

International Chamber of Commerce  
International Court of Arbitration

**ICC Arbitration n° 20564/EMT/GR**

*In the matter of an arbitration between:*

**HYDRO S.R.L.**  
**(ITALY)**

*and*

**THE REPUBLIC OF ALBANIA**

**FINAL AWARD**

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## **CHAPTER I. THE PARTIES TO THE ARBITRATION**

### 1. **Claimant:**

HYDRO S.r.L, a company incorporated and existing under the laws of Italy, registered with the Company's Register of Rome under number 09563901009, with VAT number 09563901009, and having its registered offices at Piazza di Spagna, 66, 00187 Rome, Italy;

hereinafter referred to as "Hydro" or "Claimant";

assisted and represented in this arbitration by Mr. Philippe Pinsolle and Ms. Anne-Marie Lacoste, QUINN EMANUEL URQUHART & SULLIVAN UK LLP, 6 rue Lamennais, 75008 Paris, France; Dr. Tai-Heng Cheng, QUINN EMANUEL URQUHART & SULLIVAN LLP, 51 Madison Avenue, New York, New York 10010, U.S.A.; Mr. Alexandre de Fontmichel, 2 rue Lord Byron, 75008 Paris, France; and Prof. Avv. Andrea di Porto, 13 Via Giovanni Battista Martini, 00198 Rome, Italy.

### 2. **Respondent:**

THE REPUBLIC OF ALBANIA, acting through the Ministry of Public Works, Transportation and Telecommunications of the Republic of Albania ("Ministry of Public Works") and the Ministry of Economy, Trade and Energy of the Republic of Albania ("METE"), the offices of which are for the purpose of this arbitration at Sheshi Skenderbeg, Tirana, Albania;

hereinafter referred to as "the State" or "Respondent";

assisted and represented in this arbitration by Mr. Michael Darowski and Ms. Karen O'Connell, GOWLING WLG (UK) LLP, 4 More London Riverside, London, SE1 2AU, United Kingdom; by Mr. Siddharth Dhar and Mr. Peter Webster, Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3EG, United Kingdom, and by Ms. Alma Hicka, State Advocate General, State Advocacy Office, Ministry of Justice, Blv. Zogu I, Tirana, Albania.

## CHAPTER II. THE ARBITRATION CLAUSE AND THE ARBITRAL TRIBUNAL

3. The applicable arbitration clause is contained in Article 30 (originally Article 31<sup>1</sup>) of the Concession Agreement originally entered into – as explained below<sup>2</sup> – between “the Authorised State Body” of the Republic of Albania and B.E.G. S.p.A., on 24 May 1997. It provides as follows:

*“Any dispute should occur between the Parties in the execution of the present Concession Agreement will not interfere with the duties execution, anyhow accepted through the present Concession Agreement.*

*The Parties also undertake to make use of their best good will to solve any dispute which might occur.*

*Should it be impossible to reach a friendly composition and without prejudice to Art. 26 above<sup>3</sup>, any dispute will be definitively treated according to the conciliation and arbitration rules of the International Chamber of Commerce of Paris by 3 arbiters appointed according to such rules.*

*The arbitration will take place in Paris.”*

4. The Arbitral Tribunal has been constituted as follows:

- The Claimant has nominated as arbitrator:

Mr. Eduardo ZULETA-JARAMILLO  
ZULETA Abogados Asociados S.A.S  
Calle 87 No. 10 – 93 Oficina 302

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<sup>1</sup> The original Article 31 reads as follows :

*“Any dispute should occur between the Parties in the execution of the present Concession Agreement will not interfere with the duties execution, anyhow accepted through the present Concession Agreement. [...] The Parties also undertake to make use of their best good will to solve any dispute which might occur. [...] Should it be impossible to reach a friendly composition, any dispute will be definitively treated according to the conciliation and arbitration rules of the International Chamber of Commerce of Paris by 3 arbiters appointed according to such rules.[...] The arbitration will take place in Paris.”*

Pursuant to Article 22 of Addendum II, the numbering of Article 31 has changed to Article 30 (Article 22 of Addendum II provides: “Art. 24 of the Concession Agreement is cancelled, therefore the articles following art. 24 shall be considered with their number decreased by 1 [...]”). Moreover, the original Article 31 was modified by Article 27 of Addendum II entitled *Amendment to Art. 31 of the Concession Agreement*, which provides that « *The terms 'and without prejudice to Art. 26 above' are added following the terms friendly composition' set out in art. 31, paragraph 3 of the Concession Agreement. »).*

<sup>2</sup> See §§26 to 56.

<sup>3</sup> Article 26 of the Concession Agreement reads as follows: “Article 26 – (Referring Laws) – Without prejudice to art. 2 of Law n°8708 of 01.12.2000, the Concession Agreement is subject to the Albanian Law”.

Bogota D.C. 110221

COLOMBIA

Tel: +571 743 1005

Fax: + 571 743 1005 Ext 104

Email: ezuleta@zulegal.com

whose nomination as co-arbitrator has been confirmed by the Secretary General of the ICC International Court of Arbitration (“the Secretary General”), in accordance with Article 13 (2) of the ICC Arbitration Rules in force as from 1 January 2012 (“the Rules”), on 29 January 2015.

- The Respondent has nominated as arbitrator:

Professor Sir Bernard RIX  
20 ESSEX STREET CHAMBERS  
20 Essex Street  
London WC2R 3AL  
UNITED KINGDOM

Tel: +44 7842 6731 (direct) +44 7842 6760 (switchboard)

Fax: +44 7842 6770

Email: bemark.rix@20essexst.com

whose nomination as co-arbitrator has been confirmed by the Secretary General, in accordance with Article 13 (2) of the Rules, on 15 June 2015.

- The two arbitrators have jointly nominated as President of the Arbitral Tribunal:

Professor Bernard HANOTIAU  
HANOTIAU & VAN DEN BERG  
IT Tower  
480 Avenue Louise, Box 9  
1050 Brussels  
BELGIUM

Tel: +32 2 290 39 00

Fax: +32 2 290 39 39

Email: bemark.hanotiau@hvdb.com

whose nomination as President of the Arbitral Tribunal has been confirmed by the Secretary General, in accordance with Article 13(2) of the Rules, on 9 July 2015.

### **CHAPTER III. THE PROCEDURAL HISTORY**

5. The present dispute arises out of and in connection with a Concession Agreement executed by and between BEG S.P.A., an Italian company (Claimant's predecessor in rights), and the Authorized State Organ consisting of the Ministry of Public Works, Land Planning and Tourism, and Ministry of Mining and Energy Resources of the Republic of Albania on 24 May 1997 ("the Concession Agreement" or "the Agreement", C1). The Concession Agreement was subsequently amended by Addendum I dated 2 November 2000 (C2) and Addendum II dated 8 May 2007 (C3). The Concession Agreement was "*for the financing, engineering, construction, management and transfer at the Concession expiring date, of a Hydro-Power Plant in Albania according to B.O.T. (Build Operate and Transfer) basis*" ("the Project" or "the Kalivag Project").
6. On 10 January 2018, the Secretariat notified to the Parties the Arbitral Tribunal's Partial Award dated 8 January 2018 ("the Partial Award"). The Arbitral Tribunal specified in Chapter I of the said Partial Award, entitled "Preliminary Comment" that "*the specificities of the case and the conclusions it has reached in this Award require that there is first a decision on liability, which sets certain dates and parameters required to determine the financial aspects of the damages, followed by submissions by the Parties based on such dates and parameters, and that the final decision on the financial aspects of the damages be addressed subsequently in a Final Award. For these reasons, it hereby issues a Partial Award in which it decides on the mechanism to calculate damages, without taking a decision on the damages themselves.*"<sup>4</sup>
7. The Procedural History until the date of that Award is detailed in paragraphs 6 to 174 of the Partial Award.
8. On 22 January 2018, the Arbitral Tribunal informed the Parties that the second phase of the proceedings would be devoted to the determination of the amounts of delay penalties, damages, interests and costs. It noted that paragraphs 392 to 394 of the Partial Award read as follows:

*"392. For the above reasons, the Arbitral Tribunal decides that the Claimant shall pay the Respondent delay penalties calculated as per the terms of Article 14, and in accordance with the following formula:*

*From day 1 (16 July 2011) to day 90 (14 October 2011): 5,000 € per day of delay = 450,000 €; and*

*From day 91 (15 October 2011) to the termination date of the Concession Agreement (the date of this Partial Award): 1% of one day's energy generation, per day of delay, calculated on the basis of a yearly production of*

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<sup>4</sup> Partial Award, paragraph 1.

380,000 MWh, and an electricity price based on the ERE 2014 list of import prices for the year 2011 to 2014 and, for the years 2014 to 2017 based on the Hungarian Power Exchange prices.

As Article 14 of the Concession Agreement provides that the delay penalties are due only “up to a maximum amount equal to 10% of the Estimated Project Costs” and since the parties agree that, if the cap would apply, it would amount to EUR 12.9 million<sup>5</sup>, the penalties are payable only up to this maximum amount.

393. As from the date of termination (the date of the Partial Award) until 31 December 2020, the Respondent is entitled to receive damages calculated on the basis of the concession fees which it would have received had the Claimant completed the Plant, and taking into account that the Respondent would have received such concession fees in “physical form”. The concession fees correspond to 10.5% of the energy produced by the Plant for the first three years of operations, reducing to 10% thereafter. The Respondent’s damages based on the concession fees that it would have received had the Claimant completed the Project should be calculated taking into account:

- an annual generation of the Plant in the amount of 380,000 MWh,
- electricity import prices which shall be estimated, for the period between 2017 and 2019, on the basis of the Hungarian Power Exchange (HUPX) list of future electricity contracts<sup>6</sup>; and,
- for the year 2020, electricity import prices which shall be estimated on the basis of the electricity prices for the industrial sector extracted from the report published by the European Commission entitled “EU Energy, Transport and GHG Emissions Trends to 2050”<sup>7</sup>.

394. The above amounts will be determined in the Final Award, after each Party will have been provided the opportunity to file a submission together with an expert report in which they will explain the amounts that they consider to be due and how they calculate them<sup>8</sup>.”

As a consequence, the Arbitral Tribunal invited the Parties to confer between themselves to determine a calendar for the second phase of the proceedings, including the date that they would propose for their respective submissions and hearing, if any. The Tribunal specified that the Parties’ proposals were expected no later than 12 February 2018.<sup>9</sup>

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<sup>5</sup> §362 above.

<sup>6</sup> Mr. Rathbone, ER2, para. 114.

<sup>7</sup> According to Mr. Rathbone, the most distant HUPX future contracts expire in 2019. See Mr. Rathbone ER2, para. 115 to 120.

<sup>8</sup> The relevant instructions to the Parties will follow in a procedural order.

<sup>9</sup> This email was wrongly referred to as Procedural Order No. 10 by the Arbitral Tribunal.

9. On 12 February 2018, the Claimant informed the Arbitral Tribunal that it was willing to participate in the second phase of the proceedings, which was not foreseen in the original procedural calendar, with all rights reserved. The Claimant added that it was considering that the Partial Award was suffering various flaws and that Hydro was exploring all recourses available against it. It further specified that the Parties were not able to agree on a procedural calendar for the second phase of the proceedings and presented its proposal. The Claimant explained why it disagreed with the Respondent's proposed calendar. The Claimant reserved its right to respond to the Respondent once it would have disclosed the reasons for its suggested calendar to the Arbitral Tribunal.
10. On the same date, the Respondent confirmed that it was unable to reach an agreement with the Claimant on a procedural calendar for the second phase of the proceedings. It explained its position, and why it was disagreeing with the Claimant's proposal.
11. On the same date, the Arbitral Tribunal acknowledged receipt of the Parties' respective emails and invited them to comment on the other Party's email on or before 19 February 2018.
12. On 19 February 2018, the Respondent confirmed the contents of its previous letter of 12 February 2018 and made further comments in case the Arbitral Tribunal would be minded to adopt a timetable akin to that proposed by the Claimant.
13. On the same date, the Claimant confirmed its position that the suggested procedural calendar expressed in its email of 12 February 2018 was the most suitable.
14. On 21 February 2018, the Arbitral Tribunal issued its Procedural Order No. 10 in which it decided the procedural calendar for the second phase of the proceedings. It noted that it would be more cost-effective and time-efficient if, as a first step, the Parties' Experts on quantum had the possibility to meet to agree the areas of difference which their respective reports should address and to identify if there were any questions of interpretation of the Partial Award that would need to be put to the Tribunal. Consequently, the Arbitral Tribunal decided that the following calendar should apply for the second phase of the proceedings:

- “1. 2 March 2018 : *The experts shall attend an initial joint meeting, without legal representatives, to (a) agree on the methodology and index of the report; (b) agree on the questions, if any, to be put to the Tribunal; and (c) identify the areas of agreement and the areas of difference in their reports:*
2. 9 March 2018 : *The Parties shall convey the joint questions of the experts, if any, to the Tribunal;*
3. 23 March 2018 : *The Tribunal shall respond to the joint questions of the experts;*



4. *27 April 2018 : The Parties shall file their respective submissions and experts' reports;*
5. *4 May 2018: The Parties shall file their rebuttal submissions (including experts' reports, if need be);*
6. *11 May 2018: Parties shall indicate whether they wish to hold a Hearing (by teleconference);*
7. *TBD : Hearing, if need be.*
8. *15 days after the hearing or the filing of the last submissions (as the case may be): The Parties shall file their Costs submissions.*

The Arbitral Tribunal further emphasized that the second phase of the proceedings would be dedicated to the process of valuing the Respondent's damages and should not give rise to lengthy developments. It decided to limit the length of the Parties' submissions to 50 pages.

15. On 9 March 2018, both Parties' Experts conveyed their joint questions to the Arbitral Tribunal ("the Experts' Joint Questions").
16. On 20 March 2018, the Arbitral Tribunal issued its Answers to the Experts' Joint Questions ("the Tribunal's Answers to the Experts' Joint Questions").
17. On 27 April 2018, the Claimant filed its Memorial on the financial aspects of damages, together with the Fourth Expert Report of Mr Paul Rathbone regarding the calculation of delay penalties and Respondent's damages ("Mr Rathbone's Fourth Expert Report"), and exhibits.
18. On the same date, the Respondent filed the Third Expert Report of Mr Gervase MacGregor ("Mr MacGregor's Third Expert Report"), with appendices and exhibits.
19. On 4 May 2018, the Claimant filed the Fifth Expert Report of Mr Paul Rathbone regarding the calculation of delay penalties and Respondent's damages ("Mr Rathbone's Fifth Expert Report") with appendices and exhibits, as well as the Claimant's updated prayer for relief taking into account Mr Paul Rathbone's most recent alternative calculations in response to the Third Expert Report of Mr Gervase MacGregor.
20. On the same date, the Respondent filed the Fourth Expert Report of Mr Gervase MacGregor ("Mr MacGregor's Third Expert Report"), with appendices and exhibits.
21. On 11 May 2018, the Parties informed the Arbitral Tribunal that they were not requesting that a hearing take place on the quantum issues.
22. On the same date, the Arbitral Tribunal acknowledged receipt of both Parties' emails.

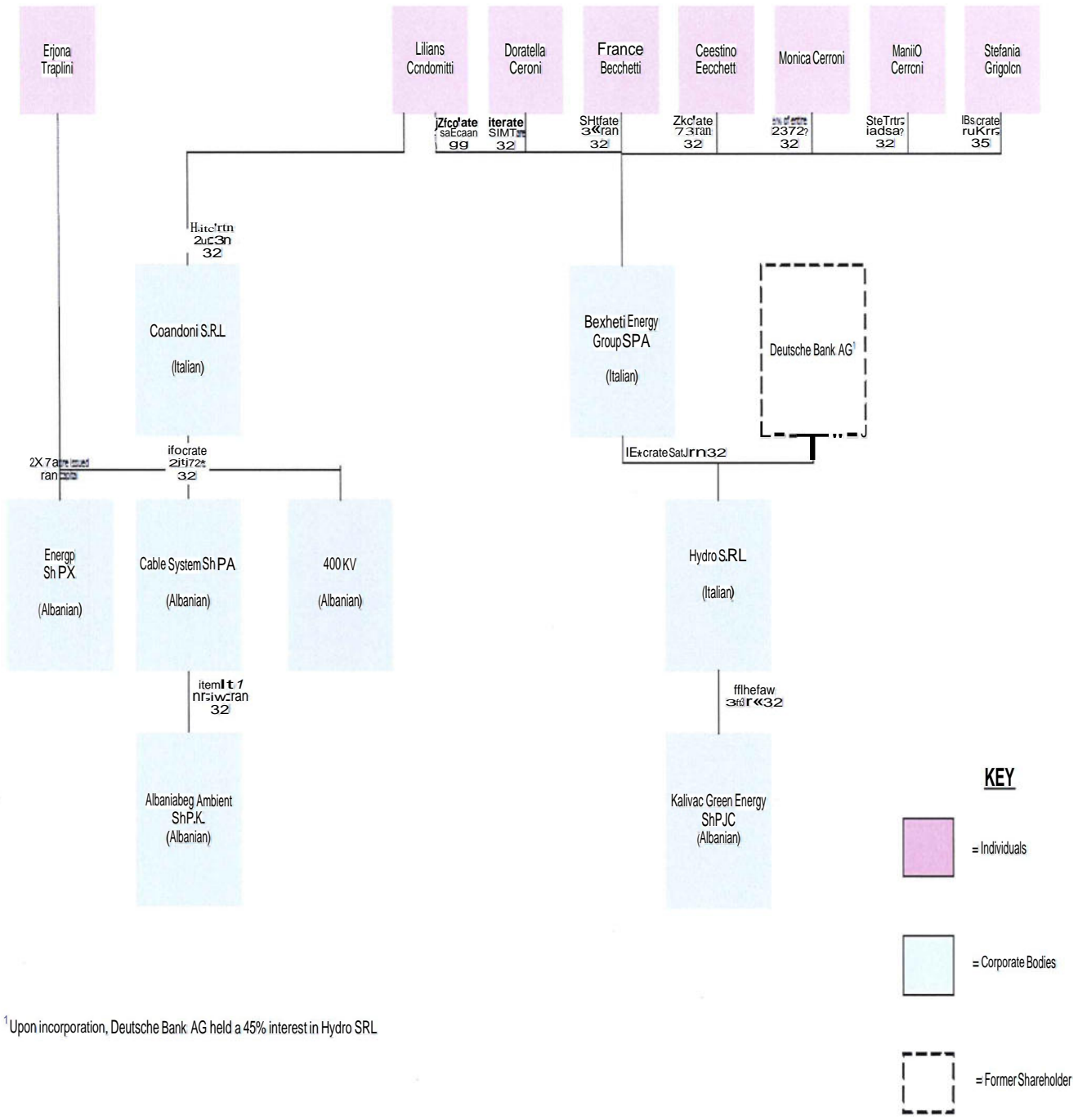
23. On 18 May 2018 and 19 May 2018, the Claimant and the Respondent respectively submitted their Costs Submissions for the second phase of the proceedings.
24. On 16 July 2018, the Arbitral Tribunal closed the second phase of the proceedings.
25. The Court extended the time limit for rendering the Final Award pursuant to Article 30 (2) of the Rules, on six occasions: at its session of 4 May 2017, the Court extended the time limit until 31 July 2017; at its session of 6 July 2017, the Court extended the time limit until 29 September 2017; at its session of 7 September 2017, the Court extended the time limit until 30 November 2017; at its session of 2 November 2017, the Court extended the time limit until 30 April 2018; at its session of 5 April 2018, the Court extended the time limit until 31 August 2018; and at its session of 2 August 2018, the Court extended the time limit until 28 September 2018.

#### **CHAPTER IV. THE CONCESSION AGREEMENT AND THE ADDENDA**

26. The Kalivag Project is located on the Vjosa river by the village of Kalivag in Gjirokaster County in Albania. It aimed at a power capacity of 100MW with an average annual production capacity of 350GWh.
27. Mr. Francesco Becchetti, the central person and main shareholder of the Becchetti group, which includes the Claimant (see the schema of the group below<sup>10</sup>), approached the Albanian Government in 1993 to propose the construction of a hydropower plant. A concession agreement (the “Concession Agreement” or the “Agreement”) was signed on 24 May 1997 by Mr. Becchetti on behalf of the company BEG (C1). On the Albanian side, the counterparty was the Ministry of Public Works, Land Planning, Tourism and the Ministry of Energy Resources, whose name was amended by Articles 3.1 and 3.2 of Addendum II (C2) as follows: Ministry of Public Works Transportation and Telecommunications and Ministry of Economy, Trade and Energy (METE). The Albanian party to the Agreement was originally referred to as “Authorised State Organ”, later changed in Addendum II as “Authorised State Body”.

