INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

GARDABANI HOLDINGS B.V. AND SILK ROAD HOLDINGS B.V.

Claimants

and

GEORGIA

Respondent

ICSID Case No. ARB/17/29

AWARD

Members of the Tribunal
Mr. Henri C. Alvarez KC, President of the Tribunal
Professor Stanimir Alexandrov, Arbitrator
Professor Zachary Douglas KC, Arbitrator

Secretary of the Tribunal
Mr. Alex Kaplan

Date of dispatch to the Parties: 27 October 2022

REPRESENTATION OF THE PARTIES

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

Abbreviation	Definition
2006 Energy Policy	Resolution of Georgia's Parliament on the main directions of Georgia's energy sector policy; in order to attract investments and development competition, electricity distribution companies had to be privatized, and provided different types of tariffs to protect consumers from monopolistic prices and permit long-term sustainable growth (RL-0006)
2006 Tariff Resolution	15 May 2006 NERC Resolution No. 18 fixed Telasi's WAPT at 4.303 tetri/kWh and its average Distribution Tariff at 7.89 tetri/kWh, effective 1 June 2006 (R-0014)
2007 Memorandum	20 June 2007 agreement between Inter RAO and the Government; established long-term tariff policy for Telasi until 2015 (C-0005 / R-0015)
2010 Memorandum	1 October 2010 non-binding memorandum of understanding between Inter RAO and the Government; set out the terms by which Telasi's share capital could be increased to settle certain historical institutional debts and to prepare for an IPO (C-0006 / R-0018)
2011 Memorandum	31 March 2011 Memorandum on the Development of Cooperation in the Electric Power Sector and the Implementation of Previous Agreements, between Inter RAO and the Government; it was agreed that Inter RAO would acquire the Khrami Companies for USD 104 million and that Georgia would set long-term tariffs for both Telasi and the Khrami Companies (C-0015 / R-0019); *see also*, Khrami SPA, 12 April 2011 (C-0016)
2012 Temporary Memorandum	26 December 2012 transitional memorandum between Inter RAO and the Government; temporarily reduced Telasi's Consumer Tariffs for household consumers (line voltage 101 kWh-301 kWh) and recorded the parties' agreement to sign a new definitive memorandum and replace the 2011 Memorandum within 3 months (C-0030)
2013 Memorandum	31 March 2013 agreement between Georgia, the Partnership Fund JSC (a Georgian state-owned company), Inter RAO, Telasi, and the Khrami Companies, which superseded the 2007, 2011 and 2012 Memoranda (C-0034 / R-0028)
2011 Methodology	8 June 2011 NERC's Methodology for Electricity Tariff Calculation (CL-0081)
2014 Amended Methodology	10 August 2017 NERC Resolution No. 20 substantially amended the 2014 Methodology

Abbreviation	Definition
2014 Methodology	30 July 2014 NERC's new tariff methodology for Distribution Tariffs and Consumer Tariffs; did not specifically exempt companies that had specific tariff agreements (CL-0084)
AES	AES Mtkvari LLC; local Georgian thermal power generation company, acquired by Inter RAO in 2003
BIT or Treaty	Agreement on Encouragement and Reciprocal Protection of Investments between Georgia and the Kingdom of the Netherlands, which entered into force on 1 April 1999
CEO	Chief Executive Officer
Claimants	Collectively, SCC Arbitration Claimants and ICSID Arbitration Claimants
Consumer Tariffs	Maximum rates that a distribution company (in this case, Telasi) can charge to its customers, and which form the revenue component of a distribution company's business; comprise the sum of the WAPT and the Distribution Tariff
COPS (also known as **ESCO**)	Commercial Operator of Power System / Electricity System Commercial Operator; Georgian State-owned company responsible for operating the electricity market
Cost-Plus	Tariff methodology in force after 1 October 2008 and until the 2011 Methodology; covered costs and a reasonable rate of return
CPI	Consumer Price Index; average annual inflation rate published by the National Statistics Office of Georgia
DCF	Discounted cash flow
Discounting Rate	Rate at which free cash flow to the firm (FCFF) is discounted
Distribution Tariff or **Distribution Margin**	Computed for different voltage levels as the distributor's forecast per unit cost, calculated on a regulatory basis; not rates charged to customers, but rather they represent a distribution company's margin on a tetri per kWh basis
EBITDA	Earnings before interest, tax, depreciations and amortization are paid
EC	European Commission
Electricity Balance	Before the start of each year, the GSE prepares, and the MOE approves, the electricity balance; includes a general forecast of the output of each generating plan, an estimate of electricity imports and exports, and a forecast of total electricity sales by each distribution company (CL-0073, Article 23.1)
Energo-Pro	Energo-Pro is one of Georgia's three electricity distributors, along with Telasi and Kakheti

Abbreviation	Definition
Enguri	Enguri HPP LLC, along with Vardnili, are the two largest HPPs generation companies in Georgia and are State-owned
ESCO (also known as "**COPS**")	The Electricity System Commercial Operator (also known as the Commercial Operator of Power System); State-owned balancer of electricity on the market by trading the volume of electricity delivered into the network by generators and importers which is not purchased under direct agreements with distributors
EU	European Union
FCFE	Free cash flow to equity is used to determine losses at the shareholder level, and measures how much cash is available to equity-holders of a company after changes in net borrowings and interest is paid
FCFF	Free cash flow to the firm is used to determine losses at the local level, and measures the financial performance of a company by expressing the amount of cash generated by a firm after considering expenses, taxes, and changes in net working capital and investments
Forecast Period (The Claimants/ Mr. Peer)	1 January 2018 – 31 December 2025: the period for the calculation of the future period's losses
Gardabani	Gardabani Holdings B.V.
GACG	General Administrative Code of Georgia (RL-0005)
GCC	Georgian Civil Code (RL-0009)
Generation Tariffs	The rates that can be charged by each company for the sale of the energy it generates
GEL	Georgian national currency Lari
GID	Gross Income Deficit
the Government or Georgia	Georgia (collectively the Respondents: Georgia, Ministry of Economy, and State Service)
GR	Gross Revenue
GRD	Gross Revenue Deficit
GSE	Georgian State Electrosystem; State-owned entity which has been designated as the transmission system operator (TSO)
Historical Period (The Claimants/ Mr. Peer)	1 January 2013 – 31 December 2017: the period for the calculation of the actual losses

Abbreviation	Definition
HPP/HPP Chain	The Hydro Power Plants or Chain of Hydro Power Plants referred to in the 2007 and 2011 Memoranda
HPPs	Hydropower plants
Inter RAO	Inter RAO UES, PJSC
IPO	Initial public offering
Kakheti	Until 2017, Kakheti Energy Distribution supplied electricity to Kakheti, the eastern region of Georgia, and was one of three electricity distribution companies, along with Telasi and Energo-Pro; in 2017, it was acquired by Energo-Pro
Khrami-1	JSC Khrami-1
Khrami-2	JSC Khrami-2
Khrami Companies, the	Collectively Khrami-1 and 2.
Khrami SPA	12 April 2011 sales and purchase agreement for Gardabani's acquisition of 100% of the Khrami Companies for USD 104 million (C-0016); *see also*, 2011 Memorandum (C-0015 / R-0019)
kWh	Kilowatt hour
Law on Electricity	Law of Georgia on Electricity and Natural Gas, adopted in 1997 and amended in June 2017 (and passed in May 2018); separates and allocates the ownership, commercial and regulator functions between the MOE and the NERC (CL-0073 / RL-0001)
Law on INRAs	Law on Independent National Regulatory Authorities; governs the NERC (RL-0004)
Ministry of Economy	Ministry of Economy and Sustainable Development of Georgia
MOE	Ministry of Energy and Sustainable Development; implements Georgia's energy policy; Second Respondent
NERC	Georgian National Energy and Water Supply Regulatory Commission; national electricity regulator and monitor
NERC's Annual Energy Plan	The NERC sets an annual plan, based on the Electricity Balance approved by the MOE, indicating how much energy each distribution company will acquire from each generator on a month-to-month basis over the course of a year
NERC Resolution No. 3	3 April 2013 resolution which amended Resolution No. 33 (2008) to include the new tariffs applicable to Telasi from 1 April 2013 onwards; implemented the tariffs in the 2013 Memorandum (CL-0083)

Abbreviation	Definition
NERC Resolution No. 5	7 April 2011 (CL-0080); implemented the tariffs in the 2011 Memorandum and Annex 1 of the Khrami SPA
NERC Resolution No. 23	27 December 2012 (CL-0082, initially mislabelled by the Claimants as C-0082); implemented the tariffs in the 2012 Temporary Memorandum
NERC Resolution No. 33	NERC Resolution No. 33 "On Adoption of Electricity (Capacity) Rates", 4 December 2008 (CL-0078); implemented the tariffs in the 2007 Memorandum; updated 3 April 2013 (CL-0083)
NERC Resolution No. 48	Prescribes the Telasi Consumer Tariffs for 2018-2020 (CL-0091)
NGI	Necessary Gross Income
NPV	Net present value
NWC	Net working capital
OB	Opening balance – data at the beginning of the period
OPEX	Operational Expenses: expenses related to the operation and maintenance of the electricity distribution grid, and other current expenses related to the regulated activity (2014 Methodology, CL-0084)
Partnership Fund JSC	Georgian State-owned company, owns 24.64% of Telasi
purchase portfolio	Allocation of energy purchases from different generators to a distributor; each distributor's purchase portfolio includes a combination of more and less expensive sources of energy for the year; the NERC's Annual Energy Plan for each distribution company identifies, for each month, the generation companies from which a particular distribution company must purchase electricity, and in what volumes
RAB	Regulatory Asset Base (2014 Methodology, CL-0084)
RCB	Regulatory Cost Base (2014 Methodology, CL-0084)
Revised Valuation Date	31 December 2018
RGR	Required Gross Revenue to cover infrastructure costs, Conditionally Fixed Costs, Agreed Investments, interest on loans, income tax, Reserve Income, compensation for negative changes in the legislation of Georgia in accordance with section 5.2 of the 2013 Memorandum (Appendix 1, C-0034)
SCC Claimants	Collectively Inter RAO, Telasi and Gardabani

Abbreviation	Definition
Scenario 1 (But-For) (Claimants/Peer)	Takes into account Telasi's Consumer Tariffs and Khrami Companies' Generation Tariffs, calculated in accordance with 2013 Memorandum for both the Historical and Forecast Periods
Scenario 2 (Actual) (Claimants/Peer)	Takes into account Telasi's actual Consumer Tariffs determined by the NERC in Historical Period; for Forecast Period, takes into account Telasi's Consumer Tariffs calculated in accordance with the 2014 Amended Methodology
Silk Road	Silk Road Holdings B.V.
State Service Bureau	Georgian state-owned entity; Respondent
Stucky Caucasus	Stucky Kavkaz LLC was a Georgian branch of an international company which was often engaged by Georgia in other projects; Stucky Caucasus prepared the preliminary feasibility study regarding construction of the HPP-chain, dated 28 January 2011 (C-0009)
Telasi	JSC Telasi, Inter RAO's Georgian distribution company; established in 1995 as a Georgian joint stock company, and owned by Georgia until 1998; 75% bought by AES Silk Road Holdings BV in 1998
Telasi SPA	21 December 1998 share purchase agreement through which AES Silk Road Holdings BV acquired 75% of Telasi (C-0001)
Tetri	1 Tetri is equal to 0.01 GEL
TIA	Target Investment Allowance
TOTEX	Allowed distribution revenues
TPPs	Gas-fired thermal power plants
TSO	Transmission system operator
Twinning Initiative	Since 2012, and in parallel with the MOE and Inter RAO's negotiations concerning the 2013 Memorandum, the NERC was in the process of updating its tariff regime to bring it in line with the best practices of other EU Member States, pursuant to funding provided by the EC's "Twinning Initiative" for inter-EU knowledge sharing and administrative reform, which culminated in the adoption of the 2014 Methodology
USD	United States Dollar
Unbundling Regime	The reform of electrical supply and distribution activities and related changes in the tariff-setting regime of Georgia, which came into effect as of 1 July 2021
Vardnili	Vardnili HPP LLC, along with Enguri, are the two largest HPP generation companies in Georgia and are state-owned

Abbreviation	Definition
WACC	Weighted Average Cost of Capital
WAPT	Weighted Average Purchase Tariff

I. INTRODUCTION

1. This arbitration concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**") under the Agreement on Encouragement and Reciprocal Protection of Investments between Georgia and the Kingdom of the Netherlands, which entered into force on 1 April 1999 (the "**BIT**" or "**Treaty**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**"). This arbitration is referred to as the "**ICSID Arbitration**". This is one of two arbitrations whose procedure the Parties have agreed to coordinate.

2. The other arbitration concerns a dispute submitted under the Rules of the Stockholm Chamber of Commerce ("**SCC**"), pursuant to the terms of the arbitration agreements contained in the Memorandum on the Development of Cooperation in the Electric Sector and the Implementation of Previous Agreements between the Government of Georgia, Partnership Fund JSC (a Georgian state-owned entity), Inter RAO, Telasi, the Khrami Companies, and Mtkvari Energy LLC (owned by Inter RAO) (the "**2013 Memorandum**")[1] and a share purchase agreement between the Government of Georgia, the Ministry of Economy and Sustainable Development of Georgia, the State Service Bureau Ltd. and Gardabani Holdings B.V. (the "**Khrami SPA**").[2] That arbitration is referred to as the "SCC Arbitration".

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[1] 2013 Memorandum, dated 31 March 2013, C-0034: Claimants' Translation / R-0028: Respondents' Translation, Clause 9, "Arbitration Section", which provides at Clause 9.3 that "[a]ny dispute … shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce".

[2] Khrami SPA, dated 12 April 2011, C-0016, Clause 8, "Dispute Settlement", which provides at Clause 8.4 that "[a]ny dispute … shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce…".

3. These disputes between the Parties to the two arbitrations relate to the Claimants' investments in Georgia's electricity sector, which have been governed by successive agreements with Georgia since 1998 (to which the Claimants' parent company acceded in 2003). Specifically, these arbitrations concern regulatory measures that were adopted shortly after the Parties concluded their most recent agreement in 2013. The Claimants allege that Georgia, through its national electricity regulator, overrode the tariff-related provisions of the Parties' agreements by adjusting the tariffs applicable to the Claimants' investments pursuant to a new tariff-setting methodology, and that its interpretation of certain provisions of the agreements governing the Claimants' investments caused losses to the Claimants' electricity companies in Georgia. The Claimants allege that by way of an amended tariff scheme implemented after the key contractual agreements were concluded, the Respondent breached those agreements and substantially reduced the tariffs that were intended to attract and support investment in Georgia's electricity sector and upon which they relied in making their investments in Georgia. In this ICSID Arbitration, the Claimants allege that the Respondent's conduct breached various aspects of the fair and equitable treatment, impairment and umbrella clause provisions of the BIT and international law. In the SCC Arbitration, the Claimants argue that the Respondents' conduct breached the 2013 Memorandum and the Khrami SPA.

4. The Claimants say they each have rights under the contracts and the Treaty because these instruments imposed on the Respondent an obligation to set and adjust tariffs in a particular way, or to compensate the Claimants for any failure to do so. According to the Claimants, the Treaty also required Georgia to ensure them a predictable, transparent and economically-rational regulatory regime for the operation of their local electricity companies. The Claimants say the Respondent violated these rights by reneging on express promises that formed the basis for the Claimants' investments in Georgia, and by acting unreasonably to undermine the viability of their investments.

5. The Respondent denies that the impugned actions breach the relevant Georgian law contracts, the Treaty or international law. They say that the tariff-setting mechanisms in the two contracts were not guaranteed to remain unchanged during their term because Georgia's electricity regulator, the NERC, is independent from the Government, and is solely responsible for setting tariffs. In any event, the Respondent says that the new tariff scheme did not breach any of the provisions of the 2013 Memorandum or the Khrami SPA. The Respondent says its conduct was in furtherance of Georgia's right to regulate and was reasonable and proportional. Further, the Respondent says that the Claimants' businesses are not struggling under arbitrary and unlawful regulation as alleged. Rather, they are thriving and receiving a generous profit.

6. The Respondent raises a counterclaim in each of the disputes,[3] requesting that their rights under the 2013 Memorandum to a 50% share of a target investment allowance ("**TIA**") accumulated by the Claimants' Company, Telasi, JSC, between 1 April 2013 and 2 September 2015 be accounted for. The Respondent requests that the Claimants be ordered to pay 50% of the TIA to Georgia.

7. The contractual claims have been addressed in separate awards (the "**SCC Awards**"). The Treaty claims ware be addressed in this award.

II. THE PARTIES

8. The Parties to the two arbitrations are described in this section.

[3] The Claimants note that the satisfaction of the counterclaim under the 2013 Memorandum in the SCC Arbitration would satisfy Georgia's counterclaim under the Georgia-Netherlands BIT under the ICSID Arbitration, and *vice versa*.

A. ICSID Case No. ARB/17/29 (the "ICSID Arbitration")

9. The Claimants are Gardabani Holdings B.V. ("**Gardabani**"), a private limited liability company established under the laws of the Netherlands,[4] and Silk Road Holdings B.V. ("**Silk Road**"), a private limited liability company established under the laws of the Netherlands.[5]

10. Silk Road owns 75.11% of JSC Telasi ("**Telasi**"), a joint stock electricity distribution company incorporated in Georgia.[6] Gardabani owns 100% of JSC Khrami-1 ("**Khrami-1**") and JSC Khrami-2 ("**Khrami-2**") (collectively, the "**Khrami Companies**"), which are electricity generation companies incorporated in Georgia. PJSC Inter RAO UES ("**Inter RAO**"), a public joint stock company incorporated under the laws of Russia,[7] owns an indirect 100% interest in each of Gardabani and Silk Road.

11. The Respondent is Georgia ("**Georgia**").[8]

B. SCC Arbitration V2018/039 / ADM/18/1 (the "SCC Arbitration")

12. The parties to the SCC Arbitration are as follows: the Claimants are **Inter RAO**, **Gardabani**, and **Telasi**, described above. Inter RAO owns an indirect 100% interest in Gardabani and an indirect 75.11% interest in Telasi.

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[4] Gardabani's address is: Strawinskylaan 655, 1077XX Amsterdam; Netherlands Chamber of Commerce Business Register extract, C-0110.

[5] Silk Road's address is: Strawinskylaan 655, 1077XX Amsterdam; Netherlands Chamber of Commerce Business Register extract, C-0111; Telasi shareholders Register, C-0113. 24.53% of Telasi is held by Partnership Fund (a Georgian state-owned company); 0.36% is freely floated on Georgian Stock Exchange.

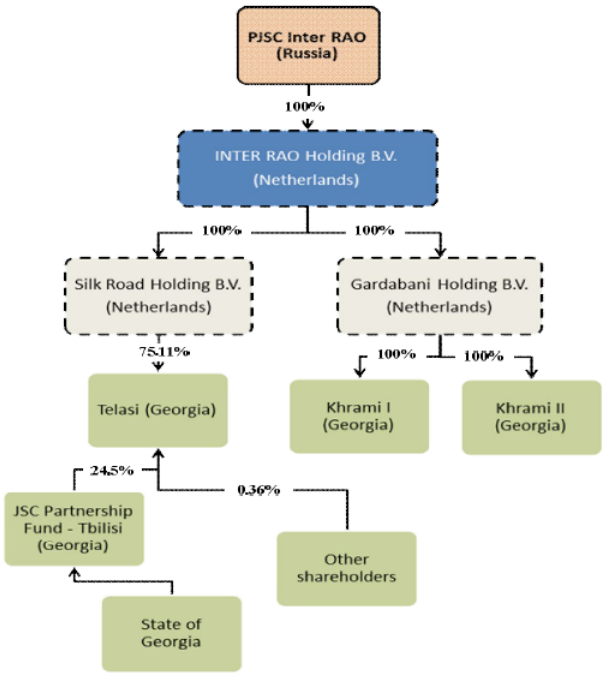
[6] Telasi's address is: 3 Van Street, Tbilisi 0154, Georgia, C-0034/ R-0028.

[7] Inter RAO's address is: 27, Bolshaya Pirogovskaya Street, Building 2, 119435, Moscow, Russia; The Netherlands Chamber of Commerce Business Register extract, C-0112.

[8] Georgia's official address and its address for receipt of notices under the 2013 Memorandum is: 7 Ingorokva Street, Tbilisi, Georgia, C-0034/ R-0028..

13. The Respondents are the Government of Georgia (the "**Government**"); the Georgian Ministry of Economy and Sustainable Development of Georgia ("**Ministry of Economy**" or the "**MOE**"); and the State Service Bureau Ltd ("**State Service Bureau**" or "**SSB**"), a state-owned entity.

14. The Claimants' corporate structure is as follows:



15. The Claimants and the Respondents are collectively referred to, where appropriate, as the "**Parties**". The Parties' representatives and their addresses are listed above.

III. PROCEDURAL HISTORY

A. The SCC Proceedings

16. On 9 June 2017, the SCC received two coordinated requests for arbitration. The first was from Gardabani Holdings B.V. against Georgia, Ministry of Economy and Sustainable Development of Georgia and State Service Bureau. The second was from Inter RAO UES, PJSC and Telasi, JSC

against Georgia (together "**SCC Request V2017/097**"). In both requests, the Claimants appointed Professor Stanimir Alexandrov as their party-appointed arbitrator.

17. On 15 August 2017, the SCC received the answers to SCC Request V2017/097. In their answers, the Respondents appointed Professor Zachary Douglas, QC, as their party-appointed arbitrator.

18. On 8 November 2017, the SCC Board appointed Professor Pierre Tercier as the chairperson of the tribunal in SCC case 2017/097.

19. On 14 November 2017, the SCC referred the case to the tribunal constituted in SCC Case V2017/097.

20. On 14 February 2018, the Parties submitted a joint request to the SCC for the arbitration to be coordinated with ICSID Case No. ARB/17/29

21. On 6 March 2018, the tribunal in SCC case 2017/097 rendered an award terminating that arbitration.

22. On 3 April 2018, the SCC received the request for arbitration from Gardabani Holdings B.V., Inter RAO UES, PJSC and Telasi, JSC against Georgia, the Ministry of Economy and Sustainable Development of Georgia and the State Service Bureau ("**SCC Request V2018/039**"). In their request, the Claimants appointed Professor Stanimir Alexandrov as their party-appointed arbitrator and advised that the Parties had agreed to appoint Mr. Henri Alvarez, KC as the chairperson of the Tribunal.

23. On 10 April 2018, the Respondents submitted their answer to SCC Request V2018/039. In their answer, the Respondents appointed Professor Zachary Douglas, KC as their party-appointed arbitrator and confirmed the agreement between the Parties that Mr. Henri Alvarez, KC be appointed as chairperson of the Tribunal.

24. On 19 April 2018, the SCC referred case V2018/039 to the Tribunal.

B. The ICSID Proceedings

25. On 4 August 2017, ICSID received a request for arbitration from Gardabani Holdings B.V. and Silk Road Holdings B.V. against Georgia (the "**ICSID Request**").

26. On 18 August 2017, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration of the case styled *Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia* (ICSID Case No. ARB/17/29). In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

27. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the two co-arbitrators.

28. The co-arbitrators subsequently proposed, and the Parties agreed on 30 November 2017, to the selection of presiding arbitrator pursuant to a list procedure administered by the co-arbitrators with the assistance of the ICSID Secretariat.

29. The Tribunal was composed of Mr. Henri C. Alvarez KC, a national of Canada, President, appointed by agreement of his co-arbitrators and pursuant to a list procedure; Professor Horacio Grigera Naón, a national of the Argentine Republic, appointed by the Claimants; and Professor Zachary Douglas KC, a national of Australia, appointed by the Respondent.

30. On 15 December 2017, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to

have been constituted on that date. Mr. Alex B. Kaplan, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

31. By the Parties' joint letters of 14 February 2018, the Parties informed ICSID and the SCC that they agreed to coordinate the two proceedings *Gardabani Holdings B.V. and Silk Road Holdings B.V. v. Georgia* (ICSID Case No. ARB/17/29) and *Gardabani Holdings B.V. (Netherlands), PJSC Inter RAO (Russia) and Telasi (Georgia) v. Government of Georgia, Ministry of Economy and Sustainable Development of Georgia, State Service Bureau Ltd* (SCC Case No. V2017/097). The Parties reached the following agreement on the coordination of the arbitrations:

> *(i) Whereas the two arbitrations will remain separate proceedings, the Parties wish for a single tribunal composed of Mr. Zachary Douglas QC (appointed by the Respondents), Mr. Stanimir Alexandrov (appointed by the Claimants) and Mr. Henri Alvarez (as chair) (the "Tribunal") to hear all claims, and hope that they, as well as the SCC and ICSID, will be amenable to this proposal;*
>
> *(ii) The two proceedings shall share a single evidentiary record, a single set of briefings, a single hearing, and a unified procedural timetable;*
>
> *(iii) Whenever reasonable to do so, and unless prohibited by or inconsistent with the applicable arbitration rules or law, the Tribunal shall issue single procedural orders, decisions or communications, indicating both proceedings in the cover page of any such procedural order, decision or communication;*
>
> *(iv) The Tribunal shall render two separate awards;*
>
> *(v) The Parties wish to express their gratitude to Professor Tercier and Professor Grigera Naón for their service on their respective tribunals. The fees and costs of Professor Tercier and Professor Grigera Naón will be borne equally by the Parties, subject to the Tribunal's final allocation of costs in the coordinated proceedings;*
>
> *(vi) As regards the appointment of Messrs. Douglas, Alexandrov and Alvarez, the Parties have reached their agreement on the assumption that, since the separation of the two proceedings is only formal, they would charge their fees and expenses as if this were a single proceeding, save as where necessary and reasonable, and that the two institutions will cooperate in implementing this arrangement.*[9]

32. On 16 February 2018, pursuant to Arbitration Rule 10(1), ICSID informed the Parties of its receipt of Professor Horacio Grigera Naón's resignation in the ICSID proceeding. In accordance

[9] Letter of February 14, 2018, jointly signed by Mr. Noah Rubins KC of Freshfields Bruckhaus Deringer LLP and Mr. Charles Nairac of White & Case LLP ("**Agreement on Coordination**").

with Arbitration Rule 10(2), the ICSID proceeding was suspended until the vacancy resulting from Professor Grigera Naón's resignation had been filled.

33. On 20 February 2018, ICSID notified the Parties that, pursuant to Arbitration Rule 8(2), Mr. Alvarez and Professor Douglas had consented to Professor Grigera Naón's resignation in the ICSID proceeding. In accordance with Arbitration Rule 11, the Claimants were invited to appoint an arbitrator to fill the vacancy.

34. On 26 February 2018, ICSID informed the ICSID Parties that Professor Stanimir Alexandrov had accepted his appointment as arbitrator appointed by the Claimants. On the same date, the ICSID proceeding resumed in accordance with Arbitration Rule 12.

35. In accordance with ICSID Arbitration Rule 13(1) and the Parties' having consented to defer the 60-day time limit by which the first session must be held, the Tribunal held a first session with the Parties on 13 June 2018 by teleconference.

36. On 28 June 2018, the Claimants filed their Memorial (the "**Claimants' Memorial**") on the merits, accompanied by:

- Witness Statement of Andrey Zavrazhnov ("**Zavrazhnov I**"));
- Witness Statement of Anatoly Markov ("**Markov I**");
- Witness Statement of Ilnar Mirsiyapov ("**Mirsiyapov I**");
- Witness Statement of Sergey Kobtsev ("**Kobtsev I**");
- Expert Report of Michael Peer of KPMG ("**Peer I**"), with Annexes MP-001 through MP-0641;
- Expert Report of Manuel A. Abdala and Julian Delamer of Compass Lexecon ("**Abdala & Delamer I**"), with Annexes MAJD-01 through MAJD-14;
- Exhibits C-0001 through C-0183; and
- Legal Authorities CL-0001 through CL-0112.

37. Following the first session, on 9 July 2018, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters in the coordinated proceedings. It provides that the applicable rules in the SCC Arbitration prior to the date of Procedural Order No. 1 were the SCC Arbitration Rules in force as of 1 January 2017. As of the date of Procedural Order No. 1, however, the SCC Arbitration is to be conducted in accordance with the ICSID Arbitration Rules in force as of 10 April 2006, unless the outcome of the application of these rules would be prohibited by the SCC Arbitration rules or laws applicable to the SCC Arbitration. The ICSID Arbitration is conducted in accordance with the ICSID Arbitration Rules in force as of 10 April 2006.

38. Procedural Order No. 1 also provides, *inter alia*, that the procedural language would be English, that the place of the ICSID Arbitration is Paris, France and that the place of the SCC Arbitration is Stockholm, Sweden. Procedural Order No. 1 also sets out the procedural calendar for the proceedings.

39. Additionally, Procedural Order No. 1 indicated that Ms. Elsa Sardinha was appointed to serve as Assistant to the ICSID Tribunal and the Administrative Secretary of the SCC Tribunal.

40. On 19 September 2018, the SCC Secretariat advised the SCC Tribunal that, pursuant to Article 43 of the SCC Arbitration Rules, the Award in the SCC Arbitration is due to be rendered by on 18 October 2018. By letter of 26 September 2018, the President of the Tribunal requested an extension of this date to 26 October 2020, which was accepted by the SCC Secretariat on 27 September 2018.

41. On 4 October 2018, the Parties jointly requested a modification to the Common Procedural Timetable that was annexed to Procedural Order No. 1. The modification was approved by the Tribunal on 15 October 2018.

42. On 25 November 2018, the Respondents filed their Counter-Memorial (the "**Respondents' Counter-Memorial**"), accompanied by:

- Witness Statement of George Bachiashvili;
- Witness Statement of Alexander Khetaguri ("**Khetaguri I**");
- Witness Statement of Irina Milorava ("**Milorava I**");
- Witness Statement of Mariam Valishvili ("**Valishvili I**");
- Expert Report of Boaz Moselle of Compass Lexecon ("**Moselle I**"), with Exhibits BM-01 through BM-23;
- Legal Opinion of Paata Turava ("**Turava I**"), with Exhibits PT-01 through PT-14;
- Exhibits R-0001 through R-0065; and
- Legal Authorities RL-0001 through RL-0040.

43. On 28 December 2018, each party submitted its Redfern Schedule, setting out its production requests and objections as well as the opposite party's response to those objections. Each party filed a request for the Tribunal to decide on production of documents.

44. On 15 January 2019, the Tribunal issued Procedural Order No. 2 concerning production of documents.

45. On 12 February 2019, the Parties jointly requested a modification to the Common Procedural Timetable, which was approved by the President on the same day.

46. On 5 March 2019, the Claimants filed their Reply (the "**Claimant's Reply**"), accompanied by:

- Second Witness Statement of Anatoly Markov ("**Markov II**");
- Second Witness Statement of Andrey Zavrazhnov ("**Zavrazhnov II**");
- Second Witness Statement of Ilnar Mirsiyapov ("**Mirsiyapov II**");
- Second Witness Statement of Sergey Kobtsev ("**Kobtsev II**");

- Second Expert Report of Manuel A. Abdala and Julian Delamer of Compass Lexecon ("**Abdala & Delamer II**"), with Exhibits MAJD-15 through MAJD-191;
- Second Expert Witness Report of Michael Peer of KPMG ("**Peer II**"), with Exhibits MP-66 through MP-962;
- Exhibits C-0184 through C-0219;
- Corrected Exhibits C-0005, C-0007, C-0010, C-0013, C-0015, C-0022, C-0027, C-0028, C-0034, C-0036, C-0037, C-0065, C-0077, C-0087, C-0090, C-0101, C-0102, C-0103, C-0109, C-0117, C-0126, C-0127, C-0128 and C-0129; and
- Legal Authorities CL-0113 through CL-0202.

47. Noting that the Reply submission was signed by attorneys affiliated with Dentons LLP who had not yet appeared in these proceedings, the Respondent sought confirmation that their appearance did not create a conflict of interest by letter of 11 March 2020. On 13 March 2020, the Members of Tribunal confirmed that they were not aware of any relationship with the proposed additional counsel that would necessitate disclosure. The Tribunal further stated that it awaited the receipt of the powers of attorney in favour of Dentons LLP. On 26 March 2019, the Respondent submitted powers of attorney in favour of Dentons LLP.

48. On 10 April 2019, the Claimants submitted an application, with Exhibits C-0203 through C-0211 and Legal Authorities CL-0220 through CL-0232, requesting that the Tribunal order the Respondent to produce additional documents in response to the Claimants' outstanding requests (the "**Application for Outstanding Request to Produce**"). In their application, the Claimants alleged that the Respondent had improperly withheld documents in response to those requests and requested that the Tribunal order the production of documents in question.

49. In accordance with the briefing schedule established by the Tribunal, the Respondent submitted its response to the Claimants' application on 25 April 2019, with Exhibits R-0066 through R-0067 as well as Legal Authorities RL-0041 through RL-0048; the Claimants submitted their reply

to the Respondent's response on 2 May 2019; and the Respondent submitted its rejoinder on the Claimants' application on 9 May 2019.

50. On 23 May 2019, the Tribunal issued Procedural Order No. 3, deciding on the Claimants' Application for Outstanding Request for Production.

51. On 13 June 2019, the Respondent filed its Rejoinder (the "**Respondent's Rejoinder**"), accompanied by:

- Second Witness Statement of George Bachiashvili ("**Bachiashvili II**");
- Second Witness Statement of Alexander Khetaguri ("**Khetaguri II**");
- Second Witness Statement of Irina Milorava ("**Milorava II**");
- Second Witness Statement of Mariam Valishvili ("**Valishvili II**");
- Second Expert Report of Boaz Moselle of Compass Lexecon ("**Moselle II**");
- Second Legal Opinion of Dr. Paata Turava ("**Turava II**");
- Amended translation of Exhibit R-0028;
- Exhibits R-0068 through R-0096;
- Amended Legal Authorities RL-0001, RL-0002, RL-0003, RL-0004, RL-0005 and RL-0009; and
- Legal Authorities RL-0055 through RL-0091.

52. On 11 July 2019, the Claimants filed their Rejoinder on Counterclaims (the "**Claimants' Rejoinder**"), accompanied by Exhibits C-0234 through C-0237 as well as Legal Authorities CL-0215 through CL-0217.

53. On 24 July 2019, the Claimants informed the Tribunal that it would seek additional time to address quantum issues at the hearing, given the alleged new submissions of the Respondent's quantum expert at the close of the written procedure. On 1 August 2019, the Respondent responded denying any prejudice to the Claimants and expressing their preference for a brief written

submission from Claimants rather than their being afforded extra time at the hearing. The Claimants replied thereto on 7 August 2019.

54. By email of 15 August 2019, the Tribunal granted leave to the Claimants to submit a brief, page limited written response by Mr. Peer to Dr. Moselle's second report. It also requested a joint expert report from Mr. Peer and Dr. Moselle setting out their key points of agreement and disagreement.

55. On 6 September 2019, the Claimants submitted their quantum expert, Mr. Peer's, third report ("**Peer III**").

56. On 10 September 2019, the President held a pre-hearing organizational meeting with the parties by telephone conference.

57. On 17 September 2019, the Tribunal issued Procedural Order No. 4 concerning the organization of the hearing.

58. On 3 October 2019, the Parties submitted the joint expert report of Dr. Boaz Moselle and Mr. Michael Peer ("**JER 1**").

59. A hearing on the merits, for both the ICSID and SCC proceedings, was held in Paris from 14 October through 25 October 2019 (the "**Hearing**"). The following persons were present at the Hearing:

TRIBUNAL	
Mr. Henri C. Alvarez KC	President
Professor Stanimir Alexandrov	Arbitrator
Professor Zachary Douglas KC	Arbitrator

ICSID SECRETARIAT	
Mr. Alex Kaplan	Secretary of the ICSID Tribunal

ASSISTANT OF THE TRIBUNAL

Ms. Elsa Sardinha	Assistant to the ICSID Tribunal Administrative Secretary of the SCC Tribunal

CLAIMANTS	
Mr./Ms. First Name/ Last Name	**Affiliation**
Counsel:	
Mr. Noah Rubins KC	Freshfields Bruckhaus Deringer LLP
Mr. Alexey Yadykin	Freshfields Bruckhaus Deringer LLP
Ms. Vasuda Sinha	Freshfields Bruckhaus Deringer LLP
Mr. Maxim Pyrkov	Freshfields Bruckhaus Deringer LLP
Ms. Mariia Puchyna	Freshfields Bruckhaus Deringer LLP
Mr. Mikhail Kalinin	Freshfields Bruckhaus Deringer LLP
Ms. Veronika Timofeeva	Freshfields Bruckhaus Deringer LLP
Mr. Ryan Harvey	Freshfields Bruckhaus Deringer LLP
Ms. Francesca Lionetti	Freshfields Bruckhaus Deringer LLP
Ms. Claire Rohou	Freshfields Bruckhaus Deringer LLP
Ms. April-Carmela Lacson	Freshfields Bruckhaus Deringer LLP
Ms. Christina Liew	Freshfields Bruckhaus Deringer LLP
Mr. Avto Svanidze	Dentons LLP
Ms. Mariam Vashakidze	Dentons LLP
Parties:	
Mr. Mikhail Konstantinov	PJSC Inter RAO
Mr. Evgeny Sarymsakov	PJSC Inter RAO
Mr. Valerian Goncharov	PJSC Inter RAO
Witnesses and Experts:	
Mr. Sergey Kobtsev	Witness
Mr. Anatoly Markov	Witness
Mr. Ilnar Mirsiyapov	Witness
Mr. Andrey Zavrazhnov	Witness
Mr. Michael Peer	KPMG
Mr. Egor Misiura	KPMG
Mr. Anton Kubasov	KPMG
Interpreters:	
Mr. Victor Prokofiev	English-Russian Interpreter
Ms. Elena Edwards	English-Russian Interpreter
Ms. Anna Kerod	English-Russian Interpreter
Ms. Elena Khorishko	English-Russian Interpreter

RESPONDENTS	
Mr./Ms. First Name/ Last Name	**Affiliation**
Counsel:	
Mr. Charles Nairac	White & Case LLP
Ms. Kirsten Odynski	White & Case LLP
Ms. Noor Davies	White & Case LLP
Mr. Paul von Mühlendahl	White & Case LLP
Ms. Elina Quinio Aleynikova	White & Case LLP
Ms. Anaïs Harlé	White & Case LLP
Mr. Domenico Cucinotta	White & Case LLP
Ms. Valeriya Tsekhanska	White & Case LLP
Ms. Florencia Wajnman	White & Case LLP
Ms. Katya Hartl	White & Case LLP
Mr. Achille Tenkiang	White & Case LLP
Ms. Juliet Rhea	White & Case LLP
Parties:	
Gocha Lordkipanidze	Ministry of Justice of Georgia
Maka Gotsiridze	Ministry of Justice of Georgia
Ana Nebieridze	Ministry of Justice of Georgia
Tornike Liklikadze	Ministry of Justice of Georgia
Tamar Nepharidze	Translator
Witnesses and Experts:	
Mr. George Bachiashvili	Witness
Mr. Alexander Khetaguri	Witness
Ms. Irina Milorava	Witness
Ms. Mariam Valishvili	Witness
Dr. Boaz Moselle	Compass Lexecon
Ms. Ruxandra Cuipagea	Compass Lexecon

60. On 22 November 2019, the Respondent submitted, with the consent of the Claimants, the third expert report of Dr. Boaz Moselle ("**Moselle III**"). On 20 December 2019, Mr. Peer submitted his fourth expert report in response on behalf of the Claimants ("**Peer IV**").

61. The Parties filed their submissions on costs on 16 January 2020 and replied thereto on 30 January 2020.

62. On 11 May 2020, the Claimants provided an update on the Telasi WAPT for 2019 and the first quarter of 2020.

63. On 10 September 2020, the Tribunal requested an extension of the date for rendering the Award in the SCC proceeding pursuant to Article 43 of the SCC Arbitration Rules. The Parties were given an opportunity to comment on the Tribunal's request, but they did not comment, as confirmed by correspondence from the SCC dated 17 September 2020. Therefore, the SCC extended the deadline for the issuance of the Award in the SCC proceeding until 29 January 2021.

64. By letters of 14 January and 22 January 2021, the Tribunal informed the Parties, via the SCC Secretariat, that it had made considerable progress in drafting the Awards in the coordinated cases. The Tribunal further indicated that, in order to determine the Parties' respective claims for damages, it would require further information and calculations from the Parties and their experts. The Tribunal therefore explained that it intended to first issue a Partial Award in the SCC proceeding together with directions for further quantum calculations. Then, once the calculations and information on quantum had been received, the Tribunal would issue a Final Award in the SCC proceeding and an Award in the ICSID proceeding simultaneously or shortly thereafter. In order to complete these steps, the Tribunal informed the Parties that it intended to issue a Partial Award on Liability on or about 22 March 2021 and it requested an extension, until 30 June 2021, of the date for issuance of the Final Award in the SCC proceeding pursuant to Article 43 of the SCC Arbitration Rules.

65. On 25 January 2021, the SCC Secretariat extended the deadline for the issuance of the Final Award until 30 June 2021.

66. On 31 March 2021, the SCC Tribunal informed the Parties that it would dispatch the Partial Award on Liability on 19 April 2021.

67. On 19 April 2021, the SCC Tribunal issued the Partial Award on Liability and Directions on Quantum to the Parties. In the Partial Award on Liability, the Tribunal deferred the quantification

of the Parties' respective claims pending receipt of additional information, revised calculations and a joint report from the Parties' respective quantum experts pursuant to the Tribunal's findings on liability in the Partial Award on Liability and its Directions on Quantum issued on 19 April 2021.

68. On 28 April 2021, the Parties informed the Tribunal that they would be unable to submit the experts' joint report and revised calculations as well as the Parties' comments by the 14 May 2021 deadline set out in the Tribunal's Directions on Quantum and requested the Tribunal to extend the deadline to 11 June 2021.

69. On 29 April 2021, the Tribunal informed the Parties that it was prepared to grant the Parties' agreed extension: however, considering the 30 June 2021 deadline for issuance of the Final Award in the SCC proceeding, the Tribunal invited the Parties to agree to a corresponding extension of time — until 30 July 2021 — for the issuance of the SCC Final Award.

70. On 5 May 2021, the Parties informed the Tribunal that they had reached agreement to extend the time for the Final Award in the SCC proceeding until 30 July 2021.

71. Pursuant to the Tribunal's direction of 27 May 2021, the Claimants submitted their response on 3 June 2021 attaching Legal Authorities CL-0224 through CL-0229.

72. Also on 3 June 2021, the Respondents advised the Tribunal of a reform of electrical supply and distribution activities and related changes in the tariff-setting regime in Georgia, which is said to fundamentally affect Telasi's tariffs as of 1 July 2021 (the "**Unbundling Regime**"). The Respondents also requested an extension of the 11 June 2021 deadline referred to above. On 4 June 2021, the Claimants submitted comments on the Respondents' letter of 3 June 2021, opposing the extension. On 5 June 2021, the Respondents filed observations on the Claimants' 4 June 2021 correspondence Then, on 8 June 2021, the Claimants filed further observations, referencing their letter of 4 June 2021 as well as the Respondents' response of 5 June 2021.

73. Having considered the Respondents' request for an extension of the deadline for the submission of the experts' joint report and updated calculations, the Tribunal informed the Parties on 9 June 2021 that the 11 June 2021 deadline was maintained. Further, the Tribunal informed the Parties that it would accept a brief reply from the Respondents to the Claimants' letter of 8 June 2021 by 15 June 2021; the Claimants would then have the opportunity to file a brief rejoinder by 21 June 2021.

74. On 10 June 2021, the Parties informed the Tribunal that their experts would not be in a position to finalize their joint report and updated calculations by the 11 June 2021 deadline and that the Parties had agreed to request a one-week extension until 18 June 2021. On 11 June 2021, the Tribunal granted the requested extension.

75. On 11 June 2021, the Tribunal, having considered the Parties' observations on the Partial Award on Liability and the Claimants' letter of 3 June 2021, invited the Respondents to submit any comments they might wish to make in response to the Claimants' 3 June 2021 letter by 21 June 2021, and stated that the Claimants would be entitled to submit comments in response by 28 June 2021.

76. Further to the Tribunal's directions of 9 June 2021, the Respondents submitted their reply to the Claimants' 8 June 2021 letter on 15 June 2021.

77. On 16 June 2021, the Respondents requested an extension of time to submit their comments in response to the Claimants' letter of 3 June 2021 until 23 June 2021. On 18 June 2021, the Tribunal granted the Respondents' extension request.

78. On 18 June 2021, the Parties informed the Tribunal that their experts had made considerable progress but had not been able to complete the joint expert report by the 18 June 2021 deadline. The Parties requested an extension to file the joint expert report and the accompanying deliverables at

6:00pm CET on 21 June 2021. The Parties' request for such extension was subsequently granted by the Tribunal.

79. On 21 June 2021, the Parties submitted the Second Joint Expert Report ("**JER 2**") and the updated models of both experts and the deliverables. Each Party also submitted simultaneously its Comments on Quantum Issues as requested in the Tribunal's Directions on Quantum ("**Claimants' Comments on Quantum Issues"** and **"Respondents' Comments on Quantum Issues**").

80. On the same date, 21 June 2021, the Claimants provided their comments on the Respondents' letter of 15 June 2021 and earlier correspondence regarding the Respondents' request to re-model the damages calculation to reflect the ongoing "unbundling" of Telasi due to the Georgian energy reform legislation.

81. On 22 June 2021, the Claimants submitted their observations on the Respondents' Comments on Quantum Issues as filed on 21 June 2021. In response to the Claimants' observations, the Respondents submitted their comments on 23 June 2021.

82. On 23 June 2021, the Tribunal admitted the Respondents' Comments on Quantum Issues into the record and informed the Parties that the Claimants could file a response to sections II, VI and VII of the Respondents' Comments on Quantum Issues by 29 June 2021. The Claimants' response was received on 29 June 2021, and was accompanied by Legal Authorities CL-0230 through CL-0233.

83. On 29 June 2021, the Tribunal invited the Parties to confirm whether or not the "Unbundling Regime" would apply to the Khrami Companies and, if it would apply, to provide a brief description of such effects by 5 July 2021.

84. On 2 July 2021, the Claimants submitted their response to the Respondents' comments of 23 June 2021.

85. On 5 July 2021, the Claimants submitted the executed Statement of Performance Indicators of Telasi for the year 2020 as Exhibit C-0256.

86. On the same date, the Parties informed the Tribunal that they had conferred and were of the view that the legal unbundling which came into effect on 1 July 2021 does not apply to the Khrami Companies, whose tariffs remain regulated by NERC resolutions. By the same communication, the Claimants reserved their rights in respect of the possible adverse impact of the ongoing Georgian energy reform on the Khrami Companies.

87. On 9 July 2021 and pursuant to Article 43 of the SCC Arbitration Rules, the Tribunal requested from the SCC Secretariat an extension of time for the rending of the SCC Final Award. The request was shared with the Parties. No comments having been received from the Parties, the SCC granted the extension by letter of 23 July 2021.

88. The procedural history of these proceedings through 30 July 2021 is set out in the Partial Award on Liability and the First Partial Award on Damages.

89. In the First Partial Award on Damages, the Tribunal decided a number of issues relating to the calculation of damages, requested that the Parties' damages experts recalculate damages on the basis of those findings and produce a new joint expert report on damages, and deferred the Parties' claims for interest and costs to the Final Award.

90. On 4 August 2021, the ICSID Secretariat wrote to the Parties to provide the Tribunal's directions regarding the calculations of damages with respect to losses suffered by Telasi and the Khrami Companies for three relevant periods of time.

91. On 3 September 2021, pursuant to the Tribunal's directions, the Parties advised that they would provide the Tribunal with an updated joint expert report with revised calculations for the losses to Telasi to 1 July 2021 and the losses to the Khrami Companies by 25 October 2021. On 7

September 2021, the Tribunal confirmed the Parties' proposed deadline for the submission of the new updated joint expert report ("**JER 3**").

92. On 10 September 2021 the Respondents wrote to the ICSID Secretariat to advise that the Parties jointly requested an extension of the deadline the Tribunal had set in its directions for providing an update on the implementation of the Unbundling Regime and its effects on Telasi's claims until 24 September 2021. This request was confirmed by the Claimants on the following day. On 12 September 2021, the Tribunal accepted the requested extension of the deadline.

93. On 24 September 2021, the Parties jointly requested a further extension of the deadline for the update on the implementation of the Unbundling Regime until 28 September 2021. On the same date, the Tribunal granted the Parties' request for an extension.

94. On 28 September 2021, the Parties advised the Tribunal that they would require additional time to provide an update on the implementation of the Unbundling Regime and to provide an updated calculation of losses to Telasi and Inter RAO for the period from 1 July 2021 through 31 December 2025. On 29 September 2021, the Tribunal confirmed its acceptance of the Parties' proposal to provide the calculation of damages of Telasi and Inter RAO, post-Unbundling, by 25 January 2022. The Tribunal also requested that the Parties provide, by 8 November 2021, an update on the implementation of the Unbundling Regime.

95. On 25 October 2021, the Respondents requested an extension for the submission of JER 3 until 27 October 2021. The Claimants did not take a position on the Respondents' request and the Tribunal granted the extension requested by the Respondents.

96. On 27 October 2021, the Parties informed the Tribunal that their experts were finalizing JER 3 and that they expected to submit it the following day.

97. On 28 October 2021, the Parties submitted JER 3 together with Exhibits MP-136 through MP-140 and BM-49.

98. On 2 November 2021, in light of the Parties' joint request to extend the deadline for their submissions on damages flowing from the Unbundling Regime, the Tribunal requested an extension of its deadline for issuing the Final Award until 28 March 2022. On 3 November 2021, the SCC Secretariat granted the extension for the issuance of the Final Award.

99. On 2 November 2021, the Claimants requested that, in light of the deferral of the Tribunal's award relating to the assessment of damages for the period 1 July 2021 to 31 December 2025, the Tribunal allocate the legal costs incurred to the date of this Second Partial Award on Damages in this award.

100. On 8 November 2021, the Respondents opposed the Claimants' request on the basis that the Tribunal should take a decision on the costs of the arbitration only after it had decided all the disputed issues between the Parties in both the SCC and ICSID arbitrations. The Respondents also submitted that it would not be practical for the Tribunal to allocate costs before the outcome of the ICSID arbitration since the Parties had not segregated their costs between the two arbitration proceedings.

101. On 9 November 2021, the Parties submitted a joint update on the implementation of the Unbundling Regime, introduced on 1 July 2021, pursuant to which tariffs will be fixed for the period 1 July 2021 to 31 December 2025, together with Exhibits R-0110 through R-0114.

102. On 23 November 2021, the Tribunal issued the Second Partial Award on Damages in the SCC Arbitration. In that award, the Tribunal determined the damages owing to Gardabani for the period from 31 March 3014 to 31 December 2025 (including the Historical Period from 31 March 2013 to 31 December 2020 and the Forecast Period from 1 January 2021 to 31 December 2025). It also determined damages owing to Telasi and Inter RAO for the Historical Period from 31 March 2013 to 31 December 2020 and for the Forecast Period from 1 January 2021 to 30 June 2021. The

Tribunal also deferred the quantification of any damages owing on account of the losses suffered by Telasi and Inter RAO for the period 1 July 2021 to 31 December 2025.

103. On 17 January 2022, the Claimants requested that the Tribunal award additional damages to Gardabani on the basis that the assumption upon which the Experts had calculated compensation due to Gardabani tariffs from 1 January 2022 had changed ("**Claim for Additional Damages**"). The Claimants indicated that they were prepared to submit an explanation with supporting expert testimony in support of their request and suggested a timeframe for the filing of submissions from the Parties.

104. On 24 January 2022, the Parties jointly requested an extension until 14 March 2022 to submit the Joint Expert Report on Telasi's losses in the Forecast Period from 1 July 2021 through 31 December 2025. On 25 January 2022, the Tribunal granted the extension requested.

105. On 26 January 2022, counsel for the Respondents advised the Tribunal that they were seeking instructions regarding the Claimants' Claim for Additional Damages and that, in the meantime, they had no objection to the Claimants' proposed briefing schedule. On 27 January 2022, the Tribunal requested that the Respondents advise it of their position once counsel had received instructions.

106. On 31 January 2022, the Claimants requested that the Tribunal provide them with a period of one month to make their submission in support of their Claim for Additional Damages. On 4 February 2022, counsel for the Respondents advised the Tribunal that they were still seeking instructions with respect to the Claimants' Claim for Additional Damages and had no objection in principle to the Claimants' request for additional time to make their submission in support of their claim and were content with the period of one month from the date of the Claimants' submission to respond.

107. On 7 February 2022, the Tribunal granted the Claimants until 7 March 2022 to make their submission on their Claim for Additional Damages and granted the Respondents until 7 April 2022 to provide their response.

108. On 18 February 2022, the Tribunal requested an extension of the date for rendering the Final Award until 10 June 2022. On 24 February 2022, the SCC extended the date for the submission of the Final Award until 10 June 2022.

109. On 7 March 2022, the Claimants filed their Submission in Respect of Additional Gardabani Losses, together with the Fifth Expert Report of Michael Peer and supporting materials.

110. On 13 March 2022, the Parties jointly requested an extension until 22 March 2022 to submit the joint expert report on Telasi's losses during the Forecast Period (1 July 2022–31 December 2025). On 14 March 2022, the Tribunal granted the Parties' request. On 22 March 2022, the Parties jointly requested an extension until 24 March 2022 to submit the joint expert report and the Tribunal granted the Parties' request on the same date.

111. On 24 March 2022, the Parties submitted the Fourth Joint Expert Report regarding the quantification of compensation owing to Telasi for the Forecast Period ("**JER 4**"). The Parties also subsequently submitted their respective experts' updated models and accompanying exhibits.

112. On 7 April 2022, the Respondents submitted their Response to the Claimants' Claim for Additional Damages. In their Response, the Respondents accepted that the tariffs in question had changed and suggested that the Parties' experts attempt to agree on the calculation of any additional damages by 15 May 2022. The Claimants accepted the Respondents' suggestion and the Tribunal set the deadline for the submission of a new joint expert report ("**JER 5**") on 16 May 2022.

113. On 5 May 2022, the Tribunal requested from the SCC a new extension of the date for rendering the Final Award until 9 September 2022. On 13 May 2022, the SCC granted the Tribunal's request and extended the deadline for rendering the Final Award until 9 September 2022.

114. On 16 and 19 May 2022, the Parties jointly requested an extension of the deadline for submitting JER 5 until 6 June 2022. On 20 May 2022, the Tribunal granted the Parties' joint request. Subsequently, the Parties jointly requested additional extensions, which the Tribunal granted.

115. On 9 June 2022, the Parties submitted JER 5 which set out the Experts' calculations relating to the Claimants' Claim for Additional Damages.

116. On 13 June 2022, the Tribunal requested that the Parties provide their submissions on interest and their updated claims for costs by 30 June 2022.

117. On 29 June 2022, the Parties jointly requested an extension of the deadline for submissions on interest and updated costs until 5 July 2022. On 30 June 2022, the Tribunal granted the extension requested.

118. On 30 June 2022, the Claimants requested leave to submit in evidence two recent articles relating to the setting of Gardabani's tariffs in November 2022.

119. On 5 July 2022, the Parties filed their respective submissions on interest and costs.

120. On 8 July 2022, the Respondents submitted their Response to the Claimants' Request to Submit New Articles into Evidence. In their response, the Respondents submitted that the press articles that the Claimants sought to submit into evidence are not relevant to the issue of whether the Khrami Companies' generation tariffs will be increased in November 2022. Nevertheless, the Respondents stated that although the request for admission of the articles in question came late in the proceedings, they had no principled objection to the introduction of the articles into the record.

121. On 14 July 2022, the Tribunal accepted the Claimants' request and admitted the articles into the record.

122. On 9 September 2022, the Tribunal issued the Final Award in the SCC Arbitration. In that award, the Tribunal determined the damages owing to Telasi for the period of 1 July 2021 to 31 December 2025 and awarded compensation to Gardabani and Telasi for breaches of the Khrami

SPA and the 2013 Memorandum. It also awarded the payment of interest and determined the costs of that arbitration.

123. The ICSID proceeding was closed on 27 September 2022.

IV. FACTUAL OVERVIEW

A. Overview of Georgia's Electricity Sector

124. Since its independence in 1991 after the collapse of the Soviet Union and until 2003, the electricity sector in Georgia has transitioned from a Soviet era state-owned monopoly system to a liberalized system which sought to separate the different activities in the electricity supply chain (transmission, distribution, and generation). During this period, a new legal and regulatory framework was established for Georgia's electricity sector.[10] Telasi provided electricity during this phase, but widespread shortages were common.

125. Georgia's early efforts in the late 1990s to modernize and liberalize its energy sector included privatizing its electricity system by selling a majority share in Telasi to an American company, AES (discussed under Section B below), transferring the management of other distribution companies to another American company, and bringing in other foreign companies to manage transmission as well as wholesale electricity market operators.[11] Concurrently, Georgia also sought to strengthen its economic links with the European Union ("**EU**") and, in 1996, Georgia entered into a Partnership and Cooperation Agreement aimed at fostering cooperation with the then European Community to transition Georgia into a market economy.[12] While these efforts improved

[10] Respondents' Counter-Memorial, ¶¶ 13-21.

[11] Respondents' Counter-Memorial, ¶ 19.

[12] Partnership and Cooperation Agreement between the European Community and Georgia, 22 April 1996, entered into force 1 July 1999, R-0001, *see especially* Art. 43(1).

Georgia's power sector, by 2003 power cuts were still commonplace and further privatization was needed to rehabilitate State-owned electricity generation, transmission and distribution assets.[13]

126. Georgia's 1999 Law on Electricity and Natural Gas (the "**Law on Electricity**") defined the legal framework for water, electricity and natural gas production and distribution in Georgia.[14] The Law on Electricity allocated the ownership, commercial and regulatory functions in the power sector between the Ministry of Energy (the "**MOE**") and what would later become the Georgian National Energy and Water Supply Regulatory Commission (the "**NERC**").

127. The MOE develops national policy in the energy sector and promotes investments in that sector, but does not implement ownership, regulatory and operational-economic activities in the electricity sector.[15]

128. The Law on Electricity establishes general principles for setting tariffs that "protect consumers from monopoly tariffs and promote long-term financial stability and development of the energy sector", and calls for the adoption of secondary legislation to elaborate specifics.[16] The law gives the NERC exclusive competence to adopt tariff-setting methodologies and set tariffs in accordance with those methodologies.[17]

129. The NERC is an independent body whose role, organization, powers and price-setting authority are governed by the Law on Independent Regulatory Authorities ("**Law on INRAs**") and its own Charter.[18] The NERC is headed by a chairperson and four commissioners who adopt

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[13] Respondents' Counter-Memorial, ¶ 21.

[14] Law of Georgia No. 1934 on Electricity and National Gas, dated 30 April 1999 ("**Law on Electricity**"), CL-0073 / RL-0001.

[15] Id., Arts. 1(3)(a), 3(1), 3(2).

[16] *Id.*, Arts. 1(3)(e), 43.

[17] *Id.*, Art. 4(5)(b).

[18] Law on INRAs, RL-0004, Arts. 4(3), 17; NERC's Resolution No. 6, 6 March 2014, R-0003, Arts. 1(2), 1(3) (The NERC's functional independence is affirmed in its Charter). Financial independence, *see* Law on Electricity, CL-

decisions and resolutions by majority vote regarding the issuing and revoking of licenses, developing and adopting tariff methodologies, setting and regulating tariffs, and settling disputes between market participants.[19] Its decisions, which must include written reasons and be published, are regulated by the General Administrative Code of Georgia ("**GACG**"), and are subject to judicial review.[20]

130. In respect of the NERC's competence to adopt and apply tariff-setting methodologies, Article 11(1) of the Law on Electricity was amended in July 2010 to provide that:

> *NERC shall follow the basic directions of national policy in the energy, security, economy, environmental protection and other areas and the normative acts issued on the basis of these directions. [NERC] may also take into account the transactions entered into by the State in the energy and water supply sectors, and other relevant legal acts.*[21]

131. The NERC is one of two independent regulatory authorities operating in Georgia.[22] The Law on INRAs establishes the NERC's "independence … from political pressure of any kind, from improper influence and illegal interference of State Authorities or other persons, as well as from any acts as may infringe on their independence".[23] "Independence" is defined as:

> *the ability of both an independent regulatory Authority and the Commissioner, without improper influence and illegal interference to exercise the authority of a regulatory Authority as determined under the applicable law, including discussing, investigating and deciding the matters assigned to its authority; any interference in the activities of an independent regulatory Authority, control of the said activities and demanding accounts of such activities on the part of any State Authority shall be inadmissible, if this is not explicitly provided for by the applicable law.*[24]

0073 / RL-0001, Arts. 19, 20: the NERC sets its own budget based on fees it sets itself and collected from the regulated entities, must submit an annual report to Georgia's President and Parliament, and must be audited.

[19] Law on Electricity, CL-0073 / RL-0001, Arts. 4(5), 5(3), 6(1).

[20] General Administrative Code of Georgia ("**GACG**"), RL-0005, Arts. 53, 103, 121, 177 (judicial review; *see also*, Law on Electricity, CL-0073 / RL-0001, Art. 15; Law on INRAs, RL-0004, Arts. 4(6), 18).

[21] Law on Electricity, CL-0073 / RL-0001, Art. 11(1).

[22] Law on INRAs, RL-0004, Art. 2(b). The other independent regulatory authority in Georgia is the National Communications Commission.

[23] Law on INRAs, RL-0004, Art. 1(2).

[24] Law on INRAs, RL-0004, Art. 3(d).

Article 6, "Independence", provides as follows:

> *1. Independent regulatory Authority and Commissioner shall be independent within the scope of their activities and shall comply only with the Georgian Legislation. Only an independent regulatory Authority shall have the right to exercise the full authority in respect to the matters which are delegated to it under the applicable law.*
>
> *2. Dual, concurrent regulatory authority shall be inadmissible.*
>
> *3. Any attempt of any person to exercise the jurisdiction over the sphere of authority of an Independent Regulatory Authority shall be illegal, and the results thereof shall be of no legal force.*
>
> *…*
>
> *5. It shall be inadmissible for an Independent Regulatory Authority to conclude any agreement which imposes certain obligations on Georgia, except for the cases as provided for in the Georgian Legislation.*[25]

132. In addition to overseeing the tariffs that distribution companies can charge, controlling the issuance of generation and distribution licenses, and setting the fees for connecting new users to the distribution network, the NERC also produces an annual energy plan of how much energy each distribution company will acquire from each generator on a month-to-month basis over the course of a year (the "**NERC's Annual Energy Plan**"). The plan is based on the "**Annual Electricity Balance**" prepared by the Georgian State Electrosystem ("**GSE**") before the start of each year, and approved by the MOE. It includes a general forecast of the output of each generating plant, an estimate of electricity imports and exports, and a forecast of total electricity sales by each distribution company.[26]

1. Organization of Georgia's Electricity Sector

133. The basic elements of Georgia's electricity supply chain consist of:[27]

- generation of electricity by power plants

[25] Law on INRAs, RL-0004, Art. 6.

[26] Law on Electricity, CL-0073 / RL-0001, Art. 23.1.

[27] Respondents' Counter-Memorial, ¶¶ 22-28; Moselle I, Figure 1 at p. 29.

- there are over 80 State-owned and privately-owned generation companies; 80% of which are hydropower plants ("**HPPs**"), 20% are thermal power plants ("**TPPs**")[28]

- transmission of electricity into the distribution network
- distribution of electricity to final consumers
  - until 2017, there were three distributors: Telasi, which supplied Tbilisi; Kakheti Energy Distribution ("**Kakheti**"), which supplied the eastern region of Kakheti; and Energo-Pro Georgia ("**Energo-Pro**"), which supplied electricity to the rest of Georgia
  - in 2017, Energo-Pro acquired Kakheti
  - today, Telasi has a 35% market share and Energo-Pro holds the remaining 65%
- sale of electricity to final consumers
  - sales are vertically integrated with distribution, meaning that the same operators distribute and supply electricity to end consumers, with the exception of some large consumers who may buy electricity directly from power generators
- trade of electricity produced by generators and imported from other countries on the wholesale market
  - operated by the Electricity System Commercial Operator ("**ESCO**"), which is also known as the Commercial Operator of Power System ("**COPS**"). ESCO/COPS balances the electricity on the market by trading the volume of electricity delivered into the network by generators and importers which is not purchased under direct agreements with distributors.

[28] Most HPPs depend on the amount of water flowing through rivers, which is at its lowest in winter when electricity consumption is at its highest, which in turn leads to electricity shortages that are serviced by TPPs and imports from neighboring countries, primarily Russia. During spring and summer, Georgia exports its surplus electricity to Turkey (Respondents' Counter-Memorial, ¶ 23).

134. In the electricity sector, transmission and distribution are natural monopolies and are typically regulated to avoid the risk of them charging excess prices to the detriment of consumers, whereas generation activities are competitive.[29]

135. Until 1 July 2021, Telasi was both a distributor and a supplier of electricity. Effective as of that date, Telasi's electricity supply activities were taken over by a new Inter RAO subsidiary, TelMiko LLC, as required by the Electricity Market Model Concept which unbundled the distribution activities of vertically integrated electricity companies operating in Georgia (R-0110, the Unbundling Regime). Telasi continues to operate its distribution network.

136. ESCO/COPS is the State-owned company responsible for operating Georgia's electricity market. It also purchases and sells left over electricity that has not been directly contracted for, at tariffs which depend on the amount of electricity it buys and sells, and on market conditions.[30] The price at which ESCO/COPS sells its electricity is usually higher than that of generation companies such as the Khrami Companies.

137. Georgia owns the two largest HPPs, Enguri HPP LLC ("**Enguri**") and Vardnili HPP Cascade ("**Vardnili**"), which produce the cheapest electricity in Georgia. They are required to supply electricity to the occupied territories in Abkhazia.[31] Enguri alone produces 31% of the total generation capacity in Georgia. In comparison, the Khrami Companies produce 4% of Georgia's generation capacity.[32]

138. The GSE is the transmission system operator ("**TSO**") responsible for ensuring the functioning of the electricity system. The GSE prepares the Annual Electricity Balance which

[29] Moselle I, ¶¶ 3.22, 3.24, 3.30; Respondents' Counter-Memorial, ¶ 28.

[30] Claimants' Memorial, ¶ 17(c).

[31] Law on Electricity, CL-0073 / RL-0001, Art. 49.

[32] Moselle I, ¶ 4.11.

forecasts the supply and demand of electricity in a given year for the MOE's approval. The GSE also assists ESCO/COPS in balancing the electricity on the market.[33] Energy supply agreements between generators (sellers) and distributors (buyers) must be registered with the GSE.[34]

2. Georgia's Tariff System

139. The NERC regulates the rates that can be charged by each company for the sale of the energy it generates, known as the "**Generation Tariffs**". Generation Tariffs are intended to cover the generation and operating costs and capital expenditures of the company, plus a profit component.

140. For distribution companies, the NERC regulates the following three types of interrelated tariffs:

141. The "**Consumer Tariffs**" are the rates that a distribution company can charge to its customers and which form the revenue component of a distribution company's business.[35] A distributor's Consumer Tariffs effectively comprise the sum of the WAPT and the Distribution Tariff, both discussed next.

142. The Weighted Average Purchase Tariff ("**WAPT**") is a distribution company's weighted average annual cost per kilo watt hour ("**kWh**") of purchasing energy from generation companies. It constitutes the primary purchase cost component of a distribution company's business and is a function of the sources from which a distribution company purchases energy. The allocation of energy purchases from different generators to a distributor is referred to as the "**purchase portfolio**". Since the cost of energy differs from generator to generator (i.e., depending on whether they are HPPs or TPPs), each distributor's purchase portfolio will include a combination of more and less

[33] Moselle I, ¶¶ 4.23-24.

[34] Moselle I, ¶ 4.40.

[35] Claimants' Memorial, ¶ 18(b)(i).

expensive sources of energy for the year. The NERC's Annual Energy Plan for each distribution company identifies, for each month, the generation companies from which a particular distribution company must purchase electricity, and in what volumes. The Claimants say that the NERC effectively controls the WAPT of each distribution company.[36]

143. The Claimants explain that the "**Distribution Tariff**" (or "**Distribution Margin**") is the difference between the amount the distributor pays to acquire electricity it is going to distribute and the amount it can charge its customers, which results in the profit.[37] It is computed for different voltage levels as the distributor's forecast per unit cost, calculated on a regulated basis. The NERC's methodology in force at any given point provides guidelines as to how to compute each component of the total costs (including capital and operational expenses, normative losses and corrections adjusted for time value of money) and expected distributed amounts of electricity for each group of consumers. The Distribution Tariffs represent a distribution company's margin on a tetri per kWh basis, as opposed to the rates charged to customers. [38]

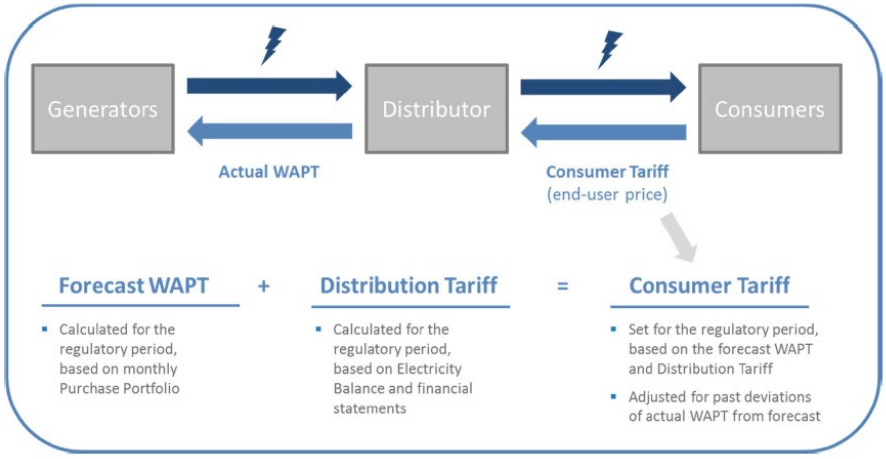
144. The Claimants' economic experts summarize the relationship between the different tariffs as follows:[39]

[36] Claimants' Memorial, ¶ 18(b)(ii).

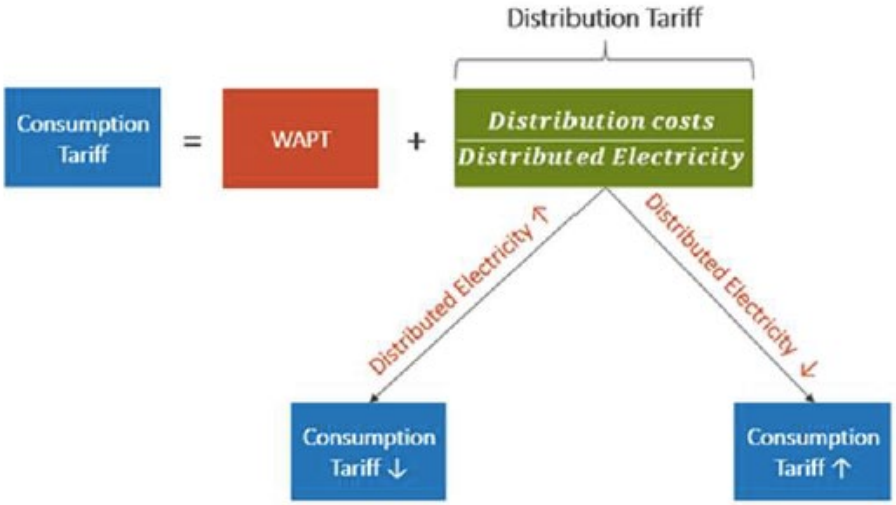
[37] Tr. Day 1 (Claimants' Opening Statement), 16.

[38] 1 tetri is equal to 0.01 GEL (Abdala & Delamer I, fn 16). "tetri" is a fractional currency used only in Georgia since 1995.

[39] Abdala & Delamer I, p. 10, Figure I; Claimants' Memorial, ¶ 19.



145. The Respondents' damages expert summarizes the building blocks of the Consumer Tariff as follows:[40]



146. When the NERC sets a particular tariff, the market participant might be charged more or less than that amount, and it can be temporarily adjusted upon the occurrence of a previously agreed trigger.

[40] Moselle I, p. 55, Figure 19; Georgian National Energy and Water Supply Regulatory Commission, Resolution No. 14 on Approving Electricity Tariff Calculation Methodologies, dated 30 July 2014 ("**2014 Methodology**"), CL-0084, Art. 16.

147. The Claimants say that because the NERC can set tariffs and control the actual WAPT, it controls the financial viability of energy generation and distribution companies in Georgia.[41]

148. Distribution companies' (and generation companies') purchase portfolios are set as follows:[42]

- Before the start of each year, the GSE prepares, and the MOE approves, the Annual Electricity Balance (described above at paragraph). Based on the Annual Electricity Balance, the NERC prepares its Annual Energy Plan. In practice, the NERC's Annual Energy Plan forms the basis of the GSE's daily and hourly planning and is used to match supply and demand on a real-time basis. It also informs the GSE's decisions to approve energy supply agreements between generation companies.[43] The Claimants say the NERC's Annual Energy Plan informs the decisions of distribution companies and the ESCO/COPS regarding the allocation of energy from suppliers to distributors.[44]

    - Based on the NERC's Annual Energy Plan, the NERC calculates tariffs for each distributor predicting an annual WAPT and Distribution Tariff. A company's WAPT, as planned by the NERC, is intended to reflect the annual average costs expected to be incurred when purchasing energy. Each distribution company has a different WAPT, since its purchase portfolio contains a unique mix of energy from various generators at different tariffs.[45]

    - Next, a distribution company (i.e., Telasi) concludes electricity supply agreements directly with generators. Agreements are concluded on the basis of the NERC's Annual Energy Plan and informal discussions with the ESCO/COPS as to the volume of energy it can receive from a particular generation company.[46]

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41 Claimants' Memorial, ¶ 21.

42 The Claimants say that the manner in which a generation company's electricity output is assigned to distribution companies as part of the NERC's Annual Energy Plan, and implemented through supply contracts executed through the ESCO/COPS, determines its revenue (Claimants' Memorial, ¶ 23).

43 Law on Electricity, CL-0073 / RL-0001, Arts. 23.2, 35(3)(a), 35(3)(c).

44 Claimants' Memorial, ¶ 22(a).

45 Claimants' Memorial, ¶ 22(b).

46 Claimants' Memorial, ¶ 22(c).

- The agreements come into effect only upon registration by the GSE.[47]
- In the event that not all of a distribution company's electricity needs are met by its direct agreements with generation companies, the distribution company will acquire those additional volumes from the ESCO/COPS at a higher tariff.[48]
- Finally, the actual delivery of energy to a distribution company is determined on a monthly basis by the ESCO/COPS. The ESCO/COPS determines how much energy was received by a distribution company in a given month from each generator with whom the company has a supply agreement. Any portion of a distribution company's monthly supply of energy that has not been supplied under direct contracts with generators is deemed to have been acquired from the ESCO/COPS at its tariff.[49]
- The Claimants say that when a distribution company receives energy, it cannot know from which generation companies it will be deemed to have received power for the purposes of monthly accounts. The ESCO/COPS informs each distributor after the fact which generators actually supplied energy to it in the previous month, in what volume and at what tariff. Monthly "acts of acceptance" signed between distributors and generators (and, to the extent applicable, the ESCO/COPS) confirm electricity volumes supplied.[50]
- The volume of energy actually provided by various generators (as allocated by the ESCO/COPS) may differ from the projected volume that formed the basis for calculating a company's WAPT. This occurs for a number of reasons, such as the reallocation of inexpensive energy to other distribution companies and/or for export, unplanned increases of generation tariffs, and technical breakdowns in energy supply.[51] Consequently, a

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47 Electricity (Capacity) Market Rules, CL-0070, Arts. 9(2)(d), 16(1)(h); Claimants' Memorial, ¶ 22(d).

48 Electricity (Capacity) Market Rules, CL-0070, Art. 14.3; Abdala & Delamer I, ¶ 12; Claimants' Memorial, ¶ 22(e).

49 Claimants' Memorial, ¶ 22(f): Claimants say this is consistent with the ESCO/COPS's role as the balancing and clearing entity for the energy market. If a distributor needs more electricity than has been planned for in its purchase portfolio (such as if a generator under-performs or because new consumers connect to its network), in practice it can only acquire additional electricity from the ESCO/COPS, or directly from a generator if the contract is registered with the GSE.

50 Claimants' Memorial, ¶ 22(g).

51 Claimants' Memorial, ¶ 22(h).

distribution company's actual WAPT may exceed its planned WAPT, reducing its Distribution Tariff (or Distribution Margin).

B. The Telasi SPA: AES's Initial Acquisition of Telasi and Management Rights to the Khrami Companies

149. Telasi was established in 1995 as a Georgian joint stock company. Telasi is now the second-largest distribution company of the three operators in Georgia, and covers Tbilisi and the surrounding urban areas. From 1995 to 1998, it was State-owned. In December 1998, the Government began privatizing distribution companies and power plants. The sale of Telasi in 1998 to an American corporation marked the first major privatization in the Georgian electricity sector. Pursuant to a share purchase agreement, AES Silk Road Holdings B.V. ("**AES**") acquired 75% of the shares of Telasi (the "**Telasi SPA**").[52]

150. On the same date, the NERC issued a resolution regarding the approval of methodology, rules and procedures of setting electricity tariffs ("**1998 Methodology**").[53]

151. In 1999, AES also acquired the management rights for the Khrami Companies for 25 years.[54] In 2003, AES changed its name to Silk Road Holdings B.V., after being acquired by the Inter RAO group.

