

**PCA Case No. 2019-05**

**IN THE MATTER OF AN ARBITRATION CONDUCTED UNDER THE 2013  
ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW**

**between**

**GPGC LIMITED**

**The Claimant**

**and**

**THE GOVERNMENT OF THE REPUBLIC OF GHANA**

**The Respondent**

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**FINAL AWARD**

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*Arbitral Tribunal*

Mr John Beechey, CBE (Presiding Arbitrator)  
Mr J. William Rowley QC  
Professor Albert K. Fiadjoe

*Assistant to the Tribunal*

Mr Niccolò Landi

*Registry*

Permanent Court of Arbitration

26 January 2021

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## LIST OF DEFINED TERMS

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| <b>A-G's Advice</b>                        | Attorney-General's PPA Review Memorandum of 28 August 2017.   |
| <b>Aboadze Site</b>                        | The proposed Site (as defined in the EPA) allocated by GoG for the location of the GPGC Equipment at Aboadze, Takoradi.                           |
| <b>Ahenkorah WS</b>                        | Witness statement of Dr Alfred Ofori Ahenkorah dated 30 August 2019.  |
| <b>Alternative Aboadze Site</b>            | The site proposed by the Respondent on 15 August 2015, <i>in lieu</i> of the Aboadze Site, located near a 330 High Voltage substation in Aboadze. |
| <b>Baiden WS</b>                           | Witness statement of Mr Ebenezer A. Baiden dated 22 May 2020.   |
| <b>Blue Ocean Ltd</b>                      | Blue Ocean Investments Limited.   |
| <b>Blue Ocean Site</b>                     | The site identified by Claimant in the Tema Free Zones Enclave, owned by Blue Ocean Investments Limited.  |
| <b>C-[#]</b>                               | Claimant's Exhibit.   |
| <b>Cabinet Decision</b>                    | Directive of the Cabinet of the Government of Ghana dated 20 June 2017.   |
| <b>Cabinet Memorandum</b>                  | Memorandum of the Cabinet of the Government of Ghana dated 20 June 2017.  |
| <b>China Petroleum</b>                     | China Petroleum Pipeline West Africa.   |
| <b>Cl. Application for Directions</b>      | Application for Directions in respect of Respondent's Deficient Document Production filed by Claimant on 29 November 2019.                        |
| <b>Cl. Document Production Application</b> | Claimant's application for an Order in respect of its unresolved document production requests submitted on 11 October 2019.                       |
| <b>Cl. Notice of Arbitration</b>           | Claimant's Notice of Arbitration dated 13 August 2018.  |

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| <b>Cl. Reply</b>                 | Claimant's Statement of Reply dated 13 March 2020.   |
| <b>Cl. Response</b>              | Claimant's response to Resp. Rebuttal submitted on 7 December 2019.  |
| <b>Cl. SoC</b>                   | Claimant's Statement of Claim dated 31 May 2019, as corrected on 3 June 2019.  |
| <b>Cl. Statement of Costs</b>    | Claimant's Statement of Costs filed on 4 November 2020.  |
| <b>Cl. Summary Briefing Note</b> | Claimant's Summary Briefing Note dated 25 September 2020.  |
| <b>Cl. Termination Notice</b>    | Claimant's letter dated 13 August 2018.  |
| <b>Claimant</b>                  | GPGC Limited.  |
| <b>Demobilization Costs</b>      | Costs claimed by GPGC in respect of the dismantling and transportation of the plants in Ghana and the restoration of the Site – see para. 201 below.   |
| <b>Disclosure Order</b>          | The Tribunal's Disclosure Order dated 10 December 2019.  |
| <b>Early Termination Payment</b> | As defined in Clause 25(b)(i) of the EPA and including mobilization, and/or demobilization costs (as applicable) and any other reasonably incurred cost by GPGC as a result of an Early Termination – and see para. 201 below. |
| <b>ECG</b>                       | Electricity Company of Ghana.  |
| <b>Energy Commission</b>         | The Energy Commission established under the Energy Commission Act.   |
| <b>Energy Commission Act</b>     | Energy Commission Act, 1997 (Act 541).   |
| <b>EPA</b>                       | The Emergency Purchase Agreement dated 3 June 2015 entered into between GPGC Limited and the Government of the Republic of Ghana.  |
| <b>Fees Reduction Request</b>    | Respondent's letter dated 2 April 2019 by which Respondent applied to the PCA for a reduction of the fees proposed to be charged by the Tribunal.  |

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|----------------------------------|---|
| <b>Ghana Gas</b>                 | Ghana National Gas Company Limited.   |
| <b>Ghana Water</b>               | Ghana Water Company Ltd.  |
| <b>GoG</b>                       | Government of the Republic of Ghana, Respondent in this arbitration.  |
| <b>GPGC</b>                      | GPGC Limited, Claimant in this arbitration.   |
| <b>GPGC Equipment</b>            | The two existing combined cycle power plants procured in Italy for shipment to, and installation, commissioning, operation and maintenance in, Ghana under the EPA.   |
| <b>GRA</b>                       | Ghana Revenue Authority.  |
| <b>Grid Connection Agreement</b> | The Grid Connection Agreement due to be signed by the Claimant with Ghana Grid Company.   |
| <b>GridCo</b>                    | Ghana Grid Company.   |
| <b>Hearing</b>                   | The hearing held by videoconference from 5 October 2020 to 9 October 2020.  |
| <b>Hearing Bundle</b>            | All documents on the record for use at the Hearing, as circulated by Claimant on 17 September 2020.   |
| <b>Hearing Schedule</b>          | Draft Indicative Hearing Schedule agreed between the Parties on 25 September 2020.  |
| <b>IDRC</b>                      | International Dispute Resolution Centre.  |
| <b>Kpone Site</b>                | The site identified by Respondent in Kpone, a coastal town near the district of Tema, in or about April 2016.   |
| <b>Mobilization Costs</b>        | The costs claimed by GPGC as incurred in dismantling the GPGC Equipment in Italy, its transportation to, and storage in Ghana, site preparation, procurement and on-site construction works in Ghana – see para. 201 below. |
| <b>Monney WS</b>                 | Witness statement of Mr Hanson Monney dated 30 August 2019.   |
| <b>MW</b>                        | Megawatts.  |

|                             |   |
|-----------------------------|---|
| <b>NITS</b>                 | National Interconnected Transmission System.  |
| <b>Oppong-Mensah ER</b>     | Expert report of Mr Richard Oppong-Mensah dated 30 August 2019.   |
| <b>Parisotto First WS</b>   | First witness statement of Mr Andrea Parisotto dated 30 May 2019.   |
| <b>Parisotto Second WS</b>  | Second witness statement of Mr Andrea Parisotto dated 13 March 2020.  |
| <b>Parties</b>              | Claimant and Respondent.  |
| <b>PCA</b>                  | Permanent Court of Arbitration.   |
| <b>PO1</b>                  | Procedural Order No. 1 dated 11 June 2019.  |
| <b>PO2</b>                  | Procedural Order No. 2 dated 1 March 2020.  |
| <b>PPAs</b>                 | Power Purchase Agreements.  |
| <b>PPA Committee</b>        | Inter-Ministerial Committee to review the fiscal and legal implications of Power Purchase Agreements executed by the ECG for the purchase and supply of electrical energy from independent power producers. |
| <b>PPA Committee Report</b> | Final Draft Report of the PPA Committee, April 2017.  |
| <b>Procedural Calendar</b>  | The Procedural Calendar annexed to PO1.   |
| <b>Project</b>              | The relocation of the GPGC Equipment from Italy to Ghana.   |
| <b>Project Documents</b>    | The documents mentioned in para. 383.d.   |
| <b>PURC</b>                 | Public Utilities Regulatory Commission.   |
| <b>Resp. Application</b>    | Respondent's reasoned application dated 16 December 2019.   |
| <b>Resp. Rebuttal</b>       | Respondent's Rebuttal dated 6 December 2019.  |
| <b>Resp. Response</b>       | Respondent's Response to the Notice of Arbitration dated 5 December 2018.   |
| <b>Resp. Rejoinder</b>      | Respondent's Rejoinder dated 22 May 2020.   |



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| <b>Resp. SoD</b>  | Respondent's Statement of Defence dated 30 August 2019.  |
| <b>Resp. Statement of Costs</b>                         | Respondent's Statement of Costs filed on 4 November 2020.  |
| <b>Resp. Summary Briefing Notes</b>                     | Respondent's Summary Briefing Notes dated 25 September 2020.   |
| <b>Resp. Termination Notice</b>                         | Respondent's letter dated 13 February 2018.  |
| <b>Respondent / GoG</b>                                 | The Government of the Republic of Ghana.   |
| <b>Review of Tribunal Proposal on Fees and Expenses</b> | Decision of the Secretary-General of the PCA dated 23 May 2019 fixing the Tribunal's fees.             |
| <b>Smith First ER</b>                                   | First expert report of Ms Ellen Smith (FTI Consulting) dated 31 May 2019.                              |
| <b>Smith Second ER</b>                                  | Second expert report of Ms Ellen Smith (FTI Consulting) dated 13 March 2020.                           |
| <b>ToA</b>  | The Tribunal's Terms of Appointment dated 11 June 2019.  |
| <b>Transcript</b>                                       | The Transcript of the Hearing circulated by Opus2 to the Tribunal and the Parties on 20 November 2020. |
| <b>Tribunal</b>   | The arbitral tribunal in this arbitration.   |
| <b>Tribunal's Ruling</b>                                | The Tribunal's ruling of 6 November 2019 on Cl. Document Production Application.                       |
| <b>UNCITRAL Rules</b>                                   | The 2013 Arbitration Rules of the United Nations Commission on International Trade Law.                |
| <b>VRA</b>  | Volta River Authority.   |
| <b>WAGP</b>   | West African Gas Pipeline.   |
| <b>Water Supply Agreement</b>                           | The Water Supply Agreement due to be signed by Claimant with Ghana Water.                              |
| <b>WES Licence</b>                                      | The generation licence to be issued by the Energy Commission.  |

*DRAMATIS PERSONAE*

|                                  |   |
|----------------------------------|---|
| <b>Francis Y. Agbenyo</b>        | VRA representative.   |
| <b>B. Agyemang</b>               | GRA's Assistant Commissioner.   |
| <b>Dr Alfred Oforu Ahenkorah</b> | Executive Secretary, Energy Commission and Chairman of the PPA Committee, a witness in these proceedings.   |
| <b>Hon William Owuraku Aidoo</b> | Deputy Minister of Power.   |
| <b>Andrew Ashong</b>             | Mechanical Engineer at the VRA and Assistant to Mr Dzata of the Ministry of Power, <sup>1</sup> to whom GPGC instructed to send weekly project progress reports.                    |
| <b>William Bobie</b>             | VRA's Managing Director.  |
| <b>Myles Bouvier-Baird</b>       | Managing Director of Blue Ocean Investments Limited.  |
| <b>Kwabena Donkor</b>            | Minister of Power at the time of the execution of the EPA. Resigned December 2015.  |
| <b>Damian Duncan</b>             | Director, GPGC, a witness in these proceedings.   |
| <b>Francis Dzata</b>             | Technical Advisor to the Minister of Power, closely involved in the negotiation of the EPA.   |
| <b>Kwabena Kankam-Yeboah</b>     | Electrical Engineer at VRA, seconded in 2016 to the Office of the Technical Advisor to the Minister of Power, designated by Mr Ashong to receive regular written reports from GPGC. |
| <b>Kirk Koffi</b>                | Chief Executive Officer, VRA.   |
| <b>Kwaku Kwarteng</b>            | Deputy Minister of Finance.   |
| <b>Hanson Monney</b>             | Engineer, Ministry of Energy and a witness in these proceedings.  |
| <b>Daniel Morton</b>             | GPGC's Operations Manager.  |
| <b>Michael Opam</b>              | Technical Advisor to the Ministry of Energy in succession to Mr Dzata.  |

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<sup>1</sup> Exhibit C-123.

|                         |  |
|-------------------------|--|
| <b>Andrea Parisotto</b> | Claimant's Authorized Representative for the Project and a witness in these proceedings. |
| <b>M. Tahir</b>         | Director, GPGC.  |
| <b>Michael Wiafe</b>    | VRA's Senior Mechanical Engineer.  |

## I. INTRODUCTION

### THE PARTIES TO THE ARBITRATION AND THEIR REPRESENTATIVES

1. The parties to the arbitration, and their respective legal representatives, are:

#### **Claimant**

GPGC Limited  
7th Floor  
One Airport Square Building  
Accra  
Ghana

#### **Counsel for Claimant**

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**Respondent**

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2. Claimant (“**GPGC**”) and Respondent (“**GoG**”) are collectively referred to as the “**Parties**”.

## THE ARBITRATION AGREEMENT

3. A dispute has arisen between GPGC and GoG under an Emergency Purchase Agreement dated 3 June 2015 entered into between GPGC and GoG, which was ratified by the Parliament of Ghana on 23 July 2015 (the “EPA”).<sup>2</sup>

4. Clause 28(f) of the EPA provides, in relevant part, as follows:

“28. Miscellaneous

[...]

f. Dispute Resolution.

[...]

xv. Where any dispute or disagreement, not being an Invoice Dispute, arising out or in connection with this Agreement cannot be settled cannot by negotiation, then the dispute shall be settled finally by ad-hoc arbitration to be conducted in accordance with the UNCITRAL Rules in effect on the date of the institution of arbitration by either Party.

xvi. The matter shall be heard and decided, and awards rendered by a panel of three arbitrators (the “Arbitration Panel”). GPGC and the GoG shall each select one arbitrator and those two arbitrators shall select a third arbitrator; provided, however, that in the event the two arbitrators cannot agree on a third arbitrator, the Secretary-General of the Permanent Court of Arbitration shall select the third arbitrator being an individual with substantial experience in the power industry. The venue and seat for the Arbitration shall be London, England and the law of the arbitration shall be the English law.

xvii. In arriving at their decision, the arbitrators shall consider the pertinent facts and circumstances and be guided by the terms and conditions of this Agreement; and, if a solution is not found in the terms of this Agreement, the arbitrators shall apply the governing law of this Agreement. Both Parties shall have the right to present documentary evidence, witnesses and to cross-examine witnesses. The decision of the arbitrators shall be final and binding upon both Parties, and neither Party shall seek recourse to a law court or other authorities to appeal for revisions of such decision. The Parties shall be entitled to seek, and the arbitrators shall be entitled to grant provisional remedies. Reasonable expenses of the arbitration shall be borne as the arbitrators may determine. On request of either Party, a transcript of the hearings shall be prepared and made available to the Parties, provided, that the cost of such transcript shall be paid by the requesting Party. The arbitrators shall be required to render a final decision within six (6) months of the date of the commencement of the arbitration.” [Emphasis omitted]

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<sup>2</sup> Exhibit C-1.

5. On 10 January 2019, the Parties agreed that the final sentence of Clause 28(f)(xvii) of the EPA, which requires a final decision to be rendered within six (6) months of the date of the commencement of the arbitration, shall not apply to the present arbitration.

#### **THE ARBITRAL TRIBUNAL**

6. On 20 August 2018, Claimant notified Respondent that it had appointed Mr J. William Rowley QC, a national of Canada and the United Kingdom, as the first arbitrator. Mr Rowley's contact details are:

Mr J. William Rowley QC  
Twenty Essex Chambers  
20 Essex Street  
London WC2R 3AL  
United Kingdom  
Tel.: +44 20 7842 6700  
Email: wrowley@twentyessex.com

7. Respondent originally appointed Mr Kojo Bentsi-Enchill as the second arbitrator. By letter dated 18 December 2018, Mr Bentsi-Enchill indicated his inability to accept the Respondent's appointment. By letter dated 3 January 2019, Respondent withdrew its appointment of Mr Bentsi-Enchill and appointed Professor Albert K. Fiadjoe, a national of Ghana, as co-arbitrator. Professor Fiadjoe's contact details are:

Prof. Albert K. Fiadjoe  
Fugar & Company  
World Trade Center  
29 Independence Avenue, 2nd Floor  
Accra - Ghana  
Tel.: +233 246 507691  
Fax: +233 302 669 589  
Email: fugar@ghana.com; pmanager@fugarandco.com

8. On 29 January 2019, the co-arbitrators appointed Mr John Beechey CBE, a national of the United Kingdom, as the presiding arbitrator in this matter. Mr Beechey's contact details are:

Mr John Beechey, CBE  
Arbitration Chambers London  
Lamb Building, 3<sup>rd</sup> Floor South  
Temple  
London  
EC4Y 7AS  
United Kingdom

Tel.: +44 (0) 207 167 2040  
Email: jb@beeheyarbitration.com

9. By their signature of the Terms of Appointment on 11 June 2019 (the “**ToA**”), the Parties *inter alia*: (i) confirmed that the members of the Tribunal were validly appointed in accordance with the Agreement and the 2013 Arbitration Rules of the United Nations Commission on International Trade Law (the “**UNCITRAL Rules**”); (ii) appointed the International Bureau of the Permanent Court of Arbitration (“**PCA**”) to act as registry and to administer the arbitral proceedings; and (iii) appointed Mr Niccolò Landi as Administrative Secretary to the Tribunal.

## **II. PROCEDURAL HISTORY**

10. By Notice of Arbitration dated 13 August 2018 (the “**Cl. Notice of Arbitration**”), GPGC commenced arbitration proceedings against GoG pursuant to Clause 28(f) of the EPA and Article 3 of the UNCITRAL Rules.
11. On 5 December 2018, GoG submitted its Response to the Cl. Notice of Arbitration (the “**Resp. Response**”).
12. By email dated 3 March 2019, sent on behalf of both Parties by GPGC, the Parties circulated an agreed draft of Procedural Order No. 1. They invited the Tribunal to confirm its availability for a five-day hearing in the week of 10 February 2020. That same day, the Presiding Arbitrator informed the Parties that he had no availability before the week commencing 6 April 2020.
13. By email dated 5 March 2019, the Tribunal confirmed its availability for the hearing in the week 27 April - 1 May 2020 or in the weeks of 18 or 25 May 2020.
14. On 8 March 2019, the Tribunal informed the Parties that it had blocked the week commencing 27 April - 1 May 2020 for the hearing.
15. By email dated 9 March 2019, GPGC confirmed its availability for a hearing during the week of 27 April 2020. It informed the Tribunal that the Parties were in the process of discussing adjustments to their previously agreed procedural calendar in light of the later hearing dates.



16. By email dated 13 March 2019, the Tribunal requested the Parties to indicate whether they were in a position to confirm their availability for a hearing in the week commencing 27 April 2020.
17. By email of the same day, sent by GPGC on behalf of both Parties, the Parties:
  - (i) confirmed their availability for a hearing in the week commencing 27 April 2020; and
  - (ii) informed the Tribunal that the Parties had agreed on certain amendments to the previously agreed procedural calendar in light of the later hearing dates.
18. A Case Management Conference was held between the Parties and the Tribunal by telephone conference call on 20 March 2019 in the course of which the following matters were discussed: (i) the Parties' proposed amendments to the draft of Procedural Order No. 1; (ii) the Parties' proposed amendments to the draft of the Tribunal's ToA; (iii) GoG's proposal to reduce the Tribunal's fees and to amend paragraph 13 of the draft ToA accordingly;<sup>3</sup> and (iv) any other matters arising.
19. By letter dated 2 April 2019, received by the PCA on 9 April 2019, GoG proposed a reduction of the fees to be charged by the Tribunal by 50% (the "**Fees Reduction Request**").
20. By letter dated 10 April 2019, the PCA acknowledged receipt of GoG's letter of 2 April 2019. It noted that the letter was addressed to "*The President, Permanent Court of Arbitration*" and that it made no reference to the UNCITRAL Rules or the Appointing Authority. The PCA sought clarification from GoG as to whether its letter was intended to amount to a request to the Secretary-General of the PCA as Appointing Authority to review the fees proposed by the Tribunal.
21. By email dated 11 April 2019, enclosing a letter dated 10 April 2019, GoG confirmed that the Fees Reduction Request constituted a request to the Secretary-General of the PCA as Appointing Authority under Article 41 of the UNCITRAL Rules to review the fees proposed by the Tribunal.

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<sup>3</sup> Paragraph 13 of the draft ToA provides as follows: "*13.1. In accordance with Article 41 of the UNCITRAL Rules, the fees of the Arbitral Tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the Arbitrators and any other relevant circumstances of the case. 13.2. Each member of the Tribunal shall be remunerated at the daily rate of USD 7,000.00 (based on a six-hour day) for all hearings and at the hourly rate of USD 950.00 for all other work carried out in connection with the arbitration.*"

22. By email dated 11 April 2019, the PCA invited Claimant to submit any comments it may have regarding the Fees Reduction Request.
23. By email dated 17 April 2019, Claimant informed the PCA that it had no objection to the Tribunal's fee proposal.
24. By letter dated 18 April 2019, the PCA invited the Tribunal to provide any comments in relation to the Fees Reduction Request.
25. By email dated 26 April 2019, the Tribunal provided its comments on the Fees Reduction Request.
26. By letter dated 23 May 2019, the Secretary-General of the PCA fixed the fees of the Tribunal at a rate of US\$ 650 per hour and US\$ 6,500 per hearing day (the "**Review of Tribunal Proposal on Fees and Expenses**").
27. On 31 May 2019, GPGC submitted an electronic copy of its Statement of Claim (the "**Cl. SoC**"), together with electronic copies of: (i) accompanying fact exhibits C-28 to C-112 and a consolidated index of fact exhibits; (ii) legal authorities CLA-1 to CLA-3, and an index of legal authorities; (iii) the witness statement of Mr Andrea Parisotto dated 30 May 2019 (the "**Parisotto First WS**"); and (iv) the expert report of Ms Ellen Smith of FTI Consulting dated 31 May 2019 (the "**Smith First ER**"), together with expert's exhibits ES-001 to ES-014.
28. By email dated 3 June 2019, GPGC informed the Tribunal and GoG that the version of the Cl. SoC circulated on 31 May 2019 contained an errant page-header and it provided a corrected version of the Cl. SoC.
29. By letter dated 4 June 2019, GoG acknowledged the Review of Tribunal Proposal on Fees and Expenses and accepted the Tribunal's fees as fixed by the Secretary-General of the PCA.
30. On 11 June 2019, the Tribunal issued its Procedural Order No. 1 ("**PO1**") containing the Procedural Calendar (the "**Procedural Calendar**"), together with the ToA signed by the Parties.

31. By letter dated 10 July 2019, the PCA acknowledged receipt of a deposit in the amount of US\$ 100,000 from GPGC, representing its share of the initial deposit, as requested in paragraph 14.1 of the ToA.
32. By email dated 16 July 2019, the Tribunal, pursuant to Article 43(4) of the UNCITRAL Rules, invited GoG to remit its outstanding share of the deposit at its earliest convenience and in any event by 31 July 2019.
33. By email dated 15 August 2019, the Tribunal again invited GoG to remit its outstanding share of the deposit at its earliest convenience.
34. By email dated 23 August 2019, GoG informed the Tribunal that the Ministry of Finance of Ghana was “*taking steps to effect payment*”.
35. On 25 August 2019, the Tribunal acknowledged GoG’s communication of 23 August 2019 and requested an update, so far GoG’s payment of its share of the deposit was concerned, by 28 August 2019.
36. On 30 August 2019, GoG filed an electronic copy of its Statement of Defence (the “**Resp. SoD**”), together with electronic copies of: (i) accompanying fact exhibits R-1 to R-34 and a consolidated index of fact exhibits; (ii) legal authorities RLA-1 to RLA-3, together with an index of legal authorities; (iii) the witness statements of Dr Alfred Oforu Ahenkorah and Mr Hanson Monney, both dated 30 August 2019 (the “**Ahenkorah WS**” and the “**Monney WS**”); and (iv) the Expert Report of Mr Richard Oppong-Mensah dated 30 August 2019 (the “**Oppong-Mensah ER**”).
37. By email dated 12 September 2019, the Tribunal invited GoG to provide the Tribunal and the PCA with a further update as to the status of the payment of its share of the deposit.
38. By email dated 17 September 2019, GPGC informed the Tribunal that GoG had not met the deadline established in the Procedural Calendar for the simultaneous exchange of the Parties’ respective document production requests on 13 September 2019. GPGC had submitted its requests for production on 13 September 2019 to the PCA (which had agreed to facilitate a simultaneous exchange upon receipt of both Parties’ document requests), but nothing had been forthcoming from GoG. GPGC recorded GoG’s commitment to file its document requests by 18 September 2019, noting that GoG had

neither offered any justification for its failure to comply with the agreed deadline, nor for the unilateral extension of its own time by several additional days.

39. The Tribunal acknowledged receipt of GPGC's communication that same day. It invited GoG to comment upon the delay in filing its document production request as soon as possible and, in any event, to file its document production requests by no later than 18 September 2019.
40. By email dated 18 September 2019, GoG informed the Tribunal and GPGC that it had been unable to complete its evaluation of the submissions filed in the arbitration so as to be in a position to determine the scope of its request for production of documents by the scheduled date of 13 September 2019. GoG requested an extension of time to file its request for production of documents until close of business on 18 September 2019.
41. By email dated 19 September 2019 (sent at 00.06 a.m., BST), the Presiding Arbitrator wrote to GoG, noting that:

“The extended deadline for which Respondent applied has now expired. Please confirm by return email when it is intended to file Respondent's outstanding request for document production.”
42. By email dated 19 September 2019 (sent at 8.34 a.m., CET), the PCA informed the Tribunal that GoG's requests for document production had been submitted at 9:00 p.m. CET on 18 September 2019.
43. By email dated 26 September 2019, the Tribunal asked GoG to provide the Tribunal and the PCA with an update as to the payment of its share of the deposit.
44. On 27 September 2019, GPGC filed its response to GoG's requests for document production.
45. By email dated 10 October 2019, the Tribunal once again requested GoG to provide the Tribunal and the PCA with an update as to the status of the payment of its share of the deposit “*as soon as possible and, in any event, within the next 10 days*”. By email of the same date, GoG replied that:

“... the Respondent's Ministry of Finance has issued a Specific Warrant for the payment of the said amount and hopefully payment will be effected within the next 10 days.”

46. On 11 October 2019, GPGC submitted its completed Redfern Schedule, together with an application to the Tribunal for an order in respect of unresolved document production requests (the “**Cl. Document Production Application**”). GPGC also attached the new Exhibits C-113 to C-114, to which it referred in its Redfern Schedule.
47. On 11 October 2019, GoG submitted its responses to GPGC’s reply to Respondent’s requests for documents production.
48. By email dated 14 October 2019, GPGC stated:

“In its replies to Requests 2 to 4, Respondent notes that it “shall await the production” of documents responsive to these requests. However, in accordance with the deadline for voluntary production in the procedural calendar of this arbitration, we recall that Claimant has already disclosed documents responsive to these requests (see Email from Helen Brown (PCA) to the Parties, 27 September 2019). As for production of documents responsive to Respondent’s first request, Claimant intends to write separately to Respondent in relation to this matter.”

49. By email dated 23 October 2019, the Tribunal sought a further update from GoG as to the status of the payment of its share of the deposit, which was to have been remitted by 21 October 2019.
50. On 4 November 2019, GPGC requested the Tribunal to indicate when it expected to issue its decision on the Cl. Document Production Application.
51. By email dated 6 November 2019, with reference to the Cl. Document Production Application, the Tribunal ruled as follows (the “**Tribunal’s Ruling**”):

“Nos. 1 – 2 – 3: granted.

No. 4: request granted, to the extent that it seeks:

(a) reports and/or memoranda and/or correspondence prepared by Mr Ashong in respect of Mr Parisotto’s reports from 26 August 2015 to 31 March 2016;

(b) reports and/or memoranda and/or correspondence prepared and sent by Mr Kankam-Yeboah to the Minister of Power in respect of Mr Parisotto’s reports from 1 April 2016 until 15 February 2018; and

(c) reports and/or memoranda and/or correspondence prepared by Mr Opam in respect of Mr Parisotto’s reports between 27 October 2017 and 13 February 2018.

No. 5: present request denied: overly broad.”

52. By letter dated 27 November 2019, GoG rejected GPGC's complaint that GoG's compliance with the Tribunal's Ruling was deficient.
53. By email dated 27 November 2019, the Tribunal wrote once more to GoG about the payment of its share of the deposit, requesting a reply by no later than 29 November 2019.
54. On 29 November 2019, GPGC filed an Application for Directions in respect of what it maintained was GoG's deficient document production (the "**Cl. Application for Directions**"). GPGC contended that GoG was in breach of the Tribunal's Ruling. GPGC further affirmed that GoG's non-compliance prejudiced its ability to prepare its Reply. GPGC requested the Tribunal to order GoG, by no later than 5 December 2019, to:

“(a) re-disclose the PPA Committee Report and the Attorney General's PPA Review in a wholly unredacted form;

(b) disclose responsive documents that are known to exist in response to Claimant's Request 1 (as identified in Section I.A.2 of this Application); and

(c) properly compete a reasonably diligent search for responsive documents to Claimant's Requests 1 to 3, and produce any other responsive documents to these Requests”.

55. By email dated 30 November 2019, the Tribunal directed as follows:

“1. Respondent shall by no later than 5 p.m., GMT. on Thursday 5 December 2019:

(a) either rebut some or all of the complaints made in respect of its compliance with the terms of the Tribunal's Ruling; and/or

(b) produce any further documents responsive to any and all of Claimant's Requests 1, 2 and 3.

2. To the extent that Respondent is unable to comply with 1(b) above within the deadline of 5 December 2019, it shall indicate by 5 p.m. on Thursday 5 December 2019 when it intends to make such production, it being understood that any and all such additional disclosure must be completed by **Friday 13 December 2019** at the latest; and

(c) failing the provision by Respondent of either or both of compelling arguments to rebut Claimant's complaints and the production of documents in accordance with the terms of this Ruling, Claimant shall have liberty to apply to the Tribunal to invite it to draw such adverse inferences as it deems appropriate in the circumstances.”

56. On 1 December 2019, GPGC requested the following clarification:

“Claimant understands that, in respect of the two heavily and unjustifiably redacted documents that Respondent has disclosed in response to Claimant’s Request 1 (see Claimant’s Application, pp. 2-7 and 14, para (a)), the Tribunal’s directions require Respondent to produce these two documents in wholly unredacted form by 5pm (GMT) on 5 December 2019. Claimant would be grateful for the Tribunal’s confirmation that this understanding is correct.”

57. By email dated 1 December 2019, the Tribunal replied to GPGC as follows:

“The Tribunal’s Order extends to all three of Claimant’s Requests. Unless Respondent wishes to maintain, and it explains, some or all of its objections to the production of documents otherwise subject to disclosure pursuant to the Tribunal’s Ruling of 6 November 2019 (which would include a decision on its part as to whether or not it maintains some or all of the redactions made to the two documents produced pursuant to Claimant’s Request No.1), it shall produce the materials ordered to be produced by 5 p.m., GMT, on 5 December 2019, including complete (or, to the extent that it maintains that any redactions are proper, less heavily redacted) copies of the two documents thus far produced in redacted form.”

58. On 5 December 2019, GoG requested the Tribunal to afford it an extension of the time within which to present its response. By email of the same day, the Tribunal granted GoG a short extension until 10 p.m., GMT, on 5 December 2019. The Tribunal took the opportunity to remind GoG that a reply remained outstanding to the Tribunal Secretary’s email of 27 November 2019 in which he had relayed the Tribunal’s request for an update as to the status of GoG’s payment of its share of the deposit by no later than 29 November 2019.

59. On 6 December 2019, GoG submitted its rebuttal (the “**Resp. Rebuttal**”) in which it requested the Tribunal to make the following ruling:

“(a) that the documents produced by the Respondent are satisfactory and meet the terms of the Tribunal’s Ruling;

(b) that there are no other responsive documents under the control, possession and custody of the Respondent; and

(c) that the Claimant should not be allowed to draw adverse inferences on the ground that the Respondent is unable to produce documents which are unavailable.”

60. By email dated 6 December 2019, GPGC requested the Tribunal's leave to submit a short letter in response to the Resp. Rebuttal, not exceeding five pages, by close of business, GMT, on 8 December 2019. On the same date, the Tribunal granted GPGC's request.
61. By email of the same date, the Tribunal reminded GoG that payment of its share of the deposit remained outstanding. The Tribunal requested confirmation from GoG's counsel that the matter had been raised with their client.
62. On 7 December 2019, GPGC submitted its response to the Resp. Rebuttal (the "**Cl. Response**"). GPGC requested that:

“the Tribunal order Respondent to, by no later than 10 December 2019: (a) comply with the requests set out in Section II of the Application [the Cl. Application for Directions]; and (b) in light of the Response [Resp. Rebuttal], explain the steps it has taken to conduct a diligent search for documents responsive to Requests 1 to 3. Respondent's continuing non-compliance with the Tribunal's disclosure directions has caused and is continuing to cause serious prejudice to Claimant's preparation of its Reply, which is due on 20 December 2019.”
63. By email of 9 December 2019, GoG's counsel apologised to the Tribunal for their failure to address the question posed in the Tribunal's email of 5 December 2019 regarding the payment of the deposit by GoG, citing lack of information on this matter at the time of the submission of the Resp. Rebuttal. GoG's counsel informed the Tribunal that they had:

“...since received confirmation from the Respondent that the budgetary processes towards the settlement of its share of the deposit is at an advance [sic] stage and that payment will be made without undue delay.”
64. By the same email, GoG confirmed receipt of the Cl. Response and requested leave to respond to the Cl. Response by 5 p.m., GMT, on 12 December 2019.
65. By email of the same date, the Tribunal noted GoG's counsel's clarification regarding payment of the outstanding deposit. The Tribunal emphasised the need for urgency in issuing its ruling in respect of the Cl. Application for Directions. It granted GoG leave until 5 p.m., GMT, on 10 December 2019 to file any comments to the Cl. Response.
66. On 10 December 2019, having considered GoG's comments (“Having perused the Claimant's said letter, we do not find any new product to merit a full response from the Respondent. In the circumstances, the Respondent hereby relies on all of its arguments in opposition to the Claimant's Application and will await the Ruling of the Tribunal”),



the Tribunal issued an order pursuant to the Cl. Application for Directions (the “**Disclosure Order**”) in the following terms:

“1. Save to the extent that Respondent forthwith makes a reasoned application to explain why any part of any such document should remain redacted, such application to address each and every redaction that Respondent wishes to maintain, Respondent shall by no later than **5 p.m. GMT, on Monday 16 December 2019**, disclose full and unredacted versions of the PPA Committee Report and of the Attorney-General’s Review, together with each and every one of the documents specifically identified in the Attorney-General’s Review, namely the Cabinet Memorandum dated 20 June 2017, the Decision of the Cabinet at its 13th meeting of 20 July 2017, the letters dated 24, 25 and 27 July 2017 submitted to the Attorney-General and the enquiries made of the Energy Commission by the Attorney-General’s office and/or the Ministry of Justice in respect of the Claimant’s EPA and the responses received from the Energy Commission;

2. By **5 p.m., GMT, on Monday 16 December 2019**, Respondent shall further submit to the Tribunal and to Claimant a full and detailed report signed by an officer of the Government of Ghana in respect of both the searches it has already made and those it will now make pursuant to this Order for any further documents to be produced pursuant to Claimant’s Requests 1, 2 and 3. To the extent that any further documents come to light in addition to those the disclosure of which is already the subject of the Tribunal’s Order 1 above, they shall be produced along with the report.”

67. By email dated 12 December 2019, GPGC stated that:

“... all of the documents referenced in the Order are already in Respondent’s possession and available immediately for disclosure, since Respondent has already disclosed redacted versions of the PPA Committee Report and the Attorney-General’s Review and has made submissions in recent correspondence on the content of the other documents referenced in the Order. Since disclosure of such documents only on 16 December 2019 will further prejudice Claimant’s ability to finalise its Statement of Reply by 20 December 2019, Claimant requests that Respondent disclose all of the documents referenced in the Order as soon as possible and by no later than 5pm GMT on Friday 13 December 2019.”

68. By letter dated 13 December 2019, the PCA acknowledged receipt of a deposit in the amount of US\$ 94,596.24 from GoG, representing its payment in respect of the initial deposit pursuant to paragraph 14.1 of the ToA.

69. On 16 December 2019, GoG filed its reasoned application in response to the Disclosure Order (the “**Resp. Application**”) to:

“... explain why any part of the redacted parts of the Attorney-General’s Review and the PPA Committee Report should remain redacted (A); reasons why the Respondent’s Cabinet Memorandum dated 20 June 2017 and minutes of Cabinet at its 13th meeting of 20 July 2017 cannot be produced (B); production of letters dated 24, 25 and 27 July 2017 to the Attorney-General (C); and unavailability of document evidencing enquiries made by the Attorney-General of the Energy Commission and responses to such enquiries.”

70. By email dated 16 December 2019, GPGC submitted that the Resp. Application amounted to a further defiance of the Tribunal’s procedural directions. GPGC maintained that it had been left with no choice but to request the Tribunal: (i) to dispense with the deadline of 20 December 2019 for the filing of GPGC’s Reply; and (ii) to grant GPGC leave to submit a response to the Resp. Application by 20 December 2019. By a further email of the same date, GPGC pointed out that although the deadline for GoG’s compliance with the Disclosure Order had lapsed, GoG had not produced any of the Tribunal-directed disclosures, nor had it offered any explanation for its non-compliance. GPGC pressed GoG to comply forthwith with the Disclosure Order.

71. By email dated 16 December 2019, GoG apologised for the delay in its compliance with the Orders of the Tribunal, but it emphasised that:

“This is not deliberate or out of disrespect to the Tribunal and the Claimant but due to technical challenges. We intend to submit the Respondent’s response not later than 7.00 p.m. today.”

72. By email dated 17 December 2019, the Tribunal notified the Parties that:

“... it will afford Claimant an opportunity to comment upon the application made by Respondent yesterday and to do so by 5 p.m., GMT, on Friday 20 December 2019. The current deadline for the filing of Claimant’s Reply (20 December 2019) is revoked. The Tribunal will address questions of timetabling and any other outstanding matters once issues arising out of Respondent’s document production have been resolved.”

73. On 20 December 2019, GPGC submitted its response to the Resp. Application, together with accompanying appendices. GPGC stated that GoG had failed to make the disclosures ordered by the Tribunal, most recently in the Disclosure Order. GPGC contended that there was nothing new in the Resp. Application and that GoG persisted with arguments that had already been rejected by the Tribunal. GPGC sought disclosure by 27 December 2019 of: (i) full and unredacted versions of both the April 2017 PPA Committee Report (the “**PPA Committee Report**”) and of the 28 August 2017 Attorney-

General's PPA Review (the "**A-G's Advice**"); (ii) full disclosure of the 20 June 2017 Cabinet Memorandum (the "**Cabinet Memorandum**"), of the 20 July 2017 decision of the Cabinet at its 13<sup>th</sup> meeting (the "**Cabinet Decision**") and the attachments to the Minister of Energy's letters of 24 and 25 May 2017; and (iii) a report signed by an officer of the Government of Ghana, which, "*in contrast to the tendered statement of the Deputy Attorney General and Minister for Justice*", was properly a "*full and detailed*" account of the searches made by GoG for documents responsive to Claimant's Requests 1, 2 and 3.

74. On 25 January 2020, the Tribunal issued an Order in the following terms:

"1. Respondent shall comply in full with the Tribunal's Order dated 10 December 2019 by no later than **5 p.m., GMT, on Friday 7 February 2020** (the "**Deadline**");

2. By the Deadline, Respondent shall:

a. disclose each of the PPA Committee Review [sic] and the A-G's PPA Review in a complete and unredacted format;

b. complete its disclosure of responsive documents that are known to exist in response to Claimant's Request 1, including (i) the Cabinet Memorandum, (ii) the Cabinet Decision and (iii) the attachments to the letters dated 24 and 25 July 2017 from the Minister of Energy; and

c. produce a full and detailed account of the searches made by Respondent for documents responsive to Claimant's Requests 1, 2 and 3, signed by an officer of the Government of Ghana."

75. By email dated 7 February 2020, GPGC recorded that GoG had failed to comply with the Tribunal's Order of 25 January 2020 within the 7 February 2020 deadline. GPGC stated that GoG had offered no explanation for its non-compliance and it pressed GoG to comply with the Tribunal's Order without any further delay.

76. By letter dated 7 February 2020, GoG took note of the content of the Tribunal's Order of 25 January 2020 and of the Tribunal's rejection of its arguments regarding the disclosure of certain of the documents sought by GPGC. GoG explained that its request to the Electricity Company of Ghana ("**ECG**") to release the emergency power purchase agreements ("**PPAs**") entered into between ECG and companies in the energy sector other than GPGC, which were attached to the letters dated July 24 and 25 July 2017, had been denied on grounds of confidentiality. GoG submitted a copy of the Attorney

General's letter sent to the government agencies mentioned in the Cl. Document Production Application. GoG undertook to provide the Tribunal and GPGC with the responses received from these agencies.

77. By email dated 8 February 2020, the Tribunal wrote to the Parties in the following terms:

“As to the outstanding enquires of government bodies, the Tribunal appreciates that the terms of its Order of 25 January 2020 (the “**Tribunal’s Order**”) required a number of such enquiries to be made and that it is a time consuming exercise to make such enquiries within government departments. But a week was lost between the date on which the Tribunal’s Order was issued and the despatch of the Deputy Attorney-General’s letter and time for compliance cannot be left open-ended. In all the circumstances, the Tribunal will afford Respondent a last and final opportunity until 5 p.m., GMT, on Friday 14 February 2020 to complete its enquiries and to respond pursuant to the terms of the Tribunal’s Order.”

78. By letter dated 11 February 2020, GPGC filed an application to vacate the April 2020 hearing dates and to re-fix the hearing in the second half of 2020.

79. By the same letter, GPGC asserted that GoG’s response of 7 February 2020 failed to comply with the Tribunal’s Order of 25 January 2020 as GoG had not produced the PPA Committee Report, the A-G’s Advice, the Cabinet Memorandum or the Cabinet Decision. GPGC made clear that if GoG failed to remedy the deficiencies in its production forthwith and, in any event, by no later than 5 p.m., GMT, on 14 February 2020, it reserved its right to apply to the Tribunal for a preemptory order pursuant to Section 41(5) of the English Arbitration Act 1996. GPGC further submitted that the Procedural Calendar was no longer viable by reason of GoG’s “*persistent non-compliance with the Tribunal’s disclosure orders*”; it maintained that it was impossible for the remaining steps in the Procedural Calendar to be completed prior to the April 2020 hearing dates. GPGC applied for the vacation of the hearing dates, with any cancellation costs to be awarded against GoG. GPGC invited the Tribunal to indicate its availability for a hearing of up to four days in the second half of 2020.

80. Mindful of its ruling of 8 February 2020, the Tribunal wrote to the Parties once more on 13 February 2020. The Tribunal observed:

“... first, that if Respondent fails to comply with the Tribunal’s ruling of 8 February 2020, the Tribunal has no power to compel production of the documents sought by Claimant or to compel the production of a report; it has

taken at face value the assurances that good faith efforts are being made to respond to the Tribunal’s ruling. ... Second, the Tribunal ... considers that a delay of up to a year could not be justified and that it is appropriate to press ahead on the dates already set aside in April 2020.”

81. By letter dated 14 February 2020, GoG made disclosure of responses from the Ministry of Energy, the Ministry of Finance, the Volta River Authority (“**VRA**”) and the Energy Commission (the “**Energy Commission**”, a statutory body established by the Energy Commission Act 1997 (the “**Energy Commission Act**”) to implement the energy policies of the GoG, while acting under the auspices of the Minister responsible for Energy)<sup>4</sup> pursuant to the Tribunal’s Order of 25 January 2020. GoG informed the Tribunal that it had not received the documents requested from GPGC, namely: (i) the audited accounts for 2017 and 2018; (ii) the documents evidencing tenders for construction of the dedicated gas pipeline and the winning bid of China Petroleum Pipeline West Africa (“**China Petroleum**”); (iii) the design layout of the gas pipeline from the site owned by Blue Ocean Investments Limited (“**Blue Ocean Ltd**”), (the “**Blue Ocean Site**”) to the VRA Metering Station; and (iv) the state of the construction of the gas pipeline at the time of termination of the EPA by GoG. GoG applied to the Tribunal for an order requiring GPGC to produce the documents.

82. On 17 February 2020, GoG made the following clarification with reference to its letter of 14 February 2020:

“... Respondent has discovered a letter dated September 27, 2019 from Claimant to Ms Helen Brown in which the Claimant included documents responsive to the Respondent’s Request 2, 3 and 4. The email and its attachment unfortunately found its way into our spam box. Accordingly, the Respondent’s request to the Tribunal for an order as regards its Requests 2, 3 and 4 is moot and should be disregarded. However, the Respondent maintains that the Claimant has not submitted its Audited accounts for the years 2017 and 2018 contained in its Document Production Requests 1.”

83. By email dated 18 February 2020, GPGC stated, *inter alia*, that none of GoG’s communications since the Tribunal’s Order of 25 January 2020 justified its continuing non-disclosure of complete and unredacted versions of the PPA Committee Report, the A-G’s Advice, the Cabinet Memorandum and the Cabinet Decision. GPGC demanded

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<sup>4</sup> Exhibit C-112.

that GoG disclose these four documents by no later than 5 p.m., GMT, on 19 February 2020.

84. By letter dated 19 February 2020, GoG reiterated the constraints upon its ability to release the PPA Committee Report, the A-G's Advice, the Cabinet Memorandum and the Cabinet Decision in the manner and form requested by GPGC. GoG affirmed that:

“The Respondent recognizes that the Claimant may draw adverse inferences in due course. However, the enormity of potential legal suits one of which is highlighted in the letter from the Managing Director of the Electricity Company of Ghana, makes it exceptionally difficult to disclose the documents requested ... This decision should not in any way be construed as disobedience of the Order of the Tribunal or the denial of the request of the Claimant.”

85. By email dated 19 February 2020, sent on behalf of both Parties by GPGC, the Parties informed the Tribunal of their agreed statement of position in respect of the Tribunal's directions of 13 February 2020 regarding the hearing dates and the Procedural Calendar. GoG: (i) took the position that maintaining the hearing dates, which the Parties agreed would require the filing of its Rejoinder within half or less of the original time allocated to GoG, would cause GoG significant difficulties; (ii) proposed that the hearing be rescheduled for the month of June 2020 or thereafter; and (iii) stated that it considered that no more than four hearing days were required. GPGC indicated its willingness to accommodate GoG's request, provided that new hearing dates were found prior to November 2020. GPGC further noted that: (i) it believed that three hearing days would be sufficient; (ii) it did not object to the hearing days including the weekend; and (iii) its team was available between 20 June and 4 July 2020, 5 and 27 September 2020 and 3 and 17 October 2020. The Parties sought confirmation of the Tribunal's availability for either a three-day or four-day hearing (including weekend days) during any of the aforementioned periods.
86. By email dated 21 February 2020, and while the Tribunal expressed its preference to retain the April 2020 hearing dates, the members of the Tribunal confirmed their availability for a hearing over the four days Saturday 3 October 2020 and Monday-Wednesday 5-7 October 2020.

87. By email dated 21 February 2020, GPGC again pressed GoG to comply with its disclosure obligations and by 5 p.m., GMT, on 24 February 2020 to produce a complete and unredacted version of the PPA Committee Report.
88. By letter dated 27 February 2020, GPGC:
- (a) reported upon the discussions between the Parties pursuant to the Tribunal’s directions of 20 February 2020, by which the Tribunal made clear that it would not vacate the April 2020 hearing dates until the Parties had proposed an agreed timetable leading up to an early October 2020 hearing. GPGC informed the Tribunal that: (i) it had submitted a revised Procedural Calendar to GoG on 24 February 2020 and it had called upon GoG to agree to bear the entirety of any cancellation fees of the Tribunal, “... *given that the hearing was being rescheduled at Respondent’s request, following Respondent’s numerous failures to comply with the Tribunal’s orders during the disclosure phase.*”; and (ii) by its response of 25 February 2020, GoG had rejected the revised Procedural Calendar and proposed that the “*original procedural timetable should be maintained to preserve the April [2020] hearing dates*”; and
  - (b) pressed its application that the April 2020 hearing dates be vacated and the hearing rescheduled for October 2020 “*in order to avoid penalising Claimant for Respondent’s procedural misconduct*”.
89. By email dated 28 February 2020, noting its communication of 21 February 2020, GPGC requested GoG to comply with the Tribunal’s Orders to disclose the PPA Committee Report, the A-G’s Advice, the Cabinet Memorandum and the Cabinet Decision by no later than 5 p.m., GMT, on 28 February 2020.
90. On 28 February 2020, the Tribunal invited GoG to comment upon both GPGC’s application to adjourn the hearing and the matters raised by GPGC in its letter to the Tribunal of 26 February 2020 by no later than midday, GMT, on 29 February 2020. Specifically the Tribunal required to know: (i) whether GoG agreed to the adjournment of the April 2020 hearing or, if it maintained its objection, the basis upon which it contended that the Tribunal should deny GPGC’s application to adjourn the hearing until 3, 5, 6 and 7 October 2020; (ii) how GoG proposed that the Tribunal should deal with the costs thrown away in the event that the adjournment was agreed or, if contested, the

Tribunal were to accede to the application for an adjournment; and (iii) whether, in the event of an adjournment, GoG would agree to the adoption of the amended Procedural Calendar proposed by GPGC set out in its letter of 26 February 2020.

91. By email dated 28 February 2020, GoG confirmed to the Tribunal that:

“(i) In view of the considerable time lost, the Respondent will now agree to an adjournment of the hearing to 3, 5, 6 and 7 October 2020.

(ii) The Respondent respectfully submits that the costs thrown away due to the adjournments should be borne in equal proportion by the Parties. Without being repetitive, the Respondent has not delayed the proceedings to warrant being mulcted in costs thrown away but has acted within the limits of the Procedural Calendar and orders of the Tribunal. It should also be underscored that the Claimant also delayed the production of documents requested by the Respondent. In the circumstances, and in the spirit of fairness, the Respondent is prepared to make a concession of proportional payment of any accrued costs.

(iii) In the event of an adjournment the Respondent would agree to the adoption of the amended Procedural Timetable proposed by the Claimant as set out in Three Crowns letter to Amofa & Partners of 24 February 2020.”

