valid provisions to the intent of the parties to the particular provision or provisions held to be invalid, and, in any event, all other terms shall remain in full force and effect.

26. Survival of Provisions

In order that the parties may fully exercise their rights and perform their obligations hereunder, such provisions of this Agreement that are required to insure such exercise or performance shall survive the termination of this Agreement for any cause whatsoever.

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27. Entire Agreement

This Agreement, including the Schedules hereto contains all of the understandings and agreements of whatsoever kind and nature with respect to the subject matter of this Agreement and the rights, interests, understandings, agreements and obligations of the parties relating thereto.

The Schedules hereto shall be deemed to be part of this Agreement and are hereby ~~incorporated herein~~ by reference. All prior written or oral understandings, offers or other communications of every kind concerning the subject matter hereof are hereby abrogated and withdrawn and shall not affect or modify any of the terms or obligations set forth in this Agreement.

28. Industrial Property Rights

BEC warrants that, to the extent necessary to comply with its obligations under this Agreement, ~~BEC has a suitable license or other legal right to all~~ patents, trademarks and copyrights which may subsist in the design of the Power Station and shall pay all royalties and license fees that are due in connection therewith during the term of this Agreement. BEC warrants that the design of the Power Station, the contemplated operation thereof, or the use of any component unit thereof by GoG shall not infringe any patent, trademark or copyright of any third person. BEC shall indemnify GoG against any penalties and liability of every kind for BEC's breach of the warranties contained in this Clause 28.

29. Representation and Warranties

29.1 BEC represents and warrants that:

- (i) BEC is a limited liability company duly organized and validly existing under the laws of Ghana and is licensed to do business in the Republic of Ghana as necessary to perform its obligations under this Agreement and has all requisite legal power and authority to execute this Agreement and to carry out the terms, conditions and provisions hereof;
- (ii) All legislative, administrative and other governmental action required to authorize the execution and delivery, and all non-Ghana, and to BEC's knowledge after the due inquiry, all Ghana, legislative, administrative and other governmental action required to authorize the performance by BEC of this Agreement and the transactions contemplated hereby have been taken except to the extent of actions which are to be taken at a later time;
- (iii) This Agreement constitutes the valid, legal and binding obligation of BEC, enforceable in accordance with the terms hereof except as the enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting creditors rights generally;

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- (iv) There are no actions, suits or proceedings pending or, to BEC's knowledge, threatened, against or affecting BEC before any court or administrative body or arbitral tribunal that might materially adversely affect the ability of BEC to meet and carry out its obligations under this Agreement; and
- (v) The execution, delivery and performance by BEC of this Agreement have been duly authorized by all requisite corporate action, and will not ~~contravene any provision of~~, or constitute a default under, any other agreement or instrument to which it is a party or by which it or its property may be bound.

29.2 GoG represents and warrants that:

- (a) Existence and Authority. ~~The GoG has full power, authority, and legal right to carry on its business as now conducted.~~ The GoG has taken all actions necessary or reasonably requested by BEC to authorize it to execute, deliver, perform and observe the terms and conditions of this Agreement and the other documents. The GoG has the full legal right, power, and authority for and on behalf of the Government of Ghana to pledge the full faith and credit of the Republic of Ghana under the terms of this Agreement.
- (b) Recordation. To ensure the legality, validity, enforceability, priority or admissibility in evidence in the Republic of Ghana of this Agreement, including, without limitation, the pledge of the full faith and credit of the Republic of Ghana set forth herein and therein, it is not necessary that this Agreement be registered, recorded, enrolled or otherwise filed with any court or other Governmental Authority, or be notarized, or that any documentary, stamp or other similar tax, imposition or charge of any kind be paid on or with respect to this Agreement or any Letter of Credit.
- (c) Restrictions. The execution, delivery and performance or observance by the GoG of the terms of, and consummation by the GoG of the transactions contemplated by this Agreement (A) do not and will not conflict with or result in a breach or violation of any applicable contract binding upon the GoG or the Government or any of each of their revenues, properties or assets, or any applicable law including, without limitation, any restriction on interest that may be paid by the GoG, and (B) do not and will not result in the creation or imposition of any lien upon any of the revenues, properties or assets of the GoG or Government pursuant to any contract or applicable law.
- (d) Binding Effect. The GoG has duly executed and delivered this Agreement on or before the Agreement Date, and the GoG will also duly execute and deliver each Letter of Credit that may hereafter be executed. This Agreement has been executed and delivered and constitutes, and will constitute, a direct, general, and unconditional obligation of the GoG

which is legal, valid, and binding upon the GoG and enforceable against the GoG in accordance with its respective terms, and for which the full faith and credit of the Republic of Ghana is pledged.

(e) Pari Passu Status. The GoG's payment obligations under this Agreement rank, and under any Letter of Credit when issued will rank, in all respects at least *pari passu* in priority of payment and in right of security with all other unsecured and unsubordinated debt of the GoG.

(f) Legal Proceedings. No litigation, investigation or legal proceedings are pending or, to the best of the GoG's knowledge and belief, after due diligence, threatened, before any court in any jurisdiction involving the Power Station, including but not limited to, the Osagyefo Barge, that might have a materially adverse effect on GoG or BEC and the GoG hereby unconditionally warrants and confirms that it has true, subsisting and valid title to the Osagyefo Barge and each and every component contained therein and that no lien either exists or is threatened in respect of any part thereof by any person in any jurisdiction.

(g) No Taxes. There is no Tax other than stamp duty at a nominal rate imposed on or in connection with:

(A) the execution, delivery or performance of this Agreement ;

(B) the enforcement of any of this Agreement ; or

(C) on any payment to be made to the BEC under this Agreement . In connection with the Letter of Credit, no Governmental Authority shall impose any reserve, special deposit, deposit insurance or assessment affecting the BEC.

No Foreign Exchange Controls. There are no foreign exchange or other restrictions in effect in the Republic of Ghana adversely affecting the ability or right of GoG to acquire and to remit to BEC foreign currency to pay and satisfy GoG's obligations under this agreement.

30. Third-Party Beneficiaries

This Agreement is intended to be solely for the benefit of BEC and GoG and their successors and permitted assigns and is not intended to and shall not confer any rights or benefits on any third party not a signatory hereto.

31. Joint Effort and Confidentiality

The parties acknowledge and agree that the terms and conditions of this Agreement have been freely and fairly negotiated. Each party acknowledges that in executing this Agreement it has relied solely on its judgment, belief, and knowledge, and such advice as it may have received from its own counsel and it has not been influenced by any representation or statements made by any other party or such party's counsel.

No provision in this Agreement is to be construed for or against any party because that party or its counsel drafted such provision.

32. Amendments

This Agreement may be amended at any time by mutual agreement of the parties in writing and signed by a duly authorized representative of each party.

33. Compliance with Laws

BEC and GoG shall comply with all applicable laws and shall comply in all material respects with and shall keep in full force and effect all governmental authorizations required to be in their respective names for the performance of their respective obligations under this Agreement.

Neither BEC nor any of its employees or contractors shall attempt to influence any government official by payment of any fees nor in any way violate the US Foreign Corrupt Practices Act in the conduct of the Project.

34. Termination

34.1 Termination upon Events of Default

34.1.1 BEC Events of Default

GoG may give notice of its intention to terminate this Agreement upon the occurrence of any of the events described below (each a "BEC Event of Default"):

34.1.1.1 the occurrence of any of the following events: (i) the passing of a resolution for the winding up, liquidation of, or other similar proceeding relating to BEC, (ii) the appointment of liquidator, manager or similar person in a proceeding referred to in clause (i), which appointment has not been set aside or stayed within thirty (30) Days of such appointment, or (iii) the making by a court having jurisdiction of an order winding up of BEC, which order has not been set aside or stayed within thirty (30) Days; or

34.1.1.2 Abandonment by BEC; or

34.1.1.3 BEC commits a breach of this Agreement that materially and adversely affects the GoG's performance or enjoyment of its rights set forth in this Agreement or repudiates this Agreement; or

34.1.2 GoG Events of Default

BEC may give notice of its intention to terminate this Agreement upon the occurrence of any of the events described below (each an "GoG Event of Default"):

34.1.2.1 the failure of the GoG to establish and maintain the Letters of Credit and to maintain the amount therein or

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(b) the GoG commits a breach of this Agreement that materially and adversely affects BEC's performance or enjoyment of its rights set forth in this Agreement or repudiates this Agreement, or the GoG, whilst it is the lessor under the Site Lease, commits a breach of the Site Lease that materially and adversely affects BEC performance or enjoyment of its rights set forth in this Agreement, or repudiates the Site Lease,

34.1.3 Other Events of Termination

Either Party may give notice of its intention to terminate this Agreement upon the occurrence of any of the events described below (each an "Other Event of Termination"):

34.1.3.1 if either Party claims relief for a Force Majeure Event, which the Parties agree, and the Force Majeure Event Period relating to it exceeds one hundred and eighty (180) Days, on or at any time after the expiry of that period, so long as the Force Majeure Event Period relating to it is continuing.

34.1.4 Termination Procedures

Upon the occurrence of a BEC Event of Default, a GoG Event of Default, or an Other Event of Termination, the following procedures shall be followed by the Parties:

34.1.4.1 Upon the occurrence of a BEC Event of Default or GoG Event of Default, as the case may be, not cured within the applicable grace period, the non-defaulting Party may, at its option, initiate termination of this Agreement by delivering a notice of its intent to terminate this Agreement (a "Notice of Intent to Terminate") to the defaulting Party. The Notice of Intent to Terminate shall specify in reasonable detail the BEC Event of Default or GoG Event of Default, as the case may be, giving rise to such notice. Upon the occurrence of an Other Event of Termination, either Party may, at its option, initiate termination of this Agreement by delivering a Notice of Intent to Terminate to the other Party. The Notice of Intent to Terminate shall specify in reasonable detail the event giving rise to such notice. Service of a Notice of Intent to Terminate by one Party shall not at any time preclude service of a Notice of Intent to Terminate by the other Party.

34.1.4.2 Following the delivery of a Notice of Intent to Terminate, the Parties shall consult for a period (the "Consultation Period") of sixty (60) Days commencing on such delivery date with respect to any such BEC Event of Default, GoG Event of Default or Other Event of Termination or such longer period as the Parties may mutually agree as to what steps shall be taken with a view to mitigating the consequences of the relevant BEC Event of Default, GoG Event of Default or Other Event of Termination, as applicable, taking into account all the circumstances.

34.1.4.3 During the Consultation Period:

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- 34.1.4.3.1 the Party in default may continue to undertake efforts to cure the default, and if the default is cured at any time prior to the delivery of a Termination Notice then the non-defaulting Party shall have no right to terminate this Agreement in respect of such cured default;
- 34.1.4.3.2 each Party shall not impede or otherwise interfere with the other Party's efforts to remedy the BEC Event of Default or GoG Event of Default, as the case may be, which gave rise to the Consultation Period; and
- 34.1.4.3.3 ~~both Parties shall, save as otherwise provided in this Agreement, continue to perform their respective obligations under this Agreement.~~
- 34.1.4.4 Within fifteen (15) Days of the expiry of the Consultation Period (or, if there is no Consultation Period, within fifteen (15) Days of the date of the Notice of Intent to Terminate) and unless the Parties shall have otherwise agreed or unless, in the case of a BEC Event of Default or GoG Event of Default giving rise to the Notice of Intent to Terminate such default shall have been remedied, the Party having given the Notice of Intent to Terminate ~~may terminate this Agreement by delivering a notice to the other Party terminating this Agreement ("Termination Notice"), whereupon this Agreement shall terminate on the date of the Termination Notice.~~

IN WITNESS WHEREOF, each of the parties has caused this Agreement to be executed by its duly authorized officer in more than one copy each of which shall be deemed to be an original as of the day and year first above written.

GOVERNMENT OF GHANA



By: [Signature]
 Name: JOSEPH KOFI ANNA, mp
 Title: Minister of Energy

Date: 27th July 2007

In the Presence Of: [Signature]
 Name: DINA HAMMOND
 Title: CHIEF DIRECTOR

Date: 27th July 2007

BALKAN ENERGY GHANA LIMITED

By: [Signature]
 Name: Phillip David Elders
 Title: DIRECTOR

Date: July 27, 2007

In the presence of: [Signature]

Date: July 27, 2007

Name: GEORGE McDONNELL NTORINKANSAH
 Title: COUNTRY DIRECTOR

[Handwritten initials]
[Handwritten mark]

FIRST SCHEDULE

PROJECT SCOPE AND SPECIFICATIONS

I. Scope of Agreement

- (i) BEC shall design and install a fuel storage and delivery facilities, refurbish and commission, a one hundred twenty five (125 MW) megawatt power barge, named the Osagyefo Barge and associated facilities ('the Power Station') within 90 working days of the Effective Date.
- (ii) BEC shall ~~convert the Power Station into a combined cycle power plant by~~ addition of a heat recovery steam generator (HRSG), a steam turbine and electric generator with an incremental capacity of approximately 60MW within 9 months of the Effective Date.
- (iii) BEC shall privately invest and bring two more combined cycle barge mounted systems to the Site within 36 months of the Effective Date with GoG on a Tolling Fee for these systems. These systems will each have a similar capacity of approximately 185 megawatts. This investment will bring the Site generation capacity to more than 550 megawatts. The Tolling Fee for these additional systems will be agreed prior to their mobilization
- (iv) BEC shall, subject to the satisfactory conclusion of supply agreements with the two source providers, invest in infrastructure to enable gas to be supplied to the Power Station within three (3) years of the Effective Date.
- (v) BEC shall provide all fuel to the Power Station on a fuel Cost basis.

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SECOND SCHEDULE

OPERATING PARAMETERS

A. Operating Parameters

BEC shall operate the Power Station in accordance with the operating criteria and guidelines recommended by the manufacturer or supplier of such equipment.

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THIRD SCHEDULE

MILESTONE SCHEDULE

	<u>MILESTONE EVENT</u>	<u>DATE</u>
1.	Execution of Agreement	July__ 2007
2.	Entry onto Site and access to Osagyefo Barge	July__ 2007
3.	All permits, licenses and approvals obtained	August__ 2007
4.	Construction Power	August__ 2007
5.	Testing and commissioning of Osagyefo Barge	90 working days after Effective Date
6.	Combined Cycle Conversion	9 months after Effective Date
7.	Provision of additional Combined Cycle barges	36 months after Effective Date (subject to Tolling fee Agreement with GoG).
8.	Natural Gas supplied to Site	Approximately 3 years after Effective Date (subject to concluded supply agreements).

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FOURTH SCHEDULETRANSMISSION LINE SPECIFICATIONSLocation

From the outgoing switching facility within the Site station in Effasu, Ghana.

Specifications

The Transmission line at 161 kV shall be capable of providing sufficient electricity for testing and commissioning of the Power Station and shall be capable of taking the maximum output of the Power Station.

means the 161 kV voltage transmission line(s), transmission towers, substations and other items necessary to transmit electricity from the outgoing gantry of the switching facility within the Site boundary to the National Grid as further described and having the specifications set out in the Fourth Schedule

1.0 Grid Characteristics

1.1 Grid Frequency and Voltage Variations

1.1.1 Nominal Values

- | | | |
|-----|----------------|--------|
| (a) | Grid Voltage | 161 kV |
| (b) | Grid Frequency | 50 Hz |

1.1.2 Operating Conditions

(a) Zone A - Normal Operation

Voltage 161kV -10% / +5%

Frequency 49Hz - 51Hz (ie 50Hz \pm 2%)

(b) Zone B - Permitted Short Term Abnormal Operation

Voltage - Within 161 Kv \pm 10%

Frequency - 47.5 Hz - 51.5 Hz (ie 50 Hz -5% / +3%)

FIFTH SCHEDULE

ELECTRICITY DELIVERY PROCEDURES

1. Definitions

"Scheduled Outage" means the scheduled removal of the generating capability of the Power Station to undertake normal inspections, maintenance, repair, replacement and overhaul of the Power Station or a portion thereof pursuant to the schedule approved pursuant to Clause 8.2, as such schedule may be revised from time to time pursuant thereto.

"Forced Outage" is defined as the inability due to the fault of BEC to meet Contracted Capacity requested by The System Dispatch Center provided that any failure to meet the Contracted Capacity resulting from the declared unavailability of any unit of the Power Station due to a Scheduled Outage shall not be Forced Outage.

"Downtime" means the sum of the number of hours per each Contract Year (i) Scheduled Outages and (ii) Forced Outages, not to exceed in the aggregate 876 hours per contract Year, provided that in any year during which a Major Overhaul is performed on the Power Station the number of allowable hours shall be increased to 1100 hours in the aggregate, plus, in addition to the foregoing hours allowable each Contract Year, any other hours that the Contracted Capacity is unavailable as a consequence of GoG's failure to perform any of its obligations under this Agreement, unavailability of the Transmission Line or the GoG grid or due to Force Majeure.

2. Measurement of Power Generated

Measurement of power generated transferred to GoG shall be made at the low voltage side of the main power transformer(s) in accordance with the provisions of the Seventh Schedule.

3. Notice in change of output

Specific procedures for notifications of power requirements shall be agreed between BEC and GoG prior to the Completion Date. Subject to such procedures, the output of the generators shall be as required by the System Dispatch Center from time to time, provided that changes in output requested by the System Dispatch Center remain within the Specifications and the Operating Parameters as set forth in the First and Second Schedules.

4. Notice of Scheduled Outages

GoG shall prepare annual, monthly and weekly systems operating plans and in so doing shall coordinate with BEC to agree on the Scheduled Outages. GoG

shall grant BEC sufficient Scheduled Outage hours to undertake all regular inspection and maintenance of each generator in accordance with the manufacturer's recommendations, taking full account of hours run, number of starts and duration of running for each start. BEC will plan with GoG to ensure that as far as practicable, Scheduled Outages are undertaken at times to cause minimum disruption to the National Grid.

5. Dispatch Coordination

BEC shall work with the System Dispatch Center to establish projected combined dispatch schedule

SIXTH SCHEDULE

MEASUREMENT AND RECORDING OF ELECTRICITY

1. The meter location to record the kW, kWh and kVAR delivered to GoG shall be at the low voltage side of the main step up transformers.
2. The quantity of power and energy delivered to GoG shall be given by the in/out meters referenced in Section 1 of this Schedule.
3. In order to verify the quantity of electricity delivered by BEC to GoG in each month, GoG and BEC shall at noon or at such other time agreed between GoG and BEC on the twenty-fifth day of each Month print a report (generated by the process computer in the Power Station) detailing the daily delivery of electricity from the Power Station by BEC provided always that if GoG shall not be present at the Power Station at the agreed time, the above mentioned report shall be printed by BEC and shall be binding on GoG for all purposes under this Agreement.
4. BEC shall maintain the meter and related equipment to be utilized for the measurement of electric power (kW), energy (kWh) and reactive power (kVA) in determining the GoG payments to BEC pursuant to this Agreement.
5. Metering equipment found to be inaccurate shall be repaired, adjusted, or replaced by GoG at BEC's expense such that the inaccuracy of said equipments shall be as near as possible to zero. If metering equipment inaccuracy exceeds plus or minus zero point two percent (0.2 %), the correct amount of energy delivered during the period of said inaccuracy shall be estimated by GoG and agreed by the parties. Adjustment for meter inaccuracy shall cover only the current Month and the Month immediately preceding it.

SEVENTH SCHEDULE

FEEES FOR POWER PRODUCED

1. **OBLIGATIONS OF PARTIES.** BEC hereby agrees to generate electricity and GoG hereby agrees to take at the high voltage side of the step-up transformer, the electric power delivered by BEC to GoG until the end of the Contract Period.
2. **TOLLING FEES.** BEC shall provide and GoG shall pay for the electric power produced by the Power Station as provided in Clause 11 of this Agreement in respect of the amount of actual power produced by the Power Station.
3. **DELIVERED ENERGY.** BEC shall convert fuel into electricity and deliver it to GoG, and ~~GoG shall take such electricity from BEC as requested by the System Dispatch Center~~

GoG shall make a supplemental payment to BEC for costs incurred by BEC associated with start-up of the Power Station or any unit therein that is a consequence of dispatch instructions for these costs. BEC shall invoice GoG for these costs associated with start-up of the Power Station or any unit therein as provided in Clause 11 of this Agreement.

4. **TERMS OF PAYMENT;**

All payments are due within 45(forty-five) days from invoice date.

6. **START UP CHARGES.** A Start Up Charge equal to \$1,000.00 per start shall be paid to BEC for each start which exceeds thirty (30) starts in the aggregate each Contract Year that is resulting from dispatch instructions from the System Dispatch Center,

A Start Up Charge equal to \$10,000.00 per start shall be paid to GoG for each start which exceeds thirty (30) starts in the aggregate each Contract Year that is resulting from acts relating to BEC's operations.

ALL SUMS PAYABLE TO EITHER PARTY SHALL BE PAYABLE IN ACCORDANCE WITH CLAUSE 12.2 OF THIS AGREEMENT.

Handwritten initials and marks, including a large 'B' and a circled 'D'.

EIGHTH SCHEDULE

INSURANCE

1. **INSURANCE DURING EQUIPPING.** From the Effective Date until the commissioning of the Power Station, BEC shall, at its own expense, obtain and maintain in force the following insurance:
 - (a) "Third Party Liability Insurance" to cover injury to or death of persons (including those of GoG) or damages to property caused by the works or by BEC's vehicles, tools and/or equipment or personnel including its subcontractors; and
 - (b) "Workmen's Compensation Insurance."

2. **INSURANCE DURING ~~CONTRACT PERIOD.~~** During the Contract Period; BEC shall at its own expense keep the Power Station insured against accidental damage from all normal risks and to a level normal for prudent operators of facilities similar to the Power Station. In addition, BEC shall secure adequate insurance cover for its employees as may be required by law.

3. The insurance effected shall be no less favorable to the insured in terms of risks covered than that normally effected by GoG in respect of its own similar operations. The insurance effected pursuant to this Eighth Schedule shall be obtained and maintained from financially sound and reputable insurers and such insurance shall generally contain provisions and deductibles which are reasonably standard in the insurance market with respect to power generating facilities of similar size and location. The scope of coverage of such insurance shall be subject to standard exclusions, exceptions and sub-limits and shall be economically reasonable.

NINTH SCHEDULE

SAMPLE INVOICES

BALKAN ENERGY (GHANA) LIMITED
C/O SEY & CO,
FIDELITY HOUSE,
20 RING ROAD CENTRAL,
P. O. BOX 9918 (KIA)
ACCRA, GHANA

BEC

Invoice # 0001

(SAMPLE)

ELECTRICAL GENERATION INVOICE
(SIMPLE CYCLE)

TO: The GoG
C/o Ministry of Energy
Accra, Ghana

Invoice Date: September 26, 2007

Billing Period:

From: August 25, 2007 @ 12:01 pm

To: September 25, 2007 @ 12:00 (noon)

Total kilowatt hours supplied for billing period: 83,700,000 (90% of total capacity)

- 1. Tolling Fee(83,700,000 X .0497) = U.S. \$4,134,780
- 2. Fuel Cost..... = U.S. \$11,250,000 (\$0.134 per kWh)

TOTAL: U.S. \$ 15,384,780

Handwritten initials/signature

DALAN ENERGY (GHANA) LIMITED
C/O SEY & CO,
FIDELITY HOUSE,
20 RING ROAD CENTRAL,
P. O. BOX 9918 (KIA)
ACCRA, GHANA

BEC

Invoice # 0010
(SAMPLE)

ELECTRICAL GENERATION INVOICE
(COMBINED CYCLE)

TO: The GoG
C/o Ministry of Energy
Accra, Ghana

Invoice Date: September 26, 2007

Billing Period:
From: March 25, 2008 @ 12:01 pm
To: April 25, 2009 @ 12:00 (noon)

Total kilowatt hours supplied for billing period: 119,880,000 (90% of total capacity)

- 1. Tolling Fee(119,880,000 X .0497) = U.S. \$5,922,072
- 2. Fuel Cost..... = U.S. \$11,250,000 (\$0.094 per kWh)

TOTAL: U.S. \$ 17,172,072

[Handwritten signatures and initials]

TENTH SCHEDULE

FORM OF LETTER OF CREDIT

[Letterhead of issuing bank]

IRREVOCABLE STANDBY LETTER OF CREDIT

, 2007

IRREVOCABLE STANDBY LETTER OF CREDIT NO. ***

[STATED AMOUNT: US\$***]

To: Balkan Energy Company, as Beneficiary _____
[insert address]

Attention: _____

Gentlemen:

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged:

1. At the request and for the account of GoG (the "Company") and pursuant to the Power Purchase Agreement dated _____, 2007 between you and the Company (as may be amended from time to time, the "Agreement."), we hereby open in your favor this Irrevocable Standby Letter of Credit, which may be drawn upon at the times and in the manner hereinafter provided with respect to the payment of fees outstanding under the agreement. All drawings under this Irrevocable Standby Letter of Credit will be paid with our own funds. Capitalized terms used herein and not otherwise defined shall have the meaning given to such terms in the Agreement.
2. The amount available to be drawn hereunder shall be equal to US\$ _____ (the "Stated Amount"), which as of the Completion Date, in case payable under the Agreement over a period of sixty (60) days and based on the Contracted Capacity and assuming that the Power Station is operated at approximately 125,000 kW each day for such sixty (60) day period, the "Sixty Day Amount".
3. Subject to the provisions hereof, demand for payment may be made by you under this Irrevocable Standby Letter of Credit at our address below at any time during our business hours on any Business Day (as hereinafter defined) by presenting to an officer of the Bank a written drawing certificate the form of Annex I hereto (the "Drawing Certificate"). If such

Handwritten initials/signature: *AP*

Handwritten initials/signature: *D*

Drawing Certificate is received prior to 12:00 P.M. (Ghana time) on a Business Day and conforms to the terms and conditions hereof, payment shall be made to you at the place designated in the drawing Certificate in U.S. dollars and in same day funds, by 2:00 P.M. (Ghana time) on such Business Day. Drawing Certificates received after 12:00 P.M. (Ghana time) on a Business Day shall be so honored by 10:00 A.M. (Ghana time) on the Business Day following the date of such demand for payment, but in no event later than the Stated Expiry Date (as defined below). If a demand for payment made by you hereunder does not, in any instance, conform to the terms and conditions of this Irrevocable Standby Letter of Credit, we shall give you immediate notice that the demand for payment was not effected in accordance with the terms and conditions of this Irrevocable Standby Letter of Credit, stating the reasons therefore and that we are holding documents at your disposal or are returning the same to you. Upon being notified that the demand for payment was not effected in conformity with this Irrevocable Standby Letter of Credit, you may attempt to correct any such nonconforming demand for payment if and to the extent that you are entitled (without regard to the provisions of this sentence) and able to do so. As used herein the term "Business Day" means any day on which commercial banks or banking institutions in Ghana are not required to remain closed.

4. This Irrevocable Standby Letter of Credit shall expire at our close of business at our address on the earlier to occur of the following dates: (i) ***, 20*** (the "Stated Expiry Date"), (ii) the date which is *** days after the Transfer Date has occurred, (iii) the date on which the Stated Amount has been _____ in full or (iv) the Company has procured and delivered to you a replacement Irrevocable Standby Letter of Credit equal to the then current Sixty Day Amount. This Irrevocable Standby Letter of Credit shall be promptly surrendered to us by you upon any expiration pursuant to the preceding sentence. We shall accept without further inquiry your certification that the Transfer Date has not occurred, notwithstanding the representations of any other Party.
5. All documents presented to us in connection with any demand for payment hereunder, as well as all notices and other communications to us in respect of this Irrevocable Standby Letter of Credit, shall be in writing and addressed and presented to us at [insert address, Attention: _____] (or any other office which may be designated by us by written notice delivered to you) and shall make specific reference to this Irrevocable Standby Letter of Credit by number. Such documents, notices and other communications shall be personally delivered to us or transmitted by electronic transmission.
6. This Irrevocable Standby Letter of Credit is not assignable or transferable except in whole to an assignee of your interest in the Agreement or any bank or financial institutions which have provided funding for the Power Station. Transfer of all but not part of this Irrevocable Standby Letter of Credit to any such assignee shall be effected by presentation to us of this Irrevocable Standby Letter of Credit accompanied by a written certificate

substantially in the form of Amex II hereto. Upon such presentation, we shall forthwith issue an irrevocable standby letter of credit in favor of such assignee in the form of this Irrevocable Standby Letter of Credit.

- 7. This Irrevocable Standby Letter of Credit sets forth in full the terms of our undertaking, and this undertaking shall not in any way be modified, amended or amplified by reference to any document, instrument or agreement referred to herein (except the Uniform Customs, hereinafter defined, and the Annexes hereto) or in which this Irrevocable Standby Letter of Credit is referred to or to which this Irrevocable Standby Letter or Credit relates, and any such reference shall not be deemed to incorporate herein by reference any document, instrument or agreement except for the Uniform Customs and Annexes hereto.
- 8. This Irrevocable Standby Letter of Credit shall be governed by construed in accordance with the Uniform customs and Practices for Documentary Credits (1983 Revision), International Chamber of Commerce Publication No. 400 (the Uniform customs) and, to the extent not inconsistent therewith, the laws of the [United States of America] and the [Republic of Ghana].

Very truly yours,

[NAME OF ISSUING BANK]

By: _____
Title:

ANNEX I TO IRREVOCABLE STANDBY LETTER OF CREDIT

DRAWING CERTIFICATE

Date:
[Name of Issuing Bank]
[insert address]

Attention: _____

Re: Irrevocable Standby Letter of Credit No. _____
(The "Standby Letter of Credit")

We refer to the Irrevocable Standby Letter of Credit No. _____ issued by you to us in connection with the Power Purchase Agreement dated _____, 2007 between the GoG and ourselves (the "Agreement"). ~~Capitalized terms used herein and not otherwise defined shall have the meaning specified in the Standby Letter of Credit.~~ We hereby certify to you, through our duly authorized officer, that:

1. We are hereby making a drawing under the Standby Letter of Credit in the amount of \$ *.
2. The account to which the proceeds of this drawing shall be paid is **.
3. The amount demanded hereby represents overdue fees payable under the Agreement which have not been paid within fifteen (15) days of the date so due under the Agreement.
4. This Certificate is presented on or prior to the date which is [] days after the Transfer Date.

IN WITNESS WHEREOF, the undersigned has executed and delivered this certificate on the ____ day of _____, 20 ____.

BALKAN ENERGY COMPANY
as beneficiary

By: _____
Name:
Title:

ANNEX II TO IRREVOCABLE STANDBY LETTER OF CREDIT
FORM OF TRANSFER LETTER

Date: _____

[Name of Issuing Bank]
[insert address]

Re: Irrevocable Standby Letter of
Credit No. _____

Gentlemen:

For value received, the undersigned beneficiary hereby irrevocably instructs you to transfer to _____ (the "Transferee") all rights of the undersigned beneficiary under the above-captioned Irrevocable Standby Letter of Credit (the "Standby Letter of Credit") in its entirety.

By this transfer, all rights of the undersigned beneficiary in the, standby Letter of Credit is transferred to the Transferee and the Transferee shall hereafter have the sole rights as beneficiary thereof.

The original of the Standby Letter of Credit is returned herewith and we ask you to issue a new Standby Letter of Credit in favor of the Transferee containing the same terms and provisions as the Standby Letter of Credit and to forward the Standby Letter of Credit directly to the Transferee with your customary notice of transfer.

Very - truly yours,

BALKAN ENERGY COMPANY
as beneficiary

By: _____
Name:
Title:

Handwritten initials and a circled 'R'.

ELEVENTH SCHEDULE

DRAFT

LEGAL OPINION OF THE ATTORNEY - GENERAL OF GHANA
TO BALKAN ENERGY (GHANA) LIMITED

Dear Sirs,

My opinion has been sought in connection with a Power Purchase Agreement (the "PPA") dated July 26, 2007 entered into between the Government of Ghana (GoG) and Balkan Energy (Ghana) Limited ("BEC") and a Site Lease (the "Lease") dated July 26, 2007 entered into between GoG and BEC (the PPA and the Lease hereinafter defined as the Project Agreements). I have examined executed copies of the Project Agreements and such other documents as I have considered necessary or desirable to examine in order that I may give this opinion. Capitalized terms used herein and not otherwise defined shall have the meanings given to such terms in the PPA.

I am of the opinion that:

- (i) GoG has the corporate or other power to enter into the Project Agreements and to exercise its rights and perform its obligations there under, and execution of the Project Agreements on behalf of GoG by the person(s) who executed the Project Agreements was duly authorized;
- (ii) all acts, conditions and things required by the laws and constitution of the Republic of Ghana to be done, fulfilled and performed in order (a) to enable GoG lawfully to enter into, exercise its rights under and perform the obligations expressed to be assumed by it in the Project Agreements, b) to ensure that the obligations expressed to be assumed by it in the Project Agreements are valid and enforceable by appropriate proceedings and (c) to make the Project Agreements admissible in evidence in the Republic of Ghana, have been done, fulfilled and performed in compliance with the laws and constitution of the Republic of Ghana;
- (iii) The obligations of GoG under the Project Agreements are legal and valid obligations binding on GoG and enforceable in accordance with the terms of the Project Agreements;
- (iv) GoG is not entitled under the terms of the Project Agreements to claim any immunity from suit, execution, attachment or other legal process in

AP

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the Republic of Ghana and such waiver is legal and binding on GoG and enforceable in accordance with the terms of the Project Agreements; and

- (v) Under the Constitution of the Republic of Ghana it is recognized that no law impairing the obligation of contracts shall be passed and consequently the validity of the Project Agreements and the binding nature of the obligations of the parties there under are constitutionally safeguarded.

This opinion is confined to matters of law of the Republic of Ghana, and opinion is expressed as to the laws of any other jurisdiction.

Yours faithfully,

ATTORNEY - GENERAL