152. By 2003, AES had rehabilitated Telasi from its former state, but had not improved the condition of Khrami Companies. The Respondents explain that when AES first took over the management of the Khrami Companies in 1999, Khrami-2 required extensive repair in order to

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[52] Share Sale and Purchase Agreement between Georgia and AES Silk Road Holdings, dated 21 December 1998 ("**Telasi SPA**"), C-0001; NERC Resolution No. 3 "On Approval of the Rules and Procedures for Establishing a Methodology for Electricity Tariffs", 1 July 1998, RL-0007.

[53] NERC Resolution No. 3 "On Approval of Methodology, Rules and Procedures of Setting Electricity Tariffs", dated 1 July 1998, RL-0007, "invalidated by resolution N 8 of [NERC] 06/08/2011".

[54] Management Agreement between Georgia and AES Georgia Holdings B.V. (another Dutch subsidiary of AES Corporation), 22 December 1999 ("**Khrami Management Agreement**"), C-0002.

operate at full capacity. To support the rehabilitation of Khrami-2, Georgia transferred its Japanese bank loans of JPY 2 billion and GEL 3 billion to AES on the condition that AES would repay them by 2025 (by the end of the 25-year Khrami Management Agreement).[55]

C. Inter RAO's 2003 Acquisition of Telasi and Management Rights for the Khrami Companies

153. Pursuant to a sale and purchase agreement in 2003, Inter RAO acquired 100% of AES's Georgian Operations, which included:

- AES's 75% indirect interest in Telasi;[56]
- the shares of AES Georgia, which held management rights for the Khrami Companies for 25 years under the Khrami Management Agreement; and
- the shares of AES Gardabani, which wholly owned AES Mktvari (a Georgian TTP).

154. At the time that Inter RAO acquired AES's existing operations in 2003, electricity consumption tariffs were significantly higher than those in Russia. Representatives of Inter RAO stated that they assumed they would be able to substantially reduce these tariffs.[57]

155. In January 2004 (six-months after Inter RAO acquired Telasi and management rights to the Khrami Companies), a new government was elected in Georgia. It made year-round electricity supply a priority. In this regard, the new Government concluded an Agreement with Inter RAO that provided that the Government would use funds from the state budget to repay bad debts of Telasi's consumers and a commercial loan that Telasi had taken out in 2003. In return, Inter RAO undertook to repay Telasi's debts to the state budget and to ensure the import of additional electricity from

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[55] *See* Khrami Management Agreement, C-0002 / R-0006, Clause 3.3.

[56] Sale and Purchase Agreement between AES and RAO Nordic (a Finnish company wholly owned by Inter RAO), dated 11 July 2003, C-0003.

[57] News article, dated 1 September 2003, R-0005; Respondents' Counter-Memorial, ¶ 43.

Russia.[58] The Government also entered into an Agreement with Telasi and Mtkvari-Energy LLC to improve the operation of the Georgian power system and provide a safe power supply to the city of Tbilisi, pursuant to which Telasi would receive a monthly credit to purchase electricity from domestic sources, including the Khrami Companies, and Telasi would sign contracts for the purchase of electricity and ensure the importation of electricity from Russia and Armenia as required to ensure uninterrupted power supply to the City of Tbilisi.[59] The Government also entered into a Memorandum with JSC Khrami-2 ("**Khrami-2**"), and others to support the rehabilitation of two turbines owned by Khrami-2 by way of loans at preferred rates.[60]

156. It appears that the Government planned to improve the reliability of the supply of electricity and, for the first time, the supply of electricity was uninterrupted during the winter of 2005-2006.[61]

157. At the time that Inter RAO acquired AES's existing operations in 2003, the Telasi SPA and Khrami Management Agreement, which continued to govern the relationship between the Parties, had not been modified since their conclusion in 1998 and 1999, respectively.[62] Under the Khrami Management Agreement, Inter RAO was obliged to rehabilitate the Khrami Companies in exchange for a right to receive all dividends and a management fee.[63]

158. After Inter RAO's acquisition of Telasi in 2003, the tariff related arrangements between the Government and Telasi were modified several times by the Memoranda concluded in 2007, 2010, 2011, 2012 and, finally, 2013 (these are discussed, in turn, below). Each time that a new agreement

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[58] Respondents' Counter-Memorial, ¶ 49; 2004-2005 Memorandum of Understanding on Uninterrupted Electricity Supply, R-0007.

[59] Agreement between Georgia, JSC Telasi and LLC Mtkvari-Energy, dated 23 September 2005, R-0008.

[60] Memorandum between Georgia, LEPL "Energogeneracia" and JSC "Khrami HPP-2" on Rehabilitation of Hydro Power Plant Khrami-2, dated 17 January 2005, R-0004.

[61] Khetaguri I, ¶ 13.

[62] Claimants' Memorial, ¶ 28; Respondents' Counter-Memorial, ¶ 44.

[63] Khrami Management Agreement, C-0002 / R-0006, ¶ 3.5.

was concluded, it was immediately implemented by the NERC. Each agreement effectively reset the Parties' relationship with new or different tariff regimes.

159. The Telasi SPA established long-term tariff rules for calculating and adjusting the tariffs applicable to Telasi's sale of electricity over two time periods: 1 April 1999 to 30 September 2008; and 1 October 2008 onwards.[64] The 1998 Telasi SPA became the model for the later agreements. It set Distribution Tariffs, agreed in advance, which provided for a fixed margin. This was separate from and unrelated to the "**Cost-Plus**" basis covering costs and a reasonable rate of return, provided for in the 1998 tariff methodology (the "**1998 Methodology**").[65]

160. The Telasi SPA allocated three main risks between the parties: (i) changes in currency; (ii) changes in inflation; and (iii) changes in the WAPT. The first period featured fixed Distribution Tariffs which were to be adjusted to take into account inflation, currency fluctuations and increases to the costs of purchasing energy. For the second period, the Telasi SPA did not specify a Distribution Tariff. Instead, the tariff was to be calculated in accordance with Georgian Law which would appear to include the tariff methodology in force at the relevant time, as follows:

> *[C]alculated as frequently as every five years and thereafter, will be calculated in co-operation with the NERC and in accordance to Good Utility Practice, and set in accordance with Georgian Law and the following principles:*
>
> *i) The costs which AES and the NERC reasonably anticipates will be incurred by AES and/or the Company in the five-year period to which the new Tariff relates with reference to international practices in regulated utility companies, including but not limited to:*
>
> - *Operation maintenance and repair costs;*
> - *Personnel costs;*
> - *Insurance and reinsurance costs;*

[64] Telasi SPA, C-0001, Schedule 11.

[65] 1998 Methodology, dated 1 July 1998, RL-0007; Tr. Day 1 (Claimants' Opening Statement), 19-20. However, according to the Claimants, the Telasi SPA did not permit the application of the 1998 Methodology after 2008: Tr. Day 7 (Claimants' Closing Statement), 6-7: "The Telasi SPA didn't allow the [1998] methodology to come into play even after the first ten years, and the Telasi SPA had no end date".

- *Depreciation and financial costs (including interest and repayment of investments in supporting, maintaining and developing all Equipment, buildings, installations and the Assets);*
- *Working capital costs;*
- *Losses, including all commercial and technical losses;*
- *Taxes;*
- *Effects of Force Majeure Events;*
- *Effects of Developments;*
- *Costs in relation to any management, support, technical support agreements;*
- *Any outside investment service fees.*

ii) A reasonable rate of return will be allowed so as to provide the Company and their Affiliates with a fair and reasonable market-related return on its initial and subsequent investments in the Company; and

iii) The large capital expenditure that will be required to upgrade the Company to a world class Energy distribution enterprise; and

iv) The need to hold the Company harmless for changes in Exchange Rates and inflation by making periodic adjustments to the Customer Tariff; and

v) Any other matters which the State and AES agree should be taken into account.[66]

161. By about 2006, as the end of the first period approached, it became apparent that new arrangements were necessary for Telasi because the Telasi SPA did not prescribe specific tariffs for the second period commencing 1 October 2008 and tariffs would then be set in cooperation with the

[66] Telasi SPA, C-0001, Schedule 11, ¶ 3.6. The 1998 Methodology did not expressly exclude Telasi from its application. The 1998 Telasi SPA also contained a Change of Law provision (Clause 20) which provided for compensation of AES for increases in taxes, additional material capital expenditures in order to comply with any change of law, or otherwise materially increase the annual cost of performing the obligations on AES or Telasi or materially decrease the annual returns (other than as the result of the decrease in demand for energy or energy services). Should a Change of Law occur, AES was required to cause Telasi to submit to both Georgia and the NERC a certificate detailing the relevant Change of Law. It also provided that for a period of 10 years from the date of the Telasi SPA, Georgia could submit to the NERC a certificate detailing relevant changes of law and/or decreased costs or increased returns of Telasi which were expected to be borne by the Company and requesting adjustments to Telasi's consumer tariff. In the event the Parties were unable to agree to a tariff adjustment by way of good faith negotiations, either Party could refer the matter to arbitration. Finally, Clause 20.7 provided that Georgia would only be obligated to indemnify AES or Telasi for any change of law in the event the change was discriminatory in the sense that its principal effect was an AES or Telasi or directly borne by them and such action materially adversely affected them (Clause 7.5.7).

NERC in accordance with Georgian Law and the various principles set out in the Telasi SPA.[67] Further, a number of disagreements had arisen between the parties regarding the adjustment of tariffs and certain taxation matters.[68] These issues were resolved by way of an agreement between the Government and Inter RAO in 2007, the 2007 Memorandum, discussed below under Section E.

D. The NERC's 2006 Adjustment of Telasi's Tariffs

162. In late 2005, the NERC undertook a comprehensive review of electricity tariffs and, on 31 January 2006, it established an electricity working group tasked with formulating a new tariff system in the long-term, and for February-April 2006 in the short term.

163. In April 2006, Telasi applied to the NERC for a 12 tetri/kWh upward adjustment of its Distribution Tariffs in accordance with the Telasi SPA to recover losses incurred between 1999 and 2005 in excess of the investment program provided for in the Telasi SPA.[69]

164. In May 2006, the NERC held a public hearing to discuss the results of its tariff system revision and Telasi's application.[70] The NERC noted the "necessity of adjusting the entire tariff system" due to: (i) increased Russian gas prices, which resulted in a 35% rise in the average cost of gas-fired TPP generated electricity in Georgia; (ii) an "increase of the expensive power share in the [electricity] balance" caused by 24-hour electricity supply; and (iii) an increase in the cost of electricity produced by the six HPPs that had submitted tariff applications due to "wage growths", "revaluation of fixed assets" and "raised prices on materials".[71] The NERC stated that these changes

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[67] Claimants' Memorial, ¶ 31; Respondents' Counter-Memorial, ¶ 45.

[68] Claimants' Memorial, ¶ 31 and fn 49: "See for example the preamble and Clause 1.6 of the Memorandum between the Government of Georgia and Inter RAO, 20 June 2007, C-0005 [/ R-0015]".

[69] Telasi Tariff Application, 11 April 2006, R-0010, Annex 1.

[70] NERC Hearing No. 13 Minutes, dated 11 May 2006, R-0011, p. 2.

[71] *Ibid*.; Explanatory Note to Energy Commission Draft Resolution on Electricity Tariffs, R-0013, p. 1.

had resulted in a 61% increase in the WAPT paid by distribution companies to generation companies.[72] The Deputy Minister of Energy at the time, Mr. Khetaguri, endorsed the NERC's proposed increase in the WAPT.[73]

165. Later in May 2006, the NERC issued Resolution No. 18 (the "**2006 Tariff Resolution**"), wherein it granted to Telasi a 2 tetri/kWh increase (of the 12 tetri/kWh tariff increase requested in Telasi's tariff adjustment application), which raised its Distribution Tariff to 7.89 tetri/kWh, effective 1 June 2006. [74] The NERC found that it was necessary to increase Telasi's Distribution Tariff to allow Telasi to recover GEL 22 million in losses in 2005-2006 due to a VAT change, investments in Telasi's power grid between 2002 and 2005 and USD 20 million in other investments to be made by Telasi between 2006 and 2008, and to account for the temporary reduction of Telasi's Distribution Tariff imposed by the NERC in 2003.[75] The Claimants say that the NERC's decision to only increase Telasi's Distribution Tariff by 2 tetri/kWh left Inter RAO with claims as of the end of 2006 that it assessed at USD 134 million.[76]

166. In June 2006, Georgia's Parliament issued a resolution on Georgia's energy policy. Amongst the various policy directions adopted was the attraction of investment and development of competition through privatization in the sector. The Energy Policy provided for different types of tariffs to protect consumers from monopolistic prices and permit long-term sustainable growth,

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[72] NERC Hearing No. 13 Minutes, dated 11 May 2006, R-0011, p. 2.

[73] *Id.*, p. 4; Khetaguri I, ¶ 15; *see* Respondents' Counter-Memorial, ¶ 56.

[74] NERC Resolution No. 18, dated 15 May 2006, R-0014, Art. 7.

[75] Explanatory Note to Energy Commission Draft Resolution on Electricity Tariffs, R-0013, pp. 1-2; NERC Hearing No. 13 Minutes, 11 May 2006, R-0011, p. 3; Khetaguri I, ¶ 16.

[76] Tr. Day 7 (Claimants' Closing Statement), 8:20-23. *See* Inter RAO internal note, dated 16 August 2006, C-0184.

including the setting of various tariffs, including long-term pre-fixed tariffs (the "**2006 Energy Policy**").[77]

167. Shortly thereafter, Telasi asked the MOE to agree to a new tariff policy for Telasi because, as explained above, as of 1 October 2008, the Telasi SPA contemplated that Telasi's tariffs would be determined in accordance with Georgian Law and the principles set out in its Schedule 11.[78]

168. The Deputy Minister of Energy, Mr. Khetaguri, testified that Inter RAO and the MOE negotiated a new tariff policy for Telasi over several months. According to him, the parties were able to reach an agreement because: (i) Georgia wanted to incentivize additional investments in its energy sector; (ii) Georgia was seeking investors to construct new HPPs to achieve a cheaper supply of energy that was not dependent on the price of imported gas; and (iii) Inter RAO had proven to be a good business partner through prior agreements with respect to Telasi and the Khrami Companies' operations, and was interested in helping the government achieve its energy policy.[79]

E. The 2007 Memorandum

169. In June 2007, Georgia and Inter RAO entered into the Memorandum on the Development of Cooperation in the Electric Power Sector and Implementation of Previous Agreements (the "**2007 Memorandum**").[80] The 2007 Memorandum provided for, *inter alia*:

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[77] Resolution of the Parliament of Georgia No. 3259-I, "On the Main Directions of Georgia's Energy Sector State Policy", dated 9 June 2006 ("**2006 Energy Policy**"), RL-0006.

[78] Khetaguri I, ¶ 18.

[79] See *Id*., ¶¶ 19-20.

[80] 2007 Memorandum between Georgia and Inter RAO, dated 20 June 2007, C-0005 / R-0015; Claimants' Memorial, ¶¶ 33-35; Claimants' Reply, ¶¶ 23, 33; Respondents' Rejoinder, ¶ 17; Respondents' Counter-Memorial, ¶¶ 63-71.

- long-term Distribution Tariffs for Telasi at higher than Cost-Plus rates until 1 September 2015 (namely, 7.89 tetri/kWh, which was the level set by the NERC in the 2006 Tariff Resolution)[81] so as to allow Telasi to recover costs previously incurred by 30 September 2008 (Clause 1.1);[82]

- a weighted average tariff for the purchase of electricity (the "**WAPT**") and the adjustment of Telasi's consumer tariff if the WAPT increased or decreased by more than 10% than the WAPT at 1 September 2007 (Clause 1.3);[83]

- the adjustment of Telasi's distribution tariff as follows:

> *1.4 To make an adjustment of distribution tariff of Telasi JSC.*
>
> *Adjustment of the distribution tariff (margin) of Telasi JSC, with respect to inflation and change in the lari to US dollar exchange rate, shall be carried out three times (on September 1, 2010, September 1, 2012, and September 1, 2015).*
>
> *The adjustment will be made only by the amount of the change exceeding 10% for any of the factors listed below. In this case:*
>
> *1) Adjustment of the tariff (margin) for distribution by Telasi JSC, taking into account inflation, will be carried out only if the average annual inflation rate for the periods (from September 1, 2007 to September 1, 2010; from September 1, 2010 to September 1, 2012; and from September 1, 2012 to September 1, 2015) is more than 10%.*
>
> *2) Adjustment of the tariff (margin) of distribution by Telasi JSC, taking into account change in the lari exchange rate against the US dollar, will be implemented only if the change in the lari exchange rate against the US dollar, at the time of the adjustment, exceeds 10% since the last revision period. Adjustment for this factor will apply only to 10% of the tariff (margin) of distribution by Telasi JSC.*
>
> *1.5 Measures to ensure tariff policy until 2015.*
>
> *The Government of Georgia, within its competence, will provide all-round assistance so that the long-term tariff schemes and the conditions for their adjustment specified in clauses 1.1 to 1.4 are approved by the GNERC resolutions no later than September 1, 2007.*
>
> *1.6 Controversial issues of adjusting the distribution tariff (margin) of Telasi JSC.*
>
> *Since the criteria set in clause 1.5 is met, Telasi JSC will not demand GNERC to increase or to adjust the tariff (margin) of distribution by Telasi JSC and/or will not use other compensation mechanisms for any of the controversial issues that arose before the signing of this Memorandum, including: change in the VAT taxation regime, reduction in the tariff due to the write-off of the debt to the PPR, the emergence of losses as a result of delays in setting tariffs, a reduction in the tariff due to the resolutions of the Constitutional Court of Georgia,*

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[81] 2007 Memorandum, C-0005 / R-0015, Clause 1.

[82] Explained in Respondents' Counter-Memorial, ¶¶ 57, 65.

[83] 2007 Memorandum, C-0005 / R-0015, Clause 1.

indebtedness to SILK ROAD HOLDINGS B.V. and indebtedness specified in clause 5 hereof.[84]

- The establishment of an investment program to be implemented by Telasi:

2 Investment program

The parties agree that, under the terms of the introduction of the long-term tariff system defined in clause 1 hereof, Telasi JSC shall implement investment projects aimed at further facilitation of the technical condition of the electric network of Telasi JSC, contributing to the reliability and quality of power supply to consumers in Tbilisi. The investment program shall adhere to the following parameters during the period from January 1, 2007 until December 31, 2015:

Years	*Investment commitments (in million US dollars)*
2007	*24.0*
2008	*13.9*
2009	*2.5*
2010	*2.5*
2011	*2.5*
2012	*2.5*
2013	*2.6*
2014	*2.9*
2015	*2.9*
Total	*56.3*

Telasi JSC shall submit a report on the investments made to the relevant structures, including GNERC, not later than 6 months after the end of the calendar year. In case of failure to meet or complete entirely the announced investment volumes, the GNERC shall have the right to make appropriate tariff adjustments for Telasi JSC (Clause 2);[85]

[84] *Ibid*.

[85] *Id.*, Clause 2.

- The construction of a new HPP on terms to be agreed between the Parties:

> *7 Construction of a new HPP*
>
> *7.1 The parties agreed that before March 1, 2008, they will ensure selection and approval of the basic technical and economic parameters of a new hydroelectric power station or hydroelectric power plants within the territory of Georgia with an approximate total capacity of 100 MW. CJSC "INTER RAO UES" will provide financing for construction and launch of the above hydroelectric power station or hydroelectric power stations before 1 September 2015. At the same time, Telasi JSC shall ensure a 100% purchase of electricity produced within 7 years from the moment of launching this station and, in case the purchase of this electricity leads to an increase in the tariff for the purchase of electricity, fixed in clause 1.3 hereof, and will not demand from GNERC a corresponding increase in the then existing consumer tariff.*
>
> *7.2 If the Parties do not reach an agreement on the selection and approval of the abovementioned basic technical and economic parameters, and a hydroelectric power station or hydroelectric power stations are not put into operation before September 1, 2015, Telasi JSC shall from September 1, 2015 and during the next 7 years, purchase at its own account at least 15% of its total annual electricity purchases from hydroelectric power plants and/or renewable energy power stations, put into operation after signing this Memorandum. At the same time, if the purchase of this electricity leads to an increase in the average tariff for the purchase of electricity recorded in clause 1.3 hereof, Telasi JSC will not demand GNERC to increase the consumer tariff existing at that time* (Clause 7).[86]

170. As will be discussed below, the Respondents say that fixing Telasi's Distribution Tariffs at the higher rate of 7.89 tetri/kWh for seven years (2007-2015), as opposed to setting them as of 1 October 2008 as provided for in the Telasi SPA, allowed Telasi to earn a significant margin on its Distribution Tariffs by way of a supplement on the base tariff. This margin, which the Respondents refer to as Telasi's alleged "**super profit**", was to be used to fund Telasi's future investment obligations in Georgia, including the construction of an HPP.[87] The Claimants say that the tariffs set under the 2007 Memorandum were intended to account for the waiver of Telasi's claims, the profitability of Telasi's operations and future investment obligations. They say there was no understanding that the margin provided for in Telasi's tariffs was a "super profit".

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[86] *Id.*, Clause 7.

[87] Respondents' Counter-Memorial, ¶ 66; Claimants' Memorial, ¶ 34(a); Khetaguri I, ¶ 22. At the hearing, the Respondents conceded that the 2007 Memorandum (and 2011 Memorandum) was drafted in a way that makes it difficult to identify and quantify how much money had been accumulated. Tr. Day 7 (Respondents' Closing Statement), 175-176.

171. Initially, Mr. Khetaguri suggested that the NERC's decision to hold the 7.89 tetri/kWh Distribution Tariff for Telasi steady until 2015 in the 2007 Memorandum was exclusively in exchange for an obligation to build an HPP, pursuant to Clause 7 of the Memorandum. However, under cross-examination, Mr. Khetaguri acknowledged that Telasi's increased Distribution Tariff for 2007-2015 was compensation for the unresolved issues left at the end of 2006, which amounted to approximately USD 134 million taking into account that the NERC had increased Telasi's Distribution Tariff by 2 tetri/kWh in May 2006.[88]

172. At the hearing, the Respondents accepted that the "super profit" generated from the increased tariffs originally provided in the 2006 Resolution and continued under the 2007 Memorandum was not exclusively destined to pay for the HPP, and was instead also meant to reimburse Inter RAO for other debts. The Respondents say that the thrust of their super-profit argument is that the supplement added to the base tariffs in the 2007 Memorandum, and subsequently in the 2011 Memorandum, was intended to finance Inter RAO's HPP construction obligation. In support, they refer to internal Inter RAO documents which state that it accumulated USD 193 million for that purpose, USD 80 million of which was coming from Telasi's consumers.[89]

173. The Parties dispute whether Inter RAO was obliged to finance the construction of a new HPP (discussed below under Section H) under Clause 7 of the 2007 Memorandum.

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[88] Tr. Day 5 (Khetaguri), 138 *et seq*; Tr. Day 7 (Claimants' Closing Statement), 8-9; 2007 Memorandum, C-0005 / R-0015, Clause 1.6; Zavrazhnov II, ¶ 10.

[89] Tr. Day 7 (Respondents' Closing Statement), 176-178; Email from Kostyunin to Markov attaching Inter RAO's performance model, dated 20 January 2011, R-0078, p. 5; Email from Parshin to Kostyunin with PowerPoint presentation on Inter RAO's cashflows, dated 31 January 2011, R-0079.

174. Under Clause 2 of the 2007 Memorandum, Inter RAO undertook to invest USD 56.3 million between 1 January 2007 and 31 December 2015, and had to submit annual reports on investments made or else the NERC could make "appropriate tariff adjustments".[90]

175. The 2007 Memorandum also provided for two adjustments to Telasi's Distribution Tariffs to protect against market risks: (i) Telasi's Consumer Tariff was to be increased or decreased where the actual WAPT fluctuated by more than 10% as compared to the WAPT in force on 1 September 2007 so that Telasi's Distribution Tariff would remain unchanged; and (ii) Telasi's Distribution Tariffs would be adjusted for inflation and USD/GEL currency exchange rates.[91]

176. The 2007 Memorandum required the Government to, "within its competence … provide all-round assistance so that the long-term tariff schemes and the conditions for their adjustment" are approved by the NERC by 1 September 2007.[92] As will be discussed under the Merits in the context of the 2013 Memorandum, the Respondents say that the Parties included this provision because they understood that the NERC had exclusive competence over setting tariffs,[93] whereas the Claimants say Georgia did not indicate that the NERC could depart from or override the tariff-related provisions of the Parties' agreements and "make the relevant decision".

177. On 8 November 2007, the Government transmitted the 2007 Memorandum to the NERC for its consideration of the long-term Distribution Tariffs and adjustment provisions and to "make the relevant decision".[94]

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[90] 2007 Memorandum, C-0005 / R-0015, Clause 2.

[91] Id., Clauses 1.3, 1.4.

[92] *Id.*, Clause 1.5

[93] Respondents' Counter-Memorial, ¶ 72.

[94] Government Decree No. 654, dated 8 November 2007, R-0016.

178. On 6 August 2008, pursuant to Article 11.1 of the Law on Electricity, the Government resolved to introduce predefined long-term marginal and/or fixed electricity tariffs and that, "…it shall be considered expedient to introduce predefined long-term marginal and/or fixed tariffs in the energy sector in order to promote investments and create stable investment environment. For this purpose, contractual obligations undertaken by the state in relation to energy facilities and other relevant legal acts shall also be taken into account".[95] According to Ms. Milorava, this resolution "simply grant[ed] the NERC discretion to take such contractual tariff arrangements into account in setting tariffs".[96]

179. Georgia and Inter RAO continued to meet regularly in the context of the task force set up under the 2007 Memorandum to monitor the implementation of the Parties' respective obligations.[97]

F. Implementation of the 2007 Memorandum: NERC Resolution No. 33

180. In September 2008, the NERC considered that the 2007 Memorandum was in line with the interests of both distribution companies and consumers and approved and extended the Distribution Tariff of 7.89 tetri/kWh provided in the 2006 Tariff Resolution and the 2007 Memorandum until 1 September 2015 and implemented the other provisions of the 2007 Memorandum.[98] In December 2008, the NERC reconfirmed the tariffs agreed by the Parties under the 2007 Memorandum, which had first been confirmed in September 2008, in a consolidated resolution ("**NERC Resolution No.**

[95] Decree of the Government of Georgia No. 170 on the Promotion of Investments in the Energy Sector of Georgia, dated 6 August 2008 ("**Decree No. 170**"), CL-0092.

[96] Milorava I, ¶ 24.

[97] Khetaguri I, ¶ 30; Respondents' Counter-Memorial, ¶ 77.

[98] NERC Resolution No. 26 On approval of Determined Fixed Tariffs of Electricity for Long-term Period to Ensure Creation of Stable Investment Environment in Energy System of Georgia, dated 24 September 2008, R-0017, p. 2.

33").[99] The following table provided by the Claimants shows that the tariff levels agreed in the 2007 Memorandum and set by the NERC in its Resolution No. 33 were identical.[100]

Telasi's tariffs (fixed in 2008)

Voltage	Distribution Tariffs (tetri/kWh)	
	2007 Memorandum, cl 1.1 [C-005]	Resolution No 33, Art 8 [CL-078]
220/380 V (commercial consumers)	8.08	8.08
6-10 kV	7.138	7.138
35-110 kV	1.8	1.8

181. These tariff rates applied independently of the NERC's 1998 Methodology which was still in effect at the time and provided for a different methodology for setting and adjusting the tariffs.[101]

G. The 2010 Memorandum

182. In late 2009, the Parties began negotiating a new memorandum (the 2011 Memorandum, described below) after Inter RAO first expressed its interest in purchasing the Khrami Companies.[102] The Parties were aware that the 2007 Memorandum would expire in September 2015 and unless they negotiated a new agreement, Inter RAO perceived a risk that the NERC might re-institute Telasi's Distribution Tariffs on a lower Cost-Plus basis, pursuant to its current tariff-setting methodology.[103] During the negotiations, Inter RAO proposed to restructure its share capital to settle some of Telasi's historical debts (dating back to when it was owned by AES) and Georgia wanted

[99] NERC Resolution No. 33 "On Adoption of Electricity (Capacity) Rates", dated 4 December 2008 ("**NERC Resolution No. 33**"), CL-0078, Art. 8.

[100] Claimants' Opening Presentation, Demonstrative No. 2; Tr. Day 1 (Claimants' Opening Statement), 22:2-3.

[101] Tr. Day 1 (Claimants' Opening Statement), 21:17-21.

[102] Khetaguri I, ¶ 31; Respondents' Counter-Memorial, ¶ 78.

[103] Claimants' Memorial, ¶ 40.

to record the Parties' agreement on a planned IPO for Telasi. To that end, in October 2010, the MOE and Inter RAO signed a two-year non-binding memorandum of understanding (the "**2010 Memorandum**").[104] The 2010 Memorandum recorded the need to improve Telasi's economic efficiency of operation and the intention to undertake joint measures for its financial rehabilitation. In this regard, the 2010 Memorandum recorded the Parties' intention to examine various options of debt restructuring, financial rehabilitation and the increase of value of Telasi, including by consideration of the increase of Telasi's authorized capital by issuing additional ordinary shares to be owned by Georgia and Inter ROA's subsidiary, Silk Road.[105] The 2010 Memorandum also stated that Inter RAO and/or its affiliates in Georgia would carry out the construction of an HPP of a capacity of at least 70 MW in accordance with terms which were to be agreed between the Parties.[106]

183. Following the conclusion of the 2010 Memorandum, the Parties continued to negotiate a new memorandum to govern Inter RAO's operations in Georgia, and a Sale and Purchase Agreement for the Khrami Companies (the "**Khrami SPA**").

H. The 2011 Memorandum

184. On 31 March 2011 (five months after the conclusion of the 2010 Memorandum), the Government of Georgia, Inter RAO, Georgian Electrosystem LLC and Energotrans LLC concluded the 2011 Memorandum.[107] The Memorandum addressed both Telasi and the Khrami Companies.

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[104] Memorandum of Intentions between the Government of Georgia, JSC INTER RAO UES, Telasi Joint-stock Company and Mtkvari Energy Limited Liability Company, dated 1 October 2010 ("**2010 Memorandum**"), C-0006 (Claimants' Translation) / R-0018 (Respondents' Translation).

[105] *Ibid*., Clause 1.

[106] *Ibid.*, Clauses 2-3.

[107] Memorandum on the Development of Cooperation in the Electric Power Sector and the Implementation of Previous Agreements between the Government of Georgia, JSC "INTER RAO UES", Georgian Electrosystem LLC and Energotrans, dated 31 March 2011 ("**2011 Memorandum**"), C-0015 (Claimants' Translation) / R-0019 (Respondents' Translation); Claimants' Reply, ¶¶ 32-33; Respondents' Rejoinder, ¶ 18; Counter-Memorial, ¶¶ 78-94.

185. The 2011 Memorandum covered the period from 31 March 2011 to 31 December 2025. It addressed, *inter alia,* the 2011-2025 investment program of Telasi, Inter RAO's investment to purchase the Khrami Companies, the construction of an HPP, and long-term electricity distribution tariffs of Telasi and the Khrami Companies' generation tariff and their adjustment.

1. Telasi's Tariffs

186. With respect to Telasi's investment program, the 2011 Memorandum extended the coverage of the program and increased the amount that Inter RAO was obliged to invest in Telasi's distribution grid from USD 56.3 million under the 2007 Memorandum to GEL 376.4 million (approximately USD 221 million) by the end of 2025:[108]

> *1. 2011-2025 Investment Program*
>
> *1.1 Investment Program of Telasi JSC*
>
> *1.1.1 To enhance the reliability of energy supply in Tbilisi and its suburbs and the service quality, to apply modern energy efficient methods and technologies, the Investor intends to procure that Telasi JSC makes and implements investment program and repair works on Telasi JSC electric power grids in the amount of 376.4 mln lari (VAT exclusive) from January 01, 2011, to December 31, 2025. The description and composition of investments and the equipment necessary therefore shall correspond to the Contract for Sale and Purchase of 75% (seventy-five percent) of Telasi JSC equity signed between the Government of Georgia, represented by the Ministry of State Property Management of Georgia, and AES Silk Road Holdings B. V. on December 21, 1998. The investment program and repair works shall be performed according to the following schedule:*

Years	*Investment commitments and repair works (mln lari, VAT exclusive)*
2011-2013	*80.5*
2014-2016	*78.3*
2017-2019	*66.0*
2020-2022	*73.6*

[108] 2011 Memorandum, C-0015 / R-0019, Clauses 1.1.1-1.1.3.

2023-2025	*78.0*
Total [GEL]	*376.4*

1.1.2 In case of decrease of the construction costs of a new HPP chain on the Khrami river (hereinafter the "HPP Chain") (the estimated costs are 193 mln US dollars), the savings amount, where necessary and if agreed with the Government of Georgia, ~~shall~~ may be pro rata applied to additional investment programs of Telasi JSC as per above table in Clause 1.1.1, in addition to the amounts already specified therein.

1.1.3 In case of increase of the construction costs of the HPP Chain (the estimated costs are 193 mln US dollars), the investment program of Telasi JSC as per Clause 1.1.1 shall be reduced on a pro rata basis but not more than by the amount of increase of the estimated construction costs of the HPP Chain.

187. Building on the 2007 and 2010 Memoranda, the 2011 Memorandum provided that Inter RAO would finance the construction and commissioning of a new HPP chain by the end of 2015, with an aggregate capacity of 90-100 MW (the "**HPP Chain**").[109] If no HPP from the HPP Chain was commissioned within that timeframe, Telasi would be required, from 1 January 2016, to buy at least 15% of its power from potentially more expensive local sources until an HPP was commissioned, and would not be allowed to request an increase of its Consumer Tariff if this purchase requirement led to an increase of its WAPT.[110]

188. The Claimants say that the HPP Chain was intended to export electricity to Turkey at a high price by way of a transmission line to be constructed by Georgia. If this objective was not met or did not result in anticipated profits, the Claimants say Telasi was to be compensated with a substantial increase in its Distribution Tariff.[111]

189. The Respondents say the location and cost of building the HPP Chain had been determined by a Tbilisi design firm, Stucky Caucasus, which concluded that the most feasible option was to

[109] *Id.*, Clauses 1.3.1, 1.3.2.

[110] *Id.*, Clauses 1.3.2, 2.2.2.

[111] *Id.*, Clause 2.1.2; Claimants' Memorial, ¶ 49.

build it along the Khrami river.[112] The relevant provisions of the 2011 Memorandum provide as follows:

> *1.3. HPP Construction*
>
> *1.3.1 In pursuance of and for the purpose of Clause 7.1 of the Memorandum of June 20, 2007 signed between the Investor and the Government of Georgia (hereinafter the "Memorandum of 2007"), having completed the preliminary feasibility studies for prospective HPP construction sites in Georgia, the Parties decided to start the construction of the HPP Chain with aggregate capacity of 90-100 MW to be commissioned by the end of 2015. In this case:*
>
> *a) The Government of Georgia will procure land plots for the HPP Chain construction at a price not exceeding the standard cost to the Investor or a company authorized by the Investor.*
>
> *b) The Government of Georgia will ~~procure and~~ ensure the provision ~~provide~~ to the Investor or a company authorized by the Investor ~~with~~ of any and all approvals and licenses necessary to construct and commission the HPP Chain within 4 months after the respective applications accompanied by the documents are filed to the competent authorities as per the applicable laws of Georgia.*
>
> *c) The cost of acquisition and operation of land plots, of approvals, licenses, and other authorization documents and procedures necessary for the construction of the HPP Chain is included in the estimated construction costs of the HPP Chain (193 mln US dollars).*
>
> *1.3.2 The Parties have agreed that if no HPP from the HPP Chain as per Clause 1.3.1 is commissioned within the specified period, Telasi JSC, starting from January 01, 2016 and until any HPP from the HPP Chain is commissioned, shall buy not less than 15% of its total annual electric power purchase amount, as divided by months, from HPPs and/or electric power plants operating on renewable sources of energy, commissioned after the date of this Memorandum. If the purchase of such electric power leads to increase of Weighted Average Purchase Tariff as per Clause 2.2.1 hereof, Telasi JSC will not require from GNEWRC the corresponding increase of then effective Consumer Tariff.*
>
> *1.3.3 The Parties have agreed that not more than 75% but not less than 300 mln kWh per year of electric power produced by the HPP Chain as per Clause 1.3.1 of this Memorandum shall be exported by a company authorized by the Investor. The remaining portion of the electric power shall be purchased by Telasi JSC.*[113]

190. The 2011 Memorandum also recorded that the Parties had agreed that a company of the Inter RAO group would purchase 100% of the two Khrami Companies for the price of USD 104 million pursuant to the Khrami SPA to be agreed between the Parties. The Memorandum also recorded the

[112] Preliminary feasibility study, Stucky Caucasus, dated 28 January 2011, C-0009, p. 10.

[113] 2011 Memorandum, C-0015 / R-0019, Clauses 1.3.1 -1.3.3.

Parties' agreement that in order to ensure the return on investment for the purchase of the Khrami Companies, tariffs chargeable by those Companies would be increased commencing in 2014.[114]

191. The 2011 Memorandum fixed Telasi's Distribution Tariffs at 7.89 tetri/kWh until the end of 2025.[115] Telasi's Distribution Tariffs could be increased by a maximum of 0.84 tetri/kWh, calculated on the basis of the export price of electricity that would be generated by the new HPP Chain, with the aim of ensuring "the return and payback of [Inter RAO's] investment" in Telasi.[116] The relevant provisions provide as follows:

> *2.1 Long-term electricity Distribution Tariff of Telasi JSC*
>
> *2.1.1 The Parties agree that the establishment of long-term electricity tariffs can be equally beneficial for both Telasi JSC and electricity consumers of all categories, including the general population. Having the long-term electricity tariffs, Telasi JSC may, with the maximum accuracy and efficiency, plan the investment projects and its business in general, and consumers may be able to plan their household budget for the payment of the electrical power.*
>
> *2.1.2 The maximum increase of the electric power Distribution Tariff will be not more than 0.84 tetri per 1 kWh (VAT exclusive) and depends on the level of electric power sale price for export of the border through Akhaltsikhe-Borchkha power transmission line of 400 kV as per the table below. If the electric power sale price for export, without the transportation tariff, is less than 6.0 US cents per 1 kWh or more than 7.5 US cents per 1 kWh and if the Operator 1 and/or Operator 2 fail to observe par. d) of Clause 1.3.4, the Parties shall recalculate the Distribution Tariff delta and/or change the amount of investment into Telasi JSC as per Clause 1.1.1 to ensure the return and payback of investment as stipulated by this Memorandum.*
>
> *Calculation of the Distribution Tariff delta*

Electric power export tariff, US cents/kWh, without the transportation costs	*Delta of Distribution Tariff (hereinafter the "D" tetri/kWh, VAT inclusive*

[114] *Id.*, Clause 1.2.3 which also provided that Telasi would not, when purchasing electricity from the Khrami Companies, require from the NERC a corresponding increase of the then effective Consumer Tariff.

[115] *Id.*, Clause 2.1.3; Claimants' Reply, ¶¶ 32-33; Respondents' Rejoinder, ¶ 18; Counter-Memorial, ¶¶ 78-94. 7.89 tetri/kWh was the level the Distribution Tariff was set in the 2006 Tariff Resolution and the 2007 Memorandum until 1 September 2016. The Parties agree this rate is higher than Cost-Plus levels.

[116] *Id.*, Clauses 1.3.4, 2.1.1- 2.1.3. This was dependent on the commissioning of the new transmission line to be constructed by Georgia and the export price remaining within a specified band. If this was not the case, then the Parties would recalculate the Distribution Tariff and adjustment delta or change Telasi's investment commitments.

6.0-6.5 inclusive	*0.84*
6.5-7.5	*0.6*

2.1.3. Considering the above, for the period 2011-2025 the Parties have agreed to establish the long-term electric power Distribution Tariff of Telasi JSC as follows:

Voltage of power transmission line (kV)	*Tariffs (tetri/kWh, VAT exclusive)*	
	January 01, 2011 – September 01, 2016	*September 01, 2016 – January 01, 2026*
Average	*7.890*	*7.890+A*
0.4	*8.080*	*8.080+A*
6/10	*7.138*	*7.138+A*
35/110	*1.800*	*1.800+A*

192. The 2011 Memorandum also provided that Telasi's WAPT from 2011-2025 was not to exceed 5.48 tetri/kWh and, if it did by more than 10% (namely, 6.028 tetri/kWh), "…the Consumer Tariff will correspondingly increase so that the Distribution Tariff (margin) of Telasi JSC would remain unchanged".[117] The adjustment would apply to the Consumer Tariff so as to maintain the Distribution Tariff unchanged if Telasi's WAPT decreased by more than 10%.

193. The 2011 Memorandum also provided that Telasi's Distribution Tariffs were to be adjusted every three years between 2011 and 2025 for a total of five times to account for currency exchange fluctuations and inflation.[118] The Distribution Tariffs would be corrected upward in the event that

[117] *Id.*, Clauses 2.2.1-2.2.2. If Telasi's WAPT decreased by more than 10% then its Consumer Tariff would decrease correspondingly.

[118] *Id.*, Clauses 2.3.1-2.3.2.

the GEL declined against the USD by more than 7%, or if Georgia's average annual inflation rate exceeded 7%.

194. In this regard, the relevant provisions of the 2011 Memorandum provided as follows:[119]

> *2.2 Weighted Average Purchase Tariff*
>
> *2.2.1 For 2011-2025 Telasi JSC will purchase electricity under direct contracts with power plants as well as from the Commercial Operator of the Electric Power System and shall form the annual electricity purchase portfolio with the Weighted Average Purchase Tariff of no more than 5.48 ttri/kWh (VAT exclusive). The Weighted Average Purchase Tariff shall be calculated annually in the period from 01 September to 31 August of the subsequent year.*
>
> *2.2.2 If the Weighted Average Purchase Tariff of Telasi JSC as per Clause 2.2.1 (VAT exclusive, including transmission and dispatching tariffs, reserve components and technical losses in the high voltage electrical grid) increases by over 10%, then the Consumer Tariff will correspondingly increase so that the Distribution Tariff (margin) of Telasi JSC would remain unchanged. During the calculation of increase of the Weighted Average Purchase Tariff, the increase of the Weighted Average Purchase Tariff for reasons set forth in Clauses 1.3 (purchase of electric power from the HPP Chain) and 1.2.3, 2.4 and 2.5 (increase of tariffs for Khrami HPP-1 JSC and Khrami HPP-2 JSC) is not considered.*
>
> *2.2.3 If, during 2011-2025, the Weighted Average Purchase Tariff of Telasi JSC for any reasons decreases by over 10%, then the Consumer Tariff will correspondingly decrease so that the Distribution Tariff (margin) of Telasi JSC would remain unchanged.*
>
> *2.3 Adjustment of Distribution Tariff of Telasi JSC*
>
> *2.3.1 The Parties have agreed that the Distribution Tariff of Telasi JSC shall be adjusted taking into account inflation and change in the lari to US dollar exchange rate once every three years within the period 2011 - 2025 and 5 times in total, according to the following frequency:*

Period	Duration	Adjustment date
1	September 01, 2011 - September 01, 2013	November 01, 2013
2	September 01, 2013 - September 01, 2016	November 01, 2016
3	September 01, 2016 - September 01, 2019	November 01, 2019
4	September 01, 2019 - September 01, 2022	November 01, 2022
5	September 01, 2022 - September 01, 2025	November 01, 2025

> *2.3.2 The adjustment will be performed on the basis of any of the following factors:*

[119] *Id.*, Clauses 2.2-2.3.

a) the adjustment of the Distribution Tariff of Telasi JSC on the basis of the inflation factor shall be made only if the inflation value calculated as follows:

ik=((1+i1) x...x(1+in))^(1/n)-1

where:

***i** - average annual inflation,*

***ik** - inflation in the period,*

***n** - number of years in the*

period,

***ik** - value of inflation*

is over 7 (seven) %. In this case, the adjustment will be applied based on the entire

value of the calculated inflation ik.

b) the adjustment of the Distribution Tariff of Telasi JSC taking into account the change in lari to US dollar exchange rate shall be applied to the part of 30 (thirty) percent of the Distribution Tariff of Telasi JSC if the change in the lari to US dollar exchange rate is more than 7 (seven) percent for the whole period. The adjustment shall be applied to the entire value of the change in the lari to US dollar exchange rate.

2. The Khrami Companies

195. Clauses 2.4 and 2.5 of the 2011 Memorandum set long-term tariffs and adjustment mechanisms for the Khrami Companies, whose purchase by Gardabani the Parties had negotiated as part of an overall agreement, as follows:[120]

Tariff in tetri/KWh

	until December 31, 2013 (inclusively)	from January 01, 2014 to December 31, 2018 (inclusively)	from January 01, 2019 to December 31, 2021 (inclusively)	from January 01, 2022 to December 31, 2025 (inclusively)
Khrami HPP-1 JSC	2.3	8.2	7.7	2.3
Khrami HPP-2 JSC	3.5	9.4	8.9	3.5

[120] *Id.*, Clause 2.4 which sets out the tariffs in table form.

196. These tariffs were to apply from the date of signature of the 2011 Memorandum until 31 December 2025. In order for Inter RAO to recover the purchase price for the Khrami Companies, tariffs were increased starting from 2014.[121] The Khrami Companies' tariffs would remain unchanged until the end of 2013, increase from 2014-2021, and then return to their pre-2011 Memorandum levels from 2022-2025.

197. The Memorandum also provided for the adjustment of tariffs for currency fluctuation. With respect to Khrami-2's tariffs, a fall in the value of the GEL against the JPY by more than 7% per year in comparison with the exchange rate as at 1 April 2009 would trigger an increase in the portion of the tariff allocated to service the loan.[122] This provision was necessary because of the Khrami-2 JPY-denominated loan, which was paid out of Khrami-2's GEL-denominated revenues.[123] With respect to both Khrami Companies' tariffs, a fall in the value of the GEL against the USD by more than 7% per year in comparison with the rate as at 12 April 2011 would trigger an increase in the tariff.[124] The Claimants say that unlike the JPY exchange rate adjustment, increases based on the GEL/USD exchange rate were to apply to the entire tariff amount.[125]

198. The relevant provisions provided as follows:[126]

> *2.5 Adjustment of Tariffs of Khrami HPP-1 JSC and Khrami HPP-2 JSC*
>
> *2.5.1 To ensure guaranteed debt servicing under the agreement between the Ministry of Finance of Georgia and Khrami HPP-2 JSC of 10.12.2008 "On Repayment to the State of the Amounts Disbursed for Rehabilitation of Khrami HPP-2 JSC from the Credit Granted by the Japan International Cooperation Agency", the Parties have agreed to adjust the maximum level of the tariff of Khrami HPP-2 JSC on an annual basis in case the change in*

[121] *Id.*, Clause 1.2.3.

[122] *Id.*, Clause 2.5.1.

[123] *Id.*, Clause 2.5; C-0016, Khrami SPA, Annex 1, Clause 2.1. Khrami-2's yen-denominated loan from the Japan International Cooperation Agency was for the rehabilitation of Khrami-2 HPP, and was meant to be repaid by Khrami-2's GEL revenues: Claimants' Memorial, ¶¶ 52(a), 185; Zavrazhnov I, ¶ 30.

[124] 2011 Memorandum, C-0015 / R-0019, Clause 2.5.2.

[125] Claimants' Memorial, ¶ 52(b).

[126] 2011 Memorandum, C-0015 / R-0019, Clauses 2.5.1-2.5.3.

the lari to Japanese yen exchange rate makes more than 7 (seven) % p.a. as compared to the exchange rate existing at the moment of setting such tariff by the Resolution of the GNERC No. 4 dated April 1, 2009. The adjustment shall be applied only to the part of the tariff which is allocated for the service of the mentioned debt.

2.5.2 In order to ensure a guaranteed return on Investment for the acquisition of Khrami HPP-1 JSC and Khrami HPP-2 JSC, the Parties have agreed to adjust the maximum level of the tariffs of Khrami HPP-1 JSC and Khrami HPP-2 JSC in case the change in the lari to US dollar exchange rate amounts to more than 7 (seven) % as compared to the exchange rate existing as of the date of SPA in respect to Khrami HPP-1 JSC and Khrami HPP-2 JSC. The adjustment shall be made once in three years and four times in total, subject to Clause 2.5.1:

Period	Duration	Adjustment date
1	Date of the Final Payment - September 01, 2013	November 1, 2013
2	September 01, 2013 - September 01, 2016	November 01, 2016
3	September 01, 2016 – September 01, 2019	November 01, 2019
4	September 01, 2019 - September 01, 2022	November 01, 2022

2.5.3 The adjustment for the entire amount of change in any of the factors specified in Clauses 2.5.1 and 2.5.2.

I. The Khrami SPA

199. On 11 April 2011, the Government issued a decree which pre-approved the sale and purchase agreement Gardabani would then enter into on 12 April 2011 with the Government, the Ministry of Economy, and the State Service Bureau, for 100% of the shares of the Khrami Companies for USD 104 million.[127] The Khrami SPA set out fixed long-term Generation Tariffs for the Khrami Companies, which replicate the tariffs provided for in the 2011 Memorandum and uses similar wording:[128]

[127] Decree of the Government of Georgia No. 750, 11 April 2011, R-0062; C-0016, Khrami SPA. The Claimants say Inter RAO understood that the Government had been considering privatizing Khrami-1 and Khrami-2, and it wanted to mitigate the risk of them being sold to a competitor because Telasi traditionally purchased 100% of the Khrami Companies' electricity: Claimants' Memorial, ¶¶ 40(c), 44(c).

[128] Khrami SPA, C-0016, Annex 1, Clauses 1.1-1.2, 2.1-2.3; 2011 Memorandum, C-0015 / R-0019, Clauses 2.4-2.5. In particular, the Claimants say Clause 1.2 codified the fixed Generation Tariffs contained at Clause 2.4 of the 2011 Memorandum, and Clauses 2.2 and 2.3 set out the same tariff adjustment mechanisms as Clause 2.5 of the 2011 Memorandum: Claimants' Memorial, ¶¶ 55-57.

Annex #1
(Tariffs of the Companies)

1. Tariffs of the Companies

1.1. From 1 January, 2011 until 31 December, 2013 (including) the upper limit of tariffs for JSC Khrami HPP-1 and JSC Khrami HPP-2 shall remain unchanged at the level of 2.3 tetris per KWh and 3.5 tetris per KWh respectively, as it was determined by the Resolution #4 of the GNEWSRC, dated 1 April, 2009 indicated within Annex # 9 to the present Agreement.

1.2. From 1 January, 2014 until 1 January, 2026 the tariffs for JSC Khrami HPP-1 and JSC Khrami HPP-2 shall be in accordance with the table provided hereunder:

Tariff in tetris/KWh

	From 01.01.2011 to 31.12.2013 (inclusive)	From 01.01.2014 to 31.12.2018 (inclusive)	From 01.01.2019 to 31.12.2021 (inclusive)	From 01.01.2022 to 31.12.2025 (inclusive)
JSC Khrami HPP-1	2.3	8.2	7.7	2.3
JSC Khrami HPP-2	3.5	9.4	8.9	3.5

2. Correction of Tariffs of JSC Khrami HPP-1 and JSC Khrami HPP-2

2.1. For the guaranteed service of the Debt Liabilities, the Parties have agreed to correct the upper limit of tariff for JSC Khrami HPP-2 in case if the fluctuation in Lari / Japanese Yen exchange rate exceeds seven percents (7%) a year in comparison with the rate existing at the date of establishing of the said tariff by the Resolution No 4 of April 1, 2009, issued by GNEWSRC indicated within Annex # 9 to the present Agreement. Herewith, only that part of the tariff shall be subject to correction which has been provided for service of the said debt.

2.2. With the purpose of ensuring return of the investment of the Buyer in acquisition of the Companies, the Parties have agreed to make corrections of the upper limit of tariffs of JSC Khrami HPP-1 and JSC Khrami HPP-2 if fluctuation in Lari / US dollar exchange rate exceeds seven percents (7%) a year in comparison with the rate existed at the date of the present Agreement, once every three years, and only 4 times, subject to the provisions of sub-paragraph 2.1 above:

Period	Duration	Date of correction
1	Final Payment Date – 1 September, 2013	1 November, 2013
2	1 September, 2013 – 1 September, 2016	1 November, 2016
3	1 September, 2016 – 1 September, 2019	1 November, 2019
4	1 September, 2019 – 1 September,2022	1 November, 2022

2.3. Correction shall be carried out for the entire range of change for any of the factors specified in sub-paragraph 2.1 and 2.2 above.

200. The Khrami SPA also provides that:

> *1.15 Until the date of the Final Payment Date, the Government is obliged to deliver to the Buyer respective resolution of the … [NERC] or any other authorized body … establishing*

> *tariffs and terms of correction thereof for … [the Khrami Companies] as per the [2011] Memorandum and in accordance with Annex #1 to the present Agreement.*[129]

201. In the event the Government failed to implement the Khrami SPA, Gardabani was entitled to rescind the contract and be indemnified for the consequences, for which the Respondents accepted joint and several liability to compensate. Clause 5.2.2 provided that the Sellers and the Government would be responsible for, amongst other things, any alteration of the tariffs and conditions of their adjustment set out in the Agreement. The relevant clauses provide more fully as follows:

> *1.15. Until the date of the Final Payment Date, the Government is obliged to deliver to the Buyer respective resolution of the Georgian National Energy and Water Supply Regulatory Commission or any other authorized body in accordance with the legislation of Georgia (hereinafter – "GNEWSRC") establishing tariffs and terms of correct on thereof for the Company 1 and for the Company 2 as per the Memorandum an in accordance with Annex #1 to the present Agreement. The Government shall not be liable for non-deliver of the resolution of GNEWSRC in case of non-provision of respective applications to the GNEWSRC by the Companies until 1 July, 2011, unless other time-frame is agreed by the Parties.*
>
> *1.16 If the Government does not deliver the respective resolution of the [NERC] establishing tariffs and terms of correction thereof for … [the Khrami Companies] as determined in the paragraph 1.15 of this Agreement and, provided that such violation is not remedied within 30 (thirty) business days after its occurrence, the Buyer has the right at his sole discretion to:*
>
> *1.16.1 …*
>
> *1.16.1.1 By rescission of the Agreement the obligations of the Parties are terminated;*
>
> *1.16.1.2 Each of the Parties shall return to the other Party everything received under the Agreement in the shortest time-limit possible but not later than 30 (thirty) business days after the date of rescission of this Agreement indicated in the notification.*
>
> *1.16.2 …*
>
> *1.17 In case of breach of the obligations determined in the paragraph 1.15 of this Agreement, the Buyer, in addition to the entitlements determined in the paragraph 1.16 of the present Agreement, is entitled to claim indemnification of damages in accordance with the rules and procedures, determined by the legislation of Georgia.*
>
> *…*
>
> *5.2.2 The Sellers and the Government shall, jointly and severally and/or separately, bear full responsibility for any damage, loss and/or expenses incurred by the Buyer and/or the Companies, which may arise as a result of and/or in relation to nullification, non-application in any form or alteration of the tariffs and conditions of their adjustment as determined in accordance with Section 1.15 and Annex #1 of this Agreement, during any time of application*

[129] Khrami SPA, C-0016, Clause 1.15.

of such tariffs and conditions of their adjustment. In case if the circumstances described in this Section take place, Sections 1.16.1 and 1.16.2 of this Agreement shall apply.[130]

J. Implementation of Telasi and the Khrami Companies' Tariffs under the 2011 Memorandum and the Khrami SPA: NERC Resolution No. 5

202. On 7 April 2011, the NERC issued a resolution amending Resolution No. 33 which had set long-term tariffs and adjustment mechanisms applicable to both Telasi and the Khrami Companies ("**NERC Resolution No. 5**"). NERC Resolution No. 5 set the Khrami Companies' tariffs as agreed in the 2011 Memorandum (and the Khrami SPA) and their adjustment conditions.[131] This occurred one week after the 2011 Memorandum was signed on 31 March 2011, and less than a week before the Khrami SPA was signed.

203. Clause 1.15 of the Khrami SPA, set out above, required the Government to deliver a resolution of the NERC establishing tariffs and the conditions for their adjustment in accordance with the 2011 Memorandum and the Khrami SPA. As it had done with the 2007 Memorandum pursuant to Resolution No. 33, the NERC through its Resolution No. 5 implemented the agreed tariffs and adjustment mechanisms for the Khrami Companies and Telasi set out in the 2011 Memorandum and at Annex 1 of the Khrami SPA. The following table shows the Khrami Companies' identical tariff rates under each of the agreements and Resolution No. 5:[132]

[130] Khrami SPA, C-0016, Clauses 1.16, 1.17 and 5.2.2.

[131] NERC Resolution No. 5 on Amendments to NERC Resolution No. 33 dated 4 December 2008, dated 7 April 2011 ("**NERC Resolution No. 5**"), CL-0080. The resolution did not address Telasi's tariffs as they had been approved in NERC Resolution No. 33 dated 4 December 2008 and had not changed.

[132] Claimants' Opening Presentation, Claimants' Demonstrative No. 3; Tr. Day 1 (Claimants' Opening Statement), 27-28.

The Khrami Companies' tariffs (fixed in 2011)

	Time period	Generation Tariffs (tetri/kWh)		
		2011 Memorandum, cl 2.4 [C-015]	Khrami SPA, Annex #1, cl 1.2 [C-016]	Resolution No 5, Art 1 [CL-080]
Khrami HPP-1	Until Dec 2013	2.3	2.3	2.3
	1 Jan 2014 – 31 Dec 2018	8.2	8.2	8.2
	1 Jan 2019 – 31 Dec 2021	7.7	7.7	7.7
	1 Jan 2022 – 31 Dec 2025	2.3	2.3	2.3
Khrami HPP-2	Until Dec 2013	3.5	3.5	3.5
	1 Jan 2014 – 31 Dec 2018	9.4	9.4	9.4
	1 Jan 2019 – 31 Dec 2021	8.9	8.9	8.9
	1 Jan 2022 – 31 Dec 2025	3.5	3.5	3.5

K. The 2011 Methodology

204. On 8 June 2011, two months after the conclusion of the 2011 Memorandum and the Khrami SPA, the NERC adopted a new generally applicable tariff-setting methodology (the "**2011 Methodology**").[133]

205. Like the 1998 Methodology before it, the 2011 Methodology was not relevant for Telasi and the Khrami Companies because the Parties' recently agreed tariff scheme in the 2011 Memorandum and the Khrami SPA, implemented by NERC Resolution No. 5 continued to apply. Article 27 of the 2011 Methodology (entitled "**Transitional Provision**") provided as follows:

> *The conditions defined by this methodology shall not apply to enterprises (before the expiration of the period of validity of the tariff), for which long-term tariffs were set based on transactions concluded by the state.*[134]

206. The Parties agree that Article 27 means that companies, such as Telasi and the Khrami Companies, which had reached specific tariff agreements with the Government, such as the 2011

[133] NERC Resolution No. 8 on approval of the Methodology for Setting Electricity Tariffs, dated 8 June 2011 ("**2011 Methodology**"), CL-0081.

[134] *Id.*, Art. 27.

Memorandum and Khrami SPA, were excluded from the scope of the 2011 Methodology's application.

207. The Parties' positions differ as to whether the same applied for the 2013 Memorandum, discussed below, which was concluded while the 2011 Methodology was still in effect. The Claimants say Article 27 of the 2011 Methodology means that the 2013 Memorandum governed Telasi's and the Khrami Companies' tariffs for the entire duration of those agreements.[135] According to them, as long as the 2011 Methodology applied, the tariff regimes contained in the Khrami SPA and the 2013 (and 2011) Memorandum governed. The Respondents say that going forward, the NERC would retain its discretion under Article 11(1) of the Law on Electricity as to whether to take into account any further agreements concluded by the Government.[136] According to the Respondents, Article 27 of the 2011 Methodology provided a transitional regime for that Methodology only.[137] According to them, since the 2013 Memorandum did not pre-exist the 2011 Methodology, the Claimants could not have expected that the tariffs under the 2013 Memorandum would remain exempted from any new tariff Methodology, which the NERC had announced it was developing in late 2012.[138]

L. Construction of the HPP

208. Although the 2013 Memorandum, *infra*, at issue in these disputes has since replaced the previous memoranda, the following divergence in the Parties' positions is relevant to the factual background. The Parties disagree over whether Inter RAO was obliged, as a condition of Telasi's

[135] Claimants' Memorial, ¶ 90.

[136] Respondents' Counter-Memorial, ¶ 94.

[137] *Ibid*.

[138] See *Id*., ¶ 159.

receipt of the increase generated by those tariffs under the 2007 and 2011 Memoranda, to invest Telasi's additional revenues to construct the HPP Chain.[139]

209. To be clear, it is common ground between the Parties that the HPP obligation did not carry over into the 2013 Memorandum. The Claimants were released from this obligation

210. After the 2011 Memorandum was signed, Inter RAO took steps intended to fulfill its obligation to construct the new HPP Chain by commissioning a feasibility study from international engineering consultant, Pöyry on 30 September 2011 to estimate the costs of constructing the HPP Chain.[140] On 15 February 2012, Inter RAO presented Pöyry's estimate of approximately USD 280-290 million to the then Minister of Energy, Mr. Khetaguri.[141] This estimate was considerably more than the preliminary estimate of USD 193 million recorded at Clause 1.3.1 of the 2011 Memorandum, which had been prepared by Georgian company Stucky Caucasus prior to the conclusion of the 2011 Memorandum.[142] The increase in costs was attributed to incorrect geological and hydrological data used in the initial Stucky Caucasus study, which was preliminary and did not involve surveying work.[143]

211. Given the high costs, the MOE's Mr. Khetaguri suggested that Inter RAO construct a 230 MW TPP instead.[144] Having agreed to consider the TPP proposal, on 26 April 2012, Inter RAO met

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[139] Claimants' Reply, ¶¶ 24, 33-35; Respondents' Rejoinder, ¶ 19; Counter-Memorial, ¶¶ 63-71.

[140] Construction contract No. 11/980 between Telasi and Pöyry, dated 30 September 2011, C-0018; Claimants' Reply, ¶ 37; Claimants' Memorial, ¶ 59; Respondents' Counter-Memorial, ¶¶ 95-96. The Pöyry study is also referred to in Khetaguri I, ¶ 47.

[141] Pöyry Conceptual study, dated 10 April 2012, C-0188; Claimants' Reply, ¶ 37; Claimants' Memorial, ¶ 62; Respondents' Counter-Memorial, ¶97. The Pöyry study is also referred to in Khetaguri I, ¶ 47.

[142] Preliminary feasibility study prepared by international engineering consultant Stucky Caucasus, dated 28 January 2011, C-0009; Mirsiyapov I, ¶¶ 29-30; Khetaguri I, ¶ 47; Claimants' Memorial, ¶ 48; Respondents' Counter-Memorial, ¶ 97.

[143] Khetaguri I, ¶ 47; Mirsiyapov I, ¶ 29.

[144] Mirsiyapov I, ¶ 32: "the reason that the Minister forewent the HPP project was based on the financing of such construction" because he was "evidently well aware that it would not be possible to finance an expensive construction project without an increase in the consumer tariffs by … Telasi".

with Mr. Khetaguri again and presented a new study by Pöyry and Inter RAO's own capital construction engineering department. This study also estimated the construction cost of a TPP at approximately USD 280 million.[145] The MOE considered that this estimate was excessive.[146] Following continued discussions with Inter RAO over this project, it was agreed that the MOE would solicit proposals from other companies.[147]

212. Between June and August 2012, the MOE and Inter RAO negotiated a financial model for the latter's operations in Georgia, including the construction of a TPP. These negotiations progressed in parallel with Georgia's tender for proposals for the construction of a TPP from other companies.[148] On 5 June 2012, Inter RAO sent to the MOE a revised financial model which included the construction of a TPP. The financial model was accompanied by an explanatory note.[149] According to the explanatory note, the model included a premium on Telasi's tariffs, the doubling of the Khrami Companies' tariffs in the 2011 Memorandum as of 2014, and tariffs for the new TPP. The model also introduced, for the first time, the concept of "Required Gross Marginal Return" (the "**RGMR**"), which was stated to be a "key performance criterion" for Inter RAO's subsidiaries in Georgia, to be guaranteed by the Government.[150] According to the explanatory note, if the actual gross margin deviated by more than 5% of the RGMR, an adjustment would be made to the actual

[145] Respondents' Counter-Memorial, ¶ 98; Mirsiyapov I, ¶ 35.

[146] Valishvili I, ¶ 17.

[147] Valishvili I, ¶¶ 17-18; Mirsiyapov I, ¶ 38; Respondents' Counter-Memorial, ¶ 98.

[148] Valishvili I, ¶ 19.

[149] Letter from Mr. Mirsiyapov to Mr. Khetaguri, dated 5 June 2012, attaching Explanatory Note to the Financial and Economic Model, C-0022; Respondents' Counter-Memorial, ¶ 99.

[150] Letter from Mr. Mirsiyapov to Mr. Khetaguri, dated 5 June 2012, attaching Explanatory Note to the Financial and Economic Model, C-0022. The Respondents say that the financial model built in a 5% profit margin on Inter RAO's operations in Georgia. Respondents' Counter-Memorial, ¶ 99. The Claimants do not deny this. There was no copy of the financial model submitted in evidence. *See also*, Mirsiyapov I, ¶ 36; Mirsiyapov II, ¶¶ 15-19; Khetaguri I, ¶ 49.

gross margin in the following year. The explanatory note did not address adjustment to the various tariffs for increases in WAPT or inflation and foreign exchange rates.

213. The Claimants say that the RGMR was meant to ensure that Inter RAO companies in Georgia earned a minimum "gross margin" (the gross revenue in GEL remaining after paying for electricity) sufficient to cover all operating costs and recover investments, including an IRR of 10% for Telasi, 14% for the Khrami Companies and 14% on the investment in the new TPP.[151] They say that the RGMR did not suggest that Inter RAO expected its Georgian businesses to only break even. The Respondents say that the RGMR concept was a key indicator of the viability of Inter RAO's investment which Mr. Mirsiyapov's letter to Mr. Khetaguri specifically stated would "not create excess revenues", but rather "enable [Telasi] to carry out break-even operating activities" and "ensure the return of funds spent for the acquisition of [the Khrami Companies] as well as the return of investments in the construction" of the new TPP.[152] The Respondents say that the financial model provided by Inter RAO built in a 5% profit margin on Inter RAO's operations in Georgia.[153]

214. A Turkish contractor, Çalik Enerji, was ultimately selected by the Government to build the TPP at an estimated cost of USD 199.5 million, and the contracts were concluded on 2 August 2012, without Inter RAO's knowledge.[154] At a meeting on 18 August 2012, the Parties attempted to reach agreement on a financial model for Inter ROA's operations in Georgia, including the construction of a TPP and other economic issues, but these efforts failed and Inter RAO informed Georgia that it

[151] Letter from Mr. Mirsiyapov to Mr. Khetaguri, dated 5 June 2012, attaching Explanatory Note to the Financial and Economic Model, C-0022; Mirsiyapov II, ¶ 17; Claimants' Reply, ¶ 40.

[152] Letter from Mr. Mirsiyapov to Mr. Khetaguri, dated 5 June 2012, attaching Explanatory Note to the Financial and Economic Model, C-0022, p. 3; Respondents' Counter-Memorial, ¶ 99.

[153] Respondents' Counter-Memorial, ¶ 99.

[154] Construction contract between Partnership Fund JSC and Çalik Enerji Sanayi Ve Ticaret, 2 August 2012, C-0023; Supply contract between Partnership Fund JSC and Çalik Enerji Sanayi Ve Ticaret, 2 August 2012, C-0024; Valishvili I, ¶ 18; Respondents' Rejoinder, ¶ 42; Respondents' Counter-Memorial, ¶ 100; Mirsiyapov I, ¶ 38: Mr. Mirsiyapov says Inter RAO learned of the Çalik Enerji contracts on 9 August 2012.

was not interested in pursuing the TPP project on the terms suggested by Georgia. The MOE was of the view that Inter RAO was required to invest its excess investment margin revenues intended for the construction of the HPP under the 2011 Memorandum (the alleged "super profit") into the TPP project, but Inter RAO declined.[155]

215. Inter RAO and the Government met again on 27-28 August 2012 to discuss Inter RAO's participation in the financing of the new TPP. Ms. Valishvili says she explained to Inter RAO that should it decide to pull out of the TPP project, it would nevertheless have to reinvest the accumulated "super profit" (which the Government calculated at USD 50 million) it had gained from the high Distribution Tariffs under the 2011 Memorandum to finance the TPP.[156] Otherwise the Government would have to reduce Telasi's Distribution Tariff accordingly or compel Inter RAO to purchase 15% of its electricity at its own cost.[157] The Parties dispute the interpretation of the 15% purchase requirement in Clause 1.3.2 of the 2011 Memorandum.

216. The Claimants deny that they were obliged under the 2007 and 2011 Memoranda to invest a portion of Telasi's revenues into the new HPP Chain. They say Inter RAO had discretion to retain a portion of the revenues generated by the investment margin in Telasi's long-term tariffs as compensation in exchange for the waiver of certain claims open to them under the Telasi SPA for

[155] Respondents' Counter-Memorial, ¶ 102 and the sources cited there.

[156] Respondents' Counter-Memorial, ¶¶ 103-105; C-0191 / R-0058, Draft Financial Model dated 9 September 2021; C-0192, Email from Mr. Mirsiyapov to Ms. Valishvili, 12 September 2021, attaching Revised Draft Financial Model. This financial model contemplated that Inter RAO would finance the TPP project with an equity contribution of USD 50 million plus loan financing. The Claimants say that they provided this model to the MOE based on Mr. Khetaguri's request that Inter RAO prepare a forecast based on a scenario where Inter RAO alone would finance the construction of the TPP. The Claimants emphasize that the financial model was a draft, and that, in any event, the proposed funding was to be a combination of equity investment of Group funds and significant loan financing. *See* Claimants' Reply, ¶ 44. The Claimants say they had not accumulated the funds for the proposed equity contribution. Further, they say the parties had not agreed on the assumptions underlying the draft model nor how Inter RAO would recover and earn a return on the possible equity investment in the TPP.

[157] Valishvili I, ¶ 22; Respondents' Counter-Memorial, ¶¶ 103-104.

compensation for losses caused by adverse tax changes and to ensure the profitability of Telasi.[158] They say that Telasi's Distribution Tariff was set in the 2011 Memorandum to enable it to pay the increased generation tariffs of the Khrami Companies, which, in turn, were intended to permit Inter RAO to recover the cost paid to purchase those companies. Therefore, Telasi's tariffs were intended to cover more than only its investment commitments.[159] Further, under the 2011 Memorandum, the construction of the new HPP Chain was not a certainty. They say this is why the 2007 and 2011 Memoranda provided Telasi with an "alternative" to building the HPP in the form of the financial requirement to purchase 15% of Telasi's electricity from high-cost renewable energy sources if Inter RAO and the Government failed to come to an agreement to construct the new HPP Chain.[160] The Claimants also say that the USD 104 million purchase price that Inter RAO paid for the Khrami Companies under the Khrami SPA was three times higher than its real value, and that it did not fully recover this value under the 2011 Memorandum and Khrami SPA because the Khrami Companies' Generation Tariffs were too low.[161]

217. The Respondents say the higher than Cost-Plus tariffs in the 2007 and 2011 Memoranda were granted on the condition that Inter RAO invests the full amount of the excess revenues[162] generated through Telasi's tariffs in Georgia.[163] Their position is that the 15% financial penalty was not an alternative to building the new HPP Chain. Rather, it contemplates that Inter RAO would eventually build the plant, and would suffer the financial penalty until the HPP Chain generated

[158] 2007 Memorandum, C-0005 / R-0015, Recitals, Clause 1.6; Claimants' Memorial, ¶ 33(b); *see also*, ¶ 84: The 2013 Memorandum also reflected the Parties' settlement of the disputed tax claims that had arisen in August 2012.

[159] Respondents' Reply, ¶ 34; Zavrazhnov I, ¶¶ 26-28; Zavrazhnov II, ¶ 18; Markov I, ¶¶ 15-22.

[160] Claimants' Reply, ¶¶ 23, 31; 2007 Memorandum, C-0005 / R-0015, Clause 7.2; 2011 Memorandum, C-0015 / R-0019, Clause 1.3.2.

[161] Claimants' Reply, ¶ 28, fn 36; Mirsiyapov I, ¶ 35; Mirsiyapov II, ¶ 13.

[162] Revenues over and above justified costs, plus a reasonable return, which Respondents suggest is 4-5%.

[163] Respondents' Rejoinder, ¶ 28.

power.[164] The Respondents say that the Government made clear during the negotiations on the Memoranda that it did not agree that Inter RAO could retain the investment margin as profit or spend it freely, but that it was to finance the construction of the HPP Chain.[165] In support, the Respondents refer to a January 2011 Inter RAO internal presentation slide, which they say shows that Inter RAO understood that the Investment Margin revenues were earmarked for the new HPP Chain:

> *Tariff policy of JSC Telasi fixed until September 2015 [allows Telasi] [t]o finance [its] investment program at the minimum necessary level [and] accumulate funds … of $100 million for the construction of a 100 MW hydroelectric power station.*
>
> *Construction of a new [HPP] … with a capacity of 90 MW with [its] own funds of JSC "Telasi" and … a loan of 113 million USD, and its compensation by including this amount in the distribution tariff of JSC "Telasi".*[166]

218. The Respondents also say Inter RAO's internal emails show that it accumulated USD 80 million as of 31 January 2011 through Telasi's tariffs for the construction of the new HPP Chain, and that it planned to raise the balance of the initial estimated construction cost of USD 193 million set out in the 2011 Memorandum through external loans.[167]

219. The Respondents say that the Parties understood that Inter RAO would recover the purchase price it paid for the Khrami Companies plus a reasonable return on its investment through the investment margin in Telasi's tariffs (agreed in the 2007 Memorandum). This was implemented by significantly increasing the Khrami Companies' Generation Tariffs between January 2014 and December 2021.[168] The Respondents say the 2011 Memorandum ensured that Inter RAO would receive through the added investment margin in Telasi's Distribution Tariffs an advance on the cost

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[164] Respondents' Rejoinder, ¶ 28; Khetaguri II, ¶ 18.

[165] Respondents' Rejoinder, ¶ 29.

[166] Email from Kostyunin to Markov attaching Inter RAO's performance model, 20 January 2011, R-0078, Section 2, p. 5; Section 5, p. 8.

[167] Respondents' Rejoinder, ¶ 31; Email from Parshin to Kostyunin with PowerPoint presentation on Inter RAO's cashflows, dated 31 January 2011, R-0079; 2011 Memorandum, C-0015 / R-0019, Clause 1.1.3.

[168] Respondents' Rejoinder, ¶ 36; Respondents' Counter-Memorial, ¶ 85.

of constructing the new HPP and revenues sufficient to recover its full investment in the Khrami Companies. This increase was referred to by the Parties in the proceedings as the "Supplement" to the Khrami Companies' tariffs. The Respondents say the Khrami Companies' Generation Tariffs were high enough to allow for full recovery of Inter RAO's investment, and refer to Inter RAO's internal correspondence in January 2011 rejecting Mr. Mirsiyapov's proposal that Inter RAO's returns should be doubled.[169]

220. The Respondents say Inter RAO refused to invest the portion of the investment margin in Telasi's tariffs, which they maintain was earmarked to build the new HPP Chain and, instead, retained these funds as a "super profit".[170] To be clear, the Respondents do not contend that Inter RAO's refusal to participate in the TPP project breached the 2011 Memorandum. Rather, the Respondents' position is that regardless of whether it chose to participate in the TPP project with Çalik Enerji, Inter RAO remained obligated to construct the HPP Chain using the revenues that it had received through the Supplement. Accordingly, although the Parties had concluded that the construction of an HPP Chain was prohibitively expensive, Inter RAO was contractually bound to agree with Georgia on a reasonable alternative.[171]

221. The Respondents deny the Claimants' allegations that the then Deputy Minister of Energy, Ms. Valishvili, threatened to cause Telasi's ruin with the 15% financial penalty pursuant to the 2011 Memorandum, or that then Minister of Finance and former Minister of Energy, Mr. Khetaguri, threatened Inter RAO with negative tax consequences.[172] The Respondents also challenge the relevance of Mr. Mirsiyapov's testimony that Inter RAO was unprofitable as of June 2012, and thus

[169] Respondents' Rejoinder, ¶¶ 38-40; Khetaguri II, ¶ 27; Zavrazhnov I, ¶ 23.; Email from Kostyunin to Markov (Inter RAO) attaching Inter RAO's performance model, 20 January 2011, Section 7, R-0078, p. 10.

[170] Respondents' Rejoinder, ¶ 43; Respondents' Counter-Memorial, ¶¶ 101-102.

[171] Respondents' Rejoinder, ¶ 47.