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<sup>10</sup> Exhibit R1.



<sup>1</sup> Upon incorporation, Deutsche Bank AG held a 45% interest in Hydro SRL

28. The Concession Agreement entered into force the day of its signature following Decision n° 222 dated 24 May 1997 of the Council of Ministers “*on the Approval of the Agreement for the Kalivaç Hydropower Plant with BOT concession*” (CL6).
29. The reason for the Project was that energy shortages in Albania, combined with untapped rivers, made a hydropower plant on the Vjosa river an attractive opportunity.
30. Article 8 of the Concession Agreement<sup>11</sup> – which was a BOT (Build Operate and Transfer) agreement – provided that the concession would last thirty years from the beginning of works. After thirty years, the concession would revert to Albania.
31. Article 12 of the Agreement provided that the Concessionaire would complete the Plant within thirty-six months of the granting of the construction license<sup>12</sup>. The works began on 30 November 2003.<sup>13</sup>
32. According to Article 7 of the Agreement, the total investment was initially estimated at US\$ 100 million,<sup>14</sup> later revised to US\$ 129 million following the conclusion of Addendum II.<sup>15</sup>
33. According to Article 9 of the Agreement, as modified by Article 12.1 of Addendum II, from the start-up date of the plant, BEG would give Albania 10.5% of the annual energy

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<sup>11</sup> Article 8 of the Concession Agreement reads as follows: “*According to this Concession Agreement, the Authorized State Organ, entrusts the Concessionaire with the concession for 30 years to exploit the River Vjosa in the Strait of Kalivac, to produce hydro electric energy as specified in Annex "A"; [...] 30 years' time will start from the date of the beginning of the works. [...] At the end of such period, the Concessionaire will deliver the Authorized State Organ the Plant perfectly running, equipped with the necessary spare parts for 5 years of normal operation, and the Concessionaire will have no right to remuneration whatever value these constructions, structures and improvements might have. [...] Six Months before the due time of the Concession, the Authorized State Organ reserves itself the right to delegate its staff with the aim to assist in the running of the Plant, and also with the aim to provide for the necessary professional training. The Concessionaire will make available all the management manuals and all other available information so as to facilitate the running of the Plant.*”

<sup>12</sup> Article 12 of the Concession Agreement reads as follows : “*The Parties agree to respect the following schedule: [...] a) the Concessionaire undertakes to begin the works within 10 months from Parliament ratification as art. 34; [...] b) the Concessionaire undertakes to complete the designing within 12 months from the yard opening; [...] c) the Concessionaire undertakes to complete Plant realization within 48 months from the beginning of the works. [...] Considering that excavation. works and other performances in the yard depend from seasonal events, and therefore may be executed only in certain periods of the year, should the permits - as well as the concession - not be released in due time the time schedule will consequently change, too.*”

<sup>13</sup> Article 8 of the Concession Agreement as amended by Article 11.2 of Addendum II reads as follows: “*According to this Concession Agreement, the Authorized State Body entrusts the Concessionaire with the concession for 30 years from the Beginning of the Works to exploit the River Vjosa in the Strait of Kalivag, to produce hydro-electric energy as specified in Annex "A bis"; The Beginning of the Works occurred on 30 November 2003. [...]*” (C9 bis)

<sup>14</sup> Article 7 of the Concession Agreement reads as follows : “*On the basis of the available data and of the Concessionaire's group project experience, the investment, on a turnkey basis for a Plant ready for the startup, is allegedly of 100.000.000 US \$.*”

<sup>15</sup> Article 7 of the Concession Agreement as amended by Article 10.1 of Addendum II reads as follows: “*On the basis of the available data and of the Concessionaire's group project experience, the investment, on a turnkey basis for a Plant ready for the start-up, is approximately of Euro 129,000,000 (the "Estimated Project Costs"). [...]*” (C9 bis).

production.<sup>16</sup> Albania had the option to take this percentage physically or to sell it with the aid of Claimant. The remaining 90% of the energy produced could be exported by BEG, without limitation, in accordance with Article 21 of the Agreement.

34. As will be detailed below, several provisions in the Agreement provided for protection of the investment:
- in the first place a fiscal package contained in Article 25 (later amended to be Article 24) providing for:
    - o A timeframe of 30 days for the reimbursement of VAT to the operating company;
    - o An exemption from any tax on the import and export of goods;
    - o An exemption from VAT for exported goods and services;
    - o A stabilisation law provision.
  - a currency guarantee included in Article 26 of the Agreement (Article 25 following Addendum II) providing that “[ajccording to Art. 14 of Law n° 7973 of 26.07.1995 the Authorised State Organ grants the conversion of the Albanian money into currency, providing suitable bank guarantees if necessary. For any reason and in no case can be denied to the Concessionaire the guarantee on the profits free transfer”.
35. This package needed to have a parliamentary approval since it derogated from the existing law. This approval was delayed due to the Kosovo war.<sup>17</sup> This is why the Parties concluded Addendum I on 2 November 2000 extending the date for approval (C2).<sup>18</sup>

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<sup>16</sup> Article 9 of the Concession Agreement as amended by Article 12.1 of Addendum II reads as follows: “*The Concessionaire, starting from the Commercial Operation Date of the Plant, grants the Authorized State Body a comprehensive concession fee equal to (i) 10.5% (ten point five per cent) of the production generated at any moment in time by the Plant as measured by the outlet box installed on clamps on the interconnection point to the Albanian grid for the first three years starting from the Commercial Operation Date; and (ii) 10% of the production generated at any moment in time by the Plant to be measured as above for the subsequent years (“Concession Fee”). [...] In the case the Authorized State Body decides not to receive the production of the Plant in physical form (i.e. the energy mentioned in the previous paragraph) but to sell such energy, in accordance with art. 21 below in order to receive the proceeds deriving from the sale of said energy, the Concessionaire will support on a free basis the Authorized State Body through its marketing network in order to maximise such proceeds. [...] Additionally, should the Authorized State Body decide, informing the Concessionaire in writing, to choose the second option above, as soon as technically possible after the Commercial Operation Date of the Plant, the Concessionaire, on the basis of the then prevailing and forecasted market conditions both in the energy and the financial markets, shall advance to the Authorized State Body an amount of money corresponding to the present value of part of the expected proceeds deriving from the Sale of Energy relating to the Concession Fee. For the sake of clarity and by way of example, taking into consideration the currently prevailing and forecasted market conditions both in the energy and the financial markets, such present value calculated at the date hereof would exceed Euro 40.000.000. [...] In case of guilty delay in the fulfilment of the obligations and duties contained in the Concession Agreement by the Authorized State Body, the Concessionaire has the right to obtain from the Authorized State Body all the damages deriving from such a default. [...] At the same time, the fiscal exemption, previously fixed by the present Concession Agreement at art. 25 in a 2 year-period, will be extended for a period equal to the one of the delay really occurred, and the same will happen for the due time of both the works and the Concession period.*” (C9 bis).

<sup>17</sup> See Hydro’s SoC, para. 30, Mr. Becchetti WS, para. 15.

<sup>18</sup> As provided in Article 34 of the Agreement (Article 33 following Addendum II).

36. The parliamentary approval was ultimately obtained through Law 8708 of 1<sup>st</sup> December 2000 On Some Exemptions and Granting Incentives for the Construction of the Kalivag Hydropower Plant on “BOT” Concession (“Law 8708”, C5).
37. Article 25 of the Concession Agreement (amended to Article 24 following Addendum II) provided that “*the Operating Company*<sup>19</sup> *might obtain the VAT refund within thirty days*”. Article 3 of Law 8708 confirms this provision. It provides that “*tax authorities shall refund VAT credit balance within thirty days from the date of application submission*” (C5).
38. Article 25 of the Agreement (amended to Article 24 following Addendum II) provided that “*the Plant, as well as all materials, equipments, services, works including those temporarily imported, and all what refers to the Plant, are exempted by any tax and customs duty concerning import and export goods and services according to art 14 point 2 of the Law on Concession n° 7973 of July the 26<sup>th</sup> 1995*”. Law 8708 confirms this exemption, providing in Article 4 that “*[t]he Kalivac hydropower plant concessionary company is exempt from import duties, and any kind of tax that has to do with import and export of goods and services, as well as for the duration of the construction and concession period*”.
39. Article 25 of the Agreement (Article 24 following Addendum II) also provided that “*[a]ccording to the Value Added Tax n° 7928 of April the 27<sup>th</sup> 1995, Article 31, the Operating Company is exempted from VAT imposition for all exported goods and services during the whole Concession period*”. This was confirmed in Law 8708 providing in Article 3 that “*the Kalivac hydropower plant concessionary company, pursuant to Article 31, Law 7928, dated 27.4.1995 “on Value Added Tax” is taxed at assessable value of VAT at the rate of 0% for export goods and services for the duration of the concession period*”.
40. Law 8708 also contained a stabilisation provision, providing in its Article 2 that “*[n]o legal act may infringe the agreement once the concession agreement enters into force*” (C5).
41. Once the Agreement was concluded and approved, BEG experienced a failed joint venture with its partner, Enel,<sup>20</sup> after which it sought new partners on the Project and ended up dealing with Deutsche Bank that accepted to be not only lender but also equity partner.<sup>21</sup> It would indeed subscribe to 45% of the shares of the company to be incorporated in Albania.
42. Deutsche Bank and BEG approached the Albanian government, formed a joint venture and BEG concluded Addendum II with the Albanian government on 8 May 2007 (C3). This Addendum entered into force on 6 June 2007.<sup>22</sup>

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<sup>19</sup> See below, § 44.

<sup>20</sup> Mr. Becchetti WS, para. 18.

<sup>21</sup> Mr. Becchetti WS, para. 20 ; see Hydro’s SoC, para.39.

<sup>22</sup> Approved on 6 June 2007 by Decision of the Council of Ministers n° 363 (CL12).

43. In order to implement the Concession, Deutsche Bank and BEG created “Newco”, Hydro Sri (Hydro), the Claimant in this arbitration, on 27 June 2007 (C4). Article 13.1 of the Agreement, as amended by Article 15.1 of Addendum II, indeed provided that:

*“[t]he Concessionaire undertakes to procure that within 180 days from the date of effectiveness of this Addendum, the Concession will be held by a company (“Newco”) controlled by BEG S.p.A. (“BEG”) and participated, directly or indirectly, by Deutsche Bank AG (“DB”) with an equity interest of at least 45% of its share capital. Such company shall have a minimum corporate capital of Euro 15.000.000”.*

44. Addendum II also provided that the construction and management of the Project would be carried out by an Operating Company.<sup>23</sup> Article 13.2 of the Agreement (as amended by Article 15.1 of Addendum II) indeed provided that:

*“The Concessionaire, once the transaction as set out under paragraph 13.1 above has been duly completed, shall not transfer, either in whole or in part, this Concession Agreement to any third party. Without prejudice to the above, the activities relating to the construction and the management of the Plant, as provided by this Concession Agreement, will be carried out and managed by the Concessionaire through the Operating Company. The Concessionaire will remain responsible towards the Authorised State Body for all the obligations set forth under this Concession Agreement”*

45. In this context, Claimant bought in June 2007 an Albanian company, Kalivag Green Energy (“KGE”) whose sole purpose would be to build and operate the Kalivag Project.<sup>24</sup>
46. Since May 2007, another company of the Becchetti group, the Albanian company Energji (“Energji”), has been involved in the Project as contractor for the excavation of material and other construction works.<sup>25</sup>
47. Addendum II left the fiscal package unchanged. The only change that was made was that Article 25 became Article 24 and Article 26 concerning the currency guarantee became Article 25.<sup>26</sup>

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<sup>23</sup> Defined in Article 1 of the Agreement (as amended by Article 4.3 of Addendum II) as “BEG S.p.A. of Newco following the completion of the transaction described in Article 13.F\

<sup>24</sup> See Hydro’s SoC, paras. 45 and 46.

<sup>25</sup> Mr. Becchetti WS para 22; Spillway Agreement by and between ABA and Energji dated 16 May 2007 (2007 Agreement), CIO; Addendum I to the 2007 Agreement dated 23 October 2008, C24; Addendum II to the 2007 Agreement dated 6 June 2012, C63. Spillway Agreement by and between KGE and Energji dated 3 April 2013, C85; Bridge CA Agreement by and between KGE and Energji dated 20 August 2012, C78; Bridge Gaudio Agreement by and between KGE and Energji dated 3 September 2012, C79; Tunnel Agreement by and between KGE and Energji dated 14 October 2012, C82; Right Bank Escarpment Agreement by and between KGE and Energji dated 3 September 2012, C80.

<sup>26</sup> See Article 22 (C3).



48. Addendum II also amended – through its Article 24.1 – the stabilization clause (in Article 26) as follows:

*“Without prejudice to Article 2 of Law n° 8708 of 01.12.2000, the Concession Agreement is subject to the Albanian Law”.*

49. Other relevant provisions of the Concession Agreement (not yet mentioned above) are Article 5 (Concessionaire Obligations), Article 6 (Authorised State Organ’s Obligations), Article 10 (Site Availability), Article 14 (Termination), Article 15 (Guarantees), Article 21 (Energy Transmission) and Article 28 (Force Majeure). The text of the relevant parts of these provisions, reproduced below, are those of the Concession Agreement following the conclusion of Addendum II (C9 bis).

50. Article 5 under the heading “Concessionaire Obligations” provides as follows:

*“The Concessionaire undertakes everything that is necessary in order to build and manage the Plant granted in concession in accordance to the planning and in accordance to the requirements mentioned in Annex "B".*

*Specifically the Concessionaire undertakes:*

- to carry out the construction works according to the time schedule set out in Annex A ter;*
- to inform the Authorized State Body about the names of the sub-contractors involved in the construction works, together with their respective balance sheets and to procure that such subcontractors formally undertake to comply with all applicable tax laws and regulations;*
- to provide the Authorized State Body, within one year from the expiry of the term established in article 13.1 hereunder, with the evidence of the availability of the financial coverage for the Implementation of the Project, it being understood and agreed between the Parties that non fulfilment of this obligation will be considered as a serious breach of the Concession Agreement.*
- to carry out the Plant providing financing;*
- to collect all data and information necessary to the engineering of the Plant [;]*
- to elaborate the detailed engineering in accordance to the requirements of Annex "B" [;]*
- to carry out the works in accordance to the engineering, including linkage infrastructure as per Art. 21;*
- to provide work supervision and test run;*
- to keep the Authorized State Body informed with a quaterly written report about any circumstance connected with the works execution, including all information regarding the choice of the main equipment;*
- to make observed, as Customer, for any work let out on contract, the rules and instructions of the present Concession Agreement [;]*
- to run the Plant;*
- to observe and to make observed all the instructions relative to social insurances and compulsory engagements foreseen by the Albanian laws;*

- to heighten the State Road Ballsh Memaliaj, at his expenses, which will be inundated due to the dam construction, and to realize the linkage between the above mentioned road and the Hydropower Plant itself according to the Concessionaire's yard needs [;]
- to adopt and to make adopted, during the Works execution, the measures and precautions necessary to guarantee the life and safety of the workers, of the people employed and of any third Party, and to avoid any damage to public and private properties, and also to observe all the general rules in force and the technical instructions for the prevention of works accidents;
- to support all the expenses and to make up for the damages caused to third Parties;
- to check the real deviations merely for irrigation existing at the moment of the signature of the present Concession Agreement downstream the Plant through:
  - a) a check of every 30 year-flood;
  - b) the measurement of the flood in the 4 years following the Plant realization;
  - c) a check of the real sections and therefore the existing deviation capacities.

*On the basis of the Concessionaire's data relative to the total amount of the existing deviations downstream the Plant and with the Authorized State Body cooperation, the Concessionaire, considering its own needs, will be able to either go on with the regulating of the water release from the Plant, thus contributing to guarantee the determined amount of the deviations, or, as an alternative, consider the possibility of building, at his expenses, a flood of suitable capacity to be destined for downstream irrigation.*

*Any responsibility of the Authorized State Body is excluded for anything connected to this article, damages, accidents or other things, which should occur to the Concessionaire and to its employees in the realization of the Concession”.*

51. Article 6 provides in its relevant part that:

- “The Authorized State Organ undertakes to realize and guarantee the following obligations:*
- *to make the site legally available and free from burdens and restraints and to facilitate everything necessary to such an aim, in accordance to art. 10;*
  - ...
  - *to procure the granting, within the time frame established by the applicable Albanian laws, of all the necessary permits, authorizations, job permits, building and import licences, provided that the relevant requests (completed with all information, submitted documents and details requested by the competent Authorities according to the applicable laws) have been duly filed:*
    - a) *all the import licences which might be required by the Concessionaire for materials, equipments, machineries and plants necessary to or connected with the Project;*
    - ...
    - c) *to ensure the necessary assistance in order to obtain the required licences and permits;*

*d) to undertake that all equipments, plants and machineries for permanent and definitive installations connected to the Project, will have the necessary licences and will be relieved of fiscal and customs duties, and of any other charge;*

*e) should the authorisations, licenses and/or permits necessary to connect the 'Plant to the Albanian grid or to allow the Concessionaire to build an autonomous transmission line as per Article 21 below, not be granted by each and all the competent Albanian authorities/bodies other than the Albanian Government, to adopt – within two months from the date on which the Concessionaire has informed the Authorized State Body of the expiry of the term by which the relevant authorisation, license and/or permit should have been granted — any legislative initiative, including ministerial and/or governmental decree, aimed at procuring the obtainment of said authorisations, licenses and/or permits.*

*- to grant the necessary assistance with any organism and Albanian Authority(ies) so as to let the Concessionaire perform its mission;*

*...”.*

52. Article 10 (Site Availability) provides in its relevant part that:

*“The Concessionaire on the basis of the Project needs, will tell the Authorized State Body the area which will have to be expropriate, as well as the time when it has to be made available.*

*The state areas will be made available for the concessionaire freely, while the private areas will be espropriated [sic] on the basis of applicable Albanian law currently in force; this will happen at the Concessionaire's expense.*

*The Authorized State Body grants the Concessionaire its assistance in the procedure, and if necessary, intervenes so as time and costs of expropriation do not hinder, in any way, the Project realization and management of the Plant.*

*...”.*

53. Under the heading “Concession Termination”, Article 14 provides as follows:

*“The Authorized State Body, according to art. 30, will have the right to start an annulment procedure of the Concession – through a previous warning to remove, by an adequate time, the irregularities that came out and in case the concessionaire do not conform – beside a serious non-fulfilment of the duties established by the present Concession Agreement, also when the Concessionaire, due to negligence [sic] and inexperience, compromises – in any phase – the running, the execution and the good results of the works themselves.*

*Should the situations mentioned in the previous comma occur, the Authorized State Body will previously ask the Concessionaire to show within 30 days its justifications, and, in case it decides not to accept them, it will be entitled to start the procedure for the rescission, informing the Concessionaire. If for any reasons imputable to the Concessionaire, after 6*

months from date of the obtainment of the construction licence, the Concessionaire does not restart the works, the Authorized State Body can declare annulled the Concession. The Concessionaire will notify the Authorised State Body of such restart as per article 12 first paragraph.

Should the Authorized State Body be late in the fulfilment of its duties, the Concessionaire may ask to annul the contract by adequate petition, and should it be accepted, the Concessionaire has right to the refund of the expenses supported; should the petition not be accepted, but being the Authorized State Body still late, the Concessionaire is allowed to ask according to art.30, for the annulment of the contract and the damage refund, by a previous petition containing the act of the Authorized State Body being put in arrears.

Should the Authorized State Body behave in a deeply non-fulfilling way, the Concessionaire has the right to ask for the annulment of the contract and for the damage refund, by a previous petition containing the act of the Authorized State Body being put in arrears.

In the event that the Concessionaire does not complete the construction works by the date falling 36 months from the date of obtainment of the construction license:

- (i) If the delay is attributable to the Concessionaire, the latter shall pay to the Authorised State Body penalties, both in cash and in kind, up to a maximum amount equal to 10% of the Estimated Project Costs; or
- (ii) If the delay is attributable to the Authorised State Body, the latter shall pay to the Concessionaire penalties, both in cash and in kind, up to a maximum amount equal to 10% of the Estimated Project Costs.

