

**INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES  
WASHINGTON, D.C.**

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In the Matter of the Arbitration between

**IOANNIS KARDASSOPOULOS**

Claimant

and

**GEORGIA**

Respondent

(ICSID Case No. ARB/05/18)

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**DECISION ON JURISDICTION**

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**Members of the Tribunal**

L. Yves Fortier, C.C., Q.C. (President)  
Professor Francisco Orrego Vicuña  
Sir Arthur Watts, K.C.M.G., Q.C.

**Secretary of the Tribunal**

Mr. Ucheora Onwuamaegbu

**Representing the Claimant**

Ms. Karyl Nairn  
Mr. Paul Mitchard  
Mr. Timothy G. Nelson  
Mr. David Herlihy  
SKADDEN, ARPS, SLATE, MEAGHER AND FLOM LLP

**Representing the Respondent**

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Mr. Matthew Saunders  
Ms. Kate Knox  
Mr. Nick Gvinadze  
DLA PIPER LLP

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## **I. PROCEDURAL HISTORY**

### **A. The Request for Arbitration**

1. On 2 August 2005, Mr. Ioannis Kardassopoulos (“**Mr. Kardassopoulos**” or “**Claimant**”), a national of the Hellenic Republic (“**Greece**”), filed a request for arbitration (the “**Request**”) with the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”).

2. In essence, the dispute among the parties to this proceeding concerns allegations by Claimant that the Republic of Georgia (“**Georgia**” or “**Respondent**”) breached its obligations to Claimant under the *Agreement between the Government of the Hellenic Republic and the Government of the Republic of Georgia on the Promotion and Reciprocal Protection of Investments* (the “**BIT**”) and the *Energy Charter Treaty* (the “**ECT**”) in respect of Claimant’s alleged interest in an oil and gas concession in Georgia.

3. On 10 August 2005, ICSID’s Secretary General acknowledged receipt of the Request in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the “**Institution Rules**”) and transmitted a copy to Georgia and to the Embassy of Georgia in London, United Kingdom. On 17 August 2005, the Centre requested further information from Claimant to assist in the review of the Request. Claimant replied through counsel by letter dated 31 August 2005.

4. On 3 October 2005, ICSID’s Secretary General registered the Request pursuant to Article 36(3) of the *ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the “**ICSID Convention**”) and, in accordance with Article 7 of the Institution Rules, notified the parties of the registration and invited them to proceed to the constitution of an arbitral tribunal as soon as possible.

### **B. Constitution of the Arbitral Tribunal and Commencement of the Proceeding**

5. On 8 December 2005, Claimant wrote to Respondent requesting its consent to the appointment of a sole arbitrator or, alternatively, to the appointment of an arbitral tribunal consisting of three arbitrators, with one arbitrator to be appointed by each party. On 14 December 2005, Respondent agreed with Claimant’s alternative proposal that an arbitral

tribunal consisting of three arbitrators be appointed and suggested a timetable to this end. On 16 December 2005, Claimant consented in writing to the appointment process and the timetable proposed by Respondent.

6. Also on 16 December 2005, Claimant appointed Professor Francisco Orrego Vicuña, a national of the Republic of Chile, as arbitrator. On 23 January 2006, Respondent appointed Sir Arthur Watts, K.C.M.G., Q.C., a national of the United Kingdom, as arbitrator. On 23 February 2006, the parties communicated to ICSID their agreement to appoint Mr. L. Yves Fortier, C.C., Q.C., a national of Canada, as the presiding arbitrator.

7. On 27 February 2006, the Arbitral Tribunal (the “**Tribunal**”) was duly constituted and, pursuant to Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“**Arbitration Rules**”), the proceeding was deemed to have commenced on that day. On that same day, the Centre informed the parties in writing that Ms. Aurélia Antonietti, Counsel at ICSID, would serve as Secretary of the Tribunal. Over the course of the ensuing year, Ms. Antonietti was replaced by Mr. Florian Grisel, Counsel at ICSID, who in turn was replaced by Mr. Ucheora Onwuamaegbu, Senior Counsel at ICSID, on 29 January 2007.

### **C. Written and Oral Phases of the Proceeding**

8. The Tribunal held its first session in London, United Kingdom, on 4 May 2006, consistent with Rule 13(1) of the Arbitration Rules. The parties confirmed that they had no objection to the proper constitution of the Tribunal or to any of its members, and furthermore agreed on all procedural issues on the agenda for the session. More specifically, the parties agreed upon two alternative timetables for the written phase of the proceeding, subject to Respondent’s decision to object or not to the Tribunal’s jurisdiction. At the request of the Tribunal, the parties later confirmed this agreement by joint letter dated 11 May 2006.

9. On 13 July 2006, Claimant submitted his Memorial on the Merits. In a joint letter of 31 July 2006, the parties indicated that they had agreed to revise the two alternative timetables for the exchange of pleadings. In its letter of 8 September 2006, Respondent informed the Tribunal that it intended to raise objections to the Tribunal’s jurisdiction under both the BIT and the ECT.

10. Respondent filed its Memorial on Jurisdiction on 3 October 2006 (“**Memorial**”), and Claimant filed his Counter-Memorial on Jurisdiction on 7 November 2006 (“**Counter-Memorial**”). By joint letter dated 28 November 2006, the parties agreed that, subject to the approval of the Tribunal, Respondent should be given an extension of time to submit its Reply on Jurisdiction and that Claimant should also be given a corresponding extension of time to file his Rejoinder on Jurisdiction. The Tribunal, by its Secretary’s letter of 1 December 2006, noted and approved the parties’ agreement on the matter. Accordingly, Respondent filed its Reply on Jurisdiction on 3 December 2006 (“**Reply**”), and Claimant filed his Rejoinder on Jurisdiction on 5 January 2007 (“**Rejoinder**”).

11. On 19 December 2006, the parties informed the Tribunal in writing that they had agreed not to call any factual or expert witnesses at the jurisdictional hearing. On 4 January 2007, the Tribunal informed the parties in writing that it did not intend to hear any witnesses. The hearing on jurisdiction was held on 15-16 January 2007 at the International Dispute Resolution Centre in London, United Kingdom.

12. Following the jurisdictional hearing, the members of the Tribunal deliberated by various means of communication, including meetings in London, United Kingdom, on 17 January 2007 and on 19 April 2007.

## II. FACTUAL BACKGROUND

### A. Negotiations Leading to the Signature of the Joint Venture Agreement

13. The investment dispute between the parties to this proceeding arose during the years following Georgia's emergence as a sovereign State. In essence, it concerns actions on the part of Georgia in respect of the interest allegedly held by Claimant in an investment vehicle devoted to the development and exploitation of oil and gas resources in Georgia.

14. Following its independence in April 1991, Georgia actively sought foreign investments as a means of both developing its national energy infrastructure and securing new export markets to replace the preferential access it had lost to the former Soviet Union. Specifically, Georgia sought investments to develop the transport of oil and gas from the oil fields of Azerbaijan on the Caspian Sea through Georgia to the Black Sea (also known as the "**Western Route**").

15. Claimant was introduced to the possibility of investing in Georgia through Mr. Ron Fuchs, an oil trader of Israeli nationality. Mr. Fuchs had been introduced to representatives of the Georgian Government by Mr. Ephraim Gur, a Georgian-born politician and member of the Israeli Parliament. Mr. Gur was "economic and cultural Attaché" to the Republic of Georgia in Israel in 1991 and 1992. Several meetings took place in September 1991 involving, on the one hand, Mr. Fuchs, Mr. Gur and Mr. Abram Nanikashvili (a Georgian-born businessman living in Israel) and, on the other hand, the President of Georgia at the time, Mr. Zviad Gamsakhurdia, various ministers of the Georgian Government and Professor Revaz Tevzadze, the General Director of the Georgian State-owned oil company "Georgian Oil" (also known as "**SakNavtobi**").

16. As a result of these meetings, the Georgian Ministry of Industry signed a Power of Attorney on 4 September 1991 with Mr. Fuchs through his company Tramex (International) Ltd. ("**Tramex USA**"), a U.S. company incorporated in Delaware.<sup>1</sup> Under the Power of Attorney, Tramex USA was granted:

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<sup>1</sup> As will be seen later in this Decision (see *infra*, paragraphs 20 and 130 *et seq.*), one of the issues disputed between the Parties is the identity of the corporate entity used by the Claimant to make his investment in Georgia.

“[T]he exclusive rights to [...] carry out preliminary expertise and organize the structure of consortium to be formed concerning building of the oil production, oil pipeline and oil refining complex and hold preliminary negotiations with the representatives of business communities (firms, banks, companies, etc.) of the USA and other countries [...]”

17. Approximately one month later, on 8 November 1991, the Georgian Cabinet of Ministers adopted *Resolution No. 834*, “About Some Activities Related to Oil and Gas Production and Refining in the Republic of Georgia”. This Resolution authorized the joint venture between SakNavtobi and “the American firm Trames” for the purpose of exploiting the Georgian oil fields of Ninotsminda, Manavi and Rustavi.

18. In December 1991, Mr. Fuchs, Mr. Gur and Mr. Nanikashvili met again with the Prime Minister, the Minister of Industry, the Deputy Minister of Industry and the General Director of SakNavtobi. On 7 December 1991, SakNavtobi and Trames USA signed a “Letter of Intent”, the preamble of which takes note that “the rational extraction and exploitation of the local resources has great importance for the establishing of an independent market economy”. This document details the activities of the joint venture as follows:

- “1.1 The construction of a small oil-refinery on the terrain adjacent to Samgori Mine, with the capacity of 50-200 thousand tones per year;
- 1.2 The construction of the main ‘Bako-Gachiani’ Pipeline;
- 1.3 The construction of the main ‘Grozno-Gachiani’ Pipeline;
- 1.4 The construction of a branch of the ‘Gachiani-Batumi’ Pipeline (on the terrain adjacent to Poti);
- 1.5 The construction of an oil-transferring unit (Supsa-Poti) on the basis of this branch;
- 1.6 In prospect, the construction of a new main Pipeline for oil products – Gachiani-Khashuri-Poti;
- 1.7 The construction of a large oil-refinery with the capacity of 8-10 million tones per year.”

19. As will be seen, the above-described activities would become the basis for the rights conferred to the joint venture vehicle GTI Ltd. under the Joint Venture Agreement and the Deed of Concession.



## B. The Joint Venture Agreement

20. On 27 February 1992, the shareholders of the Panamanian company “Are Family Trust S.A.” registered a corporate name change to create Tramex International Inc. (“**Tramex Panama**”) for the purpose of carrying out the joint venture in Georgia. Claimant and Mr. Fuchs held equal shares of the new corporation and functioned as co-Chief Executive Officers. The precise corporate entity that eventually entered into the joint venture arrangement with SakNavtobi is disputed and therefore simply referred to in this factual overview section as “Tramex”.

21. On 3 March 1992, Tramex signed a Joint Venture Agreement (“**JVA**”) with SakNavtobi which created GTI Ltd. (“**GTI**”), a joint venture vehicle owned in equal shares by Tramex and SakNavtobi. GTI’s mandate is contained in Article 3 of the JVA:

“The Joint Venture is created for the purpose of developing and strengthening the free and independent markets of the Republic of Georgia, of introducing Western methods into the Georgian Oil and Gas industry, of improving the ability of the Republic of Georgia to participate effectively in world Oil and Gas markets, of providing for maximized efficiency in exploiting the natural resources of the Republic of Georgia, of providing for increased inflow of foreign currency into the Republic of Georgia, and of dealing in matters related to Oil and Gas, including the construction of Oil and Gas pipelines and other Oil and Gas production, manufacturing, processing, refining, transportation, storage and other infrastructure facilities, and the purchase, sale, storage and export of Oil and Gas products, representation of the Republic of Georgia in world Oil and Gas markets, and exploitation of Oil and Gas resources in the Republic of Georgia.”

22. On 7 March 1992, the Georgian Cabinet of Ministers adopted *Resolution No. 123G* under which it instructed the Minister of Finance to register the joint venture. GTI was registered by the Ministry of Finance on 9 March 1992.

23. The “early oil” project was officially approved by Cabinet of Ministers Decree No. 951 of 15 December 1992. The main three objectives of the project were the reconstruction of the main Gachiani-Samgori-Batumi pipeline for transportation of crude oil to the Black Sea coast, the reconstruction of the Gachiani railway pier and the construction of an oil terminal in the Supsa River area.

### C. The Deed of Concession

24. On 14 December 1992, SakNavtobi was incorporated as one of four “departments” of the Ministry of Fuel and Energy through the adoption of *Decree No. 1105*. In this same Decree, the entity which held the rights over Georgia’s pipelines<sup>2</sup>, known as Industrial Amalgamation of Georgian Main-Oil Pipelines (also known as “**Transneft**”), was “united in the department SakNavtobi”. As a result of this restructuring, the Parties to the JVA decided that GTI should obtain a formal Deed of Concession from Transneft in order to confirm the rights it had obtained under the JVA.

25. On 28 April 1993, Transneft executed a Deed of Concession (“**Concession**”) granting a long-term concession of the Pipelines to GTI. The Concession was signed by both Transneft and GTI, witnessed by SakNavtobi and ratified by the Minister of Fuel and Energy. More particularly, the “Concession”, which was granted for a thirty-year period, is defined as follows:

‘The Concession’ means – the concession granted hereunder to GTI, including the sole and exclusive control and possession of the Pipelines, all the rights with respect to the Pipelines, the right to possess and use the assets of Transneft, excluding presently stored properties, which may be used by GTI.”

26. At the end of the thirty-year period, on 15 April 2023, GTI was to return the possession and use of the Pipelines to Transneft. However, any investments, improvements, additions or extensions made to the Pipelines by GTI were to remain its sole property. It is noted that Section 21 of the Concession entitled “No Expropriation” expressly states the following:

“21.1 The Pipelines and all property owned, leased or used by GTI in connection therewith is not subject to expropriation, confiscation nationalization or the sale or grant of any rights to any persons or entities whatsoever. The Concession rights of the GTI are protected in accordance with regulations of the Georgian legislation and applicable international treaties and public international law.

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<sup>2</sup> The Concession defines the pipelines as: “the existing main pipelines systems in the geographical territory of the Republic of Georgia for transport and/or storage of Petroleum – including pumping stations, terminals, transferring units, loading, discharging and storage facilities, workshops, stores and any other equipment or installations forming part of the Petroleum transport Pipelines system and any extensions or new Petroleum pipelines added in the future” (the “**Pipelines**”).

- 21.2 The entry of the Republic of Georgia into any confederation or union shall not confer upon any entity the power to expropriate, confiscate or nationalize the Pipelines or to sell or grant therein any rights to other persons or entities whatsoever or in any way derogate from rights mentioned in Article 21.1 above.
- 21.3 Any purported attempted or alleged act or event of expropriation, confiscation, nationalization of the Pipelines or grant of rights therein to other persons or entities shall be null and void, and shall forthwith entitle GTI the right to receive full reimbursement for any amounts expended by GTI in managing, operating or maintaining the Pipelines or in carrying out improvements, additions or extensions thereto, bearing interest on the free market value of such expenses or investment and until such reimbursement in full shall forthwith entitle GTI to payment of such users fee, rentals royalties or other compensation as shall be determined by an arbitrator to be appointed pursuant to the provisions of this Agreement, during any period in which any such purported, attempted or alleged acts are being carried out against the Pipelines or any part thereof.

The arbitrator may also award any additional amounts as reimbursement of expenses or in respect of loss of profits.”

27. Relying, *inter alia*, on the Concession, TrameX, directly or through GTI, undertook a number of steps related to the Pipelines, including the following:

- “1. Engaged Ludan Engineering Limited, a leading engineering company in Israel and its affiliate, Pecom Technologies (Europe) NV of Belgium, to (a) plan, design and manage the refurbishment, and construct sections, of the Gachiani-Samgori-Batumi pipeline, (b) construct a 200,000 tonne tank farm in the Supsa River area on the Black Sea for the storage of crude oil shipped through such pipeline, (c) construct an offshore marine terminal near Supsa and (d) construct facilities at the railway terminal at Gachiani;
2. Purchased an area of land in the Supsa River area for the construction of the tank farm;
3. Began earthworks for storage facilities at Supsa and underwater studies for an offshore marine terminal in the sea near Supsa;
4. Financed the purchase of equipment for the Gachiani and Supsa terminals (including pipes, electric equipment, pumps and fences) [...]”

