THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE

GARDABANI HOLDINGS B.V.
INTER RAO UES PJSC
TELASI, JSC

Claimants

v.

GEORGIA
MINISTRY OF ECONOMY AND SUSTAINABLE DEVELOPMENT OF GEORGIA
STATE SERVICE BUREAU LTD

Respondents

SCC Arbitration V2018/039,
administered by ICSID as ICSID Case No. ADM/18/1

PARTIAL AWARD

Members of the Tribunal

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

Assistant to the Tribunal

Ms. Elsa Sardinha

ICSID Legal Counsel

Mr. Alex Kaplan

Date of dispatch to the Parties: 19 April 2021

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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; [redacted] (C-0005 / R-0015)
2010 Memorandum	1 October 2010 non-binding memorandum of understanding between Inter RAO and the Government; [redacted] -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; [redacted] (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; [redacted] 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, [redacted] (C-0034 / R-0028)
2011 Methodology	8 June 2011 NERC's Methodology for Electricity Tariff Calculation (CL-0081)

Abbreviation	Definition
2014 Amended Methodology	10 August 2017 NERC Resolution No. 20 substantially amended the 2014 Methodology
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
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 [redacted] 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)

Abbreviation	Definition
Energo-Pro	Energo-Pro is one of Georgia's three electricity distributors, along with Telasi and Kakheti
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
[redacted]	[redacted]
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)
[redacted]	[redacted]
[redacted]	[redacted]
GSE	Georgian State Electrosystem; State-owned entity which has been designated as the transmission system operator (TSO)

Abbreviation	Definition
[redacted]	[redacted]
[redacted]	[redacted]
HPPs	Hydropower plants
ICSID Claimants	Collectively Silk Road and Gardabani
ICSID Respondents	Collectively the Government of Georgia, Ministry of Economy, and State Service
Inter RAO	Inter RAO UES, PJSC
[redacted]	[redacted]
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 [redacted] (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 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

Abbreviation	Definition
NERC Annual Energy Plan	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)
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)
[redacted]	[redacted]
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; 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)

Abbreviation	Definition
[redacted]	[redacted]
[redacted]	[redacted]
SCC Claimants	Collectively Inter RAO, Telasi and Gardabani
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 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
[redacted]	[redacted]
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
[redacted]	[redacted]
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, 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

Abbreviation	Definition
	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
Vardnili	Vardnili HPP LLC, along with Enguri, are the two largest HPP generation companies in Georgia and are state-owned
WACC	Weighted Average Cost of Capital
WAPT	Weighted Average Purchase Tariff

DRAMATIS PERSONAE

Messrs Manuel A. **Abdala** & Julian **Delamer**	The Claimants' regulatory experts on the issues of the regulatory changes in the allocation of Telasi's electricity purchases; submitted three expert reports: First Abdala & Delamer Expert Report, dated 27 June 2018 ("**Abdala & Delamer I**"); Second Abdala & Delamer Expert Report, dated 1 March 2019 ("**Abdala & Delamer II**"); Third Abdala & Delamer Expert Report, dated 16 September 2019 ("**Abdala & Delamer III**")
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[redacted]	[redacted]
[redacted]	[redacted]
Dr. Boaz **Moselle**	The Respondents' expert on damages; submitted four expert reports: First Expert Report, 23 November 2018 ("**Moselle I**"); Second Expert Report, 13 June 2019 ("**Moselle II**"); Third Expert Report, 22 November 2019 ("**Moselle III**"); Fourth Expert Report, 10 January 2020 ("**Moselle IV**")
Mr. Michael **Peer**	The Claimants' expert on damages; submitted four expert reports: First Expert Report, 27 June 2018 ("**Peer I**"); Second Expert Report, 1 March 2019 ("**Peer II**"); Third Expert Report, 6 September 2019 ("**Peer III**"); Fourth Expert Report, 19 December 2019 ("**Peer IV**")
Dr. Boaz **Moselle** and Mr. Michael **Peer**	Dr. Boaz Moselle and Mr. Michael Peer submitted joint expert report on 3 October 2019 ("**JER**").
[redacted]	[redacted]
Dr. Paata **Turava**	The Respondents' Georgian law expert, particularly on the legal nature of the two contracts at issue in the Arbitration, the principles of contractual interpretation applicable to public law contracts, and the entitlement to lost profits under Georgian law; submitted two expert reports, dated 20 November 2018 and 12 June 2019
[redacted]	[redacted]

	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

I. INTRODUCTION

1. This 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]

2. This is one of two arbitrations whose procedure the Parties have agreed to coordinate. This arbitration is referred to as the "**SCC Arbitration**".

3. The other 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**"). That arbitration is referred to as the "**ICSID Arbitration**".

4. 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

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[1] C-0034 (Claimants' Translation) / R-0028 (Respondents' Translation), Memorandum on the Development of Cooperation in the Electric Power Sector and the Implementation of Previous Agreements between (1) Government of Georgia, (2) Partnership Fund JSC and (3) OJSC "INTER RAO UES", (4) Telasi JSC (5) Mtkvari Energy LLC, (6) Khrami HPP-1 JSC, and (7) Khrami HPP-2 JSC dated 31 March 2013 ("**2013 Memorandum**"), Clause 9, [redacted]

[2] C-0016, Sale and Purchase Agreement on 100% of Shares of the Joint Stock Company "Khrami HPP-1" and 100% of Shares of the Joint Stock Company "Khrami HPP-2"between (1) Government of Georgia, (2) Ministry of Economy and Sustainable Development of Georgia, (3) State Service Bureau LTD and (4) COMPANY "Gardabani Holdings B.V." dated 12 April 2011 ("**Khrami SPA**"), Clause 8, [redacted]

with Georgia since 1998 (to which the Claimants' parent company acceded in 2003). [redacted]

5. [redacted] 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. [redacted] The Treaty claims will be addressed in a separate award (the "**ICSID Award**", in ICSID ARB/17/29, referred to below).

6. The Respondents deny that the impugned actions breach the relevant Georgian law contracts, the BIT or international law. [redacted]

[redacted]

7. The Respondents raise a counterclaim in each of the disputes,[3] [redacted]

II. THE PARTIES

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

A. ICSID CASE NO. ARB/17/29 (THE "ICSID ARBITRATION")

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

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[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*.

[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 JSC (a Georgian state-owned company); 0.36% is freely floated on Georgian Stock Exchange.

[6] Telasi's address under the 2013 Memorandum is: 3 Vani Street, Tbilisi 0119, Georgia.

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")

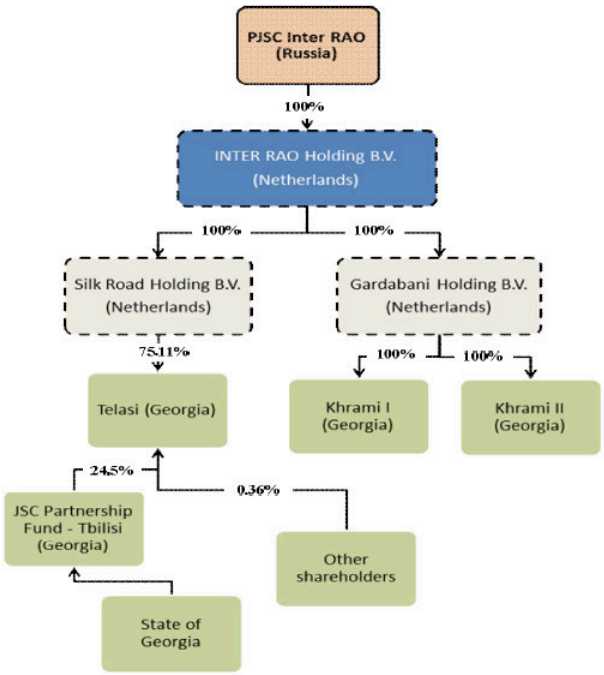
12. The parties to the SCC Arbitration, which are the subject of this Award, are as follows: the Claimants are **Inter RAO**, **Gardabani**, and **Telasi**, described above. Inter RAO owns an indirect 100% interest in Gardabani and an indirect 75% interest in Telasi.

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:

[7] Inter RAO's address is: 27, Bolshaya Pirogovskaya Street, Building 2, 119435, Moscow, Russia; 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 0114, Georgia.



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 OF THE PROCEEDINGS

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, Ministry of Economy and Sustainable Development of Georgia and 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, QC 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, QC as their party-appointed arbitrator and confirmed the agreement between the Parties that Mr. Henri Alvarez, QC be appointed as chairperson of the Tribunal.

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

B. THE COORDINATED ICSID PROCEEDING

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 QC, 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 QC, 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 ICSID Tribunal.

C. THE COORDINATED SCC AND ICSID PROCEEDINGS

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 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, 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.

