

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

IN THE PROCEEDINGS BETWEEN

**IOANNIS KARDASSOPOULOS  
and RON FUCHS**

(Claimants)

and

**THE REPUBLIC OF GEORGIA**

(Respondent)

**(ICSID Case Nos. ARB/05/18 and ARB/07/15)**

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**AWARD**

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***Arbitral Tribunal***

Mr. L. Yves Fortier, C.C., O.Q., Q.C., President  
Professor Francisco Orrego Vicuña  
Professor Vaughan Lowe, Q.C.

***Secretary of the Tribunal***

Ms. Aïssatou Diop

***Assistant to the Tribunal***

Ms. Alison G. FitzGerald

***Representing the Claimant***

Ms. Karyl Nairn  
Mr. Timothy G. Nelson  
Mr. David Herlihy  
Ms. Jennifer M. Cabrera  
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(UK) LLP / SKADDEN, ARPS, SLATE, MEAGHER  
AND FLOM LLP

***Representing the Respondent***

Ms. Claudia T. Salomon  
Mr. Matthew Saunders  
Ms. Kate Knox  
Ms. Kiera Gans  
Mr. Theodore C. Jonas  
Mr. Nick Gvinadze  
Mr. Avto Svanidze  
DLA PIPER UK LLP / DLA PIPER LLP (US) /  
DLA PIPER GVINADZE & PARTNERS LLP

*Date of dispatch to the parties: March 3, 2010*

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## DRAMATIS PERSONAE

### *Corporate Personae*

**Azerbaijan International Operating Company (“AIOC”):** Cayman Islands-incorporated consortium of oil companies including SOCAR (see below), Amoco, Pennzoil, Unocal, Exxon, BP, Ramco, Lukoil, Statoil, TPAO, Itochu and Delta.<sup>1</sup>

**Brown & Root Ltd. (“Brown & Root”):** U.K. subsidiary of Halliburton Inc., a U.S. engineering and construction firm, that entered into a Heads of Agreement with TrameX to acquire one half of its 50% interest in GTI.

**Georgian International Oil Corporation (“GIOC”):** A Georgian state-owned oil company created in 1995 and to which certain rights held by GTI were transferred.

**Georgian Oil and Gas Corporation (“GOGC”):** A Georgian state-owned entity formed in 2006 through an amalgamation of the GIOC, Georgian International Gas Corporation and SakNavtobi.

**GTI Ltd. (“GTI”):** A Georgian-incorporated joint venture company in which TrameX and SakNavtobi each owned a 50% interest.

**Industrial Amalgamation of Georgian Oil-Main Pipelines (“Transneft” or “TransNavtobi”):** A Georgian state-owned entity holding rights over the oil transportation network in Georgia (and formally merged into SakNavtobi in December 1992).

**Kissinger Associates, Inc.:** A geopolitical consulting firm based in New York called upon to assist the Claimants during the compensation commission process.

**Ludan Engineering Inc.:** An Israeli engineering firm contracted by TrameX to provide design, engineering and procurement work for the GTI project.

**SakNavtobi** (also known in Russian as “Gruzneft”, or in English as “Georgian Oil”): The Georgian state-owned national oil company and formally made a Department within the Ministry of Fuel and Energy in December 1992.

**SOCAR:** The State Oil Company of Azerbaijan.

**TrameX International Inc. (“TrameX”):** A Panamanian-incorporated investment vehicle, owned in equal shares by the Claimants, Mr. Ioannis Kardassopoulos and Mr. Ron Fuchs.

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<sup>1</sup> Participating interests in July 1996 [Hearing Bundle, Tab 185].

*Moral Personae*

**Terence (“Terry”) Adams:** Founding President of AIOC from 1994 to 1998.

**Valeri Asatiani:** Minister of Culture of the Republic of Georgia from 1985 to 1990 (Georgian SSR), and 1995 to 2000 (Republic of Georgia).

**Alan Batkin:** Vice-Chairman of Kissinger Associates, Inc. from 1990 to 2006, called upon to assist the Claimants during the compensation commission process.

**Giorgi Chanturia:** Ambassador of the Republic of Georgia to Azerbaijan from 1994 to 1997, and President of GIOC from 1996 to 2004.

**Merab Chkhenkeli:** Minister of Urbanization and Construction of the Republic of Georgia from 1995 to 2002.

**Grahame Cook:** Commercial Manager of BP Exploration, seconded to AIOC, from 1995 to 1997.

**Larry Farmer:** President of Brown & Root from 1990 to 2000.

**Edward (“Ted”) Ferguson:** Director of Oil and Gas Development for Europe and Africa for Brown & Root.

**Ze’ev Frenkiel:** Project Director overseeing the engineering and construction project in the Republic of Georgia on behalf of the Claimants.

**Rony Fuchs:** The Claimant, an Israeli citizen and Co-Chief Executive Officer of TrameX International Inc.

**Gviad Gamsakhurdia:** Chairman of Parliament of the Republic of Georgia from November 1990 to April 1991, and President of the Republic of Georgia from April 1991 to January 1992.

**Vazha Gigolashvili:** Chief Mechanic at Transneft from 1981 to 1996.

**Yusuf Selcuk Guner:** Responsible for Brown & Root Energy Services operations in Azerbaijan from 1993 to 2007.

**Ephraim Gur:** Georgian-born businessman residing in Israel, formerly a Member of the Israeli Parliament and Attaché to the Republic of Georgia in Israel.

**Koba Gvenetadze:** Deputy State Minister of the Republic of Georgia from 2001 to 2002.

**Chee Jap:** Financial advisor to TrameX, based in London, who acted as the principal liaison with third parties, lenders and strategic partners, including Brown & Root Ltd.

**Ioannis Kardassopoulos:** The Claimant, a Greek citizen and Co-Chief Executive Officer of TrameX International Inc.



**Alexandre Khetaguri:** Deputy Minister of Energy of the Republic of Georgia from 2004 to 2005, First Deputy Minister of Energy from 2005 to 2006, General Director of GOCG from 2006 to 2007, and Minister of Energy since 2007.

**Nikoloz Lekishvili:** State Minister of the Republic of Georgia from 1995 to 1998.

**David Levy:** Ludan's Chief Engineer responsible for the design and implementation of works in Republic of Georgia on behalf of the Claimants.

**Faith MacDonald:** In-house solicitor for Brown & Root from 1994 to 1999.

**David Mirtskhulava:** Deputy Minister of Fuel and Energy of the Republic of Georgia from 1995 to 1998, and Minister of Fuel and Energy from 1999 to 2003.

**Abram Nanikashvili:** Georgian-born businessman residing in Israel who acted as an interpreter for the Claimants.

**Tedo Ninidze:** Minister of Justice of the Republic of Georgia from 1993 to 1998.

**Otar Patsatsia:** Prime Minister of the Republic of Georgia from 1993 to 1995.

**Gia Sadzaglishvili:** Head of Division of the Balance of Fuel and Energy of the Ministry of Fuel and Energy of the Republic of Georgia from 1996 to 1998, and Director of Economic Department of the Ministry of Fuel and Energy from 1998 to 1999.

**Eduard Shevardnadze:** Head of the State Council of the Republic of Georgia from March to October 1992, when he was elected Chairman of Parliament. President of the Republic of Georgia from November 1995 to November 2003.

**Tengiz Sigua:** Prime Minister of the Republic of Georgia from 1990 to 1991, and 1992 to 1993.

**Avtantil Silagadze:** Minister of State Property Management of the Republic of Georgia from 1995 to 1998.

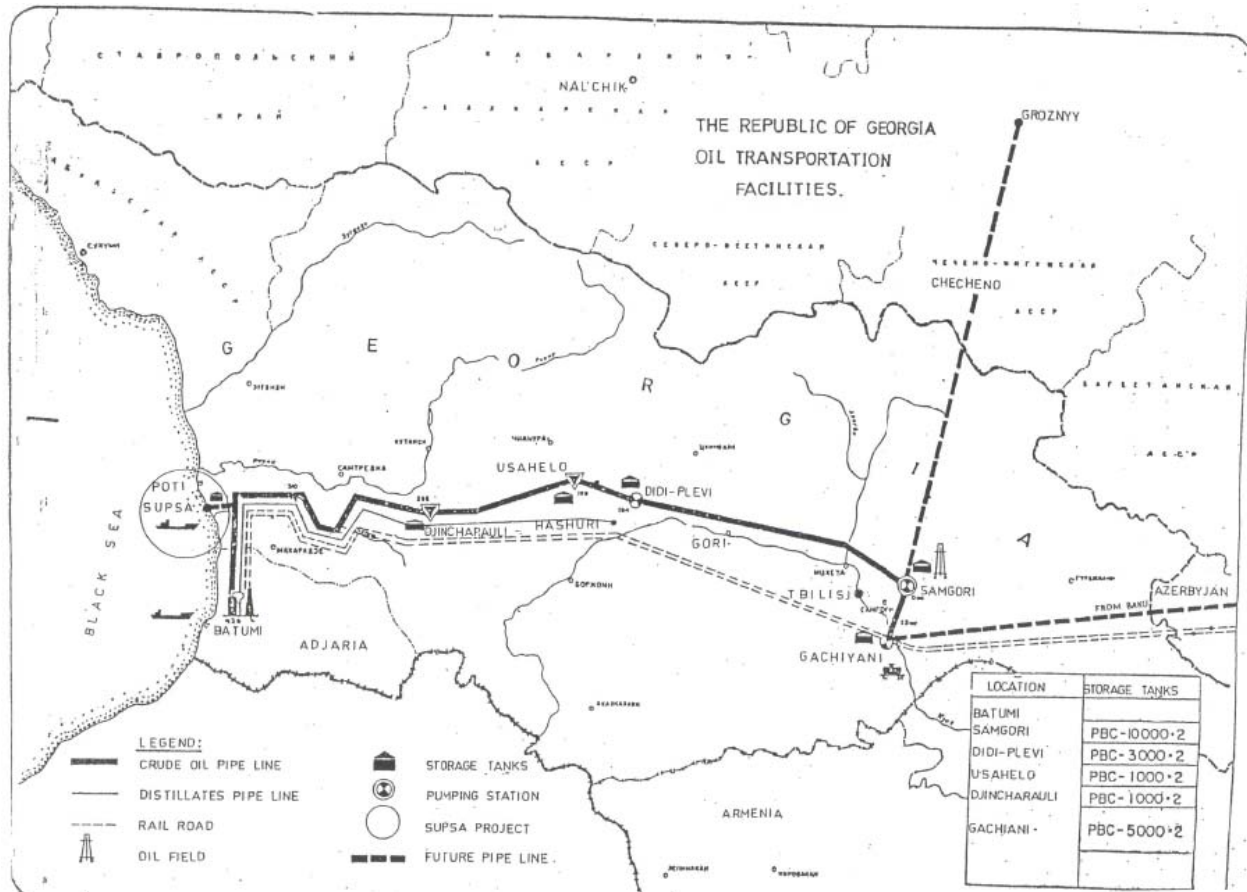
**Jack Smith:** Attorney of the Claimants, involved in the drafting of the Joint Venture Agreement between TrameX and SakNavtobi.

**Revaz Tevzadze:** Chairman of SakNavtobi from 1973 to 2004.

**David Zubitashvili:** Minister of Fuel and Energy of the Republic of Georgia from 1996 to 1998.

# MAP OF GEORGIA

## OIL TRANSPORTATION FACILITIES



THE TRIBUNAL

Composed as above,

After deliberation,

Makes the following Award:

## **PART I. PROCEDURE**

### **A. Overview**

1. At the outset of its present Award, the Tribunal deems it helpful to set out certain facets of the disputes between the parties to these arbitrations, which are brought under the Energy Charter Treaty (“**ECT**”) and the bilateral investment treaties entered into between the Republic of Georgia (“**Georgia**” or the “**Respondent**”) and Greece and Israel, respectively.
2. The investment dispute between the parties in these arbitrations 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 interests held by Mr. Ioannis Kardassopoulos and Mr. Ron Fuchs (collectively the “**Claimants**” and together with Georgia the “**Parties**”) in an investment vehicle devoted to the development of an oil pipeline for the transport of oil from the Azeri oil fields on the Caspian Sea through Georgia to the Black Sea, known as the “**Western Route**”.
3. Development of the Western Route was of significant national and strategic importance for Georgia as a means of securing its sovereignty following the break up of the Soviet Union and deepening its ties to the West. President Shevardnadze is recorded as having stated that “[i]f Georgia the country could not establish itself as important to the West, then Georgia will be treated as a province or district of Russia and lose the fruits of its first independence since 1920...”.<sup>2</sup> The shadow cast by the former Soviet Union over

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<sup>2</sup> This statement is extracted from *The Oil and The Glory*, published by journalist Steve LeVine in 2008, which recounts events surrounding the development and exploitation of the Caspian oil reserves. This extract, among others, formed part of the discussion among industry experts in these proceedings [Tr. D10:135].

Georgia is palpable even to this day, as evidenced by the onset of hostilities between Russia and Georgia during the course of these proceedings.

4. The Claimants, two highly resourceful oil traders, were virtual pioneers at the time of their investment in Georgia, with a relatively modest yet important proposal to trade oil and rehabilitate and complete the existing pipeline infrastructure crossing Georgia from Azerbaijan to the Black Sea, in order to secure a transit route for land-locked oil reserves. Within a few years of the Claimants initial investment, the Azerbaijan International Oil Company (“**AIOC**”), a consortium of multinational oil companies, also began operating in the region as vast quantities of crude oil in the Caspian were confirmed.
5. Despite some dispute over the eventuality of the Western Route as an export solution for Caspian oil, it is clear on the evidence in these proceedings that “*happiness is multiple pipelines*” [Tr. D10:122]. As the Respondent’s expert Mr. Effimoff testified [Tr. D10:166-67]:

*“If you have one route, you’re a hostage. If you have two routes, then you can make a choice. And this thinking evolved over time, because there were proponents of the northern route, there were proponents of the western route, but the correct answer in retrospect was both routes needed to be there in order to make it a workable solution, where there were checks and balances on the entire system.”*

6. This is, in fact, what occurred and what remains today – multiple pipelines for the transport of so-called “early oil” (originally the Gachiani-Supsa pipeline, now the Baku-Supsa pipeline), future crude oil reserves (the Baku-Tbilisi-Ceyhan or “**BTC**” pipeline<sup>3</sup>) and natural gas (the South Caucasus Pipeline or “**SCP**”) – with the exception that the Claimants, having proved far less attractive than AIOC as Western partners once the potential scale of the Western Route (and the overall oil and gas export solution) became apparent, are left with nothing to show for their foray into Georgia but the investment claims brought in these proceedings.

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<sup>3</sup> Prior to confirmation of the route, this pipeline was simply referred to as the Main Export Pipeline or “**MEP**”.

**B. Registration of the Requests for Arbitration**

7. Mr. Kardassopoulos submitted a Request for Arbitration to the International Centre for the Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on 2 August 2005 (the “**Kardassopoulos Request**”), invoking the ICSID arbitration provisions of the *Agreement between the Government of the Hellenic Republic and the Republic of Georgia on the Promotion and Reciprocal Protection of Investments* (the “**Georgia / Greece BIT**”) and the ECT. The Kardassopoulos Request was registered by the Secretary General of the Centre on 3 October 2005.
8. One and a half years later, on 20 April 2007, Mr. Fuchs submitted a Request for Arbitration (the “**Fuchs Request**”) invoking the ICSID arbitration provisions in the *Agreement between the State of Israel and the Republic of Georgia on the Promotion and Reciprocal Protection of Investments* (the “**Georgia / Israel BIT**”) in respect of claims arising out of the same set of facts as the Kardassopoulos Request. The Fuchs Request was registered by the Secretary General of the Centre on 16 July 2007.

**C. Constitution of the Tribunal and Commencement of the Proceeding**

9. The Arbitral Tribunal in the Kardassopoulos arbitration (the “**Tribunal**”) was constituted on 27 February 2006. It was composed of Mr. L. Yves Fortier, C.C., O.C., Q.C. (Canadian), appointed by agreement of the Parties as President, and Professor Francisco Orrego Vicuña (Chilean) and Sir Arthur Watts, Q.C. (British), appointed respectively by the Claimant and the Respondent, as arbitrators.
10. The Tribunal held its first session, which the Parties attended, on 4 May 2006, in London, England. During this meeting, two alternative timetables for the written phase were agreed by the Parties, one providing for a jurisdictional phase and one contemplating no objection to jurisdiction (see Part I.D below).
11. On 12 September 2007, following registration of the Fuchs Request, the Parties jointly wrote to the Secretary General of the Centre advising that, pursuant to Article 37 of the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* (“**ICSID Convention**”) and Rule 2 of the Rules of Procedure for Arbitration Proceedings (“**ICSID Arbitration Rules**”), they had agreed on a method for constituting

the Tribunal in the Fuchs arbitration and requesting that the same Tribunal already constituted in the Kardassopoulos arbitration hear and decide the claims presented in the Fuchs Request.

12. On 14 September 2007, the Centre confirmed in writing that the Kardassopoulos and Fuchs arbitrations would run concurrently and would be heard together by the same Tribunal constituted in the Kardassopoulos arbitration.
13. Two months later, on 16 November 2007, Sir Arthur passed away. On 19 November 2007, ICSID notified the parties of the vacancy on the Tribunal created by the passing of Sir Arthur and of the suspension of the proceeding pursuant to ICSID Arbitration Rule 10(2). Professor Vaughan Lowe, Q.C. (British), was thus appointed by the Respondent on 28 December 2007 to serve as its party-appointed arbitrator.
14. On 16 January 2008, the Tribunal was reconstituted with Professor Lowe replacing Sir Arthur as the Respondent's appointee.
15. On the final day of the Hearing in these arbitrations, counsel for both Parties recognized with gratitude and respect the contribution that Sir Arthur has made to public international law and to the ICSID system of arbitration. The Tribunal joined in this expression of gratitude for Sir Arthur's service on this Tribunal and to the international arbitration community as a whole.

***D. The Jurisdictional Phase***

16. On 3 October 2006, the Respondent filed an objection to jurisdiction in the Kardassopoulos arbitration, thereby triggering the first alternative timetable set forth in the minutes of the first session. The Respondent objected to jurisdiction on the following grounds:
  - (a) The Tribunal lacks jurisdiction *ratione materiae* over Mr. Kardassopoulos' treaty claims for two reasons: first, Mr. Kardassopoulos had not made an "investment" in Georgia; and second, the Joint Venture Agreement and the Deed of Concession, pursuant to which Mr. Kardassopoulos had purportedly made his investment, were void *ab initio* as a matter of law; and

- (b) The Tribunal lacks jurisdiction *ratione temporis* over Mr. Kardassopoulos' treaty claims because the acts which occasioned the alleged loss occurred prior to the entry into force of either the Georgia / Greece BIT or the ECT.
- 17. Mr. Kardassopoulos filed a Counter-Memorial on Jurisdiction on 7 November 2006; the Respondent filed a Reply on Jurisdiction on 4 December 2006; and Mr. Kardassopoulos filed a Rejoinder on Jurisdiction on 5 January 2007.
- 18. A hearing on jurisdiction was held on 15-16 January 2007 in London, England.
- 19. The Tribunal rendered its Decision on Jurisdiction on 6 July 2007, determining that it has jurisdiction *ratione materiae* and *ratione temporis* over Mr. Kardassopoulos' ECT claims and jurisdiction *ratione materiae* over Mr. Kardassopoulos' BIT claims. The Tribunal joined the issue of the Tribunal's jurisdiction *ratione temporis* over Mr. Kardassopoulos' BIT claims to the merits. The Tribunal's Decision on Jurisdiction is appended to the present Award.

***E. The Liability and Quantum Phase***

***1. The Written Procedure***

- 20. On 13 July 2006, Mr. Kardassopoulos filed a Memorial on the merits pursuant to the timetable agreed in the minutes of the first session of the Tribunal. However, before the Parties filed any further written submissions on the merits, the Respondent objected to jurisdiction and the procedure was suspended until completion of the jurisdictional phase.
- 21. The procedure for further written submissions on the merits was thereafter suspended until completion of the jurisdictional phase.

***a) Procedural Order No. 1***

- 22. Following the release of the Tribunal's Decision on Jurisdiction, the Tribunal invited the parties to confer and propose time limits for the further procedures in the Kardassopoulos arbitration.
- 23. On 26 September 2007, the Parties jointly wrote to the Tribunal proposing a new timetable.

24. On 9 October 2007, the Tribunal issued Procedural Order No. 1, fixing the time limits for the further procedures of the arbitration in accordance with the Parties' agreement.
25. On 5 November 2007, the Tribunal held its first session of the Parties in the Fuchs arbitration, by telephone conference. The Parties, who attended the first session, agreed to adopt, to the extent possible, the procedures already established in the Kardassopoulos arbitration.
26. Shortly following the suspension of the proceedings necessitated by the passing of Sir Arthur and the reconstitution of the Tribunal in mid-January 2008, Mr. Kardassopoulos filed a Supplemental Memorial on the merits on 28 January 2008. On the same day, Mr. Fuchs also filed a Memorial on the merits.
27. The Respondent filed a Counter-Memorial on the merits on 6 June 2008. The Claimants filed their Reply on the merits on 31 July 2008. On 12 November 2008, the Respondent filed its Rejoinder on the merits pursuant to a revised calendar of procedures necessitated by developments in Georgia and opposing discovery applications (see Part I.E.(c) below).

*b) Request for Adjournment of the Hearing*

28. On 12 August 2008, the Tribunal was seized of an application by the Respondent for a postponement of the deadline for filing and service of its Rejoinder and its response to the Claimants' August 8 cross-application for disclosure (see Part I.E.(d) below), as well as an adjournment of the hearing on the merits and quantum (the "**Hearing**"), which had been scheduled to take place in London, England from 22 October to 5 November 2008. The application was motivated by circumstances arising from the onset of hostilities between Georgia and Russia.
29. On 15 August 2008, the Claimants filed written submissions with the Tribunal submitting that postponement of the hearing was premature and requesting that the original Hearing dates be maintained and a schedule be fixed for filing and service of the remaining written evidence that would accommodate the Respondent's concerns. The Claimants averred that they had no objection to the Tribunal investigating other possible dates for the Hearing purely on a contingency basis.



30. On 19 August 2008, the Tribunal determined to cancel the Hearing and vacate the originally scheduled Hearing dates. A procedural meeting of the Parties and the President of the Tribunal, on behalf of the Tribunal, was fixed for 26 August 2008 to consider a new calendar for further procedures.

*c) Procedural Order No. 2*

31. On 26 August 2008, the President of the Tribunal held a procedural meeting of the Parties by telephone conference during which extensive oral submissions were presented both Parties.
32. During the telephonic meeting, the Claimants brought two additional applications requesting that the Respondent file and serve all non-Georgian evidence in connection with its Rejoinder by 25 September 2008, including its quantum and industry expert reports, and file and serve the remainder of its evidence and pleadings in connection with the Rejoinder by late October 2008.
33. The Respondent opposed each of the Claimants' applications, arguing that it would be inappropriate to divorce the factual evidence from the testimony of the quantum and industry experts and that, in view of the situation in Georgia, obtaining instructions from the Georgian Government in time for an October Hearing or to meet the proposed filing dates would pose serious problems.
34. Two days later, on 28 August 2008, the Tribunal issued Procedural Order No. 2, fixing peremptorily dates for the further procedures in these arbitrations, including new dates for the Hearing, the filing of the Respondent's Rejoinder and accompanying expert and fact evidence, and the filing of further submissions on the disclosure applications before the Tribunal.

*d) Procedural Order No. 3*

35. By letter dated 9 June 2008, the Respondent seized the Tribunal of a disclosure application seeking an order that three documents produced by the Claimants in redacted form, relating to legal advice sought by the Claimants in 1995 from the English firm Paisner & Co. and over which privilege had been asserted, be produced in their entirety.

36. On 14 June 2008, the Claimants filed a written response to the Respondent's request for the production of documents. On that same day, the Respondent replied in writing to the Claimants' response.
37. By letter dated 8 August 2008, the Claimants seized the Tribunal of a cross-application for disclosure seeking an order that the Respondent produce: (a) a statement of transit fees received by the Respondent in respect of certain pipelines for the period January 1, 2008 through July 31, 2008; and (b) all documents evidencing writs of arrest, criminal charges, convictions or penal sanctions, levied against David Mirtskhulava and Giorgi Chanturia, each a witness having provided written evidence in support of the Respondent's case, as well as all documents issued by the Respondent evidencing any pardon in respect of said witnesses.
38. On 25 September 2008, the Respondent filed written submissions in response to the Claimant's August 8 request for the production of documents.
39. On 3 October 2008, the Claimants filed a written reply to the Respondent's submissions in respect of their August 8 request for the production of documents.
40. On 28 October 2008, the Tribunal issued Procedural Order No. 3, ordering, *inter alia*, the disclosure in unredacted form of those parts of the three documents produced by the Claimants that relate to advice received in respect of the International Chamber of Commerce and/or English High Court proceedings contemplated by the Claimants against AIOC and/or Transneft in respect of their investments in Georgia, and the disclosure of documents issued by the Respondent since the commencement of the arbitration proceedings in respect of Messrs. David Mirtskhulava and Giorgi Chanturia relating explicitly or implicitly to the evidence which either one of them had given or would give in the present arbitrations, including the fact of either individual providing a witness statement on behalf of the Respondent.

*e) Procedural Order No. 4*

41. The President of the Tribunal held a telephone conference of the Parties at the request of the Claimants on 25 November 2008 to address several matters, including written evidence filed by the Respondent with its Rejoinder materials, compliance with

Procedural Order No. 3 and the conduct of the Hearing. The Tribunal issued written directions to the Parties on 29 November 2008, rejecting the Claimants' request to exclude certain witness statements filed by the Respondent and, *inter alia*, directing the Claimants to make any application for a follow-up order to Procedural Order No. 3 by 2 December 2008.

42. On 2 December 2008, the Claimants seized the Tribunal of three (3) applications, seeking, *inter alia*, (i) a supplemental order requiring the Respondent to state what specific measures it had taken to comply with Procedural Order No. 3; (ii) an order requiring the production of certain supplemental documents; and (iii) an order requiring the Respondent to request that AIOC conduct a search of its archives for the years 1995 and 1996 and produce to the Claimants certain documents identified by them.
43. On 9 December 2008, the Respondent submitted a written response to the Claimants' request for relief objecting to all three applications. The Claimants replied in writing on 12 December 2008. In their reply letter, the Claimants requested that their third application be held in abeyance pending a response from BP plc ("BP") to a request they had submitted for certain information.
44. On 15 December 2008, the Respondent submitted a sur-reply further clarifying its position in regard to the Claimants' first two applications. On the next day, 16 December 2008, the Claimants informed the Tribunal in writing that BP had declined to provide them with the requested information and therefore revived their third application.
45. The Tribunal issued Procedural Order No. 4 on 19 December 2008. The Tribunal denied the Claimants' application for a supplemental order regarding Procedural Order No. 3 and its application for an order compelling the Respondent to request that AIOC conduct a search of its archives and produce certain documents to the Claimants, but granted the Claimants' second application concerning a supplemental disclosure order.

## 2. The Oral Procedure

46. A Hearing on Liability and Quantum was held in two parts in London, England, on 10-19 January 2009 and 12-14 March 2009.

47. During the first part of the Hearing, the following fact witnesses were called to testify: *for the Claimants* – Ms. Chee Jap [Tr. D1:160-219]; Mr. Abram Nanikashvili [Tr. D2:5-58]; Mr. Ze'ev Frenkiel [Tr. D2:59-123]; Mr. Edward Ferguson [Tr. D3:1-124]; Mr. Ioannis Kardassopoulos [Tr. D3:125-193; Tr. D4:1-50]; and Mr. Ron Fuchs [Tr. D4:51-163]; *for the Respondent* – Mr. Gia Sadzaglishvili [Tr. D4:168-194]; Mr. Vazha Gigolashvili [Tr. D4:194-202; Tr. D5:1-14]; Mr. Tedo Ninidze [Tr. D5:15-53]; Mr. Nikoloz Lekishvili [Tr. D5:54-91]; Mr. David Mirtskhulava [Tr. D6:1-58]; Mr. Giorgi Chanturia [Tr. D6:58-107; 137-152]; Mr. Larry Farmer [Tr. D6:108-136]; Mrs. Faith MacDonald [Tr. D7:1-56]; Mr. Tengiz Sigua [Tr. D7:60-70]; Mr. David Zubitashvili [Tr. D7:71-96]; Dr. Revaz Tevzadze [Tr. D8:4-65]; Mr. Grahame Cook [Tr. D9:1-64]; and Mr. Terry Adams [Tr. D9:65-105].
48. Messrs. Ephraim Gur, Jack Smith,<sup>4</sup> Alan Batkin and David Levy submitted fact written evidence in support of the Claimants' case but were not called to testify at the Hearing. Similarly, Messrs. Valeri Asatiani, Merab Chkhenkeli, Koba Gvenetadze, Alexandre Khetaguri and Yusuf Selcuk Guner submitted fact written evidence and Mr. David Eliashvili submitted an expert report in support of the Respondent's case but were not called to testify orally.
49. The Respondent submitted a fact witness statement prepared by former Georgian President Eduard Shevardnadze in support of certain aspects of its case as developed in its Rejoinder. However, on 5 January 2009, the Respondent notified the Tribunal that it had become necessary to withdraw this evidence and submit a revised Rejoinder.
50. The Respondent filed its Amended Rejoinder, without reference to the former President's evidence, on 6 January 2009. The Tribunal has, accordingly, not taken into account in its consideration of these cases any written evidence previously filed by Mr. Shevardnadze on behalf of the Respondent, nor has it drawn any inference from the submission and subsequent withdrawal of such evidence.

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<sup>4</sup> During the Hearing the Claimants brought an application to introduce a second written statement from Mr. Smith. However, this application was subsequently withdrawn and Mr. Smith did not appear before the Tribunal to give oral evidence [Tr. D4:164].

51. Ms. Josephine Bacon served as translator, translating between Hebrew and English for certain of the Claimants' witnesses, and Ms. Irina Moore and Ms. Nino Willsea served as translators, translating between Georgian and English, for several of the Respondent's witnesses during this first part of the Hearing.
52. During the second part of the Hearing, the following expert witnesses were called to testify: *Industry Experts* - Mr. Richard Beazley [Tr. D10:2-80] for the Claimants; Mr. Igor Effimoff [Tr. D10:82-168] for the Respondent; *Quantum Experts* - Mr. Brent Kaczmarek of Navigant Consulting, Inc. [Tr. D11:66-106] for the Claimants; and Mr. Gerard John Lagerberg of PricewaterhouseCooper LLP [Tr. D11:107-143] for the Respondent.
53. During the second part of the Hearing, the Tribunal conducted a witness conferencing procedure of the quantum experts [Tr. D11:144-197], followed by a witness conferencing of these experts by counsel to the Parties [Tr. D11:197-225].

### 3. The Post-Hearing Procedure

54. On 22 May 2009, the Parties filed post-hearing briefs with the Tribunal.
55. On 24 August 2009, the Tribunal requested further detailed costs submissions, which were duly filed by the Parties on 30 September 2009. The Tribunal subsequently invited the Parties to file a simultaneous round of reply submissions on costs by 19 October 2009, which were also duly filed.
56. On 8 February 2010, pursuant to Rule 38(1) of the ICSID Arbitration Rules, the Tribunal declared the proceedings closed.

### ***F. The ECT and the BITs***

57. The treaties under which the Claimants respectively advance their claims are, in the case of Mr. Kardassopoulos, the Georgia / Greece BIT, signed on 9 November 1994 and which entered into force on 3 August 1996, and the ECT, signed by Georgia and Greece on 17 December 1994 and which entered into force for both States on 16 April 1998; and in the case of Mr. Fuchs, the Georgia / Israel BIT, signed on 19 June 1995 and which entered into force on 18 February 1997.

1. The Arbitration Clauses

58. The Parties' arbitration agreements are contained in the respective treaties. In respect of the Kardassopoulos arbitration, Article 9 of the Georgia / Greece BIT provides as follows in connection with the settlement of disputes arising under the treaty between a Contracting State and an investor of a Contracting State:

*"ARTICLE 9*

*Settlement of Disputes between an Investor and a Contracting Party*

*1. Disputes between an investor of a Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement, in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way.*

*2. If such disputes cannot be settled within six months from the date either party requested amicable settlement, the investor concerned may submit the dispute either to the competent courts of the Contracting Party in the territory of which the investment has been made or to international arbitration.*

*Each Contracting Party hereby consents to the submission of such dispute to international arbitration.*

*3. Where the dispute is referred to international arbitration the Investor concerned may submit the dispute either to:*

*a) the International Centre for the Settlement of Investment Disputes, established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature at Washington D.C. on 18 March 1965, for arbitration or c[o]nciliation, or*

*b) an ad hoc arbitral tribunal to be established under the arbitration rules of the United Nations Commission on International Trade Law (U.N.C.I.T.R.A.L.).*

*4. The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of international law. The awards of arbitration shall be final and binding on both parties to the dispute. Each Contracting Party shall carry out without delay any such award and such award shall be enforced in accordance with domestic law.*

*5. During arbitration proceedings or the enforcement of the award, the Contracting Party involved in the dispute shall not raise the objection that the investor of the other Contracting Party has received compensation under an Insurance contract in respect of all or part of the damage."*

59. Article 26 of the ECT similarly provides as follows:

**“ARTICLE 26**

**SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR AND A  
CONTRACTING PARTY**

- (1) *Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the later in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.*
- (2) *If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:*
  - a) to the courts or administrative tribunals of the Contracting Party to the dispute;*
  - b) in accordance with any applicable, previously agreed dispute settlement procedure; or*
  - c) in accordance with the following paragraphs of this Article.*
- (3) *(a) Subject to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of the dispute to international arbitration or conciliation in accordance with the provisions of this Article.*
  - (b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).*
    - (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.*
  - (c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).*
- (4) *In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:*
  - (a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the “ICSID Convention”), if the Contracting Party of the Investor and*

*the Contracting Party to the dispute are both parties to the ICSID Convention; or*

*(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the “Additional Facility Rules”), if the Contracting Party of the Investor or the Contracting Party to the dispute, but not both, is a party to the ICSID Convention;*

*(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as “UNCITRAL”); or*

*(c) an arbitral proceeding under the Arbitration Institute of Stockholm Chamber of Commerce.*

*(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:*

*(i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules;*

*(ii) an “agreement in writing” for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the “New York Convention”); and*

*(iii) “the parties to a contract [to] have agreed in writing” for the purposes of article I of the UNCITRAL Arbitration Rules.*

*(b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.*

*(6) 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.*

*(7) An Investor other than a natural person which has the nationality of a Contracting Party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a “national of another Contracting State” and shall for the purpose of article I(6) of the Additional Facility Rules be treated as a “national of another State”.*



- (8) *The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards."*

[Footnotes omitted.]

60. In respect of the Fuchs arbitration, Article 8 of the Georgia / Israel BIT provides the following in connection with the settlement of disputes between a Contracting State and an investor of a Contracting State:

*"Article 8*

*Reference to International Centre for Settlement of Investment Disputes*

1. *Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter: the "Centre") for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1956 any legal dispute arising between that Contracting Party concerning an investment of the latter in the territory of the former.*
2. *A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which, before such a dispute arises, the majority of shares are owned by nationals or companies of the other Contracting Party shall, in accordance with Article 25(2)(b) of the Convention, be treated for the purposes of the Convention as a company of the other Contracting Party.*
3. *If any such dispute should arise and cannot be resolved, amicably or otherwise, within three (3) months from written notification of the existence of the dispute, then the investor affected may institute conciliation or arbitration proceedings by addressing a request to that effect to the Secretary-General of the Centre, as provided in Article 28 or 36 respectively of the Convention. The Contracting Party which is a party to the dispute shall not raise as an objection at any stage of the proceedings or enforcement of an award the fact that the investor which is the other party to the dispute has received, in pursuance of an insurance contract, an indemnity in respect of some or all of his or its losses.*
4. *Neither Contracting Party shall pursue, through the diplomatic channel, any dispute referred to the Centre, unless:*

- (a) *the Secretary-General of the Centre or a conciliation commission or an arbitral tribunal constituted by it decides that the dispute is not within the jurisdiction of the Centre; or*
- (b) *the other Contracting Party shall fail to abide by or to comply with any award rendered by an arbitral tribunal.”*

## 2. The Substantive Clauses

61. Mr. Kardassopoulos invokes two substantive provisions in the Georgia / Greece BIT in connection with his expropriation and fair and equitable treatment claims, the relevant portions of which are reproduced below:

### **“ARTICLE 2**

#### ***Promotion and Protection of Investments***

[...]

2. *Investments by investors of a Contracting Party shall, at all times, be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal, in its territory, of investments by investors of the other Contracting Party, is not in any way impaired by unjustifiable or discriminatory measures.*

[...]”

\* \* \*

### **“ARTICLE 4**

#### ***Expropriation***

1. *Investments by investors of either Contracting Party in the territory of the other Contracting Party, shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization (hereinafter referred to as “expropriation”), except in the public interest, under due process of law, on a non discriminatory basis and against payment of prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment affected immediately before the actual measure was taken or became public knowledge, whichever is the earlier. It shall include interest from the date of expropriation until the date of payment at a normal commercial rate and shall be freely transferable in a freely convertible currency.*

[...]”

62. In addition, Mr. Kardassopoulos invokes the following provisions of the ECT in connection with his expropriation and fair and equitable treatment claims:

**“Article 10**

*(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. [...]*

\* \* \*

**“Article 13 Expropriation**

*(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subject to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as “Expropriation”) except where such Expropriation is:*

- (a) for a purpose which is in the public interest;*
- (b) not discriminatory;*
- (c) carried out under due process of law; and*
- (d) accompanied by the payment of prompt, adequate and effective compensation.*

*Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the “Valuation Date”).*

*Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.*

*[...]”*

63. Mr. Fuchs invokes a sole substantive provision in the Georgia / Israel BIT in connection with his fair and equitable treatment claim:

**“Article 2**

***Promotion and Protection of Investment***

[...]

2. *Investments made by investors of each Contracting Party shall be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.*

[...]”

64. In his Request for Arbitration, Mr. Fuchs pleaded an expropriation claim under Article 5 of the Georgia / Israel BIT. However, Mr. Fuchs averred at paragraph 89 of his Memorial that he “*does not make any claims under the [Georgia / Israel] BIT in respect of the 1996 expropriation of his investments, but rather seeks redress in these proceedings for the protracted unfair and inequitable treatment by the Respondent which took place after 18 February 1997 and arises out of the compensation process which began on 23 April 1997*”.
65. The Tribunal understands that Mr. Fuchs’ expropriation claim, as pleaded in his Request for Arbitration, has either been disavowed or totally abandoned. Accordingly, this claim is not considered further in the present Award.

### ***G. The Parties’ Respective Prayers for Relief***

66. In these arbitrations the Claimants seek both declaratory relief and damages for the alleged violations by the Respondent of the terms of the Georgia / Greece BIT, the Georgia / Israel BIT and the ECT. In particular, the Claimants seek the following relief from this Tribunal:
- (a) a declaration that Georgia unlawfully expropriated Mr. Kardassopoulos’ 25% interest in GTI and his 50% interest in Tramex’s loan to GTI, contrary to Article 13(1) of the ECT;
  - (b) a declaration that Georgia treated the Claimants’ investments unfairly, contrary to Article 10(1) of the ECT, Article 2(2) of the Georgia / Greece BIT and Article 2(2) of the Georgia / Israel BIT;
  - (c) an award of damages to Mr. Kardassopoulos for Georgia’s violation of Article 13(1) of the ECT, based on the full reparation standard required by customary international law and, in any event, no less than the fair market value of his

investments on the Valuation Date (including his interest in Tramex's loan to GTI);

- (d) an award of damages to Mr. Fuchs for Georgia's violation of Article 2(2) of the Georgia / Israel BIT equal to the amount wrongfully denied to Mr. Fuchs in the compensation process (equivalent to (c) above);
- (e) an award of damages to each Claimant for Georgia's violation of Article 10(1) of the ECT, Article 2(2) of the Georgia / Greece BIT and Article 2(2) of the Georgia / Israel BIT in the amount of \$137,901, being each Claimant's 50% share of Tramex's expenses incurred between 1997 and 2003 while participating in the Georgian compensation process<sup>5</sup>;
- (f) pre-award interest, as well as post-award interest until the date of payment, on the damages so awarded; and
- (g) an Order that Georgia pay the costs of these proceedings, including the costs of the Claimants' legal representation, experts' fees and related disbursements, as well as the Claimants' share of all arbitration costs already paid or payable to the Centre (including the fees and expenses of the Tribunal).

67. The Republic of Georgia, in turn, requests that this Tribunal:

- (a) Dismiss the Claimants' claims in their entirety; and
- (b) Award Georgia its costs incurred in connection with these proceedings, including Georgia's legal fees, experts' fees and other costs and Georgia's share of the fees and expenses of the Tribunal and the Centre.

## **PART II. FACTUAL BACKGROUND**

68. This Tribunal sets out below the principal factual basis for its decisions in the present Award in the form of a detailed chronology. Where disputed by the Parties, the Tribunal has established these facts primarily from the contemporary documentation adduced in evidence by the Parties, supplemented by the testimony of their factual witnesses (both oral and written) as provided to the Tribunal in these arbitration proceedings.

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<sup>5</sup> \$137,901 being half of the total amount (\$275,803) quantified by Deloitte Management Consultancy Israel Ltd. as expenses incurred by Tramex while participating in the compensation process.

### A. *Introduction*

69. 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. In particular, Georgia sought investments to develop a transit corridor through its territory to transport oil and gas from Azerbaijan to the Black Sea (the Western Route).
70. During the Hearing, Mr. Nanikashvili, a Georgian-born businessman living in Israel, described the “vacuum” left in newly independent states, such as Georgia, following independence from the Soviet Union, which had concentrated power at the centre in Soviet Russia [Tr. D2:24]:

*“After Soviet Union split, it appear vacuum in the system of the fuel and energy, because every country, they own Transneft, they own oil field, and before everything was concentrate in the centre: export in the centre, budget from the centre, everything from the centre. And suddenly there is no centre, you are alone. So they don’t have any contract, and this was the beginning; because of this, there was need for foreign investors there. This was the beginning, either way they cannot work.*

*I tell you one more thing, very important. Please, it’s important. Even big companies like Lukoil, when they appear, they don’t know how to open a letter of credit. Only the – it was vacuum, you must understand. I’m not saying they are dangerous in the country, it really was financial vacuum: no banks giving, no banks contact. So they really need. It’s not because they were stupid, no, they were very clever people, but they need to begin -- even me when I begin to learn, someone teach me this business. I do no learn myself.”*

71. Mrs. MacDonald, testifying on behalf of the Respondent, stated that “[t]here was no law, it was dangerous. You were quite worried about your safety. There was no concept of bribery or anything being wrong because that was how you had to get anything done” [Tr. D7:6]. Expert testimony suggests, however, that the rise to power of President Shevardnadze in early 1992, following the coup d’état which removed President Zviad Gamsakhurdia from office, brought some order and stability to Georgia thereby significantly reducing the political risk associated with the very early period of Georgia’s independence [Tr. D10:22]. In any event, the geopolitical landscape which prevailed at the time of the Claimants’ investment foray into Georgia presented considerable risk.

72. The possibility of investing in Georgia was first broached by Mr. Fuchs, an Israeli oil trader. Mr. Fuchs was introduced to representatives of the Georgian Government by Mr. Ephraim Gur, a Georgian-born Israeli politician and member of the Israeli Parliament. Several meetings took place in September 1991 involving, on the one hand, Mr. Fuchs, Mr. Gur and Mr. Nanikashvili, and, on the other hand, the President of Georgia at the time, Mr. Zviad Gamsakhurdia, various ministers of the Georgian Government and Dr. Revaz Tevzadze, the General Director of the Georgian State-owned oil company SakNavtobi (also known as “**Georgian Oil**”).
73. As a result of these meetings, the Georgian Minister of Industry signed a Power of Attorney on 4 September 1991 with Mr. Fuchs through the company Tramex (International) Ltd. (“**Tramex**”), in which Mr. Fuchs held equal shares with Mr. Kardassopoulos [Hearing Bundle, Tab 38]. The Tribunal recalls here that during the jurisdictional phase the Respondent challenged Mr. Kardassopoulos’ status as an investor for the purposes of his treaty claims on the basis of a shift in the identity of the corporate investment vehicle from Tramex, a Delaware-based corporation, to Tramex International Inc., a Panamanian corporation. The Tribunal dismissed this challenge, finding as follows [Decision on Jur., paras. 135-36]:

*“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)*

*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, 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.”

74. Two months following this first meeting, on 8 November 1991, the Georgian Cabinet of Ministers adopted Resolution No. 834 “*About Some Activities Related to the Oil and Gas Production and Refining in the Republic of Georgia*”. This Resolution authorized the joint venture between SakNavtobi and Tramex for the purpose of exploiting the Georgian oil fields of Ninotsminda, Manavi and Rustavi, as well as the export of oil under license.
75. 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 in Georgia. During this visit, the 1991 revolution erupted which led to the deposing of President Gamsakhurdia. As Mr. Fuchs explained during the



Hearing, while others left Georgia during this period, the Claimants stayed: “*we don’t leave the county we come back, and they see that we were serious, we did not escape, we come back, and they said, ‘These people had a good presentation, we know where they are coming from, we can give them more business,’ and this is how it developed.*” [Tr. D4:153]. This commitment appears, at least initially, to have paid off.

76. On 7 December 1991, SakNavtobi and Tramex 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*” [Hearing Bundle, Tab 40]. This document details the planned 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;*

*The construction of the main ‘Baku-Gachiani’ Pipeline;*

*The construction of the main ‘Grozno-Gachiani’ Pipeline;*

*The construction of a branch of the ‘Gachiani-Batumi’ Pipeline (on the terrain adjacent to Poti);*

*The construction of an oil-transferring unit (Supsa-Poti) on the basis of this branch;*

*In prospect, the construction of a new main Pipeline for oil products – Gachiani-Khashuri-Poti;*

*The construction of a large oil-refinery with the capacity of 8-10 million tones per year.”*

#### ***B. The Joint Venture Agreement***

77. In the spring of 1992, on 3 March 1992, Tramex and SakNavtobi signed a Joint Venture Agreement (“**JVA**”) which created GTI Ltd. (“**GTT**”), a joint venture vehicle owned in equal shares by Tramex and SakNavtobi [Hearing Bundle, Tab 1]. The JVA provided for an initial term of 25 years, automatically renewable for a second 25-year term unless either Party notified its intention to terminate the agreement to the other Party within six months of the expiry of the agreement.
78. The original draft JVA was prepared by Mr. Fuchs’ attorney in Israel, Mr. Jack Smith. Certain hand-written amendments were, however, made to the draft by both contracting

parties during the final negotiating session. Several of the JVA's provisions, including certain of those containing hand-written amendments, are central to the disputes between the Parties and are therefore reproduced in full below.

79. GTI's mandate is set forth in Article 3 of the JVA, which provides as follows:

*"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 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 – for transport or storage – in consideration for payment of a rental or users fee or royalties [handwritten text in emphasis];*
- 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 of the main “Grozno-Gachiani” Pipeline;*

D. *The construction, maintenance and operation of 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;*

*For the sake of clarity, the Partners acknowledge that the listing of the Projects as above does not constitute establishment of priorities or order of implementation and all Projects shall be implemented in accordance with the provisions of Article 8 below.*

- 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 Gachiani-Batumi Pipeline and the Poti oil-transferring terminal; and further shall coordinate contracts with the Republic of Azerbaijan and the Republic of Checheno-Inghushety in order to coordinate the issues of the projecting and constructing of the Bako-Gachiani and the Grozno-Gachiani Pipelines.*
- 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 than the Government will issue a tender [handwritten text in emphasis].*
- 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.*
- 3.8 *The Joint Venture will carry out the above mentioned activity using the Authorized Fund and income of the Joint Venture.*
- 3.9 *The Joint Venture will be located in Tbilisi and its offices shall be located at a suite in the Hotel “Tbilisi”. As may be expedient and according to the decision of the Board, the Joint Venture will open branches and representations both in the territory of the participating countries and in the territory of third countries. Any branches opened by the Joint Venture shall receive all the necessary licences from the competent authorities of the Republic of Georgia.*

*The branches and representations of the Joint Venture may or may not be separate legal entities, as decided by the Board. Branches or representations of the Joint Venture which are legal entities, shall not be responsible for the commitments of such branches or representations.*

*A separate branch or representation may be formed for the purpose of carrying out any particular Project or Projects.*

3.10 *By unanimous decision of the Board, the Joint Venture may issue shares. The nature and terms of such shares, and all other conditions connected with their issuance, shall be as determined by the Board.*

3.11 *No third party may be granted preferred, equal or subordinate rights in any rights granted to, or used by, the Joint Venture as stated above without prior unanimous approval of the Joint Venture."*

80. The "Oil and Gas Facilities" contemplated in Article 3 were defined at Section 1.12 to mean:

*"all the existing pipelines, production, manufacturing, processing, refining and transportation installations, rail lines, transferring units, storage and other infrastructure facilities in the Republic of Georgia used by or related to the Oil and Gas industry and all Oil and Gas Facilities included in the Projects."*

81. Under Article 4 of the JVA, SakNavtobi and TrameX each made certain declarations and representations. Pursuant to Section 4.1, SakNavtobi declared and represented the following:

"A. *It is and will remain for the duration of the Joint Venture fully owned and controlled by the Republic of Georgia and it has been duly appointed and empowered by the Republic of Georgia to exclusively represent the Republic of Georgia in all Oil and Gas and energy related matters.*

B. *that it holds the Export License under which it has the sole, exclusive and irrevocable rights from the Republic of Georgia to acquire, import, export and sell crude oil Oil [sic] products and Gas and chemical products in the Republic of Georgia and abroad which it bought, processed, produced, and transported and discovered that the said license will remain in force at least until December 1995, and that such license may be placed at the sole, uninterrupted and irrevocable use of the Joint Venture for the duration of the license. [handwritten text in emphasis]*

*The Partners agree and understand that the continued validity of said license beyond said period, and its continued sole uninterrupted and irrevocable use by the Joint Venture on the same terms of conditions thereafter, is of material importance for the continued operation of the Joint Venture and its ability to carry out the Projects as described hereinafter.*

*The Georgian side accepts and agrees that the Export License will be extended automatically by additional 5 years, immediately at the time of the registration of the Joint Venture and will be renewed automatically every 5 years. [handwritten text in emphasis]*

*The Georgian partner shall place all new, additional or extended export licences or permits received by it at the use of the Joint Venture on the same terms and conditions stipulated herein.*

- C. *that it has the sole, exclusive and irrevocable right to manage, maintain, possess, operate and use the Existing Oil and Gas Facilities and to charge fees for the use thereof.*

[...]"

