Exhibit A
Filed Under Seal

INTERNATIONAL CHAMBER OF COMMERCE
INTERNATIONAL COURT OF ARBITRATION

Case No. 26904/HBH

under the 2021 ICC Rules of Arbitration

between:

ENKA RENEWABLES LLC

Claimant

vs/

THE GOVERNMENT OF GEORGIA

Respondent

FINAL AWARD

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13 November 2024

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LIST OF ABBREVIATIONS

Answer	Respondent's Answer to the Request of Arbitration dated 30 May 2022
Arbitration Agreement	Article 12 of the BOO Agreement
Basic Design	The design of the Project prepared by Studio Pietrangeli Consulting Engineers on behalf of the GEDF in July 2015.
BOO Agreement	Build, Own, and Operate Agreement between ENKA, the GOG, Georgian Energy Development Fund JSC, Namakhvani JSC, Electricity System Commercial Operator JSC and Georgian State Electro System JSC entered on 25 April 2019
CAPM	Capital Asset Pricing Model
CCC(s)	Community Consultation Councils
CEG	Clean Energy Group A.S.
CER	Claimant's Expert Report
COD	Commercial Operations Date
C-PHB	Claimant's Post-Hearing Brief
CRP	Country Risk Premium
CWS	Claimant's Witness Statement
Detailed Design	The detailed design for the Project to be developed by ENKA
DMS Survey	Credit Suisse Global Investment Returns Yearbook 2021, Feb. 2021, March 2021 (Dimson, Marsh and Staunton Survey).
DRT	Deloitte's Turkish subsidiary, DRT Kurumsal Finans Danismmanlik Hizmetleri A.S.
DRT Determination	DRT Determination about ENKAS's calculation of the FMV, dated 15 February 2022
Early Works	Certain early construction works to be conducted by Enmar prior to entry in the EPC Contract.
EBRD	European Bank for Reconstruction and Development
Energy Community	the Energy Community Secretariat
ENKA/ Claimant	ENKA RENEWABLES LLC

Enka Insaat	Enka İnşaat ve Sanayi A.Ş.
Enmar	Enmar Construction BV
ESCO	Georgian Electricity System Commercial Operator JSC
First SHA	Shareholder's Agreement between Enka Holding and CEG dated 4 July 2017
FMV	Fair Market Value of the Transferable Assets
G&T Report	Galt & Taggart, Electricity price forecast report
GCC	Georgian Civil Code
GCCP	Georgian Code of Civil Procedure
GEDF	Georgian Energy Development Fund
GEL	Georgian Lari (currency of Georgia)
GOG / Respondent	Government of Georgia
IFC	International Finance Corporation
JDA	Joint Development Agreement signed by ENKA, GEDF and Namakhvani JSC, dated 6 July 2017
JEM / Joint Model	Joint Expert Model submitted by the Quantum Experts on 17 May 2024
JER / Joint Report	Joint Expert Report submitted by the Quantum Experts on 17 May 2024
Joint Bid Agreement	Joint Bid Agreement signed by CEG and Enka Insaat, dated 6 July 2016
Mediation	The mediation process between the GOG and several stakeholders organized by the Dispute Resolution and Negotiation Centre of the Energy Community Secretariat
Mediators	Mr. Dirk Buschle and Ms. Aleksandra Bujaroska
Mediators' Concluding Report	The Concluding Report issued by the Mediators on 18 November 2021
MEPA	Ministry of Environment and Natural Resources Protection of Georgia
MESD	Ministry of Economy and Sustainable Development of Georgia
Merchant Period	Periods of time in which ENKA would sell the power generated by the Project at market prices
MOIA	Ministry of Internal Affairs of Georgia
MoJ	Ministry of Justice of the Government of Georgia

MRP	Market Risk Premium
NASP	Georgian National Agency of State Property
NHPP / Project / Plants	Namakhvani Hydro Power Plants
Option	The possibility provided for in the First SHA (Art. 8) that CEG sells to Enka Holding additional shares of ENKA and CEG's ownership be converted to a carried interest position of 10% in ENKA
PPA	Power Purchase Agreement
PPA Period	Eight-month period (September to April) for the first 15 years of commercial operation of the Project where ENKA had the right to sale electricity at the contractual tariff
Police Protection Agreement	Private protection agreement between ENKA and the Security Police Department of the MOIA, dated 17 February 2021
PO1	Procedural Order No. 1 dated 26 July 2022
PO2	Procedural Order No. 2 dated 2 September 2022
PO3	Procedural Order No. 3 dated 2 March 2023
PO4	Procedural Order No. 4 dated 22 May 2023
PO5	Procedural Order No. 5 dated 6 June 2023
Powerchina	Powerchina Resources Ltd.
Quantum Experts	Mr. Richard Caldwell and Mr. Dominic Wreford
Reply	Claimant's Statement of Reply dated 23 June 2023
RER	Respondent's Expert Report
RfA	Claimant's Request for Arbitration dated 1 March 2022
Right to Build	Title issued by the Government of Georgia to use certain land where the sale of such land is prohibited by the laws of Georgia
R-PHB	Respondent's Post-Hearing Brief
RWS	Respondent's Witness Statement
Second SHA	Shareholder's Agreement between Enka Holding and CEG, dated 1 August 2018
Secretariat	Secretariat of the ICC International Court of Arbitration
Side Letter	Side Letter to the BOO Agreement dated April 2019
SoC	Claimant's Statement of Claim dated 2 September 2022

SocGen	Banque Société Générale
SoD	Respondent's Statement of Defence dated 23 December 2022
SOFR	Secured Overnight Financing Rate
TACSA	Technical and Construction Supervision Agency
Termination Invoice	ENKA's Termination Invoice sent to the GOG on 20 September 2021
Termination Notice	ENKA's Termination Notice sent to the GOG on 20 September 2021
ToR	Terms of Reference dated 7 July 2022
Transcripts /Tr.	Transcripts of the hearings
Transferable Assets	(i) the physical assets constituting any Plant; (ii) to the extent not previously handed over to the GOG pursuant to Article 4.2.13 (*Handover Regime for the Roads*), the Roads associated with any Plant; (iii) any real property rights held by the Company necessary to own, construct or operate any Plant or construct any Roads to the extent such rights can be unilaterally transferred by the Company under the Laws of Georgia; (iiii) any freely transferable Authorizations, licenses and permits necessary to own, construct or operate any Plant or construct any Roads and such additional Authorizations, licenses and permits for which the Company obtains approval to transfer using commercially reasonable efforts where such transfer is accomplished on or before the date by which the transfer of Transferable Assets is to occur; and (v) any freely assignable contracts with respect to the construction, operation or maintenance of the Project or the transmission or sale of electricity generated by the Project, subject to the Company obtaining (using commercially reasonable efforts) releases satisfactory to the Company with respect to all past, present and future liability under such contracts.
WACC	Weighted Average Cost of Capital
WEO	World Energy Outlook, published by the International Energy Agency

I. PARTIES

1. The Claimant in the present arbitration proceedings is ENKA RENEWABLES LLC ("**ENKA**" or the "**Claimant**"). Enka Renewables is a company established and existing under the laws of Georgia, with its registered office at N60b Ilia Chavchavadze ave., Flat N28, Tbilisi, Georgia. Formerly called Clean Energy Group Georgia LLC, the company was renamed Enka Renewables LLC on 16 May 2019.

2. The Company is a subsidiary of Enka İnşaat ve Sanayi A.Ş. ("**Enka Insaat**"), one of the world's largest construction companies.

3. The Claimant is represented by:

Mr. Daniel Gal, Q.C.
Mr. Maximilian Szymanski
Ms. Sophia Lekakis
Skadden, Arps, Slate, Meagher & Flom (UK) LLP
40 Bank Street, Canary Wharf
London E14 5DS, United Kingdom
By email: daniel.gal@skadden.com
maximilian.szymanski@skadden.com
sophia.lekakis@skadden.com

together with:

Mr. Jonathan Greenblatt
J. Greenblatt International Disputes, PLLC
2950 Macomb St. NW
Washington, DC 20008
United States
Email: greenblatt@ilawjg.com

Lord David Wolfson K.C.
One Essex Court
Temple
London EC4Y 9AR
Email: david.wolfson@oeclaw.com

Mr. Andrew Fenn
Mr. Ronan Hanna
Atkin Chambers
Grays Inn
1 Atkin Building
London WC1R 5AT
United Kingdom
By email: afenn@atkinchambers.com
rhanna@atkinchambers.com

4. The Respondent in the present arbitration proceedings is the Government of Georgia (the "**GOG**" or the "**Respondent**"), represented by the Ministry of Justice, having its address at 24a Gorgasali St., 0114, Tbilisi, Georgia.

5. The Respondent is represented by:

Mr Charles Nairac

Mr John Willems
Mr Tom Cameron
Ms Evanthia Kasiora
Ms Cristiana Gonçalves Correia
Mr Konstantine Kopaliani
White & Case LLP
19 Place Vendôme
75001 Paris, France
By email: charles.nairac@whitecase.com
jwillems@whitecase.com
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cristiana.goncalves.correia@whitecase.com
konstantine.kopaliani@whitecase.com

Ms. Mariam Antia
Deputy Head of the Department of State
Representation in Arbitration and Foreign Courts,
Ministry of Justice
24a Gorgasali St
0114 Tbilisi, Georgia
By email: maantia@justice.gov.ge

6. The Claimant, together with the Respondent, as identified above, will be collectively referred as the "**Parties**" and individually as a "**Party**".

II. ARBITRAL TRIBUNAL

7. In its Request for Arbitration (the "**RfA**"), dated 1 March 2022, ENKA nominated Mr. Stanimir Alexandrov as its party-appointed arbitrator. Mr. Alexandrov accepted his nomination on 18 March 2022.

8. On 5 April 2022, the GOG nominated Ms. Judith Gill KC as its party-appointed arbitrator. Ms. Gill accepted her nomination on 24 April 2022.

9. On 5 May 2022, the ICC Court's Secretary General confirmed the appointment of Mr. Alexandrov and Ms. Gill.

10. The party-appointed arbitrators jointly nominated Mr. Alexis Mourre as the president of the Arbitral Tribunal on 17 May 2022.

11. On 31 May 2022, the ICC Court's Secretary General confirmed the appointment of Mr. Mourre.

12. The contact details of the members of the Arbitral Tribunal are as follows:

Mr. Alexis Mourre (President)
MCL ARBITRATION
52 rue la Boétie
75008 Paris
France
Tel. +33 (0)1 40 70 11 71
Email: amourre@mcl-arbitration.com

Mr. Stanimir Alexandrov (Co-Arbitrator)
STANIMIR A. ALEXANDROV PLLC
1501 K Street, N.W., Suite C-072
Washington D.C. 20005, USA
Email: salexandrov@alexandrovlaw.com

Ms. Judith Gill KC (Co-Arbitrator)
GILL ARBITRATION SERVICES PTE. LTD
81A Clemenceau Avenue, #05-18, UE Square
239918 Singapore
Email: jgill@judithgill.com

III. ARBITRATION AGREEMENT

13. The arbitration agreement (the "**Arbitration Agreement**") upon which the Claimant submitted its Request is contained in Article 12 of the Build, Own, and Operate Agreement between ENKA, the GOG, Georgian Energy Development Fund JSC, Namakhvani JSC, Electricity System Commercial Operator JSC and Georgian State Electro System JSC entered on 25 April 2019 ("**BOO Agreement**" or "**BOO**").

14. The Arbitration Agreement reads as follows:

> *12. Dispute Resolution [...]*
>
> *12.3 Arbitration*
>
> *12.3.1 Any Dispute that has not been finally resolved between the Parties trough an amicable settlement in accordance with Article 12.1 (Amicable Settlement) or, in case of a Dispute of a technical nature, pursuant to the Technical Expert procedure set forth in Article 12.2 (Technical Expert), shall be finally settled by arbitration under the Rules of Arbitration of the International Chamber of Commerce ('ICC Rules').*
>
> *12.3.2 The tribunal shall consist of three (3) arbitrators. The claimant(s) and the respondent(s) shall each nominate an arbitrator respectively. The third arbitrator, who shall be the president of the tribunal, shall be nominated by the*

two (2) party-nominated arbitrators.

12.3.3 The seat of the arbitration shall be Paris, France.

12.3.4 The language of the arbitration shall be English.

12.3.5 Each Party to this Agreement further acknowledges and agrees that any award of the arbitral tribunal would be given effect to in their respective jurisdictions in accordance with (and subject to the limitations contained in) the 1958 New York Convention on recognition and Enforcement of Foreign Arbitral Awards.

12.3.6 The Parties agree to keep confidential all matters relating to the arbitration, including its existence and that of any related court proceeding, to the greatest extent practicable.

IV. GOVERNING LAW, PLACE AND LANGUAGE

15. According to Article 16 of the BOO Agreement, "*this Agreement shall be governed by and construed in accordance with the laws of Georgia*".

16. The Arbitration Agreement (Article 12.3.3) provides for Paris, France, as place of the arbitration.

17. Pursuant to the Arbitration Agreement (Article 12.3.4), the language of the arbitration shall be English.

V. HISTORY OF THE ARBITRAL PROCEEDINGS

18. On 1 March 2022, the Claimant filed its RfA with Exhibits C-1 to C-30. The secretariat of the International Court of Arbitration of the ICC (the "**Secretariat**" and the "**Court of the ICC**") acknowledged receipt of the RfA on 3 March 2022.

19. On 30 May 2022, the Respondent submitted its Answer to the Request (the "**Answer**") with Exhibits R-1 to R-15.

20. On 24 June 2022, the Arbitral Tribunal proposed Mr. Bingen Amezaga as Administrative Secretary, sending Mr. Amezaga's c.v. to the Parties. The Claimant and the Respondent confirmed they had no objection to the appointment of the Administrative Secretary and Mr. Amezaga also sent to the Parties his declaration of independence and impartiality.

21. On 30 June 2022, the Arbitral Tribunal held the case management conference with the Parties by video conference.

22. On 7 July 2022, in accordance with Article 23 of the ICC Rules, the Arbitral Tribunal transmitted to the Secretariat the terms of reference of the arbitration ("**ToR**"), executed in counterparts as per the Parties' agreement.

23. On 26 July 2022, the Arbitral Tribunal issued the Procedural Order No. 1, attaching the procedural timetable.

24. On 3 August 2022, the Claimant applied for the summary disposition of the Respondent's defence that the Parties agreed that the Arbitral Tribunal would determine the fair market value of the Transferable Assets[1] without being bound by the auditor certificate ("**Application for Summary Disposition**").

25. On 11 August 2022, the Court of the ICC fixed the time limit for rendering the final award until 31 August 2024.

26. On 17 August 2022, the Respondent submitted its opposition to Claimant's Application for Summary Disposition, then, on 22 August 2022, the Claimant submitted a reply and, on 26 August 2022, the Respondent submitted a rejoinder on Claimant's Application for Summary Disposition.

27. On 2 September 2022, the Claimant submitted its Statement of Claim ("**SoC**") with Exhibits C-31 to C-156 and the witness statements of Mr. Baran Ozgen (**CWS-1**) and Mr. Hakan Kozan (**CWS-2**).

28. On even date, the Arbitral Tribunal issued Procedural Order No. 2, rejecting the Claimant's Application for Summary Disposition.

29. On 23 December 2022, the Respondent submitted its Statement of Defence ("**SoD**") with Exhibits R-16 to R-159, legal authorities RL-1 to RL-87, the witness statements of Ms. Natela Turnava (**RWS-1**), Mr. David Tvalabeishvili (**RWS-2**), and Mr. Giorgi Chachibaia (**RWS-3**), and the expert reports of Prof. David Kereselidze (**RER-1**) and Mr. Dominic Wreford of Interpath Advisory (**RER-2**).

30. On 22 February 2023, each Party submitted its application for document production. The Respondent attached to its application exhibits R-160 to R-162 and legal authorities RL-88 to RL-91.

31. On 2 March 2023, the Arbitral Tribunal issued its Procedural Order No. 3 deciding the Parties' requests for document production.

32. On 25 April 2023, the Respondent filed an application concerning Enka's disclosure of documents and on 5 May 2023, the Claimant submitted a response to the Respondent's application and an application concerning the GOG's disclosure of documents.

33. On 22 May 2023, the Arbitral Tribunal issued its Procedural Order No. 4 on the Parties' applications regarding the other Party's disclosure of documents.

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1 The "Transferable Assets" are defined in Art. 1.1 of the BOO Agreement.

34. On 6 June 2023, the Arbitral Tribunal issued Procedural Order No. 5, concerning the appointment of a privilege master. On even date, the Tribunal appointed Mr. Michael Bühler as privilege master and sent him Terms of Reference as well as a Non-Disclosure Agreement.

35. On 19 June 2023, the privilege master issued his report.

36. On 23 June 2023, the Claimant submitted its Statement of Reply ("**Reply**"), with Exhibits C-157 to C-493, legal authorities CL-1 to CL-8, the second witness statement of Mr. Baran Ozgen (**CWS-3**) and Mr. Hakan Kozan (**CWS-4**), the first witness statements of Mr. Ilhan Gucuyener (**CWS-5**), Mr. Fatih Guven (**CWS-6**), and Mr. Mehmet Salih Alkan (**CWS-7**), and the expert reports of Mr. Richard Caldwell of Brattle (**CER-1**) and Mr. Hartmut Fromm (**CER-2**).

37. On 17 November 2023, the Respondent submitted its Rejoinder ("**Rejoinder**"), with Exhibits R-163 to R-263, legal authorities[2] RL-92 to RL-140, the second witness statements of Ms. Natela Turnava (**RWS-4**), Mr. David Tvalabeishvili (**RWS-5**), and Mr. Giorgi Chachibaia (**RWS-6**), the second expert reports of Prof. David Kereselidze (**RER-3**) and Mr. Dominic Wreford, of Interpath Advisory (**RER-4**), as well as the first expert report of Dr. Ricardo Siliprandi, of AFRY (**RER-5**).

38. On 15 December 2023, as per the procedural timetable, the Claimant requested to cross examine at the hearing ("**Evidentiary Hearing**") all the witnesses and experts presented by the Respondent. On even date, the Respondent requested to cross-examine all the witnesses and experts presented by the Claimant.

39. On 23 February 2024, each Party submitted its skeleton argument. On the same day, the Respondent submitted an erratum note to the expert report of Dr. Siliprandi.

40. On 26 February 2024, the Claimant submitted the presentation of Mr. Richard Caldwell ("**Caldwell's Presentation**"), and the Respondent submitted the presentation of Mr. Dominic Wreford ("**Wreford's Presentation**").

41. The Evidentiary Hearing took place in Paris from 4 to 9 March 2024.

42. The following persons participated in the Evidentiary Hearing:

Claimant:	**Respondent**:
Lord Wolfson KC, One Essex Court	Charles Nairac, White & Case
Elizabeth Gloster, One Essex Court	John Willems, White & Case
Andrew Fenn, Atkin Chambers	Tom Cameron, White & Case

2 The Respondent also attached additional translation of the exhibit RL-28 (RL-28A) and RL-29 (RL-29A).

Ronan Hanna, Atkin Chambers Daniel Gal KC, Skadden, Maximilian Szymanski, Skadden Sophia Lekakis, Skadden Pouneh Farham, Skadden. Doruk Buyukpinar, Skadden, Jonathan Greenblatt, J. Greenblatt International Disputes Baran Ozgen, witness, ENKA Hakan Kozan, witness, ENKA Ilhan Gucuyener, witness, ENKA Fatih Guven, witness, ENKA Kerem Kusi, ENKA Kaan Aksu, ENKA Lili Nahmias, ENKA Fatih Oral, ENKA Nehir Ozbilen, ENKA Cem Celiker, Enka Insaat Nicholas Buckworth, adviser to Enka Insaat Richard Caldwell, Expert, The Brattle Group.	Cristiana Gonçalves Correia, White & Case Evanthia Kasiora, White & Case Konstantine Kopaliani, White & Case Camila Bachour, White & Case Teresa Rabusin, White & Case Nicolo Minella, White & Case Mariam Antia, Ministry of Justice of Georgia Giorgi Kakushadze, Ministry of Justice of Georgia Nino Gaphrindashvili, Ministry of Justice of Georgia **Arbitral Tribunal:** Alexis Mourre, Presiding Arbitrator Stanimir Alexandrov, Co-arbitrator Judith Gill, Co-arbitrator Bingen Amezaga, Administrative Secretary Margarita Chatzi, Deputy Counsel, ICC Secretariat

43. On the first day of the Evidentiary Hearing, the Respondent submitted its pleading presentation.

44. Opus2 provided transcription services as the court reporter during the Evidentiary Hearing, including real-time transcription.

45. At the end of the Evidentiary Hearing, the Arbitral Tribunal decided that the Parties' experts on quantum, Mr. Richard Caldwell and Mr. Dominic Wreford (the "**Quantum Experts**"), should submit a joint report and a joint model for the calculation of the FMV of the Transferable Assets, allowing the Arbitral Tribunal to select the relevant inputs. Each Party was also directed to submit a chart showing the days of total or partial disruption to works. After that, the Parties were directed to submit simultaneous post-hearing briefs. Finally, an in-person hearing for oral arguments would take place in Paris

"**Closing Hearing**").[3]

46. On 27 March 2024, the Arbitral Tribunal decided that the joint expert model should be made following the WACC-based method.

47. On 1 May 2024, the Parties submitted the mutually agreed corrected transcripts ("**Evidentiary Hearing Tr.**").

48. On 17 May 2024, the Quantum Experts submitted a Joint Expert Report ("**Joint Report**" or "**JER**") and a Joint Expert Model ("**Joint Model**" or "**JEM**").

49. On 24 May 2024, each Party submitted a chart indicating the days of disruption to works.

50. On 26 May 2024, the Quantum Experts submitted an amended Joint Report correcting some referencing errors in the 17 May 2024 document.

51. On 10 June 2024, each Party submitted its post-hearing brief ("**C-PHB**" and "**R-PHB**", respectively).

52. On 27 June 2024, the Closing Hearing took place at the Delos Arbitration Centre in Paris, France.

53. The following persons participated in the Closing Hearing:

Claimant	**Respondent**
In-person participants	*In-person participants*
Lord Wolfson KC, One Essex Court	Charles Nairac, White & Case
Elizabeth Gloster, One Essex Court	John Willems, White & Case
Andrew Fenn, Atkin Chambers	Tom Cameron, White & Case
Ronan Hanna, Atkin Chambers	Cristiana Gonçalves Correia, White & Case
Daniel Gal KC, Skadden,	Evanthia Kasiora, White & Case
Maximilian Szymanski, Skadden	Konstantine Kopaliani, White & Case
Pouneh Farham, Skadden.	Teresa Rabusin, White & Case
Cem Celiker, ENKA	Audrey-Anne Guyony, White & Case
Hakan Kozan, ENKA	Sarada Nateshan, White & Case
Kaan Aksu, ENKA	
Lili Nahmias, ENKA	*Video participants*
Betsy Telim, ENKA	Ministry of Justice of Georgia

3 Arbitral Tribunal email to the Parties, dated 11 March 2024.

Nehir Ozbilen, ENKA Kerem Kusi, Knak Consult Limited Ipek Homris, Observer *Video participant* Jonathan Greenblatt, J. Greenblatt International Disputes	Mariam Antia Giorgi Kakushadze Nino Chikhradze, **Arbitral Tribunal:** Alexis Mourre, Presiding Arbitrator Stanimir Alexandrov, Co-arbitrator Judith Gill, Co-arbitrator Bingen Amezaga, Adm. Secretary

54. During the Closing Hearing, the Respondent submitted its pleading presentation.

55. Epiq Global provided transcription services as the court reporter, including real-time transcription. The corrected transcription of the Closing Hearing was sent to the Parties and the Arbitral Tribunal on 27 June 2024 ("**Closing Hearing Tr.**").

56. On 29 August 2024, the Court of the ICC extended the time limit for rendering the final award until 29 November 2024.

57. On 13 September 2024, the Parties submitted their pleadings on costs.

58. On 25 September 2024, the Respondent submitted written comments on Claimant's pleading on costs.

59. On 30 September 2024, the Claimant submitted a reply to Respondent's comments about Claimant's pleading on costs.

60. On 13 October 2024, the Arbitral Tribunal declared the closing of the proceedings.

VI. FACTUAL BACKGROUND

A. Introduction

61. The dispute arises from a contract for the building, ownership, and operation of a hydroelectric generation project in Georgia. ENKA submits that growing opposition to the project in Georgia led to several interruptions of the works and that the GOG failed to comply with its obligation to ensure access to the site, thereby creating a situation that left it with no other choice than terminating the contract and seeking compensation for the value of its assets. The GOG denies having breached its obligations under the contract and submits that the protests are attributable to the breach of Enka's own obligations. According to the GOG, Enka was therefore not entitled to terminate, and has no right to compensation for the purported value of its assets.

B. The Tender

62. On 24 December 2015, the Georgian Energy Development Fund ("**GEDF**"), an entity owned by the State of Georgia and managed by the Ministry of Economy and Sustainable Development ("**MESD**"), announced a tender for a project to conduct a detailed design study, construct, test, own and operate a hydroelectric power plant of approximately 433 MW in the Namakhvani Cascade in Tskaltubo and Tsageri regions of Georgia ("**NHPP**", "**Plants**" or the "**Project**") and invited investors to submit an Expression of Interest[4] based on a two-plant design developed by GOG over many years (the "**Basic Design**").[5]

63. According to the Basic Design, the first plant, on the lower part of the Rioni River, would generate 1,170 GWh per annum with an installed capacity of 333 MW (the "**Lower Namakhvani**"). The second, on the upper part of the river, would generate a further 344 GWh per annum with an installed capacity of 100MW (the "**Upper Namakhvani**").[6] The historical data and feasibility studies indicated that the NHPP would meet 20% of the total national peak electricity demand and increase annual domestic electricity generation in Georgia by roughly 15%.

64. Bidders for the Project were required to (i) estimate the cost required to implement the Project and (ii) propose a tariff at which they would sell the power output of the Project to the national grid operator, in accordance with the tender documents.[7] The main criterion for the award of the tender was the offered tariff.[8]

65. The tariff and its terms were determined by each bidder by way of a binding offer that was not subject to negotiation.[9] Bidders were to set (i) the level of the tariff, and (ii) the period during which the GOG would guarantee the power purchase (from eight to 12 months per year for a maximum duration of 15 years).[10]

66. ENKA was incorporated in Georgia under the name "Clean Energy Group Georgia LLC" since 1 February 2016 for the purposes of bidding for the Project. On 2 February 2016, ENKA submitted an expression of interest.[11]

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4 C-4, BOO Agreement, p. 3, Preamble; R-16, Invitation for Expression of Interest, dated 24 December 2015.

5 SoC, para. 33; C-4, BOO Agreement, Art. 1.1 definition of "Basic Design": "*the design of the Project prepared by Studio Pietrangeli Consulting Engineers of Italy on behalf of the GEDF dated July 2015*".

6 SoC, para. 34; C-2, NHPP Basic Design.

7 C-4, BOO Agreement, p. 3, Preamble.

8 R-16, Invitation for Expression of Interest, dated 24 December 2015, p. 7, para. 1(b).

9 R-7, Responses to questions of investors, dated 16 March 2016, p. 2, Question No. 5.

10 R-7, Responses to questions of investors, dated 16 March 2016, pp. 1-2, 4, Questions No. 1-2, 5 and 18.

11 C-4, BOO Agreement, p. 3, Preamble.

67. At the time, ENKA was a wholly owned subsidiary of the Norwegian company Clean Energy Group A.S. ("**CEG**"), a privately held renewable energy developer, investor, and asset manager. CEG had relevant experience in the management of a hydro project in Georgia through its involvement in the Shuakhevi HPP project.[12]

68. In anticipation of the bid's submission, CEG approached Enka Insaat, a large Turkish construction conglomerate. On 6 July 2016, CEG and Enka Insaat entered into a Joint Bid Agreement ("**Joint Bid Agreement**"),[13] whereby they agreed to submit a joint binding bid for the Project. The Joint Bid Agreement provided that:

a) the joint bid terms and the power price and escalation thereof would be agreed between CEG and Enka Insaat;[14]

b) if the Project was awarded to ENKA, Enka Insaat would acquire a 30% stake in the company,[15] and CEG and Enka Insaat would have complementary roles;[16]

c) Enka Insaat would conduct an in-depth design and value review of the Project, to finally determine its design and enter into an EPC contract;[17] and

d) CEG and Enka Insaat would jointly manage ENKA.[18]

69. An ENKA document relating to the respective experience of CEG and ENKA mentions that "*the management team behind* [CEG] *have successful experience in developing and financing large-scale hydro in Georgia (the US$ 417 million Shuakhevi Project), while Enka has extensive international infrastructure construction experience.*"[19]

70. The tender anticipated that the winning bidder would acquire the entirety of the share capital or 100% of the assets of a Georgian incorporated entity called Namakhvani JSC – a special purpose vehicle holding the right to develop the Project –, certain immovable property and associated rights to build, and certain permits and authorizations, including a Construction Permit dated 26 January 2016, and an Environmental Impact Assessment.[20]

71. On 7 July 2016, CEG and Enka Insaat submitted a joint binding bid via ENKA. Two

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12 C-162, Joint Bid Agreement, pp. 2-3.

13 C-162, Joint Bid Agreement.

14 C-162, Joint Bid Agreement, p. 2.

15 C-162, Joint Bid Agreement, p. 2.

16 C-162, Joint Bid Agreement, p. 3.

17 C-162, Joint Bid Agreement, p. 3.

18 C-162, Joint Bid Agreement, pp. 3, 6-7.

19 R-70, ENKA's experience with Energy Projects dated 7 July 2016.

20 C-4, BOO Agreement, Annex 3 (List of Permits) of Annex 8 (Form of Acquisition Agreement).

other companies submitted bids: Powerchina Resources Ltd. ("**Powerchina**") and General Development LLC.

72. ENKA proposed a tariff of USD 6.2 cents/kWh with a 3% annual escalation and a request for a guaranteed procurement period of eight months per year for 15 years.[21]

73. Such offer was below the tariff of USD 8.2 cents/kWh for a guaranteed procurement period of 12 months per year for 15 years proposed by Powerchina,[22] therefore, on 17 January 2017, the Assessment Committee decided to award the Project on an exclusive basis to ENKA.[23]

74. On 6 July 2017, ENKA, GEDF and Namakhvani JSC entered into a Joint Development Agreement ("**JDA**")[24] for the negotiation and execution of the BOO Agreement. ENKA was required to complete the review of the feasibility study for the construction of the Namakhvani-Alpana road and of the Project Basic Design[25] and to prepare a supplementary environmental package,[26] while GEDF and Namakhvani JSC undertook the land registrations needed to construct and operate the Project[27] and to provide ENKA with unlimited access to all land owned by Namakhvani JSC[28] and to assist ENKA in obtaining permits and rights for the development of the Project.[29]

75. On 2 August 2017, Enka Insaat acquired a 50% stake in ENKA.[30] At the same time, the GOG and ENKA commenced the negotiations of the BOO Agreement.

76. In parallel with these negotiations, ENKA undertook and commissioned the necessary work to refine the Basic Design and achieve a detailed design ("**Detailed Design**") of the NHPP. Enmar Construction BV ("**Enmar**"), a construction company 100% owned by Enka Insaat, reviewed the Basic Design of the Project and produced the Detailed Design.

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21 C-5, Annex "Implementation Agreement" and Power Purchase Agreement ("**PPA**") attached to ENKA's Expression of Interest, dated 7 July 2016; R-19, ENKA's Draft Term Sheet dated 7 July 2016, pp. 3, 5, Arts. 1, 5 and 6.

22 R-9, Meeting Minutes of the Assessment Committee, dated 16 January 2017, p. 3, para. 4.

23 R-9, Meeting Minutes of the Assessment Committee, dated 16 January 2017, p. 3.

24 R-10, JDA.

25 R-10, JDA, dated 6 July 2017, Art. 1.1(a).

26 R-10, JDA, dated 6 July 2017, Art. 1.1(b).

27 R-10, JDA, dated 6 July 2017, Art. 2.2.

28 R-10, JDA, dated 6 July 2017, Art. 2.5.

29 R-10, JDA, dated 6 July 2017, Art. 2.7.

30 R-3, Extract from Georgian Public Registry, dated 2 August 2017; C-166, First SHA, dated 4 July 2017, Art. 3.3.

77. The Parties also negotiated and agreed a Permitting Action Plan[31] which established a roadmap for the amendments to, or the reissuance of, the existing permits to accommodate the changes in the Detailed Design.

C. The BOO Agreement

78. The Parties negotiated the BOO Agreement during 2017 and 2018. Among other aspects, ENKA sought to include a tariff adjustment mechanism in the BOO Agreement[32] but the GOG refused such modification as "*the only criteria for selection of a winner in the Expression of Interest was a lower tariff*". The GOG also stated that "*as defined by Article 6 of the Term Sheet attached* [to the instructions], *after signing the BOO Agreement, no adjustment of tariff or other key points is acceptable.*"[33]

79. The BOO Agreement was approved by Governmental Decree No. 905 dated 23 April 2019, and executed by the Parties on 25 April 2019.[34]

1. ENKA's Obligations

80. Under the BOO Agreement ENKA undertook to:

a) develop and implement the Project, including by conducting a Detailed Design study, in accordance with the laws of Georgia;[35]

b) finance or procure financing for the development of the Project;[36]

c) obtain, maintain, and renew all necessary authorizations;[37] and

d) apply for the connection of the NHPP to the Transmission System[38] and pay the relevant connection fees.

2. The GOG's obligations

81. The GOG undertook to:

a) support ENKA in the implementation of the Project, including by obtaining

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31 C-35, Permitting Action Plan.

32 R-73, draft BOO Agreement, dated 3 November 2017, p. 45, art. 8.2.3(d)(i)(A); R-74, Issues List, dated 18 December 2017, p. 9; R-75, draft BOO Agreement, dated 20 March 2018, p. 49, art. 8.2.3(d); R-76, draft BOO Agreement, dated 29 March 2018, p. 48, art. 8.2.3(d).

33 R-74, Issues List dated 18 December 2017, p. 9.

34 C-4, BOO Agreement, Preamble.

35 C-4, BOO Agreement, Preamble and Art. 3.1.1.

36 C-4, BOO Agreement, Art. 3.1.2.

37 C-4, BOO Agreement, Art. 3.1.4.

38 C-4, BOO Agreement, Art. 3.1.6.

relevant authorizations in accordance with Georgian law;[39]

b) transfer to ENKA (or otherwise make available to it) the State-owned land or land rights to State-owned land as required for the construction of the Project;[40]

c) ensure that ENKA and its contractors/operators have access to the Project's Site[41] and Existing Infrastructure[42] without interference or interruption;[43] and

d) take all reasonable and prudent measures to safeguard the Site, Land Rights, Plant, Roads, Transmission System, and Persons involved in the Project.[44]

3. <u>Joint Obligations</u>

82. Article 5.1 of the BOO Agreement provides that "*the Parties shall jointly cooperate to ensure that the construction, operation, maintenance, management and monitoring of the Project and the Transmission Lines complies with Environmental and Social Standards.*"[45]

83. "Environmental and Social Standards" are defined as "*the requirements related to the environment and the protection and preservation thereof and the social impacts of the Project and the mitigation thereof, imposed by the Laws of Georgia and by the Financing Parties and which in any case shall include: (a) where EBRD is a Financing Party, the EBRD Performance Requirements; and/or (b) where the International Finance Corporation is a Financing Party, the IFC Performance Requirements Standards; or (c) in any other case, the Equator Principles.*"[46]

84. The BOO Agreement indicates that the "Equator Principles" means "*those principles set out in the paper entitled 'The Equator Principles III – A financial industry benchmark for determining, assessing and managing environmental and social risks in projects' dated June 2013, developed and adopted by the Equator Principles Financial*

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39 C-4, BOO Agreement, Art. 3.2.1.

40 C-4, BOO Agreement, Art. 3.2.6.

41 C-4, BOO Agreement, Art. 1.1: "'*Site' means the land on which the Project shall be constructed and located or otherwise used in connection with the Project and which is depicted, for illustration purposes only, in the map in Annex (location).*"

42 C-4, BOO Agreement, Art. 3.2.14(a): '*Existing Infrastructure*': "*all existing international, secondary and local roads, bridges or other such infrastructure.*"

43 C-4, BOO Agreement, Article 3.2.14.

44 C-4, BOO Agreement, Art. 3.2.20.

45 C-4, BOO Agreement, Art. 5.1.

46 C-4, BOO Agreement, Art. 1.1, definition of "Environmental and Social Standards".

Institutions and as the same may be amended or supplemented from time to time."[47]

4. ENKA's Rights

85. Article 3.2.2 granted ENKA the right to:

a) implement and carry out the Project on an exclusive basis;

b) harness, utilize, divert and release water resources from the Rioni River and its tributaries, and the Tskhenistsqali River, required by ENKA for the operation of the Project…;

c) export at all times (other than during the relevant PPA Period) the entire volume of electricity and electric capacity produced by each Plant provided that after the first fifteen (15) years from the Commercial Operations Date of a Plant, ENKA shall have the right to export at all times the entire volume of electricity and electric capacity of such Plant;

d) use the Environmental Attributes that may be generated by each Plant on an exclusive basis including but not limited to CER certificates.[48]

5. Authorizations and Land Rights

86. The existing authorizations held by Namakhvani JSC, including the existing construction permit, and environmental permits[49] were to be assigned to ENKA as part of ENKA's acquisition of Namakhvani JSC's assets.[50]

87. The GOG was obliged to support ENKA in acquiring the Land Rights required to implement the Project. The detailed procedure was set out in Article 3.2.6 and Annex 5 and varied depending on the nature and ownership of the land. Most of the land was classified as "agricultural land" which, under Georgian law, could not be transferred to a foreign owned company. Such land would therefore need to be reclassified as non-agricultural land before transfer to ENKA.[51]

88. If, under the laws of Georgia, the GOG was prohibited from transferring clear title to any of the land plots, the GOG was required to grant to ENKA a right to build ("**Right to Build**") valid for 99 years.[52] Right to Build meant the "*title to operate and use of the*

47 C-4, BOO Agreement, Art. 1.1, definition of "Equator Principles"; www.equator-principles.com

48 C-4, BOO Agreement, art. 3.2.2.

49 C-4, BOO Agreement, Annex 3 (List of Permits) of Annex 8 (Form of Acquisition Agreement).

50 C-4, BOO Agreement, Art. 3.2.7(c) and Annex 8 (Form of Acquisition Agreement).

51 SoC, para. 61.

52 C-4, BOO Agreement, Art. 3.2.6(e) and Annex 5, sub-paragraphs (d) and (m).

land which is second only to the ownership title under the laws of Georgia."[53]

89. Article 3.2.19 of the BOO Agreement provides that: "*The GOG acknowledges and agrees that the rights to operate the Plants granted to ENKA under this Agreement, including the rights referenced in Article 3.2.6 (Land Rights) shall be definite and irrevocable and remain with ENKA for the Term. Any relevant renewals shall be in accordance with the Laws of Georgia.*"

6. Tariff

90. The BOO Agreement provides for a tariff for the purchase by the GOG of power generated by NHPP based on ENKA's binding bid. That tariff was USD 6.2 cents/kWh and escalated by 3% per annum.[54] The tariff applied to an eight-month period within each year for the first 15 years of commercial operations ("**PPA Period**").[55] For the remaining four months of the year, as well as for the period beyond the 15 years of commercial operations, ENKA would be free to sell the power generated by NHPP at market prices ("**Merchant Period**").[56]

7. Project's Phases

91. ENKA was entitled but not required to implement the Project in phases. The phases envisaged by the BOO Agreement are set out in Article 4:

a) Preconstruction Phase (Article 4.1): before commencing the construction works, ENKA was required to: (i) obtain the required Authorizations,[57] including revisions of Environmental Permits[58] and Construction Permits[59] pursuant to the Permitting Action Plan, and (ii) acquire the necessary Land Rights[60] to any land parcel necessary for the Project.

b) Construction Phase (Article 4.2): ENKA was required to carry out the engineering, procurement, and construction for the NHPP in accordance with the BOO Agreement, good industry practice and the Detailed Design.[61] ENKA was required to complete the construction works by the milestone dates in Annex 3 to the BOO Agreement and would be liable for liquidated damages if those

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53 C-4, BOO Agreement, Art. 1.1, definition of "Right to Build".

54 C-4, BOO Agreement, Art. 1.1, definition of "Tariff".

55 C-4, BOO Agreement, Art. 1.1, definition of "PPA Period".

56 C-4, BOO Agreement, Art. 1.1, definition of "Non-PPA Period".

57 C-4, BOO Agreement, Art. 1.1, definition of "Authorizations".

58 C-4, BOO Agreement, Art. 1.1, definition of "Environmental Permits".

59 C-4, BOO Agreement, Art. 1.1, definition of "Construction Permit".

60 C-4, BOO Agreement, Art. 1.1, definition of "Land Rights".

61 C-4, BOO Agreement, Art. 1.1, definition of "Detailed Design".

dates were not met,[62] subject to a right of extension.[63]

c) Operations Phase (Article 4.3): Once the Plants were operational, ENKA was required to operate and maintain the Plants[64] and to sell electricity to the Georgian Electricity System Commercial Operator JSC ("**ESCO**") during the PPA Period at the agreed tariff.[65] Outside of the PPA Periods, ENKA was free to sell electricity on the open market.[66]

92. According to ENKA, there was overlapping between the Preconstruction and Construction Phases.[67]

8. Term

93. The Term of the BOO Agreement continued until the expiration of the Operation Phase (lifetime)[68] of the latest plant.[69] Since modern hydropower plants are assumed to have lifetimes in excess of 100 years, the Parties agree that the term of the BOO Agreement exceeded 100 years.[70]

9. Preconstruction Security

94. Article 7.1 of the BOO Agreement provides that, within ten business days after the Construction Effective Date,[71] ENKA was to deliver to the GOG two bank guarantees (one in the amount of USD 1.5 million for the Lower Namakhvani plant and another in the amount of USD 500.000 for the Upper Namakhvani plant to secure the proper and timely performance of all of ENKA's obligations during the relevant Preconstruction Phase, and shall renew the Preconstruction Security on an annual basis during the relevant Preconstruction Phase.[72]

10. ENKA's Right to Terminate

95. Article 9.2.2 of the BOO Agreement allowed ENKA to unilaterally terminate the contract based on:

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62 C-4, BOO Agreement, Art. 4.4.

63 C-4, BOO Agreement, Art. 4.2.5, definition of "Extension Event".

64 C-4, BOO Agreement, Art. 4.3.1.

65 C-4, BOO Agreement, Art. 4.3.2(b).

66 C-4, BOO Agreement, Art. 4.3.2(c).

67 SoC, para. 50.

68 C-4, BOO Agreement, Art. 1.1, definition of "Operation Phase".

69 C-4, BOO Agreement, Art. 1.1, definition of "Term".

70 SoC, para. 51; SoD, para. 100.

71 C-4, BOO Agreement, Art. 1.1: "*'Construction Effective Date' means the date on which [ENKA] has notified the GOG in writing that it has received: (a) the Revised Permits; and (b) the Required Land.*"

72 C-4, BOO Agreement, Arts. 7.1.1, 7.1.2 and 7.1.3.

a) a GOG Event of Default; and/or

b) the circumstances set forth in Article 8.1.8 (Force Majeure).

96. GOG Events of Default are listed in Article 9.1.2, such as:

> "*(a) any material breach of an obligation or representation under this Agreement or any other Project Agreement by the GOG or a Public Authority, including any Relevant Public Authority, whether or not expressly designated as such hereunder if not cured within ninety (90) days from its notification to the GOG or the Public Authority or Relevant Public Authority (as applicable).*"

97. Article 8.1.1 of the BOO Agreement defines "*Force Majeure Event*" as follows:

> "*[A]ny circumstance not within the reasonable control, directly or indirectly, of the Party affected (the 'Affected Party') resulting in or causing a total or partial failure or non-performance or delayed performance of the Affected Party in the fulfilment of any of its obligations under this Agreement (other than the payment of money), but only if and to the extent that:*
>
> *(a) such circumstance, despite the exercise of reasonable diligence, cannot be or could not have been prevented, avoided or removed by the Affected Party;*
>
> *(b) the Affected Party took or has taken reasonable precautions, due care and reasonable alternative measures in order to avoid the effect of such event on the Affected Party's ability to perform its obligations under this Agreement and to mitigate the consequences thereof; and*
>
> *(c) the event is not, or was not, the direct or indirect result of the breach by the Affected Party of any of its obligations under this Agreement.*"

98. Article 8.1.3(a) provides examples of Non-physical Force Majeure Events such as:

> "*(ii) any revolution, riot, insurrection, civil commotion, civil disturbance, civil disobedience, exercise of military or usurped power, mutiny, rebellion, state of siege or declaration or maintenance of martial law within Georgia;*
>
> *(iv) any blockade, embargo (including causing unavailability or shortage of goods or materials), any closing of borders, roads, rail links, airports or other assistance to or adjuncts of transport to Georgia;*
>
> *(vi) any act of sabotage against the Plants (or associated Roads) that is not carried out by an employee, contractor, or agent of [ENKA] or [ENKA]'s Affiliates or Shareholders;*
>
> *(ix) any public agitation or protests preventing construction or operating activities of the Project and/or the Project exceeding twenty one (21) days in aggregate in any six (6) month period.*"

99. Article 8.1.8 provides for the conditions under which a Force Majeure Event may give rise to the termination of the BOO Agreement:

> "*If any Force Majeure Event or Change in Law or Event under Article 8.2.1(d) (Compensation Event): (i) prevents, delays or hinders or could reasonably prevent, delay or hinder with the lapse of time, a Party from performing an obligation under this Agreement for an aggregate period of more than one hundred and eighty (180) days [...] or (ii) frustrates the economic basis for the implementation or operation of the Project as contemplated by this Agreement, then (A) for any Force Majeure Event or Change in Law or event under Article 8.2.1(d) (Compensation Events), [ENKA] shall have the right to terminate this Agreement in accordance with the terms hereof, and (B) in the event this Agreement is terminated by [ENKA] for a Non-Physical Force Majeure Event or Change in Law or event under Article 8.2.1(d) (Compensation Event), the GOG shall purchase all of the Transferable Assets for a purchase price calculated in accordance with Article 9.4.3 (Termination for Prolonged Non-Physical Force Majeure Event or Change in Law), and (C) in the event this Agreement is terminated by [ENKA] for a Physical Force Majeure Event, the GOG shall purchase all of the Transferable Assets for a purchase price calculated in accordance with Article 9.4.4 (Termination for Prolonged Physical Force Majeure Event).*"

100. The right of termination is additional to any other remedy for breach.[73]

11. Consequences of termination

101. In the case of termination due to a GOG Event of Default, Article 9.4.2 of the BOO Agreement provides that "*[ENKA] may, at its option, require the GOG to purchase the Transferable Assets and, if so required, the GOG shall purchase from [ENKA] and [ENKA] shall transfer to the GOG or its designee the Transferable Assets in accordance with Articles 9.4.6 and 9.4.7 for the amount (the 'Government's Default Termination Amount') denominated in US Dollars*".

102. In the case of termination due to "*Prolonged Non-Physical Force Majeure Event*", Article 9.4.3 provides for the same remedy.

103. Article 9.4.2 of the BOO Agreement defines the "*Government Default Termination Amount*" (or the "*Non-Physical Force Majeure Termination Amount*") as the greater of:

> "*(a) the aggregate of:*

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[73] In relation to Extension Events, Art. 4.2.5 provides: "*this Article 4.2.5 is without prejudice to ENKA's termination rights should ENKA elect to use such rights in accordance with Article 9.2.2*", and in relation to Compensation Events, Art. 8.2.4(a) provides: "*the right of ENKA to be compensated for a Compensation Event under this Article 8.2 shall be without prejudice to its right to request any other remedies under this Agreement or the other Project Agreements which may be applicable to the relevant Compensation Event [...] and any right of termination under Article 9.*"

(i) the Base Amount (if any);

(ii) the total amount of all documented damages, breakage costs, fees and expenses related to the termination or buyout of contracts to which [ENKA] is a party and which are terminated or breached by [ENKA] in conjunction with the termination of this Agreement or sale to the GOG of the Transferable Assets, plus any costs incurred by [ENKA] in securing [ENKA]'s release from all liability under contracts included within the Transferable Assets;

(iii) all taxes payable on the transfer of the Transferable Assets;

(iv) the Equity Investment; and

(v) the Tax Gross-Up Amount; and

(b) the aggregate of:

*(i) the Fair Market Value of the Transferable Assets ("**FMV**");*

(ii) the total amount of all documented damages, breakage costs, fees and expenses related to the termination or buyout of contracts to which [ENKA] is a party and which are terminated or breached by [ENKA] in conjunction with the termination of this Agreement or sale to the GOG of the Transferable Assets, plus any costs incurred by [ENKA] in securing [ENKA]'s release from all liability under contracts included within the Transferable Assets;

(iii) all taxes payable on the transfer of the Transferable Assets;

(iv) the Tax Gross-Up Amount.

104. The "Fair Market Value" (FMV) is defined as "*the value of a Person's interests, investments, property, commercial arrangements, rights, privileges, and exemptions, taking into account that Person's business and investments, all as related to or affected by the Project, and determined on the basis of an ongoing concern utilizing the discounted cash flow method by applying a discount rate calculated as a Person's cost of capital (where each category of capital is proportionately weighted and financially determined by the Approved Auditor), assuming a willing buyer and willing seller in a non-hostile environment and disregarding all unfavourable circumstances (including any diminution of value) leading up to or associated with termination of this Agreement. For the avoidance of doubt, the Fair Market Value determined hereunder shall not be less than the most recent book value of the relevant interest or right.*"[74]

105. These amounts would be set out by ENKA in a Termination Invoice to be served on the

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[74] C-4, BOO Agreement, Art. 1.1, definition of "Fair Market Value" (FMV).

GOG[75] and within fifteen 15 days of receiving the Termination Invoice, the GOG have the right to request that ENKA arrange that the FMV component in the Termination Invoice be verified by an Approved Auditor.[76]

106. Approved Auditor is defined by Article 1.1 to mean: "*(a) an auditor selected by [ENKA] from the list in Annex 12 (Approved Auditors); or (b) if [ENKA] does not select an auditor from the list in Annex 12, such other auditor as [ENKA] and the GOG agree.*"

107. According to Annex 12: "*Any of the following firms shall constitute an Approved Auditor:*

(a) PwC;

(b) Deloitte;

(c) KPMG; or

(d) EY"

108. Articles 9.4.6(b) to 9.4.6(e) set out the procedure for the verification by the Approved Auditor as follows:

b) Within 15 days of receipt of the Termination Invoice, the GOG may request that the FMV calculation be verified by an Approved Auditor. If requested, ENKA shall arrange for its calculations of the FMV in the Termination Invoice to be verified by an Approved Auditor.

c) The Approved Auditor shall review ENKA's calculation of the FMV and, within 30 days of receiving such calculation, issue a report to ENKA (copied to the GOG) confirming either that the FMV set out in the Termination Invoice has been properly calculated or, if in the Approved Auditor's opinion the FMV has not been properly calculated, providing its own calculation.

d) The Approved Auditor certificate shall (save in case of a manifest error) be conclusive and binding. The Approved Auditor shall act as an expert and not as an arbitrator. The reasonable costs and expenses of the Approved Auditor shall be borne equally between ENKA and the GOG. The Approved Auditor shall be entitled to have access to ENKA's premises and to its books, records, and other documents for the purposes of carrying out their review, and each of the Parties shall promptly on request supply to the Approved Auditor all such documents and information as the Approved Auditor may require for the purposes of their

75 C-4, BOO Agreement, Art. 9.4.6(a).

76 C-4, BOO Agreement, Art. 9.4.6(b).

functions pursuant to this Article 9.4.6.

e) The GOG was required to pay the FMV Termination Invoice amount, or the amount calculated by the Approved Auditor, within 180 days from delivery of the Termination Invoice or 30 days after receipt of the Approved Auditor report.

D. Other Agreements

109. On the same date as the BOO Agreement, the Parties executed a suite of related contracts:

1) Two Power Purchase Agreements (the "**PPAs**") between ENKA and ESCO for the Lower and Upper Namakhvani plants respectively,[77] regulating the purchase by GOG of the power generated by NHPP on the same tariff terms as the BOO;

2) An Agreement on the Transfer of Assets between Namakhvani JSC and ENKA[78] whereby Namakhvani JSC transferred assets related to the development of the Project to ENKA for USD 7.6 million;

110. The PPAs were on substantially the same terms and provided:

a) A yearly eight-month purchase period during the first 15 years from the Plant's Commercial Operations Date;[79]

b) During the PPA Period, ENKA would sell and ESCO purchase power at the agreed tariff (i.e. USD 6.2 cents / kWh indexed by 3% per annum) without any transmission and dispatch fees;[80]

c) Outside of the PPA Period, ENKA was entitled to freely dispose of the energy output generated by the Plant by selling it to any power purchaser in Georgia or exporting it.[81]

111. On the date of the execution of the BOO Agreement, Enka Insaat became the majority indirect shareholder in ENKA, with a total 90% stake.[82] When Enka Insaat became the controller of ENKA, it changed the management team that had been put in place by

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77 C-6, Lower Namakhvani PPA dated 25 April 2019; C-7, Upper Namakhvani PPA; C-4, BOO Agreement, Articles 3.2.10 and 3.2.11.

78 C-36, Transfer Agreement, dated 25 April 2019.

79 C-6, Lower Namakhvani PPA and C-7, Upper Namakhvani PPA, Art. 1.1, definition of "PPA Period".

80 C-6, Lower Namakhvani PPA and C-7, Upper Namakhvani PPA, Art. 1.1, definition of "Tariff", and Art. 3.1(a)(ii).

81 C-6, Lower Namakhvani PPA and C-7, Upper Namakhvani PPA, Art. 3.2.

82 R-4, Extract from Georgian Public Registry, dated 25 April 2019; C-187, Second SHA, dated 1 August 2018.

CEG and appointed Mr. Baran Ozgen as the new Project Manager.[83]

E. Financing

112. In the Joint Bid Agreement, CEG and ENKA foresaw that if the bid was successful, Enka Insaat would become a 30% shareholder of ENKA and each shareholder would provide on a pro rata basis the equity needed to construct and operate the Project.[84] CEG, however, did not have the cash to fund its 70% share of the Project's costs (estimated at USD 730 million by the GOG[85]), as a consequence of which the shareholders agreed that the Project would be financed by using non-recourse project finance from multilateral financing institutions such as the International Finance Corporation ("**IFC**") and the European Bank for Reconstruction and Development ("**EBRD**").[86]

113. The Joint Bid Agreement also provided that if CEG was unable to provide funding for its 70% share, Enka Insaat would have the right to purchase from CEG the amount of shares that CEG was unable to finance.[87]

114. In the first months of 2017, ENKA contacted IFC and EBRD and, on 18 July 2017, these institutions issued a joint mandate letter describing the due diligence and other work in relation to the financing of the Project.[88]

115. On 4 July 2017, Enka Holding and CEG executed a Shareholders' Agreement ("**First SHA**"),[89] providing *inter alia* that:

- Enka Holding would acquire 50 % of CEG's shares in ENKA rather than 30% as foreseen in the Joint Bid Agreement;[90]

- The Project would be financed by limited or non-recourse project finance from multilateral institutions such as IFC and EBRD, with the aim of maximizing gearing and minimizing the need for shareholders' support;[91]

- ENKA's shareholders granted CEG an option to sell additional shares to Enka

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83 CWS-1, Ozgen I, para. 1; SoD, para. 111.

84 C-162, Joint Bid Agreement, dated 6 July 2016, p. 3, "SPV share subscription and shareholders agreement", p. 4 "Funding".