92. By email dated 29 February 2020, GPGC responded to GoG’s letter of 28 February 2020. It:

- a. noted GoG’s agreement to an adjournment of the hearing until October 2020 and to the adoption of GPGC’s revised Procedural Calendar;
- b. noted that the allocation of costs resulting from the adjournment remained in contention;
- c. reiterated that, in the course of the discussions following the Tribunal’s 13 February 2020 intervention, the principal concern of GoG, so far as the retention of the April 2020 hearing dates was concerned, had been the curtailment of time for the preparation of its Rejoinder; and
- d. insisted that the real cause of the disruption to the Procedural Calendar was *“Respondent’s repeated and continuing non-compliance with the Tribunal’s directions regarding disclosure”*.



93. On 1 March 2020, the Tribunal issued Procedural Order No.2, by which it confirmed the revised Procedural Calendar (“**PO2**”):

- “1. The hearing dates in week commencing 27 April 2020 shall be vacated.
2. The hearing shall take place in London on 3, 5, 6 and 7 October 2020.
3. The revised procedural timetable of 24 February 2020 agreed between the Parties is hereby adopted.
4. All and any costs thrown away by reason of the adjournment (as fixed by the Tribunal), including, but not limited to, the Tribunal’s cancellation charges, lost hearing centre and hotel deposits and airline cancellation fees, shall be paid by Respondent in any event. All further matters as to costs are reserved for determination in the Final Award herein.”

94. On 13 March 2020, GPGC submitted its Statement of Reply (the “**Cl. Reply**”) and electronic copies of: (i) accompanying fact exhibits C-115 to C-170, together with a consolidated index of fact exhibits; (ii) legal authorities CLA-4 to CLA-12, together with a consolidated index of legal authorities; (iii) the second witness statement of Mr Andrea Parisotto dated 13 March 2020 (the “**Parisotto Second WS**”); (iv) the witness statement of Mr Damian Duncan dated 13 March 2020; and (v) the second Expert Report of Ms Ellen Smith of FTI Consulting dated 13 March 2020 (the “**Smith Second ER**”), together with expert’s exhibits ES-015 to ES-024.

95. By letter dated 30 March 2020, the PCA, in accordance with Article 43(2) of the UNCITRAL Rules and paragraph 14.2 of the ToA, and in order to ensure sufficient funds for the Tribunal’s fees and expenses, invited the Parties to provide a supplementary deposit of US\$ 350,000 (*i.e.*, US\$ 175,000 from each Party) by 30 April 2020.

96. On 6 April 2020, GPGC wrote to point out that GoG had not responded to GPGC’s communications of 21 and 28 February 2020 and had not disclosed the PPA Committee Report, the A-G’s Advice, the Cabinet Memorandum and the Cabinet Decision. GPGC demanded the production of these Tribunal-ordered documents without further delay and by no later than 5 p.m., GMT, on 10 April 2020.

97. By email dated 22 April 2020, the Tribunal invited GoG to provide its response to GPGC’s communication of 6 April 2020 by no later than 5 p.m., BST, on 24 April 2020.

98. By email dated 3 May 2020, the Tribunal, in light of the ongoing impact of the Covid-19 pandemic, requested the Parties' counsel to confer regarding the basic modalities for a full or partially online/remote hearing in the event that it should prove impossible to proceed with an in-person hearing as envisaged in October 2020.
99. On 11 May 2020, the PCA wrote to the Parties reminding them that payment of the supplementary deposit of US\$ 350,000 (*i.e.*, US\$ 175,000 from each Party) had fallen due on 30 April 2020.
100. By email dated 14 May 2020, GPGC, on behalf of both Parties, requested a brief extension until 29 May 2020, for the Parties to revert to the Tribunal regarding possible alternatives to an in-person hearing.
101. By letter dated 14 May 2020, the PCA acknowledged receipt of a remittance in the amount of US\$ 175,000.00 from GPGC, representing its share of the supplementary deposit.
102. On 22 May 2020, GoG submitted its Rejoinder (the "**Resp. Rejoinder**") and electronic copies of: (i) the witness statement of Mr Ebenezer A. Baiden (the "**Baiden WS**"); (ii) exhibits R-35 and R-36; (iii) legal authorities RLA-4 to RLA-13; and (iv) Appendix RA.
103. By emails dated 29 and 30 May 2020, the Parties informed the Tribunal that: (i) the Parties had no objection in principle to proceeding with a remote hearing if necessary; (ii) in that event, the Parties would have no objection to using the Zoom platform as recommended by the PCA; (iii) in principle, the Parties agreed to seek assistance from technical support personnel in presenting documents during the hearing; and (iv) the Parties proposed jointly to request the PCA to handle the arrangements for transcription services should a remote hearing be necessary.
104. On 1 June 2020, the Tribunal asked the Parties, in conjunction as necessary with the PCA, to make preliminary enquiries of the International Dispute Resolution Centre in London (the "**IDRC**") in order: (i) to ascertain what facilities remained available at the IDRC on the hearing dates in October 2020; and (ii) to discuss with IDRC what support it would be able to offer in the event that it was necessary to adopt a remote hearing option. With reference to the organisation of a remote hearing, the Tribunal proposed to

reduce the number of hearing hours per day to a maximum of five hours (one block of two hours with a 10 minute break; forty minutes at most for the lunch adjournment; and a second block of two hours with a further 10 minute break); in order to compensate for this reduction of hearing hours, the Tribunal indicated that it would reserve one or two extra hearing days in addition to the dates already set aside (3, 5 6 & 7 October 2020), should the Parties consider that necessary.

105. On 5 June 2020, the Parties filed their respective notices of witnesses and experts for cross-examination at the hearing.

106. By email dated 15 June 2020, sent on behalf of both Parties by GPGC, the Parties requested the Tribunal to consider dispensing with the requirement for pre-hearing written skeleton arguments in the interests of avoiding repetition and reducing costs. By email of even date, the Tribunal stated the following:

“... the Tribunal is content to accommodate the Parties’ request. The Tribunal proposes that, in lieu of written skeleton arguments, the Parties be invited to file summary briefing notes in advance of the hearing which set out the main strands of the Parties’ respective positions. The Tribunal has in mind that such notes should be no more than five pages in length and that they be filed by Friday 25 September 2020. ...”

107. On 17 June 2020, the Parties agreed with the Tribunal’s proposal for the Parties to file summary briefing notes of no more than five pages in length in advance of the hearing by 25 September 2020.

108. By letter dated 24 June 2020, the PCA, with reference to its letters of 30 March and 11 May 2020, recorded that: (i) GoG’s share of the supplementary deposit had not been received; and (ii) pursuant to Article 43(4) of the UNCITRAL Rules, either Party was invited to make the outstanding payment of US\$ 175,000 by 27 July 2020, after which time the Tribunal would be entitled to consider the suspension or termination of the arbitral proceedings.

109. On 1 July 2020, the Parties responded to the Tribunal regarding the contingency arrangements for a remote hearing. In particular, the Parties: (i) agreed on the use of Zoom as recommended by the PCA and the IDRC; and (ii) confirmed their agreement to engage Opus 2 to provide real time transcription and evidence display services and to use the Opus 2 Platform to upload the arbitration record (including the Parties’ pleadings) for

use at any remote hearing. By a separate email of the same date, the Parties proposed that they should prepare an agreed procedural order in respect of the organisation of the hearing. The Tribunal invited them to proceed accordingly.

110. By email dated 2 July 2020, the Tribunal informed the Parties that it was content to proceed on the basis outlined in the Parties' communication of 1 July 2020. The Tribunal confirmed that it would also hold available 8 and, if necessary, 9 October 2020.
111. By email dated 3 July 2020, GoG undertook to pay its share of the deposit (US\$ 175,000.00) not later than 27 July 2020.
112. On 31 July 2020, the Parties sent draft Procedural Order No. 3 relating to the organisation of the hearing to the Tribunal. The Parties suggested that a pre-hearing organisational meeting as contemplated in the Procedural Calendar need not be convened. In addition, in order to allow sufficient time for the hearing arrangements to be finalised, GoG requested the Tribunal to decide, in consultation with the Parties, whether the hearing would proceed in-person or remotely by 14 August 2020, while GPGC was content to wait until 4 September 2020 for such decision.
113. By email dated 31 July 2020, the PCA asked GoG to provide an update as to the status of the payment of the outstanding supplementary deposit.
114. By further email dated 3 August 2020, the PCA again requested GoG to provide an update as to the status of the payment of the deposit as soon as possible, and in any event, by no later than 4 August 2020.
115. By email dated 3 August 2020, GoG sought a delay in the provision of the update on the status of payment of the deposit until 6 August 2020 as 4 August 2020 was a public holiday in Ghana.
116. On 4 August 2020, the Tribunal approved the extension requested by GoG.
117. By email dated 7 August 2020, GoG informed the PCA that the Ministry of Finance of Ghana was "*taking all necessary steps to process and effect the payment by 14<sup>th</sup> August, 2020.*" GoG asked the Tribunal to grant a further extension to 14 August 2020 to enable it to make the payment.

118. On 7 August 2020, the Tribunal approved the extension requested by GoG.
119. On 17 August 2020, GPGC circulated an indicative list of participants at the remote hearing.
120. On 18 August 2020, after consultation with the Parties, the Tribunal issued Procedural Order No. 3 in terms agreed with the Parties.
121. On 24 August 2020, the PCA wrote to GoG, pointing out that the payment of the deposit due on 14 August 2020 in accordance with GoG's communication of 7 August 2020 was still outstanding.
122. On 25 August 2020, GoG assured the PCA that the payment of its share of the deposit *"would be made by the end of this week."*
123. In the absence of payment, by email dated 31 August 2020, the PCA sought a further update from GoG as to the status of the payment.
124. By email dated 7 September 2020, the PCA requested GoG to clarify its position, so far as its failure to pay its share of the deposit was concerned.
125. By email dated 8 September 2020, GoG provided the following clarification:

*"We wish to inform you that payment of the Respondent's Supplementary Deposit of USD 175,000.00 has been receiving attention from the Ministry of Finance and relevant institutions of the Respondent. The delay in making payment is due to administrative challenges at the various approval process steps."*
126. By letter dated 8 September 2020, the PCA acknowledged receipt of a payment in the amount of US\$ 175,000.00 from GoG.
127. On 17 September 2020, GPGC circulated electronic copies of all documents on the record for use at the hearing (the **"Hearing Bundle"**).
128. On 25 September 2020, GPGC filed its pre-hearing Summary Briefing Note (the **"CI. Summary Briefing Note"**).
129. On 25 September 2020, GoG filed its pre-hearing Summary Briefing Notes (the **"Resp. Summary Briefing Notes"**).

130. By email dated 25 September 2020, GPGC, on behalf of both Parties, circulated a final list of representatives attending the hearing and a Draft Indicative Hearing Schedule (the “**Hearing Schedule**”).
131. By email dated 2 October 2020, the Tribunal invited the Parties to confirm that they intended to proceed according to the Hearing Schedule. Confirmation by both Parties was forthcoming on the same day.
132. By email dated 2 October 2020, the PCA informed the Parties of certain logistical arrangements for the hearing. GoG replied to the PCA on 4 October 2020.
133. On 5 October 2020, GPGC filed its Opening Statement.
134. The hearing was held by videoconference between 5 October 2020 and 9 October 2020, (the “**Hearing**”). The following persons were present at the Hearing:

For Claimant:

| No  | Name                      | Role                            | Location   |
|-----|---------------------------|---------------------------------|--|
| 1.  | Dr Gaëtan Verhoosel       | Claimant’s Counsel              | London, United Kingdom                               |
| 2.  | Mr Manish Aggarwal        | Claimant’s Counsel              | London, United Kingdom                               |
| 3.  | Mr Jonathan Fernandes     | Claimant’s Counsel              | London, United Kingdom                               |
| 4.  | Dr Ahmed El Far           | Claimant’s Counsel              | London, United Kingdom                               |
| 5.  | Ms Holly Pelham-Stewart   | Assistant to Claimant’s Counsel | London, United Kingdom                               |
| 6.  | Mr Kimathi Kuenyehia, Sr. | Claimant’s Counsel              | Accra, Ghana   |
| 7.  | Mr Reginald Odoi          | Claimant’s Counsel              | Accra, Ghana   |
| 8.  | Mr Sefakor Kuenyehia      | Claimant’s Counsel              | Accra, Ghana   |
| 9.  | Mr Aden Turna             | Claimant’s Representative       | Geneva, Switzerland                                  |
| 10. | Mr Tim Baker              | Claimant’s Representative       | Geneva, Switzerland                                  |
| 11. | Mr Andrea Parisotto       | Claimant’s Fact Witness         | Cava Manara, Italy                                   |
| 12. | Mr Damian Duncan          | Claimant’s Fact Witness         | London, United Kingdom                               |
| 13. | Ms Ellen Smith            | Claimant’s Expert Witness       | Newburyport, Massachusetts, United States of America |

|     |                   |                                |   |
|-----|-------------------|--------------------------------|---|
| 14. | Mr Pat Dunne      | Claimant's Expert Witness Team | Boston, Massachusetts, United States of America |
| 15. | Mr Julian Delamer | Claimant's Expert Witness Team | London, United Kingdom                          |
| 16. | Mr James Wong     | Claimant's Expert Witness Team | London, United Kingdom                          |

For Respondent:

| No  | Name                            | Role  | Location     |
|-----|---------------------------------|---|--------------|
| 1.  | Miss Gloria Afua Akuffo         | Attorney General and Minister for Justice                 | Accra, Ghana |
| 2.  | Mr Godfred Yeboah Dame Esq.     | Deputy Attorney General and Minister for Justice          | Accra, Ghana |
| 3.  | Mrs Helen Awo Ziwu              | Solicitor-General of Ghana                                | Accra, Ghana |
| 4.  | Mrs Anna Pearl Akiwumi Siriboe  | Chief State Attorney/Director, Energy Division            | Accra, Ghana |
| 5.  | Mrs Grace Oppong-Dolphy         | Principal State Attorney                                  | Accra, Ghana |
| 6.  | Ms Yvonne Bannerman             | Snr. State Attorney                                       | Accra, Ghana |
| 7.  | Ms Sharon Owoo                  | State Attorney  | Accra, Ghana |
| 8.  | Mrs Penninah Agyakwa A. Danquah | Personal Assistant to the Attorney-General                | Accra, Ghana |
| 9.  | Hon William Owuraku Aidoo       | Deputy Minister for Energy                                | Accra, Ghana |
| 10. | Mr Lawrence Apaalse             | Chief Director, Ministry of Energy                        | Accra, Ghana |
| 11. | Mr Solomon Adjetey              | Director, Generation and Transmission, Ministry of Energy | Accra, Ghana |
| 12. | Mrs Anita Lokko                 | Head of Legal, Ministry of Energy                         | Accra, Ghana |
| 13. | Ms Seyram Adablah               | Senior Legal Counsel, Ministry of Energy                  | Accra, Ghana |
| 14. | Ms Fiona Oppong                 | Senior Legal Counsel, Ministry of Energy                  | Accra, Ghana |
| 15. | Mr Hanson Monney                | Respondent's Fact Witness                                 | Accra, Ghana |
| 16. | Dr Alfred Ofosu Ahenkorah       | Respondent's Fact Witness                                 | Accra, Ghana |
| 17. | Mr Ebenezer Ahuno Baiden        | Respondent's Fact Witness                                 | Accra, Ghana |

|     |                            |  |              |
|-----|----------------------------|--|--------------|
| 18. | Mr Richard Oppong-Mensah   | Respondent's Expert Witness              | Accra, Ghana |
| 19. | Mr James Demitrius         | Head of Revenue Unit, Ministry of Energy | Accra, Ghana |
| 20. | Mr Emmanuel Amofa Esq.     | Managing Partner, Amofa & Partners       | Accra, Ghana |
| 21. | Miss Afua Korankyawaa Ntim | Associate, Amofa & Partners              | Accra, Ghana |
| 22. | Ms Gloria Osei-Nyame       | Associate, Amofa & Partners              | Accra, Ghana |

135. In the course of the Hearing, on 7 October 2020, the Tribunal gave the following procedural directions:

“The Tribunal informs the Parties that it does not require the Parties to present oral closing arguments on the last day of the hearing. ... The Tribunal proposes that each of the Parties use some or all of the hour allocated to it on Friday, 9 October 2020 to highlight those matters, which have emerged in the course of this week’s hearing to which they ascribe particular importance and to which they consider that the Tribunal should have particular regard in the course of its further deliberations.”

136. By letter dated 13 October 2020, the PCA, in accordance with Article 43(2) of the UNCITRAL Rules and paragraph 14.2 of the ToA, and in order to ensure sufficient funds for the Tribunal’s fees and expenses, invited the Parties to make a supplementary deposit of US\$ 70,000 (*i.e.*, US\$ 35,000 from each Party) by 12 November 2020.

137. On 4 November 2020, GPGC filed its statement of costs (the “**Cl. Statement of Costs**”). GoG failed to submit its statement of costs (the “**Resp. Statement of Costs**”) within the deadline (*i.e.* on 4 November 2020). By email dated 6 November 2020, GPGC requested the Tribunal to direct GoG to explain why it had not filed the Resp. Statement of Costs and to file it without delay. By email of even date, the Tribunal directed GoG to submit its Resp. Statement of Costs by no later than 9 November 2020, a direction with which GoG complied.

138. By letter dated 5 November 2020, the PCA acknowledged receipt of US\$ 35,000 from GPGC, representing payment of its share of the supplementary deposit, as requested in the PCA’s letter of 13 October 2020, in accordance with Article 43(2) of the UNCITRAL Rules and paragraph 14.2 of the Terms of Appointment.



139. On 6 November 2020, the Parties jointly submitted to Opus2 a list of amendments to the transcript. All but four of those amendments were agreed between the Parties; and in respect of the four contested amendments, the Parties requested Opus2 to review the audio recording and to provide comments to the Parties for final agreement.
140. On 9 November 2020, Opus2 advised the Parties that they would be unable to deliver the corrected transcripts by 11 November 2020, when the Parties were due to send to the Tribunal the final agreed version of the Hearing transcript (the “**Transcript**”), in part, because of the disruption caused by Covid-19 pandemic-related restrictions in the UK.
141. On 11 November 2020, the Parties requested additional time to liaise with Opus2 to finalise and deliver the corrected Transcript. By email of even date, the Tribunal allowed the additional time requested.
142. On 13 November 2020, GPGC filed one comment on the Resp. Statement of Costs, noting the Tribunal’s direction given at the Hearing (the Tribunal “*would simply want to be assured that the costs charged had been paid.*”).<sup>5</sup> GPGC invited GoG to confirm that all the “*incurred*” costs identified in the Resp. Statement of Costs had indeed been paid. GoG did not file any comments on the Cl. Statement of Costs.
143. By email of 14 November 2020, the Tribunal requested GoG to confirm that it had paid all of the costs identified in the Resp. Statement of Costs as “*incurred*”.
144. On 20 November 2020, Opus2 circulated to the Tribunal and the Parties the agreed version of the Transcript.
145. On 25 November 2020, GoG confirmed that certain of the costs recorded as “*incurred*” in the Resp. Statement of Costs had not been paid. According to GoG, the following expenses remained outstanding: (i) US\$ 35,000.00 of the US\$ 310,000.00 deposits in respect of the Tribunal’s fees and expenses and PCA charges; (ii) £2,460.00 in respect of the production of, and courier charges for, the Hearing Bundle for which GPGC was to provide GoG with an invoice; and (iii) Amofa & Partners’ legal fees and costs in respect of the Hearing had yet to be invoiced.

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<sup>5</sup> Transcript, Day 5, pp. 80 & 81.

146. By letter dated 27 November 2020, the PCA acknowledged receipt of US\$ 35,000 from GoG, representing payment of its share of the supplementary deposit, as requested in the PCA's letter of 13 October 2020, in accordance with Article 43(2) of the UNCITRAL Rules and paragraph 14.2 of the ToA.

### III. THE DISPUTE

147. By early 2015, GoG was faced with an electricity supply crisis in that demand outstripped domestic supply. In February 2015, GPGC and GoG entered into negotiations for the provision by GPGC of a fast-track power generation solution involving the relocation of two existing GE LM 6000 aeroderivative gas turbine combined-cycle power plants from Italy to Ghana (the "**Project**"), capable of providing GoG with an emergency power supply of up to 107 megawatts ("**MW**") for a guaranteed term of four years (the "**GPGC Equipment**").

148. Following the identification of a potential site for the power plants in Ghana at Aboadze, GoG and GPGC entered into the EPA at the centre of this dispute on 3 June 2015. The EPA between GPGC and GoG was one of a number of such PPAs entered into by GoG. The EPA was a tolling agreement;<sup>6</sup> GPGC was to bear all of the costs of dismantling the plants in Italy, transporting them to Ghana and installing, operating and maintaining them there to the point that the plants achieved commercial operation and they were ready to earn tariff revenues.

149. In the course of June 2015, a GoG team, led by Mr Francis Dzata, the Technical Advisor to the Minister of Power ("**Mr Dzata**"), undertook a technical inspection of the power plants in Italy and approved their use for the Project.<sup>7</sup> Work to dismantle the plants in Italy began in April 2016 and they were shipped to Ghana in November 2016.<sup>8</sup>

150. Following a General Election in Ghana in December 2016 and a change of government in January 2017, the incoming government was concerned that the commitments into

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<sup>6</sup> As confirmed by Clause 7(a) of the EPA.

<sup>7</sup> Exhibit C-31: Ministry of Power "*Due Diligence Report on Two (2NO) TEI Energy S.p.A. of Italy LM6000 Combined Cycle Power Plants*" 24 June 2015.

<sup>8</sup> Exhibits C-74 & C-75.

which its predecessor had entered would result in a substantial excess supply to the National Grid.

151. Unbeknownst to GPGC at the time, a committee had been established by the Ministry of Power prior to the change of government to conduct a review of the PPAs into which GoG had entered (the “**PPA Committee**”). It had continued its work after the election and had submitted a final draft report, the PPA Committee Report, in April 2017.<sup>9</sup> Thereafter, on 28 August 2017, the Attorney-General of Ghana submitted her own Review of the PPAs to the Minister of Energy for consideration by the Cabinet (the “**A-G’s Advice**”).<sup>10</sup>
152. In November 2017, the Minister of Energy reported to Parliament that the PPA Committee Report had recommended that four PPAs with a combined capacity of 1,810MW be deferred until 2018-2025, three PPAs with a combined capacity of 1,150MW be deferred beyond 2025 and 11 PPAs with a combined capacity of 2,808MW, among them the GPGC EPA, be terminated.
153. The Minister told Parliament that:

“... the Government stands to make significant savings from the deferment and/or termination of the reviewed PPAs. The estimated cost for the terminations is USD 402.39 million, compared to an average annual capacity cost of USD 586 million each year or a cumulative cost of USD 7.619 billion from 2018 to 2030.”<sup>11</sup>

154. By letter dated 18 February 2018, the Ministry of Energy purported to terminate the EPA. Noting that as GPGC “*well knew*”:

“... the [EPA] was executed during the power crises as an emergency power Project. The term of the Agreement commences from the Signature Date until forty-eight (48) days after Full Commercial Operation Date.

In accordance with the terms and conditions of the Agreement, the Agreement should have become effective on 3<sup>rd</sup> August 2015 except the parties mutually extend the period for the fulfilment of the Conditions Precedent to the effectiveness of the Agreement.

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<sup>9</sup> Exhibit C-136.

<sup>10</sup> Exhibit C-144 is a substantially redacted copy of the A-G’s Advice.

<sup>11</sup> Exhibit C-151, pp. 3361-3362.

Following a review of the agreement and of the Project, we note that the parties have not mutually extended the period for the fulfilment of the Conditions Precedent.”

155. In its letter, the Ministry of Energy further contended that it was entitled to terminate the EPA with immediate effect pursuant to Section 4(g) of the EPA, because:

- a. GPGC had neither reached financial close, nor achieved Full Commercial Operation Date, largely because some of the Conditions Subsequent upon which the latter commitments were dependent had not been fulfilled 30 days after the Effective Date;
- b. contrary to the requirements of Section 11 of the Energy Commission Act, GPGC had not obtained a licence to engage in the business or commercial activity for the sale of electricity from the Energy Commission. GPGC therefore had no capacity to execute the EPA and “(a)ccordingly, the EPA is null and void for want of capacity”;
- c. GPGC had started construction activities on site without siting and construction permits and those activities were illegal; and
- d. the non-fulfilment of the Conditions Subsequent was:

“... wholly attributable to the action or inaction of GPGC and, if, on the date of termination, any Condition Subsequent has not been satisfied by GPGC as a result for reasons attributable to GPGC, GPGC shall pay GoG the Early Termination Payment and other reasonable costs incurred by GoG within ... 90 days of the issue, by GOG, of a termination notice.”<sup>12</sup>

156. An Order to Stop Work was issued by the Energy Commission on 20 February 2018.<sup>13</sup>

157. GPGC protested GoG’s purported termination by letter dated 26 February 2018.<sup>14</sup> Despite a number of what GPGC maintains were assurances on the part of GoG between April and July 2018 that the termination notice would be withdrawn and the Project

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<sup>12</sup> Exhibit C-21

<sup>13</sup> Exhibit C-107.

<sup>14</sup> Exhibit C-22.

reinstated, no formal confirmation that the EPA remained in effect was ever forthcoming. On 13 August 2018, GPGC accepted GoG's repudiation and terminated the EPA.<sup>15</sup>

158. GPGC says that it is apparent on the facts as they have now emerged, even from a less than complete record, that GoG's defences advanced in this arbitration, and which are based on the A-G's Advice, bear no relation to the reason why, in fact, GoG repudiated the EPA.
159. GPGC says that the true reason behind GoG's repudiation of the EPA was that, "*on the basis of [a] simple cost/benefit analysis*"<sup>16</sup>, GoG had concluded that it was cheaper to terminate the EPA rather than to allow GPGC to continue to commission the power plants and to begin to recoup its investment through tariff revenues for the life of the EPA. But having decided to repudiate the EPA, GoG failed to honour its obligation to make the Early Termination Payment to which it had committed under under Clause 25(b)(i) of the EPA (the "**Early Termination Payment**").

#### **IV. SUMMARY OF FACTS**

160. This summary does not purport to be an exhaustive summary of all matters of fact upon which the Parties have placed reliance in the course of these proceedings. However, the Tribunal considers that it would be helpful to set out, in chronological order, certain of the salient events and matters to which its attention has been drawn.

**February 2015:** GPGC entered into negotiations with GoG for the provision of a fast-track power generation solution, to be achieved by the relocation of the GPGC Equipment from Italy to Ghana, to alleviate the effects of Ghana's then ongoing power shortage crisis.

**February 2015:** visit by Mr Parisotto to Ghana to inspect the proposed site at Aboadze near Takoradi (the "**Aboadze Site**") with Mr Francis Dzata (Technical Advisor to the

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<sup>15</sup> Exhibit C-109.

<sup>16</sup> Transcript, Day 1, p. 6.

Minister of Power). The inspection included the area of the Aboadze Site on which an active oxidation pond was located.<sup>17</sup>

**February 2015 – March 2015:** the Parties continued discussions regarding the Aboadze Site, including in relation to available land space for the GPGC Equipment in light of the active oxidation pond on site.<sup>18</sup>

**2 April 2015:** Mr Wiafe of VRA provided Mr Parisotto with a topographic survey diagram of the proposed Aboadze Site, which showed the presence of the oxidation pond on site.<sup>19</sup>

**21 May 2015:** the VRA issued an excavation permit to GPGC for the Aboadze Site, referring to a geotechnical soil investigation to be conducted at the “*oxidation pond*”.<sup>20</sup>

**3 June 2015:** the Parties executed the EPA.<sup>21</sup>

**8 June 2015:** GPGC appointed Mr Parisotto as its Authorized Representative for the purposes of the EPA.<sup>22</sup>

**15 - 19 June 2015:** a GoG team led by Mr Dzata visited Italy to conduct a technical inspection of the GPGC Equipment to confirm its suitability for the purposes of the EPA.<sup>23</sup>

**24 June 2015:** the GoG team issued a detailed due diligence report based on its inspection, approving the use of the GPGC Equipment for the Project (with only limited adjustments).<sup>24</sup>

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<sup>17</sup> Exhibit C-116.

<sup>18</sup> Exhibits C-28 & C-116.

<sup>19</sup> Exhibit C-117.

<sup>20</sup> Exhibit C-119.

<sup>21</sup> Exhibit C-1.

<sup>22</sup> Exhibit C-30.

<sup>23</sup> Exhibit C-31.

<sup>24</sup> *Ibidem*.

**2 July 2015:** GPGC wrote to GoG to confirm, among other things, that, as required by the EPA, GPGC had provided GoG with a copy of the maintenance records for the GPGC Equipment.<sup>25</sup>

**From 21 July 2015:** Mr Parisotto was instructed to send weekly reports on the Project to Mr Andrew Ashong, a mechanical engineer at the VRA and assistant to Mr Dzata.<sup>26</sup>

**23 July 2015:** the Parliament of Ghana ratified the EPA.<sup>27</sup>

**30 July 2015:** Minutes of Meeting between GoG, GPGC, VRA, Ghana Grid Company (“**GridCo**”), Co-ver Engineering (GPGC subcontractor) signed by Mr Parisotto (GPGC Representative) and Mr Dzata (as “*GoG Representative*”).<sup>28</sup> The Minutes recorded, *inter alia*:

“GoG Authorized Representative: It was understood by the parties that Mr Francis Dzata would be officially appointed as an Authorized Representative of GoG and a deputy Authorized Representative may also be appointed.”

“GPGC has not yet received an official land allocation and it is essential that this is done to finalize any following document. It has been understood that the site where GPGC have already conducted the geotechnical survey – pending receipt of the Hazardous and Contamination report – is an active oxidation pond and therefore not suitable. Until the oxidation pond is relocated, GPGC cannot have access to the area. **GoG have anticipated that there are not other area [sic] available for the GPGC power plant. VRA/GoG would have to relocate the oxidation pond shortly. GGC needs a date when the area will be allocated and an unimpeded access to the area will be granted.**” (Emphasis added)

**15 August 2015:** Mr Dzata proposed the alternative Aboadze Site (the “**Alternative Aboadze Site**”) to GPGC for the purposes of the EPA.<sup>29</sup>

**18 August 2015:** letter GPGC (Duncan) to the Minister of Power by which GPGC informed GoG, *inter alia*, that:

- a. it had appointed Mr Parisotto as its Authorized Representative;

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<sup>25</sup> Exhibits C-1 & C-2.

<sup>26</sup> Exhibit C-32. Subsequent reports at Exhibits C-35 to C-38, C-40 to C-45, C-47 to C-52, C-54 to C-55.

<sup>27</sup> Exhibit C-3.

<sup>28</sup> Exhibit C-43 and Parisotto First WS, para. 43.

<sup>29</sup> Exhibits C-34 & 35.

- b. it had provided GoG with the maintenance records of the two power plants;
- c. it had notified GoG that a preliminary investigation had confirmed the suitability of the Aboadze Site, which had yet to be formally allocated and from which GoG was to evacuate the adjacent oxidation pond;
- d. it confirmed that it had applied to the Environmental Protection Agency for the requisite authorisations (described in the letter as an “EPA”);
- e. it confirmed that it had initiated discussions with GridCo for a Grid Connection Agreement (“**Grid Connection Agreement**”);
- f. it confirmed that it had applied to the Public Utilities Commission for confirmation/approval of the tariff stipulated in the EPA;
- g. it recorded that it had reached an initial agreement with Ghana Water Company (“**Ghana Water**”) for the provision of water; and
- h. it confirmed that, after a delay due to the unavailability of Ghana National Gas Company Limited (“**Ghana Gas**”), it had received gas samples for testing to ensure that they met the minimum fuel specifications stipulated in the EPA.

GPGC noted that it had yet to receive formal confirmation of the appointment of Mr Dzata as GoG’s Authorized Representative and it requested the formalisation of that appointment.<sup>30</sup>

**18 August 2015:** Mr Parisotto and Mr Dzata visited the Alternative Aboadze Site in order to assess its suitability for the purposes of the EPA.<sup>31</sup>

**26 August 2015:** email Parisotto – Ashong, in response to Mr Ashong’s request of 24 August 2015 for weekly updates on “*progress and challenges.*” Mr Parisotto noted that having asked GPGC to view a new site, GoG had confirmed its willingness to relocate the oxidation pond but that could take three months to carry out. The Alternative Aboadze Site had had to be ruled out, because GridCo was unable to relocate or divert

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<sup>30</sup> Exhibit C-4.

<sup>31</sup> Exhibit C-34.



the planned run of its 330kV overhead lines. *“The only available site is the oxidation pond that have [sic] to be relocated by GoG and it is on the critical path for the startup of the activities on site.”*<sup>32</sup>

**2 September 2015:** GoG appointed the then Minister of Power, Dr Kwabena Donkor, as its Authorized Representative, pursuant to Clause 9(b) of the EPA.<sup>33</sup>

**8 September 2015:** GPGC pressed for the urgent allocation of the Aboadze Site.<sup>34</sup>

**21 September 2015:** letter GPGC (Duncan) – Minister of Power. GPGC confirmed the successful sampling and testing of Ghana Gas and WAPCO gas and that the manufacturer of the plants, General Electric (“GE”) had indicated that both types of sampled gas were suitable for the operation of the GPGC Equipment. GPGC further confirmed that it had met two of the three conditions precedent required of it pursuant to the EPA, but it could not confirm the suitability or otherwise of the proposed Site until it had been officially allocated by GoG. GPGC sought the urgent allocation of a site and:

“an extension of the fulfilment period of the conditions precedent in order to reflect the time that the GoG deems necessary before it can officially allocate the site to GPGC.”

GPGC reiterated its request that GOG provide official notification of its authorized representative.<sup>35</sup>

**22 September 2015:** the Ministry of Power wrote to GPGC about the Aboadze Site, noting its efforts regarding the relocation of the active oxidation pond.<sup>36</sup>

**9 November 2015:** GPGC letter to the Minister of Power confirming the acceptability of the Aboadze Site, subject to the finalisation of boundaries.<sup>37</sup>

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<sup>32</sup> Exhibits C-34 & C-35.

<sup>33</sup> Exhibit R-2.

<sup>34</sup> Exhibit C-46.

<sup>35</sup> Exhibit C-39.

<sup>36</sup> Exhibit R-5.

<sup>37</sup> Exhibit C-125.

**Late November 2015:** in-person meeting between Mr Parisotto, Minister Donkor and Mr Dzata to discuss progress on the Project.<sup>38</sup>

**27 November 2015:** meeting between Mr Kirk Koffi (VRA's CEO) and Mr Parisotto at which Mr Koffi assured Mr Parisotto that the active oxidation pond would be relocated.<sup>39</sup>

**27 November 2015:** Mr Parisotto informed Mr Ashong that pending relocation of the oxidation pond, site activities remained on stand-by.<sup>40</sup>

**December 2015:** Resignation of Dr Donkor from the post of Minister of Power.

**18 January 2016:** receipt by GGC of a letter from the Public Utilities Regulatory Commission (the "PURC") dated 21 July 2015, approving the tariff set out in the EPA.<sup>41</sup> Throughout January 2016, GPGC continued to point out that uncertainty as to the allocation of the site was affecting GPGC's ability to progress the Project.<sup>42</sup>

**February 2016:** GPGC executed a contract to dismantle the Gorizia Plant in Italy.<sup>43</sup>

**9 March 2016:** VRA notified the Deputy Minister for Power that "*unexpected challenges*" affecting the Aboadze Site, notably the "*uneconomical*" relocation of the oxidation pond that would otherwise be required to accommodate the GPGC Equipment, had led it to investigate other options. VRA proposed a site in Kpone, Tema "*within the VRA buffer zone and the GridCo Transmission line corridor.*" VRA informed the Deputy Minister that it would request GPGC to inspect the site and to discuss "*the modalities of the land lease arrangements.*"<sup>44</sup>

**April 2016:** GPGC executed a contract to dismantle the Volta Plant in Italy and work to dismantle Gorizia Plant commenced.<sup>45</sup> Mr Parisotto instructed by Mr Ashong to send

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<sup>38</sup> Exhibits C-48, C-49 & C-51 and Parisotto Second WS, para. 8

<sup>39</sup> Parisotto First WS, para. 46.

<sup>40</sup> Exhibit C-51.

<sup>41</sup> Exhibits C-5, C-52 & C-54.

<sup>42</sup> Parisotto Second WS, para. 9.

<sup>43</sup> Exhibit C-55.

<sup>44</sup> Exhibit R-6.

<sup>45</sup> Exhibit C-56.

regular written reports to Mr Kwabena Kankam-Yeboah (VRA electrical engineer, seconded to the Office of the Technical Advisor, Minister of Power).<sup>46</sup>

**6 April 2016:** letter Ministry of Power revoking the allocation of the Aboadze Site. It proposed an alternative site, located some 250 kilometres away on the other side of Ghana, in Kpone, a coastal town near the district of Tema (the “**Kpone Site**”). GPGC was directed to commence discussions with Mr Dzata regarding a lease agreement for the Kpone Site.<sup>47</sup>

**30 April 2016:** GPGC, having been made aware of the issue that had arisen at the Aboadze Site and of the fact that an alternative site had been made available by VRA at Kpone, confirmed to the Ministry of Power (with copy to VRA) that it would proceed to conduct preliminary investigations to ascertain the suitability of the Kpone Site:

“... and afterward will communicate to GoG in writing on the suitability or otherwise of the site in line with Clause 3(a)(ii) of the [EPA].”<sup>48</sup>

**May-June 2016:** Mr Parisotto kept Mr Ashong, Mr Kankam-Yeboah, Mr Dzata and Mr Agbenyo updated on preparatory activities at the Kpone Site through regular written progress reports and other communications.<sup>49</sup> Notably on **31 May 2016**, Mr Parisotto submitted a further update on principal activities to Mr Kankam-Yeboah. He noted that a geotechnical investigation had been undertaken and a report was expected within days; the area had been pegged out; GridCo was to report on the connection to the new site; dismantling of the GPGC Equipment was under way in Italy and “*proceeding on schedule*”. Once dismantled, the parts were loaded into containers and held in locations close to the nearest ports of Trieste and Genoa; and contractors had been undertaking preliminary site visits. But:

“[p]ending clarification about the site allocation area and disposal area, the permitting document cannot be completed.”<sup>50</sup>

**14 June 2016:** Mr Parisotto informed Mr Dzata that:

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<sup>46</sup> *Ibidem* and Parisotto First WS, para. 22.

<sup>47</sup> Exhibit C-6.

<sup>48</sup> Exhibit C-57.

<sup>49</sup> Exhibits C-58, C-59, C-60, C-61 & C-64.

<sup>50</sup> Exhibit C-59.

“... we have started to clear the site treating the termite nests then removing the first layer of grass, bush and vegetables .... We will start with a temporary fencing around the whole area exceeding the marked area during the construction phase. We need to be sure that the area is free from anything that could impede or prevent the construction of GPGC power plant, including Third Party interests ...”<sup>51</sup>

That same day, Mr Dzata authorised GPGC to proceed to erect the fence around the Kpone Site and noted that GoG would have to obtain a letter of no objection from the VRA – seemingly to assist GoG to address any third party interests’ issues that might surface.<sup>52</sup>

**16 June 2016:** GPGC (Duncan) informed the VRA that following the switch from the Aboadze Site to Kpone, GPGC wished:

“to continue with preliminary investigations of the general suitability of the new site at Kpone and afterward carry out civil works if the site proves suitable for the project.

We will therefore be grateful if you indicate to GPGC you have “no objection” to the company’s use of the Kpone Site for the project.”

A copy of that letter was sent to Mr Dzata by Mr Parisotto on 20 June 2016.<sup>53</sup>

**27 June 2016:** VRA replied to GPGC, stating that it had “*no objection*” to the use of the Kpone Site, subject to the conclusion of a sub-lease for 25 years at a premium of GHS 4,410,000 and a ground rent (subject to five-yearly review) of GHS 11,500 and all subject to VRA Board Approval.<sup>54</sup>

**29 June 2016:** GPGC wrote to the Ghana Revenue Authority (the “**GRA**”), copying the Ministry of Power, applying for VAT relief and requesting an exemption from any taxes that would otherwise be levied on equipment to be imported into Ghana by GPGC.<sup>55</sup>

**20 July 2016:** the Ministry of Power instructed GPGC to:

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<sup>51</sup> Exhibit C-61.

<sup>52</sup> *Ibidem* and Parisotto Second WS, para. 27.

<sup>53</sup> *Ibidem*.

<sup>54</sup> Exhibit C-62.

<sup>55</sup> Exhibit C-63. See also GPGC’s further correspondence at Exhibits C-68 & C-71.

“put on hold [all site activities at Kpone] until the necessary Environmental & Social Impact Assessment (ESIA) procedures are duly carried out and the relevant licenses have been obtained in order to address the concerns of the community and to pave the way for a smooth project implementation.”<sup>56</sup>

**1 August 2016:** GPGC notified the Ministry of Power that it had entered into discussions with the VRA in respect of the release of the Kpone Site and that the VRA had indicated that it was:

“prepared, willing and ready to release the allocate[d] land for the project for free or at a peppercorn rent upon receipt of express directives from the Ministry to that effect.”

GPGC reminded the Ministry of GoG’s obligations pursuant to Article 5 of the EPA and requested the Ministry to write directly to the VRA to enable the release the Kpone Site to GPGC:

“We would therefore be grateful if the Ministry writes directly to the VRA to release to GPGC the allocated Kpone site for the project.”<sup>57</sup>

**4 August 2016:** the VRA instructed GPGC to cease all activities at the Kpone Site:

“... pending formal closure on all agreements and obligations, all activities on the site must cease with immediate effect.”<sup>58</sup>

That same day, news reports emerged of protests by the VRA workers’ union against the allocation of VRA-owned land to private investors (such as GPGC).<sup>59</sup>

**26 August 2016:** the VRA, first, reiterated its demand that GPGC cease all activities onsite until completion of negotiations and the approval of the VRA Board had been secured and, second, asserted that GPGC had occupied more land than had originally been intended for its project. While it was willing to grant a lease over the power plant site, it would grant short term (3 year) licences only for the additional land earmarked for the lay down area and for storage. Until such time as terms had been agreed and the VRA Board had signed off:

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<sup>56</sup> Exhibit R-11.

<sup>57</sup> Exhibit R-10.

<sup>58</sup> Exhibit C-67.

<sup>59</sup> Exhibits C-128, C-129 & C-133.

“... access to the site is prohibited.”<sup>60</sup>

**23 September 2016:** the VRA reiterated its demand that GPGC stop all work on site “*to avoid further action to remove your contractor from site.*” The VRA insisted that negotiations were not concluded and VRA Board approval had not been obtained. The VRA continued:

“Besides the above, we have also recently received a directive from the Ministry of Power reminding us generally to refrain from executing further any independent Power Projects which has [sic] not commenced construction. With this directive in place we envisage we will have challenges with our proposal to the VRA Board to grant you use of the land for the Project.”<sup>61</sup>

**17 October 2016:** the GRA assessed GPGC’s potential tax liability regarding GPGC’s equipment arriving in Ghana at EUR 10,839,036.00.<sup>62</sup>

**4 November 2016:** GPGC notified the Ministry of Power of delays experienced by the Project and of GridCo’s refusal to build a connection at Kpone to offtake electricity generated by the GPGC plants, leaving GPGC to design, procure and construct a transmission line.<sup>63</sup>

**15 November 2016:** GPGC requested the Ministry of Power’s assistance:

“for the grant of exemptions from payment of levies, VAT and taxes to enable us clear equipment and materials which have been imported and expected to arrive in Ghana shortly.”<sup>64</sup>

**21 November 2016:** the Ministry of Power requested the Tax Policy Unit at the Ministry of Finance to allow clearance of the GPGC Equipment due to arrive the following day. The Ministry of Power stated that:

“... the employer (GoG) is required to obtain approval for tax exemptions necessary for the importation, delivery, transport, installations,

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<sup>60</sup> Exhibit C-69.

<sup>61</sup> Exhibit C-131.

<sup>62</sup> Exhibit C-73.

<sup>63</sup> Exhibit C-74.

<sup>64</sup> Exhibit C-75.

commissioning, operation, maintenance of the materials and equipment for the implementation of the project.”<sup>65</sup>

**22 November 2016:** Mr William Bobie of the VRA wrote to Mr Daniel Morton of GPGC stating VRA’s intention to put on hold all discussions regarding the grant of the Kpone Site until the VRA was able to explain the rationale of the land grant to all stakeholders including “*the staff groups*”. The VRA undertook to inform GPGC if and when it might be ready to proceed with discussions.<sup>66</sup>

**20 December 2016:** GPGC requested the Ministry of Power’s assistance to:

“enable us clear our equipment from the Tema Port without the payment of import levies, VAT and taxes”.<sup>67</sup>

**7 January 2017:** assumption of power by the new President and governing party following the December 2016 General Election in Ghana.

**24 January 2017:** the VRA informed GPGC that it had “*decided not to proceed with the leasing of the above land [the Kpone Site] to your company*”.<sup>68</sup>

**24 February 2017:** location of an alternative site (the Blue Ocean Site) by GPGC and its approach to the Managing Director of Blue Ocean Ltd, Mr Bouvier- Baird, to propose that the parties enter into a lease agreement.<sup>69</sup>

**28 February 2017:** Mr Bouvier-Baird confirmed his agreement in principle to GPGC’s proposal regarding the lease, subject to certain conditions.<sup>70</sup>

**20 March 2017:** GPGC notified the Ministry of Energy that following VRA’s decision not to make the Kpone Site available, GPGC had:

“... identified an alternative site for the project and consider it necessary that we formally inform you that the proposed allocation of the Kpone Site for the project did not materialize.”<sup>71</sup>

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<sup>65</sup> Exhibit C-76.

<sup>66</sup> Exhibit C-133.

<sup>67</sup> Exhibit C-78.

<sup>68</sup> Exhibit C-7.

<sup>69</sup> Exhibit C-83.

<sup>70</sup> Exhibit C-134.

<sup>71</sup> Exhibit R-12.

**21 March 2017:** status update sent by Mr Parisotto to Mr Monney of the Ministry of Power. Mr Parisotto recorded the tasks that had been completed, including the further preliminary site definition and preliminary layout exercises, both attributable to “*a third site change*”; the dismantling of the plants in Italy and their arrival and storage in Ghana; and the fact that:

- a. civil works were on stand-by, by reason, first, of the VRA’s stop order and, second, its subsequent decision not to proceed with the lease;
- b. GPGC “*being aware of the lack of power in the country and persisting on this project*” had devoted time and resource to identify a new and available site. Mr Parisotto noted that: “*A site survey around the area that belongs to Puma has been done and discussions with GridCo are on-going pending the proposal from GridCo on how to connect the plant to the grid ...*”. He reminded Mr Monney that the EPA provided for a tax exemption for GPGC, which it anticipated would be facilitated speedily to allow the GPGC Equipment to be cleared.<sup>72</sup>

**April 2017:** Final Draft of the PPA Committee Report. The Committee had been established by the Ministry of Energy at the direction of the office of the President of Ghana. It was chaired by the Executive Secretary of the Energy Commission, Dr Alfred Ahenkorah, a witness in this arbitration.

The heavily redacted version of the PPA Committee in the record shows that the Committee set forth for consideration the option of termination of the EPA at an estimated cost of US\$ 18 million rather than the payment of an excess capacity charge of US\$ 24.9 million per annum over the contract period of 4 years.

In its Summary of Proposed Modification to PPAs of Committed Projects, the Committee noted that the GPGC Project was an:

“Emergency Plant with a 5-year PPA, used plant (not new) and high tariff. Major equipment has arrived at the Tema port awaiting tax exemption to clear.

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<sup>72</sup> Exhibit C-135.



Based on the 2018-2020 demand-supply capacity balance and the tariff rank of this project, the full capacity of this project will be excess (idle) resulting in estimated total cost of USD 115.48 Million within the duration of the PPA.

The likelihood of the plant being idle is further heightened by the fact that it is a pure natural gas fired turbine to be located in Tema where there is inadequate gas to feed it. There is therefore a high probability of the plant remaining idle even if allowed to proceed.

The actual development cost of the project to date should be verified and used as guide in negotiations for termination.”<sup>73</sup>

**17 April 2017:** news reports emerged that the new administration was taking steps to review and to terminate existing PPAs entered into by the previous government that were no longer considered necessary to meet Ghana’s ongoing power needs.<sup>74</sup>

**19 April 2017:** Valuation Certification of the independent valuer (Tripod Data Consult) engaged by GPGC to prepare a report determining the market rental value of the Blue Ocean Site.<sup>75</sup>

**20 April 2017:** GPGC gave “*formal notice*” to GridCo that it had identified an alternative site for the Project (i.e., the Blue Ocean Site) and it provided GridCo with the coordinates.<sup>76</sup>

**17 May 2017:** GPGC and Blue Ocean Ltd entered into a five-year lease agreement for the Blue Ocean Site.<sup>77</sup>

**30 May 2017:** the Ministry of Power informed GPGC that it had:

“taken note of the alternative site that has been identified by GPGC for the development of the project following VRA’s decision not to proceed with the leasing arrangements for the proposed Kpone site. We advise that you inform us about the identified alternative site and also keep the Ministry abreast with the status of the project”.<sup>78</sup>

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<sup>73</sup> Exhibit C-136.

<sup>74</sup> Exhibit C-84; Duncan at para. 16.

<sup>75</sup> Exhibit C-85.

<sup>76</sup> Exhibit C-138.

<sup>77</sup> Exhibit C-86.

<sup>78</sup> Exhibit C-9.

**June 2017:** GridCo conducted a Grid Impact Assessment following GPGC's acquisition of the Blue Ocean Site.<sup>79</sup>

**20 June 2017:** Cabinet Memorandum in respect of the PPA Committee Report.<sup>80</sup>

**19 July 2017:** the Environmental Protection Agency issued an Environmental Permit No. CE0063080112 regarding the Blue Ocean Site to GPGC to enable it:

“To commence Construction and Operation of the proposed 107MW Combined Cycle Thermal Power Plant and a 6km 14-inch diameter Single Lane Gas Pipeline project.”<sup>81</sup>

Copies were sent to the Ministry of Energy, the Energy Commission and the VRA.