82. Pursuant to Section 4.2, Tramex declared and represented the following:

- A. *that it has the necessary financial capability and resources to fulfil its investment undertakings as specified in this Agreement.*
- B. *that it has experience, expertise and Know-How in matters relating to Oil and Gas and in particular to world Oil and Gas markets, export of Oil and Gas, pricing and profit-maximization on world markets.*
- C. *that it has experience, expertise and Know-How in Western methods in the Oil and Gas industry.*
- D. *that it has experience, expertise and Know-How in shipping of Oil and Gas.*
- E. *that it maintains connections with persons and companies active in world Oil and Gas markets and in Western banking and other institutions of relevance to the Joint venture and its activities.*
- F. *that it has at its disposal a staff of employees, representatives and agents to conduct international trade in Oil and Gas."*

83. Article 5 of the JVA provided that GTI was to be funded by an initial amount of 20,000,000 roubles, deposited in an "Authorized Fund" and contributed in equal parts by SakNavtobi and Tramex. Each Partner to the JV was also to make certain non-monetary contributions to GTI. Pursuant to Section 5.3, SakNavtobi was to contribute the following:

- 5.3.1 *to place at the sole, uninterrupted and irrevocable use of the Joint Venture, for the term of the Joint Venture, the Export License and any extension thereof, successor thereto or additional Export License received by it.*
- 5.3.2 *to place at the sole, uninterrupted and irrevocable use of the Joint Venture, for the term of the Joint Venture, its exclusive right to construct, manage, maintain, possess and operate Oil and Gas Facilities in the Republic of Georgia and*

*introduce therein any and all Oil and Gas produced or acquired by it or by the Joint Venture in order to market, sell, import and export Oil and Gas, and further to introduce into said Facilities Oil and Gas belonging to others for transport, storage or processing, and to charge any rental, users fee or royalties in connection therewith”*

84. In addition, pursuant to Section 5.4 of the JVA, TrameX’s contribution was as follows:

*“5.4.1 Its expertise, Know-How and international contacts relating to World Oil Markets, export, pricing, Western methods in the Oil and Gas industry, and to Oil and Gas generally.*

*5.4.2 Its international employees, agents and representatives in the Oil and Gas industry.*

*5.4.3 Communication systems, such as computers, telex and telecopier machines, required for the initial operation of the Joint Venture.*

*5.4.4 Its expertise, Know-How and international contacts in the shipping industry.”*

85. Article 12 of the JVA addressed the procedure to be followed in the event of an expropriation, nationalization or other similar event, stating as follows:

#### *“ARTICLE 12*

##### *Continuity of Property and Other Rights*

*12.1 All property owned, leased or used by the Joint Venture is not subject to expropriation, confiscation or nationalization. The property rights of the Joint Venture are protected in accordance with regulations of the Georgian legislation and applicable international conventions of treaties and public international law. The rights for the Oil, Gas equipment and other property, including leased equipment and property, which belong to the Joint Venture are protected according to the Georgian legislation and the applicable international conventions, treaties and public international law.*

*12.2 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 rights or property of the Joint Venture or in any way derogate from rights mentioned in Article 12.1 above.*

*12.3 Any purported attempted or alleged act or event of expropriation, confiscation or nationalization of the Joint Venture, its property or its rights shall be null and void, and shall forthwith entitle the Foreign Partner to full reimbursement for the Foreign Partner’s contribution to the Authorized Fund and any amounts invested by the Foreign Partner in any Projects, bearing interest on the free market value of such investment, whichever is higher and until such reimbursement in full shall forthwith entitle the Foreign Partner 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 rights of a property of the Joint Venture.*

*The Partners hereby stipulate that the rate of the rental, users fee or royalties to be awarded shall be in the rate of at least fifty percent of the revenue of the Joint Venture. The arbitrator may also award any additional amounts as reimbursement of expenses or in respect of loss of profits.”*

86. Finally, Article 21, which contained an acknowledgement of the JVA by the Georgian State, was partially struck out by hand (as indicated here by strikethrough type), the final clause appearing as follows:

*“ARTICLE 21*

*~~Government~~ Acknowledgement*

*The Parties hereto ~~and the Government of the Republic of Georgia~~ agree and acknowledge that this Joint Venture Agreement involves a substantial, long-term investment. ~~and that the applicable legislation of the Republic of Georgia as of the date hereof may not address all the subjects dealt with herein. Accordingly, it is hereby agreed and covenanted by the Parties and the Government of the Republic of Georgia that the provisions of this Joint Venture Agreement, supplemented by the provision of Georgian legislation as in effect on the date hereof, shall govern the subject matter of this Joint Venture, and no future legislation shall prejudice or detract from any rights of the Joint Venture or of the Foreign Party hereunder, including rights vis à vis third parties.”~~*

87. On 7 March 1992, the Georgian Cabinet of Ministers adopted Resolution 123G under which it instructed the Minister of Finance to register the joint venture [Hearing Bundle, Tab 5]. GTI was duly registered by the Minister of Finance on 9 March 1992 (It would appear several years later that GTI was not, in fact, properly registered on this date, although this fact has no material bearing on the Tribunal’s findings).

88. Resolution 123G defined GTI’s “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 (“Noroil” 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 Baku-Gachiani main oil pipeline within the Republic’s territory.”*

89. In addition, the Resolution noted that it was “*advisable to elaborate, review and sanction the appropriate design proposition*” for the following projects:
- “*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.*”
90. The Cabinet of Ministers “*acknowledge[d] that the agreement was coordinated with the Ministry of Industry of The Republic of Georgia.*”
91. On 14 December 1992, the Cabinet of Ministers issued Decree No. 1105, which effected a reorganization of the management of fuel and energy resources in Georgia [Hearing Bundle, Tab 6]. The purpose of this reorganization was “*to improve the structure of management of the fields included in the complex of fuel and energy of Georgia, increase its effectiveness and provide the population with the fuel and energy resources*”.
92. As a result of Decree No. 1105, SakNavtobi was established as a Department in the Ministry of Fuel and Energy and the entity which held the rights over Georgia’s main oil pipeline, Industrial Amalgamation of Georgian Main-Oil Pipelines (also known as “**Transneft**”), was “*united in the department of SakNavtobi*”.
93. The so-called “early oil” project was officially approved by the Cabinet of Ministers in Decree No. 951, passed on 15 December 1992 [Hearing Bundle, Tab 7]. In particular, the Cabinet of Ministers authorized GTI to commence construction on a terminal at Supsa and an oil-transshipment rack at Gachiani railway, estimating the total project cost, including oil and oil product pipeline reconstruction in “*the next stage*”, at US \$29.5 million.

### **C. The Deed of Concession**

94. Following the restructuring of the Georgian fuel and energy sector, the contracting 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. According to Dr. Tevzadze, this was necessary to continue with the work already begun on the refurbishment of the Samgori-Batumi pipeline [Tr. D8:19].



95. On 28 April 1993, Transneft executed a Deed of Concession (the “**Deed**”) in favour of GTI, granting it a 30-year concession over Georgia’s Pipelines (the “**Concession**”). The Deed was signed by both Transneft and GTI, witnessed by SakNavtobi and ratified by the Minister of Fuel and Energy [Hearing Bundle, Tab 3]. Several provisions in the Deed are also material to these disputes and are therefore reproduced below.

96. Among those key terms defined in the Deed, “Concession” was 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.”*

97. The “Pipelines” the subject of the Concession were further defined in the Deed 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”*

98. Article 6 of the Deed titled “Concession Fee” set forth the consideration for the grant of the Concession:

*“6.1 In consideration for the grant of the Concession, GTI agrees to bear on its account and for its own responsibility during the Concession Period all the expenses and investments involved in carrying out the ordinary and reasonable maintenance of the Pipelines and based upon the existing method of Petroleum transport cost calculations and in effecting any improvements or extensions to the Pipelines it may deem necessary. The Board of Directors of GTI shall closely consult on a regular basis with Transneft management in resolutions concerning the Pipelines.*

*6.2 Having regard to the ongoing nature of the expenses and investments to be made by GTI in the Pipelines throughout the Concession Period, the Concession Fee shall accrue throughout the Concession Period and shall be deemed to be paid throughout the entire Concession Period in consideration for the expenses and investments of GTI.”*

99. Article 7 contained the declarations of GTI, providing among other declarations that “GTI confirms that the minimum initial investment in the Pipelines shall be US\$ 1,000,000 (One Million U.S. Dollars) and Transneft acknowledges that GTI has met this obligation.”

100. Article 10 of the Concession contained several provisions concerning GTI's rights to effect certain "Improvements, Additions and Extensions to the Pipelines":

*"10.1 During the Concession Period, GTI shall have the right to effect improvements, extensions or additions to the Pipelines, at its discretion and in consultation with Transneft, including replacement of segments of the Pipelines, addition or improvement of pumping stations, terminals, transferring units, loading, discharging and storage facilities, attachment of the Pipelines to existing or prospective oil fields and attachment of the Pipelines to pipelines of other sovereign states.*

*10.2 All improvements, additions or extensions shall be the sole property of GTI, irrespective of whether they are detachable or non-detachable from the Pipelines.*

*10.3 Without derogating from the generality of Section 10.2 and in conformity with its provisions, Transneft hereby acknowledges that the rack for loading and unloading Petroleum and the storage facilities constructed by GTI at the Gachiani railway station and the Gachiani-Samgori segment of the Pipelines installed at GTI's expense and the pipeline extension terminal and marine facilities constructed by GTI at Supsa, are the sole property of GTI."*

101. At the end of the 30-year period, 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. Transneft undertook in this Article not to "pledge, lease or grant any rights whatsoever to the Pipelines during the Concession Period." Article 18 of the Deed thus provided the following:

*"18.1 At the termination of the Concession Period, GTI shall return the possession and use of the Pipelines to Transneft.*

*18.2 Upon the termination of the Concession Period, any investments, improvements, additions or extensions made to the Pipelines by GTI shall remain the sole property of GTI and additionally GTI shall have a property interest in the Pipelines equal to any outstanding loans of GTI to Transneft at the date of termination of the Concession Period (and for the purposes of this Deed of Concession such property interest shall also be deemed an investment, improvement, addition or extension to the Pipelines).*

*Without derogating from the generality of the foregoing, upon the termination of the Concession Period, Transneft shall continue to allow GTI the uninterrupted use of any investments, improvements, additions or extensions to the Pipelines made by GTI and accordingly shall maintain the connection to the Pipelines of any such improvements, additions or extensions and shall continue the transport of Petroleum and Gas through any such improvements, additions or extensions.*

- 18.3 *Upon the termination of the Concession Transneft shall notify GTI if it wishes to purchase the investments, improvements, additions or extensions to the Pipelines from GTI. If Transneft wishes to purchase the investments, improvements, additions or extensions to the Pipelines, it shall pay GTI a price to be agreed upon between the parties but in any event not less than the sum of (i) the cost of GTI in installing, managing and maintaining the investments, improvements, additions or extensions plus the LIBOR rate for U.S. Dollars accrued thereon annually + 2.5% per annum calculated on the basis of costs and expenses of GTI in each respective year.*

*The LIBOR rate to be applied shall be the twelve month LIBOR into [sic] in effect for each separate year of the Concession Period, and (ii) compensation for the contribution of GTI to the Pipelines in an amount to be agreed upon between the Parties which shall be based upon the increased income generated by the Pipelines at the date termination, operational and managerial improvements of GTI, increased demand from users of the Pipelines, know-how and expertise contributed by GTI concerning the Pipelines and any other tangible or intangible asset created or established by GTI concerning the Pipelines.*

- 18.4 *The amounts due to GTI under Section 18.3 above shall be due and payable to GTI I full upon the termination of the Concession Period and until such payment is effected, GTI's Concession rights and all other rights hereunder shall not expire and GTI may continue to possess, use, manage and operate the Pipelines under the terms and conditions hereof.*

- 18.5 *To ensure GTI's rights hereunder Transneft undertakes not to sell, pledge, lease or grant any rights whatsoever to the Pipelines during the Concession Period."*

102. Finally, Article 21 of the Deed, titled "No Expropriation", provided as follows:

- "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.*

- 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.”*

103. The relationship between these two instruments (the JVA and Deed of Concession) is critically important to the scope of the rights in issue in these arbitrations. Further to questioning by the Tribunal on this matter during the merits Hearing, Mr. Kardassopoulos offered the following explanation of their inter-relationship [Tr. D4:33-35]:

*“I am interested to know what significance you attach to the difference between the breadth of the formula in the deed of concession and the formula that’s used in the JVA to describe the oil facilities, where, for example, in the JVA, it refers to oil refineries as one aspect of the facilities. Could you just explain how you saw those two instruments?”*

*A. The concession has to do with pipelines, and therefore, from my point of view, from the commercial point of view that I saw, what is mentioned in the concession is what is also applicable on the JVA, which means the joint venture, GTI, had a concession on the pipelines that Transneft had on any future ones, or extensions of the existing or future ones, or additional ones or whatever. I do not see any difference.*

*Q. One reading of it may be to say that the deed of concession refers to extensions of new petroleum pipelines but does not refer, for example, to refineries and to other facilities. It doesn’t refer explicitly to rail facilities and so on, so it’s a much narrower definition in that sense.*

*A. Yes.*

*Q. It’s a comparison between paragraph 2 of the deed of concession and paragraph 1.2 of the notion of oil and gas facilities in the JVA. I should also say that I appreciate that this is also a question for legal submissions rather than direct witness evidence but I am interested to know how you saw the relationship between the two instruments.*

*A. We discussed extensively the JVA, the concession came at a later stage. Already, Transneft was part of the JVA. The Georgians felt that we needed the deed of concession in order to solidify the JVA, and this is where it came about, and we were -- we were negotiating the JVA, the Georgian part, with the assistance of our lawyer, Jack Smith. The only thing that was of interest to us was that the JVA terms would not be diminished.*

*And number two, that the same applications which means the deed of concession also would be strong in international -- in any international arbitration, international law and so on, and we were protected by the investment laws of Georgia also.*

*Q. Can I just check what you said? On the transcript it says that your interest was that the JVA terms would not be diminished, is that what you said?*

*A. Yes.”*

***D. Work Performed by GTI***

104. The work involved in the GTI project was comprised of five principal elements: (1) conversion of the Gachiani railway station to receive oil by rail from Azerbaijan; (2) construction of an oil storage, mooring and distribution facility near the port of Supsa on the Black Sea; (3) restoration of the existing Samgori-Batumi pipeline; (4) building of a new branch of that pipeline to the rail loading station at Gachiani; and (5) building of an extension to the Samgori-Batumi pipeline which would bring the pipeline to Supsa [Tr. D2:65-66; Frenkiel I, paras. 15-44].
105. The Parties dispute the extent of work performed in respect of each element of the GTI project. Whilst certain elements of the project were undertaken and progressed by GTI during the period in which TrameX/GTI held rights in the early oil pipeline, such as construction work on the Gachiani railway station, design work at Supsa port, and testing of the Samgori-Batumi pipeline, others were not commenced at all. In any event, all physical work on the project appears to have been put on hold by the spring of 1994, and all work of any nature ceased by the end of 1995 [Tr. D2:101-102; D3:143:1 to 144:2].
106. In May 1995, an article was published in *Petroleum Argus*, an oil industry publication, questioning TrameX’s commitment to the GTI project, because “*minimal repair work*” had been performed to that date on the Gachiani-Batumi pipeline [Hearing Bundle, Tab 147]. On re-examination during the merits Hearing, Mr. Frenkiel, project director for GTI from 1992 to 1996, explained that the criticism of TrameX’s commitment was misplaced, as works had been completed on other elements of the GTI project, the repair work on the pipeline being but one element of the whole [Tr. D2:114].
107. The written evidence of Mr. Levy, chief engineer from Ludan Engineering Co. Ltd. and a witness for the Claimants (who was not called to testify), confirms that no suggestion was made by any of the Georgian partners at the time that GTI’s work was deficient [Levy I, para. 12.2]:

*“There was never any suggestion whatsoever by them that the quality of our designs or the construction work was in any way deficient. This was a highly important project to them, and when they had comments or suggestions, they made them early on and we took full account of them. This was a partnership in a truest sense.”*

108. Whilst progress of the GTI project was clearly encumbered at different points due to security concerns, including theft of project materials and insurgent fighting in certain regions proximate to project sites, the oral and documentary evidence discloses that Tramex’s commitment to the project appears to have waned only upon the emergence of rumours and steps taken within the Georgian government which called into question the validity of GTI’s exclusive rights in the development of the early oil pipeline.

***E. The Proposed Partnership between Tramex and Brown & Root***

109. In 1994, Tramex began to look for a partner that would either provide financing or operational know-how to further advance the GTI project. Tramex had engaged the services of a financial consultant, Ms. Chee Jap, a witness for the Claimants, in 1992 to assist in securing a short-term loan to finance the Gachiani-Supsa pipeline project, with no success. Financing proved to be unavailable without a guarantee of throughput or a partner strong enough to carry the project [Tr. D1:193-94]. As Ms. Jap explained during the merits Hearing [Tr. D1:183:9 to 183:7]:

*“A. I looked to go to EBRD, I looked to Morgan Grenfell, and various other entities, including Turkish contractors, I believe, in order to see if there were possible export credits. It became apparent that this was a project in a war zone which was going to be very difficult, insurance was going to be difficult and expensive, and it seemed the best way to go about this was to ally oneself with someone who was already in the region, who worked in the region, knew about pipelines, oil, transportation, et cetera. We then looked around for one of those, and Brown & Root happened to come along at the right time.*

*Q. Did any of your discussions with any sources of potential financing reach a stage where you were discussing specific terms of the financing?*

*A. No, as I said to you, it didn't seem the right way to go, to go alone as GTI; you had to align yourself with a large corporation who was well-versed in the subject, and in the area, in order to be successful, and that's what we sought to do.*

*Doing these projects means you have to be flexible and you have to go the route that the circumstances dictate, not, you know, blindly following the route that you first perhaps thought was possible.”*

110. Around this same time, Brown & Root Ltd. (“**Brown & Root**”), a U.K. subsidiary of Halliburton Inc., a U.S. engineering and construction firm involved in the oil and gas sector, was seeking investment opportunities in the Caspian region. According to the written evidence of Mr. Ted Ferguson, a former employee of Brown & Root and witness on behalf of the Claimants, [Ferguson I, para. 2.1]:

*“[...] the Caspian reserves were one of the planet’s largest untapped sources of energy. We were keen to be a part of that development and began to work with Chevron Corp., which was at that time extracting oil from the Tengiz fields in Kazakhstan. We also established a relationship with [AIOC], a consortium of oil companies which at that time included BP, ExxonMobil, Statoil, Ramco Oil & Gas (“Ramco”), TPAO and Unocal. We had initiated our contact with AIOC by designing some off-shore drilling structures for the consortium’s exploration activities. During 1994-95, I was spending about 80% of my time in Russia and the Caspian region.”*

111. Mr. Ferguson learned of TrameX’s investment in Georgia through a contact involved in oil and gas exploration in the Caspian region, and subsequently arranged for a meeting with Ms. Jap in June 1994. According to Mr. Ferguson, Brown & Root was, at this time, still in the early stages of its research into the export solutions for Caspian oil and therefore did not take up contact with Ms. Jap again until early the following year [Ferguson I, para. 2.10].
112. Mr. Ferguson met with Ms. Jap again in March 1995 to discuss GTI’s rights under the JVA and the Concession in further detail. He explains Brown & Root’s interest in the GTI project at this stage as follows [Ferguson I, para. 3.2]:

*“From our perspective, a stake in GTI offered an ideal fit for Brown & Root’s strategy in the region. Firstly, under the joint venture agreement GTI held the licence that would enable us to export oil from the Georgian fields that we were planning to develop with Halliburton and Makoil. Secondly, and more importantly, GTI’s right over Georgia’s pipeline and rail transport systems offered us the central plank in our proposed solution for exporting oil from the Caspian reserves. It seemed that the very rights that Brown & Root was interested in acquiring had already been allocated to GTI. Apparently, TrameX had moved in ahead of the rest of the oil industry and I was quite interested to meet the Greek and Israeli businessmen behind it all. I confirmed Brown & Root’s interest through a letter to Ms Jap dated 13 March 1995. [...]”*

113. This is confirmed by a contemporaneous email, dated 26 June 1995, sent by Mr. Larry Farmer, a witness on behalf of the Respondent and Mr. Ferguson’s superior at Brown & Root during the relevant period, to Mr. Larry Knight, President and CEO of Brown &

Root International, and Mr. Emil Zerr, President and CEO of Halliburton Inc., which states [Hearing Bundle, Tab 280]:

*“Ted Ferguson met with Tramex and was able to come to agreement generally on everything but price. Tramex will not budge from USD 10 million. I have been adamant that whatever price we pay will have to come out of profit (after tax if any) on our CAPEX work and that we will not commit an agreement that binds us to pay until the construction agreement is in place with funding satisfactory to us. Tramex understands this and has no problem with it. Faith Macdonald, our lawyer here who is handling this, is in touch with Peter Arbour – and they agree that the proposed heads of agreement give us adequate means to step out if we want to.*

*The Turkey government has reiterated (through the Turkish Ambassador to the UK) that they will fund this work. We don’t know the value of the CAPEX scope, but our estimate is USD 25-50 million. If it is on the high end of a markup of USD 10 million might be feasible—if on the low end I would think it difficult, and we might have to step aside (but maybe not as we don’t know the drivers).*

*You may recall that the lawyer acting on behalf of the US DOE suggested the value of USD 21 million for the Tramex 50 percent of the venture (we are proposing to buy 25 percent).*

*I suggest that so long as we can legally withdraw that we go along with the USD 10 million. If the project won’t stand it at the time that we know the financing requirements, tariff possibilities, and other factors to be determined, then my guess is that Tramex will take a pragmatic view of their price in order to make the project go. Our requirement must be that we can withdraw at any time up to financial closure of the project without penalty.*

*As it is logical that oil will flow through Georgia someday, I suggest we go along with USD 10 million to stay in the game.”*

[Emphasis added.]

114. On direct examination during the merits Hearing, Mr. Ferguson was asked to explain his understanding of this last paragraph in Mr. Farmer’s email [Tr. D3:9-10]:

*“A. Yes, from our various managerial meetings, we had made some strategic decisions on the Caucasus in particular. The principal client we were looking at was AIOC in Azerbaijan and we wanted to have engineering contracts with them. We were already working for Chevron in Kazakhstan, across the other side of the Caspian, and we wanted to do more work for them, so our presence in the region was already there and we wanted to expand it.*

*In looking forward we saw Georgia -- and we weren't unique in this, I must say -- we saw Georgia as a very important pivotal point for the export of crude oil in the future, so any presence we had in Georgia, ahead of anyone else, and indeed, if we could have some foothold by having equity in some existing, even outdated, Russian supply lines and some export lines, that would be advantageous to us, we*



*would have a presence, and people would like to see an international engineering company in the region, working independently.”*

115. Later during the Hearing, Mr. Farmer confirmed on cross-examination the meaning of this last paragraph, concerning the eventuality of oil flowing through Georgia [Tr. D6:126:9 to 127:18]:

*“Q. Why in your opinion in 1995 was it almost certain that oil would flow through Georgia?”*

*A. In my opinion, that was the path of least resistance, because it wasn't likely to flow through Iran and down in that direction, it wasn't likely to flow through Armenia, and there was resistance or doubt among the oil industry that they wanted to flow it north through Russia, and of course a pipeline already existed through Georgia, and so those are some of the factors that caused me to believe, I believe at that time, that oil would flow through Georgia most likely.*

*Q. You mentioned north through Russia, is it a fact that the pipeline north of Georgia that flows through Russia flows through Chechnya?*

*A. I believe that's true.*

*Q. As a businessman, can you comment on the reasons why there would have been resistance or doubt amongst the oil industry to have a pipeline flow north through Russia including Chechnya?*

*A. I believe at the time there was concern about the reliability of the delivery through that area.*

*Q. Would the fact that it was in a hotly contested ethnic region be one of the reasons for concerns about reliability of delivery?*

*A. I think that's true. There were various disruptions, as I recall, political disruptions, that were perceived to possibly jeopardise the continuous flow of oil.*

*Q. You're speaking in very strategic terms; did you see the future of Georgia as an oil corridor as a strategic issue in business terms, especially from the point of view of a pipeline industry professional?*

*A. Yes, I think that would be a fair statement.*

*Q. It's also fair to say that AIOC saw it in the same terms, isn't it?*

*A. I suspect you're right.”*

116. On 20 March 1995, Mr. Fuchs wrote to GTI's Board of Directors and to SakNavtobi to inform them of progress made in Tramax's negotiations with Brown & Root concerning their participation in the GTI project, as well as with AIOC in respect of the possibility of their shipping crude oil from Azerbaijan through GTI's oil transport system. In his letter,

Mr. Fuchs advised that discussions with Brown & Root had reached a “*serious stage*” and that they would bring “*insurance cover, engineering expertise and connections, not only to complete the project, but also to incorporate it as part of a wider transportation network for crude oil and products and to bring additional finance.*” At this point, it is evident that Tramex believed both Brown & Root and AIOC to be “*proceeding in good faith*” and Mr. Fuchs therefore proposed that the GTI Board of Directors consent to providing the companies with requested documentation relating to GTI, its rights and interest, subject to their entering into a confidentiality agreement [Hearing Bundle, Tab 95A].

117. On 27 April 1995, Dr. Tevzadze, a witness on behalf of the Respondent, confirmed in a letter to Mr. Grahame Cook of AIOC, also a witness on behalf of the Respondent, that the GTI Board had agreed to AIOC’s documentation request subject to the signature of a confidentiality agreement, confirming also that Tramex was authorized to liaise and negotiate with AIOC on behalf of GTI in all matters which cover the subject of the JVA [Hearing Bundle, Tab 104].
118. AIOC and Tramex never agreed on the final terms of a confidentiality agreement and the requested documents were therefore never forwarded by GTI or its partners, although it appears that AIOC did obtain certain documents related to the GTI project through other channels [see e.g. Hearing Bundle, Tab 296].
119. On 3 May 1995, Ms. Jap met with Bob Brendling, a colleague of Mr. Ferguson at Brown & Root, to discuss the terms of a deal in respect of the GTI project. Ms. Jap’s Meeting Note recording their discussion reflects the fact that AIOC was not interested in dealing with Tramex or GTI, as they were unknown entities [Tr. D3:44:5 to 46:17]. Furthermore, it is clear from this Note that Brown & Root would not commit to a deal with Tramex without a commitment from AIOC to put a certain amount of oil through the system, *i.e.* “throughput”, and would not finance or work on the Georgian development with other oil companies because of a company directive to cooperate with AIOC. The Meeting Note concludes as follows [Hearing Bundle, Tab 108]:

*“I think B&R are still prepared to proceed to heads of terms with us but they would carry the condition that AIOC can get B&R as a shareholder as soon as*

*possible in order that they can negotiate on behalf of GTI with AIOC, which may move events a little faster; however, we still want the [\$10] million, which they would not wish to pay unless AIOC has committed. The structure contemplated in their proposal I think is not workable.”*

120. Mr. Ferguson confirmed on cross-examination during the merits Hearing that cooperation with AIOC *“was always Brown & Root’s first choice, because they needed the work with AIOC [...]. So there was never any intent in anything that Brown & Root were doing in Georgia to [...] interfere with the relationships with AIOC and the major oil companies. Unfortunately, it happened.”* [Tr. D3:46]
121. On 15 May 1995, Dr. Tevzadze wrote to Mr. Fuchs confirming that SakNavtobi would *“look favourably on Brown & Root as an equity partner sharing in Tramex’s interest in GTI and, if needed, would undertake to obtain the necessary governmental authorizations and consents to give effect to their participation.”* [Hearing Bundle, Tab 110]
122. Before Tramex and Brown & Root reached agreement on the terms of a deal, the Georgian Minister of Justice, Mr. Ninidze, a witness on behalf of the Respondent, wrote to Dr. Tevzadze on 26 June 1995, informing him that GTI was improperly registered, contrary to Georgian law, and that the Deed of Concession did not give GTI any rights as it was not legal [Hearing Bundle, Tab 119]:

*“The Ministry of Justice of the Republic of Georgia, according to the request of the Cabinet of Ministers, reviewed the legal position of the foundation documents of GTI and the Act of Concession, which were signed by SakTrans and GTI on the 28 of April 1993.*

*After objective legal expertise of the presented documents, appeared that many of the subjects are not in constitute [sic: conformance] with the existing jurisdiction of Georgia.*

*From the above mentioned, The Ministry of Justice of the Republic of Georgia requests to inform the foreign partner, Tramex the following:*

1. *The Joint Venture, GTI, was registered improperly and against the existing law and has to be re-register[ed] as soon as possible.*

2. *According to the law of the Republic of Georgia, the Act of Concession signed between SakTrans and GTI is not legal and does not give GTI any rights.*

*[...]”*

123. Tramex responded to the Minister's letter on 17 July 1995, taking the following position [Hearing Bundle, Tab 127]:

- “1. We found the assertion made in your letter, namely that GTI Ltd. should be ‘re-registered’ and that the Deed of Concession between GTI Ltd. and Saktrans is not in conformity with Georgian law, totally unacceptable from any standpoint.
2. Our position, based upon legal advice that we have received, is that the assertions in your letter are incorrect and are in clear contravention to internationally accepted principles of law as implemented by national courts and as adopted by all recognized international tribunals. As stipulated in the relevant legal documents, all the agreements involving GTI Ltd. are governed by these accepted principles of law and we expect the Georgian Government, forming part of the community of civilized nations, to adhere to these principles.
3. On March 9, 1992 GTI Ltd. was registered and a certificate of incorporation was issued by the Republic of Georgia. If, subsequently, the Republic of Georgia enacted new legislation which required a new form of registration, this obviously cannot affect the rights and interests of GTI Ltd. which were granted and acquired in accordance with the prevailing laws.

*One of the most basic and fundamental principles of customary commercial law states that vested interests or rights cannot be invalidated or adversely affected by legislation enacted after investiture of such interest or rights.*

*Therefore, it is quite clear that any reference to ‘re-registration’ of GTI Ltd. is completely irrelevant since, as stated above, once registered in accordance with the prevailing laws as explicitly confirmed by Georgian Government officials, the rights and interests of GTI Ltd. are immune to any detraction due to any future legislation.*

*We do not understand the basis for your assertion that under the existing laws a re-registration of the Joint Venture, GTI is required and our above comment is without prejudice to our examination of the relevant Georgian legislation referred to in your letter.*

4. The assertion concerning the Deed of Concession is in our opinion a blatant attempt, based upon ulterior motives, to undermine clear rights and interests accruing directly to GTI and indirectly to our company as a foreign investor. We cannot accept that an agreement made between two Georgian State owned companies – GTI Ltd. and Saktrans, which in the body of the Deed of Concession was affirmed by yet a third Georgian State owned company, Saknavtobi, and was ratified by the Minister of Energy, would be declared by another Department of the Republic of Georgia to be invalid. This becomes even more incredulous in light of the clear declarations given both by Saknavtobi and Saktrans contained in the Deed of Concession as to the conformity of the Deed of Concession with all government decrees.

[...]”

124. During the months of June and July 1995, Tramex and Brown & Root proceeded to negotiate the terms of a draft Heads of Agreement, which was submitted for approval to the GTI Board of Directors and approved on 12 July 1995 [Hearing Bundle, Tab 125]. The draft Heads of Agreement provided for the sale by Tramex of 50% of its rights and interest in GTI to Brown & Root in exchange for payment of US\$10 million. Brown & Root also committed to obtaining throughput commitments from producers commencing upon completion of the “Projects”, defined as follows:

- “1. *Cleaning, testing and refurbishing the existing pipeline between Gachiyani and Supsa.*
2. *Upgrading and refurbishing of the existing pumping and pressure regulation stations.*
3. *Completion and expansion of the rail car unloading system at Gachiyani with a capacity in line with anticipated throughput volumes.*
4. *The construction of a new storage and loading facility at Supsa.”*

125. Conclusion of final Heads of Agreement was subject to, among other things, completion of Brown & Root’s due diligence review of GTI. A meeting note prepared by Ms. Jap recording her discussion with Mrs. Faith Macdonald (a fact witness on behalf of Respondent) and Mr. Michael Hartley (not a witness), in-house legal counsel to Brown & Root, indicates that, as of 14 July 1995, Brown & Root was aware that Tramex and GTI’s rights were being attacked and that “*legalities are being called into question*”, but were unaware of the letter recently sent by the Minister of Justice declaring GTI’s rights under the Deed of Concession invalid [Hearing Bundle, Tab 126].

126. In August 1995, Tramex and Brown & Root continued to develop a plan for implementation of the GTI project. On 25 August 1995, Mr. Ferguson wrote to President Shevardnadze to inform him of changes to their proposal. In this same letter, Mr. Ferguson recommended “*that Georgia sign no more agreements with AIOC until the AIOC and Georgia have assessed this new proposal.*” [Hearing Bundle, Tab 135]. Mr. Adams, President of AIOC, who appeared as a witness on behalf of the Respondent in these proceedings, was quite critical of Mr. Ferguson and his motives in respect of this letter, stating that it is “*interfering or attempting to interfere in an ongoing process between a national government, or two national governments, and the potential for*

*investment in an export route through to the West*” [Tr. D9:91-92]. However, Mr. Ferguson explained in his oral testimony that while “*it helped [his] business initiative somewhat*” if President Shevardnadze did not sign AIOC’s proposal, the purpose of this letter was to advise the President that AIOC was considering a separate offer from Turkey and no further action should be taken until AIOC had completed its assessment of this alternative [Tr. D3:67-69].

127. This tension between AIOC and Brown & Root, as well as internal conflict in Brown & Root occasioned by their involvement with Tramex/GTI, is a recurrent theme of these arbitrations. Whilst there can be no certainty that these tensions would have been resolved in such a way as to enable the participation of Brown & Root (and the Claimants) in any oil and gas export solution for the region, it is clear that the Georgian State played a role in quashing any such possibility.
128. A Business Plan prepared by Tramex/GTI and Brown & Root was presented to the GTI Board of Directors on 8 September 1995, which resolved to request a meeting with Prime Minister Patsatsia to present him with the Plan. During this same Board meeting, attended by Dr. Tevzadze, Mr. Asatiani, Mr. Kardassopoulos, Mr. Fuchs and Mr. Frenkiel, the issue of action taken by “*several parties, including AIOC*” to undermine and eliminate Tramex/GTI’s rights was discussed. The meeting minutes reflect the following additional resolution [Hearing Bundle, Tab 140]:

“2. *The Board of Directors irrevocably authorizes Tramex International Inc. to receive legal advice as it deems necessary concerning the steps GTI should take to protect its rights under the Joint Venture Agreement and/or the Deed of Concession and to take all action required and to initiate legal proceedings wherever necessary, on behalf of GTI, in connection therewith, against AIOC and all other parties involved in activities which are in contradiction to GTI’s rights.*”

129. On 12 September 1995, Mr. Fuchs wrote to Prime Minister Patsatsia in connection with a letter received the previous day from AIOC. Mr. Fuchs’ letter states, in relevant part, the following [Hearing Bundle, Tab. 141]:

“*It has come to our attention that members of the Cabinet of Ministers have signed an agreement with AIOC intending to grant AIOC the sole and exclusive rights over the Republic of Georgia’s existing crude oil pipeline system.*”

[...]

*We had understood from Georgian governmental representatives that AIOC had objected to Tramex/GTI being included in the ongoing discussions and negotiations with AIOC regarding the pipeline system.*

*The letter of AIOC to Tramex, dated 11<sup>th</sup> September 1995, [...] advises us that AIOC would be 'more than willing to discuss its crude oil transportation requirements with Tramex/GTI if we are advised to do so by the Government'.*

*Without derogating from AIOC's liability towards us for their actions, it is apparent that if AIOC would receive appropriate instructions, we would be included in the discussion being held with AIOC.*

*It is our firm opinion that this matter should be urgently looked into and sorted out and we hereby request an urgent meeting with you, at your earliest convenience, so that we may obtain official clarification of the matter."*

130. It would appear that such instructions, to include GTI in any deal discussed with AIOC, were never given. During the merits Hearing, Mr. Adams testified that “[i]f the government of Georgia had said, ‘this company has rights which we acknowledge and we request that they are accommodated in the consortium’, we would have reviewed the situation at that time and assessed what would be an acceptable solution” [Tr. D9:97]. This is consistent with the opinion expressed by the Claimants’ industry expert in his written and oral evidence [Tr. D10:71; Beazley Expert Report, para. 62].
131. Although development of a Business Plan with Brown & Root proceeded through the fall of 1995, Tramex and GTI appear to have been overshadowed by AIOC’s presence in the region and the ongoing negotiations with both the Georgian and Azeri governments in respect of the development of an export solution for Azeri oil. By October 1995, Brown & Root had arranged financing for the GTI project and purportedly secured a commitment from the Turkish government to provide a credit facility of US\$250 million [Ferguson II, paras. 3.9-3.10]. No final agreement was, however, ever concluded.
132. Mr. Farmer met with Mr. Adams in November 1995, following the creation of GIOC (see Part II.G below), to clarify the nature of Brown & Root’s activities in connection with the Western Route. It is clear from the meeting notes recorded by AIOC that whatever Brown & Root’s original intentions may have been, they had by this point determined not to pursue a deal with Tramex [Hearing Bundle, Tab 150]:

*“B&R advised that their relationship with Tramex goes back two years. At that point, B&R had been invited to Georgia by a California company to assist with the enhancement of production from the oilfields. Tramex, with others, had an agreement with the Georgian Government for rights to the pipelines; and one year ago, B&R signed an agreement with Tramex which provides B&R with an option to purchase 50% of Tramex’s 50% share.*

*B&R advised they had decide to put more energy into their activity in Azerbaijan, and in this respect wished to pursue other opportunities with AIOC. AIOC welcomed this news, and urged B&R to initiate a dialogue with SOCAR’s senior management.*

*At the end of the discussion both parties agreed that B&R was not a competitor to AIOC, purely a contractor. The meeting was cordial, and both parties agreed to maintain open channels of communication, with B&R confirming their sincere intent not to interfere with AIOC and its external relationships. B&R wished to maintain good relations with AIOC and its shareholders.”*

133. The Parties dispute whether Brown & Root had the experience and technical ability to construct and operate the early oil pipeline in whole or in part, let alone the main export pipeline (“MEP”) which eventually crossed through Georgia. Mr. Guner, who provided written evidence in support of the Respondent’s case but who was not called to give oral testimony, stated that in his 25 years of experience with Brown & Root, *“Brown & Root never actually owned or operated pipelines, this wasn’t [its] core business”* [Guner, para. 4]. This is countered by the testimony of the Claimant’s industry expert Mr. Beazley, who insists that, at the time, the Brown & Root Halliburton group were taking equity in oil fields around the world and, in his opinion, *“there is just no shadow of doubt in my mind but for the fact that Brown & Root could have done it”* [Tr. D10:63].
134. As will be seen later, irrespective of what might have been the GTI project under partnership with Brown & Root, it is unnecessary, in the Tribunal’s view, for the Claimants to prove in order to prevail in these arbitrations that the deal with Brown & Root would have proceeded as an absolute certainty or that it would have been a success on the scale of what actually occurred under the direction of the AIOC.

#### ***F. AIOC and Negotiation of the PCOA***

135. AIOC was formed by 13 multinational oil companies in December 1994 as a “no profit/no loss” joint oil operating company consistent with the terms of the Azeri Chirag Deepwater Gunashli (“ACG”) Production Sharing Contract (“PSA”), known as the “Contract of the Century” [Hearing Bundle, Tab 274; Adams, para. 6]. The purpose for



this common venture is explained in the written evidence of Mr. Adams [Adams, para. 9]:

*“The commercial prize for the shareholders in AIOC was substantial, which more than justified their risk exposure. The Azeri Chirag Deepwater Gunashli (‘ACG’) oil field included in the PSA was discovered by the state oil company in Soviet times, but could not be developed. (Soviet offshore technology could not cope with the water depths involved.) Some 3.5bnbls (billion barrels) of recoverable oil reserves had already been proven. In 1994 it was anticipated that these oil reserves would ultimately increase to at least 5bnbls following appraisal drilling. This would result in a field production of some 1 mmbbls/d (million barrels per day) that would require an MEP to the Mediterranean. As subsequent events have shown, ACG recoverable reserves have now increased to 9.5bnbls, making it one of the world’s few supergiant oilfields. To place this in perspective, if the ACG oilfield was overlain on a map of London it would stretch from one side of the M25 to the other. ACG was roughly four times the size of the Forties Field in the UK North Sea, and was located in an area not subject to OPEC influence and control.”*

136. Mr. Adams further explained the strategic importance of the PSA to both Georgia and Azerbaijan vis-à-vis the strengthening of their independence from Russia [Adams, para. 23]:

*“The validity of Aliyev’s oil strategy was fully vindicated by subsequent events. Both he and President Shevardnadze benefited from international political exposure to the West that resulted in their being made welcome by the powers that be, particularly in Washington. They had the remarkable ability to balance not only conflicting political interests within the immediate region, but to manipulate external political players of great influence. For example, the pursuit of improved energy security from preferential access to Caspian oil became an American political priority. Equally, the involvement of Russian Lukoil and Turkish TPAO demonstrated the importance of the PSA for Moscow and Ankara too. My direct involvement with President Aliyev and Shevardnadze became critical for the effective management of AIOC, and the eventual delivery of EOP [the Early Oil Pipeline]. In effect, nothing of significance in relation to Baku oil would happen if President Aliyev did not consider it consistent with Azerbaijan’s national interest. The same applied to President Shevardnadze in Tbilisi. Presidents Aliyev and Shevardnadze were fundamentally aligned from 1995 to the activation of EOP in 1998.”*

137. On 22 March 1995, two days after Mr. Fuchs wrote to the GTI Board requesting permission to disclose documentation in respect of GTI’s status and rights to AIOC, Mr. Gregory Rich, Vice President of AIOC, and Valekh Aleskerov, Advisor to the President of the State Oil Company of Azerbaijan (“SOCAR”), jointly wrote to President Shevardnadze providing a draft Protocol relating to the proposed transportation of Azerbaijan oil through Georgia. They also advised of conflicting information received in

respect of rights granted to GTI, which, if valid, would require appropriate modification of the Protocol [Hearing Bundle, Tab 97]. They wrote, in relevant part, as follows:

*“During the visit last week you were kind enough to instruct your officials to research whether any Government Decrees had been issued to this effect. They reported to us that whilst several Decrees had been issued recognising the formation of the joint venture GTI and confirming certain rights; [sic] none decreed the granting of any exclusive rights over, or long term lease of, any of the facilities referred to in the Protocol.*

*However, we have been informed by Department of Georgian Oil that the joint venture agreement signed by them with Tramex International Inc. does grant GTI certain exclusive rights and in particular a long term lease agreement on the Gachiyani-Samgori pipelines which was signed in April 1993.*

*Before we can progress our negotiations on the transportation of Azerbaijan Oil across the territory of the Republic of Georgia, it is important that we fully understand the extent and validity of the rights granted to the joint venture GTI. Towards this end we would request the assistance and co-operation of your staff in clarifying these matters. If it is deemed helpful, we are willing to retain a legal advisory familiar with Georgian law to assist in this matter. Should such rights have been granted and remain valid and in force then Item 2 of the protocol will need to be modified accordingly.”*

138. At or around this time, AIOC retained the legal firm Nabarro Nathanson to prepare an analysis, *inter alia*, of the legality of the GTI joint venture and the rights granted to GTI under the JVA and the Deed of Concession. Their report concluded that GTI validly existed but that the grant of rights to GTI was invalid and the provisions in the JVA and Deed of Concession purporting to grant rights to GTI were similarly invalid as neither SakNavtobi nor Transneft had the authority to make such a grant of rights absent Cabinet approval [Hearing Bundle, Tab 105]. This report, as stated in its introductory pages, was prepared on the basis of document summaries, as opposed to a complete record of the relevant legal and contractual instruments, and is therefore (and was at the time) of limited use as a dispositive assessment of the Claimants’ rights.
139. The Protocol between the governments of Georgia and Azerbaijan, and AIOC, for the transit of Azeri oil through Georgia was signed on 17 May 1995 and executed several months later on 31 August 1995. According to Mr. Cook, the Protocol enabled “*preliminary positioning work ... on the western route without contractual commitment*” [Tr. D9:11]. Indeed, a contractual commitment in respect of the Western Route was not

finalized until March 1996 in the form of the Pipeline Construction and Operating Agreement (“PCOA”).

140. In June 1995, the Claimants met with representatives of Velt Energie and United Perlite Industries Ltd. who, acting either on behalf of several or all of the members of AIOC, expressed an interest in buying out TrameX’s 50% interest in GTI. The meeting was arranged and attended by Dr. Tevzadze. Various figures appear to have been discussed, culminating in what the Claimants understood to be a tentative offer of US \$25 million. Shortly following the meeting, an exchange of correspondence ensued casting some doubt on what may (or may not) have been agreed [Hearing Bundle, Tabs 120, 122; Kardassopoulos III, paras. 3.10-11]. A letter from Prime Minister Patsatsia to United Perlite shortly following the meeting indicates, however, that the Georgian Government considered that an offer was made and that it was “almost adequate”, with a possible additional offer of 5% of share capital [Hearing Bundle, Tab 121]. Prime Minister Patsatsia further expressed the opinion that the negotiations with TrameX should continue and agreement should be reached as quickly as possible [*Ibid.*].
141. Discussions between the Claimants and representatives of Velt Energie and United Perlite appear to have progressed no further. On the other hand, the Claimants’ concerns in respect of AIOC’s involvement in the region and with the Georgian Government appear to have intensified.
142. On 24 July 1995, Mr. Kardassopoulos wrote to Mr. Adams concerning TrameX’s investment in GTI, advising as follows [Hearing Bundle, Tab 128]:

“[...]

3. *Your activity and interests in the region adjacent to the Republic of Georgia are well documented and have received expansive press coverage and we are well aware also that you have made inquiries in the Republic of Georgia concerning the possible use of the Georgian pipeline system for transport of oil, and as evidenced by your contacts with us, you are cognizant of our rights and the rights of GTI Ltd concerning the pipeline system.*
4. *We wish to bring to your urgent attention that we have received information that certain elements allegedly associated with AIOC have deviated from accepted business norms and are attempting to undermine our rights and the abovementioned rights of GTI with the aim of promoting, what they perceive to*

*be, the interests of AIOC. This information has been provided to us by well established sources involved in the situation.*

5. *We would therefore like to clearly and plainly state that our rights in GTI Ltd and the rights of GTI Ltd pursuant to the Deed of Concession have been duly granted and ratified by the competent authorities of the Republic of Georgia and are fully valid and enforceable. Obviously, any attempts, whether directly or indirectly, a knowing intervention in a contractual relationship and/or economic interests of our company and we shall hold those responsible to such actions liable for all damages or losses either we or GTI may suffer as a consequence of such conduct.*

*[...]"*

143. This letter was, in no uncertain terms, a shot across the bow from Tramex in defence of its interests in Georgia.
144. Mr. Adams replied on July 25<sup>th</sup>, confirming AIOC's intention to "*deal only with the appropriate parties in [Georgia], whether they be Tramex, GTI, Georgian Oil or any other properly sanctioned party.*" Mr. Adams further advised that, in this light, [Hearing Bundle, Tab 130]:

*"AIOC have sought clarification and authorisation from the Republic of Georgia as to such appropriate parties with whom to discuss AIOC's export options through the Republic of Georgia. We have received that authorisation from the highest levels of Government who have in turn formally appointed certain individuals to carry out these discussions on behalf of the Republic. We believe that only the Georgian Government have the proper authority to instruct AIOC as to the identity of those parties.*

*If representatives of Tramex or GTI have not been included in the efforts currently underway in Georgia, AIOC suggest that you contact Georgian authorities to determine your role in the discussions.*

*It is not nor has it ever been the intention of AIOC to interfere with the rights of any third party. All the member companies of this Consortium are particularly sensitive to their international business reputations; this sensitivity dictates the ethical and business practices of the [AIOC].*

*[...]"*

145. The next day, Mr. Adams signed an Indemnity and Guarantee Agreement between Georgia and AIOC, on behalf of AIOC and in its favour [Hearing Bundle, Tab 129]. Mr. Cook confirmed during his oral testimony that the Indemnity Agreement referred generally to those facilities covered by the Protocol signed by the Georgian and Azeri governments in May 1995 and contemplated the presence of Tramex/GTI as potential

third party claimants over those same facilities [Tr. D9:58-59]. The Indemnity Agreement provided, in relevant part, as follows:

“[...]

*WHEREAS certain of the Georgian facilities are or have been subject to various claims of ownership and other claims of exclusive rights of use, management and/or operation by individuals, entities and/or companies separate and apart from the Government of the Republic of Georgia and its ministries, agencies and state-owned enterprises;*

*WHEREAS AIOC now wishes to confirm its willingness to commence discussions with any properly authorised representatives of the Government of the Republic of Georgia (“Georgian Representatives”) on the express condition such discussions will not in any way be considered to interfere with an valid Third party (as defined below) contractual arrangements relating to the Georgian Facilities; and*

*WHEREAS the Government of the Republic of Georgia (“Government”) now wishes to confirm that the proposed discussions will in no way interfere with any valid contractual arrangements between Third Parties and any Georgian governmental units, ministries, officials, agencies or state-owned enterprises (“Georgian State Entities”)*

[...]

2. *The Government confirms and warrants that it has the full power and binding authority to enter into the discussions and legal and binding agreements with AIOC and/or the Participants regarding the exclusive control and use of the Georgian Facilities free of any valid claim of any person or entity, including (without limitation) claims of enforceable contract or concession rights of ownership, use, control, management of the Georgian Facilities, fees, royalties or other charges.*

3. *The Government hereby agrees to defend and hold AIOC and the Participants and their respective agents subsidiaries and affiliated companies and its and their employees, officers and directors (collectively, “AIOC Group”) harmless from and against all actions, causes of action (including claims of tortious interference with contract rights), claims, demands, liabilities, costs, expenses, (including reasonable attorney fees) and damages incurred by AIOC Group as a result of breach of the representation and warranty made by the Government in clause 2 hereof.*

[...]”

146. It is unclear from the record whether the Indemnity Agreement was triggered by Mr. Kardassopoulos’ July 24<sup>th</sup> letter. Mr. Cook and Mr. Adams both testified that such an Indemnity Agreement would be sought in the normal course of business [Tr. D9: 56, 57; 89] and would have taken some time to prepare [Tr. D9:57]. Mr. Cook testified that the

Agreement was not specifically related to concerns about Tramax [Tr. D9:56], but later confirmed that the recital (reproduced as the third recital in paragraph 145 above) in respect of claims of exclusive rights over the Georgian facilities by individuals apart from the government was understood by AIOC to refer to Tramax and GTI [Tr. D9:59]. On any reading, the coincidence in the timing of these events is striking.