[172] *Id*., ¶ 48. For more details, *see* ¶¶ 49-50.

did not accumulate substantial funds earmarked towards fulfilling its HPP construction obligation. The Respondents say Telasi did not have its accumulated super profit from the Supplement (between USD 50 and 67.9 million by 31 December 2012) in its bank accounts in late 2012 because Inter RAO used these funds for its own benefit. They say this is confirmed by the NERC's audit of Telasi's operations in January-April 2012.[173]

222. The Claimants deny that their decision not to invest in the TPP led to the alleged super profits. They say the 2011 Memorandum did not contemplate Inter RAO building a TPP and that there was no agreement that if the TPP project proceeded, Telasi would fund it rather than "investing in construction and recovering the capital expense through operations".[174] Further, Telasi had not accumulated USD 50 million in revenues in February 2012.[175] The Claimants explain that their reference to USD 50 million is from a draft financial model Inter RAO sent to the MOE on 12 September 2012, based on Mr. Khetaguri's request that Inter RAO prepare a forecast based on a scenario where Inter RAO alone would finance the construction of the TPP. The Claimants say that the proposed USD 50 million was to be a combination of equity investment of Group funds and significant loan financing.[176] Mr. Mirsiyapov's testimony is that Telasi had not accumulated funds that could have covered the equity portion of their proposed USD 50 million investment in full.[177] Further, his evidence is that the parties had not agreed on the assumptions underlying the aforementioned draft financial model circulated in September 2012, either at the meeting between the parties on 8-9 September, or later, since they had not resolved the issue of how Inter RAO would

[173] Respondents' Rejoinder, ¶¶ 52-53; NERC's Audit Act for Telasi, dated 12 April 2012, R-0069, p. 60.

[174] Claimants' Reply, ¶ 43.

[175] *See* Claimants' Reply, ¶ 44.

[176] Draft Financial Model dated 9 September 2021, C-0191 / R-0058; Email from Mirsiyapov toValishvili dated 12 September 2021, attaching Revised Draft Financial Model, C-0192.

[177] Claimants' Reply, ¶ 44; Mirsiyapov I, ¶ 45; Mirsiyapov II, ¶¶ 28-29.

recover and earn a return on a potential equity investment in the TPP project with an acceptable rate of return.[178]

M. The Negotiations Leading up to the Conclusion of the 2013 Memorandum

223. Parliamentary elections in the Fall of 2012 interrupted the Parties' discussions regarding the agreement which would later become the 2013 Memorandum.[179] On 1 October 2012, a change in government occurred in Georgia (the Dream Party Coalition came into power) and, on 25 October 2012, a new cabinet was appointed. This new cabinet included Prime Minister, Mr. Biszina Ivanishvili, and Vice Prime Minister and Minister of Energy, Mr. Kakha Kaladze. One of their top priorities was to fulfil a campaign promise to reduce the price of electricity for Georgian household consumers by the end of 2012.[180]

224. From November 2012 to March 2013, Inter RAO's Messrs Mirsiyapov and Markov (both of whom had been involved in negotiating the 2011 Memorandum with the prior Government) and the Minister of Energy, Mr. Kaladze, his Deputy Minister of Energy, Mr. Ilia Eloshvili, and the Government's consultant, Mr. George Bachiashvili,[181] negotiated what would become the 2013 Memorandum.

225. Mr. Bachiashvili played an important role in the meetings between Georgia and Inter RAO in their efforts to conclude the 2013 Memorandum, from November 2012 to March 2013.[182] From

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[178] Claimants' Reply, ¶ 44; Mirsiyapov II, ¶¶ 28-30; Mirsiyapov I, ¶ 47.

[179] Respondents' Rejoinder, ¶ 55; Respondents' Counter-Memorial, ¶¶ 108-126.

[180] Respondents' Counter-Memorial, ¶ 109; Bachiashvili I, ¶ 10.

[181] The Respondents say Mr. Bachiashvili was a "consultant to the Government": Respondents' Counter-Memorial, ¶ 112; Bachiashvili I, ¶ 9. The Claimants say Mr. Bachiashvili played a leading role in meetings and with all commercial decisions: Mirsiyapov II, ¶¶ 34-38; Claimants' Reply, ¶ 46.

[182] Mirsiyapov II, ¶¶ 34-38; *see e.g.*, C-0029, Email from Eloshvili to Mirsiyapov dated 12 December 2012, attaching a further draft memorandum ("**Draft Memorandum of 12 December 2012**") (in the email, Mr. Eloshvili writes, "Please see attached the memorandum with a few changes made by Giorgi Bachiashvili".).

November 2012 until August 2013, Mr. Bachiashvili served as a consultant to the Georgian Government and as the Deputy CEO of the Georgian State-owned Partnership Fund JSC, which is a party to the 2013 Memorandum through its minority interest in Telasi, and which provides equity financing for energy, hospitality and manufacturing projects in Georgia.[183] He was appointed to these roles by the then Prime Minister, Mr. Ivanishvili, shortly after he came into power in October 2012.

226. In September 2013, approximately five months after the conclusion of the 2013 Memorandum, Prime Minister Ivanishvili stepped down from his role as Prime Minister and, at the same time, Mr. Bachiashvili returned to work for Mr. Ivanishvili in a private sector capacity as the CEO of the Georgian Co-Investment Fund, which is privately financed by Mr. Ivanishvili. The Georgian Co-Investment Fund invests in a variety of energy, manufacturing, real estate and agricultural projects, and as its CEO, Mr. Bachiashvili manages assets in excess of USD 2 billion.[184]

227. When the parties met on 29 November 2012, among other things, Inter RAO sought to be formally released from certain investment commitments, including the new HPP Chain, and a guarantee that Telasi would recover through its tariffs certain costs and a reasonable margin.[185] The Government sought to reduce certain categories of Telasi's Consumer Tariffs before the end of 2012, in line with its election campaign promise of cheaper electricity. Inter RAO, Telasi and the Khrami Companies accepted a temporary reduction in certain tariff categories subject to final settlement of all issues that had been left unresolved with the previous Government.

228. On 6 December 2012, Inter RAO's Mr. Mirsiyapov sent to Mr. Eloshvili and Mr. Bachiashvili proposed terms for the new memorandum, along with a financial model forecasting

[183] Bachiashvili I, ¶ 7.

[184] Bachiashvili I, ¶ 8.

[185] Claimants' Reply, ¶ 47; Respondents' Counter-Memorial, ¶ 113.

Telasi's overall financial performance for the duration of the agreement.[186] The spreadsheet contained a summary tab entitled "margin" and identified the categories of Telasi's costs that Inter RAO wanted the Government to guarantee would be recovered.[187] This financial model would eventually become Appendix 2 to the 2013 Memorandum.

229. On 7 December 2012, Mr. Bachiashvili sent Mr. Mirsiyapov Georgia's comments on Inter RAO's proposed terms in the 6 December 2012 financial model:[188]

[186] Email from Inter RAO to Georgia dated 6 December 2012, attaching Prerequisites for activity of the Inter RAO Companies; R-0021, Email from Inter RAO to Georgia dated 6 December 2012, attaching Telasi's financial model ("Draft Financial and Economic Model for Telasi"), R-0020; Respondents' Counter-Memorial, ¶ 114. Inter RAO's proposed terms were described as the "preconditions for the long-term activity of the [Inter ROA] companies as agreed at the meeting of 05.12.2012". Among the pre-requisites listed was a condition that the average weighted purchase tariff of Telasi in the period from 2013 to 2025 would not be more than 6.028 Tetri/kWh and that the current tariffs of the Khrami Companies would be taken into account when calculating the average weighted purchase tariff of Telasi. A further pre-requisite was "[p]rofitability of Telasi JSC on the net profit is 5%".

[187] Draft Financial and Economic Model for Telasi. The spreadsheet forecasts rate of growth and other costs between 2011-2025, R-0021.

[188] Email from Mr. Bachiashvili to Mr. Mirsiyapov cc'ing Mr. Eloshvili, dated 7 December 2012, R-0022; Bachiashvili I, ¶ 15.

Prerequisites:

Telasi JSC:

- Average compound rate of the productive supply (in 2013-2015) is 2.03% per year. The rest prerequisites are given in the model; we take the percentage growth as 2.03, but we wouldn't like consider it as a prerequisite in the memorandum.
- Reduction of the electrical power sales tariff of Telasi JSC by 3 tetri/kWh for consumers with connection on the line 0.4 kW and consumption less than 300 kWh per month (hereinafter also - Population) in the period of 2013-2016. Since January 01, 2017 the tariff returns to the level of 2012; agree
- Telasi JSC raised tariffs by 0,3 tetri/kWh for all consumers except for the Population since January 01, 2017; we propose consider any alterations to the tariff after 2017. Fixing any increase of tariff in future in this situation would be a losing position for us, it would be perceived negatively on every side of Georgia.
- Average weighted purchase tariff of Telasi JSC in the period of 2013 - 2025 is not more than 6.028 tetri/kWh. Calculation of the average weighted purchase tariff of Telasi JSC takes the current tariffs of Khrami HPP-1,2 JSC into account; Please clarify whether the "Average weighted purchase tariff of Telasi JSC in the period of 2013 - 2015 is not more than 6.028 tetri/kWh" means that you want to fix the upper limit after which you propose reconsideration. If so, clarify, when do you offer the reconsideration and what will be if savings occur before the reconsideration. It would be better for us to leave the average weighted tariff of 5.48±10% according to the memorandum, but we are waiting for your clarifications.
- The tariffs of Khrami HPP-1,2 JSC will be fixed at the level provided by the Memorandum on cooperation dated March 31, 2011; We see no problems.
- No fine payments on the part of Telasi JSC; This issue should be coordinated with the Ministry of Finance. The Ministry of Finance agreed to allocate a special representative, we propose immediately commence negotiations with your representative Devi Kandelaki in order the position and terms and conditions were prepared prior to your arrival.
- Signing of the tax agreements on each asset for previous years, including 2012. This issue should be coordinated with the Ministry of Finance. The Ministry of Finance agreed to allocate a special representative, we propose immediately commence negotiations with your representative Devi Kandelaki in order the position and terms and conditions were prepared prior to your arrival.
- Release from any commitments on the construction of HPP on the territory of Georgia, provided by the Memorandum dated March 31, 2011; We disagree to release from any commitments, we agree to postpone these commitments for two years.
- Release from the commitments on the investment and repair program of Telasi JSC, provided by the Memorandum; We propose release from investments in the amount of 60 million dollars.
- The investment program of Telasi JSC corresponds to the level that involves support of existing assets and minimal program of development (see the Model)
- The budget of Telasi JSC consists of semi-fixed costs and composes the following values:
  - In 2013 – 67.2 mill. GEL incl. the property tax of 2 mill. GEL
  - In 2014 – 60.7 mill. GEL incl. the property tax of 2 mill. GEL
  - In 2015 – 55.4 mill. GEL incl. the property tax of 2 mill. GEL

- In 2016 – 48.9 mill. GEL incl. the property tax of 2 mill. GEL

- We believe, that all issues below are out of all relation specifically to the tariffs. These issues should be solved by means of negotiations and following the principles of maximum profitability for the partners. We propose immediately and in parallel commence both work and negotiations in order to achieve the final result. The only thing, in the memorandum we can clarify the particular date by which the parties must arrive at particular decisions.
- Within the framework restructuring of institutional debts of Mtkvari Energetics LLC to the state of Georgia, financial recovery of Telasi JSC and reducing the intra-group debt, the Government of Georgia will provide for obtaining of the tax regulation of the Revenue Service of Georgia with regard to absence of taxation when conducting an offset on institutional debts writing-off;
- The Ministry of Finance of Georgia will sign the tax agreements:
  - For Telasi JSC for the period of 2006 - 2012. o For Mtkvari Energetics LLC for the period of 2011 - 2012. o For Khrami HPP-1 JSC and Khrami HPP-2 JSC for the period of 2011 - 2013.
- The provision allowing Telasi JSC shares circulation at one of the exchanges, a member of WFE (the World Federation of Exchanges) (in accordance with clause 5 of the Government of Georgia Resolution No. 2536 dated December 27, 2011) will be transformed from mandatory into an optional one;
- Telasi JSC does not violate the covenants under the EBRD credit; □ Profitability of Telasi JSC on the net profit is 5%.

230. On 8 December 2012, the Parties, represented by Messrs Eloshvili and Bachiashvili on behalf of Georgia, and Mr. Mirsiyapov from Inter RAO, met to further discuss the financial model and Georgia's comments on Inter RAO's proposed terms.[189] Mr. Bachiashvili's testimony is that he asked Mr. Mirsiyapov to update the summary of the financial model so that it reflected the revenue as well as the cost side of Telasi's forecasted financial performance. He says that he and Mr. Eloshvili explained to Mr. Mirsiyapov that Georgia wanted to be able to take an informed decision on the overall level of profitability for Telasi reflected in the financial model. It is here that they say that Mr. Mirsiyapov stated that Inter RAO was committed to operating in the Georgian energy sector in the long-term and was not seeking excessive levels of profit. Mr. Mirsiyapov says that he has no recollection of Mr. Bachiashvili or Mr. Eloshvili saying they needed to make an informed decision

[189] Bachiashvili I, ¶ 16; Respondents' Counter-Memorial, ¶ 116.

on the overall profitability of Telasi. He says that he did say that Inter RAO was not seeking to make exorbitant profits, by which he meant that Inter RAO was not expecting wild rates of return on investment and profitability. However, that did not mean that Inter RAO did not expect to make a profit and grow its business. At the end of the meeting, Mr. Mirsiyapov agreed to send Georgia an updated financial model and a draft of the new memorandum.

231. On 10 December 2012, Inter RAO sent Georgia a draft memorandum which included as an appendix the financial model. Georgia marked up the draft and sent it back to Inter RAO on 12 December 2012.[190] In this draft, one of the key provisions in dispute in this arbitration (Clause 2.3 of the 2013 Memorandum) reads as follows:

> 2.3. **Telasi JSC's average weighted electric power procurement tariff**
>
> 2.3.1. From 2013 through 2025, Telasi JSC will procure electric power under direct contracts with power plants and from the Electricity Grid Commercial Operator and will form an annual portfolio of electric power procurements with an average weighted tariff of no more than 6.028 tetri/kWh (without VAT). The average weighted electric power procurement tariff is calculated annually for the period from 01 September through 31 August of each year.
>
> 2.3.2. If the average weighted electric power procurement tariff for Telasi JSC described in subclause 2.3.1. (without VAT, including the tariffs for transmission and dispatch, reserve components and technical losses within the high voltage electricity transmission grid) goes up, there will be a simultaneous rise in the consumer tariff to maintain Telasi JSC's distribution tariff unchanged in consideration of the terms of cl. 2.2.4.
>
> 2.3.3. In calculating the rise in the average weighted electric power procurement tariff, account is not taken of any rise in the average weighted electric power procurement tariff for the reasons set forth in clause 2.4.1. (a rise in the tariffs for AO Khrami-1 and AO Khrami-2).
>
> 2.3.4. The Parties have agreed that, from 2013 through 2025, Telasi JSC's distribution tariff will be adjusted for inflation and any change in the GEL/USD exchange rate in accordance with subclauses 2.3.1. and 2.3.2. of the Memorandum dated 31.03.2011.
>
> 2.3.5. When the average weighted electric power procurement tariff of Telasi JSC is calculated for 2013 through 2025, account is taken of the AO Khrami-1 and AO Khrami-2 in place when this Memorandum is signed.
>
> 2.3.6. If the actual procurement tariff between 2013 and 2016 goes up from 6.028 tetri/kWh by more than 0.1 tetri/kWh, the Parties recognise the need for additional negotiations on raising Telasi JSC ~~distribution~~ consumer tariff for the year following the current year.

232. On 15 December 2012, Inter RAO proposed substantial amendments, including the addition of the NERC as a party to the memorandum and a clause providing that "[t]he Government of Georgia and the [NERC], within the scope of their competence, agree to approve the tariff plans and conditions for their adjustment".[191] Inter RAO also proposed the addition of a clause providing that

[190] Draft Memorandum of 12 December 2012, C-0029.

[191] Email from Mirsiyapov to Eloshvili dated 15 December 2012, attaching a further draft memorandum ("**Draft Memorandum of 15 December 2012**"), R-0024, Clause 1.5.

the Government would compensate Inter RAO for losses caused by a change in Georgian legislation subsequent to the conclusion of a new memorandum.[192]

233. The Respondents suggest that Inter RAO sought to add the NERC as a party to the agreement because it knew that the transitional regime at Article 27 of the 2011 Methodology would not apply to any new memorandum concluded with Georgia after the entry into force of the 2011 Methodology.[193] The Claimants do not dispute that they requested that the NERC be added as a party to the 2013 Memorandum, but say that at no point did Georgia represent that the NERC could override the tariff related provisions and adjustment mechanisms in the Agreement. From the Claimants' perspective, "the 2011 methodology, like the 1998 methodology before it, was irrelevant to Telasi and the Khrami companies because their recently agreed, new, tailored tariff scheme continued to apply".[194] The Claimants also say that at the time the 2013 Memorandum was signed there was no draft of the memorandum and no one knew what its terms would be.

1. The 2012 Transitional Memorandum

234. The Parties had originally aimed to conclude their tariff agreement by the end of 2012, but were unable to do so. In light of the importance for the new Government of reducing Consumer Tariffs for household consumers,[195] The Parties negotiated a transitional memorandum. The last draft of that Memorandum was exchanged between the Government and Inter RAO on 19 December

[192] Draft Memorandum of 15 December 2012, R-0024, Clause 5.2.

[193] Respondents' Counter-Memorial, ¶ 122; *see e.g.*, Tr. Day 1 (Respondents' Opening Statement), 241.

[194] Tr. Day 1 (Claimants' Opening Statement), 28.

[195] Line voltage 101 kWh-301 kWh.

2012. The Claimants say that it reflected certain changes that the NERC requested, which shows that the NERC was involved in the negotiation process: [196]

> **From:** Ilia Eloshvili [mailto:I.Eloshvili@menr.gov.ge]
> **Sent:** Wednesday, December 19, 2012 8:11 PM
> **To:** MIRSIYAPOV Ilnar I.
> **Cc:** gbachiashvili@fund.ge
> **Subject:** FW:
>
> Ilnar,
>
> First of all, it is a pity that Devi has problems. I hope that his guilt is insignificant or will not be confirmed. I hope that this incident will not affect our relationship. I am sending the Memorandum that we sent to the Ministry of Justice for approval. We added a technical detail in the tariff column; we specify from which component it is necessary to make the reduction (at the request of GNERC; highlighted in yellow)
>
> Best regards
>
> Ilia

235. On 26 December 2012, the Parties concluded a transitional memorandum, which temporarily reduced Telasi's tariffs for household consumers, on the condition that the parties sign a new definitive memorandum and replace the 2011 Memorandum within three months (the "**2012 Transitional Memorandum**").[197] The Parties agreed to reduce Telasi's Consumer Tariffs for household consumers for the two lowest categories of household consumers and also reduced the Distribution Tariffs for household consumers in the 220/380 Volt category for the period from 1 January to 31 March 2013.[198]

[196] Email from Eloshvili to Mirsiyapov, dated 19 December 2012 with Draft 2012 Temporary Memorandum, C-0200; Tr. Day 1 (Claimants' Opening Statement), 33-34.

[197] 2012 Transitional Memorandum, C-0030; Claimants' Reply, ¶ 48; Respondents' Counter-Memorial, ¶ 129.

[198] 2012 Transitional Memorandum, C-0030; Claimants' Reply, ¶ 50.

236. The Claimants say that the 2012 Transitional Memorandum shows Inter RAO's good faith in the negotiations because in exchange for the reduction in Consumer Tariffs, it only received a promise to finish negotiations to codify a new tariff regime.[199]

237. On 27 December 2012, the NERC implemented the tariffs agreed in the 2012 Transitional Memorandum through a resolution ("**NERC Resolution No. 23**").[200]

238. The Claimants say that as it had done with the tariffs in the 2007 and 2011 Memoranda (by way of NERC Resolution Nos. 33 and 5)[201] the NERC immediately approved Telasi's tariffs precisely as set out in the 2012 Transitional Memorandum through Resolution No. 23.

2. The 2013 Memorandum

239. Negotiations resumed in mid-January 2013, with further drafts of the memorandum exchanged in the period from January to March. On 31 March 2013, the Government, the Partnership Fund JSC (Georgian State-owned entity which held Georgia's 24.5% stake in Telasi), Inter RAO, Telasi, the Khrami Companies and Mtkvari Energy LLC (owned by Inter RAO) entered into the 2013 Memorandum.[202] It supersedes the 2007, 2011 and 2012 Memoranda and sets out long-term tariff regimes for Telasi and the Khrami Companies.

240. Key terms of the 2013 Memorandum include the following:

1. GENERAL TERMS AND CONDITIONS

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[199] Tr. Day 1 (Claimants' Opening Statement), 34.

[200] The NERC implemented the 2012 Transitional Memorandum through CL-0082, NERC Resolution No. 23 on Amendments to NERC Resolution No. 33 dated 4 December 2008, dated 27 December 2012 ("**NERC Resolution No. 23**"); Claimants' Opening Presentation, Demonstrative No. 4; Tr. Day 1 (Claimants' Opening Statement), 34:21-24.

[201] The NERC implemented the 2007 Memorandum through CL-0078, NERC Resolution No. 33; NERC implemented the 2011 Memorandum through CL-0080, NERC Resolution No. 5.

[202] 2013 Memorandum, C-0034 / R-0028. For more on the meetings leading up to the signing of the 2013 Memorandum, *see* Respondents' Counter-Memorial, ¶¶ 110-126; Claimants' Reply, ¶¶ 46-50.

...

1.3. Indicative forecast Performance Indicators for Telasi JSC for the period 2013-2025 are provided in Appendix 2 hereto.

1.4. The Parties have agreed that each Party shall take, within its authority, all the necessary steps and initiate all the necessary procedures and measures aimed at the implementation of this Memorandum.

1.5. Within its authority, the government of Georgia shall take the necessary actions to ensure adoption of the required regulations for implementing tariff schemes and their adjustment conditions stipulated in Sections 2.2, 2.3, and 2.4 no later than May 01, 2013.

2.1. TARIFF POLICY

2.1. Performance of Telasi JSC

In respect to the performance of Telasi JSC, the Parties have agreed on the following:

2.1.1. The amount of the annual investment program of Telasi JSC, excluding investments in new connections, shall not exceed the depreciation expense for the respective reporting period.

2.1.2. Due to the optimization of the electricity tariff for individual groups of consumers and the measures to ensure breakeven operations of Telasi JSC, Telasi JSC is ensured to annually receive the Required Gross Revenue.

2.1.3. Telasi JSC will provide the optimization and reduction of administrative costs, and the Parties have defined the dynamics of the reduction of the Conditionally Fixed Costs of Telasi JSC for the period 2013- 2016. The amount of Conditionally Fixed Costs of Telasi JSC for the period 2013-2016 subject to indexation corresponds to the indicative values specified in Appendix No. 2 to this Memorandum and is not changed for the purpose of calculating the value of the actual Required Gross Revenue. The amount of Conditionally Fixed Costs of Telasi JSC for the period 2017-2025 for the purposes of calculating the value of the actual Required Gross Revenue shall be calculated in accordance with the formula stipulated in Appendix No 1 hereto.

2.1.4. With the aim of fulfilling the financial obligations for repayment of the principal debt under signed credit agreements and loan contracts, settling losses in respect of write-offs and/or unclaimed accounts receivable, and carrying out investments that have not been approved by the Ministry of Energy and Natural Resources of Georgia, Telasi JSC, on an annual basis, is ensured to receive the Reserve Revenue included in the calculation of the Required Gross Revenue. The Reserve Revenue is used to cover the above costs.

2.1.5. With respect to the need for maintaining the fixed assets of Telasi JSC in proper and good technical conditions, on an annual basis, the Ministry of Energy and Natural Resources of Georgia (or a body authorized by this Ministry), considers the appropriateness of additional investments at the initiative of Telasi JSC, and in the event of approval, the specified monetary amount is taken into account as a part of the Required Gross Revenue no later than on July 1 of the respective year.

2.1.6. Telasi JSC shall be entitled to use the Reserve Revenue funds at its own discretion for investments which it does not have to approve with the Ministry of Energy and Natural Resources of Georgia.

2.1.7. The annual amount of the Required Gross Revenue of Telasi JSC is calculated based on the results of the past fiscal year and compared with the Gross Revenue for the same period. For the calculation and verification of the actual values of the Gross Revenue and the Required Gross Revenue for the reporting period, Telasi JSC engages an independent auditor, which shall be one of universally recognized international audit companies (selected by Telasi JSC).

2.1.8. The positive value of the difference between the actual values of the Gross Revenue and the Required Gross Revenue for the reporting period forms the Target Investment Allowance. A negative value of this difference forms a Gross Revenue Deficit.

2.1.9. The value of the Target Investment Allowance or the Gross Revenue Deficit is defined based on the results of calculating the actual values of the Gross Revenue and the Required Gross Revenue of Telasi JSC for the previous reporting period carried out by an independent auditor.

2.1.10 In the period from 2017 to 2025, the Target Investment Allowance will be distributed as follows: 50% remains at the disposal of Telasi JSC; 50% is allocated to the Ministry of Energy and Natural Resources of Georgia in accordance with section 2.1.11 (subject to the exceptions set out in section 2.6.8).

2.1.11 The part of the Target Investment Allowance (subject to the exception set out in section 2.6.8), which is distributed in favor of the Ministry of Energy and Natural Resources of Georgia as a result of a completed reporting period, may be used by way of increasing the Weighted Average Purchase Tariff for Telasi JSC for the subsequent reporting period according to the decision of the Ministry of Energy and Natural Resources of Georgia. Other forms for the distribution of the Target Investment Allowance are also permitted (subject to the exception set out in Section 2.6.8); such forms will be established by the Ministry of Energy and Natural Resources of Georgia in compliance with the legislation effective at the time. -To its end, Telasi JSC shall make every effort to organize the appropriate corporate procedures for approving of the suggested form for the distribution of the Target Investment Allowance.

2.1.12 The actual amount of the Gross Revenue Deficit as determined by the results of a reporting period shall be compensated to Telasi JSC by means of raising the Consumer Tariff of Telasi JSC for the subsequent reporting period, as stipulated by the provisions of Sections 2.2.2, 2.2.3, and 2.2.4 of this Memorandum[.]

2.2. Long-term electricity tariff to be set by Telasi JSC

2.2.1. The Parties agree that the long-term electricity tariffs may be equally [Claimants Translation:] profitable / [Respondents Translation:] financially beneficial for both JSC Telasi and electricity consumers of all categories, including the general public. Long-term tariffs will enable Telasi JSC to plan its investments and operating activities with the maximum possible accuracy and high efficiency, whereas consumers will obtain the possibility to plan their expenditures for consumed electricity. Keeping in mind the understanding of the need for tariff optimization for separate consumer groups within the next years, the Parties have agreed that the Consumer Tariff of purchasing the electricity of Telasi JSC within the period 2013 - 2016 shall be decreased:

- *by 4 tetri / kWh with VAT (3.39 tetri / kWh excluding VAT) for consumers of the Population category with the connection on the line with 0.4 kV voltage and consumption of up to 101 kWh per month, inclusive,*

- *by 3.54 tetri / kWh with VAT (3 tetri / kWh excluding VAT) for consumers of the Population category with the connection on the line with 0.4 kV voltage and consumption from 101 to 301 kWh per month, inclusive,*

and the establishment of long-term electricity tariff of Telasi JSC in respect to these groups of consumers over the years at the following levels:

Table 1. Indicative limit distribution tariffs of Telasi JSC (tetri / kWh without VAT)

Transmission-line voltage	Until 31.12.2012.	from 01.04.2013 to 31.12.2016	from 01.01.2017 to 31.12.2025.
220/380 V, non-household consumers	8.08	8.08	8.08
220/380 V, household consumers (population in average)	8.08	6.855	8.08
6-10 kV	7.138	7.138	7.138
35-110 kV	1.8	1.8	1.8

Table 2. Indicative limit consumer tariffs of Telasi JSC (tetri / kWh excluding VAT)

Transmission-line voltage and the categories of consumers	Until December 31, 2012.	from April 01, 2013 to December 31, 2016	from January 01, 2017 to December 31, 2025.
0.4 kV for Non-Household Customers category	13.56	13.56	13.56
0.4 kV / up to and including 101 kWh per month, in tetri/kWh for Population category	11.424	8.034	11.424
0.4 kV / from 101 kWh to 301 kWh per month, in tetri/kWh for Population category	13.56	10.56	13.56
0.4 kV / from 301 kWh per month, in tetri/kWh for Population category	14.998	14.998	14.998

For other consumer groups of Telasi JSC, including consumers of Population category with the connection with 0,4 kV and consumption of more than 301 kWh, the Consumer Tariff may be reconsidered with respect to Section 2.2.3.

These indicative limit tariffs will be adjusted in accordance with the mechanisms provided in sections 2.2.2, 2.2.3 and 2.2.4.

2.2.2. In order to ensure breakeven results of operation of Telasi JSC in the period from 2013 to 2025, The Parties have agreed that the annual Consumer Electricity Tariff of Telasi JSC shall ensure the achievement of the annual amount of the Required Gross Revenue of Telasi JSC stipulated by this Memorandum. In this regard, if the Required Gross Revenue amount of Telasi JSC is actually not achieved as of the end of the reporting year, the Consumer Tariff of Telasi JSC shall be raised since September 1 of the year following the reporting year to the level enabling to compensate, during one year, the Required Gross Revenue amount which was not achieved within the previous year.

2.2.3. In the period from 01.04.2013 to 31.12.2016, the Consumer Tariff of Telasi JSC shall not be revised subject to the compliance with the requirements of sections 2.1.2, 2.2.2 and 5.2 hereof.

2.2.4. The calculation of the Target Investment Allowance or Gross Revenue Deficit is performed annually starting from 2013. In the period from 2013 to 2016, the Target Investment Allowance obtained in any of the reporting periods is adjusted by the amount of Gross Revenue Deficits obtained within the subsequent reporting periods after the formation of the stated Target Investment Allowance in such manner that the first distribution of the Target Investment Allowance in accordance with Sections 2.1.10 and 2.1.11 of this Memorandum is executed according to the results of 2016.

2.3. The weighted average tariff of Telasi JSC for the purchase of electricity

2.3.1. In the period from 2013 to 2025 Telasi JSC shall purchase electricity under direct contracts with power plants as well as from the Commercial Operator of the Electrical System and shall form the annual electricity purchase portfolio with the Weighted Average Purchase Tariff of no more than 6.028 tetri/kWh. The Weighted average purchase tariff shall be calculated annually in the period from 01 September to 31 August of every year. The maximum level of the weighted average purchase tariff established in this section shall not apply for the purposes of calculation of the Weighted average purchase tariff in accordance with section 2.1.11 hereof.

2.3.2. If the Weighted Average Purchase Tariff of the electricity of Telasi JSC exceeds the maximum level stipulated by Section 2.3.1, the Consumer Tariff shall be simultaneously increased in such manner that the Gross Revenue of Telasi JSC is not changed.

2.3.3. When calculating the amount of the Weighted Average Purchase Tariff increase of Telasi JSC (only for the purpose of Section 2.3.1), an increase of the Weighted Average Purchase Tariff for the reasons stipulated by Section 2.4.1 (the increase of tariffs for Khrami HPP-1 JSC and Khrami HPP-2 JSC) is not taken into account.

2.3.4. The parties agreed that the Distribution Tariff of Telasi JSC shall be adjusted with respect to inflation and change in lari to US dollar exchange rate once in three years within the period 2013 - 2025 and 5 times in total according to the following frequency:

Table 3. Periods of adjustment of Distribution Tariff of Telasi JSC

Period	Duration	Adjustment date
1	September 1, 2011 - September 1, 2013	november 1, 2013
2	september 1, 2013 — september 1, 2016	november 1, 2016
3	september 1, 2016 — september 1, 2019	november 1, 2019
4	september 1, 2019 — september 1, 2022	november 1, 2022
5	September 1, 2022 - September 1, 2025	November 1, 2025

The adjustment will be performed on the basis of any of the following factors:

a) the Distribution Tariff of Telasi JSC shall be adjusted on the basis of the inflation factor only in

case the inflation value calculated according to the below stated formula amounts to more than 7 (seven) per cent:

ik= ((1+ i1) x...x(1+ in))^(1/n)-1

where:

i - average annual inflation,

ik - inflation in the period,

n - number of years in the period,

ik - value of inflation

In this case, the adjustment will be applied based on the entire value of the calculated

inflation ik.

b) the adjustment of the Distribution Tariff of Telasi JSC with respect to a change in lari to US dollar exchange rate shall be applied to the part of 30 (thirty) per cent of the Distribution Tariff of Telasi JSC if a change in lari to US dollar exchange rate amounts to more than 7 (seven) per cent for the whole period. The adjustment shall thereby be applied to the whole amount of a change in lari to US dollar exchange rate.

This adjustment and its size will be determined [Claimants: in consultation with / Respondents: with the approval of] the Ministry of Energy and Natural Resources of Georgia.

2.3.5. When calculating the Weighted Average Purchase Tariff of Telasi JSC (only for the purpose of Section 2.3.1) for the period 2013 - 2025, the tariffs of Khrami HPP-1 JSC and Khrami HPP-2 JSC effective at the moment of signing this Memorandum are taken into account.

2.4. Long-term tariff of Khrami HPP-1 JSC and Khrami HPP-2 JSC

2.4.1. Until December 31, 2013, inclusive, the tariffs of Khrami HPP-1 JSC and Khrami HPP-2 JSC will remain unchanged at 2.3 tetri / kWh and 3.5 tetri / kWh, respectively, as they were approved by the Resolution of the National Commission for Energy and Water Regulation of Georgia No. 4 of April 1, 2009. For the purposes of return on INTER RAO's investment in respect of acquisition of Khrami HPP-1 JSC and Khrami HPP-2 JSC for the period from 01.01.2014 to 12.31.2021, the tariffs of Khrami HPP-1 and JSC Khrami HPP-2 JSC will be set according to the table below:

...

Table 4. Tariffs of Khrami HPP-1 and Khrami HPP-2 (tetri/kWh, excluding VAT)

	until December 31, 2013.	from Jenuary 01, 2014 to December 31, 2013.	from January 01, 2019 to December 31, 2021.	after 2021
Khrami HPP-1 JSC	2.3	8.2	7.7	263
Khrami HPP-2 JSC	3.5	9.4	8.9	3.5

[...]

2.6. Investment commitments

2.6.1. The Parties have agreed that from October 1, 2018 till January 1, 2025 with regard to fulfilment of INTER RAO obligations under Sections 1.3.1 and 1.3.2 of the memorandum on cooperation in the electricity energy sector and the implementation of agreements reached

earlier dated 31.03.2011, Telasi JSC shall purchase 15% of its annual electricity purchases on a monthly basis from hydro power plants and/or renewable sources electrical power plants and commissioned in Georgia after 31.03.2011. The Parties agree that the mechanism of the performance of INTER RAO obligations established in sections 1.3.1 and 1.3.2 of the memorandum on cooperation in the electric energy sector and the performance of agreements reached earlier dated 31.03.2011 is specified in sections 2.6.1, 2.6.2, 2.6.3, 2.6.4 hereof.

2.6.2. The Parties have agreed that Telasi JSC will be obliged to purchase the amount of electricity specified in Section 2.6.1 from electricity producers nominated for the following year by the Ministry of Energy and Natural Resources of Georgia. At the same time, electricity suppliers are selected based on the highest bid value for each kWh until the target volume of Telasi JSC's purchases is achieved in accordance with section 2.6.1. This procedure involves the ranking of suppliers and the amounts of electricity offered by such supplies based on the price of offer, starting with the highest price. After that, Telasi JSC shall buy the amount of electricity from the supplier with the highest price of the offer. If the said amount of electricity is not sufficient to achieve the target purchase level of Telasi JSC in accordance with section 2.6.1, Telasi JSC buys electricity from the next supplier in the ranking list, and so on, until the target amount of purchases for Telasi JSC in accordance with section 2.6.1 is reached.

2.6.3. The cost of the purchase of the target amount of electricity in accordance with Section 2.6.1 is taken into account for the calculation of the Weighted Average Purchase Tariff of Telasi JSC. The total Weighted Average Purchase tariff of Telasi JSC with due account for the amount of purchases provided for in section 2.6.1 may not exceed the limit established in section 2.3.1.

[…]

5. LIABILITY OF THE PARTIES

5.1. The Parties shall be only liable under the Memorandum for the proper performance of their obligations to the extent to which this Memorandum is legally binding in accordance with section 6. In the performance of this Memorandum, the Parties shall comply with the legislation of Georgia.

5.2. In the event that, following the signing of this Memorandum, any amendments have been made to the legislation of Georgia, making the position of Inter RAO or of any Inter RAO Group company in Georgia worse as compared to the position as of the date of signing of this Memorandum, the Government of Georgia shall compensate Inter RAO or the relevant Inter RAO Group company in Georgia for all losses caused by such a change in the legislation, including by means of an increase of the Consumer Tariff of Telasi, JSC in accordance with section 2.2.2.

241. The 2013 Memorandum attaches two appendices. Appendix 2 sets out "Indicative Performance Indicators of Telasi JSC" ("**Appendix 2**"), which set out forecast TIA and RGR Deficits for 2013 - 2025.[203]

[203] 2013 Memorandum, C-0034 / R-0028.

3. Implementation of the 2013 Memorandum: NERC Resolution No. 3

242. In furtherance of its obligations under Clauses 1.4 and 1.5 of the 2013 Memorandum, on 2 April 2013, the Government sent the 2013 Memorandum to the NERC for its consideration. The NERC issued a resolution the next day, on 3 April 2013, establishing Telasi's tariffs until 31 December 2025, including the reduction for household consumers, at identical rates to those set out in the 2013 Memorandum ("**NERC Resolution No. 3**").[204] As the Khrami Companies' tariffs specified under the Khrami SPA and the 2011 Memorandum did not change in the 2013 Memorandum, NERC Resolutions No. 33 of 2008 and No. 5 of 2011 remained in force.

243. The Claimants say that the NERC participated in the 2013 Memorandum by way of its immediate implementation of Telasi's Distribution Tariffs in Resolution No. 3, at precisely the tariff rates indicated in that agreement. According to them, this contradicts the Respondents' argument that the NERC is independent and that the Government is not responsible for the NERC's tariff setting decisions.[205] In this regard, the Claimants also point to the NERC's prompt implementation of the tariffs in all previous memoranda between the Parties: the 2012 Temporary Memorandum through Resolution No. 23, the 2007 Memorandum through Resolution No. 33, and the 2011 Memorandum through Resolution No. 5.[206]

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[204] NERC Resolution No. 3 on Amendments to NERC Resolution No. 33 dated 4 December 2008, dated 3 April 2013 ("**NERC Resolution No. 3**"), CL-0083; Tr. Day 1 (Claimants' Opening Statement), 39:18-23.

[205] NERC Resolution No. 3, CL-0083; Tr. Day 1 (Claimants' Opening Statement), 34.

[206] NERC Resolution No. 33, CL-0078; NERC Resolution No. 5, CL-0080; NERC Resolution No. 23, CL-0082.

4. Telasi's Consumer and Distribution Tariffs

244. Clause 2.2.1 of the 2013 Memorandum temporarily reduced Telasi's Consumer Tariffs for 2013-2016 by 3.54 tetri/kWh (from 11.424 to 8.034 tetri/kWh VAT inclusive) and for another category of household consumers, by 4 tetri/kWh (from 13.56 to 10.56 tetri/kWh VAT inclusive), as highlighted in the following "indicative limit" tariffs included in Clause 2.2.1:[207]

Table 2. Indicative limit consumer tariffs of Telasi JSC (tetri / kWh excluding VAT)

Transmission-line voltage and the categories of consumers	Until December 31, 2012.	from April 01, 2013 to December 31, 2016	from January 01, 2017 to December 31, 2025.
0.4 kV for Non-Household Customers category	13.56	13.56	13.56
0.4 kV / up to and including 101 kWh per month, in tetri/kWh for Population category	11.424	8.034	11.424
0.4 kV / from 101 kWh to 301 kWh per month, in tetri/kWh for Population category	13.56	10.56	13.56
0.4 kV / from 301 kWh per month, in tetri/kWh for Population category	14.998	14.998	14.998

245. Under Clause 2.2.1, Telasi's long-term Distribution Tariffs were left at the rates set out in the 2011 Memorandum, save for the temporary reduction for household consumers in 2013-2016 by 1.225 tetri/kWh (from 8.08 to 6.855 tetri/kWh without VAT):[208]

[207] Claimants' Memorial, ¶ 79(a); Respondents' Counter-Memorial, ¶ 129; 2013 Memorandum, C-0034 / R-0028, Clause 2.2.1, Table 2 (emphasis added). The figures in the tables in Clause 2.2.1 are "VAT exclusive".

[208] 2013 Memorandum, C-0034 / R-0028, Clause 2.2.1, Table 1 (emphasis added).

Table 1. Indicative limit distribution tariffs of Telasi JSC (tetri / kWh without VAT)

Transmission-line voltage	Until 31.12.2012.	from 01.04.2013 to 31.12.2016	from 01.01.2017 to 31.12.2025.
220/380 V, non-household consumers	8.08	8.08	8.08
220/380 V, household consumers (population in average)	8.08	6.855	8.08
6-10 kV	7.138	7.138	7.138
35-110 kV	1.8	1.8	1.8

246. The Parties agree that Clause 2.2.1 provides that from 1 January 2017, Consumer and Distribution Tariffs were to revert to the levels in place on 31 December 2012 until 31 December 2025 (namely, the Consumer and Distribution Tariffs levels set under the 2011 Memorandum).[209] The Parties referred to the temporary decrease of Telasi's Consumer and Distribution Tariffs in 2013-2016 as the "**tariff freeze**" or the "**tariff moratorium**".

247. The Respondents note that the tariffs set out in Clause 2.2.1 are expressly said to be "indicative limit" Distribution and Consumer tariffs, which "will be adjusted in accordance with the mechanisms provided for in sections 2.2.2, 2.2.3 and 2.2.4".[210] Mr. Bachiashvili testified that the tariff levels were referred to as "indicative maximum" tariffs because it is the NERC's exclusive prerogative to set tariffs.[211]

248. Although the Respondents agree with the Claimants that Clause 2.2.1 provides that Telasi's tariffs would revert to their 2012 levels as of 1 January 2017, their position is that "the Government did not guarantee that the NERC would fix Telasi's tariffs at the indicative limit levels specified in Clause 2.2.1", nor did it represent that Telasi's consumer tariffs would be restored to their pre-2013

[209] Respondents' Counter-Memorial, ¶ 130.

[210] 2013 Memorandum, Clause 2.2.1, C-0034 / R-0028, last sentence of the provision; *see also*, heading of Table 1: "Indicative limit distribution tariffs of Telasi JSC (tetri/kWh excluding VAT)" and Table 2: "Indicative limit consumer tariffs of Telasi JSC (tetri/kWh excluding VAT)".

[211] Bachiashvili I, ¶ 21; Claimants' Reply, ¶ 53.

Memorandum levels after the 2013-2016 tariff freeze.[212] According to the Respondents, because the tariffs set out in the 2013 Memorandum were merely "indicative limit" tariffs, the Parties agreed under Clause 5.2 that Inter RAO would be compensated for any change in legislation that makes its position "worse" as compared to when the 2013 Memorandum was signed.[213] The Respondents say Clause 2.2.1 "does not impose 'strict liability' on the Government for any inconsistency between the tariffs set for Telasi by the NERC and the 'indicative limit' tariffs set out therein".[214]

249. The Claimants' position is that the tariffs set out in Clause 2.2.1 were guaranteed, otherwise they would not have agreed to the 2013-2016 tariff reduction, which the Government needed to keep its campaign promise of keeping household tariffs low. The Claimants note that the only evidence the Respondents have adduced in support of their position that Clause 2.2.1 sets out indicative tariffs which could change at the NERC's prerogative is testimony from Mr. Bachiashvili.[215] The Claimants say that Mr. Bachiashvili's evidence is contradicted by the 2013 Memorandum negotiation record.[216] According to Mr. Mirsiyapov, Inter RAO included the words "indicative limit" tariff in a 15 December 2012 draft of the new agreement as a direct response to Georgia's attempt to introduce hard caps on tariffs in the 12 December 2012 draft.[217] According to the Claimants, the term "indicative" was employed to reflect the fact that if the adjustment mechanisms in in the Memorandum were triggered, tariffs could rise higher than the "indicative limits".[218] The Claimants point out that this logic is seen from the text of the 2013 Memorandum itself, which

[212] Bachiashvili I, ¶ 21; Respondents' Counter-Memorial, ¶ 128; Respondents' Rejoinder, ¶ 255.

[213] Respondents' Rejoinder, ¶ 255.

[214] *Ibid*.

[215] Claimants' Reply, ¶ 53.

[216] *Id.*, ¶ 54.

[217] Mirsiyapov II, ¶ 57. The Respondents' proposed language referred to "Maximum" distribution and consumer tariffs.

[218] Claimants' Reply, ¶ 55; Mirsiyapov II, ¶ 57.

indicates at the end of Clause 2.2.1 that "[t]hese indicative limit tariffs will be adjusted in accordance with the mechanisms provided in sections 2.2.2, 2.2.3 and 2.2.4".[219]

5. WAPT

250. As set out in Clauses 2.3.1 and 2.3.2, if Telasi's actual WAPT rises above 6.028 tetri/kWh in any year in 2013-2025, Telasi could request an increase to its Consumer Tariffs, calculated annually. As will be discussed in the Merits section, the Parties' positions diverge as to how this mechanism functions. The Claimants' view is that Telasi was automatically eligible for an increase when the 6.028 threshold was exceeded. For the Respondents, the adjustment was only possible when the 6.028 threshold was met *and* only to the extent necessary to ensure Telasi's Gross Revenue ("**GR**") matched the levels set out in Appendix 2 of the 2013 Memorandum.

6. Currency Exchange Rate and Inflation Changes

251. Clause 2.3.4 provides for adjustment of Telasi's Distribution Tariffs for inflation and currency exchange rate changes. It is identical to the 2011 Memorandum, with one added sentence at the end:

> *This adjustment and its size will be determined [Claimants: in consultation with/ Respondents: with the approval of] the [MOE].*[220]

252. The Parties' positions diverge as to whether Telasi is entitled to WAPT and inflation and currency-based adjustments for the 2013-2016 tariff freeze. The Respondents argue that Clause 2.2.3, which provides that Telasi's Consumer Tariff "shall not be revised subject to the compliance with the requirements of sections 2.1.2, 2.2.2 and 5.2 hereof" prevents any adjustment. On the other

[219] 2013 Memorandum, C-0034 / R-0028, Clause 2.2.1.

[220] 2013 Memorandum, C-0034 / R-0028. The Parties dispute the translation of Clause 2.3.4. Claimants' translation reads: "in consultation with"; Respondents' translation reads: "with the approval of".

hand, the Claimants say that the adjustment mechanisms in Clauses 2.3.2 and 2.3.4 are separate from Clause 2.2 and must be conducted separately from any revision of tariffs related to the Required Gross Revenue ("**RGR**"). They also say that Clauses 2.3.1, 2.3.2 and 2.3.4 refer to adjustments for WAPT and inflation and currency changes in the full period from 2013-2025.

7. Required Gross Revenue

253. The 2013 Memorandum introduced the concept of RGR, defined at Appendix 1 as follows:

> *The amount of gross revenue required to cover the following costs: Infrastructural costs, Conditionally fixed costs, Agreed Investments, Interest on Loans, Income Tax, Reserve Revenue, compensation for negative changes in the legislation of Georgia in accordance with section 5.2.*[221]

254. Appendix 1 defines the other key terms in the definition as follows:

> ***Agreed investments**: The amount of investments (excluding investments in new connections) in the amount of depreciation expenses for the reporting period and additional investments in the amount and composition as agreed with the Ministry of Energy and Natural Resources of Georgia.*
>
> ***Conditionally fixed costs of Telasi JSC**: In 2013: 71.1 mln. lari, including property tax; In 2014: 67.7 mln. lari, including property tax; In 2015: 65.3 mln.m lari, including property tax.*[222]

255. As set out at Clause 2.2.2, the RGR was meant "to ensure breakeven operations of Telasi".[223] The parties agreed on "indicative limit" tariffs and a mechanism for adjusting Telasi's Consumer Tariff to ensure Telasi recovered the RGR each year in the period from 2013 to 2025.

8. Reserve Revenue

256. Reserve Revenue ("**RR**") is defined at Appendix 1 as:

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[221] 2013 Memorandum, C-0034 / R-0028, Appendix 1.

[222] *Ibid*.

[223] *Id.*, Clause 2.2.2.

> *In the period from 2013 to 2016, the value is calculated as 4% of the difference between Revenue and Commercial Losses, and is included in the actual Required Gross Revenue without any changes.*
>
> *In the period from 2017 to 2025, the value is calculated as 5% of the difference between Revenue and Commercial Losses, and is included in the actual Required Gross Revenue without any changes.*
>
> *The amount of funds used by Telasi JSC as a source of principal debt repayment, losses settlements in respect of write-offs and / or unclaimed accounts receivable and investments that have not been approved by the Ministry of Energy and Natural Resources of Georgia.* [224]

257. Accordingly, from 2013-2016, the RR was fixed at 4% and for 2017-2025, it was 5%. It could be used to cover costs not included in the RGR, and could otherwise be retained by Telasi.

9. Yearly Calculations Yielding Target Investment Allowance or Gross Revenue Deficit

258. The "Target Investment Allowance" ("**TIA**") is defined at Appendix 1 as:

> *The amount of funds consisting of the difference between the actual values of the Gross revenue for the reporting period and the Required Gross Revenue for the period. If the value is negative, TIA is recognized to be equal to 0.* [225]

259. As set out above, Clause 2.1.7 requires Telasi to engage an independent auditor to calculate the actual RGR and compare it to Telasi's actual GR. GR is defined at Appendix 1 as:

> *The amount of revenue net of new connections, commercial losses and the Cost of Purchase of Electricity…* [226]

260. Pursuant to Clause 2.1.8, if the value of the difference between the actual RGR and the actual GR is positive, it forms the TIA. If the difference is negative, it forms the Gross Revenue Deficit ("**GRD**"), meaning that Inter RAO did not receive enough revenue to cover its RGR (including its RR).

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[224] *Id.*, Appendix 1.

[225] *Ibid*.

[226] *Ibid*.

261. Clause 2.1.10 provides that the TIA, if any, must be shared equally between Telasi and the MOE. However, if there is a GRD, Clause 2.1.12 entitles Telasi to an increase in its Consumer Tariff for the subsequent reporting period by the operation of Clause 2.2.2, postponed until 2017 pursuant to Clause 2.2.3.

10. The Khrami Companies' Generation Tariffs

262. Clause 2.4 sets out the agreed long-term tariffs agreed to for the Khrami Companies from 31 December 2013 to 31 December 2025. These are identical to those set out in Clause 2.4.1 of the 2011 Memorandum and Clause 1 of Appendix 1 of the Khrami SPA. It also sets out the same adjustment mechanism for foreign exchange fluctuations as in the 2011 Memorandum and Appendix 1 of the Khrami SPA.

11. Appendix 2

263. Appendix 2 to the 2013 Memorandum sets out for each year between 2013-2025 forecasted figures for the RGR, GR, GRD and TIA (VAT excluded), as follows:[227]

Appendix No 2. Indicative performance indicators of Telasi JSC, VAT exclude

Required GrossRevenue (RGR)		2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
RGR of Telasi JSC														
Infrastructural expenses (membership fees)	thousand lari	1,598	1,632	1,668	1,704	2,117	2,148	2,179	2,211	2,244	2,277	2,310	2,345	2,379
Conditionally fixed costs, including repairs	thousand lari	71,083	67,751	65,354	60,802	64,278	6,7954	71,842	75,954	80,302	84,901	89,765	94,910	100,352
Profit tax	thousand lari	1,034	0	0	1,488	3,636	3,462	4,175	4,516	4,223	8,769	8,257	7,700	7,095
Interest rate expense on loans and credits	thousand lari	2,423	2,034	1,784	1,618	1,470	1,211	819	377	0	0	0	0	0
Investments in the amount of depreciation	thousand lari	12,314	13,112	13,953	14,839	15,772	16,754	17,787	18,874	20,017	21,220	22,485	23,815	25,214
Agreed investments exceeding depreciation	thousand lari	0	0	0	0	0	0	0	0	0	0	0	0	0
Reserve profitability	thousand lari	10,011	10,203	10,427	10,656	14,441	14,687	14,941	15,196	15 456	15,744	16,013	16,286	16,564
RGR, total	**thousand lari**	**98,462**	**94,732**	**93,186**	**91,108**	**101,714**	**106,217**	**111,744**	**117,128**	**122,242**	**132,911**	**138,831**	**145,056**	**151,604**
Gross Revenue of Telasi JSC														
Revenue, excluding the effect of new connections and commercial losses	thousand lari	246,165	250,875	256,378	262,002	284,338	289,197	294,185	299,212	304,325	310,020	315,309	320,689	326,162
Expenses for the purchase of electricity (excluding the costs associated with the increase of tariffs of Khrami HPP-1 JSC and Khrami HPP-2 JSC in the period from 2014 to 2021)	thousand lari	132,066	134,971	137,941	140,975	143,372	145,809	148,288	150,809	153,373	155,980	158,632	161,328	164,071
Costs associated with the increase of tariffs of Khrami HPP-1 JSC and Khrami HPP-2 JSC in the period from 2014 to 2021.	thousand lari	0	35,990	35,990	35,990	35,990	35,990	32,940	32,940	32,940	0	0	0	0
Total gross revenue	**thousand lari**	**114,099**	**79,913**	**82,447**	**85,036**	**104,976**	**107,398**	**112,957**	**115,463**	**118,012**	**154,040**	**156,678**	**159,361**	**162,091**
Target Investment Allowance	**thousand lari**	**15,637**	**0**	**0**	**0**	**3,262**	**1,181**	**1,214**	**0**	**0**	**21,128**	**17,847**	**14,305**	**10,487**
RGR deficit	**thousand lari**	**0**	**14,818**	**10,738**	**6,071**	**0**	**0**	**0**	**1,664**	**4,229**	**0**	**0**	**0**	**0**

[227] *Id.*, Appendix 2.

264. The Claimants say Appendix 2 is not binding and was intended simply to illustrate how the RGR concept would operate based on the Parties' forecast of relevant conditions at the time. The Respondents say that Appendix 2 sets out the Parties' expectations of a 4 or 5% profit represented by the RR and is the benchmark against which achievement of Telasi's GR and RGR is measured.

12. Compensation for Amendments to Georgian Legislation

265. As set out above, Clause 5.2 provides for compensation for amendments to Georgian legislation which made Inter RAO's or Telasi's position worse as compared to the position under the Memorandum. The Parties differ on whether Clause 5.2 has been triggered. The Respondents' position is that the Claimants are not entitled to compensation under Clause 5.2 because Telasi is not financially worse off compared to its expectations at the date of signature of the 2013 Memorandum, since Telasi's Gross Revenue each year was not below what is set out in Appendix 2 to the 2013 Memorandum. The Claimants view Clause 5.2 as a stabilisation clause and an indemnity.[228] The Claimants point out that Clause 5.2 does not mention Appendix 2 in any way. They contest the Respondents' argument that the numbers in Appendix 2 represent Inter RAO's profit expectations, and that the indemnity is only triggered when Telasi is worse off compared to those numbers.[229] The Claimants say that their primary concern was the maintenance of the Distribution Margin, which could lead to greater profits if volumes of electricity sales increased.

13. Investment Commitments

266. Clause 2.6 did not maintain the obligation on Inter RAO to construct a HPP Chain contained in the 2007 and 2011 Memoranda. These were replaced by the requirement that Telasi buy 15% of

[228] Tr. Day 1 (Claimants' Opening Statement), 39:11-17.

[229] Tr. Day 1 (Claimants' Opening Statement), 110.

its annual electricity requirements from renewable sources and/or HPPs commissioned after 31 March 2011. Unlike in the previous Memoranda, Clause 2.6.3 provided that the additional cost involved is taken into account in calculating Telasi's WAPT.

N. The 2014 Methodology for Setting Electricity Tariffs

267. By 2012, Georgia's electricity network had been substantially improved. In parallel with the Parties' negotiations concerning the 2013 Memorandum, the NERC commenced the process of updating its tariff regime to bring it in line with the best practices of the EU, pursuant to funding provided by the European Commission ("**EC**") under the "**Twinning Initiative**" for inter-EU knowledge sharing and administrative reform.[230] The tariff review process included consultations between the NERC and electricity companies, including Telasi, and culminated in the adoption of a new tariff setting methodology (the "**2014 Methodology**") on 30 July 2014.[231] The steps leading to the adoption of the 2014 Methodology included the following:

268. On 26 October 2012, it was publicly announced that the Government, the NERC, and others would harmonize Georgia's regulatory framework in line with EU energy legislation, including a move to an incentive-based electricity tariff methodology.[232] The Respondents acknowledge that at this early stage of the process, the outcome of the project was not known, but that "[t]he idea was to modernise the Georgian regime, and that's what happened over time with the adoption of the 2014 [M]ethodology".[233]

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[230] Respondents' Rejoinder, ¶ 102; Respondents' Counter-Memorial, ¶ 159; Milorava I, ¶ 26; Tr. Day 1 (Respondents' Opening Statement), 178-179, 239-240.

[231] 2014 Methodology, CL-0084.

[232] EC Press Release, 26 October 2012, R-0030; Chalagashvili speech at Twinning Initiative conference, 26 October 2012, R-0031; Shonia speech at Twinning Initiative conference, 26 October 2012, R-0033.

[233] Tr. Day 1 (Respondents' Opening Statement), 178-179, 239-240.

269. It appears that there was some discussion of the Twinning Initiative and the NERC's plan to revise its tariff setting methodology during the negotiations of the 2013 Memorandum.[234]

270. On 19 December 2013, the NERC hosted a discussion between the Twinning Initiative leaders from the NERC (Mr. Shonia), Austrian energy regulator E-Control (Mr. Preinstorfer), Telasi and the Khrami Companies and two other electricity companies to discuss the updating of the existing tariff methodology and integrating quality supply practices from other energy regulatory authorities.[235]

271. On 17 February 2014, the EC reported on the NERC's and the Twinning team's plan to issue a new methodology for the calculation of electricity tariffs to bring it in line with EU legislation and to create good climate investments it noted that the calculation method being proposed resulted from discussions of the December 2013 roundtable with Georgian market players.[236]

272. By the end of March 2014, Inter RAO and Telasi received a Russian translation of a draft of the 2014 Methodology.[237]

273. On 14 May 2014, at the Twinning Initiative's final conference, the NERC's Ms. Milorava explained the new tariff methodology was a result of international and EU best practices and stated that it remained open for public discussion with stakeholders.[238]

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[234] Tr. Day 3 (Cross examination of Mr. Mirsiyapov), 111, 115-117. 1. Inter RAO understood that there could be changes to the tariff setting methodology, which gave rise to its proposal to include the NERC as a party to the 2013 Memorandum and Clause 5.2. *See also*, Tr. Day 7 (Respondents' Closing Statement), 129-130.

[235] Summary of Roundtable, 20 December 2013, R-0034, p. 2; EC Press Release, 24 December 2013, R-0035.

[236] EC Press Release – Plans for new calculation of electricity network tariffs for Georgia consumers, 17 February 2014, R-0036.

[237] Email from Antadze to Balchugov with attachments, dated 31 March 2014, R-0084.

[238] Milorava speech Twinning Conference, dated 14 May 2014, R-0041, p. 2; EC Press Releases, dated 13 May 2014, R-0038, dated 14 May 2014, R-0040; Twinning Conference Agenda, R-0039.

274. On 15 July 2014, the NERC met with electricity companies, including Telasi (Mr. Antadze) and the Khrami Companies (Mr. Kandelaki).[239] The NERC (Mr. Sanikidze) presented the general principles underpinning the 2014 Methodology.

275. Finally, on 30 July 2014, the NERC adopted the 2014 Methodology at a public session attended by electricity companies, including Telasi (Mr. Antadze) and the NERC's Ms. Milorava and Mr. Sanikidze.[240]

276. The 2014 Methodology provides for setting distribution and consumer tariffs yearly, based on voltage levels, capital and operational expenses and the WAPT. It applies the "revenue cap" method of regulation, in which the regulator calculates allowed revenues for a defined regulatory period in order to allow distribution companies to cover reasonable costs associated with their distribution activities and earn a reasonable return on their capital investment.[241]

277. The 2014 Methodology sets and adjusts the distribution tariff based on the justified "reasonable and fair" distribution costs and then dividing them by the volume of distributed electricity. The Distribution Tariff derives from dividing the allowed revenues for distribution companies by their forecasted sales according to voltage levels over the required period.[242] If the volume increases, then the Distribution Tariff, and in turn the Consumer Tariff, will decrease; and *vice versa*. It treats the cost of electricity as a pass-through cost recovered in full through the Consumer Tariff, whereas the 2013 Memorandum ties the adjustment of the WAPT to Gross Revenue, which is inherently sensitive to volumes. In other words, the 2014 Methodology takes

[239] Respondent's Counter-Memorial, ¶ 170; Milorava I, ¶ 33.

[240] 2014 Methodology, CL-0084; NERC Hearing No. 30 Minutes, R-0042, p. 1.

[241] Respondents' Counter-Memorial, ¶ 175.

[242] Moselle I, ¶ 5.11(b).

volumes of electricity into account through the distribution tariff, whereas the 2013 Memorandum takes volumes into account through the consumer tariff.

1. The Relevant Provisions of the 2014 Methodology

278. The relevant provisions of the 2014 Methodology provide as follows:

> *Article 3*
>
> *Main Principles*
>
> *1. This Methodology and the tariffs set on its bases*
>
> *a. protect consumers from the monopolistic prices;*
>
> *b. stimulate utility to increase its efficiency via optimization of its costs with the requirement not to decrease quality of service standards and technical conditions of the utility;*
>
> *c. support the increase of the utility's' returns by means of increased operational and management efficiency;*
>
> *d. support the stable and reliable functioning of the utility;*
>
> *e. ensure that tariffs are transparent, stable and fair for the utility;*
>
> *f. reflect the state policy with regard to discount tariffs, provided that none of the consumers categories shall receive a discount tariff subsidized by licensee, importer, market operator or any other category;*
>
> *g. reflect different costs between the different consumer categories;*
>
> *h. cover costs of the utility with funds received from each consumer category in proportion to costs incurred for servicing this consumer category.*
>
> *...*

279. The 2014 Methodology distinguishes between controllable operational expenses ("**OPEX**") and non-controllable OPEX, and incorporates efficiency incentives for controllable OPEX:[243]

> *4. For calculation controllable operational costs "incentive regulation" principle is used, which implies setting up incentives to optimize utility's costs. Controllable operational costs audit is carried out before regulatory period and costs changes are made during tariff regulatory period accordingly to this methodology.*

[243] 2014 Methodology, CL-0084, Arts. 3(4), 4; Respondents' Counter-Memorial, ¶ 176: The Respondents say this OPEX distinction encouraged distribution companies to reduce their costs so as to increase their profits.

> ...
>
> *Article 4*
>
> *Tariff regulatory and tariff setting period*
>
> *1. Based on this methodology tariff regulation period is determined individually for specific utilities.*
>
> *2. Commission sets tariff regulatory period for each year according to the terms and conditions of this methodology.*
>
> *3. The Commission sets for the whole tariff regulatory period the basic components of the Weighted Average Cost of Capital (WACC) and fixed rate for the efficiency factor (X-factor).*
>
> *4. Tariffs are set annually by the Commission during tariff regulatory period, and it is valid from 1 January to 31 December, except for the circumstances set forth in Paragraph 4 of Article 23 of this Methodology.*

280. Distribution companies' permitted revenues are calculated as the sum of OPEX, capital expenses ("**CAPEX**"), a normative allowance for electricity losses in the distribution network, and a correction factor:[244]

> *CHAPTER II*
>
> *CALCULATION OF THE REGULATORY COSTS*
>
> *Article 5*
> *Regulatory Cost Base for the Tariff Year*
>
> *Regulatory Cost Base for the tariff year is calculated according to the following formula:*
>
> $$RCB_{(t+1)} = CAPEX_{(t+1)} + cOPEX_{(t+1)} + ncOPEX_{(t+1)} + CNL_{(t+1)} + CORR_{(t+1)} \quad (1)$$
>
> *where,*
>
> *RCB(t+1) - Regulatory Cost Base for the tariff year (GEL);*
>
> *CAPEX(t+1) - Capital Expenses for the tariff year (GEL);*
>
> *cOPEX(t+1) - Controllable Operational Expenses for the tariff year (GEL);*
>
> *ncOPEX(t+1) - Non-controllable Operational Expenses for the tariff year (GEL);*

[244] 2014 Methodology, CL-0084, Art. 5; *see e.g.*, Moselle I, ¶ 5.14.

CNL(t+1) - Cost of Normative Losses in distribution networks for the tariff year (GEL);

CORR(t+1) - Cost correction factor, which provides the reflection of the difference between factual and planned costs of Tariff Year in the Regulatory Cost Base of the Tariff Year, and also received income from non-operational activity envisaged in the subparagraph "e" of paragraph 1 of Article 19 of this Methodology, based on the principles defined in this Methodology (GEL).

281. The NERC determines CAPEX as the sum of the annual depreciation on fixed assets and a return on capital, which is calculated by multiplying the Regulated Asset Base ("**RAB**") in GEL by the rate of return on the RAB using the Weighted Average Cost of Capital ("**WACC**") method:[245]

Article 6

Capital Expenses

Capital Expenses for the Tariff Year are calculated according to the following formula:

$$CAPEX_{(t+1)} = RAB_{(t+1)} * WACC + D_{(t+1)}$$

where,

CAPEX(t+1) - Capital Expenses for the tariff year (GEL);

RAB(t+1) - Regulated Assets Base for the tariff year (GEL);

WACC - Rate of return on the RAB for the tariff regulatory period (%);

D(t+1) - Annual depreciation for the tariff year (GEL).

CHAPTER III

TARIFF CALCULATION

DISTRIBUTION, PASS THROUGH AND CONSUMPTION TARIFF CALCULATION

Article 15

Electricity Distribution and Pass through Tariffs

1. For the distribution licensee, distribution and pass through tariffs are set for distribution and pass through activities.

[245] 2014 Methodology, CL-0084, Arts. 6, 15.

2. Electricity Distribution and Pass through Tariffs are set according to the following voltage levels:

a. on 0.2-0.4 kV;

b. on 3.3-6-10 kV;

c. on 35-1110 kV.

3. Electricity distribution tariffs for each voltage level are calculated according to the following formula:

$$T_{i\,Distrib} = \frac{RCB_{i\,(t+1)}}{E_{i\,Distrib(t+1)}} * 100 \qquad (10)$$

where,

Ti Distrib - distribution tariff for i-voltage level (tetri/kWh);

RCB i(t+1) - Regulated Cost Base of the entity for the tariff year of the tariff regulatory period, allocated to i-voltage level according to this Methodology (GEL);

Ei Distrib(t+1) - Sum of forecasted amounts of electricity distributed and passed through the distribution network for the tariff year according to the each i-voltage level (kWh);

I - Corresponding voltage level of the electricity distribution network.

4. Pass through tariff equals to the distribution tariff.

282. The Consumer Tariff paid by end users is calculated as the sum of the WAPT (which covers the cost of electricity and related costs) and the Distribution Tariff:[246]

Article 16

Electricity Consumption Tariff

1. Electricity consumption tariff includes costs related to the electricity purchase and distribution.

2. Electricity consumption tariff is set for each voltage level of the distribution network; it is based on principles of this Methodology and this article and is calculated according to the following formula:

$$T_{i\,Consum(t+1)} = P_{ave(t+1)} + T_{i\,Distrib\,(t+1)} \qquad (11)$$

[246] *Ibid*., Arts. 16-17, 20, 23-26.

where,

Ti Consum(t+1) - Electricity consumption tariff for i-voltage level of the distribution network for the tariff year (tetri/kWh);

Ti distrib - Electricity distribution tariff for i-voltage level of the distribution network for the tariff year (tetri/kWh);

Pave(t+1) - forecasted weighted average price of the electricity to be purchased in the tariff year by distribution licensee, which includes all costs of purchasing according to the legislation (tetri/kWh);

i - Corresponding voltage level of the electricity distribution network.

Article 17

Amount of Electricity and Weighted Average Price of Purchase

1. While calculating the tariffs the Commission utilizes the actual amounts of purchased and distributed electricity during the test year, considering the consumption dynamics in the sector and/or the Electricity (Capacity) forecasted balance approved for Tariff Year during tariff calculation year.

2. The utility is obliged to submit the possible amount and price of the electricity to be purchased from particular sources according to paragraph 1 of this article, for the purpose of determining weighted average price of the electricity to be purchased in the tariff year by distribution licensee; also other forecasted costs related to electricity purchase, such as transmission, dispatch service and purchasing the guaranteed capacity. Based on submitted information the Commission sets Weighted Average Price for Purchased Electricity by the utility.

3. Based on submitted information the Commission sets Weighted Average Price for Purchased Electricity by the utility for tariff year according to the following formula:

$$P_{aver(t+1)}=\frac{COSTE(t+1)+COSTGC(t+1)+COSTT(t+1)+COSTD(t+1)+CORR\ El.(t+1)}{E\ Receiv.(t+1)}*100 \quad (12)$$

Where,

P aver(t+1) - Weighted Average Price for electricity to be purchased for tariff year by the utility (tetri/kWh);

COSTE(t+1) - Total forecasted cost of electricity to be purchased by the utility for the tariff year (GEL);

COSTGC(t+1) - Total forecasted cost of guaranteed capacity fee for tariff year (GEL);

COSTT(t+1) - Total forecasted cost of transmission service provided by transmission licensees (GEL);

COSTD(t+1) - Total forecasted cost of dispatch service provided by dispatch licensee (GEL);

CORR El.(t+1) - Electricity Purchase Correction Factor, which ensures the reflection of the difference between planned and actual costs related to the Electricity purchase for Tariff Year;

E Receiv. (t+1) - Forecasted amount of electricity received (metered) on the delivery points of the utility for the tariff year (kWh).

…

Article 20

Correction of Capital Costs

1. If factual value of investment made by the utility differs from the planned investment value, then the tariff correction is carried out according to the Paragraph 2 of this Article, taking into consideration the principles described in the Article 7 of this methodology.

2. Correction of Capital Costs for the difference received from the investment amount is calculated according to the following formula:

$$cRRAB_{(t+1)} = [(aRAB_{(t-1)} - pRAB_{(t-1)}) \times WACC_{(t-1)}] \times (1 + WACC_{(t-1)}) \times (1 + WACC_{t}) \quad (14),$$

Where:

cRRAB(t+1) - *Corrected cost or the return for (t+1) period (GEL);*

aRAB(t–1) - *Factual cost of RAB for (t-1) period (GEL);*

pRAB(t–1) - *Planned cost of RAB for (t-1) period (GEL);*

WACC - *Rate of time value of money, which is equal to WACC (%).*

$$cD_{(t+1)} = (aD_{(t-1)} - pD_{(t-1)}) \times (1 + WACC_{(t-1)}) \times (1 + WACC_{t}) \quad (15),$$

cD(t+1) - *Corrected cost of Annual depreciation for t+1) period (GEL);*

aD(t–1) - *Factual cost of Annual depreciation for (t-1) period (GEL);*

pD(t–1) - *Planned cost of Annual depreciation for (t-1) period (GEL);*

WACC - *Rate of time value of money, which is equal to WACC (%).*

…

Article 23

Correction of Weighted Average Price of Electricity Purchase

1. If factual weighted average price of purchased electricity differs from the planned price in the tariff year, the Commission shall make correction of Electricity Consumption Tariff for the next tariff year by the difference of factual and planned price of electricity purchase using the principle of the time value of money envisaged in this Methodology.

2. The Correction of Weighted Average Price of Electricity Purchase is based on the following factors:

a. amount and cost of purchased electricity;

b. cost of purchased guaranteed capacity, electricity transmission and dispatch service.

3. The Correction of Weighted Average Price of Electricity Purchase is made in case the change between factual and planned data is not due to the utility.

4. The Commission is authorized to make correction of Electricity Consumption Tariff which was calculated based on this Methodology and set for the Tariff year by Weighted Average Price of Electricity Purchase only once in this Tariff Year.

CHAPTER V

TARIFF SETTING AND APPLICATION SUBMISSION PROCEDURES

Article 24

Accounting and Reporting

1. For regulatory purposes the utility is obligated to carry out its accounting and reporting based on the Unified System of Accounts (USOA) according to the current legislation.

2. If utility carries out more than one regulated activity as well as non–regulated activity, it is obligated to account its revenues, costs and financial results separately for each regulated activity.

3. The utility should submit information about fixed assets created from customer financial sources separately according to the conditions of this Methodology.

Article 25

Required Documents for Tariff Calculation

1. The utility has to submit tariff application to the Commission for the purpose of tariff setting for the tariff calculation period.

2. Tariff application and data templates, also the list of documentation to be filled with tariff application is determined according to the individual legal-administrative act of the Commission.

3. Together with tariff application the utility must submit the following audited documentation complied with IFRS:

a. balance sheet

b. Profit and Loss Statement

c. Cash Flow Statement

4. The Commission is authorized to request from the utility other additional information which it finds appropriate.

5. The responsibility on the accuracy of the information contained in the tariff application lies on the party submitting the application.

Article 26

Tariff Setting Timeline and Procedures

1. The utility should submit tariff application to the Commission no later than 150 days prior to expiry date of the tariff period.

2. The Commission reviews the tariff application for compliance and completeness within three days upon submission.

3. If the Commission finds tariff application incomplete or it does not correspond with the approved form, it sets the deadline in written form of no more than 45 days for amending this. This period shall be extended only once at the request of the applicant, for no more than 15 days.

4. If the tariff application is not submitted in time defined in paragraph 3 of this Article, it remains unconsidered according to the decision of the Commission. If unconsidered tariff application was submitted due to legislation (due to expiration of regulatory period), sanctions shall be imposed on the company in accordance with the law.

5. The Commission is authorized to make a relevant decision and review the utility's tariffs on its own initiative. In this case the provisions of submitting necessary information and documentations are determined by the decisions by the Commission.

6. Upon acceptance of properly submitted application and in case of paragraph 5 of this Article, the Commission starts public administrative proceedings and the notice shall be published on the Commission web site.

7. Tariff application is reviewed according to public administrative proceeding rule under Georgian legislation. Therefore, tariff application and enclosed documents (except for Personal information relating to identifiable entities, as well as commercially confidential information considered by the Commission) are public and shall be available to any interested party.

8. All the interested parties are authorized to get familiar with materials presented to the Commission and provide their comments.

9. Comments on the tariff application shall be submitted in written form and shall include justified arguments. In addition, the interested party is entitled not to indicate his identity while submitting own comments. The copy of the comments shall be sent to the provider of the tariff application and comments shall be discussed on the public hearing of tariff application.

10. The Commission is authorized to request additional information or different types of conclusions from the utility while reviewing tariff application.

11. In the process of reviewing the tariff application before reaching the final decision, the Commission is authorized to organize meetings and/or public hearings for the review of the tariff application.

> *12. Applicant shall be notified about the time and venue of the public hearing seven days in advance.*[247]

283. The Parties' positions diverge as to the Claimants' awareness at the time the 2013 Memorandum was signed in March 2013 as to whether the NERC would adopt and apply the 2014 Methodology to Telasi's and the Khrami Companies' tariffs, rather than the provisions of the 2013 Memorandum. The Tribunal assesses the Parties' arguments in this regard under the Merits section, below.

O. 2014: The Non-Adjustment of Telasi's Tariffs for alleged WAPT-Based Losses

284. From September 2014 until 27 December 2017, Telasi applied for increases to its Consumer Tariffs pursuant to the 2013 Memorandum. The following summarises the chronology of the principal relevant exchanges between Inter RAO and the MOE and the NERC during this period.

285. On 12 and 18 September 2014, Inter RAO and Telasi lodged their first complaint with the MOE that Telasi's WAPT during 2013-2014 energy year (September 2013-August 2014) was above the maximum threshold of 6.028 tetri/kWh set out in Clause 2.3.1 of the 2013 Memorandum.[248] Due to the alleged resulting revenue shortfall of GEL 1.4 million caused by its energy purchase costs, Telasi asked the MOE to order the NERC to set its Consumer Tariffs in accordance with the 2013 Memorandum, or develop a compensation mechanism.[249] Telasi also asked for compensation for losses relating to connecting new customers.[250]

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[247] Telasi did not specifically refer to an adjustment pursuant to Clause 2.3.2 of the 2013 Memorandum and Resolution No. 3. *See* C-0061.

[248] Letter from Volkov to Kaladze, dated 18 September 2014, C-0044. The 2013-2014 energy year ran from 1 September 2013 to 31 August 2014.

[249] Letter from Kobtsev to Kaladze, dated 12 September 2014, C-0042; Letter from Volkov to Kaladze, dated 18 September 2014, C-0044.

[250] Letter from Kobtsev to Kaladze, dated 12 September 2014, C-0043.

286. On 25 September 2014, Minister Kaladze, Inter RAO and Telasi met to discuss Telasi's request. On the same date, Inter RAO learned that Telasi's WAPT for September 2014 (2014-2015 energy year) was 7.56 tetri/kWh, and notified Minister Kaladze, reminding him of their earlier agreement on compensating Telasi's WAPT-based loss.[251] The Claimants say that to compensate Telasi for its GEL 1.4 million loss in the 2013-2014 energy year, Minister Kaladze agreed to decrease Telasi's WAPT for the September-December 2014 period.[252]

287. Minister Kaladze asked Deputy Minister of Energy, Ms. Valishvili, to consider the issues raised by Inter RAO and Telasi's letters regarding the WAPT.[253] Ms. Valishvili says that in order to assess whether Telasi was entitled to a WAPT-based adjustment under Clause 2.3.2 or offer another form of compensation, the MOE had to assess the impact of the increase in Telasi's WAPT beyond the 6.028 tetri/kWh threshold in light of Telasi's overall financial performance as reflected in its independently audited reports.[254] Given that the audit report for the 2013-2014 energy year would not become available until the second quarter of 2015, Ms. Valishvili says that she could not have determined whether Telasi was entitled to compensation for its actual WAPT exceeding the maximum WAPT of 6.028 tetri/kWh before that time. Ms. Valishvili considered that it would be more expedient to ensure that Telasi's WAPT in the September-December 2014 period would be such as to offset any excess WAPT during the 2013-2014 energy year. She says that this could be

[251] Letter from Volkov to Kaladze, dated 23 October 2014, C-0046; Markov I, ¶¶ 40-42.