**20 July 2017:** Cabinet decision on the PPA Committee Report.

**24 July 2017:** pursuant to GoG's obligations under the EPA to facilitate the process of securing the required approvals for tax exemptions and the like, the Ministry of Energy prepared a memorandum which it submitted to the Ministry of Finance for its consideration and approval and for onward transmission to Cabinet. The memorandum recorded, *inter alia*, that:

“... due to challenges in finding a suitable location within the Aboadze power complex, the project was relocated to a vacant land close [to] the Kpone Thermal Power Plant ... site in Tema. Currently, GPGC has secured a site in the Tema Free Zones Enclave for the project.”

The memorandum made clear, too, that GoG was aware that the “*project plans to commence construction.*”<sup>82</sup>

**27 July 2017:** GPGC applied to the Energy Commission for a generation licence.<sup>83</sup>

**28 July 2017:** GPGC notified the VRA that it intended to proceed with the construction of: “*a natural gas pipeline that will connect our power plant in Tema to the WAGPCo facilities in Tema.*” By way of background, GPGC recorded that:

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<sup>79</sup> Exhibit C-87.

<sup>80</sup> This document was not disclosed and is not part of the arbitration record.

<sup>81</sup> Exhibit C-12.

<sup>82</sup> Exhibit R-31.

<sup>83</sup> Exhibits C-90, C-91 & C-92.

“After two sites proposed by GoG (one in Aboadze and one in Tema) were determined to be unsuitable for operations ... GPGC took the decision in May 2017 to lease an adequate and suitable piece of land in Tema and to apply for relevant permits and to start construction. GPGC has informed GoG of the acquisition of the site and civil works are now underway at the site.”

GPGC requested VRA to confirm:

“the exact point where the GPGC gas pipeline can be connected to VRA’s metering station, the volume and pressure of gas that can be provided and indicate the person ... in your company that will take responsibility for this project.”<sup>84</sup>

**31 July 2017:** GPGC wrote to the Ministry of Finance, offering to pay certain import duties and taxes on condition that the Ministry of Finance provided a written assurance that those amounts would be refunded to GPGC pursuant to the EPA.<sup>85</sup>

**2 August 2017:** in response, the Ministry of Finance assured GPGC that:

“all payments made in respect of imports would be refunded upon the ratification of the exemptions provided for in the contract for which all relevant documentation are submitted to the Ghana Revenue Authority.”<sup>86</sup>

**8 August 2017:** the VRA replied to GPGC, providing certain of the information requested of it. It drew attention to the fact that the Interconnection Facility at Tema (Kpone) “*ha[d] become a critical point of interconnection for other upcoming Generation Companies in the Tema Enclave*”; that it was the subject of “*number of requests*”; and that VRA was conducting a Technical Feasibility study to assess its sustainability.<sup>87</sup>

That same day, GPGC entered into discussions with Ghana Water in respect of water availability, quality and connection points.<sup>88</sup>

**18 August 2017:** GPGC issued a tender for construction of the dedicated gas pipeline from the Blue Ocean Site to the nearest VRA metering station.<sup>89</sup>

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<sup>84</sup> Exhibit C-93.

<sup>85</sup> Exhibit C-94.

<sup>86</sup> Exhibit C-95.

<sup>87</sup> Exhibit C-97.

<sup>88</sup> Exhibits C-96, 99 & 102.

<sup>89</sup> Exhibit C-142.

**21 August 2017:** GPGC informed the VRA (copying the Minister of Energy) that it was: “about to start tendering the gas pipeline that should connect your metering station and our power plant.” GPGC requested information regarding the pressure range available at the VRA metering station.<sup>90</sup>

**28 August 2017:** the Attorney-General of Ghana presented the A-G’s Advice, prepared pursuant to the instructions of the Cabinet of 20 July 2017 and based upon the Cabinet Memorandum dated 20 June 2017 and the PPA Committee Report (*supra*), The A-G’s Advice is in the record in heavily redacted format.

The Attorney-General was asked to consider the then-extant PPAs in the context of four options: (i) proceed without modification; (ii) deferral until 2025; (iii) deferral beyond 2025; and (iv) termination. GPGC’s was among the PPAs under consideration for termination.

By way of preamble, the Attorney-General noted that the PPAs had been concluded at the height of a power crisis. She continued:

“... It has become necessary to review the implementation of the PPAs, because should all of them be implemented as originally scheduled, it would result in the production of excess energy with its attendant cost which would worsen the financial situation of the power sector. A review would therefore help to cut back on losses that would be incurred.”<sup>91</sup>

The Attorney-General noted, too, that the GPGC Project would result in costs of US\$ 115,480,000, if implemented, with its attendant high tariff.

On the basis of her understanding of the position, the Attorney-General considered that GPGC’s failure to obtain a licence from the Energy Commission left it with no capacity to enter into a PPA. Further, although GPGC was required to acquire siting and construction permits before embarking upon the construction and installation of a power plant, it had “*commenced construction on site*”. The Attorney-General concluded that GPGC’s construction activities “... *are accordingly illegal*.” She suggested that a further breach of Energy Commission policy arose by reason of the fact that the plants were not new – a conclusion apparently founded upon Clause 3(a) (iii) of the EPA, which requires

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<sup>90</sup> Exhibit C-143.

<sup>91</sup> Exhibit C-144, p. 2.

GoG to indicate “*its satisfaction with the state of the GPGC Plants, such satisfaction not to be unreasonably withheld.*”<sup>92</sup>

Noting further, first, that the Conditions Precedent had not been performed and that the EPA had not been extended by mutual agreement of the Parties and, second, that GoG had the option to terminate for GPGC’s failure to fulfil its Conditions Subsequent, the Attorney-General advised that GoG had the right to terminate the EPA on the following grounds:

- “(a) illegality for want of capacity of [GPGC] to enter into a PPA.
- (b) Failure to obtain Siting and Construction Permits.
- (c) Installation of used plant contrary to policy.
- (d) Failure on the part of [GPGC] to fulfil its CPs and conditions subsequent.”

The Attorney-General added that were GoG to terminate on the last of the four grounds, it would be entitled to Early Termination Payment under Clause 25.<sup>93</sup>

**31 August 2017:** the Energy Commission acknowledged receipt of GPGC’s submissions to complete its application for a provisional Wholesale Electricity Supply Licence and it confirmed that the application was being processed.<sup>94</sup>

**11 September 2017:** GPGC notified the Minister of Power that it had:

“... commenced with the site preparation works on the project site acquired in the Tema free zones area. Other activities towards the development of a dedicated gas pipeline to the project site are also ongoing. To this end, it has become essential to liaise with Authorized Representatives from the Ministry of Energy that will be responsible for coordinating activities with GPGC and resolving procedural questions that may occur.”

GPGC reiterated its request that such Authorized Representative(s) be appointed.<sup>95</sup>

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<sup>92</sup> ‘GPGC Plants’ is not an EPA Defined Term; the EPA references ‘GPGC Equipment’, which expressly includes the two GE aeroderivative Gas Turbines described in the Equipment Specifications in Annex 1 of the EPA. The Attorney-General’s premise is misconceived in any event: it was always going to be the case that GPGC would be relocating two used power plants from Italy, and, moreover, two used power plants that GoG had inspected and made the subject of a detailed due diligence report dated 24 June 2015 (Exhibit C-31).

<sup>93</sup> Exhibit C-144.

<sup>94</sup> Exhibit R-29.

<sup>95</sup> Exhibit C-101.

**13 September 2017:** GPGC notified the Ministry of Power that, absent any objection by the Ministry of Power, the tender offer for the construction of the gas pipeline had been issued.<sup>96</sup>

**19 September 2017:** GPGC wrote to the Ministry of Power requesting:

“... the assistance of GoG in finalizing the MoU – and then the Connection Agreement – in accordance with the EPA in a timely manner enabling GPGC to commence construction activities on this out-of-scope works and avoid delays to the project timeline”.<sup>97</sup>

**10 October 2017:** at a meeting at the Ministry of Energy, GPGC was assured by Mr Michael Opam (the Ministry of Energy’s Technical Advisor) that the GPGC project had the support of the Minister and that although other projects were to be cancelled or delayed, the GPGC project was to go ahead. Mr Opam told GPGC that he himself would be its point of contact for the Project. He instructed GPGC to proceed with the construction of the gas pipeline between the Blue Ocean Site and the nearest VRA metering station.<sup>98</sup>

**24 October 2017:** GPGC entered into a Memorandum of Understanding with GridCo.<sup>99</sup>

**9 November 2017:** GPGC informed the VRA, Ghana Gas, the Deputy Power Minister and Mr Opam that it had awarded the contract for the engineering, procurement and construction of the gas pipeline to China Petroleum. China Petroleum had begun to mobilise. GPGC requested the Ministry to let it know whether it had any concerns by 16 November 2017.<sup>100</sup>

**13 November 2017:** GPGC meeting with Dr Ahenkorah of the Energy Commission. Dr Ahenkorah informed GPGC that he could not issue a provisional licence as GPGC had first to provide evidence that the Ministry of Power/Ghana Gas had agreed to allocate gas and that the Ministry of Power had inspected and approved the power plants. He took the position that these issues should have been addressed before the EPA had been

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<sup>96</sup> Exhibit C-147.

<sup>97</sup> Exhibit C-13.

<sup>98</sup> Exhibit C-148.

<sup>99</sup> Exhibit C-103.

<sup>100</sup> Exhibits C-105 & 106.

signed, but if, nonetheless, GPGC could meet these conditions, the licence would be issued.<sup>101</sup>

**17 November 2017:** GPGC informed Mr Opam and the Deputy Power Minister that China Petroleum would proceed with the supply of the materials and install the gas pipeline in order to avoid any further delay.<sup>102</sup>

That same day: the Minister of Energy appeared before the Ghanaian Parliament to discuss the recommendations in the PPA Committee Report to, *inter alia*, terminate a number of PPAs (including the EPA).<sup>103</sup>

**30 November 2017:** in his weekly report, Mr Parisotto, having described the status of the pipeline works and requested GoG's assistance to fast track the tax waiver, noted that the application for a generation licence submitted to the Energy Commission on 31 July 2017 was still outstanding. GPGC had addressed the points raised by Dr Ahenkorah on 13 November 2017. It now requested GoG's assistance to fast track this item. GPGC further confirmed that construction activity continued at site and overall progress on the Project was at 38%. So far as grid connection was concerned, it was possible that GPGC would be ready to charge capacity six months before the grid connection was ready. Mr Parisotto also noted that the Ghana Water contract had to be finalised. He requested GoG's assistance pursuant to the EPA in this regard, too.<sup>104</sup>

**13 December 2017:** GPGC informed Mr Opam, the Deputy Power Minister, Ghana Gas, GNPC and the VRA that China Petroleum had started construction of the gas pipeline.<sup>105</sup>

**22 January 2018:** GPGC provided an update to the VRA, the Deputy Power Minister and Mr Opam regarding the construction of the gas pipeline.<sup>106</sup>

**2 February 2018:** GPGC's Weekly Report concerning the progress with respect to construction activities at the Blue Ocean Site recorded expected completion of the

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<sup>101</sup> Exhibit C-150.

<sup>102</sup> Exhibit C-152.

<sup>103</sup> Exhibit C-151.

<sup>104</sup> Exhibit C-153.

<sup>105</sup> Exhibits C-155 & 156.

<sup>106</sup> Exhibit C-159.

commissioning of the open cycle by 18 June 2018 and of the combined cycle by 11 July 2018.<sup>107</sup>

**13 February 2018:** the Minister of Energy informed GPGC that by reason of:

- a. the absence of any mutual extension by the Parties of the period within which the Conditions Precedent of the EPA were to be fulfilled;
- b. GPGC's failure to reach financial close or to achieve Full Commercial Operation Date "*primarily because some of the ... (Conditions Subsequent) ... ha[d] not been fulfilled ... thirty ... days after the Effective Date*";
- c. its failure to obtain a licence from the Energy Commission to engage in business or commercial activity for the sale of electricity such that it had no capacity to enter into the EPA, with the result that the EPA was "*null and void for want of capacity*";
- d. GPGC's commencement of construction activities on site without siting and construction permits such that its construction activities were "*illegal*",

GoG had decided to terminate the EPA with immediate effect and to look to GPGC for the Early Termination Payment pursuant to Clause 4(g) of the EPA.<sup>108</sup> (the "**Resp. Termination Notice**").

**20 February 2018:** over Dr Ahenkorah's signature, the Energy Commission issued GPGC with its Order to Stop Work at the Blue Ocean Site.<sup>109</sup>

**26 February 2018:** GPGC protested and rejected GoG's purported termination of the EPA. GPGC proposed that by no later than 12 March 2018, GoG should issue a written, "*clear and unequivocal retraction of the termination letter ... and [acknowledge] that the EPA remains fully operative.*"<sup>110</sup>

**10 March – 8 April 2018:** exchanges between GPGC and GoG, ended with an indication from the Deputy Minister of Power Aidoo that the President of Ghana had given verbal

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<sup>107</sup> Exhibit C-20.

<sup>108</sup> Exhibit C-21.

<sup>109</sup> Exhibit C-107.

<sup>110</sup> Exhibit C-22.



approval to the reinstatement of the EPA and that the Minister was “actively working” with the Attorney-General to resolve the issue.<sup>111</sup>

**24 April 2018:** GPGC resumed work at the Blue Ocean Site.

**10 July 2018:** GPGC was informed by the Deputy Minister for Power that the EPA was not to be reinstated and that GPGC must negotiate a new PPA.<sup>112</sup>

**13 July 2018 – 13 August 2018:** further inconclusive exchanges between GPGC and GoG were brought to an end by GPGC’s acceptance of GOG’s repudiation of the EPA on 13 August 2018 (the “**Cl. Termination Notice**”).<sup>113</sup>

## V. THE RELEVANT PROVISIONS OF THE EPA

161. The EPA is at the heart of this dispute. In the course of the arbitration, the Parties have laid particular emphasis upon particular provisions of that agreement.
162. Pursuant to the Recitals, the Parties confirmed their wish to enter into the EPA for the supply of “up to 107 MW (ISO installed capacity) power” from the two combined cycle power plants that GPGC was to: “procure, install, operate and maintain ...”
163. The two power plants in question were:

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<sup>111</sup> Exhibit C-160. See Cl. Reply, para. 131: “... b On 13 March 2018, the GoG advised GPGC that the Minister of Energy would be advising the Deputy Power Minister to write a memorandum to the GoG Cabinet and the President of Ghana requesting that the EPA be reinstated. c On 15 March 2018, Mr Opam confirmed to GPGC that he had been instructed by the Minister of Energy to prepare such a memorandum. d On 16 March 2018, GPGC’s team in Ghana again met with the Deputy Power Minister, who reassured GPGC that he was working on getting the EPA reinstated. e By letter dated 26 March 2018, Three Crowns wrote on behalf of GPGC to the GoG reiterating the requests made in GPGC’s unanswered letter of 26 February 2018. f On or around 28 March 2018, the Deputy Power Minister confirmed to GPGC that the Ministry of Energy was preparing a letter to the President strongly recommending that the EPA would be reinstated. g On 4 April 2018, the Deputy Power Minister advised GPGC that the President had verbally approved of the reinstatement of the EPA, and that he was working with Attorney General and the Energy Commission to do so. h On 8 April 2018, following a number of meetings and calls with the Minister of Energy and his aides, Mr Opam called GPGC to reiterate the Minister’s intentions to reinstate the EPA as quickly as possible. i On 2 May 2018, the Deputy Power Minister again advised GPGC that, while the Ministry of Energy was waiting for input from the Attorney-General, the Ministry would write a letter to GPGC providing assurance that the EPA would be reinstated. j On 3 May 2018, the Minister of Energy wrote to GPGC to confirm that the Ministry was “working on the issues raised in [GPGC’s] letter” of 26 February 2018 and would revert with its response “soon””.

<sup>112</sup> Exhibit C-24.

<sup>113</sup> Exhibit C-109 and see Exhibits C-24, C-25, C-26, C-27 & C-108.

“... existing combined cycle power plants based on GE aeroderivative gas turbines and Thermodym GE steam section to generate emergency power to supplement the power requirements of power users in Ghana subject to the conditions of this EPA.”

164. For its part, GoG specifically acknowledged that:

“... by GPGC dedicating exclusively the GPGC Equipment<sup>114</sup> for the purpose of this EPA the performance of the Term<sup>115</sup> is of the essence of the EPA as GPGC will be unable otherwise to make good any loss suffered.”<sup>116</sup>

165. Among the defined terms in the EPA, the following are of particular relevance to the Tribunal’s review:

“Authorized Representative”: means the person named or appointed from time to time by a Party and who acts on behalf of that Party. [The nature of the role of that person is developed in Clause 8(k) (GPGC’s Authorized Representative) and Clause 9(b) (GoG’s Authorized Representative) of the EPA – see below.]

“Early Termination Payment”: has the meaning set forth in Clause 25(b)(i) of this EPA and shall include mobilization, and/or demobilization costs (as applicable) and any other reasonably incurred cost by GPGC as a result of an Early Termination.

“Effective Date”: is the date on which all Conditions Precedent have been fulfilled or waived and will be thirty (30) days from Signature Date except that by mutual agreement in writing the Parties may extend the period for the fulfilment of any Condition Precedent.

“Full Commercial Operation Date”: the date on which GPGC completes the Operational Tests on the GPGC Equipment in accordance with the Operational Test Protocol.

“Guaranteed Availability”: means ninety-two percent (92%) of the Tested Capacity, as set out in Annex 2, made available annually by GPGC at the Delivery Point, for dispatch to GoG during the Term, but excluding unavailability due to Excusable Outage and unavailability due to Scheduled Maintenance.

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<sup>114</sup> Defined as: “*the two GE aeroderivative Gas Turbines, gas turbine generators, steam turbines, steam turbine generators, boilers, power transformers and other equipment, machinery, materials, parts, components and systems of GPGC to be deployed to the Site pursuant to this Agreement as more fully described in the Equipment Specifications in Annex 1.*”

<sup>115</sup> A “guaranteed period” commencing on the Signature Date (3 June 2015) and continuing until forty-eight months after the Full Commercial Operation Date. (See Clause 2 (a) and (b) of the EPA).

<sup>116</sup> Recital F.

“Site”: means an area allocated by GoG for the location of the GPGC Equipment. The proposed site is located at Takoradi, Ghana, as more fully described in the Equipment Specifications.

“Unimpeded Access”: means the GoG providing GPGC with unimpaired access to the GPGC Equipment, all GPGC-owned material, and all areas of the Site.

“Utilities”: means all electricity, water, and natural gas required during the installation, pre-commissioning, commissioning and testing of the GPGC Equipment at the Site.”

166. The Tribunal notes the following terms of the EPA:

Clause 2: Effective Date and Term Options

Clause 2(a):

“Subject to the provisions of Clause 25 of this Agreement, this Agreement shall have a Term commencing on the Signature Date and continuing until forty-eight (48) months after the Full Commercial Operation Date”.

Clause 2(b):

“The Term shall be a guaranteed period and in the event this EPA is terminated in accordance with the provisions thereof prior to its scheduled expiration date as a result of the default of any of the Parties, the Party not responsible for the default may proceed in accordance with Clause 25 of this Agreement.”

Clause 3: Conditions Precedent

“a)The performance of the obligations of the Parties under this Agreement is subject to the prior fulfilment or waiver of the following Conditions Precedent:

GoG Conditions Precedent

- i. Ratification of this Agreement by the Parliament of Ghana;
- ii. The GoG having obtained parliamentary approval for the required tax exemptions;
- iii. GoG indicating its satisfaction with the state of GPGC Plants, such satisfaction not to be unreasonably withheld; and
- iv. The GoG having provided Unimpeded Access to a Site for the GPGC Equipment.

GPGC Conditions Precedent

- i. GPGC shall, at its own expense, test samples of the natural gas to be provided by GoG to confirm whether or not they meet the minimum quality specifications stated in Annex 5.
  - ii. GPGC shall communicate to GoG in writing the suitability or otherwise of the Site.
  - iii. GPGC having provided to GoG a copy of the maintenance records of the GPGC Plants.
- b) If GPGC in its sole but reasonable discretion finds that the Site allocated to it by GoG is unsuitable for the purposes of the GPGC Equipment or this Agreement GoG shall within thirty (30) Days of being notified of the non-suitability of the Site allocate a new Site to GPGC. If any other Site allocated by GoG to GPGC is still in the sole but reasonable discretion of the GPGC unsuitable for the purposes of the Agreement, GPGC may terminate the Agreement with immediate effect and GoG shall pay GPGC the Early Termination Payment plus mobilization and other reasonable costs incurred by GPGC within ninety (90) days of the issue, by GPGC, of a termination notice.
- c) Unless sooner required under the provisions of this Agreement each Party shall be required to fulfil the Conditions Precedent for which they are responsible within thirty (30) days of Signature Date. In the event that any of the Parties fails to fulfil the Conditions Precedent within thirty (30) Days the Party which is not responsible for the satisfaction of any Conditions Precedent may extend the period for fulfilling any such Conditions Precedent.
- d) Where a Condition Precedent is not fulfilled by a Party within the specified period or waived by the Party not in default, the Party not responsible for the default shall have the right to terminate this Agreement with immediate effect pursuant to Clause 25.”

#### Clause 4: Conditions Subsequent

“a) The following conditions shall be met as a precondition for the achievement of Full Commercial Operation Date for the Plants:

##### GPGC’s Conditions Subsequent

- i. GPGC having made all investigations inspections that it deems necessary to perform its obligations hereunder, including without limitation investigations and inspections at the Site with respect to the presence of any Hazardous Materials at the Site;
- ii. GPGC having procured an approved tariff from PURC;
- iii. GPGC having procured the relevant generation license(s) from the Energy Commission and other Required Approvals;

iv. GPGC procuring each of the following documents (collectively the “Project Documents”):

i. the Grid Connection Agreement.

ii. agreement with Ghana Water Company Ltd for the provision of water for the operation of the plants;

...

b) If GPGC suffers any delay and/or incurs any costs during the obtaining of any Conditions Subsequent under this Agreement for reasons not attributable to GPGC, then GPGC shall be given an extension of time for the achievement of the Full Commercial Operation Date equal to the number of days of delay suffered by GPGC.

...

GoG’s Conditions Subsequent

i. The GoG having provided GPGC with a representative fuel sample of the actual fuel to be provided by the GoG for the operation of the GPGC Equipment as required under Annex 5.

ii. The GoG having delivered evidence of the grant of the Tax Exemption to GPGC to the extent required by Clause 13; and

iii. The GoG having provided of the Parliamentary Approval in respect of this Agreement to the GPGC.

d) Each Party, upon the request of the other Party, shall use best endeavours to assist the other Party in satisfying each Conditions Subsequent for which the other Party is particularly responsible under Clause 4.

e) The Commercial Operation Date for the GPGC Equipment will be extended on a day for day basis for each day that the GoG’s Conditions Subsequent are not fulfilled by the date specified in Clause 4.

f) GPGC may terminate the EPA with immediate effect, by giving written notice to GoG if any Condition Subsequent has not been satisfied by GoG or waived by GPGC by the date falling thirty ... days after the Effective Date (as such date may be extended by mutual agreement of the Parties) provided that such non-fulfilment of the Conditions Subsequent by GoG must be wholly attributable to the action or inaction of GoG and, if, on the date of termination, any Condition Subsequent has not been satisfied by GoG, GoG shall pay GPGC the Early Termination Payment plus mobilization and other reasonable costs incurred by GPGC within ninety ... days of the issue, by GPGC, of a termination notice.

g) GoG may terminate this Agreement, with immediate effect, by giving written notice to GPGC if any Condition Subsequent has not been satisfied by GPGC or waived by GoG by the date falling thirty ... days after the

Effective Date (as such date may be extended by the mutual agreement of the Parties) provided that such non-fulfilment of the Conditions Subsequent by GPGC must be wholly attributable to the action or inaction of GPGC, and, if, on the date of termination, any Condition Subsequent has not been satisfied by GPGC as a result for reasons attributable to GPGC, GPGC shall pay GoG the Early Termination Payment and other reasonable costs incurred by GoG within ninety ... days of the issue, by GoG, of a termination notice.

...

j) For the avoidance of doubt, the ability of a Party to terminate this EPA for reasons of non-fulfilment of any Condition Subsequent shall be limited to where such Condition Subsequent is the responsibility of the other Party.”

#### Clause 5: Site and Site Preparation

“a): The GoG shall be required to allocate a Site that is available immediately upon the Effective Date.

The GoG shall allocate the Site for the GPGC Equipment on a lease at a peppercorn rent in favor of GPGC for the lifetime of the EPA, plus one (1) year with an option for GPGC to renew for seventeen (17) years subject to the consent of GoG which consent should not be unreasonably withheld.

...

c) From the Effective Date and continuing until the expiry of all obligations under this Agreement, the GoG shall provide GPGC with Unimpeded Access<sup>117</sup> to the Site”.

#### Clause 6: Mobilization and Installation of the GPGC Equipment; testing; Commercial Testing; Commercial Operation; and Excusable Delay

“h): GPGC shall not have any liability to the GoG, or be considered to be in breach of any of its obligations under this Agreement, for any delay in the commencement of Full Commercial Operation to the extent that such delay is a direct or indirect result of any of the following (each an “Excusable Delay”):

i. the failure or inability of the GoG to fulfill the Conditions Subsequent in a proper and timely manner in accordance with Clause 4.

...

viii. any delay attributable to the inability of the GoG to assist GPGC to obtain any Required Approvals (including without limitation all Required Approvals necessary for unloading at port on arrival, transportation, unloading at Site and clearance of customs of the GPGC Equipment.”

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<sup>117</sup> Defined as: “... unimpaired access to the GPGC Equipment, all GPGC-owned material and all areas of the Site.”

#### Clause 7: Nature of the Agreement

“a) The transactions contemplated by this EPA constitute a tolling contract (Throughput). The GPGC Equipment is, and shall at all times be and remain, solely and exclusively the property of GPGC. The GPGC Equipment is, and shall at all times remain, the property of GPGC notwithstanding that GPGC Equipment or any part of the GPGC Equipment may now be, or hereafter become, in any manner affixed or attached to the NITS<sup>118</sup> or any other personal or real property located at the Site.”

#### Clause 8: Certain GPGC Obligations

“GPGC’s obligations under the Agreement commence only at the Effective Date unless otherwise mutually agreed in writing by the Parties. In addition to its other obligations under this Agreement, GPGC shall, following the Effective Date and subject to GoG having fulfilled GoG’s Conditions Subsequent or GPGC having waived the fulfilment of GoG’s Conditions Subsequent or GoG having complied with all the terms, timelines, obligations and deliverables under this Agreement have the following obligations:

a) Mobilise and bring into Ghana, install and commission the GPGC Equipment;

...

k) appoint an Authorized Representative within seven ... Days from the Signing Date. The Authorized Representative will be responsible for coordinating activities with GoG and resolving procedural questions that may occur during the EPA Term. The Authorized Representative(s) shall be fluent in English. GPGC shall be entitled to replace an Authorized Representative(s) by providing seven ... days advance notice to GoG of such replacement.”

#### Clause 9: Certain GOG Obligations

“In addition to its other obligations under this EPA the GoG shall have the following obligations:

a) assist GPGC in procuring Utilities ...;

b) appoint an Authorized Representative within seven ... Days from the Signing Date. The Authorized Representative will be responsible for coordinating activities with GPGC and resolving procedural questions that may occur during the EPA Term. The Authorized Representative(s) shall be fluent in English. GoG shall be entitled to replace an Authorized Representative(s) by providing seven ... days advance notice to GPGC of such replacement;

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<sup>118</sup> National Interconnection Transmission System.

c) provide assistance to ensure that Gridco, if requested to do so in writing by GPGC, enters into a Grid Connection Agreement, on terms acceptable to GPGC;

d) provide assistance to ensure that NITS is ready and able to accept, utilise and evacuate power from the GPGC Equipment prior to the pre-commissioning of the plants and based on the provisions of the Grid Code;

e) provide fuel, in adequate quantity and acceptable quality and pressure, which meets the Minimum Fuel Specifications and the Minimum Pressure Specifications, for testing and ongoing operation of the GPGC Equipment, and as more fully set forth in the Operating Specifications;

f) assist GPGC to obtain water, in adequate quantity and acceptable quality in a timely manner as determined for ongoing operation of the GPGC Equipment, as more fully set forth in the Operating Specifications;

g) assist GPGC to procure and maintain the Required Approvals on a timely basis;

...

i) supply gas to the power plant installation and take delivery of the power at the Electricity Delivery Point;

j) guarantee minimum delivered pressure of natural gas at 38 bar;

...

l) assist GPGC to procure and maintain (in addition to the Required Approvals) any other administrative or other documentation and approvals required to, import, install, operate and (if necessary) export the GPGC Equipment (including all customs clearance for all GPGC Equipment), whether on a temporary or a permanent basis; ...”

### Clause 13: Taxes

“a) The GoG shall obtain for the benefit of GPGC an exemption from all Taxes imposed by any Governmental Authority of the Republic of Ghana to GPGC in accordance with the laws of Ghana, during the pre-construction, construction and operation of the plants and for a period of at least 4 (four) years starting from the Effective Date (the “Tax Exemption”). The tax Exemption should include, but not be limited to, the Taxes included in Annex 6.

...

b) In the event that GPGC is required to pay any Taxes in Ghana that are not covered by the Tax Adjustment or the Tax Exemption (if any) or which are incurred as a result of the GoG’s failure to obtain or maintain the Tax Exemption(if any), the GoG shall reimburse GPGC in United States Dollars ... for the amount of such Taxes (together with such Additional Amounts as



would be required to cover any additional Taxes payable by GPGC as a result of such reimbursement) within ten ... days of the date on which GPGC provides the GoG with a written request for reimbursement, including appropriate supporting documentation.”

#### Clause 19: Representations and Warranties

“b) The GoG hereby represents and warrants to GPGC as follows:

- i The GoG has full power and authority to execute this Agreement and consummate the transactions contemplated herein;
- ii This Agreement has been authorized by all necessary action of the GoG and is a valid and binding agreement of the GoG, enforceable against the GoG in accordance with its terms” ...

#### Clause 24: Default and Remedies

“a. The GoG shall be in default under this Agreement (a “GoG Default”) upon the occurrence of any of the following events:

...

- ii failure to perform or observe any ... covenant [other than payment], condition or agreement to be performed or observed by it under this Agreement (but only with respect to a material obligation for which this Agreement does not provide exclusive remedies); provided that: (A) GPGC shall first have provided the GoG with written notice of the nature of such breach and of GPGC’s intention to terminate this Agreement as [a] result of such breach ...

...

- d. Upon the occurrence of any GPGC Default, the GoG may: (i) terminate this Agreement; or (ii) exercise any other right or remedy which may be available to the GoG under any applicable law.”

#### Clause 25: Termination and Effect of Termination

“b. Effect of Termination. In the event of the termination of this Agreement, the Parties shall, save for any accrued rights or liabilities of any Party in respect of damages for non-performance of any obligation under this Agreement falling due for performance prior to such termination, be released from any and all obligations under this Agreement, except for the following:

- i If this Agreement is terminated by GPGC due to GoG’s breach of its obligations under the Agreement or GoG’s Default, or GoG terminates the Agreement contrary to the provisions of the Agreement GoG shall pay an early termination fee of an amount equal to Capital Recovery Charge<sup>119</sup> multiplied with the amount of energy the GPGC Equipment would have

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<sup>119</sup> Annex 3 of the EPA.

produced, if the GPGC Equipment continued to operate, at the Guaranteed Capacity, for the remaining Term (“the Early Termination Payment”) up to a maximum of twenty-four ... months within ninety ... days after issuing of the termination notice by GPGC.

...

iii if this Agreement is terminated by GoG due to the GPGC’s breach of its obligations under the Agreement or GPGC Default where such breach of obligation or GPGC Default entitles GoG to terminate the EPA pursuant to the provisions of the EPA, GPGC shall pay, as an early termination fee, an amount equal to the Capital Recovery Charge multiplied with the amount of energy the GPGC Equipment would have produced, operating at the Guaranteed Availability, for the remaining Term, up to a maximum of twenty-four ... months within ninety ... days after issuing of the termination notice by GoG.”

Clause 28: Miscellaneous

“b. Notices. Any notices desired or required to be given pursuant to this Agreement shall be in writing and addressed to the Party at its address as set forth on the signature page to this Agreement ...”

## **VI. OUTLINE OF THE PARTIES’ POSITIONS**

### **CLAIMANT’S POSITION**

167. According to GPGC, GoG’s purported termination and wrongful repudiation of the EPA has caused it substantial loss.<sup>120</sup>

### **GOG’S FAILURE TO SATISFY ITS OBLIGATIONS UNDER THE EPA**

168. Despite the fact that it complied with all of its Conditions Precedent and took all available steps to comply with its Conditions Subsequent under the EPA, GPGC maintains that GoG failed to fulfil its corresponding obligations under the EPA, including its obligation

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<sup>120</sup> Cl. Notice of Arbitration, para. 2. The Claimant affirms that the EPA “*was in the nature of a “tolling” or “throughput” agreement, under which the GoG was obliged to supply the natural gas and water required for the operation of the GPGC Plants and to offtake the Plants’ electricity output by paying a preagreed tariff to GPGC.*” (Cl. SoC, para 4). See Cl. Reply, para. 2: “*The purported termination was also preceded by the GoG’s repeated breaches of its own obligations under the EPA, which significantly delayed the project and considerably increased GPGC’s costs. ... The GoG’s conduct therefore clearly manifested its intention not to be bound by its obligations under the EPA, and thus constituted a repudiation of the EPA under Ghanaian law. GPGC was accordingly entitled to accept the GoG’s repudiation and terminate the EPA on 13 August 2018.*”

to cooperate with GPGC to enable it to fulfil some of its Conditions Subsequent.<sup>121</sup> In particular:

- a Under the EPA, the GoG was obliged to provide to GPGC an adequate site with “Unimpeded Access” for GPGC’s equipment. However, on 6 April 2016—almost 10 months after the execution of the EPA—the Ministry of Power advised GPGC that the GoG was unable to allocate to GPGC the site initially identified “due to the unexpected challenges”, and that the Volta River Authority (VRA)—the main electricity utility in Ghana—would make available to GPGC an alternative site. However, after further delay, in January 2017 the VRA refused to lease the land for an alternative site to GPGC, thereby forcing GPGC to procure its own site.
- b Under the EPA, the GoG was required to obtain parliamentary approval for an exemption to GPGC from all taxes imposed by any governmental authority in Ghana during the pre-construction, construction and operation of the plants, as well for a period of four years after the Effective Date. However, notwithstanding GPGC’s repeated requests, the GoG failed to obtain this parliamentary approval, thereby forcing GPGC to pay certain taxes that necessarily had a negative impact on its cash flows.
- c Under the EPA, GPGC was required to have “the relevant generation license(s) from the Energy Commission and other Required Approvals”, and the GoG was obliged to “assist GPGC to procure and maintain the Required Approvals on a timely basis”. After obtaining a building permit and an environmental permit from the governmental authorities to commence construction at the site, GPGC applied to the Energy Commission for an electricity generation and supply licence in July 2017. However, the Energy Commission unreasonably delayed and withheld the issuance of this licence, and the GoG failed to take any steps to facilitate or expedite the approval process.
- d Under the EPA, GPGC was required to have a “Grid Connection Agreement” with Ghana Grid Company Limited (Gridco), the Ghanaian national electricity transmission grid operator, and the GoG was obliged to “provide assistance to ensure that Gridco, if requested to do so in writing by GPGC, enters into an [sic] Grid Connection Agreement, on terms acceptable to GPGC”. However, Gridco first delayed the negotiation of a Grid Connection Agreement, and ultimately refused to sign such an Agreement until the issuance of a generation licence by the Energy Commission to GPGC ...”<sup>122</sup>

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<sup>121</sup> Cl. Notice of Arbitration, paras. 5 and 25. See Cl. SoC, para. 30: “... after the execution of the EPA, the GoG failed to perform nearly all of its obligations under the EPA, which prevented the project from making any significant progress for almost two years and led to a significant increase in GPGC’s costs. Meanwhile, GPGC made every effort to perform its own obligations under the EPA despite the difficulties presented by GoG’s multiple breaches, and kept the GoG regularly updated as to its progress.”

<sup>122</sup> Cl. Notice of Arbitration, para. 25.

## GOG'S FAILURE TO APPOINT AN AUTHORIZED REPRESENTATIVE

169. GPGC contends that GoG did not appoint an Authorized Representative (as the Parties were obliged to do pursuant to Clauses 8(k) (GPGC) and 9(b) (GoG) of the EPA) who would oversee and be responsible for the Project.<sup>123</sup> For its part, GPGC appointed Mr Parisotto as its Authorized Representative five days after the execution of the EPA.<sup>124</sup> GPGC says that GoG's failure to appoint an Authorized Representative meant that GPGC had no clear channel of communication with GoG:

“there was often confusion as to whom communications and requests should be sent. To mitigate these difficulties, GPGC went to great lengths to involve the GoG's delegates in the decision-making processes, keep them constantly apprised of developments and inform them of issues on which the GoG's assistance was required.”<sup>125</sup>

## GOG'S FAILURE TO ALLOCATE A SITE

170. GPGC notes that the EPA<sup>126</sup> required GoG to allocate a “Site” (as defined in the EPA) to GPGC “at a peppercorn rent” for the installation of the GPGC Equipment.<sup>127</sup> According to GPGC, the allocation of a suitable site was an essential first operational step in the Project, and a necessary precondition for progress on most of the other work streams.<sup>128</sup> For the purposes of the EPA, the originally intended site for allocation was the Aboadze Site.<sup>129</sup>

171. GPGC says that in the 19 months that followed the execution of the EPA, GoG failed to allocate the Aboadze Site or any alternative site. In particular:

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<sup>123</sup> Cl. SoC, para. 33(a). In para. 36, the Claimant points out that: “The responsibility of the Authorized Representative was to “coordinate activities” with the other Party and to resolve “procedural questions that may occur during the EPA Term”. It was especially important for the GoG to appoint an Authorized Representative because ... many of GPGC's contractual obligations necessarily required assistance and coordination from the GoG, particularly if the GPGC Plants were to become operational on the “fast track” basis envisaged in the EPA”.

<sup>124</sup> Cl. SoC, para. 37. In para. 39, The Claimant says that: “As Mr Parisotto explains, GPGC repeatedly requested, verbally and in writing, that the GoG satisfy its contractual obligation to formally appoint an Authorized Representative. The GoG did not answer these requests.”

<sup>125</sup> *Ibidem*, para. 41.

<sup>126</sup> Exhibit C-1, Clause 5(a).

<sup>127</sup> Cl. SoC, para. 43.

<sup>128</sup> *Ibidem*, para. 44.

<sup>129</sup> *Ibidem*, para. 45. Para 48: “The Aboadze Site contained an oxidation pond, and it was recognized prior to the execution of the EPA that the pond would be relocated before the installation of the GPGC Plants.”

- within two months of the execution of the EPA, GoG had declined to allocate the Aboadze Site, noting the cost of relocating an active oxidation pond. Instead, it had proposed an alternative site located near a 330 High Voltage substation in Aboadze;<sup>130</sup>
- by email dated 24 August 2015 (almost three months after the execution of the EPA),<sup>131</sup> GoG changed its mind and reverted to its original proposal of the Aboadze Site;<sup>132</sup>
- by letter dated 6 April 2016 (ten months after the execution of the EPA),<sup>133</sup> GoG notified GPGC that, “[d]ue to the unexpected challenges with the Aboadze land initially allocated”,<sup>134</sup> the site location would be changed yet again. It proposed the Kpone Site.<sup>135</sup> In a spirit of cooperation, GPGC accommodated GoG’s request and, as it had been directed to do, entered into discussions with the landowner, the VRA;<sup>136</sup>
- by letter dated 9 January 2017, however, VRA withdrew its allocation of the Kpone Site to GPGC. No alternative site was proposed;<sup>137</sup>
- on 20 February 2017 GPGC informed the Ministry of Energy that it was exploring alternative sites. By the end of February 2017, GPGC had identified the Blue Ocean Site as a suitable location. On 30 May 2017, the Ministry of Energy

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<sup>130</sup> *Ibidem*, para. 51: “As a consequence, GPGC ceased its engineering activities at the Aboadze Site and redirected its efforts to establishing a new layout for the GPGC Plants at the Alternative Aboadze Site.”

<sup>131</sup> Exhibit C-34, email exchange among Mr Dzata (Ministry of Power), Mr Parisotto (GPGC) and others, 19-24 August 2015.

<sup>132</sup> Cl. SoC, paras. 52-53.

<sup>133</sup> Letter from Ministry of Power to GPGC, 6 April 2016, Exhibit C-6.

<sup>134</sup> Cl. SoC, para. 54: “In reality, there were no “unexpected challenges” in respect of the Aboadze Site, other than the GoG’s unwillingness to bear the cost of removing the oxidation pond, the existence of which was known before the EPA was executed.”

<sup>135</sup> *Ibidem*, para. 55.

<sup>136</sup> *Ibidem*, para. 57: “It stopped preparatory activities at the Aboadze Site. And once the Kpone Site was allocated, GPGC once again began conducting preliminary investigations to confirm the general suitability of that Site, as well as preparatory activities ... GPGC regularly apprised the GoG of these activities, and they were specifically approved by the Ministry of Power”.

<sup>137</sup> *Ibidem*, para. 61. Para 62: “Thus, some 19 months had been wasted by the GoG moving from one proposed site to another, ultimately with nothing to show for it. In contrast, in respect of each site that the GoG had proposed through those 19 months, GPGC expended significant time, effort and costs to conduct preparatory work in order to deliver the “fast track” results that had been promised in the EPA.”

expressly acknowledged the fact that GPGC had identified such an alternative site.<sup>138</sup> GPGC and Blue Ocean Ltd entered into a five-year lease agreement dated 17 May 2017 pursuant to which, GPGC agreed to pay Blue Ocean rental fees equal to US\$ 40,000 per acre per annum.<sup>139</sup>

#### **GoG'S FAILURE TO SATISFY ITS CONTRACTUAL OBLIGATION TO EXEMPT GPGC FROM ANY TAX LIABILITY**

172. Pursuant to Clauses 3(a)(ii), 4(c)(ii) and 13(a) of the EPA, GoG was obliged to procure the exemption of GPGC from all taxes relating to the Project and, to the extent that any taxes were paid by GPGC, to reimburse those amounts to GPGC in US dollars.<sup>140</sup>

173. GPGC alleges that none of its letters sent to the GRA over the five months spanning June to October 2016, in which it requested an exemption from taxes that would otherwise be levied on the GPGC Equipment to be imported into Ghana and on local project-related acquisitions, received a response.<sup>141</sup> When the GRA did eventually respond on 17 October 2016, it:

“purported to levy taxes of EUR 10.8 million on the equipment that would arrive imminently in Ghana. This was a clear breach of Clause 13 of the EPA by the GoG.”<sup>142</sup>

174. According to GPGC, its petition to the Ministry of Power of 15 November 2016 for urgent assistance to secure the tax exemptions likewise received no response.<sup>143</sup> Nor did the Ministry of Finance take any action in response to the letter of 21 November 2016 sent by the Ministry of Power to the Head of the Tax Policy Unit at the Ministry of Finance by which the latter was informed of the arrival of the GPGC Equipment in Ghana

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<sup>138</sup> *Ibidem*, paras. 64 and 65.

<sup>139</sup> *Ibidem*, para. 66: “Of course, these rental payments would have been avoided had the GoG satisfied its obligations under the EPA to allocate a site at a peppercorn rate.”; para. 67: “Because of the GoG’s failure to fulfil its obligations to allocate a suitable site, GPGC was also forced to incur costs constructing infrastructure that would connect the Blue Ocean Site to the gas supply ... and to electricity offtake stations ...”.

<sup>140</sup> *Ibidem*, para. 68.

<sup>141</sup> *Ibidem*, paras. 68 and 69. Letter from M Tahir (Director, GPGC) to GRA and Ministry of Power, 29 June 2016, Exhibit C-63; Letter from D Duncan (Director, GPGC) to GRA, 23 August 2016, Exhibit C-68; Letter from M Tahir (Director, GPGC) to GRA, 9 September 2016, Exhibit C-71.

<sup>142</sup> *Ibidem*, para. 71. Exhibit C-73, letter from B Agyemang (Assistant Commissioner, GRA) to GPGC, with enclosure, 17 October 2016.

<sup>143</sup> *Ibidem*, para. 72. Letter from D Duncan (Director, GPGC) to Ministry of Power, 15 November 2016, Exhibit C-75.

on 22 November 2016 and requested to facilitate its clearance through Customs. GPGC says that, due to “GoG’s inaction”, it was unable to unload the GPGC Equipment and it remained at the Tema Port incurring costs.<sup>144</sup>

175. GPGC maintains that the tax exemption was not provided in spite of its further letters dated 20 December 2016, 29 December 2016 and 18 July 2017.<sup>145</sup>

176. It was not until 2 August 2017, in response to GPGC’s letter of 31 July 2017 sent to the Ministry of Finance (by which it offered to pay the import duties and taxes that had been improperly levied, but on condition that the Ministry of Finance would provide a written assurance that these payments would be refunded pursuant to the EPA),<sup>146</sup> that the Ministry of Finance:

“finally acknowledged its contractual obligation under Clause 13 of the EPA to exempt GPGC from project-related taxes and provided the requested assurance.”<sup>147</sup>

177. GPGC says that, on the basis of this assurance, it paid the duties and taxes levied by the GoG for a total amount of US\$ 7.5 million in connection with the mobilisation of the GPGC Equipment. GoG failed to refund this amount.<sup>148</sup>

#### **GoG’S FAILURE TO SATISFY ITS CONTRACTUAL OBLIGATION TO ASSIST GPGC WITH THE CONCLUSION OF A “WATER SUPPLY AGREEMENT”**

178. GPGC says that GoG failed to honour its contractual obligation to assist GPGC with the conclusion of a “*Water Supply Agreement*” with Ghana Water (the “**Water Supply Agreement**”) for the provision of water to the GPGC Equipment.

179. GPGC relies on Clause 4(a)(iv)(ii) of the EPA, which obliged GoG to provide water for the operation of the GPGC Equipment and to enter into an agreement with Ghana Water

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<sup>144</sup> *Ibidem*, para. 73.

<sup>145</sup> *Ibidem*, para. 74. Letter from M Tahir (Director, GPGC) to Ministry of Power, 20 December 2016, Exhibit C-78; Letter from C Ababio (Finance Manager, GPGC) to Ministry of Power, with enclosure, 29 December 2016, Exhibit C-80; Letter from C Ababio (Finance Manager, GPGC) to Ministry of Power, 18 July 2017, Exhibit C-88.

<sup>146</sup> *Ibidem*, para. 75. Exhibit C-94, letter from D Morton (Operations Manager, GPGC) to K Kwarteng (Deputy Minister of Finance), 31 July 2017.

<sup>147</sup> *Ibidem*, para. 75.

<sup>148</sup> *Ibidem*, paras. 77 & 78.

“for the provision of water for the operation of the plants”. In addition, GPGC notes that GoG was obliged to assist GPGC to obtain water pursuant to Clauses 9(a) and 9(f) of the EPA and to “use best endeavors” to provide such assistance.<sup>149</sup>

180. According to GPGC, GoG’s repeated failure to allocate a site had the consequence that GPGC’s technical discussions with Ghana Water only began to progress after GPGC had independently secured the Blue Ocean Site for the Project in May 2017.<sup>150</sup> However, it is GPGC’s position that the contractual negotiations with Ghana Water did not progress at a satisfactory pace. On 28 October 2017, it requested the assistance of GoG (through its Ministry of Energy) in accordance with Clauses 9(a) and 9(f) of the EPA. GPGC complains that the requested assistance was not forthcoming.<sup>151</sup>

181. In light of the above, GPGC maintains that:

“at the time of the GoG’s purported termination of the EPA in February 2018, the WaterCo had not yet entered into an agreement with GPGC, and the GoG remained in default of Clause 9(f) of the EPA.”<sup>152</sup>

**GOG’S FAILURE TO SUPPLY GAS TO THE BOUNDARY OF THE ALLOCATED SITE OR TO ASSIST WITH THE PROCUREMENT OF A GAS SUPPLY FROM GHANA GAS**

182. GPGC maintains that under the terms of the EPA,<sup>153</sup> GoG was obliged to procure gas for the operation of the GPGC Equipment.<sup>154</sup>

183. GoG’s failure to allocate the Aboadze Site to GPGC, which already had a pre-existing natural gas pipeline running within one metre of the Aboadze Site boundary, undermined the working premise that gas would be supplied to the GPGC Equipment through a pre-existing gas pipeline.<sup>155</sup>

184. The Blue Ocean Site ultimately secured by GPGC in May 2017 was located 4-5 kilometres away from the nearest connection point (a VRA gas metering station in

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<sup>149</sup> *Ibidem*, paras. 79, 80 and 81.

<sup>150</sup> *Ibidem*, para. 83.

<sup>151</sup> *Ibidem*, para. 84.

<sup>152</sup> *Ibidem*, para. 85.

<sup>153</sup> Exhibit C-1, Definitions (at p. 14 defining “Utilities”), Clauses 9(a), 9(e), 9(i), Annex 2 at p. 60 and p. 62.

<sup>154</sup> Cl. SoC, para. 87.

<sup>155</sup> *Ibidem*, para. 88.