**G. The Creation of GIOC**

147. On 11 November 1995, President Shevardnadze adopted Decree No. 477, which established the State-owned company Georgian International Oil Corporation (“GIOC”). Decree No. 477 provided, in part, as follows [Hearing Bundle, Tab 11]:

*As agreed upon with the International Oil Consortium, the founding companies thereof, international financial, banking and investment structures, as well as the governmental authorities and non-governmental organizations of Georgia, the establishment of the Georgian International Oil Corporation is deemed as expedient.”*

*The aim of the Georgian International Oil Corporation shall include:*

*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.”*

148. Mr. Giorgi Chanturia, then serving as Georgia’s ambassador to Azerbaijan, was appointed President of GIOC. At this time, Mr. Chanturia had little or no experience in the oil and gas industry [Tr. D6:61, 100]. Nor does he appear to have been involved during his service in Azerbaijan with pipeline development in Georgia until sometime in late 1995 [Tr. D6:69-70].
149. Decree No. 477 also indicated that other companies would be invited to participate in GIOC:

*“The following be also invited to participate in the Georgian International Oil Corporation: the State Oil Company of Azerbaijan, LUKOIL, the Russian Oil Company, INTERSYSTEM company jointly held by Azerbaijan and Georgia and other international oil companies, banks, financial, investment and insurance companies.”*

150. The creation of GIOC sparked further concern among the Claimants, who sought reassurance from Dr. Tevzadze and other Georgian officials that this event would not disadvantage them or their investment in GTI [Gur III, para. 1.3; Nanikashvili II, paras. 2.4ff; Fuchs III, para. 2.1ff].
151. During the period that followed, the Claimants met repeatedly with various government officials to discuss whether and how GTI might be included in the new framework, including as a shareholder of GIOC. GIOC, for its part, appears to have begun considering potential foreign partners to participate in GIOC, as confirmed in a letter from Mr. Chanturia to Dr. Tevzadze on 4 December 1995 in which Dr. Tevzadze is asked [Hearing Bundle, Tab 151]:
- “to prepare and present to us proposals and give information about the intellectual, construction, transportation, financing, industrial potential and also about other abilities which can be used by GIOC together with the foreign partners, to solve the GIOC problems.*
- The above mentioned proposals will be learned by the invited foreign experts and in case of using them, the corresponding structures will participate, as well as other international organizations, in tender announced by us.”*
152. The ambiguous reference in Mr. Chanturia’s letter to “foreign partners” may be interpreted as referring either to the Claimants or to AIOC [Chanturia I, para. 21; Nanikashvili, para. 2.6]. It is unclear, despite this invitation, whether a response identifying GTI or the Claimants was ever sent.
153. On 30 January 1996, Georgia established an *ad hoc* commission, pursuant to Decree No. 133, to examine all contracts and arrangements relating to the oil sector in Georgia [Hearing Bundle, Tab 12]. The preamble to the Decree noted that the *ad hoc* commission was established in the spirit of “safeguarding the national interests of Georgia”. With this aim, the commission was assigned the task of studying and analyzing all agreements currently in place and those “in the process of preparation in the sphere of oil industry”, and preparing a report for the President. Among those entities deemed “advisable” to include in this work were the “International Oil Consortium”.
154. According to Mr. Fuchs, although this decree was an additional source of concern “it was not necessarily inconsistent with what was being promised since we believed that the

*interests that had now just been taken away would effectively be integrated into the GIOC structure. In that way, we would essentially be regaining the benefit of the rights that had been taken away.” [Fuchs III, para. 2.09]*

#### **H. The Cancellation of GTI’s Rights**

155. On 20 February 1996, the Cabinet of Ministers adopted Decree No. 178 “*for the purposes of creating essential favourable conditions for the transportation of oil and gas within the territory of Georgia*” [Hearing Bundle, Tab 14]. The Decree 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:*

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

*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;*

*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.”*

156. Decree No. 178 further provided that GIOC would represent Georgia in a contract with the 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.”*



157. The final provision of Decree No. 178 cancelled “*all rights (given earlier by the Georgian government to any of the parties) contradicting the present Decree*”. This brought to an abrupt end Tramex/GTI’s rights in Georgia.
158. With the passage of Decree No. 178, Mr. Chanturia, in effect, inherited control of the early oil pipeline project, formerly in the hands of GTI, without any apparent background in this industry.
159. Mr. Chanturia claims in his written evidence not to recall when he became aware that Tramex claimed to have rights in the early oil pipeline [Chanturia I, para. 26], but during his oral testimony stated that as late as 30 January 1996 (the date on which the *ad hoc* commission was established) he had no knowledge of GTI or Tramex [Chanturia II, para. 1; Tr. D6:67]. On questioning by the Tribunal, he confirmed that he had knowledge of Tramex by August 1996 [Tr. D6:149]. Mr. Chanturia also initially claimed not to have knowledge of Tramex’s claims until sometime in 1997, but accepted during cross-examination that several government documents presented to him indicated that he was aware of Tramex’s claims in 1996 [Tr. D6:102–104, 149; see e.g. Hearing Bundle, Tab 159]. Mr. Chanturia stated that he did not recall much of the circumstances surrounding the enactment of Decree No. 178 and the events which followed, even though he appears to have been at the center of the action during this controversial period.
160. On 8 March 1996, consistent with the above-quoted decree, Georgia entered into a Host Government Agreement (“**HGA**”) with AIOC, the preamble of which explains its purpose as follows [Hearing Bundle, Tab 285]:

*“WHEREAS the Oil Companies wish to develop a secure and efficient pipeline system for the transportation of Petroleum across the territory of Georgia (“Georgia”) to a new marine export terminal which the Oil Companies wish to develop on the Black Sea coast of Georgia; and*

*WHEREAS in developing such pipeline system and marine export terminal the Oil Companies wish to refurbish and upgrade certain existing facilities and construct certain new facilities as well as to operate and utilise the capacity in, such pipeline system and marine export terminal, all on the terms and conditions of the Pipeline Construction and Operating Agreement; and*

*WHEREAS the Government is responsible for and controls the Georgian Party; and*

*WHEREAS the Facilities are, or will become, State property; and the Government enters into this Agreement as the body ultimately responsible for managing State property; and*

*WHEREAS the Government wishes to facilitate and support the activities of the Oil Companies, as described above, and the Operating Company.”*

161. On the same day, GIOC entered into a 30-year PCOA with AIOC for the transportation of oil through Georgia. Under the terms of the PCOA, GIOC granted AIOC the sole and exclusive rights to construct and operate the Samgori-Batumi pipeline [Hearing Bundle, Tab 286].
162. On 19 August 1996, Transneft was “liquidated” pursuant to Order No. 33a and all of its property was transferred to GIOC [Hearing Bundle, Tab 16]. In practice, Transneft continued to function but now reported to a different government entity.

***I. The Compensation Commission Process***

163. Shortly following issuance of Decree No. 178, a meeting was arranged by Dr. Tevzadze between President Shevardnadze and Mr. Gur, a witness on behalf of the Claimants, in May or June 1996. According to Mr. Gur’s written evidence, President Shevardnadze was grateful to the investors for their patience and indicated there was a “*possibility of including [them] within the new structure but if that was not possible then proper compensation would be paid*” [Gur IV, para. 5.2]. Mr. Gur left this meeting feeling satisfied that Georgia had committed to compensate TrameX, the only questions being how much, in what form and from what sources [Gur IV, para. 5.3]. Although such assurances are disputed by the Respondent, including by Dr. Tevzadze [Tevzadze I, para. 14], Mr. Gur was not called to be cross-examined on his written evidence and, as is evident from the discussion which follows, President Shevardnadze initiated a compensation process approximately two months later.
164. In a letter to President Shevardnadze, dated 26 August 1996, Dr. Tevzadze appealed directly to the President for a resolution of TrameX’s legal rights and “*expenditure compensation issues*”, noting that TrameX had presented SakNavtobi with a claim demanding the reinstatement of its rights and compensation pursuant to the JVA. In particular, he requested that President Shevardnadze instruct GIOC to resolve TrameX’s legal and compensation issues [Hearing Bundle, Tab 159]. During cross-examination,

Dr. Tevzadze testified that Mr. Chanturia was not happy that he had appealed to the President for Tramex's rights to be considered [Tr. D8:45:11-23]. It is also clear that Dr. Tevzadze understood, at the time, that Tramex sought compensation not only for its expenses but for the rights that had been taken away [Tr. D8:46:11-23].

165. On 30 August 1996, President Shevardnadze issued Order No. 479, addressed to Mr. Lekishvili, Mr. Chanturia, Dr. Tevzadze and Mr. Ninidze, urging that they “[g]ather, invite necessary people, and find a decision acceptable for all the parties”, then to “[r]eport on to me” [Hearing Bundle, Tab 17]. This was the first step in what would prove to be a long, drawn-out process, lasting over a decade, during which the Claimants sought recompense for the loss of their investments in Georgia.
166. On 18 September 1996, Minister Lekishvili circulated an internal memorandum to certain government officials, including Messrs. Ninidze, Chanturia and Tevzadze, requesting that they express their “*opinion in the shortest time*” in connection with President Shevardnadze's request [Hearing Bundle, Tab 18].
167. In December 1996, a draft Order, prepared by Minister Lekishvili, was circulated for review in connection with the assessment of the investments carried out by Tramex in Georgia and determination of “*its rights, applied costs and compensation volume of future losses*” [Hearing Bundle, Tab 22]. The draft Order contemplated the establishment of a State Commission consisting of Mr. Silagadze (Chairman of the Commission), Mr. Ninidze, Mr. Zubitashvili, Mr. Chkhenkeli, Dr. Tevzadze, and Mr. Chanturia. Mr. Fuchs was also identified to participate in the commission as a representative of Tramex.
168. The draft Order (which was never adopted) stated that the purpose of the State Commission was to effect the following:

“2. To offer company Tramex International (R. Fuchs) and Georgian International Oil Corporation (G. Chanturia) jointly, on a par basis of costs to be incurred, to invite acknowledged auditing firm for estimation of investments carried out by company Tramex International in Georgia, its rights, applied costs and compensation volume of future losses.

3. After obtaining conclusion of auditing firm, compensation within 30 days period should discuss and determine volume of compensation to be assigned to company Tramex International, work out recommendations re sources of compensation and present for discussion.”

169. In a letter to Dr. Tevzadze, dated 31 March 1997, Mr. Chanturia rejected the above formulation of the draft Order, stating that “[t]he commission should be created to identify the real expenses borne by this company. We can not be liable for any future income or expected losses, since such condition is not envisaged in any contractual document” [Hearing Bundle, Tab 165]. Accordingly, Mr. Chanturia proposed amending the title of the Order to read: “*Commission for identification and possible compensation of the expenses borne by company ‘Tramex International’ in Georgia*”. In closing, Mr. Chanturia observed that the “*given remarks change not only Georgia’s responsibility before the abovementioned company, it also objectively defines the matter that the commission is created for. Therefore, it is necessary to take the above remarks into consideration.*”
170. Dr. Tevzadze testified that Mr. Chanturia’s opinion, as expressed in this letter, naturally had some effect on the wording and scope of the Order ultimately adopted [Tr. D8:44-45]. Indeed, on 23 April 1997, Georgia adopted State Minister Order No. 84 “[r]egarding Tramex International company’s expenses in Georgia, and a possible reimbursement of the expenses” [Hearing Bundle, Tab 24]. This Order contains a single operative provision, which provides as follows:
- “To create a government committee for reviewing Tramex International company’s expenses in Georgia, who will determine a possible reimbursement of such expenses.”*
171. Order No. 84 establishing the compensation commission reflects several important changes from the December 1996 draft Order. Notably, there is no longer any mention of “*future losses*”.
172. The compensation commission was composed of most of the same individuals proposed in the draft Order, including Mr. Fuchs: Mr. Zubitashvili (Chairman of the Commission), Mr. Ninidze, Dr. Tevzadze, Mr. Murjikneli (First Deputy Minister of Finance), Mr. Silagadze, Mr. Chkhenkeli, Mr. Chanturia, Mr. Chumburidze (Deputy Head of Finance-Budgeting and Credit Policy Development of State Chancellor).
173. Of particular interest to the Tribunal is the inclusion of Mr. Fuchs, one of the Claimants, in the commission established to consider compensation for Tramex in respect of its

investment in Georgia. Mr. Chkhenkeli, a Respondent witness, commented in his written evidence that *“it is very unusual for an interested party to participate in the work of a governmental commission. Such commissions typically meet to discuss the issue in private, rather than operating under the pressure of an interested party.”* [Chkhenkeli, para. 12].

174. Mr. Fuchs was subsequently removed as a member of the compensation commission through State Minister Order No. 136, adopted on 12 September 1997 [Hearing Bundle, Tab 26]. Nevertheless, it appears that Mr. Fuchs continued to attend certain meetings of the commission.
175. Mr. Nanikashvili testified during the merits Hearing that Mr. Fuchs was unhappy with the final wording of Order No. 84 because it omitted any reference to “damages”. He claims that Mr. Zubitashvili reassured Mr. Fuchs that they would find a way to compensate the Claimants for their damages [Tr. D2:32].
176. During a meeting of the compensation commission on 25 August 1997, Mr. Fuchs requested that damages be included in the scope of the commission’s work and proposed that an international audit be conducted to estimate compensation owing to the Claimants [Hearing Bundle, Tab 174]. The Protocol recording the minutes of the meeting indicates that Dr. Tevzadze endorsed the concept of an audit. However, Mr. Zubitashvili, who chaired the meeting, stated that *“the Commission will continue its work within the bounds of the functions give to it by the Order”* and *“it won’t be possible to talk about any damages if till [sic] the actual expenses of works carried out and their legality are not estimated.”* [ibid.] The commission therefore resolved to form a working group which would review Tramex’s expenses.
177. Towards the end of 1997, Tramex appointed the firm Nexia International (“**Nexia**”) to conduct an independent audit of Tramex’s expenditures related to the GTI project [Fuchs I, para. 9.13, Hearing Bundle, Tab 179]. Mr. Fuchs requested that the commission delay conclusion of its review until Tramex had received and submitted the Nexia audit report [Hearing Bundle, Tab 180]. Nexia completed its audit in May 1999, over a year later than originally anticipated.

178. Nexia examined Tramex's internal operating expenses, payments to third parties, and loss of revenue in association with the cancellation of GTI's rights (*i.e.* the agreement to sell 25% of its share in GTI to Brown & Root for US\$10,000), assessing its total losses at US\$24,040,904 [Hearing Bundle, Tab 199, p. 15]. Nexia clarified that this amount does not include the loss of any future income and revenues due to Tramex upon the completion of the GTI Project and its operational implementation [*ibid.*].
179. Tramex submitted the report to Mr. Giorgadze (Minister) and Mr. Chichua (Deputy Minister) of the Ministry of Fuel of Energy in the summer of 1999 [Fuchs I, para. 9.15; Hearing Bundle, Tabs 199, 200 and 201]. Having received no response, Mr. Fuchs wrote to Mr. Mirtskhulava on 18 January 2000, shortly following the latter's appointment as Minister of Fuel and Energy, enquiring about the status of the Commission's review [Hearing Bundle, Tab 203].
180. On 24 August 2000, Mr. Mirtskhulava wrote to President Shevardnadze, chronicling the involvement of Tramex in Georgia and advising that the "*total losses*" suffered by Tramex should be determined on the basis for the Nexia report [Hearing Bundle, Tab 203]:

*"Due to the fact that Georgian International Oil Company became the legal owner of the above facilities, investigation of Tramex's legal rights and resolving the expenditure compensation issues, upon your personal request, became the responsibility of the management of the aforesaid corporation. A similar task was assigned to the Ministry of Fuel and Energy of Georgia. The Ministry of Finance, Minister of Economy and Ministry of Justice of Georgia participated in the investigation as well.*

*As a result of the investigation, it became clear that there [was] a need to conduct an international auditing in order to determine the losses of Tramex caused by taking away Tramex's rights.*

*Such an audit was initiated by Tramex and conducted by 'Nexia International,' an international law firm and their conclusions were sent on the 28<sup>th</sup> of May last year to Deputy Minister of Fuel and Energy of that time, Mr. G. Chichua.*

*Based on this information, it will be advisable to instruct Georgian International Oil Corporation to determine the total losses suffered by 'Tramex' on the basis of 'Nexia International's' audit conclusions, since the disputed facilities are now under the control of GIOC's management.*

*Please take the appropriate measures."*

181. Approximately one month later, President Shevardnadze issued Order No. 1888/8 instructing Mr. Chanturia to “[d]iscuss, and make the appropriate decision”. Mr. Chanturia’s response to this Order, on 10 October 2000, was to deny any obligations to Tramex or GTI, averring that GIOC would not be able to determine Tramex’s loss “*if such loss was indeed incurred*”. Mr. Chanturia advised that assessment and resolution of the issue, in his view, fell under the competence of SakNavtobi [Hearing Bundle, Tab 205].
  
182. Several letters were exchanged between the Claimants and SakNavtobi in the period which ensued, but no further action was taken. Mr. Fuchs wrote to Dr. Tevzadze on 5 November 2000, demanding payment within 30 days of US\$ 24,040,904, with interest, in compensation for Tramex’s losses [Hearing Bundle, Tab 206]. Mr. Fuchs highlighted as support for Tramex’s position the letter from Mr. Mirtskhulava to President Shevardnadze in August 2000. The General Director of SakNatobi, Mr. Makharadze replied several weeks later, indicating that he expected a conclusion by the compensation commission shortly [Hearing Bundle, Tab 207].
  
183. Dr. Tevzadze wrote to Mr. Fuchs on 18 December 2000 requesting additional information, which Mr. Fuchs remitted a week later [Hearing Bundle, Tabs 210 and 211]. Nonetheless, no conclusion of the compensation commission was forthcoming.
  
184. In June 2001, Deputy State Minister Gvenetadze convened a meeting of various heads of ministries, including Dr. Tevzadze and Irakli Kelbakiani, the Vice President of GIOC, during which it was resolved that SakNavtobi would submit to the Ministries of Justice and State Property Management and to GIOC available documents concerning any debts owed to Tramex for their examination, and the Ministry of Justice would prepare a report within one month on the “*authenticity of debts to Tramex International and possibilities for legal proceedings*” [Hearing Bundle, Tab 216].
  
185. On 20 August 2001, Mr. Kelbakiani issued GIOC’s assessment of Tramex’s claims, concluding that “*the party violating the act of Concession is GTI itself and the request of Tramex on damage compensation is absolutely groundless.*” [Hearing Bundle, Tab 217]

186. Deputy State Minister Gvenetadze convened another meeting of the heads of ministries on 23 August 2001, during which it was again resolved that SakNavtobi would deliver all materials in its possession to the Ministries of Justice and State Property Management and to GIOC regarding the debts owed to Tramex in order to carry out a complete examination of same, and that another meeting would be held at the State Chancellery to discuss the outcome [Hearing Bundle, Tab 218].
187. Dr. Tevzadze wrote to Deputy State Minister Gvenetadze on 5 November 2001, advising that while SakNavtobi had complied with its obligation to provide all available documents concerning any debts owed to Tramex to the Ministries of Justice and State Property Management and to GIOC, the Ministry of Justice had not prepared a conclusion on the issues raised by Tramex, as stipulated in the minutes of the June 2001 meeting [Hearing Bundle, Tab 222]. It appears that further instructions were issued by the Deputy State Minister to the Ministry of Justice following receipt of Dr. Tevzadze's letter [Hearing Bundle, Tab 225]
188. On 28 February 2002, Mr. Fuchs wrote to Dr. Tevzadze requesting confirmation that the compensation issue would be resolved within the next 30 days [Hearing Bundle, Tab 223]:

*“Throughout the period of the State Commissions review, and in the course of many discussions and negotiations, Saknavtobi and various representatives of the Government of Georgia have requested Tramex to defer bringing international arbitration proceedings in England, pursuant to the rules of the International Chamber of Commerce (as provided for in Article 19 of the JVA) assuring Tramex that our damages would be determined by the State Commission, Saknavtobi's liability to Tramex for the breach of the JVA having already been accepted. Unfortunately, however, the work of the State Commission has taken far longer than Tramex envisaged when these assurances were given and Tramex must have seen positive progress within a defined time period, or will be forced to proceed with the ICC arbitration under English law as originally agreed upon between us.*

*Within the last few days you have again requested that Tramex should not take this course and have expressed your belief that the matter will be resolved satisfactorily in the next few months without the need for arbitration.*

*If we are to hold off any longer, we require, as a sign of your good faith, confirmation that the compensation issue will be resolved within a defined period not to exceed 30 days.”*



189. SakNavtobi's response on 26 March 2002 was defensive by any measure [Hearing Bundle, Tab 224]:

*"In response to your letter dated February 28<sup>th</sup> 2002*

*Thank you for the above letter. As you are aware the issue concerning the Joint Venture Agreement made in 1992 between Tramex and Georgian Oil is under constant control of Georgian Oil directorate.*

*The Georgian Oil management has advised you several times that the agreement has never been breached or canceled from Georgian Oil side (it was breached under specific Decree of the President of Georgia of which you have been well aware), and Georgian Oil is making all the efforts to ensure the recovery of the losses and costs actually incurred by Tramex. It is obvious that the consideration of this issue on authority level has been delayed, but this was caused by quite an objective reason related to the changes in Georgian government, and we believe that the Ministry of Justice will shortly finalize its conclusion. From time to time the detail information on this matter was provided to Tramex by Georgian oil.*

*The last letter signed by Mr. A. Zoidze – the Deputy State Minister of Georgia was sent to the Ministry of Justice on February 2<sup>nd</sup> 2002, in which the latest date for the Ministry to present the conclusion was March 15<sup>th</sup> 2002.*

*Georgian Oil will try to provide Tramex with the mentioned conclusion immediately upon its receipt. In addition, Georgian Oil would like to once again point out that the Georgian Oil management can notice the Tramex desperate effort to charge Georgian Oil with the breach.*

*We would once again like to officially advise you that there was not even an attempt made from Georgian Oil side to breach or cancel the above agreement (although there was and currently is the basis for that to happen), thus the agreement was breached not by Georgian Oil but under the Decree of the President of Georgia, which, as you are aware, is considered as Force Major for both parties.*

*So, Tramex has no basis to require the recovery of its losses and costs from Georgian Oil. Even more, Georgian Oil has carried no less losses, both moral and financial, than Tramex and this issue will be fairly raised in the near future.*

*Dear Ron, you very well understand that Tramex will benefit more if it keeps Georgian Oil as a true contractor and not as a defendant. This will enable us both to achieve final results as both parties need so desperately."*

190. The Ministry of Justice released its report on 2 April 2002, attributing the prolonged delay in preparing its report to the fact that the documents submitted to it were incomplete and not submitted jointly. The report dealt not with compensation per se but rather with the legal relationship between SakNavtobi and the Georgian State [Hearing Bundle, Tab 225].

191. Clearly frustrated by the failure of the Georgian State to compensate him and his business partner, Mr. Fuchs sought the assistance of Dr. Henry Kissinger and his consulting firm. In late 2002, Mr. Fuchs met with Mr. Alan Batkin, Vice Chairman of Kissinger Associates, Inc., to discuss a retainer in connection with the on-going compensation process. On 8 January 2003, Dr. Kissinger, Chairman of Kissinger Associates, wrote to President Shevardnadze requesting that he meet with Mr. Batkin to discuss the matter [Hearing Bundle, Tab 229].
192. In an Order dated 20 January 2003, President Shevardnadze asked Mr. Mirtskhulava to prepare certain information in respect of the concerns outlined in Dr. Kissinger's letter. In a letter dated 7 February 2003, Mr. Mirtskhulava again chronicled Tramex's involvement in Georgia and in particular the saga of the compensation process [Hearing Bundle, Tab 230]:

*"In spite of multiple written resolutions from the President of Georgia, in spite of the creation of a State Commission consisting of State Ministers, and in spite of a series of department instructions, unfortunately, the case [of Tramex's claims] still remains unresolved.*

*[...]*

*As for the loss of Tramex, to determine of the amount [sic] of the loss and to make arrangements for the compensation, the Minister of Heat and Power issued letter No. 1/1276 dated August 24, 2000 and by virtue of Presidential Resolution no. 1888/8 issued following this letter, dated September 19, 2000, the 'consider, and take the appropriate measures' task was assigned to Mr. G. Chanturia. According to Letter No. 105 dated November 13, 2001, the management of Saknavtobi made one more request to the President of Georgia to take appropriate measures. On the basis of a Personal Presidential Decree in response to this letter and according to former State Minister's Gia Arsenishvili's order an appropriate State Commission was established. Unfortunately, this Commission also managed not to close the issue, because both the Minister (Gia Arsenishvili) and the Deputy Ministers were replaced.*

*The only thing this Commission managed to do was to put the Ministry of Justice in charge of investigating the legal aspects of the issue and carrying the issue to its final conclusion.*

*Unfortunately, 6 months later (the replacement of the Minister and the Deputy Ministers took place at this time) the issue was redirected again from the Ministry of Justice back to GIOC and Saknavtobi management. It is clear that neither of them is able to solve the issue independently, they could not solve it during the last 7 years and definitely won't be able to solve it in the future."*

193. Mr. Mirtskhulava summarized the situation as follows [*ibid.*]:

*“I find it natural that after all this it will be difficult to answer the question: What did Tramex do wrong to Georgia for which it was so unduly ousted from the country, the country for which Tramex did much more than any other investor performing in Georgia?”*

*We perfectly understand that Presidential Order No. 178 on February 20, 1996 was rather a political step for our country’s benefit, but how fair was it to Tramex Company, which has carried out significant investments and spent a lot of money for various purposes in the country?*

*If the mechanism of compensation of Tramex’s actual expenses had been provided by draft order No. 178 of February 20, 1996, or even by a new order, Tramex definitely would not have suffered so unfairly and undeservedly for the 7-year period in our country. This is the exact reason that Tramex Company not only did not get its legitimate rights restored (or did not manage to get it) since February 1996, but it did not even get any acknowledgement of its actual expenses that had been incurred in the country.*

*[...]*

*It is clear that Mr. Kissinger’s legal firm would have never gotten engaged in the Tramex case if the firm had not been sure of winning. One can notice that the firm has scrutinized all the details and that is why they wanted to offer the Georgian side the right approach – a mutual consent – from the very beginning.*

*Tramex’s demanded of 24 million dollar compensation is not the main thing, the amount might be lower or higher; it will probably be determined by the international audit. The main thing is to determine who will be responsible for paying this money and who will be the respondent in Georgia.”*

194. In a handwritten note to Mr. Jorbenadze (State Minister), prepared on the cover of Mr. Mirtskhulava’s letter, President Shevardnadze observed that *“Mr. Kissinger’s claims should not be considered groundless, but at that time there was no other way out”*, and directed that he convene *“interested persons”*, i.e. Mr. Mirtskhulava, Dr. Tevzadze, and Mr. Chanturia, in order to reach a conclusion [Hearing Bundle, Tab 230].
195. A subsequent Presidential Order, issued on 21 February 2003, cryptically directed Messrs. Mirtskhulava, Jorbenadze and Chanturia *“to assist”* [Hearing Bundle, Tab 232]. Mr. Mirtskhulava testified that this directive referred to SakNavtobi, and was predicated on his letter to President Shevardnadze which concluded with the following resolve, having recognized the likelihood of legal action against Georgia: *“One thing is clear, that the Georgian side – the Georgian Government – should determine who will be the respondent before Mr. Kissinger’s deputy arrives.”* [Tr. D6:20-21; 54:14 to 58:11]

196. A meeting was arranged between various Georgian officials and Mr. Batkin, Mr. Fuchs and Mr. Smith in Tbilisi on 19 May 2003. Mr. Batkin's written evidence, which was neither tested nor challenged at the Hearing, indicates as follows [Batkin I, para. 9]:

*"At the meeting, the Georgian delegation did not dispute that Georgia had taken away the rights once held by GTI and that Tramax was therefore entitled to compensation. There was no debate or open disagreement about this issue. We all agreed that it would be best to avoid litigation or arbitration by resolving the matter of compensation amicably. The conversation therefore turned to establishing how much should be paid and how that figure should be calculated."*

197. According to Mr. Batkin's recollection of events, Mr. Mirtskhulava told Mr. Fuchs and colleagues that once a sum had been quantified and agreed, it would be repaid to Tramax on terms similar to the Paris Club rules [Batkin I, para. 11]. Mr. Batkin subsequently wrote to Mr. Mirtskhulava on 2 June 2003, memorializing the key points of the agreement reached. His letter records the following [Hearing Bundle, Tab 234]:

*"(i) Tramax entered into a Joint Venture Agreement with Georgian Oil, pursuant to which Tramax and Georgian Oil established a Georgian company, GTI Ltd., owned in equal shares between them, which was to be granted exclusive rights to the pipelines for transmission of petroleum through the territory of Georgia. The establishment of GTI was approved by the Cabinet of Ministers.*

*(ii) GTI entered into a Concession Agreement with the government entity of Georgia that, at the time, was the owner of the pipelines, which provided for the grant to GTI of a long term concession over the existing and future pipeline system in the territory of Georgia.*

*(iii) Tramax invested money in GTI, and on behalf of GTI, to implement the pipeline project and other projects stated in the Joint Venture and the Concession Agreement with Georgian Oil. Tramax also made donations of money for the welfare of Georgia.*

*(iv) No assertions were ever made that Tramax or GTI defaulted on any of their contractual obligations. It was acknowledged that Tramax met all of its obligations under the various agreements it was a party to.*

*(v) The Government of Georgia later adopted another resolution unilaterally cancelling the rights of Tramax and GTI under their respective agreements and granting the same rights to GIOG.*

*(vi) Tramax is entitled to be compensated by the Government of Georgia for the costs it incurred, the amounts it invested and for the value of the loss of the business opportunities that would have evolved under the agreements signed. Neither GTI nor Tramax have received any compensation for the costs incurred or for the loss of rights.*

*(vii) The Parties prefer to resolve this issue amicably and to avoid litigation.”*

198. The accuracy of Mr. Batkin’s record of the May 2003 meeting is disputed by Mr. Mirtskhulava. Mr. Mirtskhulava denies having received the above record of their meeting or having spoken to Mr. Batkin subsequent to their meeting in respect of the contents of his letter, despite documentary evidence suggesting the contrary [Tr. D6:32]. An email sent by Mr. Batkin to Mr. Fuchs on 19 June 2003 records in relevant part the following [Hearing Bundle, Tab 235]:

*“I spoke with the Minister today.*

*He confirmed that he had received my letter and agreed with the conclusions of our meeting that I set forth in the letter. He said that they have sent the President a decree to sign which authorizes appointing an accounting firm to determine the economic costs to Tramex of losing the contract. He did not say out of pocket costs – he said economic costs. He also said it usually takes about 10 days to get a decree signed, so he expected to get it back next week.”*

199. Mr. Mirtskhulava’s testimony stands in contradiction to Mr. Batkin’s written evidence, in which he claims to have spoken with Mr. Mirtskhulava over the telephone on 19 June 2003, at which time Mr. Mirtskhulava confirmed that he had received Mr. Batkin’s June 2<sup>nd</sup> letter and agreed with its contents [Batkin II, para. 5; Tr. D6:34-35]. However, as noted above, the Respondent elected not to challenge Mr. Batkin’s evidence.
200. In any event, on 28 June 2003, President Shevardnadze agreed to an independent audit of the costs incurred by Tramex and, on 27 October 2003, Tramex commissioned Deloitte Management Consultancy Israel Ltd. (“**Deloitte**”) to conduct the audit [Hearing Bundle, Tabs 236, 238].
201. In November 2003, President Shevardnadze resigned as the Rose Revolution gained momentum in Georgia. In a subsequent election, a new government was established and Mr. Mikheil Saakashvili became President in January 2004.
202. The Deloitte audit report, presented to the Ministry of Fuel and Energy on 5 February 2004, estimated the value of Tramex’s share in GTI’s rights in the Baku-Supsa and BTC pipelines at US \$64 million, as well as wasted expenditure and interest of US \$12.1 million and US \$30.2 million, respectively, for a total loss of US\$ 106.3 million (as of 31 December 2003) [Hearing Bundle, Tab 238].

203. In a letter to Prime Minister Zhvania, dated 22 July 2004, Tramex gave notice through counsel of its claim for reimbursement of this amount [Hearing Bundle, Tab 241].
204. On 9 October 2004, the new Georgian Government established another commission under Decree No. 144 entitled “*On setting up a governmental commission for studying questions concerning the claims of the company ‘Tramex’ made on the Georgian Government*”. The Decree further noted that “*the problem concerning the company ‘Tramex’ has existed for more than ten years. Study of this problem was discussed by different specially set up commissions, but regrettably ways of solving it have not been found.*” [Hearing Bundle, Tab 31]
205. 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 the Claimants that the commission had decided there were no legal grounds for holding the Government liable for the claim. The Commission reasoned as follows [Hearing Bundle, Tab 249]:

*“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.]

206. The Claimants wrote to Ms. Gureshidze through counsel on 24 November 2004, inviting the commission to reconsider its position, failing which formal arbitral proceedings would issue [Hearing Bundle, Tab 250]. Ms. Gureshidze replied on 10 December 2004, confirming the commission's position as set forth in its November 15<sup>th</sup> letter [Hearing Bundle, Tab 251].
207. This was an unequivocal rejection of the Claimants' demand for restitution and, indeed, a complete denial of any responsibility on the part of the Georgian State for the events which had transpired over the course of the preceding decade. Mr. Batkin's conclusion as regards this *volte face* of the Respondent reflects the Claimants' disappointment in such a bitter end to the long, drawn-out compensation process [Batkin I, para. 23]:

*"I cannot help but remark that the approach adopted by the State commission in 2004 contradicted the express acknowledgements given to me and Mr. Fuchs in Tbilisi during our meeting on May 19, 2003 and the agreement by the Georgian Government that a third party process be engaged to determine compensation. Our faith in the process was seemingly confirmed as the Government allowed the appointed auditors to proceed over the ensuing months as planned, without raising any objection. The State commission's response was also inconsistent with my clear understanding, based on the admissions made by the Georgian officials I had met, that Georgia regarded the obligation to Tramex as something which had arisen as a result of the Government's own conduct (the cancellation of GTI's rights) and not conduct by Georgian Oil."*

208. Mr. Batkin's theory on the effect of the change in government on the compensation process is confirmed by the testimony of Mr. Nanikashvili under questioning by the Tribunal [Tr. D2:56-58]:

*"Did Mr. Tevzadze ever say anything or do anything which led you to believe that he had not been Georgia's spokesperson on the issue of compensation for Mr. Kardassopoulos and Mr. Fuchs?"*

*A. Your Honour, our link to Georgian government in these particular days was Mr. Tevzadze, we don't --- because he was the head of the Georgian Oil in these days, and we don't have anyone else who can approach to the government on this. He is going there and he is bringing there the answers, and he was pushed for all these matters to not go in the court, because it was very important also for him, for him, like Georgian Oil, who will be responsible for the payment, because what he was like head of the company. So Georgian Oil will be payment. So for us, he was the guy basically who was spokesman of the Georgian government, we don't have any other one.*

*Q. When the negotiations broke down, what was the cause of the breakdown, in your words, why weren't the discussions successful? What was the cause?*

*A. First of all, when Mr. Shevardnadze finishes, because of the Rose Revolution, who was pushing, from our best knowledge, for a solution, was Mr. Shevardnadze. Even Mr. Kissinger established contact with Mr. Shevardnadze. And then come the present president, and what he has done first is clear all the people from Georgian Oil, including Mr. Tevzadze. So there is no one who is left with whom we can talk, nobody was, no committee, nobody, and even anyone have the intent, come young people now. So we understand nobody will even have the intent to talk with us.*

*Mr. Fuchs tried, believe me, even with the new president and the people to find a solution, try, try a lot, but not via me, because I already --- with these new people, I was not involved in any ---*

*Q. So it's your testimony, your evidence that the breakdown came with the departure of Mr. Shevardnadze and the arrival of the new administration?*

*A. I think this was really the case, when everybody thought the committee is finished and there would be no other chance to go to the --- Mr. Fuchs tried to establish contact with them ---"*

### **PART III. SUMMARY OF THE PARTIES' SUBMISSIONS**

#### **A. The Claimants' Case**

209. The Claimants submit that this is a simple case; it is, in essence, a question of the amount owing to the Claimants by the Respondent for its unlawful conduct. That amount, in their view, is not inconsiderable. The Claimants contend that in November 1995, the date by which the cancellation of GTI's rights could be foreseen, their rights had significant value. In the Claimants' view, the Respondent's position in these arbitrations that the Claimants are entitled to nothing is belied by Georgia's conduct over the eight-year period during which compensation was promised but never delivered and the testimony of the Respondent's own witnesses who maintain that some measure of compensation is appropriate.

#### **B. The Respondent's Case**

210. The Respondent submits that the Claimants' claims are not timely, and that it would be inequitable to allow these claims to be heard so long after the period in which the relevant events occurred. To the extent the Claimants' claims are not prescribed, the Respondent submits that it is not liable to the Claimants under any treaty provision and, in any event, that the Claimants are not entitled to compensation either because GTI's rights are invalid



and unenforceable, or because the Claimants could not have had any legitimate expectation to any compensation, or because the rights simply may not be valued.

#### **PART IV. ISSUES TO BE DETERMINED**

211. The issues before the Tribunal for determination may be grouped into six categories and are briefly summarized as follows:

- (a) *Jurisdiction & Equitable Prescription:* The issues of jurisdiction and equitable prescription are comprised of the following three questions:
  - (i) Does the Tribunal have jurisdiction *ratione temporis* over Mr. Kardassopoulos' expropriation claim under the Georgia / Greece BIT?
  - (ii) Does the Tribunal have jurisdiction *ratione temporis* over Mr. Fuchs' fair and equitable treatment claim under the Georgia / Israel BIT?
  - (iii) Are the Claimants' claims time-barred under equitable rules of prescription?
- (b) *Liability:* The issue of liability is comprised of the following four questions:
  - (i) Are the contractual commitments, acts and omissions of SakNavtobi and/or Transneft attributable to the Respondent?
  - (ii) What was the scope of GTI's rights, if any, during the relevant period?
  - (iii) Was Mr. Kardassopoulos' investment in GTI expropriated in breach of the requirements of the ECT and/or the Georgia / Greece BIT?
  - (iv) Were the investments of Mr. Fuchs and Mr. Kardassopoulos treated unfairly and inequitably or otherwise in breach of the standards of treatment set out in the Georgia / Israel BIT, the Georgia / Greece BIT or the ECT?
- (c) *Causation:* The issue of causation gives rise to the following question:
  - (i) Did the Claimants suffer any loss as a result of any of the above alleged treaty breaches and, if so, did the Respondent cause the Claimants' losses?
- (d) *Quantum:* The issue of quantum (if liability and causation are decided in favour of the Claimants) is comprised of the following five questions:
  - (i) What is the effect of the stabilization clauses on damages?
  - (ii) What is the applicable standard of compensation for breach of Article 13(1) of the ECT and Article 4(1) of the Georgia / Greece BIT (the expropriation provisions)?

- (iii) What is the applicable standard of compensation for breach of Article 2(2) of the Georgia / Israel BIT, Article 2(2) of the Georgia /Greece BIT and Article 10(1) of the ECT (the fair and equitable treatment provisions)?
  - (iv) What is the appropriate methodology for valuing the Claimant's claims?
  - (v) What is the amount of compensation owing to the Claimants?
  - (e) *Interest*: The issue of interest is comprised of the following two questions:
    - (i) What is the amount of pre-award interest owing to the Claimants?
    - (ii) What is the amount of post-award interest owing to the Claimants?
  - (f) *Costs*: Finally, the issue of costs requires the Tribunal to consider the appropriate allocation (if any) of the costs of these arbitration proceedings as between the Parties.
212. The Tribunal notes that the Claimants' claim in respect of the alleged breach of Article 10(1) of the ECT and Article 2(4) of the Georgia / Greece (the "umbrella" clauses) has been abandoned.<sup>6</sup> Accordingly, this claim shall not be considered further in the present Award.

## **PART V. ANALYSIS AND FINDINGS**

213. The Tribunal shall now discuss and determine each of these issues in turn.

### ***A. Preliminary Matters***

214. The Tribunal has considered the full submissions of the Parties in identifying the principal issues and in arriving at its decisions on those issues in this Award. The Parties' written and oral submissions in these arbitrations are extensive. The Tribunal has, where convenient, reproduced or summarized parts of those submissions in the body of the Award; however, it is not possible to incorporate the entirety of the Parties' submissions, both written and oral, made in the course of these proceedings.
215. Before turning to the specific issues identified above, the Tribunal wishes to address certain preliminary matters, including: (1) the law applicable to the merits of the present disputes; and (2) the allocation of the burden of proof.

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<sup>6</sup> Reply at para. 372.

1. The Law Applicable to the Merits

216. The Tribunal addressed the issue of the applicable law during the jurisdictional phase of Kardassopoulos arbitration and made the following findings, which it finds convenient to reproduce here [Decision on Jur., paras. 144-146]:

*“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 essentially 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. While this Tribunal is not authorized to apply Georgia law, it is well established that there are provisions of international agreements that can only be given meaning by reference to municipal law.*

*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.”*

[Footnotes omitted.]

217. The Parties have provided no further submissions on this issue, with the exception of the law applicable to Mr. Fuchs’ claim. The Tribunal recalls that the Georgia / Israel BIT, which forms the basis for Mr. Fuchs’ claim, was not before the Tribunal during the

jurisdictional phase. Unlike the treaty between Greece and Georgia, the Georgia / Israel BIT does not explicitly set out the applicable law. The Claimants submit that the treaty drafters' intent is nevertheless clear in Article 11 of the Georgia / Israel BIT, which provides as follows:

*"Article 11*

*Application of Other Rules*

*If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present agreement."*

218. On the basis of Article 11, the Claimants reason that substantive treaty rules are the principal source of law to be applied by the Tribunal, the law of the host State and other rules of international law playing a secondary role and applying only to the extent they offer more favourable treatment for the investor. The Claimants contend this analysis is consistent with Article 42(1) of the ICSID Convention.
219. Applying these principles, the Claimants take the position that Georgian law may be relevant as a fact to determine certain issues, consistent with the *"more pragmatic and less doctrinaire approach"* adopted by arbitral tribunals recently in the context of Article 42(1), but is nevertheless restricted by the primacy of the Georgia / Israel BIT as a *"product of international law"*.
220. The Respondent makes no particular submission on this issue but invokes in aid of its defence to the various claims both international law and Georgian law.
221. The authorities identified by the Claimants in connection with Article 42(1) of the ICSID Convention confirm that arbitral tribunals must decide on the proper roles to be played by each of the relevant sources of law and of obligations in applying the terms of agreements and the provisions of domestic and international law to a given dispute, as the

circumstances warrant. This is set out by the ICSID Annulment Committee in *Wena Hotels v. Egypt*<sup>7</sup> as follows:

*“Some of these views [as to the role of international law in the context of Article 42(1)] have in common the fact that they are aimed at restricting the role of international law and highlighting that of the law of the host State. Conversely, the view that calls for a broad application of international law aims at restricting the role of the law of the host State. There seems not to be single answer as to which of these approaches is the correct one. The circumstances of each case may justify one or another solution. [...] Further, the use of the word “may” in the second sentence of this provision indicates that the Convention does not draw a sharp line for the distinction of the respective scope of international and of domestic law and, correspondingly, that this has the effect to confer on to the Tribunal a certain margin and power for interpretation.*

*What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.*

*In particular, the rules of international law that directly or indirectly relate to the State’s consent prevail over domestic rules that might be incompatible with them. In this context it cannot be concluded that the resort to the rules of international law under the Convention, or under particular treaties related to its operation, is antagonistic to that State’s national interest.”<sup>8</sup>*

[Emphasis added.]

222. More recently the tribunal in *Enron Corporation v. Argentina*<sup>9</sup> observed that a discussion of which law governs as between international law and domestic law in Convention proceedings is “theoretical”, as Article 42(1) of the ICSID Convention has “*provided for a variety of sources, none of which excludes a certain role for another*”.<sup>10</sup> In that case, the tribunal determined that it would apply domestic law and international law to the extent pertinent and relevant to the decision of the various claims before it.

<sup>7</sup> ICSID Case No. ARB/98/4, Decision on Annulment (5 February 2002).

<sup>8</sup> *Ibid.* at paras. 39-41. See also *CMS Gas v. Argentina*, ICSID Case No. ARB/01/08, Award (12 May 2005) at paras. 116-17 (“**CMS Gas**”), affirming this interpretation of Article 42(1) and noting in that case that there is a “close interaction between the legislation and the regulations governing the gas privatization, the License and international law, as embodied both in the Treaty and in customary international law. All of these rules are inseparable and will, to the extent justified, be applied by the Tribunal.” *CMS Gas* at para. 117.

<sup>9</sup> ICSID Case No. ARB/01/3, Award (22 May 2007) (“**Enron**”).

<sup>10</sup> *Ibid.* at para. 205.

223. The Tribunal is satisfied in respect of Mr. Fuchs' claim that, consistent with Article 42(1) of the ICSID Convention, it may apply the substantive rules of the Georgia / Israel BIT, international law and Georgian law, as the Tribunal determines relevant and appropriate, to decide the claims before it.

## 2. Burden of Proof

224. The Parties agree that the Claimants bear the initial burden of proving their claims. However, they disagree as to the weight of this burden. The Claimants contend that their burden is not subject to a special or heavy onus, while the Respondent argues that this is precisely what the Claimants face in proving their claims. Both Parties rely on the decision of the ICSID tribunal in *Asian Agricultural Products Limited v. Sri Lanka*<sup>11</sup> (among other authorities) in support of their competing positions.
225. The Claimants assert that the *AAPL* tribunal's statement, to the effect that "*a Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency of proof*"<sup>12</sup>, simply reflects the general rule in international arbitrations that a claimant must present sufficient evidence to prove its case on a balance of probabilities. According to the Claimant only one aspect of the treaty claims involved in *AAPL* was characterized as being subject to a heavy onus as a result of the strict criteria of the relevant treaty provision, that being whether the U.K. investor's property was the subject of either "*requisitioning*" by Sri Lanka's forces or authorities or "*destruction*" by Sri Lanka's forces or authorities "*which was not caused in combat action or was not required by the necessity of the situation*".
226. The Claimants further observe, in reliance on the award in *Methanex v. United States*,<sup>13</sup> a NAFTA Chapter XI arbitration, that to hold that the Claimants bear a particularly heavy

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<sup>11</sup> ICSID Case No. ARB 18713, Final Award (27 June 1990) ("*AAPL*").

<sup>12</sup> *Ibid.* at para. 56.

<sup>13</sup> (NAFTA) UNCITRAL, Final Award (3 August 2005) ("*Methanex*").

burden of proof would be “antithetical” to the “equality of arms” principle inherent in all investment treaty arbitrations.<sup>14</sup>

227. The Respondent, on the other hand, relies on the award in *Salini Costruttori SPA & Italstrade SPA v. The Hashemite Kingdom of Jordan*<sup>15</sup> and the cases cited therein in respect of burden of proof. However, the Tribunal does not understand this award (nor the cases on which the tribunal in *Salini* in turn relied) to support the proposition that the burden on the claimant is especially “onerous” or “heavy”. It simply confirms the well-accepted principle that the claimant must prove the facts on which it relies in support of its claim.
228. The Claimants also contend that the evidentiary burden may shift to the Respondent, for example where a claimant has made a *prima facie* evidentiary showing on a particular issue or where the Respondent interposes an affirmative defence, and that in the particular case of damages a tribunal’s inability to fix damages with mathematical certainty is not a reason to award no damages at all where the facts otherwise prove that a loss has occurred. The Respondent does not appear to oppose this first proposition although, as shall be seen later, it has taken the position in respect of the second proposition that the absence of certainty in calculating a value for GTI’s rights results in ascribing a value of zero to those rights.
229. The Tribunal finds that the principle articulated by the vast majority of arbitral tribunals in respect of the burden of proof in international arbitration proceedings applies in these concurrent proceedings and does not impose on the Parties any burden of proof beyond a balance of probabilities. With respect to proof of damages in particular, the Tribunal finds the following passage quoted by the Claimants in their written submissions from the award in *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.*<sup>16</sup> to be apposite:

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<sup>14</sup> *Ibid.* at para. 54. The Tribunal notes that this statement was made in the context of the admissibility of documents and not the burden of proof *per se*, although the *Methanex* tribunal framed this principle in terms of a general duty owed by the parties to each other and to the tribunal in the conduct of an arbitration.

<sup>15</sup> ICSID Case No. ARB/02/3, Award (31 January 2006), at paras. 70-74 (“*Salini*”).

<sup>16</sup> Arbitral Award (15 March 1963), reprinted in 35 I.L.R. 136 (“*Sapphire*”).

*“It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage.”<sup>17</sup>*

230. Whilst, in certain instances, a more demanding burden may be imposed on a claimant (or indeed a respondent), there is no basis on the facts of these cases to depart from the general rule that the claimant bears the initial burden of proving its claims on the facts. This burden may, in certain circumstances (including those identified by the Claimant above), shift to the Respondent.

***B. Jurisdiction & Equitable Prescription***

231. The Respondent has raised three defences in these arbitrations that may, if proved, either remove jurisdiction over the Claimants’ investment claims from the Tribunal or preclude the claims from being heard on equitable grounds.
232. In its Decision on Jurisdiction, the Tribunal joined the issue of its jurisdiction *ratione temporis* over Mr. Kardassopoulos’ BIT claims to the merits, reasoning as follows [Decision on Jur., at para. 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.”*

233. Having heard the Parties’ full cases and on the basis of a complete evidentiary record, the Tribunal is now in a position to decide this remaining jurisdictional question, as well as the jurisdictional defence in respect of Mr. Fuchs’ claim and the equitable prescription defence raised by the Respondent.

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<sup>17</sup> *Ibid.* at p. 187-88.



1. Jurisdiction *Ratione Temporis* under the Georgia / Greece BIT

a) *The Respondent's Position*

234. The Respondent submits that because treaties do not have retroactive effect, the Georgia / Greece BIT cannot apply to conduct which occurred prior to 3 August 1996. The Respondent takes the position that all of the relevant events relating to Mr. Kardassopoulos' expropriation claim were discrete acts that were completed before the Georgia / Greece BIT came into force and all that remained was a complaint that Georgia failed to compensate Mr. Kardassopoulos for that alleged expropriation. A mere claim for compensation, however, does not in the Respondent's view transform a completed act into a continuing violation that extended beyond the entry into force of the Georgia / Greece BIT.
235. However, the Respondent concedes that, in view of the Tribunal's finding that the ECT applied provisionally at the time of the alleged expropriation of Mr. Kardassopoulos' interest in GTI in 1996 [see Decision on Jurisdiction, paras. 247ff], the Georgia / Greece BIT's non applicability *ratione temporis* over the claims is now of little practical significance.

b) *The Claimants' Position*

236. Mr. Kardassopoulos contends that his investment is constituted of two sets of rights, each of which was expropriated by an independent act of the Georgian Government: (i) the exclusive right to construct, operate and derive income from the early oil pipeline until 2023, together with a bundle of rights over associated assets such as the facilities at Gachiani and land at Supsa; and (ii) a residual package of rights, unrelated to the early oil pipeline, including the sole and exclusive control and possession of all future pipelines for any petroleum products (including oil and natural gas) and all rights with respect to those future pipelines, and sole and exclusive right to deal for the Republic of Georgia in the acquisition, sale and export of oil and gas and represent Georgia in any oil and gas or energy related projects with foreign persons.
237. According to Mr. Kardassopoulos, the first set of rights was expropriated by Decree No. 178 on 20 February 1996 and the second set of rights was taken through Order No. 33a

on 19 August 1996. Although the Georgia / Greece BIT entered into force on 3 August 1996, more than five months after the date of the first alleged taking, Mr. Kardassopoulos argues that Georgia provided a contemporaneous undertaking to make reparation for this taking. Relying on Article 4 of the Georgia / Greece BIT and international legal principles governing takings, Mr. Kardassopoulos argues that so long as the first taking was accompanied by an offer which may reasonably be considered to lead to compensation which is both “adequate” and “prompt”, the taking remains legitimate.

238. Mr. Kardassopoulos further submits that because the elements of a breach of Article 4(1) of the Georgia / Greece BIT were completed after that BIT entered into force, the breach dates from the time at which the composite act was completed.
239. Mr. Kardassopoulos also submits that, in any event, it is unnecessary for the Tribunal to make a jurisdictional finding with respect to expropriation under the Georgia / Greece BIT given the Tribunal’s jurisdiction under the ECT [Cl. Post Hearing Br., fn. 103].
240. Finally, Mr. Kardassopoulos contends that Georgia violated Article 2(2) of the Georgia / Greece BIT (fair and equitable treatment) through conduct which occurred after August 1996 and which, of itself, violates the standard of treatment required by the treaty.

*c) The Tribunal’s Determination*

241. For the reasons discussed below (see Part V.C.3(c)), the Tribunal finds that Georgia expropriated Mr. Kardassopoulos’ investment in violation of Article 13(1) of the ECT and it is therefore unnecessary to address the question of jurisdiction *ratione temporis* under the Georgia / Greece BIT. Nevertheless, for greater certainty, the Tribunal observes that the Georgia / Greece BIT entered into force on 3 August 1996. GTIs’ early oil rights were expropriated by the Georgian Government several months earlier, on 20 February 1996, through Decree 178.<sup>18</sup> The Tribunal is therefore clearly bereft of jurisdiction to consider Mr. Kardassopoulos’ expropriation claim under the Georgia / Greece BIT.

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<sup>18</sup> As explained below in Part V.C.2(c), the Tribunal has determined that any purported grant of rights in future oil and gas facilities in Georgia is unenforceable.

242. Whilst the Tribunal finds that it has jurisdiction *ratione temporis* to consider the separate claim advanced by Mr. Kardassopoulos under Article 2(2) of the Georgia / Greece BIT as regards fair and equitable treatment, the Claimants have acknowledged that consideration of this claim is unnecessary in the event the Tribunal finds in favour of Mr. Kardassopoulos on his expropriation claim, save for the amounts claimed by Mr. Kardassopoulos as his share of the expenses incurred by Tramex while participating in the compensation commission process [Tr. D12:5:14-18; Cl. Post-Hearing Br. at p. 39, n. 155].

## 2. Jurisdiction *Ratione Temporis* under the Georgia / Israel BIT

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

243. The Respondent takes the position that the investments which form the basis of Mr. Fuchs' fair and equitable treatment claim were allegedly expropriated in 1996, prior to entry into force of the Georgia / Israel BIT, and as no subsequent breaches relating to those investments occurred after the BIT entered into force the Tribunal has no jurisdiction over those claims. The Respondent reasons that in order for the Tribunal to accept Mr. Fuchs' fair and equitable claim, it must necessarily determine that Georgia expropriated Mr. Fuchs' investments in 1996.
244. Notwithstanding the above, the Respondent concedes that the Tribunal has jurisdiction *ratione temporis* in respect of Mr. Fuchs' claims to the extent that they pertain to the compensation process.