[252] Markov I, ¶ 42; *see* mention of this agreement in Letter from Volkov to Kaladze, dated 23 October 2014, C-0046; *see also*, Inter RAO's note on negotiating position, dated 26 May 2015, C-0059. The Claimants say that the Parties were aware that this commercial resolution was not what was contemplated by the terms of the WAPT-based adjustment at Clause 2.3.2 of the 2013 Memorandum. Nevertheless, because Inter RAO and Telasi were aware that it would be politically difficult for the Government to justify an increase to Consumer Tariffs, the parties were willing to entertain alternative means of compensation: Claimants' Memorial, fn 216.

[253] Valishvili I, ¶ 38; Respondents' Counter-Memorial, ¶ 179.

[254] Valishvili I, ¶¶ 38-39.

achieved by ensuring that Telasi would receive cheaper energy available on the market.[255] She shared this assessment with Minister Kaladze, who then discussed it with Inter RAO's Chairman, Mr. Kovalchuk, at the 25 September 2014 meeting.[256] Minister Kaladze informed Ms. Valishvili that Inter RAO was agreeable to this proposal.

288. On 23 October 2014, Inter RAO wrote to Minister Kaladze, requesting information about the measures that he had taken to ensure that Telasi's WAPT would be lower going forward.[257] At a meeting on 24 October 2014, Ms. Valishvili met with representatives of Inter RAO and Telasi to discuss the evolution of Telasi's WAPT. Ms. Valishvili says she reiterated that the MOE would try to ensure that Telasi's WAPT would be lower going forward so as to offset a deficit. She noted that Telasi had made savings on its WAPT prior to August 2013 (the 2012-2013 energy year), and that this should also be taken into account in assessing whether Telasi's overall average WAPT remained below the 6.028 tetri/kWh threshold.[258] The MOE therefore took the position that Georgia had no obligation to compensate Telasi for the WAPT-based losses in the 2013-2014 energy year, because it had previously earned a profit that should be offset against these losses.[259] Inter RAO's position was that the previous energy year was irrelevant to any assessment of Telasi's WAPT going forward.

289. On 28 October 2014, Inter RAO wrote to Minister Kaladze (who had not attended the 24 October meeting), requesting a meeting and advising him of the position taken by the MOE.[260] On

[255] *Id.*, ¶ 39.

[256] *Id.*, ¶ 40.

[257] Letter from Volkov to Kaladze, dated 23 October 2014, C-0046.

[258] Valishvili I, ¶ 42.

[259] Report on meeting with MOE re 2013 Memorandum performance, dated 24 October 2014, C-0047; Markov I, ¶¶ 41-42.

[260] Letter from Volkov to Kaladze, dated 28 October 2014, C-0048.

7 November 2014, Inter RAO met directly with Minister Kaladze, and, according to the Claimants, their discussion proceeded as follows:

- Minister Kaladze agreed to compensate the GEL 1.4 million shortfall by 31 August 2015 (rather than by the end of 2014, as previously agreed). Ms. Valishvili says Minister Kaladze explained to Inter RAO that, given the high price of electricity in the October-December 2014 period, it was difficult to adjust Telasi's WAPT to ensure break-even results by the end of 2014, but agreed to try to do so by the end of the 2014-2015 energy year (31 August 2015).[261]
- Telasi agreed to inform the MOE of its monthly actual WAPT until 2016, and the corresponding compensation it received through the NERC's reduction of its WAPT.[262]
- Inter RAO repeated that its WAPT for the 2014-2015 energy year (September to November 2014) was already above the 6.028 tetri/kWh threshold.
- The parties agreed that the cost of connecting new customers to Telasi's network would be "break-even" until a plan was developed by 5 December 2014.[263]

290. On 11 December 2014, the MOE, Inter RAO and Telasi met to discuss the alleged losses in connecting new customers and the depreciation of the GEL in 2014.[264]

291. The Parties' discussions continued throughout 2015, with no resolution.[265]

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[261] *Ibid*.; Valishvili I, ¶ 43.

[262] *See e.g.* Letter from Volkov to Kaladze, dated 23 October 2014, C-0046; Letter from Volkov to Kaladze, dated 11 November 2014, C-0049; Letter from Kobtsev (Telasi) to Kaladze (MOE), dated 1 December 2014, C-0050; Letter from Volkov to Kaladze, dated 10 December 2014, C-0051.

[263] Letter from Volkov to Kaladze, 11 November 2014, C-0049; Markov I, ¶ 44.

[264] Report on meeting at MOE on compensation for losses from new connections, 11 December 2014, C-0052; Markov I, ¶¶ 45-46.

[265] *See e.g.*, Letter from Volkov to Kaladze, dated 23 April 2015, C-0058; Inter RAO note on negotiating position, 26 May 2015, C-0059; Markov I, ¶ 50.

292. On 27 May 2015, Telasi's audited financial statements for 2014 were approved at Telasi's General Meeting of Shareholders and Telasi resolved to distribute GEL 8.8 million in dividends to its shareholders.[266]

1. The 2015 Tariff Review Process

293. By July 2015, the Claimants say Telasi was experiencing financial difficulties due to its increasing WAPT, and an "expected across-the-board increase to generation tariffs in Georgia, which would further increase Telasi's WAPT-based losses". On 14 July 2015, Telasi asked the NERC to adjust its Consumer Tariffs to reflect the projected increased cost of purchasing electricity, warning that the absence of a "compensatory mechanism" would lead to Telasi's bankruptcy.[267] Telasi's request read as follows:

> Ms. Milorava,
>
> In view of the projected increase in the electricity generation tariffs of thermal power plants in 2015, as well as the already existing increase in the value of the electricity transmission service, the financial standing of JSC Telasi will become extremely complicated which will, unfortunately, inevitably lead to the bankruptcy of the company in the absence of a compensatory mechanism. Moreover, this situation will have a materially adverse impact on all the participants of the Georgian energy sector from whom JSC Telasi purchases services and electricity (capacity).
>
> In order to stabilize the functioning of the company, we hereby request that you take into account the increase in the expenses to be borne to purchase electricity, as well as the increase in the transmission service tariffs, and that you correct the consumer (end-user) tariffs in respect of electricity purchase. We kindly ask you to provide compensation from the date when the value of the said components of the expenses of JSC Telasi increased.
>
> Moreover, please be advised that the company does not consider the increase of its own operating expenses (which are included in the electricity distribution tariff).
>
> Respectfully,

[266] Minutes of Telasi's Annual General Meeting, 27 May 2015, C-0060.

[267] Claimants' Memorial, ¶¶ 102-103; Letter from Kobtsev to Milorava, dated 14 July 2015, C-0061.

294. The next day, the NERC replied that it could not adjust Telasi's Consumer Tariffs.[268] It confirmed that Article 23 of the 2014 Methodology allowed for the adjustment of the WAPT of Telasi's electricity, but noted that it could not adjust Telasi's WAPT pursuant to that provision without having first calculated Telasi's tariffs in accordance with the 2014 Methodology (since Telasi's tariffs at that time were still those set pursuant to the 2013 Memorandum and NERC Resolution No. 3). The NERC stated that the only way it could make such an adjustment was if Telasi submitted a formal adjustment application in accordance with the 2014 Methodology, which would require it to ask the NERC to first set its tariffs according to the 2014 Methodology. Until Telasi brought itself within the 2014 Methodology framework, the NERC's position was that it "lack[ed] legal grounds" to review and adjust Telasi's Consumer Tariff because its authority to adjust such tariffs derived exclusively from the 2014 Methodology.[269] The NERC's letter records as follows:[270]

[268] Letter from Milorava to Kobtsev, dated 15 July 2015, C-0062.

[269] Letter from Milorava to Kobtsev, dated 15 July 2015, C-0062.

[270] *Ibid*.

In response to your letter #0714/351 of 14 July 2015, we hereby clarify the following:

Article 23 of the Methodology for Calculating the Tariffs for the Distribution, Pass-Through and Consumption of Electricity, approved by Decree No. 14 of the Georgian National Energy and Water Supply Regulatory Commission, dated 30 July 2014, allows for the adjustment of the weighted average purchase price of electricity. However, pursuant to Clause 4 of the same article, the said adjustment only pertains to the electricity consumption tariff which was calculated and established on the basis of the same Methodology.

Due to the fact that JSC Telasi has not submitted a relevant tariff application and the Commission has not set the electricity distribution, pass-through and consumption tariffs for JSC Telasi after the Methodology for Calculating the Tariffs for the Distribution, Pass-Through and Consumption of Electricity, approved by Decree No. 14 of the Commission, dated 30 July 2014, came into effect, the Georgian National Energy and Water Supply Regulatory Commission lacks any legal grounds to review and adjust the consumption tariff only in respect of electricity purchase.

Thus, the electricity distribution, pass-through and consumption tariffs will be set in the event that JSC Telasi submits a complete tariff application and relevant documentation (both as hard copies and in electronic form) in the form approved by Resolution No. 29/1 of the Commission, dated 7 August 2014. Moreover, each page of the tariff application submitted as a hard copy shall be signed by the person authorized to represent the company.

295. On 21 July 2015, the MOE and Inter RAO met to discuss the NERC's response to Telasi's request for a WAPT-based adjustment to its Consumer Tariffs. The Claimants say that Minister Kaladze confirmed that Telasi's rights under the 2013 Memorandum would not be affected if it filed a tariff application under the 2014 Methodology.[271] The same day, Telasi wrote to Minister Kaladze to confirm its understanding that the application of the 2013 Memorandum would not be cancelled if it filed the tariff application under the 2014 Methodology, and noted that the NERC's recent increase to generation tariffs in Georgia would increase Telasi's WAPT for the 2014-2015 energy year by 2.8% and in the 2015-2016 energy year by 49.5%.[272] Telasi also reiterated that it had GEL 1.4 million in WAPT-based losses in the 2013-2014 energy year, and GEL 4.2 million so far in the 2014-2015 energy year (September-July 2014). Telasi's letter to Minister Kaladze read as follows:[273]

[271] Markov I, ¶ 54; Claimants' Memorial, ¶ 105.

[272] Letter from Kobtsev to Kaladze, dated 21 July 2015, C-0063.

[273] *Ibid*.

Mr. Kaladze,

Since 20 June 2007, cooperation between the Government of Georgia and INTER RAO (and Group companies) was based on the Memorandum on the Development of Cooperation in the Electric Power Sector and the Implementation of Previous Agreements. The Memoranda successively superseded one another, while the continuity (succession) of mutual obligations was preserved. At present, the fourth Memorandum executed on 31 March 2013 is in force.

As per Clause 2.3.1. of the said Memorandum, the annual electricity purchase portfolio of Telasi under direct contracts with generating companies and ESCO (Electricity Market Operator) shall be formed with the Average Weighted Tariff not exceeding 6.028 tetri/kWh. Moreover, as per Appendix 1 to the Memorandum, in addition to the electricity cost under the contracts, the Average Weighted Purchase Tariff shall include the "components of import, reserve, loss in the electricity system (except for the networks of Telasi JSC), transmission costs, transit, dispatch."

To the best of our knowledge, in July 2015, GNERC adopted a resolution on the increase of electricity tariffs for heat generators as of 01 September 2015 (on or around 22 July 2015). As of 01 April 2015, the tariff for electricity transmission through the networks of Georgian State Electrosystem has been already increased by 0.28 tetri/kWh. The cost of electricity purchase from the Commercial Operator has increased as well.

These resolutions will definitely result in the increase of the threshold level of the Average Weighted Tariff in 2014-2015 and 2015- 2016 energy years by 2.8% and 49.5% respectively. Thus, the Georgian counterparty will be in material breach of Clause 2.3.1. of the Memorandum.

As per Clause 2.3.2 of the Memorandum, in the event that the Average Weighted Purchase Tariff of electricity exceeds the threshold level (6.028 tetri/kWh), the Consumer Tariff shall be increased simultaneously.

It is hereby requested that you adopt a resolution on the increase of the Consumer Tariff as per the Memorandum of 31 March 2015 [sic] at the same time as adopting the resolutions on the increase of the cost of components of the Average Weighted Purchase Tariff of Telasi.

Moreover, we draw your attention to the following:

1. *In 2013- 2014 energy year, the threshold level of the Average Weighted Tariff was exceeded and amounted to 6.091 tetri/kWh. This resulted in additional expenses for Telasi in the amount of GEL 1.408 million which is also subject to compensation as per the Memorandum of 31 March 2015 [sic].*

2. *In 2014- 2015 energy year, the threshold level of the Average Weighted Tariff for 10 months amounted to 6.23 tetri/kWh. This resulted in additional expenses for Telasi in the amount of GEL 4.2 million which is also subject to compensation as per the Memorandum of 31 March 2015 [sic].*

In addition, please be advised that Telasi is not planning to increase its own operating expenses which will remain at the level of Conditionally Fixed Costs envisaged in the Memorandum of 31 March 2015 [sic].

> *Telasi referred this matter to GNERC by letter No. 0714/351 of 14 July 2015 in response to which we received letter No. l/03-6/795-4554 of 15 July 2015. Based on the response of GNCERC, in order for the matter of the increase of the Consumer Tariff of Telasi to be considered, it is necessary for Telasi to submit a tariff application In this connection, please confirm that the submission of the application to GNERC by us does not cancel the application of the Memorandum of 3l March 2013 executed between the Government of Georgia, INTER RAO and the Group companies.*

296. On the same day, Minister Kaladze replied that Telasi's application would not affect its rights under the 2013 Memorandum:[274]

> To the Director General of Telasi JSC,
> S. Kobtsev
>
> In response to your letter dated July 21, 2015, No. 0721/009, we advise you that submitting an application to the LEPL National Energy and Water Supply Regulatory Commission (NERC) does not cancel the Memorandum between the Government of Georgia, Inter RAO and the companies of the Group dated March 31, 2013.
>
> Kakha Kaladze
>
> Minister
>
> MINISTRY OF ENERGY AND NATURAL RESOURCES

297. Based on Minister Kaladze's 21 July 2015 letter and Telasi's alleged financial difficulties due to the rising WAPT and Generation Tariffs, on 23 July 2015, Telasi submitted a tariff application to the NERC for an upward adjustment to its Consumer Tariffs in the format prescribed by the 2014 Methodology.[275] The Claimants note that Telasi's application was based on adjustments required for each individual tariff, and not its overall profitability compared with the forecasts included in Appendix 2 of the 2013 Memorandum.[276]

298. The NERC then initiated proceedings to review Telasi's tariffs, which involved consultations and correspondence with interested parties, including Telasi.[277] On 26 August 2015, Telasi wrote to the NERC in respect of its tariff application. Telasi stated that while its vision and that of the NERC

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[274] Letter from Kaladze to Kobtsev, dated 21 July 2015, C-0064.

[275] Application from Kobtsev to Milorava, datd 23 July 2015, C-0065.

[276] Claimants' Reply, ¶ 81.

[277] Milorava I, ¶ 39.

coincided on most issues, it went on to raise a number of issues and recalled that it had outstanding claims for reimbursements related to the 2013-2014 and 2014-2015 energy years. It also raised the issue of the expected increase in energy procurement costs due to the increase in tariffs from generating companies. Telasi also drew to the NERC's attention the requirement that under the 2013 Memorandum its tariff decisions must not worsen the economic standing of Telasi.[278]

299. On 27 August 2015, the NERC held a public hearing to discuss the approval of Telasi's investment plan for the 2015-2016 energy year in advance of issuing preliminary calculations of Telasi's Consumer and Distribution Tariffs.[279] Telasi's Deputy Commercial Director, Mr. Misha Antadze, and other Telasi representatives attended this meeting.[280] At the meeting the NERC discussed Telasi's investment plan for 2015-2016 submitted with its tariff application and adopted certain decisions regarding the adoption of the plan and how investment projects would be handled in setting Telasi's tariffs.

2. September 2015 NERC Resolution No. 26: First Application of the 2014 Methodology to Telasi's Consumer and Distribution Tariffs

300. On 3 September 2015, the NERC established Telasi's new Consumer and Distribution Tariffs pursuant to the 2014 Methodology, as opposed to the 2013 Memorandum ("**NERC Resolution No. 26**").[281] The Resolution was issued at a public hearing convened by the NERC, at which its decision and calculations were explained. The hearing was attended by Telasi's Mr.

[278] Letter from Kobtsev to Milorava, dated 26 August 2015, R-0044.

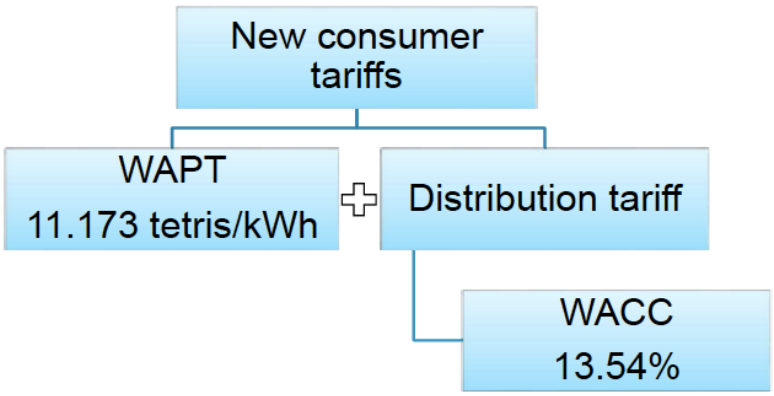
[279] NERC Hearing No. 49 Minutes, dated 27 August 2015, R-0045.

[280] *Ibid.*, p. 1.

[281] NERC Resolution No. 26 on Amendments to NERC Resolution No. 33 dated 4 December 2008, dated 3 September 2015 ("**NERC Resolution No. 26**"), CL-0085; NERC Hearing No. 51 minutes, dated 3 September 2015, R-0046. The Head of the NERC's Tariffs and Economic Analysis Department, Mr. Sanikidze presented the tariff review process and of the NERC's calculation of the different cost components of Telasi's Consumer and Distribution tariffs (pp. 4-51).

Antadze and several other representatives from Telasi. While Mr. Antadze raised some questions and some disagreements with the NERC's calculations, there is no record that Telasi complains about the application of the 2014 Methodology.[282]

301. The new tariffs included a 30% increase to Telasi's Consumer Tariffs, as follows:[283]



302. NERC Resolution No. 26 increased Telasi's WAPT, while decreasing its Distribution Tariffs, which resulted in an overall 30% increase in Telasi's Consumer Tariffs.[284] The Claimants say that the 30% increase to Telasi's Consumer Tariffs was not sufficient to compensate Telasi for its increasing WAPT because it resulted in the Distribution Tariffs being lower than the rates fixed by the 2013 Memorandum.[285] Although the issue was not raised at the time, the Respondents now say that under the terms of the 2013 Memorandum, Telasi was not entitled to a tariff adjustment due to the tariff freeze in Clause 2.2.3. However, in view of the conditions described in Telasi's letter of 14 July 2015, referring to the possible bankruptcy of the company, the NERC had granted a tariff revision under the 2014 Methodology, which they say was properly applied. The Respondents say

[282] NERC Resolution No. 26, CL-0085; NERC Hearing No. 51 minutes, dated 3 September 2015, R-0046, pp. 56-60.

[283] Respondents' Opening Presentation, slide 115; Tr. Day 1, 258-259.

[284] NERC Resolution No. 26, CL-0085; Milorava I, ¶ 45.

[285] Claimants' Memorial, ¶ 108; Markov I, ¶¶ 56-57.

that the Claimants were happy with the tariff adjustment and only complained sometime later.[286] The Respondents note that in Inter RAO's 2015 Annual Report, Telasi reported a 42% increase in revenues "due to growth in electricity sales by increasing the level of consumption and the increase of sales tariffs" as of September 2015.[287] According to the Respondents, from March 2013 to December 2015, Telasi had accumulated a Target Investment Allowance of GEL 54.3 million, GEL 23.3 million of which was generated in 2015 alone despite an expected GRD of GEL 10.74 million.[288]

303. The Claimants say that they were not satisfied with the application of the 2014 Methodology or the tariffs set by the NERC in its Resolution No. 3. Rather, they complained on various occasions and emphasized the need to set Telasi's tariffs in accordance with the 2013 Memorandum.[289]

304. The following table provided by the Claimants shows the difference between what were the Distribution Tariffs prescribed under the 2013 Memorandum and NERC Resolution No. 3 *versus* those which the NERC fixed pursuant to the 2014 Methodology and Resolution No. 26:[290]

[286] Tr. Day 1 (Respondents' Opening Statement), 255-260; NERC Hearing No. 51 minutes, dated 3 September 2015, R-0046, pp. 5-6.

[287] Inter RAO Annual Report 2015, R-0047, p. 72.

[288] Respondents' Counter-Memorial, ¶ 201; 2013 Memorandum, R-0028, Clause 2.1.10, Appendix 2.

[289] Claimants' Reply, ¶ 73 and the sources cited there.

[290] Claimants' Opening Presentation, Demonstrative No. 6; Tr. Day 1 (Claimants' Opening Statement), 45. The Respondents accept that the Distribution Tariffs was decreased but that the significant, unexpected increase in sales revenue compared to the volumes forecast at the time the of the 2013 Memorandum increased Telasi's Gross Revenue: Tr. Day 1, 258-259.

Voltage	Distribution Tariffs (tetri/kWh)	
	Resolution No 3 of 2013, Art 8 [CL-083]	Resolution No 26 of 2015, Art 8 [CL-085]
220/380 V (commercial consumers)	8.08	5.567
220/380 V (household consumers)	6.855	
6-10 kV	7.138	1.773
35-110 kV	1.8	0.705

305. NERC Resolution No. 26 also adjusted Telasi's Consumer Tariffs as follows:

> *Article 10. Limiting tariffs for the purchase of electricity by consumers of Telasi JSC:*
>
> *1. Limiting tariffs for the purchase of electricity by consumers of Telasi JSC by voltage steps:*
>
> *a) 220/380 V (non-domestic consumers) - 16.740 tetri/kWh;*
>
> *b) 3.3-6-10 kV - 12.946 tetri/kWh;*
>
> *c) 35-110 kV - 11.878 tetri/kWh.*
>
> *2. In order to create additional guarantees for social protection of the population and to promote the rational use of electricity for Telasi JSC customers, the limiting tariffs for the purchase of electricity with a voltage of 220/380V by the amount of electricity consumed (domestic consumers (population)), shall be as follows (in 30 calendar days):*
>
> *a) up to and including 101 kWh - 11.000 tetri/kWh;*
>
> *b) 101 to and including 301 kWh - 14.400 tetri/kWh;*
>
> *c) over 301 kWh - 18.200 tetri/kWh.*[291]

306. Although the 2014 Methodology initially fixed tariffs for one-year regulatory periods, Telasi's tariffs pursuant to the 2014 Methodology and Resolution No. 26 were set for 16 months (from September 2015 to 31 December 2016), in an attempt to ensure that Telasi would recover all of its costs, including the cost of purchasing electricity.[292]

[291] NERC Resolution No. 26, CL-0085, Art. 10.

[292] *Ibid.*; Milorava I, ¶ 45.

307. On 20 October 2015, Inter RAO wrote to Minister Kaladze that NERC Resolution No. 26 had "failed to take into account all [the 2013] Memorandum provisions" by fixing Telasi's tariffs pursuant to the 2014 Methodology.[293] Inter RAO also raised its previous complaints regarding grid connection charges for new subscribers and its claims for losses in energy years 2013-2014 and 2014-2015 relating to the failure to compensate Telasi for losses it incurred in energy years 2013-2014 and 2014-2015 resulting from the increase of its WAPT above the limit set in the 2013 Memorandum. Inter RAO requested consultations between the NERC and Telasi to be held under Minister Kaladze's direction "aimed at making the soonest and mutually beneficial decisions that will comply with the [2013] Memorandum terms".[294]

308. The Respondents say that Inter RAO's complaint came after the expiry of the period for filing an appeal against NERC Resolution No. 26.[295]

309. Telasi did not contest the legal basis of NERC Resolution No. 26 before the Georgian courts.[296]

310. On 3 November 2015, Minister Kaladze, Inter RAO (Mr. Kovalchuk) and the NERC (Ms. Milorava) met to discuss Telasi's claims for compensation for tariff years 2013-2014 and 2014-2015 and adjustment of Telasi's and the Khrami Companies' tariffs on the basis of GEL depreciation.[297] No agreement was reached by the Parties. On 8 December 2015, Inter RAO again complained to the MOE that no progress had been achieved, and requested another meeting.[298]

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[293] Letter from Volkov to Kaladze, dated 20 October 2015, p. 1, C-0066.

[294] *Id.*, p. 2.

[295] GACG, RL-0005, Art. 180.

[296] Milorava I, ¶ 46.

[297] Claimants' Memorial, ¶ 110; Meeting Agenda, dated 3 November 2015, C-0067.

[298] Letter from Volkov to Kaladze, dated 8 December 2015, C-0068; Markov I, ¶¶ 58-59.

311. On 15 December 2015, the MOE and Inter RAO met again to discuss the issues raised in Inter RAO's 20 October 2015 letter: Telasi's losses in 2013-2014 and 2014-2015 due to its high WAPT, losses from connecting new users and "[o]ther issues involving the activities of Telasi JSC".[299] According to Inter ROA's Mr. Markov, Minister Kaladze informed Inter RAO that the "indicative" RGR in the 2013 Memorandum was the ceiling on Telasi's permitted revenues and, as such, there was no loss to compensate since Telasi had earned revenue in excess of its Appendix 2 forecast in the 2013-2014 energy year.[300] Minister Kaladze also said that a potential connection fee increase would only apply to new commercial consumers.[301]

312. The Claimants say that this is the first time Minister Kaladze (or anyone at the MOE) informed Inter RAO that the "indicative" RGR set out in Annex 2 of the 2013 Memorandum constituted a ceiling on Telasi's permitted revenues, such that there was no loss to compensate for the previous energy years.[302] The Claimants complain that Minister Kaladze unexpectedly reversed his previous position that Telasi would be compensated for the rise in the WAPT. As discussed below, the Claimants' position is that Inter RAO and Telasi did not agree that the RGR would negate the tariff adjustment mechanisms set out in Clause 2.3 of the 2013 Memorandum, or that the forecast figure in Appendix 2 would serve as a cap on Telasi's revenue or profit. They say that there is no contemporaneous documentary support for the Respondents' position, which appears to be exclusively based on Mr. Bachiashvili's testimony that Inter RAO represented that it would not be seeking excessive levels of profit. [303]

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[299] Meeting Agenda, 15 December 2015, C-0069.

[300] Markov I, ¶ 61.

[301] Kobtsev I, ¶ 58.

[302] Letter from Volkov to Kaladze, dated 8 December 2015, C-0068; Letter from Volkov to Kaladze, dated 22 December 2015, C-0071; Markov I, ¶¶ 58-59, 61; Claimants' Memorial, ¶¶ 110-111.

[303] Mirsiyapov II, ¶ 87; Claimants' Reply, ¶ 63.

313. On 22 December 2015, Inter RAO again complained to the MOE, citing GEL 12.5 million in losses due to the WAPT rising above the 6.028 tetri/kWh threshold provided in the 2013 Memorandum.[304] Minister Kaladze replied on 6 January 2016 as follows:

> *Referring to the past meetings and previous correspondence, let me present our conclusions on the implementation status and events related to the Memorandum between the Government of Georgia and Inter RAO. You have repeatedly raised the issue of compensation for the electric energy procured by Telasi JSC; in the letter of December 22 you detailed the mechanisms for compensation of the so-called "lost" profit amounting to 12.5 mln GEL for 2013–2015.*
>
> *As per p. 2.3.2 of the Memorandum, in the event that the average weighted purchase tariff exceeds the ceiling level, specified in p. 2.3.1, the consumer tariff will be increased so that gross revenue of Telasi JSC remains unchanged.*
>
> *Moreover, Appendix No. 2 (Indicative performance indices of Telasi JSC) forms an integral part of the Memorandum, and during its validity period specifies a number of parameters, including a gross revenue.*
>
> *Telasi submitted the reports for 2013 and 2014 prepared by an independent auditor, covering the comparison between the actual parameters and the parameters set forth in the Memorandum. In accordance with the report, it is established that during the period under consideration, for two years the Company has received actual income of 228.676 thousand GEL instead of 194.012 thousand GEL, which is greater by 34.7 mln GEL compared to the specified figures. Please, see the table below:*

Indicators (without VAT)		2013	2013 (actual)	2014	2014 (actual)
Telasi JSC's RGR (without VAT)					
Infrastructural expenses (membership fees)	thousand GEL	1.598	993	1.632	1.131
Semi-fixed costs, including repairs	thousand GEL	71.083	71.083	67.751	67.751
Income tax	thousand GEL	1.034	9.490	0	1.168
Interest paid under loans	thousand GEL	2.423	1.781	2.034	1.570
Investments in the amount of depreciation	thousand GEL	12.314	9.542	13.112	8.223
Agreed investments in excess of depreciation	thousand GEL	0		0	3.471
Reserve profitability	thousand GEL	10.011	10.237	10.203	11.278
Total RGR (without VAT)	thousand GEL	98.462	103.126	94.732	94.592
Actual Telasi JSC's gross revenue (without VAT)					
Revenue excluding new connections	thousand GEL	246.165	250.380	250.875	275.438
Electric energy cost excluding Khrami return	thousand GEL	132.066	126.659	134.971	140.072
Return on investment to Khrami	thousand GEL	0	0	35.990	30.411
Total actual gross revenue (without VAT)	**thousand GEL**	**114.099**	**123.721**	**79.913**	**104.955**
TIA and GRG indicators excluding TIA allocation					
Target Investment Allowance	**thousand GEL**	**15.637**	**20.595**	**0**	**10.363**
RGR deficit	**thousand GEL**	**0**		**14.818**	**0**

> *In view of the above, I cannot agree with your reasoning of the short-received income and the issue of compensation. As to the data of 2015, a discussion will be possible only after Telasi submits a conclusion from an independent auditor for 2015… .*[305]

[304] Letter from Volkov to Kaladze, dated 22 December 2015, C-0071.

[305] Letter from Kaladze to Volkov, dated 6 January 2016, C-0072.

314. In sum, Minister Kaladze informed Telasi that its Consumer Tariffs were not entitled to a Clause 2.3.2 WAPT-based adjustment because tariffs would only be increased to the extent necessary to ensure that Telasi's GR matched the levels set out in Appendix 2 of the 2013 Memorandum.

315. Minister Kaladze's letter also stated that the cost of connecting new customers was Telasi's responsibility:

> *In respect of connection of new consumers mentioned in your letter, I'd like to note that the obligation to connect new consumers is the Company responsibility in accordance with the existing rules, however, in the event when the determined connection costs do not cover the actual Company's expenses, all the capitalized expenses under the applicable law (tariff methodology) will be respectively charged during tariff calculation. The Memorandum entered into with the Government of Georgia does not cover the said issue.*
>
> *At the same time, the Ministry has been made aware of this issue, specifically, as regards the term and costs of connection, and the consultations in respect of optimization of the existing rules both with the Regulatory Commission, and other relevant bodies, are under way.*[306]

316. On 9 February 2016, Inter RAO replied to Minister Kaladze that the numbers in Appendix 2 of the 2013 Memorandum were irrelevant to the Government's obligations under Clause 2.3.2. For the Claimants, Clause 2.3.2 required the MOE to ensure that the Consumer Tariff was automatically adjusted upward with any increase in WAPT above the 6.028 tetri/kWh threshold.[307]

317. In March 2016, Inter RAO and the MOE met again, and the MOE proposed to compensate Telasi for its WAPT-based losses by waiving its right to any TIA for 2013-2015.[308] However, no agreement was reached.

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[306] *Ibid*.

[307] Letter from Volkov to Kaladze, dated 9 February 2016, C-0073.

[308] Suggestions for the meeting with Minister Kaladze, dated 18 April 2016, C-0076.

3. The Adjustment of Telasi's Distribution Tariffs for GEL Depreciation

318. At their March 2016 meeting, the parties also discussed the need to adjust Telasi's (and the Khrami Companies') Distribution Tariffs due to currency fluctuations. They agreed that the next step was for Inter RAO to share with the MOE its calculation of the tariff adjustment under Clause 2.3.4 of the 2013 Memorandum, which it sent to the MOE on 11 April 2016.[309] Inter RAO's calculations cited an expected 42.5% increase in the USD against the GEL from 1 September 2013 to 1 September 2016, which would trigger Telasi's right to an upwards inflation-based adjustment to their Distribution Tariffs.[310] The MOE did not reply.[311]

319. On 19 May 2016, Telasi applied to the NERC and the MOE pursuant to the 2013 Memorandum for approval of the Distribution Tariff adjustments it had calculated.[312] Telasi asked the NERC to clarify the procedure and deadlines for the tariff adjustment requested.

320. On 30 May 2016, the NERC declined to adjust Telasi's Distribution Tariff, stating that it could only adjust Telasi's tariffs according to the 2014 Methodology, and not based on the 2013 Memorandum.[313] The NERC reminded Telasi that its tariffs had been set in September 2015 in accordance with the 2014 Methodology, and that they could not consider Telasi's request without receiving a full tariff application in the format prescribed under the 2014 Methodology. On 9 June

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[309] Letter from Volkov to Kaladze, dated 11 April 2016, C-0075.

[310] Claimants' Memorial, ¶ 116; Agenda for meeting between Inter RAO and the MOE, dated March 2016, C-0074; Markov I, ¶¶ 61-62.

[311] Markov I, ¶ 62.

[312] Letter from Kobtsev to Milorava, dated 19 May 2016, C-0078. *See also*, Letter from Kobtsev to Kaladze, dated 19 May 2016, C-0079.

[313] Letter from Milorava to Kobtsev, dated 30 May 2016, C-0082. On the same date, the NERC wrote to the Khrami Companies to deny their request for an adjustment to currency fluctuations for similar reasons: Letter from Kandelaki to Milorava, dated 19 May 2016, C-0077.

2016, Inter RAO wrote to Minister Kaladze to complain that the NERC's responses to the requests for adjustment from Telasi's and the Khrami Companies contradicted the 2013 Memorandum and the Government's prior position in the Parties' discussions.[314]

321. Meanwhile, on 2 June 2016, the MOE rejected Telasi's proposal on the basis that the tariffs could only be raised to the extent that Telasi's results fell below the RGR levels set out in the indicative projections in Appendix 2 of the 2013 Memorandum.[315] As Telasi's revenue for the years from 2013 to 2015 exceeded the "indicator [of its tariffs specified] in the [A]ppendix to the Memorandum," the Ministry denied Telasi's proposed adjustment of its tariffs.

322. Throughout May and June 2016, the Parties continued to negotiate a settlement regarding Telasi's WAPT-based losses. A possible resolution discussed by the Parties involved Georgia's waiver of its right to 50% of the TIA under Clause 2.1.10 of the Memorandum; however, Telasi was not prepared to accept the MOE's request that it waive its right to a distribution tariff increase on the basis of currency depreciation.[316]

323. On 3 August 2016, Telasi applied to the NERC for its distribution tariffs to be adjusted for the depreciation of the GEL against the USD and its energy purchase costs exceeding the WAPT threshold, in accordance with Clause 2.3 of the 2013 Memorandum.[317] Telasi complained of GEL 12.4 million in WAPT-based losses for the 2013-2014 and 2014-2015 energy years and a decrease of GEL of 12.6 million in Gross Revenue under the 2013 Memorandum over the same period. Telasi's application was not submitted in the form prescribed by the 2014 Methodology, but rather

[314] Letter from Volkov to Kaladze, dated 9 June 2016, C-0085.

[315] Letter from Valishvili to Telasi, dated 2 June 2016, C-0083.

[316] Report on results of meeting with Kaladze, dated 30 June 2016, C-0088; Claimants' Memorial, ¶ 119; Note for meeting with Kaladze, dated 18 April 2016, C-0076.

[317] Letter from Kobtsev to Milorava re: Telasi's Application to the NERC for Clause 2.3.4 adjustment, dated 3 August 2016, C-0090.

in accordance with the terms of the 2013 Memorandum.[318] According to Inter ROA's Mr. Markov, Telasi filed its tariff application because the previous year's application would expire in September 2015 and the tariffs had to be adjusted under the 2013 Memorandum due to the devaluation of the GEL to the USD. Although Inter RAO was already aware from the NERC's letter of 30 May 2016 that it had a negative view of the tariff adjustments requested, Telasi filed a tariff application in order to avoid having its request denied because an official application had not been submitted.[319]

324. On 8 August 2016, the NERC replied that it had no legal basis to review or adjust Telasi's tariffs as requested because the 2014 Methodology and Resolution No. 26 governed tariff setting and tariff adjustments.[320] The NERC also noted that Telasi's tariffs had been determined in 2015 by NERC Resolution No. 26 under the 2014 Methodology. Therefore, any request for adjustment was required to be under the 2014 Methodology.

325. On 21 September 2016, Inter RAO wrote to the Prime Minister seeking compliance with the 2013 Memorandum. In its letter, Inter RAO requested compliance with the 2013 Memorandum with respect to Telasi's WAPT-based losses in 2013/2014 and 2014/2015, revision of tariffs due to the devaluation of the GEL against the USD by more than 7% and the decrease of Telasi's tariffs under the 2014 Methodology.[321] Inter RAO also raised the NERC's refusal to accept the tariff application as submitted by the Khrami Companies (as discussed below) and its position that any revisions would be under the 2014 Methodology and not the 2013 Memorandum. The letter also referred to the obligation of the Government under the 2013 Memorandum to compensate for any damages arising from any change in Georgian legislation The letter also stated that in order to protect its

[318] Claimants' Memorial, ¶ 120; Markov I, ¶ 65.

[319] Markov I, ¶ 65.

[320] Letter from Milorava to Kobtsev, dated 8 August 2016, C-0094.

[321] Letter from Kovalchuk, Pakhomov, Bron and Buzyanovska to Kvirikashvili, dated 21 September 2016, C-0097.

interest under the 2013 Memorandum and the Khrami SPA, Inter RAO had no other choice but to apply to the NERC for the modification of the relevant tariffs. However, in view of the NERC's position, filing an application with it would lead to the reduction of tariffs and further increase damages to the Khrami Companies, which damages must be compensated by Georgia.[322]

326. There is no record of the Prime Minister having responded to Inter RAO's letter of 21 September 2016.

327. On 10 October 2016, the NERC wrote to inform Telasi that it had to submit a tariff application for 2017 in compliance with the 2014 Methodology within 150 days prior to the expiration date of the existing tariff period and that in order to meet the deadline for calculating tariffs for 2017, requested that Telasi submit its application within 10 business days.[323] The NERC also reminded Telasi that if it failed to submit a tariff application within that period, it would be subject to the sanctions stipulated by the legislation.[324]

328. On 21 October 2016, Telasi submitted a tariff application complaint with the 2014 Methodology but continued to insist that the 2013 Memorandum be applied. Telasi stated that since the NERC had not reviewed its application submitted on 3 August 2016 pursuant to the 2013 Memorandum, it was enclosing a tariff application with all the documents required by the NERC. It went on to insist that the provisions of the 2013 Memorandum had to be observed in considering its application.[325]

329. The Parties met several times in December 2016. At a meeting in mid-December 2016, the Parties agreed to postpone their discussion of Telasi's tariffs until after the NERC issued its

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[322] *Ibid*.

[323] Letter from Milorava to Kobtsev, dated 10 October 2016, C-0098; 2014 Methodology, Art. 26(1), CL-0084.

[324] *Ibid*.

[325] Letter from Kobtsev to Milorava re: Telasi's Application to the NERC for tariff adjustment, dated 21 October 2016, C-0102; Respondents' Counter-Memorial, ¶ 210.

preliminary tariff calculations.[326] On 23 December 2016, the NERC's calculations were provided to Telasi and Inter RAO and the Parties met again on 24 December 2016. Inter RAO was of the view that the tariffs calculated by the NERC were not in accordance with the 2013 Memorandum and stated that the parameters set out in Annex 2 of the Memorandum were only indicative in nature. The MOE's position was that Inter RAO was not entitled to any compensation since Telasi was performing better than had been expected and the NERC's proposed tariff adjustment was consistent with the 2013 Memorandum which did not allow Inter RAO to make windfall profits.[327]

330. On 26 December 2016, the NERC set Telasi's tariffs for 2017 pursuant to the 2014 Methodology ("**NERC Resolution No. 38**").[328] The new Distribution Tariffs were set in accordance with the unofficial calculations to which Inter RAO had objected at the meeting of 24 December 2016. The Claimants say that the new tariffs fixed in Resolution No. 38 were unacceptable and, in effect further reduced Telasi's Distribution Tariffs. The Respondents say that this is not consistent with Telasi's position during the NERC's public hearing in which the new tariffs were presented.[329]

331. The following table illustrates what the Claimants say was the difference between the tariffs as they would have been under the 2013 Memorandum and NERC Resolution No. 3 compared to how they were set pursuant to the 2014 Methodology and Resolution No. 38:[330]

[326] Claimants' Memorial, ¶ 123.

[327] Claimants' Memorial, ¶ 124; Markov I, ¶ 71; Respondents' Counter-Memorial, ¶¶ 211-213; Valishvili I, ¶ 60.

[328] NERC Resolution No. 38, dated 26 December 2016, CL-0086.

[329] Respondents' Counter-Memorial, ¶ 214; Minutes of NERC Hearing No. 90, dated 26 December 2016, R-0049, p. 17. NERC Resolution No. 38, dated 26 December 2016, CL-0086, Art. 1.

[330] Claimants' Opening Presentation, Demonstrative No. 7; Tr. Day 1 (Claimants' Opening Statement), 47:12-17.

Telasi's tariffs (fixed in 2016)

Voltage	Distribution Tariffs (tetri/kWh)	
	Resolution No 3 of 2013, Art 8 [CL-083]	Resolution No 38 of 2016, Art 8 [CL-086]
220/380 V	8.08	5.686
6-10 kV	7.138	1.927
35-110 kV	1.8	1.270

332. NERC Resolution No. 38 set the following Consumer Tariffs for Telasi:

> *3. Article 10 of the Resolution shall be formulated as follows:*
>
> *"Article 10. Limiting tariffs for the purchase of electricity by consumers of Telasi JSC:*
>
> *1. Limiting tariffs for the purchase of electricity by consumers of Telasi JSC by voltage steps:*
>
> *a) 220/380 V (non-domestic consumers) - 16.740 tetri/kWh;*
>
> *b) 3.3-6.10 kV - 12.981 tetri/kWh;*
>
> *c) 35-110 kV - 12.324 tetri/kWh.*
>
> *2. In order to create additional guarantees for social protection of the population and to promote the rational use of electricity for Telasi JSC customers, the limiting tariffs for the purchase of electricity with a voltage of 220/380V by the amount of electricity consumed (domestic consumers (population)) shall be as follows (in 30 calendar days):*
>
> *a) up to and including 101 kWh - 11.000 tetri/kWh;*
>
> *b) 101 to and including 301 kWh - 14.400 tetri/kWh;*
>
> *c) over 301 kWh - 18.200 tetri/kWh."*[331]

333. Telasi did not contest the legal basis of NERC Resolution No. 38 before the Georgian courts.

334. By early 2017, it was apparent that a legal dispute had arisen with respect to the application of the 2013 Memorandum. On 1 March 2017, Telasi notified Georgia of a dispute under the 2013

[331] NERC Resolution No. 38, dated 26 December 2016, CL-0086, Art. 1.

Memorandum, and reserved its rights to bring claims under the BIT.[332] On 14 April 2017, Silk Road gave a Notice of Dispute under the BIT and the Energy Charter Treaty to the Government.[333]

4. Telasi's Tariffs in 2017

335. The tariffs set by NERC Resolution No. 38 under the 2014 Methodology were valid for one year. On 4 August 2017, Telasi submitted a tariff application to the NERC to set its tariffs for 2018.[334] Telasi requested an adjustment of 30% of its Distribution Tariffs under Clause 2.3.4 of the 2013 Memorandum to account for the depreciation of the GEL against the USD. It also applied for a WAPT-based adjustment to its Consumer Tariffs to compensate for the reduction of Telasi's GR by GEL 46.3 million as a result of Georgia's alleged non-compliance with Clause 2.3.2 of the 2013 Memorandum for the tariff freeze period (2013-2016), which raised the purchase price of electricity by over 50% in 2016.[335]

336. On 10 August 2017, the NERC amended the 2014 Methodology, effective from 2018 (the "**2014 Amended Methodology**").[336] The 2014 Amended Methodology altered the tariff regulation period from one to three years and set deadlines for the submission of tariff applications to the NERC, identified the time frame for when tariff applications should be submitted (from 4 August to 15 August of the tariff-setting year), and made amendments to the formulas used for defining certain components that should be taken into account while setting the tariffs.[337]

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[332] Notice of Dispute from Telasi to Georgia (2013 Memorandum), dated 1 March 2017, C-0107.

[333] Notice of Dispute under Bilateral Investment Treaty and Energy Charter Treaty, dated 14 April 2017, C-0115.

[334] Tariff Correction Application from Telasi to NERC, dated 4 August 2017, C-0129.

[335] *Ibid*.

[336] 2014 Amended Methodology, dated 10 August 2017, effective in 2018, CL-0088.

[337] *Id*., Arts. 30-31.

337. On 27 December 2017, the NERC held a public hearing, which Telasi's Mr. Antadze attended, and it fixed new tariffs for Telasi in accordance with the 2014 Amended Methodology ("**NERC Resolution No. 48**").[338] The new tariffs were effective from 1 January 2018 to 1 January 2021. NERC Resolution No. 48 set Telasi's Distribution Tariffs at levels which were below those provided by the 2013 Memorandum, except for the smallest category (35-110 kV consumers), as summarized in the following table provided by the Claimants:[339]

Telasi's tariffs (fixed in 2017)

Voltage	Distribution Tariffs (tetri/kWh)	
	Resolution No 3 of 2013, Art 8 [CL-083]	Resolution No 48 of 2017, Art 8 [CL-091]
220/380 V (commercial consumers)	8.08	6.472
6-10 kV	7.138	2.712
35-110 kV	1.8	2.058

338. NERC Resolution No. 48 provided the following with respect to Telasi's Consumer Tariffs:

> *Article 1*
>
> *...*
>
> *In order to create additional guarantees for social protection and facilitate the rational use of electricity, the maximum rates to be set for the use of electricity by Telasi customers at 220/380V for domestic consumers (population) (in 30 calendar days) are:*
>
> *a) up to and including 101kWh - 12.325 tetri/ kWh;*
>
> *b) 101–301 kWh - 15.725 tetri/ kWh;*

[338] NERC Resolution No. 48 on Amendments to NERC Resolution No. 33 dated 4 December 2008, dated 27 December 2017 ("**NERC Resolution No. 48**"), CL-0091; NERC Public hearing minutes, dated 27 December 2017, C-0215.

[339] Claimants' Opening Presentation, Demonstrative No. 8; Tr. Day 1 (Claimants' Opening Statement), 47:18-22. NERC Resolution No. 48, CL-0091, Art. 1.

c) more than 301 kWh - 19.525 tetri/ kWh.[340]

339. Telasi did not contest the legal basis of NERC Resolution No. 38 before the Georgian courts. The Claimants contend that this is because they did not have faith in Georgia's judicial process and preferred instead to negotiate directly with the Government.[341] The Respondents note that Telasi did, however, challenge the NERC's decision with respect to the alleged confidentiality of the data in its tariff application.[342]

340. The Claimants provided the following chart which summarizes the Distribution Tariffs implemented by the NERC since the date on which it first applied the 2014 Methodology to Telasi's tariffs in 2015, 2016, and 2017, as opposed to approving the tariffs set out in the 2013 Memorandum and Resolution No. 3:[343]

Telasi's tariffs (fixed in 2015-2017)

Voltage	Distribution Tariffs (tetri/kWh)			
	Resolution No 3 of 2013, Art 8 [CL-083]	Resolution No 26 of 2015, Art 8 [CL-085]	Resolution No 38 of 2016, Art 8 [CL-086]	Resolution No 48 of 2017, Art 8 [CL-091]
220/380 V	6.855 (household consumers until 2016) / 8.08	5.567	5.686	6.472
6-10 kV	7.138	1.773	1.927	2.712
35-110 kV	1.8	0.705	1.270	2.058

[340] NERC Resolution No. 48, CL-0091, Art. 1.

[341] Claimants' Reply, ¶¶ 82, 84.

[342] Respondents' Opening Presentation, slide 116; NERC Hearing No. 51 minutes, dated 3 September 2015, R-0046, p. 8.

[343] Claimants' Opening Presentation, Demonstrative No. 9.

P. The Non-Adjustment of the Khrami Companies' Generation Tariffs in 2016

341. On 3 November 2015, and again on 28-29 March 2016, Inter RAO and the MOE met to discuss issues related to both Telasi and the Khrami Companies. At these meetings, Inter RAO requested that the Khrami Companies' Generation Tariffs be increased, starting from 1 November 2016, because of the fall in value of the GEL against the USD and JPY.[344] On 11 April 2016, Inter RAO provided the MOE with its calculations for the increase it proposed.[345]

342. On 19 May 2016, the Khrami Companies wrote to the NERC for guidance about the time-frame and documents required for a tariff correction due to the depreciation of the GEL.[346]

343. On 30 May 2016, the NERC replied that it lacked a legal basis to modify the tariffs on the basis requested by the Khrami Companies because the Generation Tariffs sought to be adjusted had not been set in accordance with the 2014 Methodology.[347] The NERC stated that the 2014 Methodology "shall be the basis for the calculation of electricity tariffs" for the Khrami Companies.[348]

344. On 9 June 2016, Inter RAO wrote to the MOE to complain that the NERC's position was contrary to the 2013 Memorandum, the Khrami SPA and the MOE's letter of July 2015.[349] The Parties met to discuss this issue, but no resolution was agreed.[350]

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[344] Meeting Agenda for meeting between Inter RAO and MOE, dated 3 November 2015, C-0067; Meeting Agenda for meeting between Inter RAO and MOE, dated March 2016, C-0074; Markov I, ¶ 77.

[345] Letter from Volkov to Kaladze, dated 11 April 2016, C-0075.

[346] Letter from Kandelaki to Milorava, dated 19 May 2016, C-0077.

[347] Letter from Milorava to Kandelaki, dated 30 May 2016, C-0081.

[348] *Ibid*.

[349] Letter from Volkov to Kaladze, dated 9 June 2016, C-0085. In its letter of 21 July 2015, the MOE stated that submitting a tariff review application to the NERC does not cancel the 2013 Memorandum, C-0064.

[350] Claimants' Memorial, ¶ 136.

345. On 4 August 2016, the Khrami Companies each submitted tariff applications requesting adjustment of their Generation Tariffs in accordance with the Khrami SPA and NERC Resolution No. 5.[351]

346. Khrami-1's tariff application provided in relevant part as follows:[352]

> *Change in Georgian Lari to US Dollar Exchange Rate:*
>
> *Pursuant to Article 2.3 of the Resolution and Article 2.2 of Annex #1 of the Purchase Agreement, for the purpose of the guaranteed return on investments made upon the acquisition of JSC Khramhesi-1 and JSC Khramhesi-2, long-term marginal tariffs of electricity generation by JSC Khramhesi-1 and JSC Khramhesi-2 shall be corrected if the change in Georgian Lari to US Dollar exchange rate exceeds 7% in comparison to the exchange rate effective as of the execution of the Sale and Purchase Agreement of JSC Khramhesi-1 and JSC Khramhesi-2. Correction of tariffs indicated in Article 1.2 of the Resolution due to change in Georgian Lari to US Dollar exchange rate shall be made four times: on 1 November 2013, 1 November 2016, 1 November 2019 and 1 November 2022.*

[351] Tariff Correction Application of Khrami-1 as submitted to the NERC on 4 August 2016 ("**Khrami-1 2016 Application**"), C-0092:

In accordance with the rules and terms set forth under Resolution #5 of the Georgian National EnergyRegulatory Commission, dated 7 April 2011, and the Sale and Purchase Agreement on 100% of shares ofJSC Khramhesi-1 and 100% of shares of JSC Khramhesi-2, dated 12 April 2011, we hereby request thatyou correct the marginal tariffs of JSC Khramhesi-1 based on the rules and principles set forth under theabove-mentioned Purchase Agreement and Resolution in view of the change in Georgian Lari to JapaneseYen, as well as – Georgian Lari to US Dollar, exchange rates.

C-0093, Tariff Correction Application of Khrami-2 as submitted to the NERC on 4 August 2016 ("**Khrami-2 2016 Application**"):

In accordance with the rules and terms set forth under Resolution #5 of the Georgian National EnergyRegulatory Commission, dated 7 April 2011, and the Sale and Purchase Agreement on 100% of shares ofJSC Khramhesi-1 and 100% of shares of JSC Khramhesi-2, dated 12 April 2011, we hereby request thatyou correct the marginal tariffs of JSC Khramhesi-2 based on the rules and principles set forth under theabove-mentioned Purchase Agreement and Resolution in view of the change in Georgian Lari to JapaneseYen, as well as – Georgian Lari to US Dollar, exchange rates.

NERC Resolution No. 5, CL-0080; Khrami SPA, C-0016, Annex 1.

[352] C-0092, Khrami-1 2016 Application.

Test:

Period	Date	Exchange Rate GEL/USD	Deviation
Base Date	12.04.2011	1.6454	
Period 1	Average in Period	1.6540	0.5%
	01.09.2011	1.6469	0.1%
	01.09.2013	1.6615	1.0%
Period 2	Average in Period	2.0198	22.8%
	01.09.2013	1.6615	1.0%
	04.08.2016	2.3470	42.25%

Change in Period 2 (from 1 September 2013 to 1 September 2016) amounts to 42.25% (over 7%).

The exchange rates as of 1 September 2013 and 1 September 2016 are used upon correction. Considering that the application is being presented on 4 August 2016, the exchange rate as of 3 August 2016 is used. However, we believe that the Georgian National Energy Regulatory Commission is authorized to take account of the exchange rate as of 1 September 2016, or the exchange rate we used in the application, upon review.

Name	Unit	Value
Applicable tariff for JSC Khramhesi-1	tetri/kWh	8.2
Actual change in exchange rate from 01.09.13 to 04.08.13	%	42.25%
Change of the tariff of JSC Khramhesi-1 due to change in GEL/USD exchange rate	tetri	3.46

The applicable tariffs must be corrected by increasing them by 42.25%. Therefore, for the purpose of ensuring the guaranteed return on investments made upon the acquisition of JSC Khramhesi-1 and JSC Khramhesi-2, the long-term marginal tariffs for electricity generation by JSC Khramhesi-1 must be corrected for JSC Khramhesi-1 by 3.46 tetri.

Overall, tariff modification for JSC Khramhesi-1 caused by change in national currency to Japanese Yen and US Dollar exchange rates amounts to 3.46 tetri for each kWh of electricity delivered.

Base Tariffs		
JSC Khramhesi-1	tetri/kWh	8.20
Correction due to Change in Japanese Yen Exchange Rate		
JSC Khramhesi-1	tetri/kWh	0.00
Correction due to Change in US Dollar Exchange Rate		
JSC Khramhesi-1	tetri/kWh	3.46
Final Requested Tariff		
JSC Khramhesi-1	tetri/kWh	11.66

We request that you correct the marginal tariffs of JSC Khramhesi-1 in accordance with the rules and terms set forth under Resolution #5 of the Georgian National Energy Regulatory Commission, dated 7 April 2011, and the Sale and Purchase Agreement on 100% of shares of JSC Khramhesi-1 and 100% of shares of JSC Khramhesi-2, dated 12 April 2011.

Requested final marginal tariff for JSC Khramhesi-1 – 11.66 tetri/kWh

347. Khrami-2's tariff application provided in relevant part as follows:[353]

> *Change in Georgian Lari to Japanese Yen Exchange Rate:*
>
> *Pursuant to Article 2.2 of the Resolution and Article 2.1 of Annex #1 of the Purchase Agreement, in order to ensure guaranteed debt servicing under the Agreement between the Ministry of Finance of Georgia and JSC Khramhesi-2 on the Repayment to the State of the Amounts from the Credit Granted by the Japan International Cooperation Agency which were Disbursed for the Rehabilitation of JSC Khramhesi-2, dated of 10 December 2008, the long-term marginal tariff of electricity generation by JSC Khramhesi-2 shall be corrected on an annual basis if the change in GEL to Japanese Yen exchange rate exceeds 7% per annum upon correction in comparison to the exchange rate effective as of the adoption of tariff based on Resolution #4 of the Georgian National Energy and Water Supply Regulatory Commission, dated 1 April 2009. Moreover, correction shall be applied only to the part of the tariff allocated for the service of the above-mentioned credit*
>
> *Test:*

Date	*Exchange Rate GEL/Yen*	*Change*
01.04.2009	*0.0170*	
31.12.2015	*0.0199*	*16.9%*

> *Change amounts to 16.9 (over 7%).*
>
> *Correction is applied to the part of the tariff allocated for the performance of obligation. Considering that correction is made once a year upon the occurrence of the said condition, difference between the exchange rate as of 31 December 2014 and the exchange rate as of 31 December 2015 — GEL 0.0043 — shall be used upon correction. The remaining outstanding amount as of 01 June 2016 is JPY 1,811,045 thousand. Average annual planned generation amounts to 330 million kWh per annum. Number of remaining years — 8. Therefore, in the remaining 8 years, the difference caused by change in Japanese Yen exchange rate must be reflected on the tariff in the amount of 0.3 tetri for each kWh. This change is derived from multiplying the remaining amount of obligation by difference in exchange rate and dividing it by average year generation and number of years remaining for debt servicing.*

Index	*Unit*	*Value*
Debt 01.06.2016	*Thousand Yen*	*1.811.045*
Change in exchange rate	*GEL*	*0.0043*
Remaining periods of payment	*Year*	*8*

[353] Khrami-2 2016 Application, C-0093.

Planned generation	*Thousand kWh*	*330.000*
Tariff correction due to Yen exchange rate	*Tetri/kWh*	*0.296*

Therefore, increase of tariff due to change in GEL to Japanese Yen exchange rate should amount to 0.296 (rounded up to 0.3) tetri per each kWh

Change in Georgian Lari to US Dollar Exchange Rate:

Pursuant to Article 2.3 of the Resolution and Article 2.2 of Annex #1 of the Purchase Agreement, for the purpose of the guaranteed return on investments made upon the acquisition of JSC Khramhesi-l and JSC Khramhesi-2, long-term marginal tariffs of electricity generation by JSC Khramhesi-l and JSC Khramhesi-2 shall be corrected if the change in Georgian Lari to US Dollar exchange rate exceeds 7% in comparison to the exchange rate effective as of the execution of the Sale and Purchase Agreement of JSC Khramhesi-l and JSC Khramhesi-2. Correction of tariffs indicated in Article 1.2 of the Resolution due to change in Georgian Lari to US Dollar exchange rate shall be made four times: on 1 November 2013, 1 November 2016, 1 November 2019 and 1 November 2022.

Test:

Period	*Date*	*Exchange Rate GEL/USD*	*Deviation*
Base Date	*12.04.2011*	*1.6454*	
Period 1	*Average in Period*	*1.6540*	*0.5%*
	01.09.2011	*1.6469*	*0.1%*
	01.09.2013	*1.6615*	*1.0%*
	Average in Period	*2.0198*	*22.8%*
Period 2	*01.09.2013*	*1.6615*	*1.0%*
	04.08.2016	*2.3470*	*42.25%*

Change in Period 2 (from 1 September 2013 to 1 September 2016) amounts to 42.25% (over 7%).

The exchange rates as of 1 September 2013 and 1 September 2016 are used upon correction. Considering that the application is being presented on 4 August 2016, the exchange rate as of 3 August 2016 is used. However, we believe that the Georgian National Energy Regulatory Commission is authorized to take account of the exchange rate as of 1 September 2016, or the exchange rate we used in the application, upon review.

Name	*Unit*	*Value*
Applicable tariff for JSC Khramhesi-2	*tetri/kWh*	*9.4*
Actual change in exchange rate from 01_09_ 13 to	*%*	*42.25%*
Change of the tariff of JSC Khramhesi-2 due to change in GEL/USD exchange rate	*tetri*	*3.97*

The applicable tariffs must be corrected by increasing them by 42.25%. Therefore, for the purpose of ensuring the guaranteed return on investments made upon the acquisition of JSC Khramhesi-l and JSC Khramhesi-2, the long-term marginal tariffs electricity generation by JSC Khramhesi-2 must be corrected by 3.97 tetri.

Overall, tariff modification for JSC Khramhesi-2 caused by change in national currency to Japanese Yen and US Dollar exchange rates amounts to 4.27 tetri for each kWh of electricity delivered.

Base Tariffs		
JSC Khramhesi-2	tetri/kWh	9.40
Correction due to Change in Japanese Yen Exchange Rate		
JSC Khramhesi-2	tetri/kWh	0.30
Correction due to Change in US Dollar Exchange Rate		
JSC Khramhesi-2	tetri/kWh	3.97
Final Requested Tariff		
JSC Khramhesi-2	tetri/kWh	13.67

We request that you correct the marginal tariffs of JSC Khramhesi-2 in accordance with the rules and terms set forth under Resolution #5 of the Georgian National Energy Regulatory Commission, dated 7 April 2011, and the Sale and Purchase Agreement on 100% of shares of JSC Khramhesi-l and 100% of shares of JSC Khramhesi-2, dated 12 April 2011.

Requested final marginal tariff for JSC Khramhesi-2 13.67 tetri/kWh.

348. The Claimants say that although a formal application was not explicitly required by the Khrami SPA or the 2013 Memorandum, the Khrami Companies chose to submit the application "out of an abundance of caution".[354]

349. On 9 August 2016, the NERC advised the Khrami Companies that their tariff adjustment applications were not in the approved form under the 2014 Methodology, and granted them a brief extension in which to resubmit compliant applications.[355] The NERC also stated that tariffs would be calculated under the 2014 Methodology, not the Khrami SPA and the 2013 Memorandum. The Khrami Companies did not file applications compliant with the 2014 Methodology within the five-day time limit provided.[356] According to Inter ROA's Mr. Markov, the Khrami Companies decided that, in light of the NERC's rejection of Telasi's application under the 2014 Methodology instead of the 2013 Memorandum and the reduction of Telasi's tariffs, the Khrami Companies determined it would not be prudent to continue with the application process under the 2014 Methodology.

350. On 21 September 2016, Inter RAO wrote to the Prime Minister of Georgia and the MOE seeking assistance in setting the Khrami Companies' tariffs:

> *[I]n order to protect our interests and rights … we have no other choice but to apply to the [NERC] and to request the modification of tariffs. In view of the [NERC's] position, filing an application with the [NERC] will lead to the reduction of tariffs and, consequently, to further increase of damages to [the Khrami Companies], which damages pursuant to the Memorandum must be compensated by the Government of Georgia.*[357]

351. At a public hearing on 6 October 2016, the NERC stated that Khrami-1's tariff application did not meet the requirements set out under the 2014 Methodology:

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[354] Claimants' Memorial, ¶ 137.

[355] Letter from Milorava to Kandelaki, dated 9 August 2016, C-0095; Letter from Milorava to Kandelaki, dated 9 August 2016, C-0096.

[356] *See* Claimants' Memorial, ¶ 138. *See* Markov I, ¶¶ 85-86.

[357] Letter from Kovalchuk, Pakhomov, Bron and Buzyanovska to Kvirikashvili, dated 21 September 2016, C-0097, p. 4.

> *[I]t was not presented in an appropriate (material) format and was not signed by company management, which was clearly explained to [Khrami-1] in [NERC's letter] dated 9 August 2016 providing them 5 business days for submission of a complete Price Statement in accordance with article 83 of [GAC]. [Khrami-1] requested additional 15 business days in the letter … of 16 August 2016, and the request was satisfied ([NERC] letter to [Khrami-1] dated 18 August 2016). However, [Khrami-1] still failed to submit tariff statement in a duly signed format within the set term, thus giving rise to the basis for leaving the tariff statement unconsidered.*[358]

352. The NERC made a similar decision with respect of Khrami-2's application.[359] On 11 October 2016, the NERC dismissed the Khrami Companies' tariff applications due to late submission, without considering them on the merits.[360]

353. Regarding the Khrami Companies' failure to submit their tariff applications under the 2014 Methodology, the Claimants say that since the NERC had recently used Telasi's application under the 2014 Methodology to override the tariffs in the 2013 Memorandum and fix lower tariffs for Telasi in accordance with the 2014 Methodology, "the Khrami Companies concluded that it would be imprudent to continue with the official adjustment process".[361]

354. The Respondents say that the Khrami Companies' shareholders, Gardabani and Inter RAO, knew that the Khrami Companies could not claim compensation from the Government for the tariffs in the Khrami SPA without first seeking a tariff adjustment from the NERC in the approved form under the 2014 Methodology.[362] The Respondents' position is that the non-adjustment of the Khrami Companies' tariffs in 2016 was the result of the Khrami Companies' own failure to file compliant tariff applications.

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[358] NERC Hearing No. 65 Minutes, dated 6 October 2016, R-0048, p. 2.

[359] *Id*., pp. 2-3.

[360] The NERC's Tariff Decisions: *see* Letter from Mr. Gabelaia to Khrami-1 dated 11 October 2016, enclosing the NERC Decision N65/33, dated 6 October 2016, C-0100; Letter from Gabelaia to Khrami-2, dated 12 October 2016, enclosing the NERC Decision N65/34, dated 6 October 2016, C-0101. In its letter to Khrami-1, the NERC noted that although Khrami-1 had applied for and been granted an additional 15 days to submit a compliant application, it had not done so.

[361] Markov I, ¶¶ 85-86; Claimants' Memorial, ¶ 138.

[362] Respondents' Rejoinder, ¶ 12.

355. As the dispute continued unresolved, on 1 March 2017, pursuant to the terms of the Khrami SPA, Gardabani notified the Respondents of a dispute regarding Georgia's compliance with the Khrami SPA. It also reserved its rights to bring claims under the BIT.[363] On 14 April 2017, Gardabani wrote to the Government to provide a Notice of Dispute under the BIT and the Energy Charter Treaty.[364]

356. On 24 May 2017, in response to the discussions between the Parties, Gardabani wrote to the Government stating that it understood that if the Khrami Companies made tariff applications, they would be considered under the Khrami SPA, not the 2014 Methodology.[365] Gardabani stated that it would proceed on the basis that tariff applications would be determined in terms of the Khrami SPA unless it received instructions to the contrary by 5 June 2017.

Q. The NERC's 2017 Resolutions on the Khrami Companies' Tariffs

357. On 13 June 2017, the Khrami Companies requested an increase in their Generation Tariffs on the basis of NERC Resolution No. 5 and the Khrami SPA to account for the depreciation of the GEL against the JPY and USD, and attached their proposed calculation of the adjustment.[366] They also included in their application a request for compensation for the period 1 November 2016 – 1 September 2017 due to their tariffs not having been adjusted as of 1 November 2016.

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[363] Notice of Dispute from Gardabani to Georgia, MOE, State Service Bureau (Khrami SPA), dated 1 March 2017, C-0106.

[364] Notice of Dispute from Gardabani to Georgia (BIT and ECT), dated 14 April 2017, C-0114. On the same date, Silk Road gave Notice of Dispute under the BIT and the Energy Charter Treaty.

[365] Notice of Dispute from Gardabani to Georgia, MOE, State Service Bureau (Khrami SPA), dated 24 May 2017, C-0116.

[366] Tariff Correction Application of Khrami-1 as submitted to the NERC on 13 June 2017 ("**Khrami-1 2017 Application**"), C-0121; Tariff Correction Application of Khrami-2 as submitted to the NERC on 13 June 2017 ("**Khrami-2 2017 Application**"), C-0122. The timing of these tariff applications was a few days after filing their Request for Arbitration in these SCC proceedings.

358. In their application, the Khrami Companies used the currency exchange rate on the last day of the previous reference period for the GEL/USD adjustment as the basis of their calculation (referred to by the Parties at the Hearing as the "**snapshot rate**"), as opposed to the average rate over the course of the previous reference period.[367] The Khrami-1 application stated as follows:

> *Pursuant to Resolution [No. 5] and Article 2.2 of Annex #1 of the [Khrami SPA], long-term marginal tariffs of electricity generation by [Khrami-1] shall be corrected if the change in Georgian Lari to US Dollar exchange rate exceeds 7% in comparison to the exchange rate effective as of the execution of the [Khrami SPA]. Correction of tariffs indicated in Article 1.2 of the Resolution due to change in Georgian Lari to US Dollar exchange rate shall be made four times: on 1 November 2013, 1 November 2016, 1 November 2019 and 1 November 2022.*
>
> *The change in Georgian Lari to US Dollar exchange rate as of 1 September 2016 amounts to 40.16% (more than 7%).*
>
> *The applicable tariff must be corrected in proportion to the change in Georgia Lari to US Dollar exchange rate, i.e. by increasing it by 40.16%. Therefore, for the purpose of ensuring the guaranteed return on investments made upon the acquisition of [the Khrami Companies], the long-term marginal tariffs for electricity generation by [Khrami-1] must be corrected for [Khrami-1] by 3.29 tetri ….*[368]

359. In addition, Khrami-1's application requested that lost profits for the period from 1 November 2016 to 31 August 2017 be added to the adjustment to the tariff for the period from 1 September 2017 to 31 August 2018. It also calculated the adjustment through to 1 November 2019.

360. Khrami-2's application contained the same request with respect to the GEL/USD exchange rate as the Khrami-1 application. It also included in the requested tariffs from 1 September 2017 to 31 August 2018 an additional adjustment to losses for the failure to adjust the tariffs pursuant to its 2016 application in respect of both GEL/USD and GEL/JPY exchange rates.[369]

361. The Khrami-2 application also requested adjustment with respect to the GEL/JPY exchange rate in the following terms:

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[367] *See e.g.*, Tr. Day 1 (Claimants' Opening Statement), 64:14-23.

[368] Khrami-1 2017 Application, C-0121, p. 1.

[369] Khrami-2 2017 Application, C-0122.

Pursuant to Article 1.1.2 of the Resolution [No. 5] ad Article 2.2.1 of Annex #1 of the [Khrami SPA], in order to ensure guaranteed debt servicing under the Agreement between the Ministry of Finance of Georgia and [Khrami-2] on the Repayment to the State of the Amounts from the Credit Granted by the Japanese International Cooperation Agency which were Disbursed for the Rehabilitation of [Khrami-2], dated of 10 December 2008, the long-term marginal tariff of electricity generation by [Khrami-2] shall be corrected on an annual basis if the change in GEL to Japanese Yen exchange rate exceeds 7% per annum upon correction in comparison to the exchange rate effective as of the adoption of tariff based on Resolution #4 of the [NERC], dated 1 April 2009.

Correction is applied to the part of the tariff allocated for the performance of obligation. Considering that correction is made once a year upon the occurrence of the said condition, difference between the exchange rate as of 1 April 2009 and the exchange rate as of 31 December 2015 -- GEL 0.00287 per one Japanese Yen shall be used upon correction. The amount paid in relation to the liability in 2016 was 190,636 thousand Yen, as planned. Annual generated electricity in 2016 was 334 million kWh. Therefore, the increased costs of servicing the debt in 2016 which is caused by increase of GEL to Japanese Yen exchange rate must be reflected on the tariff in the amount of 0.164 tetri for each kWh. This change is derived from multiplying the remaining amount of obligation by difference in exchange rate and dividing it by factual disbursement of electricity in 2016.

Index	*Unit*	*Value*
Debt servicing amount in 2016	*Thousand Yen*	*190,636*
Change in exchange rate of Yen to GEL on 31 December 2015 in comparison with 1 April 20109 [sic]	*GEL*	*0.00287*
Factual generation	*Million kWh*	*334*
Tariff correction due to change in Yen exchange rate	***Tetri/kWh***	***0.164***

Therefore, increase of tariff due to change in GEL to Japanese Yen exchange rate should amount to 0.164 tetri per each kWh for the period starting from 1 January 2016 until 31 December 2016.

The period from 31 December 2016 until 31 December 2017 is also subject to correction based on the change of exchange rate after 31 December 2016.

Correction is applied to the part of the tariff allocated for the performance of obligation. Upon correction, the difference between the exchange rate of 1 April 2009 and 31 December 2016 is used – 0,00564 GEL per one Japanese Yen. The amount payable in relation to the liability is 190,636 thousand Yen during 2017. Annual planned generation of electricity in 2017 is 302 million kWh. Therefore, the increased costs of servicing the debt in 2017 caused by change of exchange rate must be reflected on the tariff in the amount of 0.356 tetri for

each kWh. This change is derived from multiplying the remaining amount of obligation by difference in exchange rate and dividing it by factual disbursement of electricity in 2017.

Index	*Unit*	*Value*
Debt servicing amount in 2017	*Thousand Yen*	*190,636*
Change in exchange rate of Yen to GEL on 31 December 2016 in comparison with 1 April 20109 [sic]	*GEL*	*0.00564*
Planned generation of electricity	*Million kWh*	*302*
Tariff correction due to change in Yen exchange rate	***Tetri/kWh***	***0.356***

Therefore, increase of tariff due to change in GEL to Japanese Yen exchange rate should amount to 0.356 tetri per each kWh for the period starting from 1 January 2017 until 31 December 2017.

…

The period from 31 December 2016 until 31 December 2017 is also subject to correction based on the change of exchange rate after 31 December 2016.

.[370]

362. Khrami-2's application, which included adjustment based on both the GEL/USD and GEL/JPY exchange rates and losses from the failure to consider its 2016 application, was as follows:

Correction of long-term marginal tariff:

By this application, we request that you correct the marginal tariffs of JSC Khramhesi-2 in accordance with the rules and terms set forth under Resolution #5 and Purchase Agreement. In particular:

a) The final requested tariff for JSC Khramhesi-2 from 1 September 2017 to 31 August 2018 amounts to the sum of the applicable tariff, Loss Profit Compensation Tariff in relation to USD and Japanese Yen and Currency Differences Compensation Tariff, which equals to 16.73 tetri per kWh (9,4 tetri+ 3,20 tetri+ 4,13 tetri = 16,73 tetri).

[370] Khrami-2 Tariff Application, pp. 1-2, C-0122.

> *b) The final requested tariff for JSC Khramhesi-2 from 1 September 2018 to 31 December 2018 (without taking into consideration possible changes of Lari exchange rate in relation to Japanese Yen and/or US Dollar) amounts to the sum of the applicable tariff and the Currency Differences Compensation Tariff, which equals to 13,53 tetri per kWh (9,4 tetri + 4,13 tetri = 13,53 tetri).*
>
> *c) The final requested tariff for JSC Khramhesi-2 from 1 January 2019 to 1 November 2019 amounts to the sum of the relevant established tariff (without taking into consideration possible changes of Lari exchange rate in relation to Japanese Yen and/or US Dollar) and Currency Differences Compensation Tariff, which equals to 13,03 tetri per kWh (8,9 tetri + 4,13 tetri = 13,03 tetri).*
>
> *d) Also, we request that you correct the final marginal tariffs, which are set for JSC Khramhesi-2 in the period from 1 November 2019 to 31 December 2025 by the Resolution #5 and the Purchase Agreement, by taking into account devaluation factor and based on the volume of the tariff correction which will be set by you for JSC Khramhesi-2 until 1 November 2019.*[371]

363. The NERC responded that the applications were not in the prescribed format. Thus, on 16 June 2017, the NERC gave the Khrami Companies five-days to amend their application.[372] On 22 June 2017, the Khrami Companies submitted compliant applications under the 2014 Methodology under reserve. In both cases, the Khrami Companies requested that their applications be considered in accordance with NERC Resolution No. 5 and the Khrami SPA and not pursuant to the 2014 Methodology. They also stated that by submitting their applications in the form required by the 2014 Methodology, the Companies were not waiving their rights under NERC Resolution No. 5 and the Khrami SPA.[373]

364. On 30 June 2017, the NERC commenced its review of the Khrami Companies' tariffs.[374]

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[371] *Id.*, p. 4.

[372] Letters from the Shonia to Kandelaki, dated 16 June 2017, C-0124, C-0125.

[373] Letters from Kandelaki to the Milorava, dated 22 June 2017, C-0126, C-0127.

[374] *See* Letter from Gabelaya to Kandelaki, dated 24 November 2017, C-0133, pp. 5-6, which says that on 30 June 2017, NERC Decision No. 49/150 initiated a public administrative proceeding for the publication of a regulatory legal act on amendments to NERC Resolution No. 33 dated 4 December 2008, with a 19 November 2017 deadline for publishing a resolution and a 31 July 2017 deadline for submitting observations.