28. TrameX had also entered into Heads of Agreement on 12 July 1995 with Brown & Root Ltd. (“**Brown & Root**”), a company incorporated in the United Kingdom, whereby the latter would have acquired (for US\$ 10 million) 50% of TrameX’s interest in GTI, thereby significantly increasing its value. By October 1995, Brown & Root had arranged financing for the project and

secured a commitment from the Turkish Government to provide a credit facility of \$250 million, although no final agreement was ever concluded.

#### **D. The Creation of GIOC and the AIOC Agreement**

29. By 1995, many major oil companies had become interested in Georgia, including a consortium of major oil corporations called Azerbaijan International Operation Company (“**AIOC**”), which wished to secure the Western Route from the Azeri oil fields through Georgia to the Black Sea for the transportation of their oil.

30. In this context, on 11 November 1995, President Shevardnadze adopted *Decree No. 477*, which established the State-owned company Georgian International Oil Corporation (“**GIOC**”), the “aim” of which is defined to include the following:

“Rehabilitation of oil pipeline and other oil transportation facilities available in the territory of Georgia, including construction works, oil transportation, processing and sale thereof, as well as formation of relevant infrastructure, and coordination and management of financial, banking, investment, insurance and other activities related to the aforesaid issues.”

31. In January 1996, Georgia established an official commission to examine all contracts and arrangements relating to the oil sector in Georgia.

32. On 20 February 1996, *Decree No. 178* was adopted “for the purposes of creating essential favorable conditions for the transportation of oil and gas within the territory of Georgia”. This included the following:

“3. To assign a shareholder partnership to [GIOC] in order to manage the government-owned state property, without rights to transfer of joint-stock company [GIOC], to provide the rights on ownership, use, management, exploitation, reconstruction of the herein provided state property, including all other rights, necessary for the specified company as to the party, which signed the contract on construction and exploitation of the pipeline and also the right to receive all kinds of profit from the specified property. To give the mentioned rights to [GIOC] for the term not less than fixed by the contract on construction and exploitation of pipeline, in view of possible prolongation of this contract, or for thirty years:

a) On Samgori-Batumi pipeline with an external diameter of 530 mm;

- b) On all kinds of the equipment, necessary for reception, storage, measurement, check, control, pumping over, reduction of oil pressure and all other means and equipment, functionally connected with the specified pipeline;
- c) On the land, intended for construction and exploitation of oil pipeline, including any plots of land through the whole extent of the pipeline, and also other territories, the use of which is essential for realization of rights on ownership, use, management, exploitation and reconstruction of the specified property.”

33. This Decree further provided that GIOC would represent Georgia in a contract with AIOC, among other entities, for the construction and exploitation of the Samgori-Batumi pipeline:

- “4. Joint-stock company [GIOC] to represent the Georgian party (instead of Industrial Association of Main Oil Pipelines of Georgia) in the contract on construction and exploitation of the pipeline, which according to the Protocol, signed on August 31, 1995, will be concluded between the Government of Georgia, the Government of Azerbaijan, Industrial Association of Main Oil Pipelines of Georgia, State Oil company of Azerbaijan and International Operating company of Azerbaijan.”

34. The Tribunal notes that the final provision of this Decree “cancel[s] all rights (given earlier by the Georgian Government to any of the parties) contradicting the present Decree”.

35. In March 1996, consistent with the above-quoted Decree, Georgia signed a thirty-year agreement with AIOC for the transportation of oil through Georgia, whereby GIOC was appointed for the construction of the pipeline (the “**AIOC Agreement**”).

36. Throughout this period, based on assurances purportedly given by Georgian Government officials, Claimant argues that it continued to believe that the interests that he and Mr. Fuchs held in GTI would be recognized and vindicated in the scope of arrangements made with GIOC relating to Georgia’s oil industry.

#### **E. The Compensation Committee and Commission**

37. On 23 April 1997, Georgia adopted State Minister *Order No. 84* whereby a Government committee (the “**Committee**”) was created to review “Tramex International company’s expenses in Georgia” and to “determine possible reimbursement of such expenses”. After a meeting in

August 1997, the Minister of Fuel and Energy and the Chairperson of the Committee told Mr. Fuchs that all of Tramex's losses (not only its expenses) would be included in the work of the Committee.

38. This process continued for many years without any compensation being paid to Tramex by Georgia. On 28 June 2003, President Shevardnadze agreed to an independent audit of the costs incurred by Tramex and on 27 October 2003 commissioned Deloitte Management Consultancy Israel Ltd. to conduct the audit. The auditor's report, presented to the Ministry of Fuel and Energy on 5 February 2004, estimated Tramex's losses at US\$ 106.3 million (as of 31 December 2003). In a letter to Prime Minister Zhvania dated 22 July 2004, Tramex gave notice of its claim for reimbursement of this amount.

39. In November 2003, President Shevardnadze resigned. In a subsequent election, a new government was established and Mr. Mikheil Saakashvili became President in January 2004.

40. On 9 October 2004, the new Georgian Government established another compensation commission under *Decree No. 144* entitled "setting up a governmental commission for studying questions concerning the claims of the company 'Tramex' made on the Georgian Government". In a letter dated 15 November 2004, Ms. Ekaterine Gureshidze, the First Deputy Minister of the Ministry of Justice and Chairman of the Commission, informed Claimant that the Commission had decided there were no legal grounds for holding the Government liable for the claim. The Commission reasoned as follows:

"The Government can not be held liable for the Claim because the Government did not represent a party to any of the agreements which were concluded by Tramex in Georgia.

The parties to the Joint Venture Agreement of 3 March 1992 and the Concession Agreement of 28 April 1993 (collectively, the 'Agreements') were SakNavtobi and TransNavtobi, respectively. Both entities, although state-owned, under the then-existing legislation of Georgia, represented legal entities distinct and independent from the state, had the ability to unilaterally make binding decisions in commercial transactions, acted on their own behalf and were responsible for their own obligations. According to both, the then-existing and current Georgian legislation, SakNavtobi and TransNavtobi clearly possessed independent legal capacity. As you may remember, the Agreements are governed by Georgian law.

Tramex undoubtedly was aware of the fact that under the legislation of Georgia its

contractual partners possessed legal identity separate from the state. In none of the Agreements is there even a slightest reference to the Government as to a party to the Agreements. Although the Minister of Fuel and Energy countersigned the Concession Agreement of 28 April 1993, preceded by the words, 'I confirm,' the state cannot be brought in as a party to an agreement merely because it approved the project.

The fact that a government can not be held responsible for the obligations/liabilities of a legal person even if the state is the sole shareholder of such entity, does not constitute an idiosyncrasy of Georgian or Soviet legal systems. This principle is widely recognized and accepted by developed jurisdictions and, in fact, is upheld by different courts of international arbitration." (footnotes omitted)

41. Ten months later, on 2 August 2005, Claimant filed his Request for Arbitration with the Centre.

### **III. RESPONDENT'S JURISDICTIONAL OBJECTIONS**

42. The parties' respective positions on jurisdiction are described in detail in their written submissions. In this section, the Tribunal provides a brief summary of each party's position, gleaned from these written submissions and other material filed by the parties, as well as from their oral pleadings.

#### **A. Jurisdiction *Ratione Materiae***

43. Respondent challenges the Tribunal's jurisdiction *ratione materiae* in this proceeding on two independent grounds. First, Respondent submits that Claimant has no interest in the joint venture vehicle GTI. Second, Respondent contends that the JVA and Concession are void *ab initio* under Georgian law.

##### **1. Claimant's Interest in the Joint Venture Vehicle GTI**

###### **a) Respondent's Position**

44. It is Respondent's contention that Claimant has no interest in the joint venture vehicle GTI. Pointing to the documentary evidence in this proceeding, including governmental decrees and resolutions with explicit references to Tramex being a U.S. company, Respondent maintains that Tramex USA, a company owned by Mr. Fuchs in which Claimant had no interest, held the interest in GTI, not Tramex Panama.

45. Moreover, Respondent asserts that there is insufficient documentary evidence supporting, *inter alia*, Claimant's allegations that he had an interest in Tramex Panama, that this interest amounted to 50% of the shares therein and that Tramex Panama existed at the time the JVA was executed. In particular, Respondent contends there is insufficient support for Claimant's assertion that he acquired an interest in the bearer shares in Tramex Panama in February 1992.

###### **b) Claimant's Position**

46. Claimant rejects Respondent's allegation that the counter-party to the JVA was Tramex USA, explaining as follows:

“[...] The change in the signatory on the investors' side is evident from the face of the JVA itself. The original party “Tramex (International) Ltd.” was replaced prior to



signature by “Tramex International Inc.” in all relevant places on the cover page, in the recitals and on the signature page. Those changes were initialled by Rony Fuchs on behalf of Tramex [Panama] and Revaz Tevzadze on behalf of SakNavtobi.”

47. Claimant relies upon uncontested witness testimony in support of his explanation that the counter-party to the JVA was in fact Tramex Panama and that he was entitled, as of February 1992, to a 50% beneficial interest in the company. Claimant also points to Tramex Panama’s corporate records which, in his view, indisputably show that the company’s name was changed in February 1992 from “Are Family Trust S.A.” in contemplation of entering into the JVA. Claimant asserts in his Second Witness Statement that, at the time of Tramex Panama’s creation, he had agreed with Mr. Fuchs that they would each own 50% of the share capital of the company (*i.e.*, one bearer share each):

“When [Mr. Fuchs] and I decided in February 1992 to use the Panamanian company to hold our interest in GTI, we agreed that Abacus would hold the two bearer shares on trust for the equal benefit of [Mr. Fuchs] and me. I do not believe there was any written confirmation of our agreement, but I have no doubt that this is in fact what we agreed. As I stated in my first Witness Statement, [Mr. Fuchs] and I have always worked together in a spirit of complete trust and understanding that this was a 50/50 joint venture between the two of us. We therefore saw no need to document the terms or our partnership in writing.”

48. Claimant further argues that Tramex’s corporate documents confirm it has only ever issued two shares, in bearer form. Claimant observes that there is “nothing unusual or sinister” in the fact that he owned one half of the issued share capital in Tramex Panama through a bearer share arrangement. In conclusion, Claimant maintains that he was at all relevant times and continues to be the beneficial holder of 50% of the share capital in Tramex Panama and, therefore, indirectly owns a 25% interest in the joint venture vehicle GTI.

## **2. Validity of the JVA and the Concession under Georgian Law**

### ***a) Respondent’s Position***

49. Turning to the second ground upon which Respondent challenges the Tribunal’s jurisdiction *ratione materiae*, it is observed by Respondent that Article 12 of the BIT precludes the treaty’s application in respect of investments that are inconsistent with Georgia’s legislation. Article 12 of the BIT states:

**“ARTICLE 12  
Application**

This Agreement shall also apply to investments made prior to its entry into force by Investors of either Contracting Party in the territory of the other Contracting Party, consistent with the latter’s legislation.” (emphasis added)

50. Respondent further points to Article 48 of the Georgian Civil Code which provides that agreements that do not comply with the requirements of the law are void *ab initio*. In Respondent’s view, neither SakNavtobi nor Transneft was authorized to grant the rights purportedly conferred to GTI under the JVA or the Concession, or to even enter into these agreements. Therefore, according to Respondent, the agreements are void *ab initio* and Claimant can have no claim under the BIT. Respondent also submits that, even though the ECT does not include an express provision to the same effect, Claimant cannot argue that the ECT protects an investment that is otherwise illegal under Georgian law.

51. Respondent explains that although the Georgian legal system was still under development at the time of the alleged investment at issue in this arbitration, an applicable legal framework was in place. Specifically, Respondent notes that the *Law of the Republic of Georgia on the Cabinet of Ministers of the Republic of Georgia*, adopted by the Supreme Council on 26 August 1991 (the “**Cabinet Law**”), granted the Georgian Cabinet sole authority to set conditions for creating and granting any rights to joint ventures in Georgian territory, including the creation and grant of any rights to the joint venture vehicle GTI.

52. Respondent further notes that *Resolution 834* authorized the formation of a joint venture between SakNavtobi and Tramex for the limited purpose of exploiting the oil fields of Ninotsminda, Manavi and Rustavi. In Respondent’s view, the terms of the JVA far exceed the scope of what the Cabinet authorized:

“It is thus evident that the joint venture was only authorised by the Cabinet of Ministers, the only governing body in Georgia that could grant such rights, to engage in specifically identified construction projects. It follows that the JVA, which purported to grant much wider rights to the joint venture, violated both the Resolution No. 834 and the Resolution No. 123G of the Cabinet of Ministers, which resolutions were ‘obligatory to be followed on the entire territory of Georgia by each and every agency, entity, official and citizen.’”

53. Respondent further contends that the mere registration of GTI by the Ministry of Finance cannot transform the JVA into a valid contract, nor may GTI's registration be taken as evidence that the agreement was found to be in compliance with Georgian law.

54. In respect of the Concession, Respondent maintains that, at the time Transneft entered into the Concession, it was a fully State-owned entity and therefore subject to certain instruments which circumscribed the powers of State-owned entities. Specifically, *Resolution 891*, which was adopted on 4 September 1992, regulates issues of authority and governance in respect of State-owned enterprises. Respondent contends that under this Resolution any decision in respect of the disposal of Transneft's property had to be authorized by the governmental agency with oversight of Transneft's operations. This agency, according to Respondent, was the Ministry of State Property Management, which had been created on 16 January 1993 under *Resolution No. 38* and authorized, as of 8 March 1993 through *Resolution No. 184*, to be the sole agency empowered to alienate any pipelines or other State property in Transneft's possession. Respondent summarizes the situation as follows:

“As a result by 28 April 1993, the date of the Concession, the Ministry of State Property Management – not Transneft – had the sole authority to alienate any pipelines or other State property in Transneft's possession. While Transneft was authorized to propose to the Ministry of State Property Management entry into such agreement, Transneft was unambiguously prohibited from directly entering into any concessions or other agreements for alienation of state property under its management.”

55. Respondent concludes that, because the Ministry of State Property Management did not authorize the Concession, Transneft “grossly exceeded its powers” and the Concession is therefore void *ab initio*.

56. Furthermore, Respondent argues that Article 59 of the Georgian Civil Code, which is invoked by Claimant for the proposition that any invalid clauses in the JVA may be severed in order to preserve the Agreement, does not apply to agreements entered into in excess of authority. Respondent writes:

“Article 59 does not apply because it concerns only circumstances where the violations are not grave enough to make the agreement void *ab initio* and where it is possible to sever the void provisions from the rest of the agreement. In the case of the JVA, which violated not only Article 48 of the Civil Code by breaching

Resolutions of the Cabinet of Ministers, but also Article 50 of the same Code by exceeding SakNavtobi's authority, it is clear that the agreement is void *ab initio* rather than partially void. And even if the JVA was not void *ab initio*, the parts which had to be severed are of such an essence that the JVA could not be concluded without their inclusion."

57. Finally, recalling Claimant's argument that Georgia is estopped from challenging the legality of the JVA and the Concession, Respondent maintains that there has been no clear and express acceptance by Georgia of these agreements.

***b) Claimant's Position***

58. Claimant takes the position that the issue of whether or not his investment was made in accordance with the ECT and the BIT should be resolved solely under those treaties and not by reference to Georgian law. In particular, Claimant maintains that Article 26(6) of the ECT deliberately excludes any role for Georgian law by providing as follows: "A tribunal [...] shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law." Claimant also refers to Article 9(4) of the BIT which states that "the arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of international law".