85 R-16, Invitation for Expression of Interest, 24 December 2015.

86 C-162, Joint Bid Agreement, dated 6 July 2016, p. 5, "Financing Structure".

87 C-162, Joint Bid Agreement, dated 6 July 2016, p. 5 "Financing Structure".

88 CWS-5, Gucuyener I, paras. 24-26; C-167, IFC and EBRD letter to Enka Insaat, CEG and ENKA, dated 18 July 2017.

89 C-166, First SHA, dated 4 July 2017.

90 C-166, First SHA, dated 4 July 2017, Art. 3.3.

91 C-166, First SHA, dated 4 July 2017, Art. 9.13.

Holding if it was unable to obtain funding (the "**Option**"). The Option could be exercised before signature of the BOO Agreement,[92] in which case CEG's shareholding would be converted into a carried interest position equal to 10% ownership in ENKA. Enka Holding would therefore carry all financial commitments relating to CEG's share and fund the entirety of the Project.[93] If the Option was exercised, there would be a ceiling on total debt financing equivalent to 30% of the Project costs;[94]

116. In August 2017, a problem occurred in another HPP project in Georgia (the Shuakhevi HPP) in which CEG was involved.[95] IFC and EBRD were then concerned about the involvement of CEG in the Project and, on 5 April 2018, they sent an email to Enka Insaat and CEG stating that they were unwilling to continue if CEG had more than a minority stake in the Project and asked Enka and CEG to: "*(a) confirm the final shareholder structure including Enka's willingness to take over the project; (b) the action plan for any applicable changes in the structure and, (c) the plan of further equity financing of the project.*"[96]

117. On 13 April 2018, Mr. Brandtzaeg of CEG, sent an email to Mr. Managadze of IFC/EBRD, explaining that CEG would not have a majority stake in ENKA and would either sell part of its stake or exercise the Option under the First SHA.[97]

118. ENKA worked with IFC, EBRD and its consultants to produce a suite of plans and strategy documents that would meet the IFC/EBRD requirements and prepared an Environmental and Social Impact Assessment (which last version was dated 18 November 2018).[98]

119. On 1 August 2018, Enka Holding and CEG signed a second shareholder's agreement (the "**Second SHA**"),[99] which formalized CEG's decision to exercise the Option. Pursuant to the Second SHA, Enka Holding increased its shareholding in ENKA from 50% to 90% and CEG's remaining 10% stake became an interest carried by Enka Insaat.[100] The agreement to limit debt financing to 30% of Project's costs (as foreseen

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92 C-166, First SHA, dated 4 July 2017, Art. 8.1(i).

93 C-166, First SHA, dated 4 July 2017, Art. 8.1(ii).

94 C-166, First SHA, dated 4 July 2017, Art. 8.1(ix).

95 BR-81, International Journal of Hydropower & Dams, May 14, 2020.

96 C-174, IFC/EBRD email to ENKA's shareholders, dated 5 April 2018.

97 C-177, ENKA's shareholders email to IFC/EBRD, dated 13 April 2018.

98 C-200, Environmental and Social Supplementary Studies: Vol. IV – Stakeholder Engagement Plan (Rev. I), dated 18 November 2018.

99 C-187, Second SHA, dated 1 August 2018.

100 C-187, Second SHA, dated 1 August 2018, Arts. 8 and 8(i).

in the First SHA) came into effect with the transfer of ownership to ENKA.[101]

120. On 1 November 2018, IFC and EBRD issued a draft term-sheet for the financing of the Project.[102] According to ENKA, the terms proposed by IFC/EBRD were unattractive because they provided for full recourse against Enka Insaat.[103]

121. On 30 April 2019, IFC and EBRD sent a letter to the GOG, indicating that they were unable to finalize their due diligence because additional studies were needed to assess the impact on the Project of the presence of endangered sturgeon species in the Rioni river.[104] The GOG formed a working group of all HPP operators to address this issue.[105]

122. ENKA formally terminated the IFC/EBRD mandate in May 2020.[106] Until around July 2021, it contemplated financing from Enka Insaat via a back-to-back financing arrangement through Société Générale ("**SocGen**"), that issued a term sheet for a structured loan,[107] but no financing was ultimately agreed with SocGen.[108]

123. ENKA and Enka Insaat also approached ICBC China and HSBC Dubai to establish a back-to-back financing arrangement, without reaching any agreement.[109]

124. In July 2021, ENKA resumed discussions with EBRD and signed a confidentiality agreement but they did not reach any financing agreement.[110]

125. ENKA avers that Enka Insaat could finance the Project with its own equity, and that it did not make sense for it to assume both the risk of full recourse financing and finance costs while it was ready to finance the Project itself.[111]

F. Pre-contract engagement with local population

126. ENKA submits that it carried out, during the BOO negotiations, the following activities:

- identification of the land plots needed for the Project and initiation of negotiations with

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101 C-187, Second SHA, dated 1 August 2018, Art. 8(vii).

102 C-198, IFC/EBRD Indicative Term Sheet, dated 1 November 2018.

103 Reply, para. 131(d); CWS-5, Gucuyener I, paras. 58-59.

104 R-84, Letter from EBRD and IFC to the GOG, dated 30 April 2019.

105 Reply, para. 139; C-4, BOO Agreement, Art. 5.2.2.

106 Reply, para. 86(a).

107 C-249, SocGen Indemnity Letter for a Structured Loan, dated 9 June 2020.

108 CWS-5, Gucuyener I, para. 70.

109 Evidentiary Hearing Tr., D3, pp. 98:12-99:4.

110 Reply, para. 86(b); CWS-5, Gucuyener I, paras.73-74; C-387, Confidentiality Agreement between EBRD and ENKA, dated 21 July 2021.

111 CWS-5, Gucuyener I, para. 59.

households for the payment of compensation for land transfers and displacements;[112]

- around May 2018, setting up the first Community Consultation Councils ("**CCCs**") in the communities of Ophurchkheti, Mekvena and Tvishi, which were particularly focused on land acquisition;

- communicating about the Project through the media.[113]

127. The CCCs are described in the ENKA Communication Strategy reports as follows: "*these CCCs discuss all issues related to the Project, including compensation, resettlement, and livelihood restoration in a systematic and constructive* (sic). [...] *The CCCs are comprised of democratically elected representatives from communities in the valley with one representative for every 30 households*, [...]. *CEGG is providing an opportunity to all elected CCC representatives to express their views and to participate in CCC process to fully understand how CEGG is addressing the impacts/risks and what benefits the Project will provide and discuss directly with management.*"[114]

128. Since March 2019, ENKA started closing the social support centres and reducing the personnel affected to the engagement and communication activities in the Rioni valley.[115] According to ENKA, this demobilization took place because the "*primary responsibility of the staff recruited by* [ENKA] *in the valley was preparations on land acquisition i.e. inventory of private land, complete additional investigations and also explain the project to the local community. All of these tasks are completed back in March 2019 and due to the fact that the permits will not be in place till last quarter of 2019,* [ENKA] *had no choice but to demobilize its staff.*"[116] The Claimant submits that in spite the reduction, a certain level of social outreach staff was maintained throughout 2019, and that it continued to engage with the local communities in the form of public meetings, meetings of CCCs and visits to individual villages.[117]

G. The Permits and licenses

129. Tho GOG had issued environmental, and construction permits for the Project based on the Basic Design, but in view of the changes made to the Basic Design, it was necessary

112 R-55, Q&A Paper dated 8 July 2019; RWS-1, Turnava I, para. 14.

113 R-86, Article in Netgazeti dated 3 August 2018; R-87, ENKA's statement published in BMG on 23 August 2018. ENKA launched a website in September 2017 (www.namakhvani.com); C-201, Communication Strategy Report, dated 21 November 2018, action 5.5; CWS-6, Guven I, para. 44.

114 C-201, Communication Strategy Report, dated 21 November 2018.

115 R-55, Q&A Paper, dated 8 July 2019, one of the potential questions envisaged by ENKA was: "*why [ENKA] has been inactive in the valley since April 2019.*"

116 R-55, Q&A Paper, dated 8 July 2019, No. 3; CWS-3, Ozgen II, para. 22.

117 Reply, para. 150; CWS-3, Ozgen II, para. 26.

for ENKA to obtain new environmental and construction permits.[118] This was reflected in the Permitting Action Plan Side Letter which ENKA sent to the GOG on 29 March 2019.[119] The GOG agreed to the plan and confirmed that the construction permit relating to Lower Namakhvani would be issued within 20 business days of the new environmental permit.[120]

130. The new environmental impact assessment process took around ten months[121] and involved two phases. In the first phase (scoping) the Ministry of Environment assessed whether the modifications made to the Basic Design were likely to cause environmental impact. ENKA submitted a Scoping Report on 13 June 2019,[122] and after a hearing on the issue, the Ministry of Environment issued its Scoping Decision on 1 October 2019, confirming that ENKA could move to the second phase.[123] In the second phase, ENKA submitted the Environmental Impact Assessment Report on 8 November 2019[124] and a public hearing took place on 20 December 2019 at the Tskaltubo City Hall. Local villagers, interest groups, NGOs and representatives of the relevant Ministries were present at the hearing.

131. The Claimant notes that at that point, there was some opposition to the Project, mainly from Green Alternative – a Georgian organization that opposes large infrastructure projects – and a movement called "Save the Rioni Valley" (later known as "Guardians of the Rioni Valley"). Prof. Tea Godoladze from the Institute of Earth Sciences also complained about the Project's seismic parameters,[125] so that the Ministry of Environment and Natural Resources Protection of Georgia ("**MEPA**") asked ENKA to provide additional information.[126]

132. On 28 February 2020, the GOG issued the Revised Environmental Permit for an indefinite period in accordance with the Environmental Impact Assessment Report and subject to the conditions set out therein.[127] Among such conditions, ENKA had to submit additional studies to address the environmental concerns raised by some civil society

118 CWS-1, Ozgen I, para. 21.

119 C-35, Permitting Action Plan, dated 29 March 2019.

120 C-37, MEDS letter to ENKA, dated 25 April 2019; C-38, MEDS letter to ENKA, dated 30 April 2019.

121 CWS-1, Ozgen I, para. 24.

122 C-40, Scoping Report, dated 13, June 2019.

123 C-40, Scoping Report, dated 13 June 2019.

124 C-47, Environmental Impact Assessment Report, dated 8 November 2019.

125 CWS-1, Ozgen I, para. 28.

126 SoD, para. 131; RWS-2, Tvalabeishbili I, para. 26; R-56, Email from ENKA to the GOG, dated 16 January 2020; C-51, ENKA's Monthly Progress Report, dated January 2020, p. 2.

127 C-53, Revised Environmental Decision, dated 28 February 2020, p. 9, item 2.

organizations.[128]

133. On 4 March 2020, ENKA submitted to the Technical and Construction Supervision Agency ("**TACSA**") an application for the revised construction permit for Lower Namakhvani[129] and, on 22 April 2020, TACSA issued the revised construction permit for the preparatory works in Lower Namakhvani.[130]

134. Further authorizations for works on the relocation road[131] and for the Lower Namakhvani diversion tunnel and related structures[132] were issued on 18 February 2020 and on 3 December 2020, respectively.

135. No further permits were issued after December 2020.[133]

H. Land acquisition

136. ENKA needed to acquire more than 1,000 land plots for the Project. Under the BOO Agreement,[134] ENKA would enter into a trilateral agreement with the owner of the land and the GOG for a cease of usage agreement. In addition, a small number of land plots were State-owned, not capable of being transferred to ENKA, and subject to a Right to Build.[135]

137. ENKA organized a meeting on 6 March 2020 and declared the price that it was willing to pay for the land plots on a square-meter basis. The meeting allowed ENKA to obtain signatures from more than 90% of the persons attending it, and the remaining 10% requested individual agreements.[136]

138. The Claimant submits that it spent, between May 2020 and August 2021, more than USD 10 million to acquire the land needed for the Project, and that the GOG nonetheless failed to transfer to it title on most of the land.[137]

I. Early Works

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128 C-53, Revised Environmental Decision, dated 28 February 2020, p. 10.

129 C-55, ENKA letter to TACSA, dated 4 March 2020.

130 C-57, Revised Construction Permit, dated 22 April 2020.

131 C-52, TACSA Order, dated 18 February 2020.

132 C-75, TACSA letter to ENKA, dated 3 December 2020.

133 SoC, para. 116.

134 C-4, BOO Agreement, Art. 3.2.6(d) and Annex 7.

135 C-4, BOO Agreement, Art. 3.2.6(e).

136 CWS-1, Ozgen I, para. 35; C-56, ENKA Monthly Progress Report, dated March 2020.

137 SoC, para. 117.

139. On 3 March 2020, ENKA entered into an Early Works Agreement with Enmar[138] pursuant to which Enmar was to perform preparatory construction works ("**Early Works**") in advance of the execution of the EPC Contract. The scope of the Early Works included the detailed design of the Project, the construction of the camps, the temporary bridge and excavation works for the diversion tunnel.

140. The planned sequence of the Early Works was as follows:[139]

a) Between April and November 2020, construction of the Pioneer Camp (a small base camp for the workers of the Project), starting works at the roller compacted concrete plant yard, clearing trees and creating the temporary road at the location of the diversion tunnel so that tunnel excavation could commence in November 2020;

b) From November 2020 to November 2021, construction of the diversion tunnel and installation of the temporary bridge. Once completed, the diversion tunnel would reroute the Rioni river during the dry season to allow the construction of the Cofferdams between November 2021 and February 2022;

c) Construction of the Cofferdams and subsequently, from February 2022 onwards, construction of the permanent dam and all the permanent works;

d) Completion of the Lower Namakhvani was scheduled for February 2025.

141. Early Works for the larger of the two plants, the Lower Namakhvani, commenced on Site around May 2020.[140] Enmar progressed the Early Works on the critical diversion tunnel and built a bridge over the Rioni River to allow access to the left bank of the river so as to allow works on both sides of the river.

142. By the end of October 2020, Enmar was advancing the following Early Works:[141]

a) The Pioneer Camp was substantially completed and construction of the Main Camp was underway (approximatively 370 people were working on the Site);

b) The road diversion at the diversion tunnel was close to completion and opened to traffic;

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138 C-9, Early Works Agreement, dated 3 March 2020; C-10, 1st t Amendment to Early Works Agreement, dated 16 December 2020; 2nd Amendment to Early Works Agreement, dated 16 June 2021.

139 C-68, Company Namakhvani Development Schedule for October 2020; C-10, 1st Amendment to the Early Works Agreement, dated 16 December 2020; C-11, 2nd Amendment to the Early Works Agreement, dated 16 June 2021.

140 SoC, para. 9.

141 SoC, para. 121.

c) The excavation works at the diversion tunnel were substantially underway;

d) The temporary bridge was well advanced, with concrete structures and girders installed on both sides of the river and the prefabricated steel bridge delivered to site and ready for installation;

e) Tree felling works were well advanced;

f) The temporary explosive magazine had been levelled and fenced;

g) The installation of the concrete batch plant was underway.

J. Protests and first stoppage of works (July 2020 to January 2021)

143. Demonstrations against the Project began in July 2020. Two organizations were at the forefront of the protests:

a) *Save the Rioni Valley* (later also called "*Guardians of the Rioni Valley*"), a local movement based in Tvishi, led by Levan Goletiani, a priest in the Georgian Orthodox Church, his wife Marita Museliani and his son, Varlam Goletiani, who became the most prominent figure in the protests. The group objected to the Project on ecological and political grounds and was opposed to foreign investment in Georgia;[142]

b) *Green Alternative*: a Georgian organization opposing large infrastructure projects and in particular hydropower infrastructures.[143]

144. The protests started to become more vocal during the summer of 2020, at a time when ENKA was starting to implement its community outreach program.[144] In early July, Save the Rioni Valley delivered a letter to ENKA's office in Kutaisi demanding the suspension of the Project and the removal of all equipment from the Site within two weeks, threatening with rallies and demonstrations if ENKA did not comply.[145] On 13 July, Mr. Ozgen from ENKA sent a letter to the GOG explaining the situation and requesting the GOG to undertake preventive measures as necessary.[146] Protests then took place in Kutaisi, where ENKA had organized an event in favour of the Project in the presence of local and national media.[147]

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142 C-152, Save the Rioni Valley Blog.

143 C-153, Green Alternative website.

144 CWS-1, Ozgen I, para. 46; C-63, ENKA's Project Status Update to the MESD, dated 26 August 2020, pp. 7, 9; C-69, ENKA's Monthly Progress Report, dated October 2020, p. 12.

145 CWS-1, Ozgen I, para. 42; C-61, ENKA's letter to the MESD, dated 13 July 2020.

146 C-61, ENKA's letter to the MESD, dated 13 July 2020 and attached demand notice.

147 C-63, ENKA's Project Status Update to the MESD, dated 26 August 2020, p. 11.

145. Parliamentary elections took place in Georgia on 31 October and 21 November 2020. According to the Claimant,[148] the Project had by then become a political issue for the opposition.

146. From the end of October 2020, the works were met by increasing opposition. Groups of protestors, sometimes exceeding 100 people, targeted the Site by (i) threatening and carrying out acts of physical violence against personnel, (ii) demanding that works stop; (iii) erecting a large steel cross at the diversion tunnel area intended to mark the point beyond which ENKA would not pass; and (iv) attacking ENKA's warehouse with petrol bombs.[149]

147. ENKA informed the GOG of these events on 28 October[150] and 5 November 2020.[151] These letters confirmed that ENKA had decided to stop the works until the GOG would be able to secure a safe work environment. ENKA therefore asked the GOG to take appropriate action, pursuant to Article 3.2.20 of the BOO Agreement, and reserved its rights in accordance with Articles 8.1.3 and 8.2.2 of the BOO Agreement.[152]

148. The protests worsened in November 2020 at the Site and near the diversion tunnel, with activists blocking the bridge at the main powerhouse location, initially with cars and then with a steel chain.[153]

149. Around this time, Enka Insaat decided to replace Mr. Ozgen by Mr. Zeiki Kocaoglu as Project Manager for ENKA, and appointed Mr. Hakan Kozan as sponsor representative with oversight on the Project.[154] Mr. Ozgen remained responsible for construction as Project Manager for Enmar.[155]

150. Works on Site remained stopped at the end of 2020[156] and until the end of January

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148 SoC, para. 129(a); CWS-1, Ozgen I, paras. 49-50.

149 SoC, paras. 10, 130; C-66, ENKA's letter to the MESD, dated 28 October 2020; C-67, Video attached to ENKA's letter to the MESD, dated 28 October 2020; C-71, ENKA's letter to the MESD, dated 5 November 2020; C-72, Video attached to ENKA's letter to the MESD, dated 5 November 2020.

150 C-66, ENKA's letter to the MESD, dated 28 October 2020.

151 C-71, ENKA's letter to the MESD, dated 5 November 2020.

152 C-66, ENKA's letter to the MESD, dated 28 October 2020; C-71, ENKA's letter to the MESD, dated 5 November 2020.

153 CWS-1, Ozgen I, para. 77; C-73, ENKA's letter to the MESD, dated 13 November 2020.

154 CWS-1, Ozgen I, para. 77; CWS-2, Kozan I, para. 8.

155 SoC, para. 136.

156 C-70, Daily Report for 31 January 2021, p. 62.

2021.[157]

K. Works resume – February 2021

151. ENKA, the GOG and other stakeholders met on several occasions in January 2021 to discuss the resumption of works at the Site.[158] On 29 January 2021, Mr. Kocaoglu from ENKA exchanged in this regard by WhatsApp with Mr. David Tvalabeishvili, Deputy Minister of the MESD, and the latter urged Mr. Kocaoglu to wait for the GOG's instruction before recommencing the works.[159]

152. On 30 January 2021, the police intervened, removed the protestors' tents and oversaw the removal of the cross.[160] Minister Turnava, from the GOG, declared that the Project was "*safe, one of the most thoroughly studied projects*", and noted that it was bringing USD 800 million in direct investment into Georgia.[161]

153. The Early Works then resumed. However, in February 2021, protestors again invaded the Site and set up tents, preventing the progress of the works at the diversion tunnel.[162] There were also physical attacks and threats to the workers at the Site and in their villages.[163]

154. On 17 February 2021, ENKA signed a private protection agreement with the Security Police Department of the Ministry of Internal Affairs (the "**Police Protection Agreement**"),[164] placing the Project under police protection from 19 February 2021.

155. On 18 February 2021, Prime Minister Gakharia resigned[165] and the Georgian Dream Party nominated Irakli Garibashvili as his successor, which the Georgian parliament

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157 C-78, ENKA Monthly Progress Report, dated January 2021, p. 3; C-77, Civil GE Article, dated 31 January 2021; SoC, para. 142; Rejoinder para. 288.

158 SoC, para. 141.

159 SoC, para. 141; C-154, WhatsApp messages exchange between Mr. Kocaoglu and Mr. Tvalabeishvili on 29 January 2021, pp. 1-2.

160 SoC, para. 142.

161 C-77, Civil GE Article, dated 31 January 2021.

162 CWS-1, Ozgen I, paras. 80-82; C-70, Daily Reports for 1 to 28 February 2021, pp. 63 to 87; C-89, ENKA Monthly Progress Report for February 2021, Section 5.

163 C-70, Daily Report for 23 February 2021, p. 83; C-89, ENKA Monthly Progress Report for February 2021; C-83, Email chain between Mr. Ozgen, Mr. Kozan and others, dated 20 February 2021; C-154, p. 2, WhatsApp messages from Mr. Kocaoglu to Mr. Tvalabeishvili on 26 February 2021 at 18:34; C-79, Mr. Ozgen email to Mr. Gokgaz, dated 1 February 2021; C-80, Mr. Deniz email to Messrs. Ozgen and Alkan, dated 1 February 2021.

164 R-114, Police Protection Agreement, dated 17 February 2021.

165 C-82, Civil GE Article, dated 18 February 2021.

confirmed on 22 February 2021. Prime Minister Garibashvili announced on the same day that Ms. Turnava and Mr. Tvalabeishvili retained their positions as Minister and Deputy Minister of Economy and Sustainable Development[166] and would therefore continue to be the key contact persons to ENKA.

156. The government change did not put an end to the protests and on 28 February 2021, a large rally against the Project took place in Kutaisi[167] headed by Varlam Goletiani, threatening a blockade of Kutaisi within two weeks' time if the Project was not cancelled.[168]

L. Works interrupted again – March 2021

157. On the evening of the rally, Ms. Turnava asked Mr. Kocaoglu of ENKA to stop the works at the Site for some days to calm down the situation.[169] On 3 March 2021, a meeting between Ms. Turnava and Mr. Kozan took place, where Ms. Turnava announced that an "Extraordinary Action Plan" had been agreed with the new Prime Minister to conduct an intensive PPRR and communication campaign and engage with the protesters to explain the benefits of the Project in the hope of reducing the opposition.[170] On 4 March, the Prime Minister again publicly defended the Project and announced that Ms. Turnava and Environment Minister Mr. Davitashvili would visit the Site on the following day.[171]

158. During the following week, ENKA and the GOG had further discussions[172] and, on 12 March 2021, Ms. Turnava made a public announcement of the actions that had been agreed:[173]

a) An "Expert Panel" would be established to consider the protestors' environmental concerns;

b) The construction of the permanent dam would not commence until the studies

166 C-84, Civil GE Article, dated 22 February 2021.

167 C-87, Civil GE Article, dated 28 February 2021.

168 C-88, Summary of Varlam Goletiani Speech, dated 28 February 2021.

169 SoC, para. 148; C-155, p.1, WhatsApp messages between Ms. Turnava and Mr. Kocaoglu on 28 February 2021.

170 SoC, para. 150; RWS-1, Turnava I, para. 49; CWS-2, Kozan I, paras. 22-26; C-316, Mr. Kozan email to Messrs. Mehmet Tara, Sinan Tara and Cem Celiker, dated 3 March 2021.

171 C-90, Civil GE Article, dated 4 March 2021.

172 CWS-1, Ozgen I, paras. 90-95; C-91, Mr. Ozgen email to Mr. Tkavadze, dated 9 March 2021; C-92, WhatsApp messages between Mr. Ozgen and Mr. Tkavadze on 11 March 2021.

173 C-93, Civil GE Article, dated 12 March 2021; C-96, ENKA Monthly Progress Report for March 2021, Section 1.2.

had been validated, nonetheless preparatory works would proceed;

c) A community fund of GEL 5M would be jointly established for social projects in the local community;

d) ENKA would appoint a local Georgian national as spokesperson to communicate with protest groups and employees.

159. On 14 March 2021, another large rally took place in Kutaisi[174] and Ms. Turnava asked ENKA to extend the suspension of the works until the beginning of April,[175] as a consequence of which the Site remained essentially closed until the end of March 2021, with only limited works ongoing.[176]

160. At that point in time, the GOG asked ENKA to consider two changes[177] to the Project, which it considered would assist in countenancing the negative reactions of the public to the Project:

a) First, the GOG proposed to purchase shares in ENKA to counter the opposition's narrative that the Project was a surrender of Georgian's energy infrastructure to foreign investment.

b) Second, the GOG asked ENKA to consider a reduction of the term of the Right to Build to 49 years, which it considered would alleviate the perception that the State was disposing of the domestic land and natural resources.

161. These proposals would ultimately not be accepted by ENKA.

M. Works resume – April 2021

162. On 30 March 2021, in accordance with the GOG's Extraordinary Action Plan, ENKA appointed Mr. Merab Lominadze, who had been recommended by the GOG, as ENKA's spokesperson.[178] ENKA also provided the GOG with a list of technical information that it had requested and a first meeting with the Expert Panel was arranged.[179]

163. On 31 March 2021, Ms. Turnava informed ENKA that the most suitable date for the

174 C-95, Civil GE Article, dated 14 March 2021.

175 C-94, WhatsApp messages between Ms. Turnava and Mr. Ozgen on 14 March 2021; C-155, WhatsApp messages between Mr. Kocaoglu and Ms. Turnava on 18 March 2021.

176 SoC, para. 155.

177 C-92, WhatsApp messages between Mr. Ozgen and Mr. Tkavadze, dated 11 March 2021; CWS-1, Ozgen I, para. 95.

178 C-96, ENKA Monthly Progress Report for March 2021, Section 4 "Public Relations"; RWS-1, Turnava I, para. 68.

179 C-98, ENKA Monthly Progress Report for April 2021, Section 1.2 "Project Related".

resumption of works was 3 April 2021.[180]

164. Early Works indeed resumed on 3 April 2021, and by 5 April 2021, works were progressing on all fronts.[181] The presence of the police had resulted in removal of the protesters' tents from the Site and relocation of them further down the valley. On 14 April 2021, police erected an iron fence in Gumati, regulating the flow of protestors moving to the valley by car.[182]

N. 24 April 2021 onwards

165. On 24 April 2021, the GOG announced a temporary pause on the construction of the dam for the Project. The statement of the GOG read as follows:

> "*The following decision have [sic] been made in relation to the processes around to the construction of the Namakhvani HPP:*
>
> *On the Prime Minister's instructions, the Ministry of Justice has been mandated to look into the agreement with ENKA. The Ministry of Justice shall contract an international law firm to study the compliance of the agreement's terms with international practice.*
>
> *On the Georgian Government's invitation, an authorized representative of the European Union's Energy Community will engage in the process of mediation with the non-governmental sector. An international expert will assess the environmental impact of the Namakhvani HPP.*
>
> *The Georgian Government will continue clarifying the agreement's terms with ENKA. To upgrade the project, the Government will hold a meeting with the company's management in the nearest future.*
>
> *A 9-12-month moratorium has been issued on the construction of the dam, to allow for revising and justifying new environmental, geological, and seismological assessments.*
>
> *Presently, the company will only continue preparatory infrastructural work under the project's initial phase, in compliance with the applicable construction permit.*
>
> *The Georgian Government assures the participants of the protest rally and all stakeholders of its commitment to continuing the process in the form of dialogue, as part of which each contractual term will be reviewed to answer all possible questions.*
>
> *The police will also remove additional barriers from the territory adjacent to the Namakhvani HPP and will reduce the number of law-enforcement officers*

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180 C-155, p.1, WhatsApp messages between Mr. Kocaoglu and Ms. Turnava on 31 March 2021.

181 C-70, Daily Report for 5 April 2021, p. 119.

182 CWS-1, Ozgen I, paras. 100-101; CWS-2, Kozan I, para 38.

on the ground. Only a necessary number of police officers will remain in the territory [in relation to] safety considerations.

In coordination with the police, rallyist will be allowed to voice their protest, hold rallies, and choose campsites – all in compliance with the law."[183]

166. The Ministry of Justice of Georgia later issued Terms of Reference for the legal revision of and preparation of legal opinion on the BOO Agreement,[184] and in around July 2021 the legal firm CMS was selected to issue a legal opinion on the BOO Agreement. The selection of CMS and the legal opinion issued by this firm were not published.[185]

167. From April 2021 onwards, the focus of protests shifted to preventing logistical supply vehicles from accessing the Site via the civilian roads. In spite the continuing difficulties, the Early Works continued to progress.[186]

O. The Energy Community Mediation

168. On 26 April 2021, the GOG sent a letter to the chairman of the Dispute Resolution and Negotiation Centre of the Energy Community Secretariat based in Vienna ("**Energy Community**"), inviting it to hold a mediation between the GOG, ENKA, and the local civil society organizations (the "**Mediation**").[187]

169. The Energy Community accepted the invitation and appointed Mr. Dirk Buschle, Legal Counsel and Deputy Director, and Ms. Aleksandra Bujaroska, environmentalist expert, as mediators (the "**Mediators**").[188]

170. On 28 May 2021, the Energy Community sent a letter to the GOG[189] to update it on the mediation process. It recalled that the process covered two main aspects: (i) a review of the environmental impact assessment carried out so far and the contracts concluded, and (ii) a mediation between the Government, civil society organizations and other relevant stakeholders. The letter stated that the Energy Community was having regular exchanges with a number of civil society organizations as well as with the representatives of the GOG, but they did not have the opportunity to exchange with

183 R-11, Statement by GOG, dated 24 April 2021.

184 C-100, Ministry of Justice Terms of Reference for legal revision of and preparation of legal opinion on the BOO Agreement, dated 27 May 2021.

185 Evidentiary Hearing Tr., D3, pp. 258:2-259:8; Tr. D4, pp. 112:1-113:10.

186 SoC, paras. 167-168; CWS-1, Ozgen I. paras. 102-104; CWS-2, Kozan I. paras. 38, 48; C-70 Daily Reports for 1 to 23 May 2023, pp. 143-163.

187 R-13, Letter from the GOG to Energy Community, dated 26 April 2021.

188 R-50, Mediators' Concluding Report, dated 18 November 2021, p. 2, Section 2.

189 R-132, Letter from Energy Community to the GOG, dated 28 May 2021.

representatives of ENKA.[190]

171. On 7 June 2021, Mr. Kozan from ENKA had a phone call with Mr. Buschle and explained that ENKA was happy to assist with the process by providing information but would not take part in the meetings because ENKA was concerned that the Mediation would become a forum for discussing and imposing changes to the BOO Agreement.[191]

172. On 10 June 2021, Mr. Buschle emailed Mr. Kozan the agenda for the first mediation meeting on 12 June 2021.[192] On 14 June 2021, Ms. Bujaroska sent Mr. Kozan a summary of the points of agreement reached at the first meeting, including that "*Green Alternative will draft, and circulate to all, terms of reference for an independent review of the commercial terms of the contract.*"[193] The summary of the points of agreement also mentioned the commitment by the *Guardians of the Rioni* to continue peaceful protests without blocking access to the Site.[194]

173. After gathering relevant information in July 2021 and a site visit in August 2021, the Mediators issued a first "red flag" report in August 2021 and a final review report (the "**Mediators' Concluding Report**") on 18 November 2021.[195]

P. Meetings between the Parties and Blockades - from May 2021 onwards

174. On 23 May 2021, the opposition groups organized a rally in Tbilisi demanding the termination of the Project and a moratorium of similar projects until a coordinated energy policy would be developed.[196]

175. A meeting between the Prime Minister and the chairman of ENKA took place on 28 May 2021,[197] which was also attended by Mr. Mehmet Tara, chairman of ENKA, Mr. Kozan, and Ms. Turnava. The Prime Minister stated that (i) the acquisition by the GOG of ENKA's shares and (ii) the reduction of the term of the Right to Build to 49 years, were necessary to get the Project accepted by the protestors.[198] In response, ENKA said that the GOG should try to purchase CEG's share before any discussion about purchasing Enka Insaat's shares, and expressed his reluctance to the reduction of the

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190 R-132, Letter from Energy Community to the GOG, dated 28 May 2021.

191 Reply, para. 289(b); CWS-2, Kozan I, para. 78; C-340 Mr. Kozan's notes of the phone call with Mr. Buschle, dated 7 June 2021; C-341, Trend News Agency Article, dated 7 June 2021.

192 C-343, Email chain between Mr. Celiker and Mr. Kozan, dated 10 June 2021.

193 C-115, Email chain between Mr. Kozan and the Mediators, dated 17 June 2021.

194 C-115, Email chain between Mr. Kozan and the Mediators, dated 17 June 2021.

195 R-50, Mediator's Concluding Report, dated 18 November 2021, p. 20.

196 C-99, Agenda GE Article, dated 23 May 2021.

197 CWS-2, Kozan I, paras. 44-45.

198 SoC, paras. 173-175; CWS-2, Kozan I, paras. 52-58.

term of ENKA's Right to Build.[199]

176. By the end of May and the first days of June 2021, the situation worsened on the Site. All accesses were closed by the protestors, and ENKA's personnel were blocked within the valley, with limited access to water, food, heating, fuel, electricity, and sanitation.[200]

177. On 2 June 2021, Mr. Tkavadze of GEDF sent to Mr. Mehmet Tara a document entitled "Explanatory Note on Right to Build".[201]

178. On 8 June 2021, fuel reserves reached critical levels on the Site, which again led to the stoppage of the works.[202]

179. On 9 June 2021, Ms. Turnava and Mr. Kozan met to discuss the GOG's demand for a reduction of the term of the Right to Build. During the meeting, ENKA said that it would accept a reduction to 49 years, against:[203]

a) an increase of the PPA period duration from 15 years to 35 years and from 8 months to 12 months each year;

b) no escalation of the PPA for years 16 to 35; and

c) the removal of the smaller plant at Upper Namakhvani from the scope of the Project.

180. The GOG counteroffered an increase in the length of the PPA period from 15 years to 20 years and from 8 to 9 months each year.[204] ENKA submits that the GOG threatened to impose these changes through legislation.[205] Ultimately, no agreement was reached.

181. A few hours after the meeting, the Prime Minister publicly declared that: "*As for the Namakhvani Project, as you know I got this project, this problem as an inheritance and I would like to tell you too that I am working on this actively, on the conditions which we have now and which we found, 100 years and so on, I can tell you that we will not*

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199 Reply, para. 250(d) and (e); CWS-4, Kozan II, paras. 58-76.

200 SoC, paras. 15, 177-179; C-70, Daily Report for 29 May 2021, p. 169; C-111, ENKA's letter to MESD, dated 11 June 2021 and attached statement of Mr. Fatih Oral; C-105, ENKA's letter to the MESD, dated 4 June 2021.

201 SoD, para. 221; Reply, para. 252(a); R-39, Note on Right to Build.

202 C-70, Daily Report for 9 June 2021, pp. 178-179.

203 Reply, para. 253; CWS-4, Kozan II, paras. 80-89.

204 CWS-4, Kozan II, paras. 87-88.

205 Reply, para. 253(c); CWS-4, Kozan II, paras. 85-86; C-485, Namakhvani WhatsApp Group on 9 June 2021 at 20:57.

continue the project on these conditions."[206]

182. Also on 9 June 2021, a 24-truck convoy carrying supplies to the Site was stopped and forced to turn around by protestors,[207] which prompted ENKA to write to the GOG that "*the fuel reserves at camp is reduced to critical levels which means that the utilities such as electricity, water, etc. will soon become unusable and the lives of personnel will be in danger. Unless GOG provides safe and secure access to fuel trucks beforehand – ENKA will need to initiate emergency evacuation for its personnel by the evening of 10 June 2021.*"[208]

183. On 10 June 2021, one tanker of fuel and one food truck arrived at the Site,[209] and ENKA called off the evacuation.[210] From this day onwards, ENKA sent a letter to the GOG every day, notifying the GOG that the protests and blockades constituted a Force Majeure Event under the BOO Agreement and requesting the GOG to take measures under Article 3.2.20 of the BOO Agreement (the "**Daily Letters**").[211]

184. On 16 June 2021, ENKA wrote to Ms. Turnava, summarizing the circumstances that had been preventing ENKA from implementing the Project, concluding that the BOO Agreement remained in full force and effect, and urging the GOG to comply with its obligation to support the Project under Article 3.2.20.[212]

185. On 25 June 2021, Georgia's Prime Minister declared: "*I do not hide I inherited this project, and, of course, the terms of the contract ... are unacceptable. I had a conversation with the founder of the company, who was in Georgia at my invitation, and our principled position is to revise these terms. Minister of Economy Natia Turnava is actively involved in the processes. In addition, I instructed the Minister of Justice to announce an international competition and a winning company has already been identified, which will study the compliance of the agreement with Enka with international practice.*"[213]

186. On 11 August 2021, ENKA terminated the Police Protection Agreement.[214]Access to

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206 C-109, Extract of Transcript of Prime Minister's statement, dated 9 June 2021.

207 C-70, Daily Report for 9 June 2021, p. 179.

208 C-107, ENKA's letter to the MESD, dated 9 June 2021.

209 C-110, WhatsApp messages between Mr. Kozan and Ms. Turnava on 10 June 2021.

210 CWS-2, Kozan, I, paras. 72-74.

211 C-122, Daily Letters.

212 C-114, ENKA's letter to the MESD, dated 16 June 2021; C-116, Preconstruction Phase Quarterly Progress Report No. 1, dated 17 June 2021.

213 CD-1, pp. 60-61; C-PHB, para. 76

214 R-144, Termination of the Police Protection Agreement, dated 11 August 2021, effective 10 September 2021.

the Site was not reinstated prior to 20 September 2021.

Q. Termination of the BOO Agreement

187. On 20 September 2021, ENKA served the GOG with a termination notice of the BOO Agreement ("**Termination Notice**"),[215] on grounds of material breach of its obligations by the GOG and Force Majeure. The Termination Notice fixed the effective date of the termination at 31 days from the date of the notice, i.e. on 21 October 2021.

188. Along with the Termination Notice, ENKA served an invoice dated 20 September 2021 ("**Termination Invoice**"),[216] stating the Default Termination Amount to be USD 1,742,103,467 "*plus any applicable VAT and an indemnity.*"[217] Such amount included:

a) the Fair Market Value of the Transferable Assets: USD 1,480,787,947.

b) the Tax Gross-Up Amount: USD 261,315,520.

c) an indemnity amount: not quantified.

189. ENKA also served the GOG with a Notice of Transfer,[218] setting ENKA's terms for the transfer of the Transferable Assets.[219]

R. The appointment of DRT

190. On 4 October 2021, the GOG sent a letter to ENKA expressing its "*strong disagreement with* [the] *Termination Notice, Termination Invoice and Notice of Transfer*" and requested, "*without any acknowledgement whatsoever related to the Termination Invoice*", the appointment of an Approved Auditor in accordance with Article 9.4.6 of the BOO Agreement to review and verify the FMV invoked by ENKA.[220] On 11 October 2021, the GOG sent a further letter to ENKA, requesting that "*the choice of the Approved Auditor and the process to be followed by the Approved Auditor be discussed between the Parties beforehand*".[221]

191. On 12 October 2021, ENKA indicated to the GOG that it had "*commenced taking steps to arrange for the verification to occur*",[222] stated that the GOG "*ha[d] no role in the choice of the Approved Auditor*" and therefore rejected the GOG request "*to discuss in*

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215 C-18, Termination Notice.

216 C-20, Termination Invoice.

217 C-20, Termination Invoice, p. 2.

218 C-19, Notice of Transfer, dated 20 September 2021.

219 C-19, Notice of Transfer, dated 20 September 2021, p. 2; C-4, BOO Agreement, Art. 9.4.7(a).

220 C-22, Letter from the GOG to ENKA, dated 4 October 2021.

221 C-28, Letter from the GOG to ENKA, dated 11 October 2021.

222 R-14, Letter from ENKA to the GOG, dated 12 October 2021, p. 1.

advance either the choice of, or the process to be followed by, the Approved Auditor."[223]

192. On 22 December 2021, Deloitte's Turkish subsidiary, DRT Kurumsal Finans Danismmanlik Hizmetleri A.S. ("**DRT**"), was officially engaged by ENKA as Approved Auditor. ENKA notified the GOG that it had selected Deloitte as the Approved Auditor on 10 January 2022.[224]

193. ENKA provided DRT with its FMV calculation on 17 January 2022, along with a link accessing ENKA's calculations.[225] ENKA also created a data room with an electronic copy of its calculations and supporting documentation, to which the GOG was given access.[226]

194. DRT requested information and documents to the Parties on seven occasions.[227] ENKA responded to these queries and informed the GOG,[228] but the GOG did not. The GOG instead wrote to ENKA, on 15 February 2022, that it would not recognize any report issued by DRT.[229]

195. On that same 15 February 2022, DRT issued its determination to the Parties ("**DRT Determination**").[230] The Determination states that:

> "*Based on our work, we conclude that the Fair Market Value of the Transferable Assets included in the Termination Invoice, in the amount of 1,480,787,497, has not been properly calculated. Our calculation of the Fair Market Value is USD 305,000,000.*"[231]

196. DRT Determination also states that it does not express "*any opinion on the accuracy of the underlying financial data or other information provided to in connection with*

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223 R-14, Letter from ENKA to the GOG, dated 12 October 2021, p. 1.

224 R-15, Letter from ENKA to the GOG, dated 10 January 2022, p. 1.

225 C-23, Email from Skadden to DRT, dated 17 January 2022.

226 C-24, Letter from ENKA to the GOG, dated 17 January 2022; C-127, Financial Model, dated January 2021. The full materials provided to DRT is contained in the zip file "Calculation of FMV and Supporting Documentation", which is part of C-145, Dataroom Materials downloaded on 22 February 2022.

227 C-128, C-130, C-131, C-133, C-136, C-139, C-142, Letters from DRT to the Parties, dated 26 January 2022, 2 February 2022, 4 February 2022, 7 February 2022, 9 February 2022, 10 February 2022 and 14 February 2022.

228 C-129, C-132, C-135, C-137, C-138, C-140, C-141, C-143, ENKA's letters to the MESD on 28 January 2022, 4 February 2022, 7 February 2022, 9 February 2022, 10 February 2022, 11 February 2022 and 14 February 2022; C-145, Dataroom Materials downloaded on 22 February 2022.

229 C-25, GOG letter to DRT and ENKA, dated 15 February 2022.

230 C-26, DRT Determination, dated 15 February 2022.

231 C-26, DRT Determination, dated 15 February 2022, para. 3.6.

work"[232] and that DRT "*have no responsibility to update this report for events occurring after its issuance*" […], "*will not monitor this report's continuing relevance or suitability for any purpose after its issuance and* […] *will not enter into further correspondence relating to the content of this report.*"[233]

197. ENKA wrote to the GOG on 17 February 2022, inviting it to confirm that, without prejudice to the GOG's position that the termination was invalid, the GOG accepted that DRT Determination was final and binding.[234] The GOG did not respond to this letter.

198. On 1 March 2022, ENKA submitted its RfA to the ICC.

VII. REQUESTS FOR RELIEF

A. Relief sought by the Claimant

199. Claimant seeks[235] the following relief:

a) **Declarations** that:

(i) ENKA has validly terminated the BOO Agreement effective 21 October 2021;

(ii) ENKA has validly transferred the Transferable Assets to the GOG effective 21 October 2021;

(iii) ENKA validly issued the Termination Invoice; and

(iv) DRT Determination is conclusive and binding in accordance with the BOO Agreement.

b) **Orders** that:

(i) The GOG do pay to ENKA USD 358,823,529, alternatively USD 1,195,000,000 (or such other sum as the Tribunal determines) and indemnifies ENKA in respect of all such taxes as may be payable on the transfer of the Transferable Assets by way of the Termination Amount and/or as damages within 14 days of the date of the award;

(ii) the GOG do cancel and return to ENKA the Preconstruction Security of USD 1,500,000, and pay to ENKA fees and costs it has incurred and continues to incur in relation to the Preconstruction Security for the period from 21 October 2021 until the date of the award, within 14 days of the date of the award;

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232 C-26, DRT Determination, dated 15 February 2022, para. 4.3.

233 C-26, DRT Determination, dated 15 February 2022, para. 4.4.

234 C-27, ENKA letter to the GOG dated 17 February 2022.

235 C-PHB, Sections X and XI; Reply, para. 550.

(iii) the GOG do pay all costs of, and associated with these arbitration proceedings, including the fees and expenses of the Tribunal and the ICC, and the legal and other expenses of ENKA, including but not limited to, the legal fees and expenses of their counsel, witnesses and experts, together with interest on those costs so awarded within 14 days of the date of the award; and

(iv) the GOG do pay interest at a rate equal to SOFR+4% accruing daily and compounded monthly:

1. on the amount set out in sub-paragraph (b)(i) from 19 March 2022 or such other date the Tribunal considers appropriate;

2. on the fees and expenses set out in sub-paragraph (b)(ii) from 21 October 2021 until payment is received by ENKA; and

3. on the amounts set out in sub-paragraph (b)(iii) from 14 days of the date of the award or such other date the Tribunal considers appropriate.

(v) the GOG do indemnify ENKA in respect of the total amount of all documented damages, breakage costs, fees and expenses related to the termination or buyout of contracts to which ENKA is a party and which are terminated or breached by ENKA in conjunction with the termination of the BOO Agreement or sale to the GOG of the Transferable Assets, plus any costs incurred by ENKA in securing ENKA's release from all liability under contracts included within the Transferable Assets;

(c) Any other and further relief that the Tribunal seems fit.

B. Relief sought by the Respondent

200. The Respondent seeks[236] that the Arbitral Tribunal:

1) **Declare** that:

a) ENKA's termination of the BOO Agreement was without basis under the BOO Agreement and/or Georgian law and thus wrongful; and

b) as a consequence:

(i) **Dismiss** ENKA's claims in their entirety; and

(ii) **Order** ENKA to indemnify the GOG for any and all losses it may suffer as a result of the termination;

[236] R-PHB, para. 337; Rejoinder, para. 1233; Georgia's Skeleton Argument, para. 73 and fn. 131.

2) In the alternative:

a) **Declare** that:

(i) the Parties agreed that the Tribunal should determine the FMV itself without being bound by the FMV stated in DRT Determination, and that ENKA is precluded from changing its position that the Tribunal should determine the FMV itself, without being bound by the FMV stated in DRT Determination; or

(ii) DRT Determination is not a valid, conclusive, and binding Approved Auditor's certificate under the BOO Agreement; and thus

(iii) the Tribunal may determine the FMV itself;

(iv) the GOG pay the FMV determined by the Tribunal, which shall not exceed the most recent book value of the Transferable Assets;

b) In any event, **rejecting** all other relief requested by ENKA in this arbitration, including ENKA's requests for:

(i) an indemnity for taxes payable on the transfer of the Transferable Assets;

(ii) an indemnity for breakage costs, fees and expenses;

(iii) the return of the Preconstruction Security;

(iv) payment of fees and costs relating to the Preconstruction Security; and

(v) payment of interest.

3) In any event:

a) **Ordering** ENKA to pay all costs in connection with this arbitration, including but not limited to the costs of the Tribunal, the ICC as well as any legal and other fees, costs, and/or expenses incurred by the GOG in connection with this arbitration, including the GOG's legal fees, expert fees, and costs in respect of the time spent by the GOG's representatives (together with pre and post award interest on such amounts);

b) **Rejecting** ENKA's request for the costs of, and associated with, this arbitration; and

4) Granting the GOG such other and further relief as the Tribunal may deem appropriate.

VIII. SUMMARY OF THE PARTIES' POSITIONS

A. Claimant's position

201. The Claimant avers that it **(1)** was entitled to terminate the BOO Agreement and that the GOG is obliged **(2)** to pay to ENKA the Termination Amount, **(3)** to return to ENKA

the Preconstruction Security, and **(4)** to pay to ENKA the applicable interest on those amounts.

1. ENKA's entitlement to terminate the BOO Agreement

202. The Claimant alleges that it was entitled to unilaterally terminate the BOO Agreement by serving the Termination Notice based upon (a) a GOG Event of Default; or (b) circumstances set forth in Article 8.1.8 (Force Majeure). The Claimant rejects the Respondent's arguments based on (c) Georgian law and (d) good faith.

a) GOG Event of Default

203. ENKA affirms that the requirements set forth in the BOO Agreement to terminate the contract based on a GOG Event of Default are:[237]

(i) a material breach of the BOO Agreement by the GOG;

(ii) a notification to the GOG of the breach; and

(iii) a failure by the GOG to cure the breach within 90 days of notification.

204. The Claimant alleges that those requirements are satisfied in the present case.

205. ENKA considers that to be "material", a breach should not be "insignificant",[238] which is a question of fact to be assessed at the time that performance was due by reference to the specific circumstances of the alleged breach.[239]

206. Regarding the requirement of a notice, ENKA avers that Article 19.2 of the BOO Agreement provides that notices may be sent by email and that there is no requirement that it be made in person, by mail or by courier. ENKA's notices are letters and reports that satisfy the requirement of Article 19.1.[240]

i. Material breaches of the BOO Agreement

207. ENKA asserts that the GOG committed two types of material breaches of the BOO Agreement: Access and Security Breaches and Support Breaches.

208. First, the "Access and Security Breaches"[241] as the GOG failed to:

- ensure that ENKA had access without interference or interruption to the Site as well

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237 SoC, para. 201.

238 Reply, para. 323.

239 Reply, para. 325(b).

240 Reply, para. 326; SoC, para. 209.

241 SoC, para. 203.

as to existing secondary and local roads, which is a breach of Article 3.2.14(a);

- take all reasonable and prudent measures to safeguard and secure the Land Rights, the Site, the Plants, the Roads and all Persons involved in the Project, against sabotage, blockade, riot, protest, or similar events in breach of Article 3.2.20.

209. ENKA asserts that the GOG's obligation to ensure that ENKA had access to the Site and provide security to ENKA was not conditional on the performance by ENKA of its own obligations, nor did it depend on the political environment of the day.[242]

210. According to ENKA,[243] the GOG failed to take adequate measures to:

a) protect ENKA, their subcontractors and workers from protests, riots and violence taking place on and around the Site from 27 October 2020 to 20 September 2021;

b) remove until 30 January 2021 the cross that had been placed by protestors near the entrance to the diversion tunnel on 29 October 2020;

c) prevent blockades of the Site and the surrounding areas and/or enable the free and unrestricted passage of vehicles to the Site from 28 May 2021 to 20 September 2021.

211. Instead, the GOG instructed ENKA to stop the construction works between 29 October 2020 and 31 January 2021, and between 28 February 2020 and 3 April 2021.[244] ENKA avers that during these suspension periods, the GOG did not ensure that ENKA had access to the Site, in breach of Article 3.2.14.[245]

212. From 28 May 2021, the GOG refused to provide the necessary security, support, and protection, and failed to prevent the blockades and to allow the passage of vehicles to the Site. In this regard, ENKA asserts that the fact that the police remained on Site is irrelevant if it was unable or unwilling to open the roads.[246]

213. According to ENKA, this breach was deliberate since the GOG was able to open the roads with police support but instead required ENKA to amend the BOO Agreement.[247]

214. The GOG acknowledged at the Evidentiary Hearing that the blockades that occurred from 29 May 2021 onwards constituted a breach of Article 3.2.14 of the BOO

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242 Reply, paras. 46, 328, 337.

243 SoC, para. 204(a).

244 SoC, para. 204(b).

245 Reply, para. 329(a)(iv).

246 Reply, para. 339(b).

247 C-PHB, para. 92(a); Reply, para. 330 (c).

Agreement.[248] It follows from that admission, that the GOG was also in breach of Article 3.2.20 which required the GOG to safeguard and secure the Site, the Roads and all persons involved in the Project, as well as Article 3.2.1 which required the GOG to support the Project.[249]

215. ENKA avers that the changes to the BOO Agreement requested by the GOG were not necessary or useful to calm the public opinion because at that time, the size and severity of the protests had diminished considerably and the term of the Right to Build was not an essential aspect for the protestors.[250] Moreover, the Respondent failed to demonstrate its assertion that the reduction of the term of the Right to Build was an essential aspect in obtaining the support of the Church.[251] ENKA also sustains that, contrary to the GOG's allegations, the proposed adjustment was not just symbolic but a significant change which affected the balance of risk between the Parties.[252] In any case, ENKA engaged in good faith negotiations on the possibility of reducing the term of the Right to Build, but the Parties did not reach an agreement.[253]

216. According to ENKA, the breaches of Articles 3.2.14 and 3.2.20 are material because all routes to the Site were blocked, and the blockades prevented ENKA from working on the Project at all.[254] Furthermore, the GOG's breaches were intentional, to force ENKA to amend the BOO Agreement.[255]

217. In addition to the Access and Security Breaches, the Claimant assert that the GOG also breached its obligation to provide support to ENKA in the implementation of the Project, according to Article 3.2.1 of the BOO Agreement.

218. In this respect, ENKA first avers that the GOG breached Article 3.2.1 by ceasing the transfer of land plots. By June 2021, ENKA had concluded or entered into cease of usage and compensation agreements and trilateral agreements with private owners and users of 1,070 land plots and paid more than 10 million USD to them pursuant to those agreements. Yet only 96 of those properties had been registered in the name of

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248 C-PHB, para. 87(b); Evidentiary Hearing Tr. D1, p. 147:1-8: "(T. Cameron): *I should make clear from the outset, in response to a point from our colleagues, that Georgia does not of course deny that there were interferences with Enka's access to the site during this period due to the actions of protesters and that there was a breach of this provision.*"

249 C-PHB, paras. 88 and 90.

250 Reply, para. 330(v).

251 C-PHB, para. 52, Tr. D3/210:10-220:16.

252 Reply, para. 339(a).

253 C-PHB, para. 124.

254 Reply, para. 329(b).

255 C-PHB, para. 92(a).

ENKA.[256]

219. The GOG alleges that the delays to register the land plots were due to errors in ENKA's applications,[257] but it does not identify these alleged errors. In this respect, the 14 July 2021 letter from the National Agency of State Property ("**NASP**") on which the GOG relies[258] does not assert any error by ENKA.[259]

220. Second, ENKA avers that the GOG breached Article 3.2.1 by ceasing to deliver authorizations.

221. On 31 March 2021, ENKA made an application to TACSA for an authorization regarding the further stages of the construction works, including the construction of the penstock for the Lower Namakhvani, but TACSA failed to deliver it.[260] In this respect, the GOG relies upon a 27 July 2021 letter by TACSA to ENKA stating that ENKA's application was not compliant with the required design documents,[261] but the Claimant alleges that this letter concerns ENKA's application for a permit for the "headrace tunnel" and not the "penstock" application.[262] In any case, ENKA responded to TACSA's letter by stating that the changes to the configuration were not grounds for refusing its application since they were expressly permitted under the Permitting Action Plan Side Letter.[263]

222. Third, ENKA submits that although the GOG made public statements in support of the Project until March 2021, its attitude changed from April 2021 onwards and then breached its obligations by declaring that it would no longer perform its obligations under the BOO Agreement:[264]

a) on 24 April 2021, by committing to renegotiate the BOO Agreement and reduce the police support for the Project;[265] and

b) on 9 June 2021, by stating that the BOO Agreement was a "*problem*" that the Prime Minister had "*inherited*" and that it would not continue on the terms

256 SoC, para. 190(a).

257 SoD, para. 392(2) and (3).

258 R-151, Letter from NASP to ENKA, dated 14 July 2021.

259 Reply, para. 345(b).

260 C-13, ENKA's letter to the MESD, dated 9 July 2021.

261 R-152, Letter from TACSA to ENKA, dated 27 July 2021.

262 Reply, para. 345(c)(iii).

263 C-122, Daily Letters, p. 357; C-35, Permitting Action Plan – Side Letter, para. 2.1(b).

264 SoC, para. 205; Reply, para. 346(a).

265 SoC, para. 164; R-11, Statement by the Administration of the GOG, dated 24 April 2021.

originally agreed.[266]

223. Regarding the Prime Minister's 9 June 2021 statement, the Claimant avers that the Prime Minister could not reasonably have the expectation that ENKA would agree to an adjustment of the BOO Agreement given the discussion that had taken place just hours before between Ms. Turnava and Mr. Kozan, when the Parties failed to reach an agreement on this issue.[267] The Claimant alleges that these breaches amount to a renunciation of the BOO Agreement.[268]

224. The Access and Security Breaches and the Support Breaches were all material breaches of the BOO Agreement since they directly affected ENKA's ability to perform the construction works and to implement the Project.[269]

ii. Notification of breach

225. ENKA notified the breaches of the BOO Agreement to the GOG both informally and formally, through letters and emails, including but not limited to:

- letters dated 28 October 2020,[270] 5 November 2020,[271] 11 November 2020,[272] 13 November 2020,[273] 4 June 2021,[274] 9 June 2021,[275] 15 June 2021,[276] 16 June 2021,[277] 9 July 2021,[278] and the Daily Letters from 10 June 2021 to 19 September 2021;[279]

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266 Reply, para. 346(c); C-109, Extract of transcript of Prime Minister's Statement, dated 9 June 2021.