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[9] Letter of February 14, 2018, jointly signed by Mr. Noah Rubins of Freshfields Bruckhaus Deringer LLP and Mr. Charles Nairac of White & Case LLP.

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:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- Expert Report of Mr. Michael Peer of KPMG ("**Peer I**"), with Annexes MP-0001 through MP-0641;[10]
- Expert Report of Mr. Manuel A. Abdala and Mr. Julian Delamer of Compass Lexecon ("**Abdala & Delamer I**"), with Annexes MAJD-0001 through MAJD-0014;
- 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:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- Expert Report of Dr. Boaz Moselle of Compass Lexecon ("**Moselle I**"), with Exhibits BM-0001 through BM-0023;
- Legal Opinion of Dr. Paata Turava (both English and Georgian versions), with Exhibits PT-0001 through PT-0014;

- 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 "**Claimants' Reply**"), accompanied by:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- Second Expert Report of Mr. Manuel A. Abdala and Mr. Julian Delamer of Compass Lexecon ("**Abdala & Delamer II**"), with Exhibits MAJD-0015 through MAJD-0191;
- Second Expert Report of Mr. Michael Peer of KPMG dated 1 March 2019 ("**Peer II**"), with Exhibits MP-0066 through MP-0962;
- 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 Respondents 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 Respondents 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 Respondents 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 Respondents 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 Respondents submitted their 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 Respondents' response on 2 May 2019; and the Respondents submitted their 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 Respondents filed their Rejoinder (the "**Respondents' Rejoinder**"), accompanied by:

- [redacted]
- [redacted]
- [redacted]
- [redacted]

- Second Expert Report of Dr. Boaz Moselle of Compass Lexecon ("**Moselle II**");
- Second Legal Opinion of Dr. Paata Turava (both English and Georgian versions);
- Amended translation of Exhibit R-0028;
- Exhibits R-0068 through R-0096;
- Amended Legal Authorities RL-0001 through 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 at the hearing to address quantum issues at the hearing, given the alleged new submissions of the Respondents' quantum expert at the close of the written procedure. On 1 August 2019, the Respondents 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**").

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 QC	President
Professor Stanimir Alexandrov	Arbitrator
Professor Zachary Douglas QC	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	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:	

[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
Witnesses and Experts:	
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
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:	
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

Witnesses and Experts:	
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]
Dr. Boaz Moselle	Compass Lexecon
Ms. Ruxandra Cuipagea	Compass Lexecon

60. On 22 November 2019, the Respondents 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 ("**Peer IV**") in response on behalf of the Claimants.

61. On 10 January 2020, Dr. Boaz Moselle submitted his fourth expert report ("**Moselle IV**") on behalf of the Respondents.

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

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

64. 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 decided that the Award in the SCC proceeding shall be rendered by 29 January 2021.

IV. FACTUAL OVERVIEW

A. OVERVIEW OF GEORGIA'S ELECTRICITY SECTOR

65. Since its independence in 1991 after the collapse of the Soviet Union 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.[11] Telasi provided electricity during this phase, but widespread shortages were common.

66. 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.[12] 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.[13] While these efforts improved 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.[14]

67. Georgia's 1999 Law on Electricity and Natural Gas (the "**Law on Electricity**") defines the legal framework for water, electricity and natural gas production and distribution in Georgia.[15] The Law on Electricity allocated the ownership, commercial and regulatory functions in the power sector between the Ministry of Energy ("**MOE**") and what would later become the Georgian National Energy and Water Supply Regulatory Commission ("**NERC**").

68. 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.[16]

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

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

[13] 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).

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

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

[16] CL-0073 / RL-0001, Law on Electricity, Arts. 1(3)(a), 3(1), 3(2).

69. 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.[17] The law gives NERC exclusive competence to adopt tariff-setting methodologies and set tariffs in accordance with those methodologies.[18]

70. 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.[19] NERC is headed by a chairperson and four commissioners who adopt 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.[20] 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.[21]

71. In respect of 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.*[22]

72. NERC is one of two independent regulatory authorities operating in Georgia.[23] The Law on INRAs establishes NERC's "independence … from political pressure of any kind, from

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17 CL-0073 / RL-0001, Law on Electricity, Arts. 1(3)(e), 43.

18 CL-0073 / RL-0001, Law on Electricity, Art. 4(5)(b).

19 Law on INRAs, RL-0004, Arts. 4(3), 17; NERC's Resolution No. 6, 6 March 2014, R-0003, Arts. 1(2), 1(3) (NERC's functional independence is affirmed in its Charter). Financial independence, *see* CL-0073 / RL-0001, Law on Electricity, Arts. 19, 20: 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.

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

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

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

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

improper influence and illegal interference of State Authorities or other persons, as well as from any acts as may infringe on their independence".[24] "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.*[25]

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.*[26]

73. 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, 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 ("**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

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

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

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

estimate of electricity imports and exports, and a forecast of total electricity sales by each distribution company.[27]

1) Organization of Georgia's Electricity Sector

74. The basic elements of Georgia's electricity supply chain consist of:[28]

- generation of electricity by power plants
  - there are over 80 State-owned and privately-owned generation companies; 80% of which are hydropower plants ("**HPPs**"), 20% are thermal power plants ("**TPPs**")[29]
- 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

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

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

[29] 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).

into the network by generators and importers which is not purchased under direct agreements with distributors.

75. 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.[30]

76. Telasi is both a distributor and a supplier of electricity.

77. 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.[31] The price at which ESCO/COPS sells its electricity is usually higher than that of generation companies such as the Khrami Companies.

78. 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.[32] Enguri alone produces 31% of the total generation capacity in Georgia. In comparison, the Khrami Companies produce 7% of Georgia's generation capacity.[33]

79. 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 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. Energy supply agreements between generators (sellers) and distributors (buyers) must be registered with the GSE.

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

[31] Claimants' Memorial, ¶ 17(c).

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

[33] Moselle I, ¶ 4.10.

2) Georgia's Tariff System

80. 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.

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

82. 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. A distributor's Consumer Tariffs effectively comprise the sum of the WAPT and the Distribution Tariff, both discussed next.

83. 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 expensive sources of energy for the year. 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 NERC effectively controls the WAPT of each distribution company.[34]

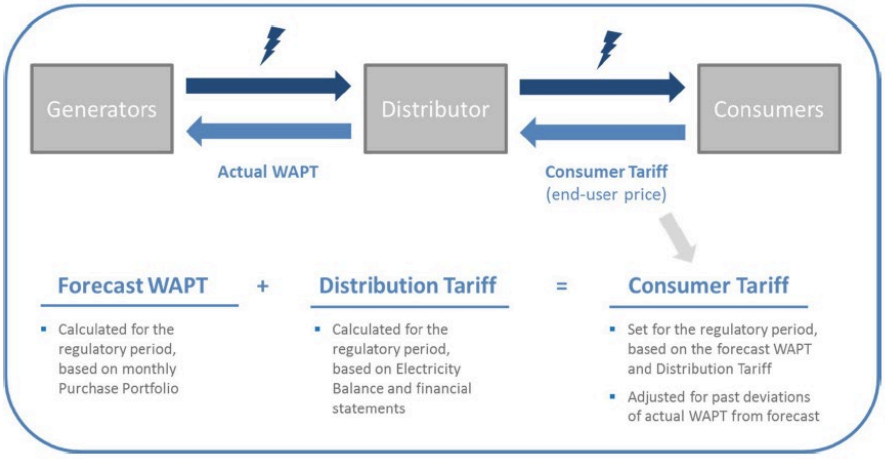
84. The Claimants explain that the "**Distribution Tariff**" (or "**Distribution Margin**") is the difference between the amount the distributor pays to acquire electricity it is going to distribute and the amount it can charge its customers, which results in the profit.[35] It is computed for different voltage levels as the distributor's forecast per unit cost, calculated on a regulated basis. NERC's methodology in force at any given point provides guidelines as to how to compute each component

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

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

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,[36] as opposed to the rates charged to customers.

85. The Claimants' economic experts summarize the relationship between the different tariffs as follows:[37]



86. The Respondents' damages expert summarizes the building blocks of the Consumer Tariff as follows:[38]

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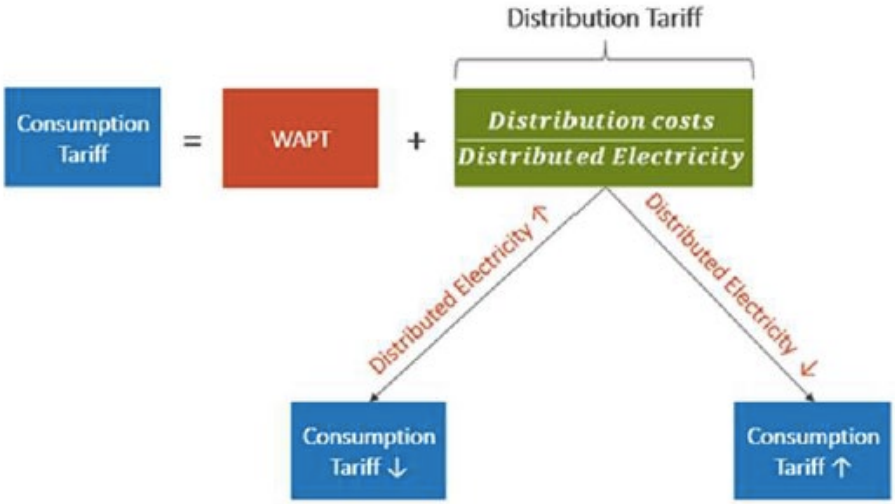
36 1 tetri is equal to 0.001 GEL (Abdala & Delamer I, fn 16). "tetri" is a fractional currency used only in Georgia since 1995.