365. On 26 October 2017, the NERC shared with the Khrami Companies' General Director, Mr. Devi Kandelaki, spreadsheets setting out its calculations of the adjustment of the Khrami Companies' tariffs.[375]

366. On 31 October 2017, the NERC held a public hearing, attended by representatives of the Khrami Companies, and ultimately voted to increase the Khrami Companies' Generation Tariffs by 19% as of 1 November 2017 ("**NERC Resolution No. 30**" and "**NERC Resolution No. 31**").[376] Mr. Kandelaki attended, but expressly refused to comment on the NERC's analysis in view of the pending arbitration.[377]

367. In response to a request from the Khrami Companies, on 24 November 2017, the NERC provided explanatory notes of its reasoning and calculations underlying Resolution Nos. 30 and 31.[378] The Respondents say that unlike the Khrami Companies' application for an adjustment, "the NERC actually bothered to explain what they did in a letter to Mr. Kandelaki".[379]

368. In Resolution Nos. 30 and 31, although the NERC agreed that the Khrami Companies' Generation Tariffs warranted adjustment in view of the depreciation of the GEL against the USD and JPY, it disagreed with the Khrami Companies' calculations. According to the NERC, due to exchange rate volatility, the Khrami Companies' proposed method of calculation using the exchange rate on a single day at the end of each reference year (the snapshot rate), as opposed to using the average exchange rate throughout the reference year preceding the adjustment, was not reliable.[380]

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[375] Email from the NERC to the Khrami Companies, dated 26 October 2017, R-0073.

[376] NERC Resolution No. 30 on Amendments to NERC Resolution No. 33 dated 4 December 2008, dated 31 October 2017 ("**NERC Resolution No. 30**"), CL-0089; NERC Resolution No. 31 on Amendments to NERC Resolution No. 33 dated 4 December 2008, dated 31 October 2017 ("**NERC Resolution No. 31**"), CL-0090.

[377] Milorava I, ¶ 70.

[378] Letter from Gabelaya to Kandelaki, dated 24 November 2017, C-0133.

[379] Tr. Day 7, 230-231.

[380] Letter from Gabelaya to Kandelaki, dated 24 November 2017, C-0133.

369. The Department of Tariffs and Economic Analysis of the Commission did not agree with the request of KhramHPP-1 JSC on the use of the indicator of the national currency's exchange rate versus the USD as of 1 September 2016 (USD 1 = GEL 2.3062) in order to determine the national currency's exchange rate versus the USD. Since the adjustment concerns the period from 1 November 2013 to 1 November 2016 in accordance with Clause 3, Article 17 of Resolution No. 33 of the Commission dated 4 December 2008, the department believed that the average exchange rate for this period, which is USD 1 = GEL 2.0863, should be used to determine the change.[381]

370. Further, the NERC disagreed with the Khrami Companies that the adjustment should be applied to the entire Generation Tariff, as opposed to only the difference between the long-term maximum tariffs of the Khrami Companies determined by Resolution No. 5 in 2011 and the tariffs in effect prior to it entering into force. The NERC stated as follows:

> *This exchange rate was compared with the exchange rate existing at the time of the conclusion of the contract for the purchase and sale of KhramHPP-1 JSC and KhramHPP-2 JSC – USD 1 = GEL 1.6454. The change amounted to 26.8%, which exceeds the 7% limit determined by the aforementioned resolution, and, consequently, the long-term maximum rate for electricity generation is subject to adjustment. At the same time, Part 1, clause 3, Article 17 of the same resolution is worded as follows: "In order to ensure the guaranteed return of investments made during the acquisition of KhramHPP-1 JSC and KhramHPP-2 JSC, the long-term maximum tariffs (upper limit) for electricity generation by KhramHPP-1 JSC and KhramHPP-2 JSC should be adjusted if the change in the lari exchange rate versus the U.S. dollar is more than 7% compared with the rate existing at the time of the conclusion of the purchase and sale contract for KhramHPP-1 JSC and KhramHPP-2 JSC", which implies an adjustment not for the total long-term maximum electricity generation tariff, but only an adjustment to the difference between the long-term maximum tariffs of KhramHPP-1 JSC determined by Resolution No. 5 dated 7 April 2011 and the tariffs in effect prior to this resolution entering into force (2.3 tetri/kWh), which should ensure a guaranteed return on investment made during the acquisition of KhramHPP-1 JSC and KhramHPP-2 JSC. In particular, for KhramHPP-2 JSC this difference for the period from 1 January 2014 to 31 December 2018 inclusive is 5.9 tetri/kWh, and from 1 January 2019 to 31 December 2021 inclusive is 5.4 tetri/kWh.* [382]

371. Regarding the GEL/JPY adjustment, the NERC disagreed with the Khrami Companies' comparison indicator and, as with the GEL/USD adjustment, decided that the average exchange rate

[381] *Id.*, p. 18.

[382] *Id.*, p. 9.

for the past year should be used to determine the change, not the last day of the past period.[383] The Respondents point out that in Resolution Nos. 30 and 31 of 31 October 2017, the NERC adjusted the Khrami Companies' tariffs for the GEL/USD depreciation even though its Resolution No. 5 and the Khrami SPA did not contemplate such adjustment until November 2019.

372. The NERC also rejected the compensation request for loses from the non-adjustment of tariffs in 2016, stating that the Khrami Companies had not submitted compliant applications in 2016.[384] The NERC stated as follows:

> *As regards the request of KhramHPP-1 JSC in connection with compensation for unearned profit for the period from 1 November 2016 to 31 August 2017 inclusive, which, according to the licensee's explanation, was caused by the fact that the Commission did not hold a discussion as part of the tariff application for the adjustment of long-term maximum tariffs submitted by KhramHPP-2 JSC dated 4 August 2016, this amount is not refundable using the electricity generation tariff since the tariff was not adjusted in 2016 through the fault of the licensee because the application was not submitted in accordance with the requirements specified by legislation, in particular the tariff application should have been submitted in a tangible form and completed in accordance with the "Tariff application form submitted by an electricity generation licensee in order to calculate electricity generation tariffs" approved by Decision No. 42/1 of the Commission dated 6 August 2015 taking into account the Law of Georgia "On Electric Power and Natural Gas". At the same time, according to Part 2, Article 83 of the General Administrative Code of Georgia, "if an applicant fails to submit to the administrative authority any document or other information envisaged by law or by a legal act issued on its basis that is necessary to resolve a case, the administrative authority shall determine a period for the applicant during which the applicant must submit an additional document or information", and according to Part 5, ""if an applicant fails to submitthe relevant document or information within the prescribed period, the administrative authority shall be authorized to decide to leave the application without consideration". Since KhramHPP-1 JSC was unable to ensure the submission of the comprehensive tariff application that was necessary to adjust the long-term maximum tariffs for electricity generation to initiate the public administrative proceedings "On Amendments to Resolution No. 33 of the Commission dated 4 December 2008 "On Electricity Tariffs" during the period specified by the Commission on the basis of legislative requirements, the Commission decided not to consider the tariff application.* [385]

[383] Transcript of NERC public hearing regarding the Khrami Companies' tariff application, dated 31 October 2017, C-0214, pp. 1-2; NERC Public Hearing No. 80-2-3, dated 31 October 2017, R-0052.

[384] NERC public hearing transcript re Khrami Companies' tariff application, dated 31 October 2017, C-0214, p. 7.

[385] Letter from Gabelaya to Kandelaki, dated 24 November 2017, C-0133, p.19.

373. The Claimants say that in a reversal of its previous position, in Resolution Nos. 30 and 31, the NERC acknowledged that it could (and did) apply the terms of the Parties' agreement in the Khrami SPA, albeit improperly.[386]

374. The NERC's rejection of the Khrami Companies' claims for the non-adjustment of their tariffs in 2016 echoed the explanation that the NERC's Ms. Milorava gave to Inter RAO and the Khrami Companies at a public hearing on 31 October 2017, in response in 2016:

> *The communication between the company and the Commission ended with the commission giving additional time to present the additional documents – the signatures are meant. The company missed the deadline and hence, it is assumed that this one-year period [2016], for which the company is asking the remuneration, this is the loss incurred due to their fault and therefore, the Commission is entitled, rather, it is obliged not to consider this loss. The loss amounts to GEL 14.4 million with respect to the USD [rate] and GEL 1.2 million – with respect to the adjustments based on Yen [rate].*[387]

375. As set out above, the Claimants say that the Khrami Companies abandoned their 2016 tariff adjustment application because when they requested an adjustment due to the decline in the GEL against the JPY and USD,

> *[t]hey were told by the NERC that an adjustment would only be made in accordance with the 2014 [M]ethodology, which does not contemplate currency adjustments. On that basis, having seen what had happened in 2015 to Telasi, the Khrami Companies didn't pursue their 2016 application to the end … because they were afraid that the situation would get worse. But in the end the situation got so bad that the Khrami Companies had to seek confirmation from Georgia that the tariff deal would be respected, and it wrote a letter to the [G]overnment saying, "Please confirm that"; that's C-116. The [G]overnment did not reply.*[388]
>
> …
>
> *[T]here was no adjustment because the Khrami [C]ompanies had effectively been forced to abandon their application under threat of application of the 2014 [M]ethodology.*[389]

[386] Tr. Day 1 (Claimants' Opening Statement), 52-53.

[387] NERC public hearing transcript re Khrami Companies' tariff application, dated 31 October 2017, C-0214, p. 7.

[388] Tr. Day 1 (Claimants' Opening Statement), 52:5-17.

[389] Tr. Day 1 (Claimants' Opening Statement), 53:15-18.

R. The Claimants' Initiation of Arbitrations Against Georgia

376. On 1 March 2017, Gardabani and Telasi notified Georgia of disputes under the Khrami SPA and the 2013 Memorandum and, on 14 April 2017, Gardabani and Silk Road notified Georgia of a dispute under the BIT. In June and August 2017, the Claimants filed their respective Requests for Arbitration before the SCC and ICSID. In the meantime, both Telasi and the Khrami Companies applied to the NERC for an adjustment to their tariffs, as discussed below.

S. The Parties' Settlement Discussions

377. Georgia initially offered to forego its share of the Target Investment Allowance (TIA) that Telasi had accumulated since March 2013 in exchange for a full and final waiver of all of Telasi's claims under the 2013 Memorandum as of January 2016. The Respondents say that it did so in order to address Inter RAO's purported dissatisfaction with Telasi's tariffs by offering to forego its share of the TIA up until that point, "although Telasi's financial results in 2014 and 2015 had exceeded all expectations".[390] Ultimately, however, the parties failed to reach an agreement. The Respondents say that Georgia's portion of the TIA was to be distributed in 2017, but that before that distribution could happen, Inter RAO commenced this arbitration.[391]

378. On 12 June 2016, Inter RAO rejected Georgia's proposal to forego its share of the TIA in settlement of Telasi's WAPT-based claimed losses as the Respondents required concessions, including a waiver of Telasi's right to claim an adjustment of its distribution tariff on the basis of currency depreciation, which were not acceptable.[392] The Respondents suggest that Inter RAO

[390] Respondents' Rejoinder, ¶ 186; *see also*, Respondents' Counter-Memorial, ¶ 201.

[391] Valishvili I, ¶¶ 62-66; Respondents' Counter-Memorial, ¶¶ 203, 289; Respondents' Rejoinder, ¶ 186.

[392] Claimants' Memorial, ¶ 119; Email from Markov to Valishvili, dated 12 June 2016, C-0087, p. 1; Email from Valishvili to Markov, dated 11 June 2016, C-0086; Report on the results of meeting with Kaladze, dated 30 June 2016, C-0088,¶ 9; NERC Resolution No. 30, dated 28 November 2019, RL-0103.

decided to maintain its claims with respect to Telasi as leverage for an increase in the Khrami Companies' Generation Tariffs.

T. 2017/2018 Changes to the Law on Electricity

379. On 30 June 2017, Georgia amended the Law on Electricity applicable to the 35/110 kV category to permit customers to purchase energy directly from ESCO/COPS, rather than from a distributor, effective 1 May 2018.[393] This decreased Telasi's sales and allocation of energy. However, after the NERC incorporated the effect of the amended Law on Electricity into its annual plan for 2018 and modified Telasi's tariffs accordingly, on 4 May 2018, the changes were rolled back by a subsequent amendment to the Law to require customers in the 35/110 kV category to continue to purchase their energy from energy distributors.[394]

U. Subsequent Regulatory Changes and the Unbundling Regime

380. On 28 November 2019, the NERC issued Resolutions Nos. 30 and 31, adjusting the Khrami Companies' Generation Tariffs for the period from 1 December 2019 to 31 December 2021 to account for the devaluation of the GEL against the USD and the JPY.[395] In these tariff resolutions, the NERC increased the Generation Tariffs of Khrami-1 from 9.147 tetri/kWh (as approved in 2017) to 10.837 tetri/kWh and those of Khrami-2 from 10.614 tetri/kWh (as approved in 2017) to 12.304 tetri/kWh.[396]

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[393] Kobtsev I, ¶ 77; Claimants' Memorial, ¶¶ 147-149.

[394] *Ibid*.

[395] Respondents' Comments on Quantum Issues, ¶ 9; NERC Resolutions Nos. 30 and 31, dated 28 November 2019, RL-0103; NERC Resolution No. 31, dated 28 November 20, RL-0104; NERC Resolution No.30, CL-0089; NERC Resolution No.31, dated 31 October 2017, CL-0090. These Resolution were issued following the Khrami Companies' tariff adjustment applications dated 27 September 2019: Letter from Khrami-1 to the NERC, dated 27 September 2019; Letter from Khrami-2, dated 27 September 2019, R-0100.

[396] Respondents' Comments on Quantum Issues, ¶ 9, and the sources cited there.

381. On 29 December 2020, the NERC issued Resolution No. 83 setting out new Distribution Tariffs for Telasi for 2021-2025 as well as new Consumer Tariffs to 1 July 2021, pursuant to the 2014 Methodology.[397]

382. As of 1 July 2021, the distribution and supply activities of vertically integrated electricity companies operating in Georgia were legally unbundled, *i.e.* the Unbundling Regime came into effect. According to the Respondents, this was a structural reform which involved the separation of potentially competitive segments (such as the production and supply of electricity) from those where competition is not possible or not permitted (such as the transmission and distribution of electricity). The Unbundling Regime required the establishment of separate legal entities for network activities and wholesale or retail activities. This was intended to harmonize Georgia's legislation and regulatory framework with EU law, which commenced with the adoption of a new tariff methodology applicable to all electricity companies operating in Georgia and to create a competitive market through the unbundling of vertically integrated companies. As a result of the unbundling, Inter RAO established a new energy supply company in Tbilisi, Telmiko LLC ("**Telmiko**") which took over Telasi's electricity supply activities while Telasi continued to operate the distribution network. [398] The new tariff regime included a profit margin on supply activities representing a percentage of Telmiko's cost of energy, unlike under the 2014 Methodology.[399]

[397] *Id.*, ¶10; NERC Resolution No. 83, dated 29 December 2020, BM-47.

[398] Respondents' Comments on Quantum Issues, ¶ 11.

[399] *Id.*, ¶12. According to the Respondents, this is not disputed. The Parties agree that the Unbundling Regime does apply to the Khrami Companies, whose tariffs remained regulated by the NERC Resolutions that the Parties' experts took into account in their updated calculations. See: Email correspondence from counsel for the Claimants on behalf of the Parties, dated 5 July 2021.

V. The Claimants' Supplemental Claims

383. The Claimants' primary claims relate to the Respondent's measures which affected Telasi's and the Khrami Companies' tariffs (the "Tariff Related Claims"). In addition, the Claimants pursued three additional claims unrelated to Telasi's and the Khrami Companies' tariffs (the "Supplemental Claims").

384. The background facts relevant to these claims are set out below.

1. Cost of New Connections Issue

385. The 2013 Memorandum does not mention the cost of new connections. The Claimants maintain that, separate from the 2013 Memorandum, the Government assured Inter RAO and Telasi that they would fully recover Telasi's costs of connecting new customers to the distribution network[400]. They say this has not occurred despite the Respondents' repeated promises.

386. Pursuant to several of the NERC's Resolutions, since 2008 Telasi was obliged to connect new users to its network at its own expense, rather than users bearing the cost, as they had previously.[401] Users pay a fixed amount set by the NERC (which has not changed since 2011) according to the applicable voltage class and capacity of the connection, and Telasi performs all necessary connection works at its own expense. If Telasi does not comply with the NERC's connection deadlines, it must pay a penalty. For each new connection, Telasi must obtain a construction permit from the Tbilisi town council and approvals from ecological authorities and

[400] Claimants' Memorial ¶¶ 150-154; Claimants' Reply, ¶¶ 85-90; Tr. Day 1 (Claimants' Opening Statement), 128-129.

[401] NERC Resolution No. 21, dated 18 September 2008, CL-0076; NERC Resolution No. 20, dated 18 September 2008, (consolidating amendments as of 26 September 2012), Art. 26, CL-0077; NERC Resolution No. 6, dated 19 April 2017, CL-0087.

other city authorities. Further, Claimants say that Telasi often needed fast-track construction permits which required the payment of a fee, in order to meet Georgia's connection deadlines.

387. In September 2014, Inter RAO and Telasi started complaining to the MOE that the new user connection fees were insufficient to cover Telasi's actual costs and requested full compensation of these costs from Georgia.[402] The Parties' discussions continued until 2016.

388. In December 2014, Georgia proposed that the definition of "Agreed Investments" at Appendix 1 to the 2013 Memorandum be amended to include the cost of new connections so as to ensure full recovery of these costs through the mechanisms of compensation for any GRD.[403] Inter RAO rejected the proposed amendment and insisted that any costs above the connection fee be compensated by way of a decrease in Telasi's WAPT.[404] The MOE rejected this proposal, stating that the connection of new users expands the distribution network, and that all associated costs should be treated as investments in that network and reflected in the Distribution Tariff, not the WAPT.[405] The MOE reiterated its proposal to include new connection costs within the meaning of "Agreed Investments", which Inter RAO rejected.[406]

389. Commencing in 2015, the NERC took into account the difference between Telasi's costs and the connection fee paid by a new user as capital expenditures ("**CAPEX**") recoverable through Telasi's Distribution Tariffs. However, the Claimants argue that the CAPEX mechanism only partly mitigated Telasi's losses, and that "the net present value of these payments over such a long period of time [gradually over 25 years] is insufficient to cover Telasi's losses".[407] It appears that

[402] Letter from Volkov to Kaladze, dated 18 September 2014, C-0044.

[403] Respondents' Counter-Memorial, ¶ 182; Claimants' Reply, ¶ 87.

[404] Letter from Volkov to Kaladze, dated 16 December 2014, C-0053.

[405] Letter from Kaladze to Volkov, dated 29 December 2014, C-0055.

[406] Valishvili I, ¶ 45.

[407] Claimants' Memorial, ¶ 155.

commencing in 2019 the NERC adopted new connection fees to require payment of Telasi's full costs of connection.[408]

2. Telasi's Purchase Portfolio Volatility

390. On 30 March 2017, Telasi paid out GEL 20 million (approximately USD 8.2 million) in dividends to its shareholders.[409]

391. Georgian electricity generation companies, Enguri and Vardnili, produce the cheapest electricity in Georgia. Up until May 2017, Telasi received Enguri energy approximately in proportion to Telasi's share of the Georgian distribution market, pursuant to long-term supply agreements.[410] However, on 25 May 2017, the MOE reduced Telasi's usual allocation of Enguri energy because of a purported imbalance between the costs and revenue of energy generation companies in Georgia, which resulted in instability in the electricity system and distribution companies having difficulty paying taxes.[411]

392. The Claimants claim that in the eight-month period between May-December 2017, the NERC's allocation of energy purchases to Telasi from Enguri followed an *ad hoc* pattern that departed from the planned amounts used to set Telasi's WAPT. In each of May, June and July 2017, Telasi applied to the ESCO/COPS to approve the amount of Enguri energy forecasted in the NERC's Annual Energy Plan, which ESCO/COPS declined, citing technical difficulties in transferring electricity to Tbilisi.[412]

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[408] Tr. Day 1, (Claimants' Opening Statement), 128-129.

[409] Telasi general meeting minutes, dated 30 March 2017, C-0109, p. 3.

[410] Telasi has a 35% market share and Energo-Pro holds the remaining 65% (Energo-Pro purchased Kakheti in 2017).

[411] Letter from Valishvili to Telasi *et al*, dated 25 May 2017, C-0117.

[412] Claimants' Memorial, ¶ 163; Kobtsev I, ¶ 65.

393. The Parties agree that the unavailability of Enguri energy caused an increase in the purchase cost of electricity on the Georgian market. Telasi sought to cover the shortfall in cheap Enguri energy with purchases from more expensive electricity sources.

394. On 25 August 2017, the MOE informed Telasi that an additional volume of 50 million kWh of Enguri energy would be allocated to Telasi to cover the earlier shortage.[413]

3. Diversion of the Khrami Companies' Electricity and Sales to Third Parties

395. In October 2017, the NERC adjusted the Khrami Companies' Generation Tariffs to increase them by over 19%.[414]

396. In 2018, the NERC diverted the energy produced by the Khrami Companies away from Telasi for the period from May to August 2018 and replaced it with energy from Enguri.[415]

397. On 25 December 2017, the NERC shared with Mr. Antadze Telasi's forecasted purchase portfolio for 2018-2020, which stated that Telasi would not receive energy from the Khrami Companies in May-July 2018.[416]

398. The Khrami Companies found alternative buyers for their electricity for the remainder of 2018,[417] at lower prices than the tariff Telasi would have paid. The Claimants say this was in order

[413] Letter from Valishvili to Telasi, Enguri, Energo-pro, COPS and GSE, dated 25 August 2017, C-0131, p. 1.

[414] Respondents' Rejoinder, ¶ 200.

[415] NERC Resolution No. 48 (new Telasi tariffs based on the NERC's 2018 Annual Energy Plan), CL-0091; Claimants' Memorial, ¶ 169. (By way of background, since the early 2000s, 100% of the Khrami Companies' output had been supplied to Telasi, and made up 15% of its annual purchases.)

[416] Email from the NERC to Telasi, dated 25 December 2017, R-0077.

[417] Purchase Agreements between Khrami-2 and Geo Servers, dated 15 May 2018, C-0137; Khrami-2 and GFDC Georgia, dated 15 May 2018, C-0138; Khrami-1 and Geo Servers, dated 24 May 2018, C-0139; Khrami-1 and BFDC Georgia, dated 24 May 2018, C-0140; Respondents' Rejoinder, ¶ 201.

to avoid their entire output being deemed acquired by ESCO/COPS at a price substantially lower than the applicable Generation Tariffs.[418]

399. In addition, the Claimants say that Telasi purchased energy from another distributor and ESCO/COPS at higher tariffs because the NERC did not allocate the full amount of Enguri energy to Telasi. ESCO/COPS's reason for the under-supply from Enguri to Telasi was that the contract between Georgia and Energo-Pro (Telasi's competitor), provided that Energo-Pro had the right to a fixed volume of Enguri energy.[419]

W. Findings on Liability in the SCC Partial Award on Liability

400. In the Partial Award on Liability in the SCC arbitration, the majority of the Tribunal reached the following conclusion:

> *1) The Claimants' Claim for a WAPT-based Adjustment under Clause 2.3.2 for the Period Prior to September 2015*
>
> *649. The Tribunal has found that this adjustment mechanism is independent of Clause 2.2.2 and the RGR mechanism. However, this adjustment is covered by the tariff freeze in Clause 2.2.3 which covers the period from 1 April 2013 through 31 December 2016. Therefore, this claim must fail.*
>
> *2) The Claimants' Claim with Respect to the Inflation and Currency-based Adjustments under Clause 2.3.4*
>
> *650. The Claimants' first formal request for an adjustment under Clause 2.3.4 was made on 19 May 2016.[420] Although this request was made after 3 September 2015, it includes a claim for a currency adjustment of the exchange rate of the GEL to the USD for period two under Clause 2.3.4 (1 September 2013 to 1 September 2016). The change in the GEL/USD exchange rate during this period appears to qualify for an adjustment during this period and, possibly, for the period prior to 3 September 2015. The Claimants are entitled to an adjustment of Telasi's Distribution Tariff for this period based on the average exchange rate over the relevant review periods. Pursuant to Clause 2.3.4(b), this adjustment should be applied to 30% of Telasi's Distribution Tariff.*

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[418] Claimants' Memorial, ¶ 170; Purchase Agreements between Khrami-2 and Geo Servers, dated 15 May 2018, C-0137; Khrami-2 and GFDC Georgia, dated 15 May 2018, C-0138; Khrami-1 and Geo Servers, dated 24 May 2018, C-0139; Khrami-1 and BFDC Georgia, 2 dated 4 May 2018, C-0140.

[419] Claimants' Memorial, ¶ 171.

[420] Letter from Kobtsev to Kaladze dated 19 May 2016, C-0079.

> *3) The Claimants' Claim of Breaches of Clauses 2.2.1, 2.3.2 and 2.3.4 after 3 September 2015*
>
> *651. The NERC's application of the 2014 Methodology and the Amended 2014 Methodology and its failure to apply the long-term tariff rates set out in Clause 2.2.1 and the tariff adjustment provisions of Clauses 2.3.2 and 2.3.4 do not, in themselves, constitute a breach of those clauses. Therefore, these claims fail. However, the Claimants' contractual rights under each of these provisions constitute part of the relevant position for the purpose of compensation pursuant to Clause 5.2.*
>
> *652. At 31 March 2013 when the 2013 Memorandum was concluded, Telasi's position included the right to the application of the tariffs contained in Tables 1 and 2 of Clause 2.2.1, including a return to the previous higher tariffs applicable in 2012, in particular the Distribution Tariffs, as of 1 January 2017 and adjustments under Clauses 2.3.2 and 2.3.4 subject to Clause 2.2.3.*
>
> *4) The Claimants' Claim for Breach of Clause 5.2*
>
> *653. A comparison of Telasi's position at 31 March 2013 with its position under the application of the 2014 Methodology (and the Amended 2014 Methodology), indicates that the Claimants have suffered losses as a result of the application of the Methodology. The amount of compensation due will depend on calculations taking into account the Tribunal's findings on how the adjustments under Clauses 2.3.2 and 2.3.4 must be applied and calculations based on directions on quantum from the Tribunal which will be provided separately to the Parties. At this stage, the Tribunal finds that compensation is due under Clause 5.2 and has not been paid by the Respondents. Accordingly, the Tribunal concludes that the Respondents are liable for the payment of compensation to be determined in the next phase of this arbitration which will determine the quantum of the Claimants' claims.*[421]

401. In addition, the Tribunal upheld the Counterclaim brought by the Claimants in the SCC arbitration (the Government of Georgia and the Partnership Fund) under the 2013 Memorandum as follows:

> *675. The Respondents are entitled to payment of a 50% share of the TIA. The amount of compensation payable is to be set off against the compensation owing to the Claimants and is subject to calculation on the basis of the Tribunal's findings on liability and directions on quantum.*[422]

402. Insofar as Gardabani's claims under the Khrami SPA are concerned, the Tribunal reached the following conclusions in the Partial Award on Liability:

> *794. For the foregoing reasons, the Tribunal has reached the following conclusions regarding the Claimants' claims under the Khrami SPA:*

[421] SCC Partial Award on Liability, ¶¶ 649-653.

[422] *Id.*, ¶ 675.

> *a. Gardabani did not waive or fail to meet a condition precedent to its claims for adjustments of the tariffs of the Khrami Companies;*
>
> *b. The Government, the MOE and the SSB have breached their obligations under Clause 5.2.2 and Clause 2 of the Annex 1 of the Khrami SPA in the following manner:*
>
> > *i. By failing to ensure the application of the adjustment provisions in Clause 2 of Annex 1 to the Khrami SPA to the Khrami Companies' application for adjustments in 2016;*
> >
> > *ii. By failing to ensure the use of the Snapshot Rate for the GEL/JPY exchange rate when making the currency adjustments in Clause 2.1 of Annex 1 to the Khrami SPA;*
> >
> > *iii. By failing to ensure the use of the Snapshot Rate for the GEL/USD exchange rate when making the currency adjustments in Clause 2.2 of Annex 1 to the Khrami SPA;*
> >
> > *iv. By failing to ensure that the GEL/USD currency adjustment under Clause 2.2 of Annex #1 of the Khrami SPA was made to the entire tariff (less any portion already adjusted for under Clause 2.1 of Annex 1 to the Khrami SPA);*
> >
> > *v. By failing to compensate Gardabani and the Khrami Companies pursuant to Clause 5.2.2 for any damage or losses arising from the non-application or alteration of the tariffs and their conditions of adjustment as required under Clause 2 of Annex 1 of the Khrami SPA.*[423]

403. In summary, the Tribunal found that the Government of Georgia, the MOE and the SSB breached their obligations under Clause 5.2.2 and Clause 2 of Annex 1 of the Khrami SPA and were required to compensate Gardabani for the loss suffered by it. Further, the Tribunal found that the Government had breached its obligation under Clause 5.2 of the 2013 Memorandum and was required to pay compensation to Telasi and Inter RAO for the loss suffered by them. In addition, the Tribunal found that the Government of Georgia is entitled to its 50% share of the TIA under the 2013 Memorandum.

V. OVERVIEW OF THE PARTIES' CLAIMS AND DEFENSES

404. The Tribunal sets out below a general summary of the Parties' claims and defences in this arbitration and their relationship to the claims and defences in the SCC Arbitration before turning to each of the claims in this arbitration in more detail.

[423] *Id.*, ¶ 794.

405. The Claimants are Gardabani and Silk Road and the Respondent is the Government of Georgia. In this ICSID Arbitration, the Claimants pursue a number of claims in addition to the contractual claims brought by Inter RAO, Telasi and Gardabani in the SCC Arbitration. The Respondent advances a counterclaim in both arbitrations, as well. While these claims are brought on the basis of alleged breaches of the BIT, most of the damages claimed in this arbitration overlap with damages claimed in the SCC Arbitration; these are for the losses claimed as a result of the alleged tariff-related breaches. The Claimants note this and confirm that they do not seek double recovery.

406. In their agreement on the coordination of the SCC and ICSID arbitrations, the Parties agreed that the Tribunal shall render separate awards in each arbitration.[424]

407. The Claimants submit that the Tribunal has jurisdiction to hear its claims under the BIT and that the Parties have consented to submit disputes arising out of a breach of the BIT to a tribunal constituted under the ICSID Convention.[425] The Claimants say that both Gardabani and Silk Road are protected investors (nationals of the Netherlands) under the BIT with qualifying investments (respectively the Khrami Companies and their contractual rights, and the 75.11% shareholding in Telasi and its assets and its contractual rights). The Claimants say that the dispute and their claims fall within the jurisdiction of ICSID and this Tribunal. However, they say the Tribunal has no jurisdiction to determine the Respondent's counterclaim since it does not fall within the scope of the Parties' consent to arbitration under the BIT.

[424] Agreement on Coordination, dated 14 February 2018. *See* ¶ 31 above.

[425] Claimants' Memorial, ¶ 223.

408. The Respondent raised no objection to jurisdiction. Accordingly, the issue of jurisdiction will not be discussed further in this award except to the extent necessary in the discussion of the Tribunal's jurisdiction to decide the Respondent's Counter-Claim.

409. However, after the issuance of the Partial Award on Liability in the SCC claim, the Respondent objected that the Claimants' tariff related claims are not admissible. In their Observations on the Partial Award, the Respondents raised the objection that the Claimants' claims under the BIT in this arbitration seek relief for the same harm as, and are duplicative of, the contract claims brought by the Claimants in the SCC Arbitration (Telasi, Inter RAO and Gardabani). The Respondent alleges that in the SCC Arbitration, the Tribunal found breaches of the 2013 Memorandum and the Khrami SPA and held that the Respondent was required to pay compensation as a result of those breaches. Therefore, the Partial Award fully remedied the harm suffered by the Claimants in this arbitration relating to those contractual breaches. The Respondents say that this renders the Claimants' treaty claims seeking relief for the same harm inadmissible.[426] The Respondent does not raise the same objection with respect to the Supplemental Claims, which were not addressed in the SCC arbitration.

410. The Claimants disagreed for a number of reasons. They argued that the Partial Award establishes liability in the SCC Arbitration under the relevant contracts and that the Tribunal had not yet ordered compensation for the breaches of those contracts, nor have the Respondents paid any

[426] In their Observations on the Partial Award, dated 14 May 2021, the Respondents submitted in response to the Claimants' claims under the umbrella clause in the BIT that the underlying contracts (the 2013 Memorandum and the Khrami SPA) contained exclusive dispute resolution mechanisms which were effectively exercised by the Claimants. This was not formally raised as an objection to jurisdiction. Therefore, the Tribunal addresses this issue as part of its analysis of the Claimants' claims under the umbrella clause.

compensation. Therefore, no harm will have been remedied until the Respondents pay compensation to the SCC Claimants.[427]

411. Further, the Claimants say that the Respondent's conduct in breach of the Khrami SPA and the 2013 Memorandum harmed them (Gardabani and Silk Road) and violated their rights as qualifying investors under the BIT. According to them, their claims as protected investors under the BIT and the ICSID Convention are separate from the contractual claims by the Claimants in the SCC Arbitration. The Claimants say that the possibility of double recovery is not an issue of admissibility but, rather, relates to the merits and raises no concern in this case.

412. The Claimants also say that when the Parties agreed at the outset that the two arbitrations would be coordinated but would result in separate awards, it was plain that the facts underlying the two arbitrations were very similar and that the awards would address overlapping harms. It was on this understanding that they agreed to coordinate the two arbitrations. They say that the Respondent's objection on admissibility was made late.

413. In this arbitration, the Claimants bring their claims pursuant to Article 3(1) (fair and equitable treatment and impairment) and 3(4) of the BIT (umbrella clause).

414. First, the Claimants allege that the Respondent failed to accord their investments fair and equitable treatment, as required by Article 3(1) of the BIT. The Claimants say that the standard of fair and equitable treatment under the BIT required the Respondent to treat their investments fairly,

[427] Claimants' letter of 2 July 2021, p. 2. Since the Parties' submissions in their pleadings and in their Observations on the Partial Award, the Tribunal has issued the Partial Award and the First and Second Partial Awards on Damages in the SCC arbitration, in which the Tribunal has ordered the payment of compensation for the contractual breaches addressed in the SCC arbitration.

including in a manner that was transparent, consistent, stable, predictable, in good faith and in fulfilment of their legitimate expectations as investors.[428]

415. The Claimants allege that the Respondent frustrated Gardabani's legitimate expectations by failing to provide the stable legal and business environment that it had the right to expect. The Claimants say that the application of the 2014 Methodology to the Khrami Companies violated Gardabani's legitimate expectation based on the Respondent's assurances, the 2011 Memorandum, the Khrami SPA and NERC Resolution No. 5 that the Khrami Companies' tariffs would be set and adjusted in accordance with the specific regime agreed in the Khrami SPA.[429] The Claimants also allege that the Respondent acted inconsistently, irrationally and contrary to the principles of transparency in its treatment of Gardabani by adopting inconsistent positions with respect to the application of the 2014 Methodology rather than the Khrami SPA and the 2011 Memorandum.[430] In addition, the Claimants allege that the Respondent acted erratically and in a non-transparent manner in relation to the Khrami Companies when it diverted output away from Telasi during the period of May to July 2018.[431]

416. Similarly, the Claimants allege that the Respondent failed to provide Silk Road with the stable legal and business environment that it legitimately expected. In taking the position that the 2014 Methodology trumped all of the agreements in place governing Telasi's Consumer and Distribution Tariffs, the Respondent acted unfairly and vitiated Silk Road's legitimate

[428] Claimants' Memorial, ¶ 243, citing *Murphy Exploration & Production Company – International v. the Republic of Ecuador*, Partial Final Award, dated 6 May 2016 ("***Murphy v. Ecuador***"), CL-0042, ¶ 206 and *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, dated 27 August 2009, CL-0013.

[429] Claimants' Memorial, ¶¶ 248-253.

[430] *Id*., ¶¶ 264-266.

[431] *Id*., ¶¶ 262-263.

expectations.[432] The Claimants also say that the Respondent acted inconsistently and in a non-transparent manner in its dealings with Telasi with respect to the setting and adjustment of its tariffs and imposing the 2014 Methodology rather than the agreed tariff regime in the 2013 Memorandum.[433] Further, the Claimants allege that the Respondent acted erratically and non-transparently in the manner in which it regulated Telasi's economic activities, including the allocation of low-cost energy from Enguri, diversion of energy from the Khrami Companies, which negatively affected both Telasi and the Khrami Companies, and connection of new users to the electrical network.[434]

417. Second, the Claimants say that the Respondent impaired their investments in contravention of Article 3(1) of the BIT by way of its unreasonable conduct in failing to ensure that the tariffs applicable to Telasi and the Khrami Companies were set and adjusted as provided for in the 2013 Memorandum and the Khrami SPA. The Claimants say that the Respondent recognized that it was bound to ensure the application of the tariff related provisions of the 2013 Memorandum and the Khrami SPA and to compensate for any loss that resulted from its failure to do so. By insisting on the application of the 2014 Methodology and failing to identify any rational purpose for its conduct, the Respondent acted unreasonably and arbitrarily and impaired the Claimants' investments.[435]

418. Third, the Claimants also allege that, in breach of Article 3(4) of the BIT (the "Umbrella Clause"), the Respondent failed to observe its binding commitments with regard to their specific investments. The Claimants say that the protected obligations include both contractual and non-contractual obligations. They allege that Georgia failed to observe its contractual obligations with

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[432] *Id*., ¶¶ 254-255.

[433] *Id*., ¶¶ 264-266.

[434] *Id*., ¶¶ 257-261; see SCC Partial Award on Liability, ¶¶ 338-343.

[435] Claimants' Memorial, ¶¶ 272-274; Claimants' Reply, ¶¶ 194-201.

regard to each of them for the reasons set out in the breach of contract claims in the SCC Arbitration. They also say that the Respondent failed to observe non-contractual obligations directed at Telasi and Gardabani when it resiled from the tariff terms applicable to Telasi under NERC Resolution No. 3 and to the Khrami Companies under NERC Resolution No. 5.[436]

419. The Claimants seek full compensation for the alleged Treaty breaches under both international law and Georgian law standards in the form of damages. Initially, the Claimants quantified these as no less than USD 143,622,000 and no more that USD 209,904,000.[437] Subsequently, the Claimants recalculated the damages they seek in accordance with the Tribunal's Directions on Quantum, dated 19 April 2021.

420. The Claimants break out the total damages they seek into three categories. The first is for the alleged tariff losses suffered by Telasi and the Khrami Companies and claimed in both arbitrations.[438] The second is for alleged losses caused by changes to Telasi's purchase portfolio in 2017, which are quantified as USD 13,000.[439] The third is for the alleged losses caused to the Khrami Companies and Gardabani as a result of having to sell electricity to third parties in 2018 at lower tariffs, which are quantified as USD 1.52 million.[440]

421. In response to the Claimants' claims, the Respondent denies that it has breached any provision of the BIT or that it owes any compensation to the Claimants.[441] The Respondent says that its conduct was transparent and reasonable and was guided by a legitimate public policy objective.

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[436] Claimants' Memorial, ¶¶ 275-281; Claimants' Reply, ¶¶ 202-207.

[437] Claimants' Reply, ¶270.

[438] Claimants' Reply, ¶¶ 251-255.

[439] Claimants' Reply, ¶ 256.

[440] Claimants' Reply, ¶ 257.

[441] Respondents' Counter-Memorial, ¶¶ 338-362; Respondents' Rejoinder, ¶¶ 344-398.

422. As described previously, the Respondent says that none of the Claimants' tariff-related claims are admissible since the Partial Award in the SCC Arbitration fully remedies the harm suffered by the Claimants: Gardabani, as a Claimant in both the SCC and this arbitration, as a result of breaches of the Khrami SPA; Silk Road, which owns 75.11% of Telasi, seeks damages commensurate with its shareholding interest as a result of breaches of the 2013 Memorandum.[442]

423. With respect to the alleged breaches of the standard of fair and equitable treatment, the Respondent says that Article 3(1) does not protect investors against a state's legitimate exercise of its right to change its laws. The Respondent says that the legitimate expectations that the Claimants allege never arose. Further, it says that it acted in a predictable, transparent and reasonable manner with respect to Silk Road's and Gardabani's investments.

424. For the same reasons, the Respondent also denies that it impaired either of the Claimants' investments through arbitrary or unreasonable treatment.

425. With respect to the claim under the umbrella clause in Article 3(4) of the BIT, the Respondent says that there is no basis for a claim since it did not undertake any obligations with respect to the Claimants, as required under the BIT. In any event, the Respondent says that it complied with its obligations under the 2013 Memorandum, the Khrami SPA and the NERC resolutions in question.[443]

426. In its Observations on Quantum, the Respondent also took the position that there could be no breach of the umbrella clause as alleged by the Claimants since the underlying contracts, the 2013 Memorandum and the Khrami SPA, contain exclusive dispute resolution mechanisms. It says

[442] Respondent's Observations on Quantum, dated 14 May 2021; Respondent's letter dated 23 June 2021. The Tribunal addresses the question of admissibility of the Claimants' tariff-related breaches separately, below.

[443] Respondents' Counter-Memorial, ¶¶ 365-383; Respondents' Rejoinder, ¶¶ 399-410.

that these were successfully engaged by the Claimants who have obtained full redress for their losses through the SCC Partial Award.[444]

427. In the event that the Tribunal considers the Claimants' claim pursuant to the Umbrella Clause, the Respondent brings a counterclaim against Silk Road for its share of the TIA under the 2013 Memorandum. The Respondent says that its counterclaim and related damages arise out of Telasi's obligations under the 2013 Memorandum and are direct counterparts to the Claimants' claims under the BIT for alleged violations of the 2013 Memorandum. According to the Respondent, its counterclaim falls within the broad scope of Article 9 of the BIT and the relevant provisions of the ICSID Convention. The Respondent's claim is for 50% of any TIA accumulated between 1 April 2013 and 2 September 2015, which it says it is entitled to receive under Clauses 2.1.8 and 2.1.10 of the 2013 Memorandum. The Respondent claims GEL 12.4 million plus interest.

428. The Respondent also says that the Claimants have not demonstrated that they suffered any damages.[445]

429. In response to the Respondent's updated counterclaim,[446] the Claimants maintain that it is not within the Tribunal's jurisdiction since there is no substantive legal basis under the BIT for such a claim. Further, Silk Road has not consented to arbitration of the counterclaim.[447] In any event, the Claimants say that the Respondent's counterclaim should be dismissed since any share of the TIA claimed was to be distributed through an adjustment to Telasi's WAPT and not through a cash

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[444] Respondent's Observations on Quantum, dated 14 May 2021, p. 5; Respondent's letter dated 23 June 2021.

[445] Respondents' Counter-Memorial, ¶¶ 384-411; Respondents' Rejoinder, ¶¶ 425-464.

[446] Initially, the Respondent claimed its share of any TIA in the future. In its Rejoinder, the Respondent confirmed that it was seeking GEL 15.5 million for its counterclaim, calculated by its expert as Georgia's 50 percent share of the TIA that Telasi earned between 1 April 2013 and 2 September 2015 (GEL 23.3 million) less GEL 10.9 million in tax settlements paid by Inter RAO that were to be offset against the TIA according to the 2013 Memorandum, plus interest (GEL 3.1 million as of 31 December 2018). *See* Respondents' Rejoinder, ¶¶ 472-479.

[447] Claimants' Reply, ¶¶ 208-210; Claimants' Rejoinder on Counter-Claims, ¶¶ 24-31.

payment. While other forms of distribution of the TIA are permitted under Clause 2.1.11 of the 2013 Memorandum, the Claimants say that any such distribution had to be in compliance with legislation effective at the relevant time. Further, any cash distribution would have to be agreed with Telasi and implemented by it. As a result, the Claimants say that there is no legal basis for the Respondent to receive a cash distribution of its share of the TIA. [448]

430. Further, the Claimants say that if the Tribunal were to determine that a cash payment for the 2013-2016 TIA is warranted, any such amount is subject to set off against subsequent gross revenue deficits pursuant to Clause 2.1.12 of the 2013 Memorandum.[449]

VI. REQUESTED RELIEF

A. The Claimants' Request for Relief

431. In this arbitration, the Claimants request that the Tribunal:

> *(a) DECLARE that Georgia violated Article 3(1) of the BIT by failing to accord Gardabani's and Silk Road's investments fair and equitable treatment and impairing their investments through the adoption of unreasonable measures;*
>
> *(b) DECLARE that by failing to observe its binding commitments with regard to Gardabani's and Silk Road's investments Georgia breached Article 3(4) of the BIT;*
>
> *(c) DECLARE that it lacks jurisdiction over Georgia's counterclaim in respect of the Target Investment Allowance;*
>
> *(d) DISMISS Georgia's counterclaim for payment of a portion of any Target Investment Allowance and pre- and post-award interest and their corresponding claim for set-off under the 2013 Memorandum;*
>
> *(e) ORDER Georgia to pay full compensation to Gardabani and Silk Road for harm caused to their investments as a result of its violations of the BIT.*[450]

432. In the SCC Arbitration, the Claimants claim the following relief:

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[448] Claimants' Reply, ¶¶ 155-157, 211-212; Claimants' Rejoinder on Counter-Claims, ¶¶ 8-14, 32.

[449] Claimants' Reply, ¶¶ 212, 261-266; Claimants' Rejoinder on Counter-Claims, ¶¶ 35-36.

[450] Claimants' Reply, ¶ 269.

Gardabani asks that this Tribunal:

(a) DECLARE that Georgia, the Ministry of Economy and the State Service Bureau have breached their obligations under Clauses 1.15 and 5.5.2 and Clause 2 of Annex 1 of the Khrami SPA;

(b) ORDER Georgia, the Ministry of Economy and the State Service Bureau to pay full compensation to Gardabani for harm caused as a result of their breaches of the Khrami SPA.

[Telasi and Inter RAO] ask that this Tribunal:

(a) DECLARE that the Government has breached its obligations under Clauses 2.2, 2.3 and 5.2 of the 2013 Memorandum;

(b) DISMISS the Respondents' counterclaim for payment of a portion of any Target Investment Allowance and pre- and post-award interest and their corresponding claim for set-off under the 2013 Memorandum;

(c) ORDER the Government to pay full compensation to Telasi and Inter RAO for harm caused as a result of its breaches of the 2013 Memorandum.[451]

433. With respect to damages, the Claimants ask that this Tribunal:

(a) ORDER that the amounts cumulatively payable by the Respondents pursuant to paragraphs 267(b), 268(c) and 269(e) shall be no less than ~~US$143,622,000~~ [USD 140,022,000] and no more than ~~US$209,904,000~~ [USD 206,304,000];[452]

(b) ORDER the Respondents to pay post-award interest at a reasonable commercial rate, compounded quarterly, accruing until payment is made in full;

(c) ORDER the Respondents to indemnify the Claimants for any taxation liability that arises in relation to the Tribunal's award;

(d) ORDER the Respondents to pay the Claimants, jointly and severally, all costs and fees of these arbitrations, including the administrative fees and costs of the SCC and ICSID Arbitrations, the fees and expenses of the Tribunal and the Claimants' legal and other costs in these proceedings; and

(e) ORDER such further and other relief as counsel may advise and the Tribunal deems just.[453]

B. The Respondent's Requests for Relief

434. In this arbitration, the Respondent requests that the Tribunal:

[451] Claimants' Reply, ¶¶ 267-268.

[452] This decrease in the amount claimed is due to USD 3.6 million correction notified by the Claimants and their expert, Mr. Peer, at the hearing for the 35/110 kV category.

[453] Claimants' Reply, ¶ 270.

i) deny Gardabani's and Silk Road's claims under the Georgia-Netherlands BIT in their entirety;

ii) declare that the Tribunal has jurisdiction over Georgia's counterclaim for its share of the Target Investment Allowance that Silk Road accumulated between 1 April 2013 and 2 September 2015;

iii) declare that Georgia is entitled to its fifty percent share of the Target Investment Allowance that Silk Road accumulated between 1 April 2013 and 2 September 2015;

iv) order Telasi and Inter RAO to pay Georgia GEL 12.4 million for its share of the Target Investment Allowance accumulated between 1 April 2013 and 2 September 2015, it being understood that the satisfaction of this counterclaim under the Georgia-Netherlands BIT satisfies the counterclaim under the 2013 Memorandum and vice versa;

v) order Telasi and Inter RAO to pay pre- and post-award interest on all amounts due to Georgia under the 2013 Memorandum to be calculated by the Tribunal with reference to the cost of debt used by the NERC to calculate Telasi's tariffs for 2017 and 2018;

vi) order Silk Road and Gardabani jointly and severally to pay all costs and expenses (including, but not limited to, the fees and expenses of the Tribunal, legal fees and expenses, fees and expenses of experts and consultants, and expenses of witnesses) incurred by Georgia in connection with the preparation for and conduct of this arbitration; and

vii) grant Georgia any such other and further relief as the Tribunal deems just and appropriate in the circumstances. [454]

435. In the SCC Arbitration, the Respondents request that the Tribunal:

i) deny Gardabani's claims under the Khrami SPA in their entirety;

ii) deny Telasi's and Inter RAO's claims under the 2013 Memorandum in their entirety;

iii) declare that Georgia is entitled to its fifty percent share of the Target Investment Allowance that Telasi accumulated between 1 April 2013 and 2 September 2015;

iv) order Telasi and Inter RAO to pay Georgia GEL 12.4 million for its share of the Target Investment Allowance accumulated between 1 April 2013 and 2 September 2015, it being understood that the satisfaction of this counterclaim under the 2013 Memorandum satisfies Georgia's counterclaim under the Georgia-Netherlands BIT and vice versa;

v) order Telasi and Inter RAO to pay pre- and post-award interest on all amounts due to Georgia under the 2013 Memorandum to be calculated by the Tribunal with reference to the cost of debt used by the NERC to calculate Telasi's tariffs for 2017 and 2018;

[454] Respondents' Rejoinder, ¶ 480(b).

> *vi)* *order the Claimants jointly and severally to pay all costs and expenses (including, but not limited to, the fees and expenses of the Tribunal, legal fees and expenses, fees and expenses of experts and consultants, and expenses of witnesses) incurred by Georgia in connection with the preparation for and conduct of this arbitration; and*
>
> *vii)* *grant Georgia any such other and further relief as the Tribunal deems just and appropriate in the circumstances.* [455]

VII. ANALYSIS AND DECISION

436. The Claimants submit that Article 31 of the Vienna Convention on the Law of Treaties (the "**VCLT**") requires that the BIT be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[456] The Claimants submit that the object and purpose of the BIT was to set out the treatment to be accorded by the party host state to investments by nationals of the other in order to "stimulate the flow of capital and technology and the economic development of the Contracting Parties".[457] The Claimants submit that the BIT required the Respondent:

> *(a)* *to ensure fair and equitable treatment of Gardabani's and Silk Road's investments;*
>
> *(b)* *not to impair, by unreasonable or discriminatory means, the operation, management use, enjoyment or disposal by Gardabani or Silk Road of their respective investments; and*
>
> *(c)* *to observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.* [458]

437. The Claimants say that the Respondent's conduct breached each of these requirements while the Respondent maintains that it did not breach any obligation owed to either Claimant under the BIT.

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[455] Id., ¶ 480(a).

[456] Claimants' Memorial, ¶ 239, citing VCLT (23 May 1969; in force on 27 January 1980) 1155 UNTS 331, CL-0005, Article 31.

[457] Claimants' Memorial, ¶ 240 referring to the preamble of the Georgia-Netherlands BIT, CL-0003.

[458] Claimants' Memorial, ¶ 241.

438. In this section, the Tribunal will first address the Respondent's objection that the Claimants' claims related to the tariffs of Telasi and the Khrami Companies are inadmissible since they seek relief for the same harm as and duplicate the contract claims by Telasi, Inter RAO and Gardabani under the 2013 Memorandum and the Khrami SPA in the SCC Arbitration. The Tribunal will then review the protections said to be afforded to the Claimants under Article 3 of the BIT before turning to an analysis of each of the Claimants' claims and the Respondent's defences. As arbitrator Douglas dissents with the Tribunal's conclusions, with the exception of those relating to the Supplemental Claims and costs, reference to the "Tribunal" in the other following sections of this award is intended to refer to the majority of the Tribunal.

A. Admissibility

439. In their claims for damages in each of the two arbitrations, the Claimants calculated the losses they seek to recover for the tariff-related claims using the same calculation and claiming, for the most part, the same amount, albeit on different legal grounds. In the SCC Arbitration, all of the claims are for tariff-related breaches of contract. In this arbitration, the claims are for violations of the BIT and international law. These include the Supplemental Claims which are not related to the setting or adjustment of tariffs and were not pursued in the SCC Arbitration.[459]

1. The Respondent's Position

440. In their observations on the Tribunal's Partial Award in the SCC Arbitration (the "Respondents' Observations on Quantum"), the Respondent submitted that the Partial Award on

[459] The Claimants initially claimed in excess of USD 200 million on account of their tariff-related claims and USD 1,533,000 on account of the Supplemental Claims. In its Final Award on Damages in the SCC Arbitration, the Tribunal awarded payment to Telasi in the amount of USD 84,500,000 and to Gardabani in the amount of USD 27,499,000 in respect of their tariff-related claims.

Liability deprived Gardabani and Silk Road of standing to pursue treaty claims relating to tariff-related breaches of the Khrami SPA and the 2013 Memorandum and rendered any such claims in this arbitration inadmissible.[460]

441. The Respondent says that the existence of several legal bases for arbitration does not necessarily mean that various entities in the same shareholder chain can make use of existing arbitration agreements to recover the same economic loss under any circumstances. In this regard, the Respondent refers to the decision in *OTMTI v. Algeria,* which held as follows:

> *…the purpose of investment treaty arbitration is to grant full reparation for the injuries that a qualifying investor may have suffered as a result of a host state's wrongful measures… [i]f the harm incurred by one entity in the chain is fully repaired in one arbitration, the claims brought by other members of the vertical chain in other arbitral proceedings may become inadmissible depending on the circumstances.*[461]

442. According to the Respondent, where one company in a shareholder chain is made whole through arbitration proceedings, companies higher up in the same corporate chain are made whole as well and their claims are accordingly inadmissible to the extent that those claims relate to derivative losses suffered by the company, rather than personal losses. With the exception of Silk Road's claim relating to Telasi's purchase portfolio volatility and Gardabani's claim relating to the redirection of its sales away from Telasi (two of the Supplemental Claims), the Claimants' claims under the BIT seek relief for the same harm as, and are duplicative of, the contractual claims brought by Telasi and Inter RAO under the 2013 Memorandum and by Gardabani under the Khrami SPA in the SCC Arbitration.[462]

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[460] Respondents' Observations on Quantum, dated 14 May 2021, pp. 1-2.

[461] *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Award, dated 31 May 2017 ("***OTMTI***" or "***OTMTI v. Algeria***"), RL-0105, ¶ 495.

[462] Respondents' Observations on Quantum, pp. 1-2.

443. The Respondent says that the Claimants have acknowledged that the conduct which led to their international law claims under the BIT and their contractual claims under the Agreements is largely the same, as is the harm alleged to have been suffered by them. The Respondent notes that the claim for damages advanced by the Claimants is precisely the same with respect to the tariff-related contract claims and treaty claims.[463]

444. The Respondent says that in the Partial Award on Liability, the Tribunal found breaches of the 2013 Memorandum and the Khrami SPA and ordered that the Respondents (which include the Government of Georgia) must compensate Gardabani, Telasi and Inter RAO for the losses suffered by them as a result of the breaches of those agreements. Therefore, according to the Respondent, the Partial Award on Liability fully remedies the harm suffered by Gardabani (which is a Claimant in both the SCC and ICSID Arbitrations) as a result of the breaches of the Khrami SPA as well as the harm suffered by Silk Road (which owns 75.11% of Telasi and seeks damages commensurate with its shareholding interest) as a result of the breaches of the 2013 Memorandum. The Respondent notes that in the Partial Award on Liability, the Tribunal not only found breaches of the Khrami SPA and the 2013 Memorandum, but also found that the Government "must compensate" Gardabani, Telasi and Inter RAO "for the loss suffered by [them]".[464] Therefore, the Tribunal ordered compensation and the only remaining issue was the precise amount of losses suffered by the Claimants.[465]

445. The Respondent says that the Claimants' attempt to distinguish the decision of the tribunal in *OTMTI v. Algeria* on the basis that settlement payments had been made by the respondent State

[463] *Ibid*.

[464] *Ibid*.

[465] Respondents' letter of 23 June 2021, p. 1. Since the Partial Award on Liability, the Tribunal has partially quantified the losses of the Claimants in the first two Partial Awards on Damages and the Final Award in the SCC Arbitration.

in that case, is misconceived. According to the Respondent, the *OTMTI* tribunal dismissed the claimant's claims in that case on the basis that the claimant's subsidiary had initiated separate proceedings against Algeria seeking relief for the same harm, and not simply because settlement payments had been made to the claimant's subsidiary. The Respondent says that the tribunal in *OTMTI* explained that by commencing proceedings against Algeria, the claimant's subsidiary had "placed itself in the position of being made whole for the alleged harm" and thus deprived other entities in the corporate chain of standing to bring separate claims relating to the same harm.[466] The Respondent says that in this case Gardabani and Silk Road initiated proceedings after Gardabani, Inter RAO and Telasi had commenced proceedings by way of the SCC Arbitration seeking relief for the same harm as they pursue in this arbitration. According to the Respondent, that harm has now been remedied by way of the Partial Award on Liability.[467]

446. The Respondent also submits that the purpose of investment treaty arbitration is to grant full reparation for the injuries that an investor may have suffered as a result of a host state's measures. They say that it is on this basis that the tribunal in *OTMTI* held, as quoted above, that "…[i]f the harm incurred by one entity in the chain is fully repaired in one arbitration, the claims brought by other members of the vertical chain in other arbitral proceedings may become inadmissible". Therefore, even if the breaches of the 2013 Memorandum and the Khrami SPA determined in the Partial Award constitute breaches of the BIT (which the Respondent denies), the Claimants' treaty claims in this arbitration based on breaches of contract are nonetheless inadmissible as they have

[466] Respondents' Observations on Quantum, pp. 1-2; *OTMTI v. Algeria,* RL-0105, pp. 496-498.

[467] Since the Partial Award on Liability, in its Partial Awards on Damages in the SCC Arbitration the Tribunal has partially quantified the losses suffered by the Claimants in the SCC Arbitration and ordered payment. In the Final Award in the SCC Arbitration, the Tribunal finalized the quantification of damages and awarded payment to Telasi and Gardabani.

been fully repaired in the Partial Award on Liability (and the Tribunal's subsequent awards in the SCC arbitration).

447. The Respondent argues that the Claimants' submissions relating to the risk of double recovery and their undertaking not to pursue such recovery are irrelevant. The Respondent also says that the Claimants' claims in this arbitration relating to breaches of the 2013 Memorandum and the Khrami SPA are inadmissible because they seek relief from the same harm which has now been fully repaired.[468]

448. In response to the Claimants' position that its objection to admissibility was made late, the Respondent refers to the Respondents' Answers submitted in the SCC arbitration, in which they objected that Gardabani and Silk Road had also submitted a request for arbitration before ICSID based on the same facts and seeking relief for essentially the same harm pursued by Gardabani, Telasi and Inter RAO. In their Answers, the Respondents alleged that the multiplication of proceedings was an abuse of process intended to maximize pressure on the Government in an attempt to induce the NERC to grant the Khrami Companies' and Telasi's tariff adjustment applications then before it. In addition, it says that the Respondents' Observations were made in response to the Tribunal's invitation to the Parties to comment on the effect of the Partial Award on Liability on this arbitration and that the Claimants have had the opportunity to make submissions in response to its objection.

[468] Respondents' Observations on Quantum, pp. 1-2. Answer in SCC Case No. V2017/098, dated 14 August 2017, ¶¶ 25-26; Answer in SCC Case No. V2017/097, dated 14 August 2017, ¶¶ 24-25. The Respondent also referred to the Respondents' Submission on Costs, in which they took the position that the Claimants' multiplication of claims was abusive and had compelled the Respondents to expend inordinate time and resources to the defend duplicative contract and treaty claims. See Respondents' Submission on Costs, dated 16 January 2020, ¶¶ 10-15.

449. Therefore, Gardabani's and Silk Road's treaty claims seeking relief for the same harm as the contract-based claims in the SCC arbitration are inadmissible.[469]

450. The Respondent also submitted that the breaches of contract identified in the Partial Award on Liability do not amount to breach of its treaty obligations since it complied with all of these. With respect to the alleged breaches of the Umbrella Clause in the BIT, the Respondent submitted, *inter alia*, that the 2013 Memorandum and Khrami SPA contain exclusive dispute resolution clauses which were available to, and invoked by, the Claimants. Therefore, there can be no breach of the Umbrella Clause. The Tribunal considers this jurisdictional argument separately, below, where it addresses the Umbrella Clause claims on their merits.

2. The Claimants' Position

451. In their observations on the Partial Award, dated 14 May 2021 (the "Claimants' Observations on Quantum"), the Claimants submitted that while there is significant overlap between the Claimants' cases in the contract and treaty arbitrations, the cases are not identical. In this regard, they say that: the cases have different legal bases; there are differences in the relevant factual allegations; and, in relation to the distribution business conducted by Telasi, there are different Claimants (Inter RAO and Telasi in the SCC arbitration and Silk Road in the ICSID Arbitration). Therefore, the Claimants say that the claims pursued by Gardabani and Silk Road under the BIT in this arbitration are different and separate from the contractual rights of Gardabani and Telasi/Inter RAO and must be resolved and protected by a separate award. The Claimants say that it was a key element of their agreement to coordinate the two arbitrations that the Tribunal would render two

[469] The Respondent also says that to the extent the Tribunal finds that treaty claims relating to breaches of the 2013 Memorandum and the Khrami SPA are admissible, then its Counter-Claim in this arbitration for its share of the TIA would also be admissible for the same reasons.

separate awards in order to ensure that Silk Road's and Gardabani's rights under the BIT and the ICSID Convention would be preserved notwithstanding the coordination of the arbitrations. The Claimants submitted that any risk of overcompensation is mitigated by their undertaking not to seek double recovery of the amounts awarded by the Tribunal.[470]

452. In their response to the Respondents' submissions of 23 June 2021, the Claimants submitted that the Partial Award on Liability only established liability under the relevant contracts and no compensation was ordered, and none has since been paid. Therefore, no harm will have been remedied until the Respondents actually pay compensation to the Claimants in the SCC arbitration.[471] On this basis, the Claimants say that the award in *OTMTI v. Algeria* does not support the Respondent's position since, in that case, a shareholder below the claimant in the ownership chain had previously pursued arbitration under a different treaty in respect of the same underlying measures. The parties to that earlier arbitration settled their dispute through the sale to the host State of shares in the local Algerian company that was the subject of the arbitration.[472] As a result, the harm suffered by the parent company, OTMTI, was remedied and it no longer had a claim to satisfy.[473]

453. Further, and in any event, the Claimants submitted that a remedy ordered by the Tribunal in the SCC arbitration would not "undo" the Respondents' wrongful conduct nor render Gardabani and Silk Road's ICSID claims moot. According to the Claimants, the Respondents' breaches of the Khrami SPA and the 2013 Memorandum harmed Gardabani and Silk Road and also violated their rights as qualifying investors under the BIT. They also say that payment of compensation by the

[470] Claimants' Observations on Quantum, ¶¶ 12-13.

[471] Claimants' letter of 2 July 2021, p. 1.

[472] *Id.*, pp. 1-2.

[473] *Id.*, p. 1.

Respondents following the Tribunal's Final Award in the SCC Arbitration will not change this. According to the Claimants, they are entitled to all available remedies for the Respondent's violation of the BIT, including: declarations that the Respondent violated the BIT; orders for monetary compensation for harm caused by treaty breaches; and an award that is enforceable pursuant to the ICSID Convention.[474]

454. The Claimants deny that the award in *OTMTI v. Algeria* suggests that shareholders and companies in which they hold a stake cannot advance separate cases under separate instruments with respect to the same underlying conduct. They say that any suggestion in this regard would be contrary to prevailing practice.[475]

455. With respect to the Respondent's argument that the potential for overlapping awards renders the claims in the ICSID Arbitration inadmissible, the Claimants say that double recovery has nothing to do with admissibility. Instead, the Claimants say that admissibility concerns whether a claim is ripe for adjudication and otherwise capable of being resolved by a tribunal.[476] Further, and in any event, addressing the possibility of double recovery is not new and has been addressed by other tribunals. In this case, the Claimants say that any concern is mitigated since they have undertaken not to seek compensation beyond the extent of the total harm caused.

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[474] Claimants' letter of 3 June 2021, p. 2.

[475] Claimants' letter of 2 July 2021, p. 2. The Claimants refer to the decisions in *CME Czech Republic BV v. The Czech Republic,* UNCITRAL, Partial Award, dated 13 September 2001, CL-0019, ¶ 419; *Flemingo DutyFree Shop Private Limited v. Republic of Poland,* PCA Case No. 2014-11, Award, dated 12 August 2016, CL-0132, ¶¶ 337-342.

[476] Claimants' letter of 3 June 2021, p. 2. The Claimants refer to *Abaclat and others (formerly Giovanna A. Beccara and others) v. Argentine Republic,* ICSID Case No. ARB/07/05, Decision on Jurisdiction and Admissibility, dated 4 August 2011, CL-0225, ¶ 247; *Hochtief Aktiengesellschaft v. Argentine Republic,* ICSID Case No. ARB/07/31, Decision on Liability, 29 December 2014, CL-0226, ¶ 180. The Claimants referred to the *HOCHTIEF Aktiengesellschaft v. Argentine Republic* Award which states: "[double recovery] is a matter concerning the remedy rather than the claim. It is not a bar to the admissibility of a claim – unless, perhaps, it arises as an aspect of an argument based upon the principle of *res judicata*, which is not the case here. To the extent there may be a possibility of double recovery, that is a matter to be taken into account in the context of the need to prove and to quantify loss, and in the drafting of any [o]rder by the [t]ribunal. The [t]ribunal accordingly rejects this objection to the admissibility of the claim".

456. The Claimants say that separating issues of admissibility from concerns relating to double recovery is particularly important in this case where the Parties agreed from the outset that the SCC and ICSID Arbitrations would be closely coordinated but would result in separate awards. They say this agreement was based on both sides' full knowledge that the facts underlying the treaty and contract cases were very similar and that the awards would address overlapping harms. In addition, the Respondent's defence on the basis of admissibility comes late and violates the Parties' agreement to coordinate these arbitrations and render two separate awards as well as the terms of Procedural Order No. 1 which required the Respondents to advance their full positive defence in their Counter-Memorial.[477]

3. The Tribunal's Analysis

457. In the Tribunal's view, its decisions in the Partial Award on Liability, the subsequent Partial Awards on Damages and the Final Award in the SCC Arbitration do not render Silk Road's and Gardabani's claims under the BIT in this arbitration inadmissible.

458. In considering the Respondent's objection to the admissibility of the tariff-related claims in this arbitration, the Tribunal finds it helpful to summarize the background relating to the commencement of the arbitrations and their coordination.

459. On 9 June 2017, Inter RAO and Telasi filed a Request for Arbitration against the Government of Georgia for breach of the 2013 Memorandum (SCC Arbitration V2017/098). On the same date, Gardabani submitted a Request for Arbitration against the Government of Georgia, the

[477] Claimants' letter of 3 June 2021, p. 3; Procedural Order No. 1, ¶ 14.2; Claimants' letter of 2 July 2021, p. 2. The Claimants note that the objections relating to multiplication of proceedings and abusive process raised in the Respondents' Answers submitted in the SCC arbitration were not maintained after the Parties agreed to coordinate the proceedings in the two arbitrations. They say the fact that the Tribunal requested comments in relation to the effect of the Partial Award on the ICSID arbitration does not change the fact that they were required to advance that position in their Counter-Memorial.

MOE and the SSB for breach of the Khrami SPA (SCC Arbitration V2017/097). The Respondents in those arbitrations requested an extension for the filing of their Answers, which was granted until 14 August 2017.

460. On 4 August 2017, Gardabani and Silk Road submitted a Request for Arbitration against the Government of Georgia in these ICSID proceedings. In their Request, they referred to Gardabani's and Inter RAO's and Telasi's Requests for Arbitration filed with the SCC and acknowledged that while these arose out of the same facts as their claims in these proceedings, the SCC arbitrations were commenced under the Khrami SPA and the 2013 Memorandum, respectively.[478]

461. On 14 August 2017, the Respondents in the SCC arbitration, Georgia, the MOE and the SSB, submitted their Answers to the Requests in both arbitrations. In their Answers, the Respondents stated that they would address the factual and legal bases of the claims in the Requests for Arbitration at a later stage once they had had the opportunity to consider fully the claims as well as those in the ICSID proceedings. The Respondents went on to set out their preliminary position that the claims against them did not reflect a genuine dispute and were not ripe for submission to arbitration. They stated that the Claimants were seeking to use the arbitral process to put pressure on the Georgian authorities in hope of securing a favourable outcome in pending applications requesting the NERC to adjust their tariffs. The Respondents also submitted that Gardabani's and Silk Road's Request for Arbitration in these ICSID proceedings was based on the same facts as those at issue in the SCC arbitrations and sought relief for essentially the same alleged harm. According to them, the multiplication of arbitration proceedings relating to essentially the same dispute reflected a strategy of harassment which constituted an abuse of process. In addition, the Respondents alleged that the commencement of multiple proceedings was prejudicial to Georgia in that it would be required to

[478] Gardabani's and Silk Road's Request for Arbitration, dated 4 August 2017, ¶¶ 47, 76.

defend multiple sets of clams before different tribunals in different fora and incur duplicative costs.[479]

462. In their Answers to the Requests for Arbitration, the Respondents requested the consolidation of the two SCC arbitrations.[480] The Claimants subsequently agreed and the SCC consolidated the two SCC arbitrations into SCC Case No. V2017/097.

463. Subsequently, the Parties agreed to coordinate the consolidated SCC arbitration with this ICSID Arbitration. By way of their Agreement on Coordination, dated 14 February 2018, the Parties agreed that while the two arbitrations remained separate proceedings, a single tribunal would hear all claims. The two proceedings were to share a single evidentiary record, a single set of briefings and a single hearing and unified procedural timetable. However, the Tribunal was required to render two separate awards.[481]

464. The Parties subsequently agreed that a new arbitration would be commenced to resolve the disputes previously the subject of consolidated SCC Case No. V2017/097, which would be coordinated with the ICSID Arbitration as provided for in the Parties' Agreement on Coordination. On 30 March 2018, the Claimants submitted their new Request for Arbitration in the SCC Arbitration, and on 10 April 2018, the Respondents submitted their Answer. In their respective Request for Arbitration and Answer, the Parties referred to and incorporated their submissions in the original Requests for Arbitration and Answers in SCC Arbitration 2017/097 and SCC Arbitration 2017/098. They also referred to their Agreement on Coordination.

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[479] *E.g.*, Claimants' Request for Arbitration in the SCC Arbitration V2017/097, dated 30 March 2019, at Section V; Respondents' Answer in SCC Arbitration V2017/097, dated 14 August 2017, ¶¶ 15-26.

[480] *Id.*, ¶¶ 15-26.

[481] Agreement on Coordination, dated 14 February 2018.

465. Pursuant to the Agreement on Coordination and Procedural Order No. 1, the Parties submitted pleadings and evidence addressing the claims in the SCC Arbitration and in the ICSID Arbitration. Throughout the course of these pleadings (including counterclaims) and the hearing, the Respondents did not repeat or otherwise address the preliminary position relating to an abuse of process and duplication of costs flowing from the commencement of proceedings before the SCC and ICSID. Nor was any objection relating to admissibility made. The merits of the Parties' claims and counterclaims were fully pleaded and addressed at the hearing. The Respondents first raised their objection to admissibility in their Observations of 14 May 2021.

466. Although the Respondents initially objected that the commencement of the ICSID Arbitration advancing treaty claims on the same facts as those at issue in the SCC arbitrations and sought relief for essentially the same alleged harm amounted to an abuse of process, this objection was not pursued. It appears that the Parties agreed to coordinate the two arbitrations in order to avoid conducting two separate proceedings in parallel and reduce unnecessary duplication and costs. However, while the Parties' Agreement on Coordination provided for one single procedure and set of briefings, it specified that the two arbitrations would remain separate proceedings and required the Tribunal to issue separate awards in respect of the contractual claims in the SCC Arbitration and the BIT in the ICSID Arbitration. Although the overlap of damages claimed by the Claimants in the two arbitrations was plain from the outset, and in particular from the Claimants' Memorial on the merits, no objection relating to jurisdiction or the admissibility of claims in this arbitration was raised by the Respondents. In these circumstances, it appears that the Parties expected the Tribunal to render awards on the merits of the claims in each of the two separate arbitrations.

467. In light of the Tribunal's findings in the SCC Arbitration, the Respondent says that Gardabani's and Silk Road's claims in this arbitration under the BIT seek relief for the same harm as, and are entirely duplicative of, the contractual claims brought by Telasi, Inter RAO and

Gardabani under the 2013 Memorandum and the Khrami SPA in the SCC Arbitration. They say that if the harm incurred by one entity in a corporate chain is fully repaired in one arbitration, claims brought by companies higher up in the same corporate chain are made whole as well and their claims are inadmissible to the extent that these relate to derivative losses, rather than personal losses. According to the Respondent, the Partial Award on Liability (and, subsequently, the Partial Awards on Damages and Final Award in the SCC Arbitration) fully remedies the tariff-related losses claimed by Gardabani and Silk Road. Since the Tribunal has found that the Respondents must compensate Gardabani, Telasi and Inter RAO for the losses suffered by them, the fact that the Tribunal had not settled the precise amount of the loss suffered by the Claimants is irrelevant.

468. The Claimants acknowledge that the conduct that led to the violations of the BIT and their contractual rights at Georgian law and the harm suffered are largely the same.[482] They also provided a single calculation of losses flowing from the breaches of contract and the tariff-related breaches of the BIT. Nevertheless, the Claimants say that the claims in the SCC Arbitration and this Arbitration are separate and distinct. They say that the Respondents' conduct breached both the Claimants' rights under the 2013 Memorandum and the Khrami SPA and also Gardabani's and Silk Road's rights as qualifying investors under the BIT. The Claimants say that the rights and obligations on which they rely are not just contractual, but derive from the resolutions adopted by the NERC to implement the Parties' agreements, which imposed separate obligations on the state. They say that there are fundamental differences between the contractual and BIT claims.[483]

469. With respect to the FET claims, the Claimants say that these are not coextensive with breach of contract. They argue that even if the Tribunal were to find no contractual breach, there could still

[482] Claimants' Memorial, ¶ 282.

[483] Tr. Day 1 (Claimants' Opening Statement), 132:12-133:25.

be a breach of the FET obligation as a result of the Respondents' conduct which they allege was erratic, non-transparent and unpredictable.[484] With respect to the impairment claims, the Claimants say that the Respondent's failure to apply the tariff regimes applicable to Telasi and the Khrami Companies was unreasonable and arbitrary as it was not reasonably based on a rational policy objective, independent of the Claimants' expectations.

470. With respect to the claims relating to the umbrella clause in the BIT, the Claimants say that Silk Road and Gardabani have rights which are independent of the companies in which they own shares. Further, they say that the obligations on which they rely are not only the contractual obligations flowing from the 2013 Memorandum and the Khrami SPA. In addition, the Claimants say the resolutions implementing those Agreements imposed obligations on the State, which they say were disregarded.[485]

471. In the SCC Arbitration, Inter RAO's and Telasi's claims are contractual in nature alleging breaches of various provisions of the 2013 Memorandum by the Government of Georgia and the Partnership Fund. Gardabani's claims are against the Government of Georgia, the MOE and the SSB for breach of various provisions of the Khrami SPA.

472. For present purposes, the Claimants' claims in this ICSID Arbitration can be summarized as follows:

> (a) FET: Georgia breached the FET standard by frustrating Gardabani's and Silk Road's legitimate expectations which were based on the express terms of the Khrami SPA and the 2011 Memorandum and, in the case of Silk Road, in the series of written agreements from the 1998 SPA to the 2013 Memorandum. The Claimants say that they were entitled to expect that the explicit obligations undertaken in those Agreements would be respected. In addition, the Claimants maintain that the legitimate expectations were based on oral and written

[484] Tr. Day 1 (Claimants' Opening Statement), 132:25-135:24.

[485] Tr. Day 1 (Claimants' Opening Statement), 132:3-132:24.

representations made by Georgia as well as the NERC resolutions adopted to implement the tariff regimes agreed to in the Agreements between the Parties.

In addition, the Claimants say that Georgia acted irrationally and in a non-transparent manner such that they were unable to discern the regulatory environment in which they were to operate and to implement a commercial strategy.

(b) The Claimants also bring three supplemental claims which are unrelated to the tariff-related claims under the Agreements with the Parties. It is common ground that these claims are not affected by the Respondents' inadmissibility objection.

(c) Impairment: Georgia's refusal to abide by the terms of the 2011 Memorandum, the Khrami SPA and the 2013 Memorandum was unreasonable and impaired the Claimants' investments. The Claimants say that Georgia's failure to carry out what it recognized to be the appropriate tariff regime falls within the meaning of "unreasonable" and "arbitrary" conduct.

(d) Umbrella Clause: the Claimants say that Georgia failed to observe its contractual obligations contained in the Agreements and also failed to comply with the obligations or commitments contained in the Regulatory Framework established by the relevant NERC resolution. The Claimants say that Georgia breached the obligation or commitments contained in the Agreements and also its unilateral commitments arising from the NERC resolutions.

The Claimants also say that their claims under the umbrella clause are based on a violation of their rights protected by the BIT and are not contractual in nature. They say that Georgia breached Article 3(4) of the BIT when it resiled from the tariff terms applicable to Telasi under NERC Resolution No. 3 and to the Khrami Companies under NERC Resolution No. 5.