267 According to ENKA, during the meeting between Mr. Kozan and Ms. Turnava, Mr. Kozan made a proposal to the GOG to accept the reduction of the term of the Rights to Build, but Ms. Turnava rejected such proposal and made a counterproposal to ENKA. Some minutes later, however, Mr. Kozan informed Ms. Turnava that her counterproposal was rejected by ENKA. Reply, paras 256-259, 346(d); CWS-4, Kozan II, paras. 89-90; R-45, WhatsApp Messages between Ms. Turnava and Mr. Kozan, message of 9 June 2021 at 10:57.

268 SoC, para. 206; Reply, para. 346.

269 SoC, para. 208.

270 C-66, ENKA's letter to the MESD, dated 28 October 2020.

271 C-71, ENKA's letter to the MESD, dated 5 November 2020.

272 C-277, ENKA's letter to the MESD, dated 11 November 2020.

273 C-73, ENKA's letter to the MESD, dated 13 November 2020.

274 C-105, ENKA's letter to the MESD, dated 4 June 2021.

275 C-107, ENKA's letter to the MESD, dated 9 June 2021.

276 C-12, ENKA's letter to NASP, dated 15 June 2021.

277 C-114, ENKA's letter to the MESD, dated 16 June 2021.

278 C-13, ENKA's letter to the MESD, dated 9 July 2021.

279 C-122, Daily Letters.

- ENKA quarterly report for the period 15 March to 15 June 2021.[280]

226. The Claimant assert that it is common ground that ENKA gave adequate notice of the breaches under Articles 3.2.14 and 3.2.20.[281] Regarding the notification of the breaches of Article 3.2.1, ENKA avers that there is no requirement in Article 9.1.2(a) of the BOO Agreement that any notice given must specifically identify the provision that has been breached, and the Daily Letters were sufficient to notify this breach.[282]

227. Once the breaches had been so notified, it was unnecessary for ENKA to keep notifying the GOG that the breach had not been cured.[283]

iii. Failure to Cure

228. ENKA accepts that the GOG's early breaches related to the suspension of works from 29 October 2020 to 31 January 2021, and 28 February 2021 to 3 April 20201, were cured by the resumptions of works on 1 February 2021, and again on 4 April 2021. ENKA does not rely on those breaches as giving rise to an entitlement to terminate pursuant to a GOG Event of Default. However, it does rely on those protests and associated suspensions as amounting to Force Majeure Events counting towards the 180-day threshold provided by Article 8.1.8.[284]

229. Regarding the blockade of the Site, ENKA rejects the GOG's allegations that these breaches had been cured by July 2021,[285] since the roads remained blocked from 29 May 2021 until the date of termination, as demonstrated by the statement of Mr. Kozan[286] as well as by the drone footage.[287]

230. ENKA submits that the Respondent has not properly refuted Claimant's allegations regarding the blockade. Neither Ms. Turnava nor Mr. Tvalabeishvili refute ENKA's account with firsthand evidence of their own.[288] The GOG only relies on a statement in the Mediator's Concluding Report according to which "*by July 2021, the situation onsite*

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280 C-116, Preconstruction Phase Quarterly Progress Report No. 1, dated 17 June 2021, p. 4.

281 C-PHB, para. 94; ENKA's Skeleton Argument, para. 20.

282 C-PHB, para. 94.

283 Reply, para. 331(b).

284 Reply, para. 332.

285 SoD, para. 371(3).

286 CWS-4, Kozan II, para. 134.

287 Photos, drone footage, truck footage and dashboard cam: C-119 to C-120, C-345 to C-349, C-352 to C-356, C-358 to C-359, C-361 to C-373, C-375, C-378 to C-379, C-381 to C-385, C-388 to C-404, C-406 to C-440, C-442 to C-443, C-445 to C-446 and C-448 to C-452.

288 Reply, para. 333(b).

was stabilized and remained overall calm."[289] That was true in terms of the risk of violence, but the blockade persisted and the roads remained closed to ENKA.[290]

231. According to the Claimant, the 90-day cure period started on 9 June 2021 and expired on 7 September 2021 without the breaches having been cured.[291]

232. Regarding the Support Breaches, ENKA avers that they were not cured within 90 days from the 15 June and 16 June 2021 letters, and the cure period elapsed on 14 September 2021.[292]

b) Force Majeure

233. ENKA submits that from at least 27 October 2020 to the Termination Notice, Non-Physical Force Majeure Events existed which satisfied the requirements of Article 8.1.8 of the BOO Agreement and gave rise to a right of termination.

i. <u>Protests and Blockades</u>

234. For purposes of Article 8.1.3, the protests and the blockades consist in "*public agitation or protest preventing construction or operation activities exceeding 21 days in any six-month period*" (Art. 8.1.3(a)(ix)).[293]

235. The requirements of Articles 8.1.1. and 8.1.8 were satisfied because the events individually and/or collectively:

- caused (i) a total or partial failure of performance or (ii) non-performance in the fulfilment of ENKA's obligations under Article 3.1.1 to implement the Project;

- prevented, delayed, or hindered or could reasonably have prevented, delayed, or hindered ENKA from implementing the Project for an aggregate period of more than 180 days. In particular:

  a) between 27 October 2020 and 20 September 2021, the works were completely stopped for a total of 232 days. On a further 39 days, the works were hindered and/or partially stopped, notably in the periods between 30 January 2021 and 23 February 2021, and between 27 May 2021 and 8 June 2021, during the first days of the blockade;[294]

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289 R-50, Mediators' Concluding Report, dated 18 November 2021, p. 4.

290 Reply, para. 333(c).

291 Reply, para. 333(d).

292 Reply, para. 348.

293 Evidentiary Hearing Tr., D1 p. 50:21-25.

294 C-PHB, para. 160; Claimant's Chart of Disruptions, pp. 6-9.

b) the Non-Physical Force Majeure Events thus prevented, delayed, or hindered ENKA from implementing the Project for a total of at least 271 days up to 20 September 2021;

c) moreover, the stoppages and disruptions prevented the completion of the cofferdams before the 2022 wet season and that work could therefore not commence before September 2022, causing an additional delay of at least 295 days from the planned date of 10 November 2021 for the start of the cofferdam works.[295]

236. The other requirements of Article 8.1.1(a)(c) are also satisfied[296] because:

a) the protests and blockades could not have been prevented, avoided, or removed by ENKA;

b) the GOG was primarily responsible under the BOO Agreement;

c) ENKA took reasonable precautions, due care, and reasonable alternative measures to avoid the effect of the protests and blockades by (i) using alternative routes to the Site; (ii) informing the GOG of the protests and blockades and promptly seeking assistance; (iii) taking steps to safeguard its workers and to avoid direct conflict by providing fencing and other security around the Site, moving staff residents in Kutaisi into the camp and keeping workers within the camp during the protests for their own safety;[297]

d) The protests and blockades were not the result of any breach of the BOO Agreement by ENKA.

237. The Claimant rejects Respondent's argument[298] that the protests were an indirect result of ENKA's breaches of Articles 5.1 and 3.1.1 of the BOO Agreement.

a) Article 5.1

238. The Claimant avers that it did not breach Article 5.1 and that the protest were not the result of any such breach.

239. First, Article 5.1 establishes a duty of cooperation. It is therefore incorrect that ENKA owes a specific obligation to the GOG to abide by the Equator Principles. The Equator Principles are a set of general procedural guidelines which describe the process of

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295 C-PHB, para. 162; SoC, para. 213(b)(iii). The planned date of 10 November 2021 is shown in ENKA's Development Schedule dated October 2020 (C-68). 10 November 2021 to 1 September 2022 = 295 days.

296 SoC, para. 214.

297 SoC, para. 214(b).

298 SoD, para. 411.1.

obtaining finance from an external lender, and they don't define express obligations of performance from one party to another.[299]

240. Second, the GOG's allegation that ENKA reduced local engagement is ill-grounded as the Respondent don't identify what ENKA should have done, and how and when it failed to do so.[300]

241. Third, regarding the GOG's allegation that ENKA reduced the personnel and closed some support centres shortly after the BOO Agreement was signed,[301] the decision to reduce workforce and to close support centres was taken prior to the BOO Agreement and was a prudent cost saving measure since works could not begin until the construction and environmental permits were renewed.[302] The Claimant submits that it continued to engage with the local community regarding the sale of the land plots and work opportunities. It also notes that at the 2019 public hearings, there was limited opposition to the Project and that any such opposition was directed towards the GOG and not ENKA.[303]

242. Fourth, as to the GOG's allegation concerning ENKA's management of environmental, seismic, and social aspects of the Project,[304] the Claimant alleges that the Respondent's allegation is unsupported[305] and the GOG does not even attempt to formulate an allegation of breach.[306] During the period from April 2019 to November 2021 referred to by the GOG,[307] ENKA obtained the revised Environmental and Construction permits and in March 2021 it submitted technical documents for an independent review as part of the GOG's "Extraordinary Action Plan", which did not raise any concerns.[308]

243. Regarding the alleged breaches of the conditions in the permits, the Claimant denies such breaches as it did to the GOG's authorities,[309] and affirms that the fine issued by the GOG for these breaches was minimal, equivalent to approximately USD 2,000.[310]

244. The Claimant affirms that the GOG failed to produce contemporary evidence showing

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299 Reply, para. 357.

300 Reply, para. 359(a) and (b).

301 SoD, para. 411.1(a) and fn. 658.

302 Reply, paras. 147-190, 359(c)(i).

303 Reply, para. 359(c)(ii).

304 SoD, para. 411.1(b).

305 Reply, para 360(b).

306 Reply, para 360(d).

307 SoD, Section II.D.2.

308 Reply, para 360(d)(i) to (ii).

309 R-94, Letter from ENKA to MEPA, dated 14 January 2021.

310 Reply, para 360(d)(iv).

the reasons for the outbreak of protests at the end of October 2020 and thereafter,[311] as well as any contemporaneous complaints by the GOG that the protest were of ENKA's fault.[312]

245. According to ENKA, most of the local population supported the Project and the opposition that existed was not to ENKA but to any hydropower plant in the Rioni Valley and to the Turkish nationality of the investor. The Claimant notes that the protests acquired a political dimension after the local October 2020 elections and the change of Prime Minister in 2021.[313]

246. Therefore, there is no proper basis for any criticism of ENKA's performance.

b) Article 3.1.1

247. Article 3.1.1 does not impose a positive obligation on ENKA in respect of communications, local engagement, project management and environmental matters.[314] The GOG failed in this regard to identify the "necessary steps" that ENKA should have taken, or the "necessary conditions" that it should have created, to implement the Project.[315]

248. ENKA's decision not to participate in the Mediation is not a breach of contract[316] because: (i) it was not a mediation between the Parties but a mediation between the GOG and its people; (ii) the BOO Agreement contains no obligation to mediate with the GOG or with third parties; (iii) ENKA's decision was taken due to a legitimate and good faith concern that the Mediation could be used to put further pressure on ENKA to amend the BOO Agreement, which concern was well founded since Green Alternative, one of the NGOs opposing the Project, was permitted to draft terms of reference for an independent review of the commercial terms of the BOO Agreement.[317] In any case, even if ENKA's refusal to participate in the Mediation which took place in June 2021, was a breach of contract, it cannot possibly have been the cause of the protests that started in October 2020.[318]

249. As to the GOG's allegation that ENKA did not exercise reasonable diligence or did not take reasonable precautions to prevent or avoid the protests,[319] no context is given to the

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311 Reply, para. 362(b).

312 Reply, para 362(c)(i).

313 Reply, para. 362(d)(ii).

314 Reply, paras. 58-66, 365(a).

315 Reply, para. 365(b) and (c).

316 Reply, para 365(d).

317 Reply, para. 288.

318 Reply, para. 365(e).

319 SoD, para. 411(2).

meaning of "*reasonable diligence*", "*reasonable precautions*" or "*reasonable alternative measures*", so that the Claimant is unable to identify what actions it should have taken.[320] In any event, these allegations are ill-grounded as ENKA could not have removed the protestors[321] and it did cooperate with the GOG to implement the measures contemplated in the March 2021 "Extraordinary Action Plan", which appear to have been successful in reducing public support for the protestors. The protests should have been prevented through police protection.[322]

250. Finally, ENKA's decision to refuse to agree to a reduction of the term of the Right to Build was legitimate, for the reasons explained above.[323]

ii. Notice

251. Pursuant to Article 8.1.2, a notice is not a condition precedent to the right to terminate on grounds of Non-Physical Force Majeure. In any event, ENKA did give notice of the Non-Physical Force Majeure Events:

- as to the protests that started at the end of October 2020, by letters of 28 October, 5 November, 11 November and 13 November 2020;[324]

- as to the February 2021 protests, the GOG told ENKA to suspend the works following a large riot on 28 February 2021[325] and no notice requirement can therefore exist;

- as to the protests and blockades that took place from 28 May 2021 onwards, by letters of 4 June, 9 June, 15 June, 16 June and 9 July 2021, as well as by Daily Letters from 10 June to 19 September 2021.[326]

iii. The 180-day threshold

252. The Claimant alleges that by 20 September 2021, there had been 271 days of total or

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320 Reply, para. 368(a).

321 Reply, para 368(d).

322 Reply, para. 368(d).

323 See *supra*, para. 215; C-PHB, paras. 121-125; Reply, para. 368(e).

324 Reply, para. 369; C-66, ENKA's letter to the MESD, dated 28 October 2020; C-71, ENKA's letter to the MESD, dated 5 November 2020; C-277, ENKA's letter to the MESD, dated 11 November 2020; and C-73, ENKA's letter to the MESD, dated 13 November 2020.

325 C-155, WhatsApp messages between Ms. Turnava and Mr. Kocaoglu on 28 February 2021, p. 1.

326 C-105, ENKA's letter to the MESD, dated 4 June 2021; C-107, ENKA's letter to the MESD, dated 9 June 2021; C-12, ENKA's letter to the NASP, dated 15 June 2021; C-114, ENKA's letter to the MESD, dated 16 June 2021; C-13, ENKA's letter to the MESD, dated 9 July 2021; and C-122, Daily Letters.

partial stoppages.[327] These days of stoppage are identified in the Claimant's Chart of Disruptions and are supported by the documents referred to therein including ENKA's daily reports.[328]

253. The Parties broadly agree on the days of stoppage, and the major difference in their accounting is that the GOG excludes the Sundays and holidays.[329] ENKA submits that those days should be counted as delay/no work because when the BOO Agreement refers to "days" that mean calendar days, not business days.[330]

254. ENKA alleges that Article 8.1.8 also captures Force Majeure Events that "*could reasonably prevent delay or hinder with the lapse of time*" a Party from performing an obligation, therefore this provision includes partial disruptions and also take into account future days that will occur as a consequence of the disruptions, which is what happened in this case, since the suspensions and delays prevented ENKA from completing the cofferdams before the wet season, forcing ENKA to wait to resume this works, at least, until the next dry season in September 2022.[331]

255. As for the possibility of adding several protests, the Claimant submits that a single Force Majeure Event can comprise several non-consecutive protests on different days, and the BOO Agreement allows to aggregate the effect of those protest to determine whether the 180-day threshold of Article 8.1.8 is met. The question of whether the protests constitute a single Force Majeure Event, or a number of different Force Majeure Events depends on whether they are sufficiently closely connected as to be treated as the same event.[332]

256. ENKA avers that the protests and blockades that took place between October 2020 and September 2021 constituted a single event, as far as the protestors were the same people (Guardians of the Rioni Valley, led by Varlam Goletiani), fighting the same cause (to stop the Project), from the same location (in the valley), during the same period (within a period of 11 months).[333]

c) The GOG's renunciation of the BOO Agreement

257. The GOG's public announcement that the Project would not be implemented on the agreed terms coupled with its actions and omissions in failing to ensure access to the

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327 C-PHB, para. 160; Claimant's Chart of Disruptions.

328 Claimant's Chart of Disruptions.

329 Claimant's Chart of Disruptions; Respondent's Chart of Disruptions.

330 C-PHB, para. 161; C-4, BOO Agreement, Art. 1.2.8.

331 C-PHB, para. 162; Reply, para. 370(b); SoC, para. 213; C-71, ENKA's letter to the MESD, dated 5 November 2020; CWS-1, Ozgen I, paras. 55-56.

332 C-PHB, para. 164.

333 C-PHB, para. 166(a).

Site, failing to safeguard the Site and ceasing the transfer of Land Rights and the issue of authorizations, amount to a renunciation of the BOO Agreement.

258. Such renunciation constitutes a Force Majeure Event under Article 8.1.1 because the GOG's refusal to perform (i) was a unilateral decision which was outside the reasonable control of ENKA, and (ii) resulted in a total or partial inability of ENKA to perform (complete stoppage of works from 9 June 2021 onwards).[334]

259. The renunciation satisfies the requirements of Articles 8.1.1 and 8.1.8[335] because (i) it lasted from 9 June to 20 September 2021, a period of 103 days, and there was no reasonable prospect of future performance; (ii) it frustrated the economic basis for the implementation or operation of the Project; (iii) it could not reasonably have been prevented or avoided by ENKA; (iv) ENKA took reasonable measures to procure performance by insisting with the GOG that it comply with its obligations; and (v) it was not the result of any breach of the BOO Agreement by ENKA.

260. Those circumstances[336] fall within the definition of a Force Majeure Event, i.e. a circumstance that is not within the reasonable control of ENKA resulting in or causing a total or partial failure or non-performance or delayed performance in the fulfilment of any of its obligations under the BOO Agreement.[337]

261. It does not matter that the GOG's renunciation does not appear in the list of Non-Physical Force Majeure Events in Article 8.1.3, because the list is non exhaustive.[338]

d) The Respondent's alternative defence under Georgian law

262. Article 405.3 of the Georgian Civil Code ("**GCC**"), which is relied upon by the GOG, does not apply to the present case because it is not mandatory and the Parties have defined the termination procedures in the BOO Agreement.[339] That provision establishes that the party that is primarily responsible for the other party's breach cannot terminate the contract. However, ENKA is not responsible for the protests or for the GOG's failure to secure the access to the Site and to provide security and protection to the access routes. ENKA did not do anything that could prevent the GOG from performing, it was the GOG who consciously decided not to intervene, from 28 May 2021 onwards, unless and until ENKA accepted to amend the BOO Agreement.[340]

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334 SoC, para. 215.

335 SoC, para. 216.

336 Reply, para. 346.

337 Reply, para. 371(b).

338 Reply, para. 371.

339 Reply, paras. 374-375.

340 Reply, para. 378(c).

e) The GOG's good faith defence

263. ENKA admits that under Georgian law a party has a duty of cooperation, but this duty is narrow and does not include actions that would be detrimental to the party.[341]

264. As to the Respondent's argument that good faith compelled ENKA to claim compensation for losses instead of termination because a party is obliged to exercise the alternative that is less disadvantageous for the counterparty:

- the Parties considered such scenario and provided for it in Article 8.2.4(a) of the BOO Agreement. Georgian law does not prohibit a party from exercising a contractual right that was agreed by the parties;[342]

- Prof. Kereselidze only states that "*if a party has an alternative option to termination that is at least equally fitting, then it should follow that option.*"[343] However, damages are not an "at least equally fitting" alternative to termination in this case and ENKA had a legitimate right to exit from the contract in circumstances in which its counterparty is continually failing or refusing to perform.[344] Prof. Kereselidze's report has been given without any consideration of the BOO Agreement.[345]

265. There is therefore no basis under the BOO Agreement or under Georgian law for compelling ENKA to choose an alternative remedy for breach over termination.[346]

266. The Claimant maintains that under Georgian law, the motive for termination is irrelevant.[347] Therefore the assertion that termination was pretextual cannot in and by itself be a basis for invalidating the termination.[348]

267. The correct position under Georgian law[349] is as follows:

- the motivations of a party exercising a contractual right are only relevant in the case of an abuse of right under Article 115 GCC, which does not apply here;

- other than in the case of abuse of rights, an exercise of rights for a reason other than those stated may amount to bad faith, but even then, the party is not in principle

341 Reply, para 385.

342 Reply, paras. 387-388; CER-2, Fromm I, paras. 43, 45-47.

343 RER-1, Kereselidze I, paras. 54-55.

344 Reply, para. 389(a).

345 Reply, para. 389(c).

346 Reply, para. 390.

347 Reply, para. 395(a); RER-1, Kereselidze I, para. 56.

348 Reply, para. 395(c).

349 Reply, para. 396.

denied the right to exercise the agreed contractual right.

268. In any case, the GOG's argument that ENKA terminated the BOO Agreement because it realized that the Project was unlikely to be profitable is without merits.

269. First, the only basis for such an assumption is the opinion of Respondent's expert Mr. Wreford, who concludes that the FMV is negative. However, this analysis is wrong and in addition it is irrelevant because it was not available at the time of termination.[350]

270. Second, the Joint Bid Model indicated that the Project was in fact likely to be extremely profitable.[351]

271. Third, IFC and EBRD were willing to extend finance to ENKA, but ENKA preferred to finance the Project itself based on its confidence in the Project.[352]

272. Fourth, the EPC Contract price was fixed, and once the BOO Agreement was signed, certain EPC items were procured below budget and no material overruns were anticipated for the other elements, so that there was no reason to anticipate costs overruns.[353]

273. If ENKA had considered that its tariff bid was too low, or that the Project was unlikely to be profitable, it would not have entered into the BOO Agreement, and after the BOO Agreement was signed, it could have sold its shares to the GOG.[354] The fact that Enka Insaat and CEG refused to sell their shares to the GOG shows that the Project was viable and likely to be lucrative.[355]

274. ENKA did not breach any obligation or act in bad faith in refusing to amend the BOO Agreement, as the GOG would have wanted to. As a matter of fact, the amendment requested by the GOG was not "*a purely symbolic adjustment*"[356] but would rather have significantly altered the allocation of property rights and risks under the BOO Agreement.[357] In any case, ENKA engaged in good faith negotiations with the GOG, but the Parties were unable to reach an agreement.[358]

275. What the GOG requested was therefore not a "small assistance" which ENKA had the

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350 Reply, para. 399(a).

351 Reply, para. 399(b)(i); C-161, Joint Bid Model, dated 6 July 2016.

352 Reply, para. 399(b)(ii).

353 Reply, para. 399(b)(iii).

354 Reply, para. 399(c).

355 Reply, para. 399(d).

356 SoD, paras. 186, 190.

357 Reply para. 400(b)(i).

358 Reply, para. 400(b)(ii).

duty to provide under its good faith obligations under Georgian law.[359]

276. It is rather the GOG who acted in bad faith by applying heavy pressure on ENKA to obtain significant amendments to the BOO Agreement, including a threat to impose changes by statute, and by allowing ENKA's employees to remain trapped on Site without supplies.[360]

2. ENKA's entitlement to the Termination Amount

277. In accordance with Article 9.4.2(b) of the BOO Agreement, the Termination Amount to which ENKA is entitled includes:

- the Fair Market Value of the Transferable Assets (FMV);

- the total amount of all documented damages and expenses related to the termination;

- all taxes payable on the transfer of the Transferred Assets; and

- the Tax Gross-Up Amount.

2.1. Fair Market Value of the Transferable Assets

a) DRT Determination

278. ENKA argues that DRT Determination of the FMV is conclusive and binding and the GOG's arguments in this respect should be dismissed.

i. Alleged agreement to abandon DRT Determination

279. The GOG's argument based on paragraph 60(i) of the RfA is misplaced. Paragraph 60(i) of the RfA was not an offer by ENKA to abandon its case in respect of DRT Determination, but a mere statement that, if the GOG argued that DRT Determination was not binding, then ENKA would advance an alternative case that invited the Arbitral Tribunal to value the FMV.[361]

280. The argument that this was an offer that the GOG accepted is misplaced because the essential requirements of a legally enforceable contract are missing. There was no intention to create contractual relations, no certainty of terms, and the alleged offer was no more than a gratuitous promise. In any case, even if there was a contract, the remedy would be a claim for breach of contract, but no such claim is advanced by the GOG.[362]

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359 Reply, para. 400(b)(iv).

360 Reply, para. 400(b)(v).

361 Reply, para. 417(a).

362 Reply, para. 417(b).

ii. Estoppel

281. The estoppel argument is equally misplaced, for it fails to explain how the procedural rule of "estoppel" applies as a mandatory rule in an arbitration seated in France,[363] and in any case, the conditions for the theory of estoppel are not satisfied here because there is no inconsistency in the Claimant's case and no suggestion that the GOG has been misled. The RfA, the ToR and the SoC are consistent in setting out ENKA's primary case based on DRT Determination, with an alternative case that invites the Tribunal to value the FMV.[364] Estoppel would also requires the GOG to show reasonable reliance to its detriment[365] but the GOG did not rely on paragraph 60(i) of the RfA in any way.[366]

iii. Waiver

282. The Respondent's case on waiver replicates its case on estoppel and fails for the same reasons.[367] Moreover, under Georgian law, a waiver requires a bilateral agreement between the parties, so if there was an agreement, the GOG's remedy would be a claim for damages for breach of the agreement, but the GOG has not requested any.[368]

b) The alleged defects affecting DRT Determination

283. ENKA's primary case is that there is no manifest error and that DRT Determination is therefore conclusive and binding.[369]

i. DRT's selection and engagement

284. The Claimant affirms that the starting point for the analysis must be the BOO Agreement rather than Georgian or German law general principles on adversarial procedures. The BOO Agreement provides as follows:[370]

a) Article 9.4.6(b): "*If requested by the GOG... [ENKA] shall arrange for [ENKA]'s calculation of the FMV (if any) in the Termination Invoice to be verified by an Approved Auditor*";

b) Approved Auditor means: "*(a) an auditor selected by [ENKA] from the list in Annex 12 (Approved Auditors); or (b) if [ENKA] does not select an auditor from the list in Annex 12 (Approved Auditors) such other auditor as [ENKA] and the*

363 Reply, para. 437(c).

364 Reply, para. 439(a).

365 CL-7, Paris Court of Appeal, 5-16, RG: 21/09460, 10 January 2023, pp. 13-14.

366 Reply, para. 439(e).

367 See *supra*, para. 281.

368 Reply, para. 417(d).

369 SoC, para. 222.

370 Reply, para. 455.

GOG agree";

c) Annex 12 reflected the Parties' agreement to any of the Big Four accountancy firms, i.e.: PwC, Deloitte, KPMG or EY.

285. Therefore, the Parties have agreed that any of the Big Four accountancy firms could perform the role of Approved Auditor and, if the GOG requested verification of the Termination Invoice under Article 9.4.6 of the BOO Agreement, it was for ENKA to select one of them and to make the necessary arrangements with the audit firm to perform the work required.[371]

286. The fact that the Parties have pre-agreed a list of accountancy firms in Annex 12 means that (i) the GOG had no role in the selection or engagement of the Approved Auditor, and that (ii) there is no basis for a separate obligation of independence and impartiality of the Approved Auditor.[372] There is no rule under the BOO Agreement according to which the Approved Auditor had to be impartial and independent.

ii. Procedure before DRT

287. Article 9.4.6(c) of the BOO Agreement provides that "*the Approved Auditor shall be responsible for reviewing ENKA's calculation of the FMV and, within thirty (30) days of receiving such calculation, issue a report to ENKA (and copied to the GOG), confirming either that the FMV set out in the Termination Invoice has been properly calculated or if, in the Approved Auditor's opinion, it has not been properly calculated, its own calculation of the FMV*".

288. Articles 9.4.6(c) and 9.4.6(d) of the BOO Agreement contrast with the provisions related to Technical Expert Determination in Articles 5.4, 5.5 and 12.2, which is a longer procedure and does provide for the participation of the Parties.[373]

289. Accordingly, under Articles 9.4.6(c) and 9.4.6(d), the process was one of review of a calculation. It was not adversarial. The Approved Auditor would lead the process and be entitled to request access to ENKA's premises and information. It would be also entitled to request documents and information from the GOG. The Parties were contractually obliged to comply with such requests. The process was to be completed within a short 30-day period.

290. Therefore, the principles according to which the parties have the right to be heard and to have an equal opportunity to present their case, and that the expert must treat both parties equally, are not applicable in the present case to the procedure before DRT.[374]

371 Reply, para. 456.

372 Reply, para. 457.

373 Reply, para. 458(c).

374 Reply, para. 460.

The GOG's approach fails to consider the agreed procedure and relies instead on civil procedure rules which are not applicable.[375]

iii. Form of DRT Determination

291. The GOG wrongly allege that certain mandatory requirements apply to the Determination.[376] That is incorrect. The Approved Auditor was not required to describe the methods it used, nor to provide reasons for its responses to the questions posed to it. Neither was it required to provide explanations or supporting evidence for its valuation. The Auditor was only required to set out its conclusions. The applicable requirements arose from Articles 9.4.6(c) and 9.4.6(d) of the BOO Agreement, not from the Georgian Code of Civil Procedure ("**GCCP**"), which is irrelevant.[377]

292. The argument that DRT Determination did not verify the accuracy of the underlying financial data or other information[378] is also misplaced, because DRT explained the limitations to its work[379] in view of the short time given to it to perform its work and the limited scope of the same, in accordance with the BOO Agreement.[380]

293. The GOG takes DRT statement that it would "*not enter into future correspondence relating to the content* [of its Determination]"[381] out of context. As it appears from the full text of paragraph 4.4 of the Determination,[382] what DRT meant was that it was not responsible for keeping its analysis updated to reflect subsequent events.[383]

c) Manifest Error

294. The Claimant considers that DRT Determination is wrong because it does not reflect the true value of the FMV, but that does not mean that it was affected by "manifest error". The review was time-constrained, and the Parties accepted that the Approved Auditor valuation might not be correct. The test agreed by the Parties was that the Approved

375 Reply, paras. 479, 484.

376 SoD, para. 626: "*(1) describe the work performed and the methods used by the expert, (2) set out the conclusions and (3) provide reasoned responses to the questions the expert is required to resolve*".

377 Reply, paras. 486; 492-493.

378 SoD, para. 670.

379 C-26, DRT Determination, dated 15 February 2021, paras. 4.1, 4.2, 4.3.

380 Reply, para. 4.9.6.

381 SoD, para. 670.

382 C-26, DRT Determination, dated 15 February 2021, para. 4.4: "*We have no responsibility to update this report for events occurring after its issuance. We will not monitor this report's continuing relevance or suitability for any purpose after its issuance and we will not enter into future correspondence relating to the content of this report.*"

383 Reply, paras. 497-498.

Auditor conclusions would be conclusive and binding unless manifestly wrong.[384]

295. ENKA agrees with the GOG that "Manifest Error" is not a defined term in the BOO Agreement or in Georgian law. The term must however be construed according to Georgian law principles of interpretation, within the context of the BOO Agreement as a whole.[385] In this regard, the German law principles on expert determination, and Article 319(1) of the German Civil Code is not relevant to this case.[386]

296. Error means a mistake and "manifest" means obvious. The mistake made by the Approved Auditor must therefore be obvious on the face of the Approved Auditor's Determination.[387]

297. The purpose of Article 9.4.6(d) of the BOO Agreement was to give the Parties a final solution on the FMV in case of termination. The party relying on the Approved Auditor's determination does therefore not need to prove that it is correct. It is the party challenging it who must prove that it is manifestly wrong.[388] Because the Approved Auditor was not required to give reasons, any manifest error would need to be obvious from the Approved Auditor's Determination itself.[389]

298. The Respondent's proposed approach would require a thorough review to assess whether the value deviates by more than 20% or 25% from the Approved Auditor's Determination, which requires expert evidence, legal arguments and a hearing. This is inconsistent with the purpose of Article 9.4.6(d), which is to avoid a lengthy and costly procedure.[390]

299. If however the Tribunal considers it appropriate to compare DRT Determination with its own assessment of the FMV to assess a manifest error, then the Claimant submits that[391] the properly determined FMV is USD 1.029 billion with a valuation date of 20 September 2021, as per Mr. Caldwell's report.[392] The deviation from DRT Determination is therefore higher than 25% and in that scenario the Determination should be held to be manifestly erroneous. The Tribunal should then declare that the

384 Reply, para. 502(c).

385 Reply, paras. 506-508;

386 Reply, para. 514; Fromm I, paras. 63-65.

387 Reply, para. 509.

388 Reply, para. 510(a).

389 Reply, para. 510(c).

390 Reply, paras. 512-513.

391 Reply, para. 519.

392 C-PHB, para. 177; JER, para. 11. Before the Evidentiary Hearing, Mr. Caldwell calculated that the FMV was USD 1.016 billion using the APV methodology (CER-1, Caldwell I, para. 12).

FMV is USD 1.029 billion.

d) The FMV calculated by ENKA's expert in the arbitration

300. The Claimant avers as an alternative to its reliance on DRT Determination that the FMV is the one calculated by its expert Mr. Caldwell, i.e., USD 1.029 billion as of 20 September 2021 and USD 935 million as of 21 October 2021.[393]

i. Valuation Date

301. The BOO Agreement does not provide that the FMV must be calculated at any particular date, therefore the date of valuation depend on the date on which ENKA choose to issue the Termination Invoice. Since ENKA issued the Termination Invoice on 20 September 2021, and it is the FMV in that invoice which the Approved Auditor was to verify, ENKA submits that the FMV is to be valued at as 20 September 2021.[394]

ii. Methodology

302. The Parties and the Quantum Experts agree that:

- a DCF analysis should be performed according to standard practice;
- it is reasonable to distinguish between three categories of cash flows with different levels of risk: (i) construction period, (ii) PPA Period, and (iii) Merchant Period;
- it is reasonable to rely on detailed electricity models to produce forecasts of electricity prices;
- cash flows should be forecasted on an after-tax basis for 100 years.

303. Initially, Mr. Caldwell, submitted his calculation of the FMV based on the Adjusted Present Value (APV) methodology,[395] while the Respondent's expert, Mr. Wreford presented his calculation following a Weighted Average Cost of Capital ("**WACC**") approach.[396] In view of the fact that the two calculations could not be directly compared, the Arbitral Tribunal asked the Quantum Experts to submit a Joint Report identifying their differences together with a Joint Model with both experts' calculations based on the WACC method. Mr. Caldwell therefore translated his APV calculations into a WACC-based equivalent in the Joint Model.[397]

304. According to the Claimant, the main difference between the Quantum Experts'

393 C-PHB, para. 177; JER, para. 11.

394 Reply, paras. 528-529.

395 CER-1, Caldwell I, para. 163.

396 RER-2, Wreford I.

397 JER, para. 9.

conclusions is driven by their approaches to risk and discounting.[398] There is also a relevant difference with respect to forecasting electricity prices.[399]

iii. Risk and Discounting

a) Cost of debt and capital structure

305. The WACC in the DCF analysis is calculated by estimating a cost of equity and a cost of debt for a project and weighting these costs by the proportion established in the project's capital structure.

306. The Quantum Experts agreed to calculate different WACCs for three different cashflows to reflect the different risks related to each phase: Construction, PPA, and Merchant,[400] and to use the Capital Asset Pricing Model ("**CAPM**") method to set an appropriate discount rate. However, they differ on (i) the applicable cost of debt, (ii) the capital structure, (iii) the methodology for including risk premia, (iv) the applicable risk-free rate, and (v) the market risk premium ("**MRP**").

Cost of debt

307. Mr. Caldwell calculates the cost of debt using a CAPM build up, in which the cost of debt will vary depending on the components to the CAPM (risk-free rate, risk premiums, etc.) in a consistent manner with the cost of equity,[401] whereas Mr. Wreford applies a fixed cost of debt of 6% based on the financing conditions proposed by IFC/EBRD.[402]

308. Mr. Caldwell affirms that Mr. Wreford methodology is wrong because implicitly assumes that business risks (country risk, construction risk and merchant risk) affect one of the elements of the WACC calculation (equity) but do not flow through to the other (debt) in a consistent way. Such assumption contravenes established economic theory[403] and explains why Mr. Wreford's WACC increased substantially because of his reduction in the assumed levels of debt in his second report.[404]

309. The Claimant assert that the cost of debt's rate chosen by Mr. Wreford (6%) is not supported by the evidence and is significantly overstated, because IFC/EBRD's

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398 C-PHB, paras. 181(b), 191; Reply, para. 532.

399 C-PHB, para. 181(a)(i).

400 C-PHB, para. 192.

401 C-PHB, para. 194(a).

402 RER-2, Wreford I, paras. 6.92-6.95; RER-4, Wreford II, paras. 4.21-4.26.

403 C-PHB, para. 195; JER, para. 26: "*Modigliani-Miller's proposition 2 states that financing choices do not affect a project's overall cost of capital, meaning its WACC, except due to a tax-related side effect.*"

404 Mr. Wreford's WACC (before the interest tax shield) increased from 9.8% in Wreford I (RER-1) to 10.1% in Wreford II (RER-4), JER, para. 29.

proposal was subject to negotiation and was three-year-old by the date of termination. ENKA also states that Mr. Wreford speculates on the reasons for the rate proposed by SocGen and ignores relevant data available which shows that the Shuakevi project reported IFC/EBRD debt financing in 2020 with a much lower debt premium of 2.5%.[405]

310. The Claimant asserts that the Tribunal should select "**Build Up Rate**" instead of "**Fixed**" at **Cell G67** and select the beta: **0.1** at **Cell G69**.[406]

Capital Structure

311. Mr Caldwell assumes a capital structure with an initial project finance loan targeting 70:30 debt/equity, gradually settling at an equal (50:50) gearing as the Project starts paying off debt in its initial years of operation,[407] while Mr. Wreford assumes a capital structure of 30/70 debt/equity based on the debt ceiling agreed in the Second SHA.[408]

312. The Claimant argues that Mr. Wreford approach is wrong because the BOO Agreement provides that the calculation of the FMV should be based on the valuation that a hypothetical willing buyer would make and is not subject to the obligations assumed by that ENKA's shareholders.[409]

313. The Claimant asserts that the Tribunal should select "**Yes**" in **Cell G59**, "**70%**" in Cell **G60**, and "**50%**" at Cell **G61** of the Control Panel.[410]

Calculation Methodology

314. Mr. Caldwell recommends a "multiplicative" approach instead of the simple "additive" approach applied by Mr. Wreford, because the former ensures that the risk premiums will be applied consistently to the WACC and separately to the cost of equity and the cost of debt. The Tribunal should thus select the risk methodology approach "**Caldwell**" in **Cell G57**.[411]

Risk-Free Rate

405 C-PHB, para. 196 (b) to (d); C-145, Calculation of FMV and Supporting Documentation/Supporting Documentation/WACC/Cost of Debt/3% Interest Rate Margin Over IR Swap (pre-tax)/Adjaristskali LLC financials for 2020 (Whole Document), "13. Loans and Accounts Payable", po. 21-22, referred to in C-127, ENKA's Financial Model, tab 'WACC Det' row 52.

406 C-PHB, para. 197.

407 C-PHB, para. 194(a); JER, Item "E.4 Cost of debt", pp. 42-43.

408 RER-4, Wreford II, para. 2.33; JER, Item "E.3 Financial leverage", pp. 32-36.

409 C-PHB, paras. 180(d), 199(a).

410 C-PHB, para. 200.

411 C-PHB, para. 202; JER, pp. 19-22.

315. Mr. Caldwell advises using a "term-matched" risk-free rate to reflect the fact that interest rates depend on the time horizon and asserts that this is the best practice where the differences in the early life of the Project matter to the discounting approach (5 years of construction, followed by 15 years of PPA sales).[412]

316. The Claimant rejects Mr. Wreford argument that using term-matched risk-free rates would be incompatible with the use of a single Market Risk Premium and alleges that Mr. Wreford has provided no actual evidence of any term related differences in the measurement of MRP.[413]

MRP

317. MRP is the expected difference between an investment in the average market portfolio and the risk-free rate. Mr. Caldwell uses a rate of 5.5% which lies in the middle of the range of data observed by Mr. Wreford.[414]

318. The Claimant asserts that Mr. Wreford selection of 6% is unjustified even following his own method, because he proposed to select a value within the range of different data sources, but the mean average of such sources is 5.55% and Mr. Wreford does not explain why he selected a higher rate. Moreover, the presentation made by Wreford during the Evidentiary Hearing[415] to explain his conclusion on this point omitted one of the sources, the annual data published by Prof. Damodaran, which reported a lower MRP of 4.72%, and Mr. Wreford's explanations for this omission are unsatisfactory.[416]

319. The Claimant also alleges that Mr. Wreford's range of values was skewed upwards through his reliance on data published for the US market in the Dimson, Marsh and Staunton Survey ("**DMS Survey**")[417] that will overstate US returns over any other market because of the superior performance of the US economy in the second half of the 20th century ("*success bias*").[418] Mr. Caldwell affirms that Mr. Wreford argument according to which US based MRP is warranted because the Project's cash flows are denominated in USD is misconceived because the DMS Survey also reports USD-

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412 C-PHB, para. 203; CER-1, Caldwell I, 67; BR-4, Brealy, Richard A, Myers, Stewart C, and Allen F, Principles of Corporate Finance, 10th Ed., N.Y., McGraw-Hill, 2011, pp. 53-55, 217-228.

413 C-PHB, para. 203(b).

414 CER-1, Caldwell-I, para. 76; C-PHB, para. 204.

415 Wreford Presentation, Slide 12.

416 C-PHB, para. 205; Tr. D6/14:24-15:21; Tr. D6/50:5-19.

417 RER-Ex-39, Dimson, Marsh and Staunton Survey (Credit Suisse Global Investment Returns Yearbook 2021, Feb. 2021, March 2021) ("**DMS Survey**").

418 C-PHB, para. 206; RER-2, Wreford I, para. 6.45(d); RER-Ex-39, DMS Survey, pp. 15, 57.

denominated returns for the "World" index.[419]

320. The Tribunal should therefore select "**5.5%**" for MRP in Cell **G64**.[420]

b) Construction costs and risk

321. The Quantum Experts have considered three ways to take into account the construction risk: (1) through the cashflow (contingency), (2) through lower discounting of construction costs during the construction phase, and (3) through higher discounting of net revenue streams during the operational phase (construction risk premium).[421]

322. Mr. Caldwell considers that ENKA's exposure to construction risks was substantially mitigated by the provisions of the BOO Agreement and the Draft EPC Contract,[422] therefore he considers appropriate to adopt ENKA's Model contingency (54 million cost contingency and 5-month schedule buffer for programme overruns).[423]

323. Mr. Caldwell also discounts construction costs at a low rate to take construction risks into account.[424] According to Mr. Caldwell, the best practice is to treat construction costs similarly to debt obligations, therefore he applies a rate that ranges from 1.12 in 2022 to 2.11 in 2025.[425]

324. Mr. Wreford applies the three possibilities for considering the construction risk: (i) adopts ENKA's contingencies, (ii) discount construction costs in a limited way, and (iii) adds a construction risk premium of 1% to the discount rate for both PPA and Merchant cashflows.[426] According to the Claimant this approach amounts to double counting.[427]

325. Mr. Wreford initially stated that the construction costs should not be discounted, which Mr. Caldwell consider wrong because it would artificially increase their present value.[428] During the Evidentiary Hearing, Mr. Wreford explained that he discounted the construction costs but only after the Commercial Operations Date ("**COD**").[429] The Claimant asserts that Mr. Wreford only discounted the construction costs after COD by mistake, and although this error does not have a significant economic impact in this

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419 C-PHB, para. 206(e); RER-Ex-39, DMS Survey, p. 60.

420 C-PHB, para. 207.

421 C-PHB, para. 209.

422 C-PHB, paras. 211-212.

423 CER-1, Caldwell I, Appendix D.

424 C-PHB, para. 208.

425 CER-1, Caldwell I, paras. 17-18, 77-78.

426 C-PHB, para. 208(b).

427 JER, para. 38.

428 SoD, paras. 540-545.

429 Evidentiary Hearing Tr., D5, p. 162:2-24.

case, it shows Mr. Wreford's lack of rigour.[430]

326. Regarding the construction risk premium, the Claimant avers that Mr. Wreford has not performed any assessment of the adequacy of ENKA's contingencies and his adoption of a 1% construction risk premium is arbitrary and unjustified, because it is not based on relevant data.[431]

327. The Tribunal should therefore retain the cost and schedule contingencies from ENKA's Model at Cells **G72** to **G74** , select "**0%**" for construction risk premium in Cell **G75** and select "**Cost of Debt**" for the discounting of construction costs before and after COD at Cells **G76** and **G77**.

c) PPA Revenues

328. Mr. Caldwell considers the PPA cashflows comparable to a debt obligation, because ESCO was obliged to purchase all the Project's electricity at a pre-agreed price, therefore he includes a low beta of 0.1 consistent with debt in the CAPM,[432] and to take into account the risk that the GOG might default on its offtake obligation, he adjusts the cashflow based on the remuneration of Georgian sovereign bonds.[433]

329. Mr. Caldwell considers that the annual chance of default of ESCO as of September 2021 was 2.74%, therefore he applies the higher discount rate applicable to merchant sales to 2.74% of the PPA cashflows (compounded every year).[434] The cashflows adjustment are the equivalent of using an asset beta of 0.3.[435]

330. According to Mr. Caldwell, the higher beta of 0.6 applied by Mr. Wreford based on alleged comparable companies is excessive and is not justified because the PPA eliminate the price uncertainty and PPA sales should therefore attract a low discount rate.[436]

331. The Claimant submits that since the Quantum Experts have agreed to consider and assess different cashflows for the different periods rather than to calculate on single discount rate, it is inappropriate to look to all-in discount rates of allegedly comparable

430 C-PHB, paras. 213-214; JER, p. 53.

431 C-PHB, para. 216.

432 C-PHB, paras. 218(a), 220(a); JER, pp. 66-71; BR-14, Moody's Investors Service, Regulated Electric and Gas Utilities, dated 23 June 2017, p. 42.

433 CER-1, Caldwell I, paras. 88-93.

434 CER-1, Caldwell I, paras. 92-93; C-PHB, para. 220(c). The compounding effect means that by Year 15 the model assumes a 34% probability of electricity produced during the PPA period being sold on the open market.

435 C-PHB, para. 220(c); CER-1, Caldwell I, fn. 106.

436 CER-1, Caldwell-1, paras. 88-89.

companies for guidance.[437]

332. Furthermore, the companies selected by Mr. Wreford are not comparable to ENKA because they are exposed to significant merchant risk, as well as to many other risks (regulatory, contractual, exchange rate).[438]

333. Finally, Claimant asserts that Mr. Wreford is wrong to add a separate premium for Country Risk for the PPA period, because the 0.6 beta derived from his selection of comparable companies already includes the counterparty risk,[439] therefore by adding a country risk premium on top Mr. Wreford is double counting counterparty risk.[440]

334. The Tribunal should therefore select "**Yes**" to the use of Counterparty Adjustment in Cell **G80**, select "**No**" to the additional country risk premium to the PPA period discount rate on Cell **G81**, and "**0.1**" for the asset beta to be used to calculate the discount rate at Cell **G82**.

d) Merchant Period

335. Mr. Caldwell considers appropriate to factor the merchant risk into the beta of the CAPM and uses a beta of 0.7, based on his set of comparable companies and analysis from the U.K. energy regulator Ofgen.[441] Mr. Caldwell then adds a country risk premium on top.

336. Mr. Wreford applies a merchant risk premium of 1% and adds a country risk premium on top. Mr. Caldwell asserts that since the beta used in Mr. Wreford CAPM includes some merchant risk, it is wrong and constitutes double counting to add on top a premium for merchant risk.[442]

337. The Tribunal should therefore select "**0%**" for Merchant Risk Premium in Cell **G90** and "**0.7**" for the Merchant Asset Beta in Cell **G91**.

e) Country Risk

338. Mr. Caldwell uses a country risk premium, based on the observed sovereign spread that varies with term between 0.62% and 2%, which he then adjusts to reflect the extent of exposure for the Project.[443]

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437 C-PHB, para. 221(a).

438 C-PHB, para. 221(b); RER-4, Wreford II, para. 6.99; Tr. D6/17:16-18:3; CER-1, Caldwell I, para. 89; RER-2, Wreford I, para. 6.40 and Appendix 4.

439 JER, pp. 66-67.

440 C-PHB, para. 221(c).

441 C-PHB, paras. 223(a), 224; JER, para. 49, pp. 77-79; CER-1, Caldwell I, para. 250.

442 C-PHB, para. 224.

443 C-PHB, para. 225(a); Brattle Workpapers G, "Counterparty and Country Risk", tab "G1".

339. Mr. Wreford uses a fixed country risk premium of 2.75%, based on Georgia's sovereign credit rating which is not adjusted to reflect the exposure for the Project.[444]

340. The Claimant assert that Mr. Caldwell approach should be preferred because there is no need to rely on a predicted spread (Wreford) when real and up to date information is available.[445]

341. The Tribunal should therefore select "**Actual Spread**" in Cell **G85** and "**0.7**" for the Merchant Asset Beta in Cell **G91**.

342. In addition, Mr. Caldwell adapts the country risk premium considering the level of exposure of the Project to country risk, taking into account the allocation of risk provided by the BOO Agreement, whereas Mr. Wreford considers that the Project is fully exposed to country risk and fails to consider the protections embedded in the BOO Agreement against adverse changes of law, political opposition and expropriation, as much as it does not consider the certainty that it provides in terms of energy dispatch.[446]

343. If the Tribunal accepts that an adjustment should be made to reflect the BOO Agreement, it should select "**Partial (BOO Risk Allocation)**" in Cell **G86**.

344. Finally, the Claimant asserts that there is no need to consider enforcement risk, because the BOO Agreement provides for that the calculation of the FMV should be made "*assuming a non-hostile environment*" and "*disregarding all unfavorable circumstances*", and the GOG has not demonstrated that it would not or could not honour a binding award against it.[447]

iv. Forecast of Electricity Prices

345. Mr. Caldwell uses a "Plexos" dispatch model to forecast electricity prices. The Plexos model was prepared by Compass Lexecon and simulates the Georgian and Turkey electricity markets every five years from 2025 to 2050.[448] Compass Lexecon Model considers 4 different scenarios reflecting different potential policy responses to the 2015

444 RER-2, Wreford I, paras. 6.60-6.69.

445 C-PHB, para. 228.

446 C-PHB, para 229; JER, pp. 74-75; CER-1, Caldwell I, paras. 24, 89 and Section VIII.A.

447 C-PHB, paras. 233-234.

448 Reply, para. 541; CER-1, Caldwell I, para. 134 and Fig. 26. Mr. Caldwell affirms that its Plexos simulation allows him to consider the advantage of the Project's reservoir, which allows it to produce energy when prices are higher, CER-1, Caldwell I, paras. 231-232, fig. 26. The GOG, to the contrary, sustains that the Upper Namakhvani plant did not have the capacity to stock enough water to generate electricity at any time (Rejoinder, para. 1066).

Paris Agreement on Climate Change.[449]

346. The World Energy Outlook ("**WEO**") published by the International Energy Agency, shows four scenarios built on different sets of underlying assumptions about how the energy system might evolve:[450] two scenarios "Stated Policies" and "Announced Pledges" would not achieve the long-term commitments of the 2015 Paris Agreement, while the two others "Sustainable Development" and "Net Zero" would meet the 2015 Paris Agreement commitments.[451]

347. By using the relevant information in the dispatch model, Mr. Caldwell forecast the electricity prices between 2025 and 2050 for each scenario.[452]

348. According to Mr. Caldwell the "Announced Pledges" and "Sustainable Development" scenarios are the most likely to occur, so he assigns 40% probability to each and applies a lower probability of 10% to each of "Stated Policies" and "Net Zero" scenarios.[453]

349. The Respondent submitted an expert report from Dr. Siliprandi, who also performed a dispatch modelling analysis that models Georgian and Turkish prices based on several scenarios. Mr. Siliprandi did not blend his scenarios, but Mr. Wreford did, applying an equal weighting to each.[454]

350. The Claimant considers that Mr. Caldwell and Dr. Siliprandi's forecasts are equally valid and asks the Tribunal to use a blended forecasts equally weighted between both.[455]

351. On the contrary, the Claimant rejects Mr. Wreford's reliance on the electricity price forecast report of Galt & Taggart ("**G&T Report**"),[456] which does not implement the dispatch model, but rather performs a regression of historical electricity prices in Turkey.[457] ENKA asserts that the G&T Report does not consider:[458] (i) the forecast of the cost of fuel like natural gas and coal; (ii) the potential evolution of generating capacity; and (iii) likely future developments such as the expansion of CO2 pricing, which would make it more expensive to use fossil fuel to generate electricity and

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449 CER-1, Caldwell I, para. 135.