### *b) The Claimants' Position*

245. Mr. Fuchs submits that the investments which are the subject of the Claimants' claims were made prior to entry into force of the Georgia / Israel BIT, even though the conduct complained of occurred after that date. Mr. Fuchs notes that, in any event, Article 12 of the BIT, which states "[t]he provisions of this Agreement shall apply to investments made on or before the entry into force of this Agreement", extends investment protection under the BIT to such investments.
246. For further clarity, Mr. Fuchs confirms that he does not make any claims under the BIT in respect of the 1996 expropriation of his investments.

*c) The Tribunal's Determination*

247. The Tribunal observes that the Respondent's objection to jurisdiction in connection with the Georgia / Israel BIT pertains to the question of whether the expropriation of Mr. Fuchs' investment also serves as a basis for Mr. Fuchs' fair and equitable treatment claim. Indeed, the Respondent concedes that the Tribunal has jurisdiction over Mr. Fuchs' claim to the extent that it relates to the compensation process.
248. On the basis of the Claimants' written and oral submissions, the Tribunal understands Mr. Fuchs' fair and equitable treatment claim to relate solely to the compensation process and not to the expropriation of his investment *per se*. The first compensation commission was established by Order No. 84 on 23 April 1997. The Georgia / Israel BIT entered into force approximately two months earlier, on 18 February 1997.
249. Accordingly, the Tribunal is satisfied that it has jurisdiction *ratione temporis* over Mr. Fuchs' fair and equitable treatment claim.

3. Time-Bar for Equitable Prescription

*a) The Respondent's Position*

250. The Respondent argues that the Claimants' claims should be time-barred due to their delay in filing their claims, *i.e.* 10 years. In the Respondent's view, it is inequitable to permit the claims to proceed as the delay has resulted in the loss of crucial evidence which has severely prejudiced Georgia's ability to defend itself. The Respondent relies upon the *Gentini Case*<sup>19</sup> for the principle that equitable principles of prescription shall prevent parties from asserting untimely claims where the delay has prejudiced the party against which the claims are asserted.
251. The Respondent also refers the Tribunal to the ICSID case *Wena Hotels Limited v. Arab Republic of Egypt*<sup>20</sup> in regard to the "parameters of prejudicial delay", noting that in that case the claims were allowed to proceed because both parties were able to produce voluminous evidence and extensive testimony. Contrasting *Wena Hotels* to the present

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<sup>19</sup> R.I.A.A., Vol. X (1903), pp. 551-561.

<sup>20</sup> ICSID Case No. ARB/98/4, Award (8 December 2000) ("*Wena Hotels*").

arbitration, the Respondent submits that it has suffered the harm the tribunal in *Wena Hotels* contemplated would require the imposition of equitable prescription.

252. In response to the Claimants' assertion that prescription in this instance would itself be inequitable, the Respondent counters that the doctrine of laches applies because any delay was occasioned by the Claimants' own actions rather than Georgia's. According to the Respondent, in order for the Tribunal to accept the Claimants' position, the Tribunal must find that the claims process which Georgia established was both mandatory and a sham, and further that the Claimants' decision to forego arbitration was justified. The Respondent contends there is no evidence on the record to support these propositions.
253. The Respondent recalls the opening proposition of the *Stevenson Case*<sup>21</sup>, which states that prescription may only be avoided "*when it appears that there has been no laches on the part of the claimant ... in its presentation for payment.*" The Respondent therefore takes the position that the *Stevenson Case* forecloses actions under international law regardless of the substantive merits at issue where there has been undue delay in presenting a claim, by setting up a presumption either that the claim was paid or that there was never a basis for the claim. Turning to the facts at hand, the Respondent contends that the presumption referenced in the *Stevenson Case* is "particularly strong" in this case and favours application of the laches doctrine.

*b) The Claimants' Position*

254. The Claimants urge the Tribunal to reject the Respondent's time-bar argument outright for four independent reasons. First, the Claimants reason that principles of equity and good faith, including the *ex turpi causa non oritur actio* principle, preclude a state from relying on its own wrong (here, delay) to evade jurisdiction. The Claimants also rely upon the *Stevenson Case* for the proposition that "*it would be evident injustice to refuse the claimant a hearing when the delay was apparently occasioned by the respondent Government*".<sup>22</sup>

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<sup>21</sup> R.I.A.A., Vol. IX (1903), pp. 385-87.

<sup>22</sup> *Ibid.* at p. 387.

255. Second, the Claimants take the position that, in this case, the Respondent has been on notice of the claims since 1995 and, during the period from 1997 to 2004, claimed to be calculating the compensation payable to the Claimants. Relying also on *Wena Hotels*, the Claimants contend that claims are not time-barred where the other party had “*ample notice*” of the dispute.
256. Third, the Claimants contend that the Respondent has not been disadvantaged by any delay, observing that there exists an extensive documentary record upon which the Tribunal may decide the claims, including hundreds of documents produced as exhibits and in response to discovery requests, as well as over 30 witness statements.
257. Finally, and in any event, the Claimants submit that the proceedings implicate conduct occurring as late as December 2004, in respect of which no case for time-bar could possibly exist.

*c) The Tribunal’s Determination*

258. The Respondent first raised its equitable prescription defence in its Counter-Memorial, after the jurisdictional phase of these proceedings. Whilst this time-bar defence is not in the nature of a jurisdictional defence *per se*, the result, were the Respondent to succeed, would effectively be the same as it would preclude the Tribunal from hearing and considering the Claimants’ claims.
259. The passage of time over the 10-year period from 1995 to 2005, when Mr. Kardassopoulos first brought his investment claim to ICSID, has clearly resulted in the fading of memories and loss of certain documentary evidence that may have otherwise assisted the Tribunal in shedding light on the facts in dispute.
260. Certain fact witnesses who testified on behalf of both the Claimants and the Respondent had difficulty recalling the precise circumstances surrounding the Claimants’ investment in Georgia as well as the events which transpired from 1995 through 2004, when the Claimants gave up hope of receiving compensation through the commission process commenced in 1997.

261. However, the Tribunal is not persuaded that the Claimants' delay in bringing their claims was unreasonable or unjustified in the circumstances. Having reviewed the totality of the evidence, it is abundantly clear to the Tribunal that the Claimants had good reason to suppose that a fair resolution of the dispute could be achieved in the manner proposed by the Georgian Government if the Claimants did not have recourse to arbitration. The Claimants were (reasonably, in the circumstances) trying to avoid having to pursue arbitration of the dispute.
262. The Tribunal accepts the following testimony offered on cross-examination by Mr. Fuchs, which indicates the good faith belief he held in 1995 – and continued to hold for years thereafter – that an amicable solution could be reached [Tr. D4:130-31]:

*“A. The relations were relations of trust. We went there, into a very strange place, went through wars, went through everything, helped them out. We traded the crude oil. They said ‘We need wheat’, we gave wheat. People were sick, we flew in medicine. We trusted them. We worked together, we sit with the two top people in the country, President Shevardnadze, which I don’t have to describe where is he coming from, and Professor Tevzadze, which is the only person in the country which has the highest learning degree for labour. I mean, the guy is working in the street, people stop and bow and say, ‘Professor Tevzadze’. He is a very serious person. We flew with him to Moscow, Russians in offices in the government come out of the corridor, employees, to shake his hand and say ‘Nice to see you sir’. The man is a very serious, straightforward, respectable individual.*

*The man has been for 30 years the chairman of Georgian Oil, he survived 10 or 15 ministers of energy, coups, everything. The man is in a class on his own. So we sit with such a person. We have a person of the calibre of Shevardnadze coming with us and telling us, ‘So-and-so has happened, you will be fully compensated’.*

*We see resolutions, we stay in the country, we bring wheat to the country, for business. No donation, no nothing, no contribution, no loans. We bring in wheat to the country, we mill the wheat, we sell the wheat in the country. We bring gasoline into the country, the Zubitashvili ministers would ask us to bring in gasoline, an extra credit quantity on open credit basis, and put it there before the tax – we do it, we are close with them.*

*So with relations, and two people like this, we had no reason to believe that they would not fulfil their word.*

*What did we stick to? The facts, the commission, the resolution, the meeting, the report. Things were on the move. I have nothing to add to this. It is only the new administration, after Shevardnadze, that changed the whole thing, because Dr. Kissinger wrote to Shevardnadze, Shevardnadze accepted what Dr. Kissinger wrote to him, and he appointed Deloitte, and everything was on the*

*verge of solution and then there was the Rose Revolution, whatever they call it, and everything is upside down.”*

263. The cases on which the Respondent relies either support the conclusion that there is no undue delay where (as here) a claimant has persistently pursued its claims in negotiations with the government concerned, or are distinguishable on their facts. The Tribunal finds the circumstances here, where the Claimants persistently pursued compensation from the Georgian Government beginning in 1996 through to their ultimate rejection in 2004, to be markedly different from cases such as *Gentini*, in which over 30 years had passed before the Claimant presented its claim, in the nature of collection of a debt, for the first time to the Government of Venezuela.
264. The Tribunal is also not persuaded by the Respondent’s argument that as a result of the Claimants’ delay in presenting their claims it has suffered harm which would justify the imposition of equitable prescription. The *Wena Hotels* tribunal found that:

*“contrary to the Respondent’s claim that ‘Claimant severely compromised the ability of the Respondent to defend itself in these proceedings’, the Tribunal agrees with Wena that, given the voluminous evidence produced by the parties as well as the extensive testimony provided by several witnesses (in particular, EHC’s counsel, Mr. Munir, who showed a remarkable recollection of the case), neither party seems to have been disadvantaged – which, of course, is one of the equitable reasons for disallowing an untimely claim.”<sup>23</sup>*

[Footnotes omitted.]

265. Despite the passage of time, the Parties to these proceedings have produced thousands of pages of documentary materials and well over 30 fact witnesses. Many of these witnesses did recollect the relevant events with a reasonable degree of clarity, and in a manner that the Tribunal is satisfied has enabled it to arrive at a full understanding of the documentary evidence.
266. The *Wena Hotels* tribunal also observed that the principle of repose applies to whether a dispute has been commenced too late to permit it to proceed:

*“Another equitable principle is the notion of ‘repose’ – that a respondent believes that a dispute has been abandoned or laid to rest long ago should not be surprised by its subsequent resurrection. Here, however, the Tribunal finds that*

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<sup>23</sup> *Wena Hotels* at para. 104.



*Wena continued to be aggressive in prosecuting its claims and that Egypt has had ample notice of this on-going dispute.”*<sup>24</sup>

[Footnotes omitted.]

267. The Claimants have continuously and persistently pursued compensation for the loss of their investment in Georgia since 1996. It is simply not credible to suggest that Georgia has not had ample notice of this dispute.
268. Accordingly, the Tribunal rejects the Respondent’s equitable prescription defence.

**C. Liability**

**1. Attribution of SakNavtobi and/or Transneft’s Acts/Omissions to Georgia**

*a) The Claimants’ Position*

269. The Claimants’ primary position in these arbitrations is that the Respondent directly breached the relevant treaties through the adoption of certain executive instruments, *i.e.* Decree No. 178 and Order No. 33a, and is therefore directly responsible for the Claimants’ losses under international law. In the alternative, and in the event the Tribunal determines that the acts or omissions of either SakNavtobi or Transneft gave rise to the Claimant’s losses, the Claimants take the position that such acts or omissions are attributable to the Respondent pursuant to the principles of state responsibility. In this regard, the Claimants rely on the International Law Commission’s (“**ILC**”) draft Articles on Responsibility of States for Internationally Wrongful Acts (“**Articles on State Responsibility**”) as an authoritative statement of the principles of international law on the rules of the attribution of conduct to a State.
270. In addition, the Claimants rely on the two tests developed by the ICSID tribunal in *Maffezini v. Spain*<sup>25</sup> - the “structural test” and the “functional test” – to determine whether an entity is a State entity such that its acts are attributable to the State. These tests were set forth by the *Maffezini* tribunal as follows:

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<sup>24</sup> *Ibid.* at para. 105.

<sup>25</sup> ICSID Case No. ARB/97/7, Award on Jurisdiction, (25 January 2000) (“*Maffezini*”).

*“77. The question of whether or not SODIGA is a State entity must be examined first from a formal or structural point of view. Here a finding that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a State entity. The same result will obtain if an entity is controlled by the state, directly or indirectly. A similar presumption arises if an entity’s purpose or objectives is the carrying out of functions which are governmental in nature or which are otherwise normally reserved to the State, or which by their nature are not usually carried out by private business or individuals.*

*[...]*

*79. Because of the many forms that State enterprises may take and thus shape the manners of State action the structural test by itself may not always be a conclusive determination whether an entity is an organ of the State or whether its acts may be attributed to the State. An additional test has been developed, a functional test, which looks to the functions of or role to be performed by the entity. [...]*

*80. [...] [A] private corporation operating for profit while discharging essentially governmental functions delegated to it by the State could, under the functional test, be considered as an organ of the State and thus engage the State’s international responsibility for wrongful acts.”<sup>26</sup>*

[Footnotes omitted.]

271. In the Claimants’ submission, SakNavtobi and Transneft satisfy both the structural and functional tests for attribution as they were (a) wholly owned and controlled by the Respondent; and (b) their activities and powers, as described in the JVA and the Deed of Concession, were those of an organ of the State, as opposed to a commercial enterprise. In support of its submission, the Claimants point to evidence of the Respondent exercising, *inter alia*, a State function through SakNavtobi by entering into the JVA (*i.e.* in Section 4.1A SakNavtobi represents that “*it is and will remain ... fully owned and controlled by the Republic of Georgia*”) and governmental authority through several provisions in the JVA whereby SakNavtobi makes commitments and representations that only the State itself could perform (*i.e.* Sections 8.2(vi) and 8.6 of the JVA). The Claimants further underscore the twin facts that the JVA was entered into in order to achieve certain national objectives (as set out in Article 3 thereof) and the Deed of Concession was ratified by the Minister of Fuel and Energy, an organ of the Georgian State.

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<sup>26</sup> Ibid. at paras. 77 and 79-80.

*b) The Respondent's Position*

272. The Respondent does not argue that it is not responsible for the executive instruments alleged to have expropriated Mr. Kardassopoulos' investment. However, the Respondent takes the position that the State is not responsible for the contractual commitments of SakNavtobi and Transneft, and that neither SakNavtobi nor Transneft may be held responsible for the acts of the State, namely the cancellation of GTI's rights. Moreover, because Article 21 of the JVA (the acknowledgement by the Government) was substantially deleted (see paragraph 86 above), the Respondent argues that the Georgian Government did not agree to be bound by the terms of the joint venture [Tr. D1:140-42]. The Respondent's arguments in this regard are intertwined with its submissions on causation (see Part V.D below).

*c) The Tribunal's Determination*

273. The Tribunal recalls that it made the following findings during the jurisdictional phase in connection with the Respondent's objection to the Tribunal's jurisdiction *ratione materiae*, which relate to the issue of attribution [Decision on Jur., paras. 189-194]:

*"189. Respondent, it is recalled, does not accept that these representations [in the JVA and Deed of Concession to the effect that those instruments were entered into in compliance with Georgian law] 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. 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.” (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 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.”*

[Emphasis added. Footnotes omitted.]

274. In the Tribunal’s opinion, there can be no real question in these arbitrations as to the attribution of any acts or omissions on the part of SakNavtobi or Transneft to the Respondent. The Tribunal invoked Article 7 of the Articles on State Responsibility in its Decision on Jurisdiction, but Articles 4, 5 and 11 are equally applicable here. They provide as follows:

“Article 4  
Conduct of Organs of a State

(1) *The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.*

(2) *An organ includes any person or entity which has that status in accordance with the internal law of the State.*

Article 5  
Conduct of persons or entities exercising elements of governmental authority

*The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.*

Article 11  
Conduct acknowledged and adopted by a State as its own

*Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.”*

275. The evidence demonstrates that both SakNavtobi and Transneft were incorporated within the structure of the Ministry of Fuel and Energy. SakNavtobi was explicitly brought under the auspices of the Ministry of Fuel and Energy as a department of the Ministry in 1992 through issuance of Cabinet Decree 1105. This same decree explicitly identified the “*management of main oil pipeline of Georgia*” as “*united in the department of SakNavtobi of the Ministry of Fuel and Energy of the Republic of Georgia*” [Hearing Bundle, Tab 6].

276. Both SakNavtobi and Transneft also clearly exercised (or purported to exercise) governmental authority. Indeed, among the representations made by SakNavtobi in Section 4.1A of the JVA, it declares and represents that:

*“It is and will remain for the duration of the Joint venture fully owned and controlled by the Republic of Georgia and it has been duly appointed and empowered by the Republic of Georgia to exclusively represent the Republic of Georgia in all Oil and Gas and energy related matters.*

277. Similarly, in Section 4.1 of the Deed of Concession, Transneft declares and represents the following:

*“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 hereof.”*

278. Georgian government officials espoused the terms of the JVA and the Deed of Concession. While the formal government acknowledgement in Article 21 of the JVA was struck out, an abundance of evidence suggests that the JVA was supported at the highest levels of government. Indeed, the joint venture between SakNavtobi and Traxem was approved by the Cabinet of Ministers in Resolution Nos. 834 and 123G. Decree No. 951 further confirms the Cabinet of Minister’s approval for the commencement of construction on the projects outlined in the JVA. In addition, the Deed of Concession was ratified by the Minister of Energy.

279. When considered together, the representations by SakNavtobi and Transneft and the various espousals by the Georgian Government of the JVA and Deed of Concession are conclusive.

280. Accordingly, whether one applies the principles of attribution set forth in the ILC Articles on State Responsibility or the tests developed in arbitral jurisprudence to ascertain whether the acts or omissions of a particular entity are attributable to a State, the answer in these arbitrations is the same. The relationship between SakNavtobi and Transneft, on the one hand, and the Georgian State, on the other hand, bears all of the hallmarks of attribution under international law. The Tribunal is therefore satisfied that, for the purpose of determining a breach of the applicable treaties, any acts or omissions of SakNavtobi and/or Transneft constituting such breach may be attributed to the Respondent and it so finds.

## 2. The Scope of GTI's Rights

281. The Respondent has advanced several arguments in respect of the scope of the rights allegedly held by GTI which the Tribunal considers most efficient to address prior to the Claimants' substantive treaty claims.

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

282. The Respondent takes the threshold positions that: (i) the scope of the JVA and the Concession was limited to the then-existing Gachiani-Supsa Pipeline; (ii) any rights to the Gachiani-Supsa Pipeline were invalid and unenforceable; and further or alternatively (iii) any remaining rights under the JVA and the Concession were limited to recovery of Tramex's and GTI's proven expenses incurred in connection with developing the Gachiani-Supsa Pipeline.<sup>27</sup>

283. In support of its first contention, Georgia argues that specific Government resolutions (e.g. Resolutions 123g and 951), the express terms of the JVA and the Concession, principles of justice and equity, industry practice and written evidence all preclude the interpretation of the JVA or Concession as conferring rights to any and all future pipelines.

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<sup>27</sup> In their Post-Hearing Brief, the Respondent also developed the argument that GTI was not entitled to be a passive owner of the Gachiani-Supsa pipeline in response to the Claimants' case on quantum. This argument is therefore dealt with in Part V.E.4 below.

284. Relying also on the witness statement of Dr. Tevzadze and expert report of David Eliashvili (who was not called to testify at the Hearing), the Respondent argues that the Claimants could only have had a legitimate expectation that the JVA and the Deed of Concession granted rights within the scope of the aforesaid Government Resolutions.
285. The Respondent further argues that, when properly construed, neither the JVA nor the Concession confers rights to future pipelines. Based on the text of Articles 1 and 3 of the JVA, the Respondent submits that no rights to future pipelines were either conveyed or contemplated. In response to the Claimants' reliance on the wording "*future ones*" in Section 3.3 of the JVA, the Respondent contends that if the parties had intended to drastically alter the definition of "*Oil and Gas Facilities*" to include not only existing but also any and all possible and unspecified future oil and gas facilities they would have clearly so stated in Section 1.12 of the JVA. The Respondent suggests that the Claimants' decision not to cross-examine Dr. Tevzadze on this issue "*is indicative of the fact that their argument is unsustainable*" [Resp. Post-Hearing Br. at para. 9].
286. In the Respondent's view, Section 3.6 of the JVA (which granted GTI a right of refusal to participate in other oil and gas projects in Georgia) does not assist the Claimants' argument as it simply permitted the Claimants to propose future projects subject to the Georgian Government's agreement on the commercial terms for such projects. The Respondent notes that this was confirmed in Mr. Kardassopoulos' oral testimony [Tr. D4:32-33].
287. The Respondent further argues that "good commercial sense," in circumstances where no term of reciprocal obligation was imposed for Tramax to construct all future oil and gas facilities, precludes interpreting the JVA or the Deed of Concession so as to conclude that either instrument conferred rights to future pipelines. The Respondent underscores Mr. Kardassopoulos' testimony on cross-examination that the Claimants' obligations concerning future pipelines were a "*matter for discussion*" [Tr. D4:39].
288. The Respondent identifies contemporaneous documents, including the Preliminary Note of Advice prepared by a London barrister [Hearing Bundle, Tab 142], none of which refer to the conferral of rights to future pipelines. The Respondent contends that recourse may be had to such documents where a contract is ambiguous, pointing in particular to



the UNIDROIT Principles of International Commercial Contracts, which expressly provide for regard to be given to “extrinsic evidence” in interpreting contracts.

289. In addition to documentary evidence supporting its interpretation of the JVA, the Respondent explains that the geopolitical context at the time did not lend support to a broad interpretation of GTI’s rights [Am. Rejoinder at paras. 117-118]:

*“117. Georgian officials were of course aware of the pressing need to develop Georgia’s oil and gas facilities, yet neither they nor Mr. Fuchs specifically contemplated or discussed the BTC or SCP projects (even Mr. Fuchs does not claim that the BTC and SCP were his brainchild) and the Claimants have adduced no evidence to the contrary.*

*118. Moreover, in light of the significant political aspect to Azerbaijan’s choice of export route for Caspian oil and the uncertainties surrounding legal title to Caspian reserves, there simply was no basis upon which the parties to the JVA and the Concession could enter into any binding obligations in 1992 or 1993 for the BTC Pipeline or the SCP (which did not exist at the time).”*

290. In a similar interpretation exercise, the Respondent relies upon the text of Article 2 (Definitions, as set out in paragraph 97 above) and Article 10 (Improvements, Additions and Extensions to the Pipelines, as set out in paragraph 100 above) of the Concession to construe narrowly the rights conferred under this instrument to those associated with the development of the Samgori-Batumi pipeline. In particular, the Respondent contends that the references to “*extensions*” and “*new Petroleum pipelines added*” must relate to extensions or additions to the existing main pipelines in Georgia, and not entirely new and distinct main pipeline systems (such as the BTC pipeline and the SCP).
291. With regard to those textual nuances relied upon by the Claimants in interpreting the Deed of Concession, *i.e.* the distinction between extension and addition in Article 10, the Respondent maintains that the text of the Deed supports its interpretation of the Claimants’ rights. According to the Respondent, the examples of “*improvements, extensions or additions to the Pipelines*” listed in Section 10.1 all concern the adding to or extending of the existing main pipelines system and related facilities and do not envisage the adding of new main pipeline systems at all.
292. Thus, in the Respondent’s view, Section 10.1 illustrates that “*additions to the Pipelines*” (“*Pipelines*” being the main pipeline systems and all related facilities, in accordance with

the definition in Article 2) could include the addition of new transferring units or discharging facilities, whereas “*extensions*” would include extending the pipeline.

293. In response to the Claimants’ argument that GTI had the right to lease the Gachiani-Supsa pipeline and remain a “passive owner” [Tr. D11:13], the Respondent argues that as neither the JVA nor the Concession granted TrameX/GTI the “isolated right” to collect transit fees, divorced from the “associated obligation” to reconstruct the Gachiani-Supsa pipeline, no such right could be expropriated or transferred to GIOG [Resp. Post-Hearing Br. at para. 25].
294. In support of its second submission concerning the alleged unenforceability of GTI’s rights, the Respondent invokes three contractual defences: (1) inequity and/or unconscionability; (2) misrepresentation; and/or (3) lack of performance or consideration. In respect of this first defence, the Respondent argues that consideration should be given to the fact that the Claimants’ lawyer, Jack Smith, drafted the JVA and the Concession and negotiated with Georgian officials who had no experience with foreign concessions, at a time when the Respondent was in a state of transition and instability.
295. The Respondent rejects the Claimants’ contention, based on the award in *Bridas S.A.I.P.I.C., Bridas Energy International, Ltd., et al v. Government of Turkmenistan*,<sup>28</sup>, that States are precluded from arguing that a contract is unconscionable, contending that the facts in the *Bridas* case are distinguishable from the facts in these arbitrations. In particular, the Respondent contends that it was not represented by legal counsel experienced in oil and gas concessions when it entered into the JVA and Deed of Concession. There is also, according to the Respondent, no evidence that “*subsequent amendments*” were made which affirmed the Claimants’ interpretation of either the JVA or the Concession. In this regard, the Respondent rejects the Claimants’ argument that the Concession should be likened to an “amendment” to the original agreement (the JVA), reasoning that the Concession was a separate agreement between different parties to the JVA and does not, properly construed, serve to confirm the Claimants’ interpretation of the JVA.

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<sup>28</sup> ICC Arbitration Case No. 9058/FMS/KGA, Partial Award (25 June 1999) (“*Bridas*”).

296. The Respondent further submits that the commitments under the JVA and the Concession are inequitable and constitute an unconscionable (and therefore unenforceable) bargain. In this regard, the Respondent points to Tramex's financial commitment under the JVA and the Concession, which was limited to providing a nominal payment to the Authorised Fund, its share of GTI's US\$ 1 million minimum capital investment and only 50% of the costs of each of the "*Projects*" carried out (as identified in Sections 3.4 and 3.5 of the JVA). In addition, under Section 6.1, GTI's "Concession Fee" comprised a requirement merely to carry out "*ordinary and reasonable maintenance of the Pipelines*" and to effect "*any improvements or extensions to the Pipelines it may deem necessary.*" According to the Respondent, the language is even weaker elsewhere in Section 7.2 of the Concession, in which GTI declared that it shall "*use its best endeavours to operate and manage the Pipelines and to effect periodic ordinary maintenance of the Pipelines, at its discretion...*".
297. In regard to its second contractual defence, the Respondent claims that the Claimants misrepresented that they had the necessary financial resources and expertise to carry out the project. The Respondent directs the Tribunal specifically to Section 4.2 of the JVA, in which Tramex represented "*that it has the necessary financial capability and resources to fulfill its investment undertakings as specified in this Agreement*" and "*that it has experience, expertise and Know-How in matters relating to Oil and Gas.*" The Respondent interprets "*investment undertakings*" more broadly than the initial financial commitments stipulated in the JVA, comprising all investment undertaking required by the JVA, including the requirement to contribute 50% of the budget of any project pursuant to Section 5.4. The misrepresentation defence is, in the Respondent's view, borne out by Mr. Kardassopoulos' evidence to the effect that "*Tramex itself had no stand-alone substantial funds*" [Kardassopoulos I, para. 4.13] and witness testimony that the Claimants were unknown in the industry and had no experience building pipelines [Adams, para. 20; Cook II, para. 13; Ferguson testimony, Tr. D3:40].
298. In regard to its third contractual defence, the Respondent argues that the Claimants failed to perform and/or provide adequate consideration under the JVA. In making this latter point, the Respondent submits that Tramex and GTI were subject to implied terms, which constituted their consideration for the alleged exclusive rights. Specifically, the

Respondent identifies the following implied obligations incumbent upon Tramex and GTI which, in the Respondent's view, were not met (and whose failure to meet is not excused): (i) to carry out the project works necessary to operate the Gachiani-Supsa Pipeline; and (ii) to complete such project works in a reasonable time-frame, in light of the urgent need to commence operation of the Pipeline.

299. The Respondent supports its position in this regard through reference to the Preliminary Note of Advice provided to the Claimants by Paisner & Co. [Am. Rejoinder at paras. 174-175]:

*“174. The Claimants’ protestations regarding the work they allegedly did are flatly refuted by the unredacted legal advice that the Claimants received in 1995 that the Tribunal’s Procedural Order No. 3 dated 28 October 2008 required the Claimants finally to disclose. A previously redacted section of a Preliminary Note of Advice dated 19 September 1995 of Richard Field QC and Philip Sales records the Claimants’ instructions and admission in this respect:*

*It is clear that little if any work has been done on the pipeline over the years since the concession agreement was executed, and we shall have to think how best to deal with this, particularly bearing in mind the obligations of full and frank disclosure. (emphasis added)*

*175. A further previously redacted section of the Preliminary Note goes on to record the following:*

*(f) Risk of repudiatory breach by GTI*

*This issue has been adverted to with the clients. It was noted that although the Georgian authorities in the course of posing many detailed questions respecting the concession agreement asked for details of GTI’s performance, no Georgian state entity had relied on repudiatory breach as a ground for asserting that the concession agreement is of no effect. The clients proposed that they give urgent instructions for work suddenly to begin on the pipeline, but were told that this would appear to be the contrivance which in substance it is. (emphasis added)”*

300. The Respondent takes the position that in these circumstances the Claimants could not have had a legitimate expectation of continuing to enjoy the rights granted under the JVA and the Concession or, if they continued to hold rights, a legitimate expectation that a knowledgeable third-party purchaser would have paid them for such rights.
301. In response to the Claimants’ submissions as to Georgia’s ability to assert the unenforceability of the JVA and/or Concession and its failure to rescind the agreements,

the Respondent contends that the Claimants' arguments fail for several reasons, including because in its view it would be inequitable if a technical requirement to rescind the contracts could entitle the Claimants to claim that they had legitimate expectations regarding the scope of the JVA and the Concession in light of the Claimants' admitted repudiatory breaches of the contracts.

302. The Respondent rejects the Claimants' argument that Georgia affirmed the Claimants' rights, citing two principal reasons: first, the Claimants failed to establish that any of the instances of alleged affirmation satisfy the legal test for affirmation; and second, in circumstances in which there were continuing alleged affirmations, Georgia retained its right to rescind the JVA and the Concession up to the date of the alleged expropriation. The Respondent accordingly submits that the alleged affirmations were ineffective.
303. With regard to its third and alternative submission, the Respondent contends that in the event Mr. Kardassopoulos retained an interest in rights under the JVA and the Concession, those rights are limited to compensation for Tramex's and GTI's proven expenses incurred in developing the Gachiani-Supsa Pipeline.

*b) The Claimants' Position*

304. The Claimants submit that the Respondent's interpretation of GTI's rights as limited to oil facilities existing at the time of the making of the JVA and the Concession is not supported by the terms of the JVA or the Concession. The Claimants argue that the term "*Oil and Gas Facilities*" plainly and unambiguously extended GTI's rights to future facilities. In the Claimants' view, the Respondent is asking the Tribunal to ignore the words "*all ... future ones*", pointing to the following additional provisions which bespeak a long-term, exclusive Joint Venture under which GTI was intended to have broad rights in respect of all matters related to "*Oil and Gas*," including the maintenance of future pipeline facilities:
- (a) The unqualified "*right of first refusal*" to participate or implement any other Oil and Gas related projects in the Republic of Georgia." (JVA at 11 §3.6)
  - (b) The unqualified "*sole and exclusive right to represent the Republic of Georgia in any Oil and Gas related projects with foreign persons.*" (JVA at 11 §3.7)

- (c) The unqualified right to use the “Export Licence” possessed by SakNavtobi. (JVA at 8 § 3.2.)
  - (d) The unqualified right to “*deal for the Republic of Georgia in the acquisition, sale and export of Oil and Gas.*” (JVA at 8 §3.2.)
  - (e) The general prohibition on “*third part[ies]*” being granted “*preferred, equal or subordinated rights*” in any “*rights granted to, or used by the Joint Venture.*” (JVA at 12 §3.7.)
305. The Claimants reject the Respondent’s reliance on contemporaneous documents as an improper use of extrinsic evidence to interpret the terms of the parties’ agreement. In the Claimants’ view, any doubts as to the breadth of GTI’s rights are dispelled by the terms of the Concession, which clarifies and supersedes the JVA’s terms. Drawing on textual nuances in the Concession’s definition of “*Pipelines*,” the Claimants assert that a plain reading of this instrument can only support a broad reading of the scope of the Claimants’ rights. Finally, the Claimants point to an opinion prepared by the Georgian Ministry of Justice in 2003 which indicates that the Concession’s provisions had granted to GTI “*the sole right to control, operate and use all existing or potential pipelines in Georgia*” [Cl. Post-Hearing Br. at para. 46; Hearing Bundle, Tab 228].
306. According to the Claimants, the Concession’s definition of “*Pipelines*” captures two further categories of pipeline beyond “*existing main pipeline systems*”: (1) “*extensions*” to the “*existing main pipeline systems*”, and (2) “*pipelines added*” to such systems “*in the future*”. These terms are referred to disjunctively and are offset by the word “*or*”, indicating that “*extensions*” are different from “*additions.*” Therefore, in the Claimants’ view, a new pipeline (such as the BTC or SCP), although not necessarily an “*extension*” of any pre-existing pipeline (e.g., the Gachiani-Batumi pipeline used for transporting Early Oil to the Black Sea), is nonetheless an “*addition*” to the pre-existing pipeline system within Georgia, and thus within the scope of the Concession.
307. The Claimants contend that the JVA and Deed of Concession entitled GTI to license or sub-lease the “*Pipelines*” to third parties in return for a fee, relying in particular on Article 17 of the Deed, which provided that “*GTI may license or sub-lease the Pipelines or any segment thereof and any additions or extensions thereto, provided, however, it shall notify Transneft of the segment sub-leased and the identity of the sub-lessees and*

*shall continue to be liable to Transneft for the performance of its obligations hereunder.”*

The Claimants reject as “*counter-textual*” the Respondent’s position that a sublease would be unconscionable, for the reasons set forth below, as well as the Respondent’s position that the Deed only authorized a “*build-own-operate*” project [Cl. Post-Hearing Br. at para. 51].

308. As regards the Respondent’s second contention, that GTI’s rights are unenforceable, the Claimants take the position that the relevant inquiry must ascertain what rights existed at the time of the relevant expropriatory conduct: if a particular contract was in force at the time of the expropriation, then it can properly be the subject of an expropriation claim. The Claimants identify several principles codified in the UNIDROIT Principles of International Commercial Contracts as evidencing the *lex mercatoria* that governs the JVA and the Deed of Concession, which are set up to counter the Respondent’s contract-based arguments [Cl. Post-Hearing Br. at para. 14].
309. As regards the Respondent’s other contractual defences, the Claimants submit that a contract may only be avoided on the basis of misrepresentation if the aggrieved party seeks to rescind it in a timely way. Absent such an affirmative election, the mere possibility of a misrepresentation claim does not make the contract void. The Claimants apply this principle *mutatis mutandis* to Georgia’s other contractual defences, *i.e.* unconscionability, non-performance and/or failure of consideration. In the Claimants’ view, as both Saknavtobi and Transneft treated the JVA and the Concession as valid and neither sought to rescind the agreements, these defences are unavailable.
310. In any event, the Claimants contend that the contractual representations concerning their financial capability and experience were true when made and that the Georgians knew who they were dealing with, citing Mr. Gur’s evidence that the Georgian “*were well aware that Tramex was just a vehicle for Mr. Fuchs and Mr. Kardassopoulos*” [Gur I, para. 4.3]. The Claimants further submit that they never represented themselves to be other than “knowledgeable oil traders who held reserve funds in the mid/upper seven figures and had the ability to earn additional funds for GTI through oil trading using GTI’s export license and its access to the Samgori-Batumi pipeline” [Cl. Post-Hearing Br. at para. 22]. This is, in their view, what the JVA recorded.

311. The Claimants argue that the Respondent's unconscionability defence has no foundation and could not, in any event, prevail as such a defence is intended to protect disadvantaged individuals. The Claimants assert that for the same reasons articulated by the tribunal in *Bridas*,<sup>29</sup> such a defence is inapposite to the facts here. The Claimants reject the proposition that the terms of the JVA and the Concession are "one-sided", pointing in particular to the obligations and contributions contemplated in respect of Tramex in Articles 5 and 9 of the JVA, *e.g.* the obligation to contribute its expertise in various areas. The Claimants again point to the similarities between the terms of the *Bridas* agreement, which was held not to be unconscionable, and the JVA. Finally, the claimants contend they did not acquire their Concession rights "*for nothing*": in their view, they paid the market price for the rights at the time.
312. The Claimants maintain that the Respondent's non-performance claims are also without merit. They identify the following works performed by Tramex:
- (a) an initial design for the whole Gachiani-Supsa line, including development of the Gachiani railway, development of a Supsa port facility and improvement of the pipeline between Gachiani and Samgori;
  - (b) significant work at Supsa;
  - (c) installation of large-scale equipment and other significant work at Gachiani;
  - (d) overall development of the pipeline; and
  - (e) negotiations with strategic investors and oil producers.
313. The Claimants contend there is simply no factual basis for the Respondent's non-performance claim. In all events, the Claimants assert on the basis of International Court of Justice jurisprudence, and in particular the *Case Concerning the Temple of Preah Vihear*<sup>30</sup> and the *North Sea Continental Shelf Case*<sup>31</sup>, that the Respondent is estopped from now arguing the unenforceability of the JVA and the Concession. The Claimants further explain this position in their Post-Hearing Brief [at para. 15]:

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<sup>29</sup> ICC Arbitration Case No. 9058/FMS/KGA, Partial Award (25 June 1999) at pp. 22-23 ("*Bridas*").

<sup>30</sup> (*Cambodia v. Thailand*), Judgment of 15 June 1962: ICJ Reports 1962, p. 6.

<sup>31</sup> (*Federal Republic of Germany v. The Netherlands & Denmark*), Judgment of 28 February 1969: ICJ Reports 1969, p. 3.



*“As explained previously, no Georgian witness involved in the GTI project has testified in support of Georgia’s non-performance claim. Instead, Georgia relies solely on (i) the evidence of Mr Gigolashvili, who acknowledged that he was not involved in the GTI team and had no keys to the GTI site office, and (ii) a hearsay remark from an English barrister who had been briefed on obviously incomplete facts for an urgent injunction application against AIOC (hardly “evidence”). The direct evidence tells the opposite story. It is common ground that GTI’s physical works halted in 1994, but that does not mean that no work continued to be done for the joint venture. The barrister’s comment in a preliminary note has no evidentiary weight and, moreover, after further meetings with Mr Fuchs and familiarising themselves with the case in more detail, the barrister went on to draft the papers for an injunction application which proceeded on the basis that GTI’s rights were extant. If counsel actually believed that a risk of termination existed after hearing a fuller account of the facts, then they would have been required to address this as part of the English law duty of full and frank disclosure that governs an ex parte injunction application, as stated in the preliminary note. Neither piece of “evidence” from Georgia therefore carries any weight at all.”*

[Footnotes omitted.]

314. In addition to the foregoing, the Claimants contend that Georgia “*repeatedly and expressly*” affirmed GTI’s rights before and after the events on which the Respondent’s contractual defences are based, relying for this proposition on a lengthy list of correspondence and witness testimony adduced in these proceedings [Cl. Post-Hearing Br. at para. 16].
315. Finally, the Claimants assert that they relied, to their detriment, on the Respondent’s assurances that their rights would be vindicated through the compensation process by refraining from seeking private law remedies.
316. As a result of the foregoing, the Claimants submit that GTI’s rights must be regarded as valid and subsisting on the relevant valuation date.

*c) The Tribunal’s Determination*

317. In its Decision on Jurisdiction, the Tribunal determined that Mr. Kardassopoulos indirectly owned a 25% interest in GTI and that, irrespective of the validity of the JVA and/or the Concession, the Georgian Government created a legitimate expectation that this investment was made in accordance with Georgian law and that any breach would trigger treaty protection [Decision on Jur., paras. 141, 191-192, 194]. As regards the scope of GTI’s rights, the Tribunal made the following observation:

*“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.”*

318. The Respondent has contested not only the scope of the rights allegedly held by GTI, but their very existence on the basis of contractual defences which seek to impugn the validity of the rights granted under the JVA and the Concession. However, the Tribunal does not understand the Respondent to be arguing in this phase that GTI/Tramex never had any oil and gas rights in Georgia; but rather, that the rights granted under the terms of the JVA and the Deed of Concession were limited to rights in the Gachiani-Supsa pipeline, and that those rights were rendered unenforceable for several reasons outlined above.
319. The Tribunal will first consider the question of precisely what rights GTI held under the JVA and Deed of Concession. As noted in its Decision on Jurisdiction, the rights described in the JVA are broader than the activities described in Resolutions 834 and 123G. The Claimants contend that the JVA and Deed of Concession granted them present and future rights in the development of oil and gas pipelines in Georgia.
320. Central to the grant of rights to GTI was the right to export oil under SakNavtobi’s export licence. The original terms of this licence were set out in Resolution No. 834, and comprise a five-year renewable licence to export oil. Section 3.2 of the JVA provided that GTI had the *“sole, exclusive and uninterrupted use of the Export License”* and that GTI *“shall deal for the Republic of Georgia in the acquisition, sale and export of Oil and Gas”*. Section 4.1B, which contains SakNavtobi’s declaration, further underscored the importance and extent of this right :

*“that it holds the Export License under which it has the sole exclusive and irrevocable rights from the Republic of Georgia to acquire, import, export and sell [crude oil] Oil [products] and Gas [and chemical products] in the Republic of Georgia and abroad [which it bought, processed and transported and discovered] that the said license will remain in force at least until [December] 1995, and that such license may be placed at the sole, uninterrupted and irremovable use of the Joint Venture for the duration of the license.*

*The Partners agree and understand that the continued validity of said license beyond said period, and its continued sole uninterrupted and irrevocable use by the Joint Venture on the same terms of conditions thereafter, is of material importance for the continued operation of the Joint venture and its ability to carry out the Projects as described hereinafter.*

*[The Georgian side accepts and agrees that the Export License will be extended automatically by additional 5 years, immediately at the time of the registration of the Joint venture and will be renewed automatically every 5 years.]*

*The Georgian partner shall place all new, additional or extended export licenses or permits received by it at the use of the Joint venture on the same terms and conditions stipulated herein.”*

[Handwritten amendments in brackets.]

321. Mr. Kardassopoulos explained the importance of this right for the Claimants, who were quite unapologetically expert oil traders, not pipeline developers. He said [Tr. D3:140:8-17]:

*“A. We were obligated, as far as I remember, to refurbish an existing pipeline, to add some value to it, to make it capable of exporting early oil from Georgia, and probably other countries within the area. Number two, we were, and this was very important to us, we were given the sole and exclusive right to use the export license to export oil through – from, through or for Georgia. This was a very important issue, and I remember putting a special wording, we used a special wording in the JVA.”*

322. Turning to the alleged rights granted to GTI in respect of the development of present and future oil and gas pipelines in Georgia, it is far from clear on a close reading of the JVA and Deed of Concession that the parties intended a broad grant of rights to future oil and gas pipelines in Georgia.
323. Beginning with the JVA, Section 1.12 defined “*Oil and Gas Facilities*” as “*all the existing pipelines*” and “*Oil and Gas Facilities included in the Projects*”. The “*Projects*” were further defined as those projects listed in Sections 3.4 and 3.5 of the JVA, which set out a closed category of projects that GTI was to undertake, including reconstruction of the Gachiani-Supsa Pipeline.
324. Whilst the Claimants emphasize the handwritten amendment to Section 3.3, which qualified “*Oil and Gas Facilities*” as those “*currently under the control of the Georgian partner and future ones*”, there is a troubling vagueness to this expression which is underscored by the reliance placed upon it by the Claimants to expand the grant of

exclusive rights in the early oil pipeline to include rights in all future oil and gas pipelines in the State of Georgia.<sup>32</sup>

325. Dr. Tevzadze, the author of the handwritten amendments to Section 3.3, testified in his written evidence that such a broad grant of rights was not the Georgian partner's intention [Tevzadze II, para. 8]:

*"It was certainly not my intention to grant to GTI rights to all future oil and has facilities in Georgia. I could not have granted such rights because Saknavtobi would not necessarily have control of any new pipeline or facility constructed in Georgia in the future – this could only be decided by the Georgian Government. Had I known that Tramex sought such broad rights to Georgia's future oil and has facilities, I would not have executed the JVA, as this was not the agreement that I reached with Tramex, and I was not empowered to grant such rights to future facilities. I do not understand how the Claimants can interpret the JVA or Concession in this way. They always knew and understood quite well that we granted GTI the rights only over the projects specifically referred to in the JVA and that they would only have rights over facilities included in those projects if they were carried out with the Claimants' funding and investment."*

326. The Claimants criticize Dr. Tevzadze's recollection in respect of his intentions during the negotiation of the JVA [Cl. Post-Hearing Br., p. 23]. Dr. Tevzadze's evidence on this point was somewhat muddled due to difficulties posed by the translation of his testimony, as is apparent from the following exchange on cross-examination [Tr. D8:15-17]:

*"Q. Certainly, and I apologise for any confusion. We have looked at the cabinet resolution of March 1992 and my question is: at around the same time as that resolution was being drafted, you told Mr. Fuchs that if other future pipeline projects were to be commenced, that further cabinet resolutions would be obtained to authorise those future projects; that's true, isn't it?"*

*MR. SVANIDZE: He still doesn't understand the question.*

*MR. KBILASHVILI: If I could paraphrase the question? I understand the sense of the question in English but the translation in Georgian is a bit confusing. Shall I make a translation in Georgian to understand our witness? That's my question.*

*MR. NELSON: With the leave of the president, and as long as the other lawyer in the room can hear the question and as long as you speak loudly enough for the translators to hear the question.*

<sup>32</sup> The Claimants rely on Mr. Kardassopoulos' understanding of GTI's rights to extend to future pipelines [Tr. D4:39:23-25] and the "natural meaning" of the terms "and future ones" [Cl. Post-Hearing Br. at para. 47]. For the reasons expressed herein, the Tribunal cannot accept this interpretation.

*THE CHAIRMAN: Agreed. (Question interpreted.)*

*A. Me and Mr. Fuchs were talking about a lot of issues, so I don't remember exactly. Maybe I told that to him, maybe I did not.*

*MR. NELSON: Is it likely that you did?*

*A. If Mr. Fuchs said that the other projects should take part in this, I think the Minister would not refuse that at that time – Council of Ministers would not refuse that at that time. I don't remember exactly, because there were a lot of projects that were being approved by this resolution, so at that time, it is hard to remember specifically.*

*MS. SALOMON: He said, 'I don't think I said it'.*

*A. There were a lot of projects that were being approved by this resolution and I don't that at that period Mr. Fuchs had any other desires.*

*THE CHAIRMAN: Ms. Knox?*

*A. But if there was, the Cabinet of Ministers would not say no to that, in that period, in that timeframe.*

*MS. KNOX: We understand that there was a correction to what was translated earlier, where Mr. Tevzadze said there were a number of projects in this resolution, he was explaining that because there were a number of projects, he doesn't think that there was a discussion about more projects, rather than he doesn't remember there being a discussion of more projects.*

*INTERPRETER MS. MOORE: Should I ask that to the witness?*

*THE CHAIRMAN: Yes, go ahead.*

*A. I don't remember, and in particular, I don't think so."*

327. Nevertheless, it is far from evident to the Tribunal that Dr. Tevzadze intended to commit or indeed committed rights in all future oil and gas pipelines in Georgia to TrameX/GTI.
328. Section 3.6 of the JVA suggests that, at most, the Claimants had a qualified right of first refusal to participate in or implement other oil and gas related projects, such as future oil and gas pipelines:

*"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."*

[Emphasis added.]

329. The fact that the Government of Georgia retained the right to issue a tender in the event the parties to the JVA did not reach an agreement in respect of the GTI's participation in or implementation of other oil and gas related projects strongly suggests that the rights granted under the JVA were limited to the exclusive right to maintain, operate and use existing oil and gas pipelines in Georgia, *i.e.*, "early oil" rights. In other words, Section 3.6 applied to those oil and gas rights not otherwise granted under the JVA.
330. The oral testimony of Mr. Kardassopoulos confirms this interpretation of Section 3.6 and its implications in respect of the extent of the rights granted under the JVA [Tr. D4:31:22 – 33:2]:

*"PROFESSOR LOWE: How did you understand the procedure envisaged by paragraph 3.6 as operating in relation to any future projects? What would happen -- someone would come up with the idea for a completely new pipeline, for example, and what would happen then?*

*A. Who that someone would be? Because the JVA was the one who was operating, the JVA was responsible for these energy facilities in Georgia. The JVA would put, as is described in various procedural matters, would put ideas to the government, and the government would have to agree or issue a decree to confirm specific projects.*

*I suppose if somebody came from abroad, or we represented, as we say in paragraph 3.7, the Government of Georgia in discussions with third parties, with foreign persons, and such a project would come. Maybe, I am not a legal -- maybe we would have had to present to the government, let's say, this proposal, and then we would have had the right to say we would like to continue this project or not.*

*Q. When it refers in 3.6 to the possibility of there being no agreement reached with the government, and the government then being obliged to issue a tender, that presumably means no agreement on the commercial terms.*

*A. No agreement on the commercial terms, yes.*

*Q. So what you had in relation to these other projects was the right to propose a project, the right to propose the terms, but no necessary right to implement it unless the government agreed on the commercial terms, is that correct?*

*A. If in practice they didn't want us to implement the project, and they put hurdles, yes."*

331. Turning to the Deed of Concession, the picture is even less clear. This instrument, coming later in time than the JVA and as a direct grant of rights by the State, is unquestionably the more important document for the purpose of resolving the scope of

rights held by the Claimants through GTI. This is confirmed in Article 27 of the Deed, which provided that the Deed superseded all prior agreements, arrangements or understandings with respect to the subject matter thereof. Yet, it suffers from the same problems of vagueness as the JVA.

332. Article 2 described the rights conveyed under the Concession by reference to the definition of “*Pipelines*”, which in turn was defined to mean, *inter alia*, “*the existing main pipelines systems*” in Georgia and “*any extensions or new Petroleum pipelines added in the future*”. Petroleum, under the terms of the Concession, includes both oil and gas.
333. However, the reference to “*new pipelines added in the future*” does not appear consistently throughout the Deed. The consideration for the Concession, set forth in Article 6, is consistent with the ordinary maintenance of existing pipelines and extensions. Indeed, this Article refers exclusively to “*extensions*” to existing pipelines, not new pipelines:

*“6.1. In consideration for the grant of the concession, GTI agrees to bear on its account and for its own responsibility during the Concession Period all the expenses and investments involved in carrying out the ordinary and reasonable maintenance of the Pipelines and based upon the existing method of Petroleum transport cost calculations and in effecting any improvements or extensions to the Pipelines it may deem necessary.”*

[...]

*6.2 Having regard to the on-going nature of the expenses and investments to be made by GTI in the Pipelines throughout the Concession Period, the Concession fee shall accrue throughout the Concession Period and shall be deemed to be paid throughout the entire Concession Period in consideration for the expenses and investments of GTI.”*

[Emphasis added.]

334. Additionally, among the commitments undertaken by GTI, Article 7 provided for a minimum investment of US\$1 million – an obligation Transneft acknowledged to have already been made by GTI. In other words, no new additional investment was required on GTI’s part to obtain the purported exclusive rights in future oil and gas pipelines.