37 Abdala & Delamer I, Compass Lexecon Report, p. 10, Figure I; Claimants' Memorial, ¶ 19.

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



87. When 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.

88. The Claimants say that because NERC can set tariffs and control the actual WAPT, it controls the financial viability of energy generation and distribution companies in Georgia.[39]

89. Distribution companies' (and generation companies')[40] purchase portfolios are set as follows:

- Before the start of each year, the GSE prepares, and the MOE approves, the Annual Electricity Balance (described above at paragraph 74). Based on the Annual Electricity Balance, the NERC prepares its Annual Energy Plan. In practice, 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.[41] The Claimants

[39] Claimants' Memorial, ¶ 21.

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

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

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.[42]

- Based on 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.[43]
- Next, a distribution company (i.e. Telasi) concludes electricity supply agreements directly with generators. Agreements are concluded on the basis of 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.[44]
- The agreements come into effect only upon registration by the GSE.[45]
- 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.[46]
- 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.[47]

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42 Claimants' Memorial, ¶ 22(a).

43 Claimants' Memorial, ¶ 22(b).

44 Claimants' Memorial, ¶ 22(c).

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

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

47 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.

- 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.[48]
- 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.[49] Consequently, a 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

90. 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**").[50]

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[48] Claimants' Memorial, ¶ 22(g).

[49] Claimants' Memorial, ¶ 22(h).

[50] Share Sale and Purchase Agreement between Georgia and AES Silk Road Holdings, 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.

91. On the same date, NERC issued a resolution regarding the approval of methodology, rules and procedures of setting electricity tariffs ("**1998 Methodology**").[51]

92. In 1999, AES also acquired the management rights for the Khrami Companies for 25 years (the "**Khrami Management Agreement**").[52] In 2003, AES changed its name to Silk Road Holdings B.V., after being acquired by the Inter RAO group.

93. 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 operate at full capacity. To support the rehabilitation of Khrami-2, Georgia transferred its Japanese bank loans [redacted] to AES on the condition that AES would repay them by 2025 (by the end of the 25-year Khrami Management Agreement).[53]

C. INTER RAO'S 2003 ACQUISITION OF TELASI AND MANAGEMENT RIGHTS FOR THE KHRAMI COMPANIES

94. 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;[54]
- the shares of AES Georgia, which held management rights for the Khrami Companies [redacted] under the Khrami Management Agreement; and
- the shares of AES Gardabani, which wholly owned AES Mktvari (a Georgian TTP).

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[51] NERC Resolution No. 3, dated 1 July 1998 "On Approval of the Rules and Procedures for Establishing a Methodology for Electricity Tariffs", 1 July 1998, RL-0007, "invalidated by [NERC] Resolution No. 8, 06/08/2011".

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

[53] *See* Khrami Management Agreement, C-0002, Clauses 3.3, 3.4, 5.3.

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

95. 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.[55]

96. 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 [redacted] 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.[57] 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.[58]

97. 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.[59]

98. 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.[60] Under the

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55 News article, 1 September 2003, R-0005; Respondents' Counter-Memorial, ¶ 43.

[redacted]

57 Agreement between Georgia, JSC Telasi and LLC Mtkvari-Energy, 23 September 2005, R-0008.

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

59 [redacted]

60 Claimants' Memorial, ¶ 28; Respondents' Counter-Memorial, ¶ 44.

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.[61]

99. 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). [redacted]

100. The Telasi SPA [redacted]

101. The Telasi SPA [redacted]

[redacted]

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

[redacted]

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102. By about 2006, [redacted], it became apparent that new arrangements were necessary for Telasi [redacted] 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. NERC'S 2006 ADJUSTMENT OF TELASI'S TARIFFS

103. In late 2005, 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.

104. In April 2006, Telasi applied to NERC for a 12 tetri/kWh upward adjustment of its Distribution Tariffs [redacted] to recover losses incurred between 1999 and 2005 [redacted].[67]

105. In May 2006, NERC held a public hearing to discuss the results of its tariff system revision and Telasi's application.[68] 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".[69] The NERC stated that these changes had resulted in a 61% increase in the WAPT paid by distribution companies to generation

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65 Claimants' Memorial, ¶ 31; Respondents' Counter-Memorial, ¶ 45.

[redacted]

67 Telasi Tariff Application, 11 April 2006, R-0010, Annex 1.

68 NERC Hearing No. 13 Minutes, 11 May 2006, R-0011, p. 2.

69 NERC Hearing No. 13 Minutes, 11 May 2006, R-0011, p. 2; E[redacted]

companies.[70] [redacted] endorsed NERC's proposed increase in the WAPT.[71]

106. 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. [72] 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, GEL 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 NERC in 2003.[73] [redacted]

107. 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, including the setting of various tariffs, including long-term pre-fixed tariffs (the "**2006 Energy Policy**").[75]

108. Shortly thereafter, Telasi asked the MOE to agree a new tariff policy for Telasi [redacted]

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

71 NERC Hearing No. 13 Minutes, 11 May 2006, R-0011, p. 4; [redacted] *see* Respondents' Counter-Memorial, ¶ 56.

72 NERC Resolution No. 15, 15 May 2006, R-0014, Art. 7.

73 Explanatory Note to Energy Commission Draft Resolution on Electricity Tariffs, R-0013, p. 1; NERC Hearing No. 13 Minutes, 11 May 2006, R-0011, p. 3; [redacted]

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

[redacted]

109. [redacted]

E. THE 2007 MEMORANDUM

110. 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**").[78] The 2007 Memorandum provided for, *inter alia*:

- [redacted]

- [redacted]

- [redacted]

  [redacted]

  [redacted]

[redacted]

[78] 2007 Memorandum, 20 June 2007, between Georgia and Inter RAO, C-0005 / R-0015; Claimants' Memorial, ¶¶ 33-35; Claimants' Reply, ¶¶ 23, 33; Respondents' Rejoinder, ¶ 17; Counter-Memorial, ¶¶ 63-71.

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118. 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".[88]

119. 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."[89] According to [redacted], this resolution "simply grant[ed] the NERC discretion to take such contractual tariff arrangements into account in setting tariffs."[redacted]

120. 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.[91]

F. IMPLEMENTATION OF THE 2007 MEMORANDUM: NERC RESOLUTION NO. 33

121. 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.[92] 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

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88 Government Decree No. 654, 8 November 2007, R-0016.

89 CL-0092, 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**").

[redacted]

[redacted] Respondents' Counter-Memorial, ¶ 77.

92 R-0017, 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 Georgi, 24 September 2008, p. 2.

resolution ("**NERC Resolution No. 33**").[93] 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.[94]

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

122. These tariff rates applied independently of NERC's 1998 Methodology which was still in effect at the time and provided for a different methodology for setting and adjusting the tariffs.[95]

G. THE 2010 MEMORANDUM

123. 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.[96] [redacted] To that end, in October 2010, the MOE and Inter RAO signed a two-year non-binding memorandum of understanding (the "**2010**

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

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

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

[96] [redacted] Respondents' Counter-Memorial, ¶ 78.
[redacted]

Memorandum").[98] 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.[99] [redacted]

124. 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

125. 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 Memorandum on the Development of Cooperation in the Electric Power Sector and the Implementation of Previous Agreements (the "**2011 Memorandum**").[101] The Memorandum addressed both Telasi and the Khrami Companies.

126. The 2011 Memorandum covered the period [redacted]

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98 C-0006 (Claimants' Translation) / R-0018 (Respondents' Translation), 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**").

99 C-0006 / R-0018, 2010 Memorandum, Clause 1.

100 [redacted]

101 C-0015 (Claimants' Translation) / R-0019 (Respondents' Translation), 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**"); Claimants' Reply, ¶¶ 32-33; Respondents' Rejoinder, ¶ 18; Counter-Memorial, ¶¶ 78-94.

[redacted].

1) Telasi's Tariffs

127. [redacted]

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131. 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 pursuant to the Khrami SPA to be agreed between the Parties. The Memorandum also recorded the 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.[108]

132. The 2011 Memorandum fixed Telasi's Distribution Tariffs at 7.89 tetri/kWh [redacted]

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2) The Khrami Companies

136. Clauses [redacted] 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:[114]

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

137. These tariffs were to apply from the date of signature of the 2011 Memorandum until 31 December 2025. [redacted] 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.

[114] C-0015 / R-0019, 2011 Memorandum, [redacted].

138. 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.[116] This provision was necessary because of the Khrami-2 JPY-denominated loan, which was paid out of Khrami-2's GEL-denominated revenues.[117] 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.[118] [redacted]

139. The relevant provisions provided as follows:[120]

> *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 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*

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116 C-0015 / R-0019, 2011 Memorandum, Clause 2.5.1.

117 C-0015 / R-0019, 2011 Memorandum, Clause 2.5; C-0016, Khrami SPA, Annex 1, Clause 2.1. [redacted]

118 C-0015 / R-0019, 2011 Memorandum, Clause 2.5.2.

119 Claimants' Memorial, ¶ 52(b).

120 C-0015 / R-0019, 2011 Memorandum, Clauses 2.5.1-2.5.3.

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

140. 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 [redacted].[121] [redacted]

[121] Decree of the Government of Georgia No. 750, 11 April 2011, R-0062; C-0016, Khrami SPA. [redacted]

[redacted]

141. The Khrami SPA also provides that:

[redacted]

142.

[redacted]

J. IMPLEMENTATION OF TELASI AND THE KHRAMI COMPANIES' TARIFFS UNDER THE 2011 MEMORANDUM AND THE KHRAMI SPA: NERC RESOLUTION NO. 5

143. On 7 April 2011, 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.[125] 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.

144. [redacted] 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

[124] C-0016, Khrami SPA.

[125] CL-0080, NERC Resolution No. 5 on Amendments to NERC Resolution No. 33 dated 4 December 2008, 7 April 2011 ("**NERC Resolution No. 5**"). 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.

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:[126]

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

145. 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**").[127]

146. 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.*

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

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

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

148. 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.[128] 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.[129] According to the Respondents, Article 27 of the 2011 Methodology provided a transitional regime for that Methodology only.[130] 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.[131]

L. [redacted]

[redacted]

[128] Claimants' Memorial, ¶ 90.

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

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

[131] *See* Respondents' Counter-Memorial, ¶ 159.

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M. THE NEGOTIATIONS LEADING UP TO THE CONCLUSION OF THE 2013 MEMORANDUM

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1) The 2012 Transitional Memorandum

175. The Parties negotiated a transitional memorandum.

176. On 26 December 2012, the Parties concluded a transitional memorandum, (the "**2012 Transitional Memorandum**").[191]

178. On 27 December 2012, NERC implemented the tariffs agreed in the 2012 Transitional Memorandum through a resolution ("**NERC Resolution No. 23**").[193]

[191] 2012 Transitional Memorandum, C-0030. Claimants' Reply, ¶ 48; Respondents' Counter-Memorial, ¶ 129.

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

[redacted]

2) The 2013 Memorandum

180. 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.[195] It [redacted] sets out long-term tariff regimes for Telasi and the Khrami Companies.

[redacted]

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

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

183. 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**").[197] 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.

[197] CL-0083, NERC Resolution No. 3 on Amendments to NERC Resolution No. 33 dated 4 December 2008, 3 April 2013 ("**NERC Resolution No. 3**"); Tr. Day 1 (Claimants' Opening Statement), 39:19-23.

[redacted]

4) Telasi's Consumer and Distribution Tariffs

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10) The Khrami Companies' Generation Tariffs

[redacted]

11) [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

N. THE 2014 METHODOLOGY FOR SETTING ELECTRICITY TARIFFS

208. 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.[215] 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.[216] The steps leading to the adoption of the 2014 Methodology included the following.

209. 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.[217] The Respondents acknowledge that at this early stage of the process, the outcome of the project was not known, but

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

[216] CL-0084, 2014 Methodology.

[217] EC Press Release, 26 October 2012, R-0030;

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."[218]

210. It appears that there was some discussion of the Twinning Project and NERC's plan to revise its tariff setting methodology during the negotiations of the 2013 Memorandum.[219]

211. On 19 December 2013, the NERC hosted a discussion [redacted] to discuss the updating of the existing tariff methodology and integrating quality supply practices from other energy regulatory authorities.[220]

212. 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 a good climate investments it noted, noting that the calculation method being proposed resulted from discussions of the December 2013 roundtable with Georgian market players.[221]

213. By the end of March 2014, Inter RAO and Telasi received a Russian translation of a draft of the 2014 Methodology.[222]

214. On 14 May 2014, at the Twinning Initiative's final conference, the NERC' [redacted] 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.[223]

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

219 [redacted]

220 Summary of Roundtable, 19 December 2013, R-0034, p. 2; EC Press Release, 24 December 2013, R-0035.

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

222 [redacted]

223 [redacted] EC Press Releases, 13 May 2014, R-0038, 14 May 2014, R-0040; Twinning Conference Agenda, R-0039.

215. On 15 July 2014, the NERC met with electricity companies, [redacted].[224] The NERC [redacted]) presented the general principles underpinning the 2014 Methodology.

216. Finally, on 30 July 2014, the NERC adopted the 2014 Methodology at a public session attended by electricity companies, i[redacted][225]

217. 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.[226]

218. 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.[227] 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, [redacted]

1) The Relevant Provisions of the 2014 Methodology

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

Article 3

[224] NERC Hearing No. 30 Minutes, R-0042.
[225] CL-0084, 2014 Methodology; NERC Hearing No. 30 Minutes, R-0042, p. 1.
[226] Respondents' Counter-Memorial, ¶ 175.
[227] Moselle I, ¶ 5.11(b).

> *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.*
>
> *…*

220. The 2014 Methodology distinguishes between controllable operational expenses ("**OPEX**") and non-controllable OPEX, and incorporates efficiency incentives for controllable OPEX:[228]

> *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.*
>
> *…*
>
> ***Article 4***
>
> ***Tariff regulatory and tariff setting period***

[228] CL-0084, 2014 Methodology, 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.

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.

221. 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:[229]

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:

where,

$$RCB_{(t+1)} = CAPEX_{(t+1)} + cOPEX_{(t+1)} + ncOPEX_{(t+1)} + CNL_{(t+1)} + CORR_{(t+1)} \quad (1)$$

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);

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

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

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).

222. 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:[230]

Article 6

Capital Expenses

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

where,

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

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

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

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

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:

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

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.

223. 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:[231]

Article 16

Electricity Consumption Tariff

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

[231] CL-0084, 2014 Methodology, Arts. 16-17, 20, 23-26.

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:

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

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:

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

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.*[232]

224. [redacted] The Tribunal assesses the Parties' arguments in this regard under the Merits section, below.

O. 2014: [redacted]

225. [redacted] The following summarises the chronology of the principal relevant exchanges between Inter RAO and the MOE and NERC during this period.

[redacted]

[redacted]

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1) The 2015 Tariff Review Process

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[redacted] 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.[259] [redacted]

[redacted]

[redacted]

239. The NERC then initiated proceedings to review Telasi's tariffs, which involved consultations and correspondence with interested parties, including Telasi.

240. 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.[263] Telasi's Deputy Commercial Director, , and another Telasi representatives attended this meeting.[264] 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

241. On 3 September 2015, the NERC established Telasi's new Consumer and Distribution Tariffs pursuant to the 2014 Methodology, ("**NERC Resolution No. 26**").[265] The Resolution was issued at a public hearing convened by the NERC, at

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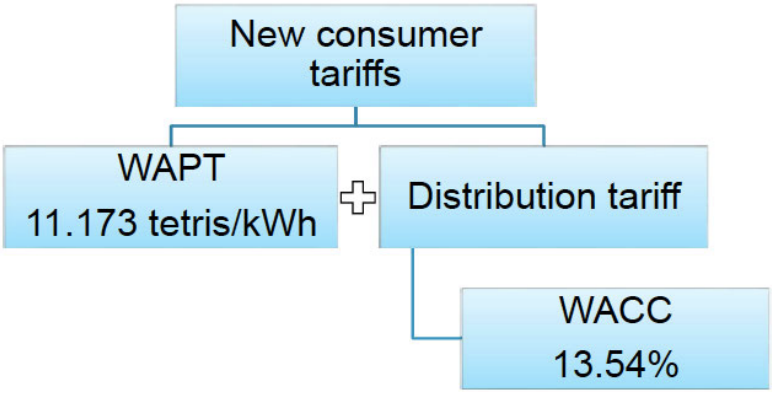
[263] NERC Hearing No. 49 Minutes, 27 August 2015, R-0045.

[264] *Ibid.*, p. 1.

[265] CL-0085, NERC Resolution No. 26 on Amendments to NERC Resolution No. 33 dated 4 December 2008, 3 September 2015 ("**NERC Resolution No. 26**"); NERC Hearing No. 51 minutes, 3 September 2015, R-0046.

which its decision and calculations were explained. The hearing was attended by Telasi's [redacted] and several other representatives from Telasi. While [redacted] raised some questions and some disagreements with NERC's calculations, there is no record that Telasi complain about the application of the 2014 Methodology.[266]

242. The new tariffs included a 30% increase to Telasi's Consumer Tariffs, as follows:[267]



243. 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.[268] [redacted]

The Head of NERC's Tariffs and Economic Analysis Department [redacted] presented the tariff review process and of NERC's calculation of the different cost components of Telasi's Consumer and Distribution tariffs (pp. 4-51)

266 CL-0085, NERC Resolution No. 26; NERC Hearing No. 51 minutes, 3 September 2015, R-0046, pp. 56-60.

267 Respondents' Opening Presentation, slide 115; Tr. Day 1, 258-259.

268 CL-0085, NERC Resolution No. 26; [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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[redacted]

[redacted]

[redacted]

246. NERC Resolution No. 3 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."*[275]

247. 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.[276]

[redacted]

[275] CL-0085, NERC Resolution No. 26, Art. 3.

[276] CL-0085, NERC Resolution No. 26; [redacted]

250. Telasi did not contest the legal basis of NERC Resolution No. 26 before the Georgian courts.

[redacted]

[redacted]

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3) The Adjustment of Telasi's Distribution Tariffs for GEL Depreciation

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269. On 21 October 2016, Telasi submitted a tariff application complaint with the 2014 Methodology

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271. On 26 December 2016, the NERC set Telasi's tariffs for 2017 pursuant to the 2014 Methodology ("**NERC Resolution No. 38**").[310]

> *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."[313]

274. Telasi did not contest the legal basis of NERC Resolution No. 38 before the Georgian courts.

275. [redacted] On 1 March 2017, Telasi notified Georgia of a dispute under the 2013 Memorandum, and reserved its rights to bring claims under the BIT.[314] On 14 April 2017, Silk Road gave a Notice of Dispute under the BIT and the Energy Charter Treaty to the Government.[315]

4) Telasi's Tariffs in 2017

276. 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 NERC to set its tariffs for 2018.[316] [redacted]

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313 CL-0086, Art. 1.

314 Notice of Dispute from Telasi to Georgia (2013 Memorandum), 1 March 2017, C-0107.

315 Notice of Dispute under Bilateral Investment Treaty and Energy Charter Treaty, 14 April 2017, C-0115.

316 Tariff Correction Application from Telasi to NERC, 4 August 2017, C-0129.

[redacted]

277. On 10 August 2017, the NERC amended the 2014 Methodology, effective from 2018 (the "**2014 Amended Methodology**").[317] The 2014 Amended Methodology altered the tariff regulation period from one to three years and set deadlines for the submission of tariff applications to 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.[318]

278. On 27 December 2017, NERC held a public hearing, which Telasi's [redacted] attended, and it fixed new tariffs for Telasi in accordance with the 2014 Amended Methodology ("**NERC Resolution No. 48**").[319] The new tariffs were effective from 1 January 2018 to 1 January 2021. [redacted]

[317] 2014 Amended Methodology, 10 August 2017, effective in 2018, CL-0088.

[318] 2014 Amended Methodology, CL-0088, Arts. 30-31

[319] CL-0091, NERC Resolution No. 48 on Amendments to NERC Resolution No. 33 dated 4 December 2008, 27 December 2017 ("**NERC Resolution No. 48**"); NERC Public hearing minutes, 27 December 2017, C-0215.

[redacted]

[redacted]

279. 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;*
>
> *c) more than 301 kWh - 19.525 tetri/ kWh.*[321]

280. Telasi did not contest the legal basis of NERC Resolution No. 38 before the Georgian courts. [redacted]

[321] CL-0091, NERC Resolution No. 48, Art. 1.

[redacted]

[redacted]

[redacted]

P. THE NON-ADJUSTMENT OF THE KHRAMI COMPANIES' GENERATION TARIFFS IN 2016

[redacted]

[redacted]

[redacted]

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[redacted]

[redacted]

286. 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.[332]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

288. Khrami-2's tariff application provided in relevant part as follows:[334]

[334] .

[redacted]	[redacted]	[redacted]

[redacted]

[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
[redacted]	[redacted]	[redacted]
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[redacted]

290. 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.[336] . The Khrami Companies did not file applications compliant with the 2014 Methodology within the five-day time limit provided.[337]

[335] Claimants' Memorial, ¶ 137.

[337] *See* Claimants' Memorial, ¶ 138.

292. 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:

> *it 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.*[339]

293. The NERC made a similar decision with respect of Khrami-2's application.[340] On 11 October 2016, NERC dismissed the Khrami Companies' tariff applications due to late submission, without considering them on the merits.[341]

[339] R-0048, NERC Hearing No. 65 Minutes, 6 October 2016, p. 2.

[340] R-0048, NERC Hearing No. 65 Minutes, 6 October 2016, pp. 2-3.

[341] NERC's Tariff Decisions:

296. 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.[344] On 14 April 2017, Gardabani wrote to the Government to provide a Notice of Dispute under the BIT and the Energy Charter Treaty.[345]

Q. THE NERC'S 2017 RESOLUTIONS ON THE KHRAMI COMPANIES' TARIFFS

[344] Notice of Dispute from Gardabani to Georgia, MOE, State Service Bureau (Khrami SPA), 1 March 2017, C-0106.

[345] Notice of Dispute from Gardabani to Georgia (BIT and ECT), 14 April 2017, C-0114. On the same date, Silk Road gave Notice of Dispute under the BIT and the Energy Charter Treaty.

[348] *See*, *e.g.*, Tr. Day 1 (Claimants' Opening Statement), 64:14-23.

[redacted]

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304. 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.[352] On 22 June 2017, the Khrami Companies submitted compliant applications under the 2014 Methodology under reserve.

305. On 30 June 2017, the NERC commenced its review of the Khrami Companies' tariffs.[354]

307. 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**").[356]

309. 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.

[356] CL-0089, NERC Resolution No. 30 on Amendments to NERC Resolution No. 33 dated 4 December 2008, 31 October 2017 ("**NERC Resolution No. 30**"); CL-0090, NERC Resolution No. 31 on Amendments to NERC Resolution No. 33 dated 4 December 2008, 31 October 2017 ("**NERC Resolution No. 31**").

312. 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 for the past year should be used to determine the change, not the last day of the past period.[362]

[362] Transcript of NERC public hearing regarding the Khrami Companies' tariff application, 31 October 2017, C-0214, p. 1; NERC Public Hearing No. 80-2-3, 31 October 2017, R-0052.

313. 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.[363] [redacted]

[redacted]

[363] NERC public hearing transcript re Khrami Companies' tariff application, 31 October 2017, C-0214, p. 7.
[redacted]

315. The NERC's rejection of the Khrami Companies' claims for the non-adjustment of their tariffs in 2016 echoed the explanation that the NERC [redacted] 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].*[366]

[redacted]

[redacted]

[redacted]

R. THE CLAIMANTS' INITIATION OF ARBITRATIONS AGAINST GEORGIA

317. 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

[366] NERC public hearing transcript re Khrami Companies' tariff application, 31 October 2017, C-0214, p. 7.
[redacted]

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. 2017/2018 CHANGES TO LAW ON ELECTRICITY

318. 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.[369] This decreased Telasi's sales and allocation of energy. However, after 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.[370]

T. THE PARTIES' SETTLEMENT DISCUSSIONS

319. Ultimately, however, the parties failed to reach an agreement.

[369] Claimants' Memorial, ¶¶ 147-149.

[370] Claimants' Memorial, ¶¶ 147-149.

U. COST OF NEW CONNECTIONS ISSUE

321. 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[374]. They say this has not occurred despite the Respondents' repeated promises. The Claimants do not specify an amount of damages for the cost of new connections, but maintain in their written submissions that they suffered "loss of several million GEL each year since at least 2013 … and continues to do so."[375]

322. The Claimants summarize the damages claimed in this and the ICSID arbitration as follows:[376]

[374] Claimants' Memorial ¶¶ 150-154; Claimants' Reply, ¶¶ 85-90; Tr. Day 1 (Claimants' Opening Statement) 128-129.

[375] Claimants' Memorial, ¶ 154;

[376] Claimants' Closing Presentation, slide 19. The Respondents rely on the fact that no damages are claimed to say that the Claimants have effectively abandoned their new connections claim (Respondents' Rejoinder, ¶ 203). The Claimants neither confirm nor deny this.

[redacted]

323. The Claimants pursue their claim in the ICSID Arbitration on the basis that Georgia's treatment of the cost of new connections was erratic and inconsistent in breach of the duty of fair and equitable treatment.[377] However, for the sake of completeness, the Parties' arguments on this claim are briefly summarized below.

324. 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.[378] Users pay a fixed amount set by 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 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. The fast-track construction permit costs GEL 400, and Claimants say they often needed one in order to meet Georgia's connection deadlines.

[377] Claimants Reply, ¶193; Tr. Day 1 (Claimants' Opening Statement) 128-129.

[378] NERC Resolution No. 21, 18 September 2008, CL-0076; NERC Resolution No. 20, 18 September 2008, (consolidating amendments as of 26 September 2012), Art. 26, CL-0077; NERC Resolution No. 6, 19 April 2017, CL-0087.

325. [redacted] The Parties' discussions continued until 2016.

[redacted]

327. 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."[384] It appears that commencing in 2019 the NERC adjusted new connection fees to require payment of Telasi's full costs of connection.[385]

1) The Claimants' Position

328. Claimants argue that the applicable rules and user fees have resulted in Telasi not being fully compensated since 2013 for the additional cost of connecting new users. [redacted]

[redacted]

[384] Claimants' Memorial, ¶ 155.

[385] Tr. Day 1, (Claimants' Opening Statement) 128-129.

[redacted]

[redacted]

2) The Respondents' Position

330. [redacted] The Respondents point out that the Claimants do not dispute that the NERC

[redacted]

addressed the new connection fee losses by treating any additional costs in excess of the fixed connection fee as CAPEX recoverable through Telasi's Distribution Tariff. [redacted]

331. The Respondents say that the Claimants do not seek damages for the cost of new connections, and have effectively abandoned their claim.[393]

V. TELASI'S PURCHASE PORTFOLIO VOLATILITY

[redacted]

333. 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.[395] 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.[396]

334. The Claimants claim that in the eight-month period between May-December 2017, the allocation of energy purchases by 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

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[392] CL-0084, 2014 Methodology, Art. 20.
[redacted]

[395] Telasi has a 35% market share and Energo-Pro holds the remaining 65% (Energo-Pro purchased Kakheti in 2017).
[redacted]

applied to the ESCO/COPS to approve the amount of Enguri energy forecasted in NERC's Annual Energy Plan, which ESCO/COPS declined, citing technical difficulties in transferring electricity to Tbilisi.[397]

335. 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.

336. On 25 August 2017, the MOE informed Telasi that additional volumes of Enguri and Vardnili energy would go to Telasi to cover the shortage in May 2017, and that Energo-Pro and Enguri's energy for August 2017 would be used to ensure an additional 50 million kWh of supply for Telasi.[398]

337. The Claimants pursue a claim in the ICSID arbitration arising from the volatility resulting from what they say was an improper decision of the MOE.[399]

W. DIVERSION OF THE KHRAMI COMPANIES' ELECTRICITY AND SALES TO THIRD PARTIES

338. In October 2017, the NERC increased the Khrami Companies' Generation Tariffs by 19%.[400]

339. In 2018, NERC diverted energy from the Khrami Companies away from Telasi through Resolution No. 48, which directed that from May to August 2018 energy from the Khrami Companies was to be replaced with Enguri energy.[401]

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397 Claimants' Memorial, ¶ 163; [redacted]

400 Respondents' Rejoinder, ¶ 200.

401 CL-0091, NERC Resolution No. 48 (new Telasi tariffs based on NERC's 2018 Annual Energy Plan); Claimants' Memorial, ¶ 169. [redacted]

340. On 25 December 2017, the NERC shared with [redacted] Telasi's forecasted purchase portfolio for 2018-2020, which stated that Telasi would not receive energy from the Khrami Companies in May-July 2018.[402]

341. The Khrami Companies found alternative buyers for their electricity for the remainder of 2018, [redacted]

342. Telasi purchased energy from another distributor and ESCO/COPS at higher tariffs because 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 [redacted]

343. The Claimants pursue a claim in the ICSID arbitration arising from the NERC's diversion of energy produced by the Khrami Companies away from Telasi.[406]

V. OVERVIEW OF THE PARTIES' CLAIMS AND DEFENSES

344. The Tribunal sets out below a general summary of the Parties' claims and defences in this SCC arbitration. It returns to a more detailed review of the Parties' respective positions respect of the relevant issues below.

345. The Claimants are Gardabani, Inter RAO and Telasi. The Respondents are Georgia, the MOE and the State Service Bureau Ltd. The arbitration arises pursuant to the arbitration clauses contained in the Khrami SPA (Clause 8) and the 2013 Memorandum (Clause 9). Both agreements are governed by Georgian law.

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402 Email from NERC to Telasi, 25 December, 2017, R-0077.

[redacted]

404 Claimants' Memorial, ¶ 170; C-0137 through C-0140.

[redacted]

A. THE CLAIMANTS' POSITION

346. With respect to Gardabani's claims, the Claimants allege that the Respondents breached the provisions of the Khrami SPA [redacted]

[redacted]

[redacted]

349. With respect to Telasi's claims under the 2013 Memorandum, the Claimants allege that the Respondents failed to ensure that Telasi's tariffs were set in accordance with the terms of the 2013 Memorandum, [redacted]

[redacted]

[redacted]

[redacted]

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[redacted]

[redacted]

[redacted]

B. THE RESPONDENTS' POSITION

362. The Respondents deny that they have violated any of the obligations under either the Khrami SPA or the 2013 Memorandum.

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[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

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VI. REQUESTED RELIEF

A. THE CLAIMANTS' REQUEST FOR RELIEF

1) The SCC Arbitration

374. In this arbitration, the Claimants claim the following relief:

> *Gardabani asks that this Tribunal:*
>
> *(a) DECLARE that Georgia, the Ministry of Economy and the State Service Bureau have breached their obligations under 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.*420
>
> *Telasi and Inter RAO ask that this Tribunal:*
>
> *(a)* DECLARE that the Government has breached its obligations under *the 2013 Memorandum;*
>
> *(b) DISMISS the Respondents' counterclaim 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.*[421]

2) The ICSID Arbitration

375. For convenience, the Tribunal also notes here the Claimants' request for relief in the ICSID arbitration:

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420 Claimants' Reply, ¶ 267.

421 Claimants' Reply, ¶ 268.

Gardabani and Silk Road ask that this 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 [redacted]

(d) DISMISS Georgia's counterclaim [redacted]

(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.[422]

376. Under both arbitrations, the Claimants ask that this Tribunal:

(a) ORDER that the amounts cumulatively payable by the Respondents [redacted]

(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

[422] Claimants' Reply, ¶ 269.

[redacted]

ORDER such further and other relief as counsel may advise and the Tribunal deems just.[424]

B. THE RESPONDENTS' REQUEST FOR RELIEF

1) The SCC Arbitration

377. In this 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* [redacted]
>
> *iv) order Telasi and Inter RAO to pay Georgia* [redacted]
>
> *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 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.*[425]

378. With respect to the ICSID Arbitration, the Respondents request that the Tribunal:

> *i) deny Gardabani's and Silk Road's claims under the Georgia-Netherlands BIT in their entirety;*

[424] Claimants' Reply, ¶ 270.

[425] Respondents' Rejoinder, ¶ 480(a).

ii) declare that the Tribunal has jurisdiction over Georgia's counterclaim [redacted]*;*

iii) declare that Georgia is entitled [redacted]

iv) 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;

v) 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

grant Georgia any such other and further relief as the Tribunal deems just and appropriate in the circumstances.[426]

VII. MERITS

A. ARBITRATION AGREEMENTS

379. The claims in this SCC arbitration are advanced by Gardabani, Inter RAO and Telasi.

380. Gardabani's claims are brought pursuant to Clause 8 of the Khrami SPA against the Government of Georgia, the MOE and the State Service Bureau. Clause 8 of the Khrami SPA provides as follows:

[redacted]

[426] Respondents' Rejoinder, ¶ 480(b).

381. Inter RAO's and Telasi's claim is brought pursuant to Clause 9 of the 2013 Memorandum which provides as follows:

[redacted].

B. APPLICABLE LAW: GEORGIAN CONTRACT LAW OR GEORGIAN PUBLIC LAW AND A BALANCING OF PUBLIC AND PRIVATE INTERESTS?

382. The Khrami SPA and the 2013 Memorandum provide that they are governed by the substantive law of Georgia.[427]

383. The Parties agree that the 2013 Memorandum and the Khrami SPA are governed by Georgian law and the contractual interpretation rules in the Georgian Civil Code ("**GCC**") as interpreted by Georgian Courts.[428] The Parties generally agree on the applicable rules in the GCC.[429]

384. Article 52 of the Civil Code of Georgia provides as follows:

> *Article 52. Interpretation of the Declaration of Intent*

[427] Khrami SPA; C-0015 / R-0019, 2011 Memorandum, Clause 8.8; C-0034 / R-0028, 2013 Memorandum, Clause 8.

[428] Claimants' Memorial, ¶ 291; Respondents' Counter-Memorial, ¶ 243.

[429] Claimants' Opening Statement, Tr. Day 1, 57-62 and the sources cited there; Respondents' Opening Statement, Tr. Day 1, 187-195 and the sources cited there; Tr. Day 7 (Claimants' Closing Statement), 34-40 and the sources cited there; Tr. Day 7 (Respondents' Closing Statement), 181-182.

> *In interpreting the declaration of intent, the intention shall be ascertained as a result of reasonable deliberation, and not only from the literal meaning of its wording.*

385. Article 338 provides as follows:

> *Article 338. Mutually Exclusive and Ambiguous Expressions in a Contract*
>
> *In case of mutually exclusive and ambiguous expressions in a contract, preference shall be given to the expression which most closely accords with the overall content of the contract.*

386. The Parties agree that the goal of contractual interpretation is to establish the parties' common intention which can be determined from the context in which the agreement was concluded, including with regard to the ordinary meaning of the words used in the relevant contractual provision, the overall content and context of the contract and the reasonable meaning of the Parties' conduct or words before or after the contract was made. If the common intention of the parties cannot be determined, then the meaning of the agreement should be construed by ascertaining how the relevant contractual provisions would be understood by a reasonable person in similar circumstances to the parties.

387. In either case, interpretation of the contract is a textual and contextual exercise which involves various elements, including the ordinary meaning of the words in question; the overall content of the contract; the aims enshrined in the contract's other provisions; the facts and circumstances in which the contract was made; the reasonable meaning of the parties' conduct or words either before or after entering into the contract; and other agreements the parties may have concluded.[430]

[redacted]

[430] Claimants' Memorial, ¶¶ 172-173.

[redacted]

389. The Parties agree that the Khrami SPA and 2013 Memorandum qualify as administrative agreements pursuant to the General Administrative Code of Georgia ("**GACG**"), which states that an administrative agreement is a civil law agreement concluded by an administrative body "for exercising public authority".[433]

1) The Respondents' Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

2) The Claimants' Position

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

3) The Tribunal's Analysis

401. Pursuant to Article 52 of the GCC, the interpretation of a contract is to be performed by way of reasonable deliberation, and not only from the literal meaning of the words used by the Parties in their agreement. In this regard, the Georgian Supreme Court has held as follows:

> Article 52 of GCC provides the rule for interpretation of the intent: "In interpreting the declaration of intent, the intention shall be ascertained as a result of reasonable deliberation, and not only from the literal meaning of its wording". The intent shall be interpreted based on the legal-dogmatic methodology (i.e. principles of contractual interpretation). There are "subjective" (based on intent) and "objective" (based on expression) theories of interpretation. When a subjective approach is applied, the common intent shall be interpreted according to the analysis

[redacted]

> of the provisions of the contract in each case. The aim is to determine what parties' actual intentions were at the moment in time when the contract was concluded and how to understand them when the dispute arises. An objective theory focuses on expression of the will of a party, explaining that this is crucial for legal certainty and stability in legal relationships. However, it is complicated when parties have agreed on some terms but have attributed different meanings to it, or one of them changes its mind later. In cases like this it is impossible to talk about "common intent". The vital criterion in such cases is the meaning that a reasonable person would have attributed to the particular statement/expression taking into account the particular and important circumstances of the case. The wording "reasonable deliberation" means establishing the meaning of a disputed term by the reasonable person under the analogous circumstances.
>
> The Chamber noted that pursuant to Article 338 of GCC, in case of mutually exclusive and ambiguous expressions in a contract, preference shall be given to the expression that most closely accords with the overall content of the contract. Therefore, when engaged in interpretation, the Court shall give preference to expressions which correspond the most to the content of the contract, the purposes enshrined in other provisions of the contract.[451]

402. In the Tribunal's view, this means determining the common intention of the Parties by way of a textual and contextual exercise which involves consideration of the ordinary meaning of the words used by the Parties as well as the content and purpose of the contract, the circumstances in which the contract was made and the reasonable meaning of the Parties' conduct or words either before or after the conclusion of the contract.[452] The Respondents agree with this articulation. Therefore, the interpretive exercise does not stop with the words of the contract where the ordinary meaning is clear, but in addition, includes consideration of the other relevant contextual elements. That said, in the Tribunal's view, the words used by parties to a contract, particularly where they have negotiated those terms, is usually the best expression of the parties' common intention.

403. Pursuant to Article 338 of the GCC, in the event of ambiguity arising from the language of a provision or from inconsistent or contradictory provisions, preference should be given to the interpretation that most closely accords with the overall content of the contract. In the event the parties' common intention cannot be determined using these principles, the meaning of the relevant provisions should be determined on the basis of how a reasonable person in similar circumstances to the parties would have understood them at the time of the contract. The Parties referred to this as the reasonability or reasonableness test.

404. With respect to the application of the GACC, as the Parties accept, it does not contain provisions on the interpretation of public law contracts. Accordingly, it does not directly govern

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[451] Supreme Court of Georgia Decision, Case No. AS-110-103-2015, CL-97.

[452] Claimants' Memorial, ¶ 173 and the sources cited there.

the interpretation of such contracts. Nevertheless, the GACC sets out a number of principles governing the content and validity of public law contracts, including the need to balance the public interest represented by the authority concluding the agreement with the interests of the private party. In the Tribunal's view, these principles form part of the nature and purpose of the contract and thus form part of its textual and contextual interpretative exercise under the GCC. Accordingly, the Tribunal takes into account the fact that the 2013 Memorandum and the Khrami SPA are public contracts which are required to balance the public and private interests of the parties to them in the interpretation of the disputed provisions of those agreements.

C. TELASI'S AND INTER RAO'S CLAIMS UNDER THE 2013 MEMORANDUM

[redacted]

[redacted]

[redacted]

407. The NERC's 2011 Methodology, adopted shortly after the 2011 Memorandum, expressly excluded its application to companies for which long-term tariffs were set by agreement with the State. This applied with respect to both Telasi and the Khrami Companies.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

1) Overview of the Parties' Interpretation of the 2013 Memorandum

a. The Claimants' Position

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c. *The Tribunal's Analysis*

444. The Tribunal commences with the interpretation of the key provisions of the 2013 Memorandum. [redacted]

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c. The Tribunal's Analysis

457. The Tribunal has found the interpretation of the 2013 Memorandum to be difficult and complex. [redacted]

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D. CONCLUSIONS ON THE INTERPRETATION OF THE RELEVANT CLAUSES OF THE 2013 MEMORANDUM

647. For the reasons set out above, the Tribunal has reached the following conclusions in respect of the key provisions of the 2013 Memorandum:

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E. CONCLUSIONS ON LIABILITY WITH RESPECT TO THE CLAIMANTS' CLAIMS UNDER THE 2013 MEMORANDUM

648. The Tribunal now turns to the Claimants' claims in light of its interpretation of the relevant clauses set out above.

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F. THE RESPONDENTS' COUNTERCLAIM UNDER THE 2013 MEMORANDUM

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1) The Respondents' Position

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2) The Claimants' Position

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3) The Tribunal's Analysis

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G. CONCLUSION ON LIABILITY WITH RESPECT TO THE RESPONDENTS' COUNTERCLAIM

675. The Respondents are entitled to payment [redacted]

H. GARDABANI'S CLAIMS UNDER THE KHRAMI SPA

676. Gardabani claims that by not ensuring that the Khrami Companies' tariffs were set and adjusted in accordance with the terms of [redacted] the Khrami SPA [redacted] the Respondents party to that Agreement (the Government of Georgia, the MOE and the SSB) breached the Khrami SPA.[701]

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1) The Claimants' Position

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2) The Respondents' Position

689. The Respondents say that they have not violated any of their obligations under the Khrami SPA. [redacted]

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728. The Tribunal now turns to the interpretation of the adjustment mechanisms in Clauses 2.1 and 2.2 of Annex 1 to the Khrami SPA and their application.

I. INTERPRETATION AND APPLICATION OF CLAUSES 2.1 AND 2.2 OF ANNEX 1 TO THE KHRAMI SPA

730. The Parties differ on the interpretation of Clause 2 of Annex 1 of the Khrami SPA and whether the NERC properly applied its provisions. There are two primary issues.[750]

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J. CONCLUSIONS ON LIABILITY WITH RESPECT TO THE CLAIMS UNDER THE KHRAMI SPA

794. For the foregoing reasons, the Tribunal has reached the following conclusions regarding the Claimants' claims under the Khrami SPA:

a.

b. The Government, the MOE and the SSB have breached their obligations under the Khrami SPA in the following manner:

[800] JER, Issue 2, pp. 4-5.

[801] C-0122, Khrami-2 2017 Application.

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VIII. CONCLUSIONS AND ORDER

795. For the reasons set out above, the Tribunal:

a) declares that the Government, the MOE and the SSB have breached their obligations under [redacted] the Khrami SPA and must compensate Gardabani for the loss suffered by it;

b) declares that the Government has breached its obligation under [redacted] the 2013 Memorandum and must pay compensation to Telasi and Inter RAO for the loss suffered by them;

c) declares that the Government is entitled to [redacted] under the 2013 Memorandum;

d) defers the quantification of the Claimants' claims and the Respondents' counterclaim to the Final Award;

e) defers the Parties' claims for interest and costs to the Final Award.

Place of Arbitration: Stockholm, Sweden

Professor Stanimir Alexandrov
Arbitrator

19 APR 2021
Date

Professor Zachary Douglas QC
Arbitrator
Subject to the attached partial dissenting opinion

Date

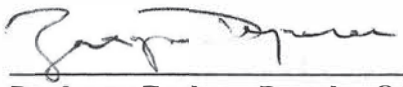
Mr. Henri Alvarez QC
President

Date

Place of Arbitration: Stockholm, Sweden

Professor Stanimir Alexandrov
Arbitrator

Date



Professor Zachary Douglas QC
Arbitrator
Subject to the attached partial dissenting opinion

19 APR 2021

Date

Mr. Henri Alvarez QC
President

Date

Place of Arbitration: Stockholm, Sweden

Professor Stanimir Alexandrov Arbitrator	**Date**
Professor Zachary Douglas QC Arbitrator *Subject to the attached partial dissenting opinion*	**Date**
Mr. Henri Alvarez QC President	19 APR 2021 **Date**

PARTIAL DISSENTING OPINION

Professor Zachary Douglas QC

A INTRODUCTION

1. This case has generated a host of fiendishly complex issues of contractual interpretation. This is due, in no small measure, to the unfortunate lack of clarity and precision that the parties applied to the drafting of their contracts. Among the large number of issues that have been decided in the Partial Award, there is happily only one that has divided the Tribunal, [redacted].

2. The decision to commit to a dissenting opinion is rarely an easy one and it is made particularly acute in this case by the very high esteem in which I hold my colleagues on the Tribunal. That esteem has only been reinforced by the care and patience with which they have considered my views on the issue that divides us throughout our long and intense deliberation process.

3. Despite addressing a single issue, this dissenting opinion is necessarily long because the key to unlocking the meaning of the text of [redacted] the 2013 Memorandum is the context both for that specific clause and the agreement as a whole. I have attempted to address this issue in a systematic fashion and hence my opinion is structured to deal with the following points:

   3.1. Applicable rules of interpretation under Georgian law;

   3.2. Background to the 2011 Memorandum;

   3.3. Interpretation of the 2013 Memorandum: (1) evidence of the parties' intent during the negotiations leading to the 2013 Memorandum; (2) evidence of the parties' intent from a comparison of the texts of the 2011 Memorandum and the 2013 Memorandum; (3) the relevance of [redacted] as evidence of the parties' intent; (4) the balance of interests under the 2013 Memorandum;

3.4. The majority's reasons for their interpretation [redacted] the 2013 Memorandum;

3.5. [redacted]

3.6. Conclusion.

B APPLICABLE RULES OF INTERPRETATION UNDER GEORGIAN LAW

4. The Claimants' have cited the Georgian Supreme Court's Decision in Case No AS-110-103-2015 as the leading statement on the applicable principles of interpretation. In that case, the Supreme Court endorsed the following passage from the Court of Appeal's decision:

> Article 52 of GCC provides the rule for interpretation of the intent: "In interpreting the declaration of intent, the intention shall be ascertained as a result of reasonable deliberation, and not only from the literal meaning of its wording". The intent shall be interpreted based on the legal-dogmatic methodology (i.e. principles of contractual interpretation). There are "subjective" (based on intent) and "objective" (based on expression) theories of interpretation. When a subjective approach is applied, the common intent shall be interpreted according to the analysis of the provisions of the contract in each case. The aim is to determine what parties' actual intentions were at the moment in time when the contract was concluded and how to understand them when the dispute arises. An objective theory focuses on expression of the will of a party, explaining that this is crucial for legal certainty and stability in legal relationships. However, it is complicated when parties have agreed on some terms but have attributed different meanings to it, or one of them changes its mind later. In cases like this it is impossible to talk about "common intent". The vital criterion in such cases is the meaning that a reasonable person would have attributed to the particular statement/expression taking into account the particular and important circumstances of the case. The wording "reasonable deliberation" means establishing the meaning of a disputed term by the reasonable person under the analogous circumstances.
>
> The Chamber noted that pursuant to Article 338 of GCC, in case of mutually exclusive and ambiguous expressions in a contract, preference shall be given to the expression that most closely accords with the overall content of the contract. Therefore, when engaged in interpretation, the Court shall give preference to expressions which correspond the most to the content of the contract, the purposes enshrined in other provisions of the contract.[1]

[1] CL-97.

5. In addition, it was common ground between the parties that the 2013 Memorandum is a public law contract as defined by Article 2(1)(g) of the General Administrative Code of Georgia:[2] it was concluded by a public entity (the Government of Georgia); its object is to fulfill a public purpose (the determination of electricity tariffs for end consumers as well as for the Khrami Companies and Telasi); and, it was approved by a Government Resolution.[3]

6. Although different views were expressed about the relevance of public law principles to the interpretation of the 2013 Memorandum, the Tribunal has found that it is obliged to take into account that it is a public law contract and thus needs to balance the public and private interests of the parties.[4]

C BACKGROUND TO THE 2011 MEMORANDUM

7. Inter RAO acquired Telasi in 2003.[5] In the initial period after its investment, the Telasi SPA of 1998[6] applied and set the Distribution Tariff [redacted]

8. The parties signed the 2007 Memorandum in June 2007. [redacted]

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2 Claimants' Reply, §96; Respondents' Counter-Memorial, §244.
3 R-27. See First Legal Opinion of Turava, §14.
4 Partial Award, §§404, 510.
5 C-3.
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D INTERPRETATION OF THE 2013 MEMORANDUM

D1 Evidence of the parties' intent during the negotiations leading to the 2013 Memorandum

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D2 Evidence of the parties' intent from a comparison of the texts of the 2011 Memorandum and the 2013 Memorandum

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D3 The relevance of [redacted] as evidence of the parties' intent

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D4 The balance of interests under the 2013 Memorandum

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E THE MAJORITY'S REASONS FOR THEIR INTERPRETATION [redacted] OF THE 2013 MEMORANDUM

108. The majority's reasoning for upholding the Claimants' interpretation is set out in paragraphs 503-515 and 526-534 of the Partial Award. With the greatest respect to my colleagues, it is not possible to ascertain from a review of this reasoning how they have weighed the evidence that I have set out above that is relevant to the interpretative exercise. It is accepted that this evidence is relevant and indeed it is reproduced in great detail in the summaries of the parties' positions in the Partial Award.

109. For instance, the majority's reasoning begins with the following statement at paragraph 503:

110. The various elements in this statement, however, are not analysed by reference to the evidence, That is certainly an important factor to take into account but one that cannot possibly be conclusive for the reasons I have set out above. Notably absent from this statement is an analysis of the critical documents exchanged between the parties setting out the fundamental premises of their new agreement as well as Inter RAO's internal presentations.

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G CONCLUSION

124. It cannot be said that the text of the 2013 Memorandum unequivocally supports either party's position: there is no doubt that it could have been drafted differently,

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[redacted] But at the end of the day, the various inputs for the interpretative process that can be derived from the record of this arbitration stack up almost entirely in favour of the Respondent's position.

125. This is the essence of my disagreement with the majority's analysis: the Claimants have the burden of persuasion in respect of their own interpretation [redacted] and that burden is not satisfied merely by demonstrating that the Respondent's rival interpretation is not completely watertight. It cannot be a matter of defaulting to the Claimants' position in case of doubt; there must be positive reasons to justify upholding that position. And yet there is no contemporaneous evidence during the negotiation process supporting the Claimants' interpretation but there are numerous elements from Inter RAO's own documents that support the Respondent's position. An analysis of the difference in the wording between the 2011 Memorandum and the 2013 Memorandum, [redacted] also supports the Respondent's position, as does the existence of [redacted] as evidence of the parties' intention. Finally, the Respondent's position is more consistent with the idea of a fair balance of the public and private interests under the 2013 Memorandum. There is nothing that can be mobilized in favour of the Claimants' interpretation that might serve to counteract the weight that must be accorded to these various elements.

Place of Arbitration: Stockholm, Sweden

Professor Zachary Douglas QC
Arbitrator

19 APR 2021
Date