

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**GRENADA PRIVATE POWER LIMITED AND WRB ENTERPRISES, INC.**

Claimants

and

**GRENADA**

Respondent

**ICSID Case No. ARB/17/13**

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**AWARD**

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***Members of the Tribunal***

Hon. Ian Binnie, C.C., Q.C., President of the Tribunal  
Ms. Olufunke Adekoya SAN, Arbitrator  
Mr. Richard Boulton, Q.C., Arbitrator

***Secretary of the Tribunal***

Ms. Jara Mínguez Almeida

*Date of dispatch to the Parties: 19 March 2020*

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**REPRESENTATION OF THE PARTIES**

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Dr. The Hon. Sir Lawrence Joseph  
Lucas Street, St. George's  
Grenada W.I.

and

Ms. Leslie-Ann Seon  
Ms. Linda Dolland  
Seon & Associates  
Lucas Street, St. George's  
Grenada W.I.

## ABBREVIATIONS

<b>Abbreviation</b>	<b>Meaning</b>
1960 ESO	<i>Electricity Supply Ordinance of 1960</i>
1994 ESA	<i>1994 Electricity Supply Act</i>
1997 RFA	Request for Arbitration filed by WRB Enterprises Limited, 17 July 1997
2016 Acts	<i>Electricity Supply Act 2016, Act No. 19 of 2016, and Public Utilities Regulatory Commission Act 2016, Act No. 20 of 2016</i>
CDC	Initially, Colonial Development Corporation; now, Commonwealth Development Corporation
CESI	Caribbean Energy Security Initiative
DCF	Discounted Cash Flow
Domlec	Dominica Electricity Services
ECERA	Eastern Caribbean Energy Regulatory Authority
ECH	Eastern Caribbean Holdings Limited
EU	European Union
GRENLEC	Grenada Electricity Services Company Limited
GPP	Grenada Private Power Limited
GOG	Government of Grenada
Government	Government of Grenada
IDB	Inter-American Development Bank
IRENA	International Renewable Energy Agency
Local Directors	Rupert Agostini, Nelson Louison, Chester Palmer, and Lawrence Samuel
MOU	Memorandum of Understanding
NDC	National Democratic Congress
NIS	National Insurance Scheme
NNP	New National Party
OAS	Organization of American States
OECS	Organisation of Eastern Caribbean States
PURC	Public Utilities Regulatory Commission
PV	Photovoltaic
RET	Renewable Energy Technology

<b>Abbreviation</b>	<b>Meaning</b>
RFP	Request for Proposals
RMI	Rocky Mountain Institute
SPA	Share Purchase Agreement between the Government of Grenada and Grenada Private Power Limited and WRB Enterprises, Inc. Relating to Shares of Grenada Electricity Services Limited, dated 14 September 1994
TCU	Turks and Caicos Utility Company
WRB	WRB Enterprises Limited
USAID	U.S. Agency for International Development

## **I. OVERVIEW**

1. Grenada Electricity Services Company Limited (“**GRENLEC**” or the “**Company**”) is the sole electric utility in Grenada, a country comprised of the main island of Grenada and the adjacent islands of Carriacou and Petite Martinique, in the Eastern Caribbean.
2. Grenada achieved independence from Britain in 1979. Over the next 15 years, GRENLEC, then publicly owned, was chronically underfunded and its service characterized by electricity shortages. In 1992, the Government of Grenada (“**GOG**”, the “**Government**” or the “**Respondent**”) was advised by the World Bank and others to privatize the utility. The then party in power, the National Democratic Congress (“**NDC**”) embraced the recommendation. The main party then in opposition, the New National Party (“**NNP**”) opposed it. This political rivalry played out over the next 20 years and provides essential background to many of the events that led to the current dispute.
3. Eventually, in 1994, the NDC government sold a controlling interest in GRENLEC to Grenada Private Power Ltd. (“**GPP**”), a Grenadian company in which WRB Enterprises Inc. (“**WRB**”), a closely held private company based in Tampa, Florida, United States of America, indirectly holds 75% of the shares (GPP and WRB, jointly, the “**Claimants**”). The privatization package included a Share Purchase Agreement (“**SPA**”) dated 14 September 1994, signed between the Respondent and the Claimants, that was made conditional upon the GOG enacting a favourable regulatory structure in the 1994 *Energy Supply Act* (“**1994 ESA**”) and the 1994 *Public Utilities Commission Act* (“**PUCA**”). The SPA specifically provided that upon the happening of any one of the “Repurchase Events”, the Claimants would have the right to “put” their shares to the GOG, and the GOG would be obliged to repurchase them at a price calculated in accordance with the Second Schedule of the 1994 *ESA* (“**Second Schedule**”).
4. Twenty-two years later, the incoming NNP Government decided to restructure the electricity sector through sweeping changes to its regulation, production and distribution. The result, the Claimants say, was to trigger an obligation on the part of GOG to repurchase the Claimants’ shares in GRENLEC.



5. On 22 March 2017, the Claimants “put” their GRENLEC shares to the GOG for repurchase, claiming compensation of EC \$182,100,000 or EC \$19 per share, pursuant to the statutory valuation formula in the Second Schedule. Following unsuccessful attempts to negotiate a solution, the GOG declared its rejection of any obligation to repurchase the shares and refused to pay the claim. Hence this arbitration.
6. The principal issues are as follows:
  - (a) the Respondent says that its repurchase obligation is “void and unenforceable” under Grenadian law. The Claimants counter that the SPA is governed by international law and, by its own terms, expressly excludes rules of Grenadian law inconsistent with the repurchase obligation. Moreover, the GOG is estopped by its words and conduct over the years from challenging the validity of the repurchase provisions;
  - (b) the Respondent argues that the SPA repurchase obligation constitutes a penalty under Grenadian law, which renders it unenforceable, and in any event, the repurchase provisions are void as unconstitutional because their effect (and perhaps intent) is to fetter the authority of the GOG to regulate the electricity sector in the public interest. The Claimants respond that the repurchase obligation is neither a penalty nor unconstitutional
  - (c) the Claimants argue that in 1994, the GOG was expertly advised by Price Waterhouse (“PwC” for both Price Waterhouse and PricewaterhouseCoopers) whose consultants analysed the bidding process, the evolution of the bids and the statutory formula and declared the transaction to be appropriate and fair. The Respondent disputes the degree of PwC participation and states that the Government representatives, including Ministers, lacked relevant experience, and did not adequately protect Grenada’s interest;
  - (d) the Respondent says that the Claimants committed “wilful malfeasance” in their management of GRENLEC which (under the express terms of the SPA) disentitles the Claimants from insisting on the GOG repurchase of the Claimants’ shares. The

Claimants dispute the “baseless” allegations of “wilful malfeasance” and state that, in any event, the GOG cannot rely on that defence because the SPA explicitly requires an ICSID declaratory order to that effect be obtained *prior* to the GOG taking an action that would otherwise trigger the repurchase demand;

- (e) the Respondent says that the repurchase price payable under the SPA should be limited to fair market value determined by Discounted Cash Flow (“DCF”) methodology rather than pursuant to the formula in the Second Schedule of the 1994 *ESA*, which is a bizarre formula inherited from the colonial past. Its application would produce compensation “extravagantly disproportionate” to the actual fair market value of the shares. The Claimants say that while the Second Schedule was rooted in a pre-independence Ordinance of 1960, it was given fresh life by the Government itself and inserted at the GOG’s insistence into the 1994 privatization. The Claimants say they are entitled to the specific performance of the agreed bargain;
  - (f) the Respondent says that any award to the Claimants must be offset by the amount of its counterclaim. The Claimants respond that the counterclaim is “fabricated” for strategic reasons and is so frivolous that the Respondent has never even bothered to quantify it.
7. Fundamentally, the Parties clash over the proper characterization of the GRENLEC investment. The Claimants consider it a straight forward commercial investment whose terms were fairly negotiated and which the Claimants are entitled to enforce. If the Claimants are now entitled to compensation in excess of fair market value (which overpayment is denied), so be it. A deal is a deal. The Claimants say their stewardship of GRENLEC has benefited Grenada and they are entitled to their entitlements. The Respondent NNP Government, on the other hand, considers the Claimants to have been poor corporate citizens. The Claimants sought at all times to maximize their return on investment with little regard for meeting GRENLEC’s capital investment needs or the well-being of the island economy (including, in particular, the Claimants’ persistent failure to develop Grenada’s ample renewable energy resources).

8. In the Tribunal's view, it has no authority to judge whether or not in the period 1994 to 2016, the Claimants caused GRENLEC to behave as a good "corporate citizen" of Grenada. The task of the Tribunal is to determine whether the complex contractual arrangements between the Parties have been complied with and, if not, what remedy should be awarded.
9. The Tribunal has concluded that neither the SPA (nor the Supplementary SPA) unconstitutionally fettered Government action. When the NNP party returned to Government in 2014, it was clearly not deterred in any way from enacting the 2016 restructuring legislation.
10. The primary relief sought by the Claimants is, in effect, for specific performance of a "put" contract to repurchase the GRENLEC shares. In the Claimants' prayer for relief, the Claimants distinguished between compensation claimed by way of specific performance **EC \$182,150,000** or damages in an equivalent amount plus costs.
11. The main difficulty confronting the Respondent was not so much that the Government lacked legal arguments (on which point the Respondent was very creative) as it was the lack of factual evidence necessary to sustain the legal arguments that were put forward with considerable gusto.
12. In the Tribunal's view, for the reasons which follow, the Claimants are entitled to succeed albeit with somewhat less compensation than they are demanding. The SPA is valid. There is no penalty. The terms are not contrary to the Constitution of Grenada. The Respondent has not established either the procedural condition precedent or the substantive factual prerequisites to deny the Claimants compensation on the basis of "wilful malfeasance". The Claimants have established a "repurchase" event which requires the Respondent to pay compensation at the level agreed to in the Second Schedule. Accordingly, the Tribunal awards the Claimants Second Schedule compensation but calculated in a way that pays due regard to the differences of opinion among the quantum experts. The Claimants are also entitled to pre and post-Award interest and costs.

## II. PROCEDURAL HISTORY

13. On 5 May 2017, ICSID received a request for arbitration from Grenada Private Power Limited and WRB Enterprises, Inc. against Grenada (the “**Request**”).
14. On 15 May 2017, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
15. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, the presiding arbitrator, to be appointed by agreement of the Parties.
16. The Tribunal is composed of Hon. Ian Binnie, C.C., Q.C., a national of Canada, President, appointed by agreement of the Parties; Mr. Richard Boulton, Q.C., a national of the United Kingdom, appointed by the Claimants; and Ms. Olufunke Adekoya SAN, a national of the United Kingdom and the Federal Republic of Nigeria, appointed by the Respondent.
17. On 9 November 2017, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Jara Mínguez Almeida, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
18. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session with the Parties on 5 January 2018 by teleconference.
19. Following the first session, on 24 January 2018, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of

proceedings would be St. George's, Grenada. Procedural Order No. 1 also sets out a schedule for the merits phase of the proceedings.

20. In accordance with Procedural Order No. 1, the Claimants filed a Memorial on the Merits dated 1 March 2018, including:
- Witness Statement of Mr. G. Robert Blanchard, Jr., dated 1 March 2018;
  - Expert Report by Mr. John MH Ellison and Mr. Thomas Popovic, dated 1 March 2018, with Appendices 1 through 13, and Exhibits JETP-01 through JETP-49;
  - Exhibits CE-0001 through CE-0055; and
  - Legal Authorities CLA-0001 through CL-0028.
21. On 11 June 2018, the Claimants filed the Request for Provisional Measure to restrain the Respondent from directly or indirectly using its regulatory powers to “obtain discovery outside the agreed arbitral process [provided for in Article 15 of] Procedural Order No. 1.”<sup>1</sup> According to the Claimants, the Respondent’s demand [purportedly as a regulator] for “a massive amount of information”<sup>2</sup> “outside of the agreed arbitral process”<sup>3</sup> for document production, was “abusing its regulatory powers in an effort ... [to] gain an unfair advantage in this arbitration”<sup>4</sup> which “threatens the level playing field... and undermines the integrity of these proceedings.”<sup>5</sup> The Request for Provisional Measure was accompanied by Exhibits CE-0056 through CE-0061, Legal Authorities CLA-0029 through CLA-0048 and CER-0001.
22. In response to the Tribunal’s invitation, the Respondent filed observations on the Claimants’ Request for Provisional Measure on 22 June 2018, opposing the Claimants’ request.<sup>6</sup>

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<sup>1</sup> Request for Provisional Measure dated 11 June 2018, para. 3.

<sup>2</sup> Request for Provisional Measure dated 11 June 2018, para. 2.

<sup>3</sup> Request for Provisional Measure dated 11 June 2018, para. 3.

<sup>4</sup> Request for Provisional Measure dated 11 June 2018, para. 1.

<sup>5</sup> Request for Provisional Measure dated 11 June 2018, para. 3.

<sup>6</sup> Respondent’s Letter regarding the Request for Provisional Measure dated 22 June 2018.

23. On 29 June 2018, the Respondent filed the Counter-Memorial, including a counter-claim, accompanied by:
  - Expert Report of Mr. Robert S. Mudge, The Brattle Group, dated 29 June 2018;
  - Witness Statement of Mr. Chester Palmer dated 28 June 2018;
  - Witness Statement of Mr. John Auguste dated 28 June 2018;
  - Witness Statement of Minister Gregory Bowen dated 28 June 2018;
  - Exhibits RE-0001 through RE-0119; and
  - Legal Authorities RLA-0001 through RLA-0064.
24. On the same date and in response to the Tribunal's invitation, the Claimants filed comments on the Respondent's observations of 22 June 2018.
25. On 20 July 2018, the Tribunal issued Procedural Order No. 2 concerning the Claimants' Request for Provisional Measure, which directed that the order against enforcement of the Minister's 9 May 2018 request would continue in effect until 2 November 2018 unless sooner extended or varied by the Tribunal. This Order also set out a timetable for the Respondent to make a "substantive reply" and for the Claimants to file a rejoinder, without disrupting the existing procedural timetable.
26. In accordance with Procedural Order No. 2, on 3 August 2018, the Respondent filed the Opposition to the Claimants' Request for Provisional Measure, including Exhibits RE-0120 through RE-0133 and Legal Authorities RLA-0065 through RLA-0076.
27. On 7 September 2018, the Claimants filed a Rejoinder to the Respondent's Opposition to the Claimants' Request for Provisional Measure, including Exhibits CE-0062 and CE-0063 and Legal Authorities CLA-0049 through CLA-0060.
28. On 20 September 2018, the Tribunal held a hearing on provisional measures by telephone conference.

29. On 26 September 2018, the Tribunal issued its Decision on Provisional Measures, which forms part of this Award.<sup>7</sup> The Tribunal recommended by way of Provisional Measure that the Government defer the date for compliance with the Minister's letter of 9 May 2018 until 30 March 2019, and that in the meantime, the Claimants are not to be considered in default of their informational obligations under the *Electricity Supply Act 2016*.
30. On 29 November 2018, the Claimants filed a Reply Memorial, including:
- Reply Expert Report of Mr. John MH Ellison FCA FSSBV MEWI dated 29 November 2018 with Exhibits JE-0001 through JE-0016;
  - First Expert Report of Dr. Boaz Moselle dated 29 November 2018 with Exhibits BM-0001 through BM-0080;
  - Reply Expert Report of Mr. Thomas Popovic, a Senior Manager in KPMG LLP dated 29 November 2018 with Exhibits TPII-0001 through TPII-0011;
  - Legal Opinion of Professor Jan Paulsson dated 28 November 2018;
  - Second Witness Statement of Mr. G. Robert Blanchard, Jr. dated 29 November 2018;
  - Witness Statement of Mr. Robert Blenker dated 29 November 2018;
  - Exhibits CE-0026 (resubmitted) and CE-0064 through CE-0207; and
  - Legal Authorities CLA-0061 through CLA-0132 as well as resubmitted Legal Authorities CLA-0025 and CLA-0050.
31. By letter dated 14 January 2019, the Claimants sought an order from the Tribunal precluding the Respondent from filing with its Rejoinder a valuation of GRENLEC under the Statutory Valuation Methodology and precluding evidence of "a quantification of its Counterclaim in its Rejoinder or at a later date." The Claimants sought a complete dismissal of the nascent counterclaim which they argued had not yet been fleshed out in any detail.
32. After receiving observations from the Respondent on 21 February 2019, the Tribunal issued Procedural Order No. 3 on 25 February 2019, permitting the Claimants to file a Reply on or before 10 May 2019, limited to the Claimants' response to the evidence in the

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<sup>7</sup> Tribunal's Decision on Provisional Measures dated 26 September 2019, Annex 1.

Rejoinder concerning (1) the Statutory Valuation, and (2) the particulars and quantification of the counterclaim. The Tribunal also stated in this Order that its ruling did not pre-judge the Claimants' argument that the counterclaim is out of time and inadmissible. The admissibility issue would be dealt with once the written pleadings were closed. The Claimants' additional costs associated with the 10 May 2019 Reply would be the subject of the Tribunal's consideration in due course.

33. On 29 March 2019, the Respondent filed a Rejoinder and Reply on Counterclaim, including:
  - Second Witness Statement of Minister Gregory Bowen dated 29 March 2019;
  - Second Witness Statement of Mr. John Auguste dated 29 March 2019;
  - Second Witness Statement of Mr. Chester Palmer dated 29 March 2019;
  - Expert Report of Mr. Robert S. Mudge of The Brattle Group dated 29 March 2019;
  - Expert Report of Mr. Wilfred Baghaloo and Mr. Doran McClellan of PwC dated 29 March 2019, with Exhibits PWC SRL 01 to PWC SRL 16;
  - Exhibits RE-0134 through RE-0437; and
  - Legal Authorities RLA-0077 through RLA-0180 as well as Mudge II Workpapers.
34. On 17 April 2019 the Claimants wrote to the Tribunal communicating the Parties' agreement to extend the deadline to file the Response and certain other adjustments to the procedural calendar.
35. On 1 May 2019, the Tribunal issued Procedural Order No. 4 concerning the procedural calendar reflecting the Parties' agreed amendments.
36. On 24 May 2019, the Claimants filed a response to the Respondent's Rejoinder of 29 March 2019, including:
  - Third Witness Statement of Mr. G. Robert Blanchard, Jr. dated 24 May 2019, with Appendices A through B;
  - Supplemental Witness Statement of Mr. Benedict Brathwaite dated 24 May 2019, with Appendices A and B;



- Second Reply Expert Report of Mr. John MH Ellison FCA FSSBV MEWI dated 24 May 2019, with Exhibits JE-17 through JE-18;
  - Second Reply Expert Report of Mr. Thomas Popovic, an Independent Contractor of KPMG LLP (US) dated 24 May 2019, with Exhibits TPIII-001 through TPIII-003;
  - Exhibits CE-0208 through CE-0235; and
  - Legal Authorities CLA-0133 through CLA-0141.
37. On 28 May 2019, the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.
38. On 29 May 2019, the Tribunal issued Procedural Order No. 5 concerning procedural matters in anticipation of the hearing.
39. In accordance with paragraph 16.3 of Procedural Order No. 1, as modified by Procedural Order No. 4, on 7 June 2019, the Claimants filed Exhibits CE-0236 through CE-0272 together with Legal Authorities CLA-0142 through CLA-0143, and the Respondent filed the additional exhibits RE-0438 through RE-0477.
40. On 14 June 2019, the Tribunal issued Procedural Order No. 6 concerning the organization of the hearing.
41. A hearing on the merits was held in Washington, D.C. from 17 June through 21 June 2019 (the “**Hearing**”). The following persons were present at the Hearing:

*Tribunal:*

Hon. Ian Binnie, C.C. Q.C.	President
Ms. Olufunke Adekoya SAN	Arbitrator
Mr. Richard Boulton, Q.C.	Arbitrator

*ICSID Secretariat:*

Ms. Jara Minguez Almeida	Secretary of the Tribunal
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*For the Claimants:*

***Counsel***

Mr. Paul Friedland	White & Case
Mr. Damien Nyer	White & Case
Ms. Preeti Bhagnani	White & Case
Mr. Barry Cameron Brewer	White & Case

Ms. Mila Owen	White & Case
Mr. Daniel Shults	White & Case
Ms. Lillian Siegel	White & Case
Mr. Thomas Alexander Crawford	White & Case
Mr. Charlie Friedlander	Global Legal & Strategic Advisors

***Witnesses***

Mr. G. Robert Blanchard Jr.	WRB Enterprises Inc.
Mr. Robert Blenker	WRB Enterprises Inc.
Mr. Benedict Brathwaite	Grenada Electricity Services

***Experts***

Mr. John Ellison	FTI Consulting
Ms. Olivia Roberts	FTI Consulting
Mr. Thomas Popovic	KPMG
Dr. Boaz Moselle	Compass Lexecon

*For the Respondent:*

***Counsel***

Mr. Donald Francis Donovan	Debevoise & Plimpton LLP
Ms. Natalie L. Reid	Debevoise & Plimpton LLP
Ms. Akima Paul Lambert	Debevoise & Plimpton LLP
Mr. Conway Blake	Debevoise & Plimpton LLP
Mr. Romain Zamour	Debevoise & Plimpton LLP
Mr. Adam Moss	Debevoise & Plimpton LLP
Ms. Emily Hush	Debevoise & Plimpton LLP
Ms. Perpetua Chery	Debevoise & Plimpton LLP
Mr. Gregory Senn	Debevoise & Plimpton LLP
Ms. Leslie-Ann Seon	Seon & Associates
Ms. Linda Dolland	Seon & Associates

***Witnesses***

The Hon. Gregory Bowen	The Government of Grenada
Mr. Chester Palmer	
Mr. John Auguste	

***Experts***

Mr. Robert Mudge	The Brattle Group
Ms. Lily Mwalenga	The Brattle Group
Mr. Wilfred Baghaloo	PricewaterhouseCoopers
Mr. Doran McClellan	PricewaterhouseCoopers
Ms. Fiona Hyman	PricewaterhouseCoopers
Mr. Roy Pacumio	PricewaterhouseCoopers
Ms. Alaina Parris	PricewaterhouseCoopers

*Court Reporter:*

Mr. David Kasdan	Worldwide Reporting, LLP
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42. During the Hearing, the following persons were examined:

*On behalf of the Claimants:*

***Witnesses***

Mr. G. Robert Blanchard Jr.	WRB Enterprises Inc.
Mr. Robert Blenker	WRB Enterprises Inc.
Mr. Benedict Brathwaite	Grenada Electricity Services

***Experts***

Mr. John Ellison	FTI Consulting
Mr. Thomas Popovic	KPMG
Dr. Boaz Moselle	Compass Lexecon

*On behalf of the Respondent:*

***Witnesses***

The Hon. Gregory Bowen	The Government of Grenada
Mr. Chester Palmer	
Mr. John Auguste	

***Experts***

Mr. Robert Mudge	The Brattle Group
Mr. Wilfred Baghaloo	PricewaterhouseCoopers
Mr. Doran McClellan	PricewaterhouseCoopers

43. On 26 July 2019, both Parties filed their responses to a set of questions posed by the Tribunal after the Hearing. The Claimants submitted with their response five annexes, and the Respondent attached Legal Authorities RLA-0181 and RLA-0182.

44. On 30 July 2019, the Claimants filed the following:

- Claimants' Submission on Costs dated 30 July 2019;
- The Claimants' Statement of Costs dated 30 July 2019;
- Exhibits CE-0274 and CE-0275; and
- Legal Authorities CL-0144 through CL-0151.

45. On the same date, the Respondent filed the following:

- The Respondent's Submission on Costs dated 30 July 2019;
- The Respondent's Statement of Costs dated 30 July 2019;
- Exhibits RE-0478 and RE-0479; and

- Legal Authorities RL-0183 through RL-0186.

46. The proceeding was closed on 31 December 2019.

### III. HISTORY OF THE DISPUTE

#### A. Origins of GRENLEC

47. GRENLEC was incorporated as a private company on 27 September 1960.<sup>8</sup> The following day, 28 September 1960, the GOG passed the Electricity Supply Ordinance of 1960 (“**1960 ESO**”) setting up the initial regulatory framework. GRENLEC was the monopoly supplier and distributor of electricity in Grenada.<sup>9</sup> Though nominally private, GRENLEC was controlled by the Colonial Development Corporation (“**CDC**”), a statutory corporation established by the British Government.<sup>10</sup>

48. Under the terms of the 1960 *ESO*, GRENLEC was granted an eighty-year exclusive license for the generation, distribution, and transmission of electricity in Grenada including the outlying islands of Carriacou and Petit Martinique.<sup>11</sup> The rate making procedure for electricity consumption was set out in the First Schedule to the 1960 *ESO*. There were criminal penalties for self-generation of electricity on the three islands unless authorized by GRENLEC; these included fines of up to EC \$240 or even “imprisonment with or without hard labor for a period not exceeding six months.”<sup>12</sup>

49. The Second Schedule to the *ESO* laid out a repurchase formula applicable in the event the Government decided to revoke the arrangement. The formula contained two components: first, a calculation of the net value of the company according to Part I of the Second Schedule, and second, a calculation of the company’s “goodwill” as defined and calculated

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<sup>8</sup> Ex. RE-0001.

<sup>9</sup> Ex. CE-0025.

<sup>10</sup> Witness Statement of the Honourable Gregory Bowen, dated 28 June 2018 (“**Bowen**”), para. 5.

<sup>11</sup> Ex. CE-0025, s. 3.

<sup>12</sup> *Ibid.*, s. 5(b). Given the date of the *ESO*’s passage, the currency used here was likely the British West Indies dollar.

by Part II of the Schedule.<sup>13</sup> The compensation formula, with modifications, has survived for more than 50 years.

**B. GRENLEC has Been an Ongoing Political Controversy Since Grenada's Independence in 1979**

50. In 1979, the People's Revolutionary Government<sup>14</sup> suspended Grenada's Constitution and laws, including the 1960 *ESO*. It nationalized GRENLEC. The Revolutionary Government fell in 1983, and its successors moved to return certain industries to the private sector with the financial assistance of the U.S. Agency for International Development, which envisioned, among other things, "the development of a program to privatize major state-owned enterprises."<sup>15</sup> Privatization became a central plank in the economic and fiscal programme of the NDC, which at the time formed the Government of Grenada.<sup>16</sup>

51. It was hoped that privatization would attract much needed financial investment.<sup>17</sup> GRENLEC had promoted electrification across all the islands, but generation capacity did not keep up with demand. Rural areas were particularly disadvantaged.<sup>18</sup>

52. To further complicate matters, an oil leakage from the Queens Park sub-station contaminated the soil and water in the surrounding area.<sup>19</sup> Remediation of the contamination was estimated to cost between USD \$750,000 and USD \$1,000,000,<sup>20</sup> which GRENLEC could ill afford. In addition, the Respondent concedes that before privatization

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<sup>13</sup> *Ibid.*, s. 29(3).

<sup>14</sup> Bowen, para. 8.

<sup>15</sup> Ex. CE-0031, para. 1.1(1).

<sup>16</sup> *Ibid.*; see also *ibid* para. 1.4 (69)-(71).

<sup>17</sup> By the summer of 1993, GRENLEC had added a permanent generator that increased installed capacity by nearly 50% from pre-1991 levels, and further leased other generators to extend its transmission and distribution network across the island but despite these initiatives, Grenada began to suffer from frequent black-outs and load shedding. Further capital investment was needed in new generators and improvements in the distribution network. See Bowen, para. 13; Witness Statement of John Auguste, dated 29 June 2018 ("**Auguste**"), para. 5.

<sup>18</sup> Bowen, para. 11.

<sup>19</sup> Ex. RE-0089; Ex. CE-0007, s. 7.6(a).

<sup>20</sup> Ex. RE-0005, at p. 17.

GRENLEC lacked the necessary capital for making overdue investments in “new generators and improvements in the distribution network.”<sup>21</sup>

53. A 1992 Memorandum commissioned by the World Bank underscored the importance of privatisation, but cautioned that it should be done only alongside the development of a regulatory framework suitable for public-private partnerships:

**An adequate regulatory framework should be developed accompanying the privatization of public utilities with monopolistic features.** This is particularly urgent in the case of the Grenada Electricity Company, where private investors have indicated their interest in purchasing the operations.<sup>22</sup> (emphasis added)

54. The Respondent NNP Government now contends that the former NDC Government failed to create an “adequate regulatory framework”. The Public Utilities Commission (1994) was designed (with input it says from WRB) to be “toothless”.
55. The World Bank noted that a problem with GRENLEC being part of the public sector was that “short-term political objectives can override concerns for long-term economic viability.”<sup>23</sup> The current NNP Government suggests that the 1994 privatization was structured to advance the “short-term political objectives” of the former NDC Government.

### **C. Privatization of GRENLEC**

56. In the second half of 1993, the GOG engaged consultants PwC to advise on privatization issues and to conduct a Request for Proposals (“RFP”) process for GRENLEC’s shares.<sup>24</sup>
57. As part of their engagement PwC produced an information memorandum outlining the process for privatization and analyzing both GRENLEC and the regulatory framework,<sup>25</sup> building on earlier work done by the power and telecommunications consultancy firm,

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<sup>21</sup> Counter-Memorial, dated 29 June 2018 (“Counter-Memorial”), para. 32.

<sup>22</sup> Ex. RE-0002, para. 3.16.

<sup>23</sup> *Ibid.*, para. 3.15.

<sup>24</sup> *Ibid.*, para. 3.16; see Ex. CE-0028; Ex. RE-0005, pp. 1-5.

<sup>25</sup> Ex. CE-0028; see also Ex. RE-0005, pp. 6-43.

- Ewbank Preece.<sup>26</sup> The RFP attracted a number of potential investors interested in purchasing the GRENLEC shares. PwC analysed the submitted bids<sup>27</sup> and briefed the relevant Government ministers.
58. As part of their due diligence, the GOG obtained various valuations of GRENLEC using different valuation methodologies.<sup>28</sup> Using the DCF method, PwC arrived at a present value within a very wide range of EC \$8.70 million to EC \$59.05 million. The “comparable transaction” method produced a narrower range of EC \$30.4 million to EC \$39.5 million.<sup>29</sup>
59. The RFP process attracted seven bids for the 50% stake in GRENLEC, including: (i) Algonquin Power Corporation (Canada); (ii) the CDC (England); (iii) IVO International (Finland); (iv) Power Systems, Inc. and NRECA International (USA); (v) Samsung/WSC (USA); (vi) Synergics, Inc. (USA); and (vii) WRB Enterprises (USA).<sup>30</sup>
60. WRB had been founded in 1969 by members of the Winter, Rozier, and Blanchard families through the merger of two Caterpillar tractor and engine dealerships in Florida and South Carolina.<sup>31</sup> At the time of its bid for GRENLEC, WRB had an existing investment in the Turks and Caicos Utility Company (“TCU”) which produced a tenth of that country’s electricity production, with the rest supplied by a different utility on the other islands.<sup>32</sup>
61. Bids were assessed by PwC according to a variety of criteria including “[c]ommitment to existing employees, [q]ualifications as a strategic partner, [a] well-articulated business & management plan, [a] long-term investment plan, [c]ommitment to environmental clean-

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<sup>26</sup> Ex. CE-0031, para. 16; Ex. RE-0005, p. 3.

<sup>27</sup> Reply, para. 17; Ex. RE-0009.

<sup>28</sup> PwC assessed the *replacement* value of GRENLEC and its assets at EC \$52.2 million; Ewbank Preece estimated the *replacement* costs of the same assets at nearer to EC \$70 million (Ex. RE-0009, at p. 2).

<sup>29</sup> *Ibid.*

<sup>30</sup> Ex. CE-0031, para. 8.