Penalties under (i) and (ii) above will be calculated according to the following table:

<i>Days of delay</i>	<i>Concessionaire</i>	<i>Authorised State Body</i>
<i>From day 1 to day 90</i>	<i>5,000 € per day of delay</i>	<i>1,000 € per day of delay</i>
<i>From day 91 onwards</i>	<i>1% of the energy generated by the Plant, at any moment in time, per each of delay</i>	<i>1% of the energy generated by the Plant, at any moment in time, per each day of delay</i>

However, in the event the Concessionaire, by the date falling 36 months from the date of obtainment of the construction license, has performed at least 80% of the Project, the penalties under point (i) and (ii) above will be calculated according to the following table:

<i>Days of delay</i>	<i>Concessionaire</i>	<i>Authorised State Body</i>
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<i>From day 1 to day 90</i>	<i>1,000 € per day of delay</i>	<i>1,000 € per day of delay</i>
<i>From day 91 onwards</i>	<i>0.5% of the energy generated by the Plant, at any moment in time, per each of delay</i>	<i>1% of the energy generated by the Plant, at any moment in time, per each day of delay</i>

*In addition, should the Authorised State Body not procure to the Concessionaire: (i) the granting of all the licenses, authorisation or equivalent titles necessary for the implementation of the Project within the relevant terms as set out under articles 6 and/or (ii) to make available the state land as per article 21 above, the time schedule for the completion of the Works as per Article 12 above will be extended accordingly”.*

54. Article 15 “Guarantees” provides in its relevant part that:

*15.3 As a guarantee for the payment by the Concessionaire of the penalties possibly due by the latter as provided by Article 14 above, the Concessionaire will provide as performance guarantee a cash collateral deposit up to an overall cumulative maximum amount of € 4,000,000 (“the Maximum Guaranteed Amount”). The deposit shall be funded starting from the date of entry into force of the Addendum in 3 years (“the Funding Period”) up to the Maximum Guaranteed Amount through the 14% of the monies which will be liquidated from time to time by the competent Albanian Tax Authority for the Concessionaire’s or the Operating Company’s VAT credits, provided that should in any year of the funding period, the amount injected into the deposit as set out above exceed 1/3 of the Maximum Guaranteed Amount, the obligation to continue to fund the deposit up to the Maximum Guaranteed Amount shall be suspended until the beginning of the subsequent year. Should at the end of any year of the Funding Period the amount injected into the deposit as set out above in such year be lower than 1/3 of the Maximum Guaranteed Amount, the deposit has to be topped up to the amount required at the moment in time with the first subsequent reimbursements of VAT credits.*

*The deposit shall be released and discharged on the date falling one month after the Commercial Operation Date”.*

55. Under the heading “Energy Transmission”, Article 21 provides in its relevant part that:

*“...  
The Concessionaire is entitled, at its sole discretion, to the Sale of Energy pertaining to its share of electricity produced by the Plant, also with the aim of obtaining Green Certificates or any equivalent incentives relating to renewable energy productions.  
... ”*

56. Finally, Article 28 (Force Majeure) provides that:

*“The execution of the Parties’ duties can be modified by unforeseen and unforeseeable events which could be defined as “Force Majeure”.*

*To make an example, not limitative, are considered as Force Majeure events as natural catastrophes such as floods and earthquakes, exceptional political events such as wars and revolutions, and third Parties’ interventions having a law force.*

*In case that during the realization of the duties Force Majeure events occur, the Parties will have no right to ask each other refunds for possible delays or non-fulfilment in due time.*

*As far as the scheduled time is concerned according to previous art. 12, will be consequently modified in accordance to the needs deriving from the stop due to the Force Majeure event.*

*The stop period and the postponing of the foreseen dates for mutual duties’ fulfilment will have to be confirmed by integrative minute books to the present Concession Agreement agreed by the Parties.”*

## **CHAPTER V. THE PERFORMANCE OF THE PROJECT AND THE BACKGROUND OF THE DISPUTE**

57. As indicated above,<sup>27</sup> the works on the Project began on 30 November 2003. As of 2011, the works performed included excavation of 2,500,000 cubic meters, the construction of the two phases of the dam body, the preparation of the base of the dam and of all the material necessary to complete the dam, the realisation of part of the galleries, part of the bridges on the Vjosa river, a ten kilometre road to connect the Project site with a national road and the installation of instruments to connect the dam.<sup>28</sup> The works continued thereafter but were stopped in June 2014. Since then, they have been discontinued. According to the Claimant, 30 to 40% of the Project has been achieved.<sup>29</sup>
58. As explained by the Claimant, the Project encountered difficulties since the beginning: first, as indicated above, a failed joint venture with Enel,<sup>30</sup> then a failure by Deutsche Bank to perform its obligations of financing, which ended up in a series of court actions and arbitral procedures,<sup>31</sup> including the following:
- BEG v. Enel;<sup>32</sup>
  - Albania Ambient Sh.p.k (“ABA”) v. Enel;
  - Hydro v. Deutsche Bank (an Italian arbitration);
  - Deutsche Bank v. BEG (an ICC arbitration);
  - Hydro v. Deutsche Bank (an Italian arbitration);
  - Deutsche Bank v. Hydro (another ICC arbitration);
  - KEG v. SACE S.p.A. and Hydro; and
  - Energji v. KEG.
59. Some of these actions have a bearing on the Claimant’s claim in this arbitration, in particular as they sought compensation for the failure to complete the Project. The Claimant has however invoked various reasons, including confidentiality and refusal of the counterparty, to persistently refuse to produce various awards and other documents whose production was requested by the Respondent and was later ordered by the Tribunal. It is however undisputed that following a settlement concluded with Deutsche Bank, Hydro received on 30 October 2013 some € 135 million in cash and KEG some € 10 million in cash on a Unicredit account in Luxembourg, and that another € 10 million held in escrow was released to Hydro end of 2015.<sup>33</sup> The money received was not expended only on the Project but was used to cover

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<sup>27</sup> §31.

<sup>28</sup> Minutes of the meeting of the KGE Board dated 3 May 2011, at 1-2, C56 at 1-2.

<sup>29</sup> See Hydro’s SoReply, para. 458 ; and Mr. Rathbone ER2, para.101.

<sup>30</sup> See §41.

<sup>31</sup> See Albania’ SoD, para. 9

<sup>32</sup> See Hydro’s SoC, para. 35, and Mr. Becchetti, para. 18.

<sup>33</sup> Mr. Becchetti, transcript, 19 December 2016, p. 262, l. 14 to 1.22.

various of Hydro's expenses and needs or spent on other projects of the Becchetti group,<sup>34</sup> among other the Albanian television station, Agonset.<sup>35</sup>

60. In tandem with the above litigation and arbitration procedures, Mr. Becchetti and his associates have commenced two further cases under the ICSID regime against the Respondent alongside this arbitration. It is contended by the Respondent that the second one involves in part substantially the same claims as those being raised in these ICC proceedings.<sup>36</sup> The first ICSID arbitration (ICSID I) is a claim by ABA against the Respondent under the Energy Chartered Treaty in respect of a separate concession contract relating to a waste management facility which was never built by ABA.<sup>37</sup> As pointed out by the Respondent, although in these ICC proceedings the Claimant alleges that it had no choice but to stop working on – and therefore terminate – the Concession Agreement in respect of the Kalivaq Project, in the ABA ICSID procedure, ABA claims specific performance of the relevant concession agreement and a sum of between € 297 and € 425 million as alleged lost profits.
61. The second ICSID claim (ICSID II) was brought by a number of claimants (including Hydro and Mr. Becchetti) under the Albania-Italy BIT for alleged mistreatment in respect of various investments said to have been made by those claimants.<sup>38</sup> According to the Respondent, it includes allegations which overlap with those brought in the present proceedings.<sup>39</sup> This is not denied by the Claimant.<sup>40</sup>
62. Beyond the lack of financing, which, according to Mr. Becchetti, became impossible to obtain, after the Deutsche Bank's failure to provide it and the 2008 bank crisis,<sup>41</sup> the Claimant submits that it also encountered many difficulties in the performance of the works,

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<sup>34</sup> Mr. Becchetti, transcript, 19 December 2016, p. 266.1. 16 to p. 267, l.1 ; p. 267, l. 15 to l. 18 ; p. 269, l.19 to l. 22

<sup>35</sup> Mr. Becchetti, transcript, 19 December 2016, p. 270, l. 4 to 5.

<sup>36</sup> Statement of Defense and Counterclaim, para.13.

<sup>37</sup> *ABA et al. v. The Republic of Albania*, ARB/14/26.

<sup>38</sup> *Hydro SRL et al. v. The Republic of Albania*, ARB/15/28 (C108).

<sup>39</sup> Statement of Defense and Counterclaim, §15.

<sup>40</sup> The Claimant acknowledges that issues related to the criminal proceedings brought by Albania against the Claimant and to which the Claimant refers in the present arbitration (§64 below) are also put before the tribunal in the parallel ICSID Case ARB/15/28. It notes particularly that the ICSID Tribunal issued an Order on Provisional Measures on 3 March 2016 (See Hydro SoReply, paras 327 to 331). This Order suspended the criminal proceedings in respect of the claimants involved in this second ICSID arbitration and their investments. It also suspended the extradition request for Mr. Becchetti and another claimant and ordered the parties to confer on how to preserve the investments (C140, paras. 5.1 to 5.3). The Respondent challenged this Order. On 8 July December 2016, the English court found that there was an abuse of process by the Respondent because it had submitted misleading documents in support of its argument that the arrest warrant could not be withdrawn (C193, para. 53). The extradition proceeding has consequently been stayed in the UK. The Respondent has decided not to appeal the English court's decision. According to the Claimant, these ongoing proceedings are important for the present arbitration as they demonstrate that there is an ongoing politically motivated criminal campaign against Mr. Becchetti and KGE as is explained further below (See §64).

<sup>41</sup> Mr. Pinsolle, transcript, 19 December 2016 p. 13, l.12 to l. 22 ; Mr. Becchetti, transcript, 19 December 2016, p. 181, l. 1 to l. 16.



the responsibility for which it attributes to the Respondent and which the Respondent denies. According to the Claimant, those include:<sup>42</sup>

- the alleged Albanian government's failure to comply with the assurances that it provided to Hydro that KGE would be able to sell energy produced by the Hydro power plant in the domestic market and/or export it to other countries;
- difficulties related to expropriation of private residents for which the Respondent allegedly failed to provide assistance;
- difficulties in obtaining the relevant permits to perform the works;
- delays in 2008, 2009 and 2013 due to serious floods and landslides in the region and the alleged refusal of the Respondent to extend the work schedule notwithstanding Claimant's requests;
- the Respondent's failure to make timely reimbursements of VAT and its alleged seizure of certain merchandise necessary for the Project.

63. It is noted that since 2012, the tensions between the Parties started to rise and intensified after September 2013, once a new government presided by Minister Rama was put in place.<sup>43</sup> According to the Claimant, this would be due to the fact that Agonchannel, the television channel operated by Agonset, another investment of Mr. Becchetti in Albania, was propagating news critical of the government, making Mr. Becchetti "*a dangerous voice of the opposition*".<sup>44</sup> According to him, this resulted, starting December 2013, in baseless administrative proceedings and abusive criminal proceedings.<sup>45</sup>
64. According to the Claimant, these proceedings included a wholly unwarranted and extensive series of audits, imposition of unjustified tax penalties<sup>46</sup> and the initiation of "bogus" criminal proceedings against himself and some of BEG group companies, including KGE, culminating on 8 June 2015 in an arrest warrant against himself and Mauro de Renzis, the administrator of Energji, the contractor for the works in Kalivag, and Administrator of Agonset.<sup>47</sup>
65. Mr. Becchetti also pointed out in cross-examination that one of the main reasons he stopped performing the Project in June 2014 was because he did not receive the reassurances that he had requested around that time from Albania. He declared as follows: "*Of course, in view of this situation, having the money to complete the project it would have been up foolish to go forward without assurances from the Government I mean I do not want to anticipate but the situation was already very tense at that time. What did Hydro and KGE do? KGE wrote a letter, it is a long letter, relatively long, two or three pages, C-93, which is in the record, to the Government seeking reassurances for the project [...].*"<sup>48</sup> In the said letter sent by KGE

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<sup>42</sup> Statement of Claim, §§60 and following.

<sup>43</sup> Mr. Becchetti WS, para. 24.

<sup>44</sup> Mr. Becchetti WS, para. 33.

<sup>45</sup> Mr. Becchetti WS, para. 34 et al.

<sup>46</sup> Statement of Reply and Answer to Counterclaim, paras. 203 et al.

<sup>47</sup> Statement of Reply and Answer to Counterclaim, paras. 277 et al.,

<sup>48</sup> Transcript, 19 December 2016, p. 60, l. 10 to l. 19

on 19 June 2014 to the Authorised State Body,<sup>49</sup> KGE indeed requested reassurances from Albania. Mr. Becchetti also referred to Albania's failure to renew its BIT with Italy, setting a mechanism of mutual recognition of green certificates. According to Mr. Becchetti, these green certificates were "*crucial for the Project*". He expressed concern about KGE's ability to sell the electricity produced in Albania and recognised in cross-examination that the impossibility to obtain green certificates made the project financially much less profitable.<sup>50</sup>

66. It is in this context that these arbitration proceedings were initiated on 16 October 2014.

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<sup>49</sup> Exhibit C93.

<sup>50</sup> Transcript, 19 December 2016, p. 215, l. 1 to p. 218, l. 22

## **CHAPTER VI. THE CLAIMS AND COUNTERCLAIMS**

### **SECTION I. CLAIMANT'S CLAIMS**

67. In its Request for Arbitration, the Claimant formulated its request for relief as follows:

*“For the reasons set out above, the Claimant respectfully requests the Arbitral Tribunal to:*

*(i) order that the Respondent pay damages to the Claimant in an amount to be determined and of at least €100,000,000;*

*(ii) declare that Hydro and KGE are not required to pay VAT\ customs taxes, and fiscal duties that have to do with the importation and exportation of goods and services both during the construction period and for the duration of the concession;*

*(iii) declare that the combined effect of articles 2 and 4 of Law No. 8708 provides that Hydro and KGE do not have to pay VAT or any penalties on imported goods and services regardless of any other interpretation by the Albanian fiscal authorities including the so called “Tax Representative” which claims that KGE has to retroactively pay VAT plus a penalty of 100% of the VAT;*

*(iv) order that the Respondent pay the Claimant the full costs of the arbitration, including but not limited to compensation for all arbitrators' fees and costs, legal fees and expenses incurred by the Claimant in connection with the present dispute;*

*(v) order any other relief that may be appropriate.*

*Claimant reserves its rights to amend or supplement the requests listed above at a subsequent stage of the proceedings.”*

68. In its Statement of Claim, the Claimant reformulated its prayer for relief as follows:

*For the reasons set out above, the Claimant respectfully requests the Arbitral Tribunal to:*

*(i) declare that the concession agreement is terminated due to the Respondent's behaviour, including multiple breaches of the concession agreement;*

*(ii) declare that Hydro and KGE are not required to pay VAT, customs taxes, and fiscal duties that have to do with the importation and exportation of goods and services;*

*(iii) declare that the combined effect of articles 2 and 4 of Law No. 8708 provides that Hydro and KGE do not have to pay VAT or any penalties on imported goods and services regardless of any other interpretation by the Albanian fiscal authorities including the so called “Tax Representative” which claims that KGE has to retroactively pay VAT plus a penalty of 100% of the VAT;*

*(iv) order that the Respondent pay damages to the Claimant in an amount of 128,593,212 Euros, described in para 271 of the Statement of Claim;*

*(v) order any other relief that may be appropriate; and*

*(vi) dismiss the Respondent's counterclaims in their entirety.*

*In any event,*

*(vii) order that the Respondent pay the Claimant the full costs of the arbitration, including but not limited to compensation for all arbitrators' fees and costs, legal fees and expenses incurred by the Claimant in connection with the present dispute;*

*The Claimant reserves its rights to amend or supplement the requests listed above at a subsequent stage of the proceedings".*

69. In its Reply to the Statement of Defense and Answer to the Counterclaim, the Claimant slightly modified its request for relief as follows:

*uFor the reasons set out above, the Claimant respectfully requests the Tribunal to:*

*(i) declare that the concession agreement is terminated due to the Respondent's behaviour, including multiple breaches of the concession agreement;*

*(ii) declare that Hydro and KGE are not required to pay VAT, customs taxes, and fiscal duties that have to do with the importation of goods and services;*

*(iii) declare that the combined effect of Article 24 of the concession agreement and Articles 2 and 4 of Law No. 8708 provides that Hydro and KGE do not have to pay VAT or any penalties on imported goods and services regardless of any other interpretation by the Albanian fiscal authorities including the so called "Tax Representative" which claims that KGE has to retroactively pay VAT plus a penalty of 100% of the VAT;*

*(iv) order that the Respondent pay damages to the Claimant in an amount of 137,235,090 euros, described in 405 of the Reply (to be updated with respect to the interests);*

*(v) order any other relief that may be appropriate;*

*(vi) declare the Respondent's counterclaim for termination of the concession agreement inadmissible under Article 23(4) of the ICC Rules of Arbitration;*

*(vi) in any event, dismiss the Respondent's counterclaims in their entirety.*

*(vii) in the alternative, reduce the amount of damages requested by the Respondent to an amount of 12.9 million euros pursuant to Article 14 of the concession agreement (paragraph 92 of the Second Expert Report of Paul Rathbone dated 22 July 2016);*

*(viii) in further alternative, reduce the amount of damages requested by the Respondent to an amount of 21.2 million euros (paragraph 130 of the Second Expert Report of Paul Rathbone dated 22 July 2016);*

*In any event,*

*(vii) order that the Respondent pay the Claimant the full costs of the arbitration, including but not limited to compensation for all arbitrators' fees and costs, and legal fees and expenses incurred by the Claimant in connection with the present dispute;*

*The Claimant reserves its rights to amend or supplement the requests listed above at*

*a subsequent stage of the proceedings.”*

70. In its Rejoinder to Counterclaim, the Claimant also lightly amended its prayer for relief as follows:

*“For the reasons set out above, the Claimant respectfully requests the Tribunal to:*

*(i) declare that the concession agreement is terminated due to the Respondent’s behaviour, including multiple breaches of the concession agreement;*

*(ii) declare that Hydro and KGE are not required to pay VAT\ customs taxes, and fiscal duties that have to do with the importation of goods and services;*

*(iii) declare that the combined effect of Article 24 of the concession agreement and Articles 2 and 4 of Law No. 8708 provides that Hydro and KGE do not have to pay VAT or any penalties on imported goods and services regardless of any other interpretation by the Albanian fiscal authorities including the so called “Tax Representative” which claims that KGE has to retroactively pay VAT plus a penalty of 100% of the VAT;*

*(iv) order that the Respondent pay damages to the Claimant in an amount of 137,235,090 euros, described in 405 of the Reply (to be updated with respect to the interests);*

*(v) order any other relief that may be appropriate; and*

*(vi) declare the Respondent’s counterclaim for termination of the concession agreement inadmissible under Article 23(4) of the ICC Rules of Arbitration;*

*(vi) in any event, dismiss the Respondent’s counterclaims in their entirety.*

*(vii) in the alternative, reduce the amount of damages requested by the Respondent to an amount of 2.2 million euros pursuant to Article 14 of the concession agreement (paragraph 23 of the Second Expert Report of Paul Rathbone dated 13 November 2016);*

*(viii) in further alternative, reduce the amount of damages requested by the Respondent to an amount of 5.8 million euros (paragraph 8 of the Third Expert Report of Paul Rathbone dated 13 November 2016, table 1);*

*(ix) in even further alternative, reduce the amount of damages requested by the Respondent to an amount of 7.8 million euros (paragraph 8 of the Third Expert Report of Paul Rathbone dated 13 November 2016, table 1);*

*In any event,*

*(x) order that the Respondent pay the Claimant the full costs of the arbitration, including but not limited to compensation for all arbitrators' fees and costs, and legal fees and expenses incurred by the Claimant in connection with the present dispute;*

*The Claimant reserves its rights to amend or supplement the requests listed above at a subsequent stage of the proceedings”.*

71. In its Skeleton Argument, the Claimant’s request for relief is expressed in the same terms as in its Rejoinder to Counterclaim.
72. In its Post-Hearing Brief, the Claimant’s request for relief reads as in its Rejoinder to Counterclaim with a slight difference regarding the amount requested in iv). It reads as follows:

*“(iv) order that the Respondent pay damages to the Claimant in an amount of 147,872,749 euros, described in paragraph 405 of the Reply and updated to today (to be further updated with respect to the interests);”*

73. On 6 June 2017, the Claimant amended its Prayer for Relief.<sup>51</sup> On 18 and 26 June 2017, the Respondent objected on the ground of Article 23 (4) of the Rules.<sup>52</sup> The said amendment of the Claimant’s Prayer for Relief was refused by the Arbitral Tribunal in Procedural Order No. 9.<sup>53</sup>
74. In its Memorial on the Financial Aspects of Damages, the Claimant updated its Prayer for Relief, which reads as follows:

*“The Claimant seeks the following relief:*

*Pursuant to the Partial Award rendered on 8 January 2018, p. 101, para 8) regarding the delay penalties to be paid by the Claimant to the Respondent between 16 July 2011 and 8 January 2018, the Claimant respectfully requests the Tribunal to:*

*(i) Limit the delay penalties to be paid by the Claimant to the Respondent to an amount of 1 693 157 euros (paragraph 50, Table 5 of the Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent’s damages dated 27 April 2018);*

*(ii) in the alternative, limit the delay penalties to be paid by the Claimant to the Respondent to an amount of 1 747 571 euros (paragraph 51, Table 6 of the Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent’s damages dated 27 April 2018);*

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<sup>51</sup> See para. 153 of the Partial Award.