Tema). Thus, GPGC was obliged to invite tenders for the construction of a dedicated gas pipeline to cover the distance between the Blue Ocean Site and the closest metering station on the West African Gas Pipeline (“WAGP”). GPGC says that it was actively encouraged by GoG to proceed with the construction of that infrastructure.<sup>156</sup> As a result, GPGC issued an invitation to tender on 18 August 2017 and eventually, on 21 October 2017, China Petroleum was chosen as the successful bidder to construct the dedicated gas pipeline as it proceeded to do. GPGC states that:

“This pipeline was more than 80% complete when the GoG wrongfully purported to repudiate the EPA in February 2018.”<sup>157</sup>

**GOG’S FAILURE TO SATISFY ITS CONTRACTUAL OBLIGATION TO ASSIST GPGC WITH THE CONCLUSION OF A “GRID CONNECTION AGREEMENT” WITH GHANA GRID COMPANY**

185. Pursuant to the terms of the EPA, GPGC was required to conclude a Grid Connection Agreement with GridCo, which GoG controlled, to facilitate the operational aspects of transferring the electricity generated by the GPGC Equipment to the National Interconnected Transmission System (“NITS”).<sup>158</sup> In turn, it was GoG’s obligation to “provide assistance to ensure that Gridco, if requested to do so in writing by GPGC, enters into a Grid Connection Agreement, on terms acceptable to GPGC.”<sup>159</sup>

186. GPGC maintains that the Grid Connection Agreement was not executed for the following reasons:

- a. one of the conditions imposed by GridCo upon the conclusion of the Grid Connection Agreement was that title be obtained to a site for the GPGC Equipment. That was a condition beyond GPGC’s control;<sup>160</sup>
- b. GPGC’s discussions with GridCo ran into difficulty for two reasons, both attributable to GoG: (i) the aforesaid lack of title to a site for the installation of the

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<sup>156</sup> *Ibidem*, para. 91.

<sup>157</sup> *Ibidem*, para. 93.

<sup>158</sup> *Ibidem*, para. 95.

<sup>159</sup> Exhibit C-1, Clause 9(c).

<sup>160</sup> Cl. SoC, para. 96. See para. 97: “... for nearly two years, the GoG had repeatedly failed to satisfy its obligation under the EPA to allocate a site for the GPGC Plants, which in turn prevented GPGC from making any significant progress with certain work streams envisaged under the EPA, including the conclusion of a Grid Connection Agreement.”

GPGC Equipment;<sup>161</sup> and (ii) GoG’s frustration of the plan to connect the GPGC Equipment to the existing transmission line that crossed over the Aboadze Site by failing to allocate the Aboadze Site to GPGC.<sup>162</sup>

187. As a consequence, GPGC says that it:

“... was left with no option but to agree to design, procure and construct a 161kV transmission line.”<sup>163</sup>

and

“At the time of the GoG’s purported termination of the EPA in February 2018, the Grid Connection Agreement had not yet been executed.”<sup>164</sup>

#### **GOG’S FAILURE TO ASSIST GPGC WITH PROCURING A GENERATION LICENCE FROM THE GHANAIAN ENERGY COMMISSION**

188. GPGC points out that:

“Under Clause 4(a)(iii) of the EPA, GPGC was required to procure “the relevant generation license(s) from the Energy Commission”. Pursuant to Clause 9(g) of the EPA, the GoG was obliged to “assist GPGC to procure and maintain the Required Approvals”, which included any generation licenses.”<sup>165</sup>

189. These contractual obligations pertained to Section 11 of the Energy Commission Act, under which GPGC was required to obtain a licence from the Energy Commission “*to engage in a business or commercial activity for the transmission, wholesale supply, distribution or sale of electricity or natural gas*”.<sup>166</sup>

190. In July 2017, GPGC applied to the Energy Commission for a generation licence, specifically a “*Wholesale Electricity Supply Licence*” (the “**WES Licence**”).<sup>167</sup>

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<sup>161</sup> *Ibidem*, para. 100. See para. 101: “*This issue was only resolved in May 2017, when GPGC independently secured the Blue Ocean Site for the project ... . This in turn cleared the way for the GridCo to conduct a Grid Impact Assessment, which ... was a prerequisite imposed by the GridCo to the conclusion of a memorandum of understanding.*”

<sup>162</sup> *Ibidem*, para. 104: “*Thus, the need for a new transmission line arose directly out of the GoG’s breaches of the EPA and was clearly beyond the agreed scope of GPGC’s work.*”

<sup>163</sup> *Ibidem*, para. 105.

<sup>164</sup> *Ibidem*, para. 107.

<sup>165</sup> *Ibidem*, para. 108.

<sup>166</sup> Energy Commission Act 1997, Section 11, Exhibit C-112.

<sup>167</sup> *Ibidem*, para. 110.

However, the Energy Commission did not issue a decision on GPGC’s application.<sup>168</sup> Repeated requests for GoG’s assistance to resolve this issue in accordance with the EPA were to no avail.<sup>169</sup> GPGC suggests that:

“the Energy Commission’s failure to grant the requested generation license was not a mere oversight. ... the absence of a generation license would later be relied upon by the GoG as a pretext to attack GPGC’s very “capacity to execute the EPA””.<sup>170</sup>

## GoG’S TERMINATION NOTICE

191. On 13 February 2018, GPGC maintains that GoG “*suddenly and without any credible contractual or legal justification*” purported unilaterally to terminate the EPA.<sup>171</sup>

192. GPGC maintains that the reasons put forward by GoG in the Resp. Termination Notice to support the termination of the EPA were “*manifestly specious*”:

- GoG had no right to terminate under Clause 3(d) of the EPA as GPGC had fulfilled all of its Conditions Precedent;<sup>172</sup>
- pursuant to Clause 4(g) of the EPA, GoG was not entitled to terminate the EPA for nonsatisfaction of GPGC’s Conditions Subsequent, unless such nonsatisfaction was “*wholly attributable to the action or inaction of GPGC*”; GPGC affirms that any non-satisfaction of the Conditions Subsequent was not “*wholly attributable*” to GPGC, but rather it was caused by GoG’s conduct;<sup>173</sup>

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<sup>168</sup> *Ibidem*, para. 111.

<sup>169</sup> *Ibidem*, para. 112.

<sup>170</sup> *Ibidem*, para. 113.

<sup>171</sup> Cl. Notice of Arbitration, para. 28. Cl. SoC, para 31: “*No longer facing the challenges of the energy crisis, the newly elected administration of the GoG did not respect its obligations and finally sought to resile from agreements struck during the height of the Ghanaian power crisis by purportedly terminating the EPA prematurely and without any valid legal basis.*” See para. 114 of Cl. SoC: “*On 2 February 2018, GPGC notified the GoG that it “had made good progress with respect to construction activities at site”, and that it expected to complete the commissioning of the open cycle by June 2018 and of the combined cycle by 11 July 2018. By this time, GPGC had also paid for a generation license to be issued and complied with the Energy Commission’s requests for additional information.*”; and para. 115 of Cl. SoC: “*Shortly thereafter, on 20 February 2018, the Energy Commission—in stark contrast to its inaction for more than seven months in respect of GPGC’s generation license application—acted hastily to issue GPGC with an “Order to Stop Work” on the project.*”

<sup>172</sup> Cl. SoC, para. 116.a: “*... In fact, at the time of the GoG’s purported termination, the EPA had already progressed to at least Stage 2 (Conditions Subsequent).*”

<sup>173</sup> Cl. SoC, para. 116.b. See Cl. Summary Briefing Note, para. 11: “*... the evidence shows that any delay in the satisfaction of GPGC’s Conditions Subsequent was not “wholly attributable to GPGC”, but instead resulted from the GoG’s dilatory and obstructionist conduct. In particular: the GoG failed to allocate, and provide Unimpeded*

- against the GoG’s complaint that GPGC had “*still not obtained a license from the [Energy] Commission to engage in the business or commercial activity for the sale of electricity*” under Section 11 of the Energy Commission Act and GPGC therefore had “*no capacity to execute the EPA*”, rendering the EPA “*null and void for want of capacity*”, GPGC says that it acted in line with Section 11 of the Energy Commission Act<sup>174</sup> and that GoG did not explain how non-procurement of this licence could possibly affect GPGC’s “*capacity to execute the EPA*” or render the EPA “*null and void*”;<sup>175</sup>
- GoG failed to explain how GPGC’s supposed failure to obtain any permits could constitute a valid basis under Ghanaian law for terminating the EPA.<sup>176</sup>

193. GPGC points out that, by letter dated 26 February 2018,<sup>177</sup> it rejected the Resp. Termination Notice and requested GoG to provide both a “*clear and unequivocal*” retraction of its purported termination notice and confirmation, by 12 March 2018, that the EPA remained fully operative.<sup>178</sup> According to GPGC, GoG did not provide any response to the Claimant’s letter of 26 February 2018 within the requested time limit.<sup>179</sup> Thus, on 26 March 2018, GPGC’s counsel, Three Crowns LLP, wrote to the Minister of Energy requesting, on or before 3 April 2018, the same written confirmations as had been

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*Access to, a site for the GPGC Plants, which was a necessary precursor to GPGC’s satisfaction of the relevant Conditions Subsequent (because they were site-specific); and b the GoG failed to perform its contractual obligation to assist GPGC to fulfil the relevant Conditions Subsequent, despite GPGC’s repeated requests for assistance.”*

<sup>174</sup> Cl. SoC, para. 116.c: “... on its plain terms, Section 11 of the Energy Commission Act 1997 required a person to obtain the relevant license before “engag[ing] in a business or a commercial activity for the transmission, wholesale supply, distribution or sale of electricity or natural gas”. At the time of the GoG’s purported termination, the GPGC Plants had not yet become operational, and GPGC had yet to engage in any type of business or commercial activity within the scope of Section 11. It could therefore not be held to be in breach of Section 11 for not having a license for those activities (the grant of which license had been considerably delayed by the Energy Commission).”

<sup>175</sup> *Ibidem*.

<sup>176</sup> *Ibidem*, para. 116.d: “Before commencing construction at the site, GPGC had obtained: (i) the requisite environmental permit from Ghana’s Environmental Protection Agency; (ii) an approval in principle for the plants’ design proposals from the GoG’s local fire brigade; (iii) a so-called “hoarding permit” approving erection of temporary fencing around the construction area from the GoG’s local district assembly; and (iv) a so called “building permit” approving GPGC’s plan to construct the power plants on the Blue Ocean Site from the GoG’s local district assembly. Further, as noted above at paragraph 110, GPGC had commenced.”

<sup>177</sup> Exhibit C-22, letter from GPGC to Ministry of Energy, 26 February 2018.

<sup>178</sup> Cl. Notice of Arbitration, paras. 29 and 30. See para. 117 of Cl. SoC.

<sup>179</sup> *Ibidem*, para. 31.

sought in GPGC's letter of 26 February 2018.<sup>180</sup> GPGC maintains that officials from GoG initially provided verbal assurances to GPGC that its legal position was correct and that GoG would resolve the issue, such that GPGC continued to work on the Project with GoG's full knowledge.<sup>181</sup>

194. GPGC states that GoG performed another *volte face* on 10 July 2018. It again insisted that the EPA had been terminated and that GPGC would have to negotiate a new PPA. According to GPGC, all further efforts to seek to change GoG's position were unsuccessful.<sup>182</sup>
195. On 13 July 2018, GPGC wrote to GoG once again to request its written confirmation that the EPA remained in full force and effect, and that GoG would comply in full with its obligations under the EPA, failing which GPGC would treat GoG's conduct as a wrongful termination and a repudiatory breach of the EPA.<sup>183</sup> GoG responded by letter dated 8 August 2018, but, according to GPGC, this communication failed again to provide the written confirmations that it had previously requested regarding the effectiveness of the EPA.<sup>184</sup>
196. GPGC maintains that the true reasons for the termination have nothing to do with its performance of the EPA. Even though GoG has failed to produce full and unredacted copies of key internal documents, which would explain what lay behind its purported termination of the EPA in February 2018, GPGC maintains that:

“... even the GoG's partial and incomplete disclosure—possibly just the tip of the iceberg—reveals that the GoG's purported termination was in pursuit of a concerted strategy adopted by the recently-elected executive to extricate itself from power purchase agreements struck by the prior administration.”<sup>185</sup>

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<sup>180</sup> *Ibidem*. See para. 118 of Cl. SoC.

<sup>181</sup> *Ibidem*, para. 32. See para. 119 of Cl. SoC.: “... GPGC received a number of assurances from the Deputy Minister of Energy for the Power Sector (the **Deputy Power Minister**) that the GoG was taking steps to resolve the issue. On the basis of this understanding that the GoG would reinstate the EPA, GPGC recommenced works at the site on 24 April 2018, with the GoG's knowledge and acquiescence.”

<sup>182</sup> *Ibidem*, paras. 6 and 33. See para. 120 of Cl. SoC.

<sup>183</sup> *Ibidem*, para. 34. See para. 121 of Cl. SoC.

<sup>184</sup> *Ibidem*, para. 34. See para. 123 of Cl. SoC.

<sup>185</sup> Cl. Reply, para. 5.

GPGC submits that in light of GoG’s failure to comply with its disclosure obligations, the Tribunal has the power to, and should, draw adverse inferences consistent with such documentary evidence as is available to it.<sup>186</sup>

197. GPGC maintains that, under Ghanaian law,<sup>187</sup> GoG’s conduct amounted to a repudiation of the EPA, which caused GPGC to incur substantial losses.<sup>188</sup> As a consequence, GPGC states that it was left with no reasonable alternative but to exercise its right under Ghanaian law to terminate the EPA – through the Cl. Termination Notice – by accepting GoG’s repudiation and to seek appropriate relief in this arbitration for the substantial harm caused by GoG’s breaches.<sup>189</sup>
198. GPGC dismisses as plainly false GoG’s assertions that the EPA only required GoG to assist GPGC in fulfilling its Conditions Subsequent under the EPA at GPGC’s request, and that GPGC neither sought such assistance from GoG, nor sought an extension of time within which to fulfil its Conditions Subsequent. GPGC maintains that:

“... the record is replete with documents evidencing GPGC’s repeated requests to the GoG for assistance in satisfying a number of GPGC’s

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<sup>186</sup> *Ibidem*, para. 6. See para. 8: “... Claimant respectfully requests the Tribunal to draw the following adverse inferences: *a* that the redacted parts of the PPA Committee Report confirm that there was no contractual or other legal basis for the GoG’s purported termination of the EPA; *b* that the withheld Cabinet Memorandum and the Cabinet Decision: *i* concluded that the EPA should be terminated based on the PPA Committee Report’s recommendation which, as noted above, was not based on any contractual or legal basis; and *ii* instructed the Attorney-General to develop a pretextual legal basis to superficially justify the purported termination; *c* that the redacted parts of the Attorney -General’s PPA Review confirm that the Attorney-General rubber-stamped the PPA Committee’s recommendation to terminate the EPA pursuant to the Cabinet’s directions; and *d* that the lack of any documentary evidence establishing that the Attorney-General’s PPA Review was subsequently circulated to the Cabinet or that a subsequent Cabinet decision was taken adopting the advice therein further confirms that the Attorney-General’s PPA Review was simply a rubberstamping exercise, which (even on the GoG’s case) was not given any consideration by the Cabinet prior to the GoG’s purported termination of the EPA.”

<sup>187</sup> Cl. SoC., para. 124: “Under Ghanaian law, a contract is repudiated where a contracting party manifests, expressly or impliedly, an intention to no longer be bound by the terms of that contract, or commits a breach that goes to the “root or substance” of that contract. In such circumstances, the innocent party has the right to terminate the contract, be released from the performance of its future obligations, and claim damages from the breaching party.”

<sup>188</sup> Cl. SoC., para. 125: “The GoG ultimately purported to terminate the EPA without any lawful basis and prematurely—notwithstanding the express stipulations in the EPA that its Term was for a “guaranteed period” and that “the performance of the Term is of the essence of the EPA as GPGC will be unable otherwise to make good on any loss suffered”. It is difficult to imagine a clearer manifestation of the GoG’s intention not to be bound by its obligations under the EPA.”

<sup>189</sup> Cl. Notice of Arbitration, para. 7. See Cl. SoC, para. 31 and Cl. Reply, para. 14: “... the GoG’s purported termination of the EPA constituted a clear manifestation of its intention not to be bound by its obligations under the EPA, and thus a repudiation of the EPA under Ghanaian law. GPGC was accordingly entitled to accept the GoG’s repudiation and terminate the EPA on 13 August 2018.”

Conditions Subsequent under the EPA, including procurement of a generation license and grid connection and water supply agreements.”<sup>190</sup>

199. Against GoG’s contention that its purported termination of the EPA on 13 February 2018 was due to the clear inability or unwillingness of GPGC to perform its obligations within the stipulated time, and that this constituted an anticipatory breach which entitled GoG to terminate the EPA, GPGC takes the following position:

- the *Timber* case<sup>191</sup> is authority under Ghanaian law for the proposition that a party is entitled to terminate a contract on the basis of an anticipatory breach only where the defaulting party makes it unequivocally clear that it does not intend to perform its side of the contract. In this regard, GPGC affirms that it had taken all available steps, at considerable cost, to mobilise the GPGC Equipment on a “*fast-track*” basis in accordance with its contractual obligations and it was, in fact, continuing to do so at the time of the Resp. Termination Notice;<sup>192</sup>
- GoG’s anticipatory breach argument based on delay also ignores the fact that any delays in the satisfaction of GPGC’s Conditions Subsequent were directly attributable to GoG’s own numerous breaches of the EPA and that, in the case of such delays, the EPA both comprehensively excluded any liability of GPGC and precluded the ability of GoG to terminate the EPA (in addition to entitling GPGC to an automatic extension of time equivalent to the delays suffered by it as a result of GoG’s conduct).<sup>193</sup>

#### **GPGC’S ENTITLEMENT TO CLAIM THE EARLY TERMINATION PAYMENT UNDER THE EPA**

200. GPGC maintains that it has incurred substantial losses as a result of the early termination of the EPA, engendered by GoG’s repudiatory conduct. Thus it:

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<sup>190</sup> Cl. SoC., para. 130. Para 131: “... GPGC’s requests either fell on deaf ears, or were frustrated for reasons directly attributable to the GoG. For example, as discussed above, the GoG’s failure to allocate the site originally envisaged in the EPA, or any suitable alternative site, necessarily led to a delay in GPGC being able to progress talks with the GridCo in relation to a Grid Connection Agreement. Similarly, the failure of the GoG to constitute a new Energy Commission in a timely fashion following the December 2016 national elections meant that GPGC’s application for a generation license was not considered for a number of months. GPGC brought these delays obstructions to the notice of the GoG on a number of occasions, but to no avail.”

<sup>191</sup> Exhibit CLA-1, *In Re Timber and Transport Kumasi-Krusevac Co. Ltd Co. Ltd, Sativa v Bonsu* [1981] GLR 256.

<sup>192</sup> Cl. SoC, para. 133.

<sup>193</sup> *Ibidem*, para. 134.

“seeks relief in this arbitration that would hold the GoG to its promise under the EPA to pay the Early Termination Payment, to at least partially compensate GPGC for those substantial losses.”<sup>194</sup>

201. GPGC says that the Early Termination Payment comprises four components:

- the early termination fee set forth in Clause 25(b)(i) of the EPA: US\$ 69,361,680 (the “**Early Termination Fee**”);<sup>195</sup>
- the costs incurred by GPGC in connection with the mobilisation of the GPGC Equipment (including, among other things, dismantling the power plants in Italy, their transportation to Ghana, storage, site preparation, procurement and on-site constructions works): US\$ 58,492,005 (the “**Mobilization Costs**”);<sup>196</sup>

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<sup>194</sup> *Ibidem*, para. 136.

<sup>195</sup> In Cl. SoC., para. 142, the Claimant points out that: “As to the first part of the calculation, the Capital Recovery Charge is defined in Annex 3 as a fixed amount: 3.7 US cents per kWh. This is equivalent to 37 US dollars per megawatt hour (MWh)”. In fn. 228 of Cl. SoC, the Claimant clarifies that: “For the purpose of the formula, the unit of this value must be changed to US dollars per MWh. This is achieved in three steps: (a) the monetary value must be divided by 100, to convert from US cents to US dollars (because there are 100 US cents to each US dollar); (b) the power generation value must be divided by 1000, to convert from kWh to MWh (because there are 1000 kWh to each MWh); and (c) the unit must be scaled up to be expressed per 1MWh by multiplying both the monetary value and the power generation value by 1000 (i.e., \$0.037 per 0.001MWh equates to \$37 per 1MWh).” As to the second part of the calculation, the Claimant points out the following: “a At the time of the termination of the EPA, the “remaining Term” of the EPA was at least forty-eight (48) months. However the calculation only permits recovery in respect of a “maximum of twenty-four (24) months” (i.e., two years). b As discussed at paragraph 20 above, the contractually guaranteed capacity of the GPGC Plants was 107 MW at ISO conditions. To calculate the amount of energy that would have been produced if the GPGC Plants had produced 107 MW of energy for 24 months (i.e., two years), it is necessary for 107 MW to be multiplied by the number of hours in two years (i.e, 17,520 hours). The amount of energy produced over two years is therefore 107 MW multiplied by 17,520 hours, which is equal to 1,874,640 MWh” (Cl. SoC., para. 143). Finally, the Claimant says, it is necessary to multiply the two parts of the formula together: US\$ 37 per MWh × 1,874,640 MWh = US\$ 69,361,680” (Cl. SoC., para. 144).

<sup>196</sup> Cl. SoC, para. 147. Para 148: “The documentary evidence relating to these mobilization costs, including invoice records, has been reviewed by Ms Ellen Smith, an independent expert with extensive experience of engineering, procurement, installation, construction, operation and maintenance of power plants (including almost twenty years of experience working for the manufacturer of the GPGC Plants, General Electric, and experience of working with the specific turbine-generator machinery that comprises the GPGC Plants). Ms Smith confirms that the claimed mobilization costs, totalling US\$ 40,223,260, correspond to mobilization activities that she would expect to see in a project of this kind, having regard to the project- and location specific factors, including the emergency fast-track nature of the project.” See paras. 101, 102 and 103 of Cl. Reply: “In her First Expert Report, Ms Smith confirmed that the claimed mobilization costs totalled US\$40,223,260 ... Since then, GPGC’s auditor, KPMG, has completed an independent audit of GPGC’s financial statements for the financial years 2016–2018. On the basis of those audited financial statements, Ms Smith has confirmed that, as of 30 September 2018, GPGC incurred debt financing costs totalling US\$18,268,745. She has also confirmed that those debt financing costs were incurred at an interest rate that is reasonable, and indeed “appreciably lower” than the cost of debt that could be obtained in the market in Ghana. ... With those debt financing costs, Ms Smith confirms that GPGC’s total incurred mobilization costs for the purpose of the calculation of the Early Termination Payment are US\$58,492,005.”



- the costs reasonably incurred by GPGC as a result of the termination of the EPA (maintenance and preservation costs): US\$ 32,448;<sup>197</sup>
- the costs associated with demobilising the GPGC Equipment from Ghana (i.e., to dismantle and transport it and to restore the Site): US\$ 6,462,528 (the “**Demobilization Costs**”).<sup>198</sup>

### GoG’s POSITION

202. GoG rejects GPGC’s allegation that it failed to perform nearly all of its obligations under the EPA. While it concedes that it failed to satisfy some of the Conditions Precedent, it points out that:

“the events surrounding the non-fulfilment of the Conditions Precedent and Conditions Subsequent were beyond the remit and control of the Respondent and not envisaged under the EPA.”<sup>199</sup>

203. GoG maintains that “the EPA did not come into effect”.<sup>200</sup>

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<sup>197</sup> Cl. SoC, para. 151. Para. 152: “... the preservation activities in relation to the GPGC Plants will need to continue until their demobilization is complete. The preservation costs will therefore increase during the course of this arbitration, and GPGC reserves its right to provide an updated quantification of such costs in due course.” See paras. 140 and 141 of Cl. Reply: “Since 31 May 2019, GPGC has continued to explore an amicable resolution of the present dispute. As such, since 31 May 2019, GPGC has incurred substantial preservation costs of at least US\$847,156 in order to (a) keep the GPGC Plants in situ and in an idle state, (b) perform the minimum necessary in order to maintain the GPGC Plants in accordance with the manufacturer’s guidance, and (c) keep the GPGC Plants secure. While these costs would not have been incurred but for the GoG’s wrongful repudiation and the consequent early termination, GPGC acknowledges that the recent costs since May 2019 are also attributable to commercial decisions to achieve a settlement. As such, GPGC does not seek recovery of the US\$847,156 additional preservation costs incurred since May 2019. ... Accordingly, GPGC’s claim in respect of this component of the Early Termination Payment stands at the amount quantified in the SoC: US\$32,448.”

<sup>198</sup> Cl. SoC, para. 155: “... Once the plants have been demobilized, GPGC will provide a quantification of the demobilization costs actually incurred by it.” Cl. Reply, para. 146: “The anticipated demobilization costs were estimated in Ms Smith’s First Expert Report to be US\$6,462,528, based on proposals from different suppliers that contain estimates for the scope of work and costs for the anticipated demobilization activities. That estimate remains unchanged.” See Cl. Summary Briefing Note, paras. from 22 to 30.

<sup>199</sup> Resp. SoD, para. 11. Para. 12: “The Respondent was unable to satisfy some of the Conditions Precedent and Conditions Subsequent due to frustration of the EPA arising out of supervening circumstances not contemplated by the Parties to the EPA.”

<sup>200</sup> *Ibidem*, para. 13: “By the frustration of the EPA which disabled the Respondent from fulfilling some of its obligations and the Claimant’s breach, the EPA did not come into effect. This necessitated the termination of the EPA by the Respondent, pursuant to its provisions.”

204. GoG suggests that, following the execution of the EPA, GPGC failed to meet all of its Conditions Subsequent under the EPA and that it neither requested GoG's assistance, nor sought an extension of time to enable it to fulfil the Conditions Subsequent.<sup>201</sup>
205. GoG says that it initially allocated the Aboadze Site for the Project. According to GoG, however, the Parties considered the Aboadze Site unsuitable, because it required substantial works which were considered uneconomical. It accepts that an alternative site at Kpone (i.e., the Kpone Site) which was subsequently proposed did not materialise.<sup>202</sup> With reference to GPGC's letter dated 20 March 2017 by which it informed GoG that GPGC had identified an alternative site for the Project, GoG points out that, by letter of 30 May 2017, the Ministry of Power had acknowledged receipt of that letter and requested GPGC to update GoG as to the particulars of the proposed site and the status of the Project. GoG affirms that no further communication was received from GPGC in this regard.<sup>203</sup>
206. So far as GoG's obligation pursuant to Clause 4(c)(ii) of the EPA to deliver evidence of the grant of the Tax Exemption to GPGC is concerned, GoG maintains that it took the necessary steps to comply with this obligation: a tax assessment on the entire Project was carried out by the GRA in order to determine the amount of tax required to be waived. GoG maintains that it fulfilled the following Conditions Precedent prior to the termination of the EPA: (i) on 24 July 2017, the Ministry of Power submitted to the Ministry of Finance a draft Memorandum to Cabinet with attached GRA tax assessment for consideration; and (ii) on 27 July 2015, parliamentary ratification was obtained for the EPA and a tax assessment on the entire project was carried out by GRA for the amount of tax required to be waived.<sup>204</sup>
207. GoG further maintains that GPGC commenced construction activities in disregard of regulatory requirements. GoG says that prior to a report of 2 February 2018, it had not

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<sup>201</sup> Resp. Response, para. 18.

<sup>202</sup> *Ibidem*, para. 19.

<sup>203</sup> *Ibidem*, para. 20.

<sup>204</sup> *Ibidem*, paras. 21 and 22.

received any weekly reports on the progress of work from GPGC through the approved communication channels contemplated in the EPA.<sup>205</sup>

208. GoG states that there is no record of any request for assistance from GPGC to satisfy any of its Conditions Subsequent. Further, prior to the termination of the EPA, there was no indication from GPGC that it had suffered any delay and/or incurred cost in the course of meeting its Conditions Subsequent, such that it would require an extension of time for the achievement of the Full Commercial Operation Date.<sup>206</sup>

### **GoG'S APPOINTMENT OF AN AUTHORIZED REPRESENTATIVE**

209. In response to GPGC's allegation that it failed to appoint an Authorized Representative pursuant to Clause 9(b) of the EPA, GoG says that GPGC:

“rather inexplicably and quite reprehensibly, failed to respect the appointment of an Authorized Representative by the Respondent, and defaulted in channelling communication regarding implementation of the project to the Respondent's duly Authorized Representative. It is the case of the Respondent that the clear breaches of Clauses 8(k) and 9(b) by the Claimant had a deleterious effect on the implementation of the EPA.”<sup>207</sup>

210. GoG states that, on 2 September 2015, it appointed the Minister for Power as its Authorized Representative and communicated this appointment to the Claimant.<sup>208</sup> GoG alleges that in breach of Clause 9(b) of the EPA, GPGC refused to respect the nomination of the Minister for Power and misdirected critical notices to officials, who were not party to the EPA, or to persons or entities (including the VRA), who or which did not have a mandate to take decisions on behalf of GoG.<sup>209</sup>

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<sup>205</sup> *Ibidem*, para. 24. The Claimant contests this position by saying that: “*This is manifestly false. ... GPGC kept the GoG informed of, and involved in, every step of the project, despite the GoG having failed to establish any “approved communication channels” (Cl. SoC, para. 42).*”

<sup>206</sup> *Ibidem*, para. 25.

<sup>207</sup> Resp. SoD, para. 20.

<sup>208</sup> *Ibidem*, para. 21. See para. 27: “*The Respondent states that its Authorized Representative was named in the EPA and the Claimant's persistent demand for the Respondent to appoint an Authorized Representative was simply unnecessary.*”; and para. 28: “*In spite of the EPA having specifically stated the Respondent's Authorized Representative, the Respondent proceeded to confirm its Authorized Representative.*”

<sup>209</sup> *Ibidem*, para. 22: “*... the Claimant boldly asserts that it directed weekly written reports by email to the Volta River Authority, an entity which was not a Party to the EPA. The Respondent submits that not being a Party to the EPA and not being the Authorized Representative of Respondent, the VRA was incompetent to receive weekly written reports on the Project from the Claimant. Notices of such written reports by the Claimant, if at all, were thus invalidly sent and of no effect.*” See para. 23: “*... The unilateral decision by Claimant to send reports to the VRA was a flagrant breach of the EPA. ...*”; and para. 24: “*... the letters by the Claimant's Damian Duncan and*

211. GoG argues, further, that GPGC’s adoption of a different approach in communicating issues concerning the EPA to GoG, resulting in delay to the fulfilment of several obligations under the EPA, amounted to a breach of Clause 28(b) of the EPA by GPGC.<sup>210</sup>

212. GoG maintains that there is no legal basis for GPGC’s allegations of a breach of the EPA founded on an asserted non-appointment of an Authorized Representative by GoG:

“It is the Claimant rather who deplorably, breached Clause 9(b) by refusing to respect the channels of communication and procedure for service of notice of correspondence on the implementation of the project.”<sup>211</sup>

213. GoG submits that:

“by its conduct [GPGC] unjustifiably rejected the Respondent’s appointed Authorized Representative and relied on a conjecture of who should have been appointed to take up that role. This is bewildering and an oppressive conduct on the part of Claimant. Claimant has no right under the EPA to reject a duly Authorized Representative by the Respondent.”

#### **FAILURE TO ALLOCATE A SITE FOR THE PROJECT**

214. GoG takes the position, first, that the Parties, after the execution of the EPA, discovered that the Aboadze Site contained an active oxidation pond which would have to be relocated to accommodate the GPGC Equipment,<sup>212</sup> and, second, on 6 April 2016,<sup>213</sup> GoG communicated that fact to GPGC and proposed the Kpone Site.<sup>214</sup>

215. GoG denies any liability for VRA’s subsequent actions and its demands made of GPGC with reference to the Kpone Site:

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*Daniel Morton dated September 21, 2015 and September 11, 2017 respectively requesting the Respondent to appoint an Authorized Representative were misplaced. ...”*

<sup>210</sup> *Ibidem*, para. 27.

<sup>211</sup> *Ibidem*, para. 23.

<sup>212</sup> *Ibidem*, paras. 30, 31 and 34. In para. 32, the Respondent says that: “At the time the Parties proposed to use the Site defined in the EPA, it was not anticipated that the proposed Site was engulfed in these unexpected challenges which literally frustrated the intention of the Parties when it came to the stage of implementation.”; para. 37: “The Respondent asserts that even if the unexpected challenges were in relation to the exorbitant costs to be incurred by the relocation of the oxidation pond, such costs were not anticipated by the Parties and this the Respondent which consequently changed the fundamental basis of the EPA as it relates to the provision of a Site by the Respondent. There was every effort by the Respondent to acquire land to move the Project to its end.”

<sup>213</sup> Exhibit R-7.

<sup>214</sup> Resp. SoD, para. 36: “... this new site as well, was not the property of the Respondent. It was offered for use by the VRA at Respondent’s request. ...”.

“The Claimant castigates the Respondent for the action of VRA in demanding the payment of rent and in compliance with its procedures for the allocation of land. The VRA, a State-owned power generation company, like any other State institution as would be demonstrated later in this Defence, is a body corporate with perpetual succession and has a management and Board of Directors. The VRA takes decisions independently of the Respondent. The Respondent only provides policy framework and not directions affecting the day to day management of the VRA.”<sup>215</sup>

216. In fact, GoG notes that, by letter of 6 April 2016, it requested GPGC to “*discuss with the VRA the modalities of the land lease agreements*”<sup>216</sup> and that, as a result, GPGC entered into discussions with VRA which culminated in a letter of 27 June 2016,<sup>217</sup> spelling out the terms and conditions for the release by VRA to GPGC of the Kpone Site. According to GoG, by the time GPGC wrote to GoG on 1 August 2016,<sup>218</sup> GPGC was aware of the terms under which the Kpone Site would be made available.<sup>219</sup>
217. GoG maintains that under the terms of VRA’s letter of 27 June 2016 (which provided that the terms of the lease were subject to the VRA Board’s approval), GPGC had no mandate to begin to prepare the Kpone Site for construction before the lease had been both agreed by the relevant parties (GPGC and VRA) and approved by the VRA Board.<sup>220</sup> GoG takes the position that VRA acted promptly and decisively by demanding that the Claimant cease all activities on the land with immediate effect, pending the formal closure of all agreements.<sup>221</sup>

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<sup>215</sup> *Ibidem*, para. 38. See also para. 41 and para. 47: “... it is undisputed that it was the VRA and not the Respondent which withdrew its offer of allocation of land to the Claimant. The Claimant’s brazen assertion to the effect that Respondent was responsible for the VRA’s withdrawal of its allocation of land, betrays ignorance about the independence of State institutions in Ghana, the authority of their boards of directors and the manner in which they function in general.”

<sup>216</sup> *Ibidem*, para. 39.

<sup>217</sup> Exhibit C-62.

<sup>218</sup> Exhibit R-10.

<sup>219</sup> Resp. SoD, para. 40: “Beyond the rent rate demanded by the VRA, it was evident that the management of VRA required the approval of its Board for the transaction. The VRA’s letter of June 27, 2016 indicated that it is the approval of the VRA Board which was needed to consummate the land transaction. This directly contradicts the Claimant’s assertion in its August 1, 2016 letter that the land would be released “for free or at a peppercorn rent upon receipt of express directives from the Ministry to that effect.”

<sup>220</sup> *Ibidem*, para. 41(i): “Even if the VRA had knowledge of the preparatory works by the Claimant ahead of construction, which the Respondent cannot confirm, that in itself does not accord legality to the preparation of the land by the Claimant, when the critical condition precedent in the matter of the land acquisition, the Board approval of VRA, had not been granted.”

<sup>221</sup> *Ibidem*, para. 41(ii): “The letter dated August 4, 2016 from the VRA vindicates the position that the VRA had neither acquiesced nor agreed to construction activities on the land in the absence of an approval from the VRA Board, as falsely claimed by the Claimant.”

218. Accordingly, it says that GPGC's claim for recovery of costs expended on the preparation of the Kpone Site has no legal basis at all.<sup>222</sup>

219. With reference to GPGC's acquisition of the Blue Ocean Site, GoG acknowledged that:

“When the VRA withdrew its offer to the Claimant regarding the use of its land at Kpone, the responsibility to provide a suitable site for the Claimant's Equipment fell again on the Respondent in accordance with the EPA.”

But it also stated that:

“By this time the EPA had been become ineffective since the Parties' compliance within the stipulated thirty (30) days moratorium had expired. As the Respondent did not have land readily available for the benefit of the Claimant, it commenced a search for an alternative location.”<sup>223</sup>

220. GoG says that GPGC breached the Conditions Precedent under the EPA by purporting to acquire land on behalf of GoG without due regard to the critical requirements which informed the initial choice of the Aboadze Site or the Kpone Site, namely, proximity to the gas pipeline and the 161KV GridCo transmission lines and the ready availability of water supply, all of which were intended to keep the costs of the Project to the barest minimum.<sup>224</sup> GoG submits that:

“The Claimant had no obligation under the EPA for the Claimant to acquire a piece of land on behalf of the Respondent. The act of acquiring the Site (or land) for the Respondent was in violation of the EPA which entitled the Respondent to terminate the EPA as it did.”<sup>225</sup>

221. GoG asserts that GPGC never involved GoG in the negotiations towards the acquisition of the Blue Ocean Site; rather, GPGC unilaterally negotiated and acquired the Blue Ocean Site and presented it as a *fait accompli* to GoG.<sup>226</sup> Matters were made worse, says GoG, because of the corporate nexus between GPGC and the landowner, Blue Ocean Ltd and which amounted to a “*conflict of interest situation*”.<sup>227</sup> GoG further maintains that

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<sup>222</sup> *Ibidem*, para. 44.

<sup>223</sup> *Ibidem*, para. 45.

<sup>224</sup> *Ibidem*, para. 49.

<sup>225</sup> *Ibidem*.

<sup>226</sup> *Ibidem*, paras. 50 and 51.

<sup>227</sup> *Ibidem*, para. 56: “... the Claimant's affiliate and beneficial owner of the Claimant, TEI Energy S.p.A Plant is an indirect minority shareholder of Blue Ocean Investments Limited, the entity which leased the Blue Ocean Site to the Claimant. The relationship between the Claimant and Blue Ocean Investments Limited is inextricably intertwined to the extent that both entities share the same office address at “1 Airport Square Building, 7th Floor,

GPGC acquired the Blue Ocean Site at market value without regard to the terms of the EPA by which GoG was to provide a site for GPGC at a “*peppercorn rent*”.<sup>228</sup>

222. GoG insists that:

“The inability of the Respondent to allocate a site immediately upon the effective date due to supervening circumstances, is not a *carte blanche* for the Claimant to embark on a search for a site ...”.<sup>229</sup>

223. It also contends that the unilateral search for a site by GPGC was an act “... *taken outside the premise of the EPA*...”<sup>230</sup> and, in particular, that GPGC had failed to fulfil its obligations pursuant to its Condition Precedent at Clause 3(a)(ii) of the EPA.<sup>231</sup>

#### **FAILURE TO GRANT TAX EXEMPTIONS**

224. GoG concedes that pursuant to Clause 13(a) of the EPA, it was obliged to obtain tax exemptions for the benefit of GPGC during the pre-construction, construction and operation of the GPGC Equipment.<sup>232</sup> But it says that:

“In the absence of an Effective Date, Clause 13(a) cannot be said to have been breached. Essentially, the application of tax exemption is triggered by the fulfilment of all Conditions Precedent. The critical point here is that without the completion of all Conditions Precedent, it is commercially

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*Airport City, Accra, Ghana, P. O. Box 1046, Accra North, Ghana*”. There is little wonder that the Claimant consummated the deal with Blue Ocean Investments Limited hook, line and sinker. With this apparent interest of the Claimant in Blue Ocean Investments Limited, the Claimant ought not to have been involved in the negotiations for the lease of the Blue Ocean Site without the interested party, the Respondent in this case.”

<sup>228</sup> *Ibidem*, para. 54. See para. 55: “... The value of the Blue Ocean Site is higher than the costs of the Kpone Site and larger in extent than the Kpone Site.”

<sup>229</sup> *Ibidem*, para. 57.

<sup>230</sup> *Ibidem*, para. 58: “Same was unwarranted and constitutes a clear violation of the terms of the EPA. ...”; para. 59: “... It is observed that Claimant’s Conditions Precedent under Clause 3(a)(ii) clearly anticipated a prior satisfaction by the Respondent of its Condition Precedent under Clause 3(a)(iv). It is in the spirit of ensuring due process and an efficient performance of the object of the EPA that Respondent was compelled to, first locate and provide to the Claimant the Site, and thereafter, the Claimant would confirm in writing the suitability of the Site.”; para. 61: “... the rationale for the EPA in allocating the duty to provide a Site for the Project to the Respondent rather than the Claimant, was that, the Respondent was better placed to ensure compliance with its local laws as regards the suitability of a Site. In light of this, Claimant cannot reasonably contend that it identified a Site for the Project. A site purportedly obtained in violation of the laws and regulations of Ghana cannot be a “Site” properly so-called.”

<sup>231</sup> *Ibidem*, para. 62: “... the Claimant cannot be held to have been able to locate a “site” for the Project, when the purported site grossly violated the provisions of the laws of Ghana and was unsuitable for the Project. In truth and in fact, no Site was identified for the Project. The Respondent cannot be held liable for any obligations arising thereunder. The Tribunal is respectfully urged to reject the assertion by Claimant that it satisfied all of its Conditions Precedent.”

<sup>232</sup> *Ibidem*, para. 64.

imprudent for the Claimant to arrange the dismantling and transportation of the Claimant's Plant from Italy to Ghana.”<sup>233</sup>

225. GoG further points out that when GPGC decided to take the initiative to apply for the tax exemption, it did not write to GoG or its Authorized Representative, but instead approached the GRA.<sup>234</sup>
226. In answer to GPGC's allegation that the Ministry of Finance took no action in response to GoG's letter of 21 November 2016,<sup>235</sup> GoG says that, by letter dated 22 December 2016,<sup>236</sup> the Ministry of Finance advised GoG to refer the matter to Cabinet/Parliament to initiate the process towards the grant of exemption.
227. GoG contends that GPGC was aware that the grant of tax exemption was within the mandate of Ghana's Parliament.<sup>237</sup> According to GoG, the Ministry of Finance assured GPGC of a refund of payments made, subject only to ratification of tax exemptions in accordance with the provisions of the EPA.<sup>238</sup>
228. GoG concludes that:

“The Claimant has no legal basis to demand a refund of the taxes when the basis for such a claim has not arisen in accordance with the terms of the EPA, that is to say, an approval of the Tax Exemptions upon the attainment of the Effective Date of the EPA.”<sup>239</sup>

#### **FAILURE TO ASSIST WITH PROCUREMENT OF WATER SUPPLY**

229. GoG maintains that, pursuant to Clause 4(a)(iv)(ii) of the EPA, it was the sole obligation of GPGC to enter into an agreement with Ghana Water for the provision of water for the

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<sup>233</sup> *Ibidem*, para. 65.

<sup>234</sup> *Ibidem*, para. 66.

<sup>235</sup> Exhibit R-15, letter dated 21 November 2016 from the Respondent to the Ministry of Finance.

<sup>236</sup> Exhibit R-16. Resp. SoD, para. 68.

<sup>237</sup> The Respondent refers to the Claimant's letter addressed to the Deputy Minister of Finance dated 31 July 2017, Exhibit R-17, and to the Deputy Minister of Finance's response of 2 August 2017, Exhibit R-18.

<sup>238</sup> Resp. SoD, paras. 69 and 70.

<sup>239</sup> *Ibidem*, para. 71: “... *The Claimant wrote the letter of July 31, 2017 on the clear understanding that its entitlement to a refund had not accrued and same would arise only in accordance with the EPA. It was for this reason that it indicated that it merely wanted a “letter of comfort” from the Respondent resulting in the Respondent's reply dated August 2, 2017. It is, with respect, disingenuous and utterly without basis for the Claimant to allege an entitlement to tax refund when the essential conditions for such a claim, that is submission to Parliament and consequent approval by Parliament, do not exist.*”



operation of the GPGC Equipment. In particular, GoG contends that, under Clause 4(d) of the EPA:

“the provision in the EPA requiring the Respondent to “use best endeavours” to assist the Claimant to procure agreement with Ghana Water Company Limited is not a substitute for the Claimant’s primary obligation in that regard. Neither is it a direct conferment of obligation on the Respondent.”<sup>240</sup>

230. GoG asserts that GPGC did not request its assistance, so far as the procurement of an agreement with Ghana Water was concerned. It rejects GPGC’s allegation that the request was made through the Weekly Reports,<sup>241</sup> since it says that those Reports were not submitted to GoG’s Authorized Representative<sup>242</sup> and that the wording adopted - “*Ghana Water had to be finalized. We require GoG assistance as per the EPA*” - was “*vague and meaningless.*”<sup>243</sup>

231. To the extent that GPGC made any attempt to develop a layout for the Aboadze Site, including a water connection point, it had done so:

“... prior to the execution of the EPA and thus, should not be reckoned as a liability to be imposed on the Respondent.”<sup>244</sup>

#### **FAILURE TO ASSIST WITH PROCUREMENT OF GAS SUPPLY**

232. GoG says that the obligation for the provision of gas supply under the EPA is split into three phases:

- a. first phase: GoG was to submit to GPGC a representative fuel sample of the actual fuel to be provided by GoG for the operation of the GPGC Equipment. GoG says that it satisfied this obligation by providing GPGC with sample gas for testing;<sup>245</sup>

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<sup>240</sup> *Ibidem*, para. 72. Clause 4(d) of the EPA reads as follows: “Each Party, upon the request of the other Party, shall use best endeavours to assist the other Party in satisfying each Conditions Subsequent for which the other Party is particularly responsible under Clause 4.”

<sup>241</sup> Exhibits C-104, C-15, C-16, C-17, C-18, C-20 and C-104.

<sup>242</sup> Resp. SoD, para. 73.

<sup>243</sup> *Ibidem*, para. 74: “... In all the purported Weekly Reports, the Claimant states that “Ghana Water had to be finalized. We require GoG assistance as per the EPA”. The Claimant’s statement is not only imprecise but nebulous. The Claimant did not indicate by its Weekly Reports either the nature of assistance or the extent of assistance it required from the Respondent. It is contended that a statement that “we require GoG assistance as per the EPA” is vague and meaningless.”

<sup>244</sup> *Ibidem*, para. 76.

<sup>245</sup> *Ibidem*, para. 77.

- b. second phase: GoG was required to assist GPGC with the procurement of utilities, including “*natural gas required during the installation, pre-commissioning, commissioning and testing of the GPGC Equipment at the Site.*”<sup>246</sup> GoG says that it is common ground that the procurement of gas supply was frustrated, because the Aboadze Site became unavailable due to unforeseen events.<sup>247</sup> GoG maintains that the EPA did not contemplate extra costs for connecting the GPGC Equipment to the gas pipeline at the Aboadze Site and that GPGC’s decision to build a gas pipeline from the Blue Ocean Site to the closest VRA metering station near the WAGP was “*unauthorized*” and contrary to the EPA;<sup>248</sup>
- c. third phase: GoG shall “*supply gas to the power plant installation and take delivery of the power at the Electricity Delivery Point*”.<sup>249</sup> GoG says that this obligation can only be satisfied once the GPGC Equipment is operational and, thus, the initiation of the third phase “*is premature at the stage where the Equipment was not operational*”.<sup>250</sup>

#### **FAILURE TO ASSIST WITH CONCLUSION OF THE GRID CONNECTION AGREEMENT**

233. GoG maintains that unless GPGC specifically requested its assistance in writing, it had no obligation under the terms of the EPA to ensure that GPGC entered into the Grid Connection Agreement with GridCo. GoG says that there is no record of any such written request for assistance from GPGC.<sup>251</sup> GoG states that, in fact, no intervention on its part was required.<sup>252</sup> GPGC’s failure to conclude the Grid Connection Agreement was

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<sup>246</sup> *Ibidem*, para. 78.

<sup>247</sup> Resp. SoD, para. 79.

<sup>248</sup> *Ibidem*, para. 82.

<sup>249</sup> Exhibit C-1, Clause 9(i).

<sup>250</sup> Resp. SoD, para. 83.

<sup>251</sup> *Ibidem*, para. 84.

<sup>252</sup> *Ibidem*, para. 85. See para. 87: “*At no point did the Claimant make a request in writing to the Respondent to assist in the procurement of a Grid Connection Agreement with GridCo. In all the exhibits referred to by the Claimant, apart from the fact that the Claimant does not refer to a request for assistance from the Respondent to ensure that GridCo enters into a Grid Connection Agreement with the Claimant, the purported requests were not directed at the Authorized Representative of the Respondent. On August 18, 2015 the Claimant apprised the Respondent’s Authorized Representative of decisions it had entered into with GridCo towards concluding a Grid Connection Agreement. That letter cannot by any stretch of imagination be construed as a request for the Respondent’s assistance*”.

attributable to its failure to provide the documentation to GridCo that would have enabled it to execute the Grid Connection Agreement.<sup>253</sup>

#### **FAILURE TO ASSIST WITH THE PROCUREMENT OF THE WES LICENCE**

234. GoG states that GPGC's application to the Energy Commission for the WES Licence was made:

“... without the knowledge of the Respondent and rightly so because the Claimant had the obligation to procure the relevant generation license(s) and other required approvals from the Commission”.<sup>254</sup>

235. It is GoG's submission that the decision to grant the WES Licence to GPGC was a matter peculiarly within the mandate of the Energy Commission and over which GoG exercised no influence.<sup>255</sup>

236. GoG asserts that GPGC failed to follow the procedure provided in the Energy Commission Act and in the Licence Application Manual<sup>256</sup> when it applied for the WES Licence.<sup>257</sup>

237. GoG says, too, that GPGC's Weekly Reports did not contain any request that GoG assist GPGC to secure the WES Licence.<sup>258</sup>

#### **GoG's TERMINATION NOTICE**

238. GoG sent its Resp. Termination Notice in response to what it asserts to be GPGC's breach of its obligations under the EPA, including its inability to:

“reach financial close nor achieve Full Commercial Operation Date primarily because some of the preconditions (Conditions Subsequent) for the achievement of financial close and Full Commercial Operation Date

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<sup>253</sup> *Ibidem*, para. 88.

<sup>254</sup> *Ibidem*, para. 92.

<sup>255</sup> *Ibidem*, para. 93. See paras. 117 and 118.

<sup>256</sup> Exhibit R-21.