335. Article 10 similarly contemplated “*improvements, additions, and extensions*” to the pipelines, but does not address the construction or maintenance of “new” pipelines in the future. Rather, the plain language of this Article suggests that “*Pipelines*” are those pipelines already in existence at the time the concession was granted.
336. Article 17 again fails to make any provision for the licensing or subletting of new pipelines in the future, but rather provided generically for the licensing and subletting of “*the Pipelines or any segment thereof and any additions or extensions thereto*”.
337. Finally, Article 18 provided for the return of possession and use of the Pipelines to Transneft upon termination of the Concession. However, there is no reference to new pipelines in the future, but rather the same iteration of “*improvements, additions or extensions*” as present throughout the Deed. Indeed, Section 18.3, which contemplated the purchase by Transneft of any investments, improvements, additions or extensions to the Pipelines from GTI, provides for a minimum purchase price reflective of the cost of installing, managing, and maintaining those investments, improvements, additions or extensions and not the value of entirely new Pipelines:

*“18.2. Upon the termination of the Concession Period, any investments, improvements, additions or extensions made to the Pipelines by GTI shall remain the sole property of GTI and additionally GTI shall have a property interest in the Pipelines equal to any outstanding loans of GTI to Transneft as the date of termination of the Concession Period (and for the purposes of this Deed of Concession such property interest shall also be deemed an investment, improvement, addition or extension to the Pipelines).”*

*Without derogating from the generality of the foregoing, upon the termination of the Concession Period, Transneft shall continue to allow GTI the uninterrupted use of any investments, improvements, additions or extensions to the Pipelines made by GTI and accordingly shall maintain the connection to the Pipelines of any such improvements, additions or extensions and shall continue the transport of Petroleum and Gas through such improvements, additions and extensions.*

*18.3. Upon the termination of the Concession Transneft shall notify GTI if it wishes to purchase the investments, improvements, additions or extensions to the Pipelines from GTI. If Transneft wishes to purchase the investments, improvements, additions or extensions to the Pipelines, it shall pay GTI a price to be agreed upon between the Parties but in any event not less than the sum of (i) the cost of GTI installing, managing and maintaining the investments, improvements, additions or extensions plus the LIBOR rate for U.S. Dollars accrued annually + 2.5% per annum calculated on the basis of costs and expenses of GTI in each respective year.”*



[Emphasis added.]

338. These provisions in the Deed reflect the proper scale of the agreement between GTI and its Georgian partners. Indeed, it is almost unimaginable that the Government of Georgia sought through its State organs to commit its entire energy sector to the hands of the Claimants in exchange for a relatively modest commitment of resources. The evidence adduced in these arbitrations suggests the contrary.
339. Accordingly, the Tribunal finds that the effect of the various instruments purporting to vest rights in GTI is to convey the exclusive rights to possess, use and operate the early oil pipeline and related facilities to GTI, including associated export rights, and to give a right to make proposals regarding future projects, but not to grant any immediate rights in future oil and gas pipelines in Georgia. This bundle of rights was, nevertheless, far from insignificant.
340. Turning to the question of validity, the Tribunal is not persuaded by the Respondent's argument that these rights were invalid as of the date on which they were allegedly taken by the State or that the Claimants' rights are limited to recovery of TrameX's proven expenses. The Tribunal cannot help but observe that the contractual defences raised by the Respondent, *i.e.* unconscionability, misrepresentation and lack of performance, appear to be raised for the first time in these arbitration proceedings and are, in the Tribunal's opinion, unsupported by the oral and written evidence.
341. While it may have been unconscionable for the Claimants to have received a grant of exclusive rights to all of Georgia's future oil and gas pipelines in exchange for the relatively modest financial commitment from the Claimants provided for in the Deed of Concession, this argument is moot in view of the Tribunal's interpretation of this instrument and is certainly not the case in regard to the rights to the early oil pipeline.
342. The Tribunal finds no evidence to suggest that Georgia was disadvantaged in the negotiation of the JVA. The text reflects that the terms of the JVA were not unilaterally imposed on the Respondent; quite the contrary, they were negotiated and agreed by capable, well-represented parties on both sides of the bargaining table. Dr. Tevzadze, who negotiated the JVA on behalf of SakNavtobi, confirmed on cross-examination

during the merits Hearing that he had reviewed a Georgian translation of the draft JVA prior to the final negotiating session with Mr. Fuchs; had discussed the draft with colleagues within the Georgian government; and had negotiated the final text over the course of several days with the assistance of an English speaking lawyer within the Georgian government [Tr. D8:7-8]. The evidence, including the final text of the JVA, suggests that both contracting parties acted in their own best interests, neither being under undue pressure or influence to agree the terms of the JVA. This first contractual defence is therefore rejected.

343. The Respondent's misrepresentation defence is similarly misplaced. The evidence indicates that the Claimants represented their experience and financial resources accurately; they do not appear, at any point, to have represented themselves as anything other than experienced oil traders with substantial financial means at their disposal. This is consistent with the declarations and representations made by Tramax<sup>33</sup> in Section 4.2 of the JVA. Tramax represented that it had the "*financial capability and resources to fulfill its investment undertakings*" (JVA, Section 4.2A). The record supports the conclusion that the Claimants had significant financial resources available to them and believed that these resources were adequate to enable them to fulfil their investment undertakings [Tr. D4:71:3-25, 72:21-24].
344. Tramax also represented that it has experience, expertise and Know-How in "*world Oil and Gas markets, export of Oil and Gas and pricing and profit-maximization on world markets*" (JVA, Section 4.2B). The Tribunal understands this to refer to the Claimants oil trading experience, which is not challenged in these proceedings. Finally, the further representations in Section 4.2 invoke Tramax's knowledge of various related aspects of the oil and gas industry – "*Western methods*", shipping and banking – all of which appear to have been within the Claimants' competence.
345. The Georgian Government officials with whom the Claimants dealt also appear to have understood them to be successful oil traders, and not pipeline experts. This was confirmed by Dr. Tevzadze during the merits Hearing [Tr. D8:17:10-24]:

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<sup>33</sup> Dr. Tevzadze testified that he understood Tramax was owned by the Claimants [Tr. D8:17:10-13].

*“MR NELSON: At the time that you signed the joint venture agreement, you knew that Tramex was owned by Mr Fuchs and Mr Kardassopoulos, didn't you?”*

*A. Yes, of course.*

*Q. And you knew that they were both successful oil traders, didn't you?*

*A. Yes.*

*Q. And you believed that they would make sure that the Gachiani-Batumi pipeline was refurbished, didn't you?*

*A. Yes.*

*Q. You also believed that once the Gachiani-Batumi pipeline was restored to operations, that Mr Fuchs' and Mr Kardassopoulos' trading expertise would earn a lot of revenue for Georgia, didn't you?*

*A. Yes.”*

346. Accordingly, the Tribunal also rejects the second contractual defence.

347. The Respondent's last contractual defence, lack of performance, is also quickly disposed of on the facts. While it does appear that progress on the GTI project was impeded and slowed at various points, the evidence suggests that works were conducted, as far as local conditions would permit, up to the point in time when GTI's rights were threatened by actors within the Georgian Government who asserted the invalidity of those rights, and there is no evidence to the contrary. Accordingly, this last contractual defence too is rejected.

348. As regards the Respondent's contention that any recovery in this case should be limited to Tramex's proven expenses, the Tribunal notes that during the Hearing on the merits, one of the Respondent's witnesses testified that the Claimants should be compensated for the value of their rights if the rights were validly granted and were later taken by the State [Cook testimony, Tr. D9:63:19 – 65:2]:

*“Q. Well, because finally, this is in connection with prior discussions, our Chairman has asked two key witnesses whether they thought that in the end of the whole business, GTI or Tramex in particular should have been compensated in some way. He asked that specifically of Mr Chanturia, who was so heavily involved, more on the political side, and Professor Tevzadze, who was of course on the more technical side. And the reply of both was yes, they should have been compensated. Well, irrespective again of the amount of compensation or the right to be compensated, that assumes there are rights.*

*You wouldn't compensate if there is nothing. Would you say that is right?*

*A. Well, my understanding is that the issue revolved around the nub that Georgian Oil had granted clearly through the agreements, or as they were related to us, because as I said we never saw the agreements, had granted certain rights to GTI which were in conflict with those granted to AIOC. The issue revolved around whether they were in a position, at least in my understanding, the position revolved around whether they were in a position to grant those rights.*

*Now I'm not a lawyer, and therefore, from a legal perspective, whether it is appropriate to grant compensation for rights which are not validly granted is -- I don't have a view as to what the law says about that.*

*PROFESSOR ORREGO VICUNA: Okay, thank you.*

*THE CHAIRMAN: But assuming that the rights were validly granted, assuming, for purposes of the follow-up question.*

*A. So if the rights were validly granted and then were later taken away from them, then logically it is reasonable they should be compensated for it."*

349. In summary, the Tribunal is satisfied on the basis of the totality of the evidence that the Claimants held rights in the early oil pipeline facilities in Georgia, including export rights, and that these rights were not vitiated by virtue of any of the contractual defences raised by the Respondent. The Tribunal shall next turn to consideration of whether GTI's rights were in fact taken by the Government of Georgia in breach of its treaty obligations to Mr. Kardassopoulos.

### 3. Was Mr. Kardassopoulos' Investment in GTI Expropriated?

350. In view of the Tribunal's finding on jurisdiction under the Georgia / Greece BIT (see paragraph 241 above), only Mr. Kardassopoulos' claim arising from expropriation under the ECT shall be considered here.

#### *a) The Claimant's Position*

351. Mr. Kardassopoulos submits that his investments were unlawfully taken through Decree No. 178, which extinguished the exclusive rights that GTI held in the Samgori-Batumi pipeline and related facilities, and Order No. 33a, which extinguished GTI's rights over future pipelines, and that he has not been compensated for that taking.

352. As a threshold position, Mr. Kardassopoulos submits that all of the conditions set out in Article 13(1) of the ECT must be satisfied in order for an expropriation to be lawful under the ECT. In this case, Mr. Kardassopoulos avers that the expropriation of his rights satisfied none of these conditions. He also contends that Georgia's breach of the stabilization clauses in the JVA and Deed of Concession in itself renders the expropriation unlawful.
353. As regards the public interest criterion applicable to expropriations under Article 13 of the ECT, Mr. Kardassopoulos concedes that a State's decision concerning the public interest is entitled to a large measure of deference. However, Mr. Kardassopoulos submits that "*it is open to question whether or not the Respondent's decision to switch to the GIOC business model (i.e. outsourcing all the construction, maintenance and operation of the pipeline in return for collecting a greatly reduced transit fee) was in Georgia's interest.*" [Supp. Mem. at para. 266].
354. Mr. Kardassopoulos rejects Georgia's contention that "*the development of the Georgian oil and gas industry and a fully-functioning pipeline system were in the public interest*", asserting that this effectively mis-states the public interest test. In any event, Mr. Kardassopoulos contends that Mr. Chanturia's role in the process taints the undertaking and renders it unlawful as, having formed part of the *ad hoc* commission established in January 1996 to examine existing agreements relating to Georgia's pipelines, Mr. Chanturia in particular stood to gain following the passage of Decree No 178 a month later which transferred GTI's rights in Early Oil pipeline to GIOC.
355. Mr. Kardassopoulos notes that commentary to Article 3 of the OECD *Draft Convention on the Protection of Foreign Property* (1967) considers "*a seizure undertaken ostensibly for public purposes but, in fact, to be used by persons connected therewith solely for private gain is unlawful and gives rise to a claim for damages.*" Moreover, in Kenneth Vandeveld's treatise on U.S. investment treaties, he observes that the public purpose test "*prohibit[s] expropriations that merely transfer property from one private party to another or which are carried out as a political reprisal.*"<sup>34</sup> Thus, in Mr. Kardassopoulos'

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<sup>34</sup> Kenneth Vandeveld, *United States Investment Treaties: Policy and Practice* (Kluwer Law and Taxation, 1992) at p. 121.

submission, this purely political agenda (orchestrated under questionable circumstances by Mr. Chanturia) renders the expropriation unlawful.

356. During the Hearing, the Claimants reiterated their submission that the evidence shows the expropriation “*was tainted by politics and factional interest*”, as GTI’s rights were essentially taken away and given to Mr. Chanturia, and could not therefore have been in the public interest [Tr. D12:33-34].
357. Mr. Kardassopoulos contends that the expropriation was also discriminatory because Georgia simply took the rights that had been granted to GTI and granted them to GIOC, a wholly-owned state entity. GIOC, in turn, licensed those rights to AIOC and, in the process, reaped 100% of the transit revenues that would have accrued to GTI. According to Mr. Kardassopoulos, if GTI had licensed those rights, the Georgian partner would have received only 50% of the revenues.
358. In their closing argument, the Claimants invited the Tribunal to draw an inference as to Georgia’s discriminatory intent for the purpose of the expropriation claims: “*the only people who end up out of pocket were foreigners, so there can be an inference that foreigners were target[ed] in a discriminatory way*” [Tr. D12:34].
359. Notwithstanding Mr. Kardassopoulos’ position that the Respondent breached the above two criteria, he submits that, at a minimum, the expropriation in any event lacked due process. Mr. Kardassopoulos again relies on commentary to the OECD *Draft Convention on the Protection of Foreign Property* for the proposition that the due process required by Article 13(1) of the ECT corresponds to a minimal standard of international due process.
360. According to Mr. Kardassopoulos, beginning in mid-1995 Georgia began to negotiate with AIOC in respect of rights held at that time by GTI. He was offered neither an opportunity to participate in the process by which his rights were granted to third parties, nor a forum in which to contest the ultimate re-granting of those rights. Mr. Kardassopoulos contends that during this period, Georgia failed to give clear answers about the status of GTI’s rights and assured him that GTI would continue to be involved in the oil and gas industry in Georgia. Georgia did not cancel the JVA or Deed of Concession – or, at least did not advise the Claimants of having done so.

361. The Claimants highlight the confidential report prepared by Mr. Ninidze, then Minister of Justice, in March 1995 which concluded that the JVA and the Deed of Concession were defective under Georgian law [Hearing Bundle, Tab 98], averring that “[p]rocedural due process required Georgia to share its ‘conclusions’ with the affected investors and invite their views. Substantive due process required Georgia to analyse the JVA and Deed of Concession by reference to the body of law which Georgia agreed to apply when it entered into the two contracts (which was international law, not Georgian law). Georgia did neither. Instead, Mr. Ninidze described the investor’s lack of awareness of the process as ‘their problem’.” [Cl. Post-Hearing Br. at para. 74]

362. The Claimants summarized their position on due process at the Hearing in closing argument [Tr. D12:34-35]:

*“MR NELSON: Let me just talk about due process. The best authorities on due process which we've cited in our memorials indicate that due process must involve judicial process, and a chance to answer the expropriating authority, and to argue one's case. We had the opposite of that. ... We had assurances from SakNavtobi and Patsatsia, from the government. People who spoke to us to our face [and] said, "You're still our partners". Then we heard rumours about other government departments. There was never a clear indication of why GIOC seemed to be emerging, there was never any indication. Mr Chanturia was opaque on a number of issues in his testimony, and I unfortunately have to deal with them in a moment.*

*The messages fed to the claimants from certain parts of the Georgian government were completely contradicted by the secret actions taken by other parts of the government. This is the antithesis of transparency and due process.”*

363. As regards the compensation criterion, Mr. Kardassopoulos takes the position that Georgia’s failure to pay any compensation, much less “*prompt, adequate and effective compensation*”, necessarily renders the expropriation unlawful under Article 13 of the ECT. During the Hearing the Tribunal pressed the Claimants for further explanation of their position [Tr. D1:99:4 to 103:1]. The Claimants insist that one of the requirements of a lawful expropriation is payment, which did not occur here.

364. Finally, and apart from the criteria identified in Article 13(1) of the ECT for a lawful expropriation, Mr. Kardassopoulos contends that the breach of the stabilization clauses contained in the JVA (Article 12) and the Deed of Concession (Article 21) itself renders the expropriation unlawful. According to Mr. Kardassopoulos, this follows “*from the*

*basic underlying principle that contractual commitments freely entered into by host States should be given legal effect. If no consequences flow under international law from the violation of such clauses, they are meaningless. Host States will be encouraged to attract investment by inserting such clauses in every investment contract safe in the knowledge that no additional consequences flow from them.” [Supp. Mem. at para. 271].*

*b) The Respondent’s Position*

365. The Respondent’s principal defence is that there was no expropriation because the Claimants had no expropriable rights and, in the alternative, that any expropriation was lawful. In respect of this first position, the Respondent claims that prior to the passage of Decree No. 178, Georgia had analyzed the existence of any exclusive rights to the Gachiani-Supsa Pipeline under the JVA and the Concession and concluded that no valid rights existed. In a report to President Shevardnadze dated 25 April 1995, the Minister of Justice concluded that the JVA and the Concession were invalid because, *inter alia*, the JVA exceeded the scope of Cabinet Resolution 123g and the Concession was void for lack of authority and had been granted to GTI through “*gross violations of law.*” [Counter-Memorial at paras. 314-318]
366. The Respondent further submits that Decree No. 178 “*erased any prospect of generating value for Mr. Kardassopoulos’ shareholding in GTI through the proposed Brown & Root share purchase agreement*” and that it was highly unlikely any agreement would have been forthcoming between GTI and Brown & Root due to the conflict of interest such a deal would have posed for Brown & Root and AIOC.
367. Arguing in the alternative, the Respondent next contends that should the Tribunal determine that Georgia expropriated any investments protected by the Georgia / Greece BIT or the ECT, such expropriation was lawful under customary international law. The Respondent acknowledges that a lawful expropriation requires that the expropriation (a) be for a purpose which is in the public interest; (b) not be discriminatory; (c) be carried out under the due process of law; and (d) be accompanied by appropriate compensation.
368. By contrast to the Claimants, however, the Respondent adopts the threshold position that an expropriation is provisionally lawful so long as it meets the first three criteria of the



treaty expropriation provision. This argument was succinctly made by the Respondent in closing argument [Tr. D12:158]:

*“Now we would argue that in order for an expropriation to be [...] lawful, or as some commentators have coined it, provisionally lawful, in the context of determining the appropriate measure of damages, it is only of concern for the first three factors, and not a question of whether payment of compensation was actually made. If that were the case, then there would never be a BIT case brought in which there was a claim for lawful expropriation. Furthermore applying the Amoco v Iran test, you don't look at the fourth factor.”*

369. Turning to the criteria for a lawful expropriation, the Respondent argues that there is no precise definition of “public purpose” for the purpose of the lawful expropriation test under customary international law. Relying on *Antoine Goetz v. République du Burundi*<sup>35</sup> concerning the discretion afforded to governments to act in the national interest Georgia submits that in “*the absence of a legal or factual error, or a manifest error in the evaluation for an abuse of power, the Tribunal may not substitute its own judgment for the discretionary evaluation made by [the Government] of ‘considerations of public interest ... or national interest.’*” [Am. Rejoinder at para. 270].
370. The Respondent points to the Expert Report of Igor Effimoff, the Witness Statements of Messrs. Chanturia, Khetaguri and Adams, and its Supplemental Memorial (which recognized at paragraph 27 that the Gachiani-Supsa Pipeline was of “*great national importance*”) for the proposition that the development of Georgia’s oil pipeline infrastructure was of crucial national importance and key to the country’s economic development and political stability. Mr. Effimoff’s first report encapsulates this position as follows [Effimoff I, paras. 59-60]:

*“On the other hand, there was a competing concern on the part of neighboring countries, namely Turkey and Georgia, and the U.S regarding Russia’s hegemony over energy in the Caspian Sea region. Moscow had used its monopoly as political leverage against its smaller neighbors, at times stopping imports. To countries like Turkey and Georgia, and also to the U.S., a multiple pipeline solution that promoted diversified energy resources and providers offered the key to diminishing Russia’s power. For example, as an energy corridor, Georgia would be able to get part of its energy from countries other than Russia and therefore hopefully could decrease its energy dependency.*

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<sup>35</sup> ICSID Case No. ARB/95/3, Award (10 February 1999), at para. 120 (“*Antoine Goetz*”).

*At the same time, [Turkey and Georgia] hoped to achieve economic independence by reaping the direct economic benefits of maintaining the pipeline. President Shevardnadze realized that for Georgia to become a viable independent state, Georgia had to develop its economy, align itself closer to the West and in general shed its “Sovietness” ... the Georgian government viewed the pipeline as the vehicle to make Georgia attractive to the West ... The Western reliance on oil from the Caspian would encourage the West to be Georgia’s “protector” because the West would have a vested interest in ensuring there were no disruptions to the pipeline’s operations.”*

371. The Respondent submits that it was in the public interest for GIOC to enter into arrangements with a business that possessed the unquestionable ability to develop the country’s oil infrastructure and, correspondingly, not in the public interest for the construction and operation of the pipeline to remain in GTI’s hands, citing four principal reasons [Counter-Memorial at para. 358]:

*“(1) the JVA and the Concession were void and unenforceable. Accordingly, Tramex and GTI had no right to construct and operate the pipeline or to claim the revenues arising therefrom;*

*(2.) by 1996, Tramex and GTI had failed to make any material progress in developing and operating the Gachiani-Supsa Pipeline. Accordingly, it was not in Georgia’s interest further to entrust the development of these facilities to Tramex and GTI;*

*(3) Tramex and GTI did not have the necessary expertise or financial capability to develop the Gachiani-Supsa Pipeline and accordingly Tramex and GTI would have been unable to implement the project; and*

*(4) Tramex and GTI did not have a feasible business plan, any throughput commitments from end users and, accordingly, Tramex and GTI would have been unable to finance the project.”*

372. Thus, the Respondent reasons President Shevardnadze had no choice, acting in Georgia’s public interest, but to grant the rights to re-construct the Gachiani-Supsa Pipeline to AIOC.

373. The Respondent relies upon *Amoco International Financial Corporation v. Iran*<sup>36</sup> and argues that a state’s decision to increase its share of revenues derived from exploitation of a national natural resource is in the public interest, citing the following passage from that award:

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<sup>36</sup> 15 IRAN-U.S.C.T.R. 189 (1987) (“*Amoco*”).

“ ... in recent practice and mostly in the oil industry, States have admitted expressly, in a certain number of cases, that they were nationalizing foreign properties primarily in order to obtain a greater share, or even the totality, of the revenues drawn from the exploitation of a national natural resource, which, according to them, should accrue to the development of the country. Such a purpose has not generally been denounced as unlawful and illegitimate.”<sup>37</sup>

374. The Respondent also denies the Claimants’ allegations in respect of the existence of political or factional interests in Georgia. During the Hearing, the Respondent submitted in closing argument there is no evidence on the record that the expropriation of the Claimants’ rights was motivated by politics (as opposed to the public interest), there is only “*innuendo*” relating to the selection of Mr. Chanturia to head GIOC instead of Dr. Tevzadze [Tr. D12:158-59].
375. The Respondent also contends that the alleged grant of GTI’s rights to GIOC was not discriminatory, reasoning firstly that there was no discrimination on the basis of nationality: Tramex and SakNavtobi were in “*a similar material situation as the only shareholders in GTP*” and both were “*affected in equal terms by the alleged grant of GTI’s alleged rights to GIOC*” [Counter-Memorial at para. 367]. The Respondent relies upon the award in *Government of Kuwait v. AMINOIL*<sup>38</sup> and the *Case Concerning Oscar Chinn*<sup>39</sup> in support of its view that an expropriatory law is not discriminatory simply because it affects only one foreign enterprise. According to the Respondent, GTI and GIOC were in fundamentally different positions and created for entirely distinct purposes, and therefore they cannot be said to have been in a similar situation, which is an important element of discrimination.
376. In response to Mr. Kardassopoulos’ allegation that the alleged expropriation was effected in order to fulfill the political agenda of Mr. Chanturia and, as such, was discriminatory in the same manner as was found in *BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic*<sup>40</sup>, the Respondent distinguishes the *BP*

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<sup>37</sup> *Ibid.* at para. 145.

<sup>38</sup> YCA 1984, Award (24 March 1982) (“*AMINOIL*”).

<sup>39</sup> PCIJ, Ser A./B., N. 63, 1934 (“*Oscar Chinn*”).

<sup>40</sup> Award (Merits) (10 October 1973), 53 ILR 297 (1979) (“*BP Exploration*”).

*Exploration* case by noting there is no evidence of Tramex being singled out for its Panamanian nationality. In its closing argument, the Respondent insisted that *[t]here's no evidence whatsoever that there was any intention on Georgia's part to discriminate against Tramex or the claimants because of their foreign nationality, which we say is determinative of this limb of lawful expropriation [...]* [Tr. D12:160].

377. During the Hearing the Tribunal solicited the Respondent's view on the significance, for the purposes of the discrimination criterion, of a situation in which, after both a private and a State entity are expropriated, the State entity alone returns to participate in an investment or business [Tr. D1:130-31]:

*“PROFESSOR ORREGO VICUNA: Do you mind if I put to you a question before you move over, in relation to the non-discriminatory nature of the alleged expropriation, in this respect, that if a Georgian entity, as you mention in point 1, SakNavtobi, was also allegedly affected by this assignment of rights, what would you comment on the question of whether that Georgian entity, either directly or indirectly being a part of the Georgian state, got its way in the new business that was being developed with AIOC or whoever else, in a hypothetical example.*

*You would expropriate both sides of the equation, but one side might be left out and the other one might be brought back in through some door, particularly if you look at the larger idea of a state business entity of some sort. How would you comment on that?*

*MS SALOMON: Well, in this case, SakNavtobi was not brought in. Mr Tevzadze of SakNavtobi will talk about being upset, and so we don't have that real situation, and we have SakNavtobi as a state-owned entity but different than the government itself, and so we would submit that that entity itself, to the extent it was negatively impacted as the claimants allege, is impacted in exactly the same way as the claimants.”*

378. In regard to due process, the Respondent submits that the Commentary to the OECD *Draft Convention on the Protection of Foreign Property*, although not binding for the interpretation of Article 13(1)(c) of the ECT, is of some assistance. The Commentary provides that due process *“implies that whenever a State seizes property, the measures taken must be free from arbitrariness. Safeguards existing in its Constitution or other laws or established by judicial precedent must be fully observed; administrative or judicial machinery used or available must correspond at least to the minimum standard required by international law.”*

379. In this case, the Respondent avers there is no evidence of arbitrariness nor any evidence that the relevant governmental orders breached any administrative requirement under international law or otherwise. Nor, in the Respondent's view, can there be any allegation of a failure in the Respondent's "*judicial machinery*". The Respondent concludes that, consistent with the Iran-U.S. Claims Tribunal's reasoning in *Amoco*, the government orders had a "legal basis" and therefore cannot properly be considered to be in breach of due process.
380. The Respondent dismisses the "*innuendo of shadowy activity*" argument and reiterates its view that any expropriation was carried out in accordance with due process [Tr. D12:160-61]:

*"The fourth factor in terms of due process, again, we have no evidence, we just have innuendo of shadowy activity, and somehow, because the claimants didn't know every single thing that happened in government decision-making, in terms of the pipelines, that somehow, there was a lack of due process. The suggestion that a government cannot act behind closed doors in making certain decisions, or that the Ministry of Justice could not provide advice to the government that doesn't get distributed is not in any way a suggestion that due process wasn't met. There's no evidence of arbitrariness, the acts about which they complain concern governmental orders and decrees."*

381. The Respondent reiterates that there is no evidence to support Mr. Kardassopoulos' allegation that there were political factions driven by AIOC within the Georgian Government. In the Respondent's submission, many of Mr. Kardassopoulos' complaints relate to AIOC's conduct rather than Georgia's.
382. As regards the compensation criterion, the Respondent also submits that while the obligation to pay compensation is a settled criterion of a lawful expropriation in customary international law, the amount that must be paid is "less well settled". According to the Respondent, the determination of appropriate compensation is subject to equitable considerations and the particular circumstances of each case. In this case, the Respondent contends that it created a governmental commission by Order No. 84 for the purpose of examining the possible payment of compensation to TrameX. TrameX was invited to produce all relevant documents in support of their claims to compensation. However, the Respondent states that TrameX failed to produce documents evidencing its expenditure.

383. As Mr. Kardassopoulos failed to provide proper evidence of the value of his allegedly expropriated investment, despite repeated requests from a government commission specifically established to examine the payment of compensation, the Respondent submits that Mr. Kardassopoulos has failed to establish that Georgia breached the requirement for compensation to be paid. Thus, the absence of payment of compensation in this case to date, bearing in mind these particular circumstances, does not render the alleged expropriation unlawful. In this regard, the Respondent draws a parallel between this case and *Amoco*, reasoning that in that case the tribunal found the alleged expropriation was lawful even though Iran made no compensation payments. Because the claimant had failed to produce documents to a commission “*in support of their demands*,” the tribunal found Iran did not breach the treaty compensation provision requiring “*prompt payment of just compensation*”.
384. Finally, the Respondent states that any breach of the JVA or the Concession by either Saknavtobi or Transneft does not render the alleged expropriation unlawful. The Respondent observes that there is no stipulation in the ECT that an expropriation in breach of a contractual provision is *ipso facto* in breach of international law. Rather, in its view, the stabilization clauses establish an agreed formula for the calculation of damages.
385. Relying on *Amoco*, in which the tribunal stated that it would be “*particularly adventurous*” to construe a contract to which the State is not a party as forbidding nationalization, the Respondent argues that the tribunal in that case expressly found that the State had not breached the stabilization clauses since these clauses “*bind only the parties to the ...Agreement, namely NPC and Amoco*”.

*c) The Tribunal’s Determination*

386. The Tribunal considers it helpful to recall the terms of Article 13(1) of the ECT which permits the expropriation of the investment of an investor of a Contracting Party where that expropriation is carried out in accordance with certain conditions:

**“Article 13 Expropriation**

*(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subject to a*

*measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as “Expropriation”) except where such Expropriation is:*

- (a) *for a purpose which is in the public interest;*
- (b) *not discriminatory;*
- (c) *carried out under due process of law; and*
- (d) *accompanied by the payment of prompt, adequate and effective compensation.*

[...]”

387. The Tribunal finds that the circumstances of Mr. Kardassopoulos’ claim present a classic case of direct expropriation, Decree No. 178 having deprived GTI of its rights in the early oil pipeline and Mr. Kardassopoulos’ interest therein. The Tribunal also finds that this deprivation was not an exercise of the State’s *bona fide* police powers.
388. It is clear on the record, however, that an expropriation of GTI’s rights was planned in advance of 20 February 1996, the date on which Decree No. 178 was adopted. Decree No. 477, adopted on 11 November 1995, established GIOC, the entity to whom GTI’s rights were eventually transferred, with essentially the same aims as GTI. In other words, the groundwork for the expropriation of GTI’s rights was laid through the adoption of Decree No. 477. While there may have been some discussion of GTI’s participation in the new GIOC regime, the status of GTI’s rights in Georgia was clearly in serious question by November 1995. This finding has particular significance for the Tribunal’s consideration of the Parties’ submission on quantum, discussed in Part V.E. below.
389. Turning to the criteria for a lawful expropriation set forth in Article 13(1) of the ECT, it is undisputed that the Georgian Government never compensated Mr. Kardassopoulos for the taking of GTI’s rights, let alone met the standard of “*prompt, adequate and effective compensation*” prescribed in Article 13(1). However, the Respondent, relying on the reasoning of the U.S.-Iran Claims Tribunal in *Amoco*, claims that failure to satisfy this criterion does not in itself render an expropriation unlawful.
390. It is unnecessary for the Tribunal to decide whether the Respondent’s argument is valid since its conduct also fails to meet another criterion set out in Article 13(1) of the ECT, namely the requirement that any expropriation be carried out in accordance with due

process of law. Such a failure, the Respondent concedes, would in any event render the expropriation unlawful.

391. Beginning with the first criterion, the Tribunal finds that, on all the evidence, it is arguable that the expropriation of Mr. Kardassopoulos' rights was in the Georgian public interest. As the Claimants acknowledge, the Respondent is entitled to a measure of deference in this regard. The Tribunal heard both fact and expert industry witnesses who asserted that the development of Georgia's oil pipeline infrastructure was of crucial national importance to the country's political independence in the region and its economic development. The Tribunal finds this evidence compelling in light of all the circumstances prevailing in Georgia and the wider region during the relevant period. The evidence of Mr. Effimoff, the Respondent's industry expert, was particularly illuminating in this regard.
392. The Tribunal is also of the view that while Mr. Chanturia's role in the expropriation is a matter of concern, it is not clear on the evidence that the so-called "factional interest" which coalesced around Mr. Chanturia was the driving factor which led to the expropriation of GTI's rights, although it would seem that it may have shaped the manner in which the expropriation and ensuing compensation discussions were carried out. There was a broader context to the expropriation of GTI's rights, namely the need to find someone who could deliver a pipeline solution on a scale required to satisfy the prevailing geopolitical and economic concerns of Georgia during the mid-1990s. Considered in this light, Georgia's decision to pursue an arrangement with AIOC, even at the expense of the Claimants, may be understood as a decision taken in the public interest, even though, as shall be seen below, the manner in which it was carried out cannot be reconciled with Georgia's treaty obligations. Therefore, the Tribunal is accordingly not convinced that the Respondent breached the "public interest" requirement in the ECT's expropriation provision.
393. With respect to the second criterion, while it does appear that the Georgian partner in the joint venture, SakNavtobi, was restored in some measure to a role in the development of Georgia's oil and gas infrastructure following the taking of GTI's rights, the Tribunal does not find that the expropriation was carried out in a discriminatory manner. While it



may, in certain circumstances, be the case that a taking can be considered discriminatory absent an intention to discriminate against an investor on the basis of nationality, the Tribunal is not convinced that this is such a case. Although GTI's rights were taken away and handed to GIOG, to the detriment of both Tramex and SakNavtobi, GIOG subsequently struck up a partnership with AIOC, another foreign entity. In other words, this was not a case in which the Georgian government discriminated against Tramex or Mr. Kardassopoulos *qua* foreign investor, but rather a case in which it determined that there was a better deal to be had with a different foreign investor. The Tribunal is not convinced that there has been a breach of the non-discrimination element of the ECT's expropriation provision.

394. This brings us to the third criterion concerning due process. The Tribunal observes, as a starting point, that both Parties rely upon the definition of due process contained in the OECD's *Draft Convention on the Protection of Foreign Property*, which provides as follows:

*"In essence, the contents of the notion of due process of law make it akin to the requirements of the "Rule of Law", an Anglo-Saxon notion, or of "Rechtsstaat", as understood in continental law. Used in an international agreement, the content of this notion is not exhausted by a reference to the national law of the parties concerned. The "due process of law" of each of them must correspond to the principles of international law."*

395. In their Post-Hearing Brief, the Claimants rely on a discussion of an identical expropriation criterion contained in the BIT between Hungary and Cyprus by the ICSID tribunal in *ADC v. Hungary*,<sup>41</sup> which the Tribunal finds apposite to the present case:

*"The Tribunal agrees with the Claimants that "due process of law", in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that "the actions*

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<sup>41</sup> ICSID Case No. ARB/03/16, Award (2 October 2006) ("*ADC*").

*are taken under due process of law” rings hollow. And that is exactly what the Tribunal finds in the present case.”<sup>42</sup>*

[Emphasis added.]

396. The Tribunal agrees with the reasoning of the ADC tribunal and, in particular, with the proposition that whatever the legal mechanism or procedure put in to place, it “*must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard*” if it is to be found to have been carried out under due process of law. As in ADC, the Respondent in the present case failed to ensure that there was a procedure or mechanism in place, either before the taking or thereafter, which allowed Mr. Kardassopoulos, within a reasonable period of time, to have his claims heard.
397. Rather, contrary to several elements which may be considered to form part of the due process obligation, such as reasonable advance notice and a fair hearing, the expropriation of Mr. Kardassopoulos’ rights was carried out in a manner that can at best be described as opaque. This is best illustrated by the documentary and oral evidence, discussed as part of the factual matrix above, which underscores the Georgian Government’s role in the events that led to squeezing the Claimants out of the investment picture once AIOC had entered the region. While the evidence indicates that AIOC had some reservations about embracing the Claimants within their corporate structure or ceding control to them on a long-term basis, the evidence is equally clear that if the Georgian Government had confirmed the existence and validity of the Claimants’ rights in the early oil pipeline, AIOC would have taken the Claimants’ presence seriously. Although AIOC repeatedly sought clarification from Georgia of the Claimants’ status in Georgia they were assured that no conflict existed.
398. The testimony of Mr. Ninidze, former Minister of Justice, evidences the Georgian Government’s disregard for the Claimants’ rights once AIOC expressed its interest in Georgia as part of the Caspian reserves export solution. When presented with a report prepared by his Ministry in March 1995, which concluded that the Claimants’ rights under the JVA and Deed of Concession were invalid, Mr. Ninidze testified that he was

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<sup>42</sup> *Ibid.* at para. 435.

unaware whether the report had ever been forwarded to the Claimants, but that it would have been sent to them if they had simply asked for it. If the Claimants did not know that the report existed, how could they ask for it, he was asked. Mr. Ninidze replied that was simply “their problem” [Tr. D5:26-28]:

*“Q. So I take it that at no time in March or April 1995 was this report to your knowledge sent to Tramex, is that right?”*

*A. No, I'm not saying that. I'm looking at the report which was signed by the head of the department and was sent to the Cabinet of Ministers. I cannot speak of anything else.*

*Q. You're not aware of it being sent to Tramex in March or April 1995 then, is that right?”*

*[...]*

*INTERPRETER MS WILLSEA: The question Mr Svanidze was clarifying was: do you actually know whether this report was sent to them or not? And the answer was not.*

*MR SVANIDZE: The answer was I don't know.*

*A. This report was prepared by the ministry, it was addressed to the Cabinet of Ministers, it was signed, it wasn't signed by the Minister of Justice, it was signed by the head of the department.*

*THE CHAIRMAN: And he doesn't know whether it was sent to GTI or Tramex.*

*A. I don't know, as I have stated, but I would like to say that this document would have been sent to GTI should they have asked and requested this document from us.*

*MR NELSON: Would it have been sent to AIOC if AIOC asked and requested for it?*

*A. According to the legislation, in-country legislation, if any subject is requesting from the government an official document, we have to respond to that request. If they don't request, we will not send it.*

*Q. But they have to know that it exists first, isn't that true?*

*A. That's their problem.*

*Q. Well, it's also an opportunity, isn't it, if you do know that it exists, it's helpful, because then you can ask for it, right?*

*A. I do not argue with that, yes.”*

399. However, Nabarro Nathanson, the law firm advising AIOC on the status of the Claimants' rights in Georgia, received a copy of this report shortly after it was completed [Tr. D5:28; Hearing Bundle, Tab 105]. Nabarro Nathanson in their report to AIOC in April 1995, less than a month after receiving the Ministry of Justice report, concluded tentatively that the Claimants' rights were invalid. The Tribunal notes that AIOC and their legal counsel appear to have received other government documents concerning the Claimants' rights, completely unbeknownst to the Claimants (see Parts II.E and F above).
400. According to Mr. Frenkiel, the first time the Claimants became aware that their rights were being challenged was through the publication of an article in an oil and gas industry newsletter in May 1995 [Tr. D2:108-109; Hearing Bundle Tab 147, p. 132 (*Petroleum Argus*); Kardassopoulos I, para. 8.2]. This is confirmed by the statement of Mr. Gur, whose evidence has not been challenged in these proceedings.
401. Mr. Gur confirms not only that although the first signs of trouble emerged in mid-1995, the Claimants nevertheless continued to receive comfort from senior officials in the Georgian Government including from President Shevardnadze and were told that they "need not worry" [Gur I, paras. 8.2 and 8.4]:

*"I was accordingly very surprised when it was first brought to my attention by Mr. Fuchs that there were troubles brewing with the Georgian government. I believe it was around the middle of 1995. I was told that there were rumours that the Georgian government were going to offer to an international oil consortium (called AIOC) rights to the very same pipeline that GTI were in the middle of constructing. Mr. Fuchs asked if I could try to find out if there was any truth to the rumours and to see if there was now a risk that the Georgian government would betray the Joint Venture arrangements. Naturally I was very concerned to hear about this but did not believe such a thing could happen, after all of the government approvals and endorsements we had obtained earlier. Mr. Sigua was no longer Prime Minister by this time, but I did my best to find out what was happening by speaking to various contacts within the Ministries. No-one in the government seemed to be very certain and I received conflicting reports. It did seem clear that a new person was now quite influential within Chairman Shevardnadze's sphere, namely Giorgi Chanturia. I was not able to arrange any private meeting with him. Up until now, whenever I needed to access anyone within the Georgian government, this had been arranged immediately so this was unusual.*

*[...]*

*I spoke to President Shevardnadze about this matter in early November 1995 when he came to Israel for the funeral of Israel's Prime Minister Rabin. I*

*escorted him in the official bus during his time in Israel and we had a good opportunity to speak when his plane was delayed for several hours at the airport. [...] He invited me onto his plane and we sat in the plane while it waited on the tarmac discussing many things and also this investment. I expressed my concern about the rumours that a deal had been struck on the Azeri side such that rights to the pipeline would be given to AIOC. He said that he had taken no decision yet but that we did not need to worry. He personally assured me that the investors I had introduced would be fully protected. He added that his door was always open. I was greatly reassured by his words and passed them onto Mr. Fuchs and Mr. Nanikashvili to relay to Mr. Kardassopoulos.”*

402. The Tribunal agrees with the Claimants that “[b]ack-door press reports are the opposite of due process.” [Cl. Post-Hearing Br. at para. 78]. It is also clear that these were not idle rumours, but were a reflection of a process afoot within the Georgian Government to back a faster, bigger and stronger horse – AIOC— at the expense of the Claimants.
403. The evidence reveals to the satisfaction of the Tribunal that, during the remainder of 1995, while Tramex pursued partnership discussions with Brown & Root with the full knowledge and approval of Dr. Tevzadze, as well as other Georgian officials, the Georgian Government was pursuing negotiations with AIOC in respect of the same rights already held by Tramex through GTI.
404. Viewed in its totality, the process by which the Respondent took GTI’s rights, and thereby expropriated Mr. Kardassopoulos’ investment, cannot by any definition be considered to have been carried out under due process of law. Moreover, the Respondent’s failure to grant Mr. Kardassopoulos a reasonable chance within a reasonable time to have his claims heard following the expropriation of his investment unquestionably, in the eyes of the Tribunal, falls short of what is required by this criterion. Accordingly, the Tribunal determines that the expropriation of Mr. Kardassopoulos’ investment was carried out in breach of Article 13(1) of the ECT.
405. Finally, and as noted above, it is uncontroversial on the facts of these cases that no payment was made to Mr. Kardassopoulos by the Georgian Government in compensation for the expropriation of his investment, let alone payment that may be considered “prompt, adequate and effective”. The Tribunal is not persuaded by the Respondent’s defence that non-payment in this case was justified due to Mr. Kardassopoulos’ alleged failure to provide proper evidence of the value of his investment. The circumstances of

this case are simply not comparable to those in *Amoco*. First, there is evidence on the record that documentary support to assist in valuing Mr. Kardassopoulos' investment was provided to the compensation commission at various points in the compensation process, unlike in *Amoco*. Second, the claimant in *Amoco* never pursued a remedy before the commission established to consider claims arising from the nationalization of investments by the Government of Iran, whereas the evidence on the record here indicates that Mr. Kardassopoulos persistently sought compensation for the expropriation of his investment through the compensation commission process.<sup>43</sup> Therefore, the Tribunal finds that this argument too must fail.

406. The Tribunal notes that Mr. Kardassopoulos also argued that the Respondent's breach of the stabilization clauses in the JVA and the Deed of Concession, in itself, renders the expropriation unlawful, regardless of whether the expropriation otherwise met the criteria enumerated in Article 13(1) of the ECT. The Respondent rejects this allegation, claiming that, as a non-party to either instrument, it had no contractual obligations capable of being breached and, in any event, that Article 13(1) of the ECT contains no requirement that an expropriation must not be carried out in breach of a contractual commitment.
407. This last element of Mr. Kardassopoulos' expropriation claim is put forward in the alternative to his primary submission that, on the basis of the enumerated requirements of the ECT, the expropriation of Mr. Kardassopoulos' rights was carried out unlawfully, in breach of the treaty. In view of the Tribunal's finding that the expropriation of Mr. Kardassopoulos' investment was unlawful, as it violated at least one of the prescribed conditions for a lawful expropriation, it is in the Tribunal's opinion unnecessary to address this last element of Mr. Kardassopoulos' expropriation claim.
408. Based on the foregoing, the Tribunal determines that the Respondent expropriated Mr. Kardassopoulos' rights by Decree No. 178 and that such expropriation was unlawful by virtue of the Respondent's failure to carry out the expropriation in accordance with due process of law. The Tribunal also finds that the Respondent breached the ECT by reason

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<sup>43</sup> See *Amoco*, at para. 134.

of its continuing failure to pay prompt, adequate and effective compensation, as required by the terms of Article 13(1) of the ECT.

#### 4. Was Mr. Fuchs Treated Unfairly and Inequitably?

##### *a) The Claimant's Position*

409. Mr. Fuchs submits that the fair and equitable treatment (“FET”) standard contained in Article 2(2) of the Georgia / Israel BIT is an autonomous standard requiring a higher level of conduct than the customary international law minimum standard. Mr. Fuchs relies on the reasoning of the *ad hoc* tribunal in *Saluka Investments v. Czech Republic*,<sup>44</sup> to the effect that the FET standard is “*meant to be a guarantee providing a positive incentive for foreign investors*” and a violation of the standard may therefore occur even where a State’s conduct “*displays a relatively lower degree of inappropriateness*”<sup>45</sup> (*i.e.* than the minimum standard of treatment at customary international law).
410. Mr. Fuchs alleges that the various measures adopted by Georgia over the period 1997 through 2004, considered in their totality, constitute a breach of Georgia’s FET obligation to Mr. Fuchs in respect of four key elements: (1) breach of an investor’s legitimate expectations; (2) arbitrary and/or negligent administration and insufficiency of action; (3) failure to provide due process in administrative decision-making; and (4) inconsistency in a State’s dealings with a foreign investor.
411. Mr. Fuchs submits that the legitimate expectations element of the FET standard is the dominant element of that standard<sup>46</sup> and may arise from various sources, including contracts, treaties, domestic law and unilateral government statements. He argues that Georgia created a legitimate expectation through the establishment of various commissions and other conduct that it would compensate Mr. Fuchs for the loss of his investment.

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<sup>44</sup> UNCITRAL, Partial Award (17 March 2006) (“*Saluka*”).

<sup>45</sup> *Ibid.* at para. 293.

<sup>46</sup> The Claimants rely upon the *ad hoc* award in *Saluka v. Czech Republic*, *ibid.* at para. 302, for this proposition.

412. Mr. Fuchs summarizes his position in respect of the Respondent's alleged breach of his legitimate expectations as follows, identifying instances of both procedural and substantive unfairness [Cl. Post-Hearing Br. at paras. 88-89]:

*“The facts prove that Georgia’s handling of the compensation process was procedurally unfair. The Tribunal is familiar with the eight-year, zero-yield saga and we will not repeat it here. It is accepted that the Claimants were slow in submitting the Nexia Report, but this was due in part to SakNavtobi, whose officers did not confirm GTI’s \$1.5 million debt to Tramex until 25 May 1999 [Tab 198] Nexia proceeded swiftly to finalise the report as soon as this final necessary item had been received. Moreover, even if the Claimants had contributed in some minor way to the delay in processing their claims, that would hardly justify the long delays indisputably caused by Georgia or the fact that, when the report was submitted, no-one in the Georgian Government bothered to read it. On any view, a delay of eight years in rendering a decision on Tramex’s claims is unfair and excessive. Georgia’s belated election to assess (and ultimately dismiss) Tramex’s claims solely by reference to internal Georgian law was also procedurally unfair, because it failed to analyse the claims under the laws by which it was bound and that it had previously agreed to supply.*

*The facts also prove that the result of the compensation process was substantively unfair. When it passed Decree No. 178 and liquidated Transneft, Georgia triggered an obligation to compensate Tramex for the fair market value of its interest in GTI. The obligation arose as a matter of customary international law (a standard mirrored in Georgia’s own foreign investment statute). This was reinforced by the contractual obligations in the JVA and Deed of Concession (which had expressly incorporated customary international law’s rules on reparation for expropriation and the corresponding guarantees in Georgia’s Law on Foreign Investment). In short, the FET standard required Georgia to produce a substantive result consistent with the applicable law and the principle of pacta sunt servanda.”*

413. In respect of the second element of Mr. Fuchs’ FET claim, Mr. Fuchs submits that Georgia breached the FET standard through arbitrary conduct, administrative negligence and “*extreme insufficiency of action*”. Relying on the awards in *Metalclad Corp. v. Mexico*,<sup>47</sup> *Occidental Exploration and Production Company v. Ecuador*<sup>48</sup> and *PSEG Global Inc. et al. v. Turkey*,<sup>49</sup> Mr. Fuchs contends that the considerations identified by these tribunals “*are present, to an even greater degree*” in the present case.

<sup>47</sup> ICSID Case No. ARB(AF)/97/1, Award (30 August 2000) (“*Metalclad*”).

<sup>48</sup> LCIA Case No. UN 3467, Final Award (1 July 2004) (“*OEPC*”).

<sup>49</sup> ICSID Case No. ARB/02/5, Award (19 January 2007) (“*PSEG*”).



414. Mr. Fuchs claims that the Shevardnadze Government led him down a “*tortuous path, whose signposts all pointed to one destination: an award of compensation*”. However, under the new regime, Georgia reneged on all previous undertakings and assurances. Perhaps more importantly, in Mr. Fuchs’ view, the process by which Tramex’s claims were shuffled from one Minister to another between 1997 and 2003 falls short of the minimum level of competent administration. Throughout this process, “*official statements from the highest levels of Government were made and conveyed to the investor but never implemented. Commissions established to resolve the matter fell apart and never reached conclusions. Ministers were replaced but their responsibilities were not. Correspondence went unanswered for months, if not permanently. Two independent audits to quantify the investors’ loss were called for, performed, paid for by Tramex and their findings ignored ...*” [Fuchs Memorial at paras. 159-161]
415. With regard to the third element of his FET claim, Mr. Fuchs argues that Georgia failed to accord him due process, pointing to the procedures implemented by the Respondent, in particular with respect to the 2004 Commission, which failed to provide “*any adequate information as to how the Claimant’s claims would be assessed and failed to offer the Claimants an opportunity to see the material on which it based its decision or participate in the meetings at which it reached its conclusion.*” [Fuchs Memorial at para. 169].
416. Finally, in respect of the fourth element of his FET claim, Mr. Fuchs claims that Georgia violated its obligation not to act in a manner that is “*manifestly inconsistent, non-transparent, unreasonable ... or discriminatory*”, citing by way of example the repeated official position of SakNavtobi that: (1) compensation would soon be forthcoming; (2) it regarded the JVA as still valid and in force; (3) Tramex had fully and properly complied with all its obligations under the JVA and Deed of Concession [Fuchs Memorial at para. 165].

*b) The Respondent’s Position*

417. The Respondent submits, as a preliminary point, that the FET standard is an objective standard synonymous with customary international law and that the threshold for breach is high. In particular, the Respondent rejects the Claimants’ interpretation of *Saluka*, observing that in applying the standard in that case, the tribunal explained that something

more than mere illegality or lack of authority is required to find a treaty violation. Drawing from *Saluka*, *Genin v. Republic of Estonia*<sup>50</sup> and NAFTA arbitral authorities, the Respondent concludes that a claimant must show a measure inconsistent with customary international law to establish a breach.

418. Accordingly, in the event of an equivalence between these two standards, the Respondent takes the position that any determination as to whether there has been a breach of this obligation must be understood from the perspective of international law, and reached from a perspective of deference to domestic regulators. The Respondent further submits that none of the three elements of this obligation identified by the Claimants – the protection of legitimate expectations, the requirement for transparency, and due process – has been breached.
419. As regards the protection of legitimate expectations, the Respondent recalls the principle articulated by the *Maffezini* tribunal that claimants are not permitted to use the right to FET as a means to transform investment treaties into “*insurance policies against bad business judgments*” or to relieve investors of the business risks inherent in investment.
420. Relying on several ICSID awards, the Respondent submits that not every wish or desire of a potential investor, nor every general statement of a host state, will give rise to a legitimate expectation. Rather, the doctrine of legitimate expectations must be interpreted “*in a manner that permits host states a reasonable degree of flexibility so that they retain the ability to respond effectively to changing circumstances.*” [Counter-Memorial at paras. 440-442]. Accordingly, the Respondent contends that proper consideration must be given to the prevailing investment climate in Georgia at the time of the Claimants’ investment, which it describes as follows [*ibid.* at paras. 452-453]:

“Much like Lithuania [as described in *Parkerings-Compagniet AS v. Lithuania*], Georgia was very much a country in transition from the prior Soviet era. Mr. Kardassopoulos’ pleadings make apparent that the Claimants were well aware of the uncertainty at the time of their investment. In this constantly changing environment, Mr. Kardassopoulos could not reasonably expect a stable political environment. In passing remarks, Mr. Kardassopoulos asserts that Tramex was given “specific assurances” from Mr. Abdulshelishvili and former Prime Minister Sigua that “the lack of detailed framework would not prejudice the

<sup>50</sup> ICSID Case No. ARB/99/2, Award (25 June 2001).