450 BR-41, International Energy Agency, 2021 WEO, Oct. 2021, pp. 94-95.

451 CER-1, Caldwell I, para. 143; BR-41, International Energy Agency, 2021 WEO, Oct. 2021, p. 327.

452 CER-1, Caldwell I, para. 150, Fig. 11.

453 CER-1, Caldwell I, para. 182.

454 RER-4, Wreford II, para. 7.33. Wreford also weighted Siliprandi's forecasts with G&T's forecast.

455 C-PHB, para. 185.

456 R-163, G&T Report, dated, 14 December 2021.

457 CER-1, Caldwell I, para. 25.

458 Reply, para. 358.

therefore offer the Project a competitive advantage and a higher market value.[459]

352. While Mr. Wreford has been instructed to assume that the G&T prices forecast is expressed in nominal terms, the Claimant assert that the only explanation for the implausibly low prices in G&T Report is that these prices are in fact in real terms and require adjustment for future inflation.[460]

353. The Tribunal should therefore select "**Manual Weighted**" in Cell **G29** and then select "**50%**" to Mr. Caldwell's Weighted Average in Cell G48 and "**50%**" to Dr. Siliprandi Weighted Average in Cell **G49**.[461]

v. Other cashflow modelling issues

354. The Claimant also referred to the following differences between the Quantum Experts with regard to the modelling of cashflows:

- Whether to inflate prices on an annual or monthly basis: Mr. Caldwell recommends adopting an annual assumption which effectively assumes a mid-year effect, as being a fairer and more reasonable approach.[462]

- Inflation rate: Mr. Caldwell recommends using the actual US inflation rate of 4.7% for 2021 instead of the generic rate of 2% adopted by Mr. Wreford.[463]

- Corporation taxes - Depreciation period: Mr. Caldwell assumes 50-year straight line book depreciation, consistent with the anticipated technical life of key Project equipment. According to Mr. Caldwell, the 100-year depreciation assumed by Mr. Wreford lacks any basis and reduces without justification the value of the available depreciation tax shield.[464]

- Corporation taxes – Depreciable asset base: Mr. Caldwell advises including the interest costs of a projected debt finance in the depreciable asset base, while Mr. Wreford argues that it is not appropriate in view that the Project had not secured external debt finance.[465]

e) The Tax Gross-Up Amount

355. ENKA claims a 15% Tax Gross-Up on the FMV in an amount of USD 179,000,000

459 CER-1, Caldwell I, paras. 126-133, and Appendix H, paras. 255-266.

460 Reply, para. 540(a).

461 C-PHB, para. 185.

462 C-PHB, para. 188(a); JER, C.2, select "**Annual**" in Cell **G20**.

463 C-PHB, para. 188(b); JER, C.3, select "**Actual**" in Cell **G20**.

464 C-PHB, para. 190(a); JER, C.5.1, select "**50**" in Cell **G25**.

465 C-PHB, para. 190(b); JER, C.5.2, select "**Yes**" in Cell **G26**.

(based on Mr. Caldwell's calculation of the FMV as of 20 September 2021) or USD 162,000,000 (based on Mr. Caldwell's calculation of the FMV as of 21 October 2021).[466]

3. The Preconstruction Security

356. In accordance with Article 7.1.5 of the BOO Agreement, the GOG shall return to ENKA the USD 1,500,000 Preconstruction Security upon termination of the Agreement. Termination occurred on 21 October 2021, but the GOG failed to return the Preconstruction Security.[467]

357. ENKA has incurred and continues to incur fees and costs in relation to maintaining the Preconstruction Security from 21 October 2021 until such time as it is returned and is entitled to claim such costs.[468]

4. Interest

358. Article 11.7 of the BOO Agreement provides that the GOG shall pay interest on any sum due under such Agreement from the due date to the date of actual payment, at the rate of LIBOR +4%, which interest shall accrue from day to day and be compounded monthly.[469] The calculation of interest based on LIBOR is however no longer possible given that LIBOR ceased to be published at the end of June 2023. The emerging replacement rate is the Secured Overnight Financing Rate ("**SOFR**"), and interest shall therefore be calculated based on SOFR +4%, accruing daily and compounding monthly.[470]

B. Respondent's position

1. ENKA did not validly terminate the BOO Agreement

a) Alleged Government Events of Default are without basis

359. To terminate the BOO Agreement on the ground of a GOG Event of Default in accordance with Article 9.1.2(a), ENKA would need to prove that the following three conditions have been met.

360. First, that the GOG has committed a 'material breach' of an obligation or representation under the BOO Agreement. Georgian law does not provide a definition of "material

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466 PHB, para. 258(a); Reply, para. 546; CER-1, Caldwell I, Table 6 (Total Amount including Tax Gross-Up and Interest). Caldwell, in so doing, refers to the Georgian 15% corporate tax as well as to the Termination invoice (Caldwell, § 185). The Termination Invoice (C-20) refers to a 17,6% rate.

467 SoC, para. 232.

468 SoC, para. 233.

469 SoC, para. 234.

470 Reply, para. 549.

breach" but according to the GCC, a contract may not be unilaterally terminated (or repudiated) if breach of an obligation is "insignificant".[471] A breach will be significant *"if due to the breach of the main obligation by the debtor, the intended use of the performance becomes impossible or the hope of its performance in the future is lost or the creditor loses interest in performance."*[472]

361. A more reasonable interpretation is that the right to terminate applies when there is a significant transgression having an impact on the BOO Agreement as a whole. Since the BOO Agreement is governed by Georgian law, the phrase "*material breach of an obligation*" must be understood in light of Georgian law as a significant transgression impacting the BOO Agreement as a whole.[473] This assessment is a question of fact that must be assessed at the time when performance was due. Therefore, the duration of the contract may be a relevant factor in determining whether a breach is material.[474]

362. Second, ENKA must have provided notice of the alleged breach to the GOG in accordance with the requirements established by Article 19.1 of the BOO Agreement, i.e.: (i) in writing, (ii) by notice delivered personally or sent by registered mail or by courier to the address of the GOG and (iii) marked for the attention of the person(s) designated by the Agreement.[475]

363. Third, ENKA must prove that the GOG has not cured the material breach within 90 days from the date of notification of the breach.[476]

364. The GOG submits that these requirements are not satisfied in the present case.

i. <u>ENKA's Reliance in Art. 3.2.14(a) is without basis</u>

365. Two only of ENKA's allegations regarding Article 3.2.14(a) could be of relevance to its claim: (i) the alleged failure to remove the cross from the Site and (ii) the alleged failure to prevent a blockade of the Site and surrounding areas.[477]

366. Regarding the issue of the cross, the Claimant accepts that such breach was cured by the resumptions of the works on 1 February and again on 4 April 2021.[478]

367. With respect to the alleged failure to prevent blockades at the Site and surrounding areas

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471 SoD, para. 360; RL-8, GCC, Arts. 405 and 405(a); RER-1, Kereselidze I, para. 30.

472 RL-30, Supreme Court of Georgia, case No. AS-1003-924-2017, 1 December 2017, p. 1.

473 R-PHB, para. 188; Rejoinder, paras. 690-693.

474 Rejoinder, para. 694.

475 SoD, para. 362; C-4 BOO Agreement, Art. 19.1.

476 SoD, para. 363.

477 SoD, para. 368.

478 Reply, para. 332.

and to allow passage of vehicles from 28 May to 19 September 2021, the GOG accepts that, as from 29 May 2021, there were interferences with ENKA's access to the Site, such that there was a breach of Article 3.2.14(a),[479] however they cannot justify the termination for the following reasons:

368. First, this situation arose from ENKA's failure to comply with its stakeholder engagement and project management obligations and the GOG did its utmost to resolve them, among other actions, through the Mediation and the negotiations with ENKA to overcome the opposition of the Church.[480]

369. Second, ENKA failed to demonstrate that these were material breaches of Article 3.2.14(a). Considering the size and duration of the Project, blockades were foreseeable and foreseen, so that these events cannot serve to establish a material breach[481] when the GOG, after 28 May 2021, assisted ENKA in accessing the Site with supplies of material, fuel, and staff.[482] The test to determine whether an alleged breach is material is whether it results in the other party losing interest in, or being deprived of, the benefit of performance of the contract. ENKA, however, does not even attempt to show that by 21 June 2021, issues with accessing the Site (which lasted for a couple of weeks) had deprived it of the benefit of this century-long Project.[483]

370. Third, in view of the 90 days cure-period, ENKA's allegations about breaches having occurred after 21 June 2021 are irrelevant to justify a termination of the BOO Agreement in September 2021.[484]

371. Fourth, even if there had been a breach of Article 3.2.14(a) of the BOO Agreement and if that breach had been properly notified to the GOG, it was cured within less than 90 days[485] as shown in the Mediators' Concluding Report (which states that "*by July 2021, the situation onsite was stabilized and remained overall calm*").[486]

372. The internal messages of ENKA's management team at that time[487] show that ENKA

479 R-PHB, para. 191.

480 R-PHB, para. 191; Tr. D1/147:9-17.

481 SoD, para. 371(1).

482 Rejoinder 704(1).

483 R-PHB, paras. 192-194; Rejoinder, para 704(2).

484 SoD, para. 371(2).

485 SoD, para. 371(3).

486 R-62, Mediators' Concluding Report, dated 19 November 2021, p. 4, Section 3(a).

487 C-485, Namakhvani WhatsApp Group, p. 33: "Mr. Kozan statement: "*They didn't allow the subcontractor's truck to pass either. Protestors were not aggressive this morning. The video is much less exciting compared to the last two days*".

was exploiting a situation which was not a real cause for concern.[488] The fact that, in August 2021, ENKA requested the termination of the Police Protection Agreement also indicates that ENKA was not invoking a material breach in good faith and had already decided to leave the Project for other reasons.[489]

373. The Claimant's allegation that the GOG did not open the roads to exert pressure on ENKA so that it would agree to reduce the term of the Right to Build is also misplaced. The Respondent maintains that the requested reduction was just a symbolic adjustment which would not affect ENKA's commercial position,[490] since it would make no sense for the GOG to acquire the structures that had been built over or below the riverbed without having the chance to buy out and operate the Project in its entirety.[491] The reduction was also a crucial tool to reduce the opposition, as the Orthodox Church confirmed to the Prime Minister that it would lift its opposition if an adjustment to the duration of the Right to Build be made.[492]

374. ENKA alleges that the GOG breached Article 3.2.20 of the BOO Agreement by failing to take adequate measures to protect it from the protests, riots and violence taking place on and around the Site from 29 May 2021 to 20 September 2021, in particular, by refusing to provide support and protection "*unless and until ENKA agreed to amend the terms of the BOO Agreement, including by a reduction in the Term of agreement to 49 years*".[493] These allegations are ill-founded for the following reasons.

375. The GOG promptly took steps to secure the Site and to protect ENKA, its assets, and personnel upon the first protests. Under the BOO Agreement, the GOG "*did not guarantee that it would keep the site safe and protected at all times, but merely to take 'all reasonable and prudent measures' to 'ensure that the construction, operation and other aspects of the Project are not adversely affected' by the events and acts listed in Article 3.2.20 of the BOO Agreement.*"[494]

376. Regarding the protests that took place at the end of October 2020 and at the end of January 2021, the GOG did the necessary to ensure that works could be safely

488 Rejoinder, para. 705.

489 SoD, para. 371(4).

490 RWS-4, Turnava II, para. 108; R-39, Note on Right to Build, dated 2 June 2021; R-40, WhatsApp messages between Mr. Tkavadze and Mr. Tara, dated 2 June 2021 (message of 2 June 2021).

491 Rejoinder, Section II.D.1. and para. 351; R-39, Note on Right to Build, dated 2 June 2021.

492 Rejoinder, Section II.D.1, and para. 346; RWS-4, Turnava II, paras. 100-101.

493 Reply, paras. 330 and 339.

494 SoD, para. 377 and fn. 599.

resumed,[495] as admitted by ENKA.[496]

377. After April 2021, the GOG continued to take measures to protect the Project. In particular, the GOG:

- transported ENKA's staff and provisions to/or from the Site on various dates;[497]

- arrested and imposed administrative penalties on protesters;[498] and

- imposed restrictions on movement around the Site.[499]

378. ENKA's allegation that it refused to provide support and protection to ENKA unless and until ENKA agreed to amend the BOO Agreement is misplaced, as the GOG only proposed to reduce the duration of the Right to Build granted to ENKA as a symbolic adjustment to address the concerns of the public, which had no negative impact on ENKA.[500] In any case, the GOG never refused to provide security, support and protection to the Project and maintained a substantial police presence at the Site until January 2022.[501]

379. Given that there was a 90-days cure period, any event post-dating 21 June 2021 could not be relevant to assess a material breach justifying a termination on 20 September 2021.[502] ENKA did not show that any alleged failure to ensure enough police presence at Site for three weeks could be a "material breach" in the context of the Project.[503]

380. Finally, since the situation on site was stabilized by July 2021, any alleged breach by the

495 RWS-1, Turnava I, para. 39; C-74, ENKA Monthly Progress Report, November 2020, p. 10; C-78, ENKA Monthly Progress Report, January 2021, p. 13; C-154, WhatsApp messages between Mr. Kocaoglu and Mr. Tvalabeishvili, p.1; C-156, WhatsApp messages between Mr. Ozgen and Mr. Tvalabeishvili, p. 1; C-66, ENKA letter to the MESD, dated 28 October 2020, p. 1; C-71, ENKA letter to the MESD, dated 5 November 2020, p. 1; C-73, ENKA letter to the MESD, dated 13 November 2020, p. 1.

496 Reply, para. 332.

497 SoD, para. 379 and Section II.D.4(b).

498 SoD, para. 379.

499 SoD, para. 379; RWS-1, Turnava I, para. 71; SoC, para. 161.

500 SoD, Section II.D.4, paras. 185-186.

501 R-118, Special Tasks Department Order No. 889004, dated 10 April 2021; R-112, Ministry of Internal Affairs Order No. 1/175, dated 27 May 2021; R-113, Ministry of Internal Affairs Order No. 1/405, dated 11 October 2021.

502 SoD, para. 384.

503 R-PHB, para. 195

GOG of its obligations to secure the Site would have been cured by then.[504]

ii. ENKA's reliance on Article 3.2.1 is without basis

381. According to the Claimant, the GOG would have renounced the BOO Agreement by 9 June 2021 at the latest by announcing that "*the Project would not be implemented on the terms agreed in the BOO Agreement, coupled with GOG 's actions and inactions in (a) failing to intervene to ensure unhindered and uninterrupted access to the Site; (b) failing to safeguard the Site; and /or (c) ceasing the transfer of Land Rights and the issue of Authorizations.*"[505] Such actions would have also amounted, according to the Claimant, to a further breach of Article 3.2.1 of the BOO Agreement.

382. With respect to securing access to the Site and provide protection, the GOG demonstrated that it was not in breach of its obligations.[506] Moreover, those alleged failures were not properly notified and/or were cured within the time limit.[507]

383. Regarding the alleged failure to transfer the land rights and issue the relevant authorizations, the GOG never ceased this process; rather, the process has been delayed because ENKA's applications were incomplete or contained errors.[508] In its 14 July 2021 letter, the NASP requested ENKA to submit a "specified application", to fulfil the conditions for land transfer, and to allow the NASP to continue its review of the application.[509] In its 20 August 2021 letter, the NASP pointed out to a number of errors in ENKA's application, but assured it that "*upon providing the requested documents and the specified application*", it would "*take appropriate measures for the purposes of privatizing the requested property*".[510]

384. The GOG admits that TACSA never responded to ENKA's 31 March 2021 application regarding the penstock design approval. Nonetheless, ENKA's application was automatically approved pursuant to Resolution No. 257, which applied the principle of consent by silence.[511] ENKA's argument is therefore disingenuous given that it was

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504 SoD, para. 385; R-62 Mediators' Concluding Report, 19 November 2021, p. 4, Section 3(a).

505 SoC, para. 215.

506 See *supra*, paras. 369, 375-378.

507 SoD, para. 391.

508 SoD, para.392(2) and (3); R-151, letter from NASP to ENKA, dated 14 July 2021.

509 R-151, letter from NASP to ENKA, dated 14 July 2021.

510 R-239, letter from NASP to ENKA, dated 20 August 2021

511 Rejoinder, para. 729; RL-110, Resolution No. 257, Art. 37: "*failure to render a decision within the stipulated timeframe will result in the automatic approval of the architectural project, construction, and or technological scheme.*"

aware of the principle of consent by silence and relied upon it on other occasions.[512]

385. ENKA's allegations concerning other construction authorisations are unavailing because under Article 48 of Resolution No. 257,[513] changes to the construction documents trigger an obligation to obtain a new construction permit unless the changes fall within specific exceptions, which was not the case of the alterations of the Detailed Design.[514]

386. In any case, in the first quarter of 2021, TACSA extended the deadline to obtain the construction permits by almost a year, so the process remained active into the second half of 2021. The fact that some permits remained pending in June or July 2021 does not show that the GOG was not committed to the Project.[515]

387. ENKA also misrepresented and took out of context the GOG's 24 April and 9 June 2021 statements, which were made in an attempt to appease protesters so to allow the Project to move forward.[516] The GOG was always fully supportive to the Project.[517] It is rather ENKA who ceased to support the Project by refusing to participate in the Mediation and planning the termination of the BOO Agreement from 7 June 2021, before the alleged renunciation of the Project by the Prime Minister.[518]

388. In any event, ENKA only notified the GOG of an alleged breach of Article 3.2.1 of the BOO Agreement on grounds of failure to transfer relevant land plots on 9 July 2021.[519] ENKA's 15 June 2021 letter was not a notice of a breach in accordance with Article 3.2.1 as it did not refer to that provision and was not addressed to the MESD.[520] Regarding the Prime Minister declaration of 9 June 2021, ENKA invoked a breach for the first time on 7 August 2021. In fact, while it is true that ENKA quoted the Prime Minister's statement in a 16 June 2021 letter, that letter did not suggest that the Prime

512 Rejoinder, para. 729(4); R-244, Letter from ENKA to TACSA, dated 21 May 2021.

513 RL-110, GOG Resolution No. 257, concerning the rules on issuing permits for constructions of facilities of special importance and permit conditions.

514 Rejoinder, para. 730; R-152, letter from TACSA to ENKA, dated 27 July 2021.

515 SoD, para. 392(3).

516 SoD, para. 395(2), Rejoinder, paras. 734-735.

517 C-74, ENKA Monthly Progress Report, November 2020, p. 10; C-78, ENKA Monthly Progress Report, January 2021, p. 13; C-77, Civil GE Article, dated 31 January 2021; R-61, BMG, dated 30 January 2021; C-90, Civil GE Article, dated 4 March 2021; R-32, Press release of the GOG, dated 4 March 2021.

518 SoD, para. 393; Rejoinder, para. 736 and Section II.E.2.

519 C-13, ENKA's letter to the GOG, dated 9 July 2021.

520 Rejoinder, para. 738; C-12, ENKA's letter to the NASP, dated 15 June 2021.

Minister had renounced to the BOO Agreement or breached its Article 3.2.1.[521]

389. The passage of time between the alleged breaches and the notifications demonstrates that ENKA did not believe that a material breach had occurred. In any case, by 20 September 2021 the period to cure such breaches had not yet expired.[522]

b) There is no Non-Physical Force Majeure

390. To be entitled to terminate the BOO Agreement based on a Non-Physical Force Majeure Event, the following cumulative conditions must be satisfied:[523]

- the event listed in Article 8.1.3(a) is "*not within the reasonable control, directly or indirectly*" of ENKA;
- the event results in or causes a total or partial failure to perform, non-performance, or delayed performance of ENKA's obligations under the BOO Agreement;
- having used "reasonable diligence", ENKA is unable to prevent, avoid or remove such event;
- ENKA has taken reasonable precautions, has exercised due care and has taken reasonable alternative measures in order to avoid the effect of the event on its ability to perform its obligations and to mitigate the consequences thereof;
- the event is not the direct or indirect result of a breach by ENKA of any of its obligations under the BOO Agreement;
- the event either (i) prevents, delay or hinders – or could reasonably prevent, delay or hinder – ENKA from performing an obligation under the BOO Agreement for an aggregate period of more than 180 days; or (ii) frustrates the economic basis for the implementation/operation of the Project; and
- ENKA served the GOG with a notice of force majeure no later than 5 business days following the occurrence of the event.

391. The Parties agree that for a termination right to arise under Articles 9.2.2(b) and 8.1.8 of the BOO Agreement, a single force majeure event and not separate force majeure events must have prevented, delayed or hindered a Party from performing an obligation

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521 Rejoinder, para. 739; C-114, ENKA's letter to the MESD, dated 16 June 2022; C-122, Daily Letters, letter of 7 August 2021.

522 SoD, para. 396.

523 SoD, para. 407.

under the BOO Agreement for an aggregate period of more than 180 days.[524]

392. The GOG accepts that the 180 days do not need to be sequential, but the aggregation of different periods is only possible if they refer to the same Force Majeure Event.[525] It is common ground that the question of whether the protests are a single event or a series of separate events depends on whether they are sufficiently closely connected so they can be treated as the aggregate of the same event or not.[526] At the Closing Hearing, the GOG asserted that the connection would not exist if an event occurs independently of the other events.[527]

i. ENKA's reliance on alleged Non-Physical Force Majeure Events is without basis

393. The GOG asserts that the circumstances invoked by the Claimant cannot be characterized as Force Majeure Events for the following reasons:

394. First, ENKA, has not indicated on which paragraph of Article 8.1.3(a) it relies. This lack of precision shows that ENKA knows that different events prevented the works on the Site between October 2020 and September 2021.[528]

395. The GOG accepts that all work stoppages, except the one from 1 March to 2 April 2021, were caused by "*public agitation or protest*", and could in theory fall within Article 8.1.3(a)(ix), but the different events on which ENKA relies are not sufficiently closely connected to be aggregated into one Force Majeure Event.[529]

396. To allege that the events were closely connected, the Claimant has alleged that "*the protesters were the same people, the Guardians of the Rioni Valley led by Varlam Goletiani, fighting the same cause to stop the Project in the same period or within a period of 11 months*".[530] However, while it is undisputed that the Guardians of the Rioni Valley was among the groups opposing the Project, ENKA did not demonstrate that it was behind all the stoppages and hindrances of works. For most periods, ENKA has not offered clear evidence of which protesting groups were involved.[531]

397. The various events invoked by ENKA are different from one another and it has always

524 R-PHB, para. 203; Evidentiary Hearing Tr., D1, p. 49:23-25.

525 R-PHB, para. 204.

526 R-PHB, para. 205; Evidentiary Hearing Tr., D2, pp. 6:24-7:15.

527 Closing Hearing Tr. p. 265:10-21.

528 R-PHB, para. 207.

529 R-PHB, para. 208; Evidentiary Hearing Tr., D1, pp. 50:12-20; 52:6-9; 243:1-6.

530 Evidentiary Hearing Tr., D1, p. 52:10-14.

531 R-PHB, para. 209.

referred to them as separate events:

- Between 27 October 2020 and 29 January 2021: erection of a cross at the Site by Church members, lasted 77 days;[532]

- Between 1 February and 2 March 2021 (excluding 20 February and 24 to 27 February): violent protests, lasted 21 days;[533]

- Between 3 March and 2 April 2021: works were stopped by agreement between the GOG and ENKA, not the result of protests or public agitation and not a Force Majeure Event, lasted 25 days;[534]

- On 8 May 2021: brief interruption by protesters, lasted few hours on 1 day;[535]

- Between 27 May and 19 September 2021: blockades of the roads by small number of pacific protesters, lasted 98 days.[536]

398. The GOG asserts that ENKA failed to show a sufficient connection between these different events, therefore it cannot aggregate the effects of such events.[537]

399. Second, ENKA has not explained nor provided evidence to support its allegation that the stoppages and disruptions in 2020 and 2021 could reasonably prevent, delay or hinder the completion of the cofferdams before the 2022 wet season.[538]

400. Third, the protests against the Project were an indirect result of numerous breaches of

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532 Respondent's Chart of Disruptions, days 1-95 (77 days excluding Sundays and holidays); C-66, ENKA's letter to the MESD, 28 October 2020; C-71, ENKA's letter to the MESD, dated 5 November 2020; C-70, Daily Reports, 1 October 2020 - 19 September 2021, pp. 25-62.

533 Respondent's Chart of Disruptions, days 98-127; C-70, Daily Reports, 1 October 2020-19 September 2021, pp. 63-89; C-79, Mr. Ozgen email to Mr. Gokgoz, dated 1 February 2021; C-80, Mr. Deniz email to Messrs. Ozgen and Alkan, dated 1 February 2021; SoC, paras. 143-144.

534 Respondent's Chart of Disruptions, days 128-158; C-316, Mr. Kozan email to Messrs. Tara and Celiker, dated 3 April 2021; Evidentiary Hearing Tr., D3, pp. 196:19-187:4; Reply, para. 369(b)(ii); C-70, Daily Reports, 1 October 2020 - 19 September 2021, pp. 90-116; C-96, Monthly Progress Report, March 2021, p. 3.

535 Respondent's Chart of Disruptions, day 194; C-70, Daily Reports, 1 October 2020-19 September 2021, p. 150.

536 Respondent's Chart of Disruptions, days 213-327; C-70, Daily Reports, 1 October 2020-19 September 2021, pp. 167-280; C-105, ENKA's letter to the MESD, dated 4 June 2021; C-107, ENKA's letter to the MESD, dated 9 June 2021; C-114, ENKA's letter to the MESD, dated 16 June 2021; C-122, Daily Letters.

537 R-PHB, para. 211.

538 R-PHB, para. 212.

ENKA's obligations under Article 5.1 of the BOO Agreement, consisting in the reduction of the local engagement after a change in management and the failure to manage public concerns about environmental, seismic and social aspects of the Project; and under Article 3.1.1 of the BOO Agreement, by failing to create the necessary conditions to implement the Project and by its refusal to engage in the Mediation.[539]

401. ENKA's position of denying its obligations under Article 5.1 and the Equator Principles is contradicted by the statements of ENKA's Project Environmental and Social Manager Mr. Cimenoglu.[540]

402. These failures confirm that ENKA did not exercise reasonable diligence to prevent, avoid or remove the protests[541] and did not take reasonable precautions, due care, and reasonable alternative measures to avoid or mitigate their effect.[542] Contrary to Mr. Brandtzaeg's recommendations, ENKA never disclosed Project information to reduce local tension and repeatedly failed to comply with environmental requirements, leading to sanctions by the authorities. Overall, ENKA did not take its duties seriously and failed to even appear at a hearing to discuss its environmental breaches.[543]

403. ENKA's argument that it was not obliged to participate in the Mediation is misplaced. In this regard, the GOG did not submit that ENKA was under an express obligation to mediate, but rather that its refusal to engage with all the relevant stakeholders when the Project was in crisis was a breach of ENKA's obligations under Article 5.1 of the BOO Agreement, and by failing to engage in this practical step to try to resolve the Project's issues, ENKA breached its obligation of implementing the Project in good faith pursuant to Article 3.1.1 of the BOO Agreement and Article 361.2 of the GCC.[544]

404. Fourth, ENKA's averment that the events that it cites stopped or hindered the Project for a total of at least 271 days[545] must be rejected. Considering only business days, there were only 222 days of total or partial stoppages, and ENKA failed to show that it served the GOG with notices of force majeure for 58 days out of the relevant 222 (working) days of full/partial stoppage.[546]

405. Of these 58 days without notice, it is not disputed that ENKA did not provide notices

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539 SoD, para. 411(1)(a) and (b).

540 Rejoinder, paras. 160 and 750; R-192, Enka Insaat's Sustainability Report, dated 2020, p. 69.

541 C-4, BOO Agreement, Art. 8.1.1(a).

542 C-4, BOO Agreement, Art. 8.1.1(b).

543 Rejoinder, para. 755 and Section II.C.2.

544 Rejoinder, para. 763; RL-8, GCC, Art. 361: "*Presumption of existence of obligations: [...] 2. The obligation shall be performed duly, in good faith, and at the time and place determined.*"

545 Claimant's Chart of Disruptions.

546 R-PHB, para. 214; C-4, BOO Agreement, Art. 8.1.2.

for 48 days[547] since ENKA does not even claim to have provided notices from 1 February to 2 March, and from 3 March to 2 April 2021. Even if the Tribunal accepts ENKA's argument that it was excused from sending a notice for the 3 March to 2 April period, because it was told to suspend the works by the GOG,[548] ENKA would still have to send the notice for the period from 1 February to 2 March 2021, but it did not.[549] In addition, ENKA provided no Force Majeure notice for two more days of stoppages: 8 and 27 May 2021.[550]

ii. The alleged Renunciation was not a Force Majeure Event

406. The Claimant does not identify a particular Force Majeure Event that could correspond to the alleged "renunciation" of the contract on the part of the GOG. The definition of Non-Physical Force Majeure Event in Article 8.1.3(a) does not include a "renunciation" to the BOO Agreement. This suffices to deny ENKA's right to terminate the BOO Agreement on this ground.[551]

407. In any event, termination on these grounds is without basis[552] because:

- the GOG did not renounce the BOO Agreement. On the contrary, it developed considerable efforts to promote its performance;
- ENKA failed to show that the facts cited to support its claim resulted in a total or partial inability to perform the works, and the GOG's statements as well as the delay in issuing the authorizations are completely unrelated to the stoppage of the works;
- ENKA acknowledges that the purported renunciation would not meet the 180-day threshold and only claims that the "*GOG renunciation of the BOO Agreement frustrated the economic basis for the implementation or operation of the Project*",[553] without justifying its claim;
- ENKA failed to show that it served the GOG with a notice of force majeure concerning any alleged renunciation to the BOO Agreement.

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547 R-PHB, para. 214.

548 ENKA asserts that no notices were required because the GOG asked ENKA to suspend the works following a large riot on 28 February 2021, Reply, para. 369(b)(ii).

549 R-PHB, fn. 466.

550 R-PHB, fn. 466; Reply, para. 369(b)(iii).

551 SoD, paras. 413-414; C-4, BOO Agreement, Art. 9.2.3.

552 SoD, para. 416.

553 SoD, para. 417(3); SoC, para. 216(b).

c) *Termination is invalid because ENKA was principally responsible for the alleged breaches*

408. Pursuant to Article 405.3(c) of the GCC, a party may not terminate a contract where it is itself fully or principally responsible for the alleged breach.[554] Georgia's Supreme Court[555] and leading Georgian scholars[556] recognise that one of the statutory preconditions for terminating a contract is that the termination party shall not be principally responsible for the breach of the obligation.[557]

409. In the present case, and to the extent that the Tribunal accepts any of the GOG's alleged breaches, ENKA is principally responsible for them due to its own local engagement, communication, and project management failures,[558] in violation of its obligations under Articles 5.1, to ensure that the construction, management and monitoring of the Project complied with the Environmental and Social Standards, including the Equator Principles,[559] and under Article 3.1.1, to implement the Project duly and in good faith under Article 361.2 of the GCC.[560]

410. The GOG rejects Claimant's argument that the GCC is irrelevant since the Parties set out their limitations to terminate the BOO Agreement in the agreement itself. Article 405.3(c) of the GCC is a default rule and a contractual deviation from it shall be explicit or undoubtedly follow from the intent of the parties. However, there is nothing in the BOO Agreement that derogates from this principle.[561]

411. The Claimant's failure to fulfil its stakeholder engagement obligations on a highly sensitive hydropower project made it inevitable that the unrest would escalate, which in turn made it impossible for the authorities to keep the protests in check and ensure constant access to the Site without giving rise to increased and escalating violence.[562]

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554 RL-8, GCC, Art. 405(3)(c): "[a] *contract may not be repudiated if: [...] c) the obligee himself/herself is fully or principally liable for the breach of the obligation.*"

555 RL-97, Supreme Court of Georgia, Case No. AS-742-2021, 2 December 2021, p. 15; RL-98, Supreme Court of Georgia, Case No. AS-362-2021, 25 June 2021; RL-111, Supreme Court of Georgia, Case No. AS-856-2021, 8 October 2021.

556 RL-29, G. Vashakidze, "Commentary to Art. 405", in *Commentary to GCC*, 2019, Vol. III, p. 672; RL-28, B. Zoidze, "*Commentary to Art. 405 of the GCC*", BOOK III, 2001, p. 443.

557 Rejoinder, para. 786.

558 SoD, paras. 423-424.

559 C-4, BOO Agreement, Art. 5.1; RL-72, Equator Principles, June 2013, principle 5.

560 C-4, BOO Agreement, Art. 3.1.1; RL-8, GCC, Art. 361.2.

561 Rejoinder, paras. 791-792; RER-3, Kereselidze II, para. 56; RL-96, S. Chachava, "*Conflict between claims and basis for claims*", 2011, p. 6.

562 Rejoinder, para. 797.

The conclusion must therefore be that ENKA's breaches was the main cause of the situation where the GOG could not perform its obligation to ensure access.[563]

2. <u>Even if valid, ENKA breached its fundamental obligation of good faith by terminating the contract and is liable to indemnify GOG for the resulting losses</u>

412. Alternatively, even if ENKA's termination were valid, ENKA breached its fundamental obligation of good faith under Georgian law and is liable to indemnify the GOG for the resulting losses.[564] Good faith is a fundamental principle under Georgian law, established in Article 8.3 of the GCC, which requires that "*participants in a legal relationship shall exercise its rights and duties in good faith*".[565] According to the Georgian Supreme Court, such an obligation of good faith can be an independent ground of liability.[566]

413. ENKA has violated its fundamental duty of good faith by pre-emptively terminating the BOO Agreement on pretextual grounds without considering the legitimate interest of the GOG or exercising exceptional care for its rights and property, as required by Article 316.2 of the GCC.[567]

414. The GOG is therefore entitled to the damages arising from this breach,[568] and such damages should restore the GOG into the position it would have been in but for ENKA's breach of its duty of good faith. The GOG therefore requests that ENKA indemnify the GOG for the losses that it may suffer as a result of the termination; which include any amounts to which ENKA might be entitled to under the BOO Agreement for the termination.[569]

415. The Claimant's argument that the GOG's claim for indirect damages is unavailable because Article 21 of the BOO Agreement excludes liability for indirect damages, except in the case of wilful misconduct, must be rejected for the following reasons:

416. First, the GOG's claim is not for indirect damages or losses, but rather for damages that ENKA could have foreseen as the direct consequence of the termination.

563 Rejoinder, para. 798.

564 SoD, para. 425.

565 RL-8, GCC, Art. 8.3.

566 SoD, para. 427; RL-42, Supreme Court of Georgia, Case No. AS-221-213-2012, 24 July 2012.

567 SoD, para. 428 and Section III.A. RL-8, GCC, Art. 316: "*2) Depending on its content and nature, an obligation may bind each party to exercise exceptional care for the rights and property of the other party.*"

568 SoD, para. 429; RL-8, GCC, Art. 394: "*1) If the obligor breaches an obligation, the obligee may claim damages arising from the breach. This rule shall not apply when the obligor is not responsible for breach of the obligation.*"

569 SoD, para. 431.

417. Second, the damages in any event fall outside of the scope of Article 21 of the BOO Agreement because they arise from wilful misconduct on the part of ENKA, which terminated the BOO Agreement with an intentional disregard of foreseeable harmful consequences.[570]

418. But for ENKA's breach, the BOO Agreement would not have been terminated, ENKA would be developing and operating the Transferable Assets for the Project's benefit and the GOG would not potentially be exposed to paying compensation to ENKA, including any FMV. Instead, there is no longer a BOO Agreement, the Transferable Assets are of little or no value to the GOG, and the GOG is potentially exposed to paying compensation to ENKA, including any FMV. As a result, the GOG is entitled to compensation for its losses deriving from termination.[571]

3. <u>If the termination were valid, the Parties agreed that the Arbitral Tribunal should determine itself the FMV</u>

419. The Claimant made a valid offer in paragraph 60(i) of its RfA to agree to determination of the FMV by the Tribunal, without being bound by DRT Determination, and the GOG accepted the Claimant's offer. That is a valid agreement under Georgian law.[572]

420. In paragraph 60(i) of the RfA, ENKA offered that if the GOG maintained its position and invited the Tribunal to determine that: (i) the FMV in DRT Determination was not binding, (ii) the FMV in the Termination Invoice was not properly calculated, and (iii) the FMV should be a lower figure, then ENKA would agree to determination by the Tribunal.[573] In denying the existence of that agreement, ENKA fails to address the plain and clear wording of paragraph 60(i). When ENKA argues that paragraph 60(i) stated that ENKA "*would advance an alternative case inviting the Tribunal to determine the FMV*" and "*would in this regard say that the true FMV was that stated in the Termination Invoice*", it reads into this paragraph words that are not there.[574]

421. Contrary to ENKA's argument, paragraph 60(i):

- does not make ENKA's case on the proper FMV dependent on the findings of the Tribunal, but rather on whether the GOG will maintain its position, and will ask the Tribunal to decide that DRT Determination is invalid;[575]

- does not state that ENKA "will argue" that the Tribunal should determine the FMV, which is what it would have stated if ENKA was advancing an alternative case

570 Rejoinder, para. 816; C-4, BOO Agreement, Art. 1.1, Definition of "Wilful Misconduct".

571 Rejoinder, paras. 820-821.

572 SoD, Section V.A.1, paras. 444-484.

573 Rejoinder paras. 834-835.

574 Rejoinder para. 838.

575 Rejoinder, para. 840; Procedural Order No. 2, para. 46.

inviting the Tribunal to determine the FMV. On the contrary, paragraph 60(i) states that ENKA "*will agree to determination by the Tribunal.*"[576]

422. In response to the Claimant's allegation that the wording of this paragraph amount to inelegant drafting,[577] the GOG replies that paragraph 60(i) is clearly and elegantly drafted and was included in a legal submission prepared by a highly sophisticated counsel team.[578] The terms of paragraph 60(i) of the RfA are clear and do not require interpretation.[579] The commercial context further confirms that ENKA was making an offer to agree to determination by the Arbitral Tribunal because ENKA calculated the FMV at almost USD 1.5 million and DRT Determination reduced ENKA's calculation by more than USD 1 billion. ENKA would therefore naturally have been disappointed by DRT Determination, which explains its offer aimed at allowing it to seek a higher figure before the Arbitral Tribunal.[580]

423. The context of the RfA confirms that ENKA was offering to agree to determination of the FMV by the Arbitral Tribunal because in its RfA, ENKA:

- does not state that DRT Determination is final and binding;[581] and

- does not include a request for a declaration that DRT Determination is conclusive and binding.[582]

424. The fact that in the RfA ENKA sought in the first place that the GOG pay the amount established in DRT Determination (USD 358,823,529) and alternatively an amount which reflects its own calculation (USD 1,742,103,467)[583] does not support its case because the request for relief only indicate that, unless and until the GOG had accepted its offer, ENKA could not seek a sum other than that stated in DRT Determination.[584]

425. The offer by ENKA and its acceptance by the GOG complies with the requirements and principles applicable to the formation of a contract under Georgian law:[585]

- a valid offer must (i) be addressed to one or more, specific or identifiable persons, (ii) be sufficiently specific, and (iii) make it clear that the offeror intends to be bound

576 RfA, para. 60(i).

577 Reply, para. 420(g).

578 Rejoinder, para. 843.

579 Rejoinder, para. 845; RER-1, Kereselidze I, paras. 18-19; CER-2, Fromm I, para. 16.

580 Rejoinder para. 846.

581 Rejoinder, para. 850.

582 Rejoinder, para. 853.

583 RfA, para. 78(b)(i).

584 Rejoinder, para. 860.

585 Rejoinder, para. 867.

by the offer in case of acceptance;[586]

- a valid acceptance must (i) clearly indicate the party's unconditional consent to the offer and (ii) comply with all terms and conditions stipulated in the offer;[587]

- a contract is concluded when the parties have agreed on all essential terms;[588]

- in interpreting the statements made by the parties, the following principles apply: (i) where the language is clear, there is no need for interpretation,[589] and (ii) unless the law imposes, or the parties have agreed on a particular form, the offer and acceptance need not take a particular form.

426. ENKA, on the other hand, makes its case by reference to common-law concepts such as "*gratuitous promise*" and "*statement of future intent*" that have no basis in Georgian law.[590] Its argument that an exchange of submissions/pleadings in legal proceedings cannot give rise to a contract are also unsubstantiated and must be rejected.[591] The issue at hand is to determine if the Parties included in their pleadings language that is specific and clear enough to satisfy the Georgian law test for the conclusion of an agreement.[592] That is the case and Professor Kereselidze confirms that there is no bar under Georgian law for the conclusion of an agreement by an offer and acceptance exchanged by way of pleadings.[593]

427. As to the Claimant's allegation that paragraph 60(i) of the RfA was a "statement of future intent" or at best a non-binding "agreement to agree", paragraph 60(i) uses definite language and includes the verb agree so that it cannot be taken as a statement of future intent. In any event, Georgian law recognises the concept of a preliminary contract and, even in that case, ENKA's offer would be binding.[594]

428. The Claimant's argument that paragraph 60(i) was an unenforceable "gratuitous promise" is mistaken because (i) by agreeing to determination of the FMV directly by

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586 SoD, paras. 447-449; RL-8, GCC, Art. 329; RL-9, E. Baghishvili, "*Commentary to Art. 329 of the GCC*", Book III, 2019, p. 109.

587 SoD, paras. 450-451; RL-10, E. Baghishvili, "*Commentary to Art. 331 of the GCC*", Book III, 2019, pp. 121-122; RL-11, G. Svanadze, in Z. Dzlierishvili et al., *Contract Law*, 2014, p. 45.

588 SoD, paras. 452-453; RL-8, GCC, Art. 327; RL-9, E. Baghishvili, "*Commentary to Art. 329 of the GCC*", Book III, 2019, p. 109.

589 CER-2, Fromm I, para. 16; RER-1, Kereselidze I, paras. 18-19.

590 Rejoinder, para. 868.

591 Rejoinder, para. 870.

592 Rejoinder, para. 869.

593 RER-3, Kereselidze II, paras. 7-10.

594 Rejoinder, para. 889(1).

the Tribunal, the GOG was providing ENKA with a chance of arguing a higher FMV and (ii) by agreeing to determination of the FMV directly by the Tribunal, the GOG gave up the potential right to argue that either DRT Determination was valid or, if it were invalid, the matter should be remitted to an Approved Auditor.[595]

429. The GOG rejects the Claimant's affirmation that the GOG was not accepting an offer because in its submission it set out its case in full as to why DRT Determination is not valid and binding.[596] It did so because ENKA had made it a condition to its offer that the GOG maintain its position that DRT Determination was not conclusive and binding.[597]

430. Finally, ENKA was not entitled to nor did it validly exercise any right to rescind the Parties' agreement based on substantial mistake.[598]

4. ENKA is estopped from changing its position

431. The French international arbitration law principle of estoppel applies to arbitrations seated in France regardless of the law applicable to the merits,[599] and such principle prevent parties from adopting contrary or incompatible positions that mislead their opponents.[600] In its RfA, ENKA took the position that if the GOG maintained that DRT Determination was not binding, that ENKA had not properly calculated the FMV in its Termination Invoice and that the Tribunal should determine a lower figure, then ENKA would agree to determination of the FMV by the Tribunal.[601] The GOG relied on that statement when it submitted its Answer, and confirmed that it agreed to determination of the FMV by the Tribunal, thereby giving up any potential right to challenge the Tribunal's power to make such a determination.[602] However, after the GOG confirmed its position, ENKA changed its case and requested in the ToR that the Tribunal declare that DRT Determination is conclusive and binding in accordance with the BOO

595 Rejoinder, para. 889(2).

596 Reply, para. 342(b).

597 Rejoinder, paras. 897-898.

598 Reply, para. 434; Rejoinder, paras. 904-910.

599 RL-13, E. Gaillard, "*L'interdiction de se contredire au détriment d'autrui comme principe général du droit du commerce international*", Rev. arb. 1985.241, p. 258, para. 17 ; RL-14, Danis, B. Siino, "*Note sous Cour d'appel de Paris, 20 Septembre 2007*", Rev. arb. 2008, p. 328 ; RL-15, Rouen Court of Appeal, 25 November 2004, *Cogecot Cotton Company v. Marlan's Cotton Industries MCI*, Gaz. Pal., 28 April 2005, No. 118, p. 32; RL-75, J.-B. Racine, *Droit de l'arbitrage* (2016), p. 426, para. 649.

600 SoD, paras. 486-487, 489; RL-14, M. Danis, B. Siino, "*Note sous Cour d'appel de Paris, 20 Septembre 2007*", Rev. arb. 2008, p. 328.

601 RfA, para. 60(i).

602 Rejoinder para. 913.

Agreement.[603]

432. The conditions for apply the estoppel theory are met in the present case for the following reasons:

- inconsistency: the position adopted by ENKA in the ToR and in the SoC is not a mere clarification, but is contradictory to that adopted in the RfA;[604]

- reliance/misleading of the opponent: the GOG relied on ENKA's statement in paragraph 60(i) of the RfA and confirmed its position in its Answer.[605]

433. If the Tribunal finds that the principle of estoppel applies, the result is that ENKA may no longer rely on DRT Determination and that the FMV must be determined directly by the Tribunal.

5. ENKA waived its right to argue that DRT Determination is conclusive and binding

434. In the alternative, the Respondent alleges that ENKA has waived its right to argue that DRT Determination is conclusive and binding under French international arbitration law.[606] The principle of waiver under French law is concerned with "*unilateral conduct*" and "*is deduced from the analysis of the conduct of a party, taken in isolation.*"[607] Therefore, ENKA's argument that the parties must bilaterally agree to alter the position that would otherwise prevail under the BOO Agreement is baseless.[608]

435. Moreover, both Parties waived their right to rely on Article 9.4.6(d) of the BOO Agreement under Georgian law.[609] Articles 448 and 451 of the GCC provide that the parties may bilaterally waive a contractual right with the effect that neither party can then invoke such right against the other.[610] In their RfA and Answer, the Parties waived their right to argue that DRT Determination is a conclusive and binding determination of the FMV, amounting to a bilateral waiver. At least, each Party waived its contractual right, which triggers the principle of *venire contra factum proprium*.[611]

6. The Tribunal should determine the correct FMV, rejecting Mr. Caldwell's calculation

603 ToR, paras. 38, 59(a)(iv).

604 Rejoinder, para. 916.

605 Rejoinder, para. 934.

606 SoD, paras. 497-501.

607 RL-21, Ph. Pinsolle, "*Note sur Cass. 1ère civ. 6 juillet 2005*", Rev. arb. 2005, p. 1005 ; RL-14, M. Danis, B. Siino, "*Note sous Cour d'appel de Paris, 20 Septembre 2007*", Rev. arb. 2008, p. 328.

608 Rejoinder para. 943.

609 SoD, paras. 502-512.

610 SoD, Section V.A.3(b); RER-1, Kereselidze I, paras. 57-62; RL-8, GCC, Arts. 448 and 451.

611 Rejoinder, para. 950; RER-3, Kereselidze II, para. 88.

436. As a preliminary matter, the Claimant has modified its case regarding the FMV. In the SoC, ENKA alleged that the FMV was USD 1,480,787,947 as indicated in the Termination Invoice and only cited in support of its claim the Termination Invoice and ENKA's Financial Model.[612] The GOG replied in its SoD, relying on the expert evidence of Mr. Wreford,[613] who reviewed and commented on ENKA's FMV calculations and presented his own calculation of the FMV.[614] Some months later, on 10 March 2023, ENKA informed the Tribunal that it had not submitted with its SoC all the documents it had intended to submit in support of its FMV claim and added a substantial volume of material to Exhibit C-145 (Dataroom Materials).[615] Then, in June 2023, ENKA submitted for the first time with its Reply a new FMV claim, supported by new expert evidence from Mr. Caldwell, a new financial model as well as new evidence that the Claimant had withheld until the document production process.[616]

437. The tactics employed by the Claimant required that Mr. Wreford respond in his second expert report[617] to a substantially new calculation and financial model as well as to a substantial volume of documents and information which could and should have been submitted with the SoC. The GOG reserved its rights regarding the procedural prejudice caused by these tactics.[618]

438. In any case, Mr. Caldwell's FMV calculation (i) does not comply with the contractual framework and (ii) is severely flawed and overstated.

a) ENKA did not follow the contractual framework for the FMV calculation

439. There are several differences of interpretation between the Parties as to the framework for the calculation of the FMV: the use of a weighted average cost of capital (WACC) analysis, and the Valuation Date.

i. <u>Use of a weighted average cost of capital (WACC)</u>

440. The BOO Agreement specifies that the FMV is to be calculated with a DCF methodology in which "*each category of capital is proportionally weighted*",[619] i.e. based on a weighted average cost of capital analysis. However, the Claimant's expert, Mr. Caldwell, adopted an "Adjusted Present Value" (APV) method, which is a variant

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612 R-154, Email from ENKA to the Tribunal, dated 16 September 2022, p. 1; SoC, p. 79, fn. 212.

613 RER-2, Wreford I.

614 SoD, Section V.B.

615 R-249, Emails between ENKA and the GOG, dated 9-14 March 2023.

616 Rejoinder, para. 961.

617 RER-4, Wreford II.

618 Rejoinder, para. 964.

619 C-4, BOO Agreement, Art. 1.1, definition of "Fair Market Value".

of the DCF method but does not employ a WACC.

441. Mr. Caldwell analysis is incompatible with the BOO Agreement and should therefore be rejected.[620] The APV approach is less adequate than the DCF/WACC analysis because traditional valuation methods based on WACC are considered to be more robust than APV and because of the following specificities of the Project:

- lack of financing: APV would require performing debt modelling on hypothetical terms as the Project had not obtained financing;[621]

- the 30% cap on debt financing by virtue of the SHAs, which means that the capital structure of ENKA would be fixed for valuation purposes given that 30% would be the target debt ratio for the Project. Since the debt ratio would remain constant, there would be no advantage in using the APV method. The WACC analysis is therefore better suited.[622]

442. For these reasons, the Tribunal should finally decide in its award that the FMV should be calculated using a WACC-based model.[623]

ii. The Valuation Date should be 21 October 2021

443. According to the GOG, even if the BOO Agreement does not prescribe the date on which the FMV should be calculated, it provides the following strong indications[624] that the appropriate valuation date is 21 October 2021.

444. The first step for terminating the BOO Agreement and raising an FMV claim was the service of the Termination Notice specifying the "Termination Date", which could not be sooner than 30 days from the Termination Notice. The next step was to submit a "Termination Invoice" setting out its FMV calculation no later than 60 days after the Termination Date. The fact that the BOO Agreement uses the Termination Date as a reference point for the calculation of the deadline for service of the Termination Invoice is a strong indication that the Parties intended for the Termination Invoice to be prepared and served after the date on which the termination had become effective.[625]

445. In addition, it is reasonable to consider that the Parties did not intend for the FMV to be calculated before the time when it had become certain that the BOO Agreement had

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620 Rejoinder, para. 971.

621 RER-4, Wreford II, paras. 2.27, 6.111 and 8.46-8.47.

622 RER-4, Wreford II, paras. 6.108-6.111, 8.12-8.13, and 8.46; RL-117, M. Kantor, *Valuation for Arbitration* (2008) p. 2010.

623 R-PHB, para. 257.

624 Rejoinder, para. 978.

625 Rejoinder, para. 979.

been terminated, and they also intended that the FMV consider any event that took place between the service of the Termination Notice and the Termination Date, which could affect the value of the Project.[626]

446. The Respondents also notes that at the time of the verification process with DRT, the Claimant suggested that DRT use 20 September 2021 as the valuation date because "*the earlier date of 20 September 2021 gives the lower number and is therefore more conservative*".[627] Now that Mr. Caldwell suggests that a 20 September 2021 valuation would lead to a much higher, and less conservative, calculation (USD 1,106 million as opposed to USD 920 million in the APV model) (USD 1,029 million as opposed to USD 935 million in the WACC-based Joint Report[628]), ENKA is proposing what would, on this case, be the less conservative approach.[629]

iii. <u>The FMV calculation must assume a willing buyer and a willing seller in a non-hostile environment</u>

447. The GOG asserts that the FMV must reflect the price at which market participants would agree to transact at arms-length. Mr. Wreford gave importance to this aspect, by considering the valuation of comparable companies and building his analysis according to market practice, whereas Mr. Caldwell follows a theoretical and academic approach that ignores the market practice.[630]

iv. <u>ENKA's circumstances are relevant to the analysis</u>

448. The FMV is defined in the BOO Agreement as the "*value of a Person's interests, investments, property*", etc., which should be calculated as a "*Person's cost of capital*". In this context, the "Person" referred to in the BOO Agreement is ENKA, and ENKA's cost of capital and the specific circumstances defining it (availability of debt, proportion of debt and equity financing, potential terms of such debt, internal agreements to fix a cap on debt financing, etc.) are relevant to calculate the FMV.[631]

449. Mr. Wreford has taken ENKA's cost of debt into account while Mr. Caldwell wrongly ignores ENKA's cost of capital, resulting in a material and unjustified increase of the FMV.[632]

626 Rejoinder, para. 980.

627 C-145, Dataroom Materials, Response to DRT Requests of 4 February 2022, Response to Request 2.

628 JER, para. 11.

629 Rejoinder, para. 983(b).

630 R-PHB, paras. 252-253.

631 R-PHB, paras. 254-255.

632 R-PHB, paras. 256-257.

b) ENKA's calculation is flawed and overstated:

i. <u>ENKA's valuation is unfounded and arbitrary</u>

450. ENKA wrongly submits that, by executing the BOO Agreement and finalizing the EPC Contract, the value of the Project would increase from USD 19 million in July 2016 to USD 1.016 billion in September 2021.[633] This is inconsistent with ENKA's own shares transactions in 2016-2018, reflecting a value of at best USD 60 million[634].

451. First, the BOO Agreement neither adds the value alleged by ENKA nor insulates the Project from country risk. The share transactions between Enka Insaat and CEG in the First and Second SHAs reflect a valuation of ENKA, on a fair market value basis, within the range of USD 36-60 million,[635] and these transactions already considered the value of the BOO Agreement, because:

- the Project was awarded to ENKA in January 2017 and the commercial terms of the Project had already been established by then;

- the tender made it clear that the Project would be implemented by way of a build, own and operate agreement that would include standard provisions for a contract of this kind such as force majeure and compensation. These legal arrangements were known to ENKA at the latest in January 2017 and were considered in the share transactions;

- at the time of the Second SHA, the BOO Agreement negotiations were at an advanced stage and ENKA's shareholders were aware of the force majeure and compensation provisions that were already in the drafts of the BOO Agreement;

- ENKA argued that the negotiation for the share's transaction was done with no supporting document calculations and not based upon any valuation of ENKA, but this is not credible because they were sophisticated parties and the SHA included a detailed provision for a WACC-based valuation of ENKA.[636]

452. None of the contemporaneous valuations of the Project that were prepared and shared with potential lenders came close to the value ascribed to the BOO Agreement by Mr. Caldwell. These financial models, prepared in the assumption of the conclusion of the BOO Agreement, conclude on values as low as minus USD 159 million,[637] quite far from the valuation that is now alleged.[638]

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633 Rejoinder, para. 1003; CER-1, Caldwell I, para. 34, Fig. 1.

634 Rejoinder, para. 1004; C-166, First SHA, Arts. 3.3-3.4, 16.8; C-187, Second SHA, Arts. 8 and 16.8.

635 RER-4, Wreford II, paras. 3.19, 3.24-3.25 and 3.38.

636 R-PHB, para. 302; Evidentiary Hearing Tr., D3, pp. 137:21-139:6.

637 RER-4, Wreford II, paras. 2.19, 3.41, 3.46-3.47; Rejoinder, Sections II.A and II.F.3.

638 Rejoinder, para. 1013.

453. Second, ENKA wrongly submits that, by mid-2021, it had "*negotiated and agreed an EPC contract*" which, according to Mr. Caldwell, added a USD 164 million in value to the Project.[639] The available evidence in fact indicates that the document presented by ENKA as an "*initialed*" draft of the EPC Contract was in fact a document prepared years before:[640]

- it refers to the old name of ENKA ("Clean Energy Group Georgia") despite the Claimant's change of name in April 2019 and it generically refers to "ENKA" as the contractor instead of "Enmar";
- it includes drafting notes referring to events that took place two years before June 2021;
- it includes various placeholders and incomplete clauses and annexes;
- it includes only one set of initials, such that it appears, at best, that it was only initialled by one of the parties;
- it shows very few changes when compared with the drafts produced by ENKA in May and July 2018, so that it is plausible that it was created around 2018.

454. As an early draft, this document was already considered by the shareholders in the share transactions. The Second SHA of August 2018 refers and incorporates the draft EPC Contract.[641]

455. Even accepting that the EPC Contract had been agreed, it did not have the effect of transferring the construction risks to a third party because Enmar was a 90% subsidiary of Enka Insaat.[642]

456. Third, the future off-take tariff guaranteed by the GOG would only apply once the Project became operational and is therefore not indicative of the Project's value during the construction phase. The amount that Enka Insaat agreed to pay for a 30% stake in ENKA in 2016 indicates a value close to zero, and at this point, ENKA had already settled on the terms of its binding commercial proposal to the GOG, i.e., a tariff of USD 62/MWh for eight months/year for the first 15 years.[643]

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639 Rejoinder para. 1014.

640 R-PHB, para. 294; C-118, ENKA letter to the MESD, dated 24 June 2021, with attached Draft EPC Contract p. 12; R-230, Comparison of Initialled Draft EPC Contract to Volume 1 draft, dated 10 May 2018; R-231, Comparison of Initialled Draft EPC Contract to Volume 2 draft dated 3 July 2018.