<sup>257</sup> Resp. SoD, para. 94. See para. 97: “...*The Commission's Manual provides details of the procedure for locating a Site. It would be noted that it includes the filing of applications and obtaining relevant permits from the Commission. The facts of this case would show that Claimant woefully failed to comply with the procedure set out by the Energy Commission in its Manual and failed to obtain the relevant permits from the Energy Commission.*”

<sup>258</sup> *Ibidem*, para. 95.

remained unfulfilled and a breach of Section 11 of Energy Commission Act 1997, (act 541) of Ghana.”<sup>259</sup>

239. GoG further considers that the EPA was properly terminated:

“following GPGC’s non fulfilment of its Conditions Subsequent, the GPGC’s inability to achieve Full Commercial Operation Date and the parties have not mutually extended the period for the fulfilment of the Conditions Precedent.”<sup>260</sup>

240. According to GoG, GPGC had demonstrated its:

“inability or unwillingness ... to perform its obligation within the stipulated time. This is an anticipatory breach, which entitled the GoG to terminate the contract and therefore GoG has not repudiated the EPA. The EPA was terminated following GPGC’s non fulfilment of its contractual obligations as well as failure and/or refusal to comply with applicable law by acquiring the requisite permits and licenses.”<sup>261</sup>

241. GoG relies further upon:

“supervening circumstances which frustrated the Respondent’s ability to fulfil the Conditions Precedent. In the first instance, ... the Parties agreed that the Aboadze Site was not suitable for the Claimant’s Equipment due to the presence of the oxidation pond which would be excruciatingly expensive to evacuate. ...”<sup>262</sup>

242. It is the Respondent’s contention that the EPA was frustrated, because gas supply to the GPGC Equipment was premised on the availability of the Aboadze Site:

“Since the fundamental basis of the EPA, the Aboadze Site and later the alternative site (which was not a site agreed in the EPA) provided by the Respondent were not available, the Respondent was entitled to legally terminate the EPA ...”<sup>263</sup>

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<sup>259</sup> Resp. Response, para. 26.

<sup>260</sup> *Ibidem*, para. 27. See para. 102(iv) of Resp. SoD: “*In light of the Claimant’s breaches of the Conditions Subsequent, it was contractually lawful for the Respondent to exercise its right under the EPA to terminate. ...*”

<sup>261</sup> *Ibidem*, para. 28. See Resp. SoD, para. 14: “*By the time the Respondent terminated the EPA, the Claimant had failed to provide “a fast track power generation solution” envisaged under the EPA.*”; and para. 15: “*... the Respondent contends that the inability of the EPA to be fully operational which led to the termination of the EPA by the Respondent was primarily due to the Claimant’s breaches and unilateral actions in total disregard of the provisions of the EPA.*”

<sup>262</sup> Resp. SoD, para. 101. See para. 106: “*Due to the Claimant’s breaches of the Conditions Subsequent and the frustration of the EPA, the Respondent’s termination of the EPA was well-founded.*”; and para. 114: “*the EPA was frustrated due to supervening events not anticipated by the Parties prior to execution.*”

<sup>263</sup> *Ibidem*, para. 102.

243. The Respondent believes that its termination of the EPA is justified in any event by GPGC's acquisition of the Blue Ocean Site and all other activities associated with that site. GoG maintains that the acquisition of the Blue Ocean Site was contrary to the terms of the EPA and tainted by a "*conflict of interest*" by reason of GPGC's shareholding in Blue Ocean Ltd, the lessor of the Blue Ocean Site.<sup>264</sup>
244. GoG denies that the Ministry of Energy provided verbal assurances to GPGC as to the validity of its legal position in respect of the termination of the EPA. At a meeting held on 10 July 2018, GoG had informed GPGC that the EPA would not be reinstated by GoG.<sup>265</sup>
245. In light of its termination of the EPA by Resp. Termination Notice, GoG maintains that:
- "The Claimant's letter of August 13, 2018 purporting to terminate the EPA was not only moot and ineffective but also unnecessary."<sup>266</sup>
246. GoG rejects the suggestion that its conduct amounted to a repudiation of the EPA, pointing to the "*aggressive and assiduous steps*" taken to fulfil its obligations under the EPA, notably, obtaining the Cabinet's approval of the EPA, GoG's allocation of the Aboadze Site and, subsequently, of the Kpone Site. It says that these are not steps indicative of a repudiation of the EPA by GoG.<sup>267</sup>

#### **GPGC'S ENTITLEMENT TO CLAIM THE EARLY TERMINATION PAYMENT UNDER THE EPA**

247. GoG contends, first, that

"having exercised the first right of termination under the EPA, the EPA was no longer in existence ... for the Claimant to consider terminating the same Agreement once again. At the material point of the Claimant's alleged termination, there was no subsisting EPA."<sup>268</sup>

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<sup>264</sup> *Ibidem*, para. 102(v): "*The acquisition of the Blue Ocean Site is fraught with a number of challenges. (a) it was acquired contrary to the terms of the EPA. The Claimant did not have the authority to negotiate for a lease of a piece or parcel of land for the Plant without the consent and authority of the Respondent. (b) the transaction for the acquisition of the Blue Ocean Site was dogged by conflict of interest because the Claimant has shareholding interest in Blue Ocean Investments Limited, the Lessor of the Blue Ocean Site. (c) The Blue Ocean Site fails the test of proximity to natural gas, water and other utilities which are critical considerations under the EPA.*"

<sup>265</sup> Resp. Response, para. 27. See para. 104 of Resp. SoD.

<sup>266</sup> Resp. SoD, para. 106.

<sup>267</sup> *Ibidem*, paras. from 108 to 113.

<sup>268</sup> *Ibidem*, para. 122.

248. GoG asserts that since it was entitled to terminate the EPA, GPGC has no claim for any compensation; rather, GPGC should pay GoG the Early Termination Fee in accordance with Clause 25(b)(iii) of the EPA.<sup>269</sup>

249. Quite apart from the fact that it has established no entitlement to the Early Termination Payment, GoG disputes GPGC's method of calculation:

“The Respondent contends that 107MW is the ISO installed capacity of Claimant's Plant and not the “guaranteed” capacity of the Plant.”;<sup>270</sup>

“... The Respondent further contests the calculation of the amount allegedly owed the Claimant for the 24 month period. ... to compute the amount of energy that would have been produced if the Claimant's Plant had produced 107MW of energy for 24 months, the guaranteed availability of ninety-two percent (92%) has to be used and not the said guaranteed capacity”;<sup>271</sup>

“The Respondent therefore asserts that the energy that the Claimant's Plant would have produced is  $107\text{MW} \times 17,520 \text{ hrs} \times 92\% = 1,724,668.8\text{MWh}$  and not the 1,874,640MWh of energy purportedly generated by the Claimant. Accordingly, the Respondent contends that the calculation of the Early Termination Fee should be:

$$\text{US\$37 per MWh} \times 1,724,668.8\text{MWh} = \text{US\$63,812,745.6}$$

and not the US\$69,361,680 claimed by the Claimant.

The Respondent further contends that if the Claimant is found to be entitled to the Early Termination Fee, which assertion the Respondent strongly denies, then the Claimant is entitled to US\$63,812,745.6 and not the US\$69,361,680 claimed in its Statement of Claim.”<sup>272</sup>

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<sup>269</sup> *Ibidem*, paras. 123, 124 and 139(c). See Resp. Response, para. 29.

<sup>270</sup> *Ibidem*, para. 127.

<sup>271</sup> *Ibidem*, para. 128.

<sup>272</sup> *Ibidem*, para. 129.

250. In addition, GoG denies that GPGC has any entitlement to any Mobilization and Demobilization Costs;<sup>273</sup> nor to any costs said to have been reasonably incurred by GPGC as a result of the early termination.<sup>274</sup>

## VII. GPGC'S REPLY TO GOG'S DEFENCES

### RESPONDENT'S FRUSTRATION THEORY

251. GPGC rejects any suggestion that GoG was entitled to terminate the EPA on the basis of frustration and says that it is, in any event, estopped from denying that the EPA entered into effect.

252. GPGC asserts that it fulfilled all of the Conditions Precedent it was required to meet and that there was no basis for GoG to seek to terminate the EPA pursuant to Clause 3(d) of the EPA by reason of its own failure to satisfy its Condition Precedent to provide GPGC with Unimpeded Access to a Site for the Project.<sup>275</sup>

253. GPGC says that in its Resp. SoD, GoG articulated for the first time a new justification for the termination of the EPA:

“... the GoG contends in its SoD, for the first time, that its failure to provide a Site for the project was “*due to frustration of the EPA arising out of*

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<sup>273</sup> Resp. SoD, para. 130. See para 132: “*On account of this provision, the Claimant had no interest, right and justification to mobilize its Equipment to Ghana and other consequential costs associated with mobilization when it was aware at all times material that the land, which is the bedrock of the transaction under the EPA had not been secured and tax exemptions had not been granted.*”; and para 133: “*the Claimant is not entitled to demobilization costs which is a consequence of the wrongful mobilization exercise undertaken by the Claimant. ...*”.

<sup>274</sup> *Ibidem*, para. 134: “*The Claimant has premised its demand on the costs associated with the continuous preservation of its Equipment in Ghana even after termination. Since February 13, 2018 when the Respondent terminated the EPA, the Claimant has preserved the Equipment in situ for no cause when it should have in line with prudent commercial decision transport its Equipment out of Ghana. To the extent that the Respondent had not expressly requested the Claimant to maintain the Equipment here in Ghana, the continuous preservation of the said Equipment in Ghana is at no costs to the Respondent, the attempted amicable resolution of the dispute notwithstanding.*”

<sup>275</sup> Cl. Reply, para. 18. See Cl. Summary Briefing Note, para. 7: “*While the GoG failed to satisfy some of its Conditions Precedent (including provision of Unimpeded Access to a site), GPGC satisfied all of its Conditions Precedent, except one—confirmation of site suitability—because, as the GoG accepts, that Condition Precedent was contingent on the GoG’s “prior satisfaction” of its obligation to provide access to a site, which obligation the GoG never performed. The Parties nevertheless proceeded to operate the EPA for almost three years—with GPGC incurring substantial time, efforts and costs in that period in performing its obligations under the EPA—on the basis of a shared understanding that the EPA became effective, notwithstanding the non-satisfaction of certain Conditions Precedent. The GoG is therefore now estopped from claiming that the EPA did not become effective.*”

*supervening circumstances not contemplated by the Parties to the EPA*". According to the GoG, these supervening circumstances consisted of a discovery by the Parties, "after the execution of the EPA", of the presence of an active oxidation pond at the Aboadze Site and of the "exorbitant costs to be incurred by [the GoG for] the relocation of the oxidation pond". The GoG asserts that the legal consequence of this alleged frustration of the GoG's own Condition Precedent was that the EPA "did not come into effect", which "necessitated the termination" of the agreement."<sup>276</sup>

254. GPGC dismisses this purported ground for termination as incoherent (arguing that an agreement that supposedly never became effective would not require termination) and inconsistent with GoG's separate contention that the Claimant breached its obligations under the EPA. (GPGC points out that an agreement that supposedly never became effective could not subsequently impose obligations that a Party might breach).<sup>277</sup>

255. GPGC says that GoG's *ex post* frustration theory fails both as a matter of fact and law. It notes that, under Ghanaian law, a contract is frustrated if the performance of the contractual obligation becomes impossible, or radically different from that originally anticipated, as a result of an unforeseen event.<sup>278</sup> In the present case, GPGC insists that:

- there was no supervening circumstance affecting the Aboadze Site after the execution of the EPA that was unforeseen by the Parties at the time of entering into the EPA;<sup>279</sup>
- specifically, the existence of an oxidation pond at the Aboadze Site was a fact well-known to the Parties prior to execution of the EPA;<sup>280</sup>
- GoG's alternative assertion that, even if the presence of an oxidation pond was known prior to the EPA, the "exorbitant costs" that it would have had to incur in

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<sup>276</sup> Cl. Reply, para. 19.

<sup>277</sup> *Ibidem*, para. 21.

<sup>278</sup> *Ibidem*, para. 29.

<sup>279</sup> *Ibidem*, para. 24.

<sup>280</sup> *Ibidem*, para. 24. Para. 26: "... the GoG's assertion that the Parties were unaware of the existence of an active oxidation pond at the Aboadze Site prior to the execution of the EPA is undermined by its own witness, Mr Monney, who accepts that "it was known from the onset that the proposed site had an active oxidation pond."



its relocation were unforeseen and thus frustrated GoG's obligation to provide a site, is equally unavailing;<sup>281</sup>

- the scope and nature of GoG's obligation under Clause 5(a) of the EPA (i.e. "to allocate a Site that is immediately available upon the Effective Date" for the GPGC Equipment) was unaffected by the existence of the oxidation pond at the Aboadze Site. GoG remained obliged under the EPA to allocate a different Site.<sup>282</sup>

### **GoG'S CLAIM THAT THE EPA NEVER ENTERED INTO FORCE**

256. GPGC dismisses GoG's "new" claim that the EPA never entered into force, because GPGC had failed to satisfy a Condition Precedent, as not credible.<sup>283</sup>

"The record is replete with evidence that: (a) the Parties held a shared assumption that the EPA entered into force and imposed various obligations on the Parties, notwithstanding the GoG's non-fulfilment of some of its Conditions Precedent (i.e., provision of a Site and procurement of parliamentary approval for tax exemptions); and (b) the Parties conducted themselves in their relationship, and GPGC expended substantial time, costs and efforts in satisfying its Conditions Subsequent and mobilizing the GPGC Plants, over almost three years on the basis of this shared assumption."<sup>284</sup>

257. GPGC points out that the Parties held, and acted upon, a shared assumption that the EPA had become effective, notwithstanding GoG's failure to fulfil some of its Conditions Precedent within the 30-day period specified in the EPA and that GPGC expended substantial time, effort and cost in order to satisfy its various Conditions Subsequent and to mobilise the GPGC Equipment.<sup>285</sup>

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<sup>281</sup> *Ibidem*, para. 27. Para. 28: "...In any event, even if the level of costs was unforeseen, this would not assist the GoG's case. The GoG has failed to offer any support in case law or other authority for its supposed 'economic frustration' theory. This is unsurprising, as no such authority exists. As a matter of Ghanaian law, the fact that a contractual obligation is more expensive or onerous to fulfil than originally anticipated at the time of entering into a contract is insufficient to establish that such obligation has been frustrated. In particular, Ghanaian courts have repeatedly confirmed that "serious inconvenience, hardship, financial loss or delay in the performance of the contract will not be sufficient to constitute frustration".

<sup>282</sup> *Ibidem*, para. 29.

<sup>283</sup> *Ibidem*, para. 33.

<sup>284</sup> *Ibidem*, para. 36.

<sup>285</sup> *Ibidem*, para. 37.

**GoG HAD NO RIGHT TO TERMINATE THE EPA ON THE BASIS OF GPGC'S FAILURE TO PROCURE LICENCES, APPROVALS AND AGREEMENTS**

258. GPGC rejects GoG's contention that it was entitled to terminate the EPA as a result of GPGC's failure to procure the WES Licence, the Grid Connection Agreement and the Water Supply Agreement within the 30-day period stipulated in the EPA. GPGC says that that position:

“... is manifestly incompatible with the GoG's first supposed ground of termination (i.e., that the EPA did not enter into effect at all because of non-satisfaction or frustration of its Conditions Precedent).”<sup>286</sup>

259. Moreover, GoG cannot demonstrate that the non-satisfaction of any Conditions Subsequent that it was incumbent on GPGC to fulfil was “*wholly attributable*” to GPGC. In fact, any failure to fulfil them was caused by:

- GoG's own conduct, including its failure to allocate the site and to subsequently allocate any suitable alternative site;<sup>287</sup> and
- GoG's failure to comply with its obligation to assist GPGC to procure the relevant licences, approvals and agreements.<sup>288</sup>

260. GPGC also dismisses GoG's assertion that it was not contractually required to assist GPGC unless it had requested such assistance:

“Even if no request was made by GPGC, the GoG nevertheless had an unqualified obligation to assist GPGC with the procurement of water supply, electricity offtake arrangements, and the generation licence.”<sup>289</sup>

261. GPGC states that the record is, in fact, replete with GPGC's requests for GoG's assistance regarding the procurement of the WES Licence, the Grid Connection Agreement and the Water Supply Agreement.<sup>290</sup>

262. It describes as “*disingenuous*” GoG's assertion that GPGC's requests for assistance regarding the Grid Connection Agreement and the Water Supply Agreement were not

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<sup>286</sup> *Ibidem*, para. 40.

<sup>287</sup> *Ibidem*, paras. 46-48.

<sup>288</sup> *Ibidem*, para. 49.

<sup>289</sup> *Ibidem*, para. 53.

<sup>290</sup> *Ibidem*, para. 54 and footnotes 132-133-134.

directed to GoG's Authorized Representative.<sup>291</sup> GPGC maintains that GoG failed to appoint an Authorized Representative in breach of Article 9(b) of the EPA.<sup>292</sup> While GoG seeks to rely on its letter of 2 September 2015, pursuant to which, it appointed the then serving Minister of Power, Dr Kwabena Donkor, as its Authorized Representative,<sup>293</sup> GPGC states that neither Mr Parisotto, nor Mr Duncan, nor any other GPGC employee on the ground in Ghana who assisted them in their roles as Authorized Representative and Director of GPGC respectively, had received or seen the letter before it was produced in the course of these proceedings.<sup>294</sup> In any event, says GPGC, it informed GoG's representatives by way of the delivery of regular written reports of developments affecting the Project and of issues in respect of which the Respondent's assistance was required.<sup>295</sup>

263. Moreover, GPGC maintains that its requests of assistance in respect of the procurement of the WES Licence, the Grid Connection Agreement and the Water Supply Agreement were "*unequivocal and precise.*"<sup>296</sup>

264. GPGC refutes GoG's suggestion that it does not control GridCo and the Energy Commission, noting that, in practice, GoG enjoys a high level of control over these bodies<sup>297</sup> and that, as a result:

"... had the GoG provided the assistance contemplated under the EPA (as it did for other projects), the processing of GPGC's applications for a Water

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<sup>291</sup> *Ibidem*, para. 55.

<sup>292</sup> *Ibidem*, para. 56.

<sup>293</sup> Exhibit R-2, Letter from the Ministry of Power to the Director of GPGC, 2 September 2015.

<sup>294</sup> Cl. Reply, para. 60. Para 61: "*In any event, Dr Donkor resigned from his position as the then Minister of Power in December 2015. Accordingly, even if Dr Donkor had been appointed as the Authorized Representative in September 2015 (which fact was not known to GPGC), no replacement Authorized Representative was ever designated by the GoG (even on its own case). In fact, as late as September 2017—over two years following the execution of the EPA—GPGC was continuing to request the GoG for it to appoint an Authorized Representative.*"

<sup>295</sup> *Ibidem*, para. 62.

<sup>296</sup> *Ibidem*, para. 65. Para. 66: "*The GoG's belated complaints regarding the specificity of GPGC's requests are further undermined by the fact that not once did the GoG ever inform GPGC that its requests were apparently unclear or seek any clarification as to the nature and scope of assistance required. ...*"

<sup>297</sup> *Ibidem*, para. 68: "*The GridCo is a wholly-owned instrumentality of the GoG and members of its Board of Directors are appointed by the President of the GoG.*"; and para. 69: "*Similarly, the Energy Commission is a statutory body whose members are appointed by the President of the GoG. Further, the Minister of Energy is empowered to issue directions to the Energy Commission "of a general character relating to the performance of the functions of the Commission" in the public interest. In fact, the GoG's assertion that it had no control over the Energy Commission's decision-making procedures in respect of GPGC's application for a generation licence is inconsistent with its contemporaneous conduct in respect of other power projects. ...*"

Supply Agreement, a Grid Connection Agreement and a generation licence would no doubt have been expedited.”<sup>298</sup>

265. So far as the procurement of the WES Licence is concerned, GPGC states that GoG’s two arguments, first, that GPGC should have applied for the WES Licence by August 2015 and, second, that GPGC did not follow the appropriate procedure for the WES Licence – are unavailing for the following reasons:

- a generation licence was necessarily site-specific and therefore could not be the subject of an application until a site for the Project had been obtained;<sup>299</sup>
- GPGC’s application for a generation licence complied with the law and, in any case, GoG had made no attempt to explain how GPGC’s alleged failure to comply with such procedure constituted a valid basis either under the EPA or Ghanaian law for GoG to terminate the EPA.<sup>300</sup>

#### **GOG HAD NO RIGHT TO TERMINATE THE EPA BY REASON OF THE LEASING OF THE BLUE OCEAN SITE**

266. GPGC points out that the contention that the lease of the Blue Ocean Site by GPGC constituted a valid basis to terminate the EPA, as it was an act “*taken outside the premise of the EPA*” was an argument raised by GoG “*for the first time*” in its Resp. SoD.<sup>301</sup>

267. Contrary to GoG’s assertion that the preparatory work and construction works at the Blue Ocean Site were performed without the Respondent’s knowledge, GPGC asserts that GoG was kept constantly apprised of developments relating to the identification and acquisition of the Blue Ocean Site and of GPGC’s construction activities at the Site.<sup>302</sup>

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<sup>298</sup> *Ibidem*, para. 70.

<sup>299</sup> *Ibidem*, para. 72.

<sup>300</sup> *Ibidem*, para. 73.

<sup>301</sup> *Ibidem*, para. 74.

<sup>302</sup> *Ibidem*, para. 75(a): “... For example, the Blue Ocean Site was clearly identified in the environmental permit notification sent to the Ministry of Energy and the application for a generation licence sent to the Energy Commission. In fact, an internal, inter-ministerial memorandum now disclosed by the GoG with its SoD evidences that the GoG was contemporaneously fully aware of the Blue Ocean Site and GPGC’s construction activities. Further, as Mr Duncan confirms, at an in-person meeting in April 2017 with the Deputy Power Minister, Mr Duncan informed him that GPGC had acquired the Blue Ocean Site and intended to commence construction activities. At this meeting, the Deputy Power Minister approved both of GPGC’s acquisition of the Blue Ocean Site and commencement of work at the Site.”

268. GPGC says that GoG was fully aware of the work that GPGC was performing, and that it never raised any objections.<sup>303</sup>
269. GPGC refutes GoG’s suggestion that the transaction with Blue Ocean Ltd was affected by a “*conflict of interest*” (“*the Claimant’s affiliate and beneficial owner of the Claimant, TEI Energy S.p.A Plant is an indirect minority shareholder of Blue Ocean Investments Limited, the entity which leased the Blue Ocean Site to the Claimant.*” – see paragraphs 221 and 243 above), noting that GPGC’s lease of the Blue Ocean Site was an arm’s length transaction, undertaken only after an independent expert’s valuation of the market rent for such a lease.<sup>304</sup>

**GOG WAS NOT ENTITLED TO TERMINATE THE EPA ON THE BASIS OF AN ALLEGED ANTICIPATORY BREACH OF THE EPA BY GPGC**

270. According to GPGC, it took all available steps, at considerable cost, to mobilise the GPGC Equipment on a “*fast-track*” basis in accordance with its contractual obligations and it was, in fact, continuing to do so at the time of GoG’s purported termination of the EPA. The acquisition of the Blue Ocean Site was both consistent with such conduct and indicative of an unequivocal intention on GPGC’s part to deliver emergency power pursuant to the EPA.<sup>305</sup>
271. GPGC rejects GoG’s position that GPGC’s actions constituted an anticipatory breach of the EPA, which entitled GoG to terminate the EPA. GPGC says that as a matter of Ghanaian law, a party is entitled to terminate a contract on the basis of an anticipatory breach only in circumstances in which the defaulting party makes it unequivocally clear that it does not intend to perform its side of the bargain.<sup>306</sup>

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<sup>303</sup> *Ibidem*, para. 75(b): “... As Mr Parisotto explains, between November 2017 and January 2018, he personally wrote six separate letters to the VRA, the Deputy Power Minister, and Mr Opam, updating them about the award of the gas pipeline tender to China Petroleum and its activities, gas capacity allocation, and access to VRA’s metering station. Indeed, the VRA actively encouraged GPGC to “quickly start construction” of the gas pipeline, and assured GPGC that its metering station—to which the gas pipeline would be connected and which was then in the process of being upgraded—would be ready for connection to the gas pipeline in December 2017. Further, as noted above, the regular written reports delivered to Mr Opam also contained detailed information about the status of the gas pipeline works.” See Cl. Summary Briefing Note, para. 16.

<sup>304</sup> Cl. Reply, para. 75(d): “... GPGC had no incentive to inflate the costs of the site lease given that, because of the GoG’s failure to allocate a site, it was required to bear these costs in the first instance.”

<sup>305</sup> *Ibidem*, para. 78.

<sup>306</sup> *Ibidem*, paras. 77 and 79.

## THE EARLY TERMINATION PAYMENT

272. GPGC relies on the evidence of its expert, Ms Ellen Smith of FTI Consulting. Having considered and reviewed the documentation relating to all four components of the Early Termination Payment (see para. 201 above), she had concluded that the quantification of all four components was properly assessed at US\$ 134,348,661.<sup>307</sup>

## THE FIRST COMPONENT: THE EARLY TERMINATION FEE

273. GPGC assesses the Early Termination Fee at US\$ 69,361,680.<sup>308</sup> GPGC points out that if GoG's proposed approach were adopted,<sup>309</sup> the methodology would be the same, but the difference is that GoG's calculation would reflect an availability factor of the GPGC Equipment of only 92%.<sup>310</sup>

274. GPGC challenges the adoption of the 92% availability factor for the following reasons:

“First, the GoG's position rests on its unsubstantiated contention that Ghanaian law requires the application of the EPA's definition of “Guaranteed Availability” in place of the “Guaranteed Capacity”. However, no such law exists. ...<sup>311</sup>

Second, ... It is premised on an assumption that the GPGC Plants would not operate for 8% of twenty-four months, which is equivalent to nearly two months of non-operation. Such an assumption is, however, directly contradicted by Clause 25(b)(i) of the EPA, which requires the early termination fee to be calculated on the basis that the GPGC Plants “continued to operate” for the entire period.<sup>312</sup>

Third, the GoG's suggestion that the term “Guaranteed Capacity” in Clause 25(b)(i) can be simply swapped for “Guaranteed Availability” is fundamentally misconceived. Capacity and availability are wholly different concepts: capacity refers to the amount of energy that a power plant is capable of delivering, while availability refers to the measure of time that a

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<sup>307</sup> *Ibidem*, para. 86.

<sup>308</sup> See the Claimant's calculation at footnote 194 above.

<sup>309</sup> Cl. Reply, para. 91: “... the GoG suggests only one adjustment to GPGC's calculation: it alleges that, notwithstanding the plain terms of Clause 25(b)(i) of the EPA, Ghanaian law supposedly requires the application of the EPA's definition of “Guaranteed Availability” in place of the “Guaranteed Capacity”.”

<sup>310</sup> *Ibidem*, para. 92: “US\$37 per MWh x 107 MW x 17,520 hrs x 92% = US\$69,361,680”.

<sup>311</sup> *Ibidem*, para. 94.

<sup>312</sup> *Ibidem*, para. 95.

power plant is capable of delivering energy. This distinction is recognized throughout the EPA. They are not interchangeable.<sup>313</sup>

Fourth, the GoG misunderstands the function of the Guaranteed Availability mechanism. ...<sup>314</sup>

Fifth, assuming a maximum (100%) availability of the GPGC Plants in the Early Termination Fee is consistent with the actual availability that the GPGC Plants would likely have achieved in practice.”<sup>315</sup>

## **THE SECOND COMPONENT: MOBILIZATION COSTS**

275. In response to GoG’s contention that the decision to mobilise the GPGC Equipment before the satisfaction of the EPA’s Conditions Precedent was taken by GPGC at its own risk, GPGC says that:

“... the PPA Committee Report records a recommendation that the GoG should verify the “actual development cost” (i.e., mobilization costs) incurred by GPGC for the purpose of establishing how much termination compensation should be paid to GPGC. In this way, the GoG recognized that its purported termination of the EPA would entail its liability for GPGC’s incurred mobilization costs.”<sup>316</sup>

276. GPGC maintains that GoG is estopped from denying that the EPA entered into effect, notwithstanding GoG’s failure to satisfy its Conditions Precedent. GPGC is entitled to compensation for those outlays as the Parties recognised by including the Mobilization Costs component in the Early Termination Payment definition.<sup>317</sup>

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<sup>313</sup> *Ibidem*, para. 96.

<sup>314</sup> *Ibidem*, para. 97: “First, pursuant to Clause 12(c) of the EPA, GPGC warrants that the GPGC Plants will have a minimum 92% availability factor once installed on site. In this way, even if the 92% availability factor within the definition “Guaranteed Availability” could be applied in isolation to the Early Termination Fee calculation (which is denied), it would actually operate as a minimum availability, and therefore is consistent with GPGC’s position that full (100%) availability should be assumed. By contrast, the GoG’s proposal to apply a 92% availability factor to the Early Termination Fee calculation would treat it as a maximum availability, which is inconsistent with the relevant contractual framework. Second, pursuant to Clause 11 of the EPA, the Guaranteed Availability is the basis for provisionally calculating the remuneration that the GoG must pay to GPGC for the latter’s contractual performance. ... Thus, the Guaranteed Availability does not preclude, and indeed financially incentivizes, GPGC to achieve full (100%) availability of the GPGC Plants. In this way also, the GoG is inappropriately applying the 92% availability factor in the “Guaranteed Availability” definition as a maximum on the Early Termination Payment, when it was not intended to operate as such.”

<sup>315</sup> *Ibidem*, para. 98.

<sup>316</sup> *Ibidem*, para. 106.

<sup>317</sup> *Ibidem*, para. 107: “... the GoG cannot now deny that GPGC was “vested with the right to mobilize” the GPGC Plants to Ghana under the EPA. GPGC properly exercised that right to mobilize with a view to achieving the commercial objective of delivering “emergency” and “fast-track” power.”

**a. Kpone Site costs**

277. While GoG contends that GPGC was required to await the approval of the VRA Board of the use of the proposed Kpone Site before commencing preparatory activities, GPGC says that it was GoG's responsibility to allocate a site at a peppercorn rent and to complete such discussions with VRA as may have been necessary in order to bring that about, including negotiating and bearing any rental payments demanded by VRA. GPGC maintains that:

“it is absurd that the GoG is now complaining about GPGC's failure to perform the GoG's obligation to obtain any necessary authorizations from the VRA in order to allocate a site”.<sup>318</sup>

278. GPGC says that it kept GoG informed about the planned preparatory activities at the Kpone Site<sup>319</sup> and that GoG never objected to those preparatory activities going ahead; on the contrary, it actively encouraged GPGC to proceed.<sup>320</sup>

**b. Blue Ocean Site costs**

279. GPGC says that GoG made no attempt to identify a further alternative location once the Kpone Site had been withdrawn.<sup>321</sup> GPGC states that under Ghanaian law, it was entitled take steps to mitigate its losses arising from GoG's breach of its obligation to allocate a Site<sup>322</sup> and, in fact, GPGC's acquisition of the Blue Ocean Site:

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<sup>318</sup> *Ibidem*, para. 111.

<sup>319</sup> The Claimant makes reference to: (i) the Respondent's communication of 6 April 2016 (Letter from Ministry of Power to GPGC, 6 April 2016, Exhibit C-6) by which the Respondent expressly directed GPGC to evaluate the suitability of the Kpone Site prior to approval from the VRA Board (*Ibidem*, para. 112(a)); (ii) the Claimant's response to the Respondent's letter of 30 April 2016, by which the Claimant informed the Respondent (including the Minister of Power) that the Claimant would “*proceed to conduct preliminary investigations as well as some initial activities such as fencing and preliminary site preparation*” to ascertain the Kpone Site's suitability (*Ibidem*, para. 112(b)); and (iii) Mr Parisotto's explanation that those preparatory activities “*included: (i) pegging and fencing the area; (ii) confirming that no third parties had rights over the land; (iii) clearing the site; (iv) conducting certain preliminary site inspections with subcontractors and utility companies; (v) developing a new layout for the GPGC Plants; and (vi) investigating new connection points for electricity, gas and water.*” (*Ibidem*, para. 112(c)).

<sup>320</sup> *Ibidem*, para. 112(d).

<sup>321</sup> *Ibidem*, para. 116.

<sup>322</sup> *Ibidem*, para. 117: “... *The relevant Ghanaian law principles in this regard are not in dispute: a to the extent a party fails to mitigate its loss by taking reasonable steps in the normal course of business, it cannot recover damages for losses that could have been avoided by taking such steps; and b a party may recover damages for any loss or expenses incurred by it in reasonably attempting to mitigate its loss.*”



“was a reasonable mitigation measure because, as the GoG appears to accept in its SoD, the newly elected GoG did not identify any alternative site following the GoG’s revocation of the Kpone Site in January 2017.”<sup>323</sup>

280. To the extent that GoG contends that the lease of the Blue Ocean Site was not a reasonable mitigation measure by GPGC, and that it should instead have exercised its right to terminate the EPA in accordance with either Clause 3(b) or Clause 3(d) of the EPA, GPGC makes the following observations:

- GPGC had a choice whether to exercise its right to terminate the EPA pursuant to Clause 3(b) or Clause 3(d) or to insist upon performance of the EPA while taking reasonable steps to mitigate the damage resulting from GoG’s failure to allocate a site. GPGC decided to locate an alternative suitable site to “*maximize the chance of the project becoming operational*” as it “*would not have been reasonable in these circumstances simply to walk away from the project*”;<sup>324</sup>
- GPGC considered the Blue Ocean Site to be the best available option in the Tema region, providing access to the WAGP and being located near the prospective location of a natural gas liquefaction facility.<sup>325</sup>

**c. The taxes incurred in the context of the mobilization activities**

281. GPGC rejects the proposition that it had no legal basis to demand a refund of taxes when the basis for such a claim had not arisen in accordance with the terms of the EPA. GPGC points out that:

“Ms Smith has confirmed that, from an industry perspective, taxes incurred in the course of mobilization activity (as the taxes incurred by GPGC were) constitute “mobilization costs”. As such, Taxes are recoverable in the “mobilization costs” component of the Early Termination Payment”.<sup>326</sup>

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<sup>323</sup> *Ibidem*, para. 115.

<sup>324</sup> *Ibidem*, para. 119.

<sup>325</sup> *Ibidem*, para. 120: “The site was also selected following discussions with GridCo regarding power evacuation. Furthermore, neither the Aboadze Site nor the Kpone Site proposed by the GoG possessed all the alleged “critical requirements” referred to by the GoG and would also have required construction of additional infrastructure.”

<sup>326</sup> *Ibidem*, para. 122.

282. GPGC further asserts that even if the taxes at issue could be somehow excluded from the Mobilization Costs component of the Early Termination Payment, GoG would still be liable to compensate GPGC for them, pursuant to Clause 13(c) of the EPA.<sup>327</sup>
283. Referencing the letter of 2 August 2017 from Mr Kwarteng to Mr Morton,<sup>328</sup> GPGC notes that GoG had previously acknowledged its responsibility under Clause 13 of the EPA to grant relief to the Claimant for its tax liabilities.
284. According to GPGC: (i) it is not disputed that all elements of Clause 13(c) of the EPA have been satisfied, such as to trigger GoG’s obligation to refund;<sup>329</sup> and (ii) pursuant to Clause 25(b) of the EPA, GoG’s liability for breach of Clause 13(c) of the EPA is not affected by GPGC’s separate claim to an Early Termination Payment.<sup>330</sup>

**d. The costs incurred after the Resp. Termination Notice**

285. GPGC says that it was contractually obliged to continue to mobilise the GPGC Equipment and to incur the associated costs in accordance with the terms of the EPA during the period of GoG’s repudiatory conduct until such time as GPGC accepted that repudiatory conduct as terminating the EPA on 13 August 2018. GPGC maintains that:

“All of those costs constitute “mobilization costs” for the purpose of the Early Termination Payment. There is no textual support or logical reason why a limitation of liability should be implied into the EPA to release the GoG from its obligation to repay the mobilization costs that GPGC was contractually obliged to incur during the period of the GoG’s repudiatory conduct.”<sup>331</sup>

286. GPGC relies on the documentary record (further supported by the testimony of Mr Duncan, who, in his capacity as a Director of GPGC, liaised directly with GoG’s representatives regarding the status of the Project during the period following GoG’s

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<sup>327</sup> *Ibidem*, para. 123.

<sup>328</sup> *Ibidem*, para. 124. Exhibit C-95, letter from Mr Kwarteng (Deputy Minister of Finance) to Mr Morton (GPGC), 2 August 2017.

<sup>329</sup> *Ibidem*, para. 125: “... (a) the GoG compelled GPGC to pay Taxes in Ghana; (b) those Taxes were incurred as a result of the GoG’s failure to grant a Tax Exemption; and (c) GPGC has requested a reimbursement with appropriate supporting documentation.”

<sup>330</sup> *Ibidem*, para. 126: “Clause 25(b) provides that, following early termination, the Parties will be released from their respective obligations under the EPA, except for the Early Termination Payment that is being sought in this arbitration and “save for any accrued rights or liabilities of any Party in respect of damages for non-performance of any obligation under this Agreement falling due for performance prior to such termination”. The GoG’s failure to refund GPGC’s Taxes was such an “accrued liability” prior to termination.”

<sup>331</sup> *Ibidem*, para. 130.

purported termination) to support its position that following the issuance of the Resp. Termination Notice, GoG led GPGC to believe that that Notice would be revoked and it did not object to GPGC's ongoing mobilisation activities.<sup>332</sup>

287. GPGC points out that GoG failed to disclose documents requested pursuant to GPGC's Document Production Request No. 2 and stated that no such documents existed, because GoG had: "*simply ignored the patronizing letters delivered by [GPGC]*"<sup>333</sup>. GPGC considers that explanation "*implausible*" and submits that the Tribunal should:

"draw adverse inferences that are consistent with the documentary evidence available:

- a that following the issuance of the GoG's purported termination notice of 13 February 2018, the GoG repeatedly reassured GPGC that the notice would be revoked, and the project reinstated; and
- b that following the issuance of the GoG's purported termination notice of 13 February 2018, GPGC continued construction works at the Blue Ocean Site after 13 February 2018 in accordance with its contractual obligations under the EPA and with the GoG's full knowledge."<sup>334</sup>

#### **THE THIRD COMPONENT: COSTS REASONABLY INCURRED BY GPGC AS A RESULT OF EARLY TERMINATION**

288. GPGC maintains that it is also entitled to recover "*any other reasonably incurred cost by GPGC as a result of an Early Termination*".<sup>335</sup> GoG's objection that the GPGC Equipment should have been removed from February 2018, is met by GPGC's argument that it was contractually obliged to maintain the GPGC Equipment between 13 February 2018 and 13 August 2018.<sup>336</sup>

289. GPGC considers that its decision to preserve the GPGC Equipment *in situ* until the end of May 2019 in light of the ongoing settlement negotiations between the Parties: "*as*

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<sup>332</sup> *Ibidem*, para. 131.

<sup>333</sup> *Ibidem*, para. 134. Letter from Amofa & Partners to the Tribunal, 5 December 2019, p. 12.

<sup>334</sup> *Ibidem*, para. 135.

<sup>335</sup> *Ibidem*, para. 138. Exhibit C-1, Definitions ("*Early Termination Payment*", on p. 5).

<sup>336</sup> *Ibidem*, para. 143: "*To recall, 13 February 2018 is the date of the GoG's purported termination notice, which marked the start of the GoG protracted repudiatory conduct over six months, during which it wrongly maintained its purported termination of the EPA. During that six-month period, the EPA remained effective, until GPGC accepted the repudiation on 13 August 2018, resulting in early termination. As discussed above, during that six-month period, GPGC was required to continue mobilizing the GPGC Plants in accordance with the terms of the EPA, and the GoG actively encouraged GPGC to do so.*"

*opposed to incurring wasteful costs transporting the GPGC Plants outside of Ghana for no purpose, was “in line with prudent commercial decision [making]”*”<sup>337</sup>

**a. Demobilization Costs**

290. GPGC rejects the contention advanced by GoG that Demobilization Costs had been incurred as “*a consequence of the wrongful mobilization exercise undertaken by the Claimant*”<sup>338</sup> GPGC reiterates that:

“... there was nothing “wrongful” about GPGC’s mobilization activities: they were undertaken in accordance with the terms of the EPA, while it remained effective, and with the GoG’s full knowledge.”<sup>339</sup>

291. While GPGC notes that GoG has objected to Ms Smith’s computation of the Demobilization Costs, it points out that GoG has not elaborated on that complaint, nor has it put forward any alternative computation.<sup>340</sup>

**b. The Early Termination Payment claimed by GoG**

292. GoG contends that it was entitled to terminate the EPA and accordingly, it was entitled to look to GPGC for payment of the Early Termination Fee in accordance with Clause 25(b)(iii) of the EPA. GPGC rejects that argument; it points out that, first, GoG has offered no legal reasoning to support this claim and it has not quantified it;<sup>341</sup> and, second, GoG was not entitled to terminate the EPA under Clause 4(g) of the EPA in any event, as the non-fulfilment of the Conditions Subsequent by GPGC was not “*wholly attributable*” to the conduct of GPGC, but rather, it was caused by GoG’s own conduct.<sup>342</sup>

**VIII. GOG’S REJOINDER**

293. In general terms, GoG:

“rejects the main theme of the Claimant’s case that the Respondent repudiated the EPA and, therefore, entitled the Claimant to accept the

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<sup>337</sup> *Ibidem*, para. 144.

<sup>338</sup> See, SoD, para. 133.

<sup>339</sup> Cl. Reply, para. 148.

<sup>340</sup> *Ibidem*, para. 149.

<sup>341</sup> *Ibidem*, para. 157.

<sup>342</sup> *Ibidem*, para. 158.

Respondent's purported repudiation and subsequently purport to terminate the EPA on August 13, 2018."<sup>343</sup>

294. In any event, GoG maintains that if, as GPGC contends, it had breached its obligations, it was incumbent on GPGC to exercise the remedy available to it under Clause 24(b) of the EPA.<sup>344</sup>

295. In answer to GPGC's complaint that in the Resp. SoD, GoG had articulated "*for the first time*" a new justification for the termination of the EPA, GoG says:

"Surely, it is not being suggested by the Claimant that the Respondent is foreclosed from advancing further arguments in support of its termination of the EPA. It should be stressed that the Respondent has every legal right and overriding duty to the Tribunal to unearth every matter which is relevant for a fair determination of the dispute."<sup>345</sup>

#### ADVERSE INFERENCE

296. GoG acknowledges that it has failed to comply with its disclosure obligations in respect of the redactions made to the PPA Committee Report<sup>346</sup> and the A-G's Advice and its refusal to produce the Cabinet Memorandum and Cabinet Decision. It insists that its non-compliance was not borne out of disrespect or disobedience to the Tribunal, but rather out of a genuine and legally justifiable desire to protect the confidential information of third parties.<sup>347</sup>

297. GoG maintains that:

"For the Tribunal to accede to the request of the Claimant to draw adverse inference from the absence of the Cabinet Memorandum and Cabinet

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<sup>343</sup> Resp. Rejoinder, para. 5.

<sup>344</sup> *Ibidem*. See para. 6: "By the time the Respondent exercised its legitimate right to terminate the EPA, the Claimant had not invoked the remedy available to it under Clause 24(b)."

<sup>345</sup> *Ibidem*, para. 12.

<sup>346</sup> Resp. Summary Briefing Notes, para. C.i: "... the PPA Committee Report contained confidential information about third Parties which should not be disclosed."

<sup>347</sup> Resp. Rejoinder, para. 12. The Respondent makes reference to letter dated February 7, 2020 from the Managing Director of Electricity Company of Ghana Limited to the Chief State Attorney and Director, Energy Division, Attorney General's Department (Exhibit ECG-1). See para 32: "... the failure of the Respondent to produce the Cabinet documents is due to its genuine desire to protect the confidentiality of these documents. The Respondent wishes to say that the protection of Cabinet documents is not a new legal concept and is not unique to Ghana's system of justice delivery."

Decision documents would be undermining basic principles underlying confidentiality and take away one of the important pillars of democracy.”<sup>348</sup>

298. With specific reference to GoG’s failure to produce the A-G’s Advice, GoG submits that:

“To compel the Respondent or its counsel to disclose a report from a lawyer, the Attorney-General and the Government’s chief legal advisor, to its client, or draw adverse inference from such disclosure will do untold damage to this time-honoured principle and near-absolute principle and will, not only undermine a principle which forms one of the cornerstones of the practice of law and of the legal profession, but also the legal system of Ghana.”<sup>349</sup>

299. In any event, GoG maintains that, first, there is no information in any of these documents that does damage to, or in any way upsets, its case,<sup>350</sup> and, second, these documents are extrinsic to the EPA and thus are not admissible to interpret the EPA due to the fact that the EPA is not ambiguous.<sup>351</sup>

#### **THE FRUSTRATION OF THE EPA**

300. GoG maintains that the EPA was frustrated with respect to the Aboadze Site, “*while it is the Claimant’s contrary view that the EPA was not frustrated*”.<sup>352</sup>

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<sup>348</sup> *Ibidem*, para. 35. See Resp. Summary Briefing Notes, para. C.i: “... while the Cabinet Memorandum and the Cabinet Decision are immaterial in determining the rationale for terminating the EPA by the Respondent, the Tribunal should protect confidential Cabinet documents and decisions particularly when such documents or decisions as the case may be are immaterial to the resolution of the dispute.”

<sup>349</sup> Resp. Rejoinder, para. 48. See Resp. Summary Briefing Notes, para. C.i: “The Respondent will also contend that the Respondent should not be compelled to disclose a document from the Attorney General (the lawyer) and its Client (Government of Ghana) since such a step will be undermining the principle of Solicitor-Client privilege”.

<sup>350</sup> Resp. Rejoinder, para. 17. See para 18: “... the Respondent’s case stands independently of the events contained in the PPA Committee Report, the Attorney General’s PPA Review, Cabinet Memorandum and Cabinet Decision.”; and para. 29: “Taking the specific breaches of the EPA by the Claimant prior to the inauguration of the PPA Committee into consideration, an unredacted PPA Committee Report, the disclosure of the Cabinet Memorandum and the Cabinet Decision as well as an unredacted Attorney General’s PPA Review will not absolve the Claimant of the incurred breaches of the EPA. The Respondent’s case is based on the breaches of the EPA and not dependent on decisions or recommendations of the PPA Committee.”

<sup>351</sup> *Ibidem*, para. 52: “...The documents in issue are extrinsic to the EPA: they were not incorporated in any shape or manner into the EPA, having been created long after the execution of the EPA. As a general rule of law, extrinsic evidence, is not admissible to interpret an unambiguous contract. The Claimant has not pleaded that the EPA is ambiguous. Therefore, whether or not one or both of the Parties breached the EPA, the legal or contractual right to terminate or otherwise, is to be found within the four corners of the written agreement and none other.” See para. 54: “... The introduction of these documents into this arbitration proceedings is so far-fetched and so far removed that one wonders why the Claimant is even raising it. It is the Respondent’s opinion that this is a red herring, thrown at the Tribunal to throw the Tribunal off the stench of the Claimant’s failing case.”

<sup>352</sup> *Ibidem*, para. 57.

301. GoG accepts that the existence of the oxidation pond was a fact known to the Parties at the time of execution of the EPA. However:

“the coexistence of the Claimant’s Equipment and the oxidation pond, was found to be operationally and technically impossible after the execution of the EPA, consequently changing the complexion of the status of the Site agreed upon by the Parties.”<sup>353</sup>

302. GoG says that GPGC and its witness, Mr Parisotto, had omitted any mention of the events which made it impossible for the Aboadze Site to be used for the Project.<sup>354</sup> In particular, GoG notes that the various investigations carried out at the Aboadze Site culminated in a meeting at Aboadze on 30 July 2015, in the course of which the Parties agreed that the Aboadze Site was not suitable for the Project: thus, GoG says that it was apparent that, from 30 July 2015, the Aboadze Site was inappropriate to be used for the purpose of installing the GPGC Equipment as envisaged under the EPA.<sup>355</sup>

303. GoG maintains that, at the time of the conclusion of the EPA, it was unforeseen that the GPGC Equipment could not co-exist with the oxidation pond.<sup>356</sup> GoG says that that fact became known to the Parties after a series of investigations and a geotechnical survey and, as a result, to the extent that the Aboadze Site was found to be incapable of being put to its intended use after the execution of the EPA and during the process of implementation, the EPA was frustrated as regards GoG’s obligation to allocate the Aboadze Site for the Project.<sup>357</sup>

#### **THE EPA DID NOT COME INTO EFFECT**

304. GoG states that this claim is “*simply borne out of the provisions of the EPA*”. By relying on the definition of the “*Effective Date*” contained in the EPA,<sup>358</sup> GoG maintains that the

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<sup>353</sup> *Ibidem*, para. 62. See para. 63: “... *In the instant case, the following circumstances are worthy of note: (a) The Parties entered into the EPA to use the Aboadze Site for the Claimant’s Equipment; (b) The Aboadze Site contained an oxidation pond; (c) After the execution of the EPA it was discovered that the oxidation pond will not co-exist with the Claimant’s Equipment; and (d) The Parties agreed that the Aboadze Site became operationally and technically unsuitable.*”

<sup>354</sup> *Ibidem*, para. 64.

<sup>355</sup> *Ibidem*, para. 65. See also para. 68: “*By July 30, 2015 the Parties were ad idem that the Aboadze Site will no longer be available for the intended purpose.*”

<sup>356</sup> The Respondent states that the unsuitability of the Aboadze Site “*was discovered after the execution of the EPA*” (*Ibidem*, para. 70).

<sup>357</sup> *Ibidem*, para. 66.

<sup>358</sup> See the definition of “*Effective Date*” in para. 163 above.