*investment and that investment law would be made around the law.” As explained by Prime Minister Sigua, it would have been readily apparent to any reasonable investor (especially a sophisticated one apparently capable of insisting upon certain commercial terms as indicated by Mr. Fuchs in his statement), that neither former Prime Minister Sigua nor the Georgian Government could make good on such a promise. Nor would it be realistic or legitimate for an investor to assume that national law would be formed on the basis of one investor (e.g., that national law would discriminate in favour of one foreign investor).”*

421. The Respondent thus asserts that Mr. Fuchs’ claims to legitimate expectations are invalid, as they are based on what he subjectively wanted to receive, but not conditions or assurances that he objectively and legitimately could have expected at the time of his investment. The Respondent discounts statements by Georgian officials as to the government’s approval of the JVA as general and non-specific, submitting there could be no reasonable expectation that the agreements with SakNavtobi or Transneft would bind the executive.
422. In regard to the stated expectation surrounding the compensation process, the Respondent contends, on the basis of the evidence provided by various former ministers, that the Georgian Government never admitted liability during the compensation commission process. Moreover, relying on the Preliminary Note prepared by Paisner & Co., the Respondent contends that such a proposition is not credible as the Paisner advice makes clear that, as early as September 1995, the Claimants were aware that it was likely that Georgia would claim breach of contract once it learned the “*true facts concerning Tramex’s lack of performance*” [Am. Rejoinder. at para. 344; Hearing Bundle, Tab 142].
423. The Respondent also contends in regard to Mr. Fuchs’ claim to expectations concerning the timing of a decision by the compensation commission that Tramex had failed to respond to the commission’s request for evidence of its expenses, despite repeated requests. According to the Respondent, when Tramex produced the Nexia report, Dr. Tevzadze found the amount claimed to be far in excess of his understanding of the amount that Tramex had spent in connection with the joint venture. The Respondent takes the position that Mr. Fuchs’ claim fails because he has not demonstrated “*a single promise or an expectation that Georgia created or reinforced through its own actions, on which he reasonably relied to then assert his right to recover*” [Counter-Memorial at para. 489; Resp. Post-Hearing Br. at para. 66].

424. In respect of the amount of compensation that Mr. Fuchs' could legitimately have expected to receive, the Respondent submits that Mr. Fuchs' claim is inconsistent with his admission that "*the precise amount of compensation was never agreed upon*" [Fuchs III, at para. 3.4]. Moreover, the Respondent takes the position that by entering into the compensation process without specifying the criteria for compensation, the Claimants accepted the risk of not being able to reach agreement on terms that were acceptable to them -- on the face of Order No. 84, "*it is evident that there was nothing certain about whether reimbursement would be forthcoming*" [Resp. Post-Hearing Br. at para. 63].
425. In any event, the Respondent submits that all of the alleged assurances concerning compensation were made years after the investments were made, and therefore the Claimants did not make any investment in Georgia in reliance on such alleged assurances and compensation.
426. In respect of Mr. Fuchs' transparency, consistency and good faith arguments, the Respondent submits that irrespective of whether the Tribunal adopts a narrow or broad definition of transparency, the Respondent has not breached this obligation. In the Respondent's view, the Claimants have no basis for asserting that the Georgian Government was not transparent because it did not permit the Claimants to participate in their own deliberations as to whether it should compensate the Claimants.
427. The Respondent also claims that no due process was owed to the Claimants in the context of the settlement procedures established by Georgia, arguing that it would be novel and unprecedented if due process rights attached to settlement discussions merely because they were held with a sovereign. In the event that any due process rights were owed to the Claimants, the Respondent submits that there is nothing about the compensation process that "*shocks or surprises in a manner that would lead one to question the propriety of the process.*" All the Georgian Government agreed to do, according to the Respondent, was to review Tramex's claims; and, to the extent that any due process duties attached to that review, they were satisfied.

c) *The Tribunal's Determination*

428. Article 2(2) of the Georgia / Israel BIT requires that “[i]nvestments made by investors of each Contracting Party shall be accorded fair and equitable treatment”. The Parties dispute what precisely is required by “fair and equitable treatment”. The Respondent claims that this standard is synonymous with the customary international law standard. The Claimants contend that the FET standard is not synonymous with the customary international law “minimum standard”, but rather may be breached by conduct of a less egregious nature.
429. The Tribunal is required to interpret and apply the treaty in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their proper context, and in light of the treaty’s object and purpose, consistent with Article 31(1) of the *Vienna Convention of the Law Treaties*.
430. Several tribunals have attempted to parse the meaning of “fair and equitable”, producing a catalogue of alternative dictionary meanings, including “just”, “even-handed”, “unbiased” and “legitimate”.<sup>51</sup> The *Saluka* tribunal added to this catalogue the statement by the NAFTA tribunal in *S.D. Myers*, to the effect that an infringement of the standard requires “*treatment in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective*”<sup>52</sup>, concluding that this is likely as close to the “ordinary meaning” of fair and equitable as one may get.<sup>53</sup>
431. Turning to the context of Article 2(2) of the Georgia / Israel BIT, the Tribunal notes the following provision which immediately precedes the FET clause: “Each Contracting Party shall, in its territory, encourage and create favourable conditions for investments by investors of the other Contracting Party and, subject to its right to exercise the powers conferred by its laws, shall admit such investments” (emphasis added).

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<sup>51</sup> See e.g., *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004), at para. 113 (“*MTD Equity*”); *Siemens A.G. v. The Argentina Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007), at para. 390 (“*Siemens*”).

<sup>52</sup> UNCITRAL (NAFTA), Partial Award (13 November 2000), at para. 263 (“*S.D. Myers I*”).

<sup>53</sup> *Saluka*, at para. 297.

432. The Treaty's preamble sets out its object and purpose as follows:

*"The Government of the State of Israel and the Government of the Republic of Georgia (referred to hereinafter as the "Contracting Parties")*

*DESIRING to intensify economic cooperation to the mutual benefit of both countries,*

*INTENDING to create favorable conditions for greater investments by investors of either Contracting Party in the territory of the other Contracting Party, and,*

*RECOGNIZING that the promotion and reciprocal protection of investments on the basis of the present Agreement will be conducive to the stimulation of individual business initiative and will increase prosperity in both states."*

433. The standard of FET in Article 2(2) must therefore be understood in the context of this aim of encouraging the inflow and retention of foreign investment. As the *Saluka* tribunal explained, such provisions form the basis for an investor's decision to invest—or not—in a particular territory:

*"An investor's decision to make an investment is based on an assessment of the state of the law and the totality of the business environment at the time of the investment as well as on the investor's expectation that the conduct of the host State subsequent to the investment will be fair and equitable."*<sup>54</sup>

434. The Tribunal takes note of the Parties' respective positions as regards the legitimate expectations element of Mr. Fuchs' claim, which appears to form the gravamen of his claim. In particular, the Respondent contends that Mr. Fuchs' FET claim, centered as it is on legitimate expectations, fails because it does not conform to the requirement articulated by the tribunal in *LG&E Energy Corp et al., v. Argentine Republic*<sup>55</sup> that any expectations must be based on conditions offered by or prevailing in the host State at the time the original investment is made.

435. The relevant discussion of legitimate expectations in *LG&E* on which the Respondent relies is contained in the following passage:

*"It can be said that the investor's fair expectations have the following characteristics: they are based on the conditions offered by the host State at the time of the investment; they may not be established unilaterally by one of the*

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<sup>54</sup> *Ibid.* at para. 301.

<sup>55</sup> ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006) ("*LG&E*").

*parties; they must exist and be enforceable by law; in the event of infringement by the host State, a duty to compensate the investor for damages arises except for those caused in the event of state of necessity; however, the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regular patterns.”*<sup>56</sup>

436. The purported assurances by Georgian government officials that Mr. Fuchs would be compensated for his losses were made many years after his initial investment and were not intended to induce reliance, and the Respondent accordingly submits there can be no breach on this ground.
437. The Claimants, rather than seeking to distinguish *LG&E*, emphasize that, just as in *LG&E*, the assurances of compensation in this case were designed precisely to modify the Claimants' behaviour, and they did, in fact, take the step of foregoing private law claims in reliance on those assurances. The Claimants also rely on the award in *Pey Casado y Fundacion Presidente de Allende v. Chile*<sup>57</sup> where a similar compensation process, initiated years after the initial investment, was held to create legitimate expectations.
438. The Tribunal finds the following passage in *Saluka* to be particularly helpful in understanding the potential sources of expectations, and the time at which they arise for the purpose of asserting the breach of a treaty standard:

*“A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies bona fide by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination. [...]”*

439. In the present case, although the specific assurances of compensation alleged to have been given to Mr. Fuchs came years after his initial investment in Georgia, the Tribunal considers the Respondent's interpretation of the legitimate expectations element of the FET standard to presuppose limitations upon the notion of fair and equitable treatment that are not established as a matter of law and that are inconsistent with the terms of the BIT read in their proper context.

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<sup>56</sup> *Ibid.* at para. 130.

<sup>57</sup> ICSID Case No. ARB/98/2, Award (8 May 2008) (“*Pey Casado*”).

440. As the tribunal in *Técnicas Medioambientales Tecmed SA v. United Mexican States*<sup>58</sup> explained, the obligation to provide FET consists of providing “*treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.*”<sup>59</sup> Similarly, the tribunal in *Sempra Energy International v. Argentina Republic*<sup>60</sup> determined that the measures in question had “*substantially changed the legal and business framework under which the investment was decided and implemented. Where there was business certainty and stability, there is now the opposite.*”<sup>61</sup>
441. Applied to the present case, the fact that it was after the investment was made that specific assurances of compensation were given, which assurances gave rise to a specific expectation of compensation, does not preclude Mr. Fuchs from holding throughout the term of his investment the legitimate expectation that Georgia would conduct itself vis-à-vis his investment in a manner that was reasonably justifiable and did not manifestly violate basic requirements of consistency, transparency, even-handedness and non-discrimination. This includes, in the view of the Tribunal, implementing a compensation process following the expropriation of GTI’s rights that is both procedurally and substantively fair.
442. Although Mr. Fuchs advances a claim based on the standards of treatment set out in the Georgia / Israel BIT (as opposed to its expropriation provision), Article 12 of the JVA and Article 21 of the Deed of Concession (the stabilization clauses) provided assurances in principle to both Claimants that neither GTI’s property nor its rights would be expropriated or confiscated by the State and, in such event, reimbursement would be forthcoming not only for the amounts invested but potentially also for loss of profits.
443. The compensation process appears to have initially begun in the spirit of reaching an amicable settlement consistent with what Mr. Fuchs may reasonably have expected, President Shevardnadze having ordered the formation of a commission to find a “*decision*

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<sup>58</sup> ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) (“*Tecmed*”).

<sup>59</sup> *Ibid.* at para. 154.

<sup>60</sup> ICSID Case No. ARB/02/16, Award (28 September 2007) (“*Sempra*”).

<sup>61</sup> *Ibid.* at para. 303; *LG&E*, at paras. 124-25.



*acceptable for all the parties*” [Hearing Bundle, Tab 17]. Lamentably, despite this initial instruction, the spirit of settlement appears to have diminished over time as lengthy delays, refusals by various government officials to address the matter, and internal disputes over who carried responsibility for the matter combined to result in an overall obfuscation of the compensation process and disregard for the duty to provide compensation.

444. The original draft Order prepared in response to President’s Shevardnadze’s instruction contemplated that an auditing firm would be hired to conduct an audit of the “*investments carried out by company Tramex International in Georgia, its rights, applied costs and compensation volume of future losses.*” [Hearing Bundle, Tab 22]. Order No. 84, by contrast, provided simply that the commission would review Tramex’s expenses in Georgia and “*determine a possible reimbursement of such expenses.*” [Hearing Bundle, Tab 24]. The oral evidence of Dr. Tevzadze clearly indicates that Mr. Chanturia, the President of GIOC, to whom GTI’s rights were given, was unhappy with the proposition of compensating Tramex for anything, let alone compensating Tramex for the full value of its rights, and that he was responsible for the change reflected in the final Order [see Tr. D8:45:5-23]. This is confirmed by the written evidence of Mr. Gur, who also states that Mr. Chanturia was entrusted with the “negotiation details” following the adoption of Decree No. 178 [Gur I, para. 8.7], and a contemporaneous document prepared by Mr. Chanturia himself [Hearing Bundle, Tab 165].
445. The Tribunal finds the following summary of the evidence concerning assurances of compensation given by the Georgian Government to various of the Claimants’ witnesses, whose testimony in this regard was not challenged by the Respondent, to be consistent with the Tribunal’s own analysis of the record [Cl. Post-Hearing Br. at fn. 153]:

*“[] Mr. Gur’s uncontradicted testimony establishes that President Shevardnadze assured him in November 1995 and mid-1996 that the Claimants would be treated in the most civilised manner, and would receive either a replacement interest in GIOC or else compensation equivalent to the full value of their interest in GTI. [Gur I paras. 8.4-8.7, Gur II para. 1.5, and Gur IV paras. 5.1-5.6] Whilst Georgia suggested (based solely on the wording of Order No. 84) that Georgia offered only to reimburse expenses, it is notable that Georgia made no attempt to challenge the direct evidence of the Claimants’ witnesses who received assurances of full compensation. For example, as well as electing not to call Mr Gur for cross-examination, Georgia also failed to cross-examine Mr.*

*Nanikashvili on his evidence dealing with the compensation process, including his testimony that Professor Tevzadze, Mr. Basilia, Mr. Tsereteli and Mr. Zubitashvili repeatedly assured him that full compensation would be paid to Tramex for its losses. [Nanikashvili II paras. 2.10-2.17; Nanikashvili III para. 5.7] Similarly, Georgia did not cross-examine Mr. Batkin, whose uncontradicted testimony establishes that Mr. Mirtskhulava and other Government officials committed on 19 May 2003 to provide full compensation: a commitment recorded in Mr. Batkin's letter of 2 June 2003. [Tab 234]"*

[Emphasis added.]

446. The process which ultimately unfolded following constitution of the compensation commission in 1997 can only be described as non-transparent, arbitrary and unfair. The relevant question is not whether the Georgian Government had an obligation to include the Claimants in their deliberations. Rather, the record shows that the Claimants did substantially participate in the compensation process, both formally when the 1997 Commission was established and informally after Mr. Fuchs was removed from its roster. Georgia was, however, obligated to act reasonably, transparently and in a non-arbitrary manner towards the Claimants. The evidence on the record demonstrates that this is not, in fact, what transpired.
447. There is moreover no defence, on the evidence presented, for the delay with which the process was carried out, even allowing for some delay on the part of the Claimants in submitting documentation of their claims. The record shows that the Claimants were repeatedly asked for documentation of their expenses in Georgia and told that a conclusion of the process would be forthcoming. While the Claimants complied with each request in an effort to settle the matter of their investment amicably, arranging for the preparation of two audit reports by reputable accounting firms, their efforts were consistently met with a circular response in which a resolution of the matter was ordered from the highest level of the Georgian Government only to be avoided or passed off by the individuals tasked with effecting such a resolution.
448. Over the course of a seven year period following the formal establishment of a compensation process, responsibility for Tramex's claim was shuffled from one government ministry to another, without any progress. An overview of this process prepared by Mr. Mirtskhulava for President Shevardnadze in 2003 exposes the process for the farce that it had become [Hearing Bundle, Tab 230]. While some relief appeared

to be on the horizon for the Claimants following Mr. Kissinger's intervention in 2003, the tide turned again as a new government was elected and yet another State commission established to consider the matter of Tramex's claims. This commission accomplished in one month what each previous commission had found itself incapable of accomplishing – the final disposition of the Tramex matter. This disposition was, however, wholly unacceptable.

449. The Tribunal finds inexcusable the categorical denial of any responsibility or obligation towards the Claimants, which came eight years after Georgia initiated the compensation process. All the more so since, throughout this period, the evidence discloses that senior members of the Georgian Government believed that the State was responsible for the Claimants' losses and that some amount of compensation was owed to them [see e.g. Hearing Bundle, Tabs 230, 232, 233, 235; Gur I, paras. 8.4-8.7; Tevzadze testimony, Tr. D8:64; Chanturia testimony, Tr. D6:150].
450. Mr. Batkins' uncontroverted evidence provides a succinct summary of the disappointment with which the Claimants received the final decision of the Respondent [Batkin I, paras. 22-24]:

*"I recall that, in October 2004, the Georgian Government established yet another State commission to examine the Tramex issue. The commission's findings were communicated though a letter sent by the First Deputy Minister of Justice, Ms. Ekaterine Guershidze, to the Skadden, Arps firms on November 15, 2004. [...] The letter was a complete turnaround from all the assurances and commitments entered into by the previous Government during the previous years. In short, the commission had apparently resolved that Georgia bore no liability to Tramex because the Joint venture and Concession had been entered into by State-owned entities, rather than by the State itself.*

*I cannot help but remark that the approach adopted by the State commission in 2004 contradicted the express acknowledgements given to me and Mr. Fuchs in Tbilisi during our meeting on May 19, 2003 and the agreement by the Georgian Government that a third party process be engaged to determine compensation. Our faith in the process was seemingly confirmed as the Government allowed the appointed auditors to proceed over the ensuing months as planned, without raising any objection. The State commission's response was also inconsistent with my clear understanding, based on the admissions made by the Georgian officials I had met, that Georgia regarded the obligation to Tramex as something which had arisen as a result of the Government's own conduct (the cancellation of GTI's rights) and not conduct by Georgian Oil.*

*I believe that the process had ultimately become a victim of the change in Government, with the assurances given by one Government simply ignored after a new Government had been elected. I remain disappointed that my efforts, which at one point seemed very close to producing an amicable settlement, have, so far, led to nothing.”*

451. Based on the totality of the evidence, the Tribunal has no hesitation in finding that the Respondent failed to afford Mr. Fuchs fair and equitable treatment as required pursuant to Article 2(2) of the Georgia / Israel BIT.
452. The Tribunal also finds, having considered the overlap in the factual and treaty matrices and, in particular, the shared essential ingredients required to establish the Claimants’ respective fair and equitable treatment claims in connection with the compensation commission process, that the Respondent failed to afford Mr. Kardassopoulos fair and equitable treatment as required pursuant to Article 2(2) of the Georgia / Greece BIT and Article 10(1) of the ECT. In view of the Claimants’ submissions on double recovery (see paragraph 242 above), this finding is made only in respect of that part of Mr. Kardassopoulos’ claim which he maintains for his share of the expenses incurred by Tramex while participating in the compensation commission process.

#### ***D. Causation***

453. Whilst the Claimants hold the burden of proving their loss in accordance with international law principles of causation, the Respondent has advanced several positive arguments in respect of causation. The Tribunal therefore considers it most efficient to reverse the order in which the Parties’ submissions are set out, understanding that this in no way alters the burden respectively held by the Parties as explained in Part V.A.2 of the Award.

##### **1. The Respondent’s Position**

454. The Respondent submits as a threshold proposition that in order to be recoverable the Claimants’ losses must have been caused by the State’s infringing conduct. In the Respondent’s submission, the Claimants have not discharged their burden of proof. Specifically, the Respondent claims the Claimants have failed to demonstrate that, but for Georgia’s alleged conduct: (i) Tramex/GTI would have been able to construct and/or operate the Gachiani-Supsa Pipeline or the Future Pipelines and to derive profits

therefrom; (ii) Tramex/GTI would have been able to stand in GOGC's shoes and receive all of the transit fees that the Claimants now seek; or (iii) the Claimants would have recovered unspecified damages by pursuing claims against AIOC, SakNavtobi and Transneft through either litigation or arbitration.

455. Thus, the Respondent argues that the Claimants' case falls on the question of causation and that the Tribunal's analysis of causation ought to be guided by the analysis in *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, citing the following passage from that award:

*"compensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is sufficient causal link between the actual breach of the BIT and the loss sustained.*

*Put another way, the claimant must show a link between the wrongful act and the damages, or rather must prove that the "value of its investment was diminished or eliminated ... and that the [complained of actions] were the actual and proximate cause of such diminution..."*<sup>62</sup>

456. On the basis of this formulation, the Respondent submits that the proposed transaction would not have materialized because of the Claimants' inexperience in pipeline development. The Respondent further submits that not even Brown & Root had the required skills to own and operate the pipeline, claiming that their "back of the envelope" plan was inadequate, particularly as regards its ability to secure throughput agreements.
457. In addition, the Respondent avers that the Western Route was never a certainty, nor was any accommodation of the Claimants, relying upon evidence of the geopolitical conditions in the region and AIOC's strategy for developing the early oil pipeline as a pilot for future oil exports as discussed in the witness statements of Messrs. Cook and Adams and the expert report of Mr. Effimoff.
458. The Respondent also contends that GTI could never have stepped into GOGC's shoes, and is therefore not entitled to the transit fees that AIOC has paid GOGC for the Western Route. Specifically, the Respondent argues that the Claimants have failed to prove that GTI had the right under the JVA or the Deed of Concession to enter into a leasing

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<sup>62</sup> ICSID Case No. ARB/5/22, Award (24 July 2008), at para. 779-80 ("*Biwater*").

arrangement in respect of the Gachiani-Supsa pipeline or, alternatively, that GTI could have leased its rights to AIOC under the terms that GOGC achieved.

459. Finally, the Respondent submits that neither of the Claimants suffered any damage as a result of the alleged breaches of the FET standard. Specifically, the Respondent submits that the only damage which the Claimants specifically attribute to the breach of the FET standard is the value of the private law claims that they say they could have brought against SakNavtobi, Transneft and AIOC in 1995. The Respondent avers that the Claimants' failure to bring those claims "*cannot properly be attributed to any unfair conduct on Georgia's part, but rather was their own choice, presumably based upon their own belief that they stood to gain more from seeking to negotiate with Georgia than from pursuing legal claims which suffered from so many defects and uncertainties (and where they may well have been left with significant adverse costs exposure).*" [Am. Rejoinder at para. 479].

460. The Respondent concludes that the Claimants simply made a bad investment of a high risk nature without adequate experience and with no guarantee of profit.

## 2. The Claimants' Position

461. The Claimants argue that while losses, in order to be recoverable, must have been caused by the State's infringing conduct, this issue does not present an obstacle to recovery in the present case. The Claimants quote the following passage from the NAFTA award in *S.D. Myers, Inc. v. Government of Canada*,<sup>63</sup> and argue that the same principles apply here:

*"The Inquiry in this case is more akin to ascertaining damages for a tort or delict. The damages recoverable are those that will put the innocent party into the position it would have been in had the interim measure not been passed. The focus is on causation, not foreseeability in the sense used in the law of contract. In the contract law, foreseeability may limit the range of recoverability. That is not the case in law of tort or delict. Remoteness is the key.*

*Similarly, a debate as to whether damages are direct or indirect is not appropriate. If they were caused by the event, engage Chapter 11 and are not too*

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<sup>63</sup> UNCITRAL (NAFTA), Second Partial Award (21 October 2002) ("*S.D. Myers II*").

*remote, there is nothing in the language of Article 1139 that limits their recoverability.”*<sup>64</sup>

462. The Claimants advance four propositions to rebut the Respondent’s causation arguments: (1) Georgia was a preferred route for the early oil and main export pipelines; (2) AIOC would have negotiated with GTI in order to access Georgia’s pipelines; (3) Brown & Root had the technical and financial capability to build and operate the Baku-Supsa pipeline; and (4) had the early oil pipeline remained with GTI, it would have been viable and probably more profitable than it was under AIOC.
463. In their Post-Hearing Brief, the Claimants characterize the Respondent’s causation theory as introducing a speculative element that is inapposite to the assessment of fair market value in treaty claims generally or in determining whether an expropriation has caused a loss. According to the Claimants, causation in expropriation claims has nothing to do with speculation about what might have happened in the future had the rights not been seized. Rather, expropriations “*by their very nature cause the loss of the rights taken.*” [Cl. Post-Hearing Br. at para. 93].
464. The Claimants distinguish the facts of the present case from those in *Biwater*, denying in any event that *Biwater* introduced a new requirement of “*speculative*” causation in cases of expropriation. According to the Claimants, the issue which dictated the result in *Biwater* was the valuation of the rights, not causation. In that case, the claimant had a “*worthless business that was about to be taken away from it anyway [as it was insolvent]*” and “[u]nsurprisingly, the ICSID tribunal found that there would be no hypothetical willing buyer prepared to pay anything for the rights.” [Cl. Post-Hearing Br. at para. 96] In other words, on the valuation date, the expropriated asset had no value. Reviewing the evidence in the present arbitrations, the Claimants contend that their rights were very valuable as of the valuation date and neither the JVA nor the Deed of Concession had been terminated, which is altogether different from the rights at issue in *Biwater*.

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<sup>64</sup> *Ibid.* at paras 159-60.

### 3. The Tribunal's Determination

465. On the matter of causation, the Tribunal finds that there can be no real question that but for the Respondent's conduct, the Claimants would not have suffered the loss of their rights. Whatever contractual rights the Claimants possessed as a result of their investment in Georgia disappeared with Decree No. 178, the proverbial deathblow. The coffin was nailed shut with the letters from Ms. Gureshidze of the Ministry of Justice in November and December 2004, which stated finally that the Respondent had no liability in respect of the claims made by Tramex and that no compensation would be forthcoming. The Georgian Government's repudiation of any liability towards the Claimants was a clear breach of their rights under international law.
466. The award in *Biwater*, relied upon by the Respondent, is inapposite on the facts of the present cases. In that case, the Tribunal focused on the absence of any "factual link" between the wrongful acts and the damage suffered, finding that as of the date of expropriation, the investment had no economic value. The *Biwater* tribunal explained that,

*"[b]y the beginning of May 2005, and before the events that begin on 13 May 2005, the normal contractual termination process was underway, and in the Arbitral Tribunal's view, in all the circumstances, termination of the Lease Contract was inevitable and was going to materialise within a matter of weeks – quite apart from the events that then occurred as of 13 May 2005."*<sup>65</sup>

467. The *Biwater* tribunal called in aid Professor James Crawford's Commentary on Article 31 of the Articles on State Responsibility,<sup>66</sup> which establishes that a State is under an obligation to make full reparation for the injury caused by an internationally wrongful act. Specifically, Article 31 provides as follows:

*"Article 31. Reparation*

- 1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*
- 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."*

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<sup>65</sup> *Biwater*, at para. 791.

<sup>66</sup> *Ibid.* at para. 785.



468. The Commentary to Article 31 with respect to the establishment of a causal link between a wrongful act and damage sustained provides:

*“The allocation of injury or loss to a wrongful act is, in principle, a legal and not only a historical or causal process. Various terms are used to describe the link which must exist between the wrongful act and the injury in order for the obligation of reparation to arise. For example, reference may be made to losses “attributable to [the wrongful] act as a proximate cause”, or to damage which is “too indirect, remote, and uncertain to be appraised”, or to “any direct loss, damage including environmental damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations as a result of” the wrongful act. Thus, causality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too “remote” or “consequential” to be the subject of reparation. In some cases, the criterion of “directness” may be used, in others “foreseeability” or “proximity”. But other factors may also be relevant: for example, whether State organs deliberately caused the harm in question, or whether the harm caused was within the ambit of the rule which was breached, having regard to the purpose of that rule. In other words, the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation. In international as in national law, the question of remoteness of damage “is not a part of the law which can be satisfactorily solved by search for a single verbal formula”. The notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.<sup>67</sup>*

[Emphasis added.]

469. In this case, the failure to provide adequate compensation following adoption of Decree No. 178, which had directly and deliberately caused the loss of GTI’s rights and, at the same time, the loss of the Claimants’ entire investment in Georgia, is a clear violation of the Respondent’s duties towards the Claimants. There is no question of remoteness or foreseeability of damage here – the loss that Mr. Kardassopoulos suffered was a direct and foreseeable consequence of the process that began with the establishment of GIOG, through Decree No. 477, and culminated in the cancellation of GTI’s rights in favour of GIOG, pursuant Decree No. 178. As a matter of international law, this should have been followed by the payment of compensation, but it was not. Similarly, the loss that Mr. Fuchs sustained through breach of the FET provision in the Georgia / Israel BIT was a

<sup>67</sup> Draft Articles on Responsibility of States for Internationally Wrongful Act, with commentaries, Report adopted by U.N. General Assembly, A/56/10, in Yearbook of the International Law Commission, 2001, vol. II, Part 2, Article 31, Commentary para. 10.

direct and foreseeable consequence of the Georgian Government's conduct throughout the compensation commission process, culminating in the denial of any relief in 2004.

470. Having found that the Claimants held valid and subsisting rights in the early oil pipeline, including export rights, as of 11 November 1995, the date on which Decree No. 477 was passed creating GIOC; that these rights were taken by the Respondent on 20 February 1996 through Decree No. 178; that the Respondent was under a legal duty following that taking to compensate Mr. Kardassopoulos and the failure to fulfill that duty caused loss to Mr. Kardassopoulos; and that Mr. Fuchs was treated unfairly and inequitably, culminating in a breach of the Georgia / Israel BIT on 10 December 2004, which treatment also caused loss to Mr. Fuchs, the Tribunal will now address what compensation is due to the Claimants by the Respondent.

### *E. Quantum*

#### 1. The Effect of the Stabilization Clauses on Damages

##### *a) The Claimants' Position*

471. The Claimants submit that compensation is due to them on the scale generally applicable in international law in respect of takings of foreign property. The Claimants also submit that private parties cannot by contract vary customary international law or a formula agreed to among States in a multilateral treaty such as the ECT. It follows, in their view, that the stabilization clauses in the JVA and the Deed of Concession do not affect the measure of damages the Respondent is liable to pay for a violation of Article 13(1) of the ECT.
472. The Claimants note that they have brought their claims under treaties, not the contractual stabilization clauses. Considering the language of the contractual clauses, however, the Claimants contend that as in many other cases where internationalised stabilization clauses have been revoked (e.g. *TOPCO v. Libya*<sup>68</sup>) the clauses in issue here effectively bring in the *Chorzów Factory* standard of compensation. Moreover, as Section 12.1 of the JVA establishes that the principle therein shall not be derogated from, the Claimants contend that in construing Section 12.3 of the JVA one would have expected a very

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<sup>68</sup> Award (19 January 1977), 17 I.L.M. 3 (1978).

explicit derogation in order to “subtract” from the *Chorzów Factory* standard. In their view, the terms of Article 12 of the JVA amplify and not cap a damages award.

473. As an alternative position, the Claimants submit that the stabilization clauses would not, in any event, dictate any different award. Both Section 12.1 of the JVA and Section 21.1 of the Deed of Concession provide that “*the property rights of the Joint venture are protected in accordance with regulations of Georgian legislation and applicable international conventions of treaties and public international law*”. The Claimants contend that both customary international law and Georgian law require payment of at least Fair Market Value (“**FMV**”) in reparation for an expropriation.

*b) The Respondent’s Position*

474. The Respondent takes the opposing view that the stabilization clauses do, in fact, represent an agreement by the Parties to limit damages for expropriation. The effect of this interpretation is that Mr. Kardassopoulos can have no legitimate expectation to damages greater than those provided for in the JVA itself. According to the Respondent, Section 12.3 of the JVA provides, in the event of an expropriation, for full reimbursement of the Claimants’ contribution to the Authorised Fund and any amounts invested in any projects covered by the JVA. Similarly, Section 21.3 of the Deed of Concession provides that GTI is entitled to full reimbursement for any amounts expended on managing, operating or maintaining the pipelines, or carrying out improvements, additions or extensions thereto.
475. The Respondent further argues that provision for other expenses or lost profits in the arbitrator’s discretion, until reimbursement of the amount invested, reflects the Parties’ agreement that an award of profits would be permissive rather than mandatory and that, in any event, such profits would be paid for a short duration and not the entire life of the JVA or Concession.
476. Referring to the Claimants’ submission that the clauses do not cap damages, the Respondent notes that the ECT did not exist when the JVA and Concession were negotiated. As Georgia signed the ECT in 1994, well after Mr. Kardassopoulos made his investment in 1992, the Respondent contends that this *post facto* event cannot be said to

have influenced what Mr. Kardassopoulos legitimately expected to receive when making his investment in 1992.

*c) The Tribunal's Determination*

477. The Tribunal recalls that both the JVA and the Deed of Concession contain stabilization clauses which contemplate a situation in which the Claimants' investment is, either in whole or in part, expropriated or nationalized by Georgia. In particular, Section 12.3 of the JVA provides:

*"12.3 Any purported attempted or alleged act or event of expropriation, confiscation or nationalization of the Joint Venture, its property or its rights shall be null and void, and shall forthwith entitle the Foreign Partner to full reimbursement for the Foreign Partner's contribution to the Authorized Fund and any amounts invested by the Foreign Partner in any Projects, bearing interest on the free market value of such investment, whichever is higher and until such reimbursement in full shall forthwith entitle the Foreign Partner 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 rights of a property of the Joint Venture.*

*The Partners hereby stipulate that the rate of the rental, users fee or royalties to be awarded shall be in the rate of at least fifty percent of the revenue of the Joint Venture. The arbitrator may also award any additional amounts as reimbursement of expenses or in respect of loss of profits."*

478. Similarly, Section 21.3 of the Deed of Concession provides as follows:

*"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."*

479. The Tribunal addressed the Parties' arguments concerning the Claimants' legitimate expectations of compensation for the taking of their rights based on Article 12 of the JVA

and Article 21 of the Deed of Concession in its discussion of liability (see Part V.C.4 above). Therefore, in this part the Tribunal considers only the issue of whether the stabilization clauses constitute an agreement to limit the amount of damages recoverable in these arbitrations or otherwise impose a ceiling of compensation beyond which the Claimants could not have legitimately expected to recover in the event of an expropriation.

480. The Tribunal recalls that the Claimants' claims are treaty-based. Therefore the relevant provisions for the purpose of both liability and quantum are contained in the treaties and, more broadly, international law. Whilst the JVA and Deed of Concession are relevant to the factual matrix which underpins those claims, the Tribunal has not been constituted under the provisions of the JVA nor the Deed of Concession to consider the Parties' contractual dispute. Article 12 of the JVA and Article 21 of the Deed do not, therefore, as such, govern the legal framework within which the Tribunal must consider the compensation owing to the Claimants for breach of the ECT and the BITs.
481. This finding is without prejudice to a host State and an investor's ability to contractually limit the compensation which may be owed following an expropriation where a treaty is also in play. Indeed, the Tribunal is loathe to accept the categorical denial of such an arrangement urged by the Claimants as a matter of law. The Claimants themselves appeared to soften their position on this issue during the Hearing [Tr. D12:71-75]:

*“PROFESSOR LOWE: I understand the difference between the contract and the treaty claim. Is it your position that an investor has the legal capacity to agree upon an approach to damages that might be claimed in a treaty claim, and to do so by contract?”*

*MR NELSON: An investor can enter into a concession agreement with a government. It can do a number of things. I think, and I'll want to caveat, I'm not sure whether there's any case law on this, off the cuff, I think if you had investors and governments who saw a treaty in front of them and clearly agreed upon a liquidated damages clause, or a cap on damages, there might be an argument that if you stipulated, in effect, that for the ECT -- I'm going into Turkmenistan, I know the ECT applies, but we'll stipulate that damages for expropriation will be liquidated in this -- that's a different case. I do acknowledge that if you had foreknowledge of the treaty standard, and a clear liquidated damages provision, it would be a different case, and it could well be.*

*PROFESSOR LOWE: Why should a liquidated damages clause be possible, but a clause stipulating a general approach to the determination of quantum not be possible?*

*[...]*

*MR NELSON: In principle, if you can clearly, and there's contractual language that puts the language beyond doubt, the expectations beyond doubt, I can imagine that's possible, but our position is that that didn't happen here obviously.*

*PROFESSOR LOWE: If they had intended to do that, how would a clause having that effect have differed from this clause?*

*MR NELSON: It would say, "Notwithstanding the Energy Charter Treaty, notwithstanding article 11 of the Energy Charter Treaty, the parties hereby agree that", or it would say, "Notwithstanding the provisions of public international law", or it would say, "It is agreed that the following events shall not be deemed to be unlawful expropriation", that would at least take Chorzow off the table. You could do it in a number of very informed and explicit ways. You don't see that here."*

482. Nevertheless, even if the stabilization clauses were to be applied in this case, the Tribunal is of the opinion that the result would be the same as the application of international law principles of compensation. This is generally consistent with the conclusions reached by both quantum experts during the witness conferencing procedure.<sup>69</sup>
483. The contractual formula agreed upon contemplates the award of compensation for all amounts expended / invested 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 as well “*as additional amounts as reimbursement of expenses or in respect of loss of profits*”. Whilst under the terms of the JVA and the Deed of Concession the award of lost profits is in the discretion of the arbitrator appointed to consider the amount of compensation due upon an expropriation, the exercise of that discretion in this case would yield essentially the same result.
484. The Claimants could legitimately expect that a neutral arbitrator vested with the authority to award compensation under the JVA and Deed of Concession for the expropriation of GTI’s rights (as opposed, for example, to a confiscation that otherwise left those rights intact), would exercise his or her discretion to award compensation not only for the sums

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<sup>69</sup> See Kaczmarek, Tr. D13:174; Lagerberg, Tr. D13:176.

expended by the Claimants but also for the loss of profits from the investment, the expected value of which points to the value of the investment, as is required by international law.

485. Accordingly, the Tribunal finds that the stabilization clauses do not “cap” damages for the purposes of valuing the Claimants’ rights, nor do they establish a ceiling of compensation beyond which the Claimants could not have legitimately expected to recover in the event of an expropriation.

## 2. The Applicable Standard of Compensation for Expropriation

486. In view of the Tribunal’s findings on jurisdiction and liability (see paragraphs 241 and 408 above), the Tribunal shall in this part of the Award only consider the applicable standard of compensation for expropriation applicable under Article 13(1) of the ECT.

### *a) The Claimant’s Position*

487. Mr. Kardassopoulos submits that he is entitled to full reparation for the loss of his investment, *i.e.* compensation that wipes out all of the consequences of the illegal act or acts. In support of this position, Mr. Kardassopoulos relies upon Articles 31, 34 and 36 of the ILC’s Articles on State Responsibility, the judgment of the Permanent Court of International Justice (“**PCIJ**”) in the *Case concerning the Factory at Chorzów*<sup>70</sup> and the U.S.-Iran Claims Tribunal’s interpretation of *Chorzów Factory* in *Amoco*.
488. As a starting point, Mr. Kardassopoulos cites the following well-known passage from *Chorzów Factory*:

*“The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*

*Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of*

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<sup>70</sup> Judgment No. 13, 13 September 1928, Merits, 1928, PCIJ Ser. A, No. 17 (“*Chorzów Factory*”).

*damages for loss sustained which would not be covered by restitution in kind or payment in place of it ...*<sup>71</sup>

489. Mr. Kardassopoulos submits that in *Chorzów Factory* the PCIJ established two now widely accepted propositions: (i) there is a distinction between lawful and unlawful expropriations; and (ii) reparation for an unlawful expropriation must wipe out the consequences of the illegal act and, when awarded in monetary rather than restitutionary form, may be higher than compensation due for a lawful expropriation.
490. On a textual analysis of the ECT, Mr Kardassopoulos argues that a distinction may be made out between a lawful and an unlawful expropriation in Article 13(1) of the Treaty. In particular, Mr. Kardassopoulos contends that this provision spells out the standard applicable to “such compensation”, *i.e.* a reference to the compensation requirement. Article 13 neither expressly requires nor implies that compensation due in the event, for example, of a discriminatory expropriation should be the same as compensation due in the event of an expropriation that complies with the Treaty’s “conduct requirements”. Moreover, Mr. Kardassopoulos claims that it is for the Respondent to show that the ECT creates a *lex specialis* which supersedes the principles articulated by the PCIJ in *Chorzow Factory* – which, in Mr. Kardassopoulos’ opinion, it has not done.
491. Mr. Kardassopoulos contends that this textual conclusion is also supported by arbitral authority, such as the US-Iran Claims Tribunal award in *Amoco* and more recent decisions in the *Siemens*, *ADC* and *Vivendi v. Argentina*<sup>72</sup> arbitrations, which recognize the possibility of higher recovery where the value of the investment has increased following the taking.
492. Whilst Mr. Kardassopoulos recognizes the body of arbitral authority which has expressed an opposing view to this interpretation of the *Chorzów Factory* case, he seeks to distinguish such awards as inapposite on the grounds they either do not support the proposition that an unlawful expropriation *cannot* be compensated according to a

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<sup>71</sup> *Ibid.* at p. 47.

<sup>72</sup> ICSID Case No. ARB/97/3, Award (20 August 2007) (“*Vivendi*”).



measure of damages exceeding the treaty standard or they simply do not deal with the case of an unlawful (as opposed to a lawful) expropriation.

493. Based on the foregoing principles, Mr. Kardassopoulos claims he is entitled to damages equal to his 25% interest in the greater of: (1) the value of GTI at 10 November 1995, one day prior to the date on which Decree 477, establishing the GIOC, was passed, plus any profits that would have been earned by it between 1996 and the date of the Tribunal's award; or (2) the value of GTI's rights under the JVA and the Concession as of the date of the Tribunal's award.
494. In the alternative, even if the Tribunal determines that the alleged expropriation was lawful, Mr. Kardassopoulos claims he is nonetheless entitled to "*prompt, adequate and effective*" compensation equal to the FMV of the investment at the time immediately before the expropriation.

*b) The Respondent's Position*

495. The Respondent agrees that should the Tribunal determine Mr. Kardassopoulos' investment was lawfully expropriated, the relevant standard of compensation is "*prompt, adequate and effective compensation*" or payment equal to the FMV of Mr. Kardassopoulos' investment at the date immediately prior to the expropriation.
496. In the event the Tribunal determines the expropriation of Mr. Kardassopoulos' rights was unlawful, the Respondent submits that Mr. Kardassopoulos is entitled to full reparation in accordance with the principle established in *Chorzów Factory*, that is: the *status quo* prior to the wrongful act ought to be restored without unjustly enriching the injured party. The Respondent rejects the proposition that Mr. Kardassopoulos is entitled to higher damages in this case [Am. Rejoinder at para. 535]:

*"Nothing in Chorzów Factory can be interpreted to mean that international law requires that the valuation date be moved mechanically to the date of the award in all instances of unlawful expropriation. Rather, the above cited language from Chorzów Factory makes apparent that the inquiry is a factual one, and a decision-maker should only change the date of valuation where to do so would further the goals of restitution, including to emphasize the consequence of breach and provide remedial justice. However, where assessing the value of the investment as of the date of the award would trample rather than serve well-accepted principles of remuneration, such an approach would not, and should*

*not, be required. It is telling that the Chorzów Factory panel expressly held that a party should not be entitled to more damages than it would have been able to earn had it retained control of its investment. For example, the panel held that if an investment of fresh capital would have been required for the normal development of the undertaking, such sums should be deducted from any award of damages.”*

[Footnotes omitted.]

497. The Respondent reasons that numerous tribunals have calculated damages for an unlawful expropriation by reference to the applicable treaty standard without regard to customary international law, citing the U.S.-Iran Claims Tribunal cases in *Phillips Petroleum Co. Iran v. Iran*<sup>73</sup> and *Amoco*, as well as more recent awards in the arbitrations of *Wena Hotels, Tecmed* and *Middle East Cement Shipping and Handling Co SA v. Egypt*<sup>74</sup>. The Respondent notes that the Claimants have conceded that the question of what standard will apply to unlawful expropriations is an open issue, arguing that the approach advocated in *Phillips Petroleum* should be followed here – that is, the standard of compensation is the same whether the expropriation is lawful or unlawful.
498. The Respondent contends that the cases cited by Mr. Kardassopoulos turned on particular facts not present here, such as profitable operation of the expropriated asset both prior to and following expropriation. The Respondent likens the present facts to those in *Vivendi*, reasoning that the tribunal in that case denied recovery of the profits sought by the claimant because it had failed to establish with a sufficient degree of certainty that a profit had been made while under the claimant’s operational control and its ability to produce profits in the particular circumstances it faced. Seizing on the deterrence aims of the tribunals in the cases relied upon by Mr. Kardassopoulos, the Respondent further submits that Georgia did not seek to profit from the investment that TrameX made, therefore allowing Mr. Kardassopoulos to value the investment as of the date of the Award would not only hold no deterrent value but it would permit Mr. Kardassopoulos to realize the value of someone else’s labour, *i.e.* AIOC.

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<sup>73</sup> 21 Iran-U.S. Cl. Trib. Rep 79, Award No. 425-39-2 (Chamber Two) (29 June 1989) (“*Phillips Petroleum*”).

<sup>74</sup> ICSID Case No. ARB/99/6, Award (12 April 2002) (“*Middle East Cement*”).

499. The Respondent concludes that the Claimants seek to use customary international law inappropriately in order to recoup speculative and non-foreseeable damages, averring that customary international law does not allow the windfall that the Claimants seek. The Respondent explains that this case must be distinguished from others where an investor, whether by luck or skill, happened on a situation in which its investment would necessarily have yielded windfall profits if the expropriation had not occurred.
500. Here, the Respondent argues, the evidence shows that the Claimants' investment was a fundamentally bad one: they lacked the requisite experience, expertise and financial backing to turn their investment into a profitable one and they have not presented any evidence that, had they retained their rights, they would have been in a substantially different position than the one they were in prior to the alleged expropriation, *i.e.* in possession of a failed investment. Moreover, they have not established that absent the alleged unlawful expropriation, they would have earned or sold their rights to third-parties for the windfall amounts they now claim.

*c) The Tribunal's Determination*

501. Article 13(1) of the ECT provides that any expropriation shall be "*accompanied by the payment of prompt, adequate and effective compensation*", which compensation shall further consist of the following:

***"Article 13 Expropriation***

*[...]*

*Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date").*

*Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment."*

502. The Parties appear to agree that in the event of a lawful expropriation, the applicable standard of compensation is "*prompt, adequate and effective compensation*", which shall amount to the FMV of the investment as of the date immediately before the expropriation

became known so as to affect the value of the investment. However, consistent with the Tribunal's findings in respect of liability, we are no longer in the realm of a lawful expropriation.

503. The Parties differ in their appreciation of the appropriate standard of compensation for an unlawful expropriation, although they begin their analysis in the same place. In particular, both Parties rely on the statement of the PCIJ in *Chorzów Factory* to the effect that “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”<sup>75</sup>

504. The *Chorzów Factory* standard is reflected today in the ILC's Articles on State Responsibility, and in particular in their compensation provision, which provides as follows:

“Article 36. Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”

505. The Commentary to Article 36 confirms that this compensation is generally assessed on the basis of the FMV of the property rights lost:

“(21) The reference point for valuation purposes is the loss suffered by the claimant whose property rights have been infringed. This loss is usually assessed by reference to specific heads of damage relating to (i) compensation for capital value; (ii) compensation for loss of profits; and (iii) incidental expenses.

(22) Compensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the “fair market value” of the property lost. The method used to assess “fair market value”, however, depends on the nature of the asset concerned. Where the property in question or comparable property is freely traded on an open market, value is more readily determined. In such cases, the choice and application of asset-based valuation methods based on market data and the physical properties of the assets is relatively unproblematic, apart from evidentiary difficulties associated with long outstanding claims. Where the

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<sup>75</sup> *Chorzów Factory*, at p. 47.

*property interests in question are unique or unusual, for example, art works or other cultural property, or are not the subject of frequent or recent market transactions, the determination of value is more difficult. This may be true, for example, in respect of certain business entities in the nature of a going concern, especially if shares are not regularly traded.”*

506. The Parties part company in respect of how these principles apply to the present case. The Respondent takes the position that whether the Tribunal applies the treaty standard or the customary international law standard, these two standards present a distinction without a difference, as FMV must be assessed at the date of the expropriation and not the date of the Award, absent exceptional circumstances not present here.
507. The Claimants contend that this distinction does present a difference, because when compensation is awarded for an unlawful expropriation in monetary rather than restitutionary form it may be higher than the compensation due for a lawful expropriation, such as where the expropriated rights have increased in value since the date of the expropriation. They rely on the Iran-U.S. Claims Tribunal’s exposition of this principle in *Amoco*, which adopted the proposition articulated by the PCIJ in *Chorzów Factory*<sup>76</sup>:

*“Restitutio is well defined by the Court. It means the restitution in kind or, if that is impossible, the payment of the monetary equivalent. In both cases the principle on which it lies is the same: “that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if this act had not been committed.” Id. at 47. One essential consequence of this principle is that the compensation “is not necessarily limited to the value of the undertaking at the moment of dispossession” (plus interest of the day of payment). According to the Court, “this limitation would be admissible only if the Polish Government [the expropriating State] had had the right to expropriate, and if its wrongful act consisted merely in not having paid ... the price of what was expropriated.” Id. This last statement is of paramount importance: It means that the compensation to be paid in case of a lawful expropriation (or of a taking which lacks only the payment of a fair compensation to be lawful) is limited to the value of the undertaking at the moment of the dispossession, i.e., “the just price of what was expropriated.”*<sup>77</sup>

[Footnotes omitted.]

<sup>76</sup> The PCIJ stated that damages are “not necessarily limited to the value of the undertaking at the moment of dispossession”. *Chorzów Factory*, at p 47.

<sup>77</sup> *Amoco*, at para. 196.

508. However, the *Amoco* tribunal went on to clarify that even in case of an unlawful expropriation, “*the damage sustained is the measure of the reparation, and there is no indication that ‘punitive damages’ could be considered.*”<sup>78</sup>

509. This debate concerning the distinction between the standard of compensation applicable in the case of a lawful versus an unlawful expropriation was more recently summarized by the ICSID tribunal in *ADC*, which found that the answer lies in the terms of the applicable treaty:

“*There is general authority for the view that a BIT can be considered as a lex specialis whose provisions will prevail over rules of customary international law (see e.g. Phillips Petroleum Co. Iran v. Iran, 21 Iran-U.S. Cl. Trib. Rep. at 121). But in the present case the BIT does not stipulate any rules relating to damages payable in the case of an unlawful expropriation. The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation. This would have been possible if the BIT expressly provided for such a position, but this does not exist in the present case.*”<sup>79</sup>

510. Since the treaty in that case (the BIT between Hungary and Cyprus) did not contain any *lex specialis* rules governing the issue of compensation in the event of an unlawful expropriation, the tribunal determined that the customary international law standard prescribed in *Chorzów Factory* applied. The tribunal further determined, in the unique circumstances of the case, that because the value of the rights had appreciated considerably since the date of expropriation the *Chorzów Factory* standard required that the rights be valued as of the date of the Award.

511. This approach has since been followed by other ICSID tribunals, including the tribunal in *Siemens*, which ventured the following explanation:

“*The law applicable to the determination of compensation for a breach of such Treaty obligations is customary international law. The Treaty itself only provides for compensation for expropriation in accordance with the terms of the Treaty.*

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<sup>78</sup> *Ibid.* at para. 197.

<sup>79</sup> *ADC*, at para. 481.

*The key difference between compensation under the Draft Articles and the Factory at Chorzow case formula, and Article 4(2) of the Treaty is that under the former, compensation must take into account “all financially assessable damage” or “wipe out all the consequences of the illegal act” as opposed to compensation “equivalent to the value of the expropriated investment” under the treaty. Under customary international law Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages.”<sup>80</sup>*

512. In the present case, it is clear that restitution is no longer possible. The Tribunal must therefore determine the amount of compensation owing to Mr. Kardassopoulos.
513. As may be seen from the cases above in which a higher recovery has been permitted under the customary international law standard of compensation, there must be a factual basis on which to award such higher recovery. Any such recovery must, furthermore, measure the damage sustained and not impose punitive damages on the Respondent State.
514. In certain circumstances full reparation for an unlawful expropriation will require damages to be awarded as of the date of the arbitral Award. It may be appropriate to compensate for value gained between the date of the expropriation and the date of the award in cases where it is demonstrated that the Claimants would, but for the taking, have retained their investment. For the reasons set out herein, however, this is not the case on the facts of these arbitrations.
515. The evidence on the record indicates that the Claimants would likely have sold their shares in GTI to AIOC (or a member of AIOC) in 1995 had Georgia affirmed the Claimants’ rights. The Claimants appear to concede this proposition, although they argue that it is a conservative scenario [see Kaczmarek I, para. 127]. This is precisely the outcome they sought, however, in entering into negotiations with Velt Energie and United Perlite. While the Claimants may have preferred to remain in the game in some capacity, the record confirms that selling their shares in the GTI project would have been an entirely acceptable outcome, assuming a fair price for those shares could be obtained.

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<sup>80</sup> *Siemens*, at paras. 349 and 352. This approach was also adopted by the tribunal in *Vivendi*. See *Vivendi*, at paras. 8.2.2-8.2.5.

516. Moreover, regardless of the Claimants' preference to retain some interest in the Gachiani-Supsa pipeline, the oral evidence of Mr. Adams suggests that AIOC's shareholders would have viewed their presence as an irritant, being a very small company on the scale of the consortium and not having any technical expertise, and sought to negotiate the purchase of their shares in the pipeline rather than work together [Tr. D9:97-101]. This is confirmed by both industry experts, Mr. Beazley [Tr. D10:71] and Mr. Effimoff [Tr. D10:127], who expressed the view that had the Georgian Government confirmed GTI's rights AIOC would likely have sought to negotiate with TrameX and purchase its interest in GTI outright.
517. The Tribunal therefore finds that the appropriate standard of compensation from which to approach the calculation of the damage sustained by Mr. Kardassopoulos is the FMV of the early oil rights (including export rights) as of 10 November 1995. Whilst this pre-dates the expropriation effected by Decree No. 178, the Tribunal considers that the circumstances of this case require it to value Mr. Kardassopoulos' investment as of the day before passage of Decree No. 477 precisely to ensure full reparation and to avoid any diminution of value attributable to the State's conduct leading up to the expropriation. This compensation is, in effect, the amount that Mr. Kardassopoulos should have been paid as a result of the compensation process which the Respondent was obliged to put in place promptly after the taking of the Claimants' investment.

### 3. The Applicable Standard of Compensation for Fair and Equitable Treatment

518. In view of the Tribunal's findings on jurisdiction and liability (see paragraphs 241, 248 and 449-50), the Tribunal shall in this part of the Award only consider the applicable standard of compensation for breach of the FET provision under the Georgia / Israel BIT.

#### *a) The Claimant's Position*

519. Mr. Fuchs submits that because no compensation standard is prescribed for a breach of the FET obligation in the Georgia / Israel BIT, customary international law should apply. Mr. Fuchs therefore asserts that damages should restore the investor to the situation that would have resulted if the Respondent's legal, contractual and/or unilateral commitments had been honoured.



520. Mr. Fuchs relies upon Article 30(1) of the *Draft Convention on State Responsibility* (1961), which provides that:

*“If ... in any civil proceeding an alien has been denied access to a tribunal or an administrative authority or an adverse decision or judgment has been rendered against an alien or an inadequate recovery obtained by an alien, damages shall include compensation for the amount wrongfully assessed against or denied such alien and any other losses resulting directly from such proceeding or denial of access.”*

521. Mr. Fuchs takes the position that, in quantifying damage in an FET claim, a tribunal must quantify the value of the protected expectation that was defeated by the unfair and inequitable conduct. In support of this proposition Mr. Fuchs highlights the award in *Victor Pey Casado et al. v. Chile*<sup>81</sup>, in which the tribunal awarded damages for breach of the FET provision in the Spain-Chile BIT (which contained no compensation standard in connection with this provision) equivalent to what a fair State compensation process would have awarded, as well as in *OEPC v. Ecuador*,<sup>82</sup> where the tribunal awarded damages equal to the amount that should have been reimbursed under the applicable VAT laws plus interest.
522. Mr. Fuchs recalls that Section 12.1 of the JVA and Section 21.1 of the Deed of Concession stipulate that *“the property rights of the Joint Venture are protected in accordance with regulations of Georgian legislation and applicable international conventions of treaties and publication international law”*. In Mr. Fuchs’ view, this represents an express commitment by Georgia not to expropriate and, in so doing, incorporates investment protections under Georgian and customary international law which require payment at least of FMV,<sup>83</sup> thereby placing the present case squarely alongside *Pey Casado* and *OEPC*, among other similar authorities.

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<sup>81</sup> ICSID Case No. ARB/98/2, Award (8 May 2008) (“*Pey Casado*”).

<sup>82</sup> *OEPC* at paras. 198ff.

<sup>83</sup> The Claimants note that the *Law of the Republic of Georgia on Foreign Investments* (30 June 1995) mirrors customary international law in its Article 11.4, which provides that “The compensation that is paid to a foreign investor shall be adequate to the real value of the seized investment at the moment of the requisition.” [Cl. Post-Hearing Br. at para. 124, n. 222.]

523. Mr. Fuchs submits that, applying these principles, there are two potential approaches the Tribunal may take in valuing Mr. Fuchs' FET claim. The first approach would involve awarding him the same sum as would be awarded to Mr. Kardassopoulos for the early oil rights in 1995, plus interest. Mr. Fuchs takes the position that this is the best approach.
524. The second approach would involve awarding Mr. Fuchs a sum equivalent to half of all of Tramex's expenses associated with the GTI project, in the period before and after the expropriation, based on either the Nexia or the Deloitte report, plus interest from the date of the report.
525. Mr. Fuchs contends that the Respondent's approach to the question of expenses is "totally wrong", explaining that he is entitled to have back everything he has spent in Georgia as part of the whole GTI project, including the value of his time put in to the project and post-expropriation expenses, *i.e.* the cost of the various audit reports and legal advice.

*b) The Respondent's Position*

526. The Respondent submits that, to the extent the same damages are claimed in respect of Mr. Fuchs' FET claim as the expropriation claim, it is inappropriate "*to have the same damages when the damage did not relate to the asset itself*" [Tr. D11:63]. In the Respondent's view, the standard applicable to Mr. Fuchs' FET claim is that prescribed by customary international law, namely to restore him to the position he would have been in had there been no treaty breach.
527. The Respondent takes the position that there is no evidence to support the proposition that Mr. Fuchs had a legitimate expectation of receiving compensation for the FMV of his investment, pointing to the legal advice the Claimants received in September 1995 indicating that they were potentially in breach of contract, the modest amount of construction work done by 1995 and the limited remit of the compensation commission established in 1997. Even applying a hypothetical willing buyer-willing seller analysis, the Respondent explains that the question is what would a reasonable buyer do if, after doing due diligence, the reasonable buyer believed that the Claimants were in breach and therefore had no rights.

528. The Respondent argues, for greater certainty, that to the extent Mr. Fuchs' request for damages equivalent to FMV derives from Georgia's alleged promise to provide the Claimants with an equity interest in GIOC, this claim must fail because there is no reliable evidence that Tramex was invited to participate in GIOC.
529. There is also no basis, in the Respondent's view, for Mr. Fuchs to expect that the terms of the JVA or Deed of Concession would apply to the compensation commission's work. But even if the JVA or Deed of Concession did apply, the Respondent takes the position that these instruments only provide for the reimbursement of expenses.
530. However, the Respondent also rejects the proposition that Mr. Fuchs could have had a legitimate expectation that even his expenses would be reimbursed, submitting that when considered in proper context, *i.e.* in the context of a threat of legal action against SakNavtobi, contemporaneous documentation, including President Shevardnadze's handwritten note in 1996 to "*find a decision acceptable to all parties*" and Order No. 84 establishing the compensation commission, brings even this proposition into question.
531. To the extent Mr. Fuchs had any legitimate expectation of compensation, the Respondent takes the view that he could at the very most only have expected that Georgia would compensate them for reasonable, proven expenses.

*c) The Tribunal's Determination*

532. The Georgia / Israel BIT is silent on the standard of compensation applicable to breach of Article 2(2). However, Article 36 of the ILC Articles on State Responsibility, reproduced above, provides that a "*state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution*" and that such compensation "*shall cover any financially assessable damage, including loss of profits insofar as it is established.*"
533. The effect of this provision, in the absence of specific treaty language to the contrary, was described by the ICSID tribunal in *Vivendi* as follows:

"Based on these principles, and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages

awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action.

*Of course, the level of damages necessary to compensate for a breach of the fair and equitable treatment standard could be different from a case where the same government expropriates the foreign investment. The difference will generally turn on whether the investment has merely been impaired or destroyed. Here, however, we are not faced with a need to so differentiate, given our earlier finding that the same measures emasculated the Concession Agreement, rendering it valueless. Put differently, the breaches of Articles 3 and 5 caused more or less equivalent harm.”<sup>84</sup>*

[Emphasis added.]

534. This approach has been endorsed by ICSID arbitral tribunals and other investment treaty arbitration tribunals,<sup>85</sup> and the Tribunal finds no reason to depart from it in the present case. There is no basis, in principle, on which to differentiate between the damage caused as between Mr. Kardassopoulos and Mr. Fuchs given that, in each case, their investment was irretrievably and entirely lost.
535. The Tribunal rejects the Respondent's submission that Mr. Fuchs could not even have legitimately expected to be reimbursed his expenses through the compensation commission process or could only have expected that reimbursement would be limited to his “proven” expenses, as seen by the Respondent. This argument is belied by the documentary evidence, as well as witness testimony.
536. The Tribunal also rejects the contention that Mr. Fuchs could not have held a legitimate expectation that he would be reimbursed more than just his share of the expenses following the expropriation of GTI's rights. The Tribunal is persuaded in this regard by Mr. Fuchs' submissions in connection with the JVA and the Deed of Concession and, in particular, the effect of their respective invocation of Georgian law and public international law.

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<sup>84</sup> *Vivendi*, at paras. 8.2.7-8.2.8.

<sup>85</sup> See e.g. *S.D. Myers, Inc. v. Canada*, UNCITRAL (NAFTA), Partial Award (13 November 2000), at paras. 311-315; *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (30 August 2000), at para. 122; *MTD*, at para. 238; *Enron*, at paras. 359-61.

537. Accordingly, the Tribunal finds that the applicable standard of compensation to Mr. Fuchs' FET claim is the FMV of his investment as of 10 November 1995, the same measurement as applied in respect of Mr. Kardassopoulos' expropriation claim.

#### 4. The Appropriate Methodology for Valuing the Claimants' Claims

538. In light of the Tribunal's findings above in respect of the scope of the Claimants' rights (see paragraphs 317 to 349 above), only those quantum submissions related to the early oil rights (including export rights) shall be considered in this part of the Award.

##### *a) The Claimants' Position*

539. The Claimants submit that FMV is the price at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts. Furthermore, the Claimants take the position that the Discounted Cash Flow ("DCF") method or income approach, complemented by the market approach, should be used to arrive at the FMV of the Claimants' 50% interest in GTI's rights<sup>86</sup>.

##### (1) The Market/Income Approaches

540. The Claimants assert that past arm's-length transactions, whether executed or only contemplated, represent strong evidence of an asset's FMV<sup>87</sup> and that the later operation of the early oil pipeline by GTI's successor, GIOC, constitutes ample proof of such value in this case.

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<sup>86</sup> While the Claimants presented an alternative valuation intended to quantify the FMV of GIOC as of November 1999, this analysis is based on the transit fees GIOC expected to collect from both the Baku-Supsa (early oil) pipeline and the BTC (Main Export) pipeline. This analysis is also predicated on the factual circumstance that on 15 November 1999 Georgia informed the Claimants that they would not receive any compensation or a stake in GIOC as the Claimants had expected. The Tribunal is not persuaded in any event that this alternative valuation is appropriate in valuing the FMV of the Claimants' interest in GTI.

<sup>87</sup> See e.g., Sergey Ripinsky and Kevin Williams, *Damages in International Investment Law*, at p. 216; Mark Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence*, at pp. 18-19. See also *Enron*, at para. 387, and *CME Czech Republic BV v. Czech Republic*, UNCITRAL, Award (14 March 2003), at paras. 514-62, where those tribunals had recourse to arms-length transactions in respect of the asset in issue within proximity of the valuation date.

541. Proceeding under the premise that the Georgian Government would have acknowledged the rights and property interest GTI possessed, Mr. Kaczmarek, the Claimants' quantum expert, established three distinct contemporaneous valuations of the Claimants' 50% interest in GTI. The Claimants accordingly take the position that the Tribunal's task of valuing their investment is assisted in this case by the fact that the market for GTI's rights in 1995 was not a hypothetical one but rather one of actual buyers and sellers, relying upon the following three independent sources of valuation to the FMV of their investment: (1) the leasing transaction between GIOC and AIOC; (2) the Brown & Root transaction; and (3) the Velt Industries and United Perlite offer.
542. These three transactions are each weighted in order to arrive at a proxy for the FMV of the Claimants' 50% stake in GTI. Mr. Kaczmarek originally estimated the total weighted average of these comparables to be US\$31.3 million [Kaczmarek I, para. 137, table 10]:

*Fair Market Value of a 50 Percent Interest in GTI as at 10 November 1995*

Valuation Approach	Weight	Valuation	Weighted Valuation
Lease of Gachiani-Supsa Assets & Rights to AIOC	55%	\$32,543,219	\$17,898,770
Brown & Root Analysis of Gachiani-Supsa	35%	\$30,281,837	\$10,596,643
Offer from Velt Energie	10%	\$28,100,000	\$2,810,000
<b>Total</b>	<b>100%</b>		<b>\$31,307,413</b>

543. Following an adjustment for the deduction of security costs related to operation of the Gachiani-Supsa pipeline, the Claimants reduced this weighted average to US \$30.2 million [Cl. Post-Hearing Br. at para. 117, n. 202]. The Claimants reject any further adjustment of this sum, such as to take account of taxes, project or country risk or other risks, although Mr. Kaczmarek has provided adjusted figures in the event the Tribunal determines a further deduction for taxes is appropriate.

*The GIOC-AIOC Leasing Transaction*

544. The first comparable identified by the Claimants is based on GIOC's leasing of the rights and assets associated with the Gachiani-Supsa pipeline to AIOC. These were, according to the Claimants, the same rights owned by GTI and taken by Decree No. 178. Mr.

Kaczmarek assessed the leasing transaction as a low-risk, low-cost transaction for GIOC, explaining his methodology in respect of this comparable as follows [Kaczmarek I, paras. 125-128]:

*“ [...] GIOC would collect transit fees for the oil AIOC would pump through the pipeline without incurring any construction, operating, or maintenance costs. All of these costs would [be] borne by AIOC. However, the cost of this low-risk, low-cost transaction was foregoing the higher profits that GTI could have earned by operating the pipeline. According to our extension of Brown & Root’s forecasts, GTI could have earned net profits of US\$ 1.12 per barrel in tariffs between 2002 and 2023. Thus, Georgia’s 50 percent stake in GTI would have yielded US\$ 0.56 per barrel or more than three times the transit fee GIOC negotiated with AIOC.*

*Had Georgia supported GTI in negotiations with AIOC rather than GIOC (as Counsel has asked us to assume), it is reasonable to conclude that GTI could have negotiated the same (or more favourable) deal than that which GIOC negotiated with AIOC for the Gachiani-Supsa pipeline assets and rights. Accordingly, the value GIOC received by leasing the Gachiani-Supsa pipeline to AIOC could have accrued to the benefit of GTI.*

*It is important to note that Claimants could have leased the Gachiani-Supsa pipeline assets and rights to AIOC, just as GIOC did, without selling their shares in GTI. Hence, Claimants could have retained their rights to construct and operate all future pipelines in Georgia plus all of the additional rights granted under the Joint Venture Agreement. However, in valuing Claimants’ GTI shares utilizing the GIOC/AIOC transaction, we have conservatively assumed Claimants would have transferred their GTI shares to AIOC for the same remuneration GIOC received for leasing the assets and rights to AIOC. This assumption is consistent with our view that a reasonably informed buyer would value the GTI shares based upon the most certain and realistic projects GTI was likely to undertake. It is also not unreasonable to believe that GIOC and AIOC had agreed to cooperate on future pipeline projects as well. If GIOC had promised cooperation to AIOC on potential future pipelines, the GIOC/AIOC deal would more closely resemble a sale of GTI shares with GIOC receiving potential future upside.*

*Claimants, as 50 percent owners of GTI, would have been entitled to half of the transit fees AIOC agreed to pay GIOC. Thus, the fair market value of Claimants’ investment in GTI as of the Valuation Date can be measured by valuing half of the expected transit fees under the terms of the agreement between AIOC and GIOC. As such, we constructed a discounted cash flow valuation model based on the pipeline tariff fees that GTI was expected to receive from AIOC. Our discounted cash flow valuation covers the period 1996 to 2023, which is the year GTI’s rights under the 30-year concession would have expired. Our estimate of the transit payments was calculated using two key inputs: the per-barrel pipeline transit rate and the number of barrels expected to be shipped through the Western Route.”*

[Footnotes omitted. Emphasis added.]

545. Mr. Kaczmarek estimated the per-barrel transit rate based on the PCOA between GIOC and AIOC, which set this rate at \$0.17 per barrel beginning in 1996, adjusted for inflation at 3% per year. He further estimated annual throughput at 40,000 barrels per day in 1997, increasing to 100,000 barrels per day by 2000, based on Brown & Root's estimates of throughput volume for the Gachiani-Supsa pipeline in 1995.
546. In order to determine the cash flows the Claimants would have received by selling their 50% interest in GTI to AIOC, Mr. Kaczmarek multiplied the forecasted throughput by the forecasted transit rate for each year until 2023, the year GTI's rights under the Deed of Concession would have expired. A nominal discount rate of 10% (representing a real rate of 7%) was applied to these expected future cash flows, and the result multiplied by 50% to account for the Claimants' share.
547. Mr. Kaczmarek explained that a 10% nominal discount rate, although lower than the rate applied in the Brown & Root valuation (see below), corresponds to a significantly lower risk profile associated with leasing the operations of the pipeline rather than operating it. By leasing the pipeline to AIOC, the only risk borne by the Claimants would be potential disruptions to throughput caused by lower than expected production of oil by AIOC and AIOC credit risk, *i.e.* the risk of being a lender to AIOC. Mr. Kaczmarek further explained that annual production from ACG was expected to reach 8 to 10 times the throughput level used in his valuation model, therefore the risk of lower throughput (and correspondingly lower cash flow) is minimal. The risk of lending to AIOC was also considered to be minimal given that the consortium is composed of international oil companies with significant resources. Thus, Mr. Kaczmarek estimated that the lending rate to AIOC would likely be US prime. Given the US prime rate of interest was 8.75 percent in late 1995, he considered a 10% discount rate (a spread of 1.25 percent over prime) adequate to compensate for the above throughput risks.
548. In their Post-Hearing Brief, the Claimants also pointed out that in August 1995, AIOC had modelled its projections for the Western Route on discount rates between 5% and 10% [Cl. Post Hearing Br. at para. 109, citing Hearing Bundle, Tab 307].
549. In response to several criticisms by the Respondent as to the appropriateness of relying on this transaction to estimate the value of TrameX's 50% interest in GTI's rights, the



Claimants observe that the JVA and the PCOA overlap in an important respect, namely in that GTI had the right to lease the pipelines under Article 17 of the Deed of Concession. The Claimants take the position that they do not need to prove that they could have built the pipeline to rely on the leasing scenario, but only that their rights would have been honoured.

550. The Claimants also reject criticism by Mr. Lagerberg, the Respondent's quantum expert, of the AIOC leasing transaction as misconceived [Tr. D12:78-80]:

*"Look at the reasons he gives for why he rejected the comparable for the GIOC sale -- I call it a sale loosely, obviously it's technically a lease, but it was effectively a sale -- of the rights to AIOC in March 1996. He says, 'Ah, two problems with that, this is why they're not the same. GTI was a different kind of seller to what GIOC would have been. GTI was 50 per cent commercially owned, and GIOC was 100 per cent government owned, so they had different priorities'. This is a big theme in the respondent's case: so you can't compare the number.*

*His second reason is: 'GTI's business model was different because what GTI was going to do was refurbish an existing pipeline and run it themselves and then have transit fees, whereas AIOC was going to build its own, so what the buyer was going to do afterwards with the rights was very different, so I can't compare'. Both of those reasons show a complete lack of understanding of what a fair market analysis requires the valuer to do. You don't look at what the buyer and seller want and their intentions and their strategies, you look at whether the rights are the same rights. It doesn't matter who GIOC was, whether they were government owned or whether they were a commercial enterprise.*

*The reason you're looking at that transaction is because it's actual evidence of what transit rights were worth in the market in March 1996, and because it's so close to the evaluation date for expropriation, you can make the assumption that it was about the same number as it would have been worth if it had been sold on the valuation date. They're very close in time. It's an actual transaction, and because it was an actual transaction, you don't go into the minutiae of what motivated GIOC and AIOC to reach that deal, because if you did, in fact, if you adjust the analysis, it would adjust to our favour, because in fact, it was a very low price. It was a very low price, we say, because GIOC was basically just a patsy. AIOC had all of the bargaining power, Georgia was desperate for the pipeline to go through, it's a very cheap price.*

[...]

*So if you're looking at whether that was a commercial deal, it probably wasn't, but we're not allowed to say that, because if you're just looking at market value, it was a real deal. It was a real deal, and the rights were the same, they were the transit rights through the western route, and it doesn't matter how AIOC was planning to exploit them. It doesn't matter that they were going to build their*

*own pipeline in the end and not use the existing one, because they decided to do a Rolls Royce job instead of the patch job that GTI were going to do. It doesn't matter that an individual buyer and an individual seller had a different game plan.*

*What matters is the rights are the same, and they had a price, and it's a price that's at a timeframe that is very close to the valuation date."*

551. Mr. Kaczmarek estimates the value of a 50% interest in GTI based on this transaction at US\$ 32,543,219. Having conceded a deduction of US\$ 0.01 per barrel for security costs, *i.e.* US\$ 1,914,307, Mr. Kaczmarek adjusts this value to US\$ 30,628,912.
552. In the event the Tribunal determines that a deduction for payment of corporate income and income withholding taxes is also appropriate, Mr. Kaczmarek offers an alternative value for the Claimants' stake in GTI of US\$ 21,440,238, having assessed those taxes at US\$ 18,377,347 [Kaczmarek II, para. 61, Table 5].

#### *The Brown & Root Offer*

553. The second comparable put forward by the Claimants is the offer extended by Brown & Root in 1995 to purchase a 25% stake in GTI. Mr. Kaczmarek explains the methodology applied to arrive at a value for this transaction in his first expert report as follows [Kaczmarek I, para. 98]

*"Brown & Root created a number of detailed financial analyses and cash flow projections that can serve as a reliable basis for a DCF valuation of GTI as of the Valuation Date. These analyses were constructed by a willing buyer in the course of its due diligence on an investment in GTI and represent the most reliable view of the project at the time in our view. While it is possible for us to independently develop our own projections for the Western Route project as of late 1995, in our view it would be disingenuous to do so because it would suggest that our own projections, prepared nearly 12 years after the relevant date, would somehow be better or preferable to Brown & Root's contemporaneously prepared projections. Even if the Brown & Root projections were too conservative or too aggressive, the projections still represent the best available evidence for the expectations of the project at that time. However, in an effort to better understand Brown & Root's analysis, we evaluated their projections and assumptions for reasonableness."*

554. As Brown & Root evaluated the financial and operational scenarios of the transaction on three different levels – pessimistic, expected and optimistic – Mr. Kaczmarek selected the middle ground expected scenario on which to base his DCF valuation.

555. The Claimants' 50% share of GTI was then valued in two "tranches". The first tranche reflects the 25% stake in GTI that Brown & Root was willing to purchase for cash. The second tranche reflects the 25% stake in GTI that the Claimants would have retained, but which, in a "post-money" analysis, would accrue additional value based on Brown & Root's in-kind contribution.
556. With respect to the first tranche, Mr. Kaczmarek observes that the ten-year cash flow projections Brown & Root prepared to support a cash offer for a 25% interest in GTI resulted in a US\$ 11 million to US\$ 16.5 million valuation. This was the basis on which Brown & Root agreed to pay cash consideration of US\$ 10 million. As this \$ 10 million was to be paid in instalments over time, Mr. Kaczmarek applies a 12% discount rate (a real rate) – the same rate used by Brown & Root to determine the \$10 million purchase price for its shares in GTI – arriving at a present value of US\$ 9,536,691.
557. With respect to the second tranche, Mr. Kaczmarek observes that Brown & Root had based its valuation of GTI on projections up to 2006 as opposed to 2023, thereby establishing a "pre-in-kind" valuation. To extend the cash flow projections, Mr. Kaczmarek extends the same assumptions Brown & Root used to develop the cash flows for the first ten years of the project.
558. To discount cash flows to present value, Mr. Kaczmarek again applies a 12% discount rate, the same used by Brown & Root in its original analysis. Mr. Kaczmarek explains why, in his consideration, this rate is an acceptable measure of the risks of investing in GTI in 1995 [Kaczmarek I, paras. 116-120]:

*" [...] First, the discount rate was established by an informed buyer and is the best reflection of how a third party viewed the risks of making an investment in GTI shares at the time.*

*Second, GTI was to earn tariffs in US dollars. Thus, GTI was not exposed to potential inflationary environment in Georgia. In fact, with its revenues denominated in US dollars and its operating costs denominated in Georgian Lari, GTI was more likely to experience higher margins in the future if the Lari lost value against the US dollar (which was not a very unlikely situation given the emerging market status of Georgia at the time).*

*Third, GTI had the benefit of the state's participation in the venture. Any political action resulting in harm to GTI would also harm the state itself.*

*Fourth, although GTI would face competition from regional and international players, GTI's concession eliminated competition in [the] Georgian pipeline construction and operation sector during the period of concession. Accordingly, GTI did not face any competition for the development of these projects in Georgia.*

*Fifth, GTI's core business was tied more closely to the global oil and gas markets rather than to the Georgian economy. Thus, local economic risk would have a minimal effect on GTI's business operations."*

[Footnotes omitted.]

559. Mr. Kaczmarek concludes that the FMV of the second tranche of the Brown & Root offer is US\$ 20,745,146.
560. The Claimants reject Mr. Lagerberg's criticisms of this comparable as misplaced, summarizing their response to the reasons given by Mr. Lagerberg as follows [Tr. D12:82-84, 85]:

*"First reason: the Brown & Root offer was too uncertain, because there were too many variables which hadn't happened yet before the deal could be consummated, and one of those variables he mentions is the fact that Brown & Root required a condition that the Georgian government confirm that they would honour the rights, and of course that didn't happen.*

*Well, we all know if you're valuing for the purposes of expropriation, the one fact you're absolutely not supposed to take into account is the expropriatory conduct of the government, so that's a completely irrelevant consideration. Equally irrelevant is this idea that he's supposed to take into account the fact that the deal hadn't yet been consummated, but again if it had been there would have been a sale in the market. If he's right, it means you can never have as a comparable a sale that's almost concluded and we know from the cases that valuers do that all the time. Almost deals, heads of agreement, where someone's actually agreed the price, and what it is they're buying, if that bit's agreed, that's a very good indication of a market value, and it doesn't matter, contrary to what Mr Lagerberg thinks, it doesn't matter that Brown & Root might have wanted to buy the rights to position themselves to get a really good construction project later. It doesn't matter why you want to buy something, it just matters that you want to pay for it.*

*The fact that you have a different game plan of how you want to use those rights is irrelevant, because as Mr Effimoff says, these rights had value in a different amount to different buyers. Everybody might have wanted them for a different reason. A competitor of AIOC that also had oil in the ex-Soviet Union might well have wanted to buy the pipeline rights and screw their competitors on the transit fees when they needed to get their Caspian Sea oil out to market. There's all sorts of people that could have been interested in this pipeline. And Mr Kaczmarek says we've got evidence of three different constituents in the market, all of whom had different motivations, who each wanted to buy these rights, and who each would have done something very different with them.*

*What you do is if you've got three different lots, then you can put them together, and say, "Here's what a construction firm wanted to pay for these rights, here's what the producers in the Caspian wanted to pay for these rights, and look at the Velt Energie offer, this is what the government was prepared to get a broker to come in and buy the rights for, to get rid of Tramax."*

*So you've got a number for the nuisance value payment, you've got a number for someone who wants it for construction, and you've got a number for somebody who want it for the transit. All of those are valuable, it creates valuable information from which you can create a hypothetical deal, and you weight them, you say which ones are the most important, and he's right, the most important one is the AIOC one, and Mr Lagerberg hadn't even looked at the evidence of AIOC's calculations in December of 1995, of how they got to the number. He hadn't even seen that evidence. Because if he's right, if it's impossible to know what these rights could have been worth in November 1995, how on earth could AIOC, three months later, have bought them?*

*They did numbers, Brown & Root did numbers, and to say, oh yes, it didn't get consummated, you don't sign a heads of agreement unless you've at least worked out the number, and it wasn't Mr Ferguson's frolic all by himself, as the respondent seems to suggest; the number that was offered by Brown & Root was approved at the highest level of Brown & Root by the head man himself. So companies like Brown & Root don't sign heads of agreement and commit to numbers if they haven't at least worked out that what they're going to buy is something worth what they're prepared to pay for it."*

561. Mr. Kaczmarek estimates the FMV of the Claimants' 50% interest in GTI based on this offer to be US\$ 30,281,837 (*i.e.* US\$ 9,536,691 + US\$ 20,745,146), unless an adjustment is made to incorporate the impact of corporate income taxes, which would reduce the value of the second tranche to US\$ 14,260,325 for a total FMV of US\$ 23,797,015.

#### *The Velt Energie Offer*

562. Finally, the Claimants rely on an offer extended to Tramax at a meeting on 20 June 1995 by United Perlite Industries and Velt Energie for the Claimants' interest in GTI.
563. Mr. Kaczmarek explains the approach taken to arrive at a value for this comparable as follows [Kaczmarek I, para. 135]:

*"At the meeting, Velt Energie effectively offered Claimants US\$ 20 million for the GTI shares held by them through Tramax. This offer was quickly rejected by Claimants, who responded with a counter-offer of US\$ 50 million plus a 5 percent stake in the AIOC's pipeline project. Later over dinner, we understand that Velt Energie expressed a willingness to increase its offer to US\$ 25 million. Ultimately no final agreement was reached between the parties at this meeting. However, a letter sent by Prime Minister Patsatsia to Mr. Fayek Ataya (a person apparently authorized to negotiate the Velt Energie offer with Georgia's*

*approval) subsequent to the meeting indicates that the Prime Minister felt Velt Energie's offer plus a remaining stake of 5 percent in the project, was 'almost adequate' and asked Mr. Ataya to negotiate further. In short, it appears that Prime Minister Patsatsia felt the Velt Energie offer could fairly be increased. If the 'offer' Prime Minister Patsatsia referred to in his letter is the US \$25 million offer verbally extended by Velt Energie and if our GTI share valuation of approximately US \$62 million is correct (based upon our prior two valuation analyses), then one can conclude that Prime Minister Patsatsia believed an economic offer of US \$28.1 million (US \$25 million plus 5% of US \$62 million) was 'almost adequate' for Claimant's rights. Thus, the Prime Minister's letter (presumably reflecting the views of the Georgian government) corroborates the valuation conclusions reached by our first two analyses."*

[Emphasis added.]

564. During the Hearing, the Claimants took the position that this offer was effectively confirmed by Georgia, as evidenced by contemporaneous documentation [Tr. D11:22-24]:

*"So Georgia, through Professor Tevzadze, was there at the meeting, participated and affirmed the opening offer, and if you look at the same letter, I don't have it up on the slide, and in the time available, I'm not going to spend too much time on this, but if you look in the same tab, you'll see that it describes Mr Ataya as attending the meeting on behalf of the government of Georgia.*

*Our understanding of the background to this is that United Perlite and Velt Energie were shareholders in a special purpose vehicle called -- I believe it was called the Trans-Georgian Pipeline Company, which was in discussions with SakNavtobi as to a buy-out of the rights in mid 1995, and under the contract, Georgia would have to pay back out of its share of the revenues of the contract whatever was paid to Tramex.*

*So this is not only a third party offer, but this is an offer that's coming out of Georgia's pocket and being endorsed by Georgia.*

*Mr Kardassopoulos has testified that the opening offer was raised to 25 million subsequently over dinner, he wasn't cross-examined about that. And the claimants returned by seeking 50 million, plus a 5 per cent interest in the successor entity. If you look at Mr Kardassopoulos' third statement, they wanted the 5 per cent interest not simply for transit fees but rather to pump their own oil through the pipeline in the way that they had initially envisaged under the original GTI model in 1992.*

*The Prime Minister replies to Mr Ataya's report of the meeting:*

*"We have received your detailed information. We think the offer you suggested was almost adequate, if you can go on to sweeten the deal by offering another 5 per cent of the share capital in the way that Tramex has requested."*

*And that offer comes out at 28. [...]"*

565. As with the above comparables, Mr. Kaczmarek has provided an alternative calculation for this comparable to take account of the payment of taxes, estimating a value of US\$ 27,144,029 (US\$ 25 million plus 5% of US\$ 42,880,476, the alternative value for the GTI under the GIOC-AIOC leaving transaction).
566. The Claimants conclude that the use of three contemporary sources of value and the weighting of those “mutually-reinforcing valuation techniques” is in keeping with orthodox valuation methodology. They reject the Respondent’s contention that the above sources are inapposite to value their investments. The Claimants insist that the evidence of these transactions is being proffered to show the terms that a willing buyer would have offered to GTI, a willing seller, had the JVA and Concession been honoured and is not, as the Respondent alleges, an attempt to “*step into another’s shoes*” [Reply at para. 205].

## (2) The Cost Approach

567. The Claimants assert that the Respondent’s approach to valuation, which would ascribe a value of “nil” to the Claimants’ project rights and award them only their costs of the project, is misconceived, contending that the Respondent has effectively asked the “wrong questions” and, in so doing, has arrived at the wrong answer [Tr. D12:76-77, 86]:

*“Unfortunately, yesterday, it's pretty clear that experienced though he is, Mr Lagerberg has approached the quantum issue in this case as basically a forensic auditor. He's not approached it in what we would say the proper way is to approach the question of fair market value. He allowed himself to be very distracted by some of the factual pattern that's very important to the respondents, and which we say is completely irrelevant to the question of quantum, and he has allowed himself, in being distracted by that fact pattern, and it's an alleged fact pattern, to actually ask himself the wrong questions, and although he says he's asking the question, and he accepts that the right question is hypothetical buyer/hypothetical seller, as at the date of valuation, November 1995, and to try and fix an objective price on that, if you actually look at the answers he gave to the questions, you realise that he was asking himself a different question, and had a different series of assumptions.*

*Before I turn to the numbers, because I do want to explain why it is that the only viable numbers you have before you are our numbers, and why you should feel comfortable with that, I think it's very important to know why it is that Mr Lagerberg went so terribly wrong. In fact, the question he really has asked himself in valuing these rights is to say what were the rights worth in the hands of these claimants. That is the wrong question. It's not the test. And if you look at some of the answers he gave to the questions yesterday, he's essentially said, "If these claimants held on to the rights and tried to exploit them, there would have*

*been too many uncertainties and too many risks. These claimants [he says] I don't think could have made money from these rights".*

*He might be right about that, it doesn't matter, because it's not the question. This is not a contract claim. We are not coming to you as an ICC tribunal under the contract on behalf of Tramex rather than the two individual claimants that you actually have, and we're not saying to you, "We want loss of profit for the life of the joint venture, and this is what we think we would have made".*

*[...]*

*So I think for an expert to sit there and say, "There are no valid comparables", just shows that he has been too distracted by this notion that these claimants somehow don't deserve to get a number of any value, because they couldn't have ever made these rights work, but that is not the test. Mr Lagerberg has asked himself all the wrong questions, and if you ask yourself the wrong question, no matter how respectable you are, you get completely the wrong answer. So I am sorry to say that virtually all of his expert report is completely useless to you in what you have to do in this case, which is to determine what the number is."*

568. Nevertheless, Mr. Kaczmarek provides a further alternative valuation of GTI's rights based on the cost approach, stating that such an approach could provide a reliable measure of the FMV of the Claimants' interest in GTI if applied properly. Proper application of the cost approach would, in his view, involve a determination of what it would cost to acquire the rights GTI possessed at 10 November 1995. According to Mr. Kaczmarek, this would necessarily include valuing the exclusive rights to build and operate the Gachiani-Supsa export system. On Mr. Kaczmarek's assessment under the cost approach, a 50% share of GTI in November 1995 would be worth US\$ 36,517,031, *i.e.* approximately US\$ 18 million, net of interest, for each Claimant [Kaczmarek II, paras. 163-168].

#### *b) The Respondent's Position*

569. The Respondent takes the position that, whether under the Treaties or under customary international law, the Claimants are required to prove their loss, and they have not done so in this case. In the absence of reliable evidence, the Respondent therefore submits that it is appropriate to approach valuation in this case on the basis of historical expenditure, not a cash flow analysis.
570. The Respondent submits that FMV requires the following five elements: (i) a willing and able buyer and seller; (ii) acting at arm's length; (iii) in an open and unrestricted market;



(iv) where both buyer and seller have reasonable knowledge of the relevant facts; and (v) no special motivation or circumstance [Tr. D11:40]. Furthermore, an FMV assessment assumes conditions as they actually exist. In valuing GTI's rights, the Respondent considers that, in the circumstances, the latter two elements (reasonable knowledge and special motivation) preclude the approach taken by the Claimants and, in particular, any reliance on the three comparables.

571. In the Respondent's view, the price that a third party buyer would have been willing to pay for GTI's rights would have been impacted by the "lack of legal certainty" in respect of those rights. The Respondent adds that if there is a reasonable basis to believe that a willing buyer in the hypothetical willing seller –willing buyer scenario was not made aware of relevant facts, and would have acted differently in the face of those facts, then any value the buyer offered while in a state of ignorance would not be a meaningful proxy of how any other party in the market would act.

572. In this regard, the Respondent highlights the Tribunal's finding in its Decision on Jurisdiction, to the effect that Tramex's rights were void under Georgian law [Tr. D12:200-01]:

*"In the jurisdictional award, and I'm glad to see some of the Tribunal members re-reading it, the Tribunal dealt with the issue of the validity of the claimants' rights, under both Georgian law and international law, and under Georgian law, this Tribunal found that Tramex's rights were void, and we believe that any third party who was reasonably informed would reach a similar conclusion as this Tribunal.*

*We would only add that while the Tribunal determined that Georgia was estopped from evoking Georgian law vis-a-vis the claimants, in terms of asserting jurisdiction in this case, that says nothing, nor could it, about how a third party would view the claimants' rights."*

573. The Respondent further submits that the price that a third party buyer would have been willing to pay would have been impacted by the "risk of rescission", relying upon the advice provided in the Paisner & Co. Preliminary Note [Hearing Bundle, Tab 142] and the testimony of Mr. MacDonald, to wit [Tr. D7:12]:

*"I don't recall that Chee Jap ever told us that their rights were being attacked, and being called into question.... I would have immediately gone to Larry Farmer and told him, and without a doubt he would have pulled the plug there and then.*

*We couldn't afford to get involved in an argument between the government of Georgia and entrepreneurs that we were thinking of."*

574. In regard to the fifth element of the FMV test, the Respondent states that the Brown & Root offer is an inappropriate comparable because Brown & Root had "special motivation" for striking a deal in respect of GTI's rights. The Respondent relies, in this regard, on the testimony of Mr. Ferguson and Mr. Farmer to the effect that Brown & Root's main interest was securing engineering contracts with AIOC and the investment would have only proceeded if the investment could have been recovered from profit from the provision of engineering and construction services [Tr. D3:10; Farmer I, para. 8].
575. The Respondent submits that, on an FMV analysis, there is a "*threshold of evidentiary value that any comparable must meet, and it is certainty*". The Respondent agrees that while this threshold does not require perfection, it does require "*sufficient probability*" [Tr. D12:198-99]. The Respondent cautions against accepting numbers proffered by the Claimant simply because those numbers existed during the relevant period.

#### (1) The Market/Income Approaches

576. In considering the most appropriate approach to valuing the Claimants' rights, the Respondent takes the position that the cost approach is to be preferred over the market or income approach, because there is more reliable evidence for a valuation on this basis. The Respondent's cost approach is set out below in Part V.E.4(b)(2).
577. As regards the income and market approaches deployed by the Claimants, Mr. Lagerberg concludes that neither approach produces a credible valuation and that, while valuations using these approaches may be theoretically possible, they are not appropriate in the present case because the resulting valuations are highly speculative and fundamentally unreliable. In considering the proposed comparables under the market approach, Mr. Lagerberg cautions that an offer that is mature and close to completion has "*greater credence for valuation purposes than an offer that might be no more than a the starting point of a negotiation*". Mr. Lagerberg considers both the Brown & Root and Velt Energie offers to fall in the latter category [Lagerberg I, para. 3.11].
578. In considering the GIOC-AIOC leasing transaction developed under the income approach, *i.e.* using a DCF model, Mr. Lagerberg considers that the immaturity of the

project and the absence of credible data for fundamental assumptions, such as tariff rates, capital expenditure, financing and realistic timescales, means that the valuation would be based on such a high degree of speculation the result would be inherently unsound and unreliable.

579. Mr. Lagerberg also takes the view that the weightings assigned to each of the Claimants' proposed comparables are arbitrary. However, to the extent these weightings are considered "appropriate in principle", he states that a 25% interest in GTI would be worth US\$ 1.5 million, based on his adjusted calculation of the value to be ascribed to each comparable respectively: GIOC-AIOC leasing transaction - US\$ 801,985 (x 17.5%); Brown & Root transaction - US\$ 4,974,177 (x 17.5%) + US\$ 501,511 x 45%; and the Velt Energie Offer - US\$ 2,775,000 (x 10%) [Lagerberg I, para. 5.73].

#### *The GIOC-AIOC Leasing Transaction*

580. Mr. Lagerberg raises three main criticisms of this transaction: (a) the role of GIOC was fundamentally different from that of GTI; (b) GTI was a joint venture between Tramax and SakNavtobi for a Build, Own Operate or "BOO" project; and (c) GIOC was a state-owned company with different priorities than GTI and entered into a leasing arrangement with AIOC (who had rights to throughput/reserves in Azerbaijan) for a number of pipelines, not limited to the Gachiani-Supsa pipeline [Lagerberg I, para. 5.54].
581. In Mr. Lagerberg's view, a valuation of GTI based on the leasing arrangement "*is not realistic and should be positioned as a theoretical exercise about a hypothetical situation rather than a meaningful assessment of the value of the Claimants' interest in the equity of GTI as at 1995.*" [Lagerberg I, para. 5.57].
582. Mr. Lagerberg elaborated on the basis for his rejection of the leasing transaction during the witness conferencing procedure as follows [Tr. D11:151-52]:

*"MR LAGERBERG: Without diving into detail, if, for example, you're looking at the leasing transaction between GIOC and AIOC, and you're by implication saying the economic benefits of that deal should be used to value GTI because they're comparable, now look at that transaction from the perspective of the different players, if you're Tramax, you see money, and so you think there's value in that, we'll take the value.*

*You then look at it from GIOC's perspective, Georgia's perspective, would it be the same? Mr Kaczmarek has described accurately that the high value proposition was the build and operate, run your own thing, maximise your revenue, and then the leasing is a lower value operation.*

*If we're looking at GTI, on the basis that the primary purpose, the intention of GTI was to build and operate, we're now talking about a different scenario, inherently by nature a very different operation, which is a leasing one. So Georgia is now going from a high value down to a low value operation. In the BOO, it was looking for an equal contribution from its joint venture partner. It's now going to a venture where there's no contribution from its partner.*

*If you look from AIOC's perspective, in the GIOC transaction, AIOC is dealing with essentially the sovereign state, sovereign government, and they're looking to it to deliver what they expect of the sovereign government. From their perspective, just logically, dealing with an entity which is 50 per cent government owned, 50 per cent commercial, privately owned, is a different proposition. You have interests immediately which may not be aligned. You then may be, and I accept that in the GIOC transaction there weren't many obligations on GIOC, but in principle, if you're dealing with a state-owned entity, from AIOC's perspective, they would expect Georgia to deliver.*

*There might be concerns that if you're dealing with an entity which has got a state-owned and a commercial enterprise, would your counterparty be able to deliver? Would the commercial enterprise be able to deliver? And then again, from TrameX's perspective, would they want to deal long-term, partnership, or short-term, in any basis, with TrameX?*

*THE CHAIRMAN: Isn't that a pretty good indication of the value which the Republic of Georgia recognised was attached to those rights?*

*MR LAGERBERG: I think it's too easy just to simply say it was a deal therefore it must by reference be the value that GTI could have got. What I'm saying is what you're trying to do is say that the value of GTI is the same as the value of this GIOC transaction, because they're comparable. What I'm pointing out is that actually there are significant, fundamental differences between the two, and therefore to simply say we must assume that whatever Georgia's position would be, whatever AIOC's position would be, is irrelevant.*

*So if you look at Georgia, they're going for a low value proposition, so giving up the value from a BOO, and they're giving 50 per cent away, does that make economic sense from Georgia? It might, but I'm just saying that the very fact that they're different by nature, counterparty, et cetera, means you cannot make a simple assumption, A equals B, simply because they both happen to be in the universe."*

583. As a result, the Respondent rejects the GIOC-AIOC leasing transaction, asserting that it is an inappropriate comparator to establish a value for GTI's rights because it is too different from the model contemplated by the GTI project and therefore one cannot stand

as a proxy for the other. The Respondent therefore defended Mr. Lagerberg's position during the Hearing, explaining as follows [Tr. D11:130-32]:

*"We say this isn't Mr Lagerberg misunderstanding the position. The fact is that GTI didn't have the right to simply collect transit fees and to divorce that right from its obligations, and as Professor Lowe mentioned this morning, there is article 20 to consider, and under article 20, there needs to be consent to assign your rights under the joint venture agreement. Now what would have happened had in 1995 the claimant said to SakNavtobi, 'We want to sell all our rights to receive transit fees -- this is at a point where we have not constructed a pipeline - - we want to sell our right to collect transit fees and we want you to consent to that'? SakNavtobi wouldn't have consented to them simply selling their rights, they would have had to sell their obligations at the same time, they go hand in hand.*

*This is the whole root of this contract, it was a project to build a pipeline when it was desperately needed to create income. This contract didn't confer the right the claimants are now trying to claim in valuing their damages claim, and this analogy that they say is a very simple analogy, very attractive, that the Tribunal should look at, the GIOC/AIOC leasing model, is entirely misconceived for that reason, because it is based on them having the right to something they didn't have."*

584. Notwithstanding Mr. Lagerberg's general position concerning the propriety of using this transaction, he has put forward several specific criticisms in respect of the assumptions made in Mr. Kaczmarek's analysis, which would substantially reduce the value attributable to this comparable. These are considered in Part V.E.4(c)(2) below.

#### *The Brown & Root Offer*

585. In Mr. Lagerberg's analysis, whilst this offer may potentially stand as a benchmark to value the Claimants' rights in GTI "the pre-money/post-money" approach taken by Mr. Kaczmarek to value the offer in two tranches is unsound for at least three reasons [Lagerberg I, para. 5.15]:

*"(a) There should not be a difference between the 'fair market value' of one equity share and another equity share given the same rights (i.e. the same stake) in an equity at a single date. This flows from the definition of the 'fair market value' [...];*

*(b) Brown & Root was not a shareholder of GTI at the Valuation Date because the deal had not completed. Therefore, the valuation should not assume that it was; to do so breaches the logic of a contemporaneous valuation; and*

*(c) The terms 'pre-money valuation' and 'post-money valuation' refer to situations in which an investment is being made in an entity. Pre-money means a*

*valuation before the investment is made. A post-money valuation is the valuation after the investment is made and is equal to the pre-money valuation plus the value of the investment. Brown & Root had not made an investment in GTI at the Valuation Date and thus I do not think the term 'post-money' is applicable to the situation."*

586. The Respondent therefore describes the Brown & Root offer as a “non-starter” for several reasons. First, the Respondent claims that Brown & Root had insufficient knowledge to satisfy the requirements of the FMV test, relying upon the testimony of Mrs. MacDonald to the effect that, had Brown & Root known there was a “question mark” over the validity of GTI’s rights, they never would have proceeded with the transaction [Tr. D11:52]:

*“Had Brown & Root known that there was a question mark over validity of rights being granted to GTI, they wouldn't have proceeded. Chee Jap withheld from Faith Macdonald the ninja, she took a conscious decision not to tell Brown & Root what the position was. According to Faith Macdonald, Faith Macdonald's evidence is very clear, she was not informed by Chee Jap that there were question marks about the rights which Tramex said GTI possessed. The claimants were not open with Brown & Root.*

*Faith Macdonald, on cross-examination, said – this is page 13, line 11:*

*"If they were hiding that information from us, what did it bode for the future? What else were they going to hide, if they're hiding something as fundamental as that?"*

*She also made clear that in due course, external counsel would have been instructed in the normal process conducted by Brown & Root. We say that external counsel brought in to consider the position would have assessed the question as to the validity of rights which had been granted and would reach a conclusion no different from that arrived at subsequently by Nabarro Nathanson. At least there would have been a question mark."*

587. Second, the Respondent submits that the Brown & Root transaction was motivated by special circumstances and therefore cannot stand as a proxy for FMV [Tr. D11:50-51]:

*“In any event, the goal for Brown & Root was a set of construction contracts, a particular -- which positions Brown & Root, and this is, I think, probably more an issue for an expert accountant, but it positions Brown & Root in a rather unique situation where what it's seeking to acquire is a benefit of potentially very significant value to it, but its position is unique.*

*[...]*

*PROFESSOR LOWE: Are you saying then that the fact that Brown & Root had a particular interest means that we have to discount them as a hypothetical buyer?*

*Why should that be? Why should we not say that amongst the category of hypothetical buyers, there would be people with a range of different ways of exploiting the rights that they were buying, and we take all of them into account?*

*THE CHAIRMAN: Because, as Mr Farmer said, it's likely that oil is going to flow through Georgia. Now this isn't just Ferguson driven, this is Farmer reacting to Ferguson saying, yes, it may be in our interests to acquire those rights.*

*MR SAUNDERS: Our answer to that is that that doesn't position -- Brown & Root is not positioned as a fair market reference point. It is not operating in, I guess, a fair market, it has a particular desire, a particular position, and that takes it from a valuation set of rules, that takes it outside of the process. But again, I'm straying into expert accounting territory."*

588. Third, the Respondent contends that the Brown & Root offer was too uncertain, as a "sober" analysis of what the transaction was worth never took place; it *"died before it ever got to that point, and it died for reasons that meant it was always going to fail"* [Tr. D11:50]:

*"Mr Kaczmarek relies on forecasts, figures that were prepared in June 1995. The document in which those figures are to be found is entitled "Preliminary Business Plan Proposal"; preliminary, very preliminary is Georgia's case. Georgia's case is that the figures contained within that document are really no more than examples of hypothetical working case scenarios. They were calculated without access to capital expenditure, significant advance to capital expenditure figures. They were calculated without reliable data in terms of throughput agreements that were actually being negotiated, or had actually been entered into.*

*So we say they were not the subject of a sober financial assessment exercise of the sort that can properly form material for an expert valuer to work with, they're the sort of financial calculations that appear all the time in commercial deals, where one party is seeking to persuade another party to do something, and is seeking to suggest, look, here's a working case scenario, look how good these figures are, and that's what Mr Ferguson was doing. Clearly ambitious in seeking to promote his project within Brown & Root, which involved selling his project to the claimants, and selling his project in a fashion that pushed the envelope, just as he accepted he had done in presentations given to Georgia in September: aren't all presentations done that way? He said something to that effect in his evidence.*

*On the single most important piece of information, the single most important piece of information, where you're considering pipeline economics, commitment actually to use the pipeline, there's nothing. Without throughput agreements, and the evidence of those in the know has been consistent that throughput agreements are vital, vital towards obtaining finance; without throughput agreements, the pipeline is just a piece of metal in the ground, and a piece of metal in the ground with holes in it.*

*We say it's relevant that in this case, as was clarified yesterday, no sound cost estimate was ever arrived at, and it was never arrived at because there was actually no final test or even advanced test as to whether the pipeline was in an adequate working condition, and exactly what repairs might have been needed.”*

589. Apart from the above general criticisms of this comparable, Mr. Lagerberg proposes an upward adjustment to the discount rate applied from 12% to 36% to reflect market risks and project specific risks, which would reduce the proxy value of a 25% stake in GTI to US\$ 4,974,177 [Lagerberg I, para. 5.30]. Alternatively, using Brown & Root’s assumptions, as did Mr. Kaczmarek, but adjusting for these factors as well as taxes, Mr. Lagerberg arrives at a value of US\$ 801,985 for a 25% interest in GTI.