<sup>31</sup> Ex. CE-0029, at p. 4.

<sup>32</sup> Bowen, para. 25; Ex. RE-0048, at p. 21 (listing the population of Grand Turk as 4,831 and Salt Cay as 108 as of 2012).

up, and [a] plan for the participation of local investors.”<sup>33</sup> The work of PwC was reviewed by the GOG’s in-house negotiating team<sup>34</sup> which included senior Ministers.

62. The bids were assessed as follows:<sup>35</sup>

Criteria	Weight	Alogonquin	CDC	IVO	PSIG	Synergics	WRB
1 Utility Expertise	13	39	65	65	26	39	46
2 Financial Strength of Bidder	13	33	65	65	13	26	39
3 Participation of Local Investors	6	12	18	24	30	30	21
4 Net Present Value of Bid	5	23	13	16	25	14	19
5 Cash Value of Bid	10	47	21	7	50	27	39
6 Management Plan	10	15	25	35	10	40	50
7 Business Development Plan	8	28	28	28	16	28	28
8 Investment Plan	13	39	39	46	33	52	59
9 Employee Plan	10	30	15	35	40	50	50
10 Environmental Plan	8	28	8	24	16	16	32
11 Other Conditions of Sale	4	12	8	10	4	12	16
<b>Total</b>		<b>306</b>	<b>305</b>	<b>355</b>	<b>263</b>	<b>334</b>	<b>398</b>

63. Three of the bidders – WRB, Synergics, and IVO – were selected as finalists and asked to submit their best and final offers to the Government.<sup>36</sup> The WRB bid assigned the lowest value of all the bids to GRENLEC itself (EC \$38.0 million) but WRB scored high on the other criteria.<sup>37</sup> The Respondent’s quantum expert, Mr. Robert Mudge, conceded that the purchase price paid by WRB was in the upper range of PwC’s pre-bid valuations.<sup>38</sup>

<sup>33</sup> GOG Responses to Key Opposition Issues, Ex. CE-0188, p. 2.

<sup>34</sup> Bowen, paras. 21-22.

<sup>35</sup> Respondent’s Opening Presentation, slide 13.

<sup>36</sup> Ex. CE-0031, para. 11.

<sup>37</sup> Respondent’s Opening Presentation, slides 13-14. See GOG Responses to Key Opposition Issues (Ex. CE-0188), at p. 3 which enumerated WRB’s proposal “protected all existing workers” of GRENLEC and in addition an employee ownership plan. WRB ensured that there would be no layoffs and agreed to the rate-setting mechanism that the Government favored (RPI-2), which entailed the “slowest rate of increasing prices”. WRB had experience in the operation of another (albeit much smaller) Caribbean electric utility, Turks and Caicos Utilities, Ltd. and operating diesel-based utilities and equipment. WRB offered significant additional cash equity investments for long-term capital improvements and WRB’s senior management would remain engaged through the negotiation period and beyond.

<sup>38</sup> Mr. Mudge testified as follows:



64. The Respondent notes that the WRB proposal included a substantial amount of cash up-front<sup>39</sup> and speculated that “[t]his was particularly attractive to the cash-strapped [NDC] Government of the day, which was looking to increase government spending in advance of an upcoming election.”<sup>40</sup> However, the Respondent does not allege that there was any illegality or impropriety in the selection of WRB.<sup>41</sup> Nevertheless, the Respondent accuses WRB of breaking many of its pre-contract promises including:

- “to utilize existing employees and improve their skills rather than rely on a system of expatriate management”;
- to make EC \$17 million worth of capital investments projected through the end of 1998, including investments in renewable energy, wind turbines and hydro generation plants;
- WRB’s “expectation” that “substantially all of the earnings of GRENLEC will be required to fund future capital investments to assure the long-term viability of GRENLEC. This plan will leave no funds available for dividend payments.”<sup>42</sup>

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Q. GPP paid \$19 million for its shares for its 50 percent share in GRENLEC.

A. Yes, I believe that’s correct.

Q. Now, the implied valuation of the 50 percent share is for the EC \$38 million for a hundred percent share of the Company?

A. That’s what this sentence seems to say, yes.

Q. And so, **GPP paid in the high of the range that was presented by PwC; right?**

A. If 22 to 38 represents – yes, it does represent 100 percent. **Yes, that’s correct.** (emphasis added)

Transcript, 20 June 2019, p. 1227, l. 19 to p. 1228, l. 7 [02:18:11].

<sup>39</sup> Bowen, para. 26.

<sup>40</sup> Counter-Memorial, para. 48.

<sup>41</sup> The Claimants reject any imputation that the process was unfair:

(i) they point out that the Government found that the other bids were “not as well constructed.” For example, the highest bidder, PSGI, offered to *broker* shares in GRENLEC, rather than to act as a strategic partner, and did not propose to invest any money of its own. Other bids were less attractive because they were “highly levered,” “offered no protection of employees” or the “bidder had no transmission and distribution experience, and no customer relations experience or utility operating experience.” (Reply Memorial dated 29 November 2018 (“**Reply Memorial**”), para. 21);

(ii) the Government was advised by “internationally-recognized experts in privatization and energy-sector transactions” from PwC (who advised the Government from the inception of the RFP process through the ultimate closing of the transaction) and a legal team led by then Attorney General of Grenada, the Honourable Dr. Francis Alexis, Q.C., (a “local constitutional expert”) (Reply Memorial, paras. 26 and 27).

<sup>42</sup> Respondent’s Opening Argument, slide 14.

65. A Commission of Inquiry that the newly-elected NNP-led Government appointed in 1995 to investigate the circumstances of the GRENLEC sale, although critical of the privatization in some respects, found no evidence of impropriety.<sup>43</sup>

**D. The 1994 Share Purchase Agreement**

66. The Government and the Claimants concluded the SPA on or about 14 September 1994<sup>44</sup> as part of a privatization package with the 1994 *ESA* and the *PUCA*. It is clear that WRB would not have completed the purchase without the 1994 *ESA* to provide protection for its investment.

67. On 15 September 1994, GPP purchased 50 percent of GRENLEC's shares for EC \$15 million, which assumed a 100% value of EC \$30 million.<sup>45</sup>

68. In addition to GPP's 50% stake, WRB also controlled the 11.4% of GRENLEC owned by Eastern Caribbean Holdings Limited ("ECH"), bringing the total shares of GRENLEC effectively controlled by WRB to 61.3%.<sup>46</sup> In summary, WRB indirectly owned 50% of GRENLEC through its subsidiary GPP.<sup>47</sup> GRENLEC's remaining shares were held by the GOG (10%), the National Insurance Scheme (11.6%), ECH (11.4%), and various local individuals and GRENLEC employees (17%).<sup>48</sup>

**(1) Buy-Out Provisions**

69. WRB, GPP and the GOG built an "exit strategy" into their arrangement. Section 7.9 of the SPA provides that on the occurrence of one or more of fifteen designated "Repurchase

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<sup>43</sup> Justice Ashton Piper, et al., Report of the Commission of Inquiry Appointed to Inquire into the Matters of the Sale of Majority Shares Held by Government in the Grenada Electricity Services Limited and into the Capital Development Fund, dated December 1996 ("**Report of the Commission of Inquiry 1996**") (Ex. CE-0031).

<sup>44</sup> *Ibid.*, p. 5.

<sup>45</sup> Ex. RE-0012, para. 10.

<sup>46</sup> Memorial, dated 1 March 2018 ("**Memorial**"), para. 29 n. 39 ("WRB exercises management control over ECH"); Compare Ex. RE-0068, at p. 1 with Ex. RE-0076, at p. 6 (listing the same corporate address for WRB and ECH).

<sup>47</sup> Request for Arbitration, para. 1, n. 1 (noting WRB indirectly owns 75% of GPP); Ex. RE-0075, at p. 2 (showing that the remaining 25% of GPP's shares are held by Ronald L. Roseman and Curtis Caribbean Construction Ltd. Mr. Roseman and Robert Curtis are directors of GRENLEC).

<sup>48</sup> Ex. RE-0076, at p. 4.

Events,”<sup>49</sup> of varied gravity, the Claimants would be entitled to demand that the Government purchase all its shares, with the purchase price “calculated on the basis

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<sup>49</sup> Pursuant to Section 7.9(a) of the SPA, the following fifteen occurrences or circumstances constitute the Repurchase Events under which the Second Schedule is triggered:

(i) any confiscation, expropriation or nationalization by any State Entity of, or the imposition by any State Entity of a confiscatory tax, levy or assessment on, all or any non-immaterial part of the Business, the Assets (including the GRENLEC System or the Real Property), the shares of GRENLEC owned by Buyer or the shares of Buyer held by Buyer’s shareholders;

(ii) any condemnation, requisition, taking or exercise of acquisition powers by any State Entity (including the commencement of any process or means for effectuating any of the foregoing) with respect to all or any part (other than an immaterial part) of the Assets (including the GRENLEC System or the Real Property), unless such Assets are subject to replacement within a commercially reasonable timeframe and the GOG pays compensation to GRENLEC in an amount and within a timeframe sufficient to permit such replacement;

(iii) any imposition of a change (without the consent of GRENLEC, not to be unreasonably withheld) in GRENLEC’s rate adjustment, recovery or collection rights, privileges or procedures or service requirements specified in the *ESA* as in effect on the Closing Date which has an adverse effect on the Business or the shares of GRENLEC owned by Buyer;

(iv) any annulment, cancellation, limitation infringement or other impairment of the term, scope or exclusivity of the GRENLEC Licence (any such action hereinafter referred to as a “**GOG Action**”), unless such GOG Action is taken pursuant to and in accordance with any final and binding order issued by [the International Centre for Settlement of Investment Disputes (ICSID)] following the conclusion of an arbitration of a Dispute between the Parties pursuant to and in accordance with the provisions of Section 11.2, which order holds that Buyer has committed extreme or wilful malfeasance in, or abandonment of, its management of GRENLEC of such a nature and to such a degree as warrants such GOG Action (taking into account the economic consequences to GRENLEC and Buyer of implementing and enforcing such GOG Action without requirement of payment by the GOG in accordance with this Section 7.9);

(v) any occurrence or circumstance which renders Eastern Caribbean dollars no longer convertible into United States dollars for a period of more than six (6) months;

(vi) any action or inaction by any State Entity or any other occurrence or circumstance which prohibits, precludes, impairs or restricts (in any manner other than as specified in Section 4.24) the repatriation of currency (whether in the form of United States or Eastern Caribbean dollars) from Grenada;

(vii) any change in Grenadian Law enacted or taking effect on or after the Closing Date which requires new capital expenditures or increased operating costs by GRENLEC, unless the resulting recovery of Exogenous Costs that GRENLEC would be entitled to receive in connection with such change pursuant to the *ESA* is sufficient to enable GRENLEC to finance the necessary new capital expenditures or increased operating costs;

(viii) any change in Grenadian Law enacted or taking effect on or after the Closing Date which directly or indirectly prohibits, precludes, restricts or impairs the ability of Buyer to hold shares of or a controlling interest in GRENLEC or the ability of the WRB Group to hold shares of or a controlling interest in Buyer, or the ability of Buyer to have or exercise control of or responsibility for the management of GRENLEC or the business, or the ability of the WRB Group to have or exercise control of or responsibility for the management of Buyer or its business;

(ix) any change in Grenadian Law enacted or taking effect on or after the Closing Date, or any imposition, outbreak or occurrence of martial or civil conditions, which prevents or materially impairs GRENLEC’s access to the Assets (including the GRENLEC System and the Real Property);

(x) any occurrence of war, civil war, revolution, rebellion, insurrection, coup d’état, terrorism or other act of public enemies, embargo, riot, civil commotion, sabotage, or labour disturbance or unrest;

(xi) any act of God, including hurricane, flood, earthquake, fire, explosion or epidemic, which requires new capital expenditures or increased operating costs by GRENLEC, unless the resulting recovery of Exogenous Costs that GRENLEC would be entitled to receive in connection with such Act of God pursuant to the *ESA* is sufficient to enable GRENLEC to finance the necessary new capital expenditures or increased operating costs;

specified in the Second Schedule to the *ESA* in effect on the Closing Date”<sup>50</sup> (hereinafter sometimes referred to as “**the put**”).

70. The structure of the Second Schedule to the 1994 *ESA* reflected in part the formula contained in the 1960 *ESO*. The main exception was a modification in the calculation of “goodwill”.<sup>51</sup>

## **(2) Extent of the Monopoly**

71. The 1994 *ESA* granted GRENLEC a monopoly over generation and distribution of electricity for a period of eighty years as had been the case with the CDC.<sup>52</sup> The monopoly was protected by a number of restrictions on individuals and corporations including tight limits on the self-generation by Grenadians of electricity<sup>53</sup> even for their own use.

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(xii) any repudiation, rejection, annulment, cancellation or termination by the GOG or any State Entity of this Agreement (other than pursuant to Section 11.5);

(xiii) any repudiation, rejection, annulment, cancellation, termination, non-performance or inability to perform by the GOG of its obligations pursuant to Sections 2.1, 2.2, 2.4(b), 2.5, 2.6, 7.6, 7.7, 7.9, 7.13, 7.16, 10.2, 11.2, 11.3 or 11.4 (unless such action by the GOG is taken pursuant to and in accordance with any final and binding order issued by the Centre (as that term is defined in Section 11.2) following the conclusion of an arbitration of a Dispute between the Parties pursuant to and in accordance with the provisions of Section 11.2, which order holds that Buyer has committed extreme or wilful malfeasance in, or abandonment of, its management of GRENLEC of such a nature and to such a degree as warrants such GOG Action taking into account the economic consequences to GRENLEC and Buyer of implementing and enforcing such action by the GOG without requirement of payment by the GOG in accordance with this Section 7.9);

(xiv) any failure of the PUC or any other State Entity having authority with respect to the recovery of Exogenous Costs that GRENLEC would be entitled to receive pursuant to the *ESA* to allow the implementation of such recovery within a timeframe and in a manner sufficient to enable GRENLEC to finance (or recover, as the case may be) the necessary capital expenditures or increased operating costs resulting from the events necessitating such Exogenous Cost recovery; and

(xv) any change in Grenadian Law taking effect after Closing which subjects members of GRENLEC’s Board or any GRENLEC shareholders (direct or indirect) to criminal responsibility or liability for actions by or omissions of GRENLEC or its officers, employees or agents in the conduct of the Business or Holding of the Assets (Ex. RE-0089, ss. 7.9(a)(i)-(xv)).

<sup>50</sup> Ex. RE-0089, s. 7.9(b).

<sup>51</sup> Under the 1960 *ESO*, goodwill was based in part on the aggregate of the net trading profit for the five years immediately prior to the revocation of GRENLEC’s license. Under the amended formulae in the 1994 *ESA*, revocation of the license within five years of its issuance would entitle the Claimants to compensation for goodwill based on net trading profits multiplied by 5-n, where n is equal to number of completed financial years (Ex. CE-0025, Second Schedule, Part II).

<sup>52</sup> Ex. CE-0005, s. 3; Ex. CE-0025, s. 3.

<sup>53</sup> Ex. CE-0005, s. 5(2)(a) to (d); s. 5(3). In the absence of a sub-license granted by GRENLEC, self-generation was allowed only under the following circumstances: (a) for “exclusively for private residential purposes”; (b) “solely during periods of interruption of supply”; (c) if an individual had been self-generating prior to the passage of the *ESA*; and (d) if the person was “in an area not supplied with electricity by the Company.” In all other instances, an individual

### (3) Calculation of Electricity Rates

72. The 1994 *ESA* divided the electricity rate into four basic components: fuel charges, non-fuel charges, exogenous event adjustments, and special charges for fuel-conversion.<sup>54</sup> Under the 1994 *PUC Act*, the PUC was empowered to review GRENLEC's rates for statutory compliance. The *Public Utilities Commission Act*, 1994, s. 17(3)(a) provides:

If an act provides the method of determining rates payable... whether on the basis of an identified formula (such as the Retail Price Index – X (RPI-X) formula or formulas) or otherwise, the Commission shall adhere to such method ... **and to this extent, the concept of a fair Rate of Return on investment shall not apply.** (emphasis added)<sup>55</sup>

73. The Respondent contends that the rate-setting formula of the 1994 *ESA* unduly favoured GRENLEC as the formula permitted excessive passing on of cost increases to consumers and, the Respondent says, in practice the Claimants maximized every opportunity to increase rates. However, in cross-examination, the Minister for Public Utilities, Gregory Bowen was obliged to admit that the Government not GRENLEC was the source of the RPI-X rate-setting formula.<sup>56</sup> Moreover, WRB had agreed to the “x” value most favourable to the Government's desire for lower rates.<sup>57</sup> Further, the rates were reviewable for statutory compliance by the PUC. The Respondent contends that the PUC was dysfunctional through the years 1994 to 2016. If so, the Claimants respond, the reason for this state of affairs was the NNP Government's failure to make the necessary appointments to the PUC itself. If the result was dysfunctional, the Claimants say, dysfunctionality was the Government's choice.

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generating their own electricity was subject to “summary conviction” and liable “to a fine of three thousand dollars or to imprisonment for six months.” The possibility of a sentence to hard labour was dropped.

<sup>54</sup> *Ibid.*, at 161-173 (First Schedule).

<sup>55</sup> Ex. CE-0006, s. 17(3)(a).

<sup>56</sup> Transcript, 18 June 2019, Day 2, p. 563, 19-22.

<sup>57</sup> See Bowen testimony at Transcript, 18 June 2019, pp. 560-562 referencing Government of Grenada *Information Memorandum* to bidders, Ex. CE-0028 at pp. 5-7. Bidders were required to use the RPI-X formula where “x” equals zero, one or two. The higher the “x” number, the lower the rate GRENLEC could charge (Transcript, p. 562, ll. 15-18) and in WRB's bid, “x” equals 2.

**(4) Composition of the GRENLEC Board of Directors**

74. The GRENLEC Board is composed of twelve members.<sup>58</sup> Six of these members are nominated by GPP.<sup>59</sup> The Government and GRENLEC workers each nominate one member to the Board. The remaining four members are elected each year, for a one-year term at the Annual General Meeting of shareholders (the GPP group does not participate in the election of these four “local” members).<sup>60</sup>
75. The Chairman of the Board was a WRB appointee and was empowered to resolve any Board impasse with a “casting” vote.<sup>61</sup> The Respondent complains that the Claimants’ nominee invariably exercised the casting vote to advance the Claimants’ interest rather than the best interest of the economy of Grenada. This is another manifestation of the “good corporate citizen” debate. The Claimants say it was quite proper for the WRB-nominated Chairman to cast the deciding vote to advance WRB’s interest. The Government on the other hand, contends that the Chair ought to have considered GRENLEC’s broader public responsibilities as the island’s sole source of electrical power with great impact on the local economy.

<sup>58</sup> Amended 1994 Articles of Association, Ex. RE-0008, para. 76. Note that GRENLEC’s shareholders as at the Repurchase Event date were:

	Shares	%
GPP	9,500,000	50.00%
Other non-GoG shareholders	5,122,571	26.96%
GoG	1,899,997	10.00%
Other Grenadian statutory authorities:		
- Grenada Development Bank	2,500	0.01%
- Grenada Ports Authority	270,094	1.42%
- National Insurance Board of Grenada	2,204,838	11.60%
<b>Total</b>	<b>19,000,000</b>	<b>100.00%</b>

Source: Exhibit JETP01 – Grenlec’s shareholder register as at 18 July 2016

Ellison & Popovic, p. 98.

<sup>59</sup> Ex. RE-0008, para. 76(2)(a).

<sup>60</sup> *Ibid.*, para. 76; Witness Statement of Chester Palmer, dated 28 June 2018 (“Palmer”), para. 7. As a matter of practice, the directors appointed by the minority shareholders have always been Grenadian and one of these four directors is always a representative from the National Insurance Scheme.

<sup>61</sup> *Ibid.*, para. 66 (“In the case of an equality of votes, either on a poll or a show of hands, the chairman of the meeting shall be entitled to a further or casting vote, and in the case of any dispute as to the admission or rejection of a vote, the chairman shall determine the same and such determination made in good faith shall be final and conclusive”).

**(5) WRB's Consulting Services Agreement**

76. As contemplated in the SPA, GRENLEC and WRB also executed a Management Consulting Services Agreement (“**Management Agreement**”).<sup>62</sup>
77. The Respondent contends the Management Agreement was never intended to be permanent, but was kept in place for no good reason by the Claimants using their control of the GRENLEC Board. According to the Respondent, the Claimants would make decisions first, management would then implement those decisions, and only then would the “local” GRENLEC directors be informed. When pressed on points of disagreement by the locally-appointed directors, the Respondent says that WRB would claim that the disputed measures were authorized by the Management Agreement.<sup>63</sup>
78. The Respondent complains that the Parties envisaged that the scope and remuneration of the Management Agreement should be subject to “annual review and approval” by both WRB and GRENLEC Boards. However, in 1997, over the local directors’ objections, the Management Agreement was “renewed and continue[d] [to be] in force until further notice” at an increased annual fee of EC \$600,000. The Management Agreement was not reviewed or approved annually by the GRENLEC Board for almost two decades. No

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<sup>62</sup> See Ex. RE-0010, ss. 1-3 of the Management Agreement provide in part that:

The Consulting Services to be provided by WRB pursuant to this Agreement will consist of consulting assistance concerning the following matters: (i) power systems engineering, (ii) generation (electricity production) maintenance, (iii) personnel training, (iv) data processing, and (v) administration, accounting and financing. The Consulting Services will be coordinated with the activities of GRENLEC’s officers and employees by GRENLEC’s General Manager. [s.1]

\* \* \* \* \*

WRB shall receive an annual fee...The Parties have agreed that the Service Fee for the first year of this Agreement shall be in the amount of [EC \$500,000] [s. 2]

\* \* \* \* \*

[I]nitial term...concluding on September 30, 1995. Thereafter, this Agreement will be renewed by the Parties on a year-by-year basis, with the understanding that the scope of Consulting Services and the amount of the Service Fee shall be subject to annual review and approval by the boards of directors of both GRENLEC and WRB. [s. 3]

<sup>63</sup> Memorial, para. 69.

itemized invoices were provided by WRB to GRENLEC explaining what services were rendered, or by whom.<sup>64</sup>

79. Nevertheless, the GRENLEC Board minutes thereafter do not record any objection by the local directors. Mr. Palmer, a local director, testified that while he often disagreed with Board decisions (where he felt WRB's people voted in WRB's interest without regard to other stakeholders), he nevertheless frequently did not record his dissent.

**E. A Change of Government Resulted in a Government Challenge to the Constitutionality of the Privatization**

80. The 1995 election returned to power the NNP which had been highly critical of the GRENLEC privatization while in opposition, and maintained this position once re-elected.<sup>65</sup> It:

- (a) established, as mentioned, a Commission of Inquiry to investigate the sale of GRENLEC;<sup>66</sup>
- (b) constituted a legislative committee to investigate its allegation that GRENLEC was charging illegally high rates;<sup>67</sup>
- (c) declared that for procedural reasons, the 1994 *ESA* had never taken effect;<sup>68</sup> and

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<sup>64</sup> Ex. RE-0010, s. 2-3; Ex. RE-0013; Ex. RE-0410 at p. 7;; Third Witness Statement of G. Robert Blanchard dated 24 May 2019 ("**Blanchard III**"), para. 17.

<sup>65</sup> Ministerial Statement on the *Electricity Supply Act* 1994, dated 1995 (Ex. CE-0074), at p. 1; see also Counter-Memorial, para. 71.

<sup>66</sup> Report of the Commission of Inquiry 1996 (Ex. CE-0031). The Commission found no evidence of impropriety.

<sup>67</sup> A Joint Committee compared GRENLEC's rates before and after privatization. The Committee reported to Minister Bowen that "it was the unanimous agreement of the members of the committee that the actual rates charged by GRENLEC over the period investigated, did not differ in any significant or material way from the rates obtained from the application of the old formula." Letter dated 15 July 1996 from W.R. Agostini to G. Bowen (Government) (Ex. CE-0078).

<sup>68</sup> Specifically, the Government argued that the previous administration's failure to instruct the Governor General to publish in the official Gazette the date on which the 1994 *ESA* came into force had the effect of extinguishing the Government's obligation under the SPA to implement and abide by the 1994 *ESA*. (First Witness Statement of G. Robert Blanchard, Jr., dated 1 March 2018 ("**Blanchard I**"), para. 34).



- (d) sought renegotiation of various provisions of the SPA (including the purchase price for the GRENLEC shares).<sup>69</sup>
81. Minister Gregory Bowen, the NNP Minister responsible for overseeing GRENLEC, warned WRB that renegotiation of the SPA was “not a matter of choice” and that it had “always been the clear position of this administration” that the SPA was “neither legally nor morally binding on the Government of Grenada” because the Prime Minister of Grenada, who had signed the instrument of ratification “had no authority from Parliament” to sign it.<sup>70</sup>
82. When the Government declared its intention not to honour its alleged contractual obligations under the SPA and the 1994 *ESA*,<sup>71</sup> WRB initiated an arbitration under ICSID seeking an award compelling the GOG to repurchase the GRENLEC shares for USD \$18.7 million, as calculated under the Second Schedule.<sup>72</sup> This demand implied a substantial capital gain over the EC \$15 million purchase price. Settlement negotiations led to a **Supplemental SPA**, dated 1 July 1998<sup>73</sup> which affirmed the validity of the 1994 *ESA* plus other related relief.<sup>74</sup>

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<sup>69</sup> Government of Grenada, *Renegotiation of the Terms of Sale of Shares in GRENLEC to WRB, Government's policy position* (Ex. CE-0018) and G. Robert Blanchard, Jr., *GRENLEC's Re-negotiating Committee/List of Items to be Re-negotiated* (Ex. CE-0019).

<sup>70</sup> Letter dated 7 March 1997 from G. Bowen (Government) to G. Robert Blanchard, Jr., (GPP and WRB) (Ex. CE-0083) and letter dated 20 March 1997 from G. Bowen (Government) to G. Robert Blanchard, Jr., (GPP and WRB) (Ex. CE-0032). See *Attorney General (Grenada) v. Grenada Private Power, WRB and GRENLEC*, 1997 Suit No. 501 (Ex. CE-0088), at 2; Facsimile transmission dated 23 October 1997 from R. Pietrowski (Coudert Brothers) to B. Blanchard (WRB) (Ex. CE-0087).

<sup>71</sup> See Letter dated 14 July 1997 from G. Robert Blanchard, Jr., (GPP and WRB) to K. Mitchell (Government) (Ex. CE-0084).

<sup>72</sup> Ex. RE-0012, para. 30.

<sup>73</sup> Ex. CE-0034.

<sup>74</sup> Section 7 released GPP and WRB from their obligations under Article 7.6 of the SPA regarding the environmental clean-up of Queens Park, “[i]n consideration of GRENLEC’s expansion program” (Ex. CE-0034, s. 7). The Respondent says the clean-up was never properly conducted. (Counter-Memorial, para. 77). The Claimants take the position that no further clean-up was necessary. Hurricanes were removed from the list of Repurchase Events under Section 7.9. (Ex. CE-0034, s. 8)

83. The terms of settlement were confirmed by the ICSID Tribunal in an Award embodying the Parties' settlement agreement that incorporated the Supplemental SPA and ended the arbitration proceedings.<sup>75</sup>

#### **F. GRENLEC's Lawsuit Against the Local Directors**

84. In December 1999, four "local" directors, Rupert Agostini, Nelson Louison, Chester Palmer, and Lawrence Samuel, held a press conference accusing WRB of serious mismanagement of GRENLEC.<sup>76</sup> They said the purchase of a prototype engine from Caterpillar International Power Systems, Inc. was marred by self-dealing<sup>77</sup> in light of WRB's corporate connections<sup>78</sup> and that relevant minutes of GRENLEC Board of Directors meeting were falsified. This was denied by WRB which said the purchase was through a European Investment Bank ("**EIB**") approved tendering process designed by the independent consultant, Seeling Bushea & Associates ("**Bushea**").<sup>79</sup> Further, at the press conference the local directors claimed that WRB forced GRENLEC to pursue a dividend policy to maximize near-term profits for its shareholders – and principally WRB itself, as majority shareholder – at the expense of the company's long-term viability.<sup>80</sup> WRB had neglected to make the necessary (and promised) capital investment in GRENLEC to ensure

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<sup>75</sup> Ex. RE-0014, para. 10.

<sup>76</sup> Specifically, the local directors alleged: (a) GRENLEC's affairs were "not being conducted in accordance with the correct procedure and process"; (b) GRENLEC was "paying out dividends in excess of profit made"; (c) GRENLEC had "falsified minutes and has tried to misrepresent what took place at meetings"; (d) "[N]egotiations with Cat Power Systems Inc. for purchase of a new generator was [*sic*] unauthorised by the Board of Directors"; (e) "[T]he appointment of Mr. G. Robert Blanchard Jr. as chairman of the Plaintiff is illegal and ultra vires [GRENLEC]'s Articles of Association"; (f) GRENLEC "had acted improperly in paying out dividends in November, 1999"; (g) "[T]he process whereby the Plaintiff decided to purchase a new engine from Cat Power Systems Inc. was not in accordance with the resolution of the Board of Directors"; and (h) GRENLEC "carrie[d] on its affairs not in the interest of its shareholders." Press Conference Transcript, Agostini, Palmer, Luison, Samuel, held 9 December 1999 (Counter-Memorial, para. 80; Ex. RE-0021; Ex. RE-0017).

<sup>77</sup> Ex. RE-0017; Ex. RE-0021, at p. 2.

<sup>78</sup> Caterpillar International Power Systems, Inc., the company that sold GRENLEC the units, is a member of the broader network of companies for which WRB Enterprises has a dealership.

<sup>79</sup> Minutes of the 232<sup>nd</sup> Meeting of the Board of Directors of GRENLEC, 18 February 1999 (Ex. CE-0091), at p. 5. The Claimants state that the minutes allegedly subject to "falsification" were from the 14 June 1999 Board meeting at which management was authorized to negotiate a contract with Caterpillar International. Those minutes were drafted and brought to the Board at the 29 November 1999 meeting at which they were reviewed and confirmed before being finalized. (Ex. CE-0097 at p. 2) The minutes do not disclose any concern raised about "falsification." (Reply Memorial, para. 92).

<sup>80</sup> Palmer, para. 20.

the proper operation of the utility.<sup>81</sup> WRB had made no further capital investment in GRENLEC after the original share purchase, although further investment was made from time to time by GRENLEC itself from its own funds.

85. WRB denied the allegations made by the four directors which it said “threatened GRENLEC’s reputation, divided the Board, and disrupted employees and management.”<sup>82</sup>

86. The Claimants caused the GRENLEC Board to direct GRENLEC to sue the four directors<sup>83</sup> for breach of fiduciary duties. The defendants counterclaimed that the business “is being carried on in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interest of all the shareholders.”<sup>84</sup> There have been settlement discussions but no settlement. The four directors refused to settle unless GRENLEC paid their legal fees. They contend that they spoke out in their capacity as GRENLEC directors and as such were entitled to reimbursement for legal expenses. WRB says payment of legal fees would amount to an admission of wrongdoing by the Claimants. The dispute remains before the courts.<sup>85</sup> GRENLEC has not pursued its claims and the local directors have not moved to have the case dismissed for want of prosecution.

**G. WRB Offered to Sell its Shares to the Government in 2013 at EC \$8.27 a Share**

87. In late 2012, WRB proposed to sell its stake in GRENLEC to a third party buyer (which had already purchased WRB’s shares in Domlec in the Dominican Republic) but under the SPA, the Government had a right of first refusal to purchase GPP’s shares.<sup>86</sup> WRB represented that it was in a position to sell both GPP’s 50% stake and the 11.4% stake

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<sup>81</sup> Reply Memorial, para. 95. WRB stated that GRENLEC had never paid dividends in excess of profits, and financial reports detailing GRENLEC’s accounts were consistently distributed to directors in advance of Board meetings in order to facilitate accountability.