641 C-187, Second SHA, Art. 6 and Schedule 4; RER-4, Wreford II, para. 2.15.

642 Rejoinder, para. 1018.

643 Rejoinder, para. 1021.

457. In any case, the terms of the GOG's off-take obligation were not as advantageous as ENKA submits since they were substantially lower than those of other comparable projects[644] and only 51% of the Project annual generation for the first 15 years (10% of the Project's operational life) was covered by the tariff.[645]

458. Fourth, the Claimant's argument that the Project's value would increase with costs expenditures by reducing future capital needs is based on a sunk costs' fallacy. By termination, only 8% of the construction costs had been incurred and the Project had not achieved financial close, so that the passage of time did not by itself automatically increase the value, as alleged by Mr. Caldwell, because no significant steps towards completion of the Project's construction had taken place.[646]

459. As to ENKA's allegation of an increase in the value based on changes in macroeconomics conditions, it is based on a series of unrealistic assumptions which, once corrected, lead to a negative valuation of the Project in 2016.[647]

ii. <u>ENKA's valuation applies unrealistic discount rate, capital structure, cost of debt and equity assumptions.</u>

a) Construction risks

460. Considering that hydropower, energy and infrastructure projects have higher risks, including during the construction phase, Mr. Wreford incorporates cost and schedule overrun in his assumption and in addition he applies a construction risk premium of 1%, based on the market practice of renewable investors. This assessment has a material impact on the FMV calculation.[648]

461. Claimant's criticism that Mr. Wreford's overstated the risks of the Project is unfounded, because Mr. Caldwell analysis does not consider the fact that the Project is at an early stage (ENKA so far only incurred about 8% of the construction costs), still under construction, and is not financed.[649]

462. The construction stage is the riskiest period because it is not able to generate cash flows and its expected date of operations is uncertain. Moreover, hydropower, energy, and infrastructure projects are generally viewed as higher-risk projects, in particular during

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644 Rejoinder, Section II.A; RWS-6, Chachibaia II, paras. 13-23.

645 Rejoinder, para. 1022.

646 Rejoinder, paras. 1025-1026.

647 Rejoinder, para. 1028; RER-4, Wreford II, paras. 3.2, 3.97(a), 3.101(a), and 3.106-3.108.

648 R- PHB, paras. 290-291; RER-2, Wreford I, paras. 6.78-6.79; RER-4, Wreford II, paras. 5.66-5.73, 5.78; Wreford Presentation, slide 10.

649 Rejoinder, para. 994.

their construction phase.[650]

463. Moreover, there was a significant risk of construction costs overruns.[651] The projected costs amount rose significantly over time[652] and, contrary to ENKA's allegations, the EPC Contract had not been executed, so that uncertainties remained as to the final amount of construction costs.[653]

464. Mr. Wreford considers reasonable to deduct construction costs undiscounted until the Project starts generating positive cashflows, and then discounting the constructions costs incurred from April onwards at the Project's WACC.[654]

b) Capital structure - 30% cap on debt financing

465. The SHAs revealed an agreement that debt financing obtained by ENKA would not exceed 30% of the Project's costs.[655] However, the financial models submitted with the SoC and the one prepared by Mr. Caldwell ignore this restriction and assume a debt/equity ratio of 70/30 during the Project's construction phase and 50/50 during the PPA Period.[656]

466. In his first report, Mr. Wreford did not consider the 30% debt cap because he was unaware of the existence of the SHAs fixing such limitation, which were revealed through the document production phase. In view of the Second SHA's provision, Mr. Wreford adjusted his debt/equity ratio assumptions to comply with this cap.[657]

c) Country risk premium

467. The country risk premium ("**CRP**") reflects the additional risks associated with the Project's location and should consider the risks associated with doing business in that country. It is a standard component used when assessing a project's value via the DCF method.[658]

468. ENKA's Financial Model, assumes a CRP range of 1.48% to 2.55% which, according

650 Rejoinder, para. 995; RER-2, Wreford I, paras. 3.19-3.20, 6.72, 6.77-6.78; RER-4, Wreford II, para. 4.9.

651 Rejoinder, para. 999.

652 RER-4, Wreford II, paras. 3.80, 3.94-3.96.

653 R-PHB, paras. 292-294; Rejoinder, Section II.F.3 and para. 990.

654 JER, pp. 50-52.

655 C-187, Second SHA, Art.8(vii).

656 Rejoinder, paras. 1039-1042; CER-1, Caldwell I, para. 160.

657 Rejoinder, para. 1043; Wreford, para. 6.63.

658 Rejoinder, para. 1044; RL-119, *Tidewater Investment SRL v. Venezuela*, ICSID Case No. ARB/10/5, Award dated 13 March 2015, para. 187; RL-120, *Karkey Karadeniz Elektrik Uretim A.S. v. Pakistan*, ICSID Case No. ARB/13/1, Award dated 22 August 2017, para. 808.

to Mr. Wreford, is too low for Georgia. In January 2021, Professor Damodaran calculated a 2.91% CRP for Georgia[659] while ENKA used a Kroll's Cost of Capital Navigator tool that indicates a 2.55% for Georgia.[660] The 1.48% rate on which ENKA relies for the low end of its calculation is based in bond yields, which fail to consider the higher volatility of equity instruments.

469. Mr. Wreford has adjusted the CRP to 2.75% (which represents the mid-point of the Kroll and Prof. Damodaran's CRP), to better account for these risks.[661]

470. In its Reply, ENKA modified its approach and avers that because the BOO Agreement largely insulated the Project from country risk, it is appropriate to reduce the CRP by 75% to arrive at a range of 0.15% to 0.5%.[662] This approach must be rejected because:

- it contradicts ENKA's previous valuations which assumed a CRP range of 1.48% to 2.55%;[663]

- it is illogical to argue that the risk associated with actions of the government would be neutralized because ENKA signed a contract with the same government;[664]

- it is incorrect to compare the provisions of the BOO Agreement, with a political risk insurance, which is an arrangement entered into with a third-party insurer;[665]

- ENKA's approach has been rejected by numerous arbitral tribunals[666] on the basis that (1) the CRP is a common component of a DCF calculation;[667] (2) the essence of the CRP is to encapsulate the risk that is present in doing business in a country, even if the investor is protected by contractual arrangements;[668] and (3) it is appropriate to

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659 R-155, professor Damodaran, Country Risk Premium, January 2021, "regional breakdown" tab, row 56, column G.

660 C-127, ENKA's Financial Model, January 2022, "WACC Det" tab, rows 66-69.

661 Wreford I, paras. 6.65-6.68.

662 Reply, para. 536; CER-1, Caldwell I, paras. 103-109.

663 Rejoinder, para. 1048.

664 Rejoinder, para. 1049.

665 Rejoinder, para. 1049.

666 Rejoinder, para. 1050.

667 RL-122, *Himpurna California Energy Ltd. V. PT (Persero) Perusahaan Listruik Negara*, Final Award, YCA 2000, Vol. XXV, dated 4 May 1999, para. 357.

668 RL-119, *Tidewater Investment SRL v. Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, para. 187.

incorporate a CRP, even when the investor has obtained political risk insurance;[669]

- The Project was fully exposed to Georgia's country risk, as (1) it is located in Georgia; (2) it is being developed under the BOO Agreement with the GOG; (3) the Project would sell electricity to the Georgian State-owned operator during the PPA Period; (4) outside the PPA Period, the Project would sell electricity on the Georgian market; and, (5) for sales in Georgia, the Project could also be subject to Georgian currency risk.[670]

471. Mr. Caldwell statement that the signature of the BOO Agreement in April 2019 increased the Project's value by almost USD 500 million because of Articles 8.2.1 and 8.2.3(a)[671] is wrong. At the stage of ENKA's bid in 2016 and the negotiations of the BOO Agreement in 2017-2018, these provisions were already envisaged, and ENKA's shareholders contemporaneously valued the BOO Agreement at USD 9.5 million.[672]

472. Mr. Caldwell has also been instructed to ignore the enforcement risk on the basis that the alternative would allow the GOG to exploit its own failure to enforce a future award,[673] which is another artificial attempt to drive the FMV upwards.[674] The GOG asserts that since Mr. Caldwell has already drastically reduced the CRP to account the BOO Agreement, his ignoring of the enforcement risk amounts to double counting.[675]

473. The Tribunal should therefore incorporate a full country risk premium in its calculation.[676]

d) Cost of debt

474. Cost of debt reflects the interest rate that ENKA will have to pay for debt financing. ENKA's Financial Model applies a pre-tax cost of debt of 4.5%, ignoring the terms that potential lenders were prepared to offer to the Project.

475. Mr. Wreford used a pre-tax cost of debt of 6% in his WACC calculations, based on the interest rates indicated to provide debt financing to the Project by IFC/EBRD in 2017 and 2018.[677] Since the cost of debt proposed by IFC/EBRD was based on LIBOR, Mr. Wreford sensitised the interest rate to consider the movements in LIBOR rate over time.

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669 RL-120, *Karkey Karadeniz Elektrik Uretim A.S. v. Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, para. 808.

670 R-PHB, para. 268; RER-1, Wreford I, para. 6.64; JER, Section E.9.2.

671 CER-1, Caldwell I, para. 35 and Fig. 1.

672 R-PHB, para. 275; Wreford Presentation, Slide 5; Tr.D5/153:19-154:25.

673 CER-1, Caldwell I, paras. 112-114.

674 RER-4, Wreford II, paras. 6.85-6.92.

675 Rejoinder, para. 1054.

676 R-PHB, para. 277.

677 Wreford II, paras. 4.21 and 4.26; C-198, IFC/EBRD Indicative Term Sheet, dated 1 November 2018.

This interest rate was very similar to the interest rate quoted by SocGen to the Project in negotiations across 2019 and 2020.[678]

476. Mr. Caldwell's analysis ignored the latest set of terms received from the IFC/EBRD and those from SocGen,[679] and applies a build-up approach to calculate the cost of debt. Mr. Wreford affirms that there's no need to adopt a build-up approach as it is contradicted by the market-based evidence of the Project's cost of debt, but if the Tribunal opts for a build-up approach, it should be performed using an additive approach to risk premiums.[680]

e) Merchant price risk

477. Since only 2.6% of ENKA expected revenues from electricity sales and 10% of the Project's operational time-period were covered by the GOG's guaranteed price, most of the Project's revenues were exposed to merchant pricing risk.[681] The Parties therefore agree that merchant sales attract a higher discount rate than PPA sales to account for the lack of guaranteed purchaser and lack of certain price,[682] but they differ on how to account for this risk.

478. Mr. Wreford selected an asset beta of 0.6 in his calculation of the WACC for the Merchant Period,[683] and applies a merchant pricing risk premium of 1-1.5% in the cost of equity, based on set of data from comparable companies selling their renewable energy production in the market.[684] According to Mr. Wreford's research, the premium is added as a separate adjustment to the discount rate and is not incorporated within any beta adjustments.[685]

479. Mr. Caldwell follows an approach that is not in line with standard practice. Mr. Wreford disagrees with Mr. Caldwell's assertion that his beta adjustment of 0.7 is equivalent to applying a premium of 1% to 1.5%,[686] according to Mr. Wreford, such beta adjustment appears to only increase his discount rate by 0.55%.[687]

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678 JER, p. 36; RER-4, Wreford II, paras. 4.36 and 4.40.

679 Rejoinder, Section VI.B.1; para. 1055; RER-4, Wreford II, paras. 6.104-6.106.

680 JER, p. 37 and fn. 119.

681 R-PHB, para. 297; RER-2, Wreford I, para. 6.80(c).

682 JER, para. 48; Rejoinder, para. 1060; RER-4, Wreford II, para. 6.94; Reply, para. 536.

683 SoD, para. 550; RER-2, Wreford I, Table 2, and Appendix 5, 'WACC' tab.

684 JER, pp. 79-80; RER-2, Wreford I, para. 6.82.

685 JER, p. 80; RER-2, Wreford I, para. 6.82; RER-4, Wreford II, para. 6.98.

686 CER-1, Caldwell I, para 95.

687 Rejoinder, para. 1061; RER-4, Wreford, II, paras. 6.67, 6.102 and Table 7.

iii. Power price tariffs for sale of electricity produced by the Project in the market.

480. Mr. Wreford based his assumptions on contemporary electricity tariff forecasts from around the Valuation Date provided by the G&T Report.[688] These forecasts were commissioned by GEDF to discuss Masdar's investment in the largest solar power project in Georgia. G&T Report's forecasts are established on a monthly basis.[689]

481. Together with the G&T forecast, the GOG relies on the power price forecast prepared by Dr. Siliprandi of AFRY specifically for the Project, modelling capture prices for the Upper and Lower Namaknvani HPP according to the nature of each plant.[690] Dr. Siliprandi has considered four potential scenarios,[691] and Mr. Wreford has weighted Dr. Siliprandi's forecasts to arrive at a weighted tariff.[692] According to the common market practice, he then incorporated in his model a blend of the forecasts by G&T and Dr. Siliprandi to arrive at a blended power price curve.[693]

482. In the Reply, ENKA relies on a dispatch modelling for the Georgian and Turkish markets based on simulations performed by Compass Lexecon, using a Plexos model.[694] The GOG avers that Mr. Caldwell's power price analysis is inflated because:

- it uses material that is not specific to Georgian or Turkish markets and performs a series of complicated and unreliable analysis to overcome its shortcomings and selectively uses the more favourable inputs from different sources;[695]

- it applies a single capture price to both HPPs, failing to account for the fact that UN HPP was designed as a run-off-river HPP without ability to store water and release its output to coordinate with consumer demands and thus capture higher prices;[696]

- it does not include all inputs required to properly assess the interactions between the Georgian and Turkish electricity markets as well as the seasonality of hydropower production.[697]

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688 RER-2, Wreford I, paras. 9.13-9.19.

689 Rejoinder, para. 1062.

690 RER-5, Siliprandi I, Section 5.1.3.

691 RER-5, Siliprandi I, Section 5.2.1, para. 225.

692 RER-4, Wreford II, paras. 7.33-7.34; RER-5, Siliprandi I, Section 5.2.4.

693 RER-4, Wreford II, paras. 7.33-7.34; RER-2, Wreford I, para. 9.9.

694 CER-1, Caldwell I, para. 134.

695 Rejoinder, para. 1065; RER-5, Siliprandi I, paras. 52-64.

696 Rejoinder, para. 1066; RER-5, Silipranndi I, paras. 140-146.

697 Rejoinder, para. 1067; RER-5, Siliprandi I, paras. 132-136.

483. Regarding Mr. Caldwell, criticisms to exclude the G&T Report from the analysis. The Respondent affirms that such criticism is ill-founded for the following reasons:

484. First, Mr. Caldwell's claim that G&T has not used dispatch modelling analysis incorporating generation and demand forecasts is incorrect because G&T has incorporated a generation and demand analysis in its Georgian market modelling.[698] Moreover, ENKA had no testifying power pricing expert to identify whether G&T's methodology is incorrect.[699]

485. The reasonableness of G&T Report is confirmed by the fact that when comparing G&T forecasts with the figures published by the Georgian electricity market operator ESCO, the G&T Report forecasts have closely followed actual prices with an average deviation of 2%.[700] The G&T Report were also prepared by and relied upon by a real-life investor in the context of a real project in Georgia and not in a litigation setting. The G&T projections were prepared to promote a foreign investment, and there can be no concern that they may forecast future energy prices downwards.[701]

486. The only power pricing expert, Dr. Siliprandi, explained at the Evidentiary Hearing that G&T is a well-known expert that produces bankable forecasts, and the G&T Report's forecasts are sophisticated and incorporate elements of 'fundamental modelling'.[702]

487. Second, contrary to what Mr. Caldwell suggests, the G&T Report present its forecast in nominal terms, as confirmed by Ms. Mariam Chakhvashvili, co-author of the G&T Report, in an email addressed to Mr. Chachibaia.[703]

488. Third, contrary to Mr. Caldwell assertions, the G&T forecasts are not flat over time; rather, they differ each month.[704]

7. <u>The correct calculation of the FMV</u>

489. The GOG asserts that the correct FMV calculation is USD minus 13.5 million.[705]

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698 Rejoinder, para. 1069; RER-Ex-76, G&T Report, dated 14 December 2021, p. 41.

699 R-PHB, para. 284.

700 RER-4, Wreford II, paras. 7.18-7.20; R-177, ESCO website – Balancing Electricity Price; R-176, ESCO Balancing Prices 2020-2023; RWS-6, Chachibaia II, paras. 48-49.

701 Rejoinder, para. 1069.

702 R-PHB, para. 284; Evidentiary Hearing Tr., D5, pp. 136:7-137:14; 140:17-23.

703 Rejoinder, para. 1070; BR-74, Emails between Mr. Chachibaia and Ms. Chakhvashvili, dated 27-28 March 2023 (Exhibit to Mr. Caldwell report).

704 Rejoinder, para. 1071; RER-Ex-76, G&T Report, dated 14 December 2021, p. 42 ; RER-4, Wreford II, para. 7.15.

705 JER, para. 11.

490. Considering that the BOO Agreement provides that "*the Fair Market Value determined hereunder shall not be less than the most recent book value of the relevant interest or right*",[706] the FMV should be the most recent book value of the Transferable Assets.[707] Initially Mr. Wreford calculated the book value of ENKA within the range of USD 40.389 million, corresponding to the amount that Enka Insaat wrote off in its audited financial statements as representing the "*net book value*" of the "*property, plant and equipment*" of the Project,[708] and USD 58.8 million, corresponding to the amount of incurred costs that ENKA had asserted in the Financial Model submitted with the SoC.[709]

491. Mr. Wreford also considered an Excel spreadsheet with information from the Enka Global Finance System recording a net book value of USD 61.9 million as at September 2021 and USD 62.1 as of 21 October 2021.[710] Since ENKA does not address the Project's book value in its submissions, it is not clear why the figures do not match or why the alleged net book value was higher in October.[711]

492. Lastly, Mr. Wreford considered the 2021 financial statement produced by ENKA, which record an impairment charge of USD 50.1 million for property, plant and equipment for the Project.[712]

493. Based on the evidence, Mr. Wreford considers that the Project's book value is within the range of USD 50.1 to 58.8 million.[713] Given the fact that the Claimant did not allege or prove what would be the floor for this alternative value, the Respondent asserts that the Tribunal should find that the Project's book value is USD 50.1 million.[714]

8. <u>The Tribunal should reduce the FMV to account for ENKA's contribution to the occurrence of the damages</u>

494. Pursuant to Article 415 of GCC, which is applicable to ENKA's damage claim, if the conduct or actions of the injured person has contributed to the occurrence of damages, then the duty to compensate the injured person and the amount of compensation shall

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706 C-4, BOO Agreement, Art. 1.1 definition of "Fair Market Value".

707 SoD, paras. 583-584; Rejoinder, para. 1080.

708 R-146, Enka Insaat's Annual Report (excerpt), dated 2 March 2022, p. 6; RER-2, Wreford I, paras. 11.1-11.6, 11.11-11.12.

709 SoD, para 595; RER-2, Wreford I, paras. 5.32, 11.1-11.6, 11.11-11.12; Rejoinder, para. 1081. Mr. Wreford concluded that the Claimant provided some form of evidence for 91.5% of the USD 58.8 million costs asserted, RER-4, Wreford II, paras. 9.7-9.10.

710 RER-4, Wreford II, paras. 3.46-3.47.

711 Rejoinder, para. 1086.

712 RER-4, Wreford 2, paras. 9.18-9.21.

713 RER-4, Wreford 2, paras. 9.22-9.27.

714 R-PHB, para. 306.

depend on which party was more at fault for the damage.[715] As said above, ENKA's communication failures and mismanagement of social, environmental and other aspects of the Project, as well as its refusal to participate in the Mediation, have caused or contributed to the grounds on which ENKA relies to terminate the BOO Agreement.[716]

495. The Claimant's legal expert, Mr. Fromm, argues that when "*the parties have explicitly agreed on the financial consequences of termination of the contract, then there is no room for applying the principle from Article 415 of the GCC*" and that "*in this case, the contract alone is decisive in determining the remedy for termination.*"[717] However, nothing in the BOO Agreement prevents the application of the principle established in Article 415 of the GCC. And even so, by application of the corrective function of good faith, the proportion of damages to which ENKA has contributed should not be recoverable.[718]

496. ENKA is therefore not entitled to any compensation. In the alternative, the Tribunal should consider ENKA's contribution to the occurrence of damages and reduce the amount of compensation in a proportion reflecting the Tribunal's assessment of its contribution to the situation that led to the termination of the BOO Agreement.[719]

9. DRT Determination is not conclusive and binding

a) Legal principles governing an expert determination

497. The GOG avers that the law governing the BOO Agreement is relevant to the powers, procedure, and principles applicable to the expert determination.[720] Principles governing expert determination are drawn from the provisions of the BOO Agreement, from analogous concepts of Georgian law, from German-law provisions, principles, and from legal authorities on expert determination.[721]

498. According to the GOG, the Claimant's exclusion of German law principles is wrong. The reference to the Laws of Georgia in the BOO Agreement includes "*determinations by* […] *any Georgian court*",[722] and Georgian courts regularly draw guidance from

715 RL-8, GCC, Article 415; RL-86, Supreme Court of Georgia, Case No. 992-2020, 29 September 2021, p. 1; RL-87, Supreme Court of Georgia, Case No. 608-2021, 29 October 2021, p. 1.

716 SoD, para. 599 and Section III.B.

717 CER-2, Fromm, para. 35.

718 Rejoinder, para. 1095; RER-3, Kereselidze II, paras. 59-61.

719 Rejoinder, para. 1097.

720 SoD, para. 605.

721 SoD, para. 609.

722 C-4, BOO Agreement, Art. 1.1. Definition of "Laws of Georgia".

German legal principles given that the GCC is modelled on the German Civil Code.[723]

499. The Claimant's argument according to which Section 319 of the German Civil Code applies to discretionary processes but not to the non-discretionary process under Article 9.4.6 of the BOO Agreement is also wrong.[724] According to settled German case law, Article 319 applies to "non-discretionary determinations", including to an expert determination where an expert is called upon to review a valuation and determine a price.[725]

500. German[726] and Georgian law impose fundamental standards regarding the (i) selection and appointment of the expert, (ii) the process to be followed by the expert, and (iii) the expert determination to be issued.

501. First, the expert must be independent and impartial. The dependence of the expert on one of the parties is considered a procedural error leading to the expert's determination being non-binding.[727] This principle applies to experts appointed in accordance with Article 325 of the GCC as it does to judges, arbitrators, and experts in other dispute resolution proceedings under Georgian law.[728] The fact that the Parties agreed that the approved auditor would be selected among the Big Four accounting firms does not mean that the GOG agreed that any employee of any of these firms (which have global presence and thousands of employees), would be deemed to be independent and impartial regardless of any actual conflict. ENKA's position leads to the absurd result that ENKA could appoint a person who works for Enka Insaat and is dependent on that work, or a person openly hostile to the GOG.[729] Even if the BOO Agreement does not include the requirement for an independent and impartial auditor, such a provision should be corrected according to good faith as requiring the selection of an impartial and independent auditor from the list of Annex 12.[730]

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723 Rejoinder, para. 1108(1); RER-1, Kereselidze I, paras. 72-73.

724 Reply, para. 514; CER-2, Fromm I, paras. 63-65.

725 RL-62, German Federal Court of Justice, 16 November 1987; RL-64, Witte, Mehrbrey, "*Variable Purchase Price Provisions in Company Purchase Agreements in the Network of Expert Determination Agreements and Arbitration Agreements*", Neue Zeitschrift für Gesellshatfsrecht (2015) 241, p. 244; RL-66, A. Sessler and L. Leimert, "*The Role of Expert Determination in Mergers and Acquisitions under German Law*", 20 Arb. Int. (2004), p. 152.

726 SoD, paras. 616-618; RL-8, GCC, Art. 325; RL-33, I. Gelashvili, *Commentary to Georgian Civil Code*", 2019, Book III, p. 2; RER-1, Kereselidze I, paras. 83-86, 91-92.

727 SoD, para. 618; RL-56, German Federal Court of Justice, 6 June 1994, p. 1; RL-57, German Federal Court of Justice, 5 December 1979, p. 1.

728 RER-1, Kereselidze I, paras. 83-86.

729 Rejoinder, paras. 1129-1130.

730 Rejoinder, para. 1131.

502. Second, parties must be given a right to be heard and shall benefit from an equal opportunity to present their case and respond to the counterparty's case.[731] The expert must treat both parties equally.[732] The GOG alleges that nothing in Article 9.4.6 of the BOO Agreement indicates that ENKA was entitled to engage with DRT unilaterally and to exclude the GOG and, even if that was the case, such a provision would be contrary to good faith and be corrected to be read as requiring an opportunity for the GOG to be heard.[733]

503. Third, according to German courts and commentators and based on fairness requirements in Georgian law, an expert determination process will not be valid if the expert information or documents material to the expert's analysis was withheld or has mislead the expert.[734] This principle is consistent with Article 9.4.6 of the BOO Agreement, which provided the Approved auditor with broad powers to request from the Parties "*all such documents and information as the Approved Auditor may require for the purposes of their functions*".[735]

504. Fourth, the expert report shall contain certain basics elements: (i) a written description of the work performed, (ii) the conclusions reached and (iii) reasoned responses to the questions the expert is required to resolve.[736] In this regard, the Claimant's allegation that the "*BOO Agreement does not require the report, the certificate or the Approved Auditor's calculation to take any particular form, nor does it require the Approved Auditor to give reasons for, or evidence in support of its conclusions*"[737] is incorrect. Article 9.4.6 provides that the expert should "*issue a report*" and, if it considers that the FMV has not been properly calculated, "*its own calculation of the* [FMV]". The word "*report*" means a written, formal, document, including details of the investigation or task.[738] And the requirement that the report confirm the Approved Auditor's own

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731 SoD, paras. 619-621; RER-1, Kereselidze I, paras. 76-82; RL-45, GCPC, Art. 4.1.

732 SoD, paras. 622-624; RER-1, Kereselidze I, paras. 76-82.

733 Rejoinder, paras. 1134, 1136.

734 Rejoinder, para. 1137; RL-106, Higher Regional Court of Düsseldorf, 28 April 1999, para. 21; RL-66, A. Sessler and C. Leimert "*The Role of Expert Determination in Mergers and Acquisitions under German Law*", 20 Arb. Int. (2004), p. 155 fn. 11; RL-126, German Federal Court of Justice, Case No. III ZR112/73, 20 November 1975, para. 46.

735 C-4, BOO Agreement, Art. 9.4.6(d).

736 SoD, paras. 625-626; RER-1, Kereselidze I, paras. 87-88; RL-58, Supreme Court of Georgia, Case No. AS-1152-2021, 31 January 2022, p. 1.

737 Reply, paras. 483-486.

738 R-252, Oxford English Dictionary, "Report": "[a]*n evaluative account or summary of the results of an investigation, or of any matter on which information is required (typically in the form of an official or formal document)*"; R-253, Merriam-Webster Dictionary, "Report": "*a usually detailed account or statement*".

calculation indicates that the Parties referred to a detailed report setting out the process of "calculation" of the FMV by using a DCF method. This is all the more so that the BOO Agreement specifies in detail the procedure for establishing the FMV and provides that the Approved Auditor's calculation would be conclusive and binding save in case of a manifest error, so that the Parties should be able to ascertain whether any mathematical error took place.[739]

505. At the very least, the Approved Auditor's report should have "*confirmed that the auditor used a DCF method and stated (i) the discount rate applied, (ii) and ENKA's cost of capital and (iii) provided details on how the Approved Auditor proportionately weighted and finally determined each category of capital.*"[740] ENKA's argument that the limited time for the work impeded the auditor to provide details of its calculations is unavailing because to perform its task, the auditor must have calculated the FMV by using a financial model and must have made assumptions for each of the components of the DCF calculation. Therefore, the financial model used could and should have been submitted with the report.[741]

506. These fundamental procedural standards derive from the following fundamental principles that cannot be excluded by party agreement:

- the principle of fairness, which provides that where "*the terms of performing an obligation are to be defined ... by a third person, then it is presumed, when in doubt, that such definition shall be constructed on a fair basis*";[742]

- the fundamental principle of good faith which have the function of supplementing and correcting contractual provisions;[743]

- the fundamental principle of equal treatment and the adversarial principle, which are applicable to all dispute resolution proceedings by virtue of the Constitution of Georgia and form part of Georgian public policy.[744]

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739 Rejoinder, paras. 1141-1142.

740 Rejoinder, para. 1143

741 Rejoinder, para. 1144(2).

742 RL-8, GCC, Art. 325.

743 RER-3, Kereselidze II, para. 107; SoD, paras. 657-659.

744 Rejoinder, para. 115; RL-46, Constitution of Georgia, Art. 62(5): "*Legal proceedings shall be conducted on the basis of equality of arms and the adversarial process*"; RL-105, Supreme Court of Georgia, Case No. a-2344-s-67-2014, 22 October 2014, p. 3: "*the principle of equality between parties and the adversarial principle in the adjudication of private law disputes is the cornerstone of an individual's relationship with the court. This principle serves as a guarantee for safeguarding a person's legal*

507. The Claimant's argument that because the Approved Auditor would have to issue a report within a short space of time, it was empowered to decide what documents to review, what questions to ask, and from whom,[745] is misplaced because the short timeframe only indicates that the Parties wanted to establish a simple and straightforward process, but not that they renounced to their fundamental right to be heard and to present their cases.[746] The Claimant's argument that Article 9.4.6 of the BOO Agreement does not provide for an adversarial process is also misplaced. Even if the expert determination is not considered to be adversarial, that fact does not justify the exclusion of the principles of equal treatment or due process, which are separate and freestanding.[747]

b) The term "Manifest Error" should be understood in accordance with Georgian law

508. Article 325 of the GCC, which applies to expert determination, is almost identical to Section 319(1) of the German Civil Code, and Georgian courts therefore draw guidance from German jurisprudence.[748] Under Article 319 of the German Civil Code, an expert determination will not be binding in case of an "obvious inequity" or "obvious incorrectness", terms generally used as synonyms of and equivalent of "manifest error".[749] Under German law, an error is considered manifest if: (1) "*obvious errors in the determination, affecting the overall result, are apparent to a knowledgeable and unbiased observer even if only after a thorough examination*"[750]and/or (2) "*the statements of the expert are so incomplete that even an expert cannot verify the result on the basis of the context of the expert determination report*".[751] This standard is met if "*the expert determination report does not contain any reasoning or only contains reasoning that cannot be verified by an expert and therefore the material content of the*

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interests, whether the dispute is under arbitration or the general courts. Any decision made in breach of this principle shall be considered contrary to public order"; RER-1, Kereselidze I, para. 76; RER-3, Kereselidze II, para. 100; RL-45, GCPC, Art. 4(1).

745 Reply, para. 459(c).

746 Rejoinder, para. 1121(2).

747 Rejoinder, para. 1122.

748 SoD, Section VI.A.2.

749 SoD, para. 630.

750 RL-61, German Federal Court of Justice, 27 June 2001, p. 1; RL-62, German Federal Court of Justice, 16 November 1987; RL-60, German Federal Court of Justice, 21 January 1963.

751 RL-61, German Federal Court of Justice, 27 June 2001, p. 1; RL-62, German Federal Court of Justice, 16 November 1987; RL-53, Higher Regional Court of Frankfurt, 26 January 2002, para. 13.

expert determination report cannot be evaluated."[752]

509. Although the GOG agrees with the Claimant that the intent of Article 6.4.6 of the BOO Agreement is to ensure finality,[753] that does not exclude the protection consisting in ensuring that each party is able to invalidate the report in case of a manifest error.[754] The GOG also acknowledges that, considering the short time frame of 30 days to issue the report, the Parties envisaged that errors of a lesser degree would be tolerable. However, this does not mean that the Parties intended to derogate from the legal principles relevant to determining whether a "manifest error" exist. A "manifest error" is found either when it is obvious, when the expert has made it impossible for anyone to see whether an obvious error exist, or when the determination deviates from the correct result to an unacceptable extent.[755]

510. In the context of an expert determination concerning valuation, it is well stablished by German case law and commentary that an expert determination is manifestly erroneous if it deviates by 20-25% or more from a properly determined result.[756]

511. In addition, an expert determination will be found to be manifestly inequitable if it grossly violates good faith, for instance, because the expert has focused unilaterally on the interests of one party.[757]

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752 RL-54, Gross "*Legal Requirements for Expert Determination Reports Using the Example of Company Valuations*", Deutsches Steuerrecht (2000) 1959, p. 3, Section 2.4.4.

753 Reply, para. 510(a).

754 Rejoinder, para 1156.

755 Rejoinder, para. 1160.

756 RL-54, Gross, "*Legal Requirements for Expert Determination Reports Using the Example of Company Valuations*", Deutsches Steuerrecht (2000) 1959, p. 2, Section 2.4.2; RL-66, A. Sessler and C. Leimert, "*The Role of Expert Determination in Mergers and Acquisitions under German Law*", 20 Arb. Int. (2004), p. 13; RL-50, Frey-Müller, *M&A Price Adjustment Disputes*, (2010), p. 2; RL-63, Higher Regional Court of Karlsruhe, 2 October 2002, p. 1, para. 7; RL-49, Elsing "*Binding Effects of Expert Determination Reports*" Zeitschrift für Vergleichende Rechtswissenschaft (2015), p. 1.

757 SoD, para. 632; RL-67, German Federal Court of Justice, 11 January 1980, para. 17; RL-68, German Federal Labour Court, 19 August 2008, para. 40; RL-69, Higher Regional Court of Hamm, 14 November 2013, para. 48; RL-55, Würdinger, *Munich Commentary on the German Civil Code*, Section 319, para. 6; RL-50, Frey-Müller, *M&A Price Adjustment Disputes* (2010), p. 2; RL-64, Witte, Mehrbrey, "*Variable Purchase Price Provisions in Company Purchase Agreements in the Network of Expert Determination Agreements and Arbitration Agreements*", Neue Zeitschrift für Gesellschaftsrecht (2015) 241, p. 1.

c) The DRT Determination is not a valid, conclusive, and binding Approved Auditor's Certificate

512. The DRT Determination is not a valid, conclusive, and binding Approved Auditor's certificate within the meaning of Article 9.4.6(d) of the BOO Agreement.

i. <u>The procedure followed by ENKA to appoint DRT violated fundamental procedural standards and good faith</u>

513. Article 9.4.6(c) requires the Approved Auditor to provide its report to ENKA and the GOG simultaneously, and Article 9.4.6(d) provides that the "*reasonable costs and expenses of the Approved Auditor shall be borne equally between* [the Parties]". These provisions show the Parties' intention that they would have an equal role in the Approved Auditor process.[758] The fact that Article 9.4.6(b) provides that ENKA "*shall arrange for its calculation of the FMV... to be verified by an Approved Auditor*" and that the Approved Auditor would be selected by ENKA, does not mean that the GOG had "*no role in the choice of the Approved Auditor*", and no right to be consulted about "*either the choice of, or the process to be followed by, the Approved Auditor.*"[759]

514. In order to perform Article 9.4.6(b) in good faith and taking the GOG's interests into account, ENKA was required to ensure the appointment of a neutral auditor and to try to agree with the GOG on the selection of, and process to be followed by, the Approved Auditor.[760]

515. On the contrary, ENKA conceived an opaque and unfair process that did not respect the fundamental rights of the GOG, and denied the GOG any opportunity to have any input in the selection of the Approved Auditor despite the GOG's request to be involved in the process.[761] On 12 October 2021, ENKA announced to the GOG that it was taking steps regarding the appointment of the Approved Auditor[762] and only on 10 January 2022 it notified the GOG that it had appointed DRT,[763] without performing any consultation with the GOG.[764]

516. Moreover, ENKA appointed an auditor local to one party only, DRT being the Turkish office of Deloitte, where the majority shareholder of ENKA is a Turkish

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758 SoD, para. 640 (1).

759 Rejoinder, para. 1170.

760 SoD, para. 640 (3).

761 SoD, paras. 642-644; C-28, GOG's letter to ENKA, dated 11 October 2021, p. 1; R-147, GOG's letter to ENKA, dated 14 October 2021, p.1.

762 R-14, ENKA's letter to the GOG, dated 12 October 2021.

763 R-15, ENKA's letter to the GOG, dated 10 January 2022.

764 SoD, paras. 646-647.

conglomerate.[765] ENKA's allegation that the DRT team was led by Andrew Robinson, a partner based in the London office, and included individual in other locations, is completely unsubstantiated given that no document disclosed to the GOG identified Mr. Robinson as the team leader. Besides, in the meeting between ENKA, Enka Insaat, their advisors and DRT, during which ENKA presented its FMV model, the person leading the meeting from DRT's side appears to have been Mr. Gokhan Altun, a partner from the Istanbul office,[766] the entity formally engaged is DRT and not Deloitte's office in London, the Letter of Instruction of Skadden was addressed to Mr. Altun,[767] and DRT's request for further information is signed by Mr. Altun.[768]

517. Fourth, DRT's terms of appointment have never been disclosed to the GOG before ENKA submitted its Reply in the arbitration.[769]

518. Fifth, DRT's letter contains no reference to its independence and impartiality nor to any conflict check, and DRT did not contact the GOG in advance to check conflicts.[770]

ii. <u>The process that DRT followed also violated several procedural standards.</u>

519. First, DRT treated the Parties in an unequal manner. DRT conducted two meetings with ENKA, Enka Insaat and their legal and valuation advisors, to which the GOG was not invited and of which the GOG was only informed *post facto*.[771] The GOG recognizes that DRT requested that the GOG provide certain comments and documents, but it did not seek the Respondent's views on many relevant aspects of the FMV calculation.[772] At any rate, in view of the opaque process followed by ENKA, the GOG decided not to recognize or participate in this process.[773]

520. Second, while ENKA was allowed to present any calculations and documents it deemed fit, the GOG was not provided with any chance to state its views as to the appropriate

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765 SoD, para. 648.

766 Reply, fn. 415.

767 C-453, Letter of Instruction from Skadden to DRT, dated 19 November 2021.

768 DRT's letters to the GOG and ENKA from 26 January 2022 to 14 February 2022: C-128, C-130, C-131, C-133, C-136, C-139, C-142.

769 SoD, para. 649; Rejoinder, para. 1173.

770 Rejoinder, para. 1174.

771 SoD, para. 652. For the first meeting, see C-145, Dataroom Materials Downloaded on 22 February 2022, "ENKA Kick-off Meeting 20220119" and SoD, paras. 292-293; for the second meeting, see C-145, Dataroom Materials Downloaded on 22 February 2022 "2022-02-07 Deloitte – Compass Lexecon session – recording", and SoD, paras. 292-293.

772 SoD, para. 654.

773 Rejoinder para. 1185; C-25, GOG letter to DRT and ENKA, dated 15 February 2022.

FMV and to comment on ENKA's financial model and supporting documents.[774]

521. Even if the Tribunal were to find that the BOO Agreement entitled ENKA to unilaterally select the Approved Auditor and to make unilateral arrangements for its verification of the FMV, ENKA was still required to exercise that right in good faith, considering the interests of the GOG, which implies (i) reaching an agreement on the Approved Auditor and the process to be followed by it, (ii) appointing a neutral Approved Auditor, and (iii) ensuring that the process to be followed by the Approved Auditor would be fair to both Parties.[775]

522. Third, ENKA refused a request for information by DRT and withheld material that would have revealed that the assumptions put forward by ENKA in its DCF calculation were incorrect and misleading.[776] As an example, ENKA refused to share with DRT the two SHAs, whose content would have impacted DRT's assessment, because in those documents, ENKA's shareholders:

- fixed a 30% ceiling on debt financing[777] and thus contradicted ENKA's assumptions regarding the debt/equity ratio for the Project (70% debt /30% equity during the construction phase, 50/50 during the PPA period and 30/70 after the PPA period);[778]

- agreed that the fair market value of their shares in ENKA would be valued by applying a 8.5% discount rate on a WACC basis,[779] while ENKA's own calculation submitted to DRT assumed a much lower discount rate of 5.49% to 5.79%[780];

- included information about the value that they attributed to ENKA's shares, which reflect a valuation of ENKA's shares of USD 36-60 million,[781] a much lower value than ENKA's USD 1.5 billion or DRT's own calculation of USD 305 million.

523. Insofar as the failure to comply with the duty of good faith can lead to the invalidation of a legal act,[782] the GOG maintains that ENKA's appointment of DRT and the process followed by DRT makes the DRT Determination invalid[783].

774 C-26, DRT Letter to ENKA and the GOG, dated 15 February 2022, p. 6, para. 4.3.

775 SoD, para. 657; RER-1, Kereselidze I, paras. 48-49.

776 Rejoinder, para. 1187 and Section II.F.

777 C-187, Second SHA, Art. 8(vii).

778 Rejoinder, para. 1191(1); C-127, ENKA Financial Model, 'WACC Det' tab, rows 20-44; RER-2, Wreford I, para. 6.56.

779 C-187, Second SHA, Art. 16.8.

780 C-127, ENKA Financial Model, 'WACC sum' tab, row 28; RER-2, Wreford I, para. 5.64.

781 RER-4, Wreford II, paras. 3.19, 3.24-3.25, 3.38 and 3.67.

782 RER-1, Kereselidze I, para. 52.

783 SoD, para. 659.

iii. The DRT Determination fails to meet the required standards

524. An expert determination should contain a description of the work performed, the conclusions reached and reasoned responses to the questions referred to the expert.[784] Given that the Approved Auditor's certificate would be conclusive and binding under Article 9.4.6(d) other than in case of a "*manifest error*", it must contain the details of the work and calculation performed which are necessary to allow for an assessment of whether the certificate is manifestly erroneous.[785]

525. Moreover, the BOO Agreement provides that the FMV is to be calculated by using the DCF method and "*by applying a discount rate calculated as a Person's cost of capital (where each category of capital is proportionally weighted and finally determined by the Approved Auditor)*".[786] The DRT Determination should have indicated the adopted appropriate discount rate, the details of its calculation of ENKA's cost of capital, and the weighting and final determination of each category of capital, but it did not.[787]

526. The DRT Determination letter is a six-page document including two sentences asserting that the proper FMV calculation is USD 305 million. It contains no explanation of DRT's methodology and calculation, of the underlying assumptions, no supporting evidence and no explanation of the significant difference between the FMV claimed by ENKA of almost USD 1.5 billion and the FMV asserted by DRT at USD 305 million.[788] In addition, DRT did not express any opinion on the accuracy of the underlying financial data or other information provided by ENKA and stated that it would not enter into future correspondence relating to the content of the DRT Determination.[789]

527. In these circumstances, the DRT Determination is invalid because it is "*so incomplete that even an expert cannot verify the result*"[790] and "*does not contain any reasoning and only contains reasoning that cannot be verified by an expert*",[791] as confirmed by Mr Wreford.[792]

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784 SoD, paras. 625-626, 665.

785 SoD, para. 666.

786 C-4, BOO Agreement, Article 1.1, definition of "FMV".

787 SoD, para. 667.

788 C-26, DRT Determination, dated 15 February 2022; SoD, paras. 668-669.

789 SoD, para. 670; C-26, DRT Determination letter, dated 15 February 2022, paras. 4.3-4.4.

790 RL-61, German Federal Court of Justice, 27 June 2001, p. 1.

791 RL-54, Gross, "*Legal Requirements for Expert Determination Reports Using the Example of Company Valuations*", Deutsches Steuerrecht (2000) 1959, p. 3, Section 2.4.4.

792 RER-2, Wreford I, Section 12.

iv. The DRT Determination is manifestly erroneous

528. In any event, the DRT Determination is manifestly erroneous,[793] in view of (i) the serious lack of substantiation of its underlying calculations,[794] (ii) the deviation by over 400% from a properly calculated FMV,[795] and (iii) the gross violation of DRT's duty of good faith by focusing only on the interests of one party.[796] The Determination is also erroneous as a result of ENKA's withholding of material information and ENKA's refusal to respond to DRT's requests for information. Since DRT was not allowed to consider all relevant information, the resulting determination is irrevocably tainted.[797]

529. Considering that the DRT Determination is not binding, the GOG maintains that the Tribunal should itself determine the FMV, and since the FMV calculated by Mr. Wreford applying the DCF methodology is negative, the Tribunal should, according to Article 9.4.3 of the BOO Agreement, determine a FMV at or below the most recent book value of the Transferable Assets.[798]

10. Confirmation of the DRT Determination would result in an award contrary to international public policy

530. The GOG alleges that ENKA knowingly withheld documents and information from DRT (and denied DRT's requests for these materials) and misrepresented essential information with the view of obtaining an inflated FMV to the detriment of the GOG.[799] These actions constitute fraud under French law,[800] as well as possibly the criminal offence of an attempted *escroquerie*.[801] All legal systems condemn fraud and circumstances amounting to the crime of *escroquerie* so the prohibition of fraud is part of French international public policy, as well as of transnational law,[802]and French

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793 SoD, para. 672; Rejoinder, para. 1203.

794 See *supra*, paras. 504-505.

795 Rejoinder, para. 1205; RER-4, Wreford II, paras. 2.39, 8.32, 8.45, 8.52.

796 Rejoinder, SectionVI.A.2 and para. 12.06.

797 Rejoinder, para. 12.07.

798 Rejoinder, para.

799 Rejoinder, paras. 1209-1210.

800 Rejoinder, para. 1212: "*Under French law, civil fraud is established when a party carries out an act 'using unfair means with the intent to surprise consent, to obtain an undue material or moral advantage, or to escape the application of the law*'", RL-127, Cour de Cassation, comm., Case No. 16-21.498, 13 December 2017.

801 Rejoinder para. 1213.

802 Rejoinder, paras. 1216-1217; RL-132, C.B. Lamm, H.T. Pham et al. "*Fraud and Corruption in International Arbitration*", in M. A. Fernández Ballesteros and D. Arias (eds.) *Liber Amicorum Bernardo Cremades*, Kluwer (2010), pp. 716-717.

courts expect arbitrators to sanction fraudulent conduct.[803] In view of these circumstances, if the Arbitral Tribunal upheld DRT Determination in its award, the award would be subject to annulment before the French courts for breach of international public policy.[804]

11. ENKA's other claims must be rejected

531. ENKA's other claims, requesting the GOG to (i) pay breakage costs and fees incurred in conjunction with the termination of the BOO Agreement, (ii) indemnify ENKA for taxes payable on the transfer of the Transferable Assets, (iii) cancel and return the Preconstruction Security, (iv) pay ENKA alleged associated fees and costs, and (v) pay interest on the sums claimed, must be rejected.

532. These claims arise from ENKA's termination of the BOO Agreement but must fail because ENKA has not validly terminated such contract. Moreover, ENKA has submitted no explanation, detail, or evidence with respect to any these claims.[805]

533. According to the GOG, ENKA has decided to hold back its case on its additional claims in its major submissions, and to claim open ended indemnities for unparticularised and unquantified amounts. Such a conduct is prejudicial to the GOG and contrary to (i) the requirements of Procedural Order No. 1, (ii) the Georgian law principle that damages are only recoverable if their existence and amount has been proven with reasonable certainty and (iii) ENKA's obligation to present in this arbitration all its claims arising from the purported termination of the BOO Agreement.[806]

534. As concerns interest, the GOG does not oppose the replacement of the contractual USD LIBOR rate with the SOFR in the circumstances of this case.[807]

803 Rejoinder, para. 1218; RL-135, Paris Court of Appeal, Case No. 191-022709, "*Ganz*", 29 March 1991.

804 Rejoinder, para. 1219.

805 Rejoinder, para. 1227.

806 SoD, paras. 688-692, 697-698, 709-711; Rejoinder, para. 1230.

807 Rejoinder, paras. 1231-1232.

IX. ANALYSIS OF THE ARBITRAL TRIBUNAL

535. The Arbitral Tribunal will first assess whether ENKA was entitled to terminate the BOO Agreement due to a GOG Event of Default, under Article 9.1.2(a) (**A**), or alternatively based on a Non-Physical Force Majeure Event, under Article 8.1.8 (**B**). The Tribunal will also consider whether the termination was made in bad faith and therefore invalid as alleged by the GOG (**C**).

536. The Arbitral Tribunal will then consider the consequences of the termination, in particular the payment of the FMV, and assess the Parties' arguments concerning the alleged agreement resulting from paragraph 60(i) of the RfA, and whether, in absence of such agreement, ENKA is nonetheless entitled to rely on Article 9.4.6(d) of the BOO Agreement to seek payment of the amount certified in the DRT Determination (**D**). The Arbitral Tribunal will then, having answered in the negative, assess the FMV to which the Claimant is entitled (**E**). The Arbitral Tribunal will further address a number of minor claims that the Claimant did not substantiate, such as the breakage costs, the contracts' termination costs and the tax gross-up (**F**). Finally, the Arbitral Tribunal will assess the Parties' claims concerning the pre-construction security (**G**), and interest (**H**).

A. GOG Event of Default

537. ENKA terminated the BOO by relying on Article 9.2.2 of the BOO. Article 9.2.2 provides as follows:

> "*Termination of this Agreement by the Company:*
>
> *The Company may unilaterally terminate this Agreement by giving a Termination Notice to the GOG based on:*
>
> *(a) a GOG Event of Default;*
>
> *(b) circumstances set forth in Articles 4.1.4 (Preconstruction Phase) or 8.1.8 (Force Majeure);*
>
> […]"

538. The relevant GOG Event of Default, as defined in Article 9.1.2(a), is "*any material breach of an obligation or representation under this Agreement or any other Project Agreement by the GOG or a Public Authority, including any relevant Public Authority, whether or not expressly designated as such hereunder if not cured within (90) days from its notification to the GOG or the Public Authority or Relevant Public Authority (as applicable)*".

539. The Parties agree[808] that three conditions must be met for ENKA to be entitled to terminate the contract due to a GOG Event of Default under Article 9.1.2(a): there must be a material breach of the BOO Agreement, a notice to the GOG of that breach, and a failure by the GOG to cure the breach within 90 days of that notice.

1. <u>Material Breach of the BOO</u>

540. The Claimant alleges that the GOG breached three provisions of the BOO Agreement: Article 3.2.14 by failing to ensure ENKA's access without interference or interruption to the Site; Article 3.2.20 by failing to safeguard and provide protection to the Site, the Plants, the Roads and the persons involved in the Project; and Article 3.2.1 by failing to support Enka in the implementation of the Project.

541. The first two of these alleged breaches are related in that they refer to the same factual events having taken place on site since May 2021, consisting in protesters preventing ENKA's employees and subcontractors from accessing the Site and the GOG failing to take the necessary measures to put an end to the situation. The Tribunal will thus first analyse these two alleged breaches together (**a**), to then consider the alleged breach of Article 3.2.1 (**b**).

a) Failure to ensure access to the Site and security

542. ENKA relies on alleged breaches by the GOG of Articles 3.2.14 (a) and 3.2.20 of the BOO.

543. Article 3.2.14 (a) of the BOO provides as follows:

> "*Access to Infrastructure:*
>
> *(a) The GOG shall ensure that the Company and its contractors/operators have access without interference or interruption to the Site as well as all existing international, secondary and local roads, bridges or other such infrastructure (the "Existing Infrastructure"), provided that the Company shall be responsible for the cost of prompt repair of the Existing Infrastructure damaged by the reason of such use by the Company and its contractors/operators except for normal wear and tear. No later than thirty (30) days prior to the first Construction Start Date, the Company and the relevant GOG representatives shall meet and establish a joint protocol describing in reasonable detail the status and condition as at that date of such Existing Infrastructure, including any substructures and concealed areas*".

544. Article 3.2.20 of the BOO provides as follows:

> "*Security*
>
> *At all times during the Term, the Government, at its sole cost and expense, shall*

808 SoC, para. 72; SoD, paras. 356-364.

> *take, and shall procure that the relevant Public Authorities take, on a timely basis in order to ensure that the construction, operation and other aspects of the Project are not adversely affected, all reasonable and prudent measures to:*
>
> *safeguard and secure the Land Rights, the Site, the Plants, the Roads, the Transmission System, and all Persons within Georgia involved in the Project; and provide protection for the Land Rights, the Site, the Plants, the Roads, the Transmission System, and those Persons within Georgia involved in the Project from all Losses resulting from civil war, sabotage, vandalism, blockade, revolution, riot, protest, demonstration, insurrection, civil disturbance, terrorism, kidnapping, commercial extortion, organised crime or other similar events, and any failure by the Government to comply with this provision shall constitute an Extension Event and/or a Compensation Event, as the case may be.*"

545. ENKA alleges that the GOG failed to ensure access to the Site in accordance with Article 3.2.14 (a) and to provide protection to ENKA in accordance with Article 3.2.20 because, from 29 May 2021 until Termination Date, protestors blocked the access roads to the Site and these roads remained blocked without the GOG taking action to remedy the situation.[809] Moreover, the Claimant alleges that this breach was intentional as it was intended to force ENKA to accept a modification of the BOO.[810]

546. Article 3.2.14 (a) and Article 3.2.20 have different scopes. Article 3.2.14 specifically deals with access to the Site, while Article 3.2.20 deals in a more general way with the safeguard and security of the Land Rights, Site, Plants, Roads, Transmission System and personnel.

547. The scope of Article 3.2.14 (a) includes protection against interferences to and interruption of access to the Site. This language is not qualified and does not distinguish between the possible causes of an interference to or interruption of access. It therefore applies to an interference to or interruption of access that may be caused by protests, as in this case.[811]

548. The language of Article 3.2.14 (a) is prescriptive and places upon the GOG the obligation to "*ensure*" that ENKA has access to Site "*without interference or interruption*".[812] In contrast with Article 3.2.20, this is not an obligation that is limited to adopting reasonable measures but rather one to ensure, as an objective obligation of result, that full and unrestricted access to Site is at all times guaranteed, which was

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809 See *supra*, paras. 210-212, 214 ; C-PHB, para. 5.

810 See *supra*, para. 213; C-PHB, para. 92(a); Reply, para. 330 (c).

811 Both legal experts agree that, according to Georgian law principles of interpretation, if the wording of a contract clause is clear, it should be applied according to its terms as reflecting the parties' intention: RER-1, Kereselidze I, para. 19; CER-2, Fromm I, para. 19

812 *Ibid.*

indeed critical not only to the construction schedule but also to the profitable operation of the Plants. By agreeing to such an obligation of result, the GOG therefore accepted to bear the consequences of blockades and other events hindering access to the Site in the conditions provided by the contractual clauses dealing with termination for breach and force majeure.

549. The Respondent submits that it complied with its obligation under Article 3.2.20 in good faith by mobilizing most of its police forces, which did manage the situation in a responsible way by avoiding an escalation of the violence and assisted ENKA effectively to transport supplies to the Site.[813] ENKA affirms on its part that the evidence does not show a mass mobilisation of security forces on or close to the Site and that, in any case, it does not matter whether police officers were present if the same remained passive and did not take action to open the access roads and protect ENKA's personnel.[814] ENKA also submits that the fact that the police allowed the supply of limited quantities of basic supplies on 10 June 2021 did not fundamentally alter the situation resulting from the blockade situation that it was facing.[815]

550. The evidence shows that the blockade that began in late May 2021 reached a critical point on 9 June, when ENKA informed the GOG that the essential reserves of the camp were reduced to critical levels and ENKA was preparing to evacuate the Site the following day.[816] On the evening of that same day, Ms. Turnava advised Mr. Kozan not to evacuate and said that "*police will help to provide site with primary needs.*"[817] On 10 June 2021, the Georgian police intervened and confronted the protesters,[818] allowing two trucks to enter the Site, one with fuel and the other with essential supplies for the workers. This intervention, however, did not prevent the blockade from continuing.[819] Even if the police facilitated the supply of small amounts of fuel and basic supplies to sustain the workers who were on Site, the works were in fact completely stopped from 9 June onwards.[820]

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813 See *supra*, para. 369; R-PHB, para. 195; Rejoinder, paras. 289(3), 713-716; R-110, MOIA Order No. 1/14, dated 25 January 2021, paras. 1-2; R-202, Special Task Dept. Order No. 01542221, dated 16 June 2021; R-203, Special Task Dept. Order No. 01779041, dated 8 July 2021; R-204, Special Task Dpt. Order No. 02363289, dated 7 September 2021; R-113, MOIA Order No. 1/405, dated 11 October 2021.