EPA would become effective only once all the Conditions Precedent had been fulfilled. However, it says that the Conditions Precedent:

“were not satisfied to make the EPA effective. The Parties did not meet the threshold of the “Effective Date” of the EPA and to that extent the Parties mutually breached the EPA.”<sup>359</sup>

305. GoG further asserts that:

“the fact that the Parties continued to operate the EPA does not invalidate the claim that the EPA never became effective because of the identified breaches which strike fundamentally at the core of the EPA.”<sup>360</sup>

306. It is GoG’s position that: (i) the fact that parliamentary approval of the EPA was obtained beyond the Effective Date (*i.e.* 54 days after the signature date) does not, by any means, make the EPA effective;<sup>361</sup> (ii) GoG’s efforts to provide the Kpone Site upon the discovery of the unsuitability of the Aboadze Site were still outside the contractual period, making the EPA ineffective within the meaning of what constitutes the Effective Date;<sup>362</sup> (iii) GPGC’s acquisition of the Blue Ocean Site was not justified;<sup>363</sup>; (iv) GPGC’s “*alleged regular progress reports*” did not affect the fact that the obligations under the EPA did not pass the test of the Effective Date;<sup>364</sup> and (v) the actions taken by “*the Government of Ghana Ministries*”, that were not Parties to the EPA,

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<sup>359</sup> Resp. Rejoinder, para. 73. See Resp. Summary Briefing Notes, para. C.iii: “*It is the Respondent’s contention that the EPA did not become effective due to the Parties’ repetitive breaches of the EPA. The Conditions Precedent under the EPA ought to have been satisfied or waived thirty days from the Signature Date to achieve the Effective Date.*”

<sup>360</sup> Resp. Rejoinder, para. 74. In para. 75, the Respondent summarizes its position as follows: “*(i) The non-fulfilment or satisfaction of the Conditions Precedent under the EPA within the period of thirty (30) days makes the EPA ineffective. In other words, the Parties did not meet the Effective Date requirement. (ii) The remedy for the breach or non-fulfilment of the Conditions Precedent is provided for in the EPA and does not rest on estoppel. (iii) Activities undertaken by the Parties under the supposed shared assumption pursuant to the EPA are voidable and determinable at the instance of any of the Parties. (iv) The Claimant cannot breach the EPA and apply the defence of estoppel to justify its breach. (v) The action of non-parties performed under the EPA does not grant the Claimant any right whatsoever to invoke estoppel to wriggle out of the ineffectiveness of the EPA.*”

<sup>361</sup> *Ibidem*, para. 74(a): “*The Respondent will submit that the Parties’ performance of the EPA in the face of this breach which contained remedies to be adopted by an aggrieved party will not make the EPA effective.*”

<sup>362</sup> *Ibidem*, para. 74(b).

<sup>363</sup> *Ibidem*, para. 74(c): “*... the Claimant had no obligation to acquire land for the Project: this was one of the Respondent’s Conditions Precedent. The Claimant informed the Respondent about discovering a piece of land for the Project. The Claimant struggles to argue that since the Respondent acknowledged the letter without raising issues about the effectiveness of the EPA, on that account, the Respondent is estopped from raising the effectiveness of the EPA.*”

<sup>364</sup> *Ibidem*, para. 74(d).



did not make the EPA effective “*only because a non-party is requested to take certain actions under the EPA*”.<sup>365</sup>

307. GoG reiterates its position that the EPA became “*inherently ineffective*” as GPGC did not fulfil its obligations regarding the Conditions Precedent, save for “*providing the maintenance record which it did on July 2, 2015*”.<sup>366</sup>

308. According to GoG, all the actions taken by GPGC:<sup>367</sup>

“were its own breaches of the EPA, breaches which the Claimant was aware of but deliberately decided it was in its best interest to undertake.”<sup>368</sup>

#### **GOG’S RIGHT TO TERMINATE THE EPA FOR GPGC’S BREACH OF ITS CONDITIONS SUBSEQUENT**

309. GoG contends that, in the event that the Tribunal “*takes a contrary view from the Respondent’s case*”, the Tribunal, pursuant to Clause 4 of the EPA, would be:

“invited to consider the Claimant’s interminable breaches of its Conditions Subsequent”.<sup>369</sup>

310. It is GoG’s contention that GPGC should have satisfied its Conditions Subsequent (including the obtaining of the WES Licence and the execution of both the Water Supply

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<sup>365</sup> *Ibidem*, para. 74(e): “There is no privity of contract between the Claimant and the various agencies the Claimant refers to in its Reply. In effect, estoppel cannot be raised against the actions taken by a non-party, who had no right or obligations under the Agreement, the EPA.”

<sup>366</sup> *Ibidem*, para. 79. See para. 88: “For the Tribunal to find otherwise and hold that the EPA became effective despite the failure of both parties to fulfil all the Conditions Precedent would amount to a rewriting for an agreement which is clear, unambiguous and voluntarily entered into by both parties without any duress.”; and para. 103: “The gravamen of the Respondent’s case in relation to this matter is that by the non-fulfilment of the Conditions Precedent within the specified date which is calculated thirty (30) days from the Signature Date, the EPA is considered ineffective.”

<sup>367</sup> *Ibidem*, para. 95: “... the Claimant says that, among other actions, it expended substantial time, costs and efforts in satisfying its Conditions Precedent and Subsequent and, a) mobilized the Claimant’s Plants; b) it commenced preparatory work on the Kpone Site; c) it acquired the Blue Ocean Site; d) it sent progress reports by email to various unauthorized officers at the Ministry of Energy; e) liaising with other governmental Ministries who it very well knew were not parties to the EPA.”

<sup>368</sup> *Ibidem*, para. 96. The Respondent considers that the Claimant’s contractual breaches fall into four categories: “those that were expressly placed on the Claimant as Conditions Precedent under clause 3, those placed on the Claimant as Conditions Subsequent under Clause 4 of the EPA; those that were not the Claimant’s obligation to perform but it unilaterally and unlawfully arrogated them to itself and performed and those that pertained to express procedures established in the EPA which the Claimant decided it did not have to, or simply would not, follow.”

<sup>369</sup> *Ibidem*, para. 103.

Agreement and of the Grid Connection Agreement) by August 2015, but it failed to comply with these obligations and thus GoG was entitled to terminate the EPA.<sup>370</sup>

311. GoG denies GPGC's assertion, based on Clauses 4(g) and 6(h) of the EPA, that its failure to satisfy its Conditions Subsequent was attributable to the acts and omissions of GoG. It says that GPGC's failure to meet its obligations under the Conditions Subsequent was wholly attributable to GPGC. GoG submits that while:

“[t]he Claimant relies on Clause 4(b) and 6(h) that it was entitled to an automatic extension of the period lost in attaining Full Commercial Operation Date”<sup>371</sup>

312. GoG maintains that: (i) there is nothing automatic about the extension of time for the fulfilment of GPGC's Condition Subsequent; (ii) GPGC's argument is not the language of the EPA and the EPA does not, even in the absence of express language to that effect, allow for such an interpretation;<sup>372</sup> and (iii) GPGC cannot explain away the plethora of breaches of its own Conditions Subsequent by allegations of delay in the performance of GoG's obligations.

313. GoG suggests that GPGC did not apply the remedy set forth in Clause 4(h) of the EPA for any delay on GoG's part, because:

“[GPGC] knew very well that either it could not prove that its non-fulfilment were [sic] not the fault of the Respondent but its own, or otherwise, it had an ulterior motive, outside the EPA why it decided not [to] invoke this remedy to its advantage, at the very least to mitigate its costs if at all.”<sup>373</sup>

314. With reference to its “*alleged failure to allocate a site to the Claimant*”, GoG maintains that: (i) GPGC is estopped from using the allocation or otherwise of the Site as a ground for its inability to satisfy its Conditions Subsequent;<sup>374</sup> (ii) GPGC made an “*unauthorized*

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<sup>370</sup> *Ibidem*, para. 106.

<sup>371</sup> *Ibidem*, para. 110.

<sup>372</sup> *Ibidem*, paras. 112, 113 and 116.

<sup>373</sup> *Ibidem*, para. 118.

<sup>374</sup> *Ibidem*, para. 119(a).

occupation” of the Kpone Site;<sup>375</sup> (iii) by its letter dated 20 July 2016,<sup>376</sup> GoG had drawn GPGC’s attention to its failure to comply with due procedure for construction activities on the Kpone Site and it had requested GPGC to comply with due procedure before undertaking works on the Kpone Site;<sup>377</sup> (iv) the content of VRA’s letter dated 23 September 2016<sup>378</sup> “has no connection to the EPA” as the EPA had been executed before the date of this letter.<sup>379</sup>; and (v) after GPGC had failed to comply with due procedure leading to the withdrawal of the Kpone Site, there was no further obligation on GoG to provide an alternative site.<sup>380</sup>

### THE PROVISION OF ASSISTANCE TO GPGC

315. While GoG admits that it had an obligation to assist GPGC to satisfy its Conditions Subsequent pursuant to the terms of Clause 4(d) of the EPA,<sup>381</sup> it points out that the use of “best endeavours” (required by Clause 4(d) of the EPA) should not such as to give rise to a breach of the laws of Ghana.<sup>382</sup>

316. GoG says that:

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<sup>375</sup> *Ibidem*, para. 119(b): “The Claimant’s undertook unauthorised activities, which went way beyond a suitability assessment and, in fact, amounted to the Claimant’s unauthorized occupation of the VRA Site. ... It is apparent from the VRA’s letter [dated 23 September 2016; Exhibit C-131] that the instruction to terminate work on the Kpone Site was issued on the 4th and 26th August 2016 respectively to the Claimant because the Claimant did not have authorization to carry out activities which, in effect, amounted to its unauthorized occupation of the land. ... The Board of VRA had also not approved the allocation of the Kpone Site to the Claimant. It was in this regard that the VRA by its letter demanded the Claimant to cease its activities on the Kpone Site.”. See para. 120: “The withdrawal of the Kpone Site from the Claimant was due to its failure to obtain the necessary licences, for the land, conducting unauthorized activities, which, in effect amounted to unauthorized occupation of the land and failure to engage the community living close to the site about its activities.” See also Resp. Summary Briefing Notes, para. C.iv: “The Claimant breached the required process for the allocation of the Kpone Site by embarking on unauthorized activities beyond a suitability assessment which culminated in VRA withdrawing the Kpone Site.”

<sup>376</sup> Exhibit R-11.

<sup>377</sup> Resp. Rejoinder, para. 119(b).

<sup>378</sup> Exhibit C-131.

<sup>379</sup> Resp. Rejoinder, para. 119(c): “The EPA was executed between the Claimant and the Respondent hence the directive to the VRA was not applicable to the EPA.... It is evident and self-explanatory that the letter of September 23, 2016 was not a direction to the VRA to stall the EPA, to which contract, VRA was not a party, but a policy directive to the VRA to refrain from entering into any future agreement for Independent Power Projects.”

<sup>380</sup> *Ibidem*, para. 119(d): “The well-structured EPA provides for only two attempts to find a site in order to avoid interminable attempts. There was no provision for a third attempt, as was the Claimant’s unauthorized acquisition of the Blue Ocean Site.”

<sup>381</sup> See its text in fn. No. 135.

<sup>382</sup> Resp. Rejoinder, para 123. Para. 124: “... under the EPA, the Respondent has an obligation to comply with all laws. What this, in effect, means is that the use of “best endeavours” should not be in breach of the laws of Ghana.”

“the Claimant had an unreasonable and unrealistic expectation of the Respondent. The offer of assistance or an obligation to offer one is not done in a vacuum and the Claimant should not expect one to be gratuitously offered.”<sup>383</sup>

317. With reference to its obligation to assist GPGC to procure and maintain the “*Required Approvals*” (as defined in the EPA) on a timely basis, GoG contends that:

“the nature of the services requires that the Claimant has the primary obligation to make the necessary applications to the agencies concerned. The Respondent’s assistance would be needed if there are bureaucratic impediments blocking the receipt, processing or issuance of such approvals.”<sup>384</sup>

318. In answer to GPGC’s complaint that GoG had failed to provide assistance to enable GPGC to obtain the WES Licence, the Grid Connection Agreement and the Water Supply Agreement, despite the fact that the President of the Republic of Ghana appoints the members of the boards of directors of the institutions in question, GoG says that, although members of the boards of directors of GridCo, of the Energy Commission and of Ghana Water are appointed by the President of the Republic of Ghana, that does not amount to allowing those institutions “*carte blanche*” to suppress due process or procedures in performing their day to day administrative functions.<sup>385</sup>

319. GoG further contends that in some cases GPGC’s requests for assistance were unclear and imprecise.<sup>386</sup>

#### **THE APPOINTMENT OF AN AUTHORIZED REPRESENTATIVE**

320. GoG relies upon its letter of 2 September 2015 as clear evidence that it had nominated then Minister of Power, Dr Donkor, as its Authorized Representative. In response to

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<sup>383</sup> *Ibidem*, para. 125.

<sup>384</sup> *Ibidem*, para. 126. See para. 127: “*It would be overstretching the meaning of assistance if the Claimant asserts that, for instance, without an application submitted by the Claimant to any of the named agencies for certain approvals, the Respondent nevertheless should offer assistance.*”

<sup>385</sup> *Ibidem*, para. 130.

<sup>386</sup> *Ibidem*, para. 133: “*... in its requests to enter into a Grid Connection Agreement, it was not enough for the Claimant to inform the Respondent that it was yet to enter into a Grid Connection Agreement and required the Respondent’s assistance. The specific assistance sought by the Claimant should be expressly stated*”; see para. 134: “*the Claimant’s alleged requests to the Respondent for assistance towards the procurement of a generation Licence from the Energy Commission and the procurement of a Water Supply Agreement are all cast in the mode of imprecision and vagueness.*”

GPGC's assertion that it had not received that letter, GoG notes that it is clear on the face of that letter that it was despatched to GPGC on 4 September 2015.<sup>387</sup>

321. GoG dismisses the suggestion that other lines of communication had been established:

“Mr. Parisotto's statement that he was instructed to send weekly reports to Mr. Andrew Ashong from August 26, 2015 is doubtful and is particularly irrelevant after the Respondent had clearly appointed an authorized representative. Mr. Parisotto is fixated with the purported appointment of Mr. Dzata as the authorized representative because the latter was a Technical Advisor to the Minister of Power.”<sup>388</sup>

322. GoG says that “*these reports*”<sup>389</sup> were not delivered by GPGC in conformity with Clause 28(b) of the EPA, as they were sent by email and addressed to unauthorized individuals.<sup>390</sup>

#### **GPGC'S BREACH OF CONDITIONS SUBSEQUENT: FAILURE TO OBTAIN THE WES LICENCE**

323. GoG says that it is uncontroverted that GPGC's failure to obtain the WES Licence had nothing to do with GoG. Rather it was a result of GPGC's failure, or refusal, to follow Energy Commission procedures in its belated application for the WES Licence.<sup>391</sup>

324. As a result of GPGC's failure to comply with the requirements of the Energy Commission Act and the Licence Supply Manual, and in the absence of any evidence adduced by GPGC to the contrary, GoG says that it: “*has the right to terminate the EPA on that account*”.<sup>392</sup>

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<sup>387</sup> Exhibit R-2.

<sup>388</sup> Resp. Rejoinder, para 137.

<sup>389</sup> See Exhibits C-32, C-35, C-36, C-37, C-38, C-40, C-41, C-42, C-43, C-44, C-45, C-46, C-47, C-48, C-49, C-50, C-52, C-54, C-55, C-56, C-57, C-58, C-126, C-64, C-67, C-70, C-74, C-77, C-81, C-126 and C-148.

<sup>390</sup> Resp. Rejoinder, para 138. See para. 139: “*The Claimant's other allegation of hand delivery of the Reports and direct communication with relevant Ministries are inconsequential. ... suffice to say that the Claimant's direct communication with other relevant Ministries was outside the prescribed mode of communication. It is unreasonable on the part of the Claimant to expect that the Respondent will have actual knowledge of such communication.*”

<sup>391</sup> *Ibidem*, para. 141.

<sup>392</sup> *Ibidem*, paras. 143 and 144.

**GPGC’S BREACH OF CONDITIONS SUBSEQUENT: FAILURE TO EXECUTE THE GRID CONNECTION AGREEMENT**

325. GoG maintains that:

“the basis for the Claimant’s inability to achieve the requirement of entering into a Grid Connection Agreement was its own failure or refusal to follow laid down procedure, compounded by its unreasonable and unrealistic expectation that the Respondent would break the laws of Ghana in order to help it along.”<sup>393</sup>

**GPGC’S BREACH OF CONDITIONS SUBSEQUENT: FAILURE TO EXECUTE THE WATER SUPPLY AGREEMENT AND TO PROCURE GAS SUPPLY**

326. GoG relies on what it maintains is GPGC’s acknowledgement that it failed to satisfy this Condition Subsequent.<sup>394</sup>

327. So far as GPGC’s asserted failure to procure a gas supply is concerned, GoG says that GPGC has: (i) “*succumbed to its allegation*” that GoG failed to assist it with the procurement of gas supply for the operation of the GPGC Equipment; and (ii) the absence of an answer in GPGC’s Cl. Reply made clear that it had abandoned its position.<sup>395</sup>

**TERMINATION OF THE EPA DUE TO GPGC’S ACQUISITION OF THE BLUE OCEAN SITE**

328. GoG says that the acquisition of the Blue Ocean Site by GPGC entitled GoG to terminate the EPA. GPGC had no express or implied authority, obligation or right to acquire the Blue Ocean Site.<sup>396</sup>

329. GoG maintains that on the basis of its failure to allocate either the Aboadze Site or the Kpone Site, the EPA imposed no further obligation on GoG to allocate another site.<sup>397</sup>

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<sup>393</sup> *Ibidem*, para. 147.

<sup>394</sup> *Ibidem*, para. 148.

<sup>395</sup> *Ibidem*, para. 149.

<sup>396</sup> *Ibidem*, para. 150.

<sup>397</sup> Resp. Rejoinder, para. 154. See Resp. Summary Briefing Notes, para. C.iv: “*It is the Respondent’s contention that the acquisition of the Blue Ocean Site by the Claimant entitled the Respondent to terminate the EPA. This is based on the fact that it is only the Respondent who had the obligation to allocate a Site for the Project. Secondly, upon the failure to allocate the Aboadze Site and the Kpone site, there was no further obligation on the Respondent and certainly not on the Claimant to acquire another Site for the Project*”.

GoG contends that GPGC’s decision “*unilaterally*” to acquire the Blue Ocean Site was “*contractually wrongful and unlawful*” and a breach of Clause 3(b) of the EPA.<sup>398</sup>

330. In any event, GoG maintains its position that it was not informed of the details of GPGC’s acquisition of the Blue Ocean Site.<sup>399</sup>

331. GoG further alleges that the acquisition of the Blue Ocean Site was:

“undoubtedly tainted with ignominious corruption. It is agreed between the Parties that the Claimant’s majority shareholder, Trafigura was an indirect minority shareholder in Blue Ocean Investments Limited. This being the fact, the Claimant should have stayed off negotiation for the acquisition of the Blue Ocean Site and involved the Respondent in the negotiations more particularly as the Respondent was ultimately going to pay for the lease.”<sup>400</sup>

**TERMINATION OF THE EPA ON THE BASIS OF GPGC’S BREACHES OF OTHER EXPRESS PROCEDURES AND REQUIREMENTS UNDER THE EPA**

332. GoG maintains that GPGC breached Clauses 6(b) and (h) and Clause 8(a) of the EPA by mobilising and bringing the GPGC Equipment into Ghana before GoG’s Conditions Subsequent had been fulfilled.<sup>401</sup>

333. GoG says that “*taking the totality of clauses 6(b) and 8(a) into account*” the following milestones had to have been achieved, prior to the arrival of the GPGC Equipment in Ghana: (i) fulfilment by GoG of its Conditions Subsequent; or (ii) waiver by GPGC of GoG’s Conditions Subsequent; (iii) allocation of a Site; and (iv) achievement of an “*Effective Date*” or a written modification of the Agreement by mutual consent.<sup>402</sup> GoG asserts that the GPGC Equipment arrived in Ghana on or about 22 November 2016, but it points out that at that time:

“there was no Effective Date, there was no Site, there was no tax exemption, let alone evidence of such exemption having been delivered to the Claimant;

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<sup>398</sup> *Ibidem*, para. 157.

<sup>399</sup> *Ibidem*, para. 158. See para. 160: “*In a similar fashion, the Claimant alleges that it informed the Respondent about the tendering process for the construction of the gas pipeline through officials of the VRA, the Deputy Power Minister and Mr Opam, all of whom are not authorized representatives of the Respondent. The fundamental basis for the construction of the gas pipeline is questionable as the land was obtained without the authority of the Respondent. Besides, there is no record available to the Respondent of the alleged letters to the VRA, the Deputy Power Minister and Mr Opam a fact admitted by the Claimant.*”

<sup>400</sup> *Ibidem*, para. 162.

<sup>401</sup> *Ibidem*, para. 164.

<sup>402</sup> *Ibidem*, para. 166.

the Claimant had not waived the Conditions Subsequent and the EPA had not been modified as per the appropriate provisions.”<sup>403</sup>

334. As a result, GoG maintains that the Claimant’s “*unilateral and premature*” mobilisation of the GPGC Equipment into Ghana long before the occurrence of the stipulated requirements was “*wrong, unlawful, commercially imprudent*”, not in line with the EPA and “*commercially unreasonable*” while Clause 6(b) of the EPA imposed on GPGC the obligation to use “*commercially reasonable efforts*” in mobilising its equipment.<sup>404</sup>

### **GPGC’S ALLEGED ENTITLEMENT TO THE EARLY TERMINATION PAYMENT UNDER THE EPA TOGETHER WITH INTEREST**

335. While GPGC suggests that it is entitled to claim for the Early Termination Payment due to the PPA Committee Report’s recommendation that certain PPAs should be terminated,<sup>405</sup> GoG points out that the PPA Committee Report was advisory only and did not form the basis for GoG’s decision to terminate the EPA.<sup>406</sup>

336. GoG insists that its February 2018 Notice of Termination was the effective instrument of termination rather than GPGC’s later purported termination:

“Once the EPA was regularly terminated by the Respondent, the Claimant had no contractual right to terminate the EPA.”<sup>407</sup>

337. With reference to Cl. Termination Notice, GoG considers that:

“the Claimant ought to have served the Respondent with notice of its intention to terminate the EPA under specific grounds and given the Respondent an opportunity to remedy the specific breach or default complained of before the Claimant will be vested with the right to terminate.”<sup>408</sup>

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<sup>403</sup> *Ibidem*, para. 168.

<sup>404</sup> *Ibidem*, para. 169.

<sup>405</sup> *Ibidem*, para. 176.

<sup>406</sup> *Ibidem*, para. 178. See para. 179: “*The Respondent emphasizes that the reasons for its termination of the EPA have been sufficiently articulated in its defence and in this Rejoinder and stand independently of the PPA Committee and the Minister for Energy’s statement to Parliament reported in the Ghanaian Parliamentary Record, Hansard alluded to by the Claimant.*”

<sup>407</sup> *Ibidem*, para. 180. See Resp. Summary Briefing Notes, para. C.v: “*The Respondent denies the Claimant’s entitlement to the Early Termination Payment. It is not in doubt that the Respondent terminated the EPA much earlier<sup>9</sup> before the purported termination by the Claimant. There is no legal basis to terminate an agreement which has already been lawfully terminated by another Party to the agreement.*”

<sup>408</sup> Resp. Rejoinder; in paras. 181, 182 and 183, the Respondent states that the Cl. Termination Letter does not meet the requirements provided by Clauses 24(a)(ii) and 25(b)(i) of the EPA. See Resp. Summary Briefing Notes,



338. As to the Early Termination Payment itself, GoG relies on the evidence of Mr Ebenezer Baiden, who concluded that the various components of the Early Termination Payment, even if payable, would not exceed the sum of US\$ 60,083,286.00.

339. GoG denies that it had agreed to the use of the Guaranteed ISO rate of the power plant of 107MW (ISO), as the Guaranteed Capacity of the power plant for the purposes of calculating the Early Termination Fee:

“With respect to the Claimant’s Equipment, the Guaranteed Capacity stated should be specified at the site ambient operating conditions and not at ISO conditions as the site specific ambient operating conditions is not one and same as the ISO conditions of ambient temperature of 15°C, relative humidity of 60% and ambient pressure of 1 bar, except that the Claimant’s Equipment has the capability of creating ISO conditions at the operating site.”<sup>409</sup>

340. GoG challenges the basis of the adoption by GPGC of 17,520 hours operating time for the GPGC Equipment over a period of 24 months. GoG takes the position that operating the GPGC Plants continuously for the entire period does not mean the equipment should not follow the recommended maintenance protocols, that is, shut down for preventive maintenance.<sup>410</sup>

341. GoG emphasises that it:

“has not, at any time, suggested that the term “Guaranteed Capacity” can be swapped for the term “Guaranteed Availability” nor the Respondent used the terms interchangeably. “Guaranteed Capacity” has to do with electric output

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para. C.v: “... the Claimant’s termination letter breached the EPA as it did not follow the procedure set out in Clause 24(a)(ii) of the EPA. Clause 24(a)(ii) requires the Claimant to serve written notice on the Respondent stating the nature of the breach and the breach should be remedied within thirty days. It is only after the Respondent had failed to cure the breach complained of that the Claimant would be entitled to terminate.”

<sup>409</sup> *Ibidem*, para. 187. See para. 188: “The Respondent categorically rejects the Claimant’s reliance on Guaranteed Capacity (ISO) to reflect site specific operating conditions with respect to the gas turbine performance correction curves for site conditions. This factual statement is endorsed by a sample of Performance Data for GE Frame 9E (PG9171) Gas Turbine supplied by GE to VRA as guide to the Claimant. The performance guarantees listed on the said Performance Data for GE Frame are based on specific site operating conditions and parameters. This type of gas turbine has a gross power output of 126MW (ISO) whilst the Guaranteed Capacity is 120.1MW at site operation ambient temperature of 29oC, relative humidity of 79.6% and ambient atmospheric pressure of 1.01 bar.”

<sup>410</sup> *Ibidem*, para. 190: “Preventive maintenance is as important as improvements in equipment performance, such as power output and availability as recommended by GE which clearly indicates that Gas turbine performance loss are as a result of the variation in environmental conditions, fuel used, machine operating scenario and maintenance practices.”

whilst “Guaranteed Availability” is the amount of time that the electricity generator is able to produce electricity over a certain period.”<sup>411</sup>

342. With reference to the recoverability of Mobilization Costs, GoG points out that:

“the Claimant alleges that since “the PPA Committee records a recommendation that the GoG should verify the actual development costs (i.e. mobilization costs) incurred by GPGC for the purpose of establishing how much termination compensation should be paid to GPGC” it means that the Respondent recognizes that its termination of the EPA would entail liability for the Claimant’s incurred mobilization costs.”<sup>412</sup>

GoG dismisses GPGC’s reliance upon the PPA Committee Report as untenable; it says that the Report was in the nature of a recommendation and it cannot override, amend or alter any provision of the EPA.<sup>413</sup> GoG reiterates that GPGC was entitled to mobilize and bring the GPGC Equipment to Ghana only upon fulfilment of GoG’s Conditions Subsequent and thus:

“There was no reason for the Claimant to have mobilized and brought its Equipment into Ghana prior to the fulfilment of the Conditions agreed in the EPA and saddle the Respondent with the costs emanating from the Claimant’s indiscretion and unreasonable commercial efforts. On this score, the Claimant is not entitled to mobilization costs.”<sup>414</sup>

343. GoG denies that GPGC has any entitlement to costs incurred in relation to the Kpone Site on the basis that what was done there by GPGC amounted to “*unlawful activities*.”<sup>415</sup>

344. GoG also rejects GPGC’s claim for costs incurred in relation to the Blue Ocean Site and gas pipeline. In response to GPGC’s argument that GoG did not provide another site after VRA withdrew its offer of the Kpone Site to GPGC, GoG contends that under the EPA, it was under no further obligation to provide a site. The only course of action available to GPGC was to terminate the EPA.<sup>416</sup> GoG criticises GPGC’s reliance upon *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation et al.*,<sup>417</sup> to support its attempt

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<sup>411</sup> *Ibidem*, para. 194.

<sup>412</sup> *Ibidem*, para. 197.

<sup>413</sup> *Ibidem*, para. 199.

<sup>414</sup> *Ibidem*, para. 205.

<sup>415</sup> *Ibidem*, para. 209: “It is strongly contended that the activities undertaken by the Claimant such as fencing the area and clearing the Site typifies acts of ownership or proprietary interest in the land which was clearly not the case.”

<sup>416</sup> *Ibidem*, para. 210.

<sup>417</sup> *Ibidem*, para. 212. See RLA-16 [1979] 1 S.C.R. 633 at pages 660 and 661.

to justify its acquisition of the Blue Ocean Site on grounds of mitigation.<sup>418</sup> GoG maintains that GPGC's argument that it had no option but to acquire the Blue Ocean Site is misconceived. On the basis of Clauses 3(b) and 3(d) of the EPA, it says that GPGC could have: (i) asked for a waiver; or (ii) asked for an extension of time; or (iii) terminated the EPA and claimed the Early Termination Payment.<sup>419</sup> As a result, GoG says that GPGC is not entitled to the alleged costs incurred in the acquisition of the Blue Ocean Site and the activities carried out on that Site since the acquisition was "*contractually unauthorized*".<sup>420</sup>

345. So far as GPGC's claim in respect of taxes incurred in the context of the mobilisation activities is concerned, GoG states that any obligation it might have in this respect is subject to two conditions: first, that GPGC had lawfully imported the GPGC Equipment into Ghana at the time and in the manner prescribed in the EPA; and, second, if the EPA had become effective. GoG takes the position that the fulfilment of these conditions would have entitled the Claimant to obtain tax exemption in accordance with the provisions of the EPA.<sup>421</sup> However, GoG maintains that GPGC breached each and every one of the disjunctive obligations under Clause 8(a) of the EPA in the course of bringing the GPGC Equipment into Ghana.<sup>422</sup>

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<sup>418</sup> *Ibidem*, para. 211: "There is no doubt whatsoever that the Claimant's acquisition of the Blue Ocean Site, and as it has admitted, was a breach of the EPA. Thus, the Respondent says that (i) there was no breach by the Respondent; if there was a breach at all, it was by the Claimant in its acquisition of the Blue Ocean Site from which the loss flowed; (ii) in the unlikely event that the Tribunal finds a breach by the Respondent, the Respondent further avers that breaching a contractual obligation, in answer to the other contractual party's breach is not an action which a reasonable and prudent man would ordinarily take in the course of his business. Consequently, the Claimant is debarred from claiming from the Respondent any loss or expenses incurred by its action and decision to acquire the Blue Ocean Site as such expenditure was the result of its own failure."

<sup>419</sup> *Ibidem*, para. 213.

<sup>420</sup> *Ibidem*, para. 216.

<sup>421</sup> *Ibidem*, para. 217. See para. 218: "... the Claimant's right to undertake that obligation of importing its Equipment into Ghana, which is part of mobilization is dependent on the satisfaction of the following: (a) Only when the EPA had become effective; (b) After the Respondent had fulfilled its Conditions Subsequent; or (c) Where the Claimant had waived the fulfilment of the Respondent's Conditions Subsequent; or (d) When the Respondent had complied with all the terms, timelines, obligations and deliverables for which it is responsible under the EPA; and (e) When the Respondent had delivered evidence of the tax exemption to the Claimant."

<sup>422</sup> *Ibidem*, para. 219: "The Claimant demonstrated absolute defiance of its obligations and proceeded to bring its Equipment into Ghana when the Respondent had not obtained Parliamentary approval for tax exemption under the EPA. Before the Respondent commenced the process towards obtaining tax exemption under the EPA, the Claimant threw every caution to the wind and brazenly breached the EPA by importing its Equipment into Ghana."

346. GoG says that GPGC’s claim pertaining to the costs allegedly incurred after the GoG’s termination of the EPA on 13 February 2018 is “*hollow and deficient contractually*”<sup>423</sup> for the following reasons: (i) GPGC’s demand is premised on its erroneous determination that the Resp. Termination Notice constituted a repudiation of the EPA;<sup>424</sup> (ii) under Clause 25(b) of the EPA, since the Resp. Termination Notice effectively terminated the contractual relationship between the Parties, GPGC had no business continuing with mobilisation or incurring any further costs on the Project;<sup>425</sup> (iii) GoG had terminated the EPA by its Resp. Termination Notice;<sup>426</sup> and (iv) there was no proper basis for reliance by GPGC upon the alleged verbal assurances given to Mr Duncan and other GPGC officials by unauthorised and unidentified GoG officials to the effect that the Resp. Termination Notice would be revoked.<sup>427</sup>
347. So far as costs allegedly incurred by GPGC between 14 February 2018 and 31 May 2019 as a result of early termination are concerned, GoG maintains that such costs “*if incurred were unreasonable*”.<sup>428</sup> With specific reference to GPGC’s costs of preservation of the GPGC Equipment, GoG objects that these costs were only incurred, because:

“... Claimant, contrary to the terms of the EPA, prematurely brought its Equipment into Ghana. If that breach of the EPA had not been committed, it would not have been necessary to preserve the Equipment in Ghana. Should the Tribunal find that the Claimant’s Equipment was imported into Ghana lawfully ... the Respondent asserts that the Claimant had no legal or contractual right to preserve the Equipment for nearly six (6) months following the termination of the EPA by the Respondent. The Claimant was

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<sup>423</sup> *Ibidem*, para. 222.

<sup>424</sup> *Ibidem*, para. 223.

<sup>425</sup> *Ibidem*, para. 224.

<sup>426</sup> *Ibidem*, para. 225: “... even if the Claimant was entitled to treat the Respondent’s letter of termination as a repudiation of the EPA which approach is vehemently denied, the Respondent contends that the Claimant was, as a matter of sound and prudent commercial business, to mitigate its costs by terminating all activities rather than “continue mobilizing the GPGC Plants and incurring the associated costs”.

<sup>427</sup> *Ibidem*, paras. 226-230. See para. 226: “It is incomprehensible and inexplicable why the Claimant will rely on verbal assurances to continue incurring costs when the termination letter was still effective.”; para. 227: “... the alleged verbal assurances were not made to the Claimant’s Authorized Representative ...”; para. 228: “The alleged verbal assurances even if they were made, but strongly challenged by the Respondent, they were not made in accordance with the EPA which requires that notices and all communication from one party to the other must be in writing.”

<sup>428</sup> *Ibidem*, para. 231.

not mandated to preserve its Equipment in Ghana in expectation of the revocation of the Respondent's letter of termination."<sup>429</sup>

348. GoG says that there might have been a legitimate basis for the claim for these Demobilization Costs: (i) if the EPA had been terminated by GPGC on grounds of breach of the EPA by GoG; and (ii) to the extent that GPGC had complied with the terms of the EPA when it mobilised the GPGC Equipment for shipment into Ghana. However, GoG asserts that: (i) under Clause 25(b)(iii) of the EPA, the termination of the EPA by GoG does not entitle GPGC to the Demobilization Costs; (ii) GPGC's mobilisation effort was "*premature and not endorsed under the EPA*"; and (iii) the acquisition of the Blue Ocean Site by GPGC was unauthorised and in breach of the EPA.<sup>430</sup>

### **GOG'S COUNTERCLAIM**

349. GoG maintains that it is entitled to the Early Termination Payment under Clause 25(b)(iii) of the EPA due to GPGC's failure to fulfil its Conditions Subsequent by: (i) not obtaining the WES Licence; (ii) not entering into the Grid Connection Agreement with GridCo; and (iii) not entering into the Water Supply Agreement with Ghana Water. GoG asserts that, in light of these breaches, it had the legal right to terminate the EPA.<sup>431</sup>

350. However, GoG considers that its entitlement to the Early Termination Payment is not based solely on GPGC's breach of its Conditions Subsequent; it is also entitled to rely on GPGC's breach of other obligations under the EPA. On the basis of Clause 25(b)(iii) of the EPA, GoG maintains that:

"it had the right to terminate the EPA for reasons such as the acquisition of the Blue Ocean Site with associated ethical breaches, the premature mobilization of its equipment together with the Claimant's breaches of its Conditions Subsequent."<sup>432</sup>

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<sup>429</sup> *Ibidem*, para. 232. See para. 234: "*The rationale underpinning the Claimant's acknowledgment that it was not entitled to exact alleged cost of US\$847,156.00 from May 31, 2019 should have guided the Claimant in its untenable demand for costs incurred for preservation of its Equipment when the letter of termination remained irrevocable. Accordingly, the Claimant is not entitled to the sum of US\$32,448 as costs allegedly incurred for the preservation of Claimant's Equipment from February 13, 2018 to May 31, 2019.*"

<sup>430</sup> *Ibidem*, paras. 235 and 236.

<sup>431</sup> *Ibidem*, para. 242.

<sup>432</sup> *Ibidem*, para. 243.

## IX. RELIEF SOUGHT

351. GPGC requests that the Tribunal:

- a. DECLARE that the EPA has been validly terminated by GPGC on account of the GoG's repudiatory conduct;
- b. ORDER the GoG to pay to GPGC the full value of the Early Termination Payment in an amount to be determined in this proceeding and, to the extent not reflected in the Early Termination Payment, any accrued liabilities to pay damages to GPGC arising from the GoG's contractual non-performance prior to termination of the EPA under Clause 25(b) of the EPA;
- c. ORDER the GoG to pay all of the costs and expenses of these arbitration proceedings, including, without limitation, the fees and expenses of: (i) the members of the Tribunal; (ii) the PCA; (iii) the Assistant to the Tribunal; (iv) GPGC's legal representation; and (v) any experts or consultants appointed by GPGC or the Tribunal;
- d. ORDER the GoG to pay pre-award interest on the sums specified in subparagraphs (b) and (c) above (including on the costs of arbitration), as well as post-award interest on the amounts awarded until full payment thereof, at the prevailing London Interbank Offered Rate for six-month deposits in US dollars plus 6 per cent, accruing daily, and compounded monthly, in amounts to be determined in this proceeding;
- e. DISMISS the GoG's counterclaim for an Early Termination Payment in its entirety; and
- f. AWARD such other and further relief as the Tribunal may deem appropriate in the circumstances.<sup>433</sup>

352. GoG requests the following relief:

"... the Respondent is entitled to the Early Termination Payment and Counterclaim as follows:

- (a) A Declaration that the Respondent lawfully terminated the EPA consequent upon the Claimant's breaches of the EPA.
- (b) An Order directed at the Claimant to pay the Early Termination Payment in accordance with Clause 25(b)(iii).
- (c) An Order directed at the Claimant to pay for damages for breach of the EPA.
- (d) An Order for the payment of all costs and expenses of this arbitration proceedings including without limitation, the fees and expenses of the

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<sup>433</sup> Cl. Reply, para. 160.

Tribunal, the PCA, the Secretary to the Tribunal, Respondent's legal representation and experts or consultants appointed by the Respondent and the Tribunal.

- (e) An Order directed at the Claimant to pay pre-award and post award interest as determined by the Tribunal under English Arbitration Act on any sums awarded by the Tribunal from date of Award until final payment.
- (f) An Order to dismiss in its entirety the Claimant's reliefs.
- (g) Any other reliefs or orders that the Tribunal may deem fit to award."<sup>434</sup>

## **X. ANALYSIS**

353. The Tribunal has carefully considered all of the evidence and the submissions advanced by the Parties in the course of its analysis of the dispute. The fact that a submission or evidence has not been recorded below does not mean that it has not been fully considered.

### **THE OPERATION OF THE EPA**

354. By its Termination Notice of 13 February 2018,<sup>435</sup> GoG noted that the EPA:

“...should have become effective on 3 August 2015 except the parties mutually extend the period for the fulfilment of the Conditions Precedent to the effectiveness of the Agreement.”

355. Noting, further, first, that there had been no mutual agreement between the Parties to extend the period for the fulfilment of the Conditions Precedent, second, certain Conditions Subsequent had not been fulfilled by GPGC and asserting, third, that in the absence of a Section 11 Energy Commission Act licence from the Commission to engage in the business or commercial activity for the sale of electricity, GPGC had no standing to execute the EPA and, fourth, that GPGC had undertaken construction works on site without the required siting and construction permits, GoG purported to terminate the EPA pursuant to Clause 4(g) of the Agreement.

356. GPGC protested the Notice by its letter dated 26 February 2018. GPGC maintained that:

- a. It had fulfilled all of the Conditions Precedent for which it was responsible; but

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<sup>434</sup> Resp. Rejoinder, para. 244.

<sup>435</sup> Exhibit C-21.

- b. GoG had neither obtained parliamentary approval for the tax exemptions, nor evidenced its satisfaction with the GPGC Equipment, nor provided Unimpeded Access to a Site;
- c. while GPGC thus had an option to terminate the EPA pursuant to Clause 3(d), it saw:

“... significant benefit in the project [and] it has and continues to extend such period.”

GPGC added that while it had sourced its own site and while it was content to continue to extend time for the fulfilment of the other outstanding Conditions Precedent, “*those CPs are not and should not be considered as having been waived.*”;

- a. there was no basis upon which GoG could terminate pursuant to Clause 4(g), because any such termination based upon an asserted non-fulfilment of GPGC’s Conditions Subsequent would have to be predicated upon the basis of actions or inactions wholly attributable to GPGC. To the extent that GoG complained of any failure on GPGC’s part to obtain licences and permits, “... *GPGC has made all the relevant applications ... and continues to await GoG’s cooperation and assistance.*” In any event, GPGC was not yet engaged in any activity for which a Section 11 licence was required, and it could not be in breach of any such obligation; and that
- b. the reality was that GPGC would be entitled to terminate the EPA pursuant to Clauses 4(f) and 4(h) of the Agreement and to seek an Early Termination Payment and other reasonable costs, which, in total, it estimated at some US\$ 300 million.

GPGC sought a retraction of the Resp. Termination Notice and GoG’s acknowledgement that the EPA remained in full force and effect by 12 March 2018, meantime reserving its right to “*accept GoG’s letter as a repudiatory breach of the EPA.*”<sup>436</sup>

357. On analysis, it is apparent that the EPA did not create three discrete and consecutive phases of operation (Conditions Precedent, Conditions Subsequent and Certain Obligations) or “*milestones*” as GoG described them,<sup>437</sup> with a clean cut-off between

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<sup>436</sup> Exhibit C-22.

<sup>437</sup> Transcript, Day 1, p. 87.



each of them, such that a failure to complete all of the steps in one phase would be sufficient of itself to preclude progress to the next and bring the EPA to an end.

358. The EPA contemplated that the Parties would fulfil all of the Conditions Precedent within 30 days of 3 June 2015, the Signature Date (which was also the date upon which time began to run for the Term of the EPA). The date upon which all of the Conditions Precedent were fulfilled within that 30-day period was to become the “*Effective Date*” for the purposes of the EPA. However, performance of a Condition Precedent could be waived or extended. Notably, while the EPA definition of the “*Effective Date*” records that such an extension may be effected by mutual agreement recorded in writing between the Parties, Clause 3(c) of the EPA provides that the Conditions Precedent shall be performed within 30 days of Signature Date (“*unless sooner required under the provisions of this Agreement*”), but the Party “*which is not responsible for the satisfaction of any Conditions Precedent*” may elect to extend the period. If the Condition Precedent of which performance has been extended is not fulfilled within the specified period, or performance is not waived by the Party not in default, Clause 3(d) of the EPA provides that the Party not responsible for the default may (but is not required to) terminate with immediate effect pursuant to Clause 25.
359. It was anticipated that, subject to waiver or extension, and fulfilment of all Conditions Precedent, the Effective Date would fall 30 days after Signature Date – *i.e.*, by 3 July 2015. The Effective Date is of importance in two respects: first, in the context of the performance of the Conditions Subsequent. While there is no defined start date for performance of the Conditions Subsequent, which were themselves a pre-condition to the achievement of Full Commercial Operation Date (the date of completion by GPGC of Operational Tests on the GPGC Equipment in accordance with the Operational Test protocol), the premise was that performance of the Conditions Subsequent would be completed within 30 days of the Effective Date, namely, by 2 August 2015.
360. Whereas in the case of the Conditions Precedent, the onus for performance falls entirely on one or other of the Parties, each of the Parties is required to lend its best endeavours to assist the other in the event that the Party with primary responsibility for a particular Condition Subsequent calls for such assistance.

361. Contrary to the suggestion made by GoG that an allegation by GPGC that it had failed to fulfil one of its Conditions Subsequent for want of the assistance of GoG would amount to displacing from GPGC the burden of the Condition Subsequent incumbent upon it,<sup>438</sup> that is consistent with the fact that achievement of the Full Commercial Operation Date (a GPGC obligation) is predicated upon the achievement of all of the Conditions Subsequent by both Parties – and that is a date which is automatically extended by a day for each day of delay in the fulfilment of GoG’s Conditions Subsequent. While each Party is afforded the option to terminate the EPA in the event of non-satisfaction of any Condition Subsequent by the other within 30 days of the Effective Date (or any agreed extension), it is a prerequisite of any such termination that the asserted non-fulfilment of a Condition Subsequent be “... *wholly attributable to the action or inaction...*” of the Party in default and that it be based upon a Condition Subsequent that is the responsibility of the Party said to be in default. That is the hurdle GoG must clear in order to make good its entitlement to terminate pursuant to Clause 4(g) of the EPA.
362. Second, the Effective Date marks the moment from which GPGC’s performance of the Certain Obligations imposed on it under Clause 8 of the EPA commences, unless otherwise mutually agreed in writing and subject to the fulfilment by GoG (or waiver by GPGC) of its Conditions Subsequent, or compliance by GoG “*with all the terms, timelines, obligations and deliverables for which it is responsible under this Agreement.*” That is understandable, because all but one of GPGC’s “*Certain Obligations*” relate to the mobilisation, import into Ghana, installation, commissioning, operation and maintenance of the GPGC Equipment. The exception is the requirement that an Authorized Representative be appointed within seven days of the date of signature of the EPA. Notably, GPGC’s obligations to commission the open cycle and, thereafter, the combined cycle within 180 days of the satisfaction of all Conditions Subsequent and 90 days of the commissioning of the open cycle respectively are both expressly stated to be dependent upon GoG’s compliance with “*all terms, timelines and deliverables under this Agreement.*”
363. In contrast, the “*Certain GoG Obligations*” set out in Clause 9 of the EPA are not subject to any ‘trigger’, whether in the form of the Effective Date or otherwise. They are stated simply to be: “*in addition to [GoG’s] other obligations under this EPA.*” In common

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<sup>438</sup> *Ibidem*, p. 126.

with GPGC, GoG was required to appoint an Authorized Representative within seven days of the date of signature of the EPA. The remainder of GoG's obligations under Clause 9 are essentially obligations to assist GPGC in four principal respects: first, the procurement of utilities (including adequate supplies of electricity, water of acceptable quality and natural gas of acceptable quality and pressure); second with the grant of Required Approvals, the obtaining in a timely manner of visas, work permits and all documentation and clearances in respect of the import into Ghana, and the eventual operation there, of the GPGC Equipment; third, the provision of temporary site facilities during the installation, pre-commissioning and commissioning phases of the Project; and, finally, to facilitate arrangements with GridCo and NITS.

364. It will be apparent at a glance that compliance by GoG with a number of those commitments was critical to GPGC's ability to satisfy its Conditions Subsequent – notably, its ability to procure Required Approvals and to conclude both the GridCo Grid Connection and Ghana Water Company Agreements. It was suggested by GoG that these obligations to afford assistance had been elided by GPGC into an issue of control by GoG over what GoG itself described as “*the institutions of State in respect of which [GPGC] owed a duty to apply for various licences and permits from [sic]*”<sup>439</sup>, including the Energy Commission, GridCo and Ghana Water Company. That, with respect to GoG, is to miss the point: GoG's obligation in the context of the Conditions Subsequent to which it committed is to assist in the procurement of the various authorisations and the like: that is not inimical to the autonomy of the bodies concerned and it is by no means clear to the Tribunal that GPGC has asserted any claim based upon an asserted failure of GoG to exercise control over these agencies, albeit that they are acknowledged to be organs of the State.

365. But that is far from the full extent of the linkage and interaction between the three phases of the Parties' respective obligations.

366. First, the ability of either Party to fulfil all of the Conditions Precedent for which it was responsible was not a matter necessarily within the sole control of that Party; in some cases, it was dependent upon the prior fulfilment of a Condition Precedent (or a Condition Subsequent or other contractual obligation) imposed on the other – for example:

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<sup>439</sup> Transcript, Day 1, pp. 126-129.

- a. GPGC was required to confirm in writing the suitability or otherwise of the Site. But that obligation does not dovetail with GoG's Condition Precedent in respect of the Site. A proposed Site (at Takoradi) had already been identified for the location of the GPGC Equipment, as the defined term "*Site*" makes clear. For the purposes of the Conditions Precedent, GoG's obligation was to provide "*Unimpeded Access*" (itself a defined term) to a Site for the GPGC Equipment." "*Unimpeded Access*" is defined as: "*unimpaired access to the GPGC Equipment, all GPGC-owned material and all areas of the Site.*" That Condition Precedent is not consistent with the provisions of Clause 5 of the EPA, which, at Clause 5(a), requires GoG to allocate a Site that is available to GPGC immediately upon the Effective Date and which further stipulates at Clause 5(c) that GoG shall provide GPGC with Unimpeded Access to the Site:

"From the Effective Date and continuing until the expiry of all obligations under this Agreement ..."

GPGC could not fulfil its Condition Precedent obligation to communicate to GoG in writing the suitability or otherwise of the Site without having had access to that Site. Clause 3(b) anticipates that GPGC will not be in a position to provide any written confirmation of Site suitability or otherwise until a Site has been allocated to it;

- b. GPGC could not meet its obligation to test samples of natural gas to be supplied by GoG until the test samples had actually been supplied by GoG, as it was obliged to do, pursuant to the first of its three Conditions Subsequent; and
- c. GoG could not indicate that it was satisfied with the state of the GPGC Plants unless it had had access to them and GPGC had provided GoG with a copy of the maintenance records.

367. On the basis of this analysis alone, it is evident that GoG's submission that:

"... without the prior fulfilment of the conditions precedent, there cannot be conditions subsequent at all to be satisfied."<sup>440</sup>

is unsustainable.

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<sup>440</sup> Transcript, Day 5, p. 49.

368. Second, the first and second of GoG's Conditions Precedent were to be performed in parallel with the second and third of its Conditions Subsequent: GoG could not establish that it had procured the ratification of the EPA by the Parliament of Ghana (the Condition Precedent) without the evidence of that Parliamentary Approval (the Condition Subsequent). Likewise, GoG was obliged to obtain parliamentary approval for the required tax exemptions (the Condition Precedent), whilst pursuant to its Condition Subsequent obligations, GoG was required to deliver evidence of the grant of the tax exemption.
369. On the basis of the factual record in this case, the position, so far as the fulfilment of the Parties' respective Conditions Precedent is concerned, is as follows:

### **GoG**

Ratification of the EPA by the Parliament of Ghana: 23 July 2015;<sup>441</sup>

Obtaining parliamentary approval for the required tax exemptions: still open in November 2016;<sup>442</sup>

Satisfaction with the state of the GPGC Plants: 24 June 2015;<sup>443</sup>

Unimpeded Access to a Site for the GPGC Equipment: never fulfilled.<sup>444</sup>

### **GPGC**

Natural gas sample testing: 21 September 2015;<sup>445</sup>

Written communication of suitability of the Site: did not arise;

Provision to GoG of a copy of the maintenance records of the GPGC Plants: 2 July 2015.<sup>446</sup>

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<sup>441</sup> Exhibit C-3.

<sup>442</sup> Exhibit C-75 & C-76. (See also Exhibits C-78, C-80 & C-88).

<sup>443</sup> Exhibit C-31.

<sup>444</sup> GoG insists that this was the only Condition Precedent that it failed to satisfy and that by reason of the "frustration of the Aboadze Site. ... the fact that the GPGC Equipment could not co-exist with the oxidation pond was discovered after the execution of the [EPA]." Transcript, Day 1, p. 104.

<sup>445</sup> Exhibits C-39 & C-41.

<sup>446</sup> Exhibit C-2.

370. On this record, it may be concluded that GoG failed to fulfil three of its four Conditions Precedent within 30 days of the Signature Date (3 June 2015) as required by Clause 3(c) of the EPA.
371. So far as the GPGC Conditions Precedent were concerned, it is plain from the description of the first and second of them that GPGC's ability to meet its obligations was dependent upon steps first being taken by GoG: as Mr Monney confirmed, GPGC could not test the gas samples until they had been provided by GoG and there was a delay on GoG's part until 18 August 2015 in making the samples available.<sup>447</sup> When eventually they were made available, GPGC had the samples tested in the Netherlands (there were no suitable facilities available in Ghana) and it confirmed their suitability on 21 September 2015<sup>448</sup> without any complaint as to the adequacy of the information provided being raised by GoG, as, after further questions put by both Counsel for GPGC and the Tribunal, Mr Monney finally conceded.<sup>449</sup> And there could be no question of any confirmation by GPGC as to the suitability of a Site until GoG had allocated one. It never did.
372. So far as the third of the GPGC Conditions Precedent is concerned, it is not disputed that a copy of the maintenance records of the plants was made available to GoG during the course of the GoG's inspection team's visit to Italy between 14 and 20 June 2015 and, thus, within 30 days of the Signature Date.<sup>450</sup>

**DID NON-SATISFACTION OF THE CONDITION PRECEDENT RESULT IN THE EPA NEVER COMING INTO EFFECT?**

373. It is GoG's principal submission that the EPA was ineffective until the Conditions Precedent had been fulfilled:

“[W]ithout the satisfaction of the Conditions Precedent, none of the Parties has any obligation whatsoever to perform any obligation imposed on it by the EPA. ...

... We say that the conditions precedent went to the root of the contract. It affected the validity of the contract and without the fulfilment of them, the

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<sup>447</sup> Transcript, Day 3, p. 27.

<sup>448</sup> Exhibit C-39.

<sup>449</sup> Transcript, Day 3, pp. 30-32.

<sup>450</sup> Exhibit C-2.

[EPA] had no binding force. None of the obligations of the parties will be fulfilled without the CPs.”<sup>451</sup>

374. For its part, GPGC argues that any such non-fulfilment of a Condition Precedent does not, as a matter of law, prevent the EPA from taking effect.

375. As the Tribunal has already noted, the Effective Date defined the moment from which it became incumbent upon GPGC to perform the obligations set out in Clause 8 of the EPA – but only then:

“subject to GoG having fulfilled GoG’s Conditions Subsequent or GPGC having waived the fulfilment of the GoG’s Conditions Subsequent or GoG having complied with all the terms, timelines, obligations and deliverables for which it is responsible under this Agreement...”

376. Simple logic dictates that performance of GoG’s Conditions Subsequent – to provide GPGC with a representative fuel sample of the actual fuel to be provided by GoG for the operation of the GPGC Equipment; to provide evidence of the Parliamentary Approval of the EPA; and to deliver evidence of the grant of the Tax Exemption – was indispensable in the latter two cases to satisfaction of GoG’s own Conditions Precedent (i) and (ii) and in the case of the first of those Conditions Subsequent, to GPGC’s ability to fulfil the Condition Precedent imposed on it pursuant to Clause 3(a)(i).

377. Moreover, Clause 3(d) of the EPA provides that:

“Where a Condition Precedent is not fulfilled by a Party within the specified period or waived by the Party not in default, the Party not responsible for the default shall have the right to terminate this Agreement with immediate effect pursuant to Clause 25.”

378. It is not an ineluctable consequence of a failure to fulfil one or more of the Conditions Precedent that the EPA is terminated; the EPA affords the non-defaulting party the option, not an obligation, to terminate in the event that a Condition Precedent is not fulfilled or its performance waived. More to the point, if it were the case, as GoG suggests, that the contract had never taken effect in the first place, such a provision would make no sense.

379. Nor can the Tribunal disregard the fact that, as the record clearly demonstrates, the Parties proceeded over a period of three years on the basis that the EPA was in full force and

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<sup>451</sup> Transcript Day 1, pp. 87 & 88 and see also Transcript, Day 5, p. 45.

effect and that they had their obligations to perform. It begs the question why, if the EPA had not taken effect, GoG procured the ratification of the EPA by Parliament more than 30 days after the Date of Signature; or why, in April 2016 when it withdrew the Aboadze Site, GoG considered that it had: “*a continuous obligation at the time to allocate a new site to GPGC*”<sup>452</sup> such that it proposed the Kpone Site and directed GPGC to negotiate a lease with VRA; or why, in November 2016, the Ministry of Power pressed the Ministry of Finance to facilitate the clearance of the GPGC Equipment by then in Ghana.<sup>453</sup>

380. A determination by this Tribunal that the EPA had never taken effect on the grounds for which GoG argues could only be made in the absence of any regard to the proper construction of the provisions of the EPA and to the actual course of dealings between the Parties over a period of three years. That is not a conclusion to which this Tribunal is disposed to subscribe.

#### **THE EPA TOOK EFFECT BUT GPGC FAILED TO SATISFY CERTAIN CONDITIONS SUBSEQUENT**

381. The obvious first point is that the proposition underpinning GoG’s second line of defence – that GPGC failed to satisfy certain of its Conditions Subsequent and so GoG was entitled to terminate – is mutually exclusive of GoG’s position that the EPA never came into effect, because the Conditions Precedent were not satisfied.

382. By its purported Termination Notice dated 13 February 2018, GoG contended that since:

- a. the Parties had not mutually agreed an extension of the period for the fulfilment of the Conditions Precedent;
- b. certain Conditions Subsequent for the achievement of financial close and Full Commercial Operation Date had not been fulfilled;
- c. GPGC had yet to obtain a licence from the Energy Commission to engage in the business or commercial activity for the sale of electricity;

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<sup>452</sup> Resp. Rejoinder, para. 69.

<sup>453</sup> Exhibit C-76.



- d. it had started construction on site without the necessary siting and construction permits, such that its construction activities were “*illegal*”;

it was entitled to implement the termination provisions of Clause 4(g) of the EPA.<sup>454</sup>

383. The Tribunal considers, first, GPGC’s obligations in the context of the Conditions Subsequent, namely:

- a. GPGC having made all investigations and inspections that it deems necessary to perform its obligations hereunder, including without limitation investigations and inspections at the site with respect to the presence of any hazardous materials at the site;
- b. GPGC having procured an approved tariff from the Public Utilities Regulatory Commission (“**PURC**”);<sup>455</sup>
- c. GPGC having procured the relevant generation licence(s) from the Energy Commission and other Required Approvals;
- d. GPGC procuring each of the following documents (collectively the “**Project Documents**”):
  - i. the Grid Connection Agreement;
  - ii. agreement with Ghana Water Company Ltd for the provision of water for the operation of the plants; and
  - iii. any other document which the Parties agree shall be designated a Project Document.

384. The consequences attendant upon any delay by GPGC to meet any of these conditions in a timely way depended upon the causes of the delay.

385. Clause 4(b) provides that:

“If GPGC suffers any delay and/or incurs any costs during the obtaining of any Conditions Subsequent under this Agreement for reasons not attributable

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<sup>454</sup> Exhibit C-21.

<sup>455</sup> Public Utilities Regulatory Commission.

to GPGC, then GPGC shall be given an extension of time for the achievement of the Full Commercial Operation Date equal to the days of delay suffered by GPGC.”

386. Clause 4(g) provides that:

“GoG may terminate this Agreement, with immediate effect, by giving written notice to GPGC if any Condition Subsequent has not been satisfied by GPGC or waived by GoG by the date falling thirty ... days after the Effective Date (as such date may be extended by the mutual agreement of the Parties) **provided that such non-fulfilment of the Conditions Subsequent by GPGC must be wholly attributable to the action or inaction of GPGC**, and, if, on the date of termination, any Condition Subsequent has not been satisfied by GPGC as a result for reasons attributable to GPGC, GPGC shall pay GoG the Early Termination Payment and other reasonable costs incurred by GoG within ninety ... days of the issue, by GoG, of a termination notice.” (Emphasis added).

387. GPGC submits that on the record before the Tribunal, there is no basis upon which GoG would be able to get a Clause 4(g) termination off the ground. The Tribunal agrees, as the record demonstrates that any delay in satisfying the Conditions Subsequent to be met by GPGC was not attributable to GPGC but to GoG.

#### **FAILURE TO ALLOCATE/PROVIDE UNIMPEDED ACCESS TO A SITE**

388. GoG does not dispute that it failed to allocate and/or provide unimpeded access to either the Aboadze or Kpone Sites – or at all. Why that should have been the case is a matter which has an element of shifting sands about it.

389. In its Resp. SoD, GoG asserted that it could not allocate the Aboadze Site, because:

“The Parties after the execution of the EPA, discovered that the Site contained an Oxidation Pond.”

390. GoG asserted that since the presence of the oxidation pond rendered the Aboadze Site unsuitable for GPGC’s Plant, it was entitled to terminate the EPA:

“... due to ... supervening circumstances which frustrated [GoG’s] ability to fulfil the Conditions Precedent.”<sup>456</sup>

391. That submission is simply unsustainable in the face of the factual record.

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<sup>456</sup> Resp. SoD, para. 30.

392. First, the Parties were well aware that the oxidation pond was on an area of the Site as early as their Site visit to Aboadze in February – March 2015<sup>457</sup>, months before they entered into the EPA. The Minutes of a further site meeting at Aboadze on 30 July 2015 record GPGC’s concern that it had not yet received an official land allocation. The Minutes continued:

“It has been understood that the site where GPGC have already conducted the geotechnical survey – pending receipt of the Hazardous and Contamination report – is an active oxidation pond and therefore not suitable. **Until the oxidation pond is relocated, GPGC cannot have access to the area. GoG have anticipated that there are not other area [sic] available for the GPGC power plant. VRA/GoG would have to relocate the oxidation pond shortly.** GPGC needs a date when the area will be allocated and an unimpeded access to the area will be granted.”<sup>458</sup> (Emphasis added)

393. Second, on 22 September 2015, the Ministry of Power wrote in the following terms to GPGC:

“As part of the conditions precedent to the effectiveness of the [EPA] GoG is required under Clause 3(iv) to provide unimpeded access to a site for the GPGC Equipment. In view of the above, the GoG through [VRA] has allocated the existing oxidation pond situate on the project site at the Takoradi Thermal Power enclave, Aboadze, to GPGC in satisfaction of the requirement of Clause 3(iv). We note the pond is still active, **however the VRA is working assiduously to divert the sewage therein into a temporary pond as soon as possible.**”<sup>459</sup> (Emphasis added).

394. At that time, well after the Effective Date, the Ministry’s letter was predicated on the basis that GoG’s obligation pursuant to the Condition Precedent at Clause 3(a)(iv) was very much ‘live’. GoG clearly contemplated that the relocation of the oxidation pond was its responsibility. Mr Monney put the point beyond any doubt when he confirmed under cross-examination that:

“[GoG] had to relocate [the active oxidation pond] because it was the [GoG]’s responsibility to give the site to GPGC.”<sup>460</sup>

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<sup>457</sup> Exhibit C-116.

<sup>458</sup> Exhibit C-43, p. 3.

<sup>459</sup> Exhibit R-5.

<sup>460</sup> Transcript, Day 3, p. 44.

395. In an evolution of the position taken in the Defence, GoG maintained in its Resp. Rejoinder that:

“It is not disputed that the existence of the oxidation pond was a fact known to the Parties at the time of execution of the EPA. However, the coexistence of [GPGC’s] Equipment and the oxidation pond, was found to be operationally and technically impossible after the execution of the EPA....<sup>461</sup>

396. But the reality behind that operational and technical impossibility appears to have been the time and the “*exorbitant*” costs<sup>462</sup> attendant upon the relocation of the oxidation pond. Mr Monney made that clear in his written evidence:

“The active oxidation pond on the land required [GPGC] to carry out extensive civil works to be able to accommodate [the GPGC Equipment] on the site. These activities were not fast track and cost effective and would have adversely affected the total cost of the project and the end-user tariff thereof.”<sup>463</sup>

397. Third, far from purporting to terminate the EPA on the (unsustainable) ground that the EPA had been frustrated, GoG offered GPGC an alternative site at Kpone in April 2016. GPGC was directed to negotiate a lease with VRA, but those negotiations foundered by reason of a combination of VRA work force opposition in the course of August 2016:

“The VRA workers say their actions are in response to attempts to cede ... a parcel of land at the Kpone Thermal Power Station to external parties”<sup>464</sup>

and a directive to VRA from the Ministry of Power in late September 2016 to:

“refrain from executing further any [IPPs] which has not commenced construction.”

398. VRA told GPGC that:

“With this directive in place we envisage we will have challenges with our proposal to the VRA Board to grant you use of the land for the Project.”<sup>465</sup>

399. Subsequently, in November 2016, VRA informed GPGC that it wished to:

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<sup>461</sup> Resp. Rejoinder, para. 62.

<sup>462</sup> Resp. SoD, para. 37.

<sup>463</sup> Monney WS, para. 24 and see Transcript, Day 3, p. 47.

<sup>464</sup> Exhibit C-128.

<sup>465</sup> Exhibit C-131.

“... put on hold all discussions on the above land grant and licence until we are able to explain the rational of the land grant and license to all our stakeholders including the staff groups.”<sup>466</sup>

400. On 24 January 2017, VRA informed GPGC that it did not wish to pursue the matter further and the prospect of the Kpone Site was lost.

401. GoG maintained the position in the course of its opening argument that the loss of the Kpone Site was attributable to GPGC’s failure to seek the relevant permits or authorisation from the VRA Board:

“the Kpone land was also not made available to GPGC as a result of GPGC’s own default in complying with due process. If GPGC has failed to comply with due process and has had the land withdrawn ... how can that be the burden of GoG?”<sup>467</sup>

402. GoG neither takes account of the matters outlined above, nor of the fact that it never pursued VRA’s confirmation to GPGC that it would offer the Kpone Site at a peppercorn rent if directed to do so by the Ministry of Power,<sup>468</sup> nor of the fact that the Ministry of Power was aware of, and had authorised, the preliminary fencing and ground clearing work undertaken by GPGC at the Kpone Site.<sup>469</sup>

403. Further and in contradiction of GoG’s submission that:

“...if the second alternative site became unsuitable for the project, GoG under the agreement really had no further obligation to provide another Site.”<sup>470</sup>

Mr Monney confirmed that once VRA had withdrawn its offer to lease the Kpone Site, GoG remained under an obligation to offer an alternative Site, but it had not proposed one to GPGC.<sup>471</sup> It is surprising that GoG would have considered itself to be under any such obligation if the loss of the Kpone Site had been the fault of GPGC.

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<sup>466</sup> Exhibit C-133.

<sup>467</sup> Transcript, Day 1, p. 107.

<sup>468</sup> Exhibit R-10.

<sup>469</sup> Exhibit C-61.

<sup>470</sup> Transcript, Day 1, p. 107.

<sup>471</sup> Transcript, Day 3, p. 61.

404. In the absence of any further attempt by GoG to allocate a site, GPGC concluded a lease for the Blue Ocean Site. The extent to which GoG was aware of, and consented to, that development is considered further at paragraphs 430 to 448 below.
405. In the context of the GPGC Conditions Subsequent, it was only at the point at which GPGC could proceed in the certainty that it had secured a site that it was in a position to address those of the Conditions Subsequent which were site-specific. Notably, GridCo was reluctant to conclude a grid connection agreement until GPGC could produce evidence of title to a site and Ghana Water would not conclude a water supply agreement until technical detailing of the water connection point had been finalised. Nor was there any possibility of obtaining a generation licence from the Energy Commission whilst the location and geographical limits of the site were unknown.
406. The principal obstacle between GPGC and the fulfilment of these Conditions Subsequent was a lack of assistance from GoG, contrary to its contractual obligations pursuant to Clause 9 of the EPA. Such assistance was requested between September and November 2017 in respect of the Generation Licence, the Water Supply Agreement and the Grid Connection Agreement. It was not forthcoming. But by then, as the factual chronology makes clear, GoG had already decided to terminate the EPA.
407. It is suggested by GoG that it was entitled to ignore GPGC's requests for assistance for three reasons. First, because they were not directed to GoG's Authorized Representative. Second, because they were "*unclear and imprecise*."<sup>472</sup> Third, because any such requests for assistance should have been delivered in conformity with Clause 28 of the EPA, namely: in writing; addressed to GoG at its address recorded on the signature page of the EPA; and delivered by hand or by recognised courier service.

#### **GOG'S AUTHORIZED REPRESENTATIVE**

408. It is in issue between the Parties whether GoG ever appointed such a representative.
409. So far as the terms of the EPA are concerned, the Tribunal notes that:
- a. GoG was: "*represented by the Minister of Power **or** its authorized representative*" (Emphasis added). It was not axiomatic that the Minister himself, who was

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<sup>472</sup> Resp. SoD, para. 74.

undoubtedly vested with authority to sign the EPA on behalf of GoG, would necessarily be the authorized representative of the GoG for the purposes of the EPA and the appointment of whom was a specific obligation of GoG within seven days of the signature date of the EPA pursuant to Clause 9(b) of the EPA;

- b. the definition of the “*Authorized Representative*” is: “... *the person named or appointed from time to time by a Party and who acts on behalf of that Party*” and
- c. each of the Parties was required to appoint an Authorized Representative within seven days of the Signing Date.<sup>473</sup> The role of the Authorized Representatives of each of GPGC and GoG was to:

“... be responsible for coordinating activities with [GoG/GPGC] and resolving procedural questions that may occur during the EPA Term. The Authorized Representative(s) shall be fluent in English. [GoG/GPGC] shall be entitled to replace an Authorized Representative(s) by providing seven ... days advance notice to GPGC/GoG] of such replacement.”

410. In the opinion of the Tribunal, it is evident from the particulars set out at para. 409.c above, which were equally applicable to the Authorized Representatives of both Parties, that what was envisaged, so far as the role of the Authorized Representative was concerned, was that of active ‘hands on’ senior managerial participation in the Project; it was not a mere formal or ceremonial role to be fulfilled at some remove from the performance of the Project itself and each of the Parties was at liberty to change its Authorized Representative upon giving the prescribed notice to the other.

411. It is not open to dispute that in conformity with its obligations pursuant to Clause 8(k) of the EPA, GPGC appointed Mr Andrea Parisotto as its Authorized Representative on 8 June 2015.<sup>474</sup> Whether or not GoG ever appointed an Authorized Representative remains in issue between the Parties, but what is not in doubt is that GoG failed to make an appointment within seven days of the date of signature of the EPA in conformity with Clause 9(b) of the EPA.

412. GPGC points to:

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<sup>473</sup> EPA Clause 8(k) (GPGC) and EPA Clause 9(b) (GoG).

<sup>474</sup> Exhibit C-30.

- a. the Minutes of Meeting of 30 July 2015, which recorded the “*understanding*” by the parties in attendance that Mr Francis Dzata, who signed the Minutes as “*GoG Representative*” “... *would be officially appointed as an Authorized Representative of GoG...*”, the Minutes further recording: “... *and a deputy Authorized Representative may also be appointed ...*”<sup>475</sup>;
- b. Mr Duncan’s letter to the Minister of Power, Dr Donkor, of 18 August 2015 in which he noted that GPGC had been informed that Mr Dzata was to serve as Authorized Representative but GPGC had yet to receive any formal communication from GoG in that regard. GPGC requested: “*the formal appointment of GoG’s authorized representative to enable more effective communication between GoG and GPGC.*”<sup>476</sup>;
- c. Mr Duncan’s letter to Dr Donkor of 21 September 2015 in which, referencing previous communications, he repeated GPGC’s request for an “*official notification detailing the authorized representative of the GoG*”<sup>477</sup>; and
- d. instructions from the Ministry of Power to communicate with designated officials – first, Mr Andrew Ashong, Mr Dzata’s assistant (August 2015 - April 2016), then Mr Ashong’s successor in Mr Dzata’s office, Mr Kankam-Yeboah (April 2016 - December 2016) and, following the General Election in December 2016, with Mr Dzata’s successor as technical advisor, Mr Michael Opam himself.<sup>478</sup>

413. For its part, GoG maintains that by letter dated 2 September 2015, stated to be in reply to GPGC’s letter of 18 August 2015, it appointed the Minister of Power, Dr Donkor himself, as its Authorized Representative in the following terms:

“... [I]n accordance with Clause 9(b) of the Agreement, GoG hereby appoints the Hon. Minister of Power, Hon. Dr. Kwabena Donkor as its Authorised Representative.”<sup>479</sup>

414. It is to be noted, first, that the appointment was not in conformity with Clause 9(b) of the EPA to the extent that it was made well outside the contractually stipulated deadline;

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<sup>475</sup> Exhibit R-3.

<sup>476</sup> Exhibit C-4.

<sup>477</sup> Exhibit C-39.

<sup>478</sup> Exhibits C-35, C-56 & C-148.

<sup>479</sup> Exhibit R-2.



second, there is no suggestion that the appointment was retroactive – rather, it purported to be made in direct response to GPGC’s letter of 18 August 2015 (see para. 412.b above); and third, the appointment was personal to Dr Donkor, rather than expressed as an appointment of the Minister of Power for the time being.

415. It is a curiosity of that letter, first, that Mr Parisotto and Mr Duncan, both of whom were questioned about it, were adamant that they had not seen it prior to its appearance in the arbitration record. Second, it is not consistent with the indication given barely a month before that Mr Dzata would fulfil the role and to which specific reference was made in GPGC’s letter of 18 August 2015. Third, when Mr Duncan wrote to Dr Donkor himself on 21 September 2015 and closed his letter by saying:

“Finally as per previous communications, we would request that we receive an official notification detailing the authorized representative of GoG.”<sup>480</sup>

he was not met with the response at the time (or at any time thereafter) that, as GOG had notified GPGC only three weeks earlier, the appointment had been filled – by the recipient of Mr Duncan’s letter, Dr Donkor.

416. The Tribunal must weigh the evidence of Mr Parisotto and Mr Duncan, having regard to a contemporary record which suggests that GPGC was unaware of any such appointment having been made by GoG on 2 September 2015 and that GPGC was never disabused by GoG of its belief that notification of GoG’s Authorized Representative was still awaited as at 21 September 2015.

417. In Closing Submissions for GoG, reliance was placed upon, *inter alia*, GPGC’s letters of 8 June 2015, 18 August 2015 and 21 September 2015 as evidence of its correspondence with the Minister *quae* Authorized Representative “... pursuant to Clause 9(b) and the parties clause [sic].” But that is not borne out by the content of that correspondence: the letter of 8 June was a notification to the Ministry of Power of Mr Parisotto’s appointment as GPGC’s Authorized Representative in (timely) conformity with Clause 8(k) of the EPA; the letter of 18 August 2015 noted that GPGC had yet to receive any formal communication from GoG as to the appointment of an Authorized Representative and pressed for such an appointment to be made; and the letter of 21 September 2015 again requested an official notification “as per previous communications” of the appointment

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<sup>480</sup> Exhibit C-39.

of GoG's Authorized Representative. While all of this correspondence was with the Ministry of Power (or with the then incumbent Minister, Dr Donkor), it was plainly not understood by GPGC as correspondence with a formally designated Authorized Representative of GoG.

418. Fourth, as the Tribunal has already noted, the role of the Authorized Representative as defined in the EPA was that of a 'hands-on' senior administrative function intended to ensure the smooth progress of the works. It is difficult to see how that would be compatible with the demands of high political office and a wide-ranging ministerial portfolio.
419. Fifth, Dr Donkor left office in December 2015 and it is not suggested that he was ever formally replaced in the role of Authorized Representative. Even as late as 11 September 2017, GPGC was still raising the appointment of a GoG Authorized Representative: in the context of a letter of which the Ministry recorded receipt on 12 September 2017 and in which GPGC informed the Deputy Minister of Power that it had commenced site preparation work at the Project site acquired in the Tema Free Zones area and that activities were under way, so far as the development of a dedicated gas pipeline to the site was concerned, GPGC emphasised that:

“... it has become essential to liaise with Authorized Representative(s) from the Ministry of Energy that will be responsible for coordinating activities with GPGC and resolving procedural questions that may occur.”

420. GPGC concluded:

“In accordance with the Ministry's obligations under the project Agreement, we kindly request the Ministry to appoint Authorized Representative(s) for the above mentioned purpose. We should be grateful to receive the name(s) and contact detail(s) of the representative(s) for our further action.”<sup>481</sup>

421. Finally, it is clear that GPGC maintained a steady flow of reports, status updates and other communications to those officials in the Ministry of Power with whom it had been instructed to communicate and not one of them ever suggested to GPGC that it was dealing with the wrong people. Regrettably, Mr Ashong, Mr Kankam-Yeboah and

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<sup>481</sup> Exhibit C-101.

Mr Opam, all of whom were recipients of these communications, did not give evidence and there was no opportunity to seek further clarification through them.

#### **GPGC’S REQUESTS FOR ASSISTANCE**

422. A further objection is raised by GoG that to the extent that GPGC made any requests of GoG for assistance, such requests were neither clear, nor unequivocal and they might properly be characterised as “*nebulous, vague and ambiguous.*”<sup>482</sup> That is a proposition with which the Tribunal has some difficulty. The complaint is simply not borne out by the record – and in any event, it is undermined by the absence of any contemporary requests for clarification on the part of GoG in respect of such applications as were made for assistance.

423. Finally, GoG maintained in the arbitration that such requests as GPGC did make were not made in conformity with Clause 28 of the EPA, which provides, in material part, that:

“Any notices **desired or required to be given** pursuant to this Agreement shall be in writing and addressed to the Party at its address as set forth on the signature page of this Agreement, and shall be served ... (i) by personal delivery ..., or (b) sent prepaid by recognised courier delivery service ...”  
(Emphasis added)

424. It is submitted by GPGC that a request to GoG for assistance pursuant to GoG’s obligations under Clause 9 of the EPA is not among the many – in excess of 20 – instances in which the EPA specifically calls for the giving of formal notice.<sup>483</sup> That point is compelling in the view of the Tribunal – which notes, as an aside, that from October 2017 onwards, GPGC progress reports were hand-delivered to Mr Opam in any event.

425. In the opinion of the Tribunal, GoG’s purported reliance on Clause 28 of the EPA is misconceived.

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<sup>482</sup> Transcript Day 1, pp. 125 & 126. Mr Monney had suggested that GPGC had not requested GoG’s assistance to secure a Grid Connection Agreement with GridCo (Monney WS, para. 46). The letter dated 19 September 2017 from GPGC to the Minister of Power with copy to the CEO of GridCo (Exhibit C-13) makes it plain that GPGC did seek GoG’s assistance to finalise a MoU and a Connection Agreement with GridCo as Mr Monney conceded: Transcript Day 3, p. 93.

<sup>483</sup> *Ibidem*, p. 46.

## **GPGC’S SELECTION OF THE BLUE OCEAN SITE**

426. GoG maintains that the selection of the Blue Ocean Site was “*an act taken outside the premise of the EPA*”, giving rise to a right to GoG to terminate the EPA. GPGC has submitted, rightly, in the opinion of the Tribunal, that there is no provision in the EPA which would permit GoG to terminate on this basis.
427. To the extent that GoG seeks to rely on Clause 3(b) of the EPA to justify any such termination, the Tribunal accepts GPGC’s submission that the attempt is misconceived: first, Clause 3(b) is a provision which operates for the benefit of GPGC. It allows GPGC to determine in its “*sole but reasonable discretion*” that a Site allocated by GoG is unsuitable and that in such event, GoG is required to allocate a new Site within 30 days of notification by GPGC that the original site was unsuitable. Second, if any such alternative site is likewise deemed unsuitable by GPGC, then GPGC has the option to terminate the EPA with immediate effect and to look to GoG for payment of the Early Termination Payment and of its mobilisation and other reasonable costs. Nor, in circumstances in which the unfulfilled Condition Precedent was a Condition Precedent which it was incumbent upon GoG to perform, would GoG be able to invoke Clause 3(d) as a basis to seek to terminate the EPA.
428. On the facts of this case, GoG withdrew the Aboadze Site and then, in January 2017, it withdrew the Kpone Site, too. Although GPGC would have been within its rights to terminate the EPA in reliance upon Clause 3(b), it chose not to do so. It chose instead to identify a further alternative site. This is not a factual matrix that can be brought within Clause 3(b) and the provision offers no basis upon which GoG might rely to support any such purported right of termination. It seems that by the stage of Closing Submissions, the emphasis of GoG’s argument had shifted, such that it sought to suggest that:

“... the arrogation onto itself [by GPGC] of a site was a voluntary risk that it assumed, and such a voluntary risk – as in the common law would be described *volenti non fit injuria* – ought not to be rewarded with any claim for payment of compensation.”<sup>484</sup>

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<sup>484</sup> Transcript, Day 5, p. 69 (at p. 77, clarified to the extent that it was suggested that GPGC had arrogated to itself “a purported execution of the condition precedent of [GoG] in identifying a site.”).

429. It is not possible either to reconcile the facts in the record with the proposition that the acquisition and development of the Blue Ocean Site amounted to a clandestine endeavour of which GoG was unaware.

430. Having located a prospective alternative site in late February 2017,<sup>485</sup> GPGC notified the Ministry of Energy on 20 March 2017 that it had:

“... identified an alternative site for the project and consider it necessary that we formally inform you that the proposed allocation of the Kpone Site for the project did not materialise.”<sup>486</sup>

431. GoG acknowledged receipt of that letter on 30 May 2017. It confirmed that it had:

“taken note of the alternative site that has been identified by GPGC for the development of the project following VRA’s decision not to proceed with the leasing arrangements for the proposed Kpone site.”

432. GoG requested GPGC to:

“... inform us about the identified alternative site and also keep the Ministry abreast with the status of the project.”<sup>487</sup>

433. In the meantime, however, Mr Parisotto had prepared a Project Status Report for GoG on 21 March 2017. It was despatched by Mr Caleb Ababio of GPGC to Mr Monney. The Report stated, *inter alia*, that;

“GPGC – being aware of the lack of power in the country and persisting on this project – has dedicated time and further resources to identify a new and available site and have [sic] started discussion with GridCo in order to define the better solution for the high voltage connection.

A site survey around the area that belongs to Puma has been done and discussions with GridCo are on-going pending the proposal from GridCo on how to connect the plant to the grid. Verbally, GridCo – engineering dept. – has confirmed that the connection is technically feasible and the power evacuation is possible.

A geotechnical and geological survey will start next week and in parallel a technical verification – drawing the interferences – between the Puma tank farms under construction and the future power station is ongoing. GPGC has performed the site survey with the engineering company that has prepared

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<sup>485</sup> Exhibits C-83 & C-134.

<sup>486</sup> Exhibit C-8/R-12.

<sup>487</sup> Exhibit R-13.

the engineering and will supply and integrate the high voltage substation and – if required, the electrical connection between the power station and the Ghanaian national grid.

Due to the above the permitting already done needs to be resubmitted especially for the permits that are site related.”<sup>488</sup>

434. Mr Parisotto also took the opportunity to report that the GPGC Equipment had been dismantled and transported to Ghana where it was being stored in a temporary storage area close to Tema port Dry Docks (the oversize items) and at the port (containers). The Tribunal will revert to this subject at paragraphs 463-472 below.

435. In cross-examination, Mr Monney sought to suggest that he had been sent the Report in error and that it was, in fact, an internal communication exchanged between Mr Ababio and Mr Parisotto. He stated that it neither merited a response, nor prompted him to seek any clarification; he had acknowledged receipt merely as a matter of courtesy. He conceded, however, that:

- a. he had read the Report;
- b. he had not sought any clarification of its content; and
- c. a day after sending the letter of 20 March 2017 to the Ministry, GPGC had identified the Puma Site in the Report.<sup>489</sup>

436. The Tribunal is not persuaded by Mr Monney’s explanation and it is satisfied that the Report was intended for, and read by, Mr Monney.

437. On 20 April 2017, GGC wrote to GridCo to give formal notification of the new site and to provide GridCo with the coordinates of the connection point.<sup>490</sup>

438. In April 2017, Mr Duncan attended a meeting with the Deputy Minister of Power, Mr Aidoo, at which he informed him that GPGC had located the Blue Ocean Site and identified it as a suitable alternative.<sup>491</sup> The Tribunal was reminded by Counsel for GPGC that Mr Aidoo was scheduled to attend the Hearing as an observer, but he had not been

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<sup>488</sup> Exhibit C-135.

<sup>489</sup> Transcript, Day 3, pp. 66-68.

<sup>490</sup> Exhibit C-138.

<sup>491</sup> Duncan, paras. 18 & 19 and Transcript, Day 2, pp. 100 & 101.

tendered as a witness – and certainly not as a witness to gainsay Mr Duncan’s evidence.<sup>492</sup>

439. Furthermore, the April 2017 PPA Committee Report identified the Blue Ocean Site, noting that the GPGC Project was to be located in Tema.<sup>493</sup> While Mr Monney professed familiarity with the content of the Report, he sought initially to suggest that its references to a site at Tema might just as well have been referring to the Kpone Site as the Blue Ocean Site, because he understood that the issue of an adequate gas supply was an issue with both sites. When it was put to him that GoG’s case was that inadequate gas feed was an issue with the Blue Ocean Site, Mr Monney said that he could not speak for the Blue Ocean Site.<sup>494</sup>

440. In the context of its letter of 24 July 2017, submitting a draft Cabinet Memorandum to the Minister of Finance in which it sought the urgent approval of the tax exemptions by Cabinet and Parliament, the Ministry of Energy noted that:

“...due to challenges in finding a suitable location within the Aboadze power complex, the project was relocated to a vacant land close the Kpone Thermal Power Plant (KTPP) site in Tema. Currently, GPGC has secured a site in the Tema Free Zones Enclave for the project.”<sup>495</sup>

441. While Mr Monney was prepared to acknowledge that by the time that the draft was prepared, GoG knew that GPGC had secured a site in the Tema Free Zones Enclave, he was initially reluctant to concede that the reference in the last sentence of the citation could only be to the Blue Ocean Site. But when pressed, he accepted that the reference could not be to the KTPP site in the penultimate sentence and that he was not aware of any other site being considered in the Tema Free Zones Enclave.<sup>496</sup> He was obliged to accept, too, that it was plain on the face of the draft memorandum that the need for urgency, so far as the long overdue fulfilment of GoG’s Condition Precedent obligation

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<sup>492</sup> Transcript, Day 1, p. 48.

<sup>493</sup> Exhibit C-136, p. 30.

<sup>494</sup> Transcript, Day 3, p. 74.

<sup>495</sup> Exhibit R-31, pp. 4 & 5.

<sup>496</sup> Transcript, Day 3, p. 77.

to obtain parliamentary approval for the tax exemptions was concerned, was that GPGC was on the point of commencing construction.<sup>497</sup>

442. Only a few days before, on 19 July 2017, the Minister of Energy had been copied on the Environmental Protection Agency’s Environmental Permit for GPGC in respect of its “*proposed project ... located at Tema Heavy Industrial Area.*”<sup>498</sup>

443. The A-G’s Advice of 28 August 2017 provides further evidence of the GoG’s state of knowledge. In her Advice, the Attorney-General noted that:

“.... [GPGC] has commenced construction on site ....”<sup>499</sup>

444. Mr Monney accepted that the only site at which GPGC was engaged in construction work at the time of the A-G’s Advice was the Blue Ocean Site.<sup>500</sup>

445. That observation was made in the context of an asserted failure on GPGC’s part, reported by the Energy Commission, to obtain the requisite siting and construction permits and which led the Attorney-General to conclude that GPGC’s construction activities were illegal. The Tribunal deals further with this aspect of the matter – and with the Attorney-General’s conclusion that GPGC’s failure to obtain a licence pursuant to Section 11 of the Energy Commission Act left it without capacity to enter into the EPA – at paragraphs 449-460 below.

446. A fortnight later, GPGC notified the Minister of Power that site preparation works were under way “*on the project site acquired in the Tema free zones area*” and that the development of a dedicated gas pipeline was ongoing.<sup>501</sup>

447. It is Mr Parisotto’s evidence that between November 2017 and January 2018, he wrote some three dozen letters to, variously, VRA, the Deputy Minister of Power and Mr Opam to keep them updated about the tender and eventual award of the gas pipeline to China Petroleum.

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<sup>497</sup> *Ibidem*, pp.79 & 80.

<sup>498</sup> Exhibit C-12.

<sup>499</sup> Exhibit C-144, p. 14.

<sup>500</sup> Transcript, Day 3, p. 82.

<sup>501</sup> Exhibit C-101.



448. The evidence that GoG was aware of the selection and acquisition of the Blue Ocean Site and of the start of construction there and that it never raised an objection is overwhelming.

#### **GPGC COMMENCED CONSTRUCTION AT THE BLUE OCEAN SITE WITHOUT THE NECESSARY PERMITS**

449. GOG asserts that it was entitled to terminate the EPA, because: (i) GPGC had failed to procure a provisional generation licence within 30 days of the Effective Date; and (ii) GPGC had started construction works at the Blue Ocean Site without the appropriate siting and construction permits from the Energy Commission.

450. As to the first complaint, GPGC's answer is that it could not apply to the Energy Commission for a provisional generation licence until it had secured the Blue Ocean Site in May 2017, because, as is common ground, such an application is site specific. And having secured the site, GPGC applied to the Energy Commission on 31 July 2017. GPGC submitted further information requested by the Commission on 22 August 2017 and on 31 August 2017, Dr Ahenkorah assured GPGC that the Commission was:

“processing your application and any further requirement would be communicated to you.”<sup>502</sup>

451. When he wrote in those terms, however, Dr Ahenkorah was well aware that pending its return to a full complement of members after the General Election, there was an hiatus in the activities of the Board of the Energy Commission between January 2017 and 20 September 2017. The Board was the body by which applications for generation licences were considered and approved.<sup>503</sup> That being the case, one is left to search for any basis for Dr Ahenkorah's assurance that GPGC's application was being “*processed*”.

452. Further, when it was put to Dr Ahenkorah that he had made no mention in his letter of 31 August 2017 of any construction works undertaken by GPGC without the requisite siting and construction permits, he suggested that his letter was a mere acknowledgement and “*we were not supposed to mention that in this letter.*” (Dr Ahenkorah accepted that the Commission had never followed up on its letter of 31 August 2017; the next

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<sup>502</sup> Exhibit R-29.

<sup>503</sup> Transcript, Day 3, pp. 112 & 113.

communication had been the 20 February 2018 Order to Stop Work. He explained that the Commission had been waiting for the Board to review the documentation submitted by GPGC and to approve it or not).<sup>504</sup>

453. At a meeting on 13 November 2017, Dr Ahenkorah raised some additional “*condition[s] precedent*” that GPGC had to meet before he could grant the provisional licence, notably, a letter from the Ministry of Power/Ghana Gas confirming that gas would be allocated to the plants and an approval based on an inspection of the plants by the Ministry of Power. While he maintained that these were matters that should have been addressed before the EPA had been signed, he confirmed that once the conditions had been met, the provisional licence would be granted. GPGC determined to take up these matters in a meeting with Mr Opam.<sup>505</sup>
454. Dr Ahenkorah told the Tribunal that he had left it to GPGC to sort out the gas supply issue with GoG and that he was unaware that the GPGC Equipment had been the subject of detailed due diligence, and had been accepted by GoG two years earlier.<sup>506</sup> Once again, no mention was made of the construction work on the Blue Ocean Site, but Dr Ahenkorah sought to explain that away by suggesting that the Commission had been labouring under the misapprehension that the works were actually being carried out on a different worksite – that of another company, AKSA, which has no connection with the Project.<sup>507</sup>
455. What Dr Ahenkorah did not tell GPGC at that meeting (or at any time) was that the Committee responsible for the PPA Committee Report, which he had chaired, had recommended to the Ministry of Energy that the EPA be terminated – a recommendation that he professed not to recall when asked about it at the Hearing.<sup>508</sup>
456. In his Weekly Report of 30 November 2017, Mr Parisotto recorded that GPGC had obtained its EPA permit for construction and operation, including the construction and operation of the gas pipeline. So far as the generation licence was concerned, he recorded that the application had been submitted on 31 July 2017. He continued:

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<sup>504</sup> Transcript, Day 3, pp. 123 & 126.

<sup>505</sup> Exhibit C-150.

<sup>506</sup> Transcript, Day 3, pp. 131 & 132.

<sup>507</sup> *Ibidem*, p. 134.

<sup>508</sup> *Ibidem*, p.128.

“Energy Commission have reviewed the application and requested evidence of fuel suitability and GoG review and acceptance of the equipment purchased from Italy for use in the project. GPGC wrote to GoG about the suitability of the fuel (letter ref. n.05 dated 21 September 2015) and received a copy of the report produced by the GoG [team] after the visit of the power plants in Italy. GPGC has provided both of these documents to the Energy Commission but notes that the provision of fuel is not its responsibility under the EPA and that the equipment was reviewed and approved as a Condition Precedent to the signing of the EPA. Therefore it feels that neither of these items should hold up issuance of the Generation Licence. **GPGC requires GoG assistance to fast track this item.**” (Emphasis added)<sup>509</sup>

457. In the course of his cross-examination, Mr Mooney agreed that the supply of gas was a matter for GoG and that the suitability of the GPGC Equipment had been dealt with in 2015.<sup>510</sup>
458. It is opportune to note in passing that in that same report, Mr Parisotto recorded the extent of the progress of construction activities on the Blue Ocean site and, specifically, the status of the China Petroleum pipeline contract. He also recorded that GPGC had obtained PURC tariff approval, its EPA permit for construction and operation, including the construction and operation of the gas pipeline, the hoarding permit and Assembly District permit and it had secured the release of the Fire Fighting permit.
459. Mr Parisotto noted:
- a. that the finalisation of the GridCo Agreement was dependent upon the Energy Commission permit;
  - b. delays in construction of the transmission infrastructure which could result in GPGC being ready to charge capacity before the grid connection was ready and might result in a 6-month potential impact on GPGC’s commissioning schedule;
  - c. that in the absence of any comments from GoG, GPGC had confirmed the gas pipeline parameters with China Petroleum; and
  - d. the still outstanding tax exemptions and the finalisation of the Ghana Water contract in respect of both of which, he requested GoG assistance.

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<sup>509</sup> Exhibit C-153.

<sup>510</sup> Transcript, Day 3, p. 91.

460. On the basis of the record as it now stands, it is apparent that even as Dr Ahenkorah was putting up further hurdles over which he required GPGC to jump in pursuit of its provisional generation licence in November 2017, the Minister of Energy was about to seek the approval of the Ghanaian Parliament of a decision to terminate the EPA along with a number of other PPAs, based upon the Report of the PPA Committee chaired by Dr Ahenkorah.
461. The second limb of GoG’s permit defence is no more meritorious than the first. It is asserted that GPGC had not been issued with a siting and construction permit from the Energy Commission and it was on the basis that GPGC had no such permit that the Commission issued its Order to Stop Work of 20 February 2018 over the signature of Dr Ahenkorah.<sup>511</sup> But first, GPGC did have a building permit for the Blue Ocean Site issued by the Kpone-Katamanso District Assembly on 15 August 2017<sup>512</sup> and second, GoG has not been able to adduce any statute or regulation, including the Energy Commission Act, which addresses the requirement for any such additional construction permit. At best, it is possible to point to the Commission’s 2012 Licence Application Manual for Service Providers in the Electrical Supply Industry,<sup>513</sup> but that is stated to be “a document developed to guide the Commission in the performance of its licensing obligations” and a “source of information” to licensed operators and prospective applicants.
462. GPGC submits, first, that there is no basis in the EPA upon which GoG could terminate that Agreement by reason of the fact that GPGC was carrying out works without the additional Energy Commission permit. Second, it is difficult to reconcile the reliance placed upon this matter now, when it is clear that, as Dr Ahenkorah conceded under cross-examination, the Commission was well aware of the ongoing construction works at the Blue Ocean Site (and it had informed the Attorney-General that GPGC had not obtained the requisite siting and construction permits – as she recorded in her A-G’s Advice).<sup>514</sup> The Commission did not take the point when it wrote to GPGC on 31 August 2017 to confirm that it was processing GPGC’s application for its provisional generation licence. Nor did it issue a stop order in August 2017, when the Attorney-General issued

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<sup>511</sup> Exhibit C-107.

<sup>512</sup> Exhibit C-98.

<sup>513</sup> Exhibit R-21, Sections 1.2-1.3.

<sup>514</sup> Transcript, Day 3, pp. 118 & 119.

the A-G's Advice or even before that, when the Commission had first become aware of the construction works. In fact, as noted above, no complaint that work was going on without such an Energy Commission permit was made until a week after GoG had issued its termination letter of 13 February 2018.<sup>515</sup>

#### **THE IMPORTATION OF THE GPGC EQUIPMENT INTO GHANA WAS PREMATURE**

463. In Closing Submissions, GoG maintained that GPGC's obligation to mobilise, import, instal and commission the GPGC Equipment could only arise after the clear approval of an Effective Date and due satisfaction of GoG's Conditions Subsequent, such that:

- a. *“any endeavour by GPGC to import the equipment into [Ghana] and require [GoG] to bear any expenses and consequences arising out of the importation and purported installation of the equipment in Ghana will necessarily be outside the premises of the [EPA]...”*; and
- b. *if GPGC imported the Equipment into Ghana “at a time that they had not been in satisfaction of Conditions Precedent and Conditions Subsequent, the Tribunal will be invited to hold that GPGC was in clear breach of Clauses 6(b) and 8 of the Agreement.”*<sup>516</sup>

464. GoG maintains that it was acknowledged by GPGC that the GPGC Equipment arrived in Ghana before any land was available for it.<sup>517</sup> Quite apart from the fact that GoG advances no contractual basis pursuant to which it would be entitled to terminate the EPA on such a basis, the record has established that GoG was well aware that the GPGC Equipment was being imported.

465. Mr Monney took the position that the GPGC Equipment had been dismantled and shipped without prior notice to GoG and too soon. He complained that the Ministry had not been privy to these developments – rather, in the absence of any formal communication, it only got wind of the shipments when on their way.<sup>518</sup>

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<sup>515</sup> *Ibidem*, pp. 120 & 121.

<sup>516</sup> Transcript, Day 5, pp. 65 & 66.

<sup>517</sup> Transcript, Day 2, p. 18.

<sup>518</sup> Transcript, Day 3, pp. 94 & 95.

466. That is not borne out by the contemporary record.
467. On 26 February 2016, Mr Parisotto informed Mr Ashong that a contract for the dismantling of the GPGC Equipment in Italy had been signed.<sup>519</sup>
468. In an email to Mr Kankam-Yeboah on 31 May 2016, Mr Parisotto reported that:
- “Dismantling activities in Italy have started and are proceeding on schedule. The parts of the plants that are dismantled are placed on containers and then moved to a temporary site close to the corresponding site (Trieste for Gorizia power plant and Livorno for Greve in Chianti power plant).”<sup>520</sup>
469. Subsequently, Mr Parisotto told Mr Kankam-Yeboah that:
- “Dismantling activities in Italy are completed 100%” and the GPGC Equipment was to be shipped to Tema by special vessel for oversize items.<sup>521</sup>
470. On 15 November 2016, GPGC wrote to the Minister of Power, seeking assistance in the grant of tax exemptions to clear the GPGC Equipment and materials which had been imported and were expected to arrive in Ghana shortly. GPGC stated that the first consignment was scheduled to arrive on 22 November 2016.<sup>522</sup>
471. Thereafter, on 21 November 2016, the Ministry of Power recorded the imminent arrival of the first consignment of the GPGC Equipment and accessories in its letter to the Minister of Finance. The Ministry of Power pressed for approval of the promised tax exemptions and recorded its obligation to give effect to the tax exemptions in the EPA.<sup>523</sup>
472. In the course of his cross-examination, Mr Monney accepted that no complaint had been raised by the Ministry in the context of GPGC’s request of 15 November 2016.<sup>524</sup>

### **THE A-G’S ADVICE**

473. Considerable weight is placed upon the Advice issued by the Attorney-General of Ghana on 28 August 2017 by which she submitted to the Minister of Energy, Mr Agyarko, her review of the PPAs, including the EPA. The purpose of the A-G’s Advice was to enable

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<sup>519</sup> Exhibit C-55.

<sup>520</sup> Exhibit C-59.

<sup>521</sup> Exhibit C-74.

<sup>522</sup> Exhibit C-75.

<sup>523</sup> Exhibit C-76.

<sup>524</sup> Transcript, Day 3, p. 100.

the Cabinet to take a decision on the future of the PPAs, but to the extent that an overall impression of that advice can be obtained from the heavily redacted text produced in the arbitration, it is apparent that the premise upon which the advice was founded was that the EPA was to be terminated; the issue was to identify a legal basis upon which that might be achieved.

474. The Attorney-General recorded that Ghana faced the prospect of the production of excess energy, if all of the PPAs concluded at the height of the power crisis were to be implemented as originally scheduled. The purpose of a review was to seek to alleviate the losses that might otherwise be incurred in the Power sector.
475. In addition to such review by the Attorney-General of the PPAs in question, of the Cabinet Memorandum of 20 June 2017 and of the PPA Committee Report, the basis of her conclusions is said to be information attributed to the Energy Commission (the absence of a Section 11 Energy Commission Act licence) and “*established Energy Commission policy*”. The latter apparently required a contractor to obtain siting and construction permits from the Commission and prohibited the deployment of a used plant. The A-G’s Advice further references the Conditions Precedent provisions of the EPA, citing Clause 3(d) in particular. It contained the bald statement that:

“Although CPs have not been performed, there is also no evidence that the E[ffective] D[ate] has been extended by mutual agreement by the Parties.”

476. That statement is wrong to the extent that there is no provision in Clause 3 of the EPA for the extension of Conditions Precedent by mutual agreement; pursuant to Clause 3(c), it is the prerogative of the Party not responsible for the fulfilment of a Condition Precedent to grant an extension.
477. So far as the Conditions Subsequent are concerned, the Attorney-General referenced Clause 4(g) of the EPA, noting that any termination based upon that provision had to arise out of a non-fulfilment of the Condition Subsequent “*wholly attributable to [GPGC]*” and it gave rise to a liability, in the event of a breach of obligation or a default on GPGC’s part, to pay the Early Termination fee to GoG pursuant to Clause 25(b)(ii).
478. Without any further reasoning, the Attorney-General concluded that GoG had the right lawfully to terminate the EPA on the grounds of:

- a. Illegality for want of capacity of GPGC to enter into a PPA;
- b. Failure to obtain siting and construction permits;
- c. Installation of used plant contrary to policy; and
- d. Failure on the part of the Seller to fulfil its CPs and conditions subsequent

and that if GoG were to terminate the EPA on the final of those four grounds, it would be entitled to the Early Termination Fee.<sup>525</sup>

479. Whether or not Dr Ahenkorah's evidence to the Tribunal was correct, when he testified that none of the information said by the Attorney-General to have been elicited on enquiry of the Energy Commission was provided directly by the Commission to the Attorney-General; rather, all correspondence had been between the Commission and the Ministry of Energy, it is evident on the record available in this arbitration that the premises upon which the A-G's Advice was founded did not reflect the true facts. First, as Dr Ahenkorah was obliged to concede, the Board of the Energy Commission, which was the body charged with approving a provisional generation licence, had not been reconstituted when GPGC had submitted its application in July 2017. That remained the case at the time that the Attorney-General was preparing her advice. Second, GPGC did have a building permit for the Blue Ocean Site issued by the Kpone-Katamanso District Assembly and GoG has not been able to adduce any statute or regulation, including the Energy Commission Act, which addresses the requirement for any additional construction permit. Third, the nature of the GPGC Equipment to be used for these works was expressly described in the EPA and it had been inspected and approved for use by the Ministry in June 2015. Fourth, the extent of the interplay between the obligations of the Parties, so far as their respective Conditions Precedent and Conditions Subsequent were concerned, has been considered in some detail above.

480. The Tribunal must respectfully disagree with the A-G's Advice: it has found that there is no basis for GoG's contention that it has established an entitlement to terminate the EPA pursuant to Clause 4(g) of the EPA.

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<sup>525</sup> Exhibit C-144.



## **GOG’S ASSERTED RIGHT TO TERMINATE THE EPA PURSUANT TO CLAUSE 24(D)**

481. Clause 24(d) provides that:

“Upon the occurrence of any GPGC Default, the GoG may: (i) terminate this Agreement; or (ii) exercise any other right or remedy which may be available to the GoG under any applicable law.”

482. But if this argument is to succeed, GoG must establish that GPGC was in default under the terms of Clause 24(c)(i); that GoG had provided GPGC with a written notice of the nature of the breach and of its intention to terminate as a result of the breach; and that GPGC had failed to commence to cure the breach or to provide reasonable evidence that no such breach had occurred within 30 days of receipt of the notice. None of those conditions was met in this case – to the point that the letter of termination of 13 February 2018 was based on a purported reliance upon Clause 4(g) of the EPA; no reference whatever was made to a Clause 24(c)(i) default.

### **“MUTUAL BREACH”**

483. At paragraph 76 of its Rejoinder, GoG advanced the contention that:

“the Parties mutually breached the EPA and in that event must be discharged from their respective obligations.”

484. GPGC dismisses this argument on the basis that no legal authority has been suggested in support of that contention and that there is none. The Tribunal accepts that submission.

### **NO ACCEPTANCE OF GOG’S REPUDIATION WITHIN A REASONABLE TIME**

485. In response to this complaint, GPGC advances the uncontroversial proposition that what constitutes a “*reasonable time*” is determined by the facts and matters of the particular case and that in evaluating what a reasonable time might be, an innocent party does not lose its right of termination by investigating the repudiation and calling upon the other party to remedy it. As Counsel for GPGC put it:

“GPGC clearly did exercise its right to terminate within a reasonable time. It immediately made several entreaties to [GoG] to remedy the situation and in response to these requests, senior government officials assured GoG that the purported termination was misguided and would be retracted.”<sup>526</sup>

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<sup>526</sup> Transcript, Day 1, p. 57.

486. The record before the Tribunal bears out that submission, in particular the following:
- a. on 13 March 2018, GPGC was told that the Minister of Energy would advise Mr Aidoo, Deputy Minister of Power, to write a memo to the President and the Cabinet of Ministers to seek the reinstatement of the EPA;
  - b. on 16 March 2018, in the course of a meeting between representatives of GPGC (led by Mr Duncan) and Deputy Minister Aidoo, the latter assured GPGC that efforts were under way to reinstate the EPA;
  - c. on 4 April 2018, Mr Aidoo informed GPGC that the President of Ghana had verbally approved the reinstatement of the EPA and instructed the Energy Commission and Mr Opam to ensure that GPGC could resume construction – as it did on 24 April 2018; and
  - d. on 3 May 2018, in response to its letter of 26 February 2018, GOGC was told that: *“the Ministry is working on the issues raised in your letter and will revert to you soon with our response.”*<sup>527</sup>

487. Mr Aidoo was not made available to give evidence about these matters, but on the basis of this record, the Tribunal concludes that once it had become clear that GoG would not retract its termination notice, GPGC’s acceptance of GoG’s repudiation of the EPA was timely and proper.<sup>528</sup>

## CONCLUSION

488. On the basis of the record before it, the Tribunal is satisfied that the die was cast for the EPA once the PPA Committee Report had reached the conclusion that the projected capacity additions from the PPAs: *“... were far in excess of the required additions inclusive of a 20% system reserve margin from 2018 to 2030.”*

489. Its recommendation was to defer four PPAs with a combined capacity of 1,810 MW to 2018-2025; defer three PPAs with a combined capacity of 1,150 MW beyond 2025; terminate 11 PPAs with a combined capacity of 2,808MW; and allow the remaining

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<sup>527</sup> See Exhibits C-160, C-161, C-163 & C-164.

<sup>528</sup> Exhibit C-109.

PPAs to proceed without modification. GoG anticipated significant savings from these deferments and terminations:

“The estimated cost for the terminations is USD 402.39 million, compared to an average annual capacity cost of USD 586 million each year or a cumulative cost of USD 7.619 billion from 2018 to 2030.”<sup>529</sup>

490. One of the PPAs recommended for termination was the GPGC project. Dr Ahenkorah’s Committee suggested that termination could be achieved for some US\$ 18 million as opposed to payments of US\$ 24.9 million a year for four years in excess capacity charges. The basis of that recommendation is not known: the copy of the PPA Committee Report submitted into the record by GoG is heavily redacted, notwithstanding the Tribunal’s Order that the unredacted text be disclosed. Under cross-examination, Dr Ahenkorah equivocated as to whether he had any recollection of the particular recommendation made in respect of the GPGC EPA at all,<sup>530</sup> just as he had sought to distance himself from the A-G’s Advice of August 2017.<sup>531</sup>
491. False assurances were given by GoG in October 2017 that the GPGC Project was one of those unaffected as a result of the Review and that it enjoyed the full support of the Minister and of Mr Opam.<sup>532</sup>
492. On the basis of this record, the Tribunal has no hesitation in concluding:
- a. that the true reason for the purported termination of the EPA was aptly summarised by Counsel for GPGC in the course of his Opening Submissions:

“The [PPA Committee Report] suggested that the “actual development cost of the project to date should be verified and used as a guide in negotiations for termination.”; in other words, the Committee suggested that [GoG] should negotiate a settlement under which it would only compensate GPGC for its actual development costs rather than what GPGC was entitled to under the contract. The Committee calculated what it estimated that actual development cost to be and thus the hoped-for price of a negotiated termination might be: USD18 Million. ... [GoG’s] sole reason for terminating the GPGC contract was

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<sup>529</sup> Exhibit C-151 Ghanian Parliamentary Record Hansard 17 November 2017 Minister of Energy’s (Agyarko’s) Statement.

<sup>530</sup> Transcript, Day 3, pp. 127 & 128.

<sup>531</sup> *Ibidem*, pp. 115-118.

<sup>532</sup> Exhibit C-148, p. 1.

that its faithful performance would be expensive, that all of the electricity generated would be excess and that [GoG] thought [it] could negotiate a settlement based on termination against a payment of UD18 million. So this was a cost/benefit analysis pure and simple. ... [given] a coating of legal veneer [by the A-G's Advice]."<sup>533</sup>;

and that

b. GoG's defence based upon Clause 4(g) of the EPA must fail.

493. In light of those conclusions, the Tribunal must consider the proper measure of damages to which GPGC is entitled by reason of GoG's wrongful termination of the EPA.

494. Recital F of the EPA records that:

"The GoG recognizes that by GPGC dedicating exclusively the GPGC Equipment for the purpose of this EPA the performance of the Term is of the essence of the EPA as GPGC will be unable otherwise to make good any loss suffered."

495. Clause 2 (b) of the EPA provides that:

"The Term shall be a guaranteed period and in the event this EPA is terminated in accordance with the provisions thereof prior to its scheduled expiration date as a result of the default of any of the Parties, the Party not responsible for the default may proceed in accordance with Clause 25 of this Agreement."

496. If GPGC is right and GoG repudiated the EPA, such that GPGC then validly terminated in response to the repudiation, as the Tribunal has found to be the case, GPGC is entitled to proceed pursuant to the provisions of Clause 25(iii) of the EPA and to require payment of the Early Termination Fee.

#### **EARLY TERMINATION PAYMENT**

497. In addition to the Parties' own submissions, the Tribunal received the written and oral evidence of Ms Ellen Smith, Mr Richard Oppong-Mensah and Mr Ebenezer Baiden.

498. Ms Smith is a Senior Managing Director of FTI Consulting and the author of two expert reports filed in these proceedings by GPGC. She is a Power Systems Engineer with more than 35 years of operational experience in the energy sector, working in the electric power

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<sup>533</sup> Transcript, Day 1, pp. 11 & 12.

industry, including nearly 20 years of experience at GE, the Original Equipment Manufacturer of the major equipment comprising the GPGC Equipment. She has a detailed knowledge of all facets of GE's power plants (including the particular LM 6000 aeroderivative power plants in issue in this case), including project development, design, engineering, procurement, installation, construction, operations and maintenance, and project and plant management. The propositions advanced in her Reports were supported, *inter alia*, by GE LM6000 fleet operational data, the purchase orders and invoice records and the KPMG audited GPGC financials in respect of the mobilisation costs claimed (neither Ms Smith's calculation of the total mobilisation costs, nor the underlying records have been contested) and the detailed costs estimates and proposals received in respect of any prospective demobilisation. Her standing as an independent expert was not questioned and she was, in the opinion of the Tribunal, an impressive and credible witness.

499. Mr Oppong-Mensah was put forward by GoG as an expert witness on the early termination payment, but his independence and his expertise are open to question. He confirmed to the Tribunal that he had retired as a Director of VRA in November 2019, within two or three months of submitting his Report in this arbitration. At VRA, he had reported to the Deputy Chief Executive, Engineering and Operations, who, in turn, had reported to the Chief Executive, an appointee of the President of Ghana.<sup>534</sup> Three particular points emerged from his short cross-examination. First, although part of his remit had been to comment upon the Guaranteed Capacity and the Availability of the GPGC Equipment, he acknowledged that he had not been provided with a full copy of the EPA. Specifically, he confirmed that he had not seen Annex 1, which contained the equipment specifications at the time that he had produced his Report.<sup>535</sup> Second, Mr Oppong-Mensah confirmed to the Tribunal that he had only become aware of Ms Smith's Second ER of 13 March 2020, in which she had disagreed with the opinions set out in his own Report of 30 August 2019, in the week before the Hearing<sup>536</sup> and to which he had had no opportunity to reply. Third, Mr Oppong-Mensah had stated in his Report that he would require access to the site in order to undertake a thorough technical

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<sup>534</sup> Transcript, Day 5, p. 80.

<sup>535</sup> Transcript, Day 4, pp. 85 & 86.

<sup>536</sup> *Ibidem*, p. 80.

audit to assess and verify the costs claimed by GPGC.<sup>537</sup> He confirmed that he had asked GoG and its counsel to request site access of GPGC.<sup>538</sup> It was suggested to him that no such request had been made of GPGC, but while he was unsure whether or not a request had been made, Mr Oppong-Mensah stated that he had gained access to the site in November 2019. When it was made clear to him that GPGC had no knowledge of his visit, he replied:

“I accessed their Site, but they wouldn’t know that I was the expert for ... [GoG]. ... [T]he security gave me access when I told I was the staff of VRA.”<sup>539</sup>

500. But whatever assessment Mr Oppong-Mensah may have carried out, it did not result in any further challenge on his part to GPGC’s costs claim or Ms Smith’s evaluation of it.<sup>540</sup>

501. Mr Baiden is an employee of the Electricity Company of Ghana. Although it was suggested that his evidence would be “*invaluable*” in light of his advisory support to GOG in the course of the negotiations leading to the conclusion of the EPA, Mr Baiden conceded that he had proffered no documentary evidence to support his assertions. More to the point, when his attention was drawn to the fact that he had twice referenced GoG’s estimate of the total cost of its termination of the EPA in the event that the Tribunal were to uphold GPGC’s claim, he confirmed that he was “*speaking for [GoG]*”<sup>541</sup>, rather than proposing an estimate of his own. In short, he was an advocate for GoG and not an expert proffering an independent opinion.

502. So far as his evidence about the Early Termination Payment was concerned, the Tribunal must conclude that it was of little, if any, probative value: first, he maintained that the minimum availability criterion of 92% was the appropriate measure for contracted availability, too, notwithstanding the provision in the EPA of a commercial incentive to achieve maximum availability, which, in the case of the LM6000 gas turbines, was close to 100% at 99.8%. Mr Baiden insisted that in real time working conditions, there was no basis to assume that GPGC would always go for the incentive and experience of the

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<sup>537</sup> Oppong-Mensah Report, para. 18.

<sup>538</sup> Transcript, Day 4, p. 81.

<sup>539</sup> *Ibidem*, p. 83.

<sup>540</sup> Transcript, Day 5, p. 32.

<sup>541</sup> Transcript, Day 4, p. 20.

operation of other GE turbines in Ghana suggested that none had achieved a performance substantially above the 92% threshold.<sup>542</sup>

503. Second, he sought to suggest that the terms “*guaranteed capacity*” and “*guaranteed availability*” were interchangeable – not a point he had taken in his written evidence and which flew in the face of GoG’s pleaded case that the terms could not be swapped and that GoG had not used them interchangeably.<sup>543</sup>

504. Third, he acknowledged that:

- a. the EPA made no provision for a discount factor in the context of the early termination fee;
- b. Mr Oppong-Mensah had not proposed the application of a discount;
- c. GoG had not applied a discount rate to its own calculation of the early termination fee; and
- d. he had provided neither an explanation of the calculation of any such discount, nor adduced any documentary evidence to support it.<sup>544</sup>

505. Fourth, whilst in his written evidence, he had maintained, as had GoG, that the issue over GPGC’s claim for Demobilization Costs turned on quantum (US\$ 6.46 million as claimed by GPGC against US\$ 3.6 million as asserted by GoG) rather than upon any entitlement to claim such costs,<sup>545</sup> in the course of his cross-examination he suggested that he disputed GPGC’s entitlement to such costs, too, because the plant had not been constructed in Ghana.<sup>546</sup> To the extent that Mr Baiden did consider the quantum of the claim, he maintained that the assessment of US\$ 3.6 million “...*came from records provided by [GPGC] to [GoG] during the negotiations for the EPA on the cost to be incurred when the power plant [was] disassembled in Italy and brought to Ghana.*” Mr Baiden accepted that none of that documentation had been produced to enable the

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<sup>542</sup> Transcript, Day 4, pp. 9-12.

<sup>543</sup> *Ibidem*, pp.14-16 and GoG Rejoinder para. 194.

<sup>544</sup> *Ibidem*, pp. 17-19.

<sup>545</sup> Baiden WS, para. 16.

<sup>546</sup> Transcript, Day 4, pp. 23 & 24.

figures to be verified and, in any event, when it was put to him that the costs of demobilisation in Italy in 2015 would not be the same as the costs of demobilisation in Ghana in 2020, he suggested that the latter costs would be less, but he adduced no materials upon the basis of which that proposition could be tested.<sup>547</sup>

506. In light of the above, the Tribunal concludes that the evidence of Ms Smith is to be preferred to that of Mr Opong-Mensah and Mr Baiden.

507. The Early Termination Payment comprises four elements: the Early Termination Fee more precisely defined in Clause 25(b)(i) of the EPA, together with “*mobilization, and/or demobilization costs (as applicable) and any other costs reasonably incurred by GPGC as a result of an Early Termination.*”<sup>548</sup>

#### **EARLY TERMINATION FEE (CLAUSE 25(B)(I))**

508. Article 25(b)(i) provides, in relevant part:

“If this Agreement is terminated by GPGC due to GoG’s breach of its obligations under the Agreement or GoG’s Default, or GoG terminates the Agreement contrary to the provisions of the Agreement GoG shall pay an early termination fee of an amount equal to Capital Recovery Charge<sup>549</sup> multiplied with the amount of energy the GPGC Equipment would have produced, if the GPGC Equipment continued to operate, at the Guaranteed Capacity, for the remaining Term (“the Early Termination Payment”) up to a maximum of twenty-four ... months within ninety ... days after issuing of the termination notice by GPGC. ...”

509. GPGC’s assessment of the Early Termination Fee is US\$ 69,361,680.<sup>550</sup>

510. So far as the first input, the Capital Recovery Charge, is concerned, it is common ground between the Parties that it is fixed at 3.7 US Cents/kWh (US\$ 37 per megawatt hour) pursuant to Annex 3 of the EPA. More contentious is the second element, the question of the amount of power the GPGC power plants would have produced, had they continued to operate at the Guaranteed Capacity over 24 months.

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<sup>547</sup> *Ibidem*, pp. 25 & 26.

<sup>548</sup> Exhibit C-1 “DEFINITIONS”.

<sup>549</sup> Annex 3 of the EPA.

<sup>550</sup> Cl. SoC, paras. 141-145.



## GUARANTEED CAPACITY OF THE GPGC PLANTS

511. “*Guaranteed Capacity*” is not a defined term in the EPA. GPGC says that it should be interpreted by reference to Recital G of the EPA:

“The Parties wish to enter into this EPA to govern the relationship for the supply of up to 107 MW (ISO installed capacity) power from the two combined cycle power plants...”

and to the Operating Specifications in Annex 2 of the EPA:

““Contracted Capacity” shall mean 80MW in Simple Cycle mode and 107MW in Combined Cycle mode.”

512. GPGC maintains that “*Guaranteed Capacity*” should be construed by references to the installed capacity of 107 megawatts in ISO conditions. The EPA refers to no other capacity in combined cycle mode and the Guarantee Conditions prescribed in Annex 2 of the EPA replicated the ISO conditions precisely.<sup>551</sup>

513. GoG says that the Guaranteed Capacity should not be benchmarked by the ISO capacity specified in the EPA, but rather, it should be “*based on actual site operating ambient conditions, i.e. operating temperatures of 29 to 35 degrees C*”<sup>552</sup> (an operating range to which the EPA makes no reference and, in any event, GoG has not identified what that capacity should be). In fact, GoG itself and its witness, Mr Baiden, both adopt 107MW, the ISO installed capacity, as the Guaranteed Capacity<sup>553</sup> and so, at the end of the day, there is nothing between the Parties as to Guaranteed Capacity.

514. GPGC submits that to the extent there is a difference, it is academic and it should be ignored. As Ms Smith observed, there are good reasons to construe Guaranteed Capacity as a reference to the 107-megawatt ISO installed capacity which is the only capacity specified in the contract as a contracted capacity.<sup>554</sup>

### **a. Assumed period of Continuous Operation**

515. So far as the assumed period of operation is concerned, GPGC says it should be 24 months (some 17,520 hours) as contemplated in Clause 25(b)(i). For its part, GOG says

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<sup>551</sup> Exhibit C-1, Annex 2, p. 65 and see also Exhibit ES-21, Section 3.1.

<sup>552</sup> Oppong-Mensah ER, para. 7.

<sup>553</sup> Resp. SoD, para. 129 and Baiden WS para. 14.

<sup>554</sup> See GPGC’s Closing Presentation Slide 68 and Transcript, Day 4, pp. 54 & 55.

that allowance must be made for shut-downs for preventative maintenance. It assesses that down time at 8% of those total hours (nearly two months) over the 24 month period.

516. That proposition is challenged by GPGC on the basis that:

- a. Clause 25(b)(i) makes no provision to factor in downtime in calculating the Early Termination Fee. Rather it contemplates continuous operation for two years; and
- b. Guaranteed Capacity is not the same as “*guaranteed availability*” – the 92% guaranteed availability is the warranted minimum availability attributable to the plants as Mr Baiden accepted in cross-examination. GPGC points out that the EPA was structured, such that if the annual Availability in an Operational Year exceeded the Guaranteed Availability, GPGC was entitled to an incentive payment of an additional capacity charge for the excess.<sup>555</sup>

517. In fact, the operational data published by the manufacturer, GE, for the LM6000 turbines, which comprised the GPGC Equipment, demonstrate that they enjoy a worldwide fleet reliability of 99.8% and an availability rating of 98.7%.<sup>556</sup> That being the case, GPGC submits that there is no reason to read into the language of Clause 25(b)(i) any constraint on plant availability which the Parties had not specified and which would be inconsistent with the actual reliability and availability of the turbines borne out by the manufacturers’ published data. Ms Smith pointed out in the course of her cross-examination that she would be confident, based on her own experience of the operation of these turbines, that 100% availability for continuous operation over a two-year period was certainly achievable. No downtime for major overhaul was contemplated in that period and, in fact, the GPGC Equipment had been delivered to Ghana in as close to new and clean condition as possible.<sup>557</sup> The Tribunal accepts Ms Smith’s opinion that it is reasonable that the Parties would have applied the maximum availability of 100% in the context of the Early Termination Fee calculation.<sup>558</sup>

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<sup>555</sup> EPA Clause 11 (g)(vi) & (vii).

<sup>556</sup> Exhibit ES-015, p. 1.

<sup>557</sup> Transcript, Day 4, pp. 58 & 59.

<sup>558</sup> Smith Second WS, para. 74(b).

**b. 12% Discount**

518. One further point of difference between the Parties is the suggestion by Mr Baiden for GoG that a 12% discount should be applied to any early termination fee paid to GPGC, because, it was suggested, GPGC would be receiving two years of capital recovery charge as an upfront payment.<sup>559</sup> GPGC says that that proposition fails, first, because there is nothing in the EPA to suggest that the Parties intended to apply a discount rate to the early termination payment, which is in the nature of a liquidated sum. Second, the 12% number is an arbitrary figure effectively plucked out of the air for which no breakdown or evidence is proffered. Third, in its own calculations of the early termination fee, GoG applied no discount,<sup>560</sup> nor is there any suggestion on the part of Mr Oppong-Mensah that any discount should be applied.
519. The Tribunal considers that no compelling case has been made for the imposition of a discount of 12% (or any discount). It concludes that GPGC is entitled to the recovery of the full Early Termination Fee of US\$ 69,361,680.

**MOBILIZATION COSTS**

520. GPGC urges on the Tribunal the point that since the EPA is a tolling or throughput contract, GPGC would not begin to earn the contractual tariff (and thereby to recoup its substantial incurred project costs and to generate a return) until the GPGC Equipment achieved commercial operation. That tariff was pre-determined. It was not based on costs actually incurred. Hence GPGC says that it had no incentive to spend anything more than was necessary to achieve commercial operation. GPGC suggests that that of itself should provide some reassurance that it would not have incurred costs unreasonably – and such costs as it did incur are supported by a substantial documentary record, including materials audited by KPMG. GPGC insists, too, on the point that the purchase cost of the GPGC Equipment, some US\$ 40 million, including the power plants turbines themselves, which remain the property of GPGC, is not included in the claimed mobilisation costs.<sup>561</sup>
521. In her first Report, Ms Smith had concluded that GPGC had incurred mobilisation costs of US\$ 40,223,260, excluding debt finance costs. For the purposes of her second Report,

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<sup>559</sup> Baiden WS, para. 14.

<sup>560</sup> Resp. SoD, para. 129 and see Transcript, Day 1, pp. 71 & 72.

<sup>561</sup> Transcript, Day 1, p. 78.

Ms Smith was able to review the independently audited GPGC Financial Statements for 2016-2018 and to confirm that, as of 30 September 2018, GPGC had incurred US\$ 18,268,745 of debt financing costs on amounts borrowed during the mobilisation of the GPGC Equipment. The incorporation of those debt financing costs into the overall mobilisation costs increases the total to US\$ 58,492,005.<sup>562</sup>

522. Rather than challenge the figures as figures, GoG takes the primary position that the mobilisation costs should not have been incurred at all, and hence they are not recoverable, but that thesis has been rejected by the Tribunal.
523. “*Mobilization Costs*” is not a defined term in the EPA, nor, as Ms Smith explained, is there a standardised industry definition.<sup>563</sup> To the extent that it acknowledged that they are relevant at all, GoG would argue for a narrow interpretation, such that such costs should be limited to costs incurred on activities before any works were undertaken on site, in other words, only transportation and delivery costs. That approach, adopted by Mr Oppong-Mensah, was disputed by Ms Smith. She stated her opinion that first, Mr Oppong-Mensah’s view was inconsistent with industry practice and, second, the meaning of “*mobilisation*” depends on the context of each specific project and the parties’ contractual relationship.<sup>564</sup> The criteria that might apply in the case of the straightforward supply of plant to a power station are inapposite in the case of a full scope tolling agreement, which calls for the supply, installation, commissioning, operation and maintenance of the power plants.
524. GoG also seeks to suggest that a recovery in respect of the discrete mobilisation costs claim would amount to paying GPGC twice. Mr Oppong Mensah’s assumption of double recovery is predicated on the basis that capital expenditure had already been counted in the so-called “*Capital Recovery Charge*” component of the Early Termination Fee. However, that assumption is wrong. Ms Smith points out that while it is true that, in the ordinary performance of the EPA, the Capital Recovery Charge would cover both capital expenditure and profits over the four- year contract term after the Full Commercial Operation Date, the Early Termination Fee calculation halves the operational period considered in the Capital Recovery Charge to just two years (instead of the full four-year

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<sup>562</sup> Smith Second ER, para. 7.

<sup>563</sup> Smith Second ER, para. 35.

<sup>564</sup> *Ibidem*.

contract term). The Capital Recovery Charge as computed in the Early Termination Fee was designed only to cover the forgone profits that GPGC would not receive due to early termination of the EPA, while the separate mobilisation costs component of the ETP was intended to cover capital costs in the event of early termination.<sup>565</sup>

525. GPGC says that there is no overlap; the mobilisation costs component of the early termination payment reflected costs reasonably incurred and for which GPGC was already out of pocket, whereas the Early Termination Fee related to profits that GPGC had foregone by reason of the early termination of the EPA.

526. The Tribunal concludes that GPGC has made good its entitlement to Mobilization Costs as determined by Ms Smith and it awards GPGC the claimed sum of US\$ 58,492,005.

#### **DEMOBILIZATION COSTS**

527. GoG accepts that if it is found liable for wrongful termination of the EPA, then GPGC is entitled to recovery in respect of its eventual Demobilization Costs.<sup>566</sup> The issue between the Parties is the likely quantum of those costs. Ms Smith estimates them at US\$ 6,462,528 (including a 15% contingency). Mr Baiden suggests a figure of US\$ 3,600,000.

528. Mr Baiden's challenge to quantum is unsustainable; as the Tribunal has noted at paragraph 505 above, he acknowledged that his opinion was based on supposed records of the costs of dismantling the GPGC Equipment in Italy and transporting it to Ghana, considered between the Parties during the negotiation of the EPA in 2015. None of these records was before the Tribunal and it is difficult to see what relevance they might have to the likely costs of demobilisation of the GPGC Equipment in Ghana in late 2020/early 2021.

529. What is before the Tribunal is Ms Smith's analysis, which, as at the date of her Second Report (13 March 2020) was based on quotations received by GPGC from different contractors by reference to the actual anticipated scope of work and costs to be incurred. Whether or not Mr Oppong-Mensah's clandestine site visit in November 2019 allowed

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<sup>565</sup> Smith Second ER, para. 8(b).

<sup>566</sup> Transcript, Day 5, p. 33.

him to undertake a “*thorough technical audit*”<sup>567</sup> is not clear, but he has not presented any figures to contradict those put forward by Ms Smith on the basis of quotations and work estimates from independent suppliers.<sup>568</sup>

530. GPGC’s entitlement to Demobilization Costs is not in issue and on the basis of the evidence before it, the Tribunal adopts the quantum assessment of Ms Smith and awards GPGC US\$ 6,462,528.

#### **OTHER COSTS REASONABLY INCURRED: PRESERVATION AND MAINTENANCE COSTS**

531. These costs are the preservation and maintenance costs incurred by GPGC pending demobilisation and which were assessed at US\$ 32,448 in Ms Smith’s First Report.<sup>569</sup> In her Second Report, Ms Smith notes that GPGC has incurred additional preservation and maintenance costs amounting to US\$ 847,156. GPGC does not seek to recover these additional sums from GoG as they acknowledge that the costs were incurred on the basis of a business decision to keep the GPGC Equipment *in situ* whilst the Parties attempted to find an amicable conclusion to the dispute.<sup>570</sup> GPGC does maintain its original claim for US\$ 32,448. Mr Oppong-Mensah had sought to argue that an element of these costs related to land lease costs which had already been factored into the build-up of mobilisation costs and so the costs had been double-counted. For the reasons that Ms Smith sets out in paragraphs 55 & 56 of her Second Report that criticism is misconceived. Accordingly, the Tribunal awards GPGC the claimed preservation and maintenance costs in the sum of US\$ 32,448.

#### **CONCLUSION**

532. On the basis of the findings and reasoning set out above, the Tribunal awards GPGC a total of US\$ 134,348,661 in respect of its Early Termination Payment claim.

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<sup>567</sup> Oppong-Mensah ER, para. 13.

<sup>568</sup> See Smith First ER, Appendices C & D and Exhibits ES-005 & ES-008.

<sup>569</sup> Smith First ER, paras. 20(a), 44-45 and Appendix D.

<sup>570</sup> Smith Second ER, para. 52.

## XI. INTEREST

533. GPGC maintains that it is entitled to pre- and post-award interest. It submits that the Tribunal may award both pre-award and post-award interest under the English Arbitration Act 1996.<sup>571</sup>
534. With reference to the rate of interest to accrue on any amounts owing under the EPA, such as the Early Termination Payment, that are not paid in a timely manner, GPGC states that the relevant provisions of the EPA are the definition of “*Applicable Rate*” and Clause 11(o) of the EPA.
535. In light of these provisions, GPGC says that it is entitled to pre-award interest on the full value of the Early Termination Payment, accruing daily and compounded monthly, at the rate of LIBOR for six-month US dollar deposits plus six per cent (6%).<sup>572</sup>
536. As to the date due for payment – on the basis of the fact that: (i) Clause 25(b)(i) of the EPA provides that the Early Termination Payment claimed by GPGC was due “*within ninety (90) days after issuing of the termination notice by GPGC*”;<sup>573</sup> and (ii) the Cl. Termination Notice is dated 13 August 2018, the Early Termination Payment was due by 11 November 2018 and interest started to accrue from 12 November 2018.<sup>574</sup> GPGC maintains that the pre-award interest on the full value of the Early Termination Payment that it claims through to the date of the Cl. Reply (i.e., 13 March 2020) stands at US\$ 17,074,403.<sup>575</sup>
537. GPGC states that, to the extent that GoG does not immediately satisfy the sum(s) payable under any Award eventually issued by this Tribunal, GPGC is also entitled to post-award interest accruing from the date of the Tribunal’s Award until payment is made in full under Article 49(4) of the English Arbitration Act 1996. GPGC seeks post-award interest on all amounts (including pre-award interest and costs) awarded to GPGC, accruing daily

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<sup>571</sup> Cl. SoC, paras. 156 and 157. See Cl. Reply, para. 150.

<sup>572</sup> Cl. SoC, para. 160. In para. 161, the Claimant states the following: “*GPGC’s claim for pre-award interest will increase for so long as the GoG fails to pay the sum which it owes*”. Cl. Reply, para. 156: “*To the extent that the Early Termination Payment remains unpaid, GPGC reserves the right to present an updated calculation of pre-award interest at a later stage of these proceedings.*”

<sup>573</sup> Exhibit C-1, Clause 25(b)(i).

<sup>574</sup> Cl. Reply, para. 152.

<sup>575</sup> Cl. Reply, para. 155.

and compounded monthly, at the rate of LIBOR for six-month US dollar deposits plus six per cent (6%) from the date of the award until payment.<sup>576</sup>

538. With specific reference to the costs incurred by GPGC in the arbitration, GPGC considers that these costs constitute an amount “*due from GoG to GPGC under this Agreement*” – specifically, under Clause 28 of the EPA. Therefore, GPGC claims post-award interest on any costs awarded by the Tribunal until full payment thereof, at the same rate as that which is to be applied to the other components of the compensation which they claim.<sup>577</sup>

539. For its part, GoG states that:

“It is inconceivable for the Claimant to claim interest from the Respondent for its breaches which resulted in the termination of the EPA by the Respondent. Clause 11(o) of the EPA does not enure in favour of the Claimant.”<sup>578</sup>

540. GoG maintains that, prior to the Cl. Termination Notice, it had already exercised its right under Clause 25(b)(iii) of the EPA and terminated the EPA, thereby rendering the Cl. Termination Notice “*redundant and moot*”.<sup>579</sup>

541. GoG further says that, in the unlikely event that the Tribunal were to find that the Cl. Termination Notice terminated the EPA, it would contend that upon careful evaluation, clause 11(o) of the EPA is not applicable to the calculation of interest upon the Early Termination Payment under Clause 25(b)(i) of the EPA.<sup>580</sup> In particular, GoG observes that under Clause 11 of the EPA, which deals specifically with “*Required Payments*” (as defined in the EPA), any Required Payment shall be made within sixty (60) days, after which interest will accrue under Clause 11(o) of the EPA. Furthermore, GoG maintains

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<sup>576</sup> Cl. SoC, para. 162.

<sup>577</sup> Cl. Statement of Costs, paras. 16-18.

<sup>578</sup> Resp. SoD, para. 137.

<sup>579</sup> Resp. Rejoinder, para. 237: “*The EPA does not allow for the co-existence of letters of termination. Certainly, the Claimant’s letter of termination should be disregarded.*”

<sup>580</sup> *Ibidem*, para. 238: “*The effect of termination by the Claimant under the EPA does not include interest and the attempt to link Clause 25(b)(i) to Clause 11(o) is contractually wrongful. ... The Early Termination Payment reproduced above does not include payment of interest as envisaged under Clause 11(o) of the EPA. Clause 11(o) of the EPA is referable to outstanding amount under Required Payment which is calculated in accordance with Annex 3 of the EPA.*”



that only once it had failed to honour the Required Payment would it be saddled with the interest rate prescribed by Clause 11(o) of the EPA.<sup>581</sup>

542. GoG considers that its position is reinforced by Clause 22(a) of the EPA, which specifically identifies the Required Payment and the Early Termination Payment as separate payment obligations to which the limitations of liability otherwise prescribed by Clause 22 of the EPA are not applicable.
543. The first limb of GoG's objection to GPGC's interest claim is moot, because the Tribunal has concluded that GoG's purported termination of the EPA amounted to a repudiation of the contract that GPGC was entitled to, and did, accept, such that it is entitled to payment of the Early Termination Payment pursuant to Clause 22(b)(i) of the EPA and which the Tribunal has assessed at US\$ 134,348,661. It is true that although Clause 22(b)(i) sets a 90-day deadline for payment of the Early Termination Payment, no provision is made for the payment of interest or for the rate, or rates, at which any such interest should be paid.
544. There is no limitation in the language of the definition of "*Applicable Rate*". It relates not only to the "*Required Payments*" (as defined) to be paid to GPGC in consideration of the mobilisation, installation, operation and maintenance of the GPGC Equipment as well as the provision of the GPGC services (Clause 11(a)), but, pursuant to Clause 11(o), interest at the Applicable Rate is payable in respect of "[a]ny amount due from GoG to GPGC under this Agreement and remaining unpaid after due date for payment of the same." (Emphasis added).
545. Whilst it is true that this sub-clause is embedded within the provision devoted primarily to the Required Payments, there is no limitation upon the ambit of "*any amount due from GoG to GPGC under this Agreement*" and the Early Termination Payment is such an amount. The Tribunal notes the absence of an express provision, which either precludes the payment of interest at the Applicable Rate upon the Early Termination Payment or stipulates a specific alternative rate of interest to be paid in that event. The Tribunal considers that the Applicable Rate should be applied in respect of the outstanding Early Termination Payment from the due date for payment pursuant to the Cl. Termination

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<sup>581</sup> *Ibidem*, para. 239: "It will be absurd and incongruous to read Clause 11(o) together with Clause 25(b)(i) since they deal with separate and independent matters - Required Payment and Early Termination Payment."

Notice of 13 August 2018 (11 November 2018), with interest accruing at the Applicable Rate from 12 November 2018 until the date payment is received by GPGC, consistent with Clause 11(o) of the EPA.

546. In view of that finding by the Tribunal, there is no need to make any further Order for post-Award interest, so far as the Early Termination Payment is concerned. The Tribunal hesitates to apply so generous a rate as the Applicable Rate to any award of legal costs that it might make. Instead, it will apply the current 3-Month US\$ LIBOR rate, compounded quarterly.

## **XII. COSTS**

547. GPGC says that, as at the date of the Cl. Statement of Costs, it had reasonably incurred the following categories of costs: (i) GPGC’s share of the fees and expenses of the Tribunal, the PCA and the Assistant to the Tribunal (the “**Costs of the Arbitration**”); (ii) reasonable costs for legal representation and assistance; and (iii) reasonable costs of an independent expert. In addition, GPGC will continue to incur costs in connection with maintaining the Opus2 platform, until the Tribunal directs otherwise.<sup>582</sup> GPGC claims costs as follows:<sup>583</sup>

### **ADVANCE DEPOSITS PAID BY CLAIMANT TO THE PCA (SECTION I.A)**

| <b>Item</b>  | <b>Amount (in original currency)</b> |
|--|--------------------------------------|
| Initial deposit requested in Terms of Appointment dated 11 June 2019 | USD 100,000.00                       |
| Supplementary deposit requested by PCA letter dated 30 March 2020    | USD 175,000.00                       |
| Supplementary deposit requested by PCA letter dated 13 October 2020  | USD 35,000.00                        |
| <b>TOTAL</b>   | <b>USD 310,000.00</b>                |

<sup>582</sup> Cl. Statement of Costs, para. 3.

<sup>583</sup> Ibidem, para. 11: “... between the last invoice issued by Three Crowns on 27 October 2020 and the date of submission of this Statement of Costs, Claimant has incurred the following amounts in connection with this arbitration, which costs Three Crowns will invoice to Claimant after the submission of this Statement: a GBP 13,388.00 on account of legal fees of Three Crowns; and b GBP 18,347.50 on account of disbursements towards Claimant’s share of the costs of the Opus2 platform during the month of October 2020.”

**LEGAL FEES AND EXPENSES INVOICED BY THREE CROWNS (SECTIONS I.B.1 AND I.D)**

| Item                 | Date                  | Amount (in original currency) |                      |                         |
|----------------------|-----------------------|-------------------------------|----------------------|-------------------------|
|                      |                       | Fees<br>(a)                   | Expenses<br>(b)      | Invoice total<br>(a+b)  |
| Invoice 10003594     | 30 May 2019           | GBP 112,867.00                | GBP 7,469.94         | GBP 120,336.94          |
| Invoice 10003595     | 30 May 2019           | GBP 232,301.50                | GBP 3,305.87         | GBP 235,607.37          |
| Invoice 10003807     | 31 August 2019        | GBP 338,011.50                | GBP 3,402.87         | GBP 341,414.37          |
| Invoice 10004023     | 30 November 2019      | GBP 66,772.00                 | GBP 25.96            | GBP 66,797.96           |
| Invoice 10004320     | 9 April 2020          | GBP 587,077.61                | GBP 12,707.97        | GBP 599,785.58          |
| Invoice 10004415     | 13 May 2020           | GBP 0.00                      | GBP 3,890.00         | GBP 3,890.00            |
| Invoice 10004717     | 29 September 2020     | GBP 150,000.00                | GBP 6,269.59         | GBP 156,269.59          |
| Invoice 10004771     | 27 October 2020       | GBP 551,563.35                | GBP 15,175.49        | GBP 566,738.84          |
| Invoice to be issued | After 4 November 2020 | GBP 13,388.00                 | GBP 18,347.50        | GBP 31,735.50           |
| <b>TOTAL</b>         |                       | <b>GBP 2,051,980.96</b>       | <b>GBP 70,595.19</b> | <b>GBP 2,122,576.15</b> |

**LEGAL FEES AND EXPENSES INVOICED BY KIMATHI & PARTNERS (SECTION I.B.2)**

| Item   | Amount (in original currency) |
|--|-------------------------------|
| Invoice No. INV/GPG20/1 dated 11 October 2019      | GHS 25,467.75                 |
| Invoice No. INV/GPG20/1/2/3B dated 22 October 2020 | GHS 217,203.89                |
| <b>TOTAL</b>                                       | <b>GHS 242,671.64</b>         |

**FEES AND EXPENSES INVOICED BY FTI (SECTION I.C)**

| Item   | Amount (in original currency) |
|--|-------------------------------|
| Invoice No. 10030534 dated 25 September 2019 | USD 100,000.00                |
| Invoice No. 10032925 dated 31 March 2020     | USD 101,053.57                |
| Invoice No. 10035388 dated 10 September 2020 | USD 43,876.25                 |
| Invoice No. 10036043 dated 23 October 2020   | USD 107,123.75                |
| <b>TOTAL</b>                                 | <b>USD 356,053.57</b>         |

548. The Respondent claims costs as follows:<sup>584</sup>

| 1. Costs incurred by Ministry of Energy           |                |                                      |  |
|---|----------------|--------------------------------------|--|
|   | Amount         | Equivalent in<br>Ghana Cedi<br>(GH¢) | Remarks  |
| Tribunal's Fees and Expenses and PCA's charges    | US\$310,000.00 | GH¢1,770,379.00                      | @ Bank of Ghana Interbank FX Rates 05 November 2020 – 5.7109 |
| Logistics for Hearing Sessions                    | GH¢167,292.50  | GH¢167,292.50                        | –  |
| Production and Courier charges for Hearing Bundle | £2,460.00      | GH¢18,391.94                         | @ Bank of Ghana Interbank FX Rates 05 November 2020 – 7.4764 |
| Hearing Room Services by Opus 2                   | £23,127.50     | GH¢172,910.44                        | @ Bank of Ghana Interbank FX Rates 05 November 2020 – 7.4764 |
| <b>TOTAL</b>                                      |                | <b>GH¢2,128,973.88</b>               |  |

<sup>584</sup> By email dated 25 November 2020, Mr Amofa stated that: “The Respondent can confirm that not all of its costs submitted in its Statement of Costs on 9 November 2020 have been paid. The following expenses which have been incurred are yet to be paid: (a) **US\$35,000.00** of the US\$310,000.00 Tribunal's Fees and Expenses and PCA Charges is yet to be paid. (b) **£2,460.00** being Production and Courier charges for Hearing Bundle is yet to be paid. The Claimant is yet to provide the Respondent with an invoice covering the said charges. The Hearing Costs in respect of Amofa & Partners legal fees are also yet to be paid. Amofa & Partners is yet to issue an invoice in respect of the said hearing costs.”

|  |  |                       |   |
|--|--|-----------------------|---|
|  |  | <b>US\$372,791.31</b> | @ Bank of Ghana<br>Interbank FX Rates 05<br>November 2020 -<br>5.7109 |
|--|--|-----------------------|---|

| <b>2. Amofa &amp; Partners Legal Fees (Pre-Hearing Costs)</b> |                    |                                  |
|---|--------------------|----------------------------------|
| <b>Fee-earner (Grade)</b>                                     | <b>Time (days)</b> | <b>Total Billed (US\$)</b>       |
| Emmanuel Amofa<br>(Partner)                                   | 90                 | 450,000.00                       |
| Afia Korankyewaa<br>Ntim (Associate)                          | 50                 | 125,000.00                       |
| Gloria Osei-Nyame<br>(Associate)                              | 40                 | 100,000.00                       |
| <b>TOTAL</b>  |                    | <b>675,000.00</b>                |
| <b>GRAND TOTAL</b><br>(of Amofa & Partners Legal Fees)        |                    | <b>US\$</b><br><b>712,585.00</b> |

| <b>Amofa &amp; Partners Legal Fees (Hearing Costs)</b> |                     |                            |
|--|---------------------|----------------------------|
| <b>Fee-earner (Grade)</b>                              | <b>Time (hours)</b> | <b>Total Billed (US\$)</b> |
| Emmanuel Amofa<br>(Partner)                            | 32                  | 19,200.00                  |
| Afia Korankyewaa<br>Ntim (Associate)                   | 27                  | 10,135.00                  |
| Gloria Osei-Nyame<br>(Associate)                       | 22                  | 8,250.00                   |
| <b>TOTAL</b>   |                     | <b>37,585.00</b>           |
|  |                     |                            |

549. GPGC has made deposits in respect of the Costs of the Arbitration in the aggregate amount of US\$ 310,000. It has incurred legal fees and expenses of UK£ 2,122,576.15

(US\$ 2,880,335.84 at the prevailing exchange rate of UK£ 1=US\$ 1.357) and GHS 242,671.64 (US\$ 42,492.71 at the prevailing exchange rate of US\$ 1=GHS 5.7109). It has also incurred expert witness fees and expenses of US\$ 356,053.57. The total of those fees and expenses, expressed in US\$ is US\$ 3,278,882.12.

550. On the basis of the findings in this Award, GPGC has prevailed on the merits. The Tribunal is satisfied that it is appropriate in this case to apply the “*costs follow the event*” principle, recalling, too, that the costs of the postponement of the Hearing fall to be borne by GoG in any event.<sup>585</sup>

551. It orders, first, that the Costs of the Arbitration be borne in their entirety by GoG. The Costs of the Arbitration, which total US\$ 614,353.86, are made up as follows;

a. fees and expenses of the Arbitral Tribunal

|                  |                 |
|------------------|-----------------|
| Mr J. W. Rowley: | US\$ 187,508.30 |
|------------------|-----------------|

|                          |                 |
|--------------------------|-----------------|
| Professor Albert Fiadjoe | US\$ 164,153.61 |
|--------------------------|-----------------|

|                     |                 |
|---------------------|-----------------|
| Mr John Beechey CBE | US\$ 209,625.00 |
|---------------------|-----------------|

b. fees and expenses of the Tribunal Secretary

|                  |                |
|------------------|----------------|
| Mr Niccolò Landi | US\$ 28,432.00 |
|------------------|----------------|

c. fees and expenses of the PCA

|  |                |
|--|----------------|
|  | US\$ 24,634.95 |
|--|----------------|

The share of the Costs of the Arbitration paid by GPGC, which shall be borne by GoG, is US\$ 309,877.74.<sup>586</sup>

552. Second, the Tribunal is satisfied that it is appropriate to make a substantial order for the recovery of GPGC’s legal costs and expenses. While it recognises that GPGC chose to retain one of the leading arbitration practices for its representation, the conduct of the proceedings, and notably of the Hearing, was both effective and efficient in its use of resource.

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<sup>585</sup> See paragraph 93 *supra* and PO2.

<sup>586</sup> This figure is calculated based on the total deposits paid by GPGC (US\$ 310,000), less the share of the unexpended balance that will be returned to GPGC (US\$ 122.26).

553. Thirdly, the Tribunal is satisfied that the fees and expenses of GPGC's expert, Ms Smith, are both reasonable and recoverable.

554. In all the circumstances, the Tribunal orders GoG to pay US\$ 3,000,000 in respect of GPGC's legal fees and expenses and those of its expert witness.

### **XIII. DISPOSITIF**

555. On the basis of the submissions, facts and matters in the record before it, the Tribunal finds and hereby AWARDS as follows:

1. DECLARES that the EPA has been validly terminated by GPGC on account of GoG's repudiatory conduct;
2. ORDERS GoG to pay to GPGC the full value of the Early Termination Payment, together with Mobilization, Demobilization and preservation and maintenance costs in the amount of US\$ 134,348,661, together also with interest thereon from 12 November 2018 until the date of payment, accruing daily and compounded monthly, at the rate of LIBOR for six-month US dollar deposits plus six per cent (6%).
3. ORDERS GoG to pay US\$ 309,877.74 in respect of the Costs of the Arbitration, together with US\$ 3,000,000 in respect of GPGC's legal representation and the fees and expenses of its expert witness, together with interest on the aggregate amount of US\$ 3,309,877.74 at the rate of LIBOR for three-month US dollar deposits, compounded quarterly.
4. DISMISSES GoG's counterclaim for an Early Termination Payment in its entirety.
5. All and any other claims and counterclaims of whatsoever nature are hereby dismissed.

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Place of Arbitration: London.

26 January 2021



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Mr J. William Rowley QC

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Professor Albert K. Fiadjoe

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Mr John Beechey CBE  
(Presiding Arbitrator)



Place of Arbitration: London.

26 January 2021

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Mr J. William Rowley QC



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Professor Albert K. Fiadjoe

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Mr John Beechey CBE  
(Presiding Arbitrator)

Place of Arbitration: London.

26 January 2021

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Mr J. William Rowley QC

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Professor Albert K. Fiadjoe



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Mr John Beechey CBE  
(Presiding Arbitrator)