<sup>82</sup> Second Witness Statement of G. Robert Blanchard, Jr., dated 29 November 2018 (“**Blanchard II**”), para. 73; Reply Memorial, para. 96.

<sup>83</sup> Minutes of the 235<sup>th</sup> Meeting of the GRENLEC Board of Directors, 27 March 2000 (Ex. CE-0098), at p. 2.

<sup>84</sup> Ex. RE-0022, para. 14; see also Ex. RE-0023.

<sup>85</sup> Blanchard II, para. 76.

<sup>86</sup> Ex. RE-0089, s. 7.10(a).

owned by ECH. Accordingly, the negotiations at the time were for the sale of 61.4% of the Company.<sup>87</sup>

88. Eventually, the Government made WRB an offer of EC \$5.49 per share.<sup>88</sup> By letter dated 23 October 2013, WRB rejected this offer, but offered “to enter into exclusive negotiations with the GOG if the government [was] prepared to increase its offer to EC \$8.27 per share.”<sup>89</sup>
89. The Government did not raise its offer. The negotiations died. WRB did not pursue to conclusion a sale of the GRENLEC shares to any other interested party at that time. However, the Respondent contends that WRB’s offer to sell at EC \$8.27 a share provides an accurate benchmark of their value in 2013 which affords a good indication of the value of the shares in 2016 and supports the Respondent’s position that Second Schedule compensation is grossly in excess of the true value of the shares.

#### **H. GRENLEC Pays a Special Dividend**

90. As the prospect of a government repurchase loomed, GRENLEC issued a special dividend to its shareholders<sup>90</sup> of EC \$57 million, or EC \$3.00 per share.<sup>91</sup> Regular dividends had routinely stood at less than EC \$1.00 per share.
91. To pay this dividend, GRENLEC took out a mortgage debenture loan on 29 February 2016 from CIBC FirstCaribbean International Bank for EC \$48 million.<sup>92</sup> The Respondent says that recourse to a loan shows the dividend was wrongly declared because, as of the end of 2015, GRENLEC had only slightly over EC \$18 million in after tax profit, and only EC \$16.6 million in cash and cash equivalents. As part of the loan, GRENLEC assigned to the bank a charge on all of its assets, including the property, plant and equipment as collateral

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<sup>87</sup> Ex. RE-0041, at pp. 79–80.

<sup>88</sup> Bowen, para. 52; Ex. RE-0051.

<sup>89</sup> Ex. RE-0051. The letter further explained that if the Government were to increase its offer to EC \$8.27, WRB “would expect those negotiations to be concluded within 21 days and include a closing date prior to December 20 [2013] as well as other provisions previously discussed with the [G]overnment.”

<sup>90</sup> Palmer, paras. 20–23.

<sup>91</sup> Ex. RE-0077, at p. 55.

<sup>92</sup> Ex. RE-0063.

for the mortgage loan. The Respondent complains that this charge added another constraint on GRENLEC's financial ability to raise capital to meet new investment requirements.<sup>93</sup>

92. The Claimants respond that the Respondent misunderstands or misrepresents GRENLEC's financial position. What is important is not a corporation's cash but the accumulation of its retained earnings. Dividends are paid from accumulated profits (retained earnings). Grenada retained a positive balance of EC \$19 million in retained earnings even *after* payment of the Special Dividend. The fact GRENLEC did not have cash to pay the dividend is irrelevant. The overall transaction increased GRENLEC's debt but the result was to adjust GRENLEC's debt to equity ratio to "better align" with GRENLEC's historical average.<sup>94</sup>
93. The Claimants argue that the Special Dividend constituted a sort of "catch-up" after several years of self-restraint,<sup>95</sup> and that it was discussed and approved by the Board<sup>96</sup> (which of course WRB controlled) and disclosed to the Eastern Caribbean Securities Exchange.<sup>97</sup> The Claimants point out that the shareholders' equity at the end of 2016 (after payment of

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<sup>93</sup> Ex. RE-0063, at pp. 9–12.

<sup>94</sup> Blanchard II, para. 80.

<sup>95</sup> The Claimants argue that the Special Dividend followed many years of very conservative dividends (Reply Memorial, para. 100). Sometimes dividends were not paid at all, for example following Hurricane Ivan or during the prolonged periods when the Government failed to pay its electricity bills which weakened GRENLEC's cash flow. At other times, dividends were paid but at a rate far below profits. For example, during the period 2008 through 2015, only 56% of GRENLEC's profits were paid out in dividends. The result of low, or non-existent, dividend payments was a build-up of equity that jumped to over EC \$100 million by 2015. This substantial accumulation of shareholders' equity was accompanied by GRENLEC paying off debts: GRENLEC's debt dropped dramatically from EC \$88.6 million in 2007 to EC \$29.7 million in 2015 (GRENLEC Annual Report, dated 31 December 2007 (Ex. CE-0108) at 31; GRENLEC Annual Report 2015 (Ex. CE-0152) at 28). As GRENLEC accumulated equity and paid off debts, GRENLEC's shareholders carried a disproportionately large share of GRENLEC's financing burden, while GRENLEC's lenders carried too small a share. The Special Dividend transaction corrected this trend, the Claimants say, by paying out some of the accumulated profits (Reply Memorial, para. 101).

<sup>96</sup> Minutes of the 316<sup>th</sup> Meeting of the Board of Directors of GRENLEC, 9 December 2015 (Ex. CE-0151), at pp. 7-9; Minutes of the 317<sup>th</sup> Meeting of the Board of Directors of GRENLEC, 4 February 2016 (Ex. CE-0155), at p.2.

<sup>97</sup> Grenada Electricity Services Limited Annual Report 2015, Form ECSRC-K (Ex. RE-110), at p. 7.

the Special Dividend) was over EC \$50 million,<sup>98</sup> including EC \$19 million in retained earnings.<sup>99</sup>

94. In negotiating the CIBC loan, GRENLEC took advantage of low interest rates and used the proceeds in part to retire GRENLEC's more-expensive (higher-interest) debt as well as to fund (in greater part) the Special Dividend.
95. The Claimants argue that the Special Dividend in fact *reduced* the quantum of the Claimants' claim in this arbitration as it reduced the assets to be valued under the Second Schedule of the 1994 *ESA*, and thus the claimed repurchase price.<sup>100</sup>
96. In the Tribunal's view, the debate over the Special Dividend simply reflects the contrasting views of the Parties regarding GRENLEC and the role of the Claimants' investment in GRENLEC. The GOG sees GRENLEC as a key player in the economic development of the islands and believes WRB should share that vision by, for example, making significant investment in renewable energy. Instead of maximizing dividends, WRB should have caused GRENLEC to plough money back into the business. By contrast, WRB sees GRENLEC as a profitable investment which is rightly managed to maximize shareholder value. The Respondent has not pointed to any relevant provision under Grenada company law, the *ESA* 1994 or the SPA, which was violated by the Special Dividend or by the decision to largely fund it through the CIBC loan. The Claimants say, and the Tribunal accepts as correct, that WRB was under no legal obligation to share the Respondent NNP Government's view of the best interest of Grenada.

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<sup>98</sup> Grenada Electricity Services Limited, Annual Report (2016) dated 7 March 2017 (Ex. RE-0077), at p. 29 (total equity as of 31 December 2016 of EC \$73 million less the hurricane insurance reserve of EC \$22 million = EC \$51 million).

<sup>99</sup> Grenada Electricity Services Limited, Annual Report (2016) dated 7 March 2017 (Ex. RE-0077), at p. 29.

<sup>100</sup> Reply Expert Report of John MH Ellison ("Ellison I"), dated 29 November 2018, para. 7.4. The quantum of the Claimants' repurchase demand is reduced, they say, by precisely the same amount that the Claimants received from the Special Dividend.

#### IV. THE 2016 RESTRUCTURING THAT ALLEGEDLY TRIGGERED THE GOVERNMENT'S REPURCHASE OBLIGATION

97. On 25 May 2016, the Senate of Grenada passed the *Electricity Supply Act* and *Public Utilities Regulatory Commission Act* (respectively, the “**2016 ESA**” and the “**2016 PURCA**”; collectively, “**the 2016 Acts**”) which came into force on 1 August 2016. The legislation was part of a restructuring of the electricity sector promised by the NNP Government consistently with its long-standing view that privatization of GRENLEC had been a mistake and its implementation bungled. The 2016 *Acts* shortened and narrowed GRENLEC’s exclusive license on the generation of electricity and cut short any future license,<sup>101</sup> cancelled its monopoly on permitting or refusing self-generators,<sup>102</sup> abolished the statutory rate-setting mechanism,<sup>103</sup> and replaced it with a more discretionary procedure before the PURC as well as eliminating GRENLEC’s import duty and tax concessions.<sup>104</sup> GRENLEC no longer had authorization to harness potential wind and water power without making payment to the Government.<sup>105</sup> The guarantee of compensation for revocation of the license contained in Sections 28, 29, and the Second Schedule to the 1994 *ESA* was removed.<sup>106</sup>
98. The Claimants allege and the Respondent denies, that the 2016 laws (the “**Restructuring Package**”) constituted three separate Repurchase Events:
- (a) the amendments to the *rate-setting mechanism* under the 1994 *ESA*, modified “GRENLEC’s rate adjustment, recovery or collection rights, privileges or procedures or service requirements,” so as to engage Section 7.9(a)(iii).<sup>107</sup> The Respondent denies that this change constitutes a “repurchase event” because the PURC has yet to make regulations and there has therefore been no “adverse effect

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<sup>101</sup> Ex. CE-0005, s. 3; Ex. CE-0008, s. 14.1.

<sup>102</sup> Ex. CE-0005., s. 5; Ex. CE-0008, s. 16.

<sup>103</sup> Ex. CE-0005., ss. 7, 10, First Schedule, Third Schedule; Ex. CE-0008, s. 32.

<sup>104</sup> *Ibid.*, ss. 13–14.

<sup>105</sup> *Ibid.*, s. 25.

<sup>106</sup> *Ibid.*, ss. 28, 29, Second Schedule.

<sup>107</sup> Ex. RE-0089, s. 7.9(a)(iii) of the SPA is engaged in the event that there is an “imposition of a change (without the consent of GRENLEC, not to be unreasonably withheld) in GRENLEC’s rate adjustment, recovery or collection rights, privileges or procedures or service requirements specified in the [1994] *ESA* as in effect on the Closing Date which has an adverse effect on the Business or the shares of GRENLEC owned by Buyer.”

on the business or shares in GRENLEC” as required by Section 7.9(a)(iii). Moreover, the Respondent suggests that a drop in rates for electricity will eventually increase demand and ultimately *benefit* GRENLEC;

- (b) the elimination of GRENLEC’s *exemption from customs and other duties* on imported materials, “increased [GRENLEC’s] operating costs” within the terms of Section 7.9(a)(vii).<sup>108</sup> The Respondent counters there is no evidence that GRENLEC has thereby actually experienced any increase in costs; and
- (c) the modification of the term of GRENLEC’s licence and abrogation of its exclusivity come within the terms of Section 7.9(a)(iv).<sup>109</sup> The Respondent does not dispute that the 2016 *Acts* modified GRENLEC’s monopoly and narrowed its scope. As to this ground, the Respondent acknowledges in the Counter-Memorial that:

There is no dispute that the 2016 *ESA* has truncated the eighty-year GRENLEC licence and heralded the end of the Company’s monopoly of all generation, transmission and distribution of electricity in Grenada.<sup>110</sup>

In the event of a Repurchase Event, the GOG “shall...purchase and acquire all GRENLEC shares then owned by [GPP],” and the “purchase price payable ... shall be calculated on the basis specified in the Second Schedule to the [1994] *ESA*.”<sup>111</sup> Eventually the Claimants pursued only the third ground, namely abrogation of the monopoly. Even on this ground, however, the Respondent takes the position that the Claimants’ “**extreme or wilful malfeasance**” in the conduct of GRENLEC’s business disentitles the Claimants from

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<sup>108</sup> Memorial, para. 80. Section 7.9(a)(vii) of the SPA is engaged in the event of “any change in Grenadian Law enacted or taking effect on or after the Closing Date which requires new capital expenditures or increased operating costs by GRENLEC, unless the resulting recovery of Exogenous Costs that GRENLEC would be entitled to receive in connection with such change pursuant to the *ESA* is sufficient to enable GRENLEC to finance the necessary new capital expenditures or increased operating costs.” See Ex. RE- 0089, s. 7.9(a)(vii).

<sup>109</sup> Memorial, paras. 89-96. Section 7.9(a)(iv) of the SPA is engaged in the event of an “annulment, cancellation, limitation, infringement or other impairment of the term, scope or exclusivity of the GRENLEC Licence.” See Ex. RE-0089, s. 7.9(a)(iv).

<sup>110</sup> Counter-Memorial, para. 171.

<sup>111</sup> SPA (Ex. CE-0007/ Ex. RE-0089), s. 7.9(b).



relying on the truncation of the GRENLEC monopoly to justify a “put” of the GRENLEC shares to the Government for repurchase.

99. Consequently, on 22 March 2017, ten months after the passage of the 2016 *Acts*, the Claimants wrote to the Government stating that the 2016 *Acts* “g[ave] direct rise” to a number of Repurchase Events<sup>112</sup> and demanded the purchase price according to the Second Schedule, which the Claimants calculated at USD \$65,428,963 payable within 30 days.<sup>113</sup>
100. On 2 May 2017, the Government responded that there was a **good-faith dispute** as to whether the passage of the 2016 *Acts* gave rise to any obligation to repurchase the GRENLEC shares from WRB<sup>114</sup> and requested negotiations to “resolve the matter”.
101. Three days later, on 5 May 2017, the Claimants filed a **Request for Arbitration** with ICSID, which gave rise to the present proceedings.
102. At a press conference on 8 May 2017, Prime Minister Mitchell restated his desire to negotiate a settlement:

Dr. Mitchell told reporters...WRB has been written to by the Minister of Public Utilities (Gregory Bowen) through the Attorney General office about their request to government to buy the shares. As you know in any disputes **and any request for cost of a particular buy out in any situation usually it’s a negotiating process** and clearly what we did was write WRB saying you just stated what the buyout should be, it’s just the basis (to start the process[]).” (emphasis added)

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<sup>112</sup> Ex. RE-0080, at pp. 2-3.

<sup>113</sup> *Ibid.*, at p. 5. On 1 March 2018, the Claimants filed their Memorial on the Merits. In their submission, the Claimants revised their repurchase demand, increasing it from USD \$65,428,923 to USD \$67,358,975, plus interest (Memorial, para. 124).

<sup>114</sup> The letter from the Attorney General Hon. Anthony C.K. Hood states:

For the avoidance of doubt, the Government has not accepted or agreed to the GPP Demand, and expressly reserves all rights and remedies, whether or not asserted in the March 28 letter or any other correspondence. As you are aware, under Section 7.9© of the SPA, the Government is under no obligation to make any payment **if there is a good-faith dispute between the Parties concerning whether a Repurchase Event has occurred.**

The Government considers, however, that it is in all Parties’ interests to determine if a reasonable, amicable resolution of the matter may be reached. The Government’s review of the GPP Demand, including analysis of the [Claimants] KPMG Report, is ongoing and may entail requests for additional information. In the interim, to ensure that the process moves forward, we propose that the Parties schedule a meeting during the week of June 5, 2017 to discuss these issues, in which the participants will be representatives of the Parties who are authorized to resolve the matter. (emphasis added) (Ex. CE-0017).

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So, now we are being asked to pay goodwill and I can't blame [WRB] so we have to negotiate. We may have to pay some goodwill indeed unfortunately...<sup>115</sup>

103. The Claimants note that at the press conference, the Prime Minister did not deny that the 2016 *Acts* put the GOG under an obligation to repurchase the shares and pay compensation nor did the Prime Minister speak of “extreme or wilful malfeasance”. The Prime Minister’s only issue was to negotiate how much compensation would have to be paid to purchase the GRENLEC shares.

## V. ISSUES IN DISPUTE

104. The Claimants seek an award:
- (a) declaring that a “Repurchase Event” has occurred and that the Government is therefore obligated to purchase and acquire all GRENLEC shares owned by GPP at the price calculated on the basis specified in the Second Schedule to the 1994 *ESA*, namely a value of EC \$361.882 million [USD \$134 million] for 100% of GRENLEC, and EC \$180.941 million [USD \$67 million] for the Claimants’ 50% interest in GRENLEC;
  - (b) declaring that the Government has breached its obligations to the Claimants under the SPA by failing to purchase and acquire, by no later than 3 May 2017, all GRENLEC shares owned by GPP;
  - (c) ordering that the Government complete, within 30 days of the Tribunal’s award, its purchase and acquisition of all GRENLEC shares owned by GPP, and by no later than such time, to pay the Claimants, in immediately available funds, the sum of not less than EC \$180.941 million [USD \$67 million];
  - (d) awarding the Claimants pre-and post-award interest on the repurchase price of EC \$180.941 million (and on all other amounts awarded), at a rate of 6% compounded

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<sup>115</sup> *NNP regime backing down on hostile GRENLEC position*, THE NEW TODAY, dated 8 May 2017 (Ex. CE-0049).

semi-annually, from 3 May 2017 up until the date of payment;

- (e) declaring that all sums to be paid by the Government pursuant to the Tribunal's award must be paid net of, and exempt from, all Grenadian taxes, levies, and other duties and may be repatriated by the Claimants free and exempt from all Grenadian taxes, levies, and other duties;
- (f) dismissing the Government's counterclaim;
- (g) awarding the Claimants the costs, including attorneys' fees, associated with enforcing its rights prior to these proceedings; and
- (h) awarding the Claimants the costs, including attorneys' fees, associated with these proceedings, including all professional fees and disbursements.<sup>116</sup>

105. With respect to liability, the Respondent raises as grounds for defence and rejection of the claim in whole or in part:

- (a) the Claimants have failed to establish that a **rate-adjustment** repurchase event has occurred;<sup>117</sup> or that a **cost-increase** repurchase event has occurred<sup>118</sup> and that wilful

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<sup>116</sup> Reply, para. 293. In the Reply, the Claimants sought the sum of not less than EC \$182,150,000, which was revised to EC \$180.941 million during the course of the hearing.

<sup>117</sup> The Respondent argues that under SPA 7.9(a)(iii), no Repurchase Event is established unless *three* cumulative requirements are met: (i) the Government made a change to "GRENLEC's rate adjustment, recovery or collection rights, privileges or procedures or service requirements"; (ii) that this change was effected "without the consent of GRENLEC, not to be unreasonably withheld"; and (iii) the change had "an *adverse effect* on the Business or the shares of GRENLEC." (Ex. RE-0089) The Respondent denies any "adverse effect" under the 2016 *PURCA*. Any public utility may seek a rate increase from PURC "on the ground that the claimed rate modification is fair and reasonable so that the modified rate would constitute a fair return upon the fair value of its property." The Respondent argues that even if the Government's reforms result in lower rates, that would be justified under the 1994 *ESA*. The drop in price could very well boost investment and overall demand in the market, thus leading to an increase in overall revenues for energy supplier, including GRENLEC. (See Counter-Memorial, para. 162). However, this theory is not supported by expert evidence. In particular, the PURC may consider (i) the efficient capital employed by the relevant public utility, valued at the most efficient cost; (ii) the efficient operating expenses of the public utility; (iii) the annual depreciation calculated upon the efficient capital cost of the public utility; (iv) taxes and other duties as may be payable by the public utility; (v) the returns on the depreciated efficient original cost rate base of the public utility; (vi) the requirement that the public utility provide an up-to-date and cost effective service to the public and that it keeps up-to-date with technological and other advances in its particular industry; and (vii) the quality of the service provided by the public utility". (Ex. CE-0009)

<sup>118</sup> The Respondent argues that there is no "cost increase" repurchase event despite the elimination of "GRENLEC's exemption from customs and other duties on imported materials." Mr. Blanchard states in witness statement that, "GRENLEC incurred EC \$1,211,440 in additional costs in the period January 1, 2014 through August 1, 2016," as a

malfeasance precludes any finding of a Repurchase Event on the basis of the **abrogation of the monopoly**;

- (b) even if there had been a Repurchase Event, the Respondent is under **no liability** to pay Second Schedule compensation because:
  - (i) Second Schedule compensation constitutes an unenforceable penalty;
    - (A) the Claimants' demand is not just the specific performance of a put option but a remedy by way of liquidated damages for the failure of the GOG to repurchase the GRENLEC shares;
    - (B) the repurchase demand of revised to USD \$67 million is grossly disproportionate to any legitimate expectation the Claimants could have in obtaining compensation for their shares;
  - (ii) moreover, imposition of Second Schedule compensation is an unconstitutional attempt to fetter the lawful exercise of governmental authority and contractual provisions that contravene the constitution are void and can have no legal effect;
- (c) on the issue of **Quantum**, the Respondent contends that if a repurchase event is established, the Claimants should nevertheless receive no more than the fair market value of their shares;
  - (i) the Discounted Cash Flow ("**DCF**") method is the appropriate method to estimate the fair market value of the Claimants' shares;
  - (ii) the fair market value of the Claimants' shares under the 2016 *ESA* is no more than EC \$63.6 million (USD \$23.6 million);

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result of the partial termination of its tax exemption effected by the *Electricity Supply Amendment Act* 2013. (See Memorial, para. 96; Blanchard I, para. 48.)

- (iii) in the alternative, the fair market value of the Claimants' shares under the 1994 *ESA* is no more than EC \$82.3 million (USD \$30.5 million);
  - (iv) in the further alternative, should the Tribunal apply the Second Schedule, it should disregard the Claimants' inflated valuation and apply the updated PwC assessment of EC \$276.239 million (USD \$51.2 million);
- (d) and by way of **Counterclaim**, the Respondent contends that the Claimants have unfairly prejudiced GRENLEC's minority shareholders including the Government through "disadvantageous transactions and subsequent litigious behavior", the Claimants' payment of "improper dividends" and promotion of "discrimination" between shareholders.<sup>119</sup> The amount of claimed damages is not quantified.

## VI. JURISDICTION

106. The Respondent has not raised any objection against the Tribunal's jurisdiction. In accordance with Article 41(1) of the ICSID Convention, the Tribunal is the judge of its own competence. Article 25(1) of the ICSID Convention foresees that "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State, which the parties to the dispute consent in writing to submit national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. In addition, Article 25(2)(b) of the ICSID Convention establishes that a "National of another Contracting State" means "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

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<sup>119</sup> Rejoinder, paras. 404-443.

107. First the Tribunal is satisfied that the Parties consented in writing to submit the dispute to the Centre. In particular, the Parties agreed in Section 11.2(a) of the SPA to submit any dispute “arising out of or in connection with” the SPA to ICSID.<sup>120</sup>
108. Second, the Tribunal is further satisfied that the Claimants are nationals of another Contracting State for the purposes of Article 25 of the ICSID Convention. The United States of America has been an ICSID Contracting State since 14 October 1966, and Grenada has been an ICSID Contracting State since 23 June 1991.<sup>121</sup>
109. WRB is a company incorporated in Florida, United States. GPP is a company incorporated in Grenada, which qualifies as a “national of another Contracting State” in light of the Parties’ agreement in s. 11.2(a) of the SPA which provides that “[f]or purposes of consenting to the jurisdiction of the Convention, the Parties agree that each of the Buyer Parties [which includes GPP] is a foreign controlled entity.”
110. Based on the evidence before it, the Tribunal is also satisfied that there is a legal dispute arising out of an investment for the purposes of Article 25 of the ICSID Convention.
111. The Tribunal therefore concludes that it has jurisdiction over the present dispute between the Claimants and the Respondent.

## **VII. APPLICABLE LAW**

112. Article 42(1) of the ICSID Convention provides that “[t]he Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.” Section 11.1 of the SPA provides that it is to be governed by and construed in accordance with the law of Grenada, a defined term that includes “the Constitution of Grenada” and “the common law of Grenada”. However, this general instruction is qualified in s. 11.1 itself by “the understanding” that the provisions of s. 7.9 [pertaining to the repurchase mechanism] and other identified sections of the SPA are to apply “notwithstanding inconsistent provisions of Grenadian law”. As will be seen, the Parties disagree on whether there is any

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<sup>120</sup> Ex. CE-0007, s. 11.2(a).

inconsistency between s. 7.9 and Grenadian law, and if so, whether, as a matter of law, the “carve out” of s. 7.9 from the application of Grenadian law is effective.

## VIII. THE TRIBUNAL’S ANALYSIS OF THE LIABILITY ISSUES

### A. The Respondent’s Allegation that the Terms of the 1994 Privatization Were Oppressive to Grenada

113. At the outset, the Tribunal wishes to address the Respondent’s general challenge to the 1994 package of laws and agreements made by the prior (and rival) NDC government as extravagantly improvident. The Claimants, says the NNP Government, have performed badly. They have reaped unconscionable benefits while hindering progress and in particular obstructed the development of “utility scale” renewable energy. It would be oppressive and unfair to reward the Claimants for their mismanagement with a grossly excessive award of compensation calculated under the Second Schedule.

114. The Respondent does not seek to set aside the SPA or Supplementary SPA as unconscionable or tainted with bad faith. There is no allegation of corruption. The Tribunal will now address the following particulars.

#### (1) The GOG Negotiating Team Lacked Expertise

115. According to the Respondent, the Government team had no experience of GRENLEC’s operations or the energy sector itself.<sup>122</sup> WRB and its legal team were able to extract a raft of concessions in exchange for a bloated offer of up-front cash.<sup>123</sup> The inordinate length of the licence and GRENLEC’s exclusive control of electricity generation were relics of the colonial regime left behind by the British.<sup>124</sup> WRB’s expanded list of Repurchase Events included penalty provisions taken from colonial-era legislation, which,<sup>125</sup> when combined with gutting any meaningful PUC “oversight” capacity, left the Government with no practical means of regulating the Claimants’ conduct.

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<sup>122</sup> Counter-Memorial, paras. 26-27, 41-42.

<sup>123</sup> *Supra*, para. 64.

<sup>124</sup> *Supra*, paras. 13-14.

<sup>125</sup> *Supra*, paras. 35-36, 63-65.

116. However, the Claimants point out that the GOG team was led by senior Ministers and advised at every stage by Price Waterhouse and other consultants. The GRENLEC shares went to tender in an open multi-stage bidding process. The suggested use of the Second Schedule methodology came originally from the Government not the Claimants.

117. The Commission of Inquiry set up by the NNP Government itself in 1997 reported that:

Price Waterhouse produced a Privatization Project in June 1993, a valuation of GRENLEC in June 1993, a review of its valuation in May 1994, an analysis of the best and final offers in December 1993, a summary of the finalists' proposals in December 1993, and a comparison of the best and final offers in December 1993.<sup>126</sup>

118. The Commission of Inquiry was critical of some of the ultimate terms of the privatization (“thought-provoking”), but concluded that the Government made the deal with its eyes wide open.<sup>127</sup>

119. **In the Tribunal’s view**, there is no credible evidence of impropriety or victimization in the negotiation of the SPA. The terms of the SPA thus negotiated do not look as attractive to the present NNP Government as they did to the 1994 NDC Government, but that is no basis for concluding that the Government was the victim of a lopsided or unfair negotiation.

**(2) GRENLEC’s Monopoly Was an Anomalous “Colonial-Era” Monopoly**

120. The NDC Government’s initial Request for Proposals presented GRENLEC as a “natural monopoly.”<sup>128</sup> However, the NNP Government now says, the scope, exclusivity and 80-year term of the monopoly granted to GRENLEC under the 1994 *ESA* inappropriately carried forward the 1960 model and fettered the Government’s ability to intervene in the energy sector in the public interest, and adversely affected development of Grenada’s abundant renewable energy resources.

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<sup>126</sup> Commission of Inquiry Report, Ex. CE-0031 at p. 8.

<sup>127</sup> *Ibid.*, at concluding summary: “No opinion is given as to whether the best terms were obtained for Government’s shares in GRENLEC, but the mention by us of certain provisions of the Share Purchase Agreement which we consider to be unfair to Government and to be not in the best interests of Grenada, should be thought-provoking.” (pp. 52-53).

<sup>128</sup> GRENLEC Information Memorandum, dated 1993 (Ex. CE-0028), at p. 20.



121. **In the Tribunal's view**, there is no doubt the 1994 privatization reduced the GOG's public policy options. The NDC Government made a trade-off between continuing state control and private investment. The evidence is that monopolies are prevalent in small island energy markets in the Caribbean.<sup>129</sup> The International Monetary Fund reviewed the Caribbean energy markets in 2016 and concluded that "[f]or the most part, electric utilities are vertically integrated monopolies that hold exclusive licenses for generation, transmission, distribution and sale of electricity."<sup>130</sup> The grant of a monopoly was important to profitability and affected the price that investors (including WRB) were prepared to offer for shares in GRENLEC.<sup>131</sup> The Tribunal does not accept this aspect of the Respondent's attack on the 1994 privatization.

**(3) The GOG Regulator, the Public Utilities Commission Established Under the 1994 Regime was "Inoperative" Because the "Claimants had Designed [it] to be Toothless, in the Contract and Legislation they Drafted in 1994"**<sup>132</sup>

122. The Respondent complains that the 1994 restructured *PUC* was "toothless" because the *PUC Act* did not permit effective government oversight of GRENLEC or grant adequate powers to curb its mismanagement.

123. However, the evidence is that design of the PUC was established by the Government itself before the bidding began: see *GRENLEC Information Memorandum*, dated 1993, which noted that "the proposed Public Utilities Commission Act...has been presented to the Parliament for approval."<sup>133</sup>

124. It is true that the role of the PUC in rate setting adjustments was largely limited to whether the proposals complied with the 1994 *ESA* formula but the limited role (which caused the resignation of some PUC Commissioners) gave potential investors security and a margin of protection once their investment had been made. In this particular trade-off between

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<sup>129</sup> First Expert Report of Dr. Boaz Moselle, dated 29 November 2018 ("**Moselle**"), para. 4.10.

<sup>130</sup> International Monetary Fund, *Caribbean Energy: Macro-Related Challenges*, IMF, 2016 (Ex. BM-01), para. 10.

<sup>131</sup> Blanchard II, para. 18.

<sup>132</sup> Counter-Memorial, para. 329.

<sup>133</sup> Ex. CE-0028, p. 17.

regulation and maximizing investment the NDC government chose investment, and this choice factored into the price the bidders were prepared to pay for GRENLEC shares.

125. The allegation that it was the Claimants which masterminded a “toothless” 1994 *PUC Act* was not supported by any evidence of impropriety in the 1994 negotiations and is not consistent with the bid records. The Respondent’s chief fact witness, Minister Gregory Bowen, had no personal involvement in the 1994 negotiations and disclaimed personal knowledge of how they were conducted.
126. When some members of the PUC resigned after the 1994 changes to the PUC, Minister Bowen did not replace them. The Tribunal does not accept the Respondent’s submission that no qualified individuals in Grenada could be found to accept an appointment to the PUC which had a role in respect of all utilities in Grenada including but not limited to the electricity sector. It was the Government’s failure to staff the PUC (whether “toothless” or not) rather than any action by the Claimants that led it to be “inoperative”. As a result, for example, the PUC complaint procedure was not only unavailable to electricity rate payers but also to the customers of the other utilities in Grenada as a whole.
127. It is of interest that new regulations are expected to be passed by the Public Utilities Regulatory Commission (the “PURC”) under the 2016 *PURC Act* but there is no evidence that this has yet been done.