<sup>52</sup> See paras. 161 and 165 of the Partial Award.

<sup>53</sup> See para. 166 of the Partial Award.

*Pursuant to the Partial Award rendered on 8 January 2018, p. 101, para 9) regarding the damages to be paid by the Claimant to the Respondent on the basis of the concession fee, between 8 January 2018 and 31 December 2020, the Claimant respectfully requests the Tribunal to:*

*(i) Limit the damages to be paid by the Claimant to the Respondent on the basis of the concession fee to an amount of 4 694 144 euros (paragraph 61, Table 7 of the Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent's damages dated 27 April 2018);*

*(ii) in the alternative, limit the damages to be paid by the Claimant to the Respondent on the basis of the concession fee to an amount of 4 769 956 euros (paragraph 61, Table 7 of the Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent's damages dated 27 April 2018);*

*(iii) in further alternative, limit the damages to be paid by the Claimant to the Respondent on the basis of the concession fee to an amount of 5 423 459 euros (paragraph 61, Table 7 of the Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent's damages dated 27 April 2018);*

*(iv) in even further alternative, limit the damages to be paid by the Claimant to the Respondent on the basis of the concession fee to an amount of 5 510 884 euros (paragraph 61, Table 7 of the Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent's damages dated 27 April 2018).*

*Dismiss any claim for post-award interests made by the Respondent;*

*In the alternative, award post-award interests on a compound basis using 12 month Euro LIBOR plus 2% (paragraph 60 of the Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent's damages dated 27 April 2018);*

*In further alternative, award post-award interests on a compound basis using 12 month EURIBOR plus 2% (paragraph 60 of the Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent's damages dated 27 April 2018);*

*The Claimant reserves its rights to amend or supplement the requests listed above at a subsequent stage of the proceedings."*

75. On 4 May 2018, the Claimant submitted its updated Prayer for Relief<sup>54</sup> to take into account Mr. Rathbone's latest alternative calculations in light of Mr. MacGregor's Third Expert Report. It reads as follows:

*"1. The Claimant seeks the following relief.*

*2. Pursuant to the Partial Award rendered on 8 January 2018, p. 101, para 8) regarding the delay penalties to be paid by the Claimant to the Respondent between 16 July 2011 and 8 January 2018, the Claimant respectfully requests the Tribunal to:*

*(i) Limit the delay penalties to be paid by the Claimant to the Respondent to an amount of 693 157 euros (paragraph 50, Table 5 of the Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent's damages dated 27 April 2018);*

*(ii) in the alternative, limit the delay penalties to be paid by the Claimant to the Respondent to an amount of 747 571 euros (paragraph 51, Table 6 of the Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent's damages dated 27 April 2018);*

*3. Pursuant to the Partial Award rendered on 8 January 2018, p. 101, para 9) regarding the damages to be paid by the Claimant to the Respondent on the basis of the concession fee, between 8 January 2018 and 31 December 2020, the Claimant respectfully requests the Tribunal to:*

*(i) Limit the damages to be paid by the Claimant to the Respondent on the basis of the concession fee to an amount of 4 694 144 euros (paragraph 61, Table 7 of the Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent's damages dated 27 April 2018);*

*(ii) in the alternative, limit the damages to be paid by the Claimant to the Respondent on the basis of the concession fee to an amount of 4 769 956 euros (paragraph 61, Table 7 of the Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent's damages dated 27 April 2018);*

*(Hi) in further alternative, limit the damages to be paid by the Claimant to the Respondent on the basis of the concession fee to an amount of 5 423 459 euros (paragraph 61, Table 7 of the Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent's damages dated 27 April 2018);*

*(iv) in even further alternative, limit the damages to be paid by the Claimant to the Respondent on the basis of the concession fee to an amount of 5 510 884 euros (paragraph*

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<sup>54</sup> With track changes.



61, Table 7 of the Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent's damages dated 27 April 2018).

(v) in any event, limit the damages to be paid by the Claimant to the Respondent on the basis of the concession fee to an amount of 4 794 866 euros (paragraph 18 to the Fifth Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent's damages dated 4 May 2018), or to 5 539 608 euros (paragraph 19 to the Fifth Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent's damages dated 4 May 2018).

4. Dismiss any claim for pre and/or post-award interests made by the Respondent;

5. In the alternative, award pre and/or post-award interests on a compound basis using 12 month Euro LIBOR plus 2% (paragraph 60 of the Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent's damages dated 27 April 2018);

6. In further alternative, award pre and/or post-award interests on a compound basis using 12 month EURIBOR plus 2% (paragraph 60 of the Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent's damages dated 27 April 2018);

7. In any event, limit the amount of pre-award interests to 174 242 euros (paragraph 23 to the Fifth Expert Report of Paul Rathbone regarding the calculation of delay penalties and Respondent's damages dated 4 May 2018).

8. In any event, dismiss the Respondent's calculation of damages.

9. The Claimant reserves its rights to amend or supplement the requests listed above at a subsequent stage of the proceedings."

## **SECTION II. RESPONDENT'S CLAIMS**

76. In its Answer to the Request for Arbitration, the Respondent formulated as follows its claim for relief:

*"For the reasons set out in the preceding section the Respondent denies the Claimant's entitlement to the relief sought or any relief.*

*The Respondent accordingly asks the Tribunal:*

*i. to declare that*

*1. the Tribunal does not have jurisdiction to hear the Claimant's claim;*

*alternatively*

*2. the claims are inadmissible;*

*ii. further or alternatively, the Tribunal is asked to dismiss the claim; and*

*Hi. declare that the Claimant is in breach of the Agreement;*

*iv. Further or alternatively that the Respondent is entitled to recover damages as a result of the Claimant's breach/(es) of the Agreement;*

*v. (in any event) order that the Respondent is entitled to reimbursement of the costs connected with these arbitration proceedings, including its arbitration costs, such as legal fees and disbursements and those of any experts and/or witnesses.*

*vi. the Respondent, in due course, shall provide the particulars of quantum in relation to its counter-claim.*

*The Respondent notes the reservation of rights in paragraph 54 of the Request for Arbitration. The Respondent likewise reserves its position in full to submit supplemental amended or additional defenses, arguments, documents and/or evidence in this arbitration as it may in its judgement deem appropriate”.*

77. In its Statement of Defence and Counterclaim, the Respondent amended its request for relief as follows:

*uFor all of the reasons set out above, the Respondent respectfully requests the Tribunal to grant it the following relief in an Award, as identified in the Terms of Reference:*

*a) To declare:*

- i. that it has no jurisdiction to hear the Claimant's claims; and/or*
- ii. that the Claimant's claims are not arbitrable/admissible; and thus to dismiss each of the Claimant's claims;*

*b) Further or alternatively*

- i. to dismiss each of the Claimant's claims;*
- ii. to declare that the Claimant is in breach of the Concession Agreement and/or the relevant and applicable law;*
- Hi. to declare that the Respondent is entitled to terminate the Concession Agreement or has terminated the Concession Agreement;*
- iv. to order the Claimant to pay damages and interest to the Respondent in the amounts claimed alternatively such sum as the Tribunal determines;*
- v. to grant the Respondent a set-off; and/or*

- vi. *to grant the Respondent all other available relief to which it is entitled in an amount and/or form to be quantified and/or identified in the arbitration ; and/or*
- vii. *reserving all rights of the Respondent under the Concession Agreement to seek compensation for any loss or damage sustained as a result of the breaches of contract by the Claimant;*
- viii. *ordering the Claimant to fully compensate and reimburse the Respondent for all legal and other expenses incurred by the Respondent in connection with these arbitration proceedings, including but not limited to costs such as (i) legal fees and disbursements (ii) the fees of the Tribunal (Hi) the fees and expenses of the ICC (iv) the reasonable costs and expenses of the Respondents officials (v) the costs of any experts and/or witnesses; and (vi) any other expenses howsoever incurred in connection with these proceedings; and/or*

*c) ordering such other relief as the Tribunal deems just and appropriate.*

*The Respondent reserves the right to add to, develop, amend or otherwise increase its prayers for relief.”*

78. In its Statement of Rejoinder and Reply to the Counterclaim, the Respondent again slightly amended its prayer for relief as follows:

*“For all of the reasons set out above, the Respondent respectfully requests the Tribunal to grant it the following relief in an Award, as identified in the Terms of Reference:*

*To declare:*

- a. that it has no jurisdiction to hear the Claimant's claims; and/or*
- b. that the Claimant's claims are not arbitrable/admissible;*

*and thus to dismiss each of the Claimant's claims.*

*Further or alternatively:*

- a. to dismiss each of the Claimant's claims;*
- b. to declare that the Claimant is in breach of the Concession Agreement and/or the relevant and applicable law;*
- c. to declare that the Concession Agreement has been validly terminated as a result of the Claimant's breaches; alternatively that the Respondent was and is entitled validly to terminate the Concession Agreement as a result of the Claimant's breaches (or, in the further alternative, to an Award terminating the Concession Agreement for those same reasons);*
- d. to order the Claimant to pay damages and interest to the Respondent in the amounts claimed alternatively such sum as the Tribunal determines;*
- e. to grant the Respondent a set-off; and/or*

- f. to grant the Respondent all other available relief to which it is entitled in an amount and/or form to be quantified and/or identified in the arbitration; and/or
- g. reserving all rights of the Respondent under the Concession agreement to seek compensation for any loss or damage sustained as a result of the breaches of contract by the Claimant;
- h. ordering the Claimant to fully compensate and reimburse the Respondent for all legal and other expenses incurred by the Respondent in connection with these arbitration proceedings, including but not limited to costs such as (i) legal fees; and disbursements (ii) the fees of the Tribunal (iii) the fees and expenses of the ICC (iv) the reasonable costs and expenses of the Respondent's officials (v) the costs of any experts and/or witnesses; and (vi) any other expenses howsoever incurred in connection with these proceedings; and/or
- i. ordering such other relief as the Tribunal deems just and appropriate.

*The Respondent reserves the right to add to, develop, amend or otherwise increase its prayers for relief\*

79. In its Skeleton Argument, the Respondent indicated as follows:

*uFor all of the reasons set out in its pleadings to date, and in particular those summarised above, Albania will invite the Tribunal (a) to hold that it had no jurisdiction in respect of Hydro's claims or that they are unarbitrable or inadmissible; or, in the alternative (b) to dismiss all of Hydro's claims. In the event that the Tribunal holds it has jurisdiction Albania will invite the Tribunal (c) to uphold its counterclaims and grant the relief it seeks in respect thereof'.*

80. In its Post-Hearing brief, the Respondent specified that:

*"[...] the Respondent maintains the relief claimed in its Submissions served in this arbitration, and in its Skeleton Argument dated 12 December 2016, and respectfully requests the Tribunal to grant the relief sought in an Award."*

## **CHAPTER VII. THE PARTIAL AWARD**

81. In the Partial Award,<sup>55</sup> the Arbitral Tribunal decided as follows:

*“For these reasons,*

*The Arbitral Tribunal:*

*On the claims:*

- 1) Decides that the Claimant's claims for breach of Article 6 of the Concession Agreement are inadmissible;*
- 2) Decides that the Claimant's other claims are admissible;*
- 3) Decides that it has no jurisdiction on the Claimant's VAT and fiscal claims concerning VAT and other fiscal amounts allegedly due by the Albanian authorities to KGE, i.e. :
  - the 7 February 2012 Reimbursement Claim;*
  - The 2012 to 2015 VAT Refund Claim;*
  - The late reimbursements of VAT claims; and*
  - The Customs Duty Claim;**
- 4) Decides that it has jurisdiction on the Claimant's Exchange Rate Losses Claim and the Claimant's Termination Claim;*
- 5) Dismisses these claims;*

*On the counterclaim:*

- 6) Decides that the Respondent's termination counterclaim is admissible;*
- 7) Declares that the Concession Agreement is terminated as a result of the Claimant's breaches as from the date of this Partial Award;*
- 8) Decides that the Claimant shall pay the Respondent delay penalties as per Article 14, limited to a maximum amount of EUR 12.9 million, calculated for the period between 16 July 2011 to the date of this Partial Award, and applying the following formula: - From day 1 (16 July 2011) to day 90 (14 October 2011): 5,000 € per day of delay = 450,000 €; and - from day 91 (15 October 2011) to the termination of the Concession Agreement (the date of this Partial Award) : 1% of one day's energy generation, per day of delay, calculated on the basis of a yearly production of 380,000 MWh, and an electricity price based on the ERE 2014 list of import prices for the year 2011 to 2014 and, for the years 2014 to 2017 based on the Hungarian Power Exchange prices;*

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<sup>55</sup> See §6 above.

9) Decides that the Claimant shall pay the Respondent damages on the basis of the concession fees that it would have received had the Project been completed by the Claimant, for the period starting from the date of this Partial Award until 31 December 2020, on the basis that the Respondent would have received such concession fees in “physical form” and that they would be calculated taking into account:

- an annual generation of the Plant in the amount of 380,000 MWh,
- electricity import prices which shall be estimated, for the period between 2017 and 2019, on the basis of the Hungarian Power Exchange (HUPX) list of future electricity contracts<sup>56</sup>; and,
- for the year 2020, electricity import prices which shall be estimated on the basis of the electricity prices for the industrial sector extracted from the report published by the European Commission entitled “EU Energy, Transport and GHG Emissions Trends to 2050”

10) Reserves for the second phase of the proceedings its decision as to the full amounts finally due by the Claimant to the Respondent;

11) Decides that the Claimant shall reimburse the Respondent the legal and other costs it has so far incurred for its defence, being EUR 1,208,642, and GBP 40,649.46;

12) Decides that the costs of the arbitration will be decided and allocated in the Final Award;

13) Dismisses all other claims.”

82. In other words, the Arbitral Tribunal decided that the Concession Agreement was terminated as a result of the Claimant’s breaches as from the date of the Partial Award. The Partial Award related to the Parties’ liability, as well as the dates and parameters of the damages that would be owed by the Claimant to the Respondent. The Partial Award specified that it would be followed by a final award on the financial aspects of the damages.<sup>57</sup> Now that the Parties have filed submissions and expert reports based on such dates and parameters, a final decision on the financial aspects of the damages is addressed in this Final Award. The Arbitral Tribunal does not reiterate the arguments of the Parties relating to their claims but only those that are necessary to decide the financial aspects of damages. In this Final Award, the Arbitral Tribunal uses the same terms and abbreviations as those used in the Partial Award.

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<sup>56</sup> Footnote 256 in the Partial Award reads as follows: *Mr. Rathbone, ER2, para. 114.*

<sup>57</sup> See the Partial Award, para. 3.

## **CHAPTER VIII. THE ISSUE OF QUANTUM**

### **SECTION I. CALCULATION OF DELAY PENALTIES DUE TO THE RESPONDENT**

#### **Sub-Section I. Position of the Claimant**

83. The Claimant points out that in the Partial Award, the Arbitral Tribunal ruled that the Respondent is entitled to receive delay penalties for the period between the date when the Plant should have been completed, i.e. 16 July 2011, and the date of termination (the date of the Partial Award), i.e. 8 January 2018 (“the Delay Penalties”).<sup>58</sup>
84. For the calculation of the Delay Penalties, the Tribunal referred to Article 14 of the Concession Agreement, which reads as follows:

*“In the event that the Concessionaire does not complete the construction works by the date falling 36 months from the date of attainment of the construction license:*

*(i) If the delay is attributable to the Concessionaire, the latter shall pay to the Authorised State Body penalties, both in cash and in kind, up to a maximum amount equal to 10% of the Estimated Project Costs:*

*[...]*

*Penalties under fi) [...] above will be calculated according to the following table:*

<i>Days of delay</i>	<i>Concessionaire</i>	<i>Authorised State Body</i>
<i>From day 1 to day 90</i>	<i>1,000 € per day of delay</i>	<i>[...]</i>
<i>From day 91 onwards</i>	<i>1% of the energy generated by the Plant, at any moment in time, per each day of delay</i>	<i>f..f</i>

*However, in the event the Concessionaire, by the date falling 36 months from the date of attainment of the construction license, has performed at least 80% of the Project, the penalties under point fi) and (is) above will be calculated according to the following table:*

<i>Days of delay</i>	<i>Concessionaire</i>	<i>Authorised State Body</i>
<i>From day 1 to day 90</i>	<i>1,009 € per day of delay</i>	<i>[...]</i>
<i>From day 91 onwards</i>	<i>0.5% of the energy generated by the Plant, at any moment in time, per each day of delay</i>	<i>f..f</i>

85. Since the works were not complete by the date falling 36 months from the date of attainment of the construction license, the Arbitral Tribunal determined that the first table should be used in the determination of the penalties. In paragraph 362 of the Partial Award, it decided as follows: “*There is no dispute between the Parties that the construction works were not*

<sup>58</sup> Para. 392 of the Partial Award. see §8 above.

*complete[d] by the date falling 36 months from the date of obtainment of the construction license. Moreover, the Parties agree that the Project is around 30 % to 40% complete<sup>59</sup>, with the consequence that the first table shall apply.”*

86. The Arbitral Tribunal further noted that the total amount calculated under the Delay Penalties clause is subjected to a cap of EUR 12.9 million.<sup>60</sup>
87. At paragraph 366 of the Partial Award,<sup>61</sup> the Arbitral Tribunal explained that the Claimant’s interpretation of Article 14 is to be preferred in that the Experts should calculate “1% of the energy generated by the Plant each day”.
88. In paragraph 392 of the same document,<sup>62</sup> the Tribunal decided that the Delay Penalties should be calculated as per the following formula:  
“From day 1 (16 July 2011) to day 90 (14 October 2011): 5,000 € per day of delay = 450,000 €; and  
From day 91 (15 October 2011) to the termination date of the Concession Agreement (the date of this Partial Award): 1% of one day’s energy generation, per day of delay, calculated on the basis of a yearly production of 380,000 MWh, and an electricity price based on the ERE 2014 list of import prices for the year 2011 to 2014 and, for the years 2014 to 2017 based on the Hungarian Power Exchange prices.
89. The experts sought clarification on the Tribunal’s ruling for the year 2014, in that the Partial Award was not clear on whether the electricity price should be calculated on the basis of the 2014 ERE (Energy Regulatory Entity) import price or the 2014 Hungarian Power Exchange (“HUPX”) prices. The experts recommended that the 2014 ERE import price be used. The Arbitral Tribunal agreed with this position.<sup>63</sup>

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<sup>59</sup> Mr. Becchetti WS, para. 28.

<sup>60</sup> See para. 362 of the Partial Award: “As Article 14 of the Concession Agreement provides that the delay penalties are due only “up to a maximum amount equal to 10% of the Estimated Project Costs” and since the parties agree that, if the cap would apply, it would amount to EUR 12.9 million<sup>60</sup>, the penalties are payable only up to this maximum amount.”

<sup>61</sup> Paragraph 366 of the Partial Award reads as follows: “The Arbitral Tribunal is not convinced by the interpretation of the Respondent that the clause means 1% of annual energy production per day. The contractual provision does not say so and there is no reference whatsoever to a reference to be made to “annual production”. The fact that the provision was amended when the Project was already behind schedule does not make the Respondent’s interpretation more convincing. To the contrary, it appears implausible that the Claimant agreed that the penalties it would be compelled to pay would be increased. Moreover, in its own letter of 6 February 2013 (R12), the Respondent mentioned the penalties due pursuant to Article 14 in the following terms: “Based on the above mentioned breach and Article 14 of the agreement you are obliged to pay 5000 euros per day for the first 90 days of delay, as well as the equivalent price of 1% of the energy production capacity for every day of delay after the first 90 days [...]” (emphasis added by the Arbitral Tribunal). At no point the Respondent mentioned that these penalties would be calculated by taking into account the annual energy production per day. Therefore, the Arbitral Tribunal concludes that the Claimant’s interpretation is to be preferred.”

<sup>62</sup> See §8 above.

<sup>63</sup> The Arbitral Tribunal’s Answers to the Experts’ Joint Questions, in Section I (b) reads as follows: “The Arbitral Tribunal agrees that for 2014 the ERE import price should be used, as that was used by both Mr MacGregor and Mr Rathbone in their final reports. The Award at para 392 and as repeated at point 8 on page 101 is unclear in referring to 2014 both in the period 2011-2014 and in the period 2014-2017. This ambiguity needs clarifying and 2014 should be allocated to the first period and thus to the ERE import price, as both experts agreed in their final reports.”



90. In paragraph 392 of the Partial Award,<sup>64</sup> the Arbitral Tribunal calculated the Delay Penalties due for the period between 16 of July 2011 and the 14 of October 2011, which amount to EUR 450.000.
91. The Claimant notes that the issue now is to determine the amount of the Delay Penalties due for the period between 15 October 2011 and the date of the Partial Award (8 January 2018).
92. According to the Claimant's expert, Mr Rathbone, for this period the total amount of penalties should be calculated using the following equation:<sup>65</sup>

$$\text{Delay penalties} = 1\% * \frac{380,000 \text{ MWh}}{365 \text{ days}} * \text{Days of Delay} * \text{Electricity Price}$$

93. Mr Rathbone explains that one of the main variables influencing the quantum of Delay Penalties (as well as the damages ("the Damages")<sup>66</sup>) calculation is the price of the imported electricity in Albania. He points out that in his Second Expert Report dated 22 July 2016, he proposed a methodology to determine the price at which the Albanian Republic will have to import the electricity, which was based on a mix of actual import price published by ERE, actual and future prices reported by the HUPX and a long-term forecast published by the European Commission. In paragraphs 390<sup>67</sup> and 392<sup>68</sup> of the Partial Award, the Arbitral Tribunal decided that this methodology should be used to determine the Albanian import electricity prices.
94. As to the Delay Penalties calculation, the Tribunal decided that:
- for the period between 2011 and 2014, the experts should use the electricity prices published by ERE, which reflect the effective average price of the imported electricity in Albania; and
  - for the following years, the prices reported by the HUPX should be used as a basis to determine the average import electricity price in Albania.
95. Therefore, Mr Rathbone calculates the Delay Penalties on the basis of the data that was used in his prior reports during this arbitration, i.e. the 2014 ERE import price and the 2014-2017

<sup>64</sup> See §88 above.

<sup>65</sup> See Mr Rathbone's Fourth Expert Report, para. 45.

<sup>66</sup> See §131 below.

<sup>67</sup> Paragraph 390 of the Partial Award reads as follows: "*The Arbitral Tribunal finds Mr. Rathbone explanations convincing regarding the electricity price for the energy imported by Albania. A combination of data provided by the Hungarian Power Exchange and a longer term price outlook developed by the European Commission give rise to a more realistic and relevant import price forecast. Therefore, the Arbitral Tribunal considers that the Hungarian Power Exchange (HUPX) list of future electricity contracts shall be used as the starting point to obtain annual future prices for the period 2017 to 2019 averaging base future contracts expiring in the same years. Since the most distant HUPX future contracts expire in 2019, the Arbitral Tribunal considers that the report published by the European Commission entitled "EU Energy, Transport and GHG Emissions Trends to 2050" is relevant and shall serve as the basis for the estimated electricity price in 2020, taking into account, specially, the European electricity prices for the industrial sector.*"

<sup>68</sup> See footnote 62 above.

HUPX prices, which is his recommended approach. He specifies:

*“Following the instructions provided by the Tribunal, I have calculated the amount of Delay Penalties and Damages that Albania is entitled to receive from Hydro. My recommendation is that the calculations be carried out using the original data which I used for all calculations in my Second and Third Reports. This would seem to me to be the appropriate application of paragraph 393 of the Partial Award, which specifically references these data with respect to the import prices of electricity in connection with the damages based on the concession fee. However, no such specific reference in paragraph 392 exists with respect to the import prices of electricity to be used in the calculation of the Delay Penalties. For reasons of consistency, my recommendation is to use the same prices for both calculations. Consequently, I have chosen to present the results of my analysis both based on the electricity prices and the weighted average cost of capital (WACC) as presented in my previous expert reports.”*<sup>69</sup>

96. Mr Rathbone points out that in the Experts’ Questions to the Tribunal, the Experts asked, at Mr MacGregor’s initiative, whether they should update the data used for both the calculation of the relevant prices<sup>70</sup> and the calculation of the weighted average cost of capital (WACC).<sup>71</sup>

<sup>69</sup> Fourth Expert Report of Mr. Paul Rathbone dated 27 April 2018, p. 1, para. 3

<sup>70</sup> Section II (a) of the Arbitral Tribunal’s Answers to the Experts’ Joint Questions reads as follows: “(a) The first question where the Experts request guidance on the approach to be taken is as follows: [...] ‘In their expert reports, Mr Rathbone and Mr MacGregor used Hungarian Power Exchange (“HUPX”) prices extracted from the HUPX website at the time of their reports. Mr Rathbone believes that the experts should use the same HUPX prices from 14 July 2016 as used in their earlier reports, since this is clearly set out by the Tribunal’s decision in point (9) and footnote 256 of the Partial Award and thus should not be reopened. Mr MacGregor believes that the experts should use the HUPX prices from the same source as in their earlier reports, as set out clearly in the Partial Award, but that the futures prices used should be updated to those that existed on 8 January 2018, the date of the Partial Award. Would the Tribunal like to give guidance on this issue now, or should each expert explain his recommended approach in their respective submissions?Y...’ The Arbitral Tribunal’s answer: [...] ‘When the Arbitral Tribunal issued the Partial Award, its decision was based on the information provided by the Experts. In his Reports, Mr. Rathbone took into account the HUPX prices which were available on the HUPX website at the time. Of course, such prices are changing constantly and the data available may not be the same at different points in time. The Arbitral Tribunal understands that the Experts cannot update their Reports every time new data are published. Each Expert should explain his recommended approach in his submission. However, the answer to the question at section I(a) above guides the experts to the effect that the calculation should be conducted as of 8 January 2018, the date of the Award, a date which was of course unknown to the experts at the time of their reports.’”

<sup>71</sup> Section II (b) of the Arbitral Tribunal’s Answers to the Experts’ Joint Questions reads as follows: “(b) The second question where the Experts request guidance on the approach to be taken is as follows: [...] ‘In their expert reports, Mr Rathbone and Mr MacGregor use a discount rate of 9.5% which Mr MacGregor calculated on 12 April 2016. Mr Rathbone believes that the experts should use the same discount rate as used in their earlier reports. Mr MacGregor believes that the experts should update the calculation of the discount rate based on market data on 8 January 2018, the date of the Partial Award. If the calculation is updated, there may be a disagreement between the experts as to the applicable rate. Would the Tribunal like to give guidance on this issue now, or should each expert explain his recommended approach in their respective submissions?’ [...] The Arbitral Tribunal’s answer: [...] ‘When the Arbitral Tribunal issued the Partial Award, its decision was based on the information provided by the Experts. In their Reports, Mr Rathbone and Mr MacGregor used a discount rate of 9.5% which Mr MacGregor calculated on 12 April 2016. Of course, such rate is subject to change and the market data available to the Experts may not be the same at different points in time. The Arbitral Tribunal fully understands that the Experts cannot update their Reports every time new data are published. Each Expert

In its Answers to the Experts' Joint Questions, the Arbitral Tribunal stated that "*each Expert should explain his recommended approach in his submission*" and then pointed out that the Experts should have regard to the instruction that the reference date should be 8 January 2018 (i.e. the date of the Partial Award).<sup>72</sup>

97. According to Mr Rathbone, in terms of the ruling on Damages, there is a very clear reference to his Second Expert Report in paragraph 393<sup>73</sup> as well as in point 9) of the operative part of the Partial Award.<sup>74</sup> He concludes that the original data should still be used to calculate Damages. However, this reference is not made in paragraph 392 of the Partial Award, which deals with the calculation of the Delay Penalties. Thus, he considers that the question of whether or not to update the Delay Penalty for new data is unanswered. He recommends using the original data for both calculations, to be consistent.
98. On this basis, he calculated that the Delay Penalties would be of an amount of EUR 1,693,157.75
99. The Claimant points out that it also instructed Mr Rathbone to give the Tribunal an alternative valuation, based on more recent data, if the Tribunal prefers this approach.
100. Mr Rathbone points out that since the date of publication of his Second Expert Report (which was dated 22 July 2016) HUPX has published new and more recent figures of the actual base load price, which are now available for the entire period of 2016 and 2017. However, at the time of his Second Expert Report, as only information up to May 2016 were available, he had to determine the average 2016 base load price using a mix of actual and future prices<sup>76</sup> and rely on future prices for the period between 2017 and 2019. All these actual prices are now available, and therefore, are used in his alternative valuation to determine the average import price for Albania in 2016 and 2017.
101. Since 8 January 2018 is the date of reference for his calculation, Mr Rathbone only considered data available at that moment in time. This implies that the updated average electricity price for 2018 (and the following years) has to be determined as the average of the future prices published by HUDEX (Hungarian Derivative Energy Exchange) on 8 January 2018. Mr Rathbone explains that HUDEX is a subsidiary of HUPX, recently set up to deal specifically with derivative contracts including futures in order to comply with new EU regulations.<sup>77</sup> The updated list of future contracts published by HUDEX on 8 January 2018

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*should explain his recommended approach in his submission. However, the answer to the question at section I(a) above guides the experts to the effect that the calculation should be conducted as of 8 January 2018, the date of the Award, a date which was of course unknown to the experts at the time of their reports."*

<sup>72</sup> See footnotes 70 and 71 above.

<sup>73</sup> See §8 above.

<sup>74</sup> See §81 above.

<sup>75</sup> Mr Rathbone's Fourth Report, Table 5, p.12.

<sup>76</sup> Actual prices up to May 2016 and future prices for the rest of the year. See Appendix C Electricity Price Forecast of Mr Rathbone's second expert report.

<sup>77</sup> See <https://www.hupx.hu/en/Product%20info/HUDEX/Pages/default.aspx> (last accessed 27 April 2018).

includes prices up to 2021. Consequently, applying the time frame indicated by the Arbitral Tribunal, which terminates on 31 December 2020 (for Damages), Mr Rathbone considered in his alternative calculation that there was no longer any need to use the European Commission long term forecast, as previously done to determine the prices from 2020 onwards. Mr Rathbone indicates that this is another reason why he considers that updating the data might be seen to be inconsistent with the Partial Award, as this leads him to ignore one of the sources cited by the Arbitral Tribunal.

102. The updated electricity prices for the period between 2016 and 2020 using the new actual figures published by HUPX for the period between 2012 and 2017 and future contracts reported by HUDEX for the following years up 2020 are presented in Table 3 of Mr Rathbone's Fourth Expert Report (p. 7).<sup>78</sup>
103. Mr Rathbone further explains that because the Albanian Regulator Authority (ERE) did not publish updated figures of the actual average prices paid by the government to import electricity in the country, it was not possible to update the historical price differential between the data published by ERE and the HUPX actual price. He has therefore relied on the figure calculated in his Second Expert Report of EUR 10.17 /MWh, as proposed by both Experts and to which the Arbitral Tribunal did not object in its clarifications.<sup>79</sup>
104. On the basis of updated import prices, Mr Rathbone calculated that the Delay Penalties would be of an amount of EUR 1,747,571.
105. He further notes that Mr MacGregor (the Respondent's Expert) calculated that the Delay Penalties on the basis of updated import prices would amount to EUR 1,745,860. The difference of EUR 1,889 between the Experts' valuation is attributable to two factors:
  - Mr Rathbone has calculated the daily energy generation by reference to the standard 365 days in every year, whereas Mr MacGregor has applied the annual generation of 380,000 MWh to each year, so during leap years he calculates a lower daily generation; and
  - Mr Rathbone has not counted 8 January 2018 so that there were only 7 days in 2018, whereas Mr MacGregor has counted it.
106. Mr Rathbone considers that this difference is trivial and that his approach differs only on a couple of details. He recommends that the Tribunal either select one or the other, or take an average.
107. For the reasons explained above, the Claimant requests that the Delay Penalties be limited to an amount of EUR 1,693,157, or in the alternative, EUR 1,747,571.

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<sup>78</sup> The details of the updated electricity prices assessment are presented in Appendix D to Mr Rathbone's Fourth Expert Report.

<sup>79</sup> See paragraph 113 at page 34 of Mr Rathbone's Second Expert Report.

## **Sub-Section II. Position of the Respondent**

108. The Respondent did not file any submission relating to the second part of the proceedings and relies only on the Third and Fourth Expert Reports prepared by its Expert, Mr MacGregor.
109. Mr MacGregor indicates first that he agrees with Mr Rathbone's Third Expert Report<sup>80</sup> regarding his calculation of Delay Penalties for the period from 16 July 2011 to 31 December 2014.<sup>81</sup>
110. For the period 2015 to 2017, Mr MacGregor explains that he has used an electricity price based on the HUPX actual Base Average Price for the year<sup>82</sup> plus EUR 10.17.<sup>83</sup> He did so for the following reasons. First, the Partial Award states that the electricity price for the years 2014<sup>84</sup> to 2017 should be based on HUPX prices. Consequently, he has used the HUPX prices as the basis for the electricity prices used in his calculation.
111. Then, the Partial Award states:
- "The Arbitral Tribunal finds Mr Rathbone explanations convincing regarding the electricity price for the energy imported by Albania. A combination of data provided by the Hungarian Power Exchange and a longer term outlook developed by the European Commission give rise to a more realistic and relevant import price forecast."<sup>85</sup>*
112. Mr MacGregor points out that in his Second and Third Reports, Mr Rathbone explained his approach regarding the electricity price as follows:
- "Since ERE has not published data concerning 2015, I have structured my analysis using base load prices reported by the Hungarian Power Exchange (HUPX). I believe HUPX prices to be an appropriate benchmark to judge Albanian import prices because of its strategical position linking the Balkans to the central European energy market. Additionally, HUPX prices are the official benchmark recognised by the Albanian government. In order to simulate eventual transport and interconnection costs from Hungary to the Albanian border, I have added a premium of 10.17 €/KWh each year which I have deduced from the average difference between the HUPX annual base price and the ERE reported annual import price for the years 2011 and 2014. I have chosen this time frame because it is relatively closer to the today's market and excluded 2010 because in that moment Albania was a net exporter of*

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<sup>80</sup> Mr Rathbone's Third Expert Report, Appendix 1.

<sup>81</sup> In paragraph 2.5 of his Third Expert Report, Mr MacGregor referred to the date "31 December 2015". The Arbitral Tribunal understands this as a typo and that it should read "31 December 2014".

<sup>82</sup> Mr MacGregor's Third Expert Report, Exhibit C.

<sup>83</sup> Mr MacGregor's Third Expert Report, para. 2.6.

<sup>84</sup> In its Answers to the Experts' Joint Questions, the Arbitral Tribunal clarified that "2014 should be allocated to the first period and thus to the ERE Import Price." See footnote 63 above.

<sup>85</sup> Partial Award, para. 390, see footnote 67 above.

electricity.»<sup>86</sup>

113. Consequently, Mr MacGregor confirms Mr Rathbone's calculation of the average difference between the HUPX annual base price and the ERE reported annual import price for the years 2011 and 2014 of € 10.17/KWh and has added this to the HUPX prices.
114. He further points out that both experts recommended to the Tribunal that the same approach as had been adopted by Mr Rathbone previously, of adding the differential of € 10.17/KWh between the Albanian and Hungarian electricity prices, should be adopted in the final damages calculation. The Tribunal indeed stated:  
*"It is not for the Arbitral Tribunal at this point in time to give directions to the Experts on this issue. If the Experts agree on the approach to be followed, the Tribunal has no objection that they adopt such approach."*<sup>87</sup>
115. According to Mr MacGregor, since both Mr Rathbone and he agreed on this approach, it should be adopted. Mr Rathbone acknowledged that Albanian ERE electricity prices were € 10.17/KWh higher than HUPX electricity prices in the years when both were available. Therefore, it is logical that a premium of € 10.17/KWh be added to the HUPX prices.
116. Mr MacGregor explains that for the period from 1 January 2018 to 8 January 2018, he has used the average HUPX Base Price for the first eight days of 2018 plus the premium for Albanian electricity prices of € 10.17/KWh.
117. As to the HUPX prices that should be used, he used the actual HUPX prices for 2015 to 2017 and the first eight days of 2018, which he has obtained from the HUPX website.<sup>88</sup> His opinion is that the Experts "*should use the HUPX prices from the same source as in [their] earlier reports, as set out clearly in the Partial Award, but that the futures prices should be updated to those that existed on 8 January 2018, the date of the Partial Award.*"<sup>89</sup> Mr Rathbone, on the other hand, believes that the Experts: "*should use the same HUPX prices from 14 July 2016 as used in their earlier reports, since this is clearly set out by the Tribunal's decision in point (9) and footnote 256 of the Partial Award and thus should not be reopened.*"<sup>90</sup> The question was put to the Arbitral Tribunal by the Experts in their Joint

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<sup>86</sup> Mr Rathbone's Second Report, paras. 112 to 113.

<sup>87</sup> Section I (d) of the Arbitral Tribunal's Answers to the Experts' Joint Questions reads as follows: "*(d) The fourth question where the Experts are agreed on a recommended approach is as follows: [...] In points 8 and 9 on page 101 of the Partial Award, the Tribunal requires the calculation to be based on electricity prices for 2014 to 2019 that are "based on" the HUPX prices, following Mr Rathbone's approach in his second and third reports. Mr Rathbone actually added €10.17 to the HUPX prices, representing the differential between Albanian and Hungarian electricity prices. The experts both recommend that this approach be adopted in the final damages calculations. Does the Tribunal agree that €10.17 should be added to the HUPX prices used in the Final Award? [...] The Arbitral Tribunal's answer: [...] It is not for the Arbitral Tribunal at this point of time to give directions to the Experts on this issue. If the Experts agree on the approach to be followed, the Tribunal has no objection that they adopt such approach.*"

<sup>88</sup> Exhibits C and D to Mr MacGregor's Third Expert Report,

<sup>89</sup> Tribunal's Answers to the Experts' Joint Questions, Section II (a).

<sup>90</sup> Tribunal's Answers to the Experts' Joint Questions, Section II (a), see footnote 70 above.

Questions. In its Answers, the Arbitral Tribunal specified: “When the Arbitral Tribunal issued the Partial Award, its decision was based on the information provided by the Experts. In his Reports, Mr Rathbone took into account the HUPX prices which were available on the HUPX website at the time. Of course, such prices are changing constantly and the data available may not be the same at different points in time. The Arbitral Tribunal understands that the Experts cannot update their Reports every time new data are published. Each Expert should explain his recommended approach in his submission. However, the answer to the question at section I(a) above guide[s] the experts to the effect that the calculation should be conducted as of 8 January 2018, the date of the Award, a date which was of course unknown to the experts at the time of their reports.”<sup>91</sup>

118. Mr MacGregor considers that the Arbitral Tribunal has confirmed that 8 January 2018 is the date that should be used for the Experts’ calculation of Damages.<sup>92</sup> Therefore, he based his calculations on the information available on this date, and not on the information from 14 July 2016 that just happened to be a date that was used by Mr Rathbone in his earlier report. Therefore, as set out in Appendix 2 to his Third Expert Report, Mr MacGregor calculates that the Delay Penalties due to the Respondent for the period from 16 July 2011 to 8 January 2018 amount to EUR 1,745,861.
119. Mr MacGregor notes that the difference of his calculation with Mr Rathbone’s calculation of such Delay Penalties<sup>93</sup> (using data updated to 8 January 2018) is so small that he does not comment it further.
120. While he does not agree with Mr Rathbone that Delay Penalties should be calculated using electricity prices that are not updated, he confirms that, should the Arbitral Tribunal prefer Mr. Rathbone’s approach, he agrees with Mr Rathbone’s calculations as set forth in his Fourth Report.<sup>94</sup>

### **Sub-Section III. Decision of the Arbitral Tribunal**

121. The Arbitral Tribunal notes that the Parties agree on the methodology to calculate the Delay Penalties due to the Respondent. They agree on the amount of Delay Penalties due for the period between 16 July 2011 to 31 December 2014. They also agree that a premium of EUR 10.17/KWh to the HUPX prices for the periods from 2015 onwards should be added to the

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<sup>91</sup> Tribunal’s Answers to the Experts’ Joint Questions, Section II (a), see footnote 70 above.

<sup>92</sup> Section I (a) of the Tribunal’s Answers to the Experts’ Joint Questions reads as follows: “(a) The first question where the Experts are agreed on a recommended approach is as follows: [...] The quantification of damages needs to be made on a specific date. The experts jointly recommend that 8 January 2018, the date of the Partial Award, be used as the date of award, for the purposes of the experts’ calculations for the Final Award. Does the Tribunal agree with this recommendation or would it prefer a different approach? The Arbitral Tribunal’s answer: [...] The Arbitral Tribunal confirms that 8 January 2018, which is the date of the Partial Award, is the date that shall be used for the Experts’ calculations of damages. This is confirmed in the dispositive part of the Partial Award<sup>92</sup> as well as in paragraph 374;”

<sup>93</sup> Amounting to EUR 1,747,571, see §104 above.

<sup>94</sup> Amounting to EUR 1.693,157, see §98 above.

HUPX Prices (as this represents the differential between Albanian and Hungarian electricity prices). Since both Parties agree on these elements and since they are not contradicting the decision taken as to the methodology provided in the Partial Award for the calculation of Delay Penalties, the Arbitral Tribunal confirms its agreement with the Parties.

122. The main area of disagreement between the Experts concerns the issue whether the Delay Penalties for the period from 2015 onwards should be calculated using the original Electricity Import Prices (based on HUPX prices) used by Mr Rathbone in his Second Report (as submitted by the Claimant) or should be calculated using updated Electricity Import Prices (as submitted by the Respondent).
123. To support his position that updated Electricity Import Prices should be used, Mr MacGregor refers to the Arbitral Tribunal's Answers to the Experts' Joint Questions. He notes first that the Arbitral Tribunal has confirmed in Section I (a) that 8 January 2018 is the date that should be used for the Experts' calculation of Damages.<sup>95</sup> Moreover, Mr Rathbone refers to the Tribunal's Answer in Section II (a) relating to which HUPX prices should be used, where the Arbitral Tribunal specified: "*The Arbitral Tribunal understands that the Experts cannot update their Reports every time new data are published. Each Expert should explain his recommended approach in his submission. However, the answer to the question at Section I (a) above guide the experts to the effect that the calculation should be conducted as of 8 January 2018, the date of the Award, a date which was of course unknown to the experts at the time of their reports.*"<sup>96</sup>
124. In the Partial Award, the Arbitral Tribunal decided that as a result of the Claimant's breaches, the Concession Agreement was terminated as from the date of the Partial Award, and it granted the Respondent Delay Penalties and Damages. While the Arbitral Tribunal decided the methodology that should be used to calculate them, it did not calculate them. It was contrived to postpone the determination of the exact amounts of Penalties and Damages due to the Respondent for the following reasons.
125. The date of the Partial Award was a crucial factor in the development equation to determine the amounts due as it is the time limit at which the calculation of Delay Penalties should stop running and the point in time as from which the calculation of Damages should start running. However, as an unknown period of time elapses between the moment when an award is drafted and when it is issued, when the Arbitral Tribunal drafted the Partial Award, it did not

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<sup>95</sup> Section I (a) of the Tribunal's Answers to the Experts' Joint Questions reads as follows: "*(a) The first question where the Experts are agreed on a recommended approach is as follows: [...] The quantification of damages needs to be made on a specific date. The experts jointly recommend that 8 January 2018, the date of the Partial Award, be used as the date of award, for the purposes of the experts' calculations for the Final Award. Does the Tribunal agree with this recommendation or would it prefer a different approach? The Arbitral Tribunal's answer: [...] The Arbitral Tribunal confirms that 8 January 2018, which is the date of the Partial Award, is the date that shall be used for the Experts' calculations of damages. This is confirmed in the dispositive part of the Partial Award*"<sup>95</sup> as well as in paragraph 374;"

<sup>96</sup> See §117 above.



know what would be the date of the Partial Award. Consequently, it could only establish the methodology for calculating the amounts due but was not able to calculate them.<sup>97</sup> The Arbitral Tribunal specifically explained the method of calculation to be followed in paragraph 392 of the Partial Award.<sup>98</sup> It confirmed it in point 8) of the operative part of the said Award.<sup>99</sup> In point 10)<sup>100</sup>, the Arbitral Tribunal “reserve[d] for the second phase of the proceedings its decision as to the full amounts finally due by the Claimant to the Respondent”.<sup>101</sup>

126. In paragraphs 386 to 390 of the Partial Award, the Arbitral Tribunal examined both Experts’ positions relating to the electricity import prices that should be taken into account. The electricity import prices that are specifically reflected in the Partial Award referred to the Experts’ opinions which in turn referred to information available at the time the Experts submitted their Reports. The decision in the Partial Award is based on these Reports and on the import prices mentioned in such Reports. Specifically, in paragraphs 392 and 393 of the Partial Award, the Arbitral Tribunal decided the method for calculating Delay Penalties and Damages *ufor the above reasons*”,<sup>102</sup> thereby specifically referring to Mr Rathbone’s Reports and to the methodology contained therein. In paragraph 390 of the Partial Award, the Arbitral Tribunal specified that: “[it] finds Mr. Rathbone explanations convincing regarding the electricity price for the energy imported by Albania. A combination of data provided by the Hungarian Power Exchange and a longer term price outlook developed by the European Commission give rise to a more realistic and relevant import price forecast. Therefore, the Arbitral Tribunal considers that the Hungarian Power Exchange (HUPX) list of future electricity contracts shall be used as the starting point to obtain annual future prices for the period 2017 to 2019 averaging base future contracts expiring in the same years. Since the most distant HUPX future contracts expire in 2019, the Arbitral Tribunal considers that the report published by the European Commission entitled “EU Energy, Transport and GHG Emissions Trends to 2050” is relevant and shall serve as the basis for the estimated electricity price in 2020, taking into account, specially, the European electricity prices for the industrial sector.”
127. The exact amount of Delay Penalties and Damages should have been calculated at the time of the Partial Award on the basis of the original HUPX prices indicated in Mr Rathbone’s Expert Reports submitted at the time. However, it was not possible to do so because the date of the Award was unknown. In sum, all the elements integrating the formula for the calculation of the Delay Penalties and Damages were known and specifically determined in

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<sup>97</sup> The Arbitral Tribunal emphasizes that, as explained in paragraphs 346 to 353 of the Partial Award, the fact that the termination date is based on the date of the Partial Award is a direct consequence of Article 14 of the Concession Agreement, which is clear that termination of the Concession Agreement can only be decided in the context of an arbitration (see §351 of the Partial Award).

<sup>98</sup> See §8 above.

<sup>99</sup> See §81 above.

<sup>100</sup> See §81 above.

<sup>101</sup> See §81 above.

<sup>102</sup> See §8 above.

the Partial Award and the only element missing, and therefore the only element that could change for purposes of the calculation, was the date of signature of the Partial Award, 8 January 2018.

128. When the Arbitral Tribunal confirmed in Section I (a) of its Answers to the Experts' Joint Questions that "**8 January 2018, which is the date of the Partial Award, is the date that shall be used for the Experts' calculations of damages**" and referred to the point 9) of the operative part of the Partial Award and paragraph 374, it was only confirming that this was the date to be used to complete such calculation. This is in line with paragraph 374 of the Partial Award, which reads as follows: « [...] *Therefore, until the date of this Award, which is the date of termination, the Concession Agreement remains valid, and the Parties are meant to execute their obligations. Therefore, **until the date of the Award**, only Article 14 penalties are due. As **from this date**, the Concession Agreement is terminated, and only damages for breach of contract will be due.* » (emphasis added by the Arbitral Tribunal).
129. In the Final Award, the exact amounts that are due should therefore be decided on the same basis as the ones used in the Partial Award and in the same circumstances as the Arbitral Tribunal was at the date of the Partial Award. This is also what the Arbitral Tribunal meant in Section II (a) of its Answers to the Experts' Joint Question when it mentioned that "*the Arbitral Tribunal understands that the Experts cannot update their Reports every time new data are published*" and that "*the answer to the question at section I (a) above guides the experts to the effect that the calculation should be conducted as of 8 January 2018, the date of the Award, a date which was of course unknown to the experts at the time of their reports*". The aim of the Partial Award is not to give the Experts a further opportunity to complete their research with updated data, but only to perform their calculation with the same data and elements on the record in the arbitration available on the date of the Partial Award, as if the Experts had known the date of the Partial Award. For the above reasons, the Arbitral Tribunal decides that the Delay Penalties due to the Respondent between 2015 and the date of the Partial Award should be calculated on the basis of the original Electricity Import Prices used in Mr Rathbone's Second Report.
130. Taking into account the Import Electricity Prices used in Mr Rathbone's Second Report, Mr MacGregor agrees with Mr Rathbone's calculation of the amount of Delay Penalties due to the Respondent.<sup>103</sup> The Arbitral Tribunal approves this calculation and therefore decides that the total amount of Delay Penalties due to the Respondent by the Claimant for the period between 16 July 2011 and the date of the Partial Award is EUR 1,693,157.

## **SECTION II. CALCULATION OF DAMAGES DUE TO THE RESPONDENT**

### **Sub-Section I. Position of the Claimant**

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<sup>103</sup> See Mr MacGregor's Fourth Expert Report, para. 2.2.

I. Electricity import price

131. The Claimant points out that in the Partial Award, the Arbitral Tribunal decided that Albania is entitled to Damages to compensate Hydro's failure to complete the Plant.<sup>104</sup> It indicated the methodology to quantify these Damages at paragraph 393 of the Partial Award.<sup>105</sup> Mr Rathbone's understanding of this methodology is that Damages are to be calculated only for the period between the termination date (the date of the Partial Award) and 31 December 2020.<sup>106</sup>
132. Mr Rathbone further notes that the concession fee corresponds to 10.5% of the energy produced during the first three years of operation and 10.00% for the following years. In the scenario described by the Arbitral Tribunal in the Partial Award, the Plant should have been completed on 16 July 2011, almost 7 years before the date of termination indicated as the starting point of Damages (8 January 2018). Consistent with this assumption, between 2018 and 2020, Albania would have received a concession fee equal to 10.0% of the electricity produced. The Arbitral Tribunal instructed that the annual generation of the Plant should be

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<sup>104</sup> Para. 382 of the Partial Award reads as follows: "As to the issue of causation, the Arbitral Tribunal is satisfied that failure to complete the Project by the Concessionaire directly results in Albania's loss of the Concession Fee, independently of any other breach. Moreover, it has been demonstrated above that the Claimant failed to demonstrate that any breach could be accountable to the Respondent or that delays contributed to the non-completion of the Project. Therefore, the Arbitral Tribunal decides that no element whatsoever justifies that Albania could be deprived of damages to compensate Hydro's failure to complete the Plant."

<sup>105</sup> See §8 above.

<sup>106</sup> Paragraph 391 of the Partial Award reads as follows: "Concerning the issue of whether mitigation should be applied in the determination of the amount of damages, the Arbitral Tribunal agrees that it should be applied considering that, as acknowledged by the Respondent in its letter of 18 June 2017, Albania has already commenced an open tender procedure, inviting bids for the construction of a dam at Kalivag<sup>106</sup>. Moreover, the Respondent acknowledged in the same letter that it is precisely doing so to mitigate its damages. The Respondent's counsel wrote as follows: "Fourth, one argument the Claimant has consistently made in respect of the Respondent's counterclaim for damages is that the Respondent 'had an obligation to mitigate its loss under Albanian law by hiring a new contractor' [...] It is the Claimant's positive case in this arbitration that the Respondent should tender the site out for a new contractor in such circumstances. All that the Respondent is now doing is starting that process. But starting the process does not commit the Respondent to issuing a new tender if doing so would be inconsistent with whatever award the Tribunal eventually makes – it means only that come the date of that award, if the Tribunal finds that the Concession Agreement has validly been terminated by the Respondent, or declares it to be terminated in its Award, it will take less time for the Respondent to enter into a contract with the new concessionaire."<sup>106</sup> In addition, Mr. MacGregor, the Respondent's expert, did not formally disagree with the appraisal made by the Claimant's expert concerning the issue of mitigation. He stated as follows: "Mr. Rathbone has prepared his calculation on the basis broadly that Albania would be able to find a new company to operate the Project, on the same terms as the Concession Agreement, and that it would cost €1 million. I do not know whether such an assumption is reasonable and how easy it would be to find a new operator to complete the Project and to operate it. If this can be done, I agree that Albania might be able to mitigate its losses, and that it might suffer no further loss from the time the new operator took over and started generating profits from the Project.", and "[...] I should emphasize that I express no opinion on whether or not it is reasonable to assume that the Respondent would have been able to mitigate all its losses after July 2020 in this way."<sup>106</sup> It follows from the above that the principle of mitigation of damages is acknowledged and accepted by the Respondent. In any case, it is one of the fundamental principles of international trade law. Therefore, the Arbitral Tribunal agrees that the principle of mitigation should be applied in the calculation of the Respondent's damages based on the concession fees. Since Albania has already initiated the tender process, and that 30% to 40% of the Plant is already completed, it is within reasonable expectations that the Plant might be completed by the new concessionaire at the end of 2020".

assumed to be equal to 380,000 MWh and instructed that the electricity prices should be based on the Hungarian Power Exchange and the European Commission report entitled “EU Energy, Transport and GHG Emissions Trends to 2050”.

133. On the basis of the recommendations of its expert, the Claimant submits that the same data as used in Mr Rathbone’s Second Report should be used for this calculation, which it believes is entirely consistent with the Arbitral Tribunal’s instructions, which referred to such Report.
134. However, a disagreement remains between both Parties’ Experts as, despite the clarity of the Partial Award on this point, Mr MacGregor’s opinion is that the HUPX prices extracted from the HUPX website should be updated in the experts’ final calculations.<sup>107</sup> According to the Claimant, such a position is fuelled by the fact that the 2018 price projections are more advantageous for Albania than those of March 2016. The point was raised by Mr MacGregor to the Arbitral Tribunal in the Experts’ Joint Questions. However, the Arbitral Tribunal’s answer on this point was vague, in that it indicated that each expert should explain his recommended approach, but then, referred to the reference date of 8 January 2018 (the date of the Partial Award).<sup>108</sup>
135. The Claimant objects to the use of the 2018 HUPX electricity import prices for the following reasons.
136. First, in the operative section of the Partial Award, the Arbitral Tribunal rendered a clear decision and specifically referred on a footnote to paragraph 114 of Mr Rathbone’s Second Expert Report, which provides for the use of HUPX prices as of March 2016 to calculate Damages (Exhibit C214). Furthermore, the 2018 HUPX electricity prices would also cover the period of 2020, whereas the Arbitral Tribunal has specifically decided in the Partial Award that the experts should use the report of the European Commission entitled “EU Energy, Transport and GHG Emissions Trends to 2050”, such report being an exhibit produced by Mr Rathbone.<sup>109</sup> According to the Claimant, deciding Damages based on the January 2018 prices in a Final Award would contradict the Partial Award’s operative section in that all price references contained in the Partial Award would be ignored. This would render the Final Award irreconcilable/incompatible with the Partial Award. Under French law, the enforcement of an award that is irreconcilable/incompatible with a previous decision is contrary to international public policy, which is a ground to set aside the award under Article 1520-5 of the French Code of Civil Procedure.<sup>110</sup> As a result, the Claimant submits that only HUPX prices as of March 2016 should be used to calculate electricity import prices, pursuant to point 9<sup>U1</sup> and footnote 256 of the operative part of the Partial Award.

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<sup>107</sup> See para. 117 above.

<sup>108</sup> See para. 117 above.

<sup>109</sup> C115.

<sup>110</sup> See Pierre Mayer, “Litispendance, connexite et chose jugee dans l’arbitrage international”, in *Liber Amicorum Claude Reymond autour de Varbitrage*, Juris-Classeur, 2004 (extract), p. 203, para. 8, CL84. ; see also Paris Court of Appeals, No.05/13780, 11 May 2006, p. 5, CL85.

<sup>111</sup> See §81 above.

137. In the alternative, the Claimant also provides the Arbitral Tribunal with calculations of Damages based on more recent data, if the Arbitral Tribunal prefers this approach.

## II. Discount rate

138. The Claimant notes that in the Partial Award, the Arbitral Tribunal was silent on the discount rate to be applied in the Damages calculation. Both experts agree that “discounting is introduced to take into account the risks and the uncertainty behind a stream of cash generated in the future. This is therefore a necessary practice that any experts need to consider when determining the value of future cash flows at a certain reference date.”<sup>112</sup> The experts agreed on the principle that a discount rate should be applied in their final calculations, which is the methodology that they had followed in their prior reports. Nonetheless, they sought the Arbitral Tribunal’s confirmation on this approach: “*Both Mr MacGregor and Mr Rathbone discounted the future element of the counterclaim, but the Tribunal does not refer to discounting in the Partial Award. Does the Tribunal agree that the future element of the counterclaim should be discounted back to the date of the Partial Award?*”<sup>113</sup>
139. The Arbitral Tribunal declined to give directions to the Experts on this question but indicated that it had no objection that they adopt this approach: “*It is not for the Arbitral Tribunal at this point of time to give directions to the Experts on this issue. If the Experts agree on the approach to be followed, the Tribunal has no objection that they adopt such approach.*”
140. The Claimant points out that in their previous reports, the Experts had agreed that the appropriate discount rate was of 9.5%. Despite this agreement, Mr MacGregor suggested to modify his discount rate with more recent numbers and sought guidance from the Arbitral Tribunal on this point: “*In their expert reports, Mr Rathbone and Mr MacGregor use a discount rate of 9.5% which Mr MacGregor calculated on 12 April 2016. Mr Rathbone believes that the experts should use the same discount rate as used in their earlier reports. Mr MacGregor believes that the experts should update the calculation of the discount rate based on market data on 8 January 2018, the date of the Partial Award. If the calculation is updated, there may be a disagreement between the experts as to the applicable rate. Would the Tribunal like to give guidance on this issue now, or should each expert explain his recommended approach in their respective submissions?*”<sup>114</sup>
141. The Arbitral Tribunal’s answer on this point was vague in that it indicated that each expert should explain his recommended approach, but then pointed to the reference date of 8 January 2018: “*When the Arbitral Tribunal issued the Partial Award, its decision was based on the information provided by the Experts. In their Reports, Mr Rathbone and Mr*

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<sup>112</sup> Fourth Expert Report of Mr Paul Rathbone, 27 April 2018, p. 7, para. 29.

<sup>113</sup> The Arbitral Tribunal’s Answers to the Experts’ Joint Questions, Section I (c).

<sup>114</sup> The Arbitral Tribunal’s Answers to the Experts’ Joint Questions, Section II (b).

*MacGregor used a discount rate of 9.5% which Mr MacGregor calculated on 12 April 2016. Of course, such rate is subject to change and the market data available to the Experts may not be the same at different points in time. The Arbitral Tribunal fully understands that the Experts cannot update their Reports every time new data are published. Each Expert should explain his recommended approach in his submission. However, the answer to the question at section I(a) above guides the experts to the effect that the calculation should be conducted as of 8 January 2018, the date of the Award, a date which was of course unknown to the experts at the time of their reports.*<sup>115</sup>

142. As a result, Mr Rathbone calculated the Damages applying a discount rate of 9.5% using the 2016 prices, which is his recommended approach, and in the alternative, a discount rate using the 2018 prices, which according to him, should be 8.29%. However, while both Experts used a similar methodology to calculate WACC as of 8 January 2018, Mr MacGregor has come to a lower rate than Mr Rathbone (7.90%).
143. Mr Rathbone explains that to calculate an updated discount rate as of 8 January 2018, he used the methodology proposed by Mr MacGregor in Appendix 6 of his First Expert Report, which is a standard approach following corporate finance theory. Mr Rathbone has introduced more recent figures, using the same sources quoted by Mr MacGregor for the following components of the WACC calculation, i.e. (i) Re-Gearred Beta; (ii) Mature Economy Equity Risk Premium; (iii) Risk Free Rate; and (iv) Country Risk Premium.<sup>116</sup> His calculation resulted in a rate of 8.29%.
144. Mr MacGregor used the same tools but his calculation has come to a slightly lower rate of 7.90% because he used a new gearing ratio of 40.16% debt, while Mr Rathbone retained the original gearing ratio of 28.57% debt used in the previous calculations.<sup>117</sup> According to Mr. Rathbone, the revised gearing of 40.16% is higher than Hydro's gearing ever had been, and he thinks that it is inappropriate to use it. For consistency, he decided to stick to the original gearing and he asserts that it is appropriate.<sup>118</sup>
145. Consequently, as to the amount of Damages based on the concession fees, the Claimant refers to the six following scenario calculated by Mr Rathbone:
- Use of 2016 electricity prices and WACC at 9.5%: EUR 4,694,144;<sup>119</sup>
  - Use of 2016 electricity prices and Mr Rathbone's updated WACC at 8.29%: EUR 4,769,956;<sup>120</sup>
  - Use of 2016 electricity prices and Mr MacGregor's updated WACC at 7.90%: EUR 4,794,866;<sup>121</sup>

<sup>115</sup> The Arbitral Tribunal's Answers to the Experts' Joint Questions, Section II (b).

<sup>116</sup> See Mr Rathbone's Fourth Expert Report dated 27 April 2018, Table 4, page 9.

<sup>117</sup> See Mr Rathbone's Fourth Expert Report dated 27 April 2018, paras. 13 to 15.

<sup>118</sup> See Mr Rathbone's Fifth Expert Report dated 4 May 2018

<sup>119</sup> See Mr Rathbone's Fourth Expert Report dated 27 April 2018, para. 61, Table 7.

<sup>120</sup> See Mr Rathbone's Fourth Expert Report dated 27 April 2018, para. 61, Table 7.

<sup>121</sup> See Mr Rathbone's Fifth Expert Report dated 4 May 2018, paras. 18.

- Use of updated electricity prices and WACC at 9.5%: EUR 5,423,459;<sup>122</sup>
- Use of updated electricity prices and Mr Rathbone's updated WACC at 8.29%: EUR 5,510,884;<sup>123</sup>
- Use of updated electricity prices and Mr MacGregor's updated WACC at 7.90%: EUR 5,539,608.<sup>124</sup>

146. In light of the above, the Claimant requests that the Damages based on the concession fee be limited to EUR 4,694,144. In the alternative, that this amount be limited to EUR 4,769,956, in further alternative, that this amount be limited to EUR 5,423,459, in even further alternative, that this amount be limited to EUR 5,510,884.<sup>125</sup> The Claimant requests in any event, that this amount be limited to EUR 4,794,866, or to EUR 5,539,608.<sup>126</sup>

## **Sub-Section II. Position of the Respondent**

### **I. Electricity import price**

#### **A. The relevant percentage of the energy produced by the Plant that should be used**

147. The Respondent notes that in the Partial Award, the Arbitral Tribunal decided that “[t]he concession fees correspond to 10.5% of the energy produced by the Plant for the first three years of operations, reducing to 10% thereafter.”<sup>127</sup> According to Mr MacGregor, as the Plant is not completed and therefore has not commenced operations, the concession fees should be calculated on the basis of 10.5% of the energy assumed to be produced of 380,000 MWh for the three years from 8 January 2018 to 8 January 2021, i.e. for the whole period for which the Arbitral Tribunal has determined the Respondent is entitled to receive Damages. This is Mr MacGregor's understanding, and he carried out his calculation on this basis. However, Mr MacGregor notes that the Claimant's Expert assumed a concession fee of 10% would apply, based on the assumption that the Plant should have been completed on 16 July 2011.<sup>128</sup> The Respondent specifies that it asked its expert to prepare an alternative calculation on this basis in case the Arbitral Tribunal would consider that the concession fee used in the calculation of Damages should be 10%.<sup>129</sup>

#### **B. The HUPX prices that should be used**

148. MacGregor disagrees with the Claimant's Expert over whether the HUPX list of future

<sup>122</sup> See Mr Rathbone's Fourth Expert Report dated 27 April 2018, para. 61, Table 7.

<sup>123</sup> See Mr Rathbone's Fourth Expert Report dated 27 April 2018, para. 61, Table 7.

<sup>124</sup> See Mr Rathbone's Fifth Expert Report dated 4 May 2018, paras. 19.

<sup>125</sup> See the Claimant's Updated Prayer for Relief dated 4 May 2018, para. 3 (i) to (iv); and Claimant's Memorial on the Financial Aspects of Damages, para. 46.

<sup>126</sup> See the Claimant's Updated Prayer for Relief dated 4 May 2018, para. 3 (v).

<sup>127</sup> Partial Award, para. 393.

<sup>128</sup> Mr Rathbone's Fourth Expert Report, para. 55; see above, §132.

<sup>129</sup> Mr MacGregor's Fourth Expert Report, Appendices 2, 3.3, and 3.4

electricity contracts that should be used in the calculation should be based on information available on 8 January 2018 or 14 July 2016. He considers that as the Tribunal has confirmed that 8 January 2018 is the date that should be used for the Experts' calculation of Damages,<sup>130</sup> his calculation should be based on the information available on this date, and not on information from 14 July 2016 that just happened to be a date that was used by Mr Rathbone in his earlier report.

149. Mr MacGregor indicates that he was not able to obtain the relevant future electricity contracts data on 8 January 2018 in the same format as Mr Rathbone used in his Second and Third Expert Reports because the physical futures market of HUPX closed permanently on 29 December 2017. Mr MacGregor notes that Mr Rathbone sourced data on future Hungarian electricity prices from the HUDEX website.<sup>131</sup> Mr MacGregor did not locate this when he was preparing his Third Report and used data as at 29 December 2017.<sup>132</sup> However, as Mr Rathbone has located this data from 8 January 2018, Mr MacGregor agrees with this data and consequently the future electricity prices used in Mr Rathbone's calculation.
150. Mr MacGregor also notes that in his second report, Mr Rathbone states that as the most distant HUPX future contracts that he had access to on 14 July 2016 expired in 2019 he had to use a different methodology to describe prices behaviour for the period between 2020 and 2033, and he based these prices on a report entitled "*EU Energy, Transport and GHG Emissions Trends to 2050*". As HUPX future contracts for 2020 are available on the HUPX website as at 29 December 2017, Mr MacGregor considers that it is not necessary to use the approximation from this EU report. Consequently, he used the HUPX future electricity price data for 2020 in his calculation.<sup>133</sup>

## II. Discount rate (WACC)

151. Mr MacGregor notes that as both Parties' Experts agreed that the future Damages should be discounted back to 8 January 2018, and as this is how future Damages are commonly calculated, he considers that the future Damages should be discounted too, although this results in lower Damages.
152. He notes that the Experts disagree as to the discount rate that should be used. Mr Rathbone stated that he believed that they should use the same discount rate of 9.5% as Mr MacGregor calculated as at 12 April 2016, whereas Mr MacGregor believes that the Experts should update the discount rate to use the same approach as he used in his First Expert Report, but to use market data on 8 January 2018.<sup>134</sup> According to the Respondent, as the Arbitral Tribunal

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<sup>130</sup> The Arbitral Tribunal's Answers to the Experts' Joint Questions, Section I (a).

<sup>131</sup> C253.

<sup>132</sup> Exhibit E.

<sup>133</sup> Mr MacGregor's Third Expert Report dated 27 April 2018, para. 3.8.

<sup>134</sup> See the Arbitral Tribunal's Answer to the Experts' Joint Questions, Section II (b).



has determined that the calculation of Damages should be conducted as of 8 January 2018,<sup>135</sup> the discount rate should be calculated using market data available on that date too. Mr MacGregor considers that it would make no sense for the Damages to be calculated as of 8 January 2018, but using discount rate data from a random date such as 12 April 2016. Consequently, Mr MacGregor calculated an updated WACC of 7.90% on 8 January 2018.<sup>136</sup>

153. He notes that Mr Rathbone on the other hand calculated an updated WACC of 8.29% on 8 January 2018.<sup>137</sup> Mr MacGregor explains that the Experts' calculations differ for the following reasons:
- they have calculated different betas, because they have used data on the same company from different sources (Mr MacGregor used data from Bloomberg while Mr Rathbone used data from Capital IQ);
  - they have used marginally different Risk Free Rates (Mr MacGregor used the Risk Free Rate on 8 January 2018 while Mr Rathbone used an average for the year from 8 January 2017 to 8 January 2018); and
  - they have assumed different gearing, between equity and debt.<sup>138</sup>

154. Mr MacGregor indicates that as the differences between his calculation and the one of Mr Rathbone are not significant, he accepts Mr Rathbone's calculation of an updated WACC of 8.29%.

### III. Other minor differences

155. Mr MacGregor emphasizes that he identified one other minor difference between Mr Rathbone's calculation and his, which is that Mr Rathbone assumed seven days between 1 and 8 January 2018, whilst he assumed this period was 8 days. The Partial Award states that the Delay Penalties shall be calculated for the period "*to the date of this Partial Award*". Mr MacGregor understands from this that the Delay Penalties should include 8 January 2018 and so should be for eight days in 2018, and that future Damages should cover the remaining 357 days of 2018. He prepared his calculations on this basis.

### IV. Calculations

156. Mr MacGregor's calculation of Damages based on his calculation in his Third Expert Report, adjusted to use Mr Rathbone's WACC and HUDEX prices on 8 January 2018 and for 7 days between 1 and 8 January 2018, on the basis of a concession fee of 10.5% results in Damages in the amount of EUR 5,775,241. The same calculation on the basis of a concession fee of 10% results in Damages in the amount of EUR 5,500,229. Alternatively, Mr MacGregor also provided calculations on the basis of Mr Rathbone's assumption that the electricity prices and

<sup>135</sup> See the Arbitral Tribunal's Answer to the Experts' Joint Questions, Section II (b).

<sup>136</sup> Mr MacGregor's Third Expert Report dated 27 April 2018, Appendix 3, and paras 3.9 to 3.14.

<sup>137</sup> Mr Rathbone's Fourth Expert Report, Table 4 ; see §... above.

<sup>138</sup> See Mr MacGregor's Fourth Expert Report dated 4 May 2018, para. 3.9.

the WACC should be based on the calculations the Experts undertook in their previous Reports in 2016.<sup>139</sup>

### **Sub-Section III. Decision of the Arbitral Tribunal**

157. Regarding the calculation of the Damages due to the Respondent, the first issue concerns the percentage of the energy of the Plant.
158. Damages should be calculated on the basis of the concessions fees. As per Article 9 of the Concession Agreement as amended pursuant to Addendum II dated 8 May 2007, the concession fee is calculated as follows: it is equal to 10.5 % of the energy produced by the Plant for the first three years of operations, reducing to 10% thereafter.<sup>140</sup> The Respondent could choose either to receive the concession fee in physical form or to sell it.<sup>141</sup> In paragraph 393 of the Partial Award, the Arbitral Tribunal decided that the Respondent is entitled to receive Damages calculated on the basis of the concession fees it would have received had the Claimant completed the Plant, and taking into account that the Respondent would have received such concession fees in “physical form”.<sup>142</sup> This was confirmed in point 9 of the operative part of the Partial Award in the following terms:

*“9) Decides that the Claimant shall pay the Respondent damages on the basis of the concession fees that it would have received had the Project been completed by the Claimant, for the period starting from the date of this Partial Award until 31 December 2020, on the basis that the Respondent would have received such concession fees in “physical form” and that they would be calculated taking into account:*

- *an annual generation of the Plant in the amount of 380,000 MWh,*
- *electricity import prices which shall be estimated, for the period between 2017 and 2019, on the basis of the Hungarian Power Exchange (HUPX) list of future electricity contracts<sup>143</sup>; and,*
- *for the year 2020, electricity import prices which shall be estimated on the basis of the electricity prices for the industrial sector extracted from the report published by the European Commission entitled “EU Energy, Transport and GHG Emissions Trends to 2050””*

159. Mr MacGregor considers that in the determination of the concession fees that the Respondent would have received, a percentage of 10.5% should apply. To come to this conclusion, he takes into account that the Damages run as from the date of the Partial Award

<sup>139</sup> See Mr MacGregor’s Fourth Expert Report, Appendix 3.

<sup>140</sup> See §33 above.

<sup>141</sup> See §384 of the Partial Award.

<sup>142</sup> See §8 above.

<sup>143</sup> Footnote 256 in the Partial Award reads as follows: *Mr. Rathbone, ER2, para. 114.*

until 31 December 2020. According to him, as the Plant is not completed and has not commenced operations, the concession fees should be calculated on the basis of 10.5% of the energy assumed to be produced of 380,000 MWh for the first three years, thereby considering that these first three years of operations start running on 8 January 2018, until 8 January 2021. This period covers the entirety of the period for which Damages are due.

160. Mr Rathbone on the other hand applied in his calculation a percentage of 10% considering that the date that should be taken into account for the completion of the Plant is 16 July 2011.<sup>144</sup>
161. Until the date of the Partial Award, the Concession Agreement was valid and pursuant to its terms, only Delay Penalties are due. The date of the signature of the Partial Award marks the date as from which the Concession Agreement is terminated by reason of the Claimant's failure to complete the Plant. Therefore, on this date, Delay Penalties stop, and Damages start running the day after. Consequently, the date of the signature of the Partial Award should virtually be considered, for purpose of calculating Damages, as the date as from which the Plant would have started to produce energy, which means that they start running as from 9 January 2018.
162. The concession fees correspond to 10.5% of the energy produced by the Plant for the first three years of operations, and this rate reduces thereafter. As the Damages that are granted are based on the concession fees that the Respondent would have received for three years only, i.e. between 9 January 2018 and 31 December 2020, the Arbitral Tribunal considers that 10.5% is the only percentage that should apply. This is further confirmed by the fact that in its decision,<sup>145</sup> regarding the electricity import prices that should be taken into account for determining the concession fee, the Arbitral Tribunal mentioned only periods between 2017 and 2020.
163. The second issue that arises is whether the HUPX electricity prices that should be taken into account for the calculation of the concessions fees should be the ones used originally by Mr Rathbone in his Second Expert Report (as suggested by Mr Rathbone) or whether they should be updated, based on information available on 8 January 2018 (as suggested by Mr MacGregor).
164. For the reasons explained above,<sup>146</sup> the Arbitral Tribunal considers that the Damages should be calculated on the basis of the exact same sources and same data as those produced to the Arbitral Tribunal when it decided the methodology of quantification of the Damages in the Partial Award. This is further confirmed by the fact that in point 9) of the operative part of the said Award, the Tribunal referred to Mr Rathbone's Second Expert Report and the exhibits produced in support thereon. These exhibits were the HUPX list of future electricity

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<sup>144</sup> See §132 above.

<sup>145</sup> See §157 above.

<sup>146</sup> See §§124 to 129.

contracts and the report published by the European Commission entitled “*EU Energy, Transport and GHG Emissions Trends to 2050*” (“the European Commission Report”). Because at the time of the Partial Award, HUPX list of future electricity contracts were not available for 2020, the Arbitral Tribunal considered that the electricity import prices for this year shall be estimated on the basis of the electricity prices for the industrial sector extracted from the European Commission Report mentioned above.<sup>147</sup> Accepting the Respondent’s theory that the concession fees should be calculated on the basis of the updated electricity import prices that were available on 8 January 2018 on the HUDEX website implies that it is no longer necessary to refer to such Report as, at that time, HUPX future contracts for 2020 were available on the said website. As a result, the Damages in the Final Award would be calculated on the basis of a different method than the one provided by the Arbitral Tribunal in the operative part of the Partial Award, and the decisions would be incompatible. For these reasons, the Arbitral Tribunal decides that the HUPX prices that should be taken into account by the Experts in their calculation of Damages should be the same as the ones provided by Mr Rathbone in his Second Expert Report, i.e. the HUPX prices as of March 2016 (C214).<sup>148</sup>

165. The third issue that needs to be decided by the Arbitral Tribunal is whether a discount rate should apply in the Damages calculation, and if so, which rate should apply.
166. The Experts agree that a discount rate should be applied in their final calculations. Since they agree on this principle, and since this does not contradict the Arbitral Tribunal’s decision in the Partial Award, the Arbitral Tribunal has no objection thereon.
167. Concerning the discount rate to be used, the Experts agreed in the Reports they submitted during the first phase of the proceedings, that it should be 9.5%. Mr Rathbone considers that this WACC should still apply for the determination of Damages, whereas the Respondent considers that an updated WACC of 8.29% on 8 January 2018 should apply. To be consistent with its decision above that the Damages should be calculated on the basis of the exact same sources and same data as those produced to the Arbitral Tribunal when it decided the methodology of quantification of the Damages in the Partial Award,<sup>149</sup> the Arbitral Tribunal considers that the same WACC as the one used in the first phase of the proceedings should apply for the determination of the Damages, i.e. 9.5%.
168. It follows from the above that:
  - the Damages should be calculated on the basis of a percentage of the energy produced by the Plant of 10.5%, and they start running on 9 January 2018;- the HUPX prices that should be used should be those as of March 2016 referred to in Mr Rathbone’s Second Expert Report, and
  - a WACC of 9.5% should apply.

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<sup>147</sup> See Partial Award, para. 390; see §126 above.

<sup>148</sup> Mr. Rathbone’s Second Expert Report, para. 114.

<sup>149</sup> See §164.

169. Consequently, the Arbitral Tribunal agrees with the alternative calculation made on the basis of the above criteria by the Respondent in Appendix 3.2 of Mr MacGregor's Fourth Expert Report, resulting in an amount of EUR 5,182,535.

### **SECTION III. THE RESPONDENT'S CLAIM FOR INTEREST**

#### **Sub-Section I. Position of the Claimant**

##### **I. Pre-Award Interest**

170. The Claimant notes that Mr MacGregor has added pre-award interest to his calculations. Mr Rathbone has not done so since the termination date was set as 8 January 2018 and there is no allowance for interest that he can see in the Concession Agreement. Mr MacGregor refers to a comment he made on pre-award interest in his First Expert Report.<sup>150</sup> He notes that this comment refers to the Claimant's claim for pre-award interest.<sup>151</sup> However, Mr Rathbone emphasizes that in the same report, in his calculation of counterclaim damages, Mr MacGregor did not include pre-award interest in the part of the calculation of those damages that preceded the date of his report.<sup>152</sup>
171. In the event that the Arbitral Tribunal determines that pre-award interest is appropriate, Mr Rathbone has calculated it on the same basis as Mr MacGregor, using a recommended interest rate of 12-month Euro LIBOR plus 2%, using his recommended calculation of Delay Penalties and Damages of EUR 6,441,715. Using these numbers, he calculates pre-award interest to be EUR 174,242.<sup>153</sup>

##### **II. Post-Award Interest**

172. The Claimant points out that in the Partial Award, the Arbitral Tribunal noted that "[t]he Respondent did not provide any information as to its claim for interest relating to its counterclaims nor proposed any interest rate that should be applied".<sup>154</sup> The Claimant requested that the Tribunal "dismiss the Respondent's counterclaims in their entirety".<sup>155</sup> According to the Claimant, instead of dismissing the Respondent's claim for interest as it should have done due to its lack of support, the Arbitral Tribunal decided to reserve this issue for the Final Award. The Claimant has therefore indicated that he reserved its rights in this

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<sup>150</sup> Mr MacGregor's Third Expert Report, para. 4.3.

<sup>151</sup> Mr MacGregor's First Expert Report, para. 10.10. Mr MacGregor stated: "I consider a conceptually more acceptable and normal approach to calculating prejudgment interest to be the Claimant's cost of borrowing."

<sup>152</sup> See Mr MacGregor's First Expert Report, Appendix 6a. The row named "Discount rate" has values of 1.000 for the years 2011-2015, showing that no interest was claimed in respect of those years.

<sup>153</sup> Mr Rathbone's Fifth Expert Report, Appendix H.

<sup>154</sup> See Partial Award, para. 395.

<sup>155</sup> See Partial Award, para. 395.

respect.<sup>156</sup>

173. The Claimant indeed submits that this claim should be dismissed. Should the Arbitral Tribunal decide to award post-award interest, the Experts are free to recommend any approach they see fit as the Arbitral Tribunal has not given any parameters for the Experts to follow.
174. The Claimant points out that Mr Rathbone recommends a classic approach of using post award-interest “*on a compound basis using 12 month Euro LIBOR, or alternatively EURIBOR, plus 2%*”<sup>157</sup>
175. To support his conclusion, Mr Rathbone refers to an article by Professor James Dow of the London School of Economics presenting a statistical assessment of pre-award interest based on 60 publicly available tribunal decisions. The results show that the most commonly adopted option for pre-award interest was a LIBOR base plus a premium, which in most of the cases examined was set equal to 2%.<sup>158</sup> Since the Award is in Euro, Mr Rathbone considers that it is appropriate to use either the Euro LIBOR benchmark or as an alternative the EURIBOR benchmark published by the European Central Bank, which is based on Euro lending between different European banks rather than London banks. Since interest is usually accumulated on an annual basis, then a 12-month rate is appropriate. For these reasons, Mr Rathbone recommends that the Tribunal award post-award interest on a compound basis using 12-month Euro LIBOR, or alternatively EURIBOR, plus 2%. The Claimant notes that the Respondent’s Expert recommends a different interest rate for both pre- and post-award interest, being a 10-year German Bund rate plus a country risk premium.
176. Mr Rathbone has two main criticisms of this rate. First, by using a 10-year rather than a 12-month base rate, Mr MacGregor is not matching the calculation of an annual rate that is compounded with a fixed rate that is set for 10 years, since he changes it every year. In Mr Rathbone’s opinion, a one-year rate should be used each year, as he has done in his recommendation of using 12-month Euro LIBOR as a base. Second, he believes that the country risk premium used by Mr MacGregor is both a long-term rating and contains some element of exchange rate risk. This is inconsistent with selecting a 12-month compounding interest rate for a Euro liability.
177. Mr Rathbone adds that it is useful to understand that interest rates vary depending upon the

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<sup>156</sup> In its Memorial on the Financial Aspects of Damages, para. 10, the Claimant considers that “*This Tribunal has given Albania an improper second bite at the apple with respect to interest on damages. Even though the Tribunal acknowledged that Albania “did not provide any information as to its claim for interest” and that Hydro had requested that this Tribunal dismiss Albania’s counterclaims in their entirety, this Tribunal inexplicably refused to take a decision on the interest rate applicable. Meanwhile, the Tribunal had no hesitation setting other parameters on the upcoming quantum phase of the arbitration. This can only be a deliberate move by this Tribunal to give Albania another chance to make inappropriately late submissions on the interest rate.*”

<sup>157</sup> Mr Rathbone’s Fourth Expert Report, para. 65.

<sup>158</sup> C252.

length of time that will pass before repayment of the underlying principal. Thus, a one-month rate is different from a one-year rate and different again from a ten-year rate. In selecting a rate that is compounded every year, and applies to payments that are due in regular intervals, it is inconsistent to choose an interest rate that relates to a long-term investment or security. This is particularly so with post award interest, where the award could be paid at any time, but also for pre-award interest in this case, where had the contract been deemed delayed and then terminated prior to the date of the Partial Award the payments would have been made at regular intervals.

178. Moreover, the interest rates vary by currency. Since the Award is denominated in Euro, it is appropriate to set a Euro based interest rate.
179. Mr Rathbone adds that Mr MacGregor states that he cannot find any Albanian bonds, which is his main reasoning for using his “Bund plus country risk” approach. However, if one looks on the National Bank of Albania website, it is clear that Albania issued three bonds very recently.<sup>159</sup> Whilst the yield on the five-year bond is near enough to Mr MacGregor’s post-award interest rate of 5.05%, it is both a long-term interest rate and denominated in Lek. Therefore, according to Mr Rathbone, it is quite unsuitable for an interest award in this case.<sup>160</sup> He explains that his recommended rate of 12-month Euro LIBOR+2% would equal 1.76% using the rate on 2 May 2018,<sup>161</sup> which is lower than the two-year Lek bond, because it is a shorter period and denominated in Euro as is the award. He therefore stands by his recommendation.

## **Sub-Section II. Position of the Respondent**

180. Mr MacGregor indicates that he was instructed by the Respondent to calculate interest on the Delay Penalties and Damages. He points out that in his First Expert Report, he stated that he considered that pre-award interest on any award to the Claimant should be based on the Claimant’s cost of borrowing.<sup>162</sup> In the same way, he considers that pre-award interest should be awarded to the Respondent on the basis of its cost of borrowing, as this is the interest rate it has suffered from not having access to the award at the time it was due.
181. As the award is in Euros, Mr MacGregor considers that the interest rate used should be an Albanian interest rate based on Euros. Consequently, he considers that the most appropriate interest rate to use would be an interest rate that is based on Albanian government bonds issued in Euros, as this is a proxy for the cost of Albanian government borrowing in Euros. He points out that unfortunately, he was not able to find any data on Albanian government bonds issued in Euros. Consequently, he has had to adopt an alternative approach to estimate the interest rate that the Albanian government is likely to have had to pay on its borrowings

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<sup>159</sup> See Mr Rathbone’s Fifth Expert Report para. 29, Table 4.

<sup>160</sup> See Mr Rathbone’s Fifth Expert Report, para. 30.

<sup>161</sup> C257 – 12 months Euro LIBOR on 2/5/2018 was -0.244%.  $-0.244+2.000 = 1.756\%$

<sup>162</sup> Mr MacGregor’s First Expert Report, para. 10.10.

in Euros. He has done this by taking the 10-year German government bond rates,<sup>163</sup> which he uses as a proxy for a risk-free interest rate in Europe, and adding a Country Risk Premium that takes account of the additional Country Risk of Albania. He has obtained this Country Risk Premium from data maintained by Professor Damodaran, which is commonly used by Mr MacGregor and others in valuation work.<sup>164</sup> Professor Damodaran's Country risk premia are calculated annually, based on the Moody's credit rating for the relevant country. For simplicity, Mr MacGregor has assumed that all amounts due to the Respondent in respect of Delay Penalties and Damages became due at the mid-point of the period in which they fell due. In calculating the interest in any given period, he has adopted a compound basis with annual rests.<sup>165</sup> According to Mr MacGregor, it is normal for tribunals to award interest on a compound basis, as this more closely reflects the interest that the Respondent has lost.

182. As a result of the above, Mr MacGregor points out that if the Tribunal considers that it is appropriate to award post award interest on the same basis, interest should be paid at 5.05%, based on the German Government 10-year bond rate on 8 January 2018 plus the Country Risk Premium, on a compound basis.<sup>166</sup> Alternatively, the Tribunal may award interest at a higher rate, to encourage the Claimant to pay the Award promptly.
183. Mr MacGregor disagrees with Mr Rathbone's recommendation to use 12-month Euro LIBOR or EURIBOR plus 2%, referring to Professor Dow's research.<sup>167</sup> First, the table in Mr Rathbone's exhibit C252, from Mr Dow's article, shows that in fact in only 9 of the 60 cases Mr Dow reviewed did the tribunal base its calculation of interest on LIBOR plus 2%. Moreover, even if it was the case that the majority of awards are based on LIBOR plus 2% (which it is not), it does not explain why this would mean that the Tribunal in this particular case should adopt EURIBOR plus 2%.
184. Mr MacGregor stands with its approach that pre-award interest should be based on the Respondent's cost of borrowing for the reasons explained above. In further support of his approach, he notes the guidance from the Chartered Institute of Arbitrators on determining the interest rate, which is as follows: "*It is good practice to assess the rate of interest by reference to the rate at which a party in the position of the receiving party would have had to pay to borrow the sum awarded for the period in question.*"<sup>168</sup>
185. Mr MacGregor sets out in Appendix 4 to his Fourth Expert Report, his calculation of interest on his calculation of Delay Penalties and Damages. This results in interest of EUR 439,478.

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<sup>163</sup> Mr MacGregor's Fourth Expert Report, Exhibit F.

<sup>164</sup> Mr MacGregor's Fourth Expert Report, Exhibit G.

<sup>165</sup> Using annual rests in a compound interest calculation results in a lower calculation of interest than if Mr MacGregor had compounded the interest on the basis of monthly or quarterly rests. Where interest rates were not available on any given day, he used the nearest available interest rate.

<sup>166</sup> Mr MacGregor's Third Expert Report, Appendix 4.

<sup>167</sup> See §175 above.

<sup>168</sup> International Arbitration Practice Guideline "*Drafting Arbitral Awards Part II – Interest*" (Exhibit A to Mr MacGregor's Fourth Expert Report), page 8.



### **Sub-Section III. Decision of the Arbitral Tribunal**

186. The Claimant considers that the Respondent's claim for interest should be dismissed and that it should have been so in the Partial Award on the ground that the Respondent did not provide any information as to its claim at the time. According to the Claimant, this claim should not be reopened.
187. In paragraph 395 of the Partial Award, the Arbitral Tribunal noted that: *'7<sub>2</sub> its Statement of Defence and Counterclaim<sup>169</sup>, and in its Statement of Rejoinder and Reply to Counterclaim, the Respondent requested the Arbitral Tribunal "to order the Claimant to pay damages and interest to the Respondent in the amounts claimed alternatively such sum as the Tribunal determines". The Respondent did not provide any information as to its claim for interest relating to its counterclaims nor proposed any interest rate that should be applied. Besides requesting the Arbitral Tribunal to "dismiss the Respondent's counterclaims in their entirety" the Claimant did not provide any indication or any specific objection as to such claim for interest. Since no amount is awarded at this stage of the proceedings, the issue of interest will also be decided in the Final Award'*. It follows from the above that at the stage of the Partial Award, besides respectively claiming for interest and rejecting such claim, none of the Parties provided any arguments in support of their claim. Consequently, since the second phase of the proceedings is dedicated to the quantification of damages, that the determination of interest depends on damages, and that both Parties had the opportunity to present their arguments in relation thereon, the Arbitral Tribunal sees no reason not to deal with this issue at this stage.
188. The Arbitral Tribunal notes that the Concession Agreement does not specify the interest rate that should apply, it does not prohibit the allocation of interest either. Moreover, the allocation of interest is neither prohibited, but rather permitted, by Albanian law, the applicable substantive law,<sup>170</sup> nor French law, the *lex arbitri*.<sup>171</sup>
189. Interest is part of the damages and a compensation for sums of money that are due. As pointed out by the author Gary B. Bom, *"[i]n practice, international arbitral tribunals are generally inclined to grant interest, and less clearly, to do so at a rate approximating market rates of interest during the period in question for the relevant currency. They do so, at the end of the day, because interest often represents an essential element of the damages suffered*

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<sup>169</sup> SoC, p.62 (iv); and SoRej., p. 110 (d).

<sup>170</sup> Article 450, 1<sup>st</sup> al. of the Albanian Civil Code provides: "The recompenses for the damage caused by the delay of the payment of a certain amount of money, consists of matured interests, from the day the debtor's delay begun, in the official currency of the country where the payment is done. The percentage of interest is defined by law."

<sup>171</sup> Article 1231-6 of the French Civil Code provides: "*Damages that are due because of the late payment of monetary obligations consist in interest at the legal rate, as from the formal notice of a default of payment. The damages and interest are due without the creditor being obliged to justify any loss.*" (free translation by the Arbitral Tribunal)

*by the aggrieved party. As an early judicial decision held: T1 is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. ... Every one who contracts to pay money on a certain day knows that, if he fails to fulfil his contract, he must pay the established rate of interest as damages for his non-performance. Hence it may correctly be said that such is the implied contract of the parties/ [...] International arbitral tribunal often award interest for both the period prior to their award and for periods after the award but prior to payment. [...] The more general practice [...] is to award interest until the date of payment of the Award (or, less commonly, the date of a judgment confirming the award).<sup>172</sup>*

190. The principle that interest can be awarded on sums due is not denied by the Parties.
191. The next issue is to determine whether both pre- and post- award interest should be awarded. As to pre-award interest, the Claimant notes that the termination date was set as 8 January 2018 and that there is no allowance for interest in the Concession Agreement. It concludes that pre-award interest should not be awarded.
192. The Arbitral Tribunal considers that as far as Delay Penalties are concerned, since they started to accrue before the date of the Partial Award, i.e. as from 16 July 2011, which therefore constitutes a significant period of delay, it is justified that pre-award interest be granted to compensate the delay in the payment of these sums. For the reasons expressed above, the fact that the Concession Agreement does not provide for interest or does not specify an interest rate cannot affect the right of the Respondent to be compensated for the delay in the Payment.
193. As to Damages, since the right of the Respondent to receive Damages arises as from the date of termination of the Concession Agreement (i.e. the date of the Partial Award) and as a result thereof, and since termination only occurred as of the date of the signature Partial Award (8 January 2018), the Arbitral Tribunal considers that pre-award interest on these sums should run from the day after the signature of the Partial Award.
194. As to post-award interest, they should be awarded for purposes of promoting payment. Without post-award interest, there is no incentive to pay as no penalty would apply in the absence of payment. The Arbitral Tribunal does not see any reason why such interest should not be awarded.
195. Therefore, the Arbitral Tribunal decides that both pre- and post-award interest should be granted on the sums due pursuant to the terms established above<sup>173</sup>.

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<sup>172</sup> Gary G. Born, *International Commercial Arbitration, Volume II*, Kluwer Law International, Wolters Kluwer, 2009, §3, p. 2506-2507.

<sup>173</sup> See §§192, 193 and 194.

196. The next issue that has to be decided concerns the interest rate that should apply.
197. The Claimant submits that the interest rate for pre- and post-award interest should be calculated, upon Mr Rathbone's recommendation, on a compound basis using 12 month Euro LIBOR +2%<sup>174</sup>.
198. The Respondent submits that the same interest rate should apply for pre- and post-award interest, which should be based on Albanian government bonds issued in Euros. As Mr MacGregor was not able to find any data on Albanian government bonds issued in Euros, he adopted an alternative approach by taking the 10-year German government bond rates, to which he added a Country Risk Premium taking account of the additional Country Risk of Albania. He estimates that post-award interest should be paid at 5.05%, based on the German government 10-year bond rate on 8 January 2018 plus the Country Risk Premium, on a compound basis. Alternatively, he considers that the Arbitral Tribunal may award interest at a higher rate, to encourage the Claimant to pay the sums granted in the Award promptly.
199. It is widely recognized in international arbitration that if the parties do not agree on the rate of interest in their contract or during the arbitration, it is up to the arbitrators to determine the appropriate rate. In any case, considering that both Parties submitted interest requests to the Arbitral Tribunal, it implies that they agree that the Arbitral Tribunal can decide on such interest rate. The rate should be reasonable and take into account all relevant circumstances.
200. The Arbitral Tribunal is not convinced by the Respondent's proposal that an interest of 5.05% based on the German government 10-year bond rate plus the Country Risk Premium, on a compound basis should apply. This rate was constructed for the purpose of this arbitration by Mr MacGregor so as to find the best alternative to Albanian government bonds issued in Euros as he could not find any data on this basis. The Arbitral Tribunal considers the Claimant's proposal to use a 12-month Euro LIBOR + 2%, on a compound basis, as being more adapted to the circumstances of the case since the sums granted in the Award are denominated in Euros. Moreover, choosing a rate that relates to a long-term investment or security as proposed by Mr MacGregor is not adapted to payments that were due in regular intervals (as was the case for Delay Penalties), or to payments that could intervene at any time. Consequently, the Arbitral Tribunal decides that a 12-month Euro LIBOR pre- and post award interest shall apply on a compound basis on all the sums found due, i.e.,
- for Delay Penalties: as from 16 July 2011 as they accrue pursuant to point 8 of the operative part of the Partial Award<sup>175</sup> until complete payment; and

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<sup>174</sup> In paragraph 65 of his Fourth Expert Report, Mr Rathbone specified that he "*recommend[s] that the Tribunal award post-award interest on a compound basis using 12-month Euro LIBOR, or alternatively EURIBOR, plus 2%*" (emphasis added by the Tribunal). This alternative approach was not reiterated in Mr Rathbone's Fifth Expert Report.

<sup>175</sup> Point 8 of the operative part of the Partial Award reads as follows: "*8) Decides that the Claimant shall pay the Respondent delay penalties as per Article 14, limited to a maximum amount of EUR 12.9 million, calculated for the period between 16 July 2011 to the date of this Partial Award, and applying the following formula: - From day 1 (16 July 2011) to day 90 (14 October 2011): 5,000 € per day of delay = 450,000 €; and - from day*

- for Damages: as from 9 January 2018, the day after the signature of the Partial Award, as they accrue pursuant to point 9 of the operative part of the Partial Award<sup>176</sup> until complete payment.

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*91 (15 October 2011) to the termination of the Concession Agreement (the date of this Partial Award): 1% of one day's energy generation, per day of delay, calculated on the basis of a yearly production of 380,000 MWh, and an electricity price based on the ERE 2014 list of import prices for the year 2011 to 2014 and, for the years 2014 to 2017 based on the Hungarian Power Exchange prices;"; see §81 above.*

<sup>176</sup> Point 9 of the operative part of the Partial Award reads as follows: "

*Decides that the Claimant shall pay the Respondent damages on the basis of the concession fees that it would have received had the Project been completed by the Claimant, for the period starting from the date of this Partial Award until 31 December 2020, on the basis that the Respondent would have received such concession fees in "physical form" and that they would be calculated taking into account:*

- *an annual generation of the Plant in the amount of 380,000 MWh,*
- *electricity import prices which shall be estimated, for the period between 2017 and 2019, on the basis of the Hungarian Power Exchange (HUPX) list of future electricity contracts; and,*
- *for the year 2020, electricity import prices which shall be estimated on the basis of the electricity prices for the industrial sector extracted from the report published by the European Commission entitled "EU Energy, Transport and GHG Emissions Trends to 2050"; see §81 above.*

## **CHAPTER IX. THE COSTS OF THE ARBITRATION**

201. Each Party requests the Arbitral Tribunal to order the other Party to bear the costs of this arbitration and to reimburse the former for reasonable legal and other costs incurred in connection with the second phase of this arbitration, including in-house costs and costs and fees for attorneys and consultants in the amounts determined in each Party's Statement of Costs.
202. The Arbitral Tribunal will allocate in this Award the costs which have been incurred by the Parties for their defence in the second phase of the proceedings as well as the total costs of arbitration, being the fees and expenses of the arbitrators, the expenses of the administrative secretary of the Arbitral Tribunal as well the ICC administrative fees.
203. The Claimant submitted its Statement of Costs for the second phase of the proceedings on 18 May 2018. It requests reimbursement of its total fees and expenses<sup>177</sup> in an amount of EUR 142,975.78, plus the costs of the arbitration fixed by the ICC. In light of the numerous and complex issues that have been addressed in these proceedings, the Arbitral Tribunal considers the above amounts reasonable as per the requirement of Article 37(1) of the Rules.<sup>178</sup>
204. The Respondent submitted its Statement of Costs for the second phase of the proceedings on 19 May 2018. It requests reimbursement of its total fees and expenses in an amount of EUR 27,000 plus the costs of the arbitration fixed by the ICC. In light of the numerous and complex issues that have been addressed in these proceedings, the Arbitral Tribunal considers the above amounts reasonable as per the requirement of Article 37(1) of the Rules.<sup>179</sup>
205. Article 37 (1) of the Rules provides that:  
*“The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses filed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for the arbitration”.*
206. Article 37 (4) further provides that:  
*“The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they should be borne by the parties”.*

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<sup>177</sup> Incurred between the submission of the Statement of Costs of 18 July 2017 up to 18 May 2018.

<sup>178</sup> See §205 below.

<sup>179</sup> See §205 below.

207. Article 37 (5) of the Rules<sup>180</sup> gives the arbitrators broad discretion to allocate costs.
208. Concerning the legal fees and expenses incurred in connection with the second phase of this arbitration, since the Claimant prevailed on the issue of quantification of Delay Penalties, Damages and Interest, the Arbitral Tribunal decides that the Respondent will bear all of the Claimant's legal and other costs for the second phase of the proceedings as well as its own legal and other costs. Accordingly, the Arbitral Tribunal condemns the Respondent to reimburse the Claimant EUR 142,975.78.
209. Concerning the fees and expenses of the arbitrators and the ICC administrative expenses, they have been fixed by the Court at USD1,100,000.
210. The advances on costs in the amount of USD 1,100,000 have been paid by the Parties in the following manner:  
- Claimant: USD 515,000;  
- Respondent: USD 585,000.
211. As the Respondent prevailed for the major part of the proceedings, the Arbitral Tribunal decides that 80% of the fees and expenses of the arbitrators and the ICC administrative expenses shall be supported by the Claimant, i.e., USD880,000, and 20% shall be supported by the Respondent, i.e., USD220,000. Consequently, Claimant must reimburse Respondent USD880,000 minus USD515,000, making a total of USD365,000.

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<sup>180</sup> Article 37(5) of the Rules reads as follows: "*In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner*".

**For these reasons,**

**The Arbitral Tribunal:**

On the counterclaim:

- 1) Decides that the Claimant shall pay the Respondent Delay Penalties in the amount of EUR 1,693,157 with interest thereon on a compound basis using 12-month Euro LIBOR +2% from 16 July 2011 until complete payment;
- 2) Decides that the Claimant shall pay the Respondent Damages in the amount of EUR 5,182,535 with interest thereon on a compound basis using 12-month Euro LIBOR +2% from 9 January 2018, the day after the signature of the Partial Award, until complete payment;
- 3) Decides that the Respondent shall reimburse the Claimant's legal costs for the second phase of the proceedings in the amount of EUR 142,975.78;
- 4) Decides that with respect to the fees and expenses of the arbitrators and the ICC administrative expenses, the Claimant shall reimburse the Respondent the amount of USD325,000;
- 5) Dismisses all other claims.

Signed in 10 originals, on 7 September 2018

Place of Arbitration: Paris, France.

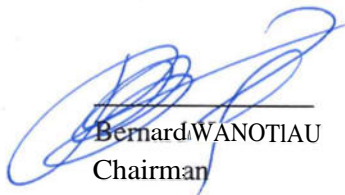
**The Arbitral Tribunal,**



Eduardo ZULETA-JARAMILLO  
Arbitrator



Bernard Anthony RIX  
Arbitrator



Bernard WANOTIAU  
Chairman