#### *The Velt Energie Offer*

590. The Respondent rejects the Velt Energie offer as too uncertain, characterizing it as little more than a “vague conversation over dinner” [Tr. D11:47]:

*“To look at the Velt Energie offer, even Mr Kardassopoulos accepted that the offer from Velt Energie was not to be taken seriously. At most, it's Georgia's case it was a matter of a conversation over dinner, no due diligence was undertaken in relation to the offer, there's certainly no proof of any, and on a normal contractual analysis, it would lack sufficient certainty to be characterised as an offer. A vague two-line letter from Prime Minister Patsatsia doesn't change that position. We say that after 14 years have passed, from a vague conversation over dinner, there's little more that can be said than to endorse Mr Kardassopoulos' assessment that it wasn't very serious.”*

591. The Respondent submits that there is no evidence that the prospective buyer conducted due diligence regarding the exact rights that the Claimants held, which is an important element of the FMV analysis [Tr. D12:200]. It is therefore submitted that this offer, to the extent it may be considered as such, was uninformed and is an inappropriate measure of value [Tr. D12:201; see also Lagerberg I, para. 5.69]:

*“We know by virtue of a letter between Velt Energie and United Perlite that Tramex assured Velt Energie that their legal position was a strong one, having been repeatedly confirmed and supported by previous legal proceedings. There was no basis for this assertion by Tramex, and in fact, the evidence is just the opposite. To the extent that Velt Energie made any offer, and we're not certain they did, their offer was not an informed one, and the value of that offer could not be considered to be an appropriate measure of damage.”*



## (2) The Cost Approach

592. Mr. Lagerberg states that the cost approach is the only viable methodology to be used in this case. Following an assessment of GTI's balance sheet as of 10 November 1995, and the Nexia and Deloitte reports, Mr. Lagerberg concludes that the Claimants expended between US\$ 5.5 million to US\$ 6.2 million in the operations of GTI's business [Lagerberg I, para. 7.25].
593. Even then, Mr. Lagerberg states that, due principally to the lack of accounting records and original source documents, he is unable to reach a conclusion as to the validity of all the expenditures incurred by Tramex on behalf of GTI. Mr. Lagerberg therefore arrives at the conclusion that, of the total amount allegedly expended by the Claimants, only US\$ 3.2 million may be tied directly to the construction or refurbishment of the pipeline project and, of this amount, only US\$ 981,425 is supported by payment documentation [Lagerberg I, paras. 7.31-32].

*c) The Tribunal's Determination*

594. The Tribunal recalls that the customary international law standard of compensation requires that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed.<sup>88</sup> As stated above, this standard is intended to eliminate the consequences of the wrongful act for which the State is responsible. It does not, however, prescribe the method for arriving at an appropriate value. The Tribunal's duty is to make the best estimate that it can of the amount of the loss, on the basis of the available evidence. That must be done even if there is no absolute documentary proof of the precise amount lost.

## (1) The Appropriate Valuation Method

595. The Tribunal finds the Claimants' approach to valuing the Claimants' 50% interest in GTI's rights, based on the income and market approaches, to be compelling in this case. The Claimants have also cited several authorities in support of their position that a

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<sup>88</sup> See *Chorzów Factory*, at p. 47.

completed or seriously contemplated transaction offers the best evidence of an asset's FMV.

596. For example, in *Sapphire*, the sole Arbitrator (M. Pierre Cavin) observed on the basis of expert evidence that “*the concessions which must be appraised are not situated in an area where rights of extraction are often the object of sale transactions. The usual method ... cannot therefore be applied.*”<sup>89</sup> The Arbitrator concluded, following an assessment of transactions in neighbouring territories and expert evidence concerning the value of the right to extract oil derived from geographical publications devoted to Iran and the Middle East generally, that “*such an appraisal [of future profits] is not free from uncertainty. But it is difficult to see what other proof could reasonably have been required of the plaintiff.*”<sup>90</sup>
597. Similarly, in *Enron* the tribunal determined that it could be assisted in assessing the FMV of the rights in issue by considering several market transactions which had transpired in respect of the claimant's participation in a natural gas transportation company (TGS), namely a swap and a share sale transaction. The tribunal aptly noted: “*Willing sellers and willing buyers in this case are thus no longer hypothetical but real enough, a situation that has turned [out] to be meaningful in the Tribunal's findings.*”<sup>91</sup>
598. It is not common in investment treaty arbitrations that a Tribunal has available to it three arm's-length, contemporaneous transactions (or potential transactions) to assist in valuing an investment, much less three that converge in a narrow range of value, *i.e.* US\$ 28.1 million to US\$ 30.6 million. The Tribunal is not persuaded by the Respondent's argument that the Brown & Root offer may not be considered an arm's-length offer because Brown & Root had a “special interest” in securing certain construction contracts in the region. As the Tribunal indicated during the Hearing, it sees no reason why, among the category of hypothetical willing buyers in an FMV analysis, there may not be a range of different ways in which such buyers would seek to exploit GTI's rights [Tr.

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<sup>89</sup> *Sapphire*, at p. 161.

<sup>90</sup> *Ibid.* at p. 189.

<sup>91</sup> *Enron*, at para. 387.

D11:50-51]. The Tribunal agrees with the Claimants that it matters not to a hypothetical willing seller how the buyer proposes to extract profit from an asset, but only what the hypothetical buyer is willing to pay for the investment. The Tribunal also agrees that, in any event, Brown & Root's offer appears to have been based on the strategic value that it attached to GTI's rights, as evidenced by Mr. Farmer's belief that "*oil [would] flow through Georgia someday*". [Hearing Bundle, Tab 280]

599. The Tribunal is similarly not persuaded on the evidence before it by any of the grounds raised by the Respondent for rejecting the GIOC-AIOC leasing scenario as a valid comparable. Rather, the Tribunal agrees with the Claimants and their expert, Mr. Kaczmarek, that it is difficult to conceive of clearer evidence of the likely value of an expropriated asset (and related rights) than a sale transaction involving the same asset (and rights) 16 days after the expropriation [Cl. Post-Hearing Br. at para. 103; Kaczmarek, Tr. D11:151-52].
600. Additionally, whilst the Tribunal agrees that an offer or transaction which is close to completion has greater credence than an offer or transaction that has yet to mature, the Tribunal finds that the Claimants have properly taken into account the relative maturity of each transaction or offer by weighting the comparables as Mr. Kaczmarek proposed. In this connection, the Tribunal notes Mr. Kaczmarek's testimony concerning the Velt Energie offer, characterised by the Respondent as no more than "*vague conversation over dinner*":

*"As a standalone, I would tend to agree with Mr Lagerberg. If that's all we had, was the Velt Energie offer, nothing more, I think we would all agree considerable caution ought to be exercised, but that's not all we have. We have far more, and we do have an actual transaction involving these rights, that can be valued. So again, I only ascribed it a 10 per cent weight to my approach [...]."*

601. Although the proposed weighting of the comparables is based entirely on the professional judgment of Mr. Kaczmarek and his team, and in this sense is not scientific, the Tribunal does not consider that this renders the weightings arbitrary, noting the view expressed by Dr. Shannon Pratt in his treatise on valuation (relied upon also by the Respondent):

*"An intuitively appealing method of concluding the value estimate is for the analyst: (1) to use subjective but informed judgment and decide on a percentage*

*weight to assign to the indications of each meaningful valuation approach or method and (2) to base the final value estimate on a weighted average of the indications of the various methods.”<sup>92</sup>*

602. The Tribunal also agrees with the Claimants that the Respondent’s expert has, with all due respect, asked the “wrong questions” and arrived at the “wrong answers”. This is not an appropriate case in which to value the Claimants’ interest in GTI on the basis of a costs approach, much less the wasted costs approach advocated by the Respondent. The Respondent’s arguments in this respect are therefore rejected.
603. Accordingly, the Tribunal finds it appropriate in the circumstances of this case to rely on the three comparables, weighted as proposed by the Claimants, to arrive at the FMV of the Claimants’ 50% interest in GTI as at 10 November 1995, which is the value that should have formed the starting point for the work of the compensation commission; and the Tribunal accordingly adopts the methodology developed by Mr. Kaczmarek.

#### (2) Proposed Adjustments to Value

604. As noted above, several specific criticisms have been levied by the Respondent, in the event that the Tribunal adopts the Claimants’ valuation methodology, in respect of Mr. Kaczmarek’s valuation model concerning adjustments that, in its view, must be made in respect of both the GIOC-AIOC leasing transaction and the Brown & Root offer in order to arrive at a reliable estimate of the value of the Claimants’ 50% interest in GTI. The Tribunal shall consider each in turn.

##### (a) Outages

605. Mr. Lagerberg proposes an adjustment in connection with the leasing scenario to take account of outages in the pipeline by reducing the number of days in a year that revenues accrue from 365 to 355.
606. Mr. Kaczmarek confirms that his model incorporates an assumption that the pipeline would operate at an average 83% of capacity to account for planned outages, as well as a risk premium of 1.5% to account for unplanned outages.

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<sup>92</sup> Pratt, Reilly & Schneihs, *Valuing a Business: the Analysis and Appraisal of Closely Held Companies*, 4<sup>th</sup> ed. (McGraw-Hill, 2000) at p. 445.

607. Mr. Lagerberg accepts Mr. Kaczmarek's explanation concerning outages, but asserts that it remains an open question whether the level of outages Mr. Kaczmarek has assumed in his analysis is reasonable.
608. The Tribunal finds Mr. Kaczmarek's assumed level of outages to be reasonable and the proposed adjustment is therefore rejected.

(b) Security Costs

609. Mr. Lagerberg proposes that a deduction be made to the value of the leasing scenario to take account of security costs, *i.e.* the costs of security services provided by Georgia, assuming for "illustrative" purposes a deduction of US\$ 0.01 per barrel from the initial US\$ 0.17 per barrel transit fee assumed by Mr. Kaczmarek.
610. Mr. Kaczmarek accepts this proposed adjustment and has recalculated the value of the leasing scenario accordingly.
611. Mr. Lagerberg nevertheless contends that as this adjustment was illustrative only, it cannot be considered an accurate assumption. Mr. Lagerberg does not, however, provide any indication of what might be a more accurate assumption than the one he himself has proposed.
612. In the absence of any further evidence of what might constitute a more accurate assumption as regards security costs, the Tribunal finds the proposed adjustment of US\$ 0.01 per barrel to be reasonable.

(c) Taxes

613. Mr. Lagerberg proposes that the valuations of the leasing transaction and the Brown & Root offer be adjusted to take account of corporate income tax and income withholding tax, arguing in respect of the leasing transaction that AIOC and GTI were very different entities such that GTI would not likely have received the same treatment. This adjustment would take account of prevailing tax rates in Georgia in 1995 of 20% on corporate income and 10% on dividend income. Whilst Mr. Lagerberg originally proposed that an adjustment also be made to take account of a "windfall profits tax", he

appears only to have maintained the propriety of an adjustment for income and dividend withholding taxes.

614. Mr. Kaczmarek states that he excluded taxes from his valuation methodology because both potential operators of the Gachiani-Supsa export system, *i.e.* AIOC and Brown & Root, did not consider in their own analyses that they would be subject to Georgian taxes. Moreover, while GTI may have been subject to corporate income taxes and dividend withholding taxes of 20% and 10%, respectively, counsel advised that because Georgia had permitted AIOC to operate the Gachiani-Supsa export system on a tax-free basis, the most favoured nation (“**MFN**”) clause in the Georgia / Greece BIT would allow the Claimants to recover damages on the basis that GTI would not have been taxed either [Kaczmarek II, paras. 59-60].
615. Although Mr. Kaczmarek has provided adjustments to reflect the payment of corporate income and income withholding taxes, he categorically rejects Mr. Lagerberg’s third proposed adjustment for “windfall profit” taxes (to the extent it is maintained), characterising it as “provocative and unsound”, and reasoning that several foreign investors have brought international arbitration proceedings claiming that windfall taxes such as those proposed by Mr. Lagerberg constitute a violation of international law.
616. The Claimants add in respect of MFN treatment that, in circumstances where both of the BITs and the ECT provide MFN treatment for covered investments, it would be inequitable and impermissible for the Respondent to seek to reduce damages on the basis of taxation given that AIOC was never taxed for exercising its pipeline rights. The Respondent, on the other hand, contends that the MFN clauses only permit the Claimants to take advantage of more favourable rights granted by another treaty and any tax benefits bestowed on AIOC were not given pursuant to a treaty. The Respondent adds that there is no general obligation to accord MFN status under international law.
617. The Tribunal accepts that, with the exception of a windfall profits tax, these adjustments may be appropriate in circumstances where a cash flow analysis so requires. To the extent the Respondent maintains its’ position as regards an adjustment for windfall taxes, the Tribunal rejects it.

618. It is not disputed that AIOC was, in fact, exempt from the application of income taxes and that Brown & Root, a hypothetical willing buyer in the FMV analysis, did not take these taxes into account in its cash flows analysis. In considering whether, as a matter of law, GTI would have been exempt from paying these taxes, the Tribunal finds it helpful to reproduce the language of the Treaties.
619. Article 3(1) of the Georgia / Greece BIT provides that “[e]ach Contracting Party shall accord to investments, made in its territory by investors of the other Contracting Party, treatment not less favourable than that which it accords to investments of its own investors or to investments of investors of any third State, whichever is more favourable.”
620. The Georgia / Israel BIT similarly provides in its Article 3(1), titled “Most Favored Nation and National Treatment”, that “[n]either Contracting Party shall, in its territory, subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third state.”
621. Article 10 of the ECT also provides, in relevant part, that covered investments shall not be accorded “*treatment less favourable than that required by international law, including treaty obligations*”, treatment being the “*treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable*”.
622. The Tribunal recalls that the Georgia / Greece BIT entered into effect in August 1996, and the Georgia / Israel BIT entered into effect in February 1997. Neither would have been binding on Georgia at the time of the valuation date, *i.e.* 10 November 1995, but both would have entered into effect before the compensation commission began its work. The ECT would have been provisionally applicable during both of these periods. The Tribunal can see no reason in theory why an MFN clause could not operate to secure preferential tax treatment in respect of an investment if such treatment was available to other foreign investors. However, it is not necessary in this case for the Tribunal to determine whether any of these particular provisions apply with the effect advocated by the Claimants.

623. The Tribunal considers that the expectations of willing buyers as to the tax treatment of GTI would certainly have been relevant to the price that they were prepared to pay for its rights. Even without the existence of an MFN clause applicable to the Claimants' investment at the critical time, as a matter of law, the tax treatment of AIOC is a relevant factor in the valuation of GTI. This tends to support the view that there should be no deduction in respect of taxes from the valuation figure because no taxes would have been paid. Accordingly, the Tribunal rejects the proposed adjustment for taxes.

(d) The Discount Rate

624. Mr. Lagerberg proposes that an upwards adjustment be made to the discount rate applied in respect of both the leasing transaction and the Brown & Root offer in order to reflect the political and economic risks facing the Claimants in Georgia in 1995. Mr. Lagerberg therefore proposes to increase the discount rate associated with the leasing scenario to 30% which reflects a risk free rate of 6.17% and a country risk premium of 23%. Mr. Lagerberg also proposes to increase the discount rate applicable to the Brown & Root valuation to 36%, which also reflects the addition of a country risk premium of 23%.
625. As regards the discount rate used in the Brown & Root valuation, Mr. Kaczmarek avers that a contemporaneous estimate developed by an informed, experienced buyer such as Brown & Root (that is a nominal 15% discount) provides a more accurate basis for assessing the risk of investing in GTI at the relevant time than an after-the-fact assessment of risk (that is a discount factor of 36%) in the context of a contentious legal proceeding. Moreover, Mr. Kaczmarek argues that the appropriate discount rate in this scenario must reflect the cost of lending money to Brown & Root, *i.e.* Brown & Root's cost of debt, not the cost of equity to GTI.
626. With respect to the discount rate applied in the leasing scenario, Mr. Kaczmarek argues that the proposed discount is so high as to deter any international oil companies from every doing business in Georgia. Mr. Kaczmarek considers that [Kaczmarek II, paras. 70-71]

*“[i]f investing in an oil pipeline in the Caspian region indeed did require a 30 percent return on capital ... the implicit indication is that the pipeline is likely to suffer frequent and prolonged periods of inoperability. In fact, through his use of a 30 percent discount rate, Mr. Lagerberg is implicitly suggesting that the*



*expected throughput of the pipeline would have to be discounted by 76 percent (i.e. the pipeline would only operate at 24 percent of its expected capacity over the life of the concession) due to country risk.*

*If transportation risks were really as high as suggested by Mr. Lagerberg, oil companies would have considered investment in oil production in the Caspian region to be very unattractive. But the evidence shows that international oil companies were interested in and did invest in the development of oil fields in the Caspian region and did do business with Georgia. This fact standing alone belies any suggestion that an excessively high discount rate such as 30-36 percent is appropriate.”*

627. Mr. Kaczmarek also reasons that an appropriate assessment of the risks faced by GTI, especially under a leasing scenario, indicates that the oil transportation business is not tied in any meaningful way to the macroeconomic environment in Georgia, as was the case in *CMS*.<sup>93</sup>
628. The Tribunal notes that both experts appear to agree that risk may be accounted for either in the cash flows of a DCF analysis or in the discount rate [Kaczmarek II, at para. 129; Lagerberg I, at para. 4.17].
629. During the Hearing, the Tribunal sought further explanation of the experts’ view on the appropriateness of an additional premium for country risk and, in particular, a premium in the nature of that proposed by Mr. Lagerberg. Mr. Lagerberg offered the following explanation in defence of his proposal [Tr. D13:185-187]:

*“MR LAGERBERG: Country risk is -- political risk, country risk can be factored into a calculation in various different ways. Mr Kaczmarek mentioned the differential yield on sovereign US denominated debt, that's one method. The method used for Georgia here, 23 per cent was the number that came out, was based on an analysis that we do, and my firm does, as a matter of routine, every quarter. The 23 per cent at that time reflected the particular sort of chaos, the particular difficulties that Georgia faced at that time. Huge, huge, uncertainty, political risk.*

*Georgia was hammered by the World Bank, I think, in 1998, the risk went up. The political risks have generally trended down, and before coming here, I went to get to my colleagues to say, what are the risk numbers looking now? What's the country risk percentage that you have calculated now? Nothing to do with*

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<sup>93</sup> Mr. Kaczmarek notes that, in the *CMS* case, pipeline cash flows depended to a large extent on the situation of the domestic economy, as the pipeline in issue supplied gas to the people of Argentina for heating and cooking purposes and to Argentina businesses with fuel for power generation. By contrast, in this case, the Gachiani-Supsa export system did not distribute oil domestically to Georgians, but rather to a consortium of international oil companies, with transit fees negotiated in U.S. dollars as opposed to Georgian Lari.

*this arbitration. And they said that the risk figure as of the end of December this year was 10.8 per cent, December last year, 10.8 per cent. They said, well, treat that --*

*PROFESSOR ORREGO VICUNA: That is a discount rate?*

*MR LAGERBERG: That is the country risk premium that you would include --*

*PROFESSOR ORREGO VICUNA: But it would reflect the --*

*MR LAGERBERG: Yes, so about 10.8 compared with 23 per cent, and about half the risk back in 1995, and I said, okay, how much of that represents Russia's intrusion in the country, invasion of the country, and they said, difficult to know because what's happened is that the country risk premium for Georgia has almost doubled. The average for last year was around 6.5 per cent, but it was 10.8 per cent at the end of the year, which reflected a combination, uncertainty to do with Russia, but generally what's been happening in the bond markets, which has seen essentially a flight to quality, and the quality bonds, if you regard US and UK as quality, the yields on the quality bonds are going down and therefore the spreads are going up. I think the 10.8 is a temporary one, therefore I wouldn't place too much reliance on it for long-term ten year projections.*

*But the country risk premium, you use country risk premiums now, if you say an average for 2008, 6 or 6.5 per cent, that's substantially lower than what it was back in 1995, and I think that reflects the fact that Georgia, subject to Russia, is a much more stable developed place than it was back in the days in 1995, because things were -- the evidence around there was that things were really very, very uncertain. Slightly better than they were maybe in 1992 but still very, very dangerous, very uncertain, and therefore justifying the CRP that you included in the discount rate."*

630. In reply, Mr. Kaczmarek offered the following view [Tr. D13:187-189]:

*"MR KACZMAREK: I'll start by recalling the previous comment I made about these are just spreads between lending to governments and the risk is really embedded in how the government runs its fiscal affairs. One needs to take exceptional caution as to how that particular type of risk would affect commercial activity, and especially in the energy industry, people like to take into account risks such as this, country risk, political risk, into the cashflows.*

*How is this going to really affect the daily operation of this business? I've demonstrated that small changes, a 1.25 per cent change increase; 1.25 decreases throughput 13 per cent, which is a pretty good reduction. Now, 3.5, I think, had a 33 per cent reduction on value. And so I think you have to think about how the quantity of what you're applying and adding to the discount rate really affects the business's operations and what you would expect. Would you expect oil that is really mostly travelling underground, not being sold to any Georgian citizens, not dependent upon the currency value in Georgia of the Lari, you know, literally being transited underground, being sold out into Western markets, how much does the political turmoil really affect that type of business operation? In my view, not much, potentially a few disruptions to the pipeline, and I've factored, I think, a very appropriate discount for that, but to take --*

*PROFESSOR ORREGO VICUNA: Which was what?*

*MR KACZMAREK: Well, looking at it from the Brown & Root perspective, about 3.5 per cent in running it, and looking at it from the AIOC transaction perspective, 1.25. 36 per cent really just eviscerates value and puts the project on a basis as if, you know, oil is hardly going to reliably flow through that pipeline, and I just don't think that's realistic. So in my view, you have to bring it down to a commercial context all the time before you just carte blanche apply that spread.*

*THE CHAIRMAN: Because it has, and it still does, flow through the pipeline.*

*MR KACZMAREK: Yes, absolutely right."*

631. The Tribunal is satisfied that GTI was not exposed to significant country risk so as to justify application of a risk premium of 23% to either valuation. It is further satisfied that Mr. Kaczmarek's methodology takes adequate account of the risks involved in each valuation scenario as of the valuation date. Mr. Lagerberg's proposed adjustment to the discount rate is therefore rejected.

(e) Project Risk Premium

632. Mr. Lagerberg proposes that an additional risk premium be applied to both the Brown & Root and the leasing valuations to take account of project execution risk. Specifically, as regards the Brown & Root offer, Mr. Lagerberg considers the value of an early stage project to be 20-30% of the value it would be once completed. In other words, the valuation of this offer should be further discounted by 70-80%. Mr. Lagerberg therefore proposes the mid-point of this range, 25%, to discount the value of this comparable.
633. As regards the leasing scenario valuation, Mr. Lagerberg considers that there are even greater uncertainties in this scenario as the Claimants had not considered the leasing option to be a realistic one as of the valuation date. Mr. Lagerberg therefore proposes a discount of 80%, averring that while this is not a verified figure it is, in his view, a realistic assumption.
634. Mr. Kaczmarek rejects these proposed adjustments for several reasons. First, as regards the leasing scenario, Mr. Kaczmarek considers any execution risks to be relegated to "when" the Gachiani-Supsa export system would be built and operational, not "if" the system would be built and operate successfully, stating that AIOC needed an export route

to be able to achieve any value out of the ACG field and noting in any event that considerations of delay in building and operating the system were taken into account through use of a conservative projection of throughput.

635. Second, Mr. Kaczmarek contends that the 80% discount results in double counting, explaining that while early stage projects are often priced at a discount to the value of the operating project, this discount generally represents the time delay in receiving the cash flow between a project in the construction phase and one in the operating stage. In assuming that cash flows would begin in 1997 at 40,000 barrels per day and gradually reach a peak of 100,000 barrels per day in 2000, Mr. Kaczmarek reasons that he has taken this into account.
636. With respect to the Brown & Root valuation, Mr. Kaczmarek claims that Mr. Lagerberg's approach to probability is significantly flawed. In his view, while there was some risk the project would not have proceeded as planned, this is better captured through the addition of a premium to the cost of lending money to Brown & Root, which Mr. Kaczmarek has incorporated into his proposed discount rate, *i.e.* a 3.25% premium added to the US Prime lending rate of 8.75%.
637. Mr. Lagerberg offers a simple analogy in response to Mr. Kaczmarek's comments on his proposed adjustment, pressing his point that an early stage project contains a relatively low value compared to a completed project, partly to reflect the inherent risks that the project will not be completed but also because little value has yet been created. Offering the example of a bread baking operation, Mr. Lagerberg reasons that flour is less valuable than a loaf of bread not only because of risk that it will burn in an oven but also because someone has yet to go through the process to make the ingredients valuable. According to Mr. Lagerberg, the baker will spend time and expend labour to make the bread, which process adds value that is then reflected in the price of the bread.
638. Applying this analogy to GTI, Mr. Lagerberg suggests that GTI was at a stage in which it did not have even flour in 1995, let alone dough or an oven. GTI did not have the required skills, nor had it expended much labour. What it had, in Mr. Lagerberg's view, was the rights to bake the bread as well as a high level feasibility study on how this might be accomplished. Mr. Lagerberg also notes that GTI was seeking an agreement with a

“baker”, *i.e.* Brown & Root, who has certain of the appropriate skills and equipment and who indicated a willingness to bake the bread in exchange for 25% of the loaf. However, this “baker” had not yet committed to a price, or even to bake the bread, so GTI could not be certain of the economic gain from the bread. At some stage GTI would receive cash for bread but, in 1995, there was no money and GTI could not, “without even flour”, sensibly claim it was entitled to the cash value of a load of bread.

639. The Tribunal has considered these submissions and decided that, based on the evidence before it, an appropriate level of risk is incorporated into the valuation scenarios, and that no further adjustment is necessary.

## 5. The Amount of Compensation Owing to the Claimants

### *a) The Claimants’ Position*

640. The Claimants provide several alternative conclusions as regards compensation in their Post-Hearing Brief [at para. 118].<sup>94</sup>
641. *1995 valuation.* If the Tribunal concludes that GTI would have been required to divest itself of its rights due to larger geopolitical forces in the region, then the Claimants concede that GTI would likely have been required to sell its early oil rights in November 1995. This would yield a value of US\$ 15.1 million, excluding interest, for 25% of GTI’s early oil rights.
642. *Interest to reflect Georgia’s unlawful conduct:* Should the Tribunal conclude that GTI would have been required to dispose of its early oil rights at the end of 1995, the Claimants submit that it should “*nevertheless account for Georgia’s unlawful conduct by wiping out the consequences of the ‘free loan’ Georgia obtained through its expropriation and subsequent denial of compensation.*” This may, in their view, be accomplished by awarding a commensurate interest rate (see Part V. F.1(a) below).

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<sup>94</sup> As stated above, the Tribunal does not here consider the Claimants’ arguments concerning any future rights.

*b) The Respondent's Position*

643. The Respondent states that it is appropriate to award only a sum equivalent to sunken costs in this case, because of the express contractual limitations contained in the JVA and the Deed of Concession, and because this is the only reliable measure of damages on the facts of these cases. Sunken costs would result in an award in the amount of US\$ 3.1 million for each Claimant [Resp. Post-Hearing Br. at para. 81].
644. Alternatively, if the Tribunal were to rely on market transactions, the Respondent claims that the Tribunal should look only to Brown & Root's offer. When this analysis is conducted in accordance with "proper valuation practices", the Respondent claims that this value is limited to US\$ 4,974,177 [Resp. Post-Hearing Br. at para. 82].

*c) The Tribunal's Determination*

645. By using the three comparables described above, properly weighted and adjusted, the Tribunal finds that Mr. Kardassopoulos is entitled to damages in the amount of US\$ 15.1 million, which reflects the value of his one quarter interest in GTI's early oil rights. This is the Tribunal's estimate of the amount that should have been the basis of the decision of the compensation commission set up after the taking effected by Decree No. 178; and it is accordingly the starting point for assessing what the Claimants lost by reason of the Respondent's failure to fulfil its duties under international law to pay compensation.
646. Having decided in this case that the same standard of compensation is applicable to the valuation of the Claimants' respective claims, the Tribunal also finds that Mr. Fuchs is entitled to damages in the amount of US\$ 15.1 million.
647. The Tribunal finds that there is insufficient evidence on the record to support a further award of damages to Mr. Kardassopoulos in the amount of US\$ 750,000, *i.e.* 50% of US\$ 1.5 million, in connection with his interest in an alleged loan to the Batumi Oil Refinery. The Tribunal agrees with the Respondent that the allegations concerning this "loan" are insufficiently clear or supported by documentary evidence and therefore rejects Mr. Kardassopoulos' plea.
648. The Tribunal also rejects the Claimant's plea for reimbursement of Tramex's expenses related to pursuit of the compensation commission process, totalling US \$275,803. The

Tribunal does not consider, in the absence of any evidence to the contrary, that these expenses would have been recoverable from the compensation commission. In other words, the Claimants could not have had a legitimate expectation to recover such expenses.

649. The Tribunal shall next address the appropriate interest rate.

***F. Interest***

***1. Pre-Award Interest***

***a) The Claimants' Position***

650. The Claimants take the position that the floor above which interest must rise is LIBOR, the rate prescribed in the Georgia / Italy BIT [Tr. D11:37]. During the Hearing, the Claimants contended that LIBOR + 2% was the “absolute minimum” that ought to apply to any sum awarded for the early oil rights, observing that US Prime + 2% and LIBOR + 4% are also open to the Tribunal in a lawful expropriation analysis [Tr. D12:89]. The Claimants point out that while the interest rates “*bump up the number, it is not their fault that the Respondent has not paid one bean to the Claimants*” [Tr. D12:90].
651. In their Post-Hearing Brief (paras. 137-38), the Claimants asserted that while LIBOR + 2% has been adopted in the awards of previous arbitral tribunals, this rate falls short of the commercial rate required by Article 17(1) of the ECT, as well as the rate of interest provided for in Section 18.3 of the Deed of Concession.<sup>95</sup> The Claimants therefore contend that the best indicator of a commercial rate is the rate agreed to in the PCOA, noting that Section 5.6 of the PCOA (relating to delay in payment by AIOC to GIOC) provides for a rate of LIBOR + 4%. Similarly, Section 18.4(f) of the PCOA stipulates, in the event of a dispute, that the arbitral tribunal must apply a rate of “*LIBOR plus four percent (4%) over the period from the date of the breach or other violation to the date the award is paid in full.*” [Hearing Bundle, Tab 286]. This same rate was applied in the HGA and the PSA [Hearing Bundle, Tabs 285 (Art. 13.3(f)) and 274 (Art. 12.4(d)(iii))].

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<sup>95</sup> Article 18.3 of the Deed of Concession stipulates a rate of LIBOR + 2.5% had Transneft wished to repurchase assets from GTI at the end of the concession period.

652. In demanding a higher interest rate, the Claimants contend that Georgia has effectively had a free loan from them [Tr. D12:96-97]:

*“[...] Instead of paying Tramex the 30 million, they have kept that money, and if they wanted to borrow that money at the time, what would they have been borrowing at? What have we saved them by the fact that we're out of pocket? I think that is an appropriate way of looking at it if someone's behaved unlawfully. They've got a lot to gain by not giving us anything, because if they had to loan that money, at the time, their sovereign rate, the interest rate is very high, their Treasury bill rates, and these are all provable rates, they are all set out by Mr Kaczmarek, those rates, significantly more than LIBOR plus 4. If they had had to go to a bank, if SakNavtobi had had to go to a bank in Georgia and borrow the money to pay us, if it had been determined that SakNavtobi was the one that had to pay us out, the interest rates were so high then in Georgia that in fact the 15 million they owed to Mr Kardassopoulos would have become by now 413 million.”*

653. The Claimants also submit that compound interest is necessary to compensate them fully and that this is now an accepted principle in international law, relying upon the ICSID awards in *Tecmed* and *Santa Elena*. The Claimants offered interest multipliers for several start dates in their post-hearing submissions, compounding interest semi-annually, noting that the appropriate date on which interest should begin to accrue in respect of both Mr. Kardassopoulos' and Mr. Fuchs' claim is 20 February 1996. As regards the *dies a quo* for Mr. Fuchs' claim, the Claimants reason that even if the date of Treaty breach is determined to be in 2004, a fair compensation process was required to award interest to Mr. Fuchs from the date of expropriation.

*b) The Respondent's Position*

654. The Respondent submits that the Claimants seek an inappropriate rate of interest. On the basis of Mr. Lagerberg's analysis, the Respondent claims that the risk premia sought by the Claimants above the risk free rate is inappropriate in the circumstances of this case, reasoning that the benchmark yield on 3-year U.S. government bonds is a more appropriate rate.
655. In response to the Claimants' request for a higher rate of interest in the event of a finding of unlawful expropriation, the Respondent argues that it is not the function of the Tribunal to punish the State. The *Chorzów Factory* test requires that a claimant be



awarded the damages suffered and, in the Respondent's view, an excessive interest rate would add a punitive element to the award that would render it unenforceable.

656. The Respondent also submits that an award of simple interest, as opposed to compound interest, would more appropriately compensate the Claimants, relying on the reasoning of the tribunal in *Santa Elena* that “[w]here an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest.”<sup>96</sup> Mr. Lagerberg nevertheless presents his interest calculations on a compounding basis.
657. In respect of the *dies a quo*, the Respondent submits that, according to Article 38(2) of the ILC Articles on State Responsibility, a state's interest obligation starts on the date when the principal sum should have been paid and, in the context of an expropriation, this has traditionally been interpreted as the date of expropriation. In the context of a non-expropriatory breach, the Respondent notes that the date for interest to begin is less clear but, according to Thomas Walde and Borzu Sabahi<sup>97</sup>, should be the date when the state becomes aware or should have become aware that a serious treaty breach exists. As regards Mr. Fuchs' FET claim in particular, the Respondent submits that should the Tribunal rule there has been a breach of the FET standard, interest should not begin to accrue until 2004.

*c) The Tribunal's Determination*

658. The Tribunal recalls that Article 13(1) of the ECT requires that compensation “*shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.*” (emphasis added). Article 2(2) of the Georgia / Israel BIT is silent on the interest applicable to an award of compensation for breach of the FET obligation.

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<sup>96</sup> *Santa Elena*, at para. 104.

<sup>97</sup> “Compensation, Damages and Valuation in International Investment Law” (Nov. 2007) 4:6 *Transnational Dispute Management* at p. 47.

659. However, in view of the Tribunal's findings above in respect of the unlawful character of the Georgian Government's conduct vis-à-vis the investments of both Mr. Kardassopoulos and Mr. Fuchs, it is appropriate also to consider that interest for damages may be awarded by the Tribunal with the necessary discretion so as to ensure full reparation. In this regard, Article 38 of the ILC's Articles on State Responsibility provides:

*"1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.*

*2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled."*

[Emphasis added.]

660. The Commentary to Article 38 notes that the awarding of interest depends on the circumstances of each case and, in particular, whether an award of interest is necessary in order to ensure full reparation.<sup>98</sup>

661. The Tribunal finds that in order to achieve full reparation in the circumstances of these cases, the PCOA rate (see paragraph 651 above) provides the best available evidence of what constitutes a fair commercial rate in the present context, and accordingly the Tribunal decides that it is appropriate to award interest at the rate of LIBOR + 4%.

662. As regards compound interest, both Parties to these proceedings rely upon the award in *Santa Elena* for the competing propositions that any award of interest either should or should not be compounded. That tribunal ultimately awarded compound interest, observing that the purpose of compound interest is not to attribute blame or to punish, but is simply a mechanism to ensure that the compensation awarded to a claimant is appropriate in the circumstances.<sup>99</sup>

663. The *Santa Elena* tribunal applied compound interest as a mechanism to ensure that the claimant received the full present value of the compensation that it should have received

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<sup>98</sup> ILC Commentary, Article 38, at para. 7.

<sup>99</sup> *Santa Elena*, at para. 104.

at the time of the taking, noting that “*the taking state is not entitled unjustly to enrich itself by reason of the fact that the payment of compensation has been long delayed.*”<sup>100</sup>

In that case, it took almost 20 years from the time of the taking to the date of the award for the host State to pay the claimant compensation for its expropriated investment.

664. Simple interest has the great advantage of simplicity; but it is often a simplicity combined with arbitrariness. When the question is, what amount has the Claimant lost by being wrongly denied payment of a sum on a certain date in the past, in circumstances where the Claimant could have invested an equivalent sum, or could only have borrowed an equivalent sum, on terms of compound interest, the award of compound interest is appropriate. The Tribunal takes the view that an award of compound interest is appropriate in this case. In so finding, it takes comfort in the principles articulated in *Santa Elena*, which apply equally here:

*“[W]hile simple interest tends to be awarded more frequently than compound, compound interest certainly is not unknown or excluded in international law. No uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case. Rather, the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by this Tribunal.”*<sup>101</sup>

665. The Parties do not appear to dispute that the relevant date for the calculation of interest in respect of Mr. Kardassopoulos’ claim is 20 February 1996, the date on which the expropriation of Mr. Kardassopoulos’ investment crystallized. On the other hand, the date from which interest under this Award is payable must be the date of the breach, which the Tribunal regards as having occurred with the definitive repudiation of the Respondent’s liability in November and December 2004. That said, the amount of compensation that should have been paid at the end of 2004 should itself have included an element in respect of interest from the date of the taking (1996) to the date of the compensation commission’s award. Accordingly, as the Tribunal does not see any good reason for applying a different interest rate for the period 1996-2004 than that applicable

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<sup>100</sup> *Ibid.*, at para. 101.

<sup>101</sup> *Santa Elena*, at para. 103.

from 2004 onwards, the interest due to Mr. Kardassopoulos will in effect be LIBOR + 4% from 20 February 1996.

666. Though Mr. Fuchs' claim is somewhat different, being confined to the FET provisions, the Tribunal considers that the loss suffered by Mr. Fuchs as a result of the Respondent's repudiation of any liability to pay compensation to the Claimants is the same as that suffered by Mr. Kardassopoulos.
667. Accordingly, the Tribunal awards pre-Award interest to both Claimants at the rate of LIBOR + 4%. This interest shall accrue on the sum awarded to Mr. Kardassopoulos beginning as of the date of expropriation, *i.e.* 20 February 1996, compounded semi-annually to the date of Award. This same rate of interest shall also accrue on the sum awarded to Mr. Fuchs as of 20 February 1996, also compounded semi-annually to the date of Award.
668. The Tribunal has compounded interest semi-annually at the six-month term LIBOR rate for U.S. dollar deposits published by the Wall Street Journal, plus four percent (4%), from 20 February 1996 and reset thereafter to the current six-month LIBOR rate in effect at the beginning of each six-month period from 1 July 1996 to the date of the present Award, *i.e.* 28 February 2010, resulting in the total sum of pre-Award interest of US\$ 30,024,736.83 each to Mr. Kardassopoulos and Mr. Fuchs.

## 2. Post-Award Interest

### *a) The Claimants' Position*

669. The Claimants also request post-Award interest to the date of payment of any damages sum, submitting that the Georgian Sovereign Debt Rate should apply during this period. The Claimants acknowledge that whilst interest is "compensatory, not punitive", compensation has been withheld from the Claimants for 13 years and Georgia has yet to pay an outstanding ICSID award against it.
670. In the Claimants' view, even a post-Award interest rate of LIBOR + 4% is too low, as it "incentivises" Georgia to continue withholding compensation indefinitely [Cl. Post-Hearing Br., para. 142].

671. The Claimants reject the Respondent's submission that interest should be applied at the "risk free" rate for three principal reasons [Reply at para. 401]. First, the purpose of damages is to compensate the Claimants. It is commercially unrealistic to suppose that the Claimants, as businessmen, would have simply put their money into U.S. bonds and not sought a more remunerative investment.
672. Second, the Respondent's position improperly presupposes that the principal sum is already in the Claimants' hands, without taking into account that the Claimants still face the task of recovering that sum from the Respondent.
673. Third, the Republic of Georgia's sovereign default risk is viewed by the market as being far higher than that of the United States, therefore it is inappropriate to apply a U.S. treasury rate.

*b) The Respondent's Position*

674. The Respondent submits that an order for post-award interest on all damages at the Georgian Sovereign Rate would be inequitable and would result in an award of interest that greatly outweighs the value of the Claimants' actual investment. Accordingly, in the Respondent's submission, the Tribunal ought not to award any post-award interest or, in the alternative, ought to award interest in accordance with the benchmark yield on 3-year U.S. government bonds.
675. The Respondent observes that the Claimants provide no legal or other rationale for awarding a different rate of interest for post-award and pre-award interest. By contrast, the Respondent notes that "[m]ost [international] tribunals do not distinguish between compensatory and moratory interest and award them together at the same rate."<sup>102</sup>
676. The Respondent further notes that the Claimants have pointed to no arbitral awards in which the tribunal has examined a Respondent State's payment history to assess the appropriate rate of interest, concluding that the Claimants' request is, in essence, a

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<sup>102</sup> J. Gotanda, *Supplemental Damages in Private International Law* (Kluwer Law International, 1998), Chapter 3, Sec. 3.1.

request to punish Georgia for (alleged) non-compliance, which punishment is prohibited under international law.

*c) The Tribunal's Determination*

677. The Tribunal sees no reason in this case to depart from its conclusion in respect of pre-Award interest, *i.e.* that interest is to be awarded at such a rate so as to achieve full reparation and runs from the date when the principal sum should have paid until the obligation to pay is fulfilled.
678. The Tribunal therefore determines that the sum awarded to each Claimant shall bear interest at the rate of LIBOR in effect as at the date of issuance of this Award plus four percent (4%), compounded semi-annually from the date of issuance of the Award at the six-month term LIBOR rate for U.S. dollar deposits published by the Wall Street Journal, plus four percent (4%), and such interest rate reset semi-annually to the current six-month LIBOR rate in effect each January 1 and July 1 until such time as the Award is satisfied in full.

**G. Costs**

1. The Claimants' Position

679. The Claimants request that they be awarded their costs in these proceedings, including the costs of their legal representation, experts' fees and related disbursements, as well as their share of all arbitration costs already paid or payable to ICSID.
680. The Claimants submit that there is an increasing trend towards outcome-based recovery in investment treaty arbitration, anticipating that they will have prevailed on liability as they did on jurisdiction. In any event, the Claimants contend that the particular facts of these arbitrations present a "compelling case" for an award of costs, identifying eight primary factors which, in their view, weigh in favour of a full costs award: (1) the Claimants have prevailed on jurisdiction and liability; (2) Georgia's decision to contest liability and its strategy of raising "every conceivable defence"; (3) Georgia raised factual objections it knew to be false; (4) many of Georgia's arguments were "unarguable or irrelevant" to an investment treaty claim; (5) Georgia was given every opportunity to compensate the Claimants between 1996 and 2004; (6) Georgia insisted that Mr.

Kardassopoulos file a full merits memorial and witness statements in 2006, even though its jurisdictional objections were confined to net points of law that could have been resolved on the facts as set out in the Kardassopoulos Request; (7) any costs that are not borne by Georgia will reduce the Claimants' net recovery, resulting in less than full recovery; (8) the Claimants have no assurance that they will recover the entire amount of the Tribunal's awards.

681. The Claimants assess their total fees at US\$ 6,235,429.15 (US\$ 4,779,745.50 on account of the Kardassopoulos claim and US\$ 1,455,683.65 on account of the Fuchs claim), and total disbursements at US\$ 1,706,868.41 (US\$ 173,607.53 on account of the Kardassopoulos claim; US\$ 84,190.88 on account of the Fuchs claim; and US\$ 1,449,070 on account of expert fees and advances on the costs of arbitration).

## 2. The Respondent's Position

682. The Respondent requests that it be awarded its costs incurred in connection with these proceedings, including Georgia's legal fees, experts' fees and other costs, as well as Georgia's share of the fees and expenses of the Tribunal and the Centre. The Respondent assesses its total legal fees at £ 3,075,844.22 and total other fees and disbursements at £ 941,560.91 (£ 475,759.90 on account of expert fees and disbursements; £ 151,881.17 on account of other disbursements and expenses; and £ 343,919.84 on account of ICSID fees).
683. In the event that the Claimants are successful in all or any of their claims, the Respondent submits that it would not be fair or appropriate for Georgia to bear the costs of the arbitrations and/or the costs of the Claimants' legal representation, noting that the prevalent approach in investment treaty arbitration has been to avoid the "loser pays" principle. Among the reasons identified by the Respondent in support of its argument that costs ought not be awarded against it are: (1) the delay with which the Claimants commenced arbitration proceedings, which caused Georgia to undertake a "factual investigation of an unusually historical nature"; (2) the Claimants' "lack of discipline" in pleading their case which has needlessly complicated the case; (3) the application of interest rates by Mr. Kardassopoulos which increased his claim by almost ten-fold, yielding an excessive damages claim; (4) conduct by the Claimants which increased costs

unnecessarily, such as the delayed disclosure of documents and the pursuit of “untenable applications” in respect to Georgia’s August 2008 request for an adjournment of the Hearing; and (5) the case raised novel and complex legal issues, including the provisional application of the ECT.

684. The Respondent also submits that because the Claimants abandoned certain claims prior to the hearing, such as Mr. Fuchs’ expropriation claim and Mr. Kardassopoulos’ umbrella clause claim, Georgia has incurred unnecessary costs in relation to these claims. As a result, even if the Tribunal were to consider that costs follow the event, the Claimants’ success is mixed such that each Party should bear its own costs.
685. In regard to the Claimants’ submissions as to the costs likely associated with recovery of any amount awarded by this Tribunal, the Respondent avers there is no recognized principle that legal costs should be awarded as an insurance policy for any costs a party perceives it may incur in an enforcement action.
686. Finally, the Respondent claims that the Claimants’ legal costs are excessive and because the Claimants’ costs have been borne in part by a third party investor it is questionable whether such costs are properly recoverable.

### 3. The Tribunal’s Determination

687. Article 61(2) of the ICSID Convention confers on the Tribunal broad discretion in assessing and allocating the costs of an arbitration proceeding. Article 61(2) provides as follows:

*“In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.”*

688. Prior to their first scheduled submission on costs, the Claimants wrote to the Tribunal requesting the right to submit correspondence exchanged between the Parties “without prejudice save as to costs”. The Claimants reasoned that if the Tribunal considered such correspondence to be material in exercising its discretion as to costs under Article 61(2), then it would be appropriate to render an award on liability and quantum, followed by a



separate award on costs. The Respondent objected to the disclosure of such correspondence. The Tribunal does not find the Claimants' proposed approach to be necessary in exercising its discretion as to costs and the Claimants' application is therefore denied.

689. ICSID arbitration tribunals have exercised their discretion to award costs which follow the event in a number of cases, demonstrating that there is no reason in principle why a successful claimant in an investment treaty arbitration should not be paid its costs. For example, the tribunal in *ADC* found no reason “*to depart from the starting point that the successful party should receive reimbursement from the unsuccessful party*”<sup>103</sup>. In that case, the tribunal found relevant to its costs award the fact that the respondent State had made no attempt to honour its obligations under the BIT in issue and had acted throughout with callous disregard of the claimants' contractual and financial rights.
690. In *PSEG*, while the claimants were only partially successful on the merits of their claim, the tribunal noted that in order “[t]o obtain justice, they had no option but to bring this arbitration forward and to incur related costs”, thereby ordering the Respondent to bear 65% of the costs associated with the arbitration.<sup>104</sup>
691. The Tribunal is not persuaded in the circumstances of these cases that the Claimants should not be allowed to recover their reasonable costs. The Tribunal observes that among those factors identified by the Respondent in support of its submissions on costs is the fact that the Claimants have an arrangement with a third-party concerning the financing of these proceedings. The Tribunal knows of no principle why any such third party financing arrangement should be taken into consideration in determining the amount of recovery by the Claimants of their costs. In this connection, the Tribunal notes that, while not directly applicable, the Georgia / Greece and Georgia / Israel BITs both provide in their respective dispute settlement provisions that a Contracting Party shall not raise as an objection at any stage of the proceedings the fact that the investor has received compensation or an indemnity under an insurance contract in respect of all or part of the

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<sup>103</sup> *ADC* at para. 553.

<sup>104</sup> See *PSEG* at para. 352.

damages incurred (Georgia / Greece BIT, Article 9(5) and Georgia / Israel BIT, Article 8(3). It is difficult to see why in this case a third party financing arrangement should be treated any differently than an insurance contract for the purpose of awarding the Claimants full recovery.

692. The Tribunal finds that it is appropriate and fair in this case to award the Claimants their costs of the arbitrations, including legal fees, experts' fees, administrative fees and the fees of the Tribunal. The Tribunal finds the total fees assessed by the Claimants to be reasonable, *i.e.* US \$6,235,429, as well as total disbursements assessed, that is US \$1,706,868.

## **PART VI. OPERATIVE PART**

693. For the reasons set out above, the Tribunal awards as follows:

- (a) The Tribunal sustains the Respondent's objection to the Tribunal's jurisdiction *ratione temporis* over Mr. Kardassopoulos' expropriation claim under the Georgia / Greece BIT;
- (b) The Tribunal dismisses the Respondent's objection to the Tribunal's jurisdiction *ratione temporis* over Mr. Fuchs' fair and equitable treatment claim under the Georgia / Israel BIT;
- (c) The Tribunal dismisses the Respondent's objection to the Claimants' claims on grounds of equitable prescription;
- (d) The Respondent has unlawfully expropriated Mr. Kardassopoulos' investment and failed to pay him the compensation due on the taking of his investment, in breach of Article 13(1) of the ECT;
- (e) The Respondent has breached the fair and equitable treatment standard applicable to Mr. Fuchs' investment under Article 2(2) of the Georgia / Israel BIT and failed to pay him the compensation due on the taking of his investment;

- (f) The Respondent is liable to pay for the losses caused by its said breaches of the ECT and Georgia / Israel BIT in the principal sums of US\$15.1 million each to Mr. Kardassopoulos and Mr. Fuchs;
- (g) The Respondent is liable to pay compound interest on such compensation from 20 February 1996 to 28 February 2010 in the amount of US\$ 30,024,736.83 each to Mr. Kardassopoulos and Mr. Fuchs, for a total sum payable each to Mr. Kardassopoulos and Mr. Fuchs of US\$ 45,124,736.83;
- (h) The Respondent is liable to pay to Mr. Kardassopoulos and Mr. Fuchs, respectively, on the said principal sums interest at the rate of LIBOR in effect as at the date of issuance of this Award plus four percent (4%), compounded semi-annually from the date of issuance of the Award at the six-month term LIBOR rate for U.S. dollar deposits published by the Wall Street Journal, plus four percent (4%), and such interest rate reset semi-annually to the current six-month LIBOR rate in effect each January 1 and July 1 until such time as the Award is satisfied in full;
- (i) The Respondent is liable to pay the Claimants their costs of these arbitration proceedings in the total sum of US\$ 7,942,297, to be allocated between the Claimants consistent with their respective share of fees and disbursements, as set out above, and expenses incurred in respect of expert fees and advances on the costs of arbitration to be divided equally among them;
- (j) The Respondent shall bear all the costs of these arbitration proceedings in full, without recourse to either of the Claimants;
- (k) The Respondent shall pay forthwith to Mr. Kardassopoulos and Mr. Fuchs respectively all amounts which it is liable hereunder to pay; and
- (l) Save as aforesaid, all other claims by the Claimants and the Respondent made in these arbitration proceedings are hereby dismissed.

[*signed*]

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Prof. Francisco Orrego Vicuña

Date: [28 February 2010]

[*signed*]

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Prof. Vaughan Lowe, Q.C.

[Date: 23 February 2010]

[*signed*]

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Mr. L. Yves Fortier, C.C., O.C., Q.C.

Date: [26 February 2010]