**(4) The Electricity Rate-Setting Framework [RPI-X] Meant That “Virtually Any Increase in Costs was Directly Passed on to the Grenadian Consumer”**

128. The Respondent does not claim that any of the GRENLEC rate increases since 1994 contravened the statutory formula.
129. The evidence is that the rate-setting methodology in the 1994 *ESA* was presented by the Government in its offering memorandum during the RFP process. The Government received advice from PwC that the rate structure selected would have a “significant effect” on the price obtainable for GRENLEC shares.<sup>134</sup> It then instructed bidders to assume, for

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<sup>134</sup> Privatization Plan & Valuation for GRENLEC, Section III on Valuation of GRENLEC, dated June 1993 (Ex. CE-0066), at pp. 8-10; Memorandum, GRENLEC Privatization Issues, dated 16 August 1994 (Ex. RE-0009), at p.

purposes of their bids, that non-fuel charges would “be set using RPI-X”<sup>135</sup> [i.e. Retail Price Index minus a negotiated value of “x”] and that any increase in fuel oil prices would be incorporated in electricity rates based on actual prices.”<sup>136</sup> The evidence is that the “RPI-X” formula is common in regulated industries. The Government advised bidders that the specified rate structure would “form the basis to compare bids and begin negotiations.”<sup>137</sup> Ultimately, in terms of non-fuel charges, the Claimants agreed to the formula of RPI-2 (i.e. “x” equals 2) which required GRENLEC to achieve cost efficiencies substantially in excess of increases in the retail price index [RPI] in order to justify a real rate increase.

130. **The Tribunal finds** that the Government has not established that the RPI-X formula is either unusual or worked unfairly to Grenada’s disadvantage.

**(5) GRENLEC’s Electricity Rates in Grenada are Excessive**<sup>138</sup>

131. The Respondent alleges that GRENLEC’s electricity rates are higher than can be justified.<sup>139</sup>

132. In response to this allegation, the Claimants called an expert, Dr. Boaz Moselle, who testified that rates in Grenada were consistent with Caribbean markets generally<sup>140</sup>

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1 (“PW[C] estimated GRENLEC’s cash flow using various assumptions for the rate structure (RPI, RPI-2)...The higher the value the less favourable were the conditions for the consumer, i.e. the higher would be the price of electricity.”).

<sup>135</sup> Electricity rates consisted of (i) a “non-fuel” charge, adjusted by the rate of inflation (the Reference Price Index or “RPI”) *less* a specified amount (referred to as “X” or 2%), and (ii) a “fuel” charge *reduced by* a stipulated portion of fuel efficiency savings. Accordingly, under the statutory formula, the maximum increase in the non-fuel charge in a given year was the rate of inflation *less* 2%.

<sup>136</sup> GRENLEC Information Memorandum, dated 1993 (Ex. CE-0028), at p. 6.

<sup>137</sup> *Ibid.*, at pp. 6, 21 (“The Government is currently envisioning the use of RPI-X regulation for GRENLEC after it is privatized.”).

<sup>138</sup> Counter-Memorial, para. 91.

<sup>139</sup> The Inter-American Development Bank drafted an Energy Dossier outlining the challenges and opportunities in 2015 and concluded that Grenada “possesses substantial renewable energy potential. Its geothermal prospects are excellent, and its location in the tropics ensures widespread availability of wind and solar resources as well as municipal waste-to-energy.” See Ex. CE-0042 at p. 7.

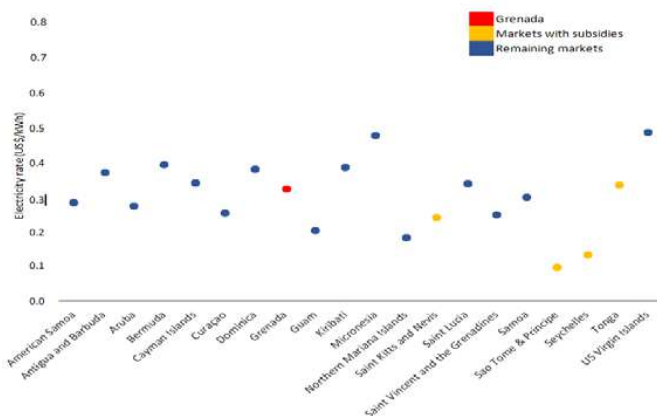
<sup>140</sup> Dr. Moselle’s analysis is as follows:

especially those which operated without Government subsidies.<sup>141</sup> The Respondent's expert, Robert Mudge, compared Grenada rates with U.S. rates, an exercise which the Tribunal considers unhelpful.

133. In any event, the Respondent does not dispute that the rates were calculated according to the SPA formula to which the prior Government had agreed.

**(6) The Failure of GRENLEC, Under WRB's Direction, to Develop Grenada's Ample Resources of Renewable Energy**

134. The Respondent states that the **2016 restructuring laws** were in the national interest because GRENLEC was squandering Grenada's renewable energy potential. It points out, correctly, that Grenada is blessed with much sun for solar energy, much wind for industrial turbines and much potential for the generation of geo-thermal energy.<sup>142</sup> In relation to these great opportunities, GRENLEC's investment for renewable energy, according to the



Dr. Moselle testified that the comparison favours Grenada more strongly for commercial and industrial consumers. (Moselle, p. 41)

<sup>141</sup> Dr. Moselle responded to Mr. Mudge in part as follows:

Now, turning to Slide 21, Mr. Mudge makes a very good point about this comparison. He says you have these prices from 19 other markets, you, Moselle, but your Grenada price is from 2015, and not all of the comparator prices are from 2015, so I agree with him that it's better to use only data from 2015. Now, unfortunately, it's not available for all 19, or I wasn't able to find 2015 prices for all 19 islands, but what we can do very simply is take those graphs and delete the dots where the prices are not from 2015, and so make a comparison which is only for prices that are exactly from 2015. And doing that, as I'll show you in a minute, leads you to the same qualitative conclusion, so Grenada's rates are still in line with those of the utilities in comparable markets.

(Transcript, 20 June 2019, p. 1116, ll. 2-18.)

<sup>142</sup> See, Ex. CE-0042 at p. 7.

Respondent, is a pittance. Given the rate-setting structure, GRENLEC was given no incentive to switch to renewables from expensive imported diesel fuel, the cost of which constitutes a significant drain on Grenada's foreign reserves.

135. The Inter-American Development Bank observed that development of energy resources in Grenada was "hampered" by the regime created by the 1994 *ESA*:

The **existing legislative and regulatory framework** has enabled a monopolistic, fossil fuel-biased development of the electricity sector, **severely hampering the development of renewable energy** technologies. Furthermore, the ability of external forces, such as the government, to implement changes to encourage the use of renewable energy is limited under the current framework.<sup>143</sup>

136. For whatever reasons (and the Parties point the finger of blame at each other), the result has been a disappointing level of renewable energy development, as the Claimants' witness, Robert Blenker acknowledged:<sup>144</sup>

Q. Excuse me, Mr. Blenker. No utility-scale renewables project in Grenada by the end of 2017; right?

A. That is correct.

Q. No geothermal energy project?

A. No.

Q. No utility-scale solar?

A. No.

Q. No wind power connected to the grid.

A. Nothing significant, no.

Q. Okay. Now, in the current plan that is the 2014 to 2020 renewable energy Strategic Plan, you set a new goal for GRENLEC of increasing renewable energy penetration to 20 percent of the nation's electricity usage by 2020; right?

A. Yes.

Q. Okay. It's 2019 now. GRENLEC isn't going to hit that target, is it?

A. No.

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<sup>143</sup> *Ibid.*, at p. 23.

<sup>144</sup> Transcript, 18 June 2019, p. 390, ll. 10-22 to p. 391, ll. 1-6 (Blenker testimony).

137. The Respondent lists what it regards as lost opportunities:

- (a) despite potential for solar development on the island, in 2015 only 0.6% of generation capacity came from solar,<sup>145</sup> and two-thirds of this solar power came from interconnected *private* owners.<sup>146</sup> The Claimants say they were unable to acquire the necessary land for utility scale facilities;<sup>147</sup>
- (b) despite the potential for wind generation, a very promising site on the island of Carriacou remains undeveloped;<sup>148</sup>
- (c) despite the potential for geothermal generation,<sup>149</sup> GRENLEC and the Government could not advance its development beyond preliminary Heads of Agreement. The Claimants blame the Government, as testified by Mr. Blenker:

Q. To be clear, Mr. Blenker, it's your testimony that the reason that the geothermal resource has not been developed is because the Government has not engaged with GRENLEC?

A. Yes.<sup>150</sup>

138. The Respondent says WRB insisted on unreasonable concessions. For whatever reason, the potential remains untapped.

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<sup>145</sup> Ex. CE-0042 at p. 11.

<sup>146</sup> *Ibid.*

<sup>147</sup> Mr. Blenker explained:

...following our inability to obtain sufficient land to do a utilities-scale project, whether it be wind or solar, we, as a short-term measure, we opted to just move ahead and do whatever we could do, which was to put solar on property we already owned, and this included the buildings at Queen's Park, this included some ground-mounted solar at plains on a piece of property that GRENLEC owned, as well as on Petite Martinique, and I think that's what that reflects. So, despite our inability to make significant headways in large enough parcels of land, you also notice that even with certain regulatory uncertainty, we went ahead and finished some projects on our own roof tops (Transcript, 18 June 2019, p. 432, l. 12 to p. 432, ll. 4-18).

<sup>148</sup> The European Union ("EU") had agreed to provide up to €3 million for the Carriacou Wind Project, pending a successful tender. That offer of funding for the project has since expired. (Auguste, para. 19) The Claimants blame lack of Government cooperation, but John Auguste, Senior Energy Officer in the Ministry of Finance, testified that the Government assisted the Company in acquiring the land on Carriacou, at the Government's own expense and the company received several tenders none of which went ahead. Mr. Auguste testified that the Government was unable to independently verify the alleged deviations, as GRENLEC did not allow the Government's steering committee for the project to review the tenders. (Ex. RE-0053 and Auguste, para. 20).

<sup>149</sup> Auguste, para. 23.

<sup>150</sup> Transcript, 18 June 2019, p. 406, ll. 12-16.

139. The Claimants argue that in fact the 1994 *ESA* created substantial *incentives* for GRENLEC to introduce renewables.<sup>151</sup> Renewable sources now support more than 7% of GRENLEC's peak demand.<sup>152</sup> To the extent that GRENLEC is required to consume less diesel fuel, 90% of the fuel efficiency savings accrue to GRENLEC (the company was required to pass the remaining 10% through to its consumers). This formula provided an incentive for GRENLEC to substitute fossil fuel generation with renewable sources<sup>153</sup> and GRENLEC has attempted to do so. Over the years GRENLEC has identified a number of renewable energy projects which, the Claimants say, were "thwarted" by the GOG, and in particular by the NNP party when in power,<sup>154</sup> including efforts to access land for utility-scale solar facilities,<sup>155</sup> an incomplete wind power project on the island of Carriacou<sup>156</sup> and a promising geothermal site.<sup>157</sup>
140. **The Tribunal concludes** on the evidence that neither the Claimants nor the Government pursued renewable energy proposals with as much vigour as they now assert. Whatever the respective merits of these dueling allegations, the Respondent was unable to identify any statutory or contractual obligation on the part of GRENLEC (or the Claimants) to

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<sup>151</sup> Reply Memorial, para. 73.

<sup>152</sup> Witness Statement of Robert Blenker, dated 29 November 2018 ("**Blenker**"), para. 67; GRENLEC Annual Report, 31 December 2017 (RE-0082), at p. 12. Mr. Blenker testified:

Q. Okay. Then let's be sure that we're talking about the same thing. So, at the end of 2017, renewable energy counted for 4.5 percent of total installed capacity?

A. Correct.

Q. Okay. But if we expressed that as a function of peak demand, it would be higher than 4.5 percent; right?

A. Yes.

Q. It would be somewhere north of 7 percent?

A. Correct.

Q. And that's where you got your number that you used with Mr. Brewer yesterday?

A. Correct.

(Transcript, 18 June 2019, p. 370, ll. 8-21)

<sup>153</sup> Moselle, para. 5.21; Moselle Appendix F.

<sup>154</sup> The Claimants' renewables expert, Robert Blenker, testified that he spent the majority of his time for the last 10 years on spearheading GRENLEC's renewable energy initiatives including solar, wind and geothermal energy projects and has "assessed" hydroelectric possibilities, wave power, ocean thermal energy conversion, and biomass, as potential sources of energy. GRENLEC also worked with the Grenada Solid Waste Management Authority to launch a waste-to-energy project. (Reply Memorial, para. 74)

<sup>155</sup> Blenker, paras. 44-48; Proposal to GAA dated 27 November 2012 (Ex. CE-0197).

<sup>156</sup> Counter-Memorial, paras. 101-103.

<sup>157</sup> Blenker, para. 59; Heads of Terms for Geothermal Resource Development Agreement, dated 27 July 2012 (Ex. CE-0127); Summary of Meetings, dated 9 August 2012 (Ex. CE-0196).

develop renewable energy.<sup>158</sup> Again, GRENLEC under the guidance of WRB may have fallen short of what might be expected of a good corporate citizen, but the root of the problem is the decision of the NDC Government in 1994 to create the regulatory framework which the NNP Government now considers “toothless” and the 1994 failure to set performance standards for renewable energy which, with the benefit of hindsight, would have promoted its development.

**B. The Claimants’ Submission That One or More Elements of the 2016 Legislation Constituted a “Repurchase Event”**

141. The Claimants contend that the 2016 legislation fundamentally altered the 1994 bargain in at least three ways:

- (a) the 1994 *rate setting mechanism*, which until 2016 operated predictably according to a statutory formula, was replaced with a regulatory procedure administered by the PURC. The jurisdiction of the PURC includes a public interest discretion;
- (b) the abolition of the *tax exemption* will necessarily result in higher capital and operating costs going forward;
- (c) the termination of the *80-year monopoly* and the substitution of a shorter and narrower period of exclusivity made GRENLEC shares a fundamentally different investment than in 1994.

142. In subsequent pleadings, the Claimants did not pursue the alleged Repurchase Events associated with the rate-setting mechanism or the tax exemption but concentrated on what it claimed was an abrogation of GRENLEC’s 80-year monopoly and associated rights.

143. The Respondent concedes that the 2016 “restructuring package” might otherwise constitute a Repurchase Event as a result of abrogation of the monopoly **but**, Section 7.9(a)(iv) of the SPA permits Government to intervene in the monopoly where the Claimants have “committed **extreme or wilful malfeasance** in, or abandonment of, its management of

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<sup>158</sup> See Rejoinder, para. 98.



GRENLEC of such a nature and to such a degree as warrants” such Government action with regard to the licence.<sup>159</sup>

144. Accordingly, the Tribunal turns to the issue of whether the 2016 impairment of the GRENLEC monopoly is negated by the alleged “extreme or wilful malfeasance” on the part of the Claimants.

**(1) Particulars of the Allegations of “Extreme or Wilful Malfeasance”**

145. The Respondent says generally that from the very inception of the Claimants’ investment, their actions show they never intended to be a genuine partner of the Government in the operation of the utility. Instead, at every turn, the Claimants have operated the Company so as to extract the highest return for themselves, without heed to the protests and warnings of the local directors or other shareholders, or indeed, the long-term viability of GRENLEC itself.<sup>160</sup> In particular:

(a) GRENLEC’s first major purchase under the Claimants’ control was two Caterpillar generator units. The purchase was made without consultation with the rest of the

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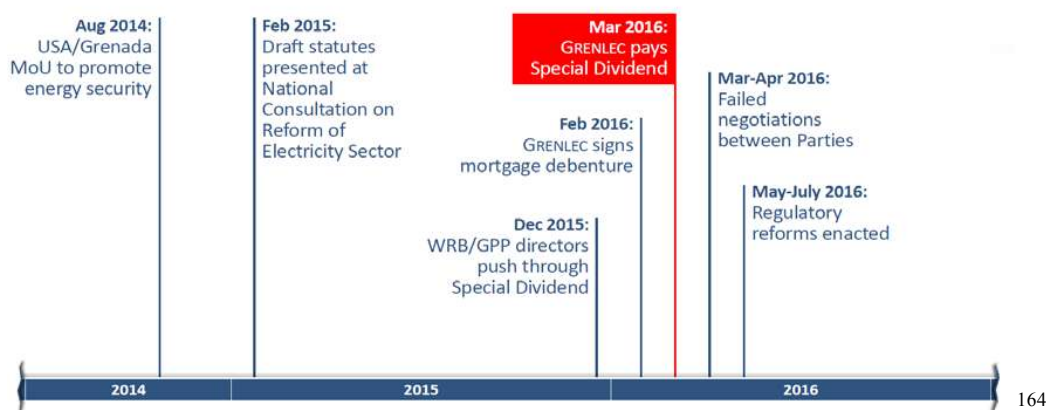
<sup>159</sup> In full, Section 7.9(a)(iv) provides that the listed “occurrences or circumstances...referred to as Repurchase Events” include:

any annulment, cancellation, limitation infringement or other impairment of the term, scope or exclusivity of the GRENLEC Licence (any such action hereinafter referred to as a “**GOG Action**”), *unless* such GOG Action is taken pursuant to and in accordance with any final and binding order issued by the Centre (as that term is defined in Section 11.2) following the conclusion of an arbitration of a Dispute between the Parties pursuant to and in accordance with the provisions of Section 11.2, which order holds that *Buyer [GPP] has committed extreme or wilful malfeasance in, or abandonment of, its management of GRENLEC of such a nature and to such a degree as warrants such GOG Action* (taking into account the economic consequences to GRENLEC and Buyer of implementing and enforcing such GOG Action without requirement of payment by the GOG in accordance with this Section 7.9). (Ex. RE-0089, s. 7.9(a)(iv)).

<sup>160</sup> Counter-Memorial, para. 187. The Respondent says that Grenadian electricity rates rank among the highest in the world. (Ex. CE-0042, at p. 10 (“Electricity prices in Grenada, as in many other small islands states in the Caribbean, rank among the highest in the world. As of March 2015, they stood at around EC \$1.00/kWh, even without considering additional environmental levies and value-added taxes.”)) For example, from January 2011 to December 2014, electricity prices in Grenada varied between USD \$0.50 and USD \$0.68 per kilowatt hour, while prices in the United States over the same period were between USD \$0.07 and USD \$0.12 per kilowatt hour – between four and ten times less expensive than in Grenada. (Ex. CE-0039, at p. 5.) Moreover, the country, one of the largest consumers of energy in the Eastern Caribbean, is almost wholly reliant on imported fossil fuels. (Ex. Re-0038 at p. 52) This combination of dependence and high costs has significant consequences for Grenada’s economy. As the International Renewable Energy Agency (“IRENA”) concluded in 2012, “slow economic growth, declining [foreign direct investment] and stagnant remittances, coupled with the country’s high dependence on imported fossil fuels, have significantly hampered the country’s growth.” (Ex. RE-0041, at p. 21) The World Bank interviewed private enterprises in 2010 and found that “electricity costs were ranked as one of the biggest obstacles to doing business in most OECS countries” (Ex. RE-0052, at 29).

Board, and without disclosing the nature and extent of the relationship between Caterpillar and WRB;<sup>161</sup>

- (b) WRB has repeatedly used its control of the Board to favour the Claimants and in particular to declare dividend payments without the approval of non-WRB Board members.<sup>162</sup> The Respondent particularly complains about the Special Dividend of EC \$57 million issued in 2016, just as this dispute was coming to the fore;<sup>163</sup>



- (c) WRB has continued to collect for over 20 years management fees under an arrangement that in 1994 was intended to be transitional to provide time to train qualified Grenadians to take over the senior positions;
- (d) the Claimants' fees for lawyers and forensic accountants have caused GRENLEC to pay for work of benefit only to the Claimants. GRENLEC paid the Claimants' legal fees in the early phase of the current ICSID dispute with the GOG.<sup>165</sup> GRENLEC paid for the KPMG valuation report that served as the basis for Claimants' "exorbitant repurchase demand."<sup>166</sup> Only the Claimants, not

<sup>161</sup> Palmer, paras. 14-15; Ex. RE-0017, at pp. 1-2.

<sup>162</sup> Ex. RE-0017, at p. 4.

<sup>163</sup> Palmer, para. 20.

<sup>164</sup> Respondent's Opening Argument, slide 27.

<sup>165</sup> Palmer, para. 24.

<sup>166</sup> Rejoinder, para. 184.

GRENLEC, would stand to gain from any award this Tribunal might render against the Government.

146. The Respondent provided a supplementary summary of wilful malfeasance in its Rejoinder:<sup>167</sup>

- (a) in negotiating with an inexperienced Government team, the Claimants secured a legal regime that combined monopoly power with no cap on returns all of which was protected by the looming threat of a repurchase penalty;<sup>168</sup>
- (b) the Claimants caused GRENLEC to issue almost all its profits in dividends, over 60% of which go directly to WRB and its principals or directors,<sup>169</sup> without regard to the capital needs of GRENLEC and the Grenadian economy;
- (c) the Claimants caused the Company to maintain legal proceedings against Local Directors for two decades for publicly and appropriately challenging the Claimants' management of GRENLEC. Moreover, the Claimants have caused GRENLEC to refuse to pay the legal costs of the four local directors even though the non-WRB directors spoke out in their capacity as directors in what they consider to be the best interest of the company;<sup>170</sup>
- (d) the Claimants have not implemented a single utility-scale renewable energy project;<sup>171</sup> and
- (e) in 1997, the Claimants successfully used the threat of the Repurchase Penalty in the earlier ICSID arbitration to force the Government to retreat from its energy sector reforms.<sup>172</sup>

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<sup>167</sup> Rejoinder, para. 5.

<sup>168</sup> Counter-Memorial, paras. 56-64, 180.

<sup>169</sup> *Ibid.*, paras. 115, 192-193.

<sup>170</sup> *Ibid.*, paras. 79-90.

<sup>171</sup> *Ibid.*, paras. 99-109.

<sup>172</sup> *Ibid.*, paras. 72-76.

**(2) The Contested Definition of “Extreme or Wilful Malfeasance”**

147. The Respondent points out that “extreme” or “wilful” are divided by the disjuncture “or”,<sup>173</sup> and therefore “malfeasance” (which the Respondent argues is equivalent to “misconduct”)<sup>174</sup> need not be “extreme” but merely “wilful”. Thus the test is satisfied by “*any form of intentional or reckless conduct that is wrongful or unlawful.*”<sup>175</sup>
148. According to the Claimants, basic principles of contract interpretation require the phrase to be read in context and in light of the words that accompany it.<sup>176</sup> The presence of the word “extreme” in the definition, which must be read as a whole, points to the high level of misconduct required to satisfy the test. The words “extreme” and “wilful” signal a requirement for intentional acts of egregious mismanagement. Moreover, the wrongdoing (malfeasance) must be so serious as to justify the correspondingly grave consequence (impairment or annulment of the GRENLEC Licence) and deprivation of Second Schedule compensation.<sup>177</sup>
149. **In the Tribunal’s view**, the key to the interpretation is not the difference between “wilful misconduct” and “egregious mismanagement” but is the requirement of proportionality (*i.e.* “so serious as to justify the correspondingly grave consequence”). While the Parties are correct that the conduct must be “wilful” and improper, even “egregious”, these terms are somewhat subjective, whereas the “consequence” has been quantified by the experts. The Respondent’s expert, Mr. Mudge, says that using the fair market value approach, the

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<sup>173</sup> The SPA requires the Respondent to demonstrate that the Claimants committed extreme or wilful malfeasance in, or abandonment of, its management of GRENLEC of such a nature and to such a degree as warrants such GOG action (taking into account the economic consequences to GRENLEC and [GPP] of implementing and enforcing such GOG action without requirement of payment by the GOG in accordance with this section.)

<sup>174</sup> Counter-Memorial, para. 186.

<sup>175</sup> *Ibid.*. The Respondent relies on the English case of *Forder v. Great Western Railway Co* [1904-7] All ER Rep Ext 1352 (Ex. RLA-0001), at 1357, which held that wilful misconduct is to act “with reckless carelessness, not caring what the results of [the] carelessness may be”.

<sup>176</sup> See e.g., *Arnold v. Britton and others* [2015] UKSC 36 (Ex. RLA-0060), para. 15 (“[The] meaning [of a contractual provision] has to be assessed in the light of [*inter alia*] (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease[.]”).

<sup>177</sup> In deciding whether this seriousness threshold is met, SPA Section 7.9(a)(iv) requires the Tribunal to “tak[e] into account the economic consequences to GRENLEC and [GPP] of implementing and enforcing such GOG Action without requirement of payment by the GOG in accordance with this Section 7.9.” (Ex. RE-0089)

claims should be valued at no more than EC \$127 million.<sup>178</sup> The Claimants' expert, Mr. Ellison, assesses Schedule Two compensation at EC \$361.882 million.<sup>179</sup> The difference ("the consequence") is EC \$235 million. The Tribunal must therefore weigh whether the allegations, if proven, either individually or collectively justify a consequent reduction (to put it at its highest) of EC \$234.8 million.

150. The Tribunal will therefore turn to the issue whether any of the allegations of "wilful malfeasance", if established, justify the consequence sought by the Respondent.

**C. Do any of the Particulars of the Alleged Malfeasance Individually or Collectively Justify Denial of Repurchase Obligation?**

**(1) The Purchase of Two Caterpillar MaK Generators**

151. The Respondent alleges that WRB had a conflict of interest in causing GRENLEC to purchase electrical generators from Caterpillar while bypassing proper procedures and board approval. Shortly after installation, both units experienced "severe problems," with significant adverse impact on Grenada's electricity supply.<sup>180</sup> Caterpillar has admitted the severity and extent of the problems. In a settlement agreement signed in 2001 between Caterpillar and GRENLEC, Caterpillar had to entirely replace one engine and do extensive work to convert the other, "at its sole cost and expense," and to give GRENLEC a *further* discount of USD \$1 million on the purchase price in exchange for the release of all claims relating to the generators, "including [their] performance, functionality, durability or reliability."<sup>181</sup>
152. As to proper process, the Claimants respond that the purchase was based on a tendering protocol recommended by the consultant, Bushea (who admittedly had done work previously for the WRB group), and approved by the EIB.<sup>182</sup> The Claimants deny that any

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<sup>178</sup> Second Expert Report of Robert S. Mudge, dated 29 March 2019 ("Mudge II"), p. 5, calculating under the 2016 *ESA*, and EC \$165 million calculating under the 1994 *ESA*.

<sup>179</sup> Ellison, as adjusted at the Hearing.

<sup>180</sup> Palmer, para. 16.

<sup>181</sup> Ex. RE-0024, ss. 2, 10, 12.

<sup>182</sup> Reply, paras. 85-87.

member of the WRB group of companies or any member of the Blanchard family received any personal benefit from GRENLEC's purchase and there is no evidence to the contrary.

153. The Minutes of the GRENLEC Board of Directors record deliberations on the Caterpillar transaction during multiple Board meetings.<sup>183</sup>
154. **In the Tribunal's view**, the Respondent has failed to establish any conflict of interest. If, contrary to the Claimants' argument, there were any procedural irregularities in making the purchase, they did not amount to "wilful malfeasance". On the merits, the transaction came within reasonable business judgment.

## **(2) Excessive Dividend Payments**

155. The Respondent complains that "WRB has repeatedly used its control of the [GRENLEC] Board to issue dividend payments without the approval of non-WRB Board members."<sup>184</sup> There is no doubt that the Claimants used their control of the GRENLEC Board to maintain a substantial dividend stream.
156. The Claimants emphasize that the dividends were issued to *all* shareholders (of which the Claimants represented about 60%) including the Government. The Board has the power to declare dividends by a majority vote.<sup>185</sup>
157. As to the 2016 Special Dividend, the Claimants rely on the GRENLEC Articles of Association which provide that "directors may from time to time pay to the member such interim dividends as appears to the directors to be justified by the *profits*["]<sup>186</sup> The Articles of Association do not refer to profits of any particular year but necessarily to accumulated profits<sup>187</sup> (or retained earnings). The Claimants say the Respondent's singular focus on

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<sup>183</sup> See e.g., Minutes of the 218th Meeting of the Board of Directors of GRENLEC, 9 January 1996 (Ex. CE-0075); Minutes of the 219th Meeting of the Board of Directors of GRENLEC, 5 March 1996 (Ex. CE-0076); Minutes of the 233rd Meeting of the Board of Directors of GRENLEC, 14 June 1999 (Ex. CE-0092).

<sup>184</sup> Counter-Memorial, para. 192.

<sup>185</sup> GRENLEC, Memorandum and Articles of Association dated 27 September 1960 (amended on 7 July 2004) (Ex. CE-0064), ss. 97, 113.

<sup>186</sup> *Ibid.*

<sup>187</sup> This is consistent with Section 52 of the *Companies Act 1994*, which does not require dividends to be paid out of the profits of any given year; the only restriction is that dividends must not be paid "out of unrealised profits." *UK Companies Act 2006* (CLA-0104), s. 829. The *UK Companies Act 2006* similarly provides that "[a] company's profits

cash is misconceived. At the time of payment of the Special Dividend, GRENLEC's retained earnings exceeded the Special Dividend by EC \$12 million.<sup>188</sup>

158. The Claimants argue that GRENLEC's decision to finance part of the Special Dividend via the CIBC Loan made good business sense because of low interest rates. The CIBC Loan realigned GRENLEC's capital mix with its historical average.<sup>189</sup> GRENLEC remains in a position to repay the loan,<sup>190</sup> and details about the loan were appropriately disclosed in GRENLEC's annual report.<sup>191</sup> Moreover, the Claimants argue the Special Dividend in fact *reduced* the amount of the Claimants' claim in this arbitration by precisely the same amount that the Claimants received.<sup>192</sup>
159. **In the Tribunal's view**, the dividend issue is another manifestation of the Parties' differing views of GRENLEC's "social" responsibility. The Respondent believes that GRENLEC ought as a "good" corporate citizen to have ploughed more of the profits back into the business for much needed infrastructure and, in particular, renewable energy. The Claimants argue that they have indeed been good corporate citizens but that, realistically, their investment was intended to make money for the shareholders or investors and they acted accordingly. GRENLEC's dividend policy, including the special dividend, did not contravene any corporate contractual or statutory requirement. The Respondent has not established that the dividend policy pursued by the Claimants demonstrated "wilful malfeasance".
160. It was suggested that s. 241(2) of the *Grenadian Companies Act* might have been utilized by the GRENLEC shareholders other than the WRB majority (including the GOG with

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available for distribution are its *accumulated, realised* profits." *Ibid.*, s. 830 (emphasis added). See also *Re Spanish Prospecting Co, Ltd.*, [1908-10] All ER Rep 573 (Ex. CLA-0062), at 580. ("Money which has in fact resulted from profits made in trading is none the less profit because it is carried over to a suspense account or reserve fund...[I]t remains as undistributed profits.").

<sup>188</sup> Retained earnings at the end of 2015 were EC \$69 million (GRENLEC Annual Report 2015 (Ex. CE-0152), at 28) and the Special Dividend was EC \$57 million (GRENLEC Annual Report 2016 (Ex. RE-0077), at p. 55).

<sup>189</sup> GRENLEC's average debt-to-equity ratio between 1999 and 2015 was 0.73 to 1. At the end of 2015, GRENLEC's debt-to-equity ratio was 0.24 to 1. See Blanchard II, para. 80.

<sup>190</sup> Debt service payments were in fact reduced from those prior to the CIBC Loan (Board Paper – Fourth Quarter Dividend, dated 25 November 2015 (Ex. CE-0150)).

<sup>191</sup> GRENLEC Annual Report 2016 (Ex. RE-0077), at p. 50.

<sup>192</sup> Ellison I, paras. 7.4-7.5.