473. In this arbitration, the Claimants pursue claims that their alleged rights as investors under the BIT have been breached. While there is considerable overlap between the facts and the damages claimed in the SCC Arbitration and this Arbitration, the claims in the two arbitrations are separate,

having separate legal bases and different applicable laws under which the conditions of liability are different. This difference between international law claims under bilateral investment treaties and contractual claims has often been recognised by investment tribunals. In this regard, the annulment committee in the *Vivendi I* case stated as follows:

> *98. In a case where the essential basis of the claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract…*
>
> *101. On the other hand, where "the fundamental basis of the claim" is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard. At most, it might be relevant – as a municipal law will often be relevant – in assessing whether there has been a breach of treaty.*
>
> *102. In the Committee's view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by an actual court. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, the BIT and by applicable international law. Such an inquiry is neither in principle determined nor precluded, by any issue of municipal law, including any municipal law agreement of the parties.*[486]

474. In the resubmitted proceedings in the *Vivendi* case (*Vivendi II*), the tribunal held as follows:

> *Whether there is a breach of contract or a breach of the Treaty involves two different inquiries. Articles 3 and 5 of the BIT do not relate to a breach of municipal contract. Rather, they set an independent standard. A state may breach a treaty without breaching a contract; it may also breach a treaty at the same time it breaches a contract. And, in the latter case it is permissible for the [t]ribunal to consider such alleged contractual breaches, not for the purposes of determining whether a party has incurred liability under domestic law, but to the extent necessary to analyze and to determine whether there has been a breach of the Treaty. In doing so, the [t]ribunal would in no way be exercising jurisdiction over the contract, it would simply be taking into account the parties behaviour under and in relation to the terms of the contract in determining whether there has been a breach of distinct standard of international law, as reflected by Articles 3 and 5 of the BIT.*[487]

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[486] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, dated 3 July 2002 ("***Vivendi I***"), ¶¶ 98-102.

[487] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, CL-0021("***Vivendi II***"), ¶ 7.3.10. *See also*, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 ("***Crystallex v. Venezuela***"), CL-0024, ¶¶ 479-482.

475. The Claimants have commenced arbitrations in respect of both their alleged contractual rights under the 2013 Memorandum and the Khrami SPA and their international law rights under the BIT. While the contractual agreements between Inter RAO, Telasi, Gardabani and Georgia, (and others), play an important role in the relationship between the Parties, the Claimants do not pursue claims for breach of contract in this arbitration. Rather, they claim breaches of various aspects of Article 3 of the BIT in relation to Georgia's conduct. While the contracts between the Parties, and their breach, are relevant facts in this arbitration, they are not its subject and the Tribunal has no jurisdiction to determine any contractual disputes of the Parties in this ICSID Arbitration.

476. In the Tribunal's view, this distinction between contractual rights and rights protected by international law under investment treaties distinguishes the award in *OTMTI v. Algeria* on which the Respondent relies.[488] In that case, three separate notices of dispute under different bilateral investment treaties were submitted by companies in the same corporate chain. The tribunal found that the three notices complained of the same measures taken by the state and gave notice of the same dispute.[489] The tribunal found that in the circumstances of that case, the claims were inadmissible as the claimant parent company and controlling shareholder had caused their subsidiary company to crystalize the dispute, in respect of their international law rights at the level of the direct investor.

477. The tribunal went on to find that the parent company was seeking reparation for the same losses claimed by its subsidiary, the direct investor, which the parent sold after the submission of the subsidiary's notice of dispute. The claim brought by the direct investor was then settled by way of an agreement between the relevant state entity and the subsidiary as well as the third-party

[488] *OTMTI v. Algeria*.

[489] *Id*., ¶¶ 488-489.

purchaser of the subsidiary from the parent company. The tribunal found that the parent company's attempt to bring a claim under the Bilateral Investment Treaty between the Belgo-Luxembourg Economic Union and Algeria in respect of the same state measures subject of the other arbitrations under different bilateral investment treaties was inadmissible and amounted to an abuse of rights.[490]

478. In the Tribunal's view, the circumstances of this case are different from the peculiar circumstances in the *OTMTI* case. As indicated above, Inter RAO, Telasi and Gardabani notified the Respondents of disputes under the 2013 Memorandum and the Khrami SPA and commenced arbitrations before the SCC in June 2017. Subsequently, Gardabani and Silk Road notified the Respondent of a dispute under the BIT in August 2017.

479. A review of these requests for arbitration and the Parties' subsequent pleadings indicates that it was clear from the outset that the Claimants were pursuing remedies in the SCC and ICSID Arbitrations on the basis of largely the same facts and that the relief pursued would overlap. After the submission of the Respondents' Answers in the SCC Arbitrations, in which they alleged the proceedings were duplicative and an abuse of process, the Parties agreed to coordinate the arbitrations and addressed the claims in the two arbitrations on their merits without further objection from the Respondents. In these circumstances, it appears that the Parties addressed the concerns raised by the Respondents and were content to proceed with coordinated, separate arbitrations and the issuance of separate awards in each case. The fact that the Tribunal has found liability in respect of the Claimants' contractual claims and awarded damages to the Claimants in the SCC Arbitration does not, in its view, affect the admissibility of the Claimants' separate claims under the BIT in this ICSID Arbitration.

[490] *Id.*, ¶¶ 518, 524-526, 538, 542-548.

480. In reaching this conclusion, the Tribunal has considered that since the Claimants have presented only one calculation of damages of their tariff-related claims, in respect of which the Tribunal has made a series of findings after the submission of several joint expert reports, it is unlikely that the Tribunal could find a greater measure of damages in respect of those claims in this arbitration than in the SCC Arbitration. However, the claims in the two arbitrations are different and as discussed above, Georgian law and the BIT set independent standards such that Georgia could breach the BIT without breaching either relevant contract and vice versa. Further, as the Claimants point out, the enforcement and challenge regimes applicable to international commercial and investment treaty awards is different. While it is true that any award the Claimants could obtain in respect of their tariff-related claims in this arbitration will not exceed damages awarded to the Claimants in the SCC Arbitration, this does not render the tariff-related claims inadmissible in this arbitration.

481. The issue of possible double compensation is commonly encountered in domestic and international jurisprudence. In the Tribunal's view, it is a question of remedy and is appropriately can be adequately addressed as such. The Tribunal has taken note of the Claimants' undertaking not to seek compensation beyond the extent of the total harm they have suffered and can make provision to avoid double recovery in its award.

482. For these reasons, the Tribunal finds that it should address the tariff-related claims at issue in this arbitration, together with the Supplemental Claims, on the merits. Accordingly, the Respondents' objection that the Claimants' tariff-related claims in this arbitration are inadmissible is dismissed.[491]

[491] As stated previously, the Tribunal will address later in this Award the Respondents' argument that the Claimants cannot invoke the Umbrella Clause provision in Article 3(4) of the BIT and that the Tribunal should decline to exercise its jurisdiction in that respect on the basis of the dispute resolution clauses contained in the 2013 Memorandum and the Khrami SPA.

B. Fair and Equitable Treatment (FET)

483. Article 3(1) BIT provides:

> *Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, use, enjoyment or disposal thereof by those nationals. Each Contracting Party shall accord to such investments full physical protection and security.*[492]

1. Scope of the FET standard and Legitimate Expectations

a. **The Claimants' Position**

484. The Claimants note that "fair and equitable treatment" is not defined in the BIT and submit that the essence of this standard is fairness. The Claimants say that this standard has been recognized consistently to include transparency, consistency, stability, predictability, good faith, legitimate expectations that an investor held when it invested, and a stable legal and business environment.[493] Further, according to the Claimants, the State must refrain from arbitrary conduct (actions that lack a reasonable relationship to a legitimate policy goal), observe due process through candour in its administrative processes and transparency, and provide advance notice of acts that will affect investors' legal and property rights.[494]

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[492] Georgia-Netherlands BIT, CL-0003, Art. 3.

[493] Claimants' Memorial, ¶¶ 243-247; Claimants' Reply, ¶¶ 160-165. *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, dated 29 May 2003, CL-0060, ¶ 154; *Saluka Investments BV (TheNetherlands) v. The Czech Republic*, UNCITRAL, Partial Award, dated 17 March 2006 ("***Saluka v. Czech Republic***") (CL-0052), ¶ 309; Tr. Day 1 (Claimants' Opening Statement), 117:8-117:23, citing *Murphy v. Ecuador*, CL-0042 at ¶ 206 and *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador,* ICSID Case No. ARB/04/19, Award, dated 18 August 2008 ("***Duke Energy***" or "***Duke Energy v. Ecuador***"), CL-0025.

[494] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, dated 12 May 2005 ("***CMS***" or "***CMS v. Argentina***"), CL-0020, ¶ 290; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, dated 30 April 2004 ("***Waste Management***" or "***Waste Management v. Mexico***"), CL-0067, ¶ 98; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, dated 12 April 2002, CL-0041, ¶ 143; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, dated 30 August 2000, CL-0039, ¶ 91.

485. In response to Georgia's argument that a State must act with "serious impropriety" in order to trigger liability for a breach of the fair and equitable treatment standard, the Claimants say that it is possible to act unfairly or inequitably without any serious impropriety and that there is no basis on which to read into the BIT an additional threshold requirement.[495] In support of their position, the Claimants refer, *inter alia,* to the interpretation of fairness in *Total v. Argentina* where the tribunal found the respondent state to have acted unfairly by changing the regulatory rules and altering the economic basis for tariffs after the investments were made despite the fact that the measures were taken in response to an economic crisis and that no tariff contract or promise of stabilisation was present in that case.[496]

486. The Claimants say FET is broad and is not confined to serious impropriety or bad faith; "what is unfair or inequitable need not equate with the outrageous or the egregious" because "a state may treat foreign investment unfairly and inequitably without necessarily acting in bad faith".[497] They say the Respondent relies on the *Neer* case, which did not consider whether the State acted fairly and equitably, but whether it violated customary international law on the treatment of aliens. The Claimants argue that the Respondent's reliance on *Waste Management* is similarly misplaced because NAFTA's minimum standard of treatment was restricted by the Free Trade Commission to the customary international law on the treatment of aliens.

487. In response to the Respondent's assertion that FET does not protect investors against regulatory changes, the Claimants say regulatory changes that alter fundamental aspects of the

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[495] Tr. Day 1 (Claimants' Opening Statement), 117:24-118:7.

[496] Tr. Day 1 (Claimants' Opening Statement), 118:8-119:1. *See also*, Claimants' Memorial, ¶¶ 242-247; Claimants' Reply, ¶¶ 160-165; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, dated 27 December 2010 ("***Total v. Argentina***"), CL-0065, ¶¶ 122, 312-314, and 333.

[497] *Crystallex v. Venezuela*, CL-0024, ¶ 543, citing *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, dated 11 October 2002 ("***Mondev v. USA***"), RL-0011; Claimants' Reply, ¶¶ 161-165. *See also*, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, dated 14 July 2006 ("***Azurix v. Argentina***"), CL-0011, ¶¶ 371-372.

State's contracts with investors can violate the State's obligation to act fairly and equitably.[498] The Claimants also say neither *Cervin v. Costa Rica* nor *Cargill v. Mexico* support the Respondent's argument that a violation of FET requires a deliberate reversal or repudiation of the State's policy objectives and purpose because the relevant parts of those awards related to the threshold for arbitrariness that could violate FET. Neither case holds that a regulation can only be unfair if it represents a deliberate reversal of policy.[499]

488. With respect to the Respondent's argument that the NERC has discretion under the law, the Claimants say that discretion cannot mean irrational, contradictory and unexplained reasons.[500] The NERC gave no justification for either its change in approach or how it could have exercised discretion differently for Telasi and the Khrami Companies in consecutive years.[501]

489. With respect to the protection of legitimate expectations, the Claimants say that an investor who assumes significant commercial risk and financial obligations in a host state will have done so in reliance on objectively reasonable expectations about how its investment would be treated by the State.[502] In this case, the Claimants' expectations were based on the agreements concluded with Georgia, on the basis of Georgia's representations and the applicable legal framework at the relevant

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[498] I*mpregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, dated 21 June 2011 ("***Impregilo v. Argentina***"), CL-0137, ¶¶ 122, 312-314, 333; Claimants' Reply, ¶¶ 163-164.

[499] Claimants' Reply, ¶ 165. S*ee also*, *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, Award [Spanish], dated 7 March 2017 ("***Cervin v. Costa Rica***"), RL-0018, ¶ 527; *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, dated 18 September 2009 ("***Cargill v. Mexico***"), CL-0127, ¶ 293.

[500] Tr. Day 7 (Claimants' Closing Statement), 109:20-25.

[501] Tr. Day 7 (Claimants' Closing Statement), 110:3-18.

[502] Claimants' Memorial, ¶ 244.

time.[503] The Claimants submit that it is only fair to hold the State accountable should it vitiate those expectations, particularly if it contributed to their formation by representations. [504]

b. **The Respondent's Position**

490. Georgia says that FET is an objective standard which must be assessed in light of all the facts and circumstances of a particular case.[505] The Respondent says that a state's conduct must be seriously improper to breach FET, but it agrees with the Claimants that a showing of bad faith is not required. Georgia refers to the following passage from *Waste Management*:

> *The minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.* [506]

491. The Respondent says the *Waste Management* tribunal's high threshold for establishing State liability has been endorsed even where the applicable treaty contains no reference to customary international law because the FET standard is not materially different from the minimum standard of treatment in customary international law.[507]

492. For the Respondent, FET does not protect investors against a State's legitimate exercise of its right to change its laws, nor does it create liability for regulatory changes that might negatively

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[503] Claimants' Memorial, ¶¶ 249, 255; Claimants' Reply, ¶¶ 166, 173.

[504] Claimants' Memorial, ¶ 244, citing, for example, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award, dated 21 July 2017 ("***Teinver v. Argentina***"), CL-0061, ¶ 667.

[505] *See* sources cited at Respondents' Counter-Memorial, ¶¶ 331-332, fns 665-672.

[506] *Waste Management v. Mexico*, CL-0067, ¶ 98; Respondents' Rejoinder, ¶¶ 326-334; Respondents' Counter-Memorial, ¶¶ 331-337. *See also e.g.*, *Alex Genin and others v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, dated 25 June 2001, RL-0014, ¶ 367; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, dated 24 July 2008 ("***Biwater v. Tanzania***"), RL-0017, ¶¶ 597, 600.

[507] Respondents' Rejoinder, ¶¶ 328, 330-334; *Biwater v. Tanzania*, RL-0017, ¶ 592.

impact a foreign investment.[508] Reasonable business investors cannot expect that the circumstances prevailing at the time of their investment will remain totally unchanged. Therefore, the State's right to regulate must be afforded a reasonable margin of appreciation in taking regulatory measures before being held to account.[509] The Respondent says that in cases of this nature, the relevant tariffs must cover all operating expenses, maintenance expenses and service amortization, and provide a reasonable return to investors. It says that this essential term must be (and was) upheld even in a changing economic climate.[510] The Respondent says the Claimants must also demonstrate that there has been a deliberate repudiation of the purpose of the State's policy. Further, the Tribunal must consider the remedies made available to investors by the State and their use of them to try to correct the application of the regulatory framework.[511]

493. The Respondent agrees that the fair and equitable treatment standard is closely tied to the notion of legitimate expectations.[512] It submits that in order to be protected, the expectations must be objective in nature and grounded in the legal order of the host state.[513] Accordingly, the analysis must take into account the state's sovereign power to regulate in the public interest and any evolution in the regulatory framework. The Respondent asserts that a contractual arrangement with the State is not a sufficient basis for legitimate expectations that the contract will not be impacted by subsequent changes in the law. Further, on the facts of this case, the Respondent submits that

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[508] Respondents' Rejoinder, ¶¶ 35-343; Respondents' Counter-Memorial, ¶¶ 334-336, 339; *Teinver v. Argentina*, CL-0061, ¶ 668.

[509] *Saluka v. Czech Republic*, CL-0052, ¶ 305; *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Award, dated 25 November 2015 ("***Electrabel v. Hungary***"), RL-0023, ¶¶ 8.35.

[510] *Impreglio v. Argentina*, CL-0137, ¶¶ 325, 331; Respondents' Rejoinder, ¶ 342. The Respondent says the *Impregilo* tribunal held Argentina liable for failing to restore the economic equilibrium in the claimants' investment following the State's emergency measures, not for merely enacting the challenged measure, as the Claimants contend.

[511] Respondents' Counter-Memorial, ¶ 336; *Cervin v. Costa Rica* (RL-0018), ¶ 527.

[512] Respondent's Counter-Memorial, ¶ 338.

[513] *Ibid*.

Appendix 2 of the 2013 Memorandum provides the benchmark, which was met and exceeded, for the Parties' expectations at the time that agreement was concluded.

494. The Respondent submits that investment tribunals have rejected claims of breach of an investor's legitimate expectations in the absence of specific commitments or representations in the relevant legal, regulatory or contractual regime that the State would not introduce regulatory changes affecting, e.g., contractual price arrangements.[514] In this regard, the Respondent referred to the awards in *AES v. Hungary*[515] and *Electrabel v. Hungary*[516] and submitted that the circumstances in those cases were remarkably similar to those at issue here.[517] The Respondent notes that those cases related to long-term power purchase agreements that provided for the terms of electricity pricing and included a change-in-law provision.[518] The Respondent says that the tribunals in those cases found that the change-in-law provision in the power purchase agreements meant that there was no legitimate expectation that the pricing provided for in the agreements would continue free from any pricing intervention from the Hungarian Government.[519]

495. The Respondent submits that the transition to the 2014 Methodology was beneficial for the electricity market in Georgia and provided a reasonable rate of return for Telasi. Georgia says that there were no assurances given to the Claimants that regulated pricing would not be introduced prior to the expiry of the 2013 Memorandum. Further, the Parties included a change-in-law provision in

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[514] *AES Summit Generation Limited and AES Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, CL-0008, ("***AES v. Hungary***"), ¶¶ 4.3-4.11; *Electrabel v. Hungary*, ¶¶ 2.5-2.6; Respondents' Rejoinder, ¶¶ 337-339.

[515] *AES v. Hungary*, CL-0008.

[516] Electrabel v. Hungary, RL-0023.

[517] Tr. Day 1 (Respondent's Opening Statement), 278:5-280:21.

[518] *Ibid*. *See also*, Slides 143-145 of Respondent's Opening Presentation.

[519] *Ibid*.

the 2013 Memorandum.[520] Accordingly, the Respondent submits that there could not have been any legitimate expectation that the pricing under the 2013 Memorandum would continue to apply. Further, the regulatory changes were reasonable.[521]

496. According to the Respondent, in order to be protected, legitimate expectations must be grounded in the legal order of the host state (the circumstances in which the investor chose to invest), as opposed to unilaterally established by one of the parties. The investor's legitimate expectation of a fair return on its investment must be balanced against the right to regulate in the public interest.[522] The Respondent maintains that the Claimants' allegation of a legitimate expectation based on the written agreements must fail because the determination of Telasi's tariffs under the 2014 Methodology was well within what the Claimants expected, or reasonably should have expected, when they signed the 2013 Memorandum. Further, the forecasted level of profitability, set out in the 2013 Memorandum, was also achieved.[523]

497. In response to the Claimants' allegations related to the obligation of transparency, the Respondent says that there is no developed uniform understanding of the notion of transparency and that it is often invoked to support another element of fair and equitable treatment and has rarely been used as a basis for an award in favour a claimant except in combination with another aspect of fair and equitable treatment.[524] The transparency obligation includes an obligation to be forthcoming with information about intended changes in policy and regulations that may significantly affect

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[520] *Ibid*.

[521] *Ibid*.

[522] Respondents' Counter-Memorial, ¶¶ 338-339; Rudoff Dolzer, Fair and Equitable Treatment: A Key Standard in Investment, The International Lawyer, RL-0019, p. 16; *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, dated 12 June 2021, RL-0021, ¶ 253; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, dated 13 October 2011 ("***El Paso v. Argentina***"), CL-0028, ¶ 358.

[523] Respondents' Counter-Memorial, ¶ 340.

[524] Respondent's Rejoinder, ¶ 372.

investments and typically arise in the context of assessing decisions taken for pretextual reasons or without any reference to their factual or legal basis or in disregard of the applicable legal framework. The Respondent says that there is no factual or legal basis for any of the Claimants' allegations related to the failure to provide transparent or consistent treatment.[525]

c. **The Tribunal's Analysis**

498. Article 3(1) of the BIT provides that the Respondent shall ensure fair and equitable treatment of the investments of nationals of the Netherlands, in this case Silk Road and Gardabani. Unlike other treaties, the BIT makes no reference to the minimum standard of treatment at international law nor to treatment "in accordance with principles of international law" or any similar formulation. As has been found by other arbitral tribunals, the Tribunal believes that the FET standard embodied in the BIT constitutes an autonomous treaty standard which is not limited to the minimum standard of treatment at customary international law.[526]

499. Many arbitral tribunals have considered the meaning of "fair and equitable treatment" in accordance with the rules of interpretation set out in the VCLT and identified a number of elements of the standard. These include the protection of an investor's legitimate expectations, protection against arbitrary and discriminatory treatment, the obligation to act transparently and with due process and good faith.[527] While the formulation of the FET standard may vary between awards, there appears to be a consensus that these elements constitute the core of the FET standard.

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[525] Respondent's Counter-Memorial, ¶ 356; Respondent's Rejoinder, ¶¶ 372-375.

[526] *Crystallex v. Venezuela*, CL-0024, ¶ 530; *Saluka v. Czech Republic*, CL-0052, ¶¶ 294-295.

[527] *Saluka v. Czech Republic*, CL-0052, ¶¶ 297-309; *Electrabel v. Hungary*, Decision on Jurisdiction, dated 30 November 2012, ¶ 7.74, (FET "comprises several elements, including an obligation to act transparently and with due process; and to refrain from taking arbitrary or discriminatory measures or from frustrating the investor's reasonable expectations with respect to the legal framework adversely affecting its investment"); *Crystallex v. Venezuela,* ¶¶ 538-543, CL-0024.

500. Compliance with the FET standard must be assessed in light of all of the facts and circumstances of a particular case.[528] Further, the standard is an objective one and does not permit an arbitral tribunal to decide in equity or to second-guess government decision making.[529]

501. With respect to the difference between the Parties with regard to the threshold for a finding of a breach of FET and whether a respondent state's conduct must be found to be "seriously improper", the Tribunal does not accept that the state's conduct must be outrageous or egregious or amount to bad faith in order to breach the standard. In this regard, the Tribunal agrees with the *Crystallex* tribunal which referred to the award in *Mondev:* "[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or be egregious. In particular, a state may treat a foreign investment unfairly and inequitably without necessarily acting in bad faith".[530] Nevertheless, a breach of the FET standard requires "treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective".[531] The infringement of the FET standard is a serious matter involving a significant threshold such that the respondent state's conduct is sufficiently serious to fall below the required standard of transparency, stability and predictability.[532] As will be discussed below in the context of legitimate expectations, a state will not breach its obligation to treat investors fairly and equitably if it changes its laws in a legitimate exercise of its regulatory authority, absent a commitment not to do so. Further, a breach by a state of a contractual obligation owed to an investor will not, in itself, necessarily amount to a breach of FET.

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[528] *Saluka v. Czech Republic*, CL-0052, ¶ 298; *Mondev v. USA*, RL-0011 , ¶ 118.

[529] *Saluka v. Czech Republic*, CL-0052, ¶ 284.

[530] *Crystallex v. Venezuela*, ¶ 543, CL-0024, quoting from *Mondev v. USA*, RL-0011, ¶ 116.

[531] *Saluka v. Czech Republic*, CL-0052, ¶ 297, quoting from *SD Myers, Inc. v. Canada*, 40 ILM 1408, ¶ 263.

[532] *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, dated 1 November 2013 ("***AES v. Kazakhstan***"), CL-0006 / RL-0037, ¶ 314, quoted in the Respondents' Rejoinder, ¶ 334.

2. The Claimants' Claims of Breach of Fair and Equitable Treatment

502. The Claimants allege that the Respondent breached its obligation of fair and equitable treatment in a number of ways. First, they say that the Respondent failed to provide both Silk Road and Gardabani with a stable legal environment that they had the right to expect and frustrated their legitimate expectations reflected in the 2013 Memorandum, the Khrami SPA, the 2011 Memorandum and the NERC's Resolutions No. 5 (2011) and No. 3 (2013). The Claimants also allege that the Respondent failed to ensure a transparent and predictable legal framework for their investments. The Tribunal addresses first Silk Road's and then Gardabani's primary claims and then the Supplemental Claims relating to Telasi's purchase portfolio volatility, the diversion of the Khrami Companies' electricity and sales to third-parties and Telasi's cost of new connections.

a. **Silk Road's Investments (Telasi)**

i. The Claimants' Position

(a) Legitimate Expectations

503. The Claimants claim that the Respondent frustrated its legitimate expectation of the stable and legal business environment provided for in the 2013 Memorandum which specifically set Telasi's long-term tariffs and the conditions of their adjustment until 2025. They say that this was the basic expectation at the heart of the 2013 Memorandum in exchange for which Silk Road agreed to the four-year tariff reduction requested by the Respondent. They say this was the stable business environment that Silk Road legitimately expected, but that the Respondent refused to abide by that agreement. The Claimants say that beginning in 2014, the Respondent refused to adjust Telasi's tariffs to account for the depreciation of the GEL and then, commencing in September 2015, set

Telasi's tariffs based on the 2014 Methodology rather than the long-term tariffs fixed in the 2013 Memorandum. In addition, the Claimants say that the Respondent refused to increase Consumer Tariffs to compensate for the shortfall against Telasi's RGR for 2017.[533]

504. Silk Road says its expectations were based upon Telasi's relationship with Georgia embodied in the series of agreements from the 1998 Telasi SPA to the 2013 Memorandum. Silk Road says that the Respondent represented that Telasi's tariffs would be set in accordance with the Agreement, and not subject to the discretion of the NERC. It says that when a State expressly assumes specific legal obligations, in this case in the series of agreements leading up to and including the 2013 Memorandum, the investor is justified in expecting that those obligations will be complied with.

505. Silk Road says that the Respondent specifically committed to the regime by which Telasi's tariffs would be set and adjusted in accordance with the tariff-related provisions of the 2013 Memorandum.[534] The Claimants note that the 2013 Memorandum was concluded in part to effect a temporary consumer tariff reduction, but that the parties agreed that previous tariff levels would be restored after 2016 and set in accordance with the 2013 Memorandum.[535] They say that Silk Road expected Georgia to honour its commitment that Telasi's tariffs would be restored and that, otherwise, Telasi would not have agreed to reduce its tariffs as requested by the Government.[536] Further, the Claimants say that Silk Road's continued investment under the 2013 Memorandum reflects that the Respondent was aware of Silk Road's reliance on the commitment and representations that Telasi's tariffs would be set and adjusted in accordance with the Memorandum.

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[533] Claimants' Memorial, ¶ 254; Tr. Day 1 (Claimants' Opening Statement), 121-122.

[534] Claimants' Memorial, ¶ 255; Claimants' Reply, ¶ 173.

[535] Claimants' Memorial, ¶ 255; Tr. Day 1 (Claimants' Opening Statement), 122:2-12.

[536] Claimants' Reply, ¶ 173; Mirsiyapov II, ¶ 85.

506. Silk Road argues that the text of the 2013 Memorandum and the statements made by Georgia after its conclusion confirm that the agreement was not to be overridden, regardless of the changes to the background methodology.[537] Silk Road refers to the evidence of the negotiation of the 2013 Memorandum when it says Georgia's negotiators assured Mr. Mirsiyapov that the NERC not being a party to the agreement would not affect the terms to which they were agreeing because the Government would ensure full implementation of the memorandum.[538] According to Mr. Mirsiyapov, the Claimants' main purpose for concluding the long-term tariff provisions of the 2013 Memorandum was to protect Telasi from the negative effects of any new tariff-related measures taken by the Georgian authorities in the future.[539]

507. Silk Road also says that the NERC's Resolution No. 3 of 2013 precisely implemented the terms of the 2013 Memorandum, which it says strengthened its legitimate expectation that the deal, as negotiated and agreed, would be implemented.[540]

508. Silk Road also refers to the evidence of the discussions with the MOE commencing in September 2014 regarding the adjustment of Telasi's purchase portfolio to compensate for high electricity costs (WAPT) as also strengthening its expectations that Georgia would abide by the terms of the 2013 Memorandum. It says that in those discussions, the MOE accepted responsibility for increasing Telasi's tariffs under the 2013 Memorandum or compensating Telasi for excessive electricity purchase costs.[541] Further, in July 2015 the Minister confirmed that Telasi's rights under

[537] Tr. Day 1 (Claimants' Opening Statement), 122:9-19.

[538] Tr. Day 1 (Claimants' Opening Statement), 122:20-123:1; Mirsiyapov II, ¶ 59.

[539] Mirsiyapov II, ¶ 59.

[540] Tr. Day 1 (Claimants' Opening Statement), 123:2-8.

[541] Claimants' Reply, ¶ 179, Tr. Day 1 (Claimants' Opening Statement), 123:9-18; Letter from Volkov to Kaladze, dated 23 October 2014, C-0046; Letter from Volkov to Kaladze, dated 11 November 2014, C-0049.

the 2013 Memorandum would not be cancelled or nullified if Telasi filed a tariff adjustment application in the form requested by the NERC.[542]

509. Silk Road submits that Georgia violated its legitimate expectations as set out in the 2013 Memorandum by leaving the tariff-setting to the discretion of the NERC, which completely disregarded the agreed tariff regime. Silk Road says that the Respondent represented that Telasi's tariffs would be set in accordance with the Parties' agreement and would not be subject to the discretion of the NERC. It says that the Respondent specifically committed to the regime by which Telasi's tariffs would be set and adjusted and entered into a legal obligation in that regard. Therefore, it legitimately expected that the Respondent's commitment would be respected.[543] Georgia's position that it lacked control over the electricity tariffs applicable to Telasi (and the Khrami Companies), taken for the first time after the 2013 Memorandum was entered into, undermined the predictability of the regulatory framework.[544]

510. The Claimants do not take issue with the fact that the NERC is formally an independent regulator and they note that nothing in the legal regime changed to make anyone expect it to be more or less independent before or after 2014.[545] However, the Claimants say that the way the NERC conducted itself over years of cooperation since 1998 was an important part of the expectations of the Inter RAO Group in coming to negotiate with the government for a tariff deal in 2013.[546] Over the course of many years, the NERC set tariffs for Telasi and the Khrami Companies (and other investors) in accordance with tariff agreements entered into by the Government and without an

[542] Tr. Day 1 (Claimants' Opening Statement), 123:19-24; Letter from Kaladze to Kobtsev, dated 21 July 2015, C-0064.

[543] Claimants' Memorial, ¶ 255.

[544] Claimants' Memorial, ¶ 267.

[545] Tr. Day 7 (Claimants' Closing Statement), 29:21-30:2.

[546] Tr. Day 7 (Claimants' Closing Statement), 30:6-9.

independent review of tariff applications.[547] The Claimants submit that, in fact, between 2006 and 2015 Telasi never made a tariff application to the NERC; its tariffs were automatically approved by the NERC when requested by the MOE in accordance with the tariff agreement in effect at the time.[548] Therefore, the Claimants submit that the Government's decision in 2015 to renege on the tariff agreements, relying on the NERC's formal independence as an excuse for imposing the 2014 Methodology, was a breach of their legitimate expectations.[549]

511. Further and in any event, the Claimants say that the NERC's formal status as an independent regulatory entity is irrelevant since it is an organ of the Respondent and its actions are attributable to the Respondent.[550]

512. In response to the Respondent's position that they were aware when the 2013 Memorandum was signed that the NERC was implementing a new tariff methodology which would override the 2013 Memorandum, they say that the evidence is that this was never communicated to them and, in fact, could not have been, and was not, known at the time.[551]

513. In response to the Respondent's position that Silk Road's legitimate expectations remained intact because Telasi was no worse off under the 2014 Methodology than it was under the 2013 Memorandum, the Claimants say that the Respondent's interpretation of the 2013 Memorandum is incorrect. According to the Claimants, there is no "profitability cap" under the 2013 Memorandum and there is no evidence that Silk Road's legitimate expectations were limited by the tariff figures contained in Appendix No. 2. Rather, Telasi's rights were expressly set out in Clauses 2.2 and 2.3

[547] Tr. Day 7 (Claimants' Closing Statement), 30:10-31:4.

[548] Tr. Day 7 (Claimants' Closing Statement), 31:4-21.

[549] Tr. Day 7 (Claimants' Closing Statement), 31:15-21.

[550] Claimants' Reply, ¶ 176.

[551] Tr. Day 7 (Claimants' Closing Statement), 31:22-32:24.

of the 2013 Memorandum which provided for the application of the long-term tariffs provided for in Clause 2.2 and the adjustment of those tariffs pursuant to Clause 2.3 of the 2013 Memorandum.[552] The application of the 2014 Methodology pre-empted Telasi's contractual rights and reduced its tariffs and earnings under the 2013 Memorandum, making its position worse. Further, and in any event, the Claimants say that Silk Road invested in Telasi on the understanding that certain aspects of the business environment would be guaranteed by the agreements negotiated over the years with the Government. By discarding the tariff-related terms in the latest of those agreements, the 2013 Memorandum, the Respondent introduced unpredictability into Telasi's business which, by definition, made its position worse than under the terms of that Agreement.[553]

(b) Transparency and Predictability

514. The Claimants also allege that the Respondent treated both Silk Road's and Gardabani's investments inconsistently, irrationally and non-transparently in breach of its obligation to ensure a transparent and predictable framework for their investments.[554] The Claimants say that transparency and predictability require that the legal framework for an investor's obligations must be readily apparent and that any decisions affecting the investor can be traced to that legal framework. According to the Claimants, these principles required the Respondent to be transparent regarding its interpretation of the relevant agreements, the 2013 Memorandum (and the Khrami SPA), and seek to resolve the interpretation disputes with respect to them.[555]

515. Rather than doing so, the Claimants say that the Respondent and the NERC contradicted themselves and each other at various times in their dealings with the Claimants. In this regard, the

[552] Claimants' Reply, ¶ 182.

[553] Claimants' Reply, ¶ 182.

[554] Claimants' Reply, ¶¶ 183-185; Tr. Day 1 (Claimants' Opening Statement), 124:5-126:3.

[555] Claimants' Reply, ¶ 184.

Claimants refer to: the MOE's inconsistency with respect to Telasi's claims for tariff adjustments commencing in September 2014, when it agreed to compensate Telasi for increases in its WAPT and then failing to do so; assuring Telasi that its rights under the 2013 Memorandum would be preserved if it were to file a tariff adjustment under the 2014 Methodology, and, shortly thereafter, the NERC applied the 2014 Methodology in disregard of the 2013 Memorandum; in May and August 2016, the NERC explained that it could not adjust Telasi's tariffs as requested under the 2013 Memorandum and the Khrami SPA because it had no legal basis to apply the terms of those agreements, which was false; and, in 2016 the NERC told the Khrami Companies that the 2014 Methodology would necessarily apply if they sought a tariff adjustment, and then changed course the following year and applied the terms of the Khrami SPA rather than the 2014 Methodology.[556]

516. The Claimants submit that the NERC's position in 2015 and 2016 that it could not adjust either Telasi's or the Khrami Companies' tariffs as requested because the 2014 Methodology deprived the NERC of a legal basis to follow the 2013 Memorandum was false.[557] They submit that the bespoke tariff agreements with the State had always been observed and the legal basis for doing so was Article 11(1) of the Energy Law and Resolution 170, which is also consistent with Article 1 of the Energy Law on promoting foreign investment.[558] The Claimants say that in 2017, the NERC found a basis to implement the Khrami SPA, albeit incorrectly.[559] The NERC's change in position with respect to the Khrami Companies – initially saying that the 2014 Methodology would apply if they sought a tariff adjustment and then, instead, applying the Khrami SPA – is another example of

[556] Claimants' Reply, ¶ 185; Tr. Day 1, 124:13-127:3; Tr. Day 7 (Claimants' Closing Statement), 246:16-247:1.

[557] Tr. Day 1 (Claimants' Opening Statement), 125:1-9; Letter from Milorava to Kobtsev, dated 15 July 2015, C-0062; Letter from Milorava to Kandelaki, dated 30 May 2016, C-0081; Letter from Milorava to Kandelaki, dated 9 August 2016, C-0095; Letter from Milorava to Kandelaki, dated 9 August 2016, C-0096.

[558] Tr. Day 7 (Claimants' Closing Statement), 34:1-15; 109:16-24.

[559] Tr. Day 1 (Claimants' Opening Statement), 125:16-22; Letter from Gabelaya to Kandelaki, dated 24 November 2017, C-0133.

inconsistency. The Claimants allege that this behaviour was a further breach of Georgia's obligation to accord fair and equitable treatment through the undermining of the predictable regulatory framework.[560]

ii. The Respondent's Position

(a) Legitimate Expectations

517. The Respondent says it did not violate Silk Road's legitimate expectations or any obligation to act consistently and transparently.

518. With respect to legitimate expectations, the Respondent says that these must be established by reference to the legal regime in which an investor invests at the time the investment is made. The Respondent says that Silk Road has operated in Georgia since December 1998 when AES acquired a majority shareholding in Telasi pursuant to the Telasi SPA. The Respondent contests the Claimants' assertion that Silk Road has operated Telasi since that time on the understanding that certain aspects of the business environment would be guaranteed by government agreements. Rather, the Telasi SPA expressly provided that as of October 2008, Telasi's Distribution Tariffs would be "calculated in co-operation with the NERC […] in accordance with Georgian Law".[561] Therefore, Silk Road could not have invested with the reasonable expectation that Telasi's operations would be outside the reach of the relevant regulatory framework. Insofar as the 2013 Memorandum is concerned, Silk Road could not have reasonably expected that its tariff provisions

[560] Claimants' Memorial, ¶¶ 265-267; Tr. Day 7 (Claimants' Closing Statement), 109:13-110:4.

[561] Respondent's Rejoinder, ¶ 348; Telasi SPA, C-0001, Schedule 11, Clause 3.6. That provision reads, in part, as follows: "After the initial 10-year period, ending on 30 September 2008, the **Specified Distribution Margin** will be calculated with effect from 1 October 2008 and may be calculated as frequently as every five years and thereafter, will be calculated in co-operation with the NERC and in accordance to Good Utility Practice, and is set in accordance with Georgian Law and the following principles…"

would apply without change until 2025 or that the NERC would not introduce new regulated tariffs until that date, because no such assurances were made.[562]

519. The Respondent says that the facts of this case are very similar to those in the *AES v. Hungary* and *Electrabel v. Hungary* awards where the tribunals found that the contractual arrangements with the state were not a sufficient basis to provide a legitimate expectation that the contracts would not be affected by subsequent changes in law. The Respondent says there was nothing in the legal regime or in the 2013 Memorandum on which Silk Road could reasonably have based an expectation that no new regulated tariffs would be introduced before the expiry of the 2013 Memorandum.[563]

520. The Respondent says that Silk Road knew that Telasi's tariffs would be set by the NERC, not by the Government, and that the NERC was under no obligation to set and adjust Telasi's tariffs in accordance with the terms of the 2013 Memorandum.[564] Further, Article 27 of the 2011 Methodology, which exempted from its scope of application electricity companies with pre-existing tariff agreements with the Government and was still in force at the time the 2013 Memorandum was signed, could not have applied to the 2013 Memorandum since it applied only to tariff agreements pre-existing the adoption of the 2011 Methodology.[565] The Respondent also says that, to Telasi's knowledge, the NERC retained its jurisdiction under Article 11.1 of the Law on Electricity to take

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[562] Respondents' Rejoinder, ¶¶ 344-358; Respondents' Counter-Memorial, ¶¶ 340-348.

[563] Respondents' Rejoinder, ¶¶ 337-339, 354. The Respondent distinguishes the award in *Impregilo* relied upon by the Claimants to say that regulatory changes that alter fundamental aspects of the host state's contractual arrangements with a foreign investor violate the host state's obligation to act fairly and equitably. The Respondent says that the Tribunal in the *Impregilo* case found a breach of the fair and equitable treatment obligation because the respondent in that case failed to restore the economic equilibrium in the claimant's concession agreement and not because of the introduction of the emergency law implementing the specification of tariffs. The Respondent notes that the tribunal in *Impregilo* stated that "fair and equitable treatment cannot be designed to ensure the immutability of the order, the economic world or the social universe" and that foreign investors cannot legitimately expect "that the State will never modify the legal framework". *See* Respondents' Rejoinder, ¶¶ 341-342 and the sources cited there.

[564] Respondents' Rejoinder, ¶¶ 92-96, 349.

[565] Respondents' Rejoinder, ¶ 349; Respondents' Counter-Memorial, ¶¶ 93-94; 2011 Methodology, CL-0081, Article 27.

into account transactions entered into by the State as it deemed appropriate.[566] Therefore, the relevant legal regime gave the NERC discretion to take into account contractual tariff arrangements. The fact that it may have chosen not to apply the tariff-setting provisions of the existing Methodologies to the Claimants in the past did not in itself create a legitimate expectation that it would continue to do so in the future, irrespective of the evolving context.

521. The Respondent also argues that the 2013 Memorandum has no stabilisation clause precluding legislative changes. Rather, it specifically deals with the Parties' rights and obligations should a change in law (e.g., the NERC's introduction of the 2014 Methodology) cause Inter RAO to be worse off compared to its expectations when the 2013 Memorandum was concluded.[567] Silk Road therefore knew that Georgia might enact laws that could render the 2013 Memorandum tariffs unenforceable. Accordingly, the only expectation Silk Road could have had was the payment of compensation under Clause 5.2 should the tariffs set by the NERC make Telasi's financial situation worse than when the 2013 Memorandum was signed.[568] The Respondent suggests that the Claimants insisted on including Clause 5.2 in the agreement so as to retain the right to obtain compensation from the Government precisely in the event the NERC's tariff decisions made Telasi's financial position worse than the forecasts at Appendix 2. Further, and in any event, the Respondent says Telasi far exceeded its expectations even after the implementation of the 2014 Methodology. In addition, Dr. Moselle confirmed that it would continue to do so up to 2025 because the Methodology guarantees a 4-5% profit margin similar to that provided in the 2013 Memorandum.[569]

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[566] Respondents' Rejoinder, ¶¶ 349-350.

[567] 2013 Memorandum, R-0028, Clauses 5.2 "change in law", 6.3 "renegotiation".

[568] Respondents' Counter-Memorial, ¶ 345.

[569] Moselle I, ¶¶ 8.1-8.15.

522. Therefore, the Respondent says Silk Road's legitimate expectation claim should be rejected because the determination of Telasi's tariffs under the 2014 Methodology was within what the Claimants expected (or ought to have expected) when they signed the 2013 Memorandum. Those expectations were reflected in the forecasts of key performance indicators, at Appendix 2 of the 2013 Memorandum. A comparison of the figures at Appendix 2 to Telasi's actual financial performance after the application of the 2014 Methodology indicates that Silk Road is not worse off since it earned a margin in excess of the 4-5% expected in the 2013 Memorandum.[570]

523. The Respondent emphasises that, under Georgian law, the NERC has full discretion to introduce regulated tariffs, and as such, was not required to apply the tariffs in the 2013 Memorandum. The Claimants knew this at the time when the 2013 Memorandum was concluded. The Respondent recalls that Silk Road (initially owned by AES at the time) has operated in Georgia since 1998 when it concluded the Telasi SPA. That agreement contemplated that, as of October 2008, Telasi's Distribution Tariffs would be calculated in co-operation with the NERC, in accordance with Georgian tariff-setting principles. Although the transitional regime in the 2011 Methodology exempted from its application electricity companies with pre-existing tariff arrangements with Georgia, because it was already in force at the time the 2013 Memorandum was signed, this exemption did not apply to the 2013 Memorandum. Accordingly, Silk Road did not invest with the expectation that Telasi would be outside the reach of the applicable regulatory framework, or that the NERC would wait a decade to apply the 2014 Methodology to Telasi, which is one of only three electricity distribution companies in Georgia. In this regard, Ms. Bachiashvili

[570] Respondents' Rejoinder, ¶ 357; Moselle II, ¶¶ 2.20, 7.13-7.14, 7.16-7.19: Dr. Moselle says Telasi's revenues above its recognized costs are higher than forecasted in Appendix 2, 2013 Memorandum and that Telasi's average margin relative to its revenues net of commercial losses is higher than the 4-5% Reserve Revenue in the 2013 Memorandum.

alleged that the Claimants were told during the negotiation process that the 2013 Memorandum tariffs would need to be agreed by the NERC.[571]

524. The Respondent says that while the NERC did not devise a new methodology before 2014, it always had the power to override the 2013 Memoranda's tariff provisions. Although the NERC chose not to apply the 2013 Memorandum to Silk Road until July 2015, this did not create a legitimate expectation that it would continue to do so, particularly when, at the time the 2013 Memorandum was concluded, the NERC was, to the Claimants' knowledge, in the process of updating and modernizing its tariff-setting methodology to bring it in line with European standards under the Twinning Initiative. The NERC publicly announced its plans to update its methodology along these lines on 26 October 2012, which was before the Claimants started negotiating the 2013 Memorandum.[572] The Claimants attended the public consultations leading up to the adoption of the 2014 Methodology and did not express any reservations. The Respondent argues that the Claimants' participation shows they were aware that, going forward, their tariffs would be set under the new methodology, which would necessarily displace the 2013 Memorandum's tariff adjustment mechanisms. Thus, they could not have expected that Telasi would remain entitled to the tariffs and their adjustment as set out in the 2013 Memorandum.

525. Georgia says it did not represent to Silk Road that Telasi would be exempted from the new tariff methodology. It points to the Government's refusal of Inter RAO's proposal to include the NERC as a contracting party to the 2013 Memorandum, which reflected Inter RAO's understanding of the NERC's exclusive competence over tariff-setting and the Government's corresponding lack of authority to compel the NERC to apply the 2013 Memorandum. Further, the 2013 Memorandum

[571] Bachiashvili I, ¶ 21.

[572] EC Press Releases, R-0030; Speech declaring that the NERC will develop "incentive based tariff regulation and creating preconditions for its application".

states that the Government will take the necessary measures "within its authority" to ensure adoption of the regulations required to implement the tariff provisions of the 2013 Memorandum, which is distinct from Inter RAO's proposed wording that the Government "approve" Telasi's tariffs.[573] Finally, because the parties understood that only the NERC could fix tariffs, these are referred to in the 2013 Memorandum as "indicative limit tariffs" in Clause 2.2.1.

(b) Transparency and Predictability

526. With respect to Silk Road's allegations that it failed to act transparently and consistently, the Respondent says that none of these have any basis.[574] The Respondent says that the measures about which the Claimants complain were implemented in good faith on the basis of considerations set forth in the applicable laws and regulations in accordance with applicable procedure, ensured due process and were always amply motivated. It also says that the policy considerations underlying the measures in question were made clear and there is no basis to conclude that they were adopted for pretextual reasons.[575]

527. Insofar as the treatment of Telasi's request for adjustment of its tariffs is concerned, the Respondent says that although Telasi had no claim for an adjustment of its tariffs in 2014 and 2015 since its expectations had all been exceeded, the MOE attempted to address the Claimants' concerns about Telasi's WAPT and the depreciation of the GEL. It also offered to settle the Claimants' complaints on a commercial basis by relinquishing its share of the accumulated TIA. However, the Claimants rejected this good faith offer.[576]

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[573] 2013 Memorandum, C-0034 / R-0028, Clause 1.5; compare to NERC's 2017 Annual Report, R-0002.

[574] Respondent's Rejoinder, ¶¶ 376-385.

[575] *Id.*, ¶ 377.

[576] *Id.*, ¶ 378.

528. With respect to the alleged erratic and non-transparent manner in which the 2014 Methodology was implemented, the Respondent says that the record shows that Silk Road was aware that Telasi's tariffs would be set by the NERC and that the NERC was under no obligation to implement the contractual tariff arrangements in the 2013 Memorandum. Further, the Claimants knew that the NERC was in the process of updating its tariff-setting methodology to achieve EU standards. It says that the NERC's preliminary calculations of Telasi's tariffs under the 2014 Methodology were shared with Telasi before the 2014 Methodology was applied to Telasi's Tariff Application in September 2015.[577] Further, the Respondent says that the NERC set Telasi's tariffs under the 2014 Methodology after a thorough and transparent tariff review process in compliance with Georgian Law and with Telasi's active participation. Finally, the NERC's decisions with respect to the setting of Telasi's tariffs were fully reasoned.[578]

iii. The Tribunal's Analysis

(a) Legitimate Expectations

529. The Tribunal finds that Silk Road has not demonstrated that at the time the 2013 Memorandum was concluded it had the legitimate expectation that Telasi's tariffs would be set and adjusted pursuant to the provisions of the Memorandum until 31 December 2025 without change. Rather, its expectation was that in the event of a change of legislation which made its position worse as compared to its position at the date of the signature of the 2013 Memorandum, the Respondent would compensate for all losses.

[577] *Id.*, ¶¶ 379, 131-134. The exchanges relating to the adjustment of Telasi's tariffs under the 2014 Methodology occurred in April 2015 and following.

[578] *Id.*, ¶ 379.

530. The relevant time at which to assess whether an investor has a legitimate expectation is at the time it makes its investment. Here, Silk Road first invested in Telasi in 1998 under the terms of the Telasi SPA when it purchased approximately 75% of Telasi's shares. The Telasi SPA contained a change of law clause which provided that for a period of 10 years the State would compensate AES Silk Road Holdings BV for certain changes of law.[579] It set Silk Road's investment requirements and Distribution Tariffs until 30 September 2008. After that, the Telasi SPA provided that Telasi's specified Distribution Margin would be calculated every 5 years "… in co-operation with the NERC and in accordance to Good Utility Practice, and set in accordance with Georgian Law" and certain principles: Telasi's costs were anticipated with reference to international practices in regulated utility companies; a reasonable rate of return would be provided so that Telasi and its affiliates would achieve a fair and reasonable market-related return on Silk Road's initial and subsequent investments in Telasi; and, the need to hold Silk Road harmless for changes in exchange rates and inflation by way of periodic adjustments.[580]

531. After this, by way of the AES SPA, in 2003 RAO Nordic Oy AES sold its shares in AES Silk Road Holdings BV to Inter RAO.[581]

532. Inter RAO then negotiated and concluded the 2007 and 2011 Memoranda, described above, with the Respondent. The 2013 Memorandum was concluded between Inter RAO, Telasi, Mtkvari and the Khrami Companies with the Government of Georgia and the Partnership Fund. As described above, the NERC implemented resolutions adopting the tariffs agreed between the Government and

[579] Telasi SPA, C-0001, Clause 20.

[580] Telasi SPA, C-0001, Schedule 11, Clause 3.6.

[581] AES SPA, dated 11 July 2003, C-0012. Subsequently, on 25 April 2008, RAO Nordic sold its shares in Silk Road and Gardabani to Inter RAO Holdings BV. *See* Sale and Purchase Agreement, dated 25 April 2008, C-0013.

Inter RAO in these Memoranda. Then, in 2014 it adopted a new tariff-setting Methodology which it applied to Telasi's tariffs commencing in September 2015.

533. Silk Road says that when the 2013 Memorandum was signed, it had an expectation that Telasi's tariffs would be set and adjusted in accordance with the terms of the 2013 Memorandum throughout the course of its entire term and were not subject to the discretion of the NERC. It says this expectation was based upon the previous series of agreements between Inter RAO and Georgia. It also says that during the course of the negotiation of the 2013 Memorandum, Georgia's representatives confirmed that the Memorandum was not to be overridden and the fact that the NERC was not a party to the Agreement would not affect its terms since the Government would ensure full implementation. Further, the NERC's resolutions, particularly Resolution No. 3 of 2013, confirmed its expectation that the Agreement, as negotiated, would be implemented. It also relies on the conduct of the MOE in discussions regarding Telasi's WAPT as confirming its expectation.

534. In the Tribunal's view, the foregoing does not demonstrate a clear, objective legitimate expectation that the tariff-setting and adjustment provisions of the 2013 Memorandum would apply without change for the term of the Memorandum. As described above, under the Telasi SPA of 2008, Telasi's tariffs were to be calculated in cooperation with the NERC in order to achieve a reasonable rate of return and hold Telasi harmless for changes in exchange rates and inflation. The bespoke Memoranda subsequently concluded by Inter RAO and Georgia were separate agreements which set a clean slate upon their entry into effect. In particular, the 2013 Memorandum specifically provided that it superseded any previous memoranda in their entirety.

535. In 2012, the MOE and the NERC had commenced the process of modernizing Georgia's tariff regulations to bring them into line with regulatory practices in the European Union. The Claimants were aware of this and attended some early information and discussion sessions. As the Tribunal found in the SCC Partial Award, at the time the 2013 Memorandum was signed, the

Claimants had knowledge of the Twinning Initiative, which was intended to revise the NERC's tariff-setting methodology, and had some concern that this might apply to them and affect Inter RAO's activities in Georgia. It appears this was the reason that, in the negotiations leading to the 2013 Memorandum, the Claimants sought to add the NERC as a party and demanded the insertion of Clause 5.2 in the draft of the Memorandum. Although the details of the 2014 Methodology were not known at the time, the Tribunal finds that the Claimants, including Silk Road, had a concern that Georgia or the NERC could seek to change its legislation in the future and affect Telasi's tariffs. This concern appears to have been significant enough for the Claimants to seek to add the NERC as a party to the 2013 Memorandum and to ensure compensation by way of a new Clause 5.2.

536. In Clause 5.2 of the 2013 Memorandum, the Parties foresaw the possibility that a change in legislation could make Inter RAO's or any Inter RAO Group company's position worse as compared to the position at the date of the signature of the Memorandum. It is common ground between the Parties that a change or amendment of legislation includes changes in the NERC's regulatory resolutions. In the event such a change occurred, Clause 5.2 provided that the Government shall compensate for any losses. This clause was agreed in the context of the Government's demand that Telasi's tariffs would be reduced for a period of approximately 3.5 years and the Claimants' demand that Telasi be protected from the adverse effects of a change in regulation. In the circumstances, the Tribunal finds that Clause 5.2 represents a specific commitment by the Government to compensate Inter RAO or any of the Inter RAO's Group companies operating in Georgia if their position under the newly agreed tariff provisions was made worse by a regulatory change. On this basis, the Claimants could legitimately expect that if a change in legislation negatively affected Telasi's position, they would be compensated by the Government for any losses.

537. The Tribunal's analysis of the complex, technical provisions of the 2013 Memorandum in the SCC Arbitration indicates that determining whether Telasi's position had been adversely

affected pursuant to Clause 5.2 was no easy matter. As the Tribunal noted in the SCC Partial Award on Liability, the terms of the 2013 Memorandum are complex and extensive submissions and evidence were required to determine how it should be interpreted. Further, the calculation of losses incurred by Telasi was particularly complex and required the submission of several joint expert reports. As a result, the Tribunal only recently determined in the SCC Awards that the conditions of Clause 5.2 of the 2013 Memorandum have been met and been in a position to assess losses in the SCC Arbitration.

538. In the SCC Arbitration, the Tribunal determined the Claimants' contractual claims under the terms of the 2013 Memorandum and found that the Government was liable for the payment of compensation.[582] In this arbitration, the Tribunal has found that the Government made a specific commitment to compensate for any losses caused by a change in legislation and that Silk Road had a legitimate expectation in that regard. The remaining question is whether the Government has breached that expectation in the circumstances of this case as it has evolved.

539. In the Tribunal's view, Silk Road's expectation of compensation is dependent on the finding that its position was made worse by a change in legislation and an assessment of what losses were suffered. When the issue of whether a qualifying change had occurred arose, the Government, as contracting party was entitled to contest the Claimants' interpretation of the relevant provisions of the 2013 Memorandum and any allegations of the breach of its terms. By way of the arbitration clause contained in Article 9 of the Memorandum, the Parties committed to resolve any dispute arising out of or in connection with the Memorandum pursuant to arbitration and have done so in good faith. The Respondent has participated fully in both the SCC Arbitration and this arbitration and has not attempted to modify or invalidate the obligation it accepted to compensate for losses

[582] SCC Partial Award on Liability, ¶¶ 653, 795.

caused by a change in legislation. In fact, the Respondent has stated in these proceedings that it has never denied that it would pay compensation found to be owing by the Tribunal.[583]

540. In summary, although the Tribunal has found in the SCC Arbitration that the Government and the Partnership Fund breached the 2013 Memorandum by failing to compensate for Telasi's losses, this does not, in itself, amount to a breach of the FET standard in the circumstances of this case. As noted previously, a breach of contract is distinct from a breach of FET, by way of the frustration of legitimate expectations or otherwise. In the circumstances before it this case, where the terms of the 2013 Memorandum are ambiguous and their interpretation is not a straightforward exercise, the Tribunal finds that the Respondent's conduct did not rise to the level of a failure to provide fair and equitable treatment. Accordingly, Silk Road's claim that the Respondent failed to provide fair and equitable treatment by frustrating its legitimate expectations fails.

(b) Transparency and Predictability

541. As summarized above, the Claimants also allege that the Respondent treated Silk Road's investment in Telasi inconsistently, irrationally and non-transparently. The Claimants say that each of the Respondents and the NERC's own conduct in treating Silk Road lacked transparency and was unpredictable. They also say that the Respondent and the NERC were inconsistent between themselves such that the rules governing Telasi's tariffs and operations were not readily accessible and apparent and could not be traced to a consistent legal framework. Having reviewed all of the evidence, the Tribunal has concluded that any apparent inconsistency or confusion relating to the adjustment of Telasi's tariffs was the result of the complex and ambiguous nature of some of the terms of the 2013 Memorandum. The Tribunal is unable to conclude that the Respondent's or the

[583] Tr. Day 1 (Respondents' Opening Statement), 155:2-8.

NERC's treatment of Telasi and the adjustment of its tariffs rises to the level of a breach of FET due to a lack of transparency or consistency.

542. With respect to the adjustment of Telasi's tariffs in 2014 and 2015, the MOE engaged with the Claimants and attempted in good faith to address their concerns regarding Telasi's WAPT and the depreciation of the GEL. Although the MOE did not agree with the Claimants' interpretation of the relevant provisions of the 2013 Memorandum, it engaged in discussions with the Claimant and offered to settle the Parties' dispute on a commercial basis.[584] In light of the difficulty in interpreting the complex provisions of the Memorandum, the position taken by the Respondent was not unreasonable.

543. With respect to the adoption and application of the 2014 Methodology, the Tribunal has found the Respondent did not commit that Telasi's tariff regime would not change. Rather, the Parties agreed that in the event a legislative change made Telasi's position worse than at the date of the 2013 Memorandum, it would compensate for any resulting losses. The Tribunal's review of the process involving the adoption of the 2014 Methodology indicates that it was transparent. Further, the NERC provided preliminary calculations of Telasi's adjusted tariffs pursuant to the 2014 Methodology in advance of the commencement of Telasi's tariff adjustment application. The NERC conducted a thorough review and a public hearing in respect of Telasi's tariff applications in 2015, 2016 and 2017. This is reflected in the transcripts of the public hearings in which Telasi participated.[585] The Tribunal notes that the NERC considered Telasi's tariff applications pursuant to its standard process, which included public hearings. In its 2015 decision, the NERC increased Telasi's Consumer Tariffs by approximately 30% despite the fact that the freeze period agreed in

[584] Respondents' Counter-Memorial, ¶¶ 178-185; Respondents' Rejoinder, ¶¶ 186-190, and the sources cited there.

[585] Respondents' Rejoinder, ¶ 52.

Clause 2.3 of the 2013 Memorandum was in effect.[586] The NERC again increased Telasi's Consumer Tariffs in 2017.[587]

544. The Tribunal has considered carefully the Claimants' allegations surrounding the 2015 review of Telasi's tariffs and, in particular, the exchange between Telasi and the MOE on 21 July 2015 regarding Telasi's rights under the 2013 Memorandum. As described above, the MOE and Inter RAO met on that date to discuss the NERC's response to Telasi's request for a WAPT-based adjustment to its Consumer Tariffs. The Claimants say that the Minister confirmed that Telasi's rights under the 2013 Memorandum would not be overridden or cancelled if it filed an application under the 2014 Methodology. This was confirmed in a brief note.[588] In the Tribunal's view, this response was not misleading. As the Tribunal has determined, the Respondent did not promise that there would be no change in the tariff regime. Rather, the Parties agreed that in the event a legislative change affected Telasi's position negatively compared to its position at 31 March 2013, the Government would compensate for any losses. There was a legitimate dispute as to how the relevant provisions of the 2013 Memorandum should be interpreted and the Respondent, as a party to the Memorandum, was entitled to contest the Claimants' interpretation and claims. The Respondent engaged in good faith in the arbitration process agreed by the Parties to determine the dispute. Thus, Telasi's rights under the 2013 Memorandum were not overridden by the application of the 2014 Methodology.

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[586] NERC Resolution No. 26, dated 3 September 2015, CL-0085; Minutes of the NERC's Hearing No. 51, dated 3 September 2015, R-0046; Respondents' Opening Presentation, slide 119 showing Telasi's Consumer Tariffs for household customers from 2014 to 2017.

[587] NERC Resolution No. 48, dated 27 December 2017, CL-0091; Respondents' Comments on Quantum Issues, ¶¶ 9-10 showing the NERC also subsequently adjusted the Khrami Companies' tariffs in accordance with its interpretation of the Khrami SPA and Telasi's tariffs pursuant to the 2014 Methodology.

[588] Letter from Kaladze (MOE) to Kobtsev (Telasi), dated 21 July 2015, C-0064.

545. Accordingly, Silk Road's claim that the Respondent treated its investment in Telasi and inconsistently, irrationally and non-transparently fails.

b. **Gardabani's Claims (The Khrami Companies)**

iv. The Claimants' Position

(a) Legitimate Expectations

546. Gardabani says that it expected a stable legal and business environment based on the Respondent's commitments to set and adjust the Khrami Companies' Generation Tariffs until 2025 under the express terms of the Khrami SPA and the 2011 Memorandum. It says that it invested more than USD 100 million on the basis of Georgia's representations that the Generation Tariffs would be set and adjusted in accordance with these Agreements. It says that its expectations arose from the applicable legal framework, the 2011 Memorandum, NERC Resolution No. 5 and, in particular, the tariff regime agreed in the Khrami SPA. The Claimants say that the Respondent frustrated Gardabani's legitimate expectations by failing to ensure that the Khrami Companies' Generation Tariffs were adjusted as required under the terms of Clauses 1 and 2 of Annex 1 to the Khrami SPA and Clause 2.5 of the 2011 Memorandum.[589] Specifically, the Claimants say that the Respondent failed to ensure that the Khrami Companies' tariffs were adjusted for the period 1 November 2016 to 1 November 2019 when the GEL devalued against the USD by more than 7% and failed to adjust Khrami-2's Tariffs when the GEL devalued against the JPY by more than 7%.

547. The Claimants say that Gardabani's claim is not based on an expectation of legislative and regulatory stability and they accept that an investor cannot reasonably expect the applicable legal

[589] Claimants' Memorial, ¶¶ 248-253; Claimants' Reply, ¶¶ 166-172; Tr. Day 1 (Claimants' Opening Statement), 118:22-121:11.

regime to remain static. Rather, Gardabani relies on the specific commitments made by Georgia in the Khrami SPA and the 2011 Memorandum, later replicated in the 2013 Memorandum, as forming the basis for its legitimate expectation as to the tariff regime that would apply. The Claimants say that Gardabani's expectations were confirmed by NERC Resolution No. 5 which implemented the specific tariff regime agreed in the Khrami SPA. They say that the relevant provisions of NERC Resolution No. 5 were not "provisions of general legislation applicable to a plurality of persons or category of persons" but the specific adoption of the Khrami SPA and the 2011 Memorandum setting the Khrami Companies' tariffs and the terms of their adjustment.[590]

548. The Claimants submit that the fact that the NERC was not bound by the Khrami SPA or the 2011 and 2013 Memoranda is irrelevant. They say that any distinction between the MOE and the NERC is artificial since they are both Georgian government organs and any act of the NERC is attributable to the Respondent. The Claimants say that non-compliance with agreed tariff terms, regardless of the form or the specific agency responsible, triggered the liability of the Respondent under the BIT. Further, the Claimants say that during the negotiation of the Khrami SPA and of the 2011 and 2013 Memoranda, the Respondent represented that it would be able to implement the agreed tariff terms, which forms part of Gardabani's reasonable expectations. The Claimants say that the Respondent never suggested in any of these agreements that the implementation of the tariff provisions remained subject to the discretion of any government agency.[591]

549. In response to the Respondent's position, the Claimants say that the Khrami Companies did not refile their initial 2016 tariff adjustment requests because the NERC had told them in clear terms

[590] Claimants' Memorial, ¶¶ 252-253; Tr. Day 1 (Claimants' Opening Statement), 118:24-120:5. The Claimants also say that Gardabani's expectations were reinforced during the negotiation of the Khrami SPA when the Respondent represented that the agreed tariff terms would apply to the Khrami Companies. *See* Tr. Day 1 (Claimants' Opening Statement), 119:12-119:19; Zavrazhnov I, ¶ 19.

[591] Claimants' Memorial, ¶ 250(b).

that the 2014 Methodology would be applied. In light of the reduction in Telasi's tariffs in 2015 due to the application of the 2014 Methodology, Gardabani says the Khrami Companies took the sensible decision to limit their losses by abandoning their applications.[592] The Claimants say that the Respondent cannot rely on the Khrami Companies' mitigation efforts to benefit from its own wrongdoing. They say that the Khrami Companies withdrew their applications to avoid an outcome similar to what had occurred to Telasi's adjustment request. Further, this decision has no bearing on Gardabani's expectation that the Respondent would honour its commitment regarding the Khrami Companies' tariffs.

550. With respect to the Respondent's argument that it respected Gardabani's legitimate expectations when in 2017 the NERC applied the provisions of the Khrami SPA to determine the Khrami Companies' new tariff adjustment requests, the Claimants say that the NERC's tariff adjustment decision did not comply with the terms of the Khrami SPA. The NERC did not use the exchange rate comparators set out in Clauses 2.1 and 2.2 of Annex 1 of the Khrami SPA, but chose, instead, to minimize the adjustments by using the average rather than the snapshot rates. Further, the NERC applied the USD rate adjustment to only part of the Generation Tariffs: the Supplement only, excluding the basic tariff, in breach of Clauses 2.1 and 2.2 of Annex 1 of the Khrami SPA.[593]

551. In response to the Respondent's position that even if it misapplied the Khrami Companies' tariff adjustment provisions in 2017 this would not be unfair or inequitable, the Claimants say the NERC's decisions set out in Resolutions Nos. 30 and 31 were not simply "imperfect". Rather they represented a complete disregard, without meaningful explanation, of the agreed tariff adjustment provisions. They say that this was a material, substantive defect, not just a minor imperfection or

[592] Tr. Day 1 (Claimants' Opening Statement), 121:9-121:11; Claimants' Reply, ¶ 170.

[593] Claimants' Reply, ¶¶ 166-167.

procedural issue, in breach of the agreed tariff adjustment arrangement at the core of Gardabani's legitimate expectations when it made its investment to purchase the Khrami Companies.[594]

552. With respect to the Respondent's argument that Gardabani waived or lost its claim under the BIT because the Khrami Companies did not pursue judicial review in the Georgian courts, the Claimants say that the BIT imposes no requirement that local remedies be exhausted before initiating arbitration. The Claimants take the same position with respect to the Respondent's argument that Gardabani did not object to NERC Resolutions Nos. 30 and 31 at the public hearing on 31 October 2017. The BIT does not require an investor to exhaust local remedies or complain at a public hearing before commencing arbitration and no such obligation exists as a matter of international law. In any event, the Claimants say that the Khrami Companies made their position clear at the public hearing when Mr. Kandelaki stated that the adjustments requested by the Khrami Companies were justified and that he would refrain from further comment in light of the ongoing dispute between the Parties.[595]

(b) Transparency and Predictability

553. Gardabani also claims that the Respondent treated its investments inconsistently, irrationally and non-transparently when in May and August 2016, the NERC stated that it could not adjust the Khrami Companies' tariffs under the Khrami SPA and the 2011 Memorandum, as requested, because the 2014 Methodology applied and it had no legal basis to apply the Khrami SPA.

[594] Claimants' Reply, ¶¶ 168-169; Tr. Day 1 (Claimants' Opening Statement), 120:21-121:8. On this basis, the Claimants distinguish the award in *AES v. Hungary,* relied on by the Respondent.

[595] Claimants' Reply, ¶ 172; C-0214, Transcript of the public hearing held by the NERC regarding the Khrami Companies tariff application, dated 31 October 2017, p. 6.

Nevertheless, the following year the NERC purported to apply the tariff adjustment provisions of the Khrami SPA.[596]

v. The Respondent's Position

554. The Respondent denies that it breached the requirement to provide fair and equitable treatment, whether by frustrating Gardabani's legitimate expectations or any obligation of transparency.[597]

(a) Legitimate Expectations

555. With respect to Gardabani's legitimate expectations, the Respondent says that the NERC adjusted the Khrami Companies' Generation Tariffs on 31 October 2017 in application of the NERC's Resolution No. 5 which replicated the tariff adjustment mechanisms in Annex 1 of the Khrami SPA. It maintains that the only dispute between the Parties relates to the Khrami Companies' complaints regarding the NERC's decision to reject their request for compensation based on the non-adjustment of the Generation Tariffs as of November 2016 and the NERC's understanding of the scope of application of the adjustment mechanisms in its Resolution No. 5.[598]

556. With respect to the Khrami Companies' 2016 tariff adjustment applications, the Respondent says that Gardabani could not reasonably have expected that the Khrami Companies' tariffs would be adjusted on 1 November 2016 or that compensation for non-adjustment would be due, in light of the Khrami Companies' abandonment of their applications.[599] According to the Respondent, any legitimate expectations of the Khrami Companies in 2016 must be based on the terms of the Khrami

[596] Claimants' Reply, ¶ 185(e) and (f); Tr. Day 1 (Claimants' Opening Statement), 125:5-126:8.

[597] Respondents' Counter-Memorial, ¶¶ 349-362; Respondents' Rejoinder, ¶¶ 359-371, 380.

[598] Respondents' Rejoinder, ¶ 359.

[599] Respondents' Rejoinder, ¶ 360; Respondents' Counter-Memorial, ¶ 351.

SPA and the applicable legal framework. The Khrami SPA does not establish any procedure for the implementation of its tariff adjustment provisions. However, Clause 9.3 of the Khrami SPA provides that "… the issues which are not stipulated in this Agreement shall be regulated by the effective Georgian legislation". Therefore, the implementation of the tariff adjustment provisions of the Khrami SPA is governed by Georgian Law which requires the submission of tariff applications to the NERC in the prescribed format and gives the NERC full discretion to dismiss non-compliant tariff applications without considering their merits.

557. The Respondent also maintains that Clause 1.15 of the Khrami SPA provides that the Government will not be liable for the non-application of the tariff provisions in Annex 1 to the Khrami SPA if the Khrami Companies fail to submit compliant tariff applications.[600] In these circumstances, Gardabani could not reasonably have expected that the NERC would adjust the Khrami Companies' tariffs or that the Government would be liable for the NERC's failure to do so when they did not submit tariff applications compliant with the 2014 Methodology.[601]

558. The Respondent also argues that Gardabani's alleged legitimate expectations with respect to the adjustment mechanisms in Annex 1 to the Khrami SPA and in the NERC's Resolution No. 5 are meritless since Gardabani has failed to demonstrate that it actually held any expectations with respect to the scope of application of the relevant adjustment mechanisms. Further, the Claimants

[600] Respondents' Rejoinder, ¶ 363. However, Clause 1.15 of the Khrami SPA relates to situations where the NERC Resolution implementing the tariffs set out in the 2011 Memorandum and the Khrami SPA is not delivered by the Final Payment Date due to the failure by the Khrami Companies to submit applications to the NERC by 1 July 2011. The NERC issued its Resolution No. 5, which established the tariffs and the terms of their adjustment on 7 April 2011. Clause 1.15 of the Khrami SPA does not purport to apply with respect to subsequent tariff applications.

[601] For the reasons set out in the SCC Partial Award, the Respondent also argued that Gardabani and the Khrami Companies had lost any rights to make a complaint in respect of the 2016 Application as they had not fulfilled a pre-condition to an adjustment or had waived any right to an adjustment. The Tribunal's findings rejecting the Respondent's argument are set out at ¶¶ 707-723 of the SCC Partial Award on Liability. In addition, the Respondent says that the Claimants knew that in order to protect their interests under the Khrami SPA, the Khrami Companies had no choice but to apply to the NERC and request a modification of their tariffs. *See* Respondents' Rejoinder, ¶ 364 and the sources cited there.

have not demonstrated that Gardabani relied upon the alleged expectations in deciding to acquire the Khrami Companies, that those expectations were "reasonable" and "legitimate" or that Georgia's conduct frustrated any such expectations.[602]

559. The Respondent says that there is no evidence supporting Gardabani's claimed expectation with respect to the exchange rate adjustment in Clauses 2.1 and 2.2 of Annex 1 of the Khrami SPA, nor that the alleged expectation relating to the GEL/USD adjustment rate in Clause 2.2 applied to the entire tariff, rather than just the Supplement to the tariff in the period from 2014 to 2021. As a result, the Claimants have no basis to claim that the NERC's implementation of the tariff adjustment provisions in Annex 1 to the Khrami SPA frustrated Gardabani's expectations.

560. Further, and in any event, the Respondent says that even assuming, contrary to fact, that the NERC misapplied the adjustment mechanisms contained in the 2011 Memorandum, the Khrami SPA and the 2013 Memorandum, this would not establish a breach of the fair and equitable treatment standard. The Respondent says there was nothing unfair or arbitrary about the NERC's adjustment of the Khrami Companies' tariffs in October 2017. In this regard, the Respondent referred to the award in *AES v. Hungary,* which states as follows:

> *[I]t is not every process failing or imperfection that will amount to a failure to provide fair and equitable treatment. The standard is not one of perfection. It is only when a state's acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety) – to use the words of the Tecmed Tribunal – that the standard can be said to have been infringed.*[603]

561. Further, the *AES* tribunal noted that the claimant had had an opportunity to submit input during the implementation of the relevant price decrees and had also had an opportunity to seek to review the process before the Hungarian courts. The Respondent says that, in this case, the Khrami

[602] Respondents' Rejoinder, ¶ 365.

[603] Respondents' Counter-Memorial, ¶ 353 quoting from *AES v. Hungary*, CL-0008, ¶ 9.3.40.

Companies had the opportunity to provide input on the NERC's tariff resolution during the public hearing on 31 October 2017. Although their General Director attended the hearing, he failed to provide any input on the NERC's proposed implementation of the tariff adjustment mechanisms. Further, the Khrami Companies had the opportunity to seek judicial review of the NERC's tariff resolutions, but chose not to do so.[604] While it accepts that the BIT does not require investors to exhaust local remedies, the Respondent says that investment tribunals have confirmed that an investor's failure to challenge local authorities' decisions is a relevant factor in assessing whether the State failed to accord FET.[605]

562. The Respondent also says the NERC's interpretation and application of the relevant adjustment mechanisms was not part of a pattern of state conduct. In this regard, the Claimants commenced this arbitration while the tariff review process concerning the Khrami Companies was still under way. The Respondent suggests that Gardabani and Inter Rao directed the Khrami Companies to not engage with the process.[606]

(b) Transparency and Predictability

563. With respect to Gardabani's allegations relating to the obligation of transparency and consistency, the Respondent says that the various measures about which Gardabani complains were implemented in good faith on the basis of considerations set forth in the applicable law and regulations, in accordance with applicable procedure, provided due process to the Claimants and were always amply motivated. Further, the evidence indicates that the policy considerations

[604] Respondents' Counter-Memorial, ¶ 355.

[605] Respondents' Rejoinder, ¶¶ 367-369; *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, dated 31 July 2007, RL-0074, ¶ 302; CL-0135, *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee, dated 14 June 2010, CL-0135, ¶ 28.

[606] Respondents' Rejoinder, ¶ 371.

underlying the NERC's measures were made clear and there is no basis to conclude they were implemented for pretextual reasons.[607]

564. With respect to the non-adjustment of the Khrami Companies' tariffs in 2016, the Respondent says that the Claimants knew that Gardabani could not give effect to the tariff adjustment provisions in the Khrami SPA and claim compensation for any non-application of those provisions without causing the Khrami Companies to submit compliant tariff applications to the NERC. If the Claimants truly believed that the NERC would adjust the Khrami Companies' tariffs in accordance with the 2014 Methodology, the Respondent says that they had the opportunity to present their views on the appropriate legal basis for the claimed adjustments. However, the Khrami Companies did not do so, despite repeated invitations and extensions of time from the NERC.[608]

vi. The Tribunal's Analysis

(a) Legitimate Expectations

565. The circumstances relevant to Gardabani's claim relating to its legitimate expectations are somewhat different from those of Silk Road. Gardabani invested in the Khrami Companies by way of the Khrami SPA by which it purchased 100% of the shares of the Khrami Companies on 12 April 2011. This was provided for in the 2011 Memorandum which stated that in order to ensure Gardabani's return on its investment in the acquisition of the Khrami Companies, their tariffs would be set at specific levels and adjusted to ensure guaranteed debt servicing of Khrami-2's debt with the Japan International Cooperation Agency and to offset fluctuation in the JPY-USD exchange rate and inflation with respect to both Companies. The NERC approved and implemented the provisions

[607] *Id.*, ¶¶ 372-385.