814 C-PHB, para. 89(a).

815 C-PHB, para 89(b).

816 C-107, ENKA's letter to the MESD, dated 9 June 2021.

817 C-110, WhatsApp Exchange between Ms. Turnava and Mr. Kozan on 9-10 June 2021.

818 R-200, Video from MOIA, dated 10 June 2021; R-45/C-110, WhatsApp messages between Ms. Turnava and Mr. Kozan, dated 10 June 2021.

819 Evidentiary Hearing Tr., D4, pp. 20:12-21:3.

820 Claimant's Chart of Disruptions; Respondent Chart of Disruptions.

551. The record shows that, even if the police did intervene,[821] it showed from the beginning of June and throughout the summer of 2021 a significant measure of restraint in confronting the demonstrators.[822] This restraint appears clearly in several videos recorded from 19 June until 19 September 2021,[823] showing police officers on the side of the access road allowing demonstrators to block access to the Site. The Arbitral Tribunal notes in this respect that the Mediators' Concluding Report[824] indicates that the situation was overall stable and calm by July 2021. However, the situation may have been calm precisely because the police had decided not to engage with the protesters to avoid further violence, letting them therefore block the access roads in breach of the GOG's undertaking under Article 3.2.14 (a).

552. The Arbitral Tribunal understands the sensitivities of police interventions in a delicate and inflammable political context such as the one prevailing around this Project back in 2021. As in any situation of this kind, the government has to arbitrate between the use of force and the need to prevent violence from escalating, which is a perfectly legitimate exercise of its police powers. This, however, is not an investment arbitration in which the Tribunal is tasked to assess the proportionality of the government's actions in light of standards such as protection and fair and equitable treatment. This Arbitral Tribunal is the judge of the contract and its task is to enforce the Parties' bargain. As said above, Article 3.2.14 is clear in that the Respondent had the obligation to maintain access to the Site. This was not merely an obligation to procure best efforts to achieve that result: rather, under that provision, a situation where ENKA was prevented from accessing the Site through no fault of its own is in and by itself a breach of contract, irrespective of the fact that the authorities may have taken measures that they considered to be adequate in view of the circumstances.

553. There is therefore no doubt that Article 3.2.14 (a) was breached by the total or partial blockades that occurred as from 29 May 2021. Indeed, the GOG accepted as much at the Evidentiary Hearing:

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821 Rejoinder, fn. 605; R-112, MOIA Order No. 1/175, dated 27 May 2021, paras. 1 and 2; R-207, Special Tasks Dept. Order No. 01351711, dated 30 May 2021; R-208, Special Tasks Dept. Order No. 01360586, dated 31 May 2021; R-209, Special Tasks Dpt. Order No. 01473060, dated 10 June 2021; R-210, Special Tasks Dpt. Order No. 01475287, dated 10 June 2021.

822 Evidentiary Hearing Tr., D3, pp. 158:15-159:5.

823 C-345-C-349, video footages from 19 to 22 June 2021; C-352-, video footage from 23 June to 28 June 2021; C-358-364, video footage from 29 June to 4 July 2021; C-365, photo of policemen on 6 July 2021; C-366, photo of protestors blocking the road on 6 July 2021; C-367-373, footage from 6 July to 12 July 2021; 375, 378-379, 381-385, 388-404, footage from 13 July to 6 August 2021; C-406-C-440, footage from 7 August to 10 September 2021; C-442-C-443, C-445-C-446, C-448-C-451, footage from 11 September 2021 to 19 September 2021.

824 R-50, Mediator's Concluding Report, dated 18 November 2021, p. 4.

> *"[M. Cameron:] Enka alleges a material breach of Article 3.2.14 (a) of the BOO Agreement, shown on the slide, which required Georgia to ensure that Enka Renewables and its contractors or operators have access without interference or interruption to the site. That's as a result of the breach alleged, as a result of blockages of certain roads giving access to the site by protesters from 29 May 2021. I should make clear from the outset, in response to a point from our colleagues, that Georgia does not of course deny that there were interferences with ENKA's access to the Site during this period due to the actions of protesters and that there was a breach of this provision".*[825]

554. Access to the Site was indeed entirely or partially hindered by protests organised by various groups from 29 May 2021 until the 20 September 2021 Termination Notice,[826] *i.e.* for a total of 114 days from 29 May 2021 to 19 September 2021.[827] As properly acknowledged by the GOG, such situation is a breach of Article 3.2.14 (a).

555. The Arbitral Tribunal does not consider that this breach was intentional. There is no evidence, and no reason to believe, that the GOG refused to unblock the accesses to Site with the intention of forcing ENKA to accept amendments to the GOG or to oblige it to waive its legitimate rights. Nor is there any basis to consider that the GOG would in any way have stirred up or encouraged the protests so as to harm ENKA. The protests were clearly not of the GOG's making, and both Parties were placed in the difficult situation of having to deal with an increasingly sensitive and inflammatory situation, which obviously had potentially dangerous consequences for public order and security. Still, as said above, these constraints cannot take away that ENKA did not enjoy full and unrestricted access to site, which is a breach of Article 3.2.14 (a).

556. Based on the foregoing, whether the GOG also breached Article 3.2.20 becomes immaterial. Article 3.2.20 provides for the GOG's obligation to take *"reasonable and prudent measures"* to ensure the protection and security of the Land Rights, Site, Plants, Roads, Transmission System and ENKA's personnel. Although this clause refers to events such as blockades, riots, protests, demonstrations, and civil disturbance, which are relevant to the lack of access to Site discussed above, it applies generally to events that may affect the construction, operation and other aspects of the Project, while Article 3.2.14 (a) applies specifically to access to Site. The GOG's objective obligation to guarantee free and unrestricted access to Site under Article 3.2.14 (a) and its protection and security obligations under Article 3.2.20 are separate obligations, and a breach of any of them entitles ENKA to the remedies provided by the BOO. It follows that a situation where ENKA is deprived of its right to access the Site is a breach of Article 3.2.14 (a) irrespective of whether reasonable and prudent measures were taken to ensure

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825 Evidentiary Hearing Tr. D1, pp.146:18-147:6 (underline added); see also, R-PHB, para. 191.

826 See *supra*, paras. 176-186.

827 C-170, ENKA Daily Reports, p. 169; Claimant's Chart of Disruptions; Respondent's Chart of Disruptions.

protection and security pursuant to Article 3.2.20.

557. At any rate, the Arbitral Tribunal considers that Article 3.2.20 was also breached by the GOG. The standard of prudence and reasonableness established by Article 3.2.20 needs to be assessed in consideration of the circumstances and, in particular, the nature of the disturbance that ENKA was facing. In the instant case, the reasonable and prudent measures that the GOG was obliged to take were those that should have protected ENKA and its personnel, as well as the Site, from the effects of the blockade. The primary goal of the police forces that the GOG mobilized should therefore have been to ensure that ENKA's personnel could safely access the Site. Rather, as said above and as shown by several videos recorded from 19 June until 19 September 2021,[828] the police elected to stay on the side of the road and to allow demonstrators to block the access. This cannot, under any standard of reasonableness, and whatever the sensitivities of the situation may have been, be considered as a prudent and reasonable way to protect and safeguard the Site or ENKA's personnel.

558. The GOG submits that any breach of Articles 3.2.14 (a) and Article 3.2.20 was not of such importance as to be considered as a "*material*" breach pursuant to Article 9.1.1(e).[829] The BOO does not define the term "*material breach*". This is therefore a question to be addressed in accordance with the applicable Georgian law.

559. ENKA has in this respect not made specific reference to Georgian law but submitted that "*it is common ground that 'material' means 'not insignificant'*".[830]

560. The GOG has on its part submitted that "*the adjective 'material' should be understood with the phrase 'breach of an obligation', allowing for a right to terminate to apply only*

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828 C-345-C-349, video footages from 19 to 22 June 2021; C-352-, video footage from 23 June to 28 June 2021; C-358-364, video footage from 29 June to 4 July 2021; C-365, photo of policemen on 6 July 2021; C-366, photo of protestors blocking the road on 6 July 2021; C-367-373, footage from 6 July to 12 July 2021; 375, 378-379, 381-385, 388-404, footage from 13 July to 6 August 2021; C-406-C-440, footage from 7 August to 10 September 2021; C-442-C-443, C-445-C-446, C-448-C-451, footage from 11 September 2021 to 19 September 2021.

829 See *supra*, para. 369-370; R-PHB, para. 192; Rejoinder, para. 704(2).

830 Evidentiary Hearing Tr., D1, p. 17:10-23 : "[Lord Wolfson]: *As to whether the breaches were material, there the parties are happily agreed that material means 'not insignificant'. Like many contractual tests, such as this one, you as a Tribunal will know a material breach when you see it. You will no doubt hear from Georgia that this was a century-long project and these breaches cannot have been material in that context. But that is no answer. If you can't build the dam as planned and in accordance with the contractual terms, then there is no project, and being prevented from building the dam is obviously, indeed essentially, material. Indeed, if being prevented from actually building the project is not material, it's hard to see what would be.*"

where there is a significant transgression impacting the BOO Agreement as a whole",[831] and relies on a Georgian Supreme Court decision according to which "*a breach is material under the GCC only if, due to the breach of the main obligation by the debtor, the intended use of the performance becomes impossible or the hope of its performance in the future is lost or the creditor loses interest in performance.*"[832] As a consequence, according to the Respondent, the breach of a minor obligation would not satisfy the requirement of materiality.[833]

561. The Arbitral Tribunal accepts the Respondent's submission, based on the Supreme Court jurisprudence, that a breach is material if it makes performance of the other party's obligations "*impossible*" or when, due to the breach, the creditor loses interest in performance. The standard so established by the Supreme Court must however be applied reasonably in light of all relevant circumstances. The Arbitral Tribunal considers that, in accordance with that test, a breach that makes performance excessively difficult or unreasonably burdensome is a material breach. Conversely, a breach that would not hinder performance beyond a reasonable level should not be considered as material.

562. The Arbitral Tribunal, however, does not accept the conclusions drawn by the GOG from that test. Pursuant to the BOO, ENKA has the obligation to proceed with the construction of the Plants according to the agreed timetable. The GOG has in this respect noted that the situation arising from the blockades could have led to extensions of times, so that there was no real impossibility to perform. ENKA, however, not only has the obligation to proceed with construction: it also has the right to complete construction in a reasonable and foreseeable timeframe so as to put the Plants in operation and to start generating profits. Rather, it was placed in a situation in which access to Site was blocked for an indefinite period with no reasonable prospect for a return to normal in the foreseeable future. Against that backdrop, it is perfectly reasonable to consider that ENKA was placed in a situation in which the breach has deprived performance of its interest, which satisfies the test of a material breach.

563. The BOO does not define a threshold, in terms of number of days or otherwise, to assess when a breach of Article 3.2.14 should be considered as material. The Force Majeure provisions of Article 8.1.8 refer, as a Force Majeure event allowing termination, to hindrances preventing performance for an aggregate period of 180 days. That length of time is however not applicable to define a material breach of Article 3.2.14. However, Article 8.1.8 still provides a useful indication of the kind of situation that the Parties intended to capture by referring to a material breach of the GOG's obligation to ensure

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831 R-PHB, para. 188(1).

832 R-PHB, para. 188(2); RL-30, Supreme Court of Georgia, Case No. AS-1003-924 2017, Decision, 1 December 2017.

833 R-PHB, para. 188(3).

free and unrestricted access to Site. In the Tribunal's view, a situation where ENKA was prevented from accessing the Site for several months meets the threshold of a material breach of Article 3.2.14.

564. As said above, the evidence shows that that from 28 May 2021 onwards, access to the Site was completely blocked by protesters, save for small deliveries of essential supplies, during an aggregate of 114 days or 16 weeks.[834]

565. The Respondent submits that, when assessing the materiality of the breach, the relevant period that the Tribunal should consider should not go beyond 21 June 2021 because, after that date, the 90-day period to cure the breach would not have expired by the date of termination on 20 September 2021. The Respondent therefore considers that the period during which access was hindered was in fact limited to three weeks, which would not be long enough to support a finding of material breach in the context of a century long project.[835]

566. The Arbitral Tribunal disagrees. As a matter of fact, the argument conflates the question of whether the breach is material with whether it constitutes an Event of Default. In the instant case, the breach is the lack of access to the Site due to blockades having started on 28 May 2021, which the GOG failed to remedy until termination on 20 September 2021. That is a material breach. In order for that material breach to be considered as an Event of Default, which is a distinct question, Article 9.1.2 (a) requires that it has not been cured within 90 days from notice. This in turn raises the question of whether, the breach being of a continuing nature, a single notice given at the beginning of the disruption period is sufficient to trigger the 90 days period or whether notices were required for every single day of disruption, thus triggering a distinct 90-day remedy period for each day of disruption. The Arbitral Tribunal considers that this latter view cannot be accepted and would lead to an absurd result in presence of a continuous breach where each day of delay is caused by the same causative event. In the instant case, as shall be seen further, ENKA happens to have delivered daily notices to the GOG.[836] It does not follow, however, that each of these daily notices triggered a separate 90-day curative period for purposes of Article 9.1.2 (a). Rather, because in presence of a continuous breach the disruption period needs to be considered in its entirety, the GOG failed to remedy the breach 90 days after the notice given at the beginning of the disruption period at the beginning of June 2021.

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834 See *supra*, paras. 176-186; C-105, ENKA's letter to the MESD, dated 4 June 2021; C-107, ENKA's letter to the MESD, dated 9 June 2021; C-110, WhatsApp messages between Mr. Kozan and Ms. Turnava, dated 10 June 2021; C-122, Daily Letters from 10 June to 19 September 2021; Video and Drone Footage, from 19 June to 19 September 2021.

835 R-PHB, para. 192; Rejoinder, paras. 703-706.

836 C-122, Daily Letters.

567. Based on the foregoing, the breach of Article 3.2.14 (a) is material. The standard of materiality being assessed in respect of the consequences of the breach, the same conclusion applies to the breach of Article 3.2.20.

b) Failure to support ENKA - Article 3.2.1

568. Article 3.2.1 of the BOO provides that:

> *"The GOG shall, in accordance with the Laws of Georgia, support the Company in implementation of the Project, including by way of rendering assistance to the Company and their contractors and subcontractors in obtaining all Authorizations documents and information necessary for implementation of the Project. In the event that the Company and/or their contractors and/or subcontractors have properly and timely applied for the granting of an Authorization, but a Public Authority fails to issue such Authorization within the timeframe according to the Laws of Georgia (and, with respect to the issuance of the Takeover Certificate by the LEPL Technical and Constructions Supervision Agency of the Ministry of Economy and Sustainable Development of Georgia, the registration of the Off-Take Agreements with the Dispatching Licensee and any other steps required in order to achieve the Actual Completion Date for each Plant under this Agreement or to achieve the Commercial Operations Date under either of the Off-Take Agreements, in each case, within fourteen (14) days from the proper and timely application by the Company) such event shall constitute an Extension Event and/or a Compensation Event, as the case may be."*

569. The Claimant submits that the GOG breached Article 3.2.1 by failing to transfer land plots to ENKA. According to ENKA, by June 2021, ENKA had concluded or entered into cease of usage and compensation agreements and trilateral agreements with private owners and users of 1,070 land plots and paid more than 10 million USD to them pursuant to those agreements. Yet only 96 of those properties had been registered in the name of ENKA.[837] The GOG responds that the delays in the registration of the land plots were due to errors in ENKA's applications,[838] without however identifying these alleged errors. The Claimant however rebuts this argument[839] by submitting that in its letter of 14 July 2021,[840] the NASP did not mention any error made by ENKA.

570. ENKA further submits that the GOG breached Article 3.2.1 by ceasing to deliver authorizations. In particular, TACSA failed to deliver the authorization that ENKA had requested for the further stages of the construction works, including the construction of the penstock for the Lower Namakhvani.[841] The GOG responds that TACSA did not

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[837] SoC, para. 190(a).

[838] SoD, para. 392(2) and (3).

[839] Reply, para. 345(b).

[840] R-151, Letter from NASP to ENKA, dated 14 July 2021.

[841] C-13, ENKA letter to the MESD, dated 9 July 2021.

release the requested permit because the application was not compliant with the required design documents,[842] and the Claimant rebuts that argument by saying that the non-compliance mentioned by TACSA was about a permit for the headrace tunnel rather than the penstock application,[843] and that ENKA responded to TACSA by pointing out that the application should in any case be admitted based on the Permitting Action Plan Side Letter.[844] The GOG also avers that there was no failure to release the permit based on the administrative law principle of consent by silence.[845]

571. Finally, ENKA submits that although the GOG made public statements in support of the Project until March 2021, its attitude changed from April 2021 onwards and it then breached its obligations by declaring that it would no longer perform its obligations under the BOO Agreement,[846] in particular by (i) announcing on 24 April 2021 its intention to renegotiate the BOO Agreement and to reduce the police support for the Project;[847] and (ii) stating on 9 June 2021 that the BOO Agreement was a "*problem*" that the Prime Minister had "*inherited*" and that it would not be pursued on its agreed terms.[848]

572. The Arbitral Tribunal considers, in view of the established material breach of Articles 3.2.14 (a) and 3.2.20, that whether Article 3.2.1 was also breached is immaterial to the outcome and does therefore not need to be analysed in detail.

573. The Arbitral Tribunal, however, does not consider that the NASP's delays in registering the land transfers, as well as TACSA's alleged failure to authorize the construction of the penstock, would satisfy the threshold of a material breach by either making impossible or unduly burdensome ENKA's performance of its obligations or by taking away ENKA's interest in the performance. There is no evidence that these circumstances would make it impossible for ENKA to perform its obligations and the Tribunal does not consider that they were such as to take away ENKA's interest in the performance of the Project. In fact, the Claimant failed to demonstrate that the alleged delays in obtaining the permits or the land transfers materially impacted the performance of the BOO. As to the GOG's statements mentioned above, as unfortunate as they may have been, they may have been made in the hope of placating the protests and there is no evidence that they had as such any adverse effects on the Project.

574. Based on the foregoing, the Arbitral Tribunal concludes that there was no material

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842 R-152, Letter from TACSA to ENKA, dated 27 July 2021.

843 Reply, para. 345(c)(iii).

844 C-122, Daily Letters, p. 357; C-35, Permitting Action Plan – Side Letter, para. 2.1(b).

845 Rejoinder, para. 729, RL-110, Resolution No. 257, Art. 37.

846 SoC, para. 205; Reply, para. 346(a).

847 SoC, para. 164; R-11, Statement by the Administration of the GOG, dated 24 April 2021.

848 Reply, para. 346(c); C-109, Extract of transcript of Prime Minister's Statement, dated 9 June 2021.

breach of Article 3.2.1.

2. Notice and failure to cure

575. Pursuant to Article 9.2.2 (a) of the BOO, ENKA is allowed to terminate in case of a GOG Event of Default. Pursuant to Article 9.2.1 (a), "*any material breach of an obligation or representation under this Agreement or any other Project Agreement by the GOG or a Public Authority, including any Relevant Public Authority, whether or not expressly designated as such hereunder if not cured within ninety (90) days from its notification to the GOG or the Public Authority or Relevant Public Authority (as applicable)*" is an Event of Default.

576. The Arbitral Tribunal has established that the GOG breached Articles 3.2.14 and 3.2.20 of the BOO by failing to ensure that ENKA enjoyed full and unrestricted access to the Site. The question is now whether proper notice was given of that breach and whether the Respondent failed to cure it within 90 days.

577. ENKA avers that it notified the GOG about the breach of Articles 3.2.14 and 3.2.20 on 4 June 2021,[849] 9 June 2021,[850] 15 June 2021,[851] 16 June 2021,[852] 9 July 2021,[853] and through the Daily Letters from 10 June to 19 September 2021.[854]

578. The Respondent does not submit that ENKA failed to provide notice of the breaches of Articles 3.2.14 and 3.2.20. As said above, the Arbitral Tribunal considers that, because the Event is the continuous disruption of access to Site having occurred as a consequence of the same causative event (protests against the Project organized by various groups) from the end of May to September 2021, the notice given on 4 June 2021 was sufficient to trigger the 90-day cure period, with no need of further notices. As a consequence, as from 4 June 2021, the GOG had 90 days to remedy the situation, *i.e.* until 2 September 2021.

579. ENKA's letter of 4 June 2021 states that "*[d]uring the past week, access to Site is completely blocked by a number of protestors (by means of stopping vehicles on public roads) and evidently the authorities do not take actions to provide Company safe and secure access to Site for personnel and material logistics. Company is not able to get in or out of the Site (cannot bring circa 150 number of its personnel employed by the Project locally and commute to Site in and out daily, cannot transport highly safety sensitive items like ventilation equipment, cannot bring any material even food or diesel*

849 C-105, ENKA's letter to the MESD, dated 4 June 2021.

850 C-122, Daily Letters.

851 C-12, ENKA's letter to NASP, dated 15 June 2021.

852 C-114, ENKA's letter to the MESD, dated 16 June 2021.

853 C-13, ENKA's letter to the MESD, dated 9 July 2021.

854 C-122, Daily Letters.

to provide personal welfare), Company's employees and suppliers are threatened, intimidated and in some occasions physically abused. Project schedule and budget of course are significantly affected."[855] Such letter expressly mentions that it is a notice of breach of *inter alia* Article 3.2.20 pursuant to the BOO.

580. As from 10 June 2021, the Claimant sent daily letters to the GOG notifying the circumstances at the roads and the Site and requesting "*that the Government takes or procures that the relevant Public Authorities take, on a timely basis, all reasonable and prudent measures to safeguard, secure and protect the Land Rights, the Site, the Roads and those Persons involved in the Project from all Losses resulting from those events in accordance with Article 3.2.20 (Security) of the Agreement*."[856] The 18 June 2021 letter explicitly states that "*we hereby further notify you that the Government remains in material breach of its obligations under Article 3.2.14 (Access to Infrastructure) and 3.2.20 (Security). We request that the Government cures the foregoing breaches forthwith*."[857]

581. The Respondent alleges that any breach of Articles 3.2.14 and 3.2.20 was cured within 90 days because the Mediators' Concluding Report of 18 November 2021 stated that "*by July 2021, the situation onsite was stabilized and remained overall calm.*"[858] The Claimant submits, in this respect, that the Mediators' statement only means that there was no risk of violent clashes because the police let the protesters block the roads, but it doesn't mean that the situation was resolved as the accesses to the Site in fact remained blocked until the Notice of Termination.[859]

582. The Arbitral Tribunal sides with the Claimant. As discussed above, the evidence shows that access to the Site remained blocked until the Termination Notice,[860] which is 18 days after the 90-day time-limit discussed above elapsed.

583. Based on the foregoing, the Arbitral Tribunal concludes that ENKA satisfied the requirement of a notice and that the breach was not cured within 90 days. As a consequence, pursuant to Article 9.2.2 of the BOO, ENKA was entitled to terminate.

3. Is the Respondent excused by ENKA's own breaches?

584. The Respondent asserts that even if the Tribunal finds that ENKA was entitled to terminate the contract, ENKA's termination was unlawful under Georgian law because

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855 C-105, ENKA's letter to the GOG, dated 4 June 2021.

856 C-122, Daily Letters (ENKA's letter to the GOG, dated 10 June 2021).

857 C-122, Daily Letters (ENKA's letter to the GOG, dated 18 June 2021).

858 R-PHB, para. 199; Rejoinder, paras. 707, 719; R-50, Mediators' Concluding Report, dated 18 November 2021, p. 4, Section 3(a).

859 Reply, para. 333(c).

860 C-452, Drone Footage, dated 20 September 2021.

ENKA was principally liable for the breaches alleged in support of its termination. The Respondent relies, in support of that contention, on Article 405.3(c) of the GCC, which provides that "[a] *contract may not be repudiated if: ... c) the obligee himself is fully or principally liable for the breach of the obligation.*"[861]

585. The Respondent submits in this respect that Article 405.3(c) is the default rule in Georgian law and that it is applicable unless the parties specifically agree otherwise.[862] This rule enforces the fundamental principle that a party cannot in good faith rely on a situation created by its own contractual breaches to terminate a contract.[863]

586. The Respondent's theory is, in substance, that ENKA failed to comply with its obligations concerning stakeholders' engagement under Article 5.1 of the BOO Agreement and with its obligation to implement the Project in good faith under Article 3.1.1 of the BOO Agreement and Article 361.2 of the GCC.[864]

587. Article 5.1 of the BOO Agreement provides that:

> "*The Parties shall jointly cooperate to ensure that the construction, operation, maintenance, management and monitoring of the Project [...] complies with the Environmental and Social Standards.*"

588. Article 1.1 of the BOO Agreement defines 'Environmental and Social Standards' as:

> "*the requirements related to the environment and the protection and preservation thereof and the social impacts of the Project and the mitigation thereof imposed by the Laws of Georgia and by the Financing Parties and which in any case shall include: (a) where EBRD is a Financing Party, the EBRD Performance Requirements; and/or (b) where the IFC is a Financing Party, the IFC Performance Standards; or (c) in any other case, the Equator Principles.*"

589. In this case, since EBRD and IFC were not financing parties, the "*in any another case*" provision applies, so that the Parties had the contractual obligation to cooperate to ensure that the Project would comply with the Equator Principles.

590. The relevant provision of the Equator Principles is Principle 5, which requires the project developer to "*demonstrate effective Stakeholder Engagement as an ongoing process in a structured and culturally appropriate manner with Affected Communities and Other*

861 RL-8, GCC, p. 92, Art. 405(3)(c); RER-3, Kereselidze II, para. 52.

862 Rejoinder, paras. 791-793; RER-3, Kereselidze II, para. 56; RL-96, Conflict between claims and bases for claims, 2011, p. 6.

863 Rejoinder, para. 794; RER-3, Kereselidze II, para. 57; CER-2, Fromm I, paras. 32-33.

864 Rejoinder, para. 787; SoD, paras. 418-424; RL-8, GCC, Art. 261.2: "*the obligation shall be performed duly, in good faith, and at the time and place determined.*"

Stakeholders."[865]

591. The Respondent submits that ENKA failed to fulfil its stakeholder engagement obligations in a sustained manner. In contrast with CEG – who successfully managed stakeholders in the Shuakhevi project – ENKA as a constructor did not have any real experience in this kind of programme, and after Enka Insaat became ENKA's majority shareholder, ENKA dismissed the social outreach team initially formed by CEG and abandoned the stakeholder engagement activities for over a year.[866] ENKA also mishandled the Project's seismic, environmental and social impacts[867] and disregarded Georgian environmental laws, allowing public concerns about the Project to grow.[868]

592. The GOG also alleges that, in breach of its duty to implement the Project in good faith, it refused to engage in the necessary steps to implement the Project by failing to participate in the Mediation[869] and refusing to amend the BOO Agreement on the duration of the Right to Build, an immaterial and inconsequential concession that would have assuaged the opposition, in particular by gaining the support of the all-important orthodox Church.[870]

593. In the Respondent's submission, these failures allowed the protests to grow and escalate until they had become unmanageable, making it practically impossible for the GOG to restore access to the Site.[871]

594. ENKA first objects that Article 405 of the GCC is irrelevant to the present dispute because the Parties have defined in the BOO Agreement the conditions and procedures to terminate the contract.[872]

595. The Arbitral Tribunal disagrees. The contract being subject to Georgian law, the conditions in which a party can exercise its contractual rights – such as the right to terminate – are subject to Georgian law, including Article 405 of the GCC. In this regard, the BOO contains no carve-out of that provision. As a consequence, ENKA could not rely on its right to terminate if it was demonstrated that the blockades and protests were caused by its own breaches. The question is therefore whether ENKA breached its obligations under Articles 5.1 and 3.1.1 in a way that was causative of the situation that it had to face, and on which it relies to terminate the BOO.

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865 RL-72, Equator Principles, Principle 5.

866 Rejoinder, paras. 133, 142, 802(b) and (c), Section II.C.2; SoD, paras. 111-113, 423(2).

867 Rejoinder, paras. 261-269.

868 Rejoinder, para. 802(d), Section II.C; SoD, paras. 423-424, Section II.D.2

869 Rejoinder, para. 394, 397; SoD, paras. 423-424, and Section II.E.2.

870 R-PHB, paras. 4(4), 234.

871 Rejoinder, paras. 787, 797.

872 Reply, paras. 374-735.

a) Stakeholder engagement

596. The first complaint articulated by the GOG against ENKA's stakeholder engagement programme is the allegation that it somehow dismantled, in April 2019, the team that had been put together by CEG to accomplish that task and stopped the engagement activities until the protests against the Project started in the summer of 2020.

597. According to the GOG, in the first years after it was awarded the Project, in 2017 and 2018, CEG recruited a group of specialists in social engagement and environmental activities[873] who carried out a series of tasks aimed at fulfilling the stakeholders' engagement obligation of the company under the BOO Agreement, such as drafting plans and strategies to manage the social and environmental effects of the Project and identifying the stakeholders and engaging with them.[874] However, since Enka Insaat took control of ENKA in April 2019, it dissolved the team of specialists and dismissed about 25 of its employees, disbanded the social support centres set up by CEG's team to engage with the local communities, thus suspending the communication efforts for more than a year until manifestations against the Project began in July 2020.[875] The new management team appointed by Enka Insaat also ignored and abandoned the plans that had been prepared by the CEG's team to perform continuous and specific stakeholder engagement work for the Project.[876]

598. The Arbitral Tribunal is not prepared to draw the conclusion that these facts constitute a breach of the BOO Agreement. The BOO Agreement does not include any specific requirement as to the qualification and size of the team in charge of stakeholders' engagement, and there is no contractual or legal obligation upon ENKA to always maintain a minimum team in charge of liaising with the communities.[877]

599. ENKA submits that its decision to reduce workforce in April 2019 and to close some of the existing support centres was justified by the fact that some permits needed to be revised before the construction works could start.[878] The Tribunal cannot exclude that this may temporarily have created a vacuum, as submitted by the GOG,[879] which may

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873 R-PHB, para. 53; Rejoinder, paras. 187 *et seq*; C-169, ENKA Draft Board Minutes, dated 14 September 2017, p. 5; C-181, ENKA's Board Meeting, dated 2 May 2018, Item 5.18 'Organisation and recruitment CEGG'.

874 R-PHB, para. 47; Rejoinder, paras. 189-193; SoD, para. 114; R-55, Q&A Paper, dated 8 July 2019, p. 4.

875 SoD, para. 115.

876 R-PHB, para. 54; Rejoinder, paras. 189-192, 194, 198; C-172, Social Policy Report, dated 9 October 2017, p. 4; C-200, Stakeholder Engagement Plan (Rev. I), dated 18 November 2018, pp. 11-12, 39, 72-74; C-201, Communication Strategy, dated 18 November 2018, p. 7.

877 Reply, para. 357.

878 Reply, paras. 137-138, 149; CWS-3, Ozgen II, paras. 22-25.

879 Rejoinder, para. 215.

have been a cause for concern for the communities. The Tribunal also accepts that it is generally desirable that the stakeholders' engagement work be done with continuity by dedicated experienced personnel. However, the Tribunal is not prepared to conclude, in absence of any evidence to that effect, that failing to implement such best practices constitutes a breach of the Equator Principles, and even less that it was the determinative cause of the demonstrations and protests with which the Parties were faced.

600. The GOG then avers that under its own Stakeholder Engagement Plan, ENKA had to maintain and update a database detailing the stakeholder engagement activities, consultations, and prepare reports about its public outreach activities and management of environmental and social aspects of the Project,[880] and that there is no evidence that ENKA did so.[881] Again, the Tribunal cannot conclude from this fact that no adequate programme was implemented. Although traceability is certainly desirable, there is no basis in the record to conclude that the lack of a written record was such as to jeopardize the program and increase the opposition to the Project.

601. According to the GOG, ENKA's prior team organised CCCs, which were supposed to be key to ENKA's stakeholder engagement strategy. The CCCs met regularly between June and December 2018 to discuss several different issues,[882] but stopped being gathered after ENKA's management change in April 2019 and since then only focused on land acquisition and resettlement.[883]

602. The Arbitral Tribunal notes that ENKA continued to organise CCCs after April 2019,[884] and considers that the fact that the frequency of these meetings was reduced and that the topics for discussion had shifted to the land acquisition, resettlement, permits and recruiting issues was a natural evolution in view of the fact that other aspects had been already covered by then and that these questions were those which concerned most the local population.

603. Overall, ENKA initiated its social and environment outreach activities as soon as the Project was adjudicated and it developed a series of initiatives to fulfil its obligations under article 5.1 of the BOO Agreement. This engagement continued after April 2019 by engaging with the community for the sale of the land plots and employment

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880 C-200, Stakeholder Engagement Plan (Revision I), dated 18 November 2018, pp. 65-66; Evidentiary Hearing Tr., D2, pp. 40:22-41:9.

881 R-PHB, para. 77; Evidentiary Hearing Tr., D2, pp. 40:22-43:23.

882 C-200, Stakeholder Engagement Plan (Revision I), dated 18 November 2018, pp. 29; C-192, CCC Overview, dated 1 September 2018, p. 2.

883 R-PHB, para. 72; Evidentiary Hearing Tr., D2, pp. 50:20-51:22.

884 Other CCCs took place on November 2019 and March 2020 before the lockdown imposed because of the COVID pandemic.

opportunities. As Mr. Tvalabeishvili testified,[885] by September 2019, when the scoping report public meeting took place, although some environmental groups had raised concerns with respect to the Project, there was no substantial opposition to the same.

604. Based on the foregoing, the Arbitral Tribunal concludes that, although ENKA could certainly have had a better and more structured engagement programme, there is nothing pointing to a level of negligence that would constitute a breach of the BOO Agreement. The Tribunal notes, in this respect, that there is evidence of support to the Project from the local population[886] while the opposition mainly came from the outside or from groups fundamentally opposed to any hydropower project in the valley,[887] which supports the conclusion that a better or more structured engagement programme would not necessarily have had a major impact in reducing the opposition.

605. The Tribunal also finds comfort in concluding that the engagement programme was not as inadequate as posited by the GOG from the fact that the GOG did not complain, at the time, about the engagement programme. As said above, the obligation derived from the Equator Principles is for both Parties to cooperate to engage with the local communities in an ongoing manner and, had ENKA failed to engage in such cooperation, the GOG would no doubt have complained, which it did not until March 2021.[888] Besides, at the time of this first complaint in March 2021, the GOG did not specify what more should have been done to implement a proper engagement program.[889] Rather, the GOG also appears to have praised ENKA's social engagement efforts.[890]

b) Environmental concerns

606. The GOG asserts that ENKA mismanaged the Project's environmental impacts, which was worsened by ENKA's failures to comply with applicable environmental requirements.

607. Regarding the environmental impact of the Project, the Tribunal notes that ENKA obtained the revised environmental and construction permits[891] after December 2019 and agreed to deal with the criticism regarding seismic risks. Later, as part of the GOG's

885 RWS-2, Tvalabeishvili I, para. 25.

886 CWS-4, Kozan II, paras. 8-10; CWS-3, Ozgen II, para. 39; CWS-7, Alkan I, paras. 8, 13-14.

887 Reply, para. 181(d).

888 R-27, WhatsApp messages between Ms. Turnava and Mr. Celiker on 19 March 2021, p. 6.

889 C-PHB, para. 105(c); Reply, para. 362(b) and (c).

890 R-59, ENKA's email to the GOG, dated 24 July 2020; C-274, Trend News Agency Article "*Namakhvani HPP project – energy project of century, Georgian minister says*", dated 23 October 2020.

891 C-35, Revised Environmental Decision, dated 28 February 2020; C-57, revised Construction Permit, dated 22 April 2020.

Extraordinary Action Plan, ENKA agreed to submit technical documents for independent review and the review panel did not raise any concerns in this respect.[892] As to the alleged breaches of some of the conditions set by the permits, the GOG only referred to a minor incident that had occurred in October 2020 due to the fact that ENKA had understood these conditions to apply to the construction works (which had not yet started) rather than to the preparatory works. At any rate, this minor incident only led to the imposition by the Georgian Environment Department of a small penalty of around USD 2,000 at the end of April 2021, and it cannot be considered as a breach that would have been causative of the protests.[893]

608. The GOG also refers to the fact that the Tskaltubo Magistrates Court found in November of 2021 that ENKA had committed administrative offences and imposed penalties to it.[894] The Arbitral Tribunal, however, considers that those decisions cannot have played any role in the initiation of protests in the summer of 2020. At this point in time, ENKA had already terminated the BOO Agreement.

609. The Arbitral Tribunal will now address two interconnected allegations on which the Respondent has placed great emphasis to demonstrate that ENKA breached its obligations in a way that caused the protests to increase: its failure to participate in the Mediation and its refusal to accept a reduction of the Right to Build.

c) The Mediation

610. In March 2021, the GOG announced the Extraordinary Action Plan, which aimed at addressing the concerns raised by the Project[895] and, on 24 April 2021, a number of measures were implemented, including a review by an international law firm of the terms of the BOO Agreement and an independent mediation to be conducted by the Energy Community.[896] Those announcements, together with a firm police intervention, allowed the works to proceed during the month of April 2021. At the same time, the GOG engaged with ENKA with the aim of reducing the contractual term of the Right to Build,[897] which was perceived as an important potential concession needed to answer the concerns raised by the Project amongst the public and to ensure that the Orthodox Church would engage to placate the opposition.

611. On 26 April 2021, the MESD accordingly asked the Dispute Resolution and Negotiation Center of the Energy Community Secretariat[898] to organize a mediation between the

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892 C-491, ENKA's letter to the GOG, dated 12 April 2021.

893 Reply, para. 193; CWS-3, Ozgen II, paras. 100-102.

894 SoD, paras. 142-144.

895 C-93, Civil GE Article, dated 12 March 2021.

896 R-11, Statement by the GOG, dated 24 April 2021.

897 See *supra*, Section VI.P.

898 R-13, GOG's letter to the Energy Community Secretariat, dated 26 April 2021.

GOG and the civil society organizations opposed to the Project, such as the Guardians of the Rioni Valley and Green Alternative. The Energy Secretariat accepted the invitation and held in May 2021 several preparatory meetings with representatives of the GOG and interested parties. When invited to participate, ENKA however responded that it would not participate out of a concern that the Mediation would be used to impose upon it changes to the BOO Agreement, but it nonetheless offered to assist by providing information as needed.[899]

612. The Respondent alleges that, by refusing to participate in the Mediation, ENKA breached its duties under Article 5.1 of the BOO and Article 5 of the Equator Principles, which includes ENKA's obligation to effectively engage with stakeholders on an ongoing basis, and that this showed ENKA's lack of willingness to implement the Project in good faith in accordance with Article 3.1.1. of the BOO Agreement.[900] The Claimant submits that it did not breach the contract or any duty of good faith by refusing to engage in the mediation process, because it had no obligation to mediate and its decision was justified.[901]

613. The Arbitral Tribunal, again, sides with the Claimant. It may well be that, from a political or diplomatic perspective, the interests of the Project would have been better served by a participation rather than by a rejection of the Mediation. However, the Tribunal is not tasked with reconstructing what a wise, prudent and well-advised contractor could have done. The issue is whether refusal to participate in the Mediation was a breach of ENKA's obligations and whether any such breach caused the protests that led to the disruptions.

614. The Arbitral Tribunal considers that ENKA had no legal or contractual obligation to participate in the Mediation. Although, pursuant to Article 5.1 of the BOO, the Claimant undertook to respect the Equator Principles, the Arbitral Tribunal does not consider that it follows from these principles that the Claimant was obliged to participate in the Mediation. In fact, while Equator Principle 5 require "*the client to demonstrate effective Stakeholder Engagement, as an ongoing process in a structured and culturally appropriate manner, with Affected Communities, Workers and, where relevant, Other Stakeholders*", the Equator Principles leaves it to the client to determine the conditions and modalities of its engagement. The Tribunal, however, now needs to address the Respondent's argument based on the duty of care that is in its view embedded in the concept of good faith in Georgian law.

615. The Arbitral Tribunal accepts that the theory of good faith may, in Georgian law, have the effect of integrating into the parties' contractual obligations duties that are not

899 C-340, Mr. Kozan's notes of the phone call with Mr. Buschle, of the Energy Community, dated 7 June 2021.

900 SoD, paras. 238, 423(4).

901 C-PHB, paras. 111-114.

provided by the contract (the so-called integrative function of good faith) and that, under the general duty of good faith, a party may be required to sacrifice its own interests up to a certain point in order to safeguard the common contractual project (based on what is in some jurisdictions referred to as a duty of solidarity).

616. The Arbitral Tribunal however agrees with the legal authority submitted by the Respondent (Prof. Kereselidze) that a finding that the duty of good faith was breached by a party refusing to sacrifice its own interests requires evidence not only that such sacrifice was necessary to preserve the parties' common interest (in this case to preserve the Project), but also that the sacrifice does not disproportionately infringe on its own interests.[902]

617. There is however no evidence that ENKA sitting in a forum with the staunchest opponents to the Project would have had any beneficial effect. It might have but it may also be that these mediation discussions would have led to further confrontation. The protest groups' opposition to the Project was a matter of principle and it may well be that they would have used that forum as a platform, leading to increasingly defensive behaviour on the part of ENKA. The Tribunal notes, in this respect, that notwithstanding the agreement reached at the first Mediation meeting that the opposing groups would stop blocking the roads of access to the Site,[903] those groups maintained the blockade.

618. The Arbitral Tribunal can therefore only conclude that there is no evidence that participation in the Mediation would have put an end to the protests and blockades, save for ENKA accepting contractual concessions that it was not prepared to make, which issue goes to whether the sacrifice expected from ENKA was limited, and which the Tribunal will now address.

d) The issue of the Right to Build

619. In March 2021, the Respondent asked ENKA to consider a reduction of the term of the Right to Build from 99 years to 49 years, which it believed would alleviate the public perception that the GOG was giving away its land and natural resources to a foreign investor.[904] The Parties discussed this possibility through exchange of correspondence and in meetings in May and June 2021.[905]

620. The Respondent alleges that ENKA did not participate in good faith in these discussions

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902 RER-3, Kereselidze II, para. 73; also RL-102, D. Kereselidze, "*The Most General Concepts of Private Law*" (2009), p. 1 ("*The obligation to consider another person's interests arises within the scope of freedom governed by the principle of good faith, provided it does not disproportionately infringe upon one's own interests*").

903 C-115, Email chain between Mr. Kozan and the Energy Community, dated 14 June 2021, p. 2.

904 C-92, WhatsApp messages between Mr. Ozgen and Mr. Tkavadze, dated 11 March 2021.

905 See *supra*, Section VI.P.

and that it opposed any reduction of the term while that was a mere symbolic change that would not have caused it any harm and was essential to rein in the opposition. According to the Respondent, that was a violation of ENKA's duty to implement the Project in good faith.[906] The Claimant objects that the requested contractual amendment was not purely symbolic and would have significantly altered the allocation of rights and risks under the BOO, but that it nonetheless accepted to consider it in good faith. According to the Claimant, the relevance of the requested change appears from the fact that the GOG was ready to accept significant concessions in exchange.[907]

621. It is undisputed that the land rights are an indispensable condition for the construction and operation of the Plants. The term 'Land Rights' is defined in Article 1.1 as "*the necessary land rights to any land parcel (including but not limited to the land parcels included in Annex 1 (Location) hereof) comprising the Required Land including, ownership, Right to Build, right of usage and Right of Way, which may be necessary for the design, construction, removing and storing of soil, boroughs, extraction of natural resources (including quarries), reforestation, resettlement and construction of transmission lines, testing, commissioning, operation, ownership and maintenance of the Plants and overall implementation of the Project provided that such land parcels are located in the Rioni valley within the boundaries of Imereti and Racha-Lechkhumi regions*". It is plain from that provision that the land rights are "*necessary*" for the construction, operation and maintenance of the Plants.

622. Article 3.2.6(a) of the BOO provides that "*the GOG shall register under the State ownership all State-Owned Land needed for the construction and operation of each Plant and the Roads, within thirty (30) days of receiving a detailed description (in the form of shape files), as required by the Company from time to time*".

623. Article 3.2(b) of the BOO further provides that "*within forty-five (45) days after receiving the application from the Company, the GOG shall transfer the non-agricultural State-Owned Land into the ownership of the Company using a Land Transfer Agreement that is substantially in the form of Annex 9 (Model Land Transfer Agreement)*".

624. Pursuant to Georgian law, some of the land plots needed for the Project were not susceptible to be sold, so that the GOG was required to grant ENKA a Right to Build over them.[908] A Right to Build is defined in the BOO as the "*title to operate and use of the land which is second only to the ownership title under the laws of Georgia.*"[909]

625. Finally, article (m) of Annex 5 of the BOO provides that "*the GOG shall ensure that all*

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906 R-PHB, para. 234.

907 Reply, para. 400(b).

908 C-4, BOO Agreement, Art. 3.2.6(e). SoD, para. 101.

909 C-4, BOO Agreement, Art. 1.1, definition of "Right to Build".

Right to Build Agreements entered in relation to the Required Lands are valid for the term of ninety-nine (99) years".

626. These provisions, therefore, clearly provide that in order to allow ENKA to construct and operate the Plants, the GOG had to ensure that the Right to Build be transferred and registered in favour of ENKA for 99 years.

627. The Respondent's position is that the 99 years duration of the Right to Build granted to ENKA was perceived by the general public as if it were a transfer of ownership of the land, something that the Georgian public could not accept.[910] A reduction from 99 to 49 years would thus have been a positive signal of appeasement, which the Orthodox Church requested in order to use its important influence to calm the protests.[911] Such a concession, in the Respondent's contention, would have been immaterial to ENKA as, at the expiry of the reduced 49 years duration, the GOG would have been contractually obliged to renew the Right to Build, so that the concession required from ENKA would have been purely "*cosmetic*".[912]

628. The GOG's position is usefully summarized as follows: "*when the Rights to Build came to an end (whether after 49 or after 99 years), nobody else could run the Project. Though Georgian law provides that, at the expiry of rights to build, the owner of the plot of land (here, Georgia) can choose between paying the leaseholder (Enka Renewables) compensation or extending the duration of the rights at issue, Georgia was required under Article 3.2.19 of the BOO Agreement to extend the duration of the Rights to Build for the Term of the BOO Agreement; in other words, Georgia could not opt for compensation under Georgian law without breaching the BOO Agreement. In any event, it would make no commercial sense for Georgia to acquire structures built over or below the riverbed, without being able to buy out and operate the entire Project, such that Georgia would inevitably extend the duration of the Rights to Build.*"[913]

629. The Arbitral Tribunal is not convinced that ENKA breached in any way its contractual obligations or a duty of good faith by refusing to reduce the duration of the Right to Build to which it was entitled pursuant to the BOO Agreement.

630. As an initial matter, it remains doubtful that such a concession, had it been accepted, would have had the effect of placating the protests. The Respondent insists on the "*symbolic*" political importance of the concession, in particular in the eyes of the

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910 SoD, para. 184; RWS-1, Turnava I, para. 56.

911 Rejoinder, para. 333, 346, RWS-4, Turnava II, para. 89; RWS-1, Turnava I, para. 90; SoD, paras. 219-222.

912 R-PHB, para. 100; Rejoinder, para. 304; SoD, para. 186, 190.

913 R-PHB, para. 99(3).

Church.[914] As discussed at the Evidentiary Hearing,[915] however, assuming that the change was really "*cosmetic*" as the Respondent posits, the opposition to the Project would no doubt have realised that the announced concession had no substance, which may have had the effect of feeding the protests rather than calming them. There is also no evidence that a symbolic concession would not have been perceived as a sign of weakness and inflamed the situation even further.

631. Finally, there is no evidence that the Orthodox Church and its hierarchy requested that change to be made, or represented in any way that, if made, the Church would have intervened successfully to terminate the protests. The Arbitral Tribunal is in this respect sensitive to the fact that the Respondent has not produced any correspondence or meeting minutes with the Georgian Church to that effect. This may well be explained, as Minister Turnava testified,[916] by the fact that government officials used to communicate orally. Nonetheless, in absence of any evidence, the Arbitral Tribunal cannot accept as a proven fact either that (i) the Church requested that this contractual change be made, or that (ii) the Church would have endeavoured, if it were made, to placate the protests, and even less that (iii) these endeavours would have been successful.

632. It is in light of the foregoing that the question of whether the duty of good faith imposed on ENKA to accept a reduction of its land rights must be assessed. As said above, the Tribunal accepts that, as a matter of Georgian law, the duty of good faith can impose upon a party to sacrifice to a limited extend its contractual rights to protect the common interest of the parties. However, the Tribunal finds the Respondent's submission concerning the land rights to be inherently contradictory. In fact, either the concession requested was 'symbolic', and as said above the Claimant could nurture legitimate doubts as to its usefulness, or it was not, and the question then becomes that of the proportionality of the sacrifice requested with the expected benefits of the reduction in terms of re-establishing a normal situation on site. From that perspective, the Tribunal considers that the proposed reduction went well beyond the limited contractual sacrifices that the solidaristic concept of good faith can impose on a party.

633. The Respondent relies in this respect on Article 3.2.19 of the BOO, which provides that "*the GOG acknowledges and agrees that the rights to operate the Plants granted to the Company under this Agreement, including the rights referenced in Article 3.2.6 (Land Rights) shall be definite and irrevocable and remain with the Company for the Term. Any relevant renewals shall be in accordance with the Laws of Georgia*".

634. The 'Term' is defined in Article 1.1 as "*a term of validity of this Agreement commencing on the date of this Agreement and continuing until the expiration of the Operations*

914 R-PHB, paras. 4(4), 88, 98.

915 Evidentiary Hearing Tr., D1, p. 105:17-22.

916 Evidentiary Hearing Tr., D3, p.183:10-16; Tr. D4, p. 22:12-14.

Phase of the latest Plant or (in case of early termination of this Agreement in accordance with its terms), until the Termination Date". The term 'Operation Phase' is defined as "*the period commencing from the Actual Completion Date of any such Plant and continuing throughout the life time of such Plant, or in the event of earlier termination of this Agreement, to the date of such termination in accordance with the terms hereof*". According to these provisions, as noted by the GOG, ENKA is contractually entitled to operate the Plants throughout their lifetime, which is in excess of 100 years.[917]

635. It is therefore correct that, had the duration of the Right to Build been reduced, ENKA would still have been entitled to operate the Plants beyond the reduced term of the land rights and the GOG would have had the contractual obligation to extend these. However, contrary to Respondent's submission,[918] the situation arising from such a reduction would not have been equivalent to that established by the BOO, where ENKA had the assurance to enjoy the land rights for at least 99 years.

636. Despite ENKA enjoying a contractual right to the land rights renewal, it would still have had to seek that renewal, which would have been pursuant to Article 3.2.19 "*in accordance with the laws of Georgia*". Pursuant to Article 1.1 of the BOO, the term 'Laws of Georgia' means "*any international treaty which is ratified by and is in force for Georgia, any Georgian national or local normative act or any individual administrative-legal act, which is issued by anybody or officer of public governance of Georgia, to the extent it has become effective, including respective interpretations by competent Public Authorities and/or any Georgian court, as such may be in effect from time to time during the Term of this Agreement*". These terms therefore refer to the laws of Georgia in force throughout the term of the BOO. The GOG's contractual obligation to renew the Right to Build would therefore have been subject to the laws of Georgia in force at the time of the renewal.

637. This is of course an important reservation because in absence of a stabilization clause, the laws of Georgia would in all likelihood change over a 49-year period. It cannot be excluded that, in a changing political climate, the Georgian legislation could introduce legislative restrictions to the extension of the Right to Build having the effect of limiting or even excluding an extension. In that scenario, ENKA would be able to terminate and seek compensation pursuant to Article 8.2.5(b) of the BOO.

638. In other words, while in the actual scenario ENKA has the assurance to enjoy the Right to Build for 99 years, under the proposed change ENKA may be faced with a termination after 49 years. Although the Claimant would in that scenario be compensated for the FMV of its assets, the proposed change would still introduce an element of risk and uncertainty on the future of the contract that cannot, in the Tribunal's view, be

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917 See *supra*, para. 93.

918 R-PHB, para. 99(3).

considered as a minor or even less, cosmetic concession that the general duty of good faith can impose on a party.

639. Based on the foregoing, the Arbitral Tribunal concludes that ENKA did not act in bad faith by refusing a reduction of the Right to Build. The fact that ENKA accepted to enter into negotiations with the GOG in this respect and sought to obtain in compensation a significant increase of the PPA period duration (from 15 years to 35 years and from 8 months to 12 months each year) is irrelevant. It is always open to any party to seek a renegotiation of its contract terms. In this case, that negotiation was prompted by the concession requested by the GOG, and it was entirely reasonable for ENKA to seek a trade-off against that concession.

B. Non-Physical Force Majeure

640. The Claimant relies on the occurrence of a non-physical force majeure event to terminate based on Article 9.2.2 (b) of the BOO. Article 9.2.2(b) provides as follows: "*The Company may unilaterally terminate this Agreement by giving a Termination Notice to the GOG based on: (b) circumstances set forth in Article* […] *8.1.8 (Force Majeure).*"

641. The Arbitral Tribunal has already found that the Claimant is entitled to terminate the BOO based on an Event of Default, but the following developments are included for the sake of the completeness of this award. In view of the high stakes of this arbitration, the Arbitral Tribunal considers appropriate to assess whether the Claimant's right to terminate would also be based on Force Majeure, even if the Tribunal would have reached a different conclusion on the Respondent's breach of Articles 3.2.14 and 3.2.20.

1. <u>Was there Non-Physical Force Majeure Event?</u>

642. Pursuant to Article 1.1, a Force Majeure Event "*has the meaning set forth in Article 8.1.1 (Force Majeure)*". Pursuant to Article 8.1.1, a Force Majeure Event means:

> "*any circumstance not within the reasonable control, directly or indirectly, of the Party affected (the 'Affected Party') resulting in or causing a total or partial failure or non-performance or delayed performance of the Affected Party in the fulfilment of any of its obligations under this Agreement (other than the payment of money), but only if and to the extent that:*
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> *such circumstance, despite the exercise of reasonable diligence, cannot be or could not have been prevented, avoided or removed by the Affected Party;*
>
> *the Affected Party took or has taken reasonable precautions, due care and reasonable alternative measures in order to avoid the effect of such event on the Affected Party's ability to perform its obligations under this Agreement and to mitigate the consequences thereof; and*
>
> *the event is not, or was not, the direct or indirect result of the breach by the Affected Party of any of its obligations under this Agreement.*"

643. Pursuant to Article 8.1.3 (a) of the BOO, non-physical Force Majeure events include the

following circumstances:

> "*(ix) any public agitation or protests preventing construction or operating activities of the Project and/or the Project exceeding twenty-one (21) days in aggregate in any six (6) month period.*"

644. Finally, Article 8.1.8 of the BOO provides that:

> "*if any Force Majeure Event or Change in Law or event under Article 8.2.1(d) (Compensation Events): (i) prevents, delays or hinders or could reasonably prevent delay or hinder with the lapse of time, a Party from performing an obligation under this Agreement for an aggregate period of more than one hundred and eighty (180) days* [...], *or (ii) frustrates the economic basis for the implementation or operation of the Project as contemplated by this Agreement, then (A) for any Force Majeure Event or Change in Law or event under Article 8.2.1(d) (Compensation Events), the Company shall have the right to terminate this Agreement in accordance with the terms hereof, and (B) in the event this Agreement is terminated by the Company for a Non-Physical Force Majeure Event or Change in Law or event under Article 8.2.1(d) (Compensation Events), the GOG shall purchase all of the Transferable Assets for a purchase price calculated in accordance with Article 9.4.3 (Termination for Prolonged Non-Physical Force Majeure Event or Change in Law)....*"

645. In order for the Claimant to terminate pursuant to these provisions of the BOO, it is therefore necessary that a Non-Physical Force Majeure Event occurred having hindered the performance of its obligations under the BOO Agreement for more than 180 days.

646. As an initial matter, Article 8.1.1 refers to "*any circumstance*" and Article 8.1.8 refers to "*any Force Majeure Event*". Both being in the singular, termination for Force Majeure requires that a single event has hindered the performance of the BOO for more than 180 days.

647. Second, Article 8.1.3(a)(ix) requires, in order for "*public agitation or protests*" to fall under that provision, that they prevented construction or operation activities for more than 21 days "*in any six month period*". This provision may thus be read as meaning that public agitation or protests only constitute a Force Majeure event if they prevent performance for more than 21 days in a six-month period, which would in turn mean that a sequence of protests lasting less than 21 days could not be treated as such.

648. However, Article 8.1.3(a) is only illustrative, as shown by the use of the word "*include*".[919] The Force Majeure event which is referred to at Article 8.1.8 is defined at Article 8.1.1, not at Article 8.1.3. In contrast with Article 8.1.8, Article 8.1.1 does not include any temporal requirement and only requires that a "*circumstance*" has caused

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919 As noted above at footnote 811, both legal experts agree that, according to Georgian law principles of interpretation, if the wording of a contract clause is clear, it should be applied according to its terms as reflecting the parties' intention: RER-1, Kereselidze I, para. 19; CER-2, Fromm I, para. 19.

non-performance of the affected party's obligation. The temporal requirement that applies to a termination for Force Majeure is found at Article 8.1.8, providing that the period of non-performance has lasted "*for an aggregate period of more than one hundred and eighty (180) days*". As shown by the term "*aggregate*", different sequences of disturbances can be aggregated to constitute one single Force Majeure event.

649. There is no difference between the Parties on that point. The Parties, as shall now be seen, however diverge on the conditions in which different sequences can be aggregated to constitute one single Force Majeure event for purposes of a termination.

650. The Claimant has in this respect submitted that whether a series of protests constitute a single Force Majeure Event or separate Events depends on whether such protests are sufficiently closely connected.[920] The Respondent has submitted at the Closing Hearing that the correct standard is whether an event could have occurred but for the other events: "*The answer you heard from* [the Claimant] *was whether the events were sufficiently closely connected. I think we could probably agree with that, but that still remains a bit of a wishy-washy definition, and the more precise conceptual answer is if it had not been for the action of one organisation, for example Green Alternative, would the folks of Save the Rioni Valley nevertheless have organised their own protest?*".[921]

651. In sum, the Parties agree that a single Force Majeure Event may have disrupted performance during several non-consecutive periods of time, but they disagree on the conditions for the aggregation of such non-consecutive periods of time. While the Claimant considers that aggregation is subject to a sufficient connection between these events, the Respondent submits a stricter standard based on which the connection would not exist if a successive event would have taken place irrespective of the previous ones. In practice, the Respondent considers that the relevant criteria to assess whether that condition is met includes whether the organisers of each protest are the same. For example, a protest organized by Green Alternative would not be sufficiently connected to one organized by Save the Rioni Valley because, even if Green Alternative had not acted against the Project, Save the Rioni Valley would have acted anyway, showing that the protests organised by the two groups were independent and therefore lacked the necessary connection to be aggregated.

652. The Respondent also avers that the various events have "*a number of obvious differences*",[922] including that the October 2020/January 2021 disruption involved the erection of a cross at the site by Church members, which issue was resolved on 29 January 2021, while the February/March disruption was due to violent protesters with Molotov cocktails and the March/April stoppage was by agreement between the Parties

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920 C-PHB, para. 164(c)-(e).

921 Closing Hearing Tr., p. 265:7-15.

922 R-PHB, para. 210.

rather than the result of protests or public agitation.

653. The Arbitral Tribunal sides with the Claimant.

654. In order to assess whether several protests can be considered as one single event, what matters is in fact not whether the protests occurred in different ways (for example by way of a violent attack against personnel as opposed to a peaceful blockade) or involved different participants, but whether they pursued the same objective and were sufficiently close in time. The Arbitral Tribunal considers that these two conditions are satisfied in the present case.

655. First, irrespective of whether they involved the Guardians of the Rioni Valley led by Varlam Goletiani, Green Alternative, or members of the Georgian Orthodox Church, the protests have as a common characteristic that they all aimed at blocking the Project.

656. Second, these circumstances are closely related chronologically. Only 2 days separate the removal of the steel cross on 30 January 2021[923] from the violent incidents that started on 1 February 2021, continued during the month of February, and culminated with the rally against the Project in Kutaisi.[924] Just after that, the GOG requested ENKA to stop the works on Site from 1 March until 3 April 2021 and, after the 23 May 2021 rally in Tbilisi,[925] the protestors, including the Guardians of the Rioni Valley, [926] returned to Gumati to block access to the Site between 27 May and 19 September 2021.[927] As both Parties acknowledged,[928] since the start of the protests in October 2020, ENKA only managed to work continually without major interruptions during about 1 month and a half between the first days of April and the 27 May 2021.

657. This chain of events shows that, rather than being isolated and unconnected protests, the activism of each of the groups involved energized the others and contributed to a movement of protest that was at the same time multiform and unified by a common goal.

658. The Arbitral Tribunal therefore considers that the various protests having hindered the

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923 See *supra*, para. 152.

924 C-87, Civil GE Article, dated 28 February 2021.

925 C-99, Agenda GE Article, dated 23 May 2021.

926 C-115, Email of Mrs. Bujaroska, from Energy Community to Mr. Kozan stating that one of the points of agreement in the Mediation was that "*The Guardians of the Rioni will continue peaceful protest without blocking access to the construction site.*"

927 C-105, ENKA's letter to the GOG, dated 4 June 2021; C-107, ENKA's letter to the GOG, dated 9 June 2021; C-110, WhatsApp messages between Mr. Kozan and Mrs. Turnava, dated 10 June 2021; C-111, ENKA's letter to the GOG, dated 11 June 2021; C-114, ENKA's letter to the GOG, dated 16 June 2021; C-122, Daily Letters; C-70, Daily Reports pp. 167-281.

928 Claimant's Chart of Disruptions and Respondent's Chart of Disruptions.

Project from 27 October 2020 to 19 September 2021 constituted one single Force Majeure Event.

659. The question remains of whether the suspension requested by the GOG and accepted by ENKA from 1 March 2021 to 2 April 2021 should be considered as part of that Force Majeure Event. The Arbitral Tribunal considers that excluding this period of suspension from the Force Majeure event would be artificial. In fact, the request to suspend the works was a precautionary measure adopted by the GOG after the massive rally organised by the protestors in Kutaisi on 28 February 2021 and was aimed at preventing a further escalation of the violence.[929] Therefore, the stoppage requested by the GOG in March 2021 was an effect of the same Force Majeure Event as it was closely connected to the overall movement of protests and blockades.

660. The question is now to assess whether this event prevented, delayed or hindered the performance of ENKA's obligations for an aggregate period of more than 180 days, as required by Article 8.1.8.

661. Two preliminary questions need to be assessed at this point. The first is whether Sundays and holidays should be included in the 180 days count. ENKA avers in this respect that they should,[930] while the Respondent submits that they should not.[931] The second is the treatment of days during which access to site was only partially hindered.

662. The first question is straightforward. Article 1.2.8 of the BOO in fact provides that "*whenever this Agreement refers to a number of 'days', such number shall refer to calendar days unless Business Days are specified*". Because Article 8.1.8 refers to "*days*", this term should be understood as calendar days, therefore including Sundays and other non-working days.

663. The GOG avers that Article 1.2.8 is irrelevant because that provision applies to time-limits while Article 8.1.8 does not refer to a time limit but to the number of days during which a Force Majeure Event prevents, delays or hinder a party from performing an obligation under this agreement. The 180 days provided in Article 8.1.8 are therefore days when a party was supposed to perform an obligation, which must mean business days.

664. The Arbitral Tribunal disagrees. Article 1.2.8 is in fact clear that "*whenever this Agreement refers to a number of days*", such number shall refer to calendar days unless Business Days are specified. That provision therefore has a general scope and is not

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929 C-155, WhatsApp messages between Mr. Kocaoglu and Mrs. Turnava, dated 28 February, 18 March and 31 March 2021; C-94, WhatsApp messages between Mr. Ozgen and Mrs. Turbava, dated 14 March 2021

930 C-PHB, para. 161; Closing Hearing Tr., p. 258:6-21; Claimant's Chart of Disruptions.

931 Closing Hearing Tr., pp. 176:19-177:6; Respondent's Chart of Disruptions; R-PHB, footnotes 455, 457, 459, 461.

limited to instances where the term 'day' is used to calculate a time limit.

665. As to the second question, it is answered by the express terms of Article 8.1.1, which refers as a Force Majeure event to circumstances causing "*a total or partial failure*" in the fulfilment of any of the obligations under the BOO.

666. There is common ground, in general terms,[932] on the four periods of time during which the works were totally or partially stopped by one of the circumstances that the Tribunal considers being part of the Force Majeure event:

- between 27 October 2020 and 29 January 2021 (protests on site and erection of a steel cross): 95 calendar days;
- between 31 January and 23 February 2021 (without counting the 20th February) (incidents and violent events on site): 22 calendar days;
- between 1 March and 2 April 2021 (stoppage by agreement with the GOG): 33 calendar days;
- between 28 May and 19 September 2021 (blockade of the access to the Site): 116 calendar days.

667. These four periods total 266 days, exceeding the 180 days required by Article 8.1.8.

668. ENKA avers that the event satisfies the requirements of Article 8.1.1 because:

- despite the exercise of reasonable diligence, they could not have been prevented, avoided or removed by ENKA;
- ENKA took reasonable precautions, due care and reasonable alternative measures to avoid the effects of such events and to mitigate the consequences;
- the event was not the direct or indirect result of any contractual breach of ENKA.

669. These averments are disputed by the Respondent and have been discussed above.

670. As to the first of these three requirements, the Arbitral Tribunal found that ENKA did not fail to exercise reasonable due diligence to prevent, avoid or remove the event. The Tribunal found that ENKA's refusal to participate in the Mediation or to accept a reduction of the Right to Build was not unreasonable,[933] that ENKA did not breach its

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932 ENKA affirms that in the entire period between 27 October 2020 and 19 September 2021 there were 50 days of non-affected works, whereas the GOG affirms that there were 49 days of non-affected works (i.e. without total or partial disturbance). The major difference in the Parties' account of the days affected by total or partial disturbances is explained by the treatment given to Sundays and holidays.

933 See *supra*, paras. 617-618, 639.

stakeholders' engagement programme,[934] and that ENKA cooperated with the GOG in its attempts to calm the protests, in particular by accepting to suspend the works at the request of the Authorities from 1 March to 2 April 2021.[935]

671. As to the second requirement, the Tribunal considers that ENKA took reasonable precautions and due care to avoid the effects of such events, by notifying and coordinating with the GOG in order to solve the situation in the most appropriate manner, as when ENKA requested the intervention of the GOG to organise the removal of the cross, and ordered their workers to stay in their rooms to avoid confrontation, or when they looked to find alternative routes to avoid the blockades. The reference in Article 8.1.1 (b) to "*alternative measures*" must be understood as a reference to measures that were reasonably available to ENKA and the Arbitral Tribunal considers that ENKA was, in the circumstances, under no obligation to resort to measures alternative to termination, such as seeking delay damages.[936] The Arbitral Tribunal therefore sees no reason to conclude that ENKA failed to take reasonable precautions, due care and reasonable alternative measures to avoid the effects of the Force Majeure Event or to mitigate its consequences.

672. As to the third requirement, the Tribunal found that the event was not the direct or indirect result of a breach of ENKA's obligations.[937]

2. Notice

673. The Arbitral Tribunal must now assess whether the contractual requirements concerning notice of the Force Majeure have been complied with.

674. The Respondent acknowledges 222 days of full or partial stoppage from 27 October 2020 to 19 September 2021,[938] but submits that 58 of these days should be excluded for lack of valid notice, thus reducing the number of stoppage days to 164, *i.e.* below the 180 days threshold required by Article 8.1.8. The Respondent's position as to the days in respect of which there was no notice is usefully summarized in its post-hearing brief as follows:[939]

a) 46 days of stoppages from 1 February to 2 March 2021 and 3 March to 2 April 2021, corresponding to 21 days of stoppage between 1 February and 2 March (excluding 20 February and 24 to 27 February) due to attacks in respect of which no notice was given, and 25 days of stoppage in March as requested by the GOG and accepted by

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934 See *supra*, paras. 604-605.

935 See *supra*, para. 157.

936 See *infra*, para. 697.

937 See *supra*, paras. 604, 617- 618, 639.

938 R-PHB, para. 214.

939 R-PHB, fn. 466.

ENKA;

b) 2 days of stoppages on 8 and 27 May 2021 for which no notice was given;

c) 10 days of stoppages from 28 May to 8 June 2021, based on the fact that the relevant notices of 4 and 9 June 2021 only mentioned access problems without referring to force majeure.

675. The Claimant asserts that:

a) notice is not a condition precedent to the right to terminate under Article 8.1.2;

b) the Claimant did not need to notify the stoppage of works that were requested by the GOG in March 2020 because the purpose of the notice is to make the situation known to the GOG;[940]

c) the stoppage from 28 May 2021 until the termination of the BOO was notified by letters of 4 June 2021, the Daily Letters, and the 9 July 2021 letter.[941]

676. The Tribunal has already decided that the number of days to be counted is of calendar days. Therefore, the number of total or partial stoppages would be 266 rather than 222 days.

677. The Tribunal will now deal with the Parties' arguments concerning the notice requirement.

678. Article 8.1.2 of the BOO Agreement provides that "*as soon as reasonably practicable, the Affected Party shall give the other Party (the 'Non-Affected Party') notice of a Force Majeure Event, but in any event within five (5) Business Days from the date of occurrence of the respective Force Majeure Event*".

679. The first argument advanced by the Claimant is in this respect that "*giving notice of a Force Majeure Event is not expressed to be, and is not in fact, a condition precedent to the right to terminate.*"[942] The Arbitral Tribunal disagrees for two reasons.

680. The first is that the Claimant's interpretation would in practice deprive Article 8.1.2 of any significance. If a party could terminate for Force Majeure without having given any notice of the events on which it relies for so doing, then such provision would be deprived of any effect. That would not be consistent with the principle, discussed above, according to which contracts should be applied according to their clear terms.

681. The second is that Article 8.1.2 needs to be read in conjunction with Article 8.1.1. Read

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940 Reply, para. 369(b)(ii).

941 Reply, para. 369(b)(iii).

942 C-PHB, para. 167(a).

together,[943] it is clear that the requirement of a notice is part of the conditions under which an event may qualify as force majeure. Read together, Articles 8.1.1 and 8.1.2 mean that an event that has the effect of totally or partially preventing performance and that has been notified to the other party may qualify as force majeure.

682. The Tribunal, however, agrees with the Claimant's second argument that, in circumstances where the suspension had been requested by the GOG itself, the requirement of a notice should not apply.[944] The *raison d'être* of the notice is in fact to inform the GOG that a certain circumstance occurred which may qualify as a Force Majeure Event. Enforcing such a requirement in circumstances where the event is a suspension that the GOG itself requested would be unduly formalistic and contrary to common sense. It is noteworthy, in that perspective, that Article 8.1.1 does not impose any formal requirement as to the content of a force majeure notice. In particular, it does not require the aggrieved party to specify that it intends to rely on Article 8.1. The only requirement is that the occurrence of the event be notified to the GOG for information purposes.

683. As a further consideration, Article 8.1.2 does not require that each single circumstance giving rise to a Force Majeure Event give rise to a separate notice. As explained above, termination based on Article 8.1.8 requires a single Force Majeure Event, and Article 8.1.2 requires that this single event has been notified. As said above, in the case at hand, the various suspensions, protests and blockades having occurred from October 2020 to September 2021, including the suspension requested as a precautionary measure by the GOG on March 2021, are closely related, both in terms of their objective characteristics and chronologically, so that they constitute one single Force Majeure Event. It is undisputed that ENKA gave notice of this single Force Majeure Event as soon as 28 October 2020,[945] and then on 11 November and 13 November 2020[946] and again on 4 June 2021[947] at the beginning of the disruption period that is found to entitle ENKA to terminate.[948] These notices are sufficient to satisfy the requirement of Article 8.1.2 for the entire period of suspension until termination.

684. Based on the foregoing, the Arbitral Tribunal concludes that the requirement of a notice

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943 As noted by the Georgian law authority on which the Respondent relies, the overall content of the contract must be taken into account when interpreting separate contractual provisions. RER-1, Kereselidze I, para. 25, RL-8, GCC, Art. 338.

944 Closing Hearing Tr., p. 257:5-12; C-PHB, para. 167(c).

945 C-66, ENKA's letter to the GOG, dated 28 October 2020.

946 C-71, ENKA's letter to the MESD, dated 5 November 2020; C-277, ENKA's letter to the MESD, dated 11 November 2020; C-73, ENKA's letter to the MESD, dated 13 November 2020.

947 C-105, ENKA's letter to the GOG, dated 4 June 2021.

948 See *supra*, para. 583.

has been satisfied at least for 266 days of partial or total stoppage,[949] and that ENKA was therefore also entitled to terminate pursuant to Article 8.1.8 of the BOO.

C. Alleged bad faith termination

685. The Respondent avers that, even if it was done in accordance with the BOO Agreement, ENKA's termination was invalid as it was pretextual and made in bad faith.[950]

686. The Respondent's bad faith argument is premised on the allegation that, after the bid, ENKA realized that the Project had become financially and operationally burdensome and unprofitable because ENKA was unable to properly manage the Project, the Project had become riskier than initially anticipated, and ENKA had failed to obtain financing for the Project, so that the already marginal prospects of profitability had become worse.[951] ENKA therefore decided to "*sabotage*" the GOG's efforts to save the Project by frustrating the negotiations about the term of the Right to Build[952] and by refusing to participate in the Mediation,[953] and ultimately failed to take any of the alternative options available and instead rushed to terminate the BOO Agreement on 20 September 2021.[954]

687. The Respondent also submits that the Claimant failed to produce any financial models and assessment of ENKA from 2019-2021, as ordered by the Tribunal during the document production phase,[955] and asks the Tribunal to infer that such documents would confirm that (i) the Project's value was low or negative, and that (ii) this was a key reason underlying the termination.[956]

688. The Claimant rejects these submissions and submits that ENKA always believed that the Project was profitable and always tried to pursue the execution of the BOO Agreement until it become impossible, and even then, it sent daily notifications to the GOG with the aim of resuming the works. ENKA had the opportunity to leave the Project before signing the BOO or sell its shares to the GOG but preferred to stay involved and continue investing because it was convinced that it was a good investment. ENKA accepted to negotiate in good faith with the GOG about the reduction of the Right to Build but the Parties did not reach an agreement and it did not accept to

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949 95 days from 27 October 2020 to 29 January 2021, plus 22 days in February 2021, plus 33 days between the end of February and 2 April 2021, plus 116 days from 27 May to 19 September 2021.

950 Rejoinder, para. 617; SoD, paras. 336-343.

951 R-PHB, paras. 226-228.

952 R-PHB, para. 229 and Sections II.D.2 and II.E.1.

953 R-PHB, para. 229 and Section II.E.2.

954 R-PHB, para. 231.

955 Procedural Order No. 3, Annex 2, p. 103, Request No. 20.

956 R-PHB, para 114(4); Rejoinder, para. 455.

participate in the Mediation, because it had good reasons not to do so.

689. The Arbitral Tribunal has already decided that ENKA had legitimate reasons not to participate in the Mediation or to accept a reduction of the Right to Build, and that in doing so it did not breach its duty of good faith.[957]

690. ENKA may of course be held to have terminated the BOO in bad faith for other reasons, but the Respondent has not established any other possible ground allowing the Tribunal to conclude that termination was in bad faith. The Tribunal agrees in this respect with ENKA that, as a matter of Georgian law, the motivations of a party in exercising a contractual right are only relevant in the case of abuse of right, which is defined by Article 115 GCC as the fact of acting with the sole intention of harming the other party.[958] However, the Respondent did not invoke Article 115 and, had it done so, the Tribunal would have rejected such a contention. In circumstances where it is established that the GOG breached its obligation to ensure free access to the Site and ENKA was confronted with blockades and protests during several months, it cannot be seriously sustained that the termination was abusive and made with the aim of harming the GOG.

691. Beyond that, the Arbitral Tribunal is not prepared to accept the Respondent's submission that as early as the end of 2018, several months before signing the BOO, ENKA understood the value of the Project to be negative.[959] There is in fact no reason to believe that an experienced party like ENKA would have entered in the BOO had it not believed that it would be profitable. ENKA would certainly not have invested around USD 60 million in sunk costs and committed to invest several hundreds of millions more[960] had it thought that the Project was unviable.

692. The Respondent's contention is also contradicted by the conclusions reached in the following parts of this award concerning the FMV. The fact that the Joint Model leads to a significantly positive FMV at the valuation date is in fact inconsistent with the Respondent's contention that the Project was loss-making since day 1. That same reason leads the Tribunal to reject the Respondent's request for adverse inferences.

693. Nor is there any evidence that, as averred by the Respondent, the tariffs were too low to make the Project profitable. ENKA has in this respect submitted that General Development LLC made a much lower bid than ENKA[961] and that Powerchina's was

957 See *supra*, paras. 618, 639.

958 RL-8, GCC, Article 115: "*A civil right shall be exercised lawfully. A right may not be exercised with a sole intention to inflict damages on another person*".

959 RER-4, Wreford II, 3.43-3.49.

960 CWS-5, Gucuyener I, para. 84; C-127, ENKA's Financial Model, January 2022, "InputS Con" tab, sum of column G).

961 Evidentiary Hearing Tr., D4, pp. 233:24-234:19.

just slightly over its bid.[962] The Respondent has on its part relied on the tariffs in other projects, such as Khudoni and Nenskra.[963] The Tribunal does not believe that debate to be relevant to the question at stake. Different bidders may build their offers on different tariffs, and tariffs are of course different in different projects depending on their costs and characteristics. For present purposes, it suffices for the Tribunal to reject the Respondent's contention that the BOO was terminated in bad faith, that ENKA has established an Event of Default allowing it to terminate, and that no abuse of right or even bad faith behaviour has been established.

694. Equally inconsistent are the Respondent's arguments concerning ENKA's alleged incapacity to obtain external financing and the ceiling for debt financing in the SHAs.[964] Even assuming that ENKA had difficulties in obtaining debt financing, that fact alone would not provide any indication as to the motivations of the termination which, as said above, have been found to be the protests and lack of access to the Site.

695. The Parties have also argued on the values derived from the Lenders' models, some of which were indeed negative.[965] Mr. Wreford, however, has accepted at the Evidentiary Hearing that these models were essentially stress tests that are of limited relevance to an assessment of the fundamentals of the Project.[966]

696. As concerns the Respondent's argument that ENKA's CEO asked for a schedule of termination scenarios as soon as 7 June 2021,[967] it is also misconceived as, at that time, ENKA was already facing a very difficult situation due to the blockades, and it was entirely reasonable for the CEO to assess its options.[968]

697. The Respondent's argument that ENKA could have considered less harmful options than termination, such as seeking compensation for delays,[969] fares no better. The BOO in fact provides for remedies that the Parties have carefully negotiated, and resorting to the contractually agreed remedies cannot in and by itself be a breach, save in case of abuse of rights, as discussed above. In the instant case, a GOG Event of Default has been established, and the agreed remedy in that case is termination and compensation, not

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962 C-PHB, para. 141(a) and fn. 351.

963 Rejoinder, para. 112.

964 C-PHB, para. 145; CWS-5, Gucuyener I, para. 31(c); Evidentiary Hearing Tr., D3, pp. 67-70 and 134-135.

965 RER-4, Wreford II, paras 3.43 -3.49; Rejoinder, paras. 43, 136-137, 454-455.

966 Evidentiary Hearing Tr., D5, pp. 201:12-207:12.

967 Rejoinder, paras. 49, 355; R-201, Emails between Messrs. Kozan, Tara, Celiker and Guven, dated 7 June 2021.

968 C-PHB, para. 150(c); Evidentiary Hearing Tr., D2, pp. 178:11-183:8 and 219:2-221:23.

969 R-PHB, para. 231; SoD, para. 351.

delay damages.

698. In addition, as said above,[970] the Arbitral Tribunal considers that ENKA had the right to complete the Project in the agreed schedule so as to start generating profits and that, in circumstances where it was faced to an indefinite suspension of works with no reasonable prospect of a return to normality in the foreseeable future, it could not be held to seek extensions of time rather than exercising its legitimate right to terminate.

699. Finally, it cannot be seriously argued that ENKA is at fault for not having accepted an equity investment by the GOG in ENKA.[971] ENKA was in fact under no obligation to accept such an offer and there is also no evidence that, had the GOG entered into the share capital of ENKA, this would have contributed in any way to placate the protests.

700. Based on the foregoing, the Arbitral Tribunal rejects the Respondent's arguments on bad faith termination.

D. FMV

701. The consequences of termination by ENKA are regulated in Articles 9.4.2 and 9.4.3.

702. Article 9.4.2 applies to termination based on Article 9.2.2(a), i.e. an Event of Default. It provides in its relevant parts that:

> "*In the event that the Company terminates this Agreement due to a GOG Event of Default* […] *then the Company may, at its option, require the Government to purchase the Transferable Assets and, if so required, the Government shall purchase from the Company and the Company shall transfer to the Government or its designee the Transferable Assets in accordance with Article […] 9.4.7 (Transfer of the Transferable Assets to the GOG following Termination) for the amount (the 'Government's Default Termination Amount') denominated in US Dollars which is equal to the greater of:*
>
> *(a) the aggregate of:*
>
>> *(i) the Base Amount (if any);*
>>
>> *(ii) the total amount of all documented damages, breakage costs, fees and expenses related to the termination or buyout of contracts to which the Company is a party and which are terminated or breached by the Company in conjunction with the termination of this Agreement or sale to the GOG of the Transferable Assets, plus any costs incurred by the Company in securing the Company's release from all liability under contracts included within the Transferable Assets;*

[970] See *supra*, para. 562.

[971] R-PHB, para. 231.

(iii) all taxes payable on the transfer of the Transferable Assets;

(iv) the Equity Investment; and

(v) the Tax Gross-Up Amount; and

(b) the aggregate of:

(i) the Fair Market Value of the Transferable Assets;

(ii) the total amount of all documented damages, breakage costs, fees and expenses related to the termination or buyout of contracts to which the Company is a party and which are terminated or breached by the Company in conjunction with the termination of this Agreement or sale to the GOG of the Transferable Assets, plus any costs incurred by the Company in securing the Company's release from all liability under contracts included within the Transferable Assets;

(iii) all taxes payable on the transfer of the Transferable Assets; and

(iv) the Tax Gross-Up Amount."

703. Article 9.4.3 applies to termination for Force Majeure based on Article 8.1.8. It provides in its relevant parts that:

> "*In the event that the Company terminates this Agreement due to a prolonged Non-Physical Force Majeure Event* […] *pursuant to Article 8.1.8 (Force Majeure),* […] *then the Company may, at its option, require the Government to purchase the Transferable Assets and, if so required, the Government shall purchase from the Company and the Company shall transfer to the Government or its designee the Transferable Assets in accordance with Article* […] *9.4.7 (Transfer of the Transferable Assets to the GOG following Termination) for the amount denominated in US Dollars which is equal to the Government's Default Termination Amount (the 'Non-Physical Force Majeure Termination Amount').*"

704. Article 1.1 of the BOO defines the terms "*Government's Default Termination Amount*" as having "*the meaning set forth in Article 9.4.2 (Termination by the Company)*".

705. Therefore, in circumstances where – as in this case – the Claimant has elected to require the GOG to purchase the Transferable Assets, both provisions mirror each other and require the Arbitral Tribunal to assess the Government's Default Termination Amount in accordance with Article 9.4.2.

706. In the instant case, the Claimant seeks payment of the FMV of the Transferable Assets, as well as the Tax Gross-Up. The other items composing the Government's Default Termination Amount according to Article 9.4.2 have been claimed but not substantiated by the Claimant.

707. Pursuant to Article 1.1 of the BOO, the term "Fair Market Value" means:

> "*the value of a Person's interests, investments, property, commercial arrangements, rights, privileges and exemptions, taking into account that Person's business and investments, all as related to or affected by the Project, and determined on the basis of an ongoing concern utilising the discounted cash flow method by applying a discount rate calculated as a Person's cost of capital (where each category of capital is proportionately weighted and finally determined by the Approved Auditor), assuming a willing buyer and willing seller in a non-hostile environment and disregarding all unfavourable circumstances (including any diminution of value) leading up to or associated with termination of this Agreement. For the avoidance of doubt, the Fair Market Value determined hereunder shall not be less than the most recent book value of the relevant interest or right.*"

708. Based on that provision, it is uncontroversial that the FMV must be assessed by assuming an ongoing concern, applying a DCF methodology, assuming a willing buyer and a willing seller and in a but-for scenario that disregards all unfavourable circumstances associated with termination.

709. The FMV definition, however, raises a question of interpretation on which the Parties disagree, and which is material to the FMV assessment: the meaning of the terms "*Person's interest*" and the reference to a "*non-hostile environment*". In substance, the Claimant avers that the FMV should be assessed objectively by ignoring the financing decisions taken by Enka and its shareholders,[972] while the Respondent submits that the "*Person*" referred to in the FMV definition is the owner of the Transferable Assets, i.e., Enka Renewables.[973]

710. Pursuant to Article 1.1 of the BOO, the term "*Person*" means "*any individual, corporation, partnership, association, company, unincorporated organization or joint venture or any other legal entity*". That definition does therefore not provide an answer to the question posed. However, in the Tribunal's view, the terms "*value of a Person's interests*" cannot, for purposes of the definition of the value of assets in the context of their transfer, refer to anything else than the value of the assets owned by the Person transferring them, which in this case is ENKA. This, in the Tribunal's view, means that the FMV of the Transferable Assets needs to be assessed by disregarding the unfavourable circumstances that led to termination (*i.e.* in a but-for scenario), but considering the legal and contractual environment of the investment, including the agreements entered into by the shareholders and the agreed financing conditions. This conclusion finds comfort in the reference, in the FMV definition, to the "*Person's cost of capital*", which does not refer to the cost of capital of a theoretical efficient operator, but to ENKA's actual cost of capital in a but-for scenario.

711. The payment of the Buyout Amount must be done in accordance with Article 9.4.6 of

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972 C-PHB, para. 180(d) and (e).

973 R-PHB, paras. 254-255.

the BOO. Article 9.4.6 provides that:

> *"As soon as reasonably practicable and in any event no later than sixty (60) days after the Termination Date, the Company shall submit an invoice to the GOG setting out the Termination Amounts payable by GOG, if any, to the Company pursuant to this Article 9.4.6 (Payment of Buyout Amounts) (the 'Termination Invoice').*
>
> *If requested by the GOG, and any such request must be made by the GOG not later than fifteen (15) days following its receipt of the Termination Invoice, the Company shall arrange for the Company's calculation of the Fair Market Value (if any) in the Termination Invoice to be verified by an Approved Auditor.*
>
> *The Approved Auditor shall be responsible for reviewing the Company's calculation of the Fair Market Value and, within thirty (30) days of receiving such calculation, issue a report to the Company (and copied to the GOG) confirming either that the Fair Market Value set out in the Termination Invoice has been properly calculated or if, in the Approved Auditor's opinion, it has not been properly calculated, its own calculation of the Fair Market Value.*
>
> *The certificate of the Approved Auditor shall (save in the case of manifest error) be conclusive and binding. The Approved Auditor shall act as an expert and not as an arbitrator. The reasonable costs and expenses of the Approved Auditor shall be borne equally between the Company and the GOG. The Approved Auditor shall be entitled to have access to the Company's premises and to its books, records and other documents for the purposes of carrying out their review, and each of the Parties shall promptly on request supply to the Approved Auditor all such documents and information as the Approved Auditor may require for the purposes of their functions pursuant to this Article 9.4.6 (Payment of Buyout Amounts).*
>
> *The GOG shall, subject to paragraph (f) below, pay to the Company the amount shown in the Termination Invoice, subject to, in the case of any Fair Market Value calculation, any adjustment proposed in the report of the Approved Auditor (less any amounts owed by the Company to the GOG under this Agreement) no later than one hundred and eighty (180) days following the date of delivery of the Termination Invoice to the GOG or, if later, thirty (30) days after the Parties' receipt of the report of the Approved Auditor."*

712. Article 9.4.6 therefore establishes a procedure whereby ENKA first has to issue a termination invoice setting out the FMV. This was done on 20 September 2021[974] and the termination invoice was for a FMV of USD 1,480,787,947.

713. The GOG may then request that value to be verified by an "Approved Auditor". This was done by the GOG on 4 October 2021.[975]

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974 C-20, Termination Invoice, dated 20 September 2021.

975 C-22, Letter from the GOG to ENKA, dated 4 October 2021.

714. Pursuant to Article 1.1, the term "Approved Auditor" means "*(a) an auditor selected by the Company from the list in Annex 12 (Approved Auditors); or (b) if the Company does not select an auditor from the list in Annex 12 (Approved Auditors), such other auditor as the Company and the GOG agree*".

715. Annex 12 provides that: "*Any of the following firms shall constitute an Approved Auditor: (a) PwC; (b) Deloitte; (c) KPMG; or (d) EY*".

716. As is apparent from that provision, the BOO did not limit ENKA's choice amongst these four firms, nor did it impose any limitation in terms of which offices of each of these firms should be entrusted with the work.

717. Once the GOG requests a review of the FMV by the Approved Auditor, the same has, within thirty (30) days, to "*issue a report*" to the Company (and copied to the GOG) either confirming that the Fair Market Value set out in the Termination Invoice was properly calculated or providing "*its own calculation*" of the FMV, which shall be "*conclusive and binding*" as a binding expert determination.

718. On 22 December 2021, ENKA selected DRT to act as Approved Auditor[976] and, on 15 February 2022, DRT issued the DRT Determination, setting the FMV at USD 305,000,000.[977]

719. These provisions have given rise to two important points of contention between the Parties, that the Arbitral Tribunal will now address. First, the Respondent contends that the Parties agreed that, if the GOG objected to the DRT Determination, the Tribunal would disregard it and assess the FMV itself (**1**). Second, the Respondent avers that the DRT Determination does not comply with the requirement set by Article 9.4.6 that a "*report*" be issued and is inconsistent with fundamental principles of international public policy (**2**).

1. <u>Existence of a procedural agreement that the Arbitral Tribunal should disregard the DRT Determination and determine the FMV itself:</u>

720. The Respondent avers that a procedural agreement was concluded between the Parties by way of an offer contained in paragraph 60(i) of the RfA and an acceptance contained in the Answer.

721. Paragraph 60(i) of the RfA reads as follows:

> "*To the extent that the GOG maintains its present position and it invites this Tribunal to determine that the certificate of the Approved Auditor is not binding, that the Company has not properly calculated the Fair Market Value in the*

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976 R-15, Letter from ENKA to the GOG, dated 10 January 2022, p. 1.

977 C-26, DRT Determination, dated 15 February 2022, para. 3.6.

> *Termination Invoice and that the Tribunal should therefore determine a lower figure, the Company will agree to determination by the Tribunal, and will in those circumstances contend that the Fair Market Value calculated in the Termination Invoice is correct and that there are no adjustments to be made to the figure there stated*".

722. In its relevant parts, the Answer contains the following statements:

> "*As indicated in Section IV.B.1 above, Georgia's position is indeed that DRT's calculation of the Fair Market Value is not in accordance with the BOO Agreement, and is therefore not final and binding. In these circumstances, Georgia agrees that, in the event that the Tribunal were to find Enka's purported termination to be valid, the Tribunal should determine the Fair Market Value itself, in accordance with the provisions of the BOO Agreement.*"

723. The Respondent submits that this exchange constitutes a valid agreement under Georgian law,[978] and that the terms of the offer are clear and do not require interpretation. According to the Respondent, the commercial context confirms that ENKA wanted to renounce the DRT Determination because it reduced its calculation of the FMV by more than USD 1 billion. The RfA confirms this interpretation because it does not state or request a declaration that the DRT Determination is final and binding, which is consistent with the Respondent's offer that the Tribunal calculate the FMV itself.[979]

724. The Respondent also alleges that, by virtue of the principle of estoppel, which applies to all arbitrations seated in France,[980] ENKA cannot change its prior position in respect of paragraph 60(i) of the RfA.[981] According to the GOG, ENKA unequivocally declared in its RfA that it would agree to a determination of the FMV by the Tribunal if the GOG continued to contest the validity of the DRT Determination, and then completely changed its position to purport to rely on the FMV stated in DRT Determination.[982]

725. In the alternative, the GOG submits that, both under French arbitration law and under Georgian law, ENKA's declaration in paragraph 60(i) of the RfA amounts to a waiver of ENKA's right to rely on the DRT Determination as a conclusive and binding

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978 Rejoinder, para. 867; RER-3, Kereselidze II, paras. 7-10.

979 Rejoinder, para. 853.

980 Rejoinder, para. 921; RL-13, E. Gaillard, "*L'interdiction de se contredire au détriment d'autrui comme principe général du droit du commerce international*", Rev. arb. 1985.241, p. 258, para. 17; RL-14, M. Danis, B. Siino, "*Note sous Cour d'appel de Paris, 20 septembre 2007*", Rev. arb. 2008.327, p. 328; RL-15, Rouen Court of Appeal, 25 november 2004, *Cogecot Cotton Company v. Marlan's Cotton Industries MCI*, Gaz. Pal., 28 April 2005, n° 118, p. 32.

981 Rejoinder, para. 916; SoD, para. 137.

982 Rejoinder, para. 927.

determination of the FMV.[983] In French law, the principle of waiver is concerned with unilateral conduct and is deduced from the analysis of the conduct of a party taken in isolation.[984] Articles 448 and 451 of the GCC provide that parties may bilaterally waive a contractual right, with the effect that neither party can invoke the contractual right against each other.[985] The GOG asserts that by virtue of their statements in the RfA and Answer, ENKA and the GOG have waived their rights to argue that the DRT Determination is conclusive and binding.[986] Furthermore, the Georgian-law principle of *venire contra factum proprium* prohibits ENKA from contradicting its prior conduct by now seeking to rely on the DRT Determination.[987]

726. ENKA, on its part, denies having made an offer to the GOG to abandon its case in respect of the binding nature of the DRT Determination. Paragraph 60(i) of the RfA only states that, if the GOG argued that the DRT Determination was not binding and that position was accepted, then the Claimant would submit an alternative case inviting the Arbitral Tribunal to assess the FMV.[988]

727. ENKA also submits that the elements of an estoppel are not satisfied in the present case[989] because: (i) there is no inconsistency in ENKA's pleaded case; (ii) any representation made in paragraph 60(i) of the RfA was not clear and unequivocal; (iii) if there was an inconsistency, that inconsistency has been resolved in the ToR and the SoC, and no longer exists; (iv) there is no suggestion that the GOG has been misled regarding ENKA's case; (v) there is no suggestion by the GOG that it relied on paragraph 60(i) in any way because the Respondent devoted a significant part of the Answer to arguing that the DRT Determination was invalid; and finally, (vi) the GOG did not suffer any detriment in reliance on paragraph 60(i) as ENKA clarified that there was no agreement within a month of the filing of the Answer and before the ToR were signed.[990]

728. As to the waiver argument, ENKA considers that the waiver of a contractual right requires that both parties agree to terminate such right and French law is not relevant in that respect.[991] In this case, ENKA did not purport to waive its rights in respect of the

983 Rejoinder, para. 940.

984 Rejoinder, para. 943; RL-21, Ph. Pinsolle, "*Note sous Cass. 1ère civ., 6 juillet 2005*", Rev. arb. 2005.994, p. 1005; also RL-14, M. Danis, B. Siino, "*Note sous Cour d'appel de Paris, 20 septembre 2007*", Rev. arb. 2008.327, p. 329.

985 Rejoinder, para. 947; RER-1, Kereselidze I, paras. 57-62; RL-8, GCC, Arts. 448 and 451.

986 Rejoinder, para. 949.

987 Rejoinder, para. 954; SoD, paras. 139-140; RER-1, Keserelidze I, paras. 13-15.

988 Reply, para. 417(a).

989 Reply, para. 439.

990 Reply, para. 439(f)(iii).

991 Reply, para. 441.

DRT Determination.[992]

729. The Arbitral Tribunal will deal briefly with these arguments. In fact, as shall be seen in following sections of this award, the Tribunal will find that the DRT Determination does not comply with the requirements of the BOO and is therefore invalid. As a result, the Tribunal will have to assess the FMV itself, which makes the discussion on the purported procedural agreement moot.

730. It suffices to say, however, that the Tribunal considers unlikely that ENKA could have agreed to leave the fate of the DRT Determination entirely in the Respondent's hands by agreeing that it would be disregarded if the Respondent objected to it, thus leaving to the Respondent to accept it in its discretion. It is also unlikely in the Tribunal's view that, if the Parties had agreed to disregard the DRT Determination, they would have done that in such convoluted and unclear terms through the RfA and the Answer, rather than concluding such agreement in clear terms by way of an exchange of letters or emails between them.

731. The Arbitral Tribunal certainly accepts that the drafting of paragraph 60(i) of the RfA is obscure and may have created a misunderstanding, which undermines the Respondent's claims of estoppel and waiver. Yet, the most reasonable reading of paragraph 60(i) is that the Claimant intended to say that, if the Tribunal accepted the Respondent's position as to the nullity of the DRT Determination, then the Tribunal would have to assess the FMV itself. This was not unreasonable to state in the Request because the BOO is silent on that question, and this is indeed a point on which the Parties now agree in the scenario in which – as is the case - the Tribunal rejects the procedural agreement theory.

2. Invalidity of the DRT Determination

732. The Respondent submits that the DRT Determination is not a valid, conclusive and binding Approved Auditor certificate. In fact, the procedure for selecting, hiring and working with DRT, was contrary to basic notions of fairness, good faith and equality since ENKA (i) unilaterally selected, briefed and instructed DRT; (ii) ignored the contractual requirement to share the costs of the Approved Auditor to exclude the GOG from the process;[993] (iii) selected a local auditor based in Istanbul;[994] (iv) DRT met with ENKA, Enka Insaat, their lawyers and their valuation adviser to hear ENKA's FMV calculation and accepted the supporting data that ENKA wished to provide without allowing the GOG to do the same, as shown by the fact that DRT asked 53 questions to ENKA and only 3 to the GOG;[995] and (v) ENKA withheld from DRT important

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992 Reply, para. 442.

993 C-455, DRT Engagement letter, dated 22 December 2021, Arts. 3.1 and 4.1.1.

994 Rejoinder, paras. 1175-1178.

995 Rejoinder, paras. 1179-1186.

information and misled DRT on key issues so as to achieve a higher FMV.[996]

733. The Respondent also submits that the DRT Determination cannot constitute an Approved Auditor's Certificate because it only states in three lines that the FMV is USD 305 million, so that it cannot be considered a "*report*" providing DRT's "*calculation*" of the FMV, as required by the BOO Agreement.[997] The Determination also fails to indicate the adopted methodology and to provide a weighting of the different categories of capital as required by the BOO Agreement.[998]

734. Finally, the DRT Determination is manifestly erroneous because (i) it is so incomplete that not even an expert can verify the result;[999] (ii) the correct FMV, on both Parties' cases, deviates more than 25% from DRT Determination;[1000] (iii) the determination violates good faith as a result of the process followed by ENKA; and (iv) ENKA withheld relevant material and provided DRT with incomplete information, leading to a higher FMV,[1001] this last defect alone being sufficient to invalidate it regardless of any fraud.[1002] In sum, an award confirming the DRT Determination would be contrary to international public policy.[1003]

735. The Claimant, in contrast, submits that (i) the process for selecting and hiring DRT followed the BOO Agreement; (ii) there was no contractual basis for the GOG's request to be involved in the process; (iii) there was nothing unusual in the way in which DRT was engaged;[1004] (iv) there was no requirement that the Approved Auditor be independent (although it was) and the fact that the Approved Auditor was the Turkish subsidiary of Deloitte is not an issue as Deloitte is a global firm, the team was led by a partner in London and it included individuals from London, Istanbul and Georgia;[1005] (v) there was no need for the Approved Auditor to perform a conflict check since the

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996 R-PHB, para. 335 and Section II.F.2.

997 C-4, BOO Agreement, Art. 9.4.6(c): "[t]*he Approved Auditor shall be responsible for reviewing the Company's calculation of the FMV and, within thirty (30) days of receiving such calculation, issue a report to the Company (and copied to the GOG) confirming either that the FMV set out in the Termination Invoice has been properly calculated or if, in the Approved Auditor's opinion, it has not been properly calculated, its own calculation of the FMV*."

998 Rejoinder, para. 1200(3).

999 Wreford I, paras. 12.9-12.11.

1000 See *supra*, para. 510.

1001 R-PHB, para. 334, Section II.F.2(b).

1002 R-PHB, para. 334(4).

1003 Rejoinder, paras. 1214-1220; RL-74, French CPC, Art. 1520(5).

1004 Reply, para. 466; C-453, Letter of Instruction from Skadden to DRT, dated 19 November 2022; C-455, DRT Engagement Letter, dated 22 December 2021; C-486, DRT Correspondence.

1005 Reply, para. 468 and fn. 415.

Parties pre-selected the accountancy firms in Annex 12 of the BOO Agreement;[1006] (vi) there was nothing objectionable in the fact that DRT met with ENKA on two occasions without the GOG being present as the meetings were video recorded and the GOG made no complaint in this respect;[1007] (vii) rules concerning the principles of adversarial procedure were not applicable to a binding expert determination;[1008] and (viii) it was for DRT to decide what questions to ask and to whom and it is normal that DRT asked more questions to ENKA than to the GOG because it was engaged to review ENKA's calculation and information.[1009] In addition, DRT asked relevant questions to the GOG and the GOG decided not to respond in breach of Article 9.4.6(d) of the BOO Agreement.[1010]

736. As to the form of DRT Determination, ENKA submits that (i) the BOO Agreement does not require any particular form nor does it require the Approved Auditor to provide reasons, to describe the method used or to attach evidence in support of its conclusions;[1011] and (ii) the concise and restricted character of the DRT Determination is explained by the limited time available and the limited scope of the work, as explained by DRT.[1012]

737. Finally, ENKA submits that there is no basis to conclude that the DRT Determination was manifestly erroneous because (i) the meaning of manifest error must be construed within the context of the BOO Agreement, and the term 'error' means a mistake and the term 'manifest' means obvious, so the mistake must be obvious from the face of the certificate;[1013] (ii) the purpose of Article 9.4.6(d) ("*the certificate of the Approved Auditor shall (save in case of manifest error) be conclusive and binding*") was to give the Parties finality and avoid further disputes; (iii) the Approved Auditor had to complete its task within a short period of 30 days and the Parties therefore accepted that mistakes might be made; and (iv) the test proposed by the Respondent that DRT's calculation shall not deviate by more than 20-25% of a properly determined result is not compatible with the characteristics of the procedure and its purpose.[1014]

738. The starting point of the analysis should, in the Tribunal's view, be Articles 9.4.6 (b) and (c) of the BOO. These provisions read as follows:

1006 Reply, para. 470.

1007 Reply, para. 474(b); SoD, paras. 290, 292.

1008 Reply, paras. 479, 484.

1009 Reply, para. 475(b).

1010 Reply, para. 475(d).

1011 Reply, paras. 483, 493.

1012 Reply, paras. 495-496; C-26, DRT Determination, dated 15 February 2022, paras. 4.1 to 4.3.

1013 Reply, para. 509.

1014 Reply, paras. 512-513.

> "*(b) If requested by the GOG, and any such request must be made by the GOG not later than fifteen (15) days following its receipt of the Termination Invoice, the Company shall arrange for the Company's calculation of the Fair Market Value (if any) in the Termination Invoice to be verified by an Approved Auditor.*
>
> *(c) The Approved Auditor shall be responsible for reviewing the Company's calculation of the Fair Market Value and, within thirty (30) days of receiving such calculation, issue a report to the Company (and copied to the GOG) confirming either that the Fair Market Value set out in the Termination Invoice has been properly calculated or if, in the Approved Auditor's opinion, it has not been properly calculated, its own calculation of the Fair Market Value.*"

739. These two provisions are directly related to the definition of the FMV contained in Article 1.1, which provides that the FMV is to be calculated by "*utilising the discounted cash flow method by applying a discount rate calculated as a Person's cost of capital (where each category of capital is proportionately weighted and finally determined by the Approved Auditor).*"

740. These three provisions are closely intertwined and should be read together. Article 9.4.6(b) provides that the Approved Auditor must verify the FMV, which according to Article 9.4.6(c) must be done in a "*report*". The definition of FMV in turn specifies that the Approved Auditor must utilize the DCF method by applying a discount rate calculated as ENKA's cost of capital where each category of capital is proportionately weighed. The content of the "*report*" to be issued by the Approved Auditor is determined by the conjunction of these provisions and requires that the report include the Approved Auditor's "*own calculation of the Fair Market Value*" performed as required in Article 1.1.

741. The DRT Determination, however, does not include the Approved Auditor's "*own calculation*" of the FMV in accordance with Article 1.1. Rather, it only provides the *result* of the calculation, which is completely different. One thing is to issue a report including a calculation, which would as a minimum have required an explanation of the model used, and another completely different thing is to only provide the result of a calculation. In the Arbitral Tribunal's view, in order to satisfy the requirement of Article 1.1, the DRT Determination should have included an indication of the methodology used, the underlying data as well as the assumptions based on which the result is obtained.

742. The Tribunal therefore concludes that DRT failed to issue a report containing its own calculation of the FMV, and for this reason the report cannot be accepted as "*conclusive and binding*" in accordance with Article 9.4.6(d).

743. Based on the foregoing, the Arbitral Tribunal will now proceed to calculate the FMV itself.

744. In view of the conclusions so reached by the Tribunal, there is no need to address the other arguments of the Parties concerning fraud, due process and procedural public

policy.

E. Calculation of the FMV

745. As said above, the definition of FMV contained in Article 1.1 requires applying the discounted cash flow method by applying a discount rate calculated as Enka's cost of capital where each category of capital is proportionately weighted and by assuming a willing buyer and a willing seller in a non-hostile environment and disregarding the unfavourable circumstances associated with the termination.

746. The experts and the Parties have, in consultation with the Arbitral Tribunal, agreed on a Joint Model allowing the Tribunal to calculate the FMV by selecting different entries concerning the items on which they were unable to agree.

747. The Arbitral Tribunal considers that the structure of this Joint Model complies with the requirements set in Article 1.1. The Arbitral Tribunal raised at the Closing Hearing the question of whether, by using the Joint Model, the Tribunal could encounter any inconsistency, and both Parties answered to the negative subject to their points of disagreements and the questions raised in the Joint Report.[1015] In essence, neither of the Parties has submitted that, by electing different entries as allowed by the Joint Model, it could produce a result that would not be compliant with the requirements of the BOO.

748. This, however, is subject to two threshold considerations, the first being whether the cost of capital is that of a theoretical efficient operator or ENKA's actual cost of capital in a but for scenario and the second whether the WACC method or the APV method should be used.

749. The first of these two questions has been decided above.[1016] The second has been addressed by the Arbitral Tribunal in its communication of 27 March 2024, when it decided whether the Quantum Experts should prepare the Joint Model and Joint Report by utilising both methodologies, APV and WACC, as proposed by Mr. Caldwell, or only the WACC methodology proposed by Mr. Wreford.

750. In relevant parts, that decision reads as follows:

> "2. *For the reasons expressed below, the Tribunal adopts the Wreford approach and rejects at this stage the Caldwell proposal that each expert should translate its respective model into the approach of the other expert.*
>
> 3. *In deciding that the joint model should be WACC-based, the Tribunal first considers that the Caldwell approach would, by requiring each expert to work based on two different methodologies, introduce an unnecessary element of complexity in the assessment of the FMV. In addition, either these two*

1015 Closing Hearing Tr., pp. 290:15-291:11.

1016 See *supra*, para. 710.

methods will produce identical or similar results (as should be expected) and the time and cost related to the exercise will have been useless, or they will produce substantively different results, which would require the Tribunal either to adjust these different outcomes or to elect between one of them, thereby essentially taking away the benefit of having both quantum experts working together on a joint model. The Tribunal has, pursuant to Article 22.1 of the Rules, the duty to conduct the arbitration in an expeditious and cost-effective manner, which requires it to direct the experts to adopt the method that is most likely to reduce the cost and complexity of the determination of the FMV while giving the Tribunal a sound basis allowing it - in the scenario in which it would reach that point - to determine the FMV in the award without having to seek further submissions by the parties.

4. In reaching this conclusion, the Tribunal has also considered that Article 1.1. of the BOO requires the FMV to be calculated by using a discounting method where each category of capital is proportionally weighted, which is achieved by the WACC method, to which both parties have made reference in their dealings prior to the arbitration."[1017]

751. The Arbitral Tribunal confirms that decision as it considers that a WACC-based calculation better conforms to the requirements that the FMV be calculated by applying a discount rate calculated as ENKA's cost of capital. The Joint Model proposed by the experts is WACC-based and will therefore be used. The Arbitral Tribunal will now discuss each of the entries to calculate the FMV.

752. The following sections of this award will follow the order adopted by the experts in their Joint Report. The completed Joint Model is appended to this award, with the resulting FMV.

1. C.1: Valuation Date

753. The experts did not agree on the valuation date, which is a legal matter to be decided by the Arbitral Tribunal. The Claimant submits that the valuation date should be 20 September 2021, being the date of the Termination Notice, while the Respondent submits that the date should be the effective date of termination, *i.e.* 21 October 2021.

754. The Arbitral Tribunal considers that the FMV being a component of the Government's Default Termination Amount, which is, pursuant to Article 9.4.6(e), to be paid upon termination, the valuation dated must be the date at which termination took effect. Pursuant to the definition of the term "*Termination Notice*" in Article 1.1, termination takes effect 30 days thereafter. The Termination Notice having been served on 20 September 2021, the termination took effect on **21 October 2021**, which is therefore the valuation date.

2. C.2.1: Merchant price escalation: Annual or Monthly

[1017] Arbitral Tribunal's letter to the Parties, dated 27 March 2024.

755. Mr. Caldwell inflates prices on an annual basis while Mr. Wreford performed his DCF calculations by using monthly cash flows, which are inflated monthly. This point of disagreement applies to the 2020 cashflows. Mr. Caldwell's approach assumes a mid-year effect while Mr. Wreford's treats the 2020 prices as year-end prices, meaning that he does not start inflating the figures until January 2021.[1018]

756. The Arbitral Tribunal adopts Mr. Caldwell's **annual** approach, which appears to reflect more accurately the effect of inflation on the 2020 prices.

3. <u>C.3: 2021 Inflation: Actual or 2%</u>

757. This item applies to the inflation adjustment for 2021. Mr. Caldwell applies an historical inflation rate of 4.7% in 2021, while Mr. Wreford applies the 2% rate that was used in ENKA's model.[1019] The Arbitral Tribunal adopts Mr. Wreford's approach because, at the valuation date in October 2021, the actual inflation data was not known and the **2%** used by Mr. Wreford is consistent with the inflation escalation assumptions made in ENKA's model.

4. <u>C.4.1: Second Electro-Mechanical (EM) Overhaul</u>

758. The difference between the experts is that Mr. Caldwell assumes a single overhaul in year 40, while Mr. Wreford assumes one in 2067 and another in 2105, i.e. every 40 years.[1020] The Arbitral Tribunal adopts Mr. Wreford's approach, as overhauls every 40 years are consistent with the assumptions in Enka's Financial Model. [1021]

5. <u>C.5.1: Depreciation Period: 50 years or 100 years</u>

759. The difference between the experts is that Mr. Caldwell assumes a depreciation period of 50 years that is consistent with the useful life of most of the equipment while Mr. Wreford assumes a depreciation calculated over the useful economic life of the Plants of a hundred years.[1022]

760. The Arbitral Tribunal adopts Mr. Caldwell's approach (**50 years**) because the 100 years useful life of the Plant does not imply that depreciation should not be made on a shorter period, consistent with the anticipated technical life of its key equipment. In this respect, the Arbitral Tribunal notes that the Parties and the experts have not made submissions on the applicable accounting rules and, in absence of contrary evidence, it is reasonable to assume that depreciation will be made prudentially on a shorter period of time. The Arbitral Tribunal agrees in this respect with Mr. Caldwell that the depreciation period

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1018 C-PHB, para. 188(a).

1019 C-127, Enka's Financial Model, January 2022, 'Esc' tab, rows 14 to 17 and 52 to 55.

1020 JER, Section C.4.1, pp. 9-10.

1021 C-127, Enka's Financial Model, January 2022, 'OpInc' tab, cell G82; RER-2, Wreford I, para. 5.43.

1022 JER, Section C.5.1, pp. 11-12.

should reflect accounting rules and in absence of evidence as to what these rules say,[1023] the more conservative approach is warranted.

761. The Arbitral Tribunal also notes that, as emphasised by Mr. Caldwell, the ENKA/EBRD-IFC Financial Models assume a depreciation period of only 15 years[1024] and accepting a 100-year period would introduce a significant mismatch with this assumption.

6. C.5.2: Inclusion of Capitalised Interest in Depreciable Asset Base

762. Mr. Caldwell proposes to include interest incurred during construction as it is common industry practice to fund construction partially with project finance debt. In contrast, Mr. Wreford does not include financing costs in the depreciable asset base because the Project had not secured any external debt financing.

763. As discussed above, the answer to this question depends on whether the FMV definition in Article 1.1 of the Contract is construed from the perspective of a hypothetical willing buyer by ignoring the contractual environment of the investment at the time of the disputed facts or whether the valuation should take into account the actual conditions of the Project while ignoring, in a but-for scenario, the unfavourable circumstances having led to termination.

764. The Arbitral Tribunal has in this respect decided that, this being a case where the Tribunal is tasked to assess the value of assets to be transferred in the context of the termination of a commercial contract, the cost of capital should be the actual cost of capital of ENKA in a but-for scenario, *i.e.* a cost of capital that takes into account the actual contractual environment of the Project, including the shareholders' arrangements and the lending conditions contemplated by the shareholders.[1025]

765. Based on the foregoing, because no debt finance has been secured for the construction costs, the Tribunal considers that capitalised interest should **not** be included in the depreciable asset base.

7. D.1.1: Electricity Prices Forecast

766. The Claimant's position is that electricity prices should be modelled on the Siliprandi report and Mr. Calwell submits that the Siliprandi model may also be blended with his own figures, which is immaterial anyway because both projections are very close and in fact the Siliprandi prices appear to be slightly higher than his.[1026]

1023 Closing Hearing Tr., p. 300:8-22.

1024 C-127, ENKA's Financial Model, tab 'Depreciation'.

1025 See *supra*, para. 119.

1026 C-PHB, para. 184.

767. In contrast, Mr. Wreford submits[1027] that an accurate projection should be based on a blending of the Siliprandi projections with those of the G&T Report.[1028]

768. It is common ground that the G&T projections have not been established for purposes of this arbitration. Rather, they have been elaborated at the request of the GOG in the context of the discussions regarding the implementation of the Masdar solar power project power in Georgia.[1029] These projections are criticised by the Claimant essentially because they are backward looking and because they do not consider the impact of possible future evolutions of the electricity market in Georgia, including regulatory changes and the consequences of the development of renewables on the energy mix.

769. In contrast, both the Siliprandi and the Caldwell electricity prices projections are based on different forward-looking scenarios. The Siliprandi report factors the following four scenarios:[1030] (i) Decarbonisation, (ii) Balanced Transition, (iii) High Gas Price and (iv) Alternative Transition, while Mr. Caldwell factors the following slightly different hypothesis:[1031] (i) Announced Pledges, (ii) Sustainable Development, (iii) Stated Policies and (iv) Net Zero.

770. At the Evidentiary Hearing, the Arbitral Tribunal raised with the experts the inherent uncertainty of these models[1032] and Mr. Siliprandi agreed that his forecast of electricity prices is indeed inherently speculative.[1033]

771. The Arbitral Tribunal is faced with the very significant difficulty of assessing the uncertainties of electricity prices forecasts over a hundred years in a market that will be subject to profound evolutions and changes in the coming decades. In the Arbitral Tribunal's view, this justifies adopting the broadest possible range of sources in order to mitigate these uncertainties.

772. In doing so, the Arbitral Tribunal is however mindful of the fact that the Respondent elected to base its case on the evidence of Mr. Siliprandi, and that G&T was not called

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1027 R-PHB, para. 280.

1028 R-163, G&T Report, dated, 14 December 2021.

1029 Rejoinder, para. 1062.

1030 RER-5, Siliprandi, para. 225.

1031 CER-1, Caldwell I, para. 143; BR-41, International Energy Agency, 2021 WEO, Oct. 2021, pp. 94-95.

1032 Evidentiary Hearing Tr., D5, p. 143:19-20: "*[President] So, how do you – there's a huge level of uncertainty here?*".

1033 Evidentiary Hearing Tr., D5, pp. 143:21-144:4: "*[Siliprandi] Yes, there's a huge level of uncertainty. I do think that – I choose to move two policy drivers because I think from policy perspective there is a very high uncertainty. So you don't have a market but you will have it because it's still forming and should take place in – well, this year, maybe the next year, I don't know. And on the other hand, implementing EU ETS has a huge impact on the whole economy of a country.*"

to appear as an expert in these proceedings.[1034] Irrespective of the reasons why G&T did not appear as an expert-witness, the Arbitral Tribunal notes that the Respondent relies primarily on Mr. Siliprandi's expert evidence, to which more weight should therefore be assigned.

773. This, however, is not in the Tribunal's view a valid reason to exclude G&T as fact evidence altogether. First, whatever the Parties' choice may be as to the selection of their expert evidence, the Arbitral Tribunal remains free to assess the evidence in its entirety in light of all surrounding circumstances. Second, Mr. Siliprandi himself acknowledged the high level of uncertainty of his forecasts and accepted that blending them with those of G&T would be appropriate.[1035] Third, the Arbitral Tribunal considers that the G&T forecasts are credible in that they have not been prepared for purposes of this arbitration and are authored by an investment bank having uncontested experience in the sector. Finally, Mr. Wreford[1036] explained that G&T forecasts followed closely ESCO's historical electricity prices in the period between January 2022 and September 2023, which evidence the Tribunal accepts.

774. While the Arbitral Tribunal does not have any objective basis to modify the internal weighting of each of the four scenarios respectively adopted by Mr. Wreford[1037] and Mr. Caldwell, it does consider reasonable to blend the two experts' conclusions with those of G&T.

775. Based on the foregoing, the Arbitral Tribunal considers it reasonable and appropriate to give a **50%** percent weight to Mr. **Siliprandi** and respectively **25%** to Mr. **Caldwell** and to **G&T**.[1038]

8. D.1.2: G&T nominal or real

776. The point here is whether the G&T forecasts are in real or nominal terms. Mr. Caldwell submits that the prices in the G&T Report are denominated in real terms while Mr.

1034 The Respondent (Mr. Willems, Closing Hearing, Tr., pp. 214:5-215:2) informed that it did request G&T to attend the Evidentiary Hearing as an expert-witness but that it declined on the basis that it is an investment bank and does not act as consultant for disputes.

1035 Evidentiary Hearing Tr., D5, p. 142:2-14.

1036 Wreford 2, RER-4, paras. 7.17-7.19.

1037 Mr. Siliprandi considered 4 scenarios but he did not propose a weighting of such scenarios (RER-5, Siliprandi I, p. 59). Mr. Wreford gave an equal weight (25%) to each of them (Wreford 2, RER-4, paras. 7.27-7.28).

1038 The Arbitral Tribunal has raised at the Closing Hearing a concern as to the fact that Mr. Wreford's price forecast is already blended with those of G&T. The Parties have confirmed that model avoids that risk (Closing Hearing Tr., p. 279:9-23), so that the 50/25/25 blending adopted by the Tribunal does not include an element of double blending.

Wreford opines that they are expressed in nominal terms.[1039] G&T has confirmed that they are **nominal**[1040] and the Arbitral Tribunal has no reasons to doubt this answer.

9. E.2.1: Risk Premiums Adjustment Approach

777. Mr. Caldwell's approach is to apply risk premiums to the cost of debt in the same way as to the cost of equity. In other words, the risk premium is applied to the overall WACC in a multiplicative way and it therefore applies coherently to the underlying cost of equity and debt.[1041]

778. Mr. Wreford, in contrast, only adds premiums in the cost of equity of his WACC analysis to take into account country risk, construction risk and merchant risk, which is aligned with the approach of risk premiums used by market participants when calculating discount rates.[1042]

779. The Arbitral Tribunal considers that Mr. Caldwell's approach is not consistent with valuation principles applying CRP to equity and not to debt. Mr. Caldwell's approach leads potentially to align the cost of equity and debt in a way that is inconsistent with established valuation principles.

780. Based on the foregoing, the Arbitral Tribunal decides not to apply a risk premium to the cost of debt, thus following Mr. **Wreford's** approach.

10. E.3.1: Existence of Project Finance Loan

781. Mr. Caldwell assumes that construction would be financed by a loan whereas Mr. Wreford does not model any project finance loan in his assessment of the Project's gearing.

782. The Arbitral Tribunal notes, based on the experts' positions and the way in which the Joint Model is framed, that the Parties agree that the Project would have a certain level of debt finance. In fact, in their submissions on entry E.3.3, the experts respectively submit that the target debt share would be either 50% (Caldwell) or 30% (Wreford).

783. The Arbitral Tribunal considers, as shown by the loan prospects that are in the record,[1043] that part of the construction costs would have been financed by a loan.

1039 JER, pp. 16-17.

1040 Rejoinder, para. 1070; BR-74, Emails between Mr. Chachibaia and Ms. Chakhvashvili, dated 27-28 March 2023

1041 JER, para. 20, Sections E.1.1 and E.2.1.

1042 JER, Sections E.1.2 and E.2.1.

1043 C-198, IFC/EBRD Indicative Term Sheet, dated 1 November 2018; C-249, SocGen Indemnity Letter for a Structured Loan, dated 9 June 2020.

11. E.3.2: Size of Project Finance Loan (share of CAPEX)

784. Mr. Caldwell submits that the debt would have financed 70% of the construction costs while Mr. Wreford suggests no debt finance for construction costs.

785. The Arbitral Tribunal finds Mr. Wreford's position to be inconsistent with the Parties common assumption that the Project would have had a share of project finance, which in the normal course would have financed construction costs.

786. There is however no evidence in the record allowing deduction of the share of the construction costs which would have been financed by debt assuming, as shall be seen in following sections, that debt finance would not exceed 30% of the total financing needs of the Project.

787. The Arbitral Tribunal however finds it reasonable to assume that **50%** of the construction costs would have been financed by debt.

12. E.3.3: Target Debt Share

788. Mr. Caldwell assumes (as did Mr. Wreford's first report) a 50% target debt share, while Mr. Wreford adopts in his second report a 30% debt share based on the ceiling on debt finance agreed by ENKA's shareholders in the Second SHA (which was introduced in document production and was not available to Mr. Wreford at the time of drafting his first report).[1044]

789. The Arbitral Tribunal sides with Mr. Wreford. As a matter of fact, as said above, even though the FMV is calculated in a but-for scenario, ENKA's cost of capital has to be assessed by considering its contractual environment, including the financing agreements and shareholders agreements.

790. As said above, both Parties agree that the Project would have had a certain level of debt finance, and the Arbitral Tribunal assumes that the financing conditions would have been subject to the Second SHA.

791. As a consequence, the answer to entry E.3.3 is **30%**. As said above, this is unrelated to the share of the construction costs that such debt finance would cover, which is assumed to be 50%.

13. E.4.1: Cost of debt

792. The same consideration leads the Arbitral Tribunal to adopt Mr. Wreford's position on the cost of debt.

793. As said above, Mr. Caldwell uses the CAPM build-up method to calculate the cost of debt while Mr. Wreford uses a fixed cost of debt of 6% which is derived from the interest

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1044 C-187, Second Sha, dated 1 August 2018, Arts. 8 and 8(i).

rate offered by SocGen in negotiations in 2019-2020[1045] and from the rate offered by IFC/EBRD in 2018.[1046]

794. The Tribunal considers that the cost of debt must be assessed by considering the loan conditions that would have applied in a but-for scenario and does not see any reason to believe that these would have significantly departed from the offers made by SocGen and IFC/EBRD. The Tribunal therefore selects a fixed cost of debt of **6%**.

14. E.4.2: Debt beta

795. This item is moot. Because the CAPM does not apply to the cost of debt, there is no reason to apply a beta.

15. E.5.1: Risk-free rate

796. Mr. Caldwell recommends using a term-matched risk-free rate to reflect the fact that interest rate depends on the time horizon under consideration, while Mr. Wreford uses a 2.13% single long-term interest rate that is derived from the yields of US government bonds as of the valuation date.

797. The Arbitral Tribunal notes that Mr. Caldwell accepts that investors often apply a single risk-free rate as a simplification and that a term-matched risk-free rate "*may not be worth the effort*".[1047]

798. The Arbitral Tribunal adopts Mr. Wreford's **long-term** rate which is more aligned with market practice.

16. E.6: Market Risk Premium (MRP)

799. While Mr. Caldwell recommends a MRP of 5.5%, Mr. Wreford uses 6% based on a review of market risk premia which, in his submission, "*provides a range of MRP assumptions from 5 to 6%.*"[1048]

800. The Arbitral Tribunal however notes that Mr. Wreford's figure is at the top of its range and therefore considers Mr. Caldwell's figure of **5.5%**, which is in the middle of the range,[1049] to be more appropriate.

801. The Arbitral Tribunal notes that this figure is on top of the 4.72% 2020 valuation published by Prof. Damodaran, which Mr. Wreford did not mention in his presentation

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1045 C-221, SocGen Indemnity Letter for a Structured Loan, dated 20 November 2019.

1046 C-198, IFC/EBRD Indicative Term Sheet, dated 1 November 2018.

1047 JER, Section E.5.1, p. 47; RER-Ex-150, "*What is the riskfree rate? A Search for the Basic Building Block*", A. Damodaran, December 2008.

1048 RER-4, Wreford II, para. 6.20(b); JER, Section E.6, pp. 48-49.

1049 RER-4, Wreford II, para. 6.20(b); RER-2, Wreford I, para. 6.46.

at the Evidentiary Hearing.[1050]

17. E.7.1: Discounting of construction costs

802. Both Parties agree on a 10% contingency on the construction costs. The Parties however disagree on how to factor the additional risk of overruns pre and post COD.[1051]

803. Pre-COD, Mr. Caldwell discounts the construction costs at a low cost of debt from 1.2 to 2.11% while Mr. Wreford does not discount the cost of debt but adds in a separate entry (to be discussed at E.7.4) a 1% Construction Risk Premium. The Joint Model only offers the following options: (i) no discounting, (ii) discounting at WACC, and (iii) discounting at cost of debt. Based on the Tribunal's decision under E.4.1, the cost of debt is 6%.

804. Pre-COD the Arbitral Tribunal sees no reason not to discount the construction costs at the cost of debt. Discounting lowers the value of costs and it therefore increases the value. Because the Tribunal has accepted that construction costs will be financed by debt, these costs should be discounted at the **cost of debt**. Therefore, pre-COD, the Arbitral Tribunal will accept Mr. Caldwell's position, save that the cost of debt will be 6% as decided in E.4.1 rather than the lower rate of debt proposed by Mr. Caldwell.

805. Post-COD, the Arbitral Tribunal consider that the Project would have started to generate revenues and that the discount would therefore apply to the net balance of costs and revenues. As a consequence, it is logical to discount these cashflows by applying the **WACC** as proposed by Mr. Wreford.

18. E.7.2: Risk of cost overruns

806. The experts agree that the entry in the Joint Model should be '**yes**'.

19. E.7.3: Risk of schedule delays

807. The experts agree that the entry in the Joint Model should be '**yes**'.

20. E.7.4: Construction Risk Premium

808. Mr. Caldwell submits that no risk premium should be added to the construction costs while Mr. Wreford adds a 1% construction risk premium on account of cost overruns and schedule delays on top of the **agreed 10% contingency**.[1052] The Arbitral Tribunal notes that the Joint Model does not allow to choose anything else than 0, as proposed by Mr. Caldwell, or 1% as proposed by Mr. Wreford.

809. Mr. Caldwell submits that the proposed Construction Risk Premium would involve

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1050 C-PHB, para. 205(b).

1051 JER, Section E.7, pp. 50-55.

1052 JER, Section E.7.4, pp. 61-63.

double counting and is not supported by evidence.[1053] Mr. Wreford, in contrast, considers that the addition of a risk premium is warranted by the fact that, at termination date, there was no EPC in place.[1054]

810. The Arbitral Tribunal agrees with Mr. Caldwell that adding a 1% risk premium to the contingency would be excessive, as it would be equivalent to increasing the overall cost contingency to, at least, 25%.[1055]

21. E.8.1: Counterparty Risk Adjustment

811. Both experts proceed according to completely different methodologies concerning the PPA cashflows. Mr. Caldwell accounts for the PPA risk by subjecting 2.75% of the PPA's cashflows to a 0.7% merchant beta while considering that 97.26% of these cashflows are not subject to merchant risk and applying to these a 0.1 beta. According to Mr Caldwell,[1056] this combination of merchant and PPA risk is equivalent to applying a 0.3 beta to the overall cashflow.

812. Mr. Wreford, in contrast, applies a 2.75% risk premium to the entire cashflow as well as a 0.6 beta.

813. It appears from the Joint Model that the 2.75% proposed by Mr. Wreford moves the valuation by approximately USD 15 million which is approximately equivalent to a 0.055 beta. As a consequence, the difference between the two experts converts into applying a 0.3 (Caldwell) or a 0.655 beta (Wreford) to unadjusted cashflows.

814. The Arbitral Tribunal considers that Mr. Wreford's position has the conceptual defect of applying the same CRP to PPA and merchant cashflows while Mr. Caldwell's position has the defect of assuming no risk at all for 97.26% of PPA cashflows, which seems unreasonable.

815. The Arbitral Tribunal believes it reasonable to adjust the PPA period cash-flows to consider counterparty risk by adopting a middle ground and to apply a 0.5 beta to the overall PPA cashflows with no CRP.

22. E.8.2: CRP on PPA cashflows

816. Based on the above, there shall be **no** CRP on PPA cash flows.

23. E.8.3: PPA asset beta

817. Based on the above, the PPA asset beta is **0.5**.

1053 CER-1, Caldwell I, paras. 19, 82.

1054 RER-4, Wreford II, para. 5.71 to 5.72; RER-2, Wreford I, para. 6.78.

1055 JER, Section E.7.4, pp. 62-63.

1056 CER-1, Caldwell I, fn. 106.

24. E.9.1: Measurement of Country Risk

818. Mr. Caldwell proposes to rely on observed market base sovereign spreads as a measure of country risk during the Merchant Period, while Mr. Wreford adds a 2.75% CRP to his WACC calculation based on a review of data from a mixture of sources, including Prof. Damodaran, Duff & Phelps and Kroll.[1057]

819. The Arbitral Tribunal considers that in the case of long-term projects such as this, models based on sovereign ratings are more appropriate as they better reflect the market reality.

820. The Arbitral Tribunal will therefore adopt the 2.75% **predicted spread** premium proposed by Mr. Wreford, which is convincingly established by reliable sources such as Prof. Damodaran for the Merchant Period cash-flows.

25. E.9.2: Partial or full exposure

821. Mr. Caldwell's approach consists in reducing the Project's exposure to country risk by 75% based on the contractual warranties embedded into the BOO. This reduction is applied to actual spreads assumed to be 1.34%, leading to a country risk measurement for the merchant period of approximately 0.68%.

822. The Tribunal, however, considers such a risk premium unreasonably low even in presence of contractual warranties such as those embedded in the BOO.

823. The Arbitral Tribunal will therefore accept Mr. Wreford's full exposure, applying a 2.75% premium corresponding to predicted spreads on sovereign bonds.

824. The Arbitral Tribunal considers that the BOO substantially eliminates the State's sovereign power to modify its obligations and essentially converts the GOG's obligations into a monetary debt. It is therefore reasonable to consider that the 2.75% premium based on predicted spreads on sovereign bonds reflects the counter-party risk under the BOO. In other words, the risk of a default of the GOG's obligations under the BOO is equivalent to the risk of default of the State on its sovereign bonds.

825. As a consequence, the answer to entry E.9.2 is full exposure, with no additional enforcement risk haircut.

26. E.9.3: Exposure

826. Based on the above, the answer is **Full**.

27. E.10.1: Merchant Asset Beta

827. The experts essentially agree on this entry. Mr. Caldwell in fact applies a 0.7 beta while Mr. Wreford applies a 0.6 beta to which he adds a 1% merchant risk premium. A 1%

1057 JER, pp. 71-73.

risk premium is, according to the experts,[1058] approximately equivalent to a 0.08 beta, so that the difference between the experts is minimal (0.7 for Mr. Caldwell and approximately 0.68 for Mr. Wreford).

828. Based on the foregoing, the Arbitral Tribunal will adopt Mr. Caldwell's **0.7** beta.

28. E.10.2: Merchant Risk Premium

829. Based on the foregoing, there is **no merchant risk premium** to be added.

Conclusion on FMV

830. In view of the foregoing, the FMV is USD 297,000,000. The completed Joint Model, based on the above decisions of the Arbitral Tribunal, is attached to the award.

F. Other Claims under Article 9.4.2(b) of the BOO

831. ENKA, in addition to the FMV under Article 9.4.2(b)(i) of the BOO Agreement, asserts claims for (**1**) breakage costs under Article 9.4.2(b)(ii) and taxes pursuant to Article 9.4.2(b)(iii), and (**2**) the Tax Gross-Up provided by Article 9.4.2(b)(iv). The Arbitral Tribunal will address each of these claims in turn.

1. Breakage costs and Taxes payable on the transfer of Transferred Assets

832. In the Termination Invoice, ENKA sought the "*total amount payable under Article 9.4.2(b)(ii) and (iii) of the BOO Agreement.*"[1059] In the SoC, the Claimant sought "*any amount arising*" from Articles 9.4.2(b)(ii) and (iii) of the BOO Agreement.[1060]

833. On 16 September 2022, the Claimant however explained, regarding its claim for an indemnity for documented costs and fees associated with the termination of the BOO, that it "*will not in these proceedings quantify the amount in respect of which the indemnity is sought. The relief it seeks as to that claim is the indemnity itself*", and that "*in respect of such fees and costs as may in the future arise* […] [t]*here is nothing that precludes the Respondent from pleading to that claim for relief in the manner in which it is put.*"[1061]

834. The Respondent alleges that ENKA's claims must be rejected as it entirely failed to substantiate it.[1062] The GOG also submits that while the BOO allows for claims for damages, breakage costs, fees and expenses related to the termination or buyout of contracts "*in conjunction with the termination*", as well as for taxes payable on the

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1058 Mr. Caldwell's Presentation, slide 17.

1059 C-20, Termination Invoice, dated 20 September 2021.

1060 SoC, paras. 226 and 228.

1061 R-154, ENKA's email to the Arbitral Tribunal, dated 16 September 2022.

1062 SoD, para. 689.

transfer of the Transferable Assets, it does not allow speculative claims for fees and costs that may in the future arise. The Respondent also submits that Georgian law does not allow claims for damages which existence and quantum have not been proven with reasonable certainty.[1063]

835. Pursuant to Article 9.4.2(b) of the BOO Agreement, the Government's Default Termination Amount includes:

> "...
>
> *(ii) the total amount of all documented damages, breakage costs, fees and expenses related to the termination or buyout of contracts to which the Company is a party and which are terminated or breached by the Company in conjunction with the termination of this Agreement or sale to GOG of the Transferable Assets, plus any costs incurred by the Company in securing the Company's release from all liability under contracts included within the Transferable Assets;*
>
> *(iii) all taxes payable on the transfer of the Transferable Assets..."*

836. The Arbitral Tribunal however notes that ENKA did not provide any evidence of the nature and quantum of the damages, fees, costs or taxes in respect of which it submits to be entitled to indemnification. As a consequence, the claim for breakage costs and taxes payable on the transfer of Transferred Assets is dismissed.

2. Tax Gross-Up

837. The Claimant claims the Tax Gross-Up Amount at the rate of 15% on the FMV.[1064]

838. The Respondent objects to that claim because the Claimant has not demonstrated that it has any tax liability in respect of the FMV,[1065] and that, in any event, the Tax Gross-Up is overstated as it is based on a grossly inflated FMV. As a consequence, if this claim is accepted by the Tribunal, ENKA would only be entitled to a Gross-Up on the FMV amount awarded by the Tribunal.[1066]

839. It is undisputed that, pursuant to Article 9.4.2(a)(v) of the BOO Agreement, the Claimant is entitled to the Gross-Up Amount. Pursuant to Article 1.1 of the BOO Agreement, the terms 'Gross-Up Amount' mean "*if Taxes are required to be paid by the Company or any Financing Party with respect to any payments to be made, an amount which (after making any such Tax payment) leaves an amount equal to the payment which would*

1063 SoD, para. 692 and 697; RL-80, Supreme Court of Georgia, Case No. AS-556-2021, dated 29 September 2021, p. 2.

1064 SoC, para. 229.

1065 SoD, para. 701.

1066 SoD, paras. 703-704.

have been due if no Tax had been payable."

840. It is also undisputed that the FMV amount will be taxed at the rate of 15%. In order to make the Claimant whole, the amount of the gross-up should be calculated to take into account that tax will be calculated on the entire amount awarded, including the tax-gross up amount.[1067] Considering that the Tribunal established a FMV of USD 297,000,000, the Tax Gross-Up Amount would therefore be USD 52,411,764.70 (297,000,000 ÷ 85 × 15 = 52,411,764.70).

841. As a consequence, the Arbitral Tribunal will order the Respondent to pay an amount of USD 52,411,764.70, or any higher or lower amount that will be taxed on the FMV, as Gross-Up Amount.

G. Preconstruction Security

842. The Claimant submits that the GOG failed to return to ENKA the Preconstruction Security upon termination of the BOO, as provided for in Article 7.1.5 of the BOO and it therefore requests that the GOG returns to ENKA the Preconstruction Security in an amount of USD 1,500,000[1068] as well as the fees and costs incurred by ENKA to maintain such security.[1069]

843. The Respondent objects that ENKA is not entitled to the relief claimed as it did not validly terminate the BOO Agreement,[1070] and because it failed to substantiate its claim as to the alleged fees and costs that it incurred.[1071]

844. Article 7.1.5 of the BOO Agreement provides that :

> "*When the Company provides a Construction Security for a Plant or on the Construction Start Date of that Plant forming part of the Project (whichever is later), the GOG will return the relevant Preconstruction Security within ten (10) days or upon earlier termination of the Agreement in accordance with the terms hereof, unless the GOG collects under such Preconstruction Security in accordance with the terms of this Agreement.*"

1067 The Claimant submitted a Tax Gross-Up calculation based on the assumption that the gross-up amount would itself be subject to taxation (SoC, para. 229 and fn. 230), which has not been objected by the Respondent. The awarded Tax Gross-Up amount of USD 52,411,764.70 corresponds to a 15% taxation of the total amount granted of USD 349,411,764.70 (USD 297,000,000 FMV + USD 52,411,764.70 Tax Gross-Up). That Tax Gross-Up amount, once deducted from the total amount granted of USD 349,411,764.70, leaves to the Claimant a net amount of USD 297,000,000, equal to the FMV.

1068 C-29, Preconstruction Security, dated 24 March 2021.

1069 SoC, paras. 232-233.

1070 SoD, para. 706.

1071 SoD, paras. 709-711.

845. The GOG does not submit that that the Preconstruction Security was not paid by ENKA, nor does it object to the amount claimed by the Claimant in this respect. The only argument advanced by the GOG to object to the return of the Preconstruction Security amount is that the BOO Agreement was not validly terminated by ENKA. The Arbitral Tribunal, however, has concluded that the BOO Agreement was validly terminated by the Claimant. As a consequence, ENKA's claim for a return of the Preconstruction Security shall be granted.

846. As to the claim concerning the fees and costs incurred to maintain such security since the termination date, ENKA has failed to explain which costs were incurred and the amount of the same. The claim not having been substantiated, it shall therefore be rejected.

H. Interest

847. The Claimant alleges that, pursuant to Article 11.7 of the BOO, it is entitled to pre- and post- award interest on the amounts due by the GOG,[1072] compounded monthly, based on the Secure Overnight Financing Rate (SOFR) rather than LIBOR (as provided for in the BOO), due to the discontinuation of the USD LIBOR.[1073]

848. The Claimant submits that interest is due (i) on the Termination Amount from 19 March 2022 to the date of payment; and (b) on the Preconstruction Security from 21 October 2021 to the date of payment.

849. The Respondent rejects Claimant's claim because ENKA did not validly terminate the BOO Agreement.[1074] It also objects to interest on ENKA's claims for (i) documented damages, breakage costs, fees and expenses related to the termination of the contracts, (ii) taxes to be payable on the transfer of the Transferable Assets, and (iii) fees and expenses incurred to maintain the Preconstruction Security, since these claims have not been quantified by the Claimant.[1075]

850. As to the applicable rate, the Respondent agrees in principle to SOFR as proposed by the Claimant.[1076] The Respondent does not object to the 4% premium on SOFR requested by ENKA.

851. Article 11.7 of the BOO provides that:

> "*If a Party defaults in the payment when due of any sum payable under this Agreement, it shall pay the interest on that sum from the due date to the date of*

1072 SoC, paras. 234-235.

1073 Reply, paras. 548-549.

1074 SoD, para. 715.

1075 SoD, paras. 717-718.

1076 Rejoinder, paras. 1231-1232.

actual payment (after as well as before judgement), at the rate equal to LIBOR plus four percent (4%), which interest shall accrue from day to day and be compounded monthly."

852. ENKA's entitlement to compounded interest on the awarded amounts is undisputed. The applicable rate, SOFR +4%, is also undisputed.

853. As to the *dies a quo* of interest on the FMV amount, it shall be 180 days after Termination Invoice as provided by Article 9.4.6(e) of the BOO Agreement. Interest shall therefore accrue as from 19 March 2022, i.e. 180 days after the date of the Termination Invoice, which is 20 September 2021.

854. As to the Preconstruction Security, compounded interest shall accrue at the same rate from 21 October 2021, which is the Termination Date.

855. The *dies a quem* is the date of full payment.

856. As for the Gross-Up Amount, compounded interest shall only accrue as from the date at which the tax amount is paid by ENKA to the tax authorities.

X. SUMMARY OF THE TRIBUNAL'S DECISIONS

857. The Tribunal's decisions on each of the Claimant's prayers for relief (as submitted in their last iteration in the Reply) are the following:

a) Declare that ENKA has validly terminated the BOO Agreement effective 21 October 2021: granted (paragraphs 583, 641 and 684 of this award).

b) Declare that ENKA has validly transferred the Transferable Assets to the GOG effective 21 October 2021: this declaratory request has not been objected by the Respondent and is therefore accepted.

c) Declare that ENKA validly issued the Termination Invoice: ENKA issued the Termination Invoice on 20 September 2021. As provided by Article 9.4.6(b) of the BOO Agreement, the GOG has on 4 October 2021 rejected the Termination Invoice and requested that the FMV be reviewed by an Approved Auditor in accordance with Article 9.4.6(c) of the BOO. As explained in Section IX.D(2) of this award, the Arbitral Tribunal has decided that the DRT Determination is invalid and has itself assessed the FMV at an amount lower than the assessment of the Termination Invoice. This request is therefore rejected.

d) Declare that the DRT Determination is conclusive and binding in accordance with the BOO Agreement: rejected (paragraphs 738-742 of this award).

e) Order that the GOG pay to ENKA USD 358,823,529 for the transfer of the Transferable Assets: partially granted (paragraph 830 of this award).

f) Alternatively, order the GOG to pay to ENKA USD 1,195,000,000 (or such other sum as the Tribunal determines) for the transfer of the Transferable Assets and/or as damages: rejected as the Tribunal partially granted the claim under (e) above.

g) Indemnify ENKA in respect of all such taxes as may be payable on the transfer of the Transferable Assets: granted (paragraphs 839-841 of this award).

h) Order the GOG to cancel and return to ENKA the Preconstruction Security of USD 1,500,000: granted (paragraph 845 of this award).

i) Order the GOG to pay to ENKA fees and costs it has incurred and continues to incur in relation to the Preconstruction Security for the period from 21 October 2021 until the date of the award: rejected (paragraph 846 of this award).

j) Order the GOG to pay ENKA all costs of, and associated with these arbitration proceedings, including the fees and expenses of the Tribunal and the ICC, and the legal and other expenses of ENKA, including but not limited to, the legal fees and expenses of their counsel, witnesses and experts, together with interest on those costs so awarded within 14 days of the date of the award: partially granted (Section XI below).

k) Order the GOG to pay interest at a rate equal to SOFR+4% accruing daily and compounded monthly on the FMV amount from 19 March 2022 or such other date the Tribunal considers appropriate: granted (paragraph 853 of this award).

l) Order the GOG to pay interest on the Preconstruction Security: granted (paragraph 854 of this award); and on the fees and expenses incurred in relation to the Preconstruction Security from 21 October 2021 until payment is received by ENKA: rejected (paragraph 846 of this award).

m) Order the GOG to pay interest on costs: granted (paragraph 882 of this award).

n) Indemnify ENKA in respect of the total amount of all documented damages, breakage costs, fees and expenses related to the termination or buyout of contracts to which ENKA is a party and which are terminated or breached by ENKA in conjunction with the termination of the BOO Agreement or sale to the GOG of the Transferable Assets, plus any costs incurred by ENKA in securing ENKA's release from all liability under contracts included within the Transferable Assets: rejected (paragraph 836 of this award).

858. The Tribunal's decisions on each of the Respondent's prayers for relief (as submitted in their last iteration in the Rejoinder) are the following:

a) Declare that ENKA's termination of the BOO Agreement was without basis under said agreement and/or Georgian law and thus wrongful: rejected (paragraphs 583, 641 and 684 of this award).

b) In the alternative, declare that:

(i) the Parties agreed that the Tribunal should determine the FMV itself without being bound by the FMV stated in DRT Determination, and that ENKA is precluded from changing its position that the Tribunal should determine the FMV itself, without being bound by the FMV stated in DRT Determination: rejected (paragraphs 730-731 of this award).

(ii) DRT Determination is not a valid, conclusive, and binding Approved Auditor's certificate under the BOO Agreement and thus the Tribunal may determine the FMV itself: granted (paragraph 742 of this award).

(iv) the GOG shall pay the FMV determined by the Tribunal: granted (paragraphs 742-743 of this award).

Such FMV shall not exceed the most recent book value of the Transferable Assets: rejected (paragraph 830 of this award).

Reject all other relief requested by ENKA in this arbitration: rejected.

c) In any event:

(i) Order ENKA to pay all costs in connection with this arbitration: rejected (Section XI of this award).

(ii) Reject ENKA's request for the costs of, and associated with, this arbitration: partially granted (Section XI of this award).

(iii) Grant the GOG such other and further relief as the Tribunal may deem appropriate: rejected.

XI. COSTS

859. The Arbitral Tribunal will now deal with costs. The BOO is silent in this respect. Article 38(4) of the ICC Rules provides that the Arbitral Tribunal shall fix the costs of the arbitration in the final award and decide which party shall bear them or in what proportion they shall be borne by the parties. According to Article 38(1) of the ICC Rules, the costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court of the ICC, as well as the reasonable legal and other costs incurred by the parties for the arbitration.

860. On 6 November 2024, the Court of the ICC fixed the costs of the arbitration at USD 1,400,000.

861. On 23 June 2022, the Court of the ICC fixed the advance on costs for the arbitration at

USD 700,000, and on 11 April 2024, the Court readjusted the amount of the advance on costs for the arbitration at USD 1.400.000. Such provision has been paid by the Parties in the following proportion: USD 700,000 by the Claimant and USD 700,000 by the Respondent.

A. Claimant's position

862. The Claimant submits to have incurred in costs for a total of USD 18,179,125.99, EUR 307,644.66, GBP 34,861.58 and GEL 248,766.15. These amounts correspond to the following items:

1. Costs incurred in the arbitration

- Legal fees and expenses

- fees of Skadden LLP, J. Greenblatt and N. Buckworth: USD 8,997,433.94;[1077]

- fees of A. Constable KC, Lord Wolfson KC, A. Fenn, R. Hanna, Rt. Hon. D. E. Gloster DBE, PC: GBP 2,580,523.42[1078] (or USD 3,288,075.43[1079]);

- fees of BLC: GEL 248,766.15.

- Valuation experts and advisers

- fees and expenses of Brattle USD 2,002,047.42;[1080]

- fees and expenses of Compass Lexecon: USD 206,810.03;

- fees and expenses of Knak Consult: USD 429,781.50.[1081]

- Georgian Law Expert fees and expenses

- fees of BUSE Rechtsanwalte Steuerberater: EUR 135,792.30[1082]

1077 Skadden LLP fees: USD 8,298,477, J. Greenblatt Esq. fees: USD 414,550.50 plus USD 49,247.94 of expenses, Nicholas Buckworth fees: USD 233,288.50 plus USD 1,870 of expenses.

1078 Adam Constable KC fees: GBP 42,387.50, Lord Wolfson KC fees: GBP 1,004,250, Andrew Fenn fees: GBP 915,095.34, plus GBP 11,113.60 of expenses, Ronan Hanna fees GBP 422,731.25, plus GBP 4,114.05 of expenses, Rt. Hon. Dame Elizabeth Gloster, DBE, PC fees: GBP 179,250 GBP, plus GBP 1,581.68 of expenses.

1079 GBP converted to USD at GBP 1 = USD 1.273.

1080 USD 1,988,682 fees plus USD 13,365.42 of expenses.

1081 USD 422,206.50 fees plus USD 7,575 of expenses.

1082 EUR 130,431.50 fees plus EUR 5,360.80 as expenses.

- Claimant's share of ICC's Advance on Costs: USD 700,000
- Disbursements: USD 382,069.76 + EUR 171,852.36 + GBP 34,861.58

863. For a total of USD 12,718,142.65, GBP 2,615,385, GEL 248,766.15 and EUR 307,644.66.

2. Costs incurred in connection with the Approved Auditor proceeding

864. The Claimant also seeks the following costs incurred in connection with the Approved Auditor proceedings:

- Legal fees:

- fees of Skadden LLP and J. Greenblatt Esq.: USD 507,527.20[1083]
- fees of A. Constable KC and A. Fenn: GBP 77,845.[1084]

- Valuation advisers:

- fees of Compass Lexecon: USD 413,632.50;
- fees of FTI: USD 292,691.37;
- fees of Knak Consult: USD 108,993;[1085]
- fees of DRT: USD 773,516.

865. For a total of USD 2,096,360.07 and GBP 77,845.

866. The Claimant claims that the GOG shall pay all costs of, and associated with the arbitration, together with interest at a rate equal to SOFR +4% accruing daily and compounded monthly on those costs within 14 days of the date of the award or such other date that the Tribunal considers appropriate.[1086]

867. As to reasonableness, the Claimant submits that it should be assessed by considering the high amount in dispute[1087] and the fact that the sought costs only represent 1.5% of the same. The Claimant also submits that the difference between the costs claimed by the

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1083 Skadden's fees of USD 457,105.20 plus J. Greenblatt Esq. fees of USD 50,422.

1084 Adam Constable KC's fees of 12,325 GBP plus Andrew Fenn's fees of 65,520 GBP.

1085 Knak Consult Approved Auditor related fees: USD 108,993, plus USD 3,963 as expenses incurred in October and December 2021, and January 2022.

1086 Reply, para. 550(b)(iii) and (iv).

1087 Claimant's reply on costs, dated 30 September 2024, p. 2; T. Webster, M. Bühler, "*Handbook of ICC Arbitration*" (5th ed. 2021), paras. 38-39.

Parties is due to the fact that ENKA did, in its submission, a more thorough and critical job than the GOG and that the Respondent unnecessarily complicated the case by pursuing every possible argument, irrespective of its merit, and by making unnecessary procedural challenges. Finally, ENKA submits that the GOG's defence was prosecuted by junior associates in contrast with ENKA's choice of engaging more senior counsel.[1088]

868. As to the costs engaged in connection with the Approved Auditor, the Claimant alleges that pursuant to Article 9.4.6(b) of the BOO Agreement, the GOG is to bear half of the fees of Deloitte, which were USD 773,516. Therefore, irrespective of the result of the arbitration, the GOG is in any event liable for half of those fees, i.e., USD 386,758.[1089]

869. The Claimant is however also justified in seeking the other costs engaged in respect of the Approved Auditor process if the Tribunal finds that the DRT Determination is conclusive and binding.[1090]

B. Respondent's Position

870. The Respondent submits to have incurred a total of USD 9,314,446.76, which comprises:

- GOG's Share of ICC advance on costs: USD 700,000
- Representation costs:

- fees of White & Case: USD 6,619,709.52;
- expenses of the Ministry of Justice of Georgia: USD 10,015.32.

- Expert Witnesses:

- fees of Interpath's (Mr. Wreford): USD 1,343,941.96;
- fees of AFRY (Mr. Siliprandi): USD 515,266.17;
- fees of Prof. Kereselidze: USD 33,125.

- Disbursements: USD 79,952.12
- GOG's share of the fees and expenses of the Privilege Master: USD 12,436.67

1088 Claimant's reply on costs, dated 30 September 2024, pp. 2-3, paras. 5-8.

1089 Claimant's reply on costs, dated 30 September 2024, p. 3, para. 9.

1090 Claimant's reply on costs, dated 30 September 2024, p. 3, para. 10.

871. The Respondent requests that the Claimant be ordered to bear all the GOG's legal fees and costs, together with pre and post award interest.[1091]

872. The Respondent submits that the costs sought by the Claimant, of more than USD 18.65 million, are unreasonable,[1092] as shown by the "sharp difference" between the Parties' costs.[1093] ENKA chose to conduct an overly costly arbitration by hiring an array of prominent legal counsel whose fees almost double those of the GOG's counsel, plus several experts and consultants,[1094] whose role remains for some of them unclear.[1095]

873. As to the costs sought by ENKA in respect of the Approved Auditor process, the GOG submits that the ICC Rules do not allow it to recover costs incurred before the commencement of the arbitration.[1096]

C. Arbitral Tribunal's decision

874. It is broadly accepted that international arbitrators have wide discretion, under the ICC Rules to assess the reasonableness of the costs incurred by the parties as well as their apportionment.

875. In the case at hand, the Arbitral Tribunal sees no reason to depart from the generally accepted principle according to which the apportionment of costs should be done by considering the outcome of the arbitration. The Arbitral Tribunal has decided in favour of the Claimant on the main issue in dispute, which is whether the Claimant was entitled to terminate for breach or, alternatively, based on force majeure. As a consequence, the Tribunal considers that the Respondent is not entitled to be reimbursed for any portion of its costs and expenses. Based on the same principle that costs should follow the event, the Claimant is entitled to be compensated for its costs and expenses. This, however, is subject to two additional considerations that the Arbitral Tribunal will now address: first, an assessment of the reasonableness of the costs incurred and, second, an

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1091 R-PHB, para. Rejoinder, para. 1233(3).

1092 Respondent's comments on Claimant's Schedule of Costs, dated 25 September 2024, p. 2.

1093 Respondent's comments on Claimant's Schedule of Costs, dated 25 September 2024, p. 2; S. Greemberg et al. "*The Secretariat's Guide to ICC Arbitration*", (2012), para. 3-1493; T. Webster, M. Bühler, "*Handbook of ICC Arbitration*" (5th ed. 2021), paras. 38-48.

1094 Respondent's comments on Claimant's Schedule of Costs, dated 25 September 2024, p. 2.

1095 Respondent's comments on Claimant's Schedule of Costs, dated 25 September 2024, pp. 2-3. The Respondent asserts that the Georgian law firm BLC did not openly contribute on Georgian law. Compass Lexecon did not appear before the Arbitral Tribunal and Knak Consult's role in the arbitration and contribution "*is a mystery*".

1096 Respondent's comments on Claimant's Schedule of Costs, dated 25 September 2024, p. 2; S. Greemberg et al. "*The Secretariat's Guide to ICC Arbitration*", (2012), para. 3-1492.

assessment of the rate of success of the Claimant.

876. As to the reasonableness of the Claimant's costs and expenses, the Arbitral Tribunal notes the significant disproportion between the legal representation costs incurred by the Claimant (USD 12,285,509.37 and GEL 248,766.15[1097]) and those of the Respondent (USD 6,629,724.84) in spite of the fact that each Party was represented by premier arbitration law firms. The Arbitral Tribunal believes that both legal teams have provided services of the highest quality and professionalism and therefore considers that the Respondent's costs should serve as the most appropriate benchmark for a reasonable amount of representation costs in this case. In this regard, the Arbitral Tribunal does not share the Claimant's criticism that the Respondent elected to include in its legal team more junior lawyers instead of more experienced practitioners for reasons which presumably include the lowering of costs. The Arbitral Tribunal considers, as a matter of principle, that it is laudable to include in legal representation junior practitioners as well as more experienced attorneys. What matters in the end is the ability of each team to provide to its client the highest quality legal services, as was the case on both sides. The Arbitral Tribunal recognises that a party is entitled to retain whatever level of legal services it chooses, in terms of both extent and seniority of the team members. However, in the context of requiring one party to reimburse the other's reasonable costs and expenses, the Tribunal considers that the level of recovery must reflect an assumption that each party has, in the interest of cost efficiency, limited the scale of its costs to those necessary to ensure that the quality remains unaffected. The Tribunal considers that ENKA could have submitted its case for a cost that is roughly comparable to that of the Respondent. Based on the foregoing, the Arbitral Tribunal considers that the Claimant's reasonable representation costs should be reduced to a total of USD 8 million.

877. As to the costs of the experts, the Arbitral Tribunal notes that there is no significant difference between the total amounts claimed by each party and sees no reason to reduce the Claimant's entitlement. However, the Claimant seeks USD 429,781.50 for the fees and expenses of Knak Consult, which has never been mentioned in the written submissions. The Claimant has explained[1098] that Knak Consult assisted in the calculation of the FMV. However, the Claimant has relied upon the evidence of Brattle on matters related to the FMV calculation and none of the evidence provided by Brattle refers to Knak Consult. As a consequence, the Arbitral Tribunal does not consider it appropriate to award the costs of Knak Consult.

878. Based on the foregoing, the Claimant's representation costs shall be reduced to USD

1097 See *supra*, para. 862: a total of USD 8,997,433.94 plus 3,288,075.43 USD (GBP 2,580,523.42 converted to USD at 1.273 rate). Claimant also seeks fees in GEL for a limited amount of 248,766.15.

1098 Claimant's reply on costs, dated 30 September 2024, p. 3, para. 11.

11,290,927.21, EUR 307,644.66 and GBP 34,861.58.[1099]

879. The Arbitral Tribunal now must address whether the Claimant is entitled to be reimbursed for the entirety of its costs. The Arbitral Tribunal notes, in this regard, that the outcome in favour of the Claimant is very close to its main claim, so that it should not be appropriate to further reduce its entitlement. The Arbitral Tribunal therefore concludes that ENKA is entitled to be reimbursed for the entirety of its reasonable representation costs, as fixed in paragraph 876 above.

880. The Arbitral Tribunal now has to assess whether ENKA is entitled to be compensated for the costs of the Approved Auditor process. The Claimant seeks in this respect a total of USD 2,096,360.07 and GBP 77,845, which includes its own costs and the fees of DRT. In respect of the fees of DRT, Article 9.4.6(d) of the BOO provides that "*the reasonable costs and expenses of the Approved Auditor shall be borne equally between the Company and the GOG.*"

881. The Arbitral Tribunal has however rejected the DRT Determination as not having been compliant with the requirements of the BOO. The Arbitral Tribunal does not accept that the GOG should be required to bear the costs of a process which, as set out at paragraphs 191 – 192 of this award, was instigated by ENKA, and the result of which ENKA has sought unsuccessfully to rely upon in the arbitration. Having appointed DRT, it would have been open to ENKA to insist upon a compliant DRT Determination. Instead, ENKA pressed the GOG to accept the DRT Determination and when the GOG did not do so ENKA commenced this arbitration. In these circumstances, the Arbitral Tribunal rejects ENKA's claim for the related costs and expenses, including the fees of DRT.

882. Based on the foregoing, the Arbitral Tribunal decides that the Claimant is entitled to USD 11,290,927.21, EUR 307,644.66 and GBP 34,861.58, as compensation for its costs in this arbitration. Concerning interest on those sums, the Arbitral Tribunal accepts ENKA's claim to apply post-award interest, which is not disputed by the Respondent. As to the rate of interest, the Arbitral Tribunal considers appropriate to apply the rate agreed in the BOO for the payments of other amounts due to ENKA, as modified in this award (i.e. SOFR instead of LIBOR).

883. The Claimant requests that payment of the FMV and return of the Preconstruction Security be within 14 days after the issuance of the award.[1100] The Respondent has not objected to this request, and the Arbitral Tribunal will therefore say that compliance with these decisions will be within 14 days.

1099 USD 8,000,000 as legal representation costs, USD 2,208,857.45 as valuation experts' costs, EUR 135,792.30 as Georgian law expert's costs, USD 700,000 as Claimant's share of ICC's advance on costs and USD 382,069.76, EUR 171,852.36 and GBP 34,861.58 as disbursements).

1100 See *supra*, para. 199(b)(i) and (ii).

XII. AWARD

884. Based on the foregoing, the Arbitral Tribunal:

a) Declares that ENKA has validly terminated the BOO Agreement effective 21 October 2021;

b) Declares that ENKA has validly transferred the Transferable Assets to the GOG effective 21 October 2021;

c) Declares that the DRT Determination is not a valid, conclusive, and binding Approved Auditor's certificate under the BOO Agreement and that the FMV is to be determined by the Tribunal;

d) Orders the Respondent to pay to the Claimant, within 14 days after the issuance of this award, USD 297,000,000 as the Fair Market Value of the Transferable Assets with pre and post award interest at the rate of SOFR+4, accruing daily and compounded monthly from 19 March 2022 until full payment;

e) Orders the Respondent to pay to the Claimant, upon payment of that amount by the Claimant to the Georgian tax authorities, USD 52,411,764.70 as the Tax Gross-Up amount. Such amount will bear interest accruing daily and compounded monthly at the rate SOFR+4% from the day of payment by the Claimant to the Georgian tax authorities until full payment by the GOG;

f) Orders the GOG to cancel and return to ENKA, within 14 days after the issuance of this award, the Preconstruction Security of USD 1,500,000 with pre and post award interest at the rate of SOFR+4% accruing daily and compounded monthly from 21 October 2021 until full payment;

g) Orders the Respondent to pay to the Claimant USD 11,290,927.21, EUR 307,644.66 and GBP 34,861.58 on account of costs with post award interest accruing daily and compounded monthly at the rate of SOFR+4% running 14 days after the date of this award, and until full payment;

h) Rejects any other claim and prayer for relief.

Annex: FMV Model

Place of the Arbitration: Paris

17 November 2024

Mr. Stanimir Alexandrov

Ms. Judith Gill KC

Mr. Alexis Mourre

Output Summary

Summary

FMV, USD mn	[1]	**297**
All-in Equivalent Discount Rate	[2]	**8,4%**
Checks for Error in the Joint Expert Model	[3]	**No Error**

Control Panel

		Selected Input	Caldwell	Wreford
Valuation Date	[3]	21/10/2021		
Cash Flows				
Merchant Price Escalation	[4]	Annual	Annual	Monthly
2021 Inflation	[5]	2%	Actual	2%
Include Second Advanced EM Overhaul	[6]	Yes	No	Yes
Corporate Taxation				
Depreciation Period	[7]	50	50	100
Include Capitalised Interest in Depreciable Asset Base	[8]	No	Yes	No
Electricity Prices				
Selected Scenarios	[9]	Manual - Weighted	Caldwell	Wreford II
Manually Assigned Weights (If Chosen in Row [9]):				
Stated Policy	[10]	[redacted]	10,0%	0,0%
Announced Pledges	[11]		40,0%	0,0%
Sustainable Development	[12]		40,0%	0,0%
Net Zero	[13]		10,0%	0,0%
Decarbonisation	[14]		0,0%	12,5%
Balanced Transition	[15]		0,0%	12,5%
Alternative Transition	[16]		0,0%	12,5%
High Gas Price	[17]		0,0%	12,5%
G&T, Interpreted as Nominal	[18]		0,0%	50,0%
G&T, Interpreted as Real	[19]		0,0%	0,0%
Total Manual Shares Assigned	[20]	[redacted]		
Total Manual Shares Assigned Equal 100%?	[21]			
Manually Assigned Weight on Weighted Price Scenarios (If 'Manual - Weighted' is Chosen in Row [9]):				
Caldwell's Weighted Average	[22]	25,0%		

Siliprandi's Weighted Average in Wreford II [23]	50,0%		
G&T, Interpreted as Nominal [24]	25,0%		
G&T, Interpreted as Real [25]	0,0%		
Total Manual - Weighted Shares Assigned [26]	100,0%		
Total Manual - Weighted Shares Assigned Equal 100%? [27]	Yes		

Discounting and Risk Adjustments

		Caldwell	Wreford
Risk Premiums Methodology [28]	Wreford	Caldwell	Wreford
Financial Leverage			
Model Project Finance Loan [29]	Yes	Yes	No
Project Finance Loan Size (Share of Capex) [30]	50%	70%	n.a.
Target Debt Share [31]	30%	50%	30%
Risk Free Rate [32]	Long Term	Term Matched	Long Term
Market Risk Premium [33]	5,5%	5,50%	6%
Cost of Debt			
Cost of Debt [34]	Fixed	Build up rate	Fixed
Fixed Cost of Debt (If 'Fixed' is Chosen in Row [34]) [35]	6%	n.a.	6%
Debt Beta [36]	0,1	0,10	0,00
Construction Costs and Risk			
Adjustment for Cost Overruns (10% EPC Contingency) [37]	Yes	Yes	Yes
Adjustment for Schedule Delay (5 Months) [38]	Yes	Yes	Yes
EPC Cost Contingency [39]	10%	10%	10%
Construction Risk Premium [40]	0%	0%	1%
Discounting of Construction Costs Before CoD [41]	Cost of Debt	Cost of Debt	No Discounting
Discounting of Construction Costs After CoD [42]	WACC	Cost of Debt	WACC
PPA Cash Flows and Risk			
Counterparty Risk Adjustment [43]	No	Yes	No
Include CRP [44]	No	No	Yes
PPA Asset Beta [45]	0,5	0,1	0,6
Country Risk			
Measurement [46]	Predicted Spread	Actual Spread	Predicted Spread
Exposure [47]	Full	Partial (BOO Risk Allocation)	Full
Enforcement Risk Haircut [48]	0%	0%	100%
Merchant Risk			
Merchant Risk Premium [49]	0%	0%	1%

Merchant Asset Beta [50]	0,7	0,7	0,6

Notes and sources:
[1]: Table 1.
[2]: Table 24.