10%) to remedy conduct “without valid corporate purpose” or that “discriminates between shareholders with the effect of benefitting the majority” or with “lack of adequate and appropriate disclosure of material information to minority shareholders” but there is no evidence that such remedy was ever sought in the courts of Grenada.<sup>193</sup>

161. In the Tribunal’s view, the Respondent has not established that the dividend policy imposed on GRENLEC by the Claimants amounted to “wilful malfeasance”.

**(3) Refusal to Promote Development of Renewable Energy**

162. The lack of serious development of renewable energy is an important matter for the development of Grenada’s economy. However, the Claimants gave evidence of serious efforts in that regard. While the Claimants and the Government blame each other for the lack of progress, the Tribunal does not accept the Respondent’s allegation that the lack of success was “wilful” or that the history of these efforts demonstrate “malfeasance”.

**(4) GRENLEC’s Payment of Fees of Legal and Forensic Accounting Consultant Benefitted the Claimants not GRENLEC**

163. The Respondent argues that the Claimants committed wilful malfeasance by causing GRENLEC to fund legal expense during the initial stages of this arbitration as well as KPMG’s advisory *quantum* report<sup>194</sup> used to justify the Claimants’ initial demand for USD \$65,428,923 “payable within 30 days”.

164. The Claimants say the Board voted in favor of funding “the initial stages of this arbitration in the hope of persuading Respondent to negotiate mutually-acceptable regulatory

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<sup>193</sup> *Grenadian Companies Act* (Ex. RE-0007), No. 35 of 1994, s. 241:

- (2) If...the court is satisfied that in respect of a company or any of its affiliates,
  - (a) any act or omission of the company or any of its affiliates effects a result,
  - (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner, or
  - (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner, that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any shareholder or debenture holder, creditor, director or officer of the company, the court may make an order to rectify the matters complained of.

<sup>194</sup> Counter-Memorial, para. 194.



reforms” which would allow the Claimants to continue their investment.<sup>195</sup> GRENLEC, they say, was entitled to defend itself in light of the dramatic impact of the 2016 reform package on GRENLEC’s business. To achieve impact, the Claimants’ demand had to be accompanied by the KPMG “advisory” report supporting the high cost of a buy-out. Management hoped, according to the Claimants, that a negotiated solution would allow GRENLEC to continue in business on the basis of the 1994 privatization regardless of whether the Claimants’ shares were repurchased by the Government. The Claimants recall the experience of the first ICSID arbitration in 1997 which led to a negotiated settlement which restored GRENLEC’s monopoly and privileges.

165. The Claimants acknowledge that by the end of 2017, it was clear that Respondent had no interest in pursuing a negotiated solution; accordingly, GRENLEC stopped paying legal and expert fees related to this arbitration.<sup>196</sup>
166. **In the Tribunal’s view**, the first point to make is that whatever basis might otherwise have existed to justify GRENLEC’s retainer of outside legal counsel to assess the impact of the 2016 laws on its business, the fact is the Claimants had already issued the current Notice of Arbitration on 5 May 2017 seeking compensation *for the Claimants* not GRENLEC. The dominant purpose of the legal work was to advance the Claimants’ claim. GRENLEC continued to pay legal fees until the end of 2017, which was well beyond anything that could be justified, even on the Claimants’ view of the facts.
167. Moreover, in the Tribunal’s view, there was no justification for GRENLEC to fund the work of forensic accountants KPMG whose mandate was to calculate and justify the amount of the Claimants’ compensation. The benefit to GRENLEC as a negotiating tool with the Government was marginal at best. The Claimants’ quantum expert, Mr. John Ellison, acknowledged that the work product reflected in his report put before this Tribunal was “largely the same” as the KPMG work product undertaken for its original 2017 “indicative valuation report”:

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<sup>195</sup> *Ibid.*, para. 225; Minutes of the 320<sup>th</sup> Meeting of the Board of Directors of GRENLEC, 7 June 2016 (Ex. CE-0157), at 10.

<sup>196</sup> Blanchard II, para. 92.

Q. Okay. You would agree with me, though, that the work product reflected in the Ellison/Popovic Report is virtually the same as the work product in the Indicative Valuation Report that had been produced a year earlier?

A. Well, it's largely the same. I wouldn't say "virtually," but it's largely the same.

Q. I'm willing to concede on that one word. That may be the only point we agree on for the entire cross-examination.

So, largely the same, and that had been the work product that at least as far as we've discussed in this Hearing that GRENLEC had paid for?

A. Yes, that's right.<sup>197</sup>

In effect, the GOG as shareholder was being required to fund in part the litigation against itself.

168. However, while such payments demonstrate (as the Respondent alleges) conflation by WRB of GRENLEC's interest and WRB's interest, they do not amount to such "extreme or wilful malfeasance" as to justify denying the Claimants compensation under Schedule Two. The issue of reimbursement to GRENLEC for improperly charged fees and disbursements is dealt with below.

#### **(5) GRENLEC's Constitutional Claim Against the Government**

169. The Respondent asserts that the Claimants caused GRENLEC to bring "a nominal constitutional claim against the Government...[that] in fact concerns contractual obligations in the SPA" and is intended to benefit the Claimants.<sup>198</sup> The constitutional claim challenged a December 2017 amendment to the 2016 ESA mandating that GRENLEC henceforth pay 5% of its pre-tax profits to the Government to be devoted to whatever purposes a committee appointed by the GOG may decide.<sup>199</sup>
170. **The Tribunal's view** is that the purpose of GRENLEC's claim, whatever its legal merit, was to benefit GRENLEC. Any indirect benefit to the Claimants would have the same, on a per share basis, as the benefit to the GOG. GRENLEC litigation for the benefit of

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<sup>197</sup> Transcript, 19 June 2019, p. 833, ll. 5-18.

<sup>198</sup> Counter-Memorial, para. 194.

<sup>199</sup> Electricity Supply (Amendment) Bill, 2017 (Ex. CE-0047), s. 20 (amending 2016 *ESA*, s. 70).

GRENLEC does not constitute “wilful malfeasance” by the Claimants in the management of GRENLEC<sup>200</sup> justifying a denial of Second Schedule compensation.

**(6) The Management Agreement Fees**

171. The Management Agreement<sup>201</sup> requires WRB to provide GRENLEC with a variety of management services.<sup>202</sup>
172. The Respondent contends that the Claimants improperly extended control of the day-to-day management of GRENLEC to ensure that GRENLEC was managed for the benefit of WRB rather than Grenada. In part the Government contends that the management role was abused by WRB to decide issues free of scrutiny by the Board of Directors on which sat the local directors.
173. The Claimants respond that access to “specialized management services” was one of the key reasons that the Government sought a strategic partner to purchase a controlling stake in GRENLEC.<sup>203</sup> Many of the top jobs have subsequent to 1994 been filled by Grenadians and the management training process continues to be a work in progress. The Claimants point out that the “modest annual fee” (approximately USD \$222,000) has not increased in 22 years despite periods when GRENLEC required significantly greater involvement by WRB personnel, such as in the aftermath of Hurricane Irma.<sup>204</sup> The Respondent says that competent Grenadians were available years ago to take the top management jobs.
174. **In the Tribunal’s view**, the assessment of a need for ongoing management services was a matter of business judgment. There is no evidence that Grenadians were denied top jobs for improper reasons. The Claimants have a large investment in GRENLEC’s performance and the decision to continue management services at USD \$220,000 per year does not

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<sup>200</sup> In its argumentation on “wilful malfeasance,” the Respondent asserts that GRENLEC’s constitutional law claim is “in contravention of the Claimants’ agreement to arbitrate [under the SPA].” Counter-Memorial, para. 194. This is illogical, as GRENLEC is not a party to the SPA and is not invoking the SPA as a legal basis for its claims.

<sup>201</sup> SPA (CE-0007/RE-0089), s. 6B.3(b).

<sup>202</sup> Management Consulting Services Agreement between Grenada Electricity Services Limited and WRB Enterprises, Inc, dated 5 October 1994 (Ex. RE-0010). Services include strategic planning, relations, engineering, administration, finance, and training.

<sup>203</sup> See GOG assessment of bids, *supra*, at para. 61.

<sup>204</sup> Transcript, 18 June 2019, at p. 657, ll. 2-21 (Palmer testimony).

amount to extreme or wilful malfeasance on the part of WRB (even under the Respondent's broad definition of the term) to justify denial of Second Schedule compensation.

**D. The Causation Issue**

175. The Claimants argue that in order to rely on the "wilful malfeasance" exception, the Respondent must show that the wilful malfeasance *caused* the GOG to abrogate of the GRENLEC monopoly. The 2016 "restructuring package" was the result of politics not management deficiencies. Allegations of malfeasance came as an afterthought in response to commencement of the present arbitration.
176. The Respondent says the allegations of malfeasance are of long-standing nature, as evidenced by the charges made against the Claimants by the local directors that are the subject of the ongoing "fiduciary" lawsuit. Whether or not the words "extreme or wilful malfeasance" were used is of no consequence. There is evidence of numerous stand-offs between GRENLEC (as directed by WRB) and the GOG including the Claimants' resistance to the development of renewable energy and its divisive dividend policy.
177. The Claimants argue that the allegations of "wilful malfeasance" are not authentic but are merely the *ex post facto* product of lawyers casting around for a defence to a pending ICSID claim. In a letter to WRB, the Claimants argue, the Respondent acknowledged that the decision to abrogate the GRENLEC monopoly was political:

In view of the implications for job creation, foreign direct investment, the overall development of the economy of Grenada and the international commitment of the Government to the production of cleaner and more renewable energy, it is imperative that relevant changes are made to pertinent legislation and attendant regulations. The Government considers that the public interest must be viewed as overriding to the interests of WRB/GRENLEC...<sup>205</sup>

178. Significantly, the Claimants say, there are no documents communicated to the Claimants alleging "wilful malfeasance" and the Government's willingness in 2016 and 2017 to

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<sup>205</sup> Letter dated 27 April 2016 from M. Sylvester (Government) to G. Robert Blanchard, Jr. (GPP and WRB) (Ex. CE-0044).

continue WRB's stewardship of GRENLEC on 2016 terms indicates clearly that "malfeasance" was not an issue.

179. **The Tribunal concludes** on the evidentiary record that the GOG believed in good faith that it had many good policy reasons to take back control of GRENLEC but wilful malfeasance was not on its list of reasons. This is not to say that the GOG and the local Directors were satisfied with the Claimants' performance. Undoubtedly the Claimants' determination to manage the GRENLEC monopoly to the advantage of the WRB shareholders gave cause, as the Respondent saw the situation, for dissatisfaction. However, dissatisfaction generated by the Claimants' exercise of contractual rights does not translate into "wilful malfeasance". The 2016 restructuring package was clearly motivated (*i.e.* caused) by the NNP Government's public policy objectives, which differed from those of the prior NDC Government, not any malfeasance (belatedly alleged) on the part of the Claimants. There were (and are) numerous allegations of management deficiencies laid at the door of WRB but, applying the proportionality test called for by the SPA, and whether viewed individually or collectively, they do not justify denial of Second Schedule compensation.

**E. The Claimants Contend that the Malfeasance Argument is Procedurally Inadmissible**

180. Section 7.9(a)(iv) of the SPA provides that "any annulment, cancellation, limitation or other impairment of the term, scope or exclusivity of the GRENLEC Licence" constitutes a Repurchase Event, *unless* **"taken pursuant to and in accordance with any final and binding order issued by"** an ICSID tribunal upholding an allegation of extreme or wilful malfeasance.<sup>206</sup>

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<sup>206</sup> Section 7.9(a)(iv) reads in relevant part:

[A]ny annulment, cancellation, limitation infringement or other impairment of the term, scope or exclusivity of the GRENLEC Licence (any such action hereinafter referred to as a "GOG Action") [constitutes a Repurchase Event], unless such GOG Action is **taken pursuant to** and in accordance with any final and binding order issued by [ICSID] **following the conclusion** of an arbitration of a Dispute between the Parties pursuant to and in accordance with the provisions of Section 11.2, which order holds that Buyer has committed extreme or wilful malfeasance in, or abandonment of, its management of GRENLEC of such a nature and to such a degree as warrants such GOG Action (taking into account the economic consequences to GRENLEC and Buyer of implementing and enforcing such GOG Action without requirement of payment by the GOG in accordance with this Section 7.9). (SPA (Ex. CE-0007/RE-0089), s. 7.9(a)(iv))

181. The Respondent does not dispute that only a finding of wilful malfeasance by an ICSID tribunal will definitively bar WRB and GPP from recovery on this ground.<sup>207</sup> However, the Respondent argues that the reference to an ICSID Tribunal includes *this* Tribunal and that whether that finding is made *before* or *after* the Government's abrogation of the monopoly is immaterial. If wilful malfeasance is established, the Respondent argues, the timing and sequence of the ICSID orders are irrelevant to the purpose served by Section 7.9(a)(iv) which is "to preclude Claimants from forcing a share repurchase where they had themselves committed wilful malfeasance."<sup>208</sup>
182. Imposition of an ICSID award as a condition *precedent* to abrogation makes no commercial sense, the Respondent argues, as the double hearing would impose increased costs, undue delay, and put an unnecessary administrative burden on the Government, and yield no discernible benefit in the performance of the contract.<sup>209</sup>
183. The Respondent relies upon UK Supreme Court decision in *Rainy Sky SA v. Kookmin Bank* for the proposition that "it is 'not necessary to conclude that a particular construction [of an agreement] would produce an absurd or irrational result before having regard to the commercial purpose of the agreement'"<sup>210</sup> as well as Lord Diplock's *dictum* in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.*:<sup>211</sup>

...[I]f detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, ***it must be made to yield to business common sense.*** (emphasis added)

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<sup>207</sup> Counter-Memorial, para. 181.

<sup>208</sup> *Ibid.*, para. 179.

<sup>209</sup> The Respondent says it is nonsensical to require it: "(i) initiate ICSID arbitration proceedings seeking declaratory relief; (ii) mount a full case to prove that Claimants were wilfully malfeasant, in the face of undoubtedly vigorous opposition; (iii) obtain an award finding wilful malfeasance; and then (iv) enact the reforms long recommended by international experts and desperately needed to bring Grenada in line with modern standards—only to find itself back before an ICSID tribunal when Claimants inevitably sought to compel repurchase on any of the other grounds, which do not have the wilful malfeasance exception set out in Section 7.9(a)(iv). [The] Claimants could have no legitimate purpose in forcing the Government to incur such cost, delay, and burden. Instead, considerations of efficacy and reasonableness counsel that the application of this exception is best determined in precisely the posture in which it is now presented to the Tribunal. (*Ibid.*, paras. 183-184).

<sup>210</sup> *Ibid.*, para. 177 (citing *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50 (Ex. RLA-0028, para. 43).

<sup>211</sup> *Antaios Cia Naviera SA v. Salen Rederierna AB* (The Antaios) [1984] 3 All ER 229 at 233 (Ex. RLA-0006).

Moreover, the Eastern Caribbean Court of Appeal in *Grenada Tech*<sup>212</sup> held that the proper interpretation of an agreement should not be limited to the plain text.<sup>213</sup>

184. The Claimants respond generally that the text of the clause means what it says and that the Tribunal has no authority to rewrite the procedure agreed to by the Parties. In the decisions relied on by the Respondent, the court found (unlike here) the text to be ambiguous<sup>214</sup> and cite the decision of the UK Supreme Court in *Arnold v. Britton and others* for the proposition that:

[T]he clearer the natural meaning the more difficult it is to justify departing from it...[W]hile commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed.<sup>215</sup>

185. In the Claimants' view, Section 7.9(a)(iv) is clear and unambiguous. In order to rely on the "malfeasance" exception, the Respondent must *first* obtain an order from an ICSID tribunal finding that GPP committed "wilful malfeasance" of such nature and to such a degree as warrants impairment of the GRENLEC Licence without obligation to make Second Schedule Compensation, and *only after obtaining such an order* ("following the conclusion" of the arbitration proceedings) can the Respondent annul or impair the GRENLEC Licence ("pursuant to and in accordance with" the ICSID tribunal's order) without triggering a Repurchase Event.
186. The purpose of this requirement, the Claimants say, is to protect the Claimants against "precisely the sort of situation that pertains here, where Respondent opportunistically, and without legitimate aims, asserts wilful malfeasance *ex post facto*."<sup>216</sup>

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<sup>212</sup> *Grenada Tech. and Allied Workers Union v. St. George's University Ltd.*, GDAHCVAP2014/0008, CA Grenada, Award (13 February 2017) (Ex. CLA-0028)

<sup>213</sup> Counter-Memorial, para. 178.

<sup>214</sup> Reply Memorial, paras. 197-198.

<sup>215</sup> *Arnold v. Britton and others* [2015] UKSC 36 (Ex. CLA-0124), paras. 18, 20.

<sup>216</sup> Reply Memorial, para. 196.

187. **In the Tribunal's view**, the text clearly requires a prior ICSID determination to that effect *before not after a* licence abrogation in order for the defence of "extreme or wilful malfeasance" to apply. The abrogation is to follow not precede the conclusion of the initial ICSID arbitration. The Tribunal has no authority to re-write the procedural steps necessary to invoke the "malfeasance" provision as sought by the Respondent. That provision is not only of benefit to the Claimants. It provides the Government with an opportunity to test its allegations of wilful malfeasance risk-free before an ICSID Tribunal without triggering a Repurchase event. Otherwise a Government that is deeply unhappy with the investor would have to plunge ahead with its restructuring, thereby triggering the Claimants' *prima facie* right to Second Schedule compensation and only afterwards, having committed itself to a repurchase, would the Government get to argue about the defence of wilful malfeasance. As in the present case, the Government's legislative abrogation, once launched, could not be recalled. Under the two-stage process the Government would have the opportunity for sober second thoughts if the ICSID Tribunal ruled in favor of the investors on the issue of wilful malfeasance. The Government might decide to live with what it views as an unsatisfactory situation rather than pay the price of terminating the relationship.
188. Whether or not the two-step process is sensible commercial practice was for the Parties, not this Tribunal, to decide. The two-stage process was capable of compliance but the Respondent chose not to initiate the first stage. The malfeasance issue only surfaced in a formal way when it came time to defend the Claimants' repurchase demand. The procedural objection alone is fatal to the Respondent's "wilful malfeasance" defence.

#### **F. Conclusion on Liability**

189. The Claimants effectively abandoned the alleged Repurchase Events other than abrogation of the monopoly.<sup>217</sup>

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<sup>217</sup> See Reply Memorial, para. 118, note 269 "In the interest of judicial economy, and because of the strength and simplicity of the Repurchase Event under Section 7.9(a)(iv), Claimants will not pursue further these two additional Repurchase Events at this stage. Claimants nonetheless reserve the right to revive their claim in this respect at a later date as the Government takes further actions to implement the 2016 ESA."; Rejoinder, paras. 142-145.



190. For the forgoing reasons, the Tribunal concludes that the Claimants have established a “Repurchase Event” by the GOG’s abrogation of GRENLEC’s 80-year monopoly.<sup>218</sup> The abrogation was not caused by “wilful malfeasance”. These conclusions are sufficient to dispose of the issue of liability. Accordingly, the Claimants were entitled to “put” their GRENLEC shares to the Respondent for repurchase and the payment of compensation.

191. The next issue is to determine the basis on which compensation is to be assessed.

#### **IX. ARE THE CLAIMANTS ENTITLED TO SECOND SCHEDULE COMPENSATION?**

192. The Claimants rely on Section 7.9(b) of the SPA and the Second Schedule of the 1994 *ESA* (together, the “**Repurchase Demand Calculation**”). Section 7.9(a)(iv) defines one such Repurchase Event as:

any annulment, cancellation, limitation, infringement or other impairment of the term, scope or exclusivity of the GRENLEC License.

193. The SPA goes on to state in Section 7.9(b):

The GOG agrees that it shall within thirty (30) days following demand by [the] Buyer upon the occurrence of a **Repurchase Event, purchase and acquire all GRENLEC shares then owned by [the] Buyer...the purchase price payable in such event shall be calculated on the basis specified in the Second Schedule** to the *ESA* as in effect on the Closing Date. (emphasis added)<sup>219</sup>

194. The Respondent says the purchase price must be assessed by reference to the fair market value of the shares under the most recent legal regime governing GRENLEC, the 2016 *ESA*.<sup>220</sup> The Second Schedule is legally ineffective and unenforceable under Grenadian law, the Respondent says, because:

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<sup>218</sup> Section 7.9(a)(iv) of the SPA is engaged in the event of an “annulment, cancellation, limitation, infringement or other impairment of the term, scope or exclusivity of the GRENLEC Licence.” See Ex. RE-0089, s. 7.9(a)(iv).

<sup>219</sup> Ex. CE-0007/ RE-0089.

<sup>220</sup> Counter-Memorial, para. 266.

- (a) *first*, as a matter of contract law, the provisions constitute an unlawful and unenforceable penalty;
- (b) *second*, as a matter of constitutional law, the provisions are void and of no legal effect because they fetter Government action contrary to fundamental principles enshrined in the Constitution of Grenada.

195. The Second Schedule in the SPA is taken with modifications from the Second Schedule of the 1960 *ESO*,<sup>221</sup> which applied only where the Government revoked the licence. The mechanism created by the 1994 SPA and 1994 *ESA* changed the 1960 formula in important respects as follows:

- (a) the SPA repurchase obligation lists an extensive list of repurchase events that fall short of revocation,<sup>222</sup>
- (b) the 1960 arrangement required compensation for goodwill only during the first 40 years of the licence.<sup>223</sup> The 1994 *ESA* and SPA require payment for goodwill throughout the entire duration of the licence for all but a Repurchase Event arising under Section 7.9(xi) – that is, for an “act of God”.<sup>224</sup>

**A. Is the Repurchase obligation to pay Second Schedule Compensation Valid?**

196. The Respondent argues<sup>225</sup> that Grenadian law governs the SPA and enforcement of its contractually prescribed remedy is invalid because it is exorbitant, unconscionable and out of proportion to the Claimants’ legitimate interest in payment for the GRENLEC shares.<sup>226</sup>

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<sup>221</sup> Compare Ex. CE-0005, with Ex. CE-0025; *supra*, para. 49.

<sup>222</sup> Ex. RE-0089, s. 7.9(a).

<sup>223</sup> Compare Ex. CE-0005, s. 29(3) with *ibid.*, s. 29(4).

<sup>224</sup> Ex. RE-0089, s. 7.9(b) (“no [repurchase] payment in respect of a Repurchase Event arising under Section 7.9(xi) shall include recovery of amounts calculated pursuant to Part II of the Second Schedule to the *ESA* as in effect on the Closing Date”).

<sup>225</sup> Counter-Memorial, para. 202.

<sup>226</sup> *Halsbury’s Laws of England: Damages* (Volume 29 (2014)) (Ex. RLA-0032), at 8.(5)(i)(549):

If a clause goes beyond a mere liquidated damages provision, so as to be unconscionable and calculated more to discourage breach than facilitate compensation, it is invalid as a ‘penalty’. The justification for this practice.. has been variously described as a matter of public policy and a means for the prevention of oppression. Today the best view is that the penalties rule exists in order to suppress unconscionable business conduct not otherwise commercially justified.”

The rule against penalties is applicable to liquidated amounts payable, as here, under a contract of purchase and sale of shares where the purchaser refuses to complete the transaction.

197. In any event, the provisions are void and of no legal effect because the requirement to pay Second Schedule Compensation was designed to fetter the Government's ability to regulate Grenada's electricity sector in the public interest.<sup>227</sup>
198. The Claimants respond that while the SPA is generally to be governed and construed in accordance with Grenadian law:
- (a) the Respondent is estopped from contesting the validity of the terms of a contract that it has repeatedly affirmed over the past quarter century, and the benefit of which it has freely and fully accepted;
  - (b) even if there is no estoppel, the provisions of the SPA expressly exclude the application of Grenadian law that might serve to invalidate the Repurchase Obligation;
  - (c) in any event, the Respondent misconceives the rule against penalties which does not permit courts and tribunals to rewrite terms of purchase agreed to by sophisticated parties. The rule against penalties operates only when assessing damages for a breach of contract (e.g. where there is a liquidated damages clause) not for specific performance of a contract of purchase and sale;
  - (d) the requirement of Second Schedule compensation does not fetter Government action but specifically contemplates Government action at a time of the Government's choosing provided only that the contractual compensation is subsequently paid; and
  - (e) international law precludes the Respondent from invoking its domestic constitutional principles to avoid its commitments to the Claimants.

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<sup>227</sup> Counter-Memorial, para. 201.

**B. The Claimants Contend that the Respondent is Estopped by its Conduct from Disputing the Validity of the Second Schedule Methodology**

199. The Claimants argue that the Respondent is estopped under international law from contesting the SPA Repurchase Obligation. They say the doctrine of estoppel under international law prohibits a party from “opportunistically” changing its position to the detriment of another.<sup>228</sup> A party “who has voluntarily assented to a contract and openly reaffirmed its validity [cannot] thereafter oppose its performance or its ultimate juridical effect.”<sup>229</sup> The same doctrine exists under common law.<sup>230</sup>
200. The Respondent represented and warranted in Sections 4.3 and 4.4 of the SPA that the SPA, including its Repurchase Obligation, was valid and enforceable under Grenadian Law, as follows:

This Agreement has been, and the documents to be delivered by the GOG at Closing will be, duly executed and delivered by the GOG and constitute **the lawful, valid and legally binding obligations of the GOG, enforceable in accordance with their respective terms.**<sup>231</sup>

The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby...(ii) are not prohibited by and **do not violate or constitute a default** under any contract, agreement or other instrument to which GRENLEC or the GOG is a party, **or any provision of Grenadian Law applicable to GRENLEC or the GOG.**<sup>232</sup> (emphasis added)

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<sup>228</sup> See e.g., Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953) (Ex. CLA-0050), at p. 141; *Pan Am. Energy LLC & BP Arg. Expl. Co. v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections (27 July 2006) (Ex. CLA-0102), para. 159; Charles Kotuby & Luke Sobota, *General Principle of Law and International Due Process* (2017) (Ex. CLA-0129), at p. 119.

<sup>229</sup> Charles Kotuby & Luke Sobota, *General Principle of Law and International Due Process* (2017) (Ex. CLA-0129), at 122. See also *ICC Case No. 10671*, Interim Award (30 July 2001), note Silva Romero, 2006 *J. dr. int.* 1417, p. 1428 (Ex. CLA-0094), s. IV (observing that it “would be unfair to allow” a party to challenge, “in an opportunistic manner and in the context of a dispute,” the “nullity of a contract to which it had voluntarily agreed”) (unofficial English translation).

<sup>230</sup> See e.g., *Shah v. Shah & Anor* [2001] EWCA Civ 527 (10 April 2001) (Ex. CLA-0093), at p. 46 (“[A] person [should not be permitted] to escape the consequences of an apparently valid deed he has signed, representing that he has done so in the presence of an attesting witness, merely by claiming that in fact the attesting witness was not present at the time of signature.”); *Lowe v. Lombark* [1960] 1 W.L.R. 196 (Ex. CLA-0066), at p. 205.

<sup>231</sup> SPA (Ex. CE-0007/ Ex. RE-0089), s. 4.3 (emphasis added). To the same effect, Respondent agreed that the Repurchase Obligation would be “irrevocable and unconditional,” and that Section 7.9, together with other clauses, would “control...the enforcement of this Agreement...notwithstanding inconsistent provisions of Grenadian law.” See SPA (Ex. CE-0007/ Ex. RE-0089), ss. 7.9(b), 11.1.

<sup>232</sup> SPA (Ex. CE-0007/ Ex. RE-0089), ss. 4.3-4.4.

Mr. Blanchard, the CEO of WRB, testified that without these representations and warranties, the Claimants would never have entered into the SPA and would never have invested the initial capital.<sup>233</sup>

201. The Claimants also rely on the terms of the Supplemental SPA that the Parties concluded when agreeing to settle their first ICSID arbitration under the SPA. The only change to the SPA that Respondent sought at the time was to exclude “hurricanes” from the list of Repurchase Events.<sup>234</sup> Otherwise, “the SPA *shall remain in full force and effect.*” Mr. Blanchard testified that WRB relied on these representations in continuing to invest time and effort in GRENLEC.<sup>235</sup>
202. According to the Claimants, the Respondent cannot now claim in good faith that two core provisions of the SPA – the Repurchase Obligation and carve-out of inconsistent Grenadian Law provisions – are “legally ineffective and unenforceable.”<sup>236</sup>
203. The Claimants rely in particular on *ADC v. Hungary*<sup>237</sup> where foreign investors and a Hungarian state agency had entered into a series of agreements for the renovation, construction, and operation of two terminals at Budapest International Airport. The Tribunal held that Hungary was estopped from relying on Hungarian law to contest the validity of these agreements because (as here) “[t]hese Agreements were entered into years ago and both parties ha[d] acted on the basis that all was in order”:

[W]hen, after receiving top class international legal advice, Hungary enters into and performs these agreements for years and takes the full benefit from them, it lies ill in the mouth of Hungary now to challenge the legality and/or enforceability of these Agreements....Hungary entered into these agreements willingly, took advantage from them and led the Claimants over a long period of time, to assume that these Agreements were effective. Hungary cannot now go behind these Agreements.<sup>238</sup>

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<sup>233</sup> Blanchard II, paras. 20-22.

<sup>234</sup> Supplemental SPA (Ex. CE-0034), s. 8.1.

<sup>235</sup> Blanchard II, para. 32.

<sup>236</sup> Counter-Memorial, para. 200.

<sup>237</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006) (“*ADC v. Hungary*”) (Ex. CLA-0103).

<sup>238</sup> *Ibid.*, para. 475.

204. A number of other authorities were cited by the Claimants to the same effect.<sup>239</sup>
205. The Respondent says the authorities cited by the Claimants are inapplicable. The Constitution is the supreme law of the country and is paramount to any other law including the law of estoppel. The Parties were not free to contract out of a constitutional prohibition and cannot be estopped from enforcing it.
206. **In the Tribunal's view**, the Respondent is not estopped from denying liability for Second Schedule compensation on the basis that it accepted the investment and lived with the arrangement for over 22 years. It is noted that the Respondent does not challenge the SPA generally. Its attack is focused on the Second Schedule compensation provisions.
207. Undoubtedly, the Claimants "relied" on the terms of the SPA and the Supplemental SPA in the same way that any contracting party relies on the warranties and other terms of its contract. There is no reason to doubt Mr. Blanchard's evidence that without the whole 1994 package, WRB would not have made the initial investment. The situation with respect to the 1997 Supplementary SPA is different because the investment had been made and the evidence is that the Claimants made no subsequent contribution of capital.
208. Estoppel is generally relevant as a "shield" where an opposing party is seeking to enforce rights to which it is otherwise entitled but is "estopped" from doing so by its collateral representations or conduct. That is not this case. The Respondent is not seeking a benefit under the SPA. There are no "representations" outside the representations, warranties and undertakings in the SPA and Supplemental SPA. In respect of those "representations", the remedies lie in the law of contract not estoppel.
209. There is no evidence of reliance beyond the original purchase. Indeed one of the Respondent's complaints is that the Claimants have not lived up to an alleged promise "to make EC \$17 million worth of capital investments projected through the end of 1998."

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<sup>239</sup> In *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18 ("**Kardassopoulos v. Georgia**"), Award (3 March 2010), the Tribunal held that Georgia was estopped from challenging the validity of the joint venture agreement and concession under Georgian law because they had been "cloaked with the mantle of Governmental authority". See also *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992), 8 ICSID Rev. 328 (1993) (Ex. CLA-0088) at p. 352, paras. 82-83. See also *Bankswitch Ghana Ltd. v. Ghana*, UNCITRAL, Award Save as to Costs (11 April 2014) (Ex. CLA-0118).