[608] *Id.*, ¶ 380; Respondents' Counter-Memorial, ¶ 362.

of the 2011 Memorandum relating to the Khrami Companies' tariffs agreed between the Government and Inter RAO. This occurred on 7 April 2011.[609] Subsequently, on 12 April 2011, Gardabani and the Respondents signed the Khrami SPA. Then, on 8 June 2011, the NERC approved and adopted the 2011 Methodology which provided that the terms of the Methodology would not apply to enterprises for which long-term tariffs were set based on transactions concluded by the State.[610]

566. In addition, at the Claimants' insistence, the Parties to the Khrami SPA negotiated and agreed Clause 5.2.2 which reads as follows:

> *5.2.2*
>
> *The Sellers and the Government shall, jointly and severally and/or separately, bear full responsibility for any damage, loss and/or expenses incurred by the Buyer and/or the Companies which may arise as a result of and/or in relation to the nullification, non-application in any form or alteration of the tariffs and conditions of their adjustment as determined in accordance with Section 1.1.5 and Annex #1 of this Agreement, during any time of application of such tariffs and conditions of their adjustment. In case if the circumstances described in this section takes place, Sections 1.16.1 and 1.16.2 of this Agreement shall apply.*

567. Clause 1.15 of the Khrami SPA required the Government to deliver a resolution of the NERC establishing the tariffs of the Khrami Companies and the terms of their correction as set out in the 2011 Memorandum and in Annex #1 of the SPA. In the event the Government did not deliver the required NERC resolution, the Buyer (Gardabani), had the option at its sole discretion to rescind the Agreement. Clause 1.18 of the SPA confirmed that any inconsistency of the tariffs in terms of their adjustment in the NERC's resolution with the provisions of Annex #1 of the Khrami SPA was to be considered a breach of the requirement to provide the NERC resolution required by Clause 1.15.

[609] NERC Resolution No. 5, CL-0080.

[610] 2011 Methodology, CL-0081, Section 27.

568. As summarized above, Gardabani says that at the time it purchased the shares of the Khrami Companies, it had a legitimate, objectively reasonable expectation arising from the applicable legal framework at the time and the representations made by Georgia's representatives that the Khrami Companies' tariffs and their adjustment would be governed by the terms of the Khrami SPA until the end of 2025.

569. The Respondent says that Gardabani has not demonstrated a legitimate expectation or that it relied upon any such expectations. In addition, and in any event, it says that it applied the terms of the Khrami SPA and the 2011 Memorandum to the Khrami Companies' tariff adjustment application in 2017. It also says that even if the NERC's application of the tariff provisions of the SPA may not have been entirely correct, the Khrami Companies and Gardabani could not expect perfection in this regard. Further, Gardabani and the Khrami Companies did not fully participate in the tariff review applications and did not challenge the NERC's decision in the Georgian courts at the time.

570. The Claimants refer to the evidence of Mr. Zavrazhnov, the head of Inter RAO's Transcaucasia, Turkey and Middle East division who participated in the negotiation of the 2011 Memorandum and the Khrami SPA. He testified that the long-term agreement regarding the Khrami Companies' tariffs in the 2011 Memorandum was a pre-condition to Gardabani's purchase of the Khrami Companies. For that reason, it was critical that the Khrami SPA include the same long-term tariff and adjustment mechanism provided for in the 2011 Memorandum.[611] Further, he says that while the Claimants did not consider the NERC to be a negotiating party to the Khrami SPA, they requested that MOE procure the adoption of the agreed tariff regime by the NERC. This was achieved by NERC Resolution No. 5, adopted five days prior to the signature of the Khrami SPA. From this, the Claimants say they understood that the MOE and the NERC were acting in

[611] Zavrazhnov I, ¶¶ 31-33.

cooperation in order to implement the terms of the 2011 Memorandum and the Khrami SPA. In addition, according to Mr. Zavrazhnov, since Inter RAO was concerned that the Government might not abide by the terms of the Khrami SPA, it insisted that the Agreement include a provision establishing responsibility on the part of the Government and the Sellers for any damage or loss incurred by Gardabani or the Khrami Companies arising from a violation of the agreed tariff regime.[612]

571. In the Tribunal's view, the Claimants have not established that at the time they concluded the Khrami SPA, Gardabani had a legitimate expectation that the tariffs and their adjustment provisions contained in Annex #1 to the Khrami SPA and NERC Resolution No. 5 would remain unchanged and unaffected by the decisions of the NERC throughout the entire course of the Khrami SPA to 31 December 2025. Rather, as testified by Mr. Zavrazhnov, the Claimants were concerned that the terms of the Khrami SPA might not be respected and, therefore insisted on the inclusion in the Khrami SPA of Clause 5.2.2. This Clause provides for the Sellers' and the Government's joint and several responsibilities in the event of non-application of the tariffs and the conditions of their adjustment. However, it is not a stabilization clause and does not provide a commitment by the Respondent that there would be no alteration of the tariffs or the conditions of their adjustment until the end of 2025. Rather, bearing in mind the term of the Khrami SPA, from 1 January 2011 to 31 December 2025, it suggests that the opposite could occur. Any legitimate expectation Gardabani may have had at the time of the conclusion of the Khrami SPA was that it would be compensated for any damage or loss from the non-applications or the conditions of their adjustment provided for in the Agreement and NERC Resolution No. 5.

[612] Zavrazhnov I, ¶¶ 35-36. Although he contests other aspects of Mr. Zavrazhnov's evidence, Mr. Khetaguri does not challenge this evidence of Mr. Zavrazhnov. *See* Khetaguri I, ¶¶ 31-46; Khetaguri II, ¶¶ 22-30.

572. The dispute between the Parties concerns the failure to adjust the Khrami Companies' tariffs in 2016 and the application of the adjustment provisions in 2017. There is no dispute relating to the levels of the tariffs themselves, which remained as set out in the Khrami SPA and NERC Resolution No. 5.

573. For the reasons set out in the SCC Partial Award on Liability (at paragraphs 707-794), Tribunal has found that the Government and the Sellers breached the specific obligations of Clause 5.2.2 as a result of the NERC's non-application of the tariff adjustment provisions of Annex #1 to the Khrami SPA in 2016 and its incorrect application of those provisions in 2017. However, in the Tribunal's view, these contractual breaches do not amount to a breach of Gardabani's legitimate expectations under the BIT.

574. Similar to the situation under the 2013 Memorandum and Clause 5.2 of that Agreement, the most Gardabani and the Claimants could legitimately expect is that the Government would bear responsibility for any damage or loss incurred as the result of the non-application or alteration of the tariffs and conditions of their adjustment. Gardabani has pursued the Government and the Sellers for breach of contract in the SCC Arbitration and has been partially successful. However, a breach of contract is distinct from a breach of legitimate expectations, particularly in this case. In response to Gardabani's claim under the Khrami SPA, the Government participated in the SCC Arbitration, and this Arbitration, in good faith. It has not denied its responsibility to compensate for damage or loss incurred by Gardabani. As in the case of the Claimants' claims under the 2013 Memorandum, as a party to the Khrami SPA the Respondent was entitled to contest the claims against it. In the Tribunal's view, the positions adopted by the Respondent were not unreasonable.

575. The relevant tariff adjustment clauses of Annex #1 to the Khrami SPA are ambiguous and were difficult to interpret. As a consequence, it is not apparent that Gardabani had any specific intention as to how those clauses would be applied by the NERC. The only expectation Gardabani

could legitimately have had at the time of concluding the Khrami SPA was that the Government would bear responsibility and compensate for any losses flowing from the non-application or alteration the tariffs and their conditions of adjustment. Although, ultimately, the Government's and the NERC's interpretation of the clauses and their position with respect to the adjustment of Gardabani's tariffs in 2016 and 2017 have proved to be incorrect, and, therefore, in breach of contract, these were not unreasonable or arbitrary such as to give rise to a breach of the obligation of fair and equitable treatment.

576. For these reasons, the Tribunal concludes that the NERC's failure to accept the Khrami Companies' tariff adjustment applications in 2016 and its interpretation of the tariff adjustment provisions in Annex #1 to the Khrami SPA and NERC Resolution No. 5 did not amount to a breach of Gardabani's legitimate expectations. As the Tribunal has now determined in the SCC Arbitration the compensation due to Gardabani, the Respondent must now make payment consistent with Gardabani's legitimate expectation that it would be compensated for losses flowing from the non-application or alteration of the tariffs and their conditions of adjustment. In the SCC Final Award dated 9 September 2022 the Tribunal found the compensation due to Gardabani is USD 27,499,000. The Respondent must now pay this amount in compensation to Gardabani.

(b) Transparency and Predictability

577. The Tribunal is not persuaded that the NERC's treatment of Gardabani's 2016 and 2017 tariff-adjustment applications amounts to the breach of any obligation of transparency or predictability owed by the Respondent.

578. With respect to the NERC's dismissal of Gardabani's 2016 Application to adjust the Khrami Companies' tariffs, the NERC explained the need for the Khrami Companies to submit applications compliant with the 2014 Methodology and afforded them the opportunity to submit compliant

applications and explained the consequences of failure to do so. While the NERC's position regarding the requirement to submit an application pursuant to the 2014 Methodology ultimately proved to be incorrect, the NERC was transparent in its dealings with the Khrami Companies.

579. With respect to the Khrami Companies' 2017 Applications, these were submitted in a form compliant with the requirements of the 2014 Methodology. The NERC then addressed the applications pursuant to its established procedure which included the opportunity for the Khrami Companies to participate by providing comments and attending a public hearing. The NERC reconsidered its previous position that there was no legal basis for it to apply the terms of the Khrami SPA rather than the 2014 Methodology. Although its application of the tariff adjustment provisions of Annex #1 to the SPA and NERC Resolution No. 5 was not in accordance with the Tribunal's ultimate interpretation of those provisions, the NERC's interpretation was not arbitrary or unreasonable in light of the ambiguity of the provisions in question and the difficulty in their interpretation. In the Tribunal's view, the NERC's interpretation and application of the adjustment provisions in question is a matter of contractual interpretation. As the Tribunal has noted previously, a breach of contract does not necessarily amount to a breach of the obligation of fair and equitable treatment.

580. As result, Gardabani's claim that the Respondent failed to accord it transparent and predictable treatment fails.

c. **The Claimants' Supplemental Claims**

581. In addition to their claims in respect of the alleged tariff-related breaches, the Claimants advance three separate supplemental claims where they say Georgia was in breach of the obligation to ensure fair and equitable treatment of their investments. [613]

582. The Claimants argue that this resulted in an all-time low cash balance, all-time high accounts payable as well as interest and penalties incurred due to delays in settling Telasi's liabilities with its suppliers. [614]

583. In response to the Respondent's reasons for the alleged undersupply of Enguri energy to Telasi, the Claimants say that none of these is satisfactory and that, in fact, those reasons are incompatible with each other. [615] They say that the MOE variously cited a significant cash imbalance among the distribution companies [616] and technical problems with transmitting energy to Telasi. [617] The Claimants submit that there was no rational explanation for what the government did and it was therefore erratic, inconsistent and lacking in transparency. [618]

584. The Claimants say that Georgia was erratic and inconsistent in refusing to increase the fees for Telasi to cover the cost of connecting new customers to Georgia's expanding electricity network. [619] Telasi was required to connect all new customers initially at its own expense, as there

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[613] Tr. Day 1 (Claimants' Opening Statement), 126:4-131:8; Minutes of the annual general meeting of the shareholders of Telasi, dated 27 May 2015, C-0060; Letter from M Valishvili to Telasi *et al*, dated 25 May 2017, C-0117; Letter from S Kobtsev to I Eloshvili, I Milorava and V Ambokadze, dated 3 August 2017, C-0128; Claimants' Memorial, ¶¶ 150, 171, 257-263; Claimants' Reply, ¶¶ 91-94, 186-193.

[614] Tr. Day 1 (Claimants' Opening Statement), 126:24-127:14, citing Abdala & Delamer II, ¶¶ 12 and 14, 37-38.

[615] Tr. Day 1 (Claimants' Opening Statement), 127:15-20; Claimants' Memorial, ¶ 163; Claimants' Reply, ¶¶ 92, 188-189.

[616] Letter from Valishvili to Telasi *et al*, dated 25 May 2017, C-0117.

[617] Claimants' Memorial, ¶ 163; Claimants' Reply, ¶ 189; Kobtsev I, ¶ 65.

[618] Tr. Day 1 (Claimants' Opening Statement), 127:21-128:20.

[619] Tr. Day 1 (Claimants' Opening Statement), 128:21-129:9.

was no fee built into the tariff.[620] The Claimants say that during and after the signing of the 2013 Memorandum, the Respondent represented that new connections would be immediately paid for by customers at cost.[621] Despite this, Georgia did not implement new connection costs until 2019.

585. The Claimants argue that Georgia unfairly redirected the Khrami Companies' output away from Telasi from May to July 2018 and that this had an impact on both Telasi and the Khrami Companies.[622] The Claimants note that from the early 2000s through 2017 the Khrami Companies supplied all of their output to Telasi. The Claimants say that this arrangement guaranteed sales for the Khrami Companies, made possible the return of funds used to acquire the Khrami hydro facilities in 2011, and locked in synergies between the generation and distribution businesses.[623] The Claimants submit that Georgia's decision to not allocate Khrami energy to Telasi during the 2018 peak season left the Khrami Companies to scramble for alternative buyers, leading to selling their energy at lower prices than what Telasi would have paid. Meanwhile, Telasi was left to purchase more expensive energy from the COPS in order to meet its requirements.[624]

vii. Telasi's Purchase Portfolio Volatility

(a) The Claimants' Position

586. The Claimants say that Georgia was erratic, inconsistent and not transparent in its regulation of Telasi's purchase portfolio in 2017 and that the motivation for this was the distribution of dividends to Telasi's shareholders in April 2017. The Claimants say that the Government was

[620] Tr. Day 1 (Claimants' Opening Statement), 128:19-129:2.

[621] Tr. Day 1 (Claimants' Opening Statement), 128:21-24; Letter from Volkov to Kaladze, dated 11 November 2014, C-0049; Mirsiyapov I, ¶ 81 and Markov I, ¶¶ 44-45.

[622] Tr. Day 1 (Claimants' Opening Statement), 129:11-130:5.

[623] Tr. Day 1 (Claimants' Opening Statement), 129:16-21.

[624] Tr. Day 1 (Claimants' Opening Statement), 129:23-130:5; Email from the NERC to Telasi, attaching Telasi's purchase portfolio for 2018-2020, dated 25 December 2017, R-0077.

opposed to that distribution and that the following month, the MOE announced that the amount of inexpensive electricity that Telasi would receive from Enguri would be reduced, contrary to the NERC's Annual Energy Plan for 2017.[625] The Claimants say that this resulted in Telasi's energy allocation deviating significantly from the planned purchase portfolio and required Telasi to purchase energy from the COPS at much higher prices. According to the Claimants, this resulted in an all-time low cash balance, an all-time high accounts payable and interest and penalties being incurred due to delays in settling its liabilities with its suppliers.[626]

587. The Claimants explain that the purchase portfolio of distribution companies is determined centrally on the basis of the NERC's Annual Energy Plan and contracts concluded between generators and distributors on the basis of that plan. Until April 2017, Telasi and the other major Georgian distribution company, Energo-Pro, received energy from Enguri, the cheapest source of electricity available to distributors, under long-term supply agreements in proportion to their market share in the Georgian distribution market.[627] The Claimants say this changed after Telasi paid out dividends in 2017. By way of a letter dated 25 May 2017, the MOE significantly reduced Telasi's allocation of Enguri energy for the period from May to July.[628] In its letter, the MOE advised that the analysis of the current and projected data for the year showed a "significant disbalance" between the electric power procurement costs and the income figures for the companies holding electric power distribution licenses. According to the MOE and the COPS, this created cash deficits for certain distribution companies which faced problems in paying their taxes. This, in turn, was said to

[625] Tr. Day 1 (Claimants' Opening Statement), 126:14-24; Claimants' Memorial, ¶ 91; Claimants' Reply, ¶ 258.

[626] Tr. Day 1 (Claimants' Opening Statement), 126:24-127:14, citing Abdala & Delamer II, ¶¶ 12, 14, 37-38.

[627] Claimants' Memorial, ¶ 162; Abdala & Delamer I, ¶ 21. Telasi's market share was approximately 35% and Energo-Pro's market share was approximately 65% (Energo-Pro purchased Kakheti in 2017). Respondents' Counter-Memorial, 26.

[628] Claimants' Memorial, ¶ 163; Claimants' Reply, ¶ 92(a); Kobtsev I, ¶¶ 65, 67; Letter from Valishvili to Telasi *et al*, dated 25 May 2017, C-0117.

pose a threat to the financial stability of the entire electricity system. As a result, the MOE changed the current distribution procedure to address the problem by reallocating cheaper energy from Enguri and Vardnili.[629] This resulted in a reduction of the electricity Telasi expected to receive from Enguri under the NERC's Annual Energy Plan.[630]

588. The Claimants say that from May to July 2017, each time Telasi applied to receive the volumes of energy from Enguri provided for in the NERC's Annual Energy Plan, the COPS stated that a technical issue prevented the transfer of the electricity from Enguri to Tbilisi.[631] The Claimants say that the COPS' explanation was false and that the Respondent has not produced any documents confirming any technical issues that would have impeded the delivery of Enguri electricity to Telasi at the time.[632]

589. The Claimants contest the other explanations given by the Respondent in these proceedings for the reduced allocation of Enguri energy to Telasi for the period of May to July 2017. With respect to the Respondent's position that the shortage of Enguri and Vardnili energy was the result of the unexpected increase in electricity consumption in the occupied territories of Abkhazia during the Winter of 2017, the Claimants say that the volume of Enguri and Vardnili electricity exports was only unusually high in one of the three months in question (July) and exports for May and June 2017 were very similar to those for the same months in 2016 and 2018. Therefore, the need to meet the

[629] Letter from Valishvili to Telasi *et al*, dated 25 May 2017 C-0117.

[630] Claimants' Memorial, ¶¶ 163-165; Claimants' Reply, ¶ 93. The Claimants say that according to the NERC's Energy Plan for 2017, Telasi was to receive 120 million kWh of energy from Enguri in May, 136 million kWh in June, and 153 million kWh in August. However, Telasi in fact only received 95 million kWh in May, 57 million kWh in June and 97 million kWh in July. *See* Claimants' Memorial, ¶ 164 and fn 350.

[631] Claimants' Reply, ¶¶ 92(b), 189; Claimants' Memorial, ¶163; Kobtsev I, ¶ 65.

[632] Claimants' Reply, ¶189. *See also*, Claimants' Memorial, ¶ 163 where the Claimants say that the COPS' explanation was a pretext as technical reasons had never previously hindered Telasi's purchase of energy from Enguri.

increased demand for energy in Abkhazia in early 2017 does not explain the subsequent diversion of energy of Enguri and Vardnili from Telasi.[633]

590. The Claimants also contest the Respondent's position that the under-supply of Enguri and Vardnili energy to Telasi started in January 2017 and that therefore the diversion of energy could not have been related to Telasi's dividend payments in April 2017. The Claimants say there was no unusual deviation from Telasi's planned purchase portfolio during the period from January to April 2017 and that it was only in May 2017 that Telasi's energy allocation began to deviate significantly from its purchase portfolio.[634]

591. The Claimants say that although the MOE allocated additional electricity from Enguri to Telasi in August 2017 and the situation was normalized by the end of 2017, the additional allocation of electricity did not offset the detriment to Telasi. The Claimants say that the volatility in Telasi's purchase portfolio between May and December 2017 inflicted lasting financial damage on Telasi.[635] The Claimants summarized these effects as follows:

(a) Telasi's cash-flows were negatively affected when it was forced to replace cheaper electricity from Enguri and Vardnili with more expensive electricity. Telasi's electricity costs from May-July 2017 exceeded its planned levels by GEL 1.28 million, reaching all-time high deviations after May 2017.

(b) Monthly deviations from Telasi's planned electricity volumes were almost five times greater than the historical average. This resulted in cash-flow volatility, increasing the

[633] Claimants' Reply, ¶ 92(c); Abdala & Delamer II, ¶¶ 21-22; Respondents' Counter-Memorial, ¶ 220. The Claimants also say that the documents produced by the Respondent relating to monthly average export and import tariffs for Enguri and Vardnili do not show that these companies had to pay for expensive imports of electricity from Russia between February and March 2017 with emergency exports of Enguri and Vardnili electricity in July 2017, as maintained by the Respondent. *See* Claimants' Reply, ¶188.

[634] Claimants' Reply, ¶ 92(d); Respondents' Counter-Memorial, ¶¶ 218-219.

[635] Claimants' Memorial, ¶ 167; Claimants' Reply, ¶ 94.

spread between the highest and lowest monthly cash-flow for the period by 30% as compared to the plan. This increased volatility and unpredictability affected certain components of Telasi's working capital. For example, Telasi's liabilities with suppliers peaked in May and June 2017 and its cash level reached all-time lows during the same period.

(c) The increased volatility and unpredictability of Telasi's monthly cash-flows would result in increased risks, inevitably taken into account on assessing the value of Telasi either through the discount rate, cash-flows or opportunity costs. The Ministry of Energy's additional electricity allocation did not off-set the detriment to Telasi in this regard. As a regulated company with a single line of business, Telasi was unable to mitigate regulatory risk through diversification.[636]

592. The Claimants quantify the losses they say Telasi suffered as a result of the treatment of Telasi's purchase portfolio in the amount of USD $13,000. The Claimants' expert, Mr. Peer, calculated this amount on the basis of the additional expenses and resulting cash shortfall due to the redirection of Enguri and Vardnili energy away from Telasi. Mr. Peer estimated Telasi's loss on the basis of the investment return Telasi could have received had they not been required to meet the cash shortfall.[637]

[636] Claimants' Reply, ¶ 94. The Claimants rely on the first two expert reports of Messrs. Abdala & Delamer, Abdala & Delamer I and Abdala & Delamer II. In their third expert report, Messrs. Abdala & Delamer reviewed and commented on additional data provided by the Respondents submitted after the filing of their second report. On the basis of the new data, which covered Telasi, Energo Pro and Kakheti, they confirmed their conclusion in their previous reports that starting in May 2017, the allocation of electricity from Enguri to Telasi and the other distributors evolved from "discretionary" to "arbitrary". They also concluded that in the period during May to July 2017, the electricity purchases from Enguri allocated to Telasi relative to the other distributors were disproportionately low, compared to planned levels. In their view, this confirmed their conclusions of increased unpredictability and corresponding regulatory risks in relation to Telasi's supplies of electricity. *See* Abdala & Delamer III, ¶¶ 3-9.

[637] Claimants' Reply, ¶ 256; Peer II, ¶¶ 3.5.1, 13.1-13.3.

(b) Respondent's Position

593. The Respondent says that it acted in a predictable, transparent and reasonable manner with respect to all of Silk Road's investments.[638] The Respondent denies that the deviations which Silk Road complains of were in retaliation for Telasi's decision to distribute dividends. The Respondent says that the deviations in Telasi's purchase portfolio started in February 2017, before Telasi decided to issue dividends in April 2017.[639]

594. The Respondent says that the deviations were due to the need to supply additional electricity to occupied territories of Abkhazia during the winter of 2017. The Respondent says that as the designated suppliers of energy to Abkhazia, Enguri and Vardnili were required to apply all of their output to Abkhazia and to purchase additional volumes of expensive electricity to cover any shortfall. Subsequently, after the peak in demand had subsided, Enguri and Vardnili needed to export their electricity in order to cover the costs incurred to purchase additional electricity to meet Abkhazia's requirements. As a result, according to the Respondent, Enguri and Vardnili also delivered less energy to Energo-Pro, the other major Georgian distributor. This caused an increase in the purchase cost of electricity on the Georgian market.[640] The Respondent says that the MOE attempted to allocate additional volumes of Enguri and Vardnili energy to Telasi and Energo-Pro in May 2017. However, this was not sufficient to compensate Telasi for the shortfall of energy during

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[638] Respondents' Rejoinder, ¶¶ 193, 381; Respondents' Counter-Memorial, ¶ 219; C-0118, Letter from Kobtsev to Milorava, dated 7 June 2017, p. 1; C-0104, Purchase Portfolio of Telasi in 2017; C-0105, Power Purchase Plan of the NERC for 2017.

[639] Respondents' Rejoinder, ¶¶ 193, 381; Respondents' Counter-Memorial, ¶ 219; C-0118, Letter from Kobtsev to Milorava, dated 7 June 2017, p. 1; C-0104, Purchase Portfolio of Telasi in 2017; C-0105, Power Purchase Plan of the NERC for 2017.

[640] Respondents' Counter-Memorial, ¶ 220; Milorava III, ¶ 75; Law on Electricity, CL-0073 / RL-0001, p. 30, requiring Enguri and Vardnili to supply electricity to the occupied territories of Abkhazia; Electricity (Capacity) Market Rules, CL-0070, Article 38(2), requiring Enguri and Vardnili to procure electricity from other sources at their own cost when electricity consumption in Abkhazia exceeded their output; Respondents' Rejoinder, ¶¶ 194-195 and the sources cited there.

the first half of the year. After exchanges with Telasi, the MOE took measures to ensure that Telasi would receive additional supplies from Enguri and Vardnili.[641] The Respondent says that as a result, Telasi received more Enguri electricity than forecasted during the second half of 2017 such that its average WAPT in 2017 was lower than the forecasted WAPT reflected in its tariffs.[642]

595. The Respondent denies that the monthly deviations in Telasi's planned volumes were five times their historical average and affected Telasi's cash flow or WAPT. The Respondent says the Claimants' arguments are based on a partial analysis of the planned and actual electricity volumes received by Telasi from Enguri during two years and three months only. They say that Telasi should have considered a longer period because variable rainfall year-to-year affects the supply of electricity.[643]

596. The Respondent's expert, Dr. Moselle, says the Claimants' experts, Messrs. Abdala and Delamer, do not show the difference between the actual figures and expected electricity expenses, but only the difference between actual and what Telasi would have expected with perfect foresight regarding every cost and uncertainty regarding the volume of Enguri energy.[644] According to Dr. Moselle, the Claimants and their experts should have considered a longer period of time (rather than two years and three months) in order to draw a meaningful conclusion of the historical size of deviations in the amount of electricity supplied to Telasi from Enguri. In his view, this was particularly so in view of the fact that Enguri is an HPP whose ability to supply electricity depends on rainfall and can vary significantly from year to year.[645]

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[641] Respondents' Counter-Memorial, ¶¶ 221, 359; Letter from Valishvili to Telasi *et al*, 25 May 2017, C-0117, p. 1; Valishvili IV, ¶ 64; Letter from Valishvili to Telasi, Enguri, EnergoPro, COPS and GSE, dated 25 August 2017, C-0131, p. 1.

[642] Respondents' Counter-Memorial, ¶ 222; Milorava III, ¶ 75; Respondents' Rejoinder, ¶ 195.

[643] Respondents' Rejoinder, ¶ 196; Moselle II, ¶ 10.5, responding to Claimants' Reply, ¶ 94(b).

[644] Respondents' Rejoinder, ¶ 197; Moselle II, ¶ 10.14.

[645] Moselle II, ¶ 10.5-10.6.

597. The Respondent also contests the Claimants' claim that there were unusually large deviations between Telasi's actual and expected electricity expenses. According to Dr. Moselle, Dr. Abdala and Mr. Delamer's analysis does not show the difference between actual and expected electricity expenses. Rather, it shows the difference between actual electricity expenses and "what Telasi would have expected electricity expenses to be if it had perfect foresight concerning every cost uncertainty other than the uncertainty concerning the volume of electricity that would come from Enguri".[646] According to Dr. Moselle, it is impossible to tell from Dr. Abdala's and Mr. Delamer's analysis whether Telasi's electricity expenses in May-June 2017 were in fact higher than expected or whether any deviation between the plan and expected costs due to the change of allocation of Enguri electricity was material in comparison to the other uncertainties that affected Telasi's cost of electricity.[647]

598. Dr. Moselle also challenged Dr. Abdala and Mr. Delamer's analysis of Telasi's accounts payable which was said to have increased in order to fund the shortfall in Enguri and Vardnili energy. According to Dr. Moselle, the analysis focusses only on a fraction of Telasi's accounts payable rather than looking at all relevant components which, according to him, would show that there was no dramatic increase in Telasi's accounts payable in the summer of 2017.[648]

(c) The Tribunal's Analysis

599. The Claimants allege that the Respondent acted erratically and in a non-transparent manner with regard to the regulation of Silk Road's investments such that Telasi and Silk Road were unable

[646] Moselle II, ¶ 10.14.

[647] Moselle II, ¶ 10.15.

[648] Respondents' Rejoinder, ¶ 197; Moselle II, ¶¶ 10.25-10.29. Dr. Moselle also denies that Dr. Abdala and Mr. Delamer analysis demonstrates that the deviation in Telasi's purchase portfolio caused it additional exposure to liquidity risk or any direct negative impact on its financial statements. Further, even if there were theoretical increases in risk, Dr. Moselle says this could only be relevant if it were material. According to him, Dr. Abdala and Mr. Delamer did not provide any analysis to support that conclusion. *See* Moselle II, ¶¶ 10.30-10.34.

to discern the regulatory environment in which they were to operate, and to adopt and implement a commercial strategy. They suggest that due to Telasi's payment of dividends in April 2017, the MOE reduced the supply of Enguri energy to Telasi which affected its cash flow and financial situation. Telasi's Mr. Kobtsev testified that reducing Telasi's access to cheap Enguri energy may have been Georgia's response to paying out dividends.[649] The Claimants allege that the Respondents' explanations for the reduction in the allocation of Enguri energy to Telasi were false and inconsistent. They also maintain that although additional quantities of Enguri energy were supplied to Telasi such that by the end of 2017 the situation had been normalized, Telasi nonetheless suffered losses due to cash shortages which required expensive borrowing to supplement its working capital and increased exposure to regulatory risk.

600. The Respondent denies that it diverted Enguri energy away from Telasi in retaliation for Telasi's decision to pay dividends to its shareholders in April 2017. Rather, they say the deviation in energy supply was the result of the unexpected increases in electricity consumption in the occupied territories of Abkhazia which were required to be covered by Enguri and Vardnili. It says that the MOE attempted to minimize the impact of the temporary unavailability of Enguri energy on Telasi's cash flow and that by the end of 2017, Telasi received more Enguri energy than had been forecasted and that its average WAPT in 2017 was lower than the WAPT forecasted in its tariffs.

601. From its review of the evidence, the Tribunal is not persuaded that the reduction in Telasi's allocation of Enguri and Vardnili energy in the months of May to July 2017 was a retaliatory measure for the payment of dividends by Telasi in April of that year. It is more likely that the

[649] Kobtsev I, ¶¶ 60-63. Kobtsev explains that when Telasi paid out dividends in 2015, Ms. Valishvili was angry by the dividend distribution which she alleged was in violation of the 2013 Memorandum. Mr. Kobtsev says that, in response, he told Ms. Valishvili that the payment had been approved by the Partnership Fund. In 2017, the Partnership Fund voted against the payment of dividends, but the decision was adopted by the necessary majority of Telasi's shareholders.

deviation in supply of Enguri energy was due to the unexpected increase in electricity consumption in Abkhazia during the winter of 2017. In this regard, the Tribunal notes that Telasi had started receiving less Enguri and Vardnili energy than forecasted before Telasi's decision to pay dividends.[650] Further, the Tribunal finds Ms. Milorava's evidence explaining the need to supply additional energy to Abkhazia and the steps taken in response persuasive and supported by the documentary evidence.[651] In the Tribunal's view, the temporary reduction in Enguri and Vardnili energy supply to Telasi of which the Claimants complain was due to unforeseen operational requirements and does not amount to erratic or non-transparent conduct in breach of the Respondent's obligation of fair and equitable treatment.

602. As a result, the Tribunal is not required to address the difference between the Parties' experts on the impact of the deviation in Telasi's purchase portfolio, including Telasi's actual and expected electricity expenses and accounts payable. In any event, the Tribunal notes the relativity modest loss claimed by Silk Road (USD 13,000) in respect of this claim. In the Tribunals view, the amount claimed could easily fall within the margin of difference between the experts' assessment of any loss caused by the deviation in Telasi's purchase portfolio.

viii. The Cost of New Connections

603. The 2013 Memorandum does not mention the cost of new connections. The Claimants' claim is that, separate from the 2013 Memorandum, the Government assured Inter RAO and Telasi that they would fully recover Telasi's costs of connecting new customers to the distribution network[652].

[650] Respondents' Rejoinder, ¶ 193; Power Purchase Plan for the NERC for 2017, C-0105; Purchase Portfolio of Telasi in 2017, C-0104.

[651] Milorava I, ¶ 75; Milorava II, ¶¶ 43-47; Respondents' Rejoinder, ¶ 195 and the documents cited there.

[652] Claimants' Memorial ¶¶ 150-154; Claimants' Reply, ¶¶ 85-90; Tr. Day 1 (Claimants' Opening Statement), 128:16-129:4.

They say this has not occurred despite the Respondent's repeated promises. The Claimants do not specify an amount of damages for the cost of new connections, but maintain in their written submissions that Telasi suffered "loss of several million GEL each year since at least 2013 … and continues to do so".[653]

604. Pursuant to several of the NERC's Resolutions, since 2008 Telasi has been obliged to connect new users to its network at its own expense, rather than users bearing the cost, as they did previously.[654] Users pay a fixed network connection for the amount set by the NERC according to the applicable voltage class and capacity of the connection, and Telasi is required to perform all necessary connection works at its own expense. The connection fee had not been adjusted by the NERC since 2011. If Telasi does not comply with the NERC's connection deadlines, it must pay a penalty. For each new connection, Telasi must obtain a construction permit from the Tbilisi town council and approvals from ecological authorities and other city authorities. Due to delays in the issuance of regular construction permits, the Claimants say that Telasi often had to request fast-track construction permits, which cost it GEL 400 each.

605. In September 2014, Inter RAO and Telasi started complaining to the MOE that the new user connection fees were insufficient to cover Telasi's actual costs and requested full compensation of these costs.[655] The Parties' discussions continued until 2016.

606. In December 2014, the MOE proposed that the definition of "Agreed Investments" in Appendix 1 to the 2013 Memorandum be amended to include the cost of new connections so as to

[653] Claimants' Memorial, ¶ 154; Kobtsev I, ¶ 50.

[654] NERC Resolution No. 21, dated 18 September 2008, CL-0076; NERC Resolution No. 20, dated 18 September 2008, (consolidating amendments as of 26 September 2012), Art. 26, CL-0077; NERC Resolution No. 6, dated 19 April 2017, CL-0087.

[655] Letter from Volkov to Kaladze, dated 18 September 2014, C-0044.

ensure full recovery of these costs through the mechanisms to compensate for any GRD.[656] Inter RAO rejected the proposed amendment and insisted that any costs above the connection fee be compensated by way of a decrease in Telasi's WAPT.[657] The MOE rejected this proposal, stating that the connection of new users expands the distribution network and that all associated costs should be treated as investments in that network and reflected in the Distribution Tariff, not the WAPT.[658] The MOE reiterated its proposal to include new connection costs within the meaning of "Agreed Investments", which Inter RAO rejected.[659]

607. Commencing in 2015, the NERC took into account the difference between Telasi's costs and the connection fee paid by a new user as capital expenditures ("**CAPEX**") recoverable through Telasi's Distribution Tariffs. However, the Claimants argue that the CAPEX mechanism only partly mitigated Telasi's losses, and that "the net present value of these payments over such a long period of time [gradually over 25 years] is insufficient to cover Telasi's losses".[660] It appears that commencing in 2019 the NERC adjusted new connection fees to require payment of Telasi's full costs of connection.[661]

(a) The Claimants' Position

608. The Claimants allege that the Respondent acted erratically and obstructively in its response to Telasi's requests to increase new connection fees in order to cover the costs of those connections, thereby causing Telasi an annual loss of several million GEL, commencing in 2013.

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[656] Respondents' Counter-Memorial, ¶ 182; Claimants' Reply, ¶ 87.

[657] Letter from Volkov to Kaladze, dated 16 December 2014, C-0053.

[658] Letter from Kaladze to Volkov, dated 29 December 2014, C-0055.

[659] Valishvili I, ¶ 45.

[660] Claimants' Memorial, ¶ 155.

[661] Tr. Day 1 (Claimants' Opening Statement), 128-129.

609. The Claimants say that since 2008, Telasi was obliged to connect new users to its network at its own expense, rather than having users bear that cost. Under the applicable rules, users are required to pay a fixed fee set by the NERC according to the voltage class applicable and the capacity of the connection. Telasi was required to perform all necessary connections at its own expense and was subject to penalties if it did not comply with connection deadlines.[662] The Claimants say that the user fees for new connections are inadequate and have not been updated. In addition, the requirement to obtain construction permits and approvals from other authorities is expensive and time consuming. As a result, the Claimants say that Telasi has incurred substantial losses in connecting new users, particularly with respect to the connection of household users.[663]

610. Although since 2015 the NERC has taken into account Telasi's costs and the connection fee paid as part of Telasi's investments to be compensated through its tariffs, the Claimants say this does not fully compensate for Telasi's losses.[664]

611. The Claimants say that Inter RAO and Telasi raised the issue repeatedly with the Respondent and were assured during the negotiation of the 2013 Memorandum and at various meetings throughout 2014 and 2016 that the new connection fees would be adjusted to a level that would prevent losses to Telasi.[665] The Claimants say that despite the Respondent's representations, Telasi's new connection fees were not adjusted to cover the costs of new connections until 2019.[666]

612. In response to the Respondent's position that the cost of new connections was expressly excluded from the definition of "Gross Revenue" and "Agreed Investments" in Appendix 1 of the

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[662] Claimants' Memorial, ¶ 150.

[663] *Id.*, ¶¶ 150-157, 261; Respondents' Rejoinder, ¶ 195; Tr. Day 1, 128:16-129:16.

[664] Claimants' Memorial, ¶¶ 155-156.

[665] *Id.*, ¶¶ 85, 155-157; Kobtsev I, ¶¶ 51, 58; Markov I, ¶¶ 44-45; Mirsiyapov I, ¶ 81; Letter from Volkov to Kaladze, dated 11 November 2014, C-0049, pp. 1-2; Claimants' Reply, ¶ 193.

[666] Tr. Day 1 (Claimants' Opening Statement), 128:21-129:9.

2013 Memorandum, the Claimants say this is irrelevant. They say that the Respondent repeatedly represented during and after the signing of the 2013 Memorandum that new connections to Telasi's networks would be paid for by consumers at cost.[667] The Claimants explain that although "Inter RAO and the Government recognized the importance of the new connections issue… it was too difficult to implement a corresponding mechanism for them in the 2013 Memorandum".[668] The Claimants assert that the Government assured them that Telasi's connections would be made on a no-loss basis and that customers would pay for new connections. They say that "Georgia refused to put this agreement in writing for political reasons,"[669] but because of the Government's assurances they eventually agreed that the cost of new connections would not be included in the 2013 Memorandum.

613. The Claimants say that despite the NERC's promise to raise the connection fee paid by commercial consumers to a level that would prevent Telasi's losses and address Inter RAO's numerous complaints from 2014-2016, the issue was not resolved and losses continued to accrue.

614. It appears that the Claimants' concerns were resolved in 2019. At the hearing, the Claimants stated that the Respondent resolved the issue relating to the cost of new connections in 2019, which demonstrates that it had always been possible to do.[670]

[667] Claimants' Reply, ¶ 193.

[668] Claimants' Reply, ¶ 86.

[669] Mirsiyapov II, ¶¶ 81, 97-101; Claimants' Reply, ¶ 86.

[670] Tr. Day 1 (Claimants' Opening Statement), 128:16-129:4.

(b) The Respondent's Position

615. The Respondent says that it acted in a predictable, transparent and reasonable manner with respect to Silk Road's investments and denies any breach of the FET standard on account of the treatment of the cost of new connections.[671]

616. The Respondent says that the cost of new connections was excluded from the scope of the 2013 Memorandum at Inter RAO's request.[672] Nevertheless, the MOE offered in good faith to treat any costs of new connections above the connection fees as "Agreed Investments" and thereby ensured their recovery through the RGR mechanism.[673] However, the Claimants rejected this offer. Subsequently, at Telasi's request, the NERC treated the additional costs of new connections as capital expenditures recoverable through Telasi's Distribution Tariffs under the 2014 Methodology.[674] The Respondent says that the Claimants' complaint that including the additional costs of new connections as CAPEX in Telasi's Distribution Tariff is insufficient to cover Telasi's costs is unjustified. According to Ms. Milorava, the NERC takes into account the time value of money in adjusting CAPEX to reflect any additional costs that Telasi may have incurred in connecting new customers.[675]

617. The Respondent says that the Claimants do not dispute that the NERC has addressed the new connections issue by treating any additional costs in excess of the fixed connection fee as CAPEX.

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[671] Respondents' Counter-Memorial, ¶ 361 and the sources cited there; Respondents' Rejoinder, ¶¶ 202-203 and the sources cited there.

[672] Respondents' Counter-Memorial, ¶ 158 and the sources cited there; Respondents' Rejoinder, ¶202 and the sources cited there.

[673] Respondents' Rejoinder, ¶ 202; Respondents' Counter-Memorial, ¶¶ 178-184; Valishvili I, ¶¶ 44-48; Letter from Kaladze to Volkov, dated 29 December 2014, C-0055.

[674] Respondents' Rejoinder, ¶ 202; Respondents' Counter-Memorial, ¶¶ 194-195; Milorava I, ¶ 40.

[675] Milorava I, ¶ 42; Respondents' Counter-Memorial, ¶ 195; 2014 Methodology, CL-0084, Art. 20.

Further, the Respondent notes that the Claimants are not seeking damages related to the cost of new connections.[676]

618. Accordingly, the Respondent says that the Claimants have effectively abandoned their claim with respect to the cost of new connections.[677]

(c) The Tribunal's Analysis

619. In the Tribunal's view, the Respondent's conduct in response to the Claimants' complaints regarding the cost of new connections does not amount to erratic, non-transparent or unreasonable conduct in breach of the obligation of fair and equitable treatment.

620. It appears that the issue relating to the cost of new connections was discussed to some extent during the negotiation of the 2013 Memorandum.[678] There is a dispute as to whether the Respondent's representatives assured the Claimants that the payment for new connections would be set at a level that would fully cover Telasi's expenses. According to Mr. Bachiashvili, he did not guarantee that Inter RAO would be reimbursed for the cost of every new connection in full. In any event, it appears that it was Inter RAO that proposed excluding the cost of new connections under the definitions of Agreed Investments and Gross Revenue.[679]

621. Subsequently, although the cost of new connections had been excluded from the scope of the 2013 Memorandum, the MOE offered to treat any costs above the fixed connection fee as "Agreed Investments" under the 2013 Memorandum in order to ensure their full recovery through

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[676] Respondents' Rejoinder, ¶ 203.

[677] Respondents' Rejoinder, ¶¶ 202-203, 385.

[678] Mirsiyapov I, ¶ 81; Bachiashvili I, ¶ 36.

[679] Draft Memorandum of 15 December 2012, R-0024, p. 17, Appendix No. 1; Email from Inter RAO to Georgia, dated 10 December 2012, R-0023, p. 12, Appendix No. 1.

the RGR mechanism.[680] The MOE offered to amend the terms of the 2013 Memorandum in order to do this. The Claimants did not agree and maintained that the cost of new connections should be covered by decreasing Telasi's WAPT. In the MOE's view, this was not appropriate as the cost of connecting new customers to the network was not related to the price of electricity and there was, therefore, no basis to reflect those costs in the WAPT. Unfortunately, the Parties were not able to agree.

622. Subsequently, under the 2014 Methodology, the difference between Telasi's costs and the connection fee paid by new users is taken into account by the NERC as part of Telasi's investments and is included as an element of Telasi's tariffs. There is a dispute between the Parties as to whether the net present value of the payments received by Telasi is sufficient to cover its losses for the full period of the 2013 Memorandum.[681]

623. In these circumstances, the Tribunal is unable to conclude that the Respondent acted erratically or unreasonably with respect to the cost of new connections. The MOE acknowledged an issue and attempted to resolve it constructively with the Claimants. Although no agreement was reached, the Claimants accept that the NERC addressed the issue by treating additional costs in excess of the fixed connection fee as an element of capital expenditures. Further, as noted above, it appears that as of 2019, the issue had been resolved.[682]

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[680] Valishvili I, ¶¶ 44-45; Letter from Kaladze to Volkov, dated 29 December 2014, C-0055.

[681] Claimants' Memorial, ¶ 155; Kobtsev I, ¶ 51; Respondents' Counter-Memorial, ¶ 195; Milorava I, ¶ 42. According to Ms. Milorava, the NERC takes into account the time value of money in adjusting CAPEX to reflect any additional costs that Telasi may have incurred in connecting new customers. Further, according to the Respondent, Article 20 of the 2014 Methodology contemplates a correction of the CAPEX to reflect the time value of money.

[682] *See* Tr. Day 1 (Claimants' Opening Statement), 128:16-129:4.

624. Finally, and in any event, the Claimants have not quantified or claimed damages in respect of the cost of new connections. As a result, it is not apparent to the Tribunal what loss, if any, Telasi and the Claimants may have suffered in respect of this claim.

625. Accordingly, the Tribunal dismisses the Claimants' claim relating to the costs of new connections.

ix. The Diversion of the Khrami Companies' Electricity and Sales to Third-Parties

626. From the early 2000s through 2017, 100% of the Khrami Companies' generation was sold to Telasi. This represented approximately 15% of Telasi's annual purchases.

627. In October 2017, the NERC increased the Khrami Companies' Generation Tariffs by over 19%.[683]

628. On 25 December 2017, the NERC provided Telasi's forecasted purchase portfolio for 2018-2020 to Telasi. This purchase portfolio indicated that Telasi would not receive energy from the Khrami Companies between May and July 2018.[684] On 27 December 2017, the NERC issued its Resolution No. 48 which contained new Telasi tariffs which were based on the NERC's Annual Energy Plan for 2018. According to the NERC's Plan, for the first time, between May and July 2018, Telasi would not receive any energy from the Khrami Companies.[685] According to the NERC's Annual Energy Plan, energy to be supplied from the Khrami Companies was to be replaced with less expensive energy produced by Enguri.

[683] Respondents' Rejoinder, ¶ 200; NERC Resolution No. 30, CL-0089; NERC Resolution No. 31, CL-0090.

[684] Email from the NERC to Telasi, 25 December, 2017, R-0077; Milorava II, ¶ 49.

[685] Claimants' Memorial, ¶ 169; Kobtsev I, ¶ 71; NERC Resolution No. 48, CL-0091.

629. As a result, the Khrami Companies had to find a buyer for the energy they had intended to sell to Telasi. The Khrami Companies were able to find alternative purchasers. However, the prices they obtained were lower than those they would have obtained from Telasi.[686]

(a) The Claimants' Position

630. The Claimants say that the Respondent acted erratically and in a non-transparent manner by abruptly diverting the Khrami Companies' output from Telasi across the entire peak season of electric power production from May to August in 2018. As a result, the Khrami Companies had to find alternative purchasers for the balance of 2018, which they did, but at a lower price. As a result, the Khrami Companies suffered losses on their sales in 2018.[687]

631. The Claimants say that the sale of 100% of the Khrami Companies' electricity to Telasi was significant since it provided a predictable market for the Khrami Companies' output. That electricity was less expensive than the average market tariffs and significantly less expensive than the tariffs charged by the COPS, which allowed Telasi to avoid obtaining energy from other, potentially more expensive, sources. In addition, the Claimants say that the supply of all of the Khrami Companies' output to Telasi was an important aspect of the financial models underlying the 2011 and 2013 Memoranda.[688]

632. The Claimants say that the Respondent's abrupt diversion of the Khrami Companies' output required the Khrami Companies to find alternative buyers on short notice, which resulted in lower prices than they would have received from Telasi.[689] The Claimants say that as a result of the

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[686] Claimants' Memorial, ¶ 170 and the sources cited there; Kobtsev I, ¶ 73.

[687] Claimants' Memorial, ¶¶ 168-171, 262-263.

[688] Claimants' Memorial, ¶ 168; Markov I, ¶ 22.

[689] Claimants' Memorial, ¶ 170; Claimants' Reply, ¶ 187. The Claimants say that if the Khrami Companies had not been able to find alternative purchasers, their entire output would have been deemed to acquired by the COPS at the much lower tariff of 1.8 tetri/kWh.

NERC's sudden and unexplained diversion of their output, the Khrami Companies suffered a loss which they quantify in the amount of USD 1,520,000.[690]

633. In response to the Respondent's position that the NERC set maximum tariffs for the Khrami Companies and was under no obligation to ensure that they could sell their entire output at those tariffs, the Claimants say this confuses the Respondent's obligation to act fairly with its contractual obligations. They say that the diversion of the Khrami Companies' output in 2018 changed the Khrami Companies' business activity, which, for almost 20 years, had been to sell all of their electricity to Telasi. This was consistent with the financial models underlying the 2011 and 2013 Memoranda.[691]

634. The Claimants also claim that the NERC did not actually allocate the full amount of Enguri energy to Telasi in accordance with its Annual Energy Plan. As a result, Telasi was forced to purchase the shortfall in volumes from Mktvari HPP and the COPS at higher tariffs.[692] The Claimants maintain that the COPS explained to Mr. Kobtsev that the shortfall in Enguri energy was due to Energo-Pro's contract which provided that it had the right to a certain guaranteed volume of energy. The Claimants allege that in the past, Telasi and Energo-Pro had received Enguri energy in proportion to their market share. They suggest that the Respondent prioritized its obligations to Energo-Pro over its obligations to them.[693]

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[690] Claimants' Closing Presentation, Slide No. 19; Peer II, ¶¶ 10.1.1-10.1.5; Peer Hearing Presentation, p. 7.

[691] Claimants' Reply, ¶ 187.

[692] Claimants' Memorial, ¶ 171; Kobtsev I, ¶ 74.

[693] Claimants' Memorial, ¶ 171; Kobtsev I, ¶¶ 75-76. Mr. Kobtsev stated that if Telasi and Inter RAO had known in advance that supplies from Enguri would not be provided in the volumes envisaged by the NERC's Annual Energy Plan, they would have been able to find a better solution and minimize losses.

(b) The Respondent's Position

635. The Respondent says that it was under no obligation to direct the Khrami Companies' entire output to Telasi or to ensure that the Khrami Companies could sell their entire output at the maximum generation tariffs set by the NERC.[694] Further, the Respondent says that the NERC had provided ample advance notice to the Khrami Companies that Telasi would not receive electricity from them between May and July 2018.[695]

636. According to the Respondent, the NERC sets maximum tariffs for the Khrami Companies, and it is not required to ensure that they can sell all of their output at those tariffs. Further, Telasi has no right to receive all of the Khrami Companies' output, nor the obligation to take it, particularly if cheaper energy is available on the market. Also according to the Respondent, the NERC only decided not to allocate all of the Khrami Companies' energy to Telasi after the increase in the Khrami Companies' tariffs in October 2017. In order to avoid an increase in Telasi's Consumer Tariffs, the NERC decided to replace some of the Khrami energy in Telasi's purchase portfolio with cheaper Enguri energy. According to Ms. Milorava, at a meeting in 2016, she explained to Messrs. Volkov and Markov that an increase in the Khrami Companies' tariffs could require replacing some of the Khrami energy in Telasi's purchase portfolio with Enguri energy.[696] Subsequently, after the increase in the Khrami Companies' tariffs, on 25 December 2017, the NERC provided to Telasi a copy of Telasi's purchase portfolio for 2018 which indicated that there would be no energy supplied from the Khrami Companies for the months of May through July. Accordingly, Ms. Milorava was

[694] Respondents' Counter-Memorial, ¶ 360; Milorava I, ¶¶ 76-77; Respondents' Rejoinder, ¶ 199.

[695] Milorava I, ¶ 77; Milorava II, ¶¶ 48-49.

[696] Milorava I, ¶¶ 77.

of the view that the Khrami Companies had four months to find alternative purchasers which, in her experience, was more than sufficient.[697]

637. Further, the Respondent notes that the Khrami Companies were able to find alternative purchasers. It says that neither it nor the NERC has any involvement in, or control over, the prices that generation companies negotiate with purchasers.[698] According to Ms. Milorava, it is not clear why the Khrami Companies agreed to sell their energy at a price lower than they would have received from Telasi when the "reference price" for electricity at the relevant time of year was higher than the Khrami Companies' marginal tariffs and those companies later sold their electricity to the same buyers at the maximum tariffs.[699]

(c) The Tribunal's Analysis

638. Having carefully reviewed all of the evidence, the Tribunal is not persuaded that the diversion of the Khrami Companies' electricity from May through July 2018 amounted to erratic or non-transparent conduct in breach of the obligation of fair and equitable treatment.

639. In the Tribunal's view, there is no contractual obligation or guarantee under the Khrami SPA or the 2013 Memorandum that the Khrami Companies will be able to sell all of their output to Telasi. The Khrami Companies did supply all of their output to Telasi for a number of years and the 2013 Memorandum reflects that Telasi did and would purchase energy from the Khrami Companies (in Clause 2.3.3 and 2.3.5). However, this did not create a right or guarantee that the Khrami Companies would be able to sell all of their output to Telasi at the maximum tariffs described in the Khrami

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[697] Milorava II, ¶¶ 48-49.

[698] Respondents' Rejoinder, ¶ 201.

[699] Milorava II, ¶ 49; Respondents' Rejoinder, ¶ 201, referring to the Direct Agreements on Electricity (Capacity) Purchased between the Khrami Companies and GEO Servers LLC and GFDC Georgia LLC and BFDC Georgia LLC, all dated in May 2018: Purchase Agreements between Khrami-2 and Geo Servers, dated 15 May 2018, C-0137; Khrami-2 and GFDC Georgia, dated 15 May 2018, C-0138, ; Khrami-1 and Geo Servers, dated 24 May 2018, C-0139, ; Khrami-1 and GFDC BFDC Georgia, dated 24 May 2018, C-0140.

SPA and the 2013 Memorandum. The Claimants appear to acknowledge this when they distinguish between the obligation to act fairly and contractual obligations.

640. The Claimants say that when the NERC diverted the Khrami Companies' output, it abruptly changed their business activity in a non-transparent and erratic manner to the detriment of Gardabani.[700] In the absence of a contractual obligation or a specific commitment by the Respondent that the Khrami Companies would be able to sell all of their production at the maximum tariffs to Telasi on an ongoing basis, the Tribunal is not persuaded that the NERC's decision not to supply all of the Khrami Companies' output to Telasi was in breach of the obligation of fair and equitable treatment.

641. In the Tribunal's view, it was within the NERC's discretion to replace some of the Khrami energy in Telasi's purchase portfolio with less expensive Enguri energy in order to limit the effect of the increase in the Khrami Companies' tariffs in 2017 on Telasi's Consumer Tariffs. Further, the Tribunal accepts that this possibility should not have come as a surprise to the Khrami Companies or Telasi. It appears that in 2016, Ms. Milorava had informed the Claimants that an increase in the Khrami Companies' tariffs might require replacing some of the Khrami energy in Telasi's purchase portfolio with Enguri energy. In addition, the purchase portfolio provided to Telasi in December 2017 indicated that Telasi would not receive any energy from the Khrami Companies from May to July 2018. As a result, the Claimants had knowledge of the NERC's intended reallocation of the Khrami Companies' energy four months in advance. In these circumstances, the Tribunal is unable to conclude that the NERC's decision was erratic, non-transparent or unreasonable.

642. Accordingly, the Claimants' claim must fail.

[700] Claimants' Reply, ¶¶ 186-187.

C. Impairment - Arbitrary or Unreasonable Treatment

643. Article 3(1) BIT requires that the Contracting Parties

> *...not impair, by unreasonable or discriminatory measures, the operation, management use, enjoyment or disposal thereof by those nationals.*

1. The Claimants' Position

644. The Claimants allege that the NERC's application of the 2014 Methodology to Telasi and the Khrami Companies in disregard of the 2013 Memorandum and the Khrami SPA unreasonably impaired the investments of Silk Road and Gardabani.[701]

645. The Claimants say that the ordinary meaning of "impairment" means any negative impact or effect and that the ordinary meaning "measures" includes action or omission.[702] Citing *AES v. Hungary,* the Claimants submit that the ordinary meaning of "unreasonable" and "arbitrary" is essentially the same: something done capriciously, without reason, and that measures must be both in furtherance of a rational policy and be reasonable in relation to that policy:

> *There are two elements that are required to be analysed to determine whether a state's act was unreasonable: the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy.*
>
> *A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter.*
>
> *Nevertheless, a rational policy is not enough to justify all the measures taken by a state in its name. The challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented.*[703]

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[701] Claimants' Memorial, ¶¶ 268-274; Claimants' Reply, ¶¶ 194-201; Tr. Day 1 (Claimants' Opening Statement), 130:18-131:10.

[702] Claimants' Memorial, ¶¶ 268-269.

[703] *Id.*, ¶ 270, quoting from *AES v. Hungary,* CL-0008, ¶¶ 10.3.7-10.3.9. The Claimants also refer to *EDF (Services) Limited v. Romania,* ICSID Case No. ARB/05/13, Award, dated 8 October 2009 ("***EDF v. Romania***"), CL-0026, ¶ 303; *Joseph Charles Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, dated 21 January 2010, CL-0037, ¶ 262.

646. The Claimants say that until the present dispute arose, some considerable time after the conclusion of the Khrami SPA and the 2013 Memorandum, the Respondent accepted that the tariffs applicable to Telasi and the Khrami Companies would be governed by those Agreements. According to the Claimants, the Respondent subsequently denied that it was bound by those Agreements and applied the 2014 Methodology to the setting of Telasi's and the Khrami Companies' tariffs. This caused losses to Silk Road's and Gardabani's investments, which the Respondent failed to compensate.[704]

647. The Claimants argue that the Respondent's refusal to continue to determine Telasi's and the Khrami Companies' tariffs in accordance with the 2013 Memorandum and the Khrami SPA was without any rational policy basis. The Claimants say that those Agreements were wholly consistent with the policy underlying Georgia's general approach to regulating electricity generation and distribution. In that regard the Claimants say that there is nothing to suggest that the Respondent needed to override their contractual agreements since these shared similar underlying objectives to those of the 2014 Methodology: increasing operational and management efficiency; supporting stable and reliable functioning of the utilities; ensuring tariffs that are transparent, stable and fair for the utility; and covering the costs of the utility with funds received from consumers in proportion to costs incurred. The Claimants say that the goals of the 2014 Methodology to have tariffs that are "transparent", "stable", and "fair" were undermined by displacing the long-term rules for setting and adjusting Telasi's and the Khrami Companies' tariffs and the stability and predictability they were designed to achieve.[705]

[704] Claimants' Reply, ¶ 194.

[705] *Id.*, ¶¶ 196-197; Tr. Day 1 (Claimants' Opening Statement), 130:18-131:4.

648. The Claimants also argue that even if the Respondent's underlying policy goals were consistent with the Parties' contractual arrangements (which they deny), the Respondent acted unreasonably when it imposed a disproportionate burden on Silk Road and Gardabani. According to the Claimants, proportionality requires that a state's conduct must not be "…excessive considering the relative weight of each interest involved".[706] The Claimants say that the application of the 2014 Methodology to Telasi and the Khrami Companies unilaterally terminated the Parties' agreements, prioritizing the Respondent's interest in implementing the 2014 Methodology in disregard of the Claimants' rights under the 2013 Memorandum and the Khrami SPA.[707]

649. The Claimants reject the Respondent's defence that the application of the 2014 Methodology was completely within the control of the NERC which is independent of the Government. They say that the NERC's conduct is undisputedly attributable to the state. Further, the NERC's alleged independence does not provide any policy justification for the Respondent's conduct, whether the NERC acted alone or in concert with other government agencies, its actions were out of proportion with any rational policy goal.[708]

650. The Claimants maintain that their claim of unreasonable impairment is separate and distinct from their claim of breach of the Respondent's obligation to provide fair and equitable treatment. Therefore, whether a measure was reasonable under the treaty is unrelated to Silk Road's and Gardabani's expectations. In this regard, the Claimants say that their alleged expectations regarding Telasi's financial position under the 2013 Memorandum is irrelevant to a claim of impairment which sanctions any unreasonable impairment of "the operation, management, maintenance, use, enjoyment or disposal" of investments.

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[706] Claimants' Reply, ¶ 198, quoting from *Electrabel v. Hungary*, RL-0023, ¶ 179.

[707] *Id*., ¶¶ 198-199.

[708] *Id*., ¶ 195.

651. With respect to Silk Road's claim, the Claimants say that when Telasi earned less revenue than would have been generated under the 2013 Memorandum's tariff-related provisions, Silk Road's rights to operate, enjoy and use its investment were impaired. In any event, the Claimants say that the Respondent's view of the Claimants' and Silk Road's expectations in 2013 is incorrect. Further, the Claimants say that they have demonstrated that as a result of the application of the 2014 Methodology, Telasi's position was worse than what had been expected when the 2013 Memorandum was concluded.[709]

652. With respect to Gardabani's claim, the Claimants reject the Respondent's position that Gardabani's investments were not unreasonably impaired because the NERC adjusted the Khrami Companies' tariffs in 2017 and the Khrami Companies did not challenge that decision. The Claimants say that the Khrami Companies' conduct in the tariff-setting process is not relevant to an unreasonable impairment claim. Further, and in any event, they say that neither Gardabani nor the Khrami Companies agreed to the adjustments implemented by the NERC in its Resolutions Nos. 30 and 31 and that they made this clear before, during and after the public hearing at which those Resolutions were adopted.[710]

2. The Respondent's Position

653. The Respondent denies that it impaired Silk Road or Gardabani's investments by unreasonable or discriminatory measures.

654. The Respondent does not dispute the Claimants' articulation of the scope of the BIT's impairment clause. The ordinary meaning of "impairment" means any negative impact or effect on the operation, management, maintenance, use or disposal of investments, while "measures" include

[709] *Id*., ¶ 200.

[710] *Id*.,¶¶ 74-77, 172, 201.

actions or omissions. "Unreasonable" and "arbitrary" mean "capriciously, without reason"; "a measure that inflicts damage on the investor without serving any apparent legitimate purpose…not based on legal standards but on discretion…taken for reasons that are different from those put forward by the decision maker; or…taken in willful disregard of due process…".[711]

655. The Respondent emphasizes that the Tribunal must refrain from second-guessing policy makers and substituting their own judgment for that of Georgia about effective regulatory policy.[712] If the Tribunal does not agree with Georgia's policy decision, that alone is not a basis to conclude that the measure is arbitrary or unreasonable. The standard is not one of perfection:

> *a BIT may … not be invoked each time the law is flawed or not fully or properly implemented by a state. Some attempt to balance the interests of the various constituents within a country, some measure of inefficiency, a degree of trial and error, a modicum of human imperfection must be overstepped before a party may complain of a violation of a BIT.*[713]

656. Factually, the Respondent relies on the same rationale as it advances with respect to the FET claims to argue that the Claimants' claims that its measures were unreasonable or discriminatory are baseless. In particular, the Respondent says that the Claimants knew that the NERC had total control over the approval of tariffs; the Claimants could not have expected that the 2013 Memorandum tariffs would continue to apply after the 2014 Methodology was adopted; Telasi is no worse off than it expected to be at the time of signature of the 2013 Memorandum; and the NERC adjusted the Khrami Companies' tariffs in accordance with the agreed adjustment mechanisms and any dispute in that regard falls below the threshold for a violation of the Treaty.[714]

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[711] Respondents' Rejoinder, ¶ 387, quoting *EDF v. Romania*, CL-0026, ¶ 303.

[712] *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, dated 16 September 2003, RL-0080, ¶ 20.33; *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, dated 26 January 2006, RL-0081, ¶ 160; *Investmart, B.V. v. Czech Republic*, UNCITRAL, Award, dated 26 June 2009 ("***Investmart v. Czech Republic***"), CL-0035, ¶ 501.

[713] *E.g., Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC No. 088/2004, Partial Award, dated 27 March 2007, RL-0082, ¶ 272.

[714] Respondents' Counter-Memorial, ¶¶ 363-364.

657. The Respondent says that it did not treat Silk Road or Telasi unreasonably. They say that the 2014 Methodology was developed to bring Georgian legislation in line with EU law and to create transparent and predictable tariff-setting rules for all regulated companies in Georgia. The Methodology established detailed rules aimed at ensuring that electricity companies could cover their justified costs and make a reasonable return on their investment. It also provides for adjustment mechanisms to account for evolving market conditions.[715] Further, the development of the 2014 Methodology was an open and transparent process in which Telasi's representatives were involved.

658. The Respondent says that its conduct was clearly guided by a legitimate public policy.[716] The Respondent says that the Claimants were aware that the NERC would set its tariffs in accordance with the 2014 Methodology when Telasi submitted its tariff application in July 2015. The 2014 Methodology was applied in a transparent manner and set stable and fair tariffs for Telasi.[717]

659. The Respondent also maintains that the adoption and implementation of the 2014 Methodology did not impose a disproportionate burden on Telasi, as alleged by the Claimants. It says that this is confirmed by Dr. Moselle's analysis of Telasi's financial performance and the indicators set out in Appendix No. 2 to the 2013 Memorandum, which shows that Telasi's revenues were significantly higher than forecasted and better than Silk Road had expected when it entered in to the 2013 Memorandum.[718]

660. With respect to the Khrami Companies, the Respondent says that the NERC adjusted their generation tariffs pursuant to the terms of the Khrami SPA and Resolution No. 5 in 2017. They say

[715] Respondents' Rejoinder, ¶ 395.

[716] *Id.*, ¶ 393.

[717] *Id.*, ¶ 394.

[718] *Id.*, ¶¶ 395-397.

that the only dispute between the Parties is whether the NERC correctly interpreted the adjustment provisions in Clause 2 of Appendix No. 1 of the Khrami SPA. It says that even if the NERC's interpretation was incorrect, there is no evidence to support the conclusion that the NERC's decisions were arbitrary or unreasonable. Rather, its decisions were taken in good faith following an open and transparent process.[719]

3. The Tribunal's Analysis

661. Having carefully reviewed the Parties' respective positions in the complex circumstances of this case, the Tribunal concludes that the Respondent did not unreasonably impair the investments of Silk Road and Gardabani. While in the SCC Arbitration, the Respondents' conduct was found to amount to breaches of contract, it was not unreasonable or arbitrary and, therefore, does not amount to impairment by unreasonable measures of Silk Road's and Gardabani's investments.

662. In addressing the Claimants' claims of unreasonable impairment, the Tribunal considers it important to bear in mind the Parties' different interpretations of the 2013 Memorandum and the Khrami SPA.[720] As the Tribunal has noted, the Parties' Agreements, and the 2013 Memorandum in particular, are complex and ambiguous in various respects. This required an extensive interpretive exercise in the SCC Partial Award on Liability. An important element of the Tribunal's interpretation of the relevant Agreements is that neither contains a stabilization clause freezing the regulatory regime at the relevant dates or prohibiting modifications of their tariff-related provisions. Rather, they provided contractual remedies of compensation for damage or losses in the event of a change of legislation or regulation (in the case of the 2013 Memorandum) or the non-application or alteration of tariffs and conditions of their adjustment (in the case of the Khrami SPA). While the

[719] *Id.*, ¶ 398.

[720] The differing interpretations of these Agreements is also relevant to the implementing resolutions adopted by NERC.

Claimants maintain that the Respondent denied that it was bound by these Agreements and effectively terminated them, the Respondent denies this and says that the issue between the Parties is the interpretation of the Agreements. While the Tribunal ultimately determined in the SCC Arbitration that the Claimants' interpretation was correct, the Respondents' interpretation was not unreasonable.

663. The Tribunal's review of the adoption of 2014 Methodology indicates that it was developed to bring Georgian legislation in line with EU law and to create tariff-setting rules for all regulated entities in Georgia. The Methodology seeks to balance the interests of electricity companies and consumers and is in line with EU legislation and practices.[721] In the Tribunal's view, the 2014 Methodology and the Amended 2014 Methodology reflect a legitimate public policy objective. Further, the development of the Methodology and its implementation were accomplished by way of a transparent process in which the Claimants' representatives participated. In the Tribunal's view, the NERC's application of the 2014 Methodology to both Telasi and the Khrami Companies was rationally connected to the Respondent's policy of implementing its tariff-setting rules in line with EU legislation and practice. It was also performed with notice to the Claimants.

664. With respect to the application of the 2014 Methodology to Telasi, the Tribunal does not consider that it posed a disproportionate burden. It appears that under the 2014 Methodology, Telasi was able to cover its costs and earn a profit.[722] While this profit is lower than would have been achieved under the provisions of the 2013 Memorandum, and therefore, Telasi's position under the 2014 Methodology was worse than under the provisions of the Memorandum as interpreted by the

[721] Milorava I, ¶¶ 31, 36; Moselle I, ¶¶ 5.6-5.20; Moselle II, ¶¶ 7.21-7.24.

[722] *See* SCC Partial Award on Liability, ¶¶ 644-646.

Tribunal, this is an issue of contractual interpretation and remedy. This does not amount to unreasonable or arbitrary treatment under Article 3 of the BIT.

665. With respect to Gardabani's claim relating to the Khrami Companies, the Tribunal found in the Partial Award on Liability that due to the NERC's refusal to accept the Khrami Companies' adjustment applications in 2016, the Respondent breached the terms of Clause 5.2.2 and Clause 2 of Annex #1 of the Khrami SPA. However, this does not amount to unreasonable or arbitrary conduct constituting impairment by unreasonable or discriminatory measures under Article 3 of the BIT. The determination of whether or not the Khrami Companies were required to file their tariff adjustment application in the format compliant with the 2014 Methodology was not straightforward. In the Tribunal's view, the NERC's insistence that the application had to be made pursuant to the 2014 Methodology, while ultimately found incorrect, was not unreasonable in the circumstances. The NERC subsequently reconsidered its position that it could not address the Khrami Companies' applications under Annex #1 of the Khrami SPA and Resolution No. 5 of 2011 and adjusted the Khrami Companies' tariffs in accordance with its interpretation of those provisions. While the Tribunal has found in the SCC Arbitration that the NERC's interpretation and application of the adjustment provisions of Clauses 2.1 and 2.2 of Annex #1 of the Khrami SPA was incorrect, in light of the ambiguity and difficulty in interpreting those clauses, the Tribunal has concluded that the NERC's interpretation at the time and the Respondent's position in the Arbitrations was reasonable. Further, the NERC appears to have made its determination in good faith by way of a transparent, deliberative process.[723]

666. Accordingly, the Claimants' claim of unreasonable impairment of their investments must fail.

[723] Respondent's Rejoinder, ¶¶ 179-184, 398.

D. The Umbrella Clause

667. Article 3(4) of the BIT provides as follows:

> *Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals of the other Contracting Party.*

1. The Claimants' Position

668. The Claimants allege Georgia failed to observe its contractual and other binding commitments concerning specific investments in breach of Article 3(4) of the BIT.[724]

669. The Claimants argue that Article 3(4) is broad, and requires Georgia to observe "any obligation", of whatever legal source and nature – contractual, regulatory or legislative obligations – it entered into with regard to the investments of Gardabani (the Khrami Companies) and Silk Road (Telasi).[725] The Claimants emphasise that the ordinary meaning of Article 3(4) of the BIT is an imperative and categorical obligation on Georgia to observe all obligations entered into with regard to the investments of qualifying investors. The Claimants note that in *SGS v. Philippines,* the Tribunal found that the breach by a state organ of a contractual obligation relating to a qualifying investment was in breach of the umbrella clause in the Swiss Confederation – Republic of the Philippines Bilateral Investment Treaty.[726]

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[724] Claimants' Memorial, ¶¶ 275-281; Claimants' Reply, ¶¶ 202-206.

[725] Claimants' Memorial, ¶¶ 276-277, citing the VCLT, as well as *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, dated 19 December 2016, CL-0032, ¶ 329; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, dated 3 October 2006 ("***LG&E v. Argentina***"), CL-0038, ¶ 175 and *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V(064/2008), Partial Award on Jurisdiction and Liability, dated 2 September 2009, CL-0143, ¶ 257, among others.

[726] Claimants' Memorial, ¶ 277, citing *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, dated 29 January 2004 ("***SGS v. Philippines***"), CL-0055, ¶ 128.

670. The Claimants submit that investment tribunals have held that a clause similar to Article 3(4) permits an investor to pursue claims based on obligations undertaken vis-à-vis its investment.[727] Further, Claimants submit that, unlike some other treaties, Article 3(4) does not restrict its scope to a "specific investment by investors".[728] Accordingly, the Claimants say that Article 3(4) is not limited to obligations directly or specifically between the foreign investor and the host State. The Claimants say that the Respondent's reference to *WNC v. Czech Republic* disregards "the obvious (and dispositive) point that the umbrella clause in that case was narrow, expressly covering only 'specific agreements' between the claimant and the host State".[729]

671. The Claimants submit that several tribunals have held that a clause similar to Article 3(4) of the BIT permits an investor to pursue claims based on obligations undertaken in favour of an investment vehicle owned by the Claimant. For instance, in *EDF v. Argentina*, the tribunal accepted an umbrella clause claim founded on a concession agreement with the claimant's subsidiary.[730] Similarly, in *Sempra Energy v. Argentina*, the tribunal held that an umbrella clause was breached where a gas transportation license in favour of the claimants' indirect subsidiaries had been amended

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[727] Claimants' Reply, ¶ 205, citing *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, dated 11 June 2012 ("***EDF v. Argentina***"), CL-0131, ¶¶ 938-942 (tribunal accepted umbrella clause claim based on concession agreement signed by claimants' subsidiary); *Sempra Energy International v. Argentine Republic*¸ ICSID Case No. ARB/02/16, Award, dated 28 September 2007 ("***Sempra Energy v. Argentina***"), CL-0150, ¶ 312 (umbrella clause breached where gas transportation license in favour of claimant's indirect subsidiaries had been amended unilaterally; Art. II(2)(C) required Argentina to "observe any obligation it may have entered into with regard to investments"); *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, dated 22 May 2007 ("***Enron v. Argentina***"), CL-0031, ¶ 277; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, dated 5 September 2008 ("***Continental Casualty v. Argentina***"), CL-0023, ¶ 302 (umbrella clause not breached in this case, but tribunal noted that debt instruments issued to claimant's subsidiary were guaranteed by the umbrella clause).

[728] Claimants' Reply, ¶ 204, fn 491. The Claimants contrast the language of the BIT in this case with other bilateral investment treaties, for example, between the Republic of Austria and the Republic of Yemen, CL-0158, Art. 9, Agreement for the Promotion of Protection of Investment between the Republic of Austria and the Federal Republic of Nigeria, CL-0157, Art. 11(1).

[729] Claimants' Reply, ¶ 204, fn 490, citing *WNC Factoring v. Czech Republic*, PCA Case No. 2014-34, Award, dated 22 February 2017 ("***WNC***" or "***WNC v. Czech Republic***"), RL-0026, ¶ 320.

[730] *EDF v. Argentina,* CL-0131, ¶¶ 938-942; Claimants' Reply, ¶ 205.

unilaterally.[731] Further, in *Continental Casualty v. Argentina*, debt instruments issued to the claimant's subsidiary were considered as guaranteed by the umbrella clause.[732] The Claimants point out that, like the umbrella clause applicable in this case, the relevant provision of the applicable treaty in all three of these cases required Argentina to "observe any obligation it may have entered into with regard to investments".

672. The Claimants argue that the umbrella clause applies to both contractual and non-contractual obligations, so long as the State has an existing obligation and the obligation was entered into by the State toward the claimant specifically.[733] Whether an obligation exists and a breach has occurred are issues to be determined according to the law governing the obligation.[734] The Claimants submit that Georgia breached both contractual and non-contractual obligations. They say that the protected contractual obligations in this case include those in the 2011 Memorandum, the Khrami SPA, and the 2013 Memorandum, governed by Georgian law. The non-contractual obligations are contained in the NERC's implementing resolutions: NERC Resolution No. 5 of 7 April 2011 in the case of the Khrami Companies' tariffs; and NERC Resolution No. 3 of 3 April 2013 in the case of Telasi's tariffs.[735]

673. With respect to the alleged contractual obligations owed to Gardabani, the Claimants say there is no issue since Gardabani is a Party to the Khrami SPA. Insofar as Silk Road is concerned, the Claimants say that Article 3(4) of the BIT refers to "any obligation [the State] may have entered into with regard to investments of nationals of the other contracting party". The obligation in

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[731] *Sempra Energy v. Argentina*, CL-0150, ¶ 312; *see also*, *Enron v. Argentina*, CL-0031, ¶ 277.

[732] *Continental Casualty v. Argentina,* CL-0023, ¶ 302: the umbrella clause was not found to have been breached, on the facts.

[733] Claimants' Memorial, ¶ 278.

[734] *Ibid.*

[735] Tr. Day 1 (Claimants' Opening Statement), 131:8-10.

question need only be entered into with regard to investments and not directly "with investors". Other treaties may use a narrower definition. However, the Claimants say that the State Parties to the BIT consciously chose the language of Article 3(4) of the BIT.[736] Therefore, the Respondent's argument that Article 3(4) of the BIT requires privity between the Claimants and the state has no basis.

674. With respect to the alleged non-contractual breaches, the Claimants say that Georgia also breached Article 3(4) when it resiled from the tariff terms applicable to Telasi under NERC Resolution No. 3 and to the Khrami Companies under NERC Resolution No. 5.[737] The Claimants say that a State's commitments in the form of a law or a regulation can give rise to a breach of the umbrella clause if the commitment is firm and directed specifically towards the investor.[738] They say that the case here is clear since the regulatory framework established in the NERC resolutions were directed specifically at Telasi and the Khrami Companies respectively and were introduced, together with the contractual agreements on which they were based, to induce Silk Road to enter into the 2013 Memorandum and Gardabani to enter into the Khrami SPA. Accordingly, the Respondent failed to observe its obligations when the NERC applied the tariff-setting provisions of the 2014 Methodology to Telasi and the Khrami Companies, overriding the commitments contained in NERC Resolutions Nos. 3 and 5.

675. In response to the Respondent's argument that it complied with all the obligations under the 2013 Memorandum, the Khrami SPA and the NERC's Resolutions, the Claimants say that this repeats the Respondent's defences to its contractual claims brought by Gardabani, Telasi and Inter RAO in the SCC Arbitration. The Claimants say that the Respondent breached its obligations under

[736] Tr. Day 1 (Claimants' Opening Statement), 131:17-132:8.

[737] Claimants' Memorial, ¶ 281.

[738] *Ibid*. The Claimants refer to the decision in *LG&E v. Argentina*, CL-0038, ¶ 175.

the umbrella clause for the same reasons as it breached its contractual obligations under the 2013 Memorandum and the Khrami SPA.[739]

2. Respondent's Position

676. The Respondent says that there is no basis under the 2013 Memorandum and the NERC's Resolutions Nos. 3 and 5 for an umbrella clause claim under Article 3(4) of the BIT because any obligations that may have undertaken under those instruments are not owed to Silk Road or Gardabani.[740]

677. The Respondent says that any obligation under Article 3(4) of the BIT is limited to "… any obligation it may have entered into with regard to investments of nationals of the other contracting party". According to the Respondent, the term "obligation" denotes an "obligor-obligee relationship", which preconditions any claims to the existence of a legal relationship between the claimant and the State. As neither Silk Road nor Gardabani are parties to the 2013 Memorandum, they are not obligees of any direct obligations owed by Georgia.[741] Similarly, insofar as any obligations arise out of the NERC's Resolutions Nos. 3 and 5 are concerned, these run to Telasi and the Khrami Companies, respectively, and not to their parent companies.[742]

678. The Respondent refers to several cases that interpret umbrella clauses similar to Article 3(4) of the BIT, which it says confirm that the obligation must be entered into by the state towards the

[739] Claimants' Reply, ¶ 207.

[740] Respondents' Counter-Memorial, ¶¶ 367-373; Respondents' Rejoinder, ¶¶ 400-409.

[741] Respondents' Counter-Memorial, ¶ 367; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability ("***Burlington v. Ecuador***"), dated 14 December 2012, CL-0016, ¶ 214. The parties to the 2013 Memorandum are: the Government of Georgia, and the Partnership Fund on one side and Inter RAO, Telasi, Mtkvari and Khrami-1 and Khrami-2.

[742] Respondents' Counter-Memorial, ¶ 373.

claimant specifically, and not just to a claimant's subsidiary.[743] The Respondent notes that each of these cases considers umbrella clauses that, like the one at issue in this case, cover "any obligation…with regard to investments". Further, the Respondent contends that Georgian law applies to whether an obligation exists and that the Claimants have not alleged, nor established, that under that law a non-signatory parent or subsidiary of a contracting party may directly enforce its parent's or subsidiary's contractual rights.[744] Therefore, Silk Road's and Gardabani's umbrella law claims, as they relate to the 2013 Memorandum and NERC Resolutions Nos. 3 and 5, must fail because there is no undertaking to be honoured by Georgia to either parent company.

679. However, the Respondent does not advance the same threshold argument in response to Gardabani's claim as it relates to the Khrami SPA; Gardabani is a party to that agreement. In respect of this claim, Georgia submits that it has not violated its obligations under the Khrami SPA and relies on its submissions in the SCC Arbitration in this regard.[745]

680. In support of the privity requirement, the Respondent relies on the *WNC v. Czech Republic* award for the general proposition that tribunals have consistently resolved that they have no jurisdiction to consider umbrella clause claims where the contractual obligations do not run to the claimants.[746] The Respondent contests the distinction drawn by the Claimants on the basis of the umbrella clause in that case as expressly covering only "specific agreements between the claimant

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[743] *See* Respondents' Rejoinder, ¶ 403-408, fns 800-812; Respondents' Counter-Memorial, ¶¶ 368-372, citing *Azurix v. Argentina*, CL-0011, ¶ 384; *Siemens AG v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, dated 6 February 2007 ("***Siemens v. Argentina***"), CL-0056, ¶¶ 204-205; *CMS v. Argentine Republic*, Annulment Decision, dated 25 September 2007 ("***CMS v. Argentina***"), RL-0025, ¶¶ 89-100; *Duke Energy v. Ecuador*, CL-0025, ¶¶ 317-323; *El Paso v. Argentina*, CL-0028, ¶ 538; *Burlington v. Ecuador,* CL-0016, ¶¶ 211, 214-215, 234; *WNC v. Czech Republic*, RL-0026, ¶ 334, affirmed by Annulment Decision.

[744] Respondents' Counter-Memorial, ¶ 371, citing for example the annulment decision in *CMS v. Argentina*, RL-0025, ¶¶89-100; Respondents' Rejoinder, ¶¶ 403-404, 409.

[745] Respondents' Counter-Memorial, ¶ 374; Respondents' Rejoinder, Sections IV.B and IV.D, ¶ 410.

[746] Respondents' Counter-Memorial, ¶ 372; Respondents' Rejoinder, ¶¶ 405-406.

and the host State". It says that, in *obiter*, the *WNC* tribunal found that it "would uphold the requirement of privity even for generally worded umbrella clauses" because they "are intended to give effect to legal commitments entered into by the host State with regard to investments, not to change their scope or content".[747]

681. The Respondent points out that the *WNC* tribunal distinguished the 2008 award in *Continental Casualty* and the 2012 award in *EDF v. Argentina*, relied on by the Claimants here. With respect to *Continental Casualty*'s finding that "[obligations] may have been entered with persons or entities other than foreign investors themselves, so that an undertaking by the host State with a subsidiary … is not in principle excluded",[748] the Respondent notes that the tribunal stated that this "should not upset the otherwise consistent jurisprudence on the privity objection".[749] With respect to *EDF v. Argentina*, the Respondent says that the *WNC* tribunal stated that "the Concession Agreement in the *EDF v. Argentina* case imposed a positive contractual obligation on the claimant companies not to transfer shares without prior consent" and thus the claimant companies "were parties to the transactions, not merely beneficiaries".[750]

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[747] Respondents' Rejoinder, ¶ 405, citing *WNC v. Czech Republic,* RL-0026, ¶ 335.

[748] *Continental Casualty v. Argentina*, CL-0023, ¶297.

[749] Respondents' Rejoinder, ¶ 407, citing *WNC v. Czech Republic*, RL-0026, ¶ 333. The Respondent refers to the *WNC* tribunal's explanation as follows:

> *First, in making this statement, the tribunal was referring to obligations of the host state in general and not contractual promises in particular. Second, the tribunal did not ultimately pursue its investigation of whether contractual obligations of Argentina were justiciable under the umbrella clause because it had already decided Argentina could rely on the defence of necessity with respect to those obligations.'" As such, it did not need to conduct a full analysis of the issue or engage with cases that had resolved similar questions. Finally, it commented that the contracts in question "could ... be considered as guaranteed by the umbrella clause, subject to the caveat that they were not directed to foreign investors nor specifically addressed to their investments'. Accordingly, it is not apparent that the contracts would have fallen under the umbrella clause even if the tribunal had taken this question to its conclusion.*

[750] *WNC v. Czech Republic*, RL-0026, ¶ 339.

682. The Respondent says that the tribunal in *Duke Energy,* on which the Claimants rely, rejected an umbrella clause claim on the basis that the obligation alleged to have been breached was in a government decree, and it did not run to the claimant, but rather its subsidiary.[751] Similarly, the Respondent says that the annulment committee in *CMS* held that because the obligations under the host State's law were obligations to a subsidiary of the claimant, and not to the claimant itself, the claimants had no right to enforce them. In the Respondent's view, the umbrella clause cannot transform the parties, the underlying legal instrument or the applicable law. Rather, it concerns consensual, specific obligations directed at particular persons, arising independently of the BIT itself (i.e., under the law of the host State or possibly under international law).[752]

683. The Respondent also argued that not every breach of contract automatically amounts to a breach of an umbrella clause since these are intended to protect an investor's vested rights against the exercise of sovereign authority. It maintains that there is no evidence that the breaches of contract identified in the Partial Award on Liability were the result of its use or abuse of its sovereign authority such as to give rise to breaches of the umbrella clause.[753]

684. In any event, the Respondent says it observed all of its obligations in relation to Silk Road and Gardabani's Investments under the 2013 Memorandum, Khrami SPA and the NERC Resolutions Nos. 3 and 5.[754]

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[751] *Duke Energy v. Ecuador*, CL-0025, ¶ 313, referring to Art. II(3)(c) of the US-Ecuador BIT: "each party shall observe any obligation it may have entered into with regard to investments".

[752] Respondents' Rejoinder, ¶ 403, referring to *CMS v. Argentina*, RL-0025, ¶¶ 89-100, especially 95(a)-(d).

[753] Respondents' Observations on the Partial Award, p. 5.

[754] The Respondent does not appear to have contested that a contractual obligation exists between it and Gardabani under the Khrami SPA. The Parties to the Khrami SPA include: the Government of Georgia, the MOE, and the SSB on one side and Gardabani on the other. Respondents' Rejoinder, ¶¶ 399-410 and further sections cited there; Respondents' Counter-Memorial, ¶¶ 365-374.

3. Tribunal's Analysis

685. The Tribunal's first task is to determine the scope of the umbrella clause. The Tribunal notes that Article 3(4) of the BIT must be interpreted in accordance with Article 31 of the VCLT, which sets out the general customary international law rules of treaty interpretation.

686. Article 31 of the VCLT requires a treaty to be interpreted in good faith, according to the plain and ordinary meaning of the terms used in that treaty, in the context and taking into account the object and purpose of the treaty. Article 32 of the VCLT permits recourse to supplementary means of interpretation in order to confirm the meaning derived by application of Article 31 or to resolve an ambiguity.

687. Pursuant to its plain meaning, Article 3(4) of the BIT is intended to ensure that a Contracting Party observes "…any obligation it may have entered into with regard to investments of nationals of the other contracting party". The use of the word "any" suggests that the Contracting Parties intended the protection provided in Article 3(4) to apply broadly to any obligation. There is no limitation of the scope of relevant obligations to international obligations, contractual or non-contractual obligations. On a plain meaning of the language, the obligations falling within the scope of protection could be any of these. However, Article 3(4) goes on to provide that the obligation is one "…entered into with regard to investments of nationals of the other contracting party". This language suggests that a certain degree of specificity must exist in that it must be with regard to or relate to investments of nationals. Nevertheless, unlike the language used in other treaties, the scope of protection is not limited to obligations entered into "with" an investor or an investment of an investor.[755]

[755] *See e.g.*, Article 10(1) of the Energy Charter Treaty.

688. In the Tribunal's view, the broad language of Article 3(4) of the BIT and its plain meaning are consistent with the object and purpose of the Treaty which, as stated in the preamble to the BIT, is to "extend and intensify the economic relations" between the two States and agree upon the treatment to be provided to investments of nationals of the Contracting Parties. The preamble of the BIT recognizes "… that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investments is desirable". Providing assurances with regard to the respect or performance of obligations assumed by the host State with regard to specific investments supports the object and purpose of the Treaty.[756]

689. There is no dispute between the Parties that a contractual obligation entered into by a Contracting Party falls within the scope of a protected obligation. The Claimants maintain that in the case of a contractual obligation, there need not be privity between the state and the investment of a national. The Respondent, on the other hand, maintains that there must be privity of contract and that only a party to the contract may bring a claim pursuant to the umbrella clause. The Parties have submitted a number of awards which they say support their respective positions. In the Tribunal's view, the language of Article 3(4) does not require a direct contractual relationship between a contracting party and the investment of a national. Rather, the obligation must be "with regard to" the investment of a national. As will be discussed below, the Tribunal finds that the

[756] Although the issue was not argued by the Parties, the Tribunal sees no relevant distinction between the use of the terms "observe" or "perform" or other possible terms such as "respect" or "comply with" in Article 3(4). As the tribunal in *SGS v. Philippines* found in the context of an umbrella clause which provided that each Contracting Party was required to "observe any obligation it has assumed with regard to specific investments…". It went on to state: "Article X (2) addresses not the *scope* of the commitments entered into with regard to specific investments but the *performance* of these obligations, once they are ascertained. It is a conceivable function of a provision such as Article X (2) of the Swiss-Philippines BIT to provide assurances to foreign investors with regard to the performance of obligations assumed by the host State under its own law with regard to specific investments – in effect, to help secure the rule of law in relation to investment protection. In the Tribunal's view, this is the proper interpretation of Article X (2). *See SGS v. Philippines*, CL-0055, ¶¶126 – 127.

language of the 2013 Memorandum was intended to protect not only the signatories but also any member of the Inter RAO Group, which would include both Silk Road and Gardabani. Further, and in any event, the Tribunal notes that Gardabani's claim is based on the provisions of the Khrami SPA, to which it is a signatory.

690. The other issue between the Parties regarding the scope of Article 3(4) of the BIT is whether it is limited to contractual obligations. Again, the Parties have made reference to a number of arbitral awards which address this question. The Claimants say that non-contractual obligations may trigger a breach of an umbrella clause. For example, they say that breach of a commitment contained in a law or regulation may constitute a violation of the umbrella clause providing the obligation or commitment in question is firm and directed specifically towards the investor.[757] The Respondent, on the other hand, maintains that an obligation covered by Article 3(4) of the BIT requires the existence of a legal relationship between the claimant and Georgia. As noted above, the Respondent says that any obligation enforceable under the umbrella clause must be assumed to have been entered into by the state towards the claimant specifically. Therefore, a claimant which is not a party to a contract with the state cannot base an umbrella law claim on the basis of the contract.[758] Insofar as an obligation which may arise from a law or regulation is concerned, the Respondent says that any such obligation which may arise, must run specifically to the claimant itself.[759]

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[757] Claimants' Memorial, ¶ 279-281: *AES v. Kazakhstan*, CL-0006 / RL-0037, ¶ 333; *Investmart v. Czech Republic*, CL-0035, ¶ 526; *Enron v. Argentina* , CL-0031, ¶ 274; *Continental Casualty v. Argentina,* CL-0023, ¶¶ 298-301; *LG&E v. Argentina*, CL-0038, ¶ 175.

[758] Respondents' Counter-Memorial, ¶¶ 367-373; Respondents' Rejoinder, ¶¶ 401-409; *Azurix v. Argentina*, CL-0011, ¶ 379; *Siemens v. Argentina*, CL-0056, ¶ 196; *Duke Energy v. Ecuador*, CL-0025, ¶ 317; *CMS v. Argentina*, RL-0025, ¶ 86; *El Paso v. Argentina*, CL-0028, ¶ 538; *Burlington v. Ecuador*, CL-0016, ¶¶ 211-234; *Oxus US Gold plc v. Republic of Uzbekistan,* UNCITRAL, Final Award, dated 17 December 2015 ("***Oxus Gold***" or "***Oxus Gold v. Uzbekistan***"), CL-0046, ¶ 848; *WNC v. Czech Republic*, RL-0026, ¶ 334.

[759] Respondents' Counter-Memorial, ¶¶ 370-373; Respondents' Rejoinder, ¶¶ 403-404; *Duke Energy v. Ecuador*, CL-0025, ¶¶ 317-323.

691. In the Tribunal's view, legislation or regulations are capable of creating obligations that are protected by an umbrella clause. However, as in the case of contractual obligations, an obligation contained in a law or regulation must have been entered into or undertaken by the state "with regard to investments" of a claimant. The obligation must be made with respect to an identifiable investment of a qualifying investor. A general regulatory statute will not normally contain a sufficiently specific commitment or obligation. In this case, the relevant regulations are NERC Resolution No. 3 of 3 April 2013 and NERC Resolution No. 5 of 11 April 2011.

692. Finally, in their Observations of 14 May 2021 on the Partial Award on Liability in the SCC Arbitration, the Respondents submitted that umbrella clauses serve to protect an investor's vested rights against uses and abuses of sovereign authority and that the breaches of contract identified in the Partial Award on Liability were not the result of Georgia's use and abuse of its sovereign authority such as to rise to breaches of the umbrella clause.[760] Consistent with the Tribunal's interpretation of Article 3(4), above, the scope of this provision covers any failure to observe any obligation entered into with regard to investments of the Claimants. Therefore, the Tribunal sees no requirement for the use or abuse of sovereign authority in order to give rise to a breach of the umbrella clause in this case. Further, the Tribunal notes that at the root of the obligation to compensate Silk Road and Gardabani was the exercise of regulatory powers to adopt and apply new tariff regulations.

a. **Telasi's Claim**

693. Silk Road pursued its claim under Article 3(4) of the BIT on the basis that the Respondent failed to observe its contractual obligations under the 2013 Memorandum by failing to compensate

[760] Respondents' Observations on the Partial Award on Liability, p.5.

for losses caused by a change in legislation which made its position in Georgia worse as compared to the position at the date of the signature of the Memorandum. It also claims that when it resiled from the tariff terms applicable to Telasi under NERC Resolution No. 3, it also breached Article 3(4) of the BIT.[761] In each case, Silk Road says that the Respondent failed to observe an obligation entered into specifically towards it.

694. Silk Road says that the language of Article 3(4) of the BIT is broad and extends to any obligation it entered into with regard to its investment in Telasi. Although it is not a signatory to the 2013 Memorandum, it says that it falls within the scope of protection offered by Article 3(4) of the BIT for a failure by Georgia to observe its contractual obligation contained in the 2013 Memorandum. With respect to NERC Resolution No. 3, Silk Road appears to argue that when the NERC applied the terms of the 2014 Methodology to Telasi, it failed to observe the obligation to set and adjust Telasi's tariffs pursuant to Clause 2 of the 2013 Memorandum.[762]

695. The Respondent says that Silk Road cannot invoke Article 3(4) of the BIT because it is not a party to the 2013 Memorandum and any obligations under the NERC's Resolution No. 3 applies only to Telasi.[763]

696. As indicated above, in the Tribunal's view, the broad language of Article 3(4) of the BIT does not limit the scope of protected obligations to those entered into directly with a claimant. Rather, the relevant obligation need only be entered into by the state with regard to investments provided the obligation was entered into towards the claimant specifically. In this case, the Tribunal

[761] Claimants' Memorial, ¶¶ 280-281.

[762] Claimants' Memorial, ¶ 281; Claimants' Reply, ¶ 203.

[763] Respondents' Counter-Memorial, ¶ 373; Respondents' Rejoinder, ¶¶ 400, 409. The Respondent takes a similar position with respect to Gardabani's claim.

finds that the obligation contained in Clause 5.2 of the 2013 Memorandum was entered into towards Silk Road although it was not a signatory to the Memorandum.

697. In this regard, the Tribunal recalls the language of Clause 5.2 of the 2013 Memorandum:

> *5.2. In the event that, following the signing of this Memorandum, any amendments have been made to the legislation of Georgia, making the position of Inter RAO or of any Inter RAO Group company in Georgia worse as compared to the position as of the date of signing of this Memorandum, the Government of Georgia shall compensate Inter RAO or the relevant Inter RAO Group company in Georgia for all losses caused by such a change in the legislation, including by means of an increase of the Consumer Tariff of Telasi, JSC in accordance with section 2.2.2.*

698. This provision contains an obligation towards Inter RAO or any member of the Inter RAO Group in Georgia, which includes Silk Road which holds 75.11% of Telasi's shares. Further, as a 25% shareholder of Telasi, the Respondent must be taken to be aware of the majority shareholder of Telasi, Silk Road. In this regard, the Tribunal notes that in the 1998 Telasi SPA, the Respondent sold 75% of the shares of Telasi to AES Silk Road Holdings BV.[764] Further, Silk Road was identified as the "investor" in the 2010 Memorandum of Intent entered into between the Government and the MOE and Inter RAO and Silk Road.[765]

699. In these circumstances, the Respondent was aware that Silk Road was the majority shareholder of Telasi and a member of the Inter RAO Group and it entered into an obligation with regard to any member of the Inter RAO Group. In the Tribunal's view, the obligation contained in Clause 5.2 of the 2013 Memorandum to compensate Inter RAO or Inter RAO Group company was entered into with regard to Silk Road's investment in Telasi for the purposes of Article 3(4) of the BIT.

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[764] Telasi SPA, C-0001. Clause 20 of the Telasi SPA provided for compensation to AES Silk Road for a period of 10 years in respect of losses caused to Telasi by way of specified changes of law. AES Silk Road Holdings B.V. was then purchased by Inter RAO in 2003.

[765] 2010 Memorandum, C-0006 / R-0018. Clause 1.3.3.1 of the Memorandum of Intent refers to the joint ownership of Telasi by Georgia and the investor, Silk Road. Reference was also made to Silk Road in Clause 1.6 of the 2007 Memorandum, C-0005 / R-0015, and in Clause 1.1.1 of the 2011 Memorandum, C-0015 / R-0019.

700. The Tribunal has considered the Respondent's position that the Claimants have not demonstrated that, under Georgian law, a non-signatory parent or subsidiary of the contracting party may directly enforce its parent or subsidiary's contractual rights. In the Tribunal's view, the right to claim protection under Article 3(4) of the BIT depends on the language of the treaty and international law, which in the Tribunal's view, permits Silk Road to bring its claim.

701. As indicated above, in the SCC Arbitration the Tribunal determined the obligation to compensate that the Respondent was required to observe. Having failed to observe that obligation and compensate Silk Road, the Respondent has breached its obligation entered into in the 2013 Memorandum. Accordingly, the Respondent has failed to observe its obligation entered into with respect to Silk Road's investment, Telasi.

702. In light of this conclusion, the Tribunal need not address Silk Road's argument that the Respondent also failed to observe an obligation contained in NERC Resolution No. 3. Nevertheless, the Tribunal recalls that the obligation or commitment undertaken by the Respondents was to compensate for any losses flowing from a change in the legislation which made the position of Inter RAO or any Inter RAO Group company in Georgia worse as compared to the position as of the date of the signature of the 2013 Memorandum. While NERC Resolution No. 3 was implemented to give effect to the tariffs agreed in the 2013 Memorandum, it does not provide that there will be no change in Telasi's tariffs nor does it address the question of compensation in the event this occurs.

b. **Gardabani's Claim**

703. Gardabani's primary claim alleges that the Respondent failed to observe the obligation it owed to it pursuant to Khrami SPA. Gardabani also alleges the Respondent failed to observe the obligation contained in NERC Resolution No. 5 which implemented the tariffs agreed in the Khrami

SPA. As there is no dispute that Gardabani is a party to the Khrami SPA, the Tribunal need not consider the second basis for the claim, nor the Respondent's defence as it relates to it.[766]

704. With respect to its obligations under the Khrami SPA, the Respondent says that it did not breach any of these.[767] In this regard, the Respondent maintains that having failed to cause the Khrami Companies to submit compliant tariff applications, Gardabani is not entitled to claim compensation for their non-adjustment and that, in any event, the Khrami Companies waived their right to a tariff adjustment in 2016. Further, the Respondent says it is not responsible for the Khrami Companies' decision to abandon the request for tariff adjustment. With respect to the Khrami Companies' 2017 applications, the Respondent says that adjustments were made in full compliance with the tariff provisions of the Khrami SPA.[768]

705. Gardabani's claims pursuant to the Khrami SPA and the Respondents' defences to those claims were considered in detail and determined by the Tribunal in the SCC Arbitration. Having considered Gardabani's claims under the Khrami SPA in that Arbitration, the Tribunal found that Gardabani did not waive or fail to meet a condition precedent to its claims and found that the Respondents had breached their obligations under Clause 5.2.2 and Clause 2 of Annex #1 of the Khrami SPA.[769] In the Partial Award on Liability and the Final Award in the SCC Arbitration, the Tribunal determined that the Respondents, the Government, the MOE and the SSB, are required to compensate Gardabani and finally determined the extent of compensation due, in the amount of

[766] The Respondent argued that Gardabani had no basis for a claim under Article 3(4) of the BIT since it was not a signatory to the 2013 Memorandum (which, in addition to Telasi's tariffs and conditions of adjustment, also incorporated Khrami's tariffs and the conditions of their adjustment set out in Annex #1 to the Khrami SPA). Further, the Respondent also alleged that insofar as NERC Resolution No. 5 is concerned, there is no obligation or undertaking by it with respect to Gardabani since any obligation runs to the Khrami Companies and not Gardabani. *See* Respondents' Rejoinder, ¶ 409.

[767] Respondents' Counter-Memorial, ¶ 374; Respondents' Rejoinder, ¶ 410.

[768] Respondents' Rejoinder, ¶¶ 285, 322, 410.

[769] SCC Partial Award on Liability, ¶ 794.

USD 27,499,000.[770] As there is no indication that the Respondent has paid compensation to Gardabani to date, the Respondent must now compensate Gardabani in that amount pursuant to its obligation under Article 3(4) of the BIT.

E. The Dispute Resolution Clauses in the 2013 Memorandum and the Khrami SPA

1. The Respondent's Position

706. In their Observations on the Partial Award, dated 14 May 2021, the Respondents raised an additional defence to the Claimants' claim under the Umbrella Clause in the BIT. In those Observations, the Respondent raised the objection that there can be no breach of an umbrella clause, where, as in this case, the underlying contracts provide for an exclusive dispute resolution mechanism available to the Claimants and which offers them effective means of redress.[771] It says that a number of tribunals and commentators have confirmed that investors cannot invoke an umbrella clause provision in a treaty to circumvent an exclusive dispute resolution provision in the underlying contract.[772] The Respondent referred in particular to the award of the tribunal in *Consutel v. Algeria*.[773]

707. In response to the Claimants' position that breaches of contract are facts that support their umbrella law claim and not the legal causes of action under the BIT and that the dispute resolution mechanisms are irrelevant to the legal causes of action under the treaty, the Respondent refers to the award in *SGS v. Philippines* where the tribunal found that it could not "…accept that standard BIT

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[770] SCC Final Award, ¶ 125(b).

[771] Respondents' Observations on the Partial Award, p. 5; Respondent's letter of 14 May 2021, p. 5.

[772] Respondents' Observations on the Partial Award, p. 5; Respondent's letter of 14 May 2021, p. 5, and the sources cited in fn 32.

[773] *Consutel Group S.p.A in Liquidazione v. People's Demcratic Republic of Algeria*, PCA Case No. 217-33, Final Award, dated 3 February 2020 ("***Consutel***" or "***Consutel v. Algeria***"), RL-0106, ¶¶ 372-375.

jurisdiction clauses automatically override the binding selection of a forum by the parties to determine their contractual claims" and that "SGS should not be able to approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim".[774]

708. In response to the Claimants' position that it had advanced a new argument late in the proceedings under the auspices of the implications of the Partial Award, but which is not dependent upon it, the Respondent says that it has always maintained that the BIT claims presented by Gardabani and Silk Road are duplicative of the contract claims submitted in the SCC arbitration.[775] In any event, the Respondent says that it advanced its argument in accordance with the Tribunal's directions for further submissions on the implications of the Partial Award for the pending treaty claims and that both Parties had been given a fair and equal opportunity to be heard.[776]

2. The Claimants' Position

709. The Claimants say that the Respondent conflates their rights under the BIT with the contractual rights of the Parties to the 2013 Memorandum and the Khrami SPA. According to the Claimants, breaches of contract are facts that support the Article 3(4) claims and not the legal causes of action under the treaty. Therefore, the dispute resolution mechanism in the agreements is irrelevant to the Claimants' BIT claims.

710. The Claimants say that in the Partial Award on Liability, the Tribunal found that the Respondents had breached their contractual obligations. However, it did not assess whether the

[774] Respondents' Letter of 23 June 2021, pp. 2-3, and the sources cited there; *SGS v. Philippines*, CL-0055, ¶ 153.

[775] Respondents' Letter of 23 June 2021, p. 3, referring to Georgia's Answers in SCC Case No. V2017/098, dated 14 August 2017 and SCC Case No. V2017/097, dated 14 August 2017 and the Respondents' Submissions on Costs, dated 16 January 2020.

[776] Respondents' Letter of 14 May 2021, p. 1-2.

Respondent violated the treaty by way of those breaches, nor could it have done so. According to the Claimants, the dispute resolution clauses in the 2013 Memorandum and the Khrami SPA are only relevant in the sense that the Claimants in the SCC arbitration followed them and received a finding of contractual breach in that forum. As such, the findings in the Partial Award simply confirm the truth of the facts underlying the Claimants' umbrella clause claims in this arbitration.[777]

711. With respect to the award in *SGS v. Philippines*, the Claimants say that the tribunal in that case observed only that a BIT's umbrella clause does not automatically displace a contractual dispute resolution clause in respect of contractual claims. The Claimants emphasize that their Article 3(4) claims are not contractual but, rather, based on a violation of the Respondent's treaty obligations. According to the Claimants, the tribunal in *SGS v. Philippines* concluded that the umbrella clause in the relevant treaty would apply once the contractual claim had been determined in accordance with the contractual dispute resolution clause.[778]

712. Finally, as noted previously, the Claimants say that the Respondent's argument that the dispute resolution clauses in the 2013 Memorandum and the Khrami SPA preclude their claim under Article 3(4) of the BIT constitutes a new argument which should have been argued from the outset. Further, they say that this new argument advanced under the auspices of the implications of the Partial Award is not dependent on the Partial Award.[779]

3. The Tribunal's Analysis

713. The arbitration clause in the 2013 Memorandum provides in relevant part as follows:

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[777] Claimants' Letter of 3 June 2021, pp. 3-4.

[778] Claimants' Letter of 2 July 2021, p. 2, referring to *SGS v. Philippines*, CL-0055, ¶ 155 ("Until the question of scope or extent of the Respondent's obligation to pay is clarified – whether by agreement between the parties or by proceedings in the Philippine courts as provided for in Article 12 of the CISS Agreement – a decision by this Tribunal on SGS's claim to payment would be premature").

[779] Claimants' Letter of 3 June 2021, p. 4.

> 9.3 Any dispute, controversy or claim arising out of or in connection with this Memorandum, including those *relating to the breach, cessation or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce.*

714. The arbitration clause in the Khrami SPA provides in relevant part as follows:

> 8.4 Any dispute, controversy or claim arising out of or in connection with this Agreement, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. By virtue of this Agreement*, the Parties hereby unambiguously waive their rights use (sic) any other forum appeal, reconsideration or application to the court of any other country or other judicial authority, in case if such a waiver is legal.*

715. The Tribunal commences its analysis by noting that the Respondent's position is an objection to the Tribunal's jurisdiction. As such, it should have been raised in the Respondents' Counter-Memorial or at least, in the Respondents' other pleadings on the merits. The argument is not one of admissibility and does not depend on the Partial Award on Liability or the other awards in the SCC Arbitration. Nevertheless, the Tribunal addresses the merits of the Respondent's objection.

716. In the Tribunal's view, it is important to distinguish between the contractual rights arising under the 2013 Memorandum and the Khrami SPA and Silk Road's and Gardabani's claims as investors under Article 3(4) of the BIT. The Tribunal addressed and determined the contractual obligations in the SCC Award and addresses here, in this award, rights and obligations arising at international law under the BIT. Although the Parties agreed to coordinate the two arbitrations, they did not consolidate them. The two arbitrations remain separate and address different rights and obligations, which is implicit in the Parties' agreement that the Tribunal must issue two separate awards.

717. The particular, complex circumstances of this arbitration distinguish it from the authorities on which the Respondent relies, in particular, the award in *Consutel v. Algeria* which addresses very different factual circumstances. The fundamental distinction is that in this case, the Claimants have not sought to circumvent exclusive jurisdiction clauses contained in the 2013 Memorandum and the

Khrami SPA. Rather, the dispute resolution processes provided for have been pursued and the Tribunal has determined the scope of those obligations and found that the Respondents, including in each case the Government acting on behalf of the State, and State entities, have breached their contractual obligations and must compensate the Claimants.

718. Now that the compensation payable has been determined in accordance with the dispute resolution clauses in the 2013 Memorandum and the Khrami SPA, the issue of the Respondent's observance or performance of its BIT obligations arises under the umbrella clause. The Tribunal notes that unlike the *Consutel* case, the Government of Georgia acting on behalf of the State is itself a party to each agreement and expressly undertakes to compensate for any damage or loss. In the case of the 2013 Memorandum, the Government undertook to compensate Inter RAO or the relevant Inter RAO Group company for all losses by a change in the legislation. In the case of the Khrami SPA, the Government undertook to bear full responsibility for any damage or loss incurred by Gardabani and/or the Khrami Companies resulting from the non-application of the relevant tariffs and their conditions of adjustment. Now that the nature and scope of the Respondent's obligation has been determined, it is now obliged to comply with it and pay compensation to the Claimants in this arbitration, Silk Road and Gardabani.

719. As discussed below, Silk Road and Gardabani claim the same amount of damages with respect to their tariff-related claims as were claimed by the Claimants in the SCC Arbitration. The specific compensation due is discussed in the next section of this Award.

F. The Respondent's Counter-Claim

1. The Respondent's Position

720. In the event the Tribunal determines that Silk Road and Gardabani are allowed to make claims pursuant to the umbrella clause, the Respondent argues that the Tribunal also has jurisdiction on the basis of Article 9 of the BIT, Article of the 46 ICSID Convention and Rule 40 of the ICSID Arbitration Rules to hear its counterclaim for 50% share of any TIA.[780] The Respondent says Georgia's counterclaim is a direct counterpart to the Claimants' claims for alleged violations of obligations owed by Georgia to Telasi under the 2013 Memorandum, and that this nexus between the claims and counterclaims establishes the Tribunal's jurisdiction over counterclaims. The Respondent's arguments in support of its entitlement to a 50% share of the TIA from 2013-2016 are set out at paragraph , above.

721. The dispute resolution clause at Article 9 of the BIT covers:

> [A]*ny legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party. . . .*[781]

722. Article 46 of the ICSID Convention provides as follows:

> [T]*he Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.*[782]

723. Rule 40 of the ICSID Arbitration Rules provides as follows:

> *Except as the parties otherwise agree, a party may present an incidental or additional claim or counterclaim arising directly out of the subject matter of the dispute provided that such*

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[780] Respondents' Counter-Memorial, ¶¶ 375-383; Respondents' Rejoinder, ¶¶ 411-424; *Saluka v. Czech Republic,* CL-0052, ¶ 39; *Saluka v. Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Couterclaim, dated 7 May 2004 ("***Saluka v. Czech Republic II***"), RL-0033, ¶ 61.

[781] Georgia-Netherlands BIT, CL-0003, Art. 9.

[782] ICSID Convention, Regulations and Rules, RL-0027, Art. 46.

> *ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.*[783]

724. The Respondent says the Parties' consent to submit their dispute to ICSID arbitration establishes the Tribunal's jurisdiction to hear counterclaims because the applicable procedural rules allow counterclaims (Article 46 and Rule 40, above). Several cases have recognized that a tribunal's jurisdiction under investment treaties extends to counterclaims, and thus the fact the Georgia-Netherlands BIT does not expressly give the Tribunal jurisdiction to hear counterclaims is of little importance.[784]

725. The Respondent contests the Claimants' arguments that the language of the umbrella clause is not broad enough to give rise to counterclaims. The Respondent says Article 9 of the BIT is "agnostic" as to the identity of the claiming party and should not be read in the restrictive manner advocated by Claimants. The express choice of ICSID, which allows counterclaims, should be read as consistent with the absence of a limitation on counterclaims in Article 9.[785]

726. The Respondent also contests the Claimants' arguments that Article 9 of the BIT codifies only Georgia's consent to arbitrate and not the Claimants' consent to adjudicate *any* dispute, and thus Article 3(4) of the BIT is asymmetrical and does not allow counterclaims. The Respondent refers to several cases which rejected arguments that the BIT's provisions were asymmetrical and

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[783] *Id*., Rule 40.

[784] *See* Respondents' Counter-Memorial, ¶¶ 378, 380-381, citing *Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/01/2, Award, dated 21 June 2021, RL-0028, ¶ 298; *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Award, dated 6 January 1988, RL-0029, ¶ 10(b); *Burlington Resources, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on Counterclaims, dated 7 February 2017, RL-0030, ¶ 52; *Sergei Paushok, CJSC Golden East Company, and CJSC Vostokneftegaz Company v. The Government of Mongolia*, Award on Jurisdiction and Liability, UNCITRAL, dated 28 April 2011 ("***Paushok v. Mongolia***"), RL-0031, ¶ 689; *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ARB/81/2, Decision on Annulment, dated 21 October 1983, RL-0032, ¶¶ 9, 17; *Saluka v. Czech Republic,* CL-0052, ¶ 39; *Saluka v. Czech Republic II,* RL-0033, ¶ 61.

[785] Respondents' Rejoinder, ¶ 417.

no counterclaim could be raised by the State.[786] The Respondent argues that the BIT does not limit the State's ability to raise counterclaims based on its procedural rights under the BIT, the 2013 Memorandum and Georgian law, thereby allowing the State to raise a counterclaim based on a system of law beyond the closed system in the BIT. While the BIT does not provide a choice of law, whereas the Spain-Argentina BIT at issue in the *Urbaser* case did, the Respondent says Article 42(1) ICSID Convention fills the gap with Georgian law and international law as the substantive basis for Georgia's counterclaims.[787]

727. Regarding the purported asymmetry of the umbrella clause, the Respondent says *Oxus Gold*, relied on by the Claimants, dealt with a clause that provided that only disputes "concerning an obligation of the [host State] under this Agreement" could go to arbitration. That tribunal held that the clause precluded the State's counterclaim and, even if it did not, there would be further hurdles to jurisdiction because the counterclaim was not closely connected to the primary claim, unlike the instant case.[788]

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[786] *Id.*, ¶ 418; *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, dated 8 December 2016 ("***Urbaser***"), CL-0156, ¶ 1143 (citing Argentina-Spain BIT, Art. X(1): "disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement shall, as far as possible, be settled amicably between the parties to the dispute". The Tribunal held that this clause is "completely neutral as to the identity of the claimant or respondent in an investment dispute between arising 'between the parties'", and thus does not limit counterclaims by the State); *Saluka v. Czech Republic II*, RL-0033, ¶ 39 (citing Netherlands-Czech BIT, Art. 8: "all disputes" could be referred to arbitration); *Paushok v. Mongolia*, RL-0031, ¶ 689 (citing Russia-Mongolia BIT, Art. 6: "disputes" broadly interpreted).

[787] Respondents' Rejoinder, ¶ 421-422. Respondents say the *Burlington v. Ecuador* tribunal did just that in considering counterclaims based on Ecuadorian law contracts and tort law because the US-Ecuador BIT did not contain an express choice of law and did not limit an arbitral tribunal to deciding the case solely on the BIT, the tribunal relied on Art. 42(1) ICSID Convention.

[788] Respondents' Rejoinder, ¶ 423, citing *Oxus Gold v. Uzbekistan*, CL-0046, ¶ 946.

2. The Claimants' Position

728. The Claimants say neither Articles 9 or 3(4) of the BIT nor Article 42(1) of the ICSID Convention grant the Tribunal jurisdiction over the Respondent's counterclaim for its alleged share of the TIA from 2013-2016.[789] Similarly, interpreting Article 9 of the BIT in this way would suggest that any dispute between any foreign investor and Georgia would be arbitrable, despite no evidence that this was the Contracting Parties' intention and no supporting caselaw.[790] Silk Road's Notice of Dispute, which the Claimants say perfected their agreement to arbitrate, only identified breaches of protections Georgia afforded to them under the BIT, and therefore does not contain the Claimants' consent to arbitrate *any* dispute or Georgia's counterclaim, but only those disputes "arising between [Georgia] and a national of [the Netherlands] concerning an investment of that national in [Georgia]".[791] The Claimants also say Article 9 of the BIT is irrelevant to the Tribunal's jurisdiction because Georgia cannot identify any substantive basis for its TIA counterclaim.

729. In the Claimants' view, the Article 3(4) umbrella clause does not permit Georgia to bring a treaty-based claim against Silk Road. The Respondent does not have a cause of action because it conditioned its counterclaim on Article 3(4) of the BIT, which only deals with obligations entered into by the "Contracting Parties" (Georgia and the Netherlands), not private parties/investors. The *Oxus Gold* tribunal observed that recourse to the umbrella clause is not possible because it refers to the host State's obligations only.[792] The Claimants argue that the Respondent cannot overcome this

[789] Claimants' Reply, ¶¶ 208-212.

[790] Claimants' Rejoinder, ¶¶ 21-31.

[791] Georgia-Netherlands BIT, CL-0003, Art. 9.

[792] Claimants' Reply, ¶ 209; *Oxus Gold v. Uzbekistan*, CL-0046, ¶ 958(i).

hurdle by relying on Articles 46 and Rule 40 ICSID Arbitration Rules because the counterclaim is not "within the scope of the consent of the parties"[793] to arbitration under the BIT.

730. The Claimants say Article 42 ICSID Convention is unavailing because it pertains to the law applicable to existing causes of action over which a tribunal already has jurisdiction.

731. However, if the Tribunal finds it has jurisdiction over Georgia's counterclaim, the Claimants invoke their arguments above that Georgia is not entitled to a cash payment of its share of the TIA.[794]

732. The Claimants also claim that the Parties' respective entitlements should be calculated and set off as of the date of the Tribunal's Award because the Claimants are entitled to set off any GRDs against the TIA claimed.[795] The Claimants refer to Table 8.6 of the second Peer Expert Report, which shows that while there was a TIA from 2013 through to early 2016, starting in 2017 there was a GRD. The Claimants say that under the 2013 Memorandum, the deficits must be offset against the TIA and that tax must also be taken into account, which results in a cancelling out of the Respondent's counterclaim value in the actual scenario.[796] The Claimants say that this right to set off is also supported by the provisions of the Georgian Civil Code.[797] In the event that the Claimants are successful on their contractual claims, their damages model in the but-for scenario assumes a distribution of 50 percent of any TIA to the state.

733. The Claimants also contest Georgia's claim for interest from 1 January 2017. The earliest date from which interest could accrue is 25 November 2018 (i.e., the date of the Respondent's Counter-Memorial when the Respondent first requested the payment of the TIA in the two

[793] Claimants' Rejoinder, ¶ 29; Claimants' Reply, ¶¶ 208-210, citing ICSID Convention, RL-0027, Art. 46.

[794] Claimants' Rejoinder, ¶ 32; Tr. Day 1 (Claimants' Opening Statement), 137:21-138:16.

[795] Claimants' Rejoinder, ¶¶ 35-36.

[796] Tr. Day 1 (Claimants' Opening Statement), 138:21-139:12; 140:22-141:4.

[797] Tr. Day 1 (Claimants' Opening Statement), 141:5-11, citing GCC, Article 442.

arbitrations).[798] However, the Claimants maintain that there cannot be any interest until the Tribunal issues an award on the TIA because no payment was ever asked for by the state so the obligation to pay cannot arise until the Tribunal imposes it.[799]

3. The Tribunal's Analysis

734. In the Tribunal's view, Article 9 of the BIT is sufficiently broad to include the Respondent's claim for a 50% share of the TIA. This claim clearly forms an integral part of the legal dispute between Silk Road and the Respondent and is closely linked to the obligation Silk Road pursues under Article 3(4) of the BIT.

735. In the Partial Award on Liability in the SCC Arbitration, the Tribunal found that the Respondent's Counterclaim must be assessed in the context of the Claimants' claims under the 2013 Memorandum and should be assessed as part of the reckoning of the losses claimed by the Claimants. The Tribunal also found that the MOE's entitlement to a 50% share of the TIA forms an integral part of the assessment of Telasi's position at the relevant times provided for in Clause 5.2 of the 2013 Memorandum and the calculation of any compensable loss. Accordingly, Telasi's entitlement to compensation was calculated by the Parties' respective quantum Experts, taking into account the MOE's 50% share of the TIA. As Silk Road relied on the same quantification of damages in this arbitration as the Claimants in the SCC Arbitration, the Respondent's counterclaim has been fully accounted for.

736. Therefore, the Tribunal finds that the Respondent's counterclaim arises directly out of the subject-matter of the underlying dispute and that the Tribunal has jurisdiction over the counterclaim. The Respondents' entitlement to their 50% share of the TIA under the 2013 Memorandum was

[798] Claimants' Rejoinder, ¶¶ 33-34.

[799] Tr. Day 1 (Claimants' Opening Statement), 141:12-17.

upheld in the SCC Arbitration and the relevant amount owing formed a necessary and integral part of the calculation of the Claimants' loss. The same is true in this arbitration where the Respondent's counterclaim forms part of the legal dispute between Silk Road and the Respondent. Accordingly, the Respondent's counterclaim also succeeds under the umbrella clause.

VIII. DAMAGES

A. The Claimants' Position

737. The Claimants argue that they are entitled to full compensation for the Respondent's treaty breaches. They note that the alleged wrongful conduct that led to violations of the Claimants' international law and Georgian law rights is largely the same, as is the harm suffered. The additional actions beyond those within the scope of the 2013 Memorandum and the Khrami SPA are the actions that introduced volatility into Telasi's purchase portfolio in 2017 and the diversion of the Khrami Companies' energy from Telasi to other buyers at a lower price in 2016 (two of the Supplemental Claims).

738. The Claimants submit that the legal standard under customary international law is full compensation pursuant to the *Chorzów Factory* case, which requires that all the consequences of the illegal act be wiped out.[800] This is achieved by awarding compensation that restores the Claimants to the economic position they would have occupied but for the Respondent's treaty breaches. The Claimants argue that the correct assessment of their losses, which do not need to be proven with absolute certainty, should be based on the fair market value of their investment as it would have been in the absence of Georgia's wrongful conduct.[801]

[800] Claimants' Memorial, ¶¶ 284-287.

[801] *Id.*, ¶ 290.

739. According to the Claimants, the measure of damages under Georgian law for breach of contract is very similar to the position under international law. Under Georgian law, damages include both actual, materialized damages and lost profit. Compensation should be such as to place the aggrieved party in the position it would have occupied "but for" the breach of contract. In order to be recoverable, the damages must be the consequence of the breaching party's actions and must have been foreseeable. Lost profit is due so long as it is directly connected to the breach of contract.[802] The Claimants say that had the tariffs been adjusted according to the 2013 Memorandum and the Khrami SPA and the 2011 Memorandum, the Khrami Companies and Telasi would have received additional profits, and that those losses were caused by the Respondent. They say that the loss of profits is a clear and necessary consequence of the failure to apply the tariff adjustment mechanisms in the agreements between the Parties. As such, the loss was entirely foreseeable and the Respondent is liable to compensate for the full loss of profits.[803]

740. In response to the Respondent's arguments, the Claimants say that damages caused by an administrative body under public law contracts attract compensation in accordance with the normal rules of the Civil Code of Georgia, which are very similar to those provided by international law.[804] In response to the Respondent's argument that they must prove their individual losses, the Claimants say that international arbitral tribunals quantify damages flexibly. They refer to the decisions in *Saphire International Petroleum Ltd. v. National Iranian Oil Company* and several other cases for the proposition that it is not necessary to prove the exact damage in order to award damages. Where

[802] *Id.*, ¶¶ 291-294; Claimants' Reply, ¶¶ 213-216.

[803] Claimants' Memorial, ¶ 295.

[804] Claimants' Reply, ¶ 218. The Claimants say that the two instances under the GACG in which a balancing of public and private interests may be appropriate are irrelevant. They also distinguish the cases relied upon by the Respondent's expert, Dr. Turava. They say that these cases deal only with liquidated damages in respect of which Georgian courts have sometimes required the damages be limited to some standard of reasonableness of proportionality. In any event, the Claimants say that the damages they seek are not disproportionate to their business and investments. *See* Claimants' Reply, ¶¶ 219-220.

proof of the exact damage suffered is not possible, it is sufficient for the adjudicator to find with sufficient probability the existence and extent of the damage.[805] The Claimants say that they need only prove their losses with reasonable certainty, given the particular factual circumstances of this case. Further, they say that all that is required is to ascertain the extent of the total loss they suffered with reasonable certainty and they are not required to allocate damages to each specific breach.[806] The Claimants say that international tribunals have held at that separate compensation is not required to be awarded for each separate treaty violation and referred to a number of awards in this regard. They say this is because multiple treaty violations are often based on the same offending governmental measure or measures. The Claimants say that international tribunals focus on whether the offending governmental measures caused loss and not whether a separate monetary amount could be attached to each breach.[807]

741. The Claimants say that in this case their overall losses are not easily divided by breach since the methods for calculating tariff adjustments under the 2013 Memorandum and the 2014 Amended Methodology are completely different.[808]

B. The Respondent's Position

742. The Respondent says that even if it had breached any obligation, which it denies, no compensation would be owed to the Claimants. The Respondent says that the Claimants have failed

[805] *Id.*, ¶¶ 222-223 and the sources cited there.

[806] *Id.,* ¶ 223.

[807] *Id.*, ¶ 224.

[808] *Id.*, ¶¶ 225-233. Nevertheless, although not required, the Claimants say that their expert, Mr. Peer has attempted to allocate losses by categories of breaches, which, they say disposes of the Respondent's complaint. Further, the Claimants also say that if the Tribunal wishes to attribute losses between claims with greater particularity, the Parties' quantum experts can be requested to recalculate losses according to one or more scenarios depending on the Tribunal's findings.

to discharge their burden to particularize their losses. In this regard, the Respondent relies on the award in the *Gami v. Mexico*:

> *One cannot fail to observe that Gami's complaint of alleged unfair and inequitable treatment is not connected with a demonstration of specific and quantifiable prejudice… Gami rather proceeds on the basis that the entire value of its investment has been destroyed… Gami's approach seems to be all or nothing. But no credible cause-and-effect analysis can lay the totality of Gami's disappointments as an investor at the feet of the Mexican Government… Gami can assert only that mal administration of [Mexico] sugar program caused it some prejudice. But the prejudice must be particularized and quantified. Gami has not done so.* [809]

743. The Respondent says that under Georgian law, a claimant must prove that its alleged losses were caused by the wrongful actions of the respondent in order to obtain compensation. Therefore, the Claimants must demonstrate with specificity which damages flow from which breach. The Respondent says that it is not sufficient for the Claimants to quantify their alleged losses on the basis of "tariff breaches" which they define as "the loss that the Claimants suffered from the breach of the Khrami SPA and the 2013 Memorandum that also represents a breach of the BIT". The Respondent says that the Claimants' expert's damages model does not connect with any degree of specificity the quantum claimed and the alleged losses of the relevant provisions of the 2013 Memorandum, the Khrami SPA and the BIT. On this basis, the Respondent says that the Claimants' damages claim should be rejected. [810]

744. The Respondent also says that the Claimants' claim for damages is premised on unreasonable, speculative assumptions. [811] These arguments are discussed below where the Tribunal addresses the detail of the calculation of the Claimants' damages claim.

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[809] Respondent's Counter Memorial, ¶ 387, citing *Gami Investments, Inc. v. Mexico,* UNCITRAL, Final Award, dated 15 November 2004 ("***Gami***" or "***Gami v. Mexico***"), RL-0013, ¶ 83.

[810] *Id.*, ¶¶ 388-391.

[811] *Id.*, ¶¶ 392-407; Respondent's Rejoinder, ¶¶ 425-452. The Respondent also says that a reasonableness check against objective measures of performance shows that the Claimants' damages claim is unreliable and overstated with respect to Telasi. *See* Respondent's Rejoinder, ¶¶ 453-458.

C. The Tribunal's Analysis

745. In this arbitration, Silk Road and Gardabani claim damages for breach of their rights under the BIT. With the exception of the Supplemental Claims, which are advanced in this arbitration only, the Claimants in both this arbitration and the SCC Arbitration claim the same amounts. According to the Claimants, the measure of damages under international law and Georgian law is very similar. While analytically and legally distinct, simultaneous contractual and treaty breaches attract "full compensation". The Claimants say that damages for treaty and contractual breaches must restore claimants to the economic position they would have been in had the breaches not occurred.[812] On that basis, the Claimants provided the same calculation of damages for their claims relating to the tariffs of Telasi and the Khrami Companies.

746. The Respondents have not disputed that the measure of damages for international and contractual breaches in this case is similar. Rather, they disputed that the Claimants had properly quantified the losses claimed in a number of ways, including reliance on unreasonable assumptions and the inclusion of alleged hypothetical future losses which resulted in unreliable and overstated damage claims.[813]

747. The Tribunal addressed in detail the Parties' respective submissions relating to the assessment and quantification of damages in the First and Second Partial Awards on Damages and the Final Award in the SCC Arbitration. The Parties did not distinguish between the measure of damages for international law and Georgian contract law breaches in their submissions on damages and the Parties' Experts did not differentiate between the measure of damages for international and contractual breaches in their various calculations and joint reports.

[812] Claimants' Reply, ¶¶ 214, 216.

[813] Respondents' Rejoinder, ¶¶ 425-464.

748. Having carefully reviewed the Parties' submissions on damages and their Experts' joint reports, the Tribunal fixed the compensation payable by the Respondents for breach of contract in the SCC Final Award. The damages claimed by Silk Road and Gardabani in this arbitration under the umbrella clause in the BIT relate to the same underlying obligations and, with one exception, have been calculated in the same manner.

749. In this arbitration, Silk Road's and Gardabani's claims have been calculated on a Free Cash Flow to Equity (FCFE) basis since their claims are based on losses suffered by their investments, Telasi and the Khrami Companies. However, in the SCC Arbitration the Claimants calculated damages on both a Free Cash Flow to Firm (FCFF) to Telasi and on an FCFE basis to Inter RAO and Silk Road. In the SCC Final Award the Tribunal awarded compensation to Telasi in the amount of USD 84,500,000.[814]

750. Silk Road's claim in this arbitration must be calculated on an FCFE basis and amounts to USD 48,427,000. For the Historical Period from 31 March 2013 to 30 June 2021, the Parties' Experts' agreed calculation on an FCFE basis using a valuation date of 31 December 2020 was USD 35,934,000.[815] For the Forecast Period from 1 July 2021 to 31 December 2025, in the SCC Final Award the Tribunal adopted the Respondent's Expert's, Dr. Moselle's, approach to the two disputes between the Experts (Valuation Date and FCFF Components) in fixing the compensation payable to Telasi. Adopting the same approach in the calculation of compensation due to Silk Road on an FCFE basis yields the amount of USD 12,493,000.[816] Therefore, the compensation due to Silk Road is

[814] SCC Final Award, ¶ 89.

[815] JER 3, ¶ 2.9. The Claimants' claim with respect to Inter RAO and Silk Road was identical and calculated on the same FCFE basis.

[816] SCC Final Award, ¶¶ 86-87; JER 4, ¶ 2.8.

USD 48,427,000, which represents a portion of the losses awarded to Telasi in the SCC Arbitration on an FCFF basis.

751. Compensation due to Gardabani is calculated on an FCFE basis in both arbitrations and amounts to USD 27,499,000.

752. The Claimants have stated that the damages they seek in this arbitration overlap with those claimed in the SCC Arbitration and have undertaken not to seek double compensation. Therefore, any compensation payable in this arbitration is subject to the payment of compensation pursuant to the SCC Final Award and the Claimants' express undertaking.

IX. INTEREST

753. Each of the Parties claimed interest on the amounts awarded in relation to their respective claims and counterclaims. The Parties' quantum experts took pre-award interest into account in their calculations, without disagreement.[817] As a result, the only relevant issue for the Tribunal's determination is post-award interest.

A. The Claimants' Position

754. The Claimants say that the Tribunal should award post-award interest at a reasonable commercial rate. The Claimants maintain that the Tribunal should adopt a post-judgment interest rate similar to that used by the Experts in their calculations in their Joint Expert Reports assessing

[817] *See* paragraph 90 of the Final Award in the SCC Arbitration and the sources cited there: Claimants' Memorial, ¶¶ 324-325; Claimants' Additional Submission on Interest and Costs, dated 5 July 2022 ("**Claimants' Additional Submission on Interest and Costs**"), ¶¶ 4-11; Respondents' Submissions on Costs and Interest, dated 5 July 2022 ("**Respondents' Additional Submissions on Costs and Interest**"), ¶ 17. In their Memorial, at ¶ 325, the Claimants stated that since their assessment of losses included interest as of the date of assessment, no separate pre-judgment interest is required.

losses. On that basis, the Claimants say that the appropriate interest rates for 2021 and 2022 are 4.4% and 6.5% respectively.[818]

755. Alternatively, the Claimants submit that the Tribunal could award interest at an annual rate equal to the annual average yield to maturity on 5-year dollar-denominated Georgian Government bonds. They say that this would reflect Georgia's borrowing cost, on the basis that by withholding compensation, the Respondents have forced the Claimants to lend those funds to the State. On this basis, the Claimants say that the relevant interest rates are 2.5% for 2021 and 6% for 2022.[819]

756. In further alternative, the Claimants say that if the Tribunal does not accept these alternatives, post-judgment interest should be set at the three-month LIBOR rate plus 2%.[820]

757. The Claimants also say that interest should be compounded on a quarterly basis until payment in full.[821] The Claimants say that compounding on a quarterly basis reflects the commercial uses to which compensation could have been put if it had been paid in a timely manner. According to the Claimants, investment arbitration tribunals often award post-award interest on a compound basis and refer to certain awards in that regard.[822] With respect to the effective date from which interest should accrue, the Claimants say that their losses were assessed as of 31 December 2020. However, the first tranche of damages was awarded later, in the Second Award on Damages, dated 23 November 2021, with the remaining portion to be awarded in the Final Award. The Claimants say that the Respondents have not paid any part of the compensation awarded to them.[823] Therefore,

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[818] Claimants' Memorial, ¶¶ 326-328; Claimants' Additional Submission on Interest and Costs, ¶¶ 15-17.

[819] Claimants' Additional Submission on Interest and Costs, ¶ 18.

[820] *Id.*, ¶ 19.

[821] *Id.*, ¶ 20; Claimants' Memorial, ¶¶ 326-328, 337(b); Claimants' Reply, ¶ 270(b).

[822] Claimants' Additional Submission on Interest and Costs, ¶ 20; *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No ARB/15/28, Award, dated 24 April 2019, CL-0235, ¶ 885; *Crystallex v. Venezuel*a, CL-0024, ¶ 935.

[823] Claimants' Additional Submission on Interest and Costs, ¶ 13.

interest should accrue from the day after the valuation date, 1 January 2021. Otherwise, the Claimants say that they would be left with less money than they would have received had the Respondents paid compensation on the valuation date.[824] With respect to the Respondents' claims for interest, the Claimants say that no such interest is due since these claims were offset against the damages awarded to the Claimants. Since the balance is in favour of the Claimants, no amount is due to the Respondents.[825]

B. The Respondents' Position

758. The Respondents provided submissions on post award interest only, since pre-award interest has been taken into account in the Experts' calculations.[826] The Respondents say that any post-award interest should be awarded at the six-month USD Secured Overnight Financing Rate ("**SOFR**") plus 2% should be adopted as a reasonable commercial arbitration rate for post-award interest.[827] The Respondents say that the Tribunal should apply this rate as of 23 December 2021, the date that the sums awarded in the Second Partial Award on Damages fell due (30 days after the issuance of the Second Partial Award on Damages, pursuant to paragraph of that Award).[828]

759. The Respondents say that interest should be awarded on a simple basis as there are no special circumstances justifying an award of compound interest in this case. Further, the Respondents say

[824] *Id.*, ¶ 14.

[825] Claimants' Additional Submission on Interest and Costs, ¶ 22. With respect to pre-award interest, the Claimants say that interest on the Respondents' Counterclaims could not have accrued before 25 November 2018 (the date of the Respondents' Counter-Memorial and Memorial on Counterclaims), since this was the first date on which payment of the TIA was requested. *See* Claimants' Additional Submission on Interest and Costs, ¶ 23.

[826] Respondents' Additional Submissions on Costs and Interest, ¶ 17.

[827] *Id.*, ¶¶ 23-24. The Respondents say that since LIBOR is being phased out, arbitral tribunals have found that the SOFR is an appropriate replacement.

[828] *Id.*, ¶ 27.

that the award of compound interest is not authorized under Georgian law.[829] The Respondent says that the award of interest is not, as submitted by the Claimants, to "incentivize" a party to satisfy an award. Rather, it is to provide full compensation and should not have a punitive function.[830] According to the Respondents, absent specific circumstances that would justify awarding compound interest, only simple interest should be awarded.[831] Further, the Respondents say that the Claimants have accepted that compound interest is not authorized under Georgian law and that in these circumstances, simple interest at a reasonable commercial rate is appropriate in the SCC Arbitration.[832] As the dispute between the Parties is contractual and the claims in the ICSID Arbitration are entirely duplicative of the contractual claims brought in this arbitration, there is no reason to award compound interest in the ICSID Arbitration.[833]

C. The Tribunal's Analysis

760. In the Tribunal's view, post-award interest should accrue as of 24 December 2021, the day following the date on which specific sums, which were first awarded by the Tribunal in the Second Partial Award on Damages, fell due. The Tribunal is not persuaded that post-award interest should run from the assessment date of 31 December 2020, as submitted by the Claimants.

761. With respect to the applicable rate of interest, the Tribunal finds that in the circumstances of this case, the six-month USD SOFR plus 2% rate proposed by the Respondents is a reasonable commercial rate for post-award interest. The Tribunal is not persuaded that the other alternatives submitted by the Claimants would be appropriate. Although the Claimants have argued that in

[829] *Id.*, ¶¶ 19-20.

[830] *Id.*, ¶ 22.

[831] *Id.*, ¶ 26; Respondents' Counter-Memorial, ¶¶ 408-411; Respondents' Rejoinder, ¶¶ 468-471.

[832] Respondents' Submissions on Costs and Interest, ¶ 20; Claimants' Letter to the Tribunal, dated 29 June 2021, p. 3.

[833] *Id.*, ¶ 26

investment treaty cases compound interest should be, and often is, awarded, the Tribunal is not persuaded that awarding post-award interest on a compound basis would be appropriate. In particular, the Tribunal sees no basis for awarding different rates of interest in the two arbitrations. Accordingly, interest is awarded on a simple basis.

X. COSTS

762. In this arbitration, the relevant rules on costs are Article 61 of the ICSID Convention and Rule 28 of the ICSID Arbitration Rules. The relevant provisions referred to by the Parties are as follows:

> ICSID Convention
>
> Article 61 (1)
>
> (2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.
>
> ICSID Arbitration Rules
>
> Rule 28
> Cost of Proceeding
>
> (1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:
>
> > (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
> >
> > (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.
>
> (2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

763. In their submissions, the Parties also addressed Articles 49 and 50 of the SCC Arbitration Rules. Article 49, which provide as follows:

> Article 49 Costs of the Arbitration
>
> (1) The Costs of the Arbitration consist of: (i) the Fees of the Arbitral Tribunal; (ii) the Administrative Fee; and (iii) the expenses of the Arbitral Tribunal and the SCC.
>
> [. . .]
>
> (6) Unless otherwise agreed by the parties, the Arbitral Tribunal shall, at the request of a party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances.
>
> Article 50 Costs incurred by a party
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> Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award, at the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances.

764. The Parties agree that the rules governing the award of costs under the ICSID Convention and Arbitration Rules and the SCC Arbitration Rules are similar and provide the Tribunal broad discretion in allocating costs. Although the Parties referred to different aspects of the procedure in both the SCC Arbitration and the ICSID Arbitration, they did not distinguish between the two arbitrations for the purposes of their claims on costs which sought a single award of costs covering both arbitrations.

A. The Claimants' Position

765. The Claimants say that the general basic principle is that costs show follow the event. Therefore, if they are the successful Party in the arbitrations, even if only substantially successful, they should be awarded their full costs. The Claimants say that the successful Party should only be denied its costs if it has needlessly prolonged the proceedings or otherwise conducted itself improperly. The Claimants say that they have conducted the arbitration efficiently and acted in good faith. In this regard, they sought to maximize efficiency by agreeing to the consolidation of the SCC Arbitrations and proposing a method of coordinating the ICSID and SCC Arbitrations. They also

say they advanced their full case from the beginning, thus ensuring a fair opportunity for the Respondents to develop a full defence at the appropriate stages of the arbitration.[834] In response to the Respondents' argument, the Claimants say that the commencement of parallel arbitrations was not an abuse of process and did not unnecessarily complicate or increase the costs of the arbitrations. According to the Claimants, they are distinct legal entities with rights under different instruments. Therefore, they were entitled to pursue a remedy in the forum designated in the relevant instrument: the 2013 Memorandum, the Khrami SPA and the BIT. In order to promote efficiency in time and cost, the Claimants say they agreed to consolidate the SCC Arbitrations and coordinate the SCC and ICSID Arbitrations. They say they were entitled to advance their claims under alternative liability bases and that they should be denied costs for having commenced parallel claims.[835]

766. In response to the Respondents' argument, the Claimants say they did not cause unnecessary expense in their conduct of the arbitration by *inter alia*, bringing the Supplemental Claims in the ICSID Arbitration. They say these claims were appropriate and valid.[836]

767. The Claimants also maintain that their document production requests were proper and consistent with the process agreed in the arbitrations. They say that the fact that the Respondents made fewer document production requests does not demonstrate an abuse of procedural rights.[837]

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[834] Claimants' Submission on Costs, dated 16 January 2020, ¶ 16.

[835] Claimants' Reply Submission on Costs, dated 30 January 2020 ("**Claimants' Reply on Costs**"), ¶¶ 7-8.

[836] Claimants' Reply on Costs, ¶¶ 10-11. The Claimants say that their document production requests in respect of the diversion of the Khrami Company's electricity and sales were legitimate and could not have generated significant costs. Further, the Tribunal ordered production in several of these requests and the Respondents agreed to search for and produce documents in relation to a number of items; although the Claimants did not quantify their claim for the cost of new connections, this represented a breach of Silk Road's rights under the BIT and the fact that it did not lead to a claim for additional damages is irrelevant; with respect to the claim relating to Telasi's Purchase Portfolio Volatility, the Claimants say that the quantum claim is immaterial to the legitimacy of the claim, particularly where it evidenced further breaches of rights under the BIT.

[837] *Id.*, ¶¶ 12-15.

768. With respect to the Respondents' claim for costs, the Claimants say that the Respondents should not be awarded costs even if they succeed substantially in the arbitrations. The Claimants allege that the Respondents' conduct was inefficient and uncooperative in a number of respects.[838]

769. The Claimants also maintain that the Respondents' counterclaims unnecessarily increased the Parties' costs. In this regard, the Claimants say that the Respondents gave no indication that they would be advancing counterclaims in response to the Claimants' Request for Arbitration. In addition, the Claimants say they had to dedicate additional resources to respond to two separate counterclaims that were virtually identical in substance. They also allege that the scope of the Respondents' counterclaims changed drastically between the Counter-Memorial and the Rejoinder.[839] The Claimants' updated Statement of Costs provides as follows:[840]

Claimants' Statement of Costs

Type of fees and expenses	**Details/ Law firm/Expert**	**Total (in USD)**	**Total (in €)**	**Total (in RUB)**	**Total (in GEL)**
Legal fees and expenses (including VAT where applicable)	Freshfields Bruckhaus Deringer	8,625,096			
	Dentons	373,315			
	DLA Piper	80,183			
Advances on the costs of the Tribunal, ICSID and SCC	ICSID	450,000			
	SCC	100,000	300,000		

[838] Claimants' First Submissions on Costs, ¶¶ 17-21; Claimants' Reply on Costs, ¶¶ 16-17.

[839] Claimants' First Submissions on Costs, ¶¶ 23-25.

[840] Claimants' Additional Submission on Interest and Costs, Appendix A. Footnotes have been omitted.

Experts' fees and expenses	Compass Lexecon	512,466			
	KPMG	572,173	650,739		
	Deloitte	107,555			
Party expenses (including applicable taxes)	Travel and related costs of the witnesses and party representatives		3,093	3,229,480	47,058

B. The Respondents' Position

770. In their initial submissions on costs, the Respondents maintain that as the successful Party, they would be entitled to recover of all their costs of the Arbitrations. In this regard, the Respondents submitted that tribunals have applied the principle of "costs follow the event" toward the successful party all or a portion of its costs.[841] Where a claimant prevails on some, but not all, of its claims, the Respondents say that tribunals typically take into account the relative success of the parties' respective claims and defences in allocating costs.[842]

771. The Respondents argued that should they prevail in the Arbitrations, there is no reason to depart from the principle of costs following the event. The Respondents contest the Claimants' allegations with respect to their response to document production requests, the timing and scope of their expert evidence and their counterclaims.[843] The Respondents also submitted that the Claimants should be ordered to bear at least part of the Respondents' costs, regardless of the outcome of the Arbitrations, because the Claimants caused the dispute to be unnecessarily complex and costly by:

[841] Respondents' Submission on Costs, dated 16 January 2020, ¶¶ 3-6; Respondents' Reply Submission on Costs, dated 30 January 2020 ("**Respondents' Reply on Costs**"), ¶¶ 2-4.

[842] Respondents' Submission on Costs, ¶ 7.

[843] Respondents' Reply on Costs, ¶¶ 5-13.

commencing three arbitrations against the Respondents; bringing duplicative contract and treaty claims based on the same underlying facts and challenged measures; and purporting to justify the difference between their duplicative contract and treaty claims by bringing a series of meritless treaty claims.[844]

772. The Respondents also say that the Claimants increased the costs of document production by their overbroad requests for documents to support meritless claims.[845] The Respondents also complained that the Claimants did not answer their full case from the beginning, as alleged, but, rather, raised new arguments in Peer's direct presentation at the hearing which required the Respondents to compel leave to submit additional evidence from Dr. Moselle.[846]

773. The Respondents also argued that the Claimants' costs are unreasonable. In this regard, they say that the Claimants' decision to bring duplicative contract and treaty claims greatly increased their costs, which the Respondents should not be required to bear. The Respondents also challenged the costs claimed with respect to the expert reports filed by Dr. Abdala and Mr. Delamer for the preparation of three expert reports in respect of the Claimants' very small claim in connection with the volatility of Telasi's Purchase Portfolio.[847] The Respondents changed their primary position in their updated submissions on costs in which it maintains that the Parties should each bear their own costs. The Respondents say that irrespective of the Claimants' partial success in the SCC Arbitration,

[844] Respondents' Reply on Costs, ¶¶ 14-17.

[845] *Id.*, ¶ 18.

[846] *Id.*, ¶ 19.

[847] *Id.*, ¶ 23. The Respondents say that the Claimants claimed USD 512,466 in expert fees and expenses in respect of a claim for USD 13,000. The Respondents say that the costs in question are unreasonable and should not be borne by them irrespective of the Tribunal's findings. The Respondents also challenged the claim for costs incurred by Deloitte, which did not specify how they related to the Arbitrations. The Respondents say that any costs incurred in respect of Deloitte's preparation of Annual Independent Reports on Telasi Performance Indicators was required under the 2013 Memorandum and would have been incurred by Telasi in any event. *See* Respondents' Reply on Costs, ¶ 24.

they should not be made to bear the Claimants' costs in the two arbitrations. In this regard, the Respondents say that the Parties' disputes were caused in part by the unclear wording of the 2013 Memorandum and the difficulty in its interpretation. Further, the Claimants did not prevail on all of their claims while the Respondents' prevailed on their counterclaim.[848]

774. The Respondent also says that the Claimants unnecessarily complicated the quantum phase of the SCC Arbitration. After having presented their damages claim in the amount of USD $199.5 million dollars at the hearing, the Claimants maintained a claim for damages amounting to USD $205 million after the Tribunal had found in the Respondents' favour with respect to several issues in the Partial Award on Liability. Therefore, the Claimants' updated damages calculations did not properly take the findings in the Partial Award on Liability into account.[849]

775. In addition, the Tribunal found in the Respondents' favour on the great majority of the disputed issues in the First and Second Partial Awards on Damages.[850] The Respondents say that in similar circumstances, arbitral tribunals have held costs of the proceeding should be shared equally between the parties and that the parties should bear their own legal fees and expenses.[851] The Respondents also maintain that an equal apportionment of costs is particularly appropriate in the circumstances of these Arbitrations in which the Claimants caused the disputes to be unnecessarily complex and costly. In this regard, the Respondents refer to: the Claimants commencement of three separate arbitrations against the Respondents and bringing duplicative contract and treaty claims based on the same underlying facts and measures; the Claimants' compelling the Respondents to expend an inordinate amount of time and resources to rebut the Supplemental Claims in the ICSID

[848] Respondents' Additional Submissions on Costs and Interest, ¶¶ 6-9.

[849] *Id.*, ¶ 10.

[850] *Id.*, ¶ 11.

[851] *Id.*, ¶ 12 and the sources cited there.

Arbitration which were largely unsubstantiated by any evidence; and the Claimants' use of document production to fish for non-existent evidence to support their meritless Supplemental Claims.[852]

776. For these reasons, the Respondents maintain that they should not have to bear any of the Claimants' costs and request that the Tribunal order the costs of the proceedings to be shared equally between the Parties and that each Party bear its own legal fees and other costs.

The Respondents provided an updated Statement of Costs as follows: [853]

Category	**Amount as at 31 December 2019**	**Additional Amount as at 30 June 2022**	**Total**
White & Case LLP Legal Fees	USD 6,175,059	USD 889,983.70	USD 7,065,042.7
White & Case LLP Expenses	USD 103,865.08	USD 3,245.63	USD 107,110.71
Ministry of Justice Costs	GEL 80,577.79	GEL 17,694.50	GEL 88,272.29
Dr. Moselle's Fees and Expenses	USD 1,462,244.81	USD 513,420.6	USD 1,975,665.41
Prof. Turava's Fees and Expenses	USD 9,000	/	USD 9,000
Prof. Tercier's Fee and Expenses	EUR 8,880	/	EUR 8,880
SCC Costs	EUR 42,845	/	EUR 42,845
ICSID and Tribunal Costs	/	/	To be determined by ICSID in due course

[852] Respondents' Additional Submissions on Costs and Interest, ¶ 13.

[853] *Id.*, ¶16. Footnotes omitted. These costs and expenses are in addition to the Tribunal's fees and expenses, the fees and expenses of Professor Tercier, and the administrative charges of ICSID and of SCC. The Respondents reserve their right to update their Statement of Costs should further significant costs be incurred after 30 June 2022, including, for example responding to the Claimants' applications seeking to add certain documents to the record.

C. The Tribunal's Analysis

777. Having carefully reviewed the Parties' submissions on costs and considered their conduct of the Arbitration, the outcome of the various disputes addressed in the Partial Award on Liability, the First and Second Partial Awards on Damages and this Final Award in the SCC Arbitration as well as the outcome of the dispute in the ICSID Arbitration, the Tribunal finds that the Parties should share the cost of the proceedings equally and that each Party should bear its own legal fees and other costs.

778. In the Tribunal's view, as in the case of the SCC Arbitration, success in this arbitration has been mixed. While the Claimants have succeeded in obtaining a substantial award, it is significantly less than they claimed. Further, the Respondent has been successful in its counterclaim and with respect to a number of contested issues related to the calculation of damages.

779. With respect to the Parties' conduct of the Arbitrations, they pursued their claims and defences vigorously, but did not exceed the bounds of appropriate, diligent conduct, particularly in light of the complexity of the issues in Arbitrations.

780. The estimated costs of these arbitration proceedings, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Mr. Henri C. Alvarez KC	257,671.06
Professor Stanimir Alexandrov	111,813.77
Professor Zachary Douglas KC	119,823.83
Professor Horacio Grigera Naón	5,625.00
Assistant Elsa Sardinha's fees and expenses	69,521.00
ICSID's administrative fees	252,000.00
Direct expenses	92,878.97
Total	**909,333.63**

The above costs have been paid out of the advances made by the Parties in equal parts. As a result, each Party's share of the costs of arbitration amounts to USD 454,666.815.

781. The costs of the arbitration have been paid out of the advances made by the Parties, which will be reflected in ICSID's final financial statement.

XI. CONCLUSIONS

782. For the reasons set out above, the Tribunal:

(a) Declares that by failing to observe its obligations with regard to Silk Road's and Gardabani's investments, the Respondent has breached Article 3(4) of the BIT;

(b) Declares that it has jurisdiction over the Respondent's counterclaim for its share of the Target Investment Allowance that Silk Road accumulated between 1 April 2013 and 2 September 2015;

(c) Orders the Respondent to pay to Silk Road USD 48,427,000;

(d) Orders the Respondent to pay to Gardabani USD 27,499,000;

(e) Orders that the amounts awarded in sub-paragraphs (c) and (d) are subject to any payments made by the Respondents to the Claimants in the SCC Arbitration and the express undertaking of the Claimants not to seek double compensation;

(f) Declares the amounts awarded in paragraphs (c) and (d) above are awarded on an after-tax basis

(g) Orders the Respondent to indemnify the Claimants for any taxation liability that may arise in Georgia in relation to the amounts awarded in paragraphs (c) and (d), above;

(h) Awards the Claimants simple interest on the amounts awarded in paragraphs (c) and (d), above, at the six-month USD SOFR rate plus 2% from 24 December 2021 until payment in full;

(i) Orders that the Parties shall share equally the costs of the Arbitration and bear their own legal costs and other expenses; and

(j) Denies all other claims.

Professor Stanimir Alexandrov
Arbitrator

Date: 27 OCT 2022

Professor Zachary Douglas KC
Arbitrator
Subject to the attached Dissenting Opinion

Date:

Mr. Henri C. Alvarez KC
President of the Tribunal

Date:

Professor Stanimir Alexandrov
Arbitrator

Date:

Professor Zachary Douglas KC
Arbitrator
Subject to the attached Dissenting Opinion

Date: 27 OCT 2022

Mr. Henri C. Alvarez KC
President of the Tribunal

Date:

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Date: 27 OCT 2022