59. In connection with Article 12 of the BIT, which extends the application of the BIT to investments made prior to its entry into force provided they are consistent with the other Contracting Party's legislation, Claimant offers the following interpretation:

"Even assuming *arguendo* that Article 12 requires a pre-BIT Investment to have complied with every piece of Georgian Legislation, that requirement can only be interpreted as excluding Investments where the investor violates local law, not where the host state itself is responsible for the breach. The Tribunal should reject the Respondent's contrary interpretation of Article 12, which would defeat the purpose of the Treaty and reward a host state for its own domestic law violations, contrary to the fundamental international law principles that: (1) no party should profit from its own wrong; and (2) a state may not rely on its internal law to avoid the application of an international treaty." (emphasis in original)

60. Claimant alternatively maintains that, in any event, both the JVA and the Concession comply with Georgian law. It is Claimant's contention that the Cabinet Law is a general enabling law which does not regulate specific conditions for the approval of joint ventures.

Claimant additionally asserts that the Cabinet Law should be read harmoniously with the *1991 Law on Entrepreneurship Principles* (“**Entrepreneurship Law**”) which, in his view:

“[D]irectly regulated the requirements for the formation of joint venture companies in Georgia, including joint ventures between foreign parties and state parties. In particular, the [Entrepreneurship Law] required that joint ventures created with state funds or foreign participation must have been registered through the authority designated by the Georgian Government, in this case the Ministry of Finance. That procedure, which included a substantive review of the legality of the JVA, was fully compiled (*sic*) with here.”

61. Claimant also contends that the registration of a joint venture with the Ministry of Finance is in fact the only requirement for its validity under the Entrepreneurship Law. He submits that Cabinet of Ministers’ Resolutions Nos. 834 and No. 123G were only an “expression of contemporaneous political support for the joint venture.”

62. Claimant adds that the JVA in particular must be construed consistently with Article 19.1.4 of the JVA, which stipulates:

“The arbitrators shall not be bound by the rules of procedure or evidence or by the substantive law, but shall base their decision upon the provisions of this Agreement and principles of justice and equity as understood and practiced in commercial contexts in Western industrial countries.”

63. According to Claimant, this means that Claimant’s rights under the JVA should be construed in light of the express warranty given by SakNavtobi at Article 14.4 of the JVA which states that it “is in compliance with all laws, rules, regulations of all judicial, administrative, or governmental authorities”.

64. Claimant further argues that the various resolutions relied upon by Respondent in support of its jurisdictional challenge were inapplicable to Transneft at the time it entered into the Concession because it was a part of the State itself, and not a State-owned entity. Claimant acknowledges that the recitals to the Concession (incorrectly, in his view) refer to Transneft as a fully State-owned enterprise, but argues that Transneft’s status is “corrected later in the same recitals, which state that as a result of Resolution No. 1105 [...] Transneft had been converted into a Division of SakNavtobi”. Claimant also contends that even if Transneft was a State-

owned entity at the relevant time, the rules on the alienation of property by State-owned entities were inapplicable to the Concession because it did not involve the privatization of State assets.

65. Regarding the suggestion that SakNavtobi may have acted beyond its power, Claimant stresses that the JVA would not be void *ab initio* on this basis because Article 59 of the Georgian Civil Code permits the severability of unenforceable contractual terms. Article 59 provides as follows:

“The invalidity of a part of an agreement does not result in the invalidity of the remaining parts if it can be assumed that the agreement would have been concluded without the inclusion of its invalid part.”

66. In the further alternative, Claimant relies upon the principles articulated in Articles 26 and 27 of the *Vienna Convention on the Law of Treaties* (“**Vienna Convention**”) in support of the proposition that Georgia must perform its treaty obligations in good faith and may not invoke its internal law as justification for its failure to perform a treaty. Articles 26 and 27 of the Vienna Convention provide:

**“Article 26  
‘Pacta sunt servanda’**

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

**Article 27  
Internal law and observance of treaties**

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.”

67. On this basis, Claimant argues that Respondent is precluded from disputing that the JVA and the Concession were made in accordance with Georgian law, reasoning that:

“Where a state has remained passive despite becoming aware of relevant and material facts, estoppel certainly arises. Thus, if estoppel were required here [...] the Respondent cannot be heard to state that the JVA and Concession were illegal and void *ab initio*.”

68. Rather, Claimant contends that the warranties in Article 14.4 of the JVA and Article 4.1 of the Concession, combined with other assurances by Georgian officials, created a legitimate expectation that both were valid. In the words of Claimant:

“One of the legitimate expectations created by Respondent’s conduct is that Claimant’s investment is a qualifying investment under the ECT and the BIT, having been properly entered into in compliance with Georgian law and with full government approval. The warranties contained in the JVA and the Concession (which remain as representations that Claimant relied upon to his detriment even if the contracts were void *ab initio*), the ratification of the Concession by the Minister of Energy and the assurances and encouragement provided by government officials at every turn combined to give Claimant every impression that his investment accorded with Georgian law.”

69. Finally, Claimant also takes the position that Respondent’s claims of invalidity are now time-barred under the Georgian Civil Code, which prescribes a general maximum limitation period of ten years.

## **B. Jurisdiction *Ratione Temporis***

70. Respondent challenges the Tribunal’s jurisdiction *ratione temporis* in this proceeding under both the ECT and BIT. In essence, Respondent maintains that the acts which caused Claimant’s alleged loss, including various government Decrees and the AIOC Agreement, occurred prior to the entry into force of both the ECT and the BIT.

### **1. Jurisdiction *Ratione Temporis* under the ECT**

#### **a) Respondent’s Position**

71. Respondent’s primary contention is that the acts alleged to have deprived Claimant of his investment occurred before the ECT’s entry into force on 16 April 1998,<sup>3</sup> and therefore the Tribunal lacks jurisdiction *ratione temporis* to consider Claimant’s ECT claims. In Respondent’s view, Greek law does not permit the provisional application of the ECT, and therefore Claimant was not entitled to the ECT’s protection until 16 April 1998. Respondent adds that Georgian law also prohibits the provisional application of the ECT.

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<sup>3</sup> Both Parties acknowledge that Greece and Georgia signed the ECT on 17 December 1994.

72. Further, according to Respondent, the plain language of the ECT only gives the Tribunal jurisdiction over disputes relating to an “investment”, defined at Article 1(6) as “matters affecting such investments after the Effective Date”. Respondent observes that the term “Effective Date” is defined as the later of the dates on which the ECT entered into force for Georgia and for Greece. According to Respondent, the ECT entered into force in Georgia and Greece on 16 April 1998. Respondent writes:

“[A]ll of the acts which purportedly caused the Claimant’s alleged loss occurred prior to 16 April 1998, the last such act occurring in March 1996 (specifically, the AIOC Agreement). On the Claimant’s own case, the alleged expropriation of the Claimant’s investments ‘reached its full extent or consummation on 23 April 1997’, a year prior to the ECT’s entry into force. Even the alleged transfer of land, which the Claimant attempts to characterise as a separate and distinct act of expropriation occurred prior to the ECT’s entry into force. Therefore, the Tribunal lacks jurisdiction *ratione temporis* to consider all of the Claimant’s ECT claims.” (citations omitted)

73. Moreover, Respondent maintains that the ECT does not apply provisionally because, under its Article 45(1), provisional application is excluded when it is inconsistent with the constitution, laws or regulations of a State. In Respondent’s view, this is the case in respect of both Georgia and Greece. Article 45 of the ECT, at paragraphs 1 and 2, reads as follows:

- “(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.
- (2) (a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository.  
  
(b) Neither a signatory which makes a declaration in accordance with subparagraph (a) nor Investors of that signatory may claim the benefits of provisional application under paragraph (1).  
  
(c) Notwithstanding subparagraph (a), any signatory making a declaration referred to in subparagraph (a) shall apply Part VII provisionally pending the entry into force of the Treaty for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its laws or regulations.”



74. As regards Greek law, Respondent relies on Article 28 of the Greek Constitution, which provides that treaties are an integral part of Greek law once they are ratified by Greek law. Respondent concludes that because the fundamental acts alleged to have caused Claimant's loss occurred prior to ratification of the ECT by *Greek Law No. 2476/1997*, enacted on 4 September 1997, the Tribunal lacks jurisdiction *ratione temporis* under the ECT. As regards Georgian law, Respondent relies on Article 20 of the *Law on International Treaties* of 16 October 1997, which also prohibits the provisional application of treaties.

75. Respondent further contends that the absence of any declaration by Greece under Article 45(2) of the ECT rejecting the treaty's provisional application does not mean that Greece in fact accepted the treaty's provisional application. Although certain treaties have been provisionally applied in Greece, Respondent maintains this has only occurred subject to compliance with Greek norms, such as publication in the Official Gazette.

76. As to Claimant's contention that the reference in Article 1(6) to "the date of entry into force" of the ECT should be read as referring to the date of its application on a provisional basis, Respondent notes that this interpretation would introduce into Article 1(6) language which was not there. According to Respondent:

"To argue that prior to the ECT's entry into force and/or subsequent ratification of the ECT, a state must, in accordance with Article 45, nevertheless be bound by its provisions must be wrong. In that case, the act of ratification and the entry into force of the ECT would have no purpose, because the obligation to perform would not then be dependant on ratification and/or the ECT's entry into force. It is instead submitted that the provisional application of a treaty must be aspirational in nature, rather than capable of binding the state with the consequence of potential sanctions before the treaty has actually entered into force."

77. Moreover, Respondent reasons that because Claimant did not rely upon the ECT in deciding to make his investment in Georgia, it cannot be said that it would be unfair or inequitable to deprive Claimant of the benefit of being able to rely on the ECT now.

78. Finally, Respondent maintains that Claimant's argument based on the Most Favoured Nation ("MFN") clause in Article 10(7) of the ECT must be rejected since that Article refers to the treatment accorded to investors of "any other Contracting State" and, by virtue of Article 1(2) of the ECT, Greece was not a Contracting Party to the ECT until it entered into force for Greece.

*b) Claimant's Position*

79. While acknowledging that the ECT did not enter into force until 16 April 1998, Claimant argues that the definition of investment in Article 1(6) establishes that the ECT applies to matters affecting investments “after the Effective Date”. By virtue of the Article 45(1), Claimant submits that the Effective Date was 17 December 1994, the date on which both Greece and Georgia signed the ECT. In Claimant’s view, “the matters affecting his Investments all took place or crystallised after the Effective Date”, therefore the Tribunal has jurisdiction *ratione temporis* over Claimant’s ECT claims. Claimant notes that although Article 45(2) allowed signatory States to make a declaration excluding the operation of the provisional application provision in Article 45(1), neither Greece nor Georgia made such a declaration.

80. Claimant alternatively argues that pursuant to Article 45(3), the ECT applies to matters affecting investments during its provisional application period, notwithstanding the definition of investment in Article 1(6). According to Claimant, Respondent’s argument that the “plain language” of Article 1(6) refers to a definitive entry into force of the ECT “rests on a myopic reading” of that provision. In Claimant’s view, the ECT should be interpreted in accordance with Articles 25, 31, and 32 of the Vienna Convention which deal, respectively, with the provisional application of treaties and treaty interpretation. Claimant summarizes his position as follows:

“[T]he wording of Article 45, read in good faith and in light of the object and purpose of the ECT, taken together with the treaty’s negotiating history, conclusively reject the Respondent’s attempt to invoke Article 1(6) as a basis to exclude Part III of the Treaty from the scope of provisional application.”

81. Claimant further argues that provisional application of the ECT is consistent with Georgian law for the following five reasons:

- Georgian law actually permits the provisional application of treaties – a legal position officially confirmed by the Respondent in 2001;
- Georgia’s law on International Treaties was not adopted until 16 October 1997 and under Georgian law, does not have retrospective effect;
- even if the Respondent purported to give that law retrospective effect, it could not thereby immunize itself from any international treaty obligations arising from its conduct prior to 16 October 1997;

- the 1997 law on International Treaties also lacks prospective effect as regards the ECT, because the ECT contemplates only one way to terminate provisional application: a declaration under Article 45(3)(a). The Respondent did not comply with that procedure; and
- the Respondent represented at the December 1994 signature conference that it would not seek to deny provisional application of the ECT under Article 45(1).”

82. In Claimant’s view, Greek law is irrelevant on this point because provisional application of the ECT was not subordinated to an unwritten rule of reciprocity:

“The application of the reciprocity principle is defined clearly in Article 25 and extends no further than the plain wording of Article 25(2)(b). Under that clause, provisional application may be denied only to investors of signatories that made a declaration in accordance with Article 45(2)(a), which Greece did not. In particular, nothing in the text of Article 45 permits Georgia to deny the benefits of provisional application to investors of countries that declared or considered themselves excused from provisional application under Article 45(1).”

83. Moreover, it is Claimant’s position that, even if reciprocity had been required under Article 45(1), that requirement would be satisfied because both Greece and Georgia have been equally bound by the ECT from the date they signed the treaty on 17 December 1994. Claimant additionally argues that Articles 2(2) and 28(1) of the Greek Constitution permit and encourage the provisional application of treaties. In any event, assuming Greek law prohibited provisional application of the ECT, Claimant maintains that the benefits of provisional application would nevertheless have to be extended to Greek investors by virtue of the MFN clause in Article 10(7) of the ECT, as “treatment” covers the benefit of provisional application.

84. As regards Respondent’s argument that provisional application of a treaty does not give rise to legal commitments but was only aspirational in nature, Claimant notes that this issue does not affect the Tribunal’s jurisdiction, but is rather related to the applicable law which is a matter to be considered at a later stage of this arbitration. However, Claimant observes that Article 45(1) provides that each signatory “agrees to” apply the ECT on a provisional basis, which may be contrasted with other provisions that are aspirational and use such phrases as “shall endeavour to” or “may”. According to Claimant, the signatories’ agreement was “to apply” the ECT provisionally, *i.e.*, to put it into practical operation immediately upon signature and that on this basis, the Tribunal has jurisdiction *ratione temporis* under the ECT.

## 2. Jurisdiction *Ratione Temporis* under the BIT

### a) Respondent's Position

85. As for Respondent's contention in respect of the application of the BIT, Respondent argues that the acts alleged to have deprived Claimant of his investment occurred before the BIT's entry into force on 3 August 1996, and that therefore the Tribunal lacks jurisdiction *ratione temporis* to consider Claimant's BIT claims, namely his claims for expropriation under Article 4 of the BIT and his claims for stand-alone breaches under Articles 2(2) and 2(4). In reference to Article 12 of the BIT, Respondent argues that pre-treaty conduct is relevant only if conduct after the treaty's entry into force constitutes a breach of the Treaty. Respondent insists that the fundamental acts which constituted the alleged breach in the circumstances are discrete acts that were completed prior to the entry into force of the BIT on 3 August 1996.

86. Relying on arbitral authority and Article 15 of the International Law Commission's ("**ILC**") *Articles on Responsibility of States for Internationally Wrongful Acts* ("**Articles on State Responsibility**"), Respondent argues that acts which occur prior to a treaty's entry into force do not have a "continuing character" simply because they have consequences after that date. Respondent contends that while the effect of the acts may be said to be continuing, in the same manner that an alleged expropriation may have a continuing effect if compensation is not paid, this fact alone is insufficient to confer jurisdiction.

87. In respect of Claimant's contention that Georgia's conduct should be considered a continuing process, Respondent notes that this proposition is based on the assumption that Georgia's alleged expropriation could not be recognised as a violation of the BIT at the time the relevant acts occurred. Respondent points out, however, that Claimant in fact recognized at paragraph 53(a) of his Request that the Decrees and the AIOC Agreement were a violation of the BIT at the time they occurred. In Respondent's words:

"[T]he alleged breach in this case is not a composite act, such that it is necessary to take a series of alleged acts in aggregate in order for them to constitute a wrongful act. Rather, the Decrees and the AIOC Agreement are in themselves acts which, without further acts, are alleged to be wrongful and in breach of the BIT and to have caused the alleged damage."

88. Respondent further rejects Claimant’s contention that the alleged wrongful expropriation crystallized only after the entry into force of the BIT because the possibility of restructuring Claimant’s investment purportedly remained open until mid-1997:

“If a dispute arises before a treaty’s entry into force, it is necessarily the case that the acts which gave rise to the dispute also pre-dated the treaty; the treaty cannot bind a state in relation to such pre-treaty acts, by virtue of Article 28 of the Vienna Convention. Accordingly, it is a natural consequence of Article 28 of the Vienna Convention that the Tribunal lacks jurisdiction *ratione temporis* over any disputes arising prior to entry into force of the BIT.”

89. In terms of any alleged promise to pay compensation, it is contended by Respondent that such a promise to compensate an investor for an expropriation “cannot prevent or indefinitely suspend” a breach of a BIT. Respondent emphasizes that, in any event, no such promises of compensation were ever made by Georgian officials.

90. Finally, in respect of claims for stand-alone breaches,<sup>4</sup> Respondent adopts the following position:

“First, [Claimant] seeks to re-write the express terms of the BIT. Article 2(4) requires the observance of obligations entered into by Georgia regarding the alleged investments. It does not require the observance of alleged unilateral assurances or non-binding ‘commitments’ in respect of pre-treaty conduct. Second, alleged ‘stand-alone violations’ under Articles 2(2) and 2(4) solely concern Georgia’s alleged response to [Claimant’s] requests for compensation for conduct occurring prior to the BIT’s entry into force.”

***b) Claimant’s Position***

91. Claimant essentially maintains that Article 12 of the BIT expressly establishes that it applies to investments made prior to its entry into force and that this Tribunal accordingly has jurisdiction over Claimant’s claims in this arbitration. Claimant further argues that Respondent’s conduct prior to the BIT’s entry into force is relevant to the assessment of Respondent’s alleged breaches thereof after its entry into force. In this sense, it argues that the alleged breaches of the BIT by Georgia should be considered as a process and not as an unrelated sequence of events.

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<sup>4</sup> See *infra*, paragraph 96.

92. Regarding Claimant's claims for expropriation under Article 4 specifically, Claimant states that while certain acts on the part of Respondent occurred before 3 August 1996, Claimant only experienced the irrevocable loss of his investment (*i.e.*, its expropriation) after that date. Claimant makes three primary points in this regard.

93. Firstly, Claimant submits that there was no "expropriation" within the meaning of Article 4 of the BIT until GTI's rights were extinguished through the liquidation of Transneft and the transfer of its property to GIOC on 19 August 1996.<sup>5</sup>

94. Secondly, Claimant argues that an "expropriation" under Article 4 did not become a breach of that provision until Respondent "disavowed" its promise to pay prompt, adequate and effective compensation, which did not occur until, at the earliest April 1997, or at the latest October 2004. Claimant alleges that the full significance of Respondent's conduct only "crystallized" on 23 April 1997, when the Commission was established to consider the reimbursement of Tramex's expenses in Georgia.<sup>6</sup>

95. Finally, Claimant asserts that Respondent ultimately expropriated his share of the rights held by GTI when it failed to compensate him for this loss and, accordingly, reasons that these events cumulatively triggered a breach of Article 4 after the BIT entered into force.

96. Regarding Claimant's claims under Article 2(2) and 2(4) of the BIT, Claimant submits that Respondent's conduct after the BIT's entry into force gives rise to separate, stand-alone breaches, referring to Georgia's alleged failure "to honour its repeated assurances that [Claimant] would either be invited to participate in GIOC or else compensated through a fair and transparent process". Claimant specifically refers to the following acts of Respondent after the entry into force of the BIT:

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<sup>5</sup> The Tribunal notes that, in his Rejoinder, Claimant argues that "[n]othing extinguished GTI's separate rights over gas pipelines until 20 April 1997, when the Respondent passed Presidential Decree No. 206 (...) granting those rights to GIOC."

<sup>6</sup> The Tribunal notes that Counsel for Claimant nonetheless argued at the jurisdictional hearing that the date of the breach was in fact 20 May 1997, when Claimant received formal notice of the establishment of the Commission. Transcript, 15 January 2007, p. 158, lines 23-25; p. 159, lines 1-12; p. 163, lines 19-25; p. 164, lines 1-2.

“President Shevardnadze’s 30 August 1996 order to ‘come together’ and ‘find a solution acceptable to all interested parties’;

the establishment of a Tramex-specific compensation commission through Order of the State Minister of Georgia No. 84 of 23 April 1997;

President Shevardnadze’s Order No. 1888/8 of 19 September 2000, instructing the relevant Georgian Ministers to discuss and make appropriate decisions;

President Shevardnadze’s acknowledgment through Order No. 20/18 of 26 February 2003 that Tramex’s claims ‘should not be considered groundless, but at that time there was no other way out’ and his commitment to convene the interested Georgian officials and prepare a conclusion;

the commitment by the Georgian Minister of Fuel and Energy on 19 May 2003 that ‘on the basis of an act submitted by the Tramex audit and a joint audit, the sum [due to Tramex] should be recognized and compensated under the terms no better than Paris Club (regime) rules’;

the establishment of a further compensation commission through Decree No. 144 of 9 October 2004; and

the procedural and substantive denial of fair treatment by that Commission during 2004.” (emphasis in original) (references omitted)

97. Claimant also refers to other assurances given by Respondent such as:

“President Shevardnadze’s assurance to Ephraim Gur in November 1995 that the Claimant’s investments would be protected;

the establishment of a commission under Decree No. 133 of 30 January 1996 to examine all oil related agreements, including those concerning GTI;

the assurances given to Mr. Nanikashvili in early 1996 that GTI and Tramex would be involved as part of the new GIOC regime; and

similar assurances given by President Shevardnadze to Ephraim Gur in May/June 1996.”

98. While all of the above-quoted alleged acts on the part of Respondent did not necessarily occur after 3 August 1996, it is Claimant’s contention that the commitments and assurances encompassed therein were not breached until after 3 August 1996, *i.e.*, after the BIT’s entry into force. On this basis, Claimant submits that the Tribunal has jurisdiction *ratione temporis* over Claimant’s claims under the BIT.

#### IV. ANALYSIS AND FINDINGS

##### A. Preliminary Observations

99. The present dispute arises in the context of the Soviet Union's collapse and the consequent emergence of the Republic of Georgia, as a sovereign state, with all of the rights and responsibilities attendant thereto.

100. The Tribunal observes that very similar circumstances were present in Estonia in 1994 when US nationals invested in the former Soviet State and subsequently claimed a breach of the US-Estonia BIT before an ICSID tribunal.

101. In the subsequent ICSID decision of *Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Estonia*, that arbitral tribunal stated as follows:

“[T]he Tribunal considers it imperative to recall the particular context in which the dispute arose, namely, that of a renascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown. This is the context in which Claimants knowingly chose to invest [...]”<sup>7</sup>

102. The Tribunal in the present case, as it commences its analysis of the positions advanced by the parties in this arbitration, finds very apposite the observations of the *Genin* Tribunal as to the context in which Claimant's investment was made in Georgia.

103. In terms of preliminary observations, it is also apposite to recall the standard applicable to jurisdictional challenges. In the words of the tribunal in the ICSID case of *Siemens AG v. Argentina*:

“At this stage of the proceedings, the Tribunal is not required to consider whether the claims under the Treaty made by [Claimant] are correct. This is a matter for the merits. The Tribunal simply has to be satisfied that, if Claimant's allegations would be proven correct, then the Tribunal has jurisdiction to consider them.”<sup>8</sup>

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<sup>7</sup> *Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Estonia*, ICSID Case No. ARB/99/2, Award of 25 June 2001 at paragraph 348.

<sup>8</sup> *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 4 August 2004 at paragraph 180.



104. Except as noted later in respect of certain of Claimant's claims against Respondent under the BIT<sup>9</sup>, there are no exceptional circumstances in this case which would justify a departure from this standard. Accordingly, the Tribunal must accept *pro tem* the facts as alleged by Claimant and analyze Respondent's objections to jurisdiction in this light. This is consistent with the approach of other ICSID tribunals in respect of the standard applicable at this stage.<sup>10</sup>

105. Turning to the circumstances at issue, the Tribunal recalls that it is seized of two principal objections to its jurisdiction over this dispute. The first objection relates to the Tribunal's jurisdiction *ratione materiae*. As described in greater detail earlier in this Decision, Respondent contends that Claimant does not in fact have an interest in an investment that could be protected under the ECT or the BIT. Respondent also asserts that, in any event, the JVA and the Concession are void *ab initio* under Georgian law and that, therefore, any investment in which Claimant may have had an interest as derived from these agreement is not protected by the ECT or the BIT.

106. The second objection relates to the Tribunal's jurisdiction *ratione temporis* under the ECT and the BIT. Respondent contends that the acts which allegedly breach the ECT and the BIT occurred prior to their respective entry into force and therefore cannot ground Claimant's claim.

107. For the reasons explained more fully below, the Tribunal rejects Respondent's first objection and finds that it has jurisdiction *ratione materiae* over this dispute. The Tribunal also rejects Respondent's second objection as it relates to its jurisdiction *ratione temporis* under the ECT. The issue of the Tribunal's jurisdiction *ratione temporis* under the BIT will be joined to the merits, consistent with the Tribunal's authority under Article 41(2) of the ICSID Convention and Article 41(4) of the ICSID Arbitration Rules.

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<sup>9</sup> See *infra* at paragraph 259.

<sup>10</sup> See e.g. *SGS Société Générale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003 at paragraph 145; *Bayindir Insaat Turizm Ticaret Ve Snayi v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 at paragraph 195.

**B. Jurisdiction *Ratione Personae***

108. Respondent has not raised any objection to the Tribunal’s jurisdiction *ratione personae*. As is well established, the Tribunal may, nevertheless, examine its competence in a particular dispute, *ratione personae* or on another basis, on its own initiative (*proprio motu*).<sup>11</sup>

109. Article 25 of the ICSID Convention requires that the dispute before the Tribunal be between a “Contracting State” and a “national of another Contracting State”. These basic requirements are satisfied in the present case. Georgia is a Contracting State to the ICSID Convention since 6 September 1992. Greece is also a Contracting State to the ICSID Convention since 21 May 1969. Claimant is and was at all material times a Greek national, and is consequently a “national of another Contracting State”. The Tribunal therefore has jurisdiction *ratione personae* under the Convention.

110. Regarding the ECT, Article 26(1) thereof requires that the dispute before the Tribunal be between a “Contracting Party and an Investor of another Contracting Party”. Georgia is a “Contracting Party” within the meaning of Article 1(2) of the ECT, as it signed the ECT on 17 December 1994 and ratified it on 12 July 1995. Greece, which signed the ECT on 17 December 1994 and ratified it on 4 September 1997, is also a “Contracting Party”. Claimant is a Greek national and is therefore an “Investor of another Contracting Party” within the definition set out in Article 1(7)(i) of the ECT. The Tribunal therefore has jurisdiction *ratione personae* under the ECT.

111. As for the BIT, it requires under Article 9(1) that the dispute before the Tribunal be between an “investor of a Contracting Party and the other Contracting Party”. Claimant is a Greek national and accordingly qualifies as an “investor” within the meaning of Article 1(3)(a) of the BIT. The Tribunal therefore has jurisdiction *ratione personae* under the BIT.

112. For these reasons, the Tribunal is satisfied that it has jurisdiction *ratione personae* in this proceeding.

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<sup>11</sup> See *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction, 11 July 1997 at paragraph 25.

### C. Jurisdiction *Ratione Materiae*

113. In order for the Tribunal to have jurisdiction *ratione materiae* over the present dispute, it must be found to have jurisdiction under the ICSID Convention, and under the ECT or the BIT.<sup>12</sup> Respondent has not raised the issue of the Tribunal's jurisdiction *ratione materiae* under the ICSID Convention. The Tribunal will deal with this issue first, *proprio motu*.

#### 1. Jurisdiction *Ratione Materiae* under the ICSID Convention

114. Article 25(1) of the ICSID Convention states, in relevant part, as follows:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment between a Contracting State [...] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”

115. The Tribunal is of the view that there is, indeed, a legal dispute between the parties in the present proceeding within the meaning of Article 25(1).

116. The ICSID Convention does not define the term “investment”. ICSID tribunals have, however, developed a set of conjunctive criteria to determine whether an investment was made within the meaning of the Convention. There must be: (i) a contribution, (ii) a “certain duration of performance of the contract”, (iii) a “participation in the risks of the transaction”, and (iv) a contribution to the host State's economic development.<sup>13</sup>

117. In the Tribunal's view, Claimant's economic activities in connection with the joint venture GTI constitute an investment under the ICSID Convention. On the basis of the criteria listed above, the Tribunal notes that Respondent does not dispute that GTI's economic activities constituted a financial contribution to Georgia. In terms of duration, the JVA contemplates an “initial term” of 25 years, while the Concession was for a period of 30 years. In fact, GTI's actual activities in Georgia lasted for approximately three years, well within the minimum

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<sup>12</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 at paragraph 44. See also *Fedax NV v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997.

<sup>13</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, at paragraph 52. See also *Fedax NV v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997 at paragraph 43.

temporal requirement recognized by other tribunals.<sup>14</sup> Furthermore, there is no question that Claimant's investment was intended to contribute to Georgia's economic development. Finally, the risk component is satisfied in light of the political and economic climate prevailing throughout the period of the investment.

118. Georgia and Greece consented to the settlement of disputes by an arbitral tribunal constituted under ICSID rules in Articles 9(2) and 9(3)(a) of the BIT and Articles 26(3) and 26(4) of the ECT. Claimant also consented to arbitration by filing his Request with the Centre. Both parties have therefore given their consent in writing to submit the present dispute to the Centre.

119. Accordingly, the Tribunal finds that it has jurisdiction *ratione materiae* under the ICSID Convention.

## **2. Jurisdiction *Ratione Materiae* under the ECT and the BIT**

120. The Tribunal recalls that Respondent's first objection in respect of the Tribunal's jurisdiction *ratione materiae* is based on the contention that Claimant had no interest in an investment that could be protected under the ECT or the BIT. Respondent also contends that the JVA and the Concession are void *ab initio* under Georgian law and that, therefore, any investment in which Claimant may have had an interest under these agreements is not protected by the ECT or the BIT.

### ***a) Claimant's Interest in the Joint Venture Vehicle GTI***

121. The Tribunal recalls that Article 1(6) of the ECT defines investment as follows:

“‘Investment’ means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

[...]

(b) a company or business enterprise, or shares, stock or other forms of equity

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<sup>14</sup> See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001 at paragraph 54. See also *Jan de Nul N.V. & Dredging International N.V. v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006 at paragraphs 92-95.

participation in a company or business enterprise, and bonds and other debt of a company or business enterprise.” (emphasis added)

122. As for the BIT, Article 1 thereof defines investment as follows:

“‘Investment’ means every kind of asset and in particular, though not exclusively, includes:

[...]

(b) shares in and stock and debentures of a company and any other form of participation in a company.”

123. The BIT is silent on whether the investor is required to directly own shares in a company investing in Georgia in order to qualify as an “investment” under the treaty. The tribunal in the ICSID case of *Siemens A.G. v. Argentina* was faced with a similar situation. That tribunal reasoned as follows:

“The Tribunal has conducted a detailed analysis of the references in the Treaty to ‘investment’ and ‘investor’. The Tribunal observes that there is no explicit reference to direct or indirect investment as such in the Treaty. The definition of ‘investment’ is very broad. An investment is any kind of asset considered to be such under the law of the Contracting Party where the investment has been made. The specific categories of investment included in the definition are included as examples rather than with the purpose of excluding those not listed. The drafters were careful to use the words ‘not exclusively’ before listing the categories of ‘particularly’ included investments. One of the categories consists of ‘shares, rights of participation in companies and other types of participation in companies’. The plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty. The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company. Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.”<sup>15</sup> (emphasis added)

124. The Tribunal agrees. The Tribunal is of the view that, in the present case, the indirect ownership of shares by Claimant constitutes an “investment” under the BIT and the ECT.

125. However, Respondent contends that Claimant had no interest, direct or indirect, in an investment in Georgia and accordingly challenges the Tribunal’s jurisdiction *ratione materiae* under both the ECT and the BIT. This challenge in fact turns on three issues. First, did Tramex

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<sup>15</sup> *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 at paragraph 137.

Panama exist before the JVA was executed? Second, if Tramex Panama existed before the JVA was executed, was the JVA entered into by Tramex Panama? Finally, did Claimant have an interest in Tramex Panama when the JVA was executed? The Tribunal will now examine these three questions.

(i) ***Did Tramex Panama Exist before the JVA was Executed?***

126. Respondent contends, in essence, that there is insufficient documentary support for Claimant's assertion that Tramex Panama existed as a corporate entity prior to the execution of the JVA in March 1992. On the basis of the evidence before it, the Tribunal is not persuaded by this contention of Respondent.

127. Claimant has submitted documentary evidence demonstrating that the company "Are Family Trust S.A." was incorporated in Panama in 1986 with a share capital consisting of two bearer share certificates of US\$ 100 each. This evidence is supported by the witness statements of Ms. Rainelda Mata-Kelly, Tramex Panama's company secretary, and Mr. Jack Smith, an Israeli attorney.

128. Claimant's and Mr. Fuchs' second witness statements include affirmations that these two shares were owned by Mr. Fuchs and that they were transferred to a trust, in the Channel Islands, where they were held for the benefit of Mr. Fuchs' family. Claimant also submitted documentary evidence demonstrating that on 27 February 1992, the name of the company "Are Family Trust S.A." was changed to "Tramex International Inc." (*i.e.*, Tramex Panama) for the purpose of entering into a contract in Georgia.

129. Claimant has accordingly established to the Tribunal's satisfaction that Tramex Panama existed prior to the execution of the JVA in March 1992 and the Tribunal so finds.<sup>16</sup>

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<sup>16</sup> The Tribunal will examine later the status of Claimant as a shareholder of Tramex Panama (See *infra* paragraphs 137 *et seq.*)

(ii) *Was the JVA Entered into by Tramex Panama?*

130. Respondent's next contention is that Tramex USA, and not Tramex Panama, entered into the JVA. The Tribunal notes that Respondent points to certain pre-JVA documents that do in fact refer to "Tramex (International) Ltd." (*i.e.*, Tramex USA) such as the Power of Attorney or suggest that Tramex is a U.S. company, such as the Letter of Intents and Cabinet of Ministers' Resolution no. 834 of 8 November 1991.

131. The Tribunal further notes that certain post-JVA documents also refer to Tramex as a U.S. company, such as official Georgian decrees, resolutions and judgments to which Tramex is not a party, but which were, nevertheless, publicly available. Conversely, other post-JVA agreements to which Tramex was a party refer to the company as being Panamanian, including the Concession and the Heads of Agreement entered into with Brown and Root.

132. In considering this issue, the Tribunal accepts the unchallenged witness testimony of Ephraim Gur submitted by Claimant which provides credible explanations as to why some post-JVA Georgian decrees and resolutions refer to Tramex as a U.S. company. Mr. Gur stated:

"The Georgians liked the idea of being able to say that an American company was investing in their country because they hoped that it might encourage other Americans [...] to invest. [...] The Georgians were well aware even from these very first meetings that any investment by 'Tramex' was an investment by a Greek and [an] Israeli businessman."

133. The JVA itself was amended in several places such that all references to "Tramex (International) Ltd." (*i.e.*, Tramex USA) were crossed out and replaced with "Tramex International Inc." (*i.e.*, Tramex Panama). These handwritten amendments were made directly on the original typewritten English text of the JVA and were acknowledged by the initials of Mr. Fuchs, on behalf of Tramex Panama, and by Mr. Tevzadze on behalf of SakNavtobi.

134. Messrs. Gur, Nanikashvili and Fuchs took part in the negotiations of the JVA with Georgian officials. Their unchallenged testimony is to the effect that Respondent's representatives were aware, prior to signing the JVA, that the agreement would be entered into by a Panamanian, not an American company.

135. Tramex Panama was indeed the entity that signed the JVA with SakNavtobi and the Tribunal so finds.

136. In this connection, it is interesting to note that the letter dated 15 November 2004 from the Georgian First Deputy Minister of the Ministry of Justice to Claimant informing him that his claim for compensation before the Commission had been rejected is additional compelling proof that Respondent was aware that Tramex Panama was the true party to the JVA, not Tramex USA:

“Neither Mr. Fuchs nor Mr. Kardassopoulos carried out any investments in Georgia in their own name or on their own behalf in relation with the Claim. The investor in Georgia was Tramex, which is a legal entity incorporated and registered in Panama, possessing a legal identity separate and distinct from its owners.” (emphasis added)

**(iii) *Did Claimant have an Interest in Tramex Panama when the JVA was Executed?***

137. Respondent also contends that there is insufficient documentary support for Claimant’s assertion that he held an interest in Tramex Panama at the time the JVA was executed in March 1992. Again, the Tribunal, on the basis of the evidence before it, is not persuaded by Respondent’s contention.

138. There is, in the Tribunal’s view, ample evidence establishing that Claimant had an interest in Tramex Panama at the time the JVA was executed. This evidence includes a letter dated 4 May 1993 from Abacus (C.I.) Limited, a company incorporated in the Channel Islands which owned all of the shares of Tramex International Inc. (*i.e.*, Tramex Panama), to Tramex Development BV, a company incorporated in the Dutch Antilles and used as “an intermediate trust” by Claimant and Mr. Fuchs for tax planning purposes. Claimant and Mr. Fuchs stated in that letter:

“We, the undersigned, the owners of all the shares of Tramex International Inc, a company registered in Panama, do hereby irrevocably assign and transfer all our rights, title and interest in the shares of Tramex International Inc without consideration to Tramex Development BV. Enclosed please find the certificates numbered 1 and 2 issued to Bearer in respect of all the outstanding and issued shares of Tramex International Inc.”



139. Claimant also produced a letter, dated 25 May 1993, again from Abacus (C.I.) Limited to Tramex Development BV, which confirms that two bearer share certificates were physically transferred on that date to Tramex Development BV c/o Mr. Jack Smith, an attorney in Israel. This is supported by the witness statement of Mr. Smith himself who confirmed that Claimant is the exclusive beneficiary of one of the bearer shares.

140. It has been suggested by Respondent that Claimant only became the exclusive beneficiary of one of the bearer shares in May 1993. As already mentioned above,<sup>17</sup> Claimant, however, maintains that he has been the beneficial owner of one bearer share of Tramex Panama since February 1992. Claimant's affirmation is supported by the witness testimony of Mr. Fuchs. Respondent did not file any witness statements contradicting the extensive evidence submitted by Claimant on this point.

141. The Tribunal therefore concludes that Claimant had an interest in Tramex Panama at the time the JVA was executed. The Tribunal accordingly finds that Claimant was, at all relevant times (and remains now), the beneficial holder of 50% of the share capital in Tramex Panama and indirectly owned a 25% interest in the joint venture vehicle GTI which carried out an investment in Georgia.

***b) Validity of the JVA and the Concession under Georgian Law***

142. Respondent's second objection to the Tribunal's jurisdiction *ratione materiae* is based on the contention that neither SakNavtobi nor Transneft had the authorization to enter into the JVA and the Concession, respectively, and that, under Georgian law, these agreements are therefore void *ab initio*. In response, Claimant contends that Georgian law is irrelevant to Respondent's obligations under the ECT and the BIT and that even if Georgian law were applicable, the agreements are enforceable.

143. Before addressing Respondent's objection in the present section of our Decision, the Tribunal must recall certain well established principles of international law.

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<sup>17</sup> *Supra*, paragraph 47.

144. As an international tribunal, this Tribunal must decide the issues in dispute between the Parties in accordance with the applicable rules and principles of international law. It is thus essential at this point to cite the relevant provisions of the ICSID Convention, the ECT and the BIT which are clear and prescriptive. They read as follows:

Article 42(1) of the ICSID Convention

“The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable”

Article 26(6) of the ECT

“A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.”

Article 9(4) of the BIT

“The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of international law (...).”

145. There is no doubt that a choice of international law by the Parties either in conjunction with a national law or on its own is valid and has to be respected by our Tribunal.<sup>18</sup> While this Tribunal is not authorized to apply Georgian law, it is well established that there are provisions of international agreements that can only be given meaning by reference to municipal law.<sup>19</sup>

146. In the present case, Georgian law is relevant as a fact to determine whether or not Claimant’s investment is covered by the terms of the ECT and the BIT. But, whatever may be the determination of a municipal court applying Georgian law to the dispute, this Tribunal can only decide the issues in dispute in accordance with the applicable rules and principles of international law.

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<sup>18</sup> C. Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, 2001, p. 583.

<sup>19</sup> *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)*, second phase, Judgment of 5 February 1970, *ICJ Reports* 1970, p. 4, at paragraph 34.

147. Having thus settled the basis on which it should act, the Tribunal will now address the following questions.

148. First, was SakNavtobi authorized under Georgian law to enter into the JVA and make the purported grant of rights to GTI? Second, was Transneft authorized under Georgian law to enter into the Concession and make the purported grant of rights to GTI? Finally, in the event the JVA and/or the Concession are found to be void *ab initio* under Georgian law, are they nonetheless enforceable?

- (i) ***Was SakNavtobi Authorized under Georgian Law to Enter into the JVA and Make the Purported Grant of Rights to GTI and, if so Authorized, did SakNavtobi, in fact, exceed its Authority?***

149. Respondent does not contest that SakNavtobi was a State-owned enterprise at the time it entered into the JVA.<sup>20</sup> Essentially, Respondent argues that SakNavtobi was not authorized to enter into the JVA because the Cabinet Law allocates the responsibility for directing and regulating “relations between the state and joint venture or capital enterprises” to the Cabinet of Ministers, not entities such as SakNavtobi. Further, the Entrepreneurship Law requires, in Respondent’s view, that a joint venture be registered in conformity with the “normative acts” which regulate its establishment. *Resolution No. 834* constitutes the normative act regulating the establishment of GTI. It provides as follows:

“The Cabinet of Ministers of the Republic of Georgia notes that in order to launch an independent economy and favorable market conditions in the country, it is extremely important to effectively exploit and use the domestic resources. The Ministry of Industry of the Republic of Georgia has performed some works in this direction; in particular, agreements with several foreign companies have been achieved on rehabilitation of the dead wells and implementation of the new technology for deep processing of the raw materials.

The Cabinet of Ministers of The Republic of Georgia has decided as follows:

1. To approve the request by the Ministry of Industry of the Republic and to establish in Tbilisi joint ventures between Georgian Oil [i.e., SakNavtobi] and the American firm Tramex as well as with the companies Mac Oil and Bao Oil Corporation, for the purpose of exploiting the oil fields of Ninotsminda, Manavi

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<sup>20</sup> See Expert Legal Opinion of Mr. Dzlierishvili, 3 December 2006, at paragraph 18.

and Rustavi. Further, the Ministry of Economy & Finance of the Republic of Georgia should define their status after registration.” (emphasis added)

150. The JVA, on the other hand, provides, in relevant part:

“The Joint Venture is created for the purpose of developing and strengthening the free and independent markets of the Republic of Georgia, of introducing Western methods into the Georgian Oil and Gas industry, of improving the ability of the Republic of Georgia to participate effectively in world Oil and Gas markets, of providing for maximized efficiency in exploiting the natural resources of the Republic of Georgia, of providing for increased inflow of foreign currency into the Republic of Georgia, and of dealing in matters related to Oil and Gas, including the construction of Oil and Gas pipelines and other Oil and Gas production, manufacturing, processing, refining, transportation, storage and other infrastructure facilities, and the purchase, sale, storage and export of Oil and Gas products, representation of the Republic of Georgia in world Oil and Gas markets, and exploitation of Oil and Gas resources in the Republic of Georgia. In achieving the aforementioned Joint Venture shall act in accordance with the following principles:

- 3.1 The Joint Venture shall take all actions and measures and enter into the necessary agreements and arrangements to acquire and/or import Oil and Gas and to sell and/or to export to the widest range possible of buyers, in the Republic of Georgia and/or outside thereof, the largest volume possible of Oil and Gas and/or to maximize the utilization of the Oil and Gas Facilities by the widest range of users and customers possible, from both within the Republic of Georgia and outside of it, at free market prices;
- 3.2 The Joint Venture shall have the sole, exclusive and uninterrupted use of the Export License - to be placed at the exclusive use of the Joint Venture by the Georgian Partner as hereinafter described - and shall deal for the Republic of Georgia in the acquisition, sale and export of Oil and Gas;
- 3.3 The Joint Venture shall have the sole, exclusive and uninterrupted use to be provided exclusively to the Joint Venture by the Georgian Partner to maintain, operate and use all Oil and Gas Facilities in the Republic of Georgia, currently under the control of the Georgian Partner and future ones, including offering use of such Oil and Gas Facilities to third parties [...];
- 3.4 The Joint Venture shall have the sole and exclusive rights from the Republic of Georgia to carry out the following Projects in the Republic of Georgia:
  - A. The construction, maintenance and operation of a small oil refinery on the terrain adjacent to Samgori Mine with the capacity of 50-200 thousand tons per year;
  - B. The construction, maintenance and operation of the main ‘Bako-Gachiani’ Pipeline;
  - C. The construction, maintenance and operation the main ‘Grozno-Gachiani’ Pipeline;

- D. The construction, maintenance and operation a branch of the ‘Gachiani-Batumi’ Pipeline (on the terrain adjacent to Poti);
  - E. The construction, maintenance and operation of an oil-transferring unit (Supsa-Poti) on the basis of the abovementioned branch of the ‘Gachiani Batumi’ Pipeline;
  - F. The construction, maintenance and operation of a new main Pipeline for Oil products - Gachiani-Khashuri-Poti;
  - G. The construction, maintenance and operation of a large Oil refinery with the capacity of 8-10 million tons per year on a site to be agreed upon [...];
- 3.5 The Joint Venture shall contact the Government of the Republic of Georgia regarding inclusion of the construction of an oil-transferring unit and corresponding terminal in the design of the reconstruction of Poti Port, and regarding construction of the Supsa-Poti branch between the Gachiani-Batumi Pipeline and the Poti oil-transferring terminal [...];
  - 3.6 The Joint Venture shall have the sole and exclusive right of first refusal in the Republic of Georgia to participate or implement any other Oil and Gas related projects in the Republic of Georgia. If no agreement can be reached then the Government will issue a tender [...];
  - 3.7 The Joint Venture shall have the sole and exclusive right to represent the Republic of Georgia in any Oil and Gas or energy related projects with foreign persons.” (emphasis added)

151. *Resolution No. 123G*, which instructed the Minister of Finance to register the joint venture between SakNavtobi and Tramex Panama, provides the following:

“2. To instruct Ministry of Finance of the Republic of Georgia to register the joint venture between “Georgian Oil” and the American firm “Tramex” and to define its fields of activity as follows:

- Construction of a compact, ecologically safe oil refinery, with a capacity of one million tons per annum, on the terrain adjacent to the main facilities of Samgori oilfield and development of the technology for producing a premium quality luminescence oil (“Noriol” and others) widely used in pinpointing defects in components with complicated configuration at the above refinery;
- Construction of the branch pipeline (Supsa-Poti) of the main oil pipeline Gachiani-Batumi and construction of the new oil terminal (on a terrain adjacent to Poti);
- Construction of a Baku-Gachiani main oil pipeline within the Republic’s territory.

3. It's advisable to elaborate, review and sanction the appropriate design proposition for:

- Construction of a Grozny-Gachiani main oil pipeline;
- Construction of a new Gachiani-Khashuri-Poti oil product pipeline;
- Construction of an 8-10 million-ton capacity oil refinery.”

152. A cursory comparison of the terms of *Resolution No. 834*, on the one hand, and the rights and activities contemplated by the JVA, on the other hand, demonstrates clearly that the scope of the latter far exceeds the terms of *Resolution No. 834*. And while the Tribunal accepts that the JVA cannot be in “breach” of *Resolution No. 123G* which was enacted four days earlier, it is a fact that GTI's scope of work under the JVA is far broader than that authorized under *Resolution No. 123G*.

153. These conclusions appear to support Respondent's assertion that, under Georgian laws, SakNavtobi was not authorized under *Resolution No. 834* to grant to GTI the rights set forth in the JVA and that, consequently, SakNavtobi entered into the JVA in direct violation of *Resolution No. 834*.

154. The Tribunal notes, as a fact, the terms of Article 48 of the *Civil Code of Georgia*:

“...agreements that do not comply with the requirements of law are void *ab initio*”

155. Accordingly, the JVA, having been entered into by SakNavtobi in excess of its authority would appear to be void *ab initio* under Georgian law.

156. Claimant calls in aid of its position Article 59 of the Civil Code which permits the severability of unenforceable terms of a contract. However, because the “*ultra vires*” provisions at issue appear to be at the very core of the JVA, Article 59 may not be applicable.

157. In these circumstances, the conclusion of a Georgian Court may well be that the JVA is void *ab initio* under Georgian law. But as observed earlier by the Tribunal, our remit as an

ICSID Tribunal is to apply international law to resolve this dispute. We will develop our analysis later.<sup>21</sup>

(ii) ***Was Transneft Authorized under Georgian Law to Enter into the Concession and Make the Purported Grant of Rights to GTI?***

158. As with the JVA, Respondent contends that the Concession is also void *ab initio* because Transneft lacked the requisite authority under Georgian law to enter into this agreement and make the purported grant of rights to GTI thereunder. In support of this contention, Respondent has identified several government Resolutions adopted prior to the date of the Concession which circumscribe the rights of State-owned enterprises to alienate State property. Respondent alleges that Transneft was a State-owned enterprise and that, therefore, it was not authorized to grant the rights provided for in the Concession.

159. Claimant, on the other hand, argues that Transneft was not a State-owned enterprise at the time the Resolutions at issue were adopted but was, rather, a part of the State itself. Claimant further argues that even if the Resolutions at issue were applicable to Transneft, it was nonetheless vested with the authority under Georgian law to grant the rights provided for in the Concession.

160. The Tribunal will now examine separately two issues: Was Transneft a State-owned enterprise under Georgian law at the time it entered into the Concession? and was Transneft authorized to enter into the Concession?

(a) Was Transneft a State-owned Enterprise at the Time it Entered into the Concession?

161. In *Decree No. 1105* dated 14 December 1992, the Cabinet of Ministers established an oil department within the Ministry of Fuel and Energy. This oil department was headed by SakNavtobi and “united” Transneft under it. More particularly, the Cabinet resolved as follows:

“For the purposes to improve the structure of management of the fields included in

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<sup>21</sup> See *infra*, paragraphs 171 *et seq.*

the complex of fuel and energy of Georgia, increase its effectiveness and provide the population with the fuel and energy resources, the Cabinet of Ministers of Georgia resolves:

1. To establish in the Ministry of Fuel and Energy of Georgia the following departments:

[...]

- oil - SakNavtobi (Georgian Oil)

[...]

2. Organizations and institutions of the relevant fields located on the territory of Georgia to unite under the authority of the mentioned departments according to annexes 1-4. [...]

Annex No. 2 to the Decree #1105 of the Cabinet of Ministers of Georgia

List of organizations and institutions, which will be united in the department SakNavtobi of the Ministry of Fuel and Energy of the Republic of Georgia

- Industrial amalgamation SakNavtobi (Gruzneft)
- Batumi Oil Refinery
- Trust SakNavtobgeophizika
- The management of main oil pipeline of Georgia [Transneft]
- Management SakBurgvotermia
- Scientific-research and Projecting Center of oil and gas
- Trading-industrial enterprise Menavtobe.” (emphasis added)

162. Consistent with these provisions, the Tribunal was referred to Transneft’s Charter which, at Article 1.1, describes Transneft as “one of the member units subordinated to the Department SakNavtobi in accordance with Decree 1105”. The recitals to the Concession itself also refer to Transneft as a State-owned enterprise as follows:

“INDUSTRIAL AMALGAMATION OF GEORGIAN OIL-MAIN PIPELINES  
a fully state owned Enterprise under the laws of the Republic of Georgia (hereinafter:  
‘Transneft’)

[...]

WHEREAS Transneft is the owner, sole proprietor and operator of the ‘Pipelines’, as hereinafter defined, in the Republic of Georgia.”

163. In addition, Article 3.1 of the Concession contains an acknowledgment by SakNavtobi that it “has irrevocably instructed and empowered GTI to receive the Concession to the



Pipelines”. The Tribunal also recalls that the Concession was signed by Transneft, witnessed by SakNavtobi, and ratified by the Minister of Fuel and Energy.

164. Finally, the new Charter of the oil department led by SakNavtobi was approved by the Ministry of Fuel and Energy on 8 July 1993 under *Decree No. 33*, Annex No. 1 of which contains a list of “member state enterprises and organizations of the Department SakNavtobi”. Transneft is included among these organizations and not as a “direct structural unit member[s] of the Department SakNavtobi.”

165. This chronology of various Georgian instruments referred to by Respondent appears to support its contention that Transneft was a State-owned enterprise at the time it signed the Concession.

(b) Was Transneft Authorized to Enter into the Concession?

166. The issue here, it is recalled, is whether Transneft was the proper body authorized to sign the Concession. In this connection, the Tribunal has been referred to *Resolution No. 891* dated 4 September 1992 concerning “Provisional Rules for State-owned Enterprises”. Article 5.5 of this Resolution states the following:

“Decisions regarding any sale, lease, rental, exchange, grant of free of charge possession, or writing off the balance sheet of any buildings, constructions, equipment, transport, materials, and other assets are made by the government agency authorized in accordance with the laws of Republic of Georgia upon the proposal of the State owned enterprise which manages the said property and in compliance with effective Law of Republic of Georgia.”

167. The Tribunal recalls that on 16 January 1993, the Cabinet of Ministers in *Resolution No. 38* established the Ministry of State Property Management. Approximately one month later, on 10 February 1993, the Cabinet of Ministers adopted *Resolution No. 78*, which provides that a main function of the Ministry of Fuel and Energy is to coordinate and organize the activities of the industries in the fuel-energy complex. The Fuel and Energy Ministry’s powers further include, *inter alia*, the power to “submit duly agreed legislative and normative acts to the Cabinet [...] for approval” and to “conduct talks, sign agreements with both Georgian and foreign persons and legal entities”. And on 8 March 1993, the Cabinet of Ministers adopted *Resolution No. 184*, which stipulates the following at Article 1.1:

“The Ministry of State Property Management of the Republic of Georgia [...] is the central agency of State governance authorized to alienate the State property of the Republic of Georgia in order to ensure the accomplishment of the State policy in the process of privatization of the State property in the country.”

168. In this regard, the Tribunal notes that the Concession established a “term lease of the Pipelines” for a period of thirty years when GTI was then required to return the possession and use of the pipeline to Transneft. Thus the Concession did not involve the privatization of State property. Article 1.1 of the *Law on Privatization of Public Companies*, adopted on 9 August 1991, further supports this conclusion since it defines “privatization” as the “acquisition of proprietary rights on the state-owned property by citizens their units and Non-governmental legal entities as the result of which they assume property, financial and other obligations in terms of this right”.

169. It is not entirely clear to the Tribunal whether the above-quoted *Resolution No. 184* applies outside of the privatization context. On the one hand, Article 1.1 of the Resolution suggests that it does not. The various functions of the Ministry of State Property Management, enumerated in Article 2 of the Resolution, also relate to the privatization of State property. Article 2.18 of the Resolution, on the other hand, provides that the Ministry “makes decisions on the lease of State property in accordance with the rules”. Article 3.1.1 of the Resolution further establishes that the Ministry is entitled to “dispose of the state property”. In the Tribunal’s opinion, the terms of *Resolution No. 184* are unclear, and the issue of whether it required that the Concession be approved by the Ministry of State Property Management thus remains an open question.

170. Claimant has, however, put forward strong arguments that the Ministry of Fuel and Energy (including SakNavtobi and by extension Transneft) was in fact the authorized government agency for leasing State-owned property at the time of the Concession. *Resolution No. 78*, quoted above, illustrates not only the importance of the Ministry of Fuel Energy to issues related to the “fuel-energy complex”, but also that it had the power to ratify the Concession. There appears, therefore, to be some merit to Claimant’s argument that no further approval was required and that the Concession was valid under Georgian law. In the circumstances, and for the reasons set forth earlier, the Tribunal need not make a definitive finding in this regard.

(iii) ***Even if the JVA and/or Concession were Void Ab Initio under Georgian Law, is Claimant's Investment Nonetheless Entitled to Protection under International Law?***

171. The Tribunal will now consider Claimant's argument that, even if the JVA and/or the Concession were void *ab initio* under Georgian law, his investment is nonetheless protected under the BIT and the ECT.

172. As the Tribunal noted at the outset of this section of its Decision, this is the true remit of an international tribunal such as the present ICSID Tribunal.

173. Specifically, Claimant contends that Respondent cannot, before an ICSID tribunal, rely on Georgian law to avoid its treaty obligations and that Article 12 of the BIT offers it no shelter in this respect. Referring to its legitimate expectations regarding the validity of the JVA and Concession, Claimant further submits that, under international law, Respondent is estopped from invoking Georgian law to invalidate these agreements.

(a) Georgia's Obligations under Article 12 of the BIT

174. The requirement that an investment be made in accordance with the laws of the host State in order to benefit from a BIT's protection is uncontroversial. It is found in numerous BITs.<sup>22</sup> Article 12 of the BIT at issue expresses this requirement as follows:

175. "This Agreement shall also apply to investments made prior to its entry into force by investors of either Contracting Party in the territory of the other Contracting Party, consistent with the latter's legislation."The parties, however, disagree on the proper interpretation to be given to this requirement of the BIT. The Tribunal accordingly turns to the Vienna Convention for guidance in interpreting Article 12 of the BIT.

176. As noted earlier by the Tribunal, the general rule for the interpretation of a treaty is set out in Article 31(1) of the Vienna Convention in the following terms:

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<sup>22</sup> See *e.g.*, *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 at paragraph 84.

“(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

177. The ordinary meaning of the words in Article 12 of the BIT, “consistent with the latter’s legislation”, on their face, connotes that if an investment is made in violation of Georgian law, such an investment is not entitled to protection under the BIT.

178. However, it is not only the ordinary meaning of the terms of a treaty which will resolve their interpretation. The object and purpose of the treaty must also be taken into consideration.

179. It is obvious to the Tribunal that the object and purpose of this BIT do not support a literal interpretation.

180. Article 31(2) of the Vienna Convention provides that the treaty’s context include in particular the text of the treaty taken as a whole, including its preamble.

181. The object and purpose of the BIT, as expressed in its preamble, are to encourage foreign investment, and in particular to provide broad protection for investors and their investments:

“HAVING as their objective to create favourable conditions for investments by investors of either Contracting Party in the territory of the other Contracting Party.

RECOGNIZING that the promotion and protection of investments, on the basis of this Agreement, will stimulate the initiative in this field.”

182. “Protection of investments” under a BIT is obviously not without some limits. It does not extend, for instance, to an investor making an investment in breach of the local laws of the host State. A State thus retains a degree of control over foreign investments by denying BIT protection to those investments that do not comply with its laws. As noted by one scholar, “no State has taken its fervour for foreign investment to the extent of removing any controls on the flow of foreign investment into the host State”.<sup>23</sup> This control, however, relates to the investor’s actions in making the investment. It does not allow a State to preclude an investor from seeking

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<sup>23</sup> M. Sornarajah, *The International Law on Foreign Investment*, Cambridge University Press, 2nd ed. 2004, p. 106.

protection under the BIT on the ground that its own actions are illegal under its own laws. In other words, a host State cannot avoid jurisdiction under the BIT by invoking its own failure to comply with its domestic law.

183. Against this background, the Tribunal observes that Respondent does not allege that Claimant committed any act in violation of Georgian law. Quite the contrary, it is the Respondent which argues that its State-owned enterprises violated Georgian law by exceeding their authority, thus rendering void *ab initio* the JVA and the Concession.

184. Accordingly, Article 12 of the BIT cannot be invoked by Respondent to exclude Claimant's investment from protection under the BIT. It follows that notwithstanding the fact that the JVA and the Concession may be void *ab initio* under Georgian law, Claimant's investment nonetheless remains entitled to protection under the BIT and the Tribunal so finds.

(b) Claimant's Legitimate Expectation Regarding the Validity of the JVA and the Concession

185. It is Claimant's contention that various representations made by, *inter alia*, SakNavtobi and Transneft created a legitimate expectation regarding the validity of the JVA and the Concession. On this basis, Claimant argues that Respondent is estopped from arguing that these agreements are void *ab initio* under Georgian law as grounds for objecting to the Tribunal's jurisdiction *ratione materiae* under the ECT and the BIT. For instance, Claimant points to Article 2.1 of the JVA which provides that the joint venture was established "in accordance with the provisions of the Legislation for Joint Ventures".

186. Claimant also avers that SakNavtobi made the following representations in the JVA:

“14.1 Authorization

The valid execution, delivery and performance of this Agreement has been duly authorized by all necessary action on its part, and it has all requisite power and authority to enter into and perform its obligations under this Agreement in accordance with its terms. This Agreement constitutes a valid and legally binding obligation, enforceable against it in accordance with its terms.

[...]

#### 14.3 No Breach

The execution and performance of this Agreement in accordance with its terms does not and will not violate or conflict with any statute, regulation, judgment, order, writ, decree or injunction of any judicial, administration or governmental authority applicable to it or any of its properties or assets and does not and will not violate, conflict with, result in a breach of, constitute a default (or an event which with due notice or lapse of time or both would constitute a default) under, result in a termination of, accelerate the performance required by or result in the creation of any lien, pledge, security interest, charge or other encumbrances on any of its properties or assets under any note, agreement or other instrument or obligation to which it is a party or by which it or its properties or assets may be bound.

#### 14.4 Compliance with Laws

Each Partner, respectively, represents and warrants that it is in compliance with all laws, rules and regulations of all judicial, administrative or governmental authorities or political subdivision thereof, applicable to it and to the conduct of its business, violation of any of which could have a material adverse effect on it, or its ability to comply with this Agreement. In addition, there exists no laws, rules or regulations which inhibit the ability of the parties to fulfill their responsibilities under and to complete successfully the transactions contemplated by this Agreement. The Georgian Partner hereby declares that this Joint Venture Agreement, and all the provisions hereof, are in accordance with Georgian legislation and do not contradict any provision thereof.” (emphasis added)

187. Similarly, in the Concession, SakNavtobi made the following acknowledgement and declaration:

“3.3 That this Deed of Concession is in conformity with the Joint Venture Agreement and Charter of GTI and all government decrees with respect to GTI.

3.4 It will obtain for the Parties hereto any further government approval – if required – for the performance of this Deed of Concession and exercise of any rights hereunder.”

188. Transneft further declared, warranted and represented the following under the Concession:

“4.1 It is duly authorized to grant the concession to GTI as provided herein and no further consent or approval of any third party or governmental authority is required for Transneft to grant the Concession to the Pipelines to GTI in accordance with the terms and conditions thereof.

4.2 It has complied with all applicable laws regulations, decrees and orders governing the ownership and maintenance of the Pipelines thereby.” (emphasis added)

189. Respondent, it is recalled, does not accept that these representations are relevant. Respondent maintains that these representations cannot be attributed to it because it had not yet entered into the ECT nor the BIT when SakNavtobi and Transneft concluded the JVA and the Concession, respectively.

190. The Tribunal finds Respondent's position untenable. The principle of attribution, in principle, applies to Georgia by virtue of its status as a sovereign State and is not contingent on the timing of its adherence to a treaty. It is also immaterial whether or not SakNavtobi and Transneft were authorized to grant the rights contemplated by the JVA and the Concession or whether or not they otherwise acted beyond their authority under Georgian law. Article 7 of the *Articles on State Responsibility* provides that even in cases where an entity empowered to exercise governmental authority acts *ultra vires* of it, the conduct in question is nevertheless attributable to the State.

191. In the Tribunal's view, Respondent cannot simply avoid the legal effect of the representations and warranties set forth in the JVA and the Concession by arguing that they are contained in agreements which are void *ab initio* under Georgian law. The assurances given to Claimant regarding the validity of the JVA and the Concession were endorsed by the Government itself, and some of the most senior Government officials of Georgia (including, *inter alia*, President Gamsakhurdia, President Shevardnadze, Prime Minister Sigua and Prime Minister Gugushvili) were closely involved in the negotiation of the JVA and the Concession. The Tribunal also notes that the Concession was signed and "ratified" by the Ministry of Fuel and Energy, an organ of the Republic of Georgia.

192. The Tribunal further observes that in the years following the execution of the JVA and the Concession by SakNavtobi and Transneft, respectively, Georgia never protested nor claimed that these agreements were illegal under Georgian law. In light of all of the above circumstances, the Tribunal is of the view that Respondent created a legitimate expectation for Claimant that his investment was, indeed, made in accordance with Georgian law and, in the event of breach, would be entitled to treaty protection.

193. The Tribunal is comforted in this finding by the decision of the ICSID Tribunal in the case of *Southern Pacific Properties (Middle East) Limited v. Egypt*. In that case, Egypt had argued that certain acts of Egyptian officials upon which the investor had relied were in fact “legally non-existent or absolutely null and void” under Egyptian law.<sup>24</sup> The arbitral tribunal found that even if such acts were illegal, they were performed by governmental authorities, which created a legitimate expectation for the investor:

“It is possible that under Egyptian law certain acts of Egyptian officials, including even Presidential Decree No. 475, may be considered legally non-existent or null and void or susceptible to invalidation. However, these acts were cloaked with the mantle of Governmental authority and communicated as such to foreign investors who relied on them in making their investments.

Whether legal under Egyptian law or not, the acts in question were the acts of Egyptian authorities, including the highest executive authority of the Government. These acts, which are now alleged to have been in violation of the Egyptian municipal legal system, created expectations protected by established principles of international law. A determination that these acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victims who relied on the acts. If the municipal law does not provide a remedy, the denial of any remedy whatsoever cannot be the final answer.

[...]

The principle of international law which the Tribunal is bound to apply is that which establishes the international responsibility of States when unauthorized or *ultra vires* acts of officials have been performed by State agents under cover of their official character. If such unauthorized or *ultra vires* acts could not be ascribed to the State, all State responsibility would be rendered illusory.”<sup>25</sup> (emphasis added)

194. The reasoning in *Southern Pacific Properties* is apposite to this case in many respects. Thus, even if the JVA and the Concession were entered into in breach of Georgian law, the fact remains that these two agreements were “cloaked with the mantle of Governmental authority”. Claimant had every reason to believe that these agreements were in accordance with Georgian law, not only because they were entered into by Georgian State-owned entities, but also because their content was approved by Georgian Government officials without objection as to their

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<sup>24</sup> *Southern Pacific Properties (Middle East) Limited v. Egypt*, ICSID Case No. ARB18413, Award of 20 May 1992 at paragraph 81.

<sup>25</sup> *Ibid.* at paragraphs 82, 83 and 85.



legality on the part of Georgia for many years thereafter. Claimant therefore had a legitimate expectation that his investment in Georgia was in accordance with relevant local laws. Respondent is accordingly estopped from objecting to the Tribunal's jurisdiction *ratione materiae* under the ECT and the BIT on the basis that the JVA and the Concession could be void *ab initio* under Georgian law.

#### **D. Jurisdiction *Ratione Temporis***

195. Respondent has challenged the Tribunal's jurisdiction *ratione temporis* under both the ECT and the BIT. These two issues will be examined separately.

##### **1. Jurisdiction *Ratione Temporis* under the ECT**

196. The Tribunal's jurisdiction under the ECT derives from Article 26 of the ECT. Paragraph (1) of that Article refers to:

“Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III [...].”

197. The paragraph continues by requiring that “such disputes” are to be settled amicably, but if they cannot be so settled within a stated period they may be (and in this case have been) submitted to arbitration. Thus the Tribunal's jurisdiction to decide the issues in dispute under the ECT depends *inter alia* on (i) Claimant having an investment in Georgia, and on (ii) the existence of an obligation under Part III of the ECT which it is alleged has been breached.

##### **a) *Existence of an Investment in Georgia***

198. “Investment” is defined in Article 1(6) of the ECT. That definition covers “every kind of asset, owned or controlled directly or indirectly by an Investor” and includes a variety of specified assets, and adds that a change in the form in which assets are invested does not affect their character as investments: the definition then continues by providing that:

“[T]he term “Investment” includes all investments, whether existing at or made after the later of the date of entry into force of this Treaty for the Contracting Party of the Investor making the Investment and that for the Contracting Party in the Area of which the Investment is made (hereinafter referred to as the “Effective Date”) provided that the Treaty shall only apply to matters affecting such Investments after the Effective Date.”

199. That provision established two conditions both of which have to be met if an investment is to fall within the investment protection provisions of the ECT. These are: (i) that the investment must have been existing at or made after the Effective Date, and (ii) that the Treaty only applies to “matters affecting such investments after the Effective Date”.

200. The meaning of the term “Effective Date” is therefore crucial to the operation of Article 1(6) and thus of Article 26(1). In its application to the present case that term is defined as the later of the dates of entry into force of the ECT for Greece and for Georgia. It is therefore necessary to determine when the ECT entered into force for Georgia and when it did so for Greece, since only then can one know the date after which “matters affecting [...] investments” come within the purview of the ECT.

201. Entry into force of the ECT is provided for in Article 44. The parties agree that the operation of that provision had the effect that the ECT entered into force under Article 44 on 16 April 1998.

202. Article 45 of the ECT, however, provides also for the provisional application of the ECT. Paragraph (1) of that Article reads:

“Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.”

203. Georgia and Greece both signed the ECT on 17 December 1994. Both States thereupon and thenceforth accepted the provisional application of the ECT (subject to the domestic law considerations addressed below in paragraphs 224 *et seq.*). The question which has been raised, and on which the parties differ, is therefore whether, for the purposes of the definition of “Effective Date” in Article 1(6) of the ECT, the date from which the ECT became provisionally applicable is to be treated as its “date of entry into force”.

204. This question has two aspects. First, is provisional application of the ECT under Article 45(1) equivalent to its entry into force? Second, if so, did the ECT enter into force on that “provisional application” basis for Georgia and Greece on the date of their signature of the ECT?

(i) ***Is Provisional Application under Article 45(1) Equivalent to Entry into Force?***

205. Article 45(1) does not say in terms what it meant by saying that each signatory agreed to “apply this Treaty provisionally”. The meaning of that concept is thus to be determined by (i) an interpretation of that phrase, and (ii) the generally accepted meaning of the notion of the provisional application of a treaty.

206. As noted in the earlier section of this decision, the general rule for the interpretation of a treaty is set out in Article 31(1) of the Vienna Convention.

207. The treaty’s context includes in particular the text of the treaty taken as a whole, including its preamble (Article 31(2)). Article 31(3)(c) of the Vienna Convention further provides that together with the context:

“There shall be taken into account [...] any relevant rules of international law applicable in the relations between the parties.”

208. This includes relevant rules of general customary international law.<sup>26</sup>

209. Applying the ECT provisionally is used in contradistinction to its entry into force: “[...] agrees to apply this Treaty provisionally pending its entry into force [...]”. Provisional application is therefore not the same as entry into force. But the ECT’s provisional application is a course to which each signatory “agrees” in Article 45(1): it is (subject to other provisions of the paragraph) thus a matter of legal obligation. The Tribunal cannot therefore accept Respondent’s argument that provisional application is only aspirational in character.

210. It is “this Treaty” which is to be provisionally applied, *i.e.*, the Treaty as a whole and in its entirety and not just a part of it; and use of the word “application” requires that the ECT be “applied”. Since that application is to be provisional “pending its entry into force” the implication is that it would be applied on the same basis as would in due course result from the ECT’s (definitive) entry into force, and as if it had already done so.

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<sup>26</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment of 6 November 2003, *ICJ Reports 2003*, p. 161, at paragraph 41.

211. It follows that the language used in Article 45(1) is to be interpreted as meaning that each signatory State is obliged, even before the ECT has formally entered into force, to apply the whole ECT as if it had already done so.

212. This interpretation of the significance of Article 45(1) is consistent with Article 45(3). That provision refers to the possibility that a signatory may terminate its provisional application of the Treaty by giving written notification to the Depositary that it does not intend to become a Contracting Party to the ECT: that provision applies to provisional application pursuant to Article 45(1). When such notification is given Article 45(3)(b) provides that

“[T]he obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination [...]”

213. This provision confirms that Parts III (concerning investment promotion and protection) and V (concerning dispute settlement) apply during the period of provisional application, and that the operation of those Parts gives rise to an “obligation”.

214. Moreover, the object and purpose of the ECT were such as to require that it be possible for the ECT as a whole to apply immediately on signature.

215. There is some uncertainty whether the provisional application of treaties constitutes a rule of international law applicable in relations between Georgia and Greece, so as to be taken into account under Article 31(3)(c) of the Vienna Convention. Article 25 allows for the provisional application of treaties in stipulating:

“1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:

(a) the treaty itself so provides; or

(b) the negotiating States have in some other manner so agreed.”

216. But the only “rule” which this reflects is that States may agree to provisional application of a treaty if they so wish and subject to such conditions as they might agree upon. It does not

establish that there is a general rule of customary international law allowing for provisional application apart from the express agreement of the States concerned.

217. The ILC's Commentary on its draft Article 22 on the law of treaties (which was to become Article 25 of the Vienna Convention) does not say anything about provisional application being a rule of customary international law. It says, rather, that the draft "recognizes a practice which occurs with some frequency today and requires notice in the draft articles" and that "there can be no doubt that such clauses have legal effect and bring the treaty into force on a provisional basis" (Commentary at paragraph (1)). It is notable that the ILC's draft article referred to a treaty "enter[ing] into force provisionally", whereas this was changed at the Vienna Conference to a treaty being "applied provisionally", which would appear the more correct usage.

218. Although the ILC believed that provisional application of treaties was a matter occurring with some frequency, it has also been observed that "[a]t the time the Convention was adopted, provisional application clauses were relatively rare" and that "provisional application clauses are not generally favoured".<sup>27</sup> The basis for a rule of customary international law may therefore be lacking.

219. There is, nevertheless, in the Tribunal's view a sufficiently well-established practice of provisional application of treaties to generate a generally accepted understanding of what is meant by that notion. Where what is in issue is, as in the present case, the provisional application of the whole treaty, then such provisional application imports the application of all its provisions as if they were already in force, even though the treaty's proper or definitive entry into force has not yet occurred.

220. An inevitable consequence of a provisional application clause in a complex treaty is that some of the treaty's language, which will have been drafted with the intention of providing for the permanent situation which would exist upon and after the treaty's definitive entry into force,

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<sup>27</sup> A. Aust, *Modern Treaty Law and Practice*, Cambridge Univ. Press, Cambridge, 2000, pp. 139, 140.

may not fit precisely with the situation created by its provisional application. One remedy is for the treaty to say that in the context of its provisional application certain provisions of the treaty are to be read in such and such a way: particularly with treaties of some complexity this is not the usual practice, which is hardly surprising given that the situation of provisional application which is being addressed is by definition expected to be only temporary. The other remedy is to leave the treaty as it stands and to rely on an implicit acceptance of the need to apply it (provisionally) on a *mutatis mutandis* basis.

221. So long as the intention of the negotiating States clearly shows that they intended the treaty to be provisionally applied, it cannot be accepted that that clear intention could be undermined by an insistence on applying the terms of the treaty in their strictly literal form. The clear terms of the treaty providing for provisional application, coupled with such provisional application being consistent with the object and purpose of the treaty, provide sufficient justification for interpreting its terms in a sense equivalent or analogous to their strict and literal meaning, but as adapted to the expressly intended situation of provisional application.

222. It is significant that were this not so, and were “entry into force” in Article 1(6) to mean only definitive entry into force under Article 44 of the ECT, the effect would be to make the “Effective Date” in Article 1(6) the date of definitive entry into force which would mean that “matters affecting ... Investments” before the date of entry into force, i.e., during the period of provisional application, would be excluded from the scope of the ECT: such a result would strike at the heart of the clearly intended provisional application regime.

223. For all the foregoing reasons the Tribunal is satisfied that, properly interpreted in accordance with international law, the language used in Article 45(1) is to be interpreted as meaning that each signatory State is obliged, even before the ECT has formally entered into force, to apply the whole ECT as if it had already done so, and that the language used in Article 1(6), particularly its use of the term “entry into force”, is to be interpreted as meaning the date on which the ECT became provisionally applicable for Georgia and Greece.

(ii) *Did the ECT Enter into Force on a “Provisional Application” Basis for Georgia and Greece on 17 December 1994 when they signed the ECT?*

224. Since the date of the provisional application of the ECT for Georgia and Greece, namely 17 December 1994, constitutes in principle the “Effective Date” for purposes of Article 1(6), it is now necessary to determine whether in practice the ECT was provisionally applicable for those two States as from that date. That question arises because Article 45(1) of the ECT not only stipulates that each signatory State shall apply the treaty provisionally, but adds the rider that it shall do so “to the extent that such provisional application is not inconsistent with its constitution, laws or regulations” – an exception which the Tribunal will refer to as the “domestic law” exception. Respondent argues that provisional application of the ECT is excluded by both Georgia’s and Greece’s domestic laws; Claimant, on the other hand, argues that provisional application is permitted by both States’ domestic laws.

225. In the context of the domestic law exception, there are three preliminary points which need to be made. First, in developing their arguments in this context the parties made much play with the notion of reciprocity and whether it formed part of the ECT arrangements or part of international law generally, this discussion being related to the question whether provisional application had to be permissible under the domestic law of both States, or whether it was sufficient for it to be permissible under the law of only one of them (namely, Georgia).

226. The Tribunal does not regard that discussion as particularly helpful. For the Tribunal “reciprocity” involves a relationship of mutuality whereby what is done by one party is a reaction to or dependent upon what is done by the other. In the present context the Tribunal sees no such relationship between the operation of the domestic law of the two States; rather, the two domestic laws are self-standing legal systems applying independently of each other. It necessarily follows from the terms of Article 1(6) that the laws of *both* States have to be considered – not because of considerations of reciprocity, but because in order to determine which is the “later” of the two dates referred to (namely the dates of entry into force of the ECT for Georgia and Greece) it is necessary to identify each of them, since only then can the “later” of them be determined.

227. Second, while Article 45(1) has a built-in domestic exception clause which excludes the provisional application of the ECT, Article 45(2) provides for the possibility of making an express declaration that the ECT will not be provisionally applied by a signatory. The argument has been made that Respondent, by not making a declaration under Article 45(2) that it is unable to accept provisional application of the ECT, has demonstrated that provisional application of the ECT was not inconsistent with the constitution, laws or regulations of Georgia.

228. The Tribunal is unable to accept that argument. There is no necessary link between paragraphs (1) and (2) of Article 45. A declaration made under paragraph (2) may be, but does not have to be, motivated by an inconsistency between provisional application and something in the State's domestic law; there may be other reasons which prompt a State to make such a declaration. Equally, a State whose situation is characterised by such inconsistency is entitled to rely on the proviso to paragraph (1) without the need to make, in addition, a declaration under paragraph (2). The Tribunal is therefore unable to read into the failure of either State to make a declaration of the kind referred to in Article 45(2) any implication that it therefore acknowledges that there is no inconsistency between provisional application and its domestic law.

229. Third, substantively the consideration which has to be given to domestic law arises because inconsistency with domestic law constitutes an exception to the normal rule in Article 45(1) that the ECT is provisionally applicable on signature. This exception has been invoked by Respondent in asserting that the required inconsistency exists in relation both to the law of Georgia and to the law of Greece and that therefore the ECT did not become provisionally applicable on signature. In these circumstances it is for Respondent to make good its assertion, and the burden of proof on this issue lies with Respondent.

230. Respondent bases its argument that provisional application is inconsistent with the domestic law of Georgia primarily on the provisions of Article 20 of the *Law on International Treaties*, adopted on 16 October 1997. In support of its view Respondent submitted an expert opinion from Professor Dzlierishvili, and in support of its opposing view Claimant has submitted an expert opinion from Mr Archil Kbilashvili. Not surprisingly, these opinions adopt different views as to the legal position in Georgian law.



231. Article 20 provides:

*“Provisional Application of International Treaties by Georgia*

If an international treaty provided for provisional application of a treaty as a whole or certain provisions thereof, or agreement has been reached concerning this between parties, Georgia shall apply such treaty from the moment of the entry thereof into force.”

232. Respondent argues that this shows that “it is clear that in Georgia, a treaty applies as of the entry into force - not as of the date of signature”, and on this the first occasion that Georgian law addressed the subject of the provisional application of treaties “it clarified unequivocally that treaties are not to be applied provisionally”.

233. There is, in the Tribunal’s view, room for argument about the precise effect of Article 20 of the 1997 Law, particularly in view of the statement made by Georgia in the context of the Council of Europe’s 2001 Study (where Georgia stated, in response to a question whether in Georgia provisional application of a treaty was possible before its entry into force, “Yes, it is possible, subject to the provisions of Article 25 of the Vienna Convention on the Law of Treaties”). However that may be, the Tribunal notes that this *Law on International Treaties* was not adopted until 16 October 1997, and that it is not disputed that as a matter of Georgian law Laws do not have retroactive effect. The Tribunal also notes that Claimant has accepted that “no stand-alone acts of consequence in this case occurred between October 1997 and April 1998” (the date of the ECT’s entry into force): i.e., no such acts occurred while the 1997 Law was in force. The correct appreciation of Article 20 of the 1997 Law is therefore not relevant to the situation before the Tribunal.

234. What is relevant, however, is the situation in Georgian law in the period before the 1997 Law was adopted. As to that, Respondent has argued that:

“Any ambiguity regarding the prior status of Georgian law on this issue - which was necessarily in a nascent stage, especially regarding sovereign state obligations, following the collapse of the Soviet Union - must be resolved in light of the unambiguous expression embodied in the first law on the issue, the Law on International Treaties, that treaties should not be provisionally applied.”

235. In other words Respondent invokes a presumption that Georgian law before October 1997 was to the same effect as it was after the adoption of the 1997 Law on International Treaties.

236. In support of its view that “it cannot be argued that the 1997 Law introduced a change in the position under Georgian law in respect of the provisional application of treaties”, Respondent notes that the *Law of Georgia on Normative Acts*, and the 1993 *Law of Georgia on Making, Ratification, Execution and Denunciation of International Treaties of the Republic of Georgia*, both stipulate that treaties must have “entered into force” if they are to prevail over Georgia’s internal law: *i.e.*, these two pre-1997 Laws do not (in the context of treaties prevailing over domestic law) contemplate treaties having provisional application.

237. The Tribunal is not satisfied that Respondent has demonstrated satisfactorily that provisional application of treaties was inconsistent with Georgian law before 1997 and in particular with Georgian law as it stood on 17 December 1994 when the ECT was signed. Laws, neither of which deal in terms with the provisional application of treaties but deal rather with the supremacy of treaties over domestic laws, and requiring that treaties have “entered into force” as a condition for such supremacy, do not necessarily imply that provisional application of treaties is not permitted.

238. Nor does the Tribunal find persuasive the alleged presumption that the 1997 Law did not change the law, and that the previous law is to be assumed to have been the same as the law after the adoption of the 1997 Law. In this context the Tribunal notes that the 1997 Law appears to have replaced the 1993 *Law on Making, Ratification, Execution and Denunciation of International Treaties of the Republic of Georgia*, and that this 1993 Law did not itself make any express reference to the provisional application of treaties.

239. Accordingly the Tribunal finds that the ECT provisionally applied in Georgia as from the date of its signature by Georgia on 17 December 1994, and until 16 April 1998 when the ECT definitively entered into force.

240. That finding is not, however, sufficient in itself to establish the Tribunal’s jurisdiction, since on its own it does not establish the “Effective Date”, which is the date only *after* which the

ECT applies to matters affecting investments. The other relevant date is the date when the ECT (including its dispute settlement provisions) became provisionally applicable for Greece (if indeed it ever did). As with the law of Georgia, that requires an examination of the possibility, in relation to Greece, that provisional application was inconsistent with the domestic law of Greece. And also as with the law of Georgia, each party has supported its case with expert opinions: Respondent has submitted opinions from Professor Konstantinos Issaias, Professor Kerameus and Professor Spyropoulos, and Claimant has submitted opinions from Professor Nikos Alivizatos and Dr. Ioannis Ktistakis. As is often the case, these opinions support conflicting views of the legal position in Greek law.

241. In arguing that provisional application was inconsistent with Greek law Respondent relied on Article 28 of the Greek Constitution, asserting that the effect of that provision is that “until an international treaty is ratified by Greek law, it is not effective”: rather, consistently with Articles 36 and 35 of the Constitution, “the ECT was enacted into Greek law by *Law No. 2476/1997*, which was published in the Governmental Gazette on 18 April 1997. Accordingly Greek law prohibits the application of the ECT prior to that date”. Moreover, Greek law required all conditions set out in the treaty for its entry into force to have been fulfilled, which in relation to the ECT were the deposit of instruments of ratification and the expiry of 90 days following the deposit of the thirtieth instrument of ratification; the result is that the ECT entered into force only on 16 April 1998.

242. Claimant, on the contrary, argued that Articles 35 and 36 of the Constitution were not relevant to the provisional application of treaties, and Articles 2(2) and 28 of the Constitution permitted the provisional application of treaties, which was part of the generally accepted rules of international law which were made an integral part of Greek law by Article 28 of the Constitution and was recognized by Article 25 of the Vienna Convention; and Greece had provisionally applied several other treaties. Greece had acknowledged in the 2001 Council of Europe Study that the provisional application of treaties was possible under Greek law if the treaty so provided.

243. In the translation provided by Claimant, Articles 2(2) and 28(1) of the Constitution provide:

*“Article 2(2)*

Greece, adhering to the generally recognized rules of international law, pursues [...] the fostering of friendly relations between peoples and States.

*Article 28(1)*

The generally accepted rules of international law, as well as international conventions as of the time they are ratified by statute and become operative according to their respective conditions, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of law [...]

244. For reasons already given in relation to the law of Georgia, the Tribunal has some difficulty with the notion of the provisional application of treaties being a generally accepted rule of international law, although the Tribunal accepts that it is a procedural device which is well-known in international treaty practice. Even if it were a rule of international law, the rule would have to be qualified by a reference to such conditions as might be prescribed in the treaty itself for its provisional application; in the case of the ECT that qualification simply takes one back to the consideration whether provisional application would be inconsistent with a State’s domestic law. Even if the alleged rule were a rule of customary international law and as such an integral part of Greek law, an alleged rule containing, in its application to the ECT, such a circular qualification is not a safe basis on which to decide affirmatively that Greek domestic law permits provisional application of treaties, and that therefore provisional application cannot be inconsistent with Greek law.

245. As for Article 28(1) of the Greek Constitution, its import for provisional application of treaties seems somewhat equivocal. A Constitutional provision which is not dealing with the provisional application of treaties but which establishes the circumstances in which treaties become an integral part of domestic law and prevail over inconsistent domestic law, and requires prior ratification for those purposes, does not necessarily imply that provisional application of treaties is not permitted.

246. In short, there appears to the Tribunal to be no specific provision in the Greek Constitution or in Greek law generally which clearly establishes that provisional application of treaties, and of the ECT in particular, would be inconsistent with Greek domestic law. Accordingly the Tribunal finds that the ECT provisionally applied in Greece as from the date of

its signature by Greece on 17 December 1994, and until 16 April 1998 when the ECT entered into force.

***b) The “Effective Date” for Purposes of Article 1(6) of the ECT***

247. Since the reference in Article 1(6) to “entry into force” of the ECT embraces provisional application of the ECT, and since the date on which the ECT applied provisionally in both Georgia and Greece was 17 December 1994 when both States signed the ECT, it follows – and the Tribunal so holds – that the “Effective Date” for purposes of Article 1(6) of the ECT is 17 December 1994. This means that in relation to investments made before or after that date the ECT applies to matters affecting such investments after 17 December 1994.

248. This in turn means that those matters affecting such investments are within the scope of Part V (Dispute settlement) of the ECT, and that this Tribunal accordingly has jurisdiction to consider those matters in accordance with Article 26(1) of the ECT.

***c) During the Period of Provisional Application, Did Obligations Exist under Part III of the ECT which are Alleged to Have Been Breached?***

249. That provision, however, lays down a further requirement which has to be fulfilled in order for the Tribunal to have jurisdiction over a dispute. This is that the dispute must “concern an alleged breach of an obligation of the [host State] under Part III” of the ETC. Claimant’s claims are presented in terms of alleged breaches of Part III of the ECT, but in the circumstances of the present case the question arises whether, during the period of provisional application of the ECT, the provisional application of Part III gives rise to “obligations” for this purpose.

250. The Tribunal has already addressed this point during its consideration of the significance of provisional application. The Tribunal there noted that provisional application was a matter to which each signatory “agrees” in Article 45(1), and as a subject of such specific agreement (which may be separate from their agreement to the ECT as a whole) provisional agreement was a matter of legal obligation. The Tribunal also noted that provisional application imported the application of all the treaty’s provisions as if they were already in force, even though the treaty’s proper or definitive entry into force had not yet occurred. This involves treating the treaty’s provisions as having the same legal status as they would have if the treaty were in force, which

in turn means treating those provisions which are so worded as to give rise to legal obligations as if they already had that legal status during the period of provisional application. As also noted above by the Tribunal, the language of Article 45(3)(b) of the ECT confirms both that Part III applies during the period of provisional application, and that the operation of that Part gives rise to an obligation.

251. The Tribunal thus concludes that the claims asserted in this case give rise to a dispute which concerns an alleged breach of an obligation under Part III.

252. For all the foregoing reasons the Tribunal concludes that the requirements for its jurisdiction under Article 26(1) of the ECT have been satisfied, and that it therefore has jurisdiction under the ECT to decide upon that part of Claimant's claims.

## **2. Jurisdiction *Ratione Temporis* under the BIT**

253. The parties agree that the substantive protections set out in the BIT apply from 3 August 1996 onward, and that the BIT does not apply retrospectively to conduct which occurred *and ended* prior to 3 August 1996. It is Respondent's position that the Tribunal lacks jurisdiction *ratione temporis* over Claimant's BIT claims because all acts which caused Claimant's purported loss occurred *prior* to the BIT's entry into force.

254. It is a well-known and accepted principle of international law that treaties do not have retroactive effect. This principle is set out in Article 28 of the Vienna Convention and in Article 13 of the ILC Articles on State Responsibility. The BIT between Greece and Georgia was signed on 9 November 1994 and entered into force on 3 August 1996. Article 12 of the BIT provides that the treaty applies to investments made prior to its entry into force.

255. The Tribunal accepts that the BIT does not apply retrospectively to acts of Respondent that took place prior to the entry into force of the BIT. In the Tribunal's view, this does not, however, mean that Respondent's conduct prior to 3 August 1996 is irrelevant.

256. In respect of the timing of the alleged acts of expropriation, the parties refer to seven different events which they consider essential to determine the moment when the alleged acts took place and when the alleged breach of the BIT occurred. These are:

11 November 1995	Decree No. 477
20 February 1996	Decree No. 178
March 1996	Signature of the agreement between Georgia and AIOC
19 August 1996	SakNavtobi's Order No. 33a
20 April 1997	Decree No. 206
23 April 1997	State Minister Order No. 84
20 May 1997	Letter to Tramex

257. In the Tribunal's view, Respondent's objection to the Tribunal's jurisdiction *ratione temporis* under the BIT is clearly not ripe for decision. The Tribunal cannot determine whether the alleged BIT breaches occurred before or after 3 August 1996 without having considered the testimony and other evidence that can only be obtained through a full hearing of the case. A thorough examination of the events which may have led to the expropriation of Claimant's investment in Georgia is necessary to determine whether Article 4 of the BIT was breached and, if so, when it was breached. This must be left to the merits stage of the proceeding when a full evidentiary hearing will take place.

258. In respect of the timing of the alleged violation of Article 2 of the BIT, the Tribunal agrees with Claimant that the legitimacy of his expectation is a merits issue which has no bearing on the Tribunal's jurisdiction. However, the Tribunal notes that in order to decide whether or not it has jurisdiction over the alleged "stand-alone" violations of the BIT, it must determine whether the conduct complained of occurred after the entry into force of the BIT. Claimant again refers to no less than seven different sets of "assurances" that were allegedly given by Respondent after the entry into force of the BIT. Claimant also refers to four separate "commitments" which were purportedly given by Respondent before the entry into force of the BIT on 3 August 1996, but which were allegedly breached after that date.

259. In the Tribunal’s view, this is not a case where Claimant’s bare allegations that these assurances and commitments were given and made after the entry into force of the BIT can be accepted *pro tem*. The Tribunal must be briefed by the parties on the nature of these “assurances” and “commitments”. The Tribunal is unable to resolve the jurisdictional question of timing of these “assurances” and “commitments” without a complete picture of their scope and content, the circumstances in which they were made, the different actors involved and the impact they may have had on Claimant’s investment in Georgia.

260. It is well settled that whenever a jurisdictional issue is closely related to the facts to be examined at the merits phase of the case, it can be joined to the merits.<sup>28</sup> The Tribunal’s decision on jurisdiction here is closely related to the merits and will depend, to a large extent, on the same factual questions.

261. The Tribunal therefore invokes its authority under Article 41(2) of the ICSID Convention and Article 41(4) of the ICSID Arbitration Rules and will join Respondent’s objection to its jurisdiction *ratione temporis* under the BIT to the merits of the dispute.

## V. DECISION

262. For the above reasons, the Tribunal unanimously decides that:

- a) Respondent’s objection to the Tribunal’s jurisdiction *ratione materiae* under the ECT and the BIT, as well as Respondent’s objection to the Tribunal’s jurisdiction *ratione temporis* under the ECT, are denied. The dispute submitted by Claimant is accordingly within the jurisdiction of the Centre and the competence of the Tribunal.
- b) Respondent’s objection to the Tribunal’s jurisdiction *ratione temporis* under the BIT is joined to the merits.

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<sup>28</sup> See e.g., *Saluka Investments v. Czech Republic*, UNCITRAL Arbitration, Decision of 7 May 2004 on Jurisdiction over the Czech Republic’s Counterclaim at paragraph 11; *World Duty Free Company Limited v. Kenya*, ICSID Case No. Arb/00/7, Award of 4 October 2006 at paragraph 102; *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award of 16 September 2003 at paragraphs 6.1 to 6.4; *Tradex Hellas v. Albania*, ICSID Case No. ARB/94/2, Decision on Jurisdiction, 24 December 1996 at p. 185.



- c) The decision on the costs of the jurisdictional phase of the proceeding is reserved.

*[Signed]*

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Professor Francisco Orrego Vicuña  
Co-arbitrator

*[Signed]*

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Sir Arthur Watts, K.C.M.G., Q.C.  
Co-arbitrator

*[Signed]*

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L. Yves Fortier, C.C., Q.C.  
President

Date: 6 July 2007