As to detriment, the continued investment has been very profitable. It will be recalled that WRB “expected” that “substantially all of the earnings of GRENLEC will be required to fund future capital investments to assure the long-term viability of GRENLEC”, which, according to WRB, “will leave no funds available for dividend payments.”<sup>240</sup>

210. The simple fact that the agreement has stood for over two decades (despite the Respondent’s 1997 challenge to its validity) does not immunize the SPA from having the validity of its compensation provisions determined on the merits.

**C. As a Matter of Contract, Does the SPA Successfully Exclude All Rules of Grenadian Law that are Inconsistent with the Repurchase Obligation?**

211. The Respondent argues that pursuant to Section 11.1, the SPA is to be governed by and construed in accordance with Grenadian Law, a defined term that includes “the Constitution of Grenada” and “the common law of Grenada.”<sup>241</sup> Accordingly, enforcement of the SPA is subject to the prohibition against penalties and constitutional compliance. The Respondent says the Second Schedule imposes an extravagantly excessive monetary penalty on the exercise of the Government’s regulatory authority, and thereby for all practical purposes fetters the exercise of that authority. The Second Schedule formula for compensation is contrary to the constitution and common law of Grenada.

212. The Claimants point out that Section 11.1 of the SPA *expressly* excludes the application of any provision of Grenadian Law that is inconsistent with the Repurchase Obligation and certain other provisions of the SPA:

This Agreement and the rights and obligations of the Parties hereunder shall be governed by and construed in accordance with Grenadian Law (with the understanding that **the provisions of Section 7.9 [the Repurchase Obligation]**, Article X, and Sections 11.2, 11.3, 11.4 and 11.5 **are intended by the Parties to control the implementation, interpretation and enforcement of this Agreement** with regard to the

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<sup>240</sup> Respondent’s Opening Argument, slide 14.

<sup>241</sup> See Reply Memorial, para. 121; also SPA (Ex. CE-0007/ Ex. RE-0089), s. 11.1.

subject matter of said Sections **notwithstanding inconsistent provisions of Grenadian Law**).<sup>242</sup> (emphasis added)

213. Section 7.9(b) of the SPA reinforces this carve-out by providing that the Repurchase Obligation is “irrevocable and unconditional,” irrespective of any objection or defence that Respondent may raise under Grenadian Law:

The obligations of the GOG under this Section 7.9 with respect to any Repurchase Event shall, subject to Section 7.9(c), be **irrevocable and unconditional regardless of...the invalidity or unenforceability of this Agreement against the GOG**,...or ...any other defence which the GOG may from time-to-time to assert as a defence to any payment under this Agreement in respect of a Repurchase Event, excepting only the defence that the payment in question has been paid-in-full to Buyer when and as required hereunder.<sup>243</sup> (emphasis added)

214. The Claimants point out that Article 42(1) of the ICSID Convention, which governs this arbitration,<sup>244</sup> provides that “[t]he Tribunal **shall** decide a dispute in accordance with such **rules of law as may be agreed** by the parties.”<sup>245</sup> The reference to “rules of law” permits the parties to choose selectively, adopting some rules from the referenced legal system while excluding the application of other rules from the same system.<sup>246</sup> The Parties’ choice

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<sup>242</sup> SPA (Ex. CE-0007/ Ex. RE-0089), s. 11.1.

<sup>243</sup> SPA (Ex. CE-0007/ Ex. RE-0089), s. 7.9(b).

<sup>244</sup> SPA (Ex. CE-0007/ Ex. RE-0089), s. 11.2.

<sup>245</sup> ICSID Convention (Ex. CLA-0010), Article 42(1):

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

<sup>246</sup> The Claimants contend that this “cherry picking” is consistent with the negotiating history of Article 42(1). Aron Broches (the World Bank’s General Counsel from 1959 to 1971 who led the negotiations that culminated in the 1965 ICSID Convention) observed that “[t]he reason for adopting this more flexible term [‘rules of law’] was to indicate, among other things, that the parties are not limited to a choice of one or more national laws or legal systems, but may, for example, ‘incorporate’ a national law as in existence on a certain date or exclude certain provisions of such a law.” (See Aron Broches, *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of 1965: Explanatory Notes and Survey of its Application*, 18 Y.B. COMM. ARB. 627 (1993) (Ex. CLA-0089), para. 113). See also History of the ICSID Convention, *Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Volume II-1 (Ex. CLA-0086), at p. 9 (“It is characteristic of arbitration that the parties are free in the choice of the law to be applied by arbitrators. Example of such choice would be the national law of one of the parties, the principles of law common to the legal systems of the two parties, general principles of law recognized by civilized nations, principles of international law or any combination of the foregoing.”). Professor Schreuer likewise explains in his commentary on the ICSID Convention that Article 42(1) “refers to ‘rules of law’ rather than to systems of law. Therefore, it is generally accepted that the parties are not restricted to accepting an entire system of law *tel quel* but are free to combine, to select and to exclude rules or sets of rules of different origin.” Christoph Schreuer et al.,



of law, including the carve-out of inconsistent provisions of Grenadian Law, must be given full effect.<sup>247</sup> The Claimants say that this approach has been applied consistently by ICSID Tribunals. In *Aucoven v. Venezuela*, for example, the Tribunal noted that “[i]t is generally accepted that...[the term ‘rules of law’ in Article 42(1)] allows the parties to agree on a partial choice of law, and in particular to select specific rules from a system of law.”<sup>248</sup> A common example of a partial choice of law (or exclusion of certain rules of national law) is a “stabilization” clause that freezes national law at the time of the making of the investment agreement so as to make any subsequent changes to that particular law inapplicable to the investment.<sup>249</sup>

215. **In the Tribunal’s view**, the Parties’ common intent regarding the choice of law is clear and unambiguous and will be given effect. The Tribunal sits as an international tribunal applying rules of international law. The rules include respect for party autonomy. International law permits (and there is no evidence that the law of Grenada expressly prohibits) giving effect to the parties’ choice of “**rules of law**” including a carve out of such rules as the parties agree, including the rule against penalties.
216. Section 11.1 gives paramountcy to Section 7.9 and the Tribunal concludes that this paramount intent must be given effect.
217. However, as will be seen, in the Tribunal’s view, the Repurchase provisions of Section 7.9 do not infringe any rule against penalties nor does Section 7.9 constitute an unconstitutional fetter on the regulatory authority of the Government of Grenada. Accordingly, the legal

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*The ICSID Convention: A Commentary* (2nd ed. 2009) (CLA-0109), at p. 563. See also United Nations Conference on Trade and Development (UNCTAD), *Course on Dispute Settlement: International Centre for Settlement of Investment Disputes: 2.6 Applicable Law* (2003) (Ex. CLA-0098), at p. 8 (observing that Article 42(1) allows parties “to set aside certain aspects of a chosen system of law from its application to the[ir] relationship”); Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd ed. 2012) (Ex. CLA-0116), at p. 82 (“Investment agreements are negotiated by the investor and the host state to allow for special rules between the two parties, separate from the general legislation of the host state.”).

<sup>247</sup> Reply Memorial, paras. 123 *et seq.*

<sup>248</sup> *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award (23 September 2003) (“*Aucoven v. Venezuela*”) (Ex. CLA-0096), para. 96 (emphasis added).

<sup>249</sup> Christoph Schreuer et al., *The ICSID Convention: A Commentary* (2nd ed. 2009) (Ex. CLA-0109), at p. 564 (“The parties may also **exclude certain parts of a chosen system of law** from its application to their relationship. The most common use of this technique is the exclusion of legislation passed by the host State after the conclusion of the investment agreement through a stabilization clause.”) (emphasis added).

arguments advanced by the Respondent concerning the choice of law do not arise on the facts of this case.

**D. Does the Requirement of Second Schedule Compensation Fetter the Government Action Contrary to the Constitution of Grenada?**

218. The Respondent says the GOG cannot contractually grant an investor a special legal regime subversive of the rules of the Constitution.<sup>250</sup> The intended effect of such a contractual undertaking would be to negate the supremacy of the Constitution – a proposition that is “an anathema” to the law in Grenada.<sup>251</sup>

219. On this point, the Respondent cites the authors of Dicey and Morris on the *Conflict of Laws* (9<sup>th</sup> ed) who state that:

No court...will give effect to a choice of law...if the parties intended to apply it in order to evade mandatory provisions of that legal system with which the contract has its most substantial connection.<sup>252</sup>

220. The Respondent argues<sup>253</sup> that the SPA imposes an “exorbitant” cost as the price for the exercise of the Government’s otherwise lawful executive and legislative actions. Insofar as it deters Government action in the public interest, Section 7.9(b) imposes unconstitutional constraints on the Government’s freedom of action contrary to “the principle of executive necessity”,<sup>254</sup> citing the 1921 observation of an English court:

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<sup>250</sup> Constitution of Grenada (Ex. RLA-0003), art. 106 (“This Constitution is the supreme law of Grenada and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”); *BCB Holdings* (Ex. RLA-0031) para. 51 (Caribbean Court of Justice striking down contractual scheme which “conceptualised and designed a whole...tax policy for the benefit of [a foreign investor]” on the basis that the contractual scheme had “the objective of overriding all current and any future statutes enacted by the National Assembly” and the Constitution).

<sup>251</sup> See e.g., *BCB Holdings* (Ex. RLA-0031), para. 59 (“[T]he supremacy of the Constitution is a core constitutional value.”); *Collymore v. AG* (1967) 12 W.I.R. 5 (CA TT) (Ex. RLA-0061)..

<sup>252</sup> Respondent’s Opening Argument, Slide 52.

<sup>253</sup> Counter-Memorial, para. 249.

<sup>254</sup> The Respondent cites executive necessity as a principle of Caribbean constitutional law affirmed in the 1977 *Revere* case by the Supreme Court of Jamaica:

Whatever doubts exist as to the precise limits of the principle, it is clear that, on the grounds of public policy, [executive necessity] allows freedom of executive action in matters fundamental for effective government and for the general welfare of the community...It is also clear on the authorities that when the principle

it is not competent for the Government **to fetter** its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract **hamper its freedom of action** in matters which concern the welfare of the State.<sup>255</sup> (emphasis added)

221. In the Tribunal's view, the proposition that the Government cannot make a contract that "hampers its freedom of action" where the "welfare of the State" is concerned is too broad. Many traditional Government functions (*i.e.* aspects of health care for example) may be outsourced. Outsourcing requires contractual commitments that "hamper" a Government's "freedom of action" and are not on that account invalid. The whole point of a contract is to "hamper" the parties from engaging in conduct contrary to its terms.
222. According to the Respondent,<sup>256</sup> the **2016 restructuring package** is the "quintessential" example of necessary Government action in the public interest, citing the Chief Justice of Trinidad and Tobago's opinion that:

[O]ne can readily envisage situations or areas of economic activity (e.g. power or water supply, air traffic routes) where it may well be in the public interest to restrict licences or concessions to one or two players... Equally, one can also envisage that with changing circumstances it may be in the public interest to liberalise or change a licencing or regulatory regime.<sup>257</sup>

223. The Respondent submits<sup>258</sup> that the 2016 restructuring was motivated by the urgent need to reform the electricity sector to improve the economic position and general welfare of the citizenry of Grenada.<sup>259</sup>

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applies it **overrides existing, and conflicting, contractual rights** and renders them unenforceable in an action against the government for their breach." *Revere Jamaica* (Ex. RLA-0004), at pp. 490-491 (emphasis added).

To the same effect, see also *Ports of Belize Ltd. v. Attorney General*, Claim No. 404 of 2007 (2012) (Ex. RLA-0029), para. 43 (Supreme Court of Belize) (emphasis added); see also *Legal Officers' Staff Association v. Attorney General et al.*, [2015] JMFC FC 3 (Ex. RLA-0037), para. 123 (Supreme Court of Jamaica); *Jamaica Public Service Co., Ltd. v. Attorney General et al.*, [2015] JMCA Civ 1 (Ex. RLA-0036), para. 87(e).

<sup>255</sup> Respondent's Opening Argument, slide 45.

<sup>256</sup> Counter-Memorial, para. 255.

<sup>257</sup> *Sawmillers Co-Operative Society Ltd. v. Director of Forestry*, No. S426 of 2000 (Ex. RLA-0015), at p. 4 (emphases added).

<sup>258</sup> Counter-Memorial, para. 256.

<sup>259</sup> See e.g. an April 2016 letter from the Permanent Secretary in the Ministry of Finance and Energy to Mr. Blanchard outlined the policy justification for passage of the 2016 *Acts*:

224. Similarly, in *Revere Jamaica Alumina*, the Jamaican Supreme Court held that the Jamaican government's contractual undertaking not to increase taxes and levies on certain mining operations (*i.e.*, a form of fiscal stabilization clause), was invalid because it fettered Jamaica's power to legislate (referred to as the "executive necessity" doctrine).<sup>260</sup>
225. According to the Respondent, the "exorbitant" compensation contemplated by the Second Schedule was **intended** by WRB to deter Government regulation of the electricity sector in the public interest by making a repurchase prohibitively expensive and as such Second Schedule compensation constitutes an unconstitutional fetter.<sup>261</sup>
226. The Claimants adopt the proposition of the sole arbitrator in *Texaco*:

[A] State cannot invoke its sovereignty to disregard commitments freely undertaken through the exercise of this same sovereignty and cannot, through measures belonging to its internal order, make null and void the rights of the contracting party which has performed its various obligations under the contract.<sup>262</sup>

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In view of the implications for job creation, foreign direct investment, the overall development of the economy of Grenada, and the international commitment[s] of the Government to the production of cleaner and more renewable energy, it is imperative that relevant changes are made to pertinent legislation and attendant regulations. The Government considers that the public interest must be viewed as overriding to the interests of WRB/GRENLEC particularly given the essential nature of the service provided, the existing monopoly, and the fact that the government occupies a minority position in GRENLEC and will thus be unable to affect the direction taken by GRENLEC that may seriously affect this sector. Any response by WRB in keeping with the provisions of Section 7.9 of the SPA will be very unfortunate. However, the Government considers it unavoidable that necessary changes are promptly made to the framework in the energy sector. (Ex. CE-0044, at p. 2; see also e.g. *supra*, paras. 134-135; Exs. RE-0074; RE-0038, at p. 59; RE-0041, at pp. 25, 29.)

<sup>260</sup> *Revere Jamaica Alumina Ltd. v. Attorney General*, 26 WIR 486 (1977) (Jam.) (Ex. RLA-0004), at p. 9.

<sup>261</sup> According to the Respondent, these principles apply no matter whether the offending provision contravenes principles expressly stated in the text of the Constitution or those which are implicit in the constitutional document. *Moses Hinds and others v. The Queen* [1977] AC 195 (Ex. RLA-0053), at p. 5 (Jamaica Privy Council); *Attorney General v. Joseph and Boyce*, [2006] CCJ 3 ((Ex. RLA-0046) (Caribbean Court of Justice).

<sup>261</sup> See e.g., *Belize Telemedia Limited. v. The Attorney General of Belize (on behalf of the Government of Belize)*, LCIA Arbitration No. 81079, Final Award (18 March 2009) (Ex. RLA-0024); *British Caribbean Bank Ltd. v. Attorney General of Belize* [2014] 2 LRC 11 (Ex. RLA-0030) (Caribbean Court of Justice).

<sup>262</sup> *Texaco Overseas Petrol. Corp. & California Asiatic Oil Co. v. Libyan Arab Republic*, 17 I.L.M. 1, Award (19 January 1977) (1978) ("**Texaco**") (Ex. CLA-0068), para. 68. This rule derives from another principle of international law, namely, that States cannot invoke domestic law to avoid their international obligations. Stephen Schwebel has observed in this respect that "there is no more firmly established principle of international law than that a State cannot plead its national law in derogation of its international obligations." Stephen Schwebel, *International Arbitration: Three Salient Problems* (1987) (Ex. CLA-0084), at 108-09. See also *Bankswitch v. Ghana* (Ex. CLA-0118), para. 11.59 ("The Government cannot rely on its own Constitution to avoid the customary international law rule that a host State must act in good faith and in a manner that is consistent with international law principles when dealing with a

227. The Claimants contend that the Respondent is bound by the maxim *pacta sunt servanda* because “international law...recognizes the power of a State to commit itself internationally” even if its freedom of action is thereby “hampered.”<sup>263</sup>
228. The Claimants point out that in fact the GOG was *not* deterred from precipitating Repurchase Events. Otherwise this dispute would not have arisen and the Tribunal would not be here. The Government was free to enact the 2016 *ESA*, and it did so with a plain understanding of the repurchase price and Grenada must now bear “the consequences of that action under the parties’ contract,” and “be ordered to honor its contract and bear all costs of this arbitration.”<sup>264</sup>
229. **In the Tribunal’s view**, the SPA properly construed is constitutionally compliant. The SPA provides that “[n]o commitments made by the [Government of Grenada] in this Agreement *shall be construed* in a manner that would constitute an infringement...of the powers reserved under the Constitution of Grenada to any judicial or legislative body.”<sup>265</sup> If a provision can be *construed* in a way that is constitutionally compliant it must be so construed. None of the provisions of the SPA *properly construed* “fetter” Government action. Thirteen of the fifteen Repurchase Events in Section 7.9(a) specify actions which the Government was free to take but which would give rise, at the Claimants’ election, to a right under Section 7.9(b) to require the GOG to repurchase GPP’s shares.<sup>266</sup> Almost all the Repurchase Events expressly contemplate the Government’s freedom of action to modify or abrogate the rights and privileges of GRENLEC. There is no evidence that the Government was deterred from legislating in the public interest. The 20-year debate between the NDC party and the NNP party about privatization and repurchase rested on public policy differences. The GOG was not deterred in 2016 by the prospect of paying

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foreign investor.”). See also A.F.M. Maniruzzaman, *State Contracts in Contemporary International Law: Monist versus Dualist Controversies*, 12 *EURO. J. INT’L L.* 309 (2001) (Ex. CLA-0095), at p. 324.

<sup>263</sup> *Texaco*, para. 71.

<sup>264</sup> Memorial, paras. 4, 8.

<sup>265</sup> Ex. RE-0089, s. 12.8; compare Ex. CE-0007.

<sup>266</sup> Ex. RE-0089, s. 7.9(a)(i)-(ix), (xii)-(xv). Section 7.9(a)(x) refers to “any occurrence of war, civil war, revolution, rebellion, insurrection, coup d’etat, terrorism or other act of public enemies, embargo, riot, civil commotion, sabotage, or labour disturbance or unrest”), while s. 7.9(a)(xi) covers acts of God.

Second Schedule compensation as opposed to what it now proposes, namely Fair Market Value.

230. The Respondent acknowledges that many of the Repurchase Events “closely mimic either the substantive obligations typically imposed on host states by bilateral investment treaties, or the express stabilisation obligations featured in numerous investment arbitration cases.”<sup>267</sup> The Tribunal agrees and therefore cannot accept the Respondent’s constitutional argument.

**E. Does Second Schedule Compensation Constitute a Penalty?**

231. The Respondent contends that Second Schedule compensation is extravagantly disproportionate to the true value of the Claimants’ investment and constitutes a penalty.

232. Both Parties rely on the decision of the United Kingdom Supreme Court in *Cavendish* which in 2015 considered anew the rule against penalties.<sup>268</sup> Subsequent cases binding on Grenadian courts confirm the application of *Cavendish* to contracts governed by Grenadian law.<sup>269</sup> Within *Cavendish*, however, the Parties emphasize different opinions:

- (a) the Respondent relies in particular on the opinion of Lord Hodge that the key consideration is whether there is “an extravagant disproportion between the

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<sup>267</sup> See *ibid.*, s. 7.9(a)(i) (expropriation); *ibid.*, s. 7.9(a)(ii) (exercise of acquisition powers or similar action regarding assets); *ibid.*, Section 7.9(a)(iii) (change in rate-setting process); *ibid.*, Section 7.9(a)(iv) (any change to scope or term of licence); *ibid.*, Section 7.9(a)(v) (free convertibility); *ibid.*, Section 7.9(a)(vi) (repatriation of currency); *ibid.*, Section 7.9(a)(vii) (any change in law requiring new capital expenditures or increased operating costs); *ibid.*, Section 7.9(a)(viii) (right to own shares, controlling interest); *ibid.*, Sections 7.9(a)(ix), (x) (martial law or any change in law impairing access to assets, occurrence of war or similar circumstances, evoking full protection and security treaty provisions); *ibid.*, s. 7.9(a)(xii), (xiii) (repudiation or otherwise failure to abide by investment agreement); *ibid.*, s. 7.9(a)(xv) (any change in law subjecting shareholders or Board members to criminal responsibility or liability for business conduct).

<sup>268</sup> *Cavendish Square Holding BV v. Talal El Makdessi* [2015] UKSC 67 (“*Cavendish*”) (Ex. RLA-0039), paras. 62-170.

<sup>269</sup> See e.g., *Brown’s Bay Resort Ltd. v. Pozzoni* [2016] UKPC 10 (Ex. RLA-0041), para. 9 (Court of Appeal of the Eastern Caribbean Supreme Court); *Starry Benjamin v. Caribbean Commercial Bank (Anguilla) Ltd.*, Claim No. AXAHCV2013/0079 (2014) (“*Starry Benjamin*”) (Ex. RLA-0034), para. 29 (Court of Appeal of the Eastern Caribbean); *Delta Petroleum (Caribbean) Ltd. v. British Virgin Island Electricity Corp.*, Claim No. BVIHCVAP2016/0003 (“*Delta Petroleum*”) (Ex. RLA-0045), para. 3 (Court of Appeal of the Eastern Caribbean); *Equator Exploration Ltd. v. BW Peace Limited*. BVIHCV2007/0315 (Ex. CLA-0015), para. 38 (High Court of Justice of the British Virgin Islands); *Audrey Cook Henry v. William Carr*, Claim No. ANUHCV2014/0638 (“*Audrey Cook Henry*”) (Ex. RLA-0042), para. 26 (Eastern Caribbean Supreme Court).

stipulated sum” to be paid, “and the highest level of damages that could possibly arise from the breach”<sup>270</sup> (the “**extravagant disproportion**” test);

- (b) the Claimants rely in particular on the lead opinion expressed by Lords Neuberger and Sumption which frames the question somewhat differently. In the majority view, disproportionate compensation only comes within the rule against penalties if the clause or clauses in question arise in the context of “a secondary obligation” – typically, a remedy in the form of payment of a sum of money – “which imposes a detriment on the *contract-breaker* out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation”<sup>271</sup> (the “**secondary obligation**” test). On this view, a court or tribunal must consider at the outset whether the Claimants seek enforcement such as specific performance of the agreed purchase price (a “primary” obligation) or a remedy for breach of contract agreement by a *contract-breaker* (a secondary obligation).

233. In their Memorial, the Claimants’ primary claim to relief is for specific performance (*i.e.* payment of the repurchase price calculated according to the formula in the Second Schedule). In the alternative, the Claimants ask for damages for non-performance.

234. The Respondent emphasizes that to find a penalty *Cavendish* does not require:

- (a) a finding that the Government had inadequate legal representation or specialist advice;
- (b) a showing of uneven bargaining power;
- (c) that Claimants imposed the relevant provisions on the Government; or

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<sup>270</sup> *Cavendish*, para. 255 (in another formulation, noting that “[the test] is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party’s interest in the performance of the contract”); see also *ibid.*

<sup>271</sup> *Cavendish*, para. 32.

(d) a showing that the Government was ignorant of the details of the Second Schedule methodology or its outcome.<sup>272</sup>

235. The Respondent also calls in aid the earlier decision of the House of Lords in *Dunlop Tyre*<sup>273</sup> which the Respondent says is still good law in Grenada, as held in decisions of the Eastern Caribbean Supreme Court and Court of Appeal subsequent to *Cavendish*.<sup>274</sup> Under the *Dunlop Tyre* line of authority, the Respondent argues, the clause will be deemed a penalty when “a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others trifling damages.”<sup>275</sup> That description, the Respondent says,<sup>276</sup> fits perfectly the terms and effect of the present case,<sup>277</sup> which requires the same “exorbitant” repurchase price on the occurrence of any one of fifteen Repurchase Events of widely varying severity from annulment of the licence or an act of God,<sup>278</sup> to “any [post-SPA] change in Grenadian Law[...] [however minor] which requires new capital expenditures or increased operating costs by GRENLEC.”<sup>279</sup>

236. Second, *Dunlop Tyre* is relied on by the Respondent for the proposition that “[t]he essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party.”<sup>280</sup>

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<sup>272</sup> Respondent’s Closing Argument, slide 29.

<sup>273</sup> Counter-Memorial, para. 206.

<sup>274</sup> See e.g., *Audrey Cook Henry* (Ex. RLA-0042) (Eastern Caribbean Supreme Court); *Delta Petroleum* (Ex. RLA-0045) (Court of Appeal of the Eastern Caribbean); *Starry Benjamin* (Ex. RLA-0034), para. 29 (Court of Appeal of the Eastern Caribbean).

<sup>275</sup> *Dunlop Pneumatic Tyre Co., Ltd. v. New Garage and Motor Co., Ltd.* [1914-15] (“*Dunlop Tyre*”) All ER Rep 739 (Ex. RLA-0002), at p. 742 (emphasis added). See also *Starry Benjamin v Caribbean Commercial Bank (Anguilla) Ltd*, Claim Number AXAHCV2013/0079, 3 October 2014 (Ex. RLA-0034), para. 30; *Delta Petroleum (Caribbean) Limited v British Virgin Islands Electricity Corporation*, Claim Number BVIHCVAP2016/0003, 8 May 2017 (Ex. RLA-0045), paras. 77, 82; *Equator Exploration Limited v. BW Peace Limited*, Claim Number BVIHCV2007/0315, 7 May 2008 (Ex. CLA-0015), para. 38.

<sup>276</sup> Counter-Memorial, para. 207.

<sup>277</sup> See *supra*, paras. 69-70 (explaining effect of Ex. RE-0089, s. 7.9(a), 7.9(b); Ex. CE-0025 (1994 *ESA*, Second Schedule)).

<sup>278</sup> Ex. RE-0089, s. 7.9(a)(iv), (xi).

<sup>279</sup> *Ibid.*, s. 7.9(a)(vii).

<sup>280</sup> *Dunlop Tyre* (Ex. RLA-0002), at p. 739.



The Respondent contends<sup>281</sup> that the threat of a Second Schedule buyout was always intended to serve as a deterrent to Government regulation in the public interest.<sup>282</sup>

237. The Claimants, for their part, say the Repurchase Event mechanism in Section 7.9 of the SPA represents an agreed compromise. The Claimants expressed concern in 1994 about the prospect the Government might unilaterally change the regulatory framework after the privatization and thereby dramatically damage the value of the proposed investments.<sup>283</sup> The Claimants wanted, in effect, a form of stabilization clause. The Government however refused to accept a fetter on the exercise of its sovereign power to modify Grenada's laws and regulations,<sup>284</sup> in the public interest. The compromise, the Claimants say, was to ensure that the Government would not be "fettered" by any stabilization-type provision but if certain events occurred, WRB would be able to demand that the Government repurchase GPP's shares and thus achieve WRB's efficient exit from Grenada.<sup>285</sup> According to the Claimants, "this resolution properly recognized and preserved the Government's prerogative to take any and all policy and legislative actions that it deemed appropriate."<sup>286</sup> The Respondent did not lead evidence to dispute the Government's participation in crafting this "compromise".
238. The Claimants say the Second Schedule methodology protected their "legitimate interest" – no more and no less – in accordance with *Cavendish*. They had a legitimate interest both in maintaining their commercial bargain and "in an *efficient* exit, without the complexity and expense associated with having to prove Claimants' actual damage and without controversy and delay, if these fundamentals [of the bargain] were to change."<sup>287</sup>

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<sup>281</sup> Counter-Memorial, para. 208.

<sup>282</sup> Ex. RE-0012, paras. 10, 30(ii); Counter-Memorial, para. 209. The Respondent says that the outcome of the last ICSID arbitration Claimants brought against the Government confirms that *in terrorem* is exactly how WRB and GPP have used the threat of compelled repurchase in the past (*Dunlop Tyre* at p. 739). Less than three years after they had purchased their stake in the Company for USD \$5.6 million, the Claimants used the repurchase formula in the Second Schedule to demand USD \$18.7 million, more than triple the amount of their investment. The Government settled the case instead of paying the Second Schedule compensation (See Ex. CE-0034).

<sup>283</sup> Blanchard II, para. 22.

<sup>284</sup> Blanchard II, para. 20.

<sup>285</sup> Blanchard II, para. 20.

<sup>286</sup> Reply Memorial, para. 59.

<sup>287</sup> Reply Memorial, para. 170; Blanchard II, para. 22.

239. As to the quantum, the repurchase price needed to properly reflect “not just the risks and costs of the long-term investment involved, but also lost opportunity costs and lost profits caused by their investment being cut short.”<sup>288</sup> The Government itself acknowledged that the “Goodwill” component of the statutory methodology represented the “profit opportunity foregone in [the] remaining term of the license.”<sup>289</sup>
240. In the result, the Claimants say, the Parties were free to and *did* negotiate “a practicable exit protocol in the event of a change in the commercial fundamentals ... upon which the investment was made...[including]...the exclusivity and duration of the GRENLEC Licence.”<sup>290</sup>
241. **In the Tribunal’s view**, the Claimants had a legitimate interest in the protection of their investment, as did the Respondent in protecting the public interest of the people of Grenada. The issue raised by the Respondent is not whether the investment was entitled to protection but whether Second Schedule “protection” was “out of all proportion” to the Claimants’ legitimate interest as will now be addressed.

**F. Does Application of the Second Schedule Result in an “Extravagantly Disproportionate” Valuation?**

242. John Ellison of FTI (and formerly of KPMG), the Claimants’ quantum expert, acknowledged that “the valuation methodology set out in the 1994 *ESA* is different from that normally used to value companies. Company valuations are largely based on future earnings potential, often derived from future cash flow forecasts.”<sup>291</sup> The Respondent’s expert, Robert Mudge, testified that “[t]he Repurchase Price Methodology is fundamentally out of step with standard valuation methodologies, duplicative, and hence unlikely to be replicated by any third-party buyer.”<sup>292</sup> Moreover, in the Respondent’s view:

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<sup>288</sup> Reply Memorial, para. 171.

<sup>289</sup> GOG Responses to Key Opposition Issues (Ex. CE-0188), at p. 6.

<sup>290</sup> Reply Memorial, para. 169.

<sup>291</sup> Ex. RE-0078, para. 3.2.4.

<sup>292</sup> Mudge I, para. 27.

- (a) Part I of the Second Schedule sets out an asset valuation, which would normally accompany a liquidation of the company.<sup>293</sup> But, at the same time, Part II sets out a profit valuation, which would normally pertain only to a going concern.<sup>294</sup> These inconsistent approaches, in combination, create double-accounting and therefore inflated compensation in the result. For example, the Respondent contends that Mr. Ellison double-counted EC \$10 million (once as part of the assets under Part I and a second time as profits under Part II),<sup>295</sup>
- (b) the result of the Second Schedule formula (EC \$21 per share)<sup>296</sup> is incompatible with the EC \$8.27 per share which the Claimants were willing to accept in 2012/2013, and which better reflects the true value of GRENLEC shares;
- (c) the result of the KPMG valuation using the Second Schedule is vastly in excess of the DCF valuation of the Respondent's expert, Mr. Mudge. The Claimants did not put forward a DCF report and Mr. Mudge's analysis is the only reliable guide to Fair Market Value.

243. The Respondent relies on the formulation in *Cavendish* by Lord Mance at para. 143:

[T]he agreed sum must not have been extravagant, unconscionable or incommensurate with the possible interest in maintenance of the system.<sup>297</sup>

244. The Claimants' principal position on the Second Schedule is that a deal is a deal and the Respondent should live up to its contractual undertaking. Courts have no authority to rewrite the terms of purchase. The Respondent cannot rebut the strong presumption that "the parties themselves are the best judges of what is legitimate."<sup>298</sup> In addition:

- (a) the 1994 Government also conducted due diligence testing of the Second Schedule methodology by applying it under two scenarios: (i) a repurchase after 15 years;

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<sup>293</sup> *Ibid.*, para. 20.

<sup>294</sup> *Ibid.*

<sup>295</sup> Respondent's Closing Argument, slide 44.

<sup>296</sup> Transcript, 19 June 2019, p. 857, l. 7 to p. 858, l. 17.

<sup>297</sup> Respondent's Opening Argument, slide. 42.

<sup>298</sup> Reply Memorial, paras. 163-164.

and (ii) a repurchase after one year. Under both scenarios, the valuation was within the range of the valuations of GRENLEC that the Government had received from its financial consultants, Price Waterhouse and Ewbank Preece, based on the discounted cash flow model and the replacement value respectively;<sup>299</sup>

- (b) the Second Schedule formula, while unusual, is of the Respondent's own design. It has been on the statute books in one form or another since 1960. The Government itself dictated the Second Schedule approach to the Claimants. The GOG's initial objective was to establish the specific formula to calculate the repurchase payment following a Government "call" for GRENLEC shares under section 28 of the 1994 *ESA*. The GOG then agreed with Claimants to use the same methodology in conjunction with any "put" by the Claimants under Section 29 of the 1994 *ESA*;
- (c) the GOG was aware of the "Goodwill" component of the statutory methodology. In a presentation to the public,<sup>300</sup> the Government explained that it represented the "profit opportunity foregone in [the] remaining term of the license",<sup>301</sup>
- (d) in December 2012 negotiations, the Government confirmed that it considered the Repurchase Obligation to be reasonable by incorporating the Second Schedule methodology into its proposed terms of the onward sale to a proposed Canadian investor of the Claimants' stake in GRENLEC once repurchased;<sup>302</sup>
- (e) in any event, the Claimants argue, the Respondent's attack rests on a false premise, *i.e.*, that the Second Schedule yields a valuation of GRENLEC that is out of proportion with the fair market value of the company.<sup>303</sup> The Claimants rely on its expert, Mr. Ellison, who contended that *when corrected* for Mr. Mudge's errors and other required adjustments, the DCF valuation proffered by the Respondent

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<sup>299</sup> Memorandum, GRENLEC Privatization Issues (Ex. RE-0009), at pp. 1, 2, 7. The valuation for a repurchase in 15 years was EC \$46.9, and a repurchase after one year was EC \$54.7. The discounted cash flow model gave a range of values for GRENLEC between EC \$8.70 and EC \$59.05 million. GRENLEC's replacement value was estimated at EC \$52.2 million by PwC and at EC \$70 million by Ewebank Preece.

<sup>300</sup> Ex. CE-0188.

<sup>301</sup> GOG Responses to Key Opposition Issues (Ex. CE-0188), at p. 6.

<sup>302</sup> Successor GOG Agreement (Ex. RE-0043).

<sup>303</sup> Reply Memorial, para. 185.

and its quantum expert is in fact *higher* than a statutory valuation under the Second Schedule.<sup>304</sup>

**G. Is the Second Schedule Compensation Out of Line With the Prior Valuations Including Valuations by WRB?**

245. The following table summarizes some of the arguably relevant valuations of GRENLEC between 1994 and 2019.

	<b>Total</b>	<b>Per Share</b>
Price Waterhouse original 1994 valuation of 100% of GRENLEC	EC \$21 million to EC \$38.4 million <sup>305</sup>	
WRB 1994 purchase price of 50% of shares	EC \$15 million for 50% implied that 100% worth EC \$30 million <sup>306</sup>	
WRB demand in 1997 Request for Arbitration	USD \$18.7 million or EC \$50.49 million	

<sup>304</sup> Transcript, 19 June 2019, p. 857, l. 7 to p. 858, l. 17:

In any event, with the corrections and adjustments that you made and have netted out, the total value of GRENLEC in your let's call it corrected DCF valuation is just under EC \$400 million; right?

A. Yes, subject to the caveat I mentioned that I've not done a full DCF, but that is just making certain adjustments. That is showing the effect of the adjustments rather than showing my own figure.

Q. Okay. So, perhaps let's just call it your adjusted DCF value.

A. Okay, as long as it's understood what I've done, but I think everyone in the room knows I've not done my own DCF.

Q. Understood. So, that adjusted DCF value, the total value of GRENLEC, hundred percent of the Shares just under EC \$400 million?

A. Yes, that's right.

Q. Okay. And they're 19 million shares, so that works out about EC \$21 per share.

A. Yes. As I said, I have not done my calculations per share, but I'm sure you're right.

Q. Okay. In any event, your nearly EC \$400 million in the adjusted DCF valuation is more than your Second Schedule valuation of EC \$364.3 million?

A. Well, that's correct, but I should just to be fair make the point that since then, life has moved on a bit, and we've had Mr. Mudge's further report which I was not permitted to do a Reply because we're up to round four ready, and he has raised some other issues which might alter that figure.

<sup>305</sup> Memorandum, GRENLEC Privatization Issues, dated 16 August 1994 (Ex. RE-0009) at p. 1.

<sup>306</sup> SPA (Ex. CE-0007/ Ex. RE-0089), ss. 1.1 (definition of "**Purchase Price**"), 2.5. The Government claims that WRB originally bid USD \$17 million for 50% of GRENLEC and acquired GRENLEC for less (Respondent's Counter-Memorial, para. 51). However, WRB's original bid was EC \$8.5 million for 50% of GRENLEC, implying a value of EC \$17 million (not USD \$17 million) for 100% of GRENLEC. WRB ultimately invested EC \$19 million for 50% of GRENLEC (see Blanchard II, paras. 12-13).

	<b>Total</b>	<b>Per Share</b>
WRB's 2012 offer to sell its GRENLEC investment		USD \$8.27
Mr. Mudge's Revised DCF valuation (for the Respondent)	(i) 2016 <i>ESA</i> EC \$51.9 million or USD \$19.2 million <sup>307</sup>	2016: EC \$5.50
	(ii) 1994 <i>ESA</i> EC \$76.9 million or USD \$28.5 million <sup>308</sup>	1994: EC \$8.10
PwC Second Schedule valuation as presented at the hearing (for the Respondent)	EC \$276,239,000 <sup>309</sup>	
KPMG/FTI's calculation of Second Schedule valuation as presented at the hearing (for the Claimants)	EC \$361,882,000 million <sup>310</sup>	EC \$21

246. The Respondent relies in particular on the 2013 situation, where WRB sought to sell its majority stake in GRENLEC<sup>311</sup> but as required by the SPA, was obliged<sup>312</sup> to first offer its shares to the Government.<sup>312</sup> Although WRB rejected the Government's offer of EC \$5.49 per share,<sup>313</sup> Mr. Blanchard indicated that a deal could be struck if the Government offered more, noting that **“we are prepared to enter into exclusive negotiations with the GOG if the government is prepared to increase its offer to EC \$8.27 per share.”**<sup>314</sup>

<sup>307</sup> See Mudge I, para. 68, Table 18 and para. 9.

<sup>308</sup> Mudge I, paras. 68 and 8.  $(EC \$299,404,000 - EC \$153,900,000) / EC \$153,900,000 = 94.5\%$ . Mr. Mudge's DCF valuation of EC \$153,900,000 is equivalent to USD \$57,000,000.

<sup>309</sup> PwC's Second Schedule valuation of GRENLEC at EC \$276,239,000 is equivalent to USD \$102,310,740 at the exchange rate of 2.7:1 that is stipulated in s.1.1 of the SPA.

<sup>310</sup> KPMG's Second Schedule valuation of GRENLEC at EC \$361,882,000 is equivalent to USD \$134,030,370 at the exchange rate of 2.7:1 that is stipulated in s.1.1 of the SPA.

<sup>311</sup> Bowen, para. 49.

<sup>312</sup> Ex. RE-0089, s. 7.10(a)(ii) (Government's right of first refusal); Bowen, paras. 49-52.

<sup>313</sup> Bowen, para. 52.

<sup>314</sup> Ex. RE-0051, at p. 1 (emphasis added); see Bowen, para. 52.

247. Indeed, it seems WRB would have taken EC \$7.50 per share.<sup>315</sup>
248. In other words, the Respondent relies on the fact that in 2013 the Claimants were willing to sell their shares for *less than half* of what they now demand. The Government declined to pay the asking price and WRB pulled out of the negotiations.<sup>316</sup> There is no evidence that GRENLEC shares greatly appreciated in value between 2013 and 2016.
249. The Claimants deny the relevance of their 2013 offer to sell their GRENLEC holding at EC \$8.27 per share.<sup>317</sup> The 2013 offer was subject to several conditions that had value for the Claimants, e.g., a requirement that GRENLEC would continue using WRB's management services.<sup>318</sup> In addition, Mr. Blanchard explains that the origin of the offer was that two individual investors [Roseman and Curtis] were facing "personal challenges" at the time, and they sought to "unwind their equity positions."<sup>319</sup> The Claimants did not

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<sup>315</sup> Respondent's Closing Argument, slides 21-22; Robert Blanchard testified that in 2012 and 2013:

Q. You were prepared to take 750.

A. We were prepared to move forward, yes.

Q. But when you say "move forward," you were prepared to take 750?

A. Yes, yes, yes. Again, primarily motivated by the pressures that the Curtises and Rosemans had asked us to deal with.

\* \* \* \* \*

[T]his was a few years after the great recession, and Florida real estate was still under tremendous challenges, and [Roseman and Curtis] had projects which they had significant challenges on and financial challenges on, and they wanted -- they felt like they could -- this was an investment that if they could liquidate it would help those challenges.

\* \* \* \* \*

Q. And you said, then, that WRB was prepared to accept a much lower price for its shares in GRENLEC in 2012 and 2013 because of that pressure?

A. That's correct.

<sup>316</sup> Bowen, para. 53.

<sup>317</sup> Transcript, 19 June 2019, p. 868, l. 4 to p. 869, l. 13:

Q. And you didn't think it was necessary to even crosscheck the Second Schedule value in this case?

A. Well, no, because it's a very specific, easy to follow formula. I mean, I think one of the reasons it was set out that way, and I'm speculating slightly here, is that it avoids a lot of uncertainty about what's going to happen in the future because there's no reference to the future. There is a very clear black and white formula which does not permit any other methods such as DCF or multiples or historical costs or anything. I would agree with you that, if you're normally doing a valuation and as I've said this is an unusual one, you would look to triangulate it by looking at other measures. So, if you're doing a DCF one, you would probably look at multiples and the prices at which quoted shares in similar companies are operating. So, normally, yes, one would triangulate it but this is different here because, you know, you've got these railway lines telling you exactly what to do in the ESA.

<sup>318</sup> Blanchard II, para. 106.

<sup>319</sup> *Ibid.*, para. 101.

obtain an independent valuation of GRENLEC<sup>320</sup> before suggesting a price of EC \$8.27 per share. Accordingly, the Claimants say, “the 2013 offer says nothing at all about the ‘actual value’ of GRENLEC at the time much less its value in 2019.”<sup>321</sup>

250. The Respondent says courts have refused to enforce clauses which award sums equivalent to double or triple the prevailing market price or the claimant’s genuine estimated loss.<sup>322</sup> Accordingly, “extravagant disproportion” is established in this case. The Tribunal agrees with the Respondent that the value of GRENLEC assessed under the Second Schedule is very substantially in excess of the EC \$8.27 per share which the Claimants were willing to accept in 2012. However, the Claimants are not “estopped” by the \$8.27 figure which the Respondent declined to accept. In the absence of an estoppel, the Tribunal must be guided by the expert witnesses.
251. It does appear that the Second Schedule compensation is substantially in excess of a DCF valuation. However, the pertinent question is whether the “extravagantly disproportionate” test applies at all to this case, bearing in mind the *dictum* of Lords Neuberger and Sumption in *Cavendish* that the rule against enforcement of penalties provides no basis for the courts to review primary obligations, *i.e.* “the courts do not review the fairness of men’s bargains either at law or in equity.”<sup>323</sup> On this view, the Respondent agreed to the Second Schedule and in the absence of unconscionability or a gross imbalance in bargaining power (which is not alleged), the question is whether the GOG should be relieved of a bargain which it

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<sup>320</sup> *Ibid.*, para. 106.

<sup>321</sup> Reply Memorial, para. 184.

<sup>322</sup> See e.g., *Unaoil Ltd v. Leighton Offshore Pte Ltd* [2014] EWHC 2965 (Comm) (Ex. RLA-0054), para. 72 (High Court of Justice Queen’s Bench Division Commercial Court of the UK) (striking down clause prescribing payment of 73 percent of the contract price in the event of a breach); *Allplus Holdings Pte Ltd. and others v. Phoon Wui Nyen (Pan Weiyuan)* [2016] SGHC 144 (Ex. RLA-0055), para. 12 (High Court of Singapore) (striking down clause prescribing payment of more than double the contract price in the event of a breach); *First Personnel Services Ltd. v. Halfords Ltd.* [2016] EWHC 3220 (Ch) (Ex. RLA-0056), para. 163 (High Court of Justice Chancery Division of the UK) (finding that a clause prescribing, as remedy for breach, payment of interest at more than three times the prevailing rate for commercial debts was disproportionate and served no legitimate interest).

<sup>323</sup> John Ellison of FTI Consulting, explained:

Valuing GRENLEC based on depreciated net tangible assets alone would understate its value, as it would exclude the value of the GRENLEC Licence (an intangible asset). Equally, valuing GRENLEC based on just five years of historical earnings (the other element of the Second Schedule calculation), with an exclusive licence originally for 80 years (of which 57 years still remain), would significantly undervalue GRENLEC. (Ellison I, para. 2.10)



now views as unsatisfactory but is a “primary bargain” which it made with the benefit of sound professional advice and its eyes wide open.

#### H. Are the Claimants Seeking to Enforce a “Primary” or “Secondary” Obligation?

252. The Claimants argue that under *Cavendish* the rule against penalties has no application to the Repurchase Obligation as the Repurchase Obligation is a *primary* conditional obligation (a put option) and not a *secondary* obligation (a remedy for a contractual breach).<sup>324</sup> The UK Supreme Court in *Cavendish* emphasized “[t]here is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach”, as stated by Lords Neuberger and Sumpton:

Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, **the courts do not review the fairness of men’s bargains either at law or in equity**. The penalty rule regulates only the remedies available for breach of a party’s primary obligations, not the primary obligations themselves.<sup>325</sup> (emphasis added)

Section 7.9 of the SPA enables a shareholder to exit its investment at a certain price “upon the occurrence” of one or more of the fifteen events listed in Section 7.9(a).<sup>326</sup> Payment of the agreed repurchase price is a primary obligation.

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<sup>324</sup> Reply Memorial, para. 153.

<sup>325</sup> *Cavendish* (Ex. RLA-0039), para. 13 (emphasis added). See also *Vivienne Westwood Ltd. v. Conduit Street Development Ltd.* [2017] EWHC 350 (Ch) (Ex. RLA-0064), para. 41 (“The *Cavendish* case shows clearly that, in considering whether a contractual stipulation is or is not a penalty, one must address first the threshold issue – is the stipulation in substance a secondary obligation engaged upon breach of a primary contractual obligation; then identify the extent and nature of the legitimate interest of the promisee in having the primary obligation performed, and then determine whether or not, having regard to that legitimate interest, the secondary obligation is exorbitant or unconscionable in amount or in its effect.”); *Holyoake v. Candy* [2017] EWHC 3397 (Ex. CLA- 0130), para. 467. The Supreme Court explained in *Cavendish* that, “if the contract does not impose (expressly or impliedly) an obligation to perform the act, but simply provides that, if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty.” *Cavendish* (Ex. RLA-0039), para. 14.

<sup>326</sup> SPA (Ex. CE-0007/ Ex. RE-0089), s. 7.9(b) (“The GOG agrees that it shall... upon the *occurrence* of a *Repurchase Event*, purchase and acquire all GRENLEC shares then owned by [GPP]... The purchase price payable in such *event* shall be calculated[.]”).

253. The Respondent concedes that under the applicable case law, only provisions that create contractual remedies can be deemed penalties<sup>327</sup> but in the Respondent's view, the Claimants' "put option" is just another kind of tailored remedy provision. The test is a question of "substance" and not of "form."<sup>328</sup> The fact that Section 7.9(b) is formulated as a "put option" rather than a liquidated damages clause or similar term, is irrelevant in the Respondent's view.<sup>329</sup> The rule against penalties applies to the full range of contractual remedies, including obligations to transfer assets at an agreed price.<sup>330</sup>
254. The Claimants insist that the Respondent's "substance over form" argument is not only at odds with the majority opinion in *Cavendish*,<sup>331</sup> but it is at odds with the concurring opinion of Lord Hodge, on which the Respondent particularly relies. Lord Hodge related his "extravagant disproportion" *dictum* to clauses "fixing the level of damages [for a] *breach*" (e.g. a liquidated damages clause).<sup>332</sup> The Claimants emphasize that their claim for repurchase payment is *not* for payment of damages for contract breach, but specific performance of a contractual bargain.
255. **In the Tribunal's view, the rule against penalties has no application to the present case.** The Respondent cannot be said to be a "contract breaker". It has argued that it is relieved from performance by virtue of various legal arguments including the "wilful malfeasance" provision. If required to pay compensation, the Respondent has argued that

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<sup>327</sup> Counter-Memorial, para. 211; see also *Cavendish* (Ex. RLA-0039), para. 14 ("[W]here a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation" – in other words, a contractual remedy – "which is capable of being a penalty").

<sup>328</sup> *Cavendish* (Ex. RLA-0039), para. 15; *Vivienne Westwood Ltd. v. Conduit Street Development Ltd.* [2017] EWHC 350 (Ch) (Ex. RLA-0064), paras. 38, 63 (affirming that whether clause is punitive is "question of substance and not of form"; applying principle to hold that "the obligation to pay rent at a higher rate as from the rent commencement date of the lease, regardless of the nature and consequences of the breach and when it occurs, is penal in nature"); Digest of *Vivienne Westwood Ltd. v. Conduit Street Development Ltd.* [2017] All ER (D) 47 (Mar) (Ex. RLA-0044), at p. 4, para. 2 (same).

<sup>329</sup> Counter-Memorial, para. 214.

<sup>330</sup> *Cavendish* (Ex. RLA-0039), paras. 14-18. The exercise of an option is often triggered by, or dependent on, a breach of the main agreement or another agreement in the suite of documents (for example a share purchases agreement or a key service agreement). See Ex. RE-0086.

<sup>331</sup> The Claimants also doubt the ongoing validity of the *Dunlop Tyre* test, and state that most of the authorities relied on by the Respondent (including Halsbury) predate *Cavendish*. See Reply Memorial, paras. 165-170.

<sup>332</sup> *Cavendish* (RLA-0039), para. 255. Lord Hodge made clear that in "other circumstances [i.e., other than liquidated damages clause] the contractual provision that applies on breach is measured against the interest of the innocent party which [are] protected by the contract and the court asks whether the remedy is exorbitant or unconscionable."

its obligation would be fulfilled by payment of fair market value. The fact the Tribunal has not agreed with these positions does not turn the Respondent's contested questions of interpretation into breaches of the SPA.

256. In the 1994 SPA, the GOG made a conditional offer to purchase the GRENLEC shares in the event one or more "repurchase" events occurred. In the first instance, at least, it is for the Claimants to formulate the relief they seek. The primary relief sought by the Claimants is specific performance of the GOG promise to purchase. The Claimants seek to enforce the contract not a remedy for its breach. The rule against penalties presupposes a breach of the contract and a claim for damages, per Lord Hodge in *Cavendish*, at para. 243:

The rule against penalties is a rule of contract law based on public policy. It is a question of construction of the parties' contract judged by reference to the circumstances at the time of contracting; the public policy is that the courts will not enforce a stipulation for **punishment for breach of contract**.<sup>333</sup>

and Lords Neuberger and Sumption at para. 28:

The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the **contract-breaker** out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.<sup>334</sup>

257. The Respondent argues that the fact the SPA specifies the same compensation for several Repurchase Events shows it is a penalty rather than a genuine pre-estimate of damages. However, in the Tribunal's view, the range of Repurchase events shows that the Repurchase Obligation has nothing to do with fixing the level of damages. Rather, the SPA determines the purchase price of the GRENLEC shares. Because any Repurchase Event triggers the transfer of the same assets (the GRENLEC shares), the valuation of the GRENLEC shares will always be the same regardless of the seriousness of the event that triggered the repurchase.

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<sup>333</sup> Respondent's Closing Argument, slide 30.

<sup>334</sup> Respondent's Opening Argument, slide 32.

258. **In the Tribunal’s view**, the GOG cannot convert its primary obligation to repurchase the GRENLEC shares at an agreed price into a secondary obligation to pay damages. The Claimants have framed this case as a claim in specific performance of the SPA. If an individual of sound mind buys a painting and agrees to pay twice what it is worth despite the availability of expert advice and is not disadvantaged by duress, or some debilitating infirmity, or uneven bargaining power, *Cavendish* holds that a court or tribunal has no authority to set aside the bargain because the purchaser now claims he agreed to pay an “extravagantly disproportionate” price.

259. The Tribunal therefore rejects the Respondent’s challenge to the validity and applicability of the Second Schedule as determining the Repurchase Price of the Claimants’ GRENLEC shares.

## X. QUANTUM

260. Section 7.9(b) of the SPA specifies that “the GOG agrees that it shall... upon the occurrence of a Repurchase Event, purchase and acquire all GRENLEC shares then owned by the Buyer” (i.e. GPP). The Claimants’ quantum expert, John Ellison of FTI, assessed the Second Schedule value of the Claimants’ investment (and thus the claim) as of the valuation date, 1 August 2016, being 50% of GRENLEC’s value, for a claim of EC \$182.04 million<sup>335</sup>, subsequently adjusted to EC \$182.1 million<sup>336</sup>. At the hearing, Mr. Ellison

<sup>335</sup> Summary of FTI valuation of GRENLEC as at 1 August 2016.

	<b>EC\$m</b>
Fixed Assets – Land	18.288
Fixed Assets – Property, Plant and Equipment	
Other Real Property (Buildings)	14.182
Personal Property (e.g. Plant & Equipment)	202.303
Non-PPE Fixed Assets and inventories	28.072
Other Assets	55.842
Less: Liabilities	(81.849)
<b>Net assets</b>	<b>236.837</b>
<b>ESA Goodwill</b>	<b>127.245</b>
<b>Value of Grenlec (according to the statutory formula)</b>	<b>364.082</b>
<b>Value of GPP’s 50% shareholding</b>	<b>182.041</b>

Source: Table 38

Source: Expert Report of John MH Ellison & Thomas Popovic (“**Ellison & Popovic**”), dated 1 March 2018, p. 10.

<sup>336</sup> See Ellison I, para. 2.21, n. 39.

accepted a further adjustment resulting in a revised value of EC \$180.941 million. PwC produced a Second Schedule valuation of GRENLEC at approximately EC \$299.4 million<sup>337</sup> of which the Claimants' 50% share would be EC \$149.7 million. At the hearing, PwC revised that figure to EC \$276.239 million (of which 50% is EC \$138.12 million), approximately 24% less than FTI's revised valuation.

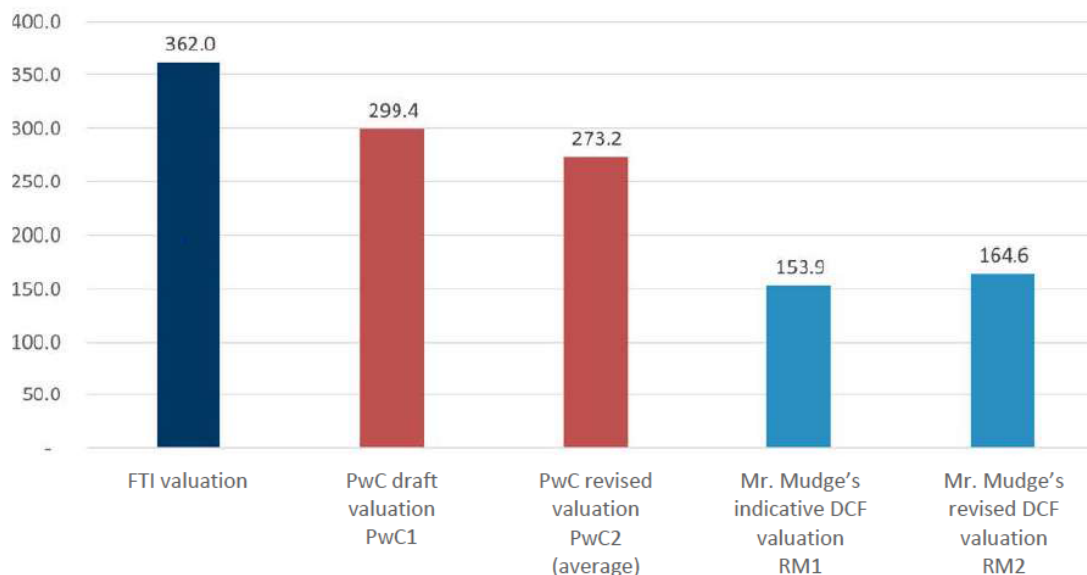
261. The Tribunal was presented with conflicting calculations of Second Schedule compensation by PwC, called by the Respondent and Mr. Ellison (FTI) and Mr. Popovic (KPMG) for the Claimants.<sup>338</sup>
262. In addition, the Tribunal also heard evidence from Mr. Robert Mudge of the Brattle Group, retained by the Respondent. Applying a version of the discounted cash flow (DCF) approach, Mr. Mudge generated values much lower than the quantum experts who applied the Second Schedule:

<sup>337</sup> PwC, Draft GRENLEC Valuation Report, dated 25 June 2018 (Ex. CE-0182).

<sup>338</sup> See Respondent Closing Argument, slide 41:

Ellison-Popovic Valuation – November 2018	364,282	Corrections made by PwC	
<b>Adjustments:</b>		Deferred Tax	2,500
Amendment to value of buildings	(2,582)	Customs	500
Amendment to value of fixed assets (not including buildings)	(19,904)	<b>Revised PwC Valuation</b>	<b>276,239</b>
Deferred tax liability	(40,352)	Ellison-Popovic Initial Valuation	364,282
Contributions to hurricane reserve	(10,000)	Adjustment based on testimony (customer contributions)	(2,400)
ESA depreciation	(7,300)	<b>Revised Ellison-Popovic Valuation</b>	<b>361,882</b>
Customer contributions to line extensions	(7,000)	<b>Revised Difference</b>	<b>85,643</b>
Accounts Receivable	(2,271)		
Non-PPE fixed assets (customs duties)	(754)		
Customs Duties	(500)		
Other	(380)		
<b>PwC's Indicative Valuation – March 2019</b>	<b>273,239</b>		

### Summary of valuations, EC \$m



Note: The Claimants' 50% share of the US dollar valuations requires dividing these figures by 5.4.<sup>339</sup>

263. Mr. Mudge did not do a Second Schedule calculation and his DCF calculation, for reasons already explained, is irrelevant to the calculation of quantum, although his evidence was helpful in other respects.<sup>340</sup>

<sup>339</sup> FTI, slide 4. Sources: JE1: 2.21; TP1: 4.2.3; 4.3.3; 4.3.9; 4.3.13; 4.4.8; 4.4.12; 4.5.6; 4.6.8; 4.7.3; 4.9.3; PwC1: 16-17, 60; PwC 2: Table 1; RM1: Table 1; RM2: Table 1.

<sup>340</sup> Mr. Mudge affirmed that he did not undertake a Second Schedule valuation:

Q. What you have calculated in your Report, in your two reports, sir, is what you think is the value of GRENLEC; right?

A. I think they are fair estimates of the Fair Market Value of GRENLEC.

Q. You have not applied the agreed methodology to determine the price of GRENLEC; right?

A. I've calculated the value based on a standard methodology, not bound by the Second Schedule, that's correct.

Q. You have not applied the repurchase-price methodology; right?

A. Correct.

Q. ...[PwC considered] GRENLEC, the value [to be] between EC \$22.28 million and EC \$38.37 million is likely for 100 percent of GRENLEC's shares. Do you see that?

A. I do see that.

264. The Second Schedule is comprised of three parts:

- (a) Part I sets out a methodology for calculating the value of GRENLEC's net assets;<sup>341</sup>
- (b) Part II sets out a methodology for calculating GRENLEC's goodwill,<sup>342</sup> and
- (c) Part III sets out certain depreciation rates to be used in calculations under Part I and Part II.<sup>343</sup>

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<sup>341</sup> Part I of the Second Schedule stipulates that the value of GRENLEC's net assets should be calculated at the Repurchase Event Date as:

- (a) the value in the open market of the Company's assets (other than goodwill and fixed assets);
- (b) the value in the open market of all land of whatever tenure of the Company as if such land were unencumbered with any such buildings, plant, works and fixtures as may be erected thereon or affixed thereto; and
- (c) the replacement cost on site of the Company's fixed assets (excluding land but including any such buildings, plant, works and fixtures as may be erected on or affixed to such land and including also the fixed assets described in Part III of this Schedule) after deducting from such aggregate amount, firstly, depreciation calculated on the replacement cost (including customs and import duties) of each such fixed asset (such depreciation to be reckoned in the case of each such fixed asset from the date when the fixed asset in question was acquired by the Company to the date of the revocation of the Licence at the appropriate rate specified in Part III, or, in the case of any fixed asset not described in Part III, at a reasonable rate, provided that in respect of any fixed asset which is not reasonably suitable for its purpose by reason of obsolescence [sic], lack of repair or other cause the amount of depreciation to be deducted shall equal the difference between the replacement cost of the asset in question and its value in the open market) and, secondly, the amount of the Company's debts and other liabilities arising otherwise than in respect of any debentures or preference shares issued by the Company. (Ex. CE-0005, pp. 173-174)

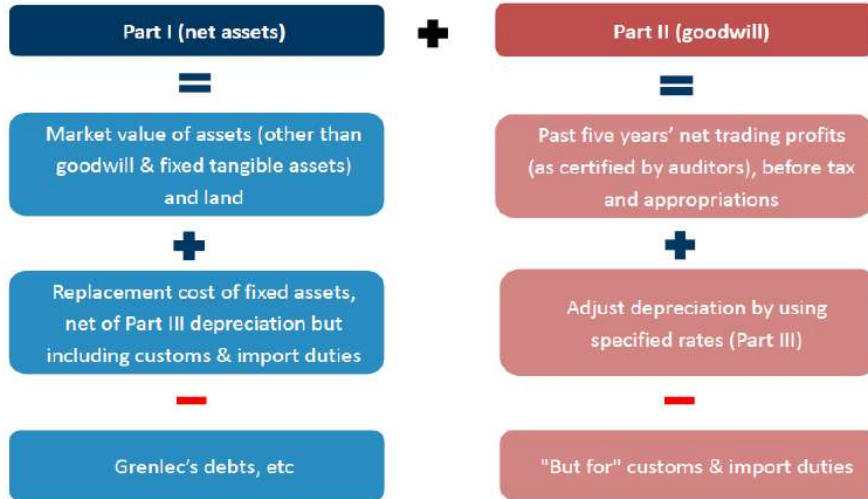
<sup>342</sup> The methodology for calculating the value of GRENLEC's goodwill under the ESA Valuation Methodology at the Repurchase Event Date is as follows:

The value of the Company's goodwill shall be deemed for the purpose of section 29 to equal the aggregate of the Company's **net trading profits (as certified by the Company's auditors)** during the five completed financial years of the Company next preceding the revocation of the Licence (such net trading profits being computed before charging or crediting income tax or similar tax based on income and before making any loan redemption provision or other appropriation of profits but after making all other deductions including payment of interest on indebtedness **and provisions for depreciation at the appropriate rates specified in Part III of this Schedule**) after deducting from the aggregate amount of such profits the aggregate amount of **all customs and import duties** (excluding customs and import duties on fuel) which the Company **would, but for the provision of section 13, have had to pay** during the aforementioned five completed financial years of the Company... (emphasis added). (Ex. CE-0005, p. 174)

The relevant financial years are ended 31 December 2011 to 2015 (i.e. the past five completed financial years prior to the Repurchase Date of 1 August 2016).

<sup>343</sup> ESA Depreciation Rates in Part III of the Second Schedule:

265. A Second Schedule valuation is therefore composed of the following elements:



Source: FTI Slide 6.<sup>344</sup>

**A. The Respondent Says it was Prevented from Doing a Second Schedule Calculation by the Claimants' Refusal of Cooperation**

266. The Respondent argues that GRENLEC is the sole custodian of a significant amount of relevant information which GRENLEC refused to disclose to the Respondent's experts.<sup>345</sup> Thus, the Respondent's experts have been forced to rely on the limited information

	% depreciation p.a.
Buildings – Permanent	2.0%
Buildings – Temporary	5.0%
Fencing	5.0%
Wooden Jetties	5.0%
Furniture and Office Equipment	5.0%
Oil Storage Tanks, Pipelines and Equipment	3.0%
Diesel Engines	4.0%
Alternators, switchboard, switchgear and transformers	4.0%
Transmission and Distribution Lines	2.5%
Meters	2.5%
Instruments	5.0%
Refrigeration plant	4.0%
Land clearance equipment	10.0%
Vehicles	10.0%
Motor Launches	5.0%
Bicycles	10.0%
Hydro-electric turbines and control gear	4.0%
Dams, intake works and water conduits	2.0%

Source: Part III of the Second Schedule of the 1994 ESA

<sup>344</sup> Ex. CE-0005; 1994 ESA, Second Schedule, Parts I, II & III, pp. 173-175.

<sup>345</sup> Respondent's Letter to the Tribunal, dated 22 June 2018.



provided by the Claimants and publicly available data in its review of FTI's Second Schedule valuation.

267. In the course of the hearing, two of the Respondent's quantum experts complained of denial of access to relevant information, including a frustrating site visit by Doran McClellan in January 2019 where, he says, GRENLEC employees were instructed by the Claimants' counsel not to answer straight-forward factual questions.

268. Mr. McClellan testified that:

I would tell you that that site visit, after 45 years of site visits in the valuation of machinery and equipment, is the most restrictive site visit that I have ever been a part of.<sup>346</sup>

269. The Claimants' expert, Mr. Thomas Popovic, a consultant on valuation who also attended the site visit in January 2019, said it appeared to comply with his understanding of the prior agreement reached between counsel for both Parties.<sup>347</sup>

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<sup>346</sup> Transcript, Day 4, p. 1334, ll. 14-17.

<sup>347</sup> Popovic Second Reply Report ("**Popovic II**"), dated 24 May 2019 at pp. 8-9. Mr. Popovic reported as follows:

PwC acknowledges that during the Site Visit, it was permitted to ask certain questions of GRENLEC personnel, as listed at paragraph 4.1.3 of PwC's report, as well as follow up questions to confirm and clarify points. PwC states that it was prohibited from discussing other questions with GRENLEC personnel.

In this respect, it was my understanding that, in advance of the Site Visit, the Government had proposed, and Claimants had agreed, that PwC would be permitted to ask the following questions of GRENLEC personnel:

- How are the major electric power generation assets used?
- What are their current conditions?
- What is the layout of the transmission grid and related sub-stations?
- What are the primary distribution areas and where are they located?
- What is the location of the other main transmission and distribution assets?
- What are the measurements, the principal characteristics, and the uses of these buildings? [See Email from Debevoise & Plimpton to White & Case dated 24 December 2018 (Ex. CE-0216); Email from White & Case to Debevoise & Plimpton dated 4 January 2019 (Ex. CE-0218)].

During my participation in the Site Visit, the GOG's representatives and experts were afforded the opportunity to ask GRENLEC personnel these questions as well as follow-up questions to confirm and clarify the answers provided on these points. Objections were raised only when GOG's representatives and experts asked GRENLEC personnel questions that were outside the scope of the agreed list, or when PwC made requests for new documents.

270. Mr. McClellan said he assessed building construction costs in Grenada as the same as in the United States because he says he lacked local information to do otherwise.<sup>348</sup>

271. As to whether the Tribunal could safely rely on his asset valuation, Mr. McClellan responded to a question from a Tribunal member as follows:

ARBITRATOR ADEKOYA: Mr. McClellan, I have just one question. In Paragraph 4.2.1 of your Report, you have indicated the restrictive nature of the site visits, the lack of access to supporting materials and to information.

THE WITNESS: Correct.

ARBITRATOR ADEKOYA: To what extent would you say that this impacts negatively on the figures that you have quoted in your Report?

THE WITNESS: Well, it's hard for me to assess what the negative impact would be...

\* \* \* \* \*

And I would really like to address your point and say, well, it might have a 10 percent negative impact, but I don't know because we never, even were able to make any assessments whatsoever in that regard.

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<sup>348</sup> Mr. McClellan testified as follows:

Q. Now, when you were in Grenada, did you speak with a local developer?

A. We reached out to local developers, but we received no responses and no return calls.

Q. And Mr. Brewer did not prevent you from speaking with local developers; right?

A. Well, that was procedures we implemented once we returned to the office to try and find any local construction people in Grenada.

Q. Now, is that because there are few developers in Grenada; right?

A. You know, we reached out to whoever we could. I don't remember who the Parties were. There were never any responses.

Q. Now, you applied – instead of applying the rates obtained from a local developer, you provided rates from the cost estimating guide; right?

A. Well, we didn't have rates from a local develop so we use the U.S. publication, MVS Services, as it relates to certain types of buildings, industrial buildings or whatever.

Q. And MVS is Marshall Valuation Services; right?

A. That's correct.

\* \* \* \* \*

Now, the reason we didn't make any adjustments is because we had – we had such a lack of data and information, including footings, foundations, and piers that might have been below the buildings, as well as any other information that we did not – and under my instruction – we did not want to create a whole list of extraordinary assumptions that weren't known and knowable into which we couldn't offer exact specifications. So we used the straight cost of the MVS Manual.

Q. Well –

A. The U.S. cost.

ARBITRATOR ADEKOYA: If you were my advisor and I'm trying to make an acquisition, based on this Report, what would you tell me?

THE WITNESS: I would tell you that we need to do a thorough investigation of the assets and the asset records, the amounts recorded in the asset records, how the--what has been the capitalization policy into the asset record, what adjustments have you made over the years.<sup>349</sup>

272. It would appear therefore that Mr. McClellan would not regard his valuation of assets under Part I of the Schedule as reliable without "a thorough investigation" of a type which he was unable to perform at GRENLEC.
273. The Tribunal accepts that the Respondent's experts were denied some of the factual information they considered important, but in that case it was up to the Respondent to invoke the Tribunal's assistance to seek additional disclosure.
274. By its ruling dated 17 September 2018, the Tribunal ordered disclosure of much financial and other information from GRENLEC. Certainly the Tribunal expected the Respondent to be in a position to make a full answer and defence to the claims. If subsequent difficulties arose (as described by Mr. McLellan in connection with the site visit), the Tribunal stood ready to deal with disputes arising out of any protocol negotiated by the Parties. The Tribunal was not approached by either Party for a further disclosure Order or other interim measure in this respect. In light of Mr. McLellan's own self-deprecating assessment of the value of his report, the Tribunal concludes that his report is of little assistance to the resolution of the claim.

**(1) The Meaning of "Net Trading Profits As Certified by the Company Auditors" During the Five Completed Financial Years [Prior to the Repurchase Event]**

275. The phrase "net trading profits" is not a defined term in the Second Schedule but none of the experts expressed difficulties applying the term.
276. The Respondent's expert, Wilfred Baghaloo, testified the phrase simply means "net profits of the company."<sup>350</sup>

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<sup>349</sup> Transcript, 21 June 2019, p. 1434, l. 9 to p. 1437, l. 17.

<sup>350</sup> Transcript, 21 June 2019 at p. 1497, l. 12 to p. 1498, l. 11:

277. The significance of the expression “as certified by the auditors” is less clear. The purpose seems to have been to freeze the accounts as set out in the financial statements of the preceding five years so as to create a firm basis for valuation that could not be manipulated after the initiation of the claim.<sup>351</sup>
278. However, in some instances, both FTI and PwC departed from the audited accounts for the years 2011 through 2015. As will be explained, the result of such departures would be, in the Tribunal’s view, to skew the valuation intended by the Parties.

**B. The Competing Valuations**

279. In the result, after the adjustments accepted at the hearing, FTI appraised GRENLEC at EC \$361,882,000 and the Claimants’ entitlement, at EC \$180.941 million equating to USD \$67 million .
280. PwC valued GRENLEC at EC \$276.239 million, of which the Claimants’ entitlement would be EC \$138.12 million or USD \$51.155 million.

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Q. So, if the Net Trading Profits do not appear in the Financial Statements, sir – and you can take my representation for that – GRENLEC’s auditors do not certify the Net Trading Profits of GRENLEC; right?

A. Well, that’s really – you’re getting into a legal issue here, a bit of substance over form. From an accounting perspective, where the word “net trading profit” and, you know, different persons, some person may call it “net trading profit,” some call it “net profits.” I think it meant overall the Net Profits of the Company, I guess the word “trading” used to exist because trading was, you know, back in the days, but I think substance or form, it means – it has a meaning, which is the net profits of the Company.

Q. Well, but you seem to be hesitating a lot, though, in coming to that conclusion; right?

A. Yes, because – because the words, you know – it’s lower case it says “net trading profits,” low N, low T, low P, you know, I think it’s substance over form or substantial what they really mean.

Q. They’re somewhat unusual, those words; right?

A. No, I don’t think so.

<sup>351</sup> Mr. Ellison testified as follows:

ARBITRATOR BOULTON: And this is a question that’s probably ultimately for counsel rather than for you, but in your experience, is it right that sometimes agreements have in a phrase like “go to the Audited Accounts to get this figure,” and that a reason for that is to provide certainty, that the Parties know what accounts they’re going to find the figures in order to adopt something like Schedule 2 rather than opening up a dispute about whether a different accounting treatment should have been possible or preferable.

THE WITNESS: Yes. That is right, but whether that extends as far as something which is not a question of whether an accounting treatment is possible or preferable but simply a mistake, that’s pushing it a bit further, but that’s a matter for you.

Transcript, 19 June 2019, p. 956, l. 11 to p. 957, l. 4.

281. The principal issues on which the quantum experts differed are as follows:

- (i) *deferred taxes* (EC \$37.8 million) – PwC considers that GRENLEC has a deferred tax liability because of the restated value of fixed assets arising from the repurchase. FTI states that no such restatement or revaluation is necessary or appropriate as a result of a transaction between shareholders;
- (ii) *Hurricane Insurance Reserve Fund* (EC \$10 million) – is treated by PwC as a liability but by FTI as an “equity reserve” i.e. an appropriation of profit;
- (iii) *computer depreciation* (EC \$7.3 million) – PwC and Robert Mudge depreciated the GRENLEC computers at a 20% rate given the useful life of computer technology (estimated at 5 years), whereas FTI classifies computers as “furniture and office equipment” within the meaning of Part III of the 1994 Second Schedule, which calls for a depreciation rate of 5%;<sup>352</sup>
- (iv) *customer contribution to the cost of installing supply lines to the private premises distant by 400 feet or more* (EC \$4.6 million) – at issue is whether and to what extent these payments are refundable and therefore should be recognized as a liability.<sup>353</sup> PwC recognizes a liability of EC \$7 million. FTI recognizes only a lesser liability of EC \$2.4 million, on the basis that the balance is non-refundable;
- (v) *FTI has inflated the valuation of assets by adding in an amount equivalent to “customs and import duties” that were never paid* because of GRENLEC’s then existing tax exemption (EC \$754 thousand);
- (vi) *the Respondent says the Claimants’ experts wrongly included in the valuation some of “the assets that were damaged or destroyed” by Hurricane Ivan* (EC \$22.486

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<sup>352</sup> Ellison & Popovic, Appendix 5 Native, Personal Property Classes Tab, Row 19, columns C & J; Mudge I, para. 76.

<sup>353</sup> Popovic Reply Report (“**Popovic I**”), dated 29 November 2018, para. 3.3.5.

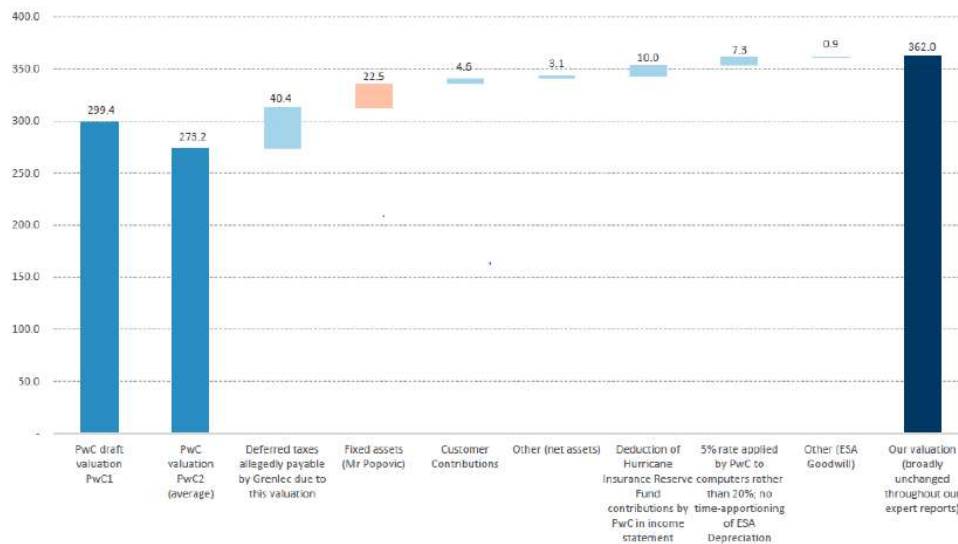
million).<sup>354</sup> In other words, according to the Respondent, the Claimants' figures included assets which no longer exist and form no part of the GRENLEC enterprise.

(vii) *Accounts receivable* (EC \$2.271 million); and

(viii) *Other* (EC \$380 thousand).

### C. Impact on the Valuation of the Disputed Items

282. FTI sought to show the relative importance of these differences as follows:



Note: The Claimants' 50% share of the US dollar valuations requires dividing these by 5.4.  
 Source: FTI Slide 11.<sup>355</sup> The chart does not take account of concessions of EC \$2.5 million (deferred tax) and EC \$0.5 million (customs duties) made by PwC at the hearing.

### D. Alleged Liability for Deferred Taxes (EC \$37.852 Million)

283. PwC considers that GRENLEC has a deferred tax liability because of a restated value of fixed assets that PwC says would result from the repurchase. FTI states that there is no such revaluation. The repurchase is a transaction between shareholders. GRENLEC's financial statements are not affected.

<sup>354</sup> Ellison & Popovic, para. 6.2.12(c).

<sup>355</sup> FTI, Slide 11.

284. The Respondent's quantum expert, Mr. Wilfred Baghaloo of PwC acknowledged that at present, there is no such deferred tax liability and that such a tax liability would not arise unless and until GRENLEC "restate upwards" the carrying value of its fixed assets, which GRENLEC has not done and which Mr. Baghaloo admits GRENLEC is not under any present obligation to do so.<sup>356</sup>
285. **In the Tribunal's view**, there is no factual foundation for the alleged "deferred tax liability" which does not exist and which therefore need not be taken into account in the valuation of GRENLEC as of the valuation date of 1 August 2016.

**E. Hurricane Insurance Reserve Fund (EC \$10 Million)**

286. In each of the relevant financial years, GRENLEC put aside EC \$2 million as a form of self-insurance against hurricane damage. In the financial statements 2011 to 2015, the fund was recorded as a liability.<sup>357</sup>

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<sup>356</sup> Mr. Baghaloo testified as follows:

Q. Now, for this to happen, for GRENLEC to have to account for **deferred tax liability** in its accounts, GRENLEC would have to revalue its fixed assets; right?

A. That's correct.

Q. That is, GRENLEC would have to restate upwards the carrying value of its fixed assets.

A. That's correct.

Q. In its books.

A. That's correct.

Q. And GRENLEC has not done so.

A. No, it has not.

Q. Is there any indication in the record, sir, that GRENLEC intends to do so?

A. Not to the best of my knowledge.

Q. In fact, sir, isn't it true that **GRENLEC is under no obligation to restate the carrying value of its fixed assets, whether to reflect the Second Schedule valuation under the ESA or for any other reasons?**

A. **That is correct.** But equally, it can account for it, if it so chose to do.

Q. If it so chose to; right?

A. At this point in time.

Q. Right.

Transcript, 21 June 2019, p. 1488, l. 18 to p. 1489, l. 19. (emphasis added)

<sup>357</sup> Mr. Ellison testified:

Q. Okay. So the accounting treatment of the Hurricane Insurance Reserve Fund as of the Valuation Date was as a liability; right?

A. Yes, that's right.

Transcript, 19 June 2019, p. 908, ll. 2-5.

287. The 2016 financial statements correcting the “error” were only issued on 17 March 2017 which was subsequent to the commencement of this arbitration and subsequent to the Valuation Date of 1 August 2016.<sup>358</sup>
288. In their respective quantum reports, the “Hurricane Reserve Fund” is treated by PwC as a liability but by FTI as an “equity reserve”, *i.e.* an appropriation of profit.
289. The Claimants argue that the earlier classification by the GRENLEC auditors<sup>359</sup> as a liability was an error subsequently acknowledged by GRENLEC’s auditors (PKF) and by the Association of Chartered Certified Accountants (“ACCA”).<sup>360</sup> (The Respondent contends that KPMG initiated the “correction”.)<sup>361</sup>

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<sup>358</sup> John Ellison testified:

Q. And GRENLEC partially changed that treatment as you just referred to, in the 2016 Annual Report?

A. Yes.

Q. Now, as with many annual reports it comes out the year after, so the 2016 Annual Report was dated March 2017; right?

A. Yes.

Q. That's about the time that your First Report, your indicative Valuation Report was finalized; right?

A. Yes, I think that was March'17.

Q. Okay. March'17 is after the Valuation Date of August 1st, 2016; right?

A. Yes.

Transcript, 19 June 2019, p. 907, ll. 11-22.

And the issue, sir, that you will have to decide is whether you follow PriceWaterhouse’s approach which is basically, as I understand it, to treat contributions to the fund as expenses because that is what the accounts showed at the time, and then you’ve got this reference to as certified by the Company's auditors, or whether to take the correct approach and accept that this is not a liability, and putting aside this 2 million every year is not an expense, it is a reserve.

Transcript, 19 June 2019, p. 797, l. 22 to p. 798, l. 9.

<sup>359</sup> “Prior to GRENLEC’s 2016 Audited Accounts, the annual EC \$2 million contribution to the Hurricane Insurance Reserve fund was recorded as an expense in GRENLEC’s accounts, with the other side of the accounting entry being an addition to the ‘Provision for Hurricane Insurance Reserve’, **which was recorded as a liability** in those accounts...The 2015 Audited Accounts record this amount to be EC \$19.953 million...GRENLEC changed its accounting treatment of the Hurricane Insurance Reserve in the 2016 Audited Accounts, and restated the 2015 comparative results to reflect this change of treatment. GRENLEC now reflects the Hurricane Insurance Reserve under Shareholder’s Equity as a reserve, and not as a ‘provision’ in Liabilities...However, **GRENLEC still deducts deposits into the Hurricane Insurance Reserve in the calculation of its profits before tax (i.e. GRENLEC still treats these deposits as an expense), even though they should now be considered an appropriation of profits to the Hurricane Insurance Reserve rather than an expense.** (emphasis added) (Ellison & Popovic, pp. 86-87)

<sup>360</sup> Letter dated 10 October 2016 from H. Joseph (PKF) to B. Brathwaite (GRENLEC) (Ex. CE-0168).

<sup>361</sup> Respondent’s Closing Argument, slide 44; see evidence of John Ellison (Transcript, 19 June 2019, p. 922, l. 5 to p. 923, l. 3).



290. **In the Tribunal's view**, the Respondent is correct. Part II of the Second Schedule directs the valuation to be based on the financial statements for the 5 years preceding the revocation of the license, being 1 August 2016, "as certified by the Company auditors". Throughout those years, the financial statements were "certified by the auditors." The Tribunal accepts the evidence that GRENLEC's auditors were probably wrong in their treatment of the "hurricane reserve" over the relevant 5 years but for the purpose of the Second Schedule calculation, the auditor's certification is conclusive. The Tribunal therefore concludes that the Hurricane Insurance Reserve must be treated as a liability.

**F. Computer Depreciation (EC \$7.3 Million)**

291. GRENLEC has substantial computer systems. The company had some computer capacity in 1994, but in the subsequent 22 years technology accelerated and more sophisticated systems were acquired.

292. It is not clear what rate of depreciation was applied by GRENLEC's auditors to the computer systems in the 2011 to 2015 period.

293. PwC and Robert Mudge depreciated the GRENLEC computers at a 20% rate given their estimate of a 5-year useful life of computer technology. The Claimants' expert, Mr. Popovic, classified computers as "furniture and office equipment" within the meaning of Part III of the 1994 Second Schedule, which meant applying a depreciation rate of 5%<sup>362</sup> implying a useful life of 20 years.

294. The Second Schedule expressly states that any asset "not described in [the] Part III" categories must be depreciated "at a reasonable rate"<sup>363</sup> [**the reasonable rate test**]. The Tribunal is satisfied that a reasonable rate would have reflected the much shorter useful life of computers. The Respondent accuses FTI of choosing a rate that would artificially inflate the value ascribed to Claimants' shares.<sup>364</sup>

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<sup>362</sup> Ellison & Popovic. Appendix 5 Native, Personal Property Classes Tab, Row 19, columns C & J; Mudge I, para. 76.

<sup>363</sup> Ex. CE-0005, Second Schedule, Part I.

<sup>364</sup> Counter-Memorial, para. 298.

295. Mr. Popovic testified that he would have felt free under the Second Schedule to use a different rate of depreciation if the application of a 5% rate to computers “would have yielded an unreasonable result.”<sup>365</sup> However, in his view, the 5% rate was not unreasonable.<sup>366</sup>
296. The Respondent points out that the depreciation rates set out in Part III of the Second Schedule were prepared in 1960 when computers were not a significant factor in the GRENLEC business. It is anomalous that “bicycles” and “motor launches” have their own category but not the much larger asset class of computers. It is obvious that, in the 2011–2015 period, computer technology did not have a useful life of 20 years.
297. **The Tribunal agrees** with the Respondent that a 5% depreciation rate for computers is unreasonable.
298. The Claimants’ expert, Mr. Popovic, testified that he applied a “reasonableness” test to depreciation rates and did not apply without question the 5% rate to computers as being

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<sup>365</sup> Mr. Popovic testified as follows:

Q...there’s a provision, let’s call it the “common sense” clause, which says that if the asset doesn’t fit into one of those categories, you can apply a reasonable rate?

A. That’s – that’s correct.

Q. Okay. So, would you agree with me that if an asset under one view perhaps used to belong in one category, but times have changed, technology has advanced, so that it no longer fit that category, the “common sense” clause allows you to determine what would be the appropriate depreciation rate?

A. **I think if it would have yielded an unreasonable result, then I would consider making a change to something that was reasonable.** In this case, it didn’t yield an unreasonable result, so didn’t feel it was necessary to make a change.

Transcript, 20 June 2019, p. 1055, l. 8 to p. 1056, l. 1.

<sup>366</sup> Mr. Popovic explains that:

I disagree with PwC’s approach for two reasons. First, computers were widely used in offices in 1994. Yet in the Second Schedule the parties chose not to create a distinct category for computers. They chose only the broader category of office equipment. I note that where the parties wanted to create specific (rather than broad) categories in Part III of the Second Schedule, they did so (for example, “bicycles” and “motor launches”).

Second, in my experience, the purpose of provisions such as the one that PwC relied upon to justify creating a new asset category (“in the case of any fixed asset not described in Part III”) is to allow for the acquisition of new technology, not for the re-classification of existing technology. For example, solar panels and batteries are assets that were not owned by GRENLEC in 1994 (and were not specified in Part III of the Second Schedule) but were owned by GRENLEC as of the Valuation Date, and so I assigned them to a new asset classification. In contrast, I understand that computers were owned and used by GRENLEC in 1994.

Popovic II, paras. 4.5.3-4.5.4.

“furniture and office equipment,”<sup>367</sup> on the basis that while computer technology progresses rapidly much of the computer infrastructure has an extended useful life.

299. Mr. Ellison acknowledged the Second Schedule left room for judgment:

THE WITNESS: Well, you could take – you could take a view on that, Mr. President. I took the view, as did Mr. Popovic, that it is office equipment and, therefore, one goes by the rates that in their wisdom those who drafted the Schedule came up, but I can see that you could say, well, it’s actually not office equipment, it’s in a category of its own. People did have computers back in 1994, so it’s not something that – I had one then. It’s not something that had only come along since.<sup>368</sup>

300. The Tribunal agrees with PwC that technology has changed in the years since 1994, let alone 1960, when the depreciation categories were fixed. There is no evidence that GRENLEC possessed any computers in 1960 GRENLEC when the GOG adopted the depreciation rates for office equipment.

301. The Tribunal does not consider the fact that some sort of computers were present in 1994 (there is evidence computers were present but no details of what they were or did) requires their inclusion in “furniture and office equipment” when it was obvious, as of the Valuation

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<sup>367</sup> Mr. Popovic testified as follows:

Q. Okay. So, that this might be a circumstance in which, even if somebody thought computers, you know, sort of the massive mainframes that you had in 1960, would have qualified as office equipment in 1960, this might be an instance to use the common-sense clause in 2019 or 2018?

A. And if the common-sense clause would have resulted in a different value or a more reasonable conclusion, then absolutely, but because these assets are network equipment that have generally a longer life and the company has been using them for in excess of 10 years, and as I said, the result is assets above 10 years, 11 years not— have virtually no value, and those around 10 years have about 20 cents on the dollar of value which we would typically consider a pretty reasonable floor. There isn’t really a reason to make a lower life, one year compounding it with the deflationary trend.

Transcript, 20 June 2019, p. 1058, ll. 4-21.

Q...performed a reasonableness analysis. You start with the 5 percent, and then you explained to Ms. Reid that, well, when you put the 5 percent, which yields this implied 20-year useful life, but then you put it with the trend method of valuation, you put the whole package together, the result is reasonableness. So you were, in the end, applying a reasonableness test.

THE WITNESS: That’s correct.

Transcript, 20 June 2019, p. 1094, ll. 15-22.

<sup>368</sup> Transcript, 19 June 2019, p. 959, l. 18 to p. 960, l. 5.

Date, 1 August 2016, that the estimate of a 20-year useful life would yield a wholly unrealistic rate of depreciation and would artificially inflate the valuation.

302. There is no compelling reason to insist on a 5% depreciation rate when in the circumstances, the Second Schedule offers the alternative of a “reasonable rate test”. Accordingly, the Tribunal accepts the PwC evidence that the valuation should employ a 20% depreciation rate to GRENLEC’s computer equipment.

**G. Customer Contribution to the Cost of Installing Supply Lines to the Private Premises Distant by 400 Feet or More (EC \$4.6 Million)**

303. There is an EC \$7 million discrepancy in the valuation of transmission assets between the company’s 2016 unaudited financial statements and the fixed asset register on which Mr. Popovic relies<sup>369</sup>. The higher figure in the fixed asset register represents the cost of the transmission assets, while the lower figure in the financial statements includes a deduction for customer contributions to the installation of branch power lines.<sup>370</sup>

304. In considering whether and to what extent these customer payments are refundable and therefore should be recognized as a liability,<sup>371</sup> PwC recognizes a liability of EC \$7 million, referring to the contribution as “contra-assets”. FTI recognizes only a lesser liability of EC \$2.4 million.

305. The Claimants’ expert Mr. Ellison explained the issue as follows:

What happens here, sir, is that if a customer is more than 400 feet away from the supply line, he has to pay GRENLEC for the cost of installing an electricity supply line to his house – from his house to the main line going down the road. That line is the property of GRENLEC, that has to be paid for by the customer, and PwC and Mr. Popovic and I all agree that the asset – that line – should be included in the valuation of GRENLEC as an asset. There is no dispute about that. The issue is whether it is right to treat that cash coming in as, in effect, a profit or an offset against the cost,

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<sup>369</sup> Compare Ex. JETP02, at 1 (2016 Unaudited Financial Statements indicating EC \$69.1 million of transmission assets) with Ex. JETP49, at p. 120 (Fixed Asset Register indicating EC \$76.1 million of transmission assets). See also Mudge I, para. 76 (noting that KPMG provides no rationale for including contra-assets in GRENLEC’s fixed asset register and arguing that the inclusion of contra-assets creates an overstatement in cost calculations).

<sup>370</sup> Popovic I, para. 3.3.5.

<sup>371</sup> *Ibid.*

is probably more accurate, or whether it should be carried forward and recognized over the life of the line.

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...but the current position appears to be that some of it [the customer contribution] is repayable, in which case I would agree with you that it should be or potentially repayable [to the customer] – not repayable, potentially repayable – in which case I agree **it should be set up as a liability. And for that reason I moved my figure down from 7 million to 4 million in the slides.**

Q. So, again, just to be clear for the record, to make this adjustment, you're relying on information that you got from GRENLEC within the last week?

A. Yes.<sup>372</sup> (emphasis added)

306. **In the Tribunal's view**, the entire EC \$7 million should be treated as a GRENLEC liability. Mr. Ellison acknowledges that at least a portion of the EC \$7 million should be recognized as a liability based on a conversation with a GRENLEC employee "within the past week". This is a situation where GRENLEC controlled and managed by the Claimants has relevant information which has not been made available in a timely way to the Respondent (or indeed to the Claimants' expert, Mr. Ellison). In the circumstances, the Claimants having failed to cause GRENLEC to produce information uniquely within their control in a form that could be tested by the Respondent, it should be inferred that production of such information would not have assisted the Claimants' case.

**H. Should the Valuation Include an Amount Equivalent to "Customs and Import Duties" That Were Never Paid? (EC \$754,000)**

307. Part I of the Second Schedule requires the calculation of "replacement cost (including customs and import duties) of each such fixed asset."<sup>373</sup> FTI interprets the term "customs and import duties" to mean "customs and import duties' that would have been paid 'but for' the exemption granted to GRENLEC under Section 13 of the 1994 *ESA*". PwC, on the other hand would exclude any value attributed to unpaid customs and import duties.

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<sup>372</sup> Transcript, 19 June 2019, p. 799, ll. 7-21; p. 896, l. 18 to p. 897, l. 6.

<sup>373</sup> Ex. CE-0005, Second Schedule, Part I. The *ESA* valuation methodology requires *ESA* goodwill to be calculated net of a deduction for "all customs and import duties (excluding customs and import duties on fuel) which the Company would, but for the provision of Section 13, have had to pay during the aforementioned five completed financial years of the company." (*Ibid.*, Part II)

308. Part I of the Second Schedule, the Claimants argue, is clear that replacement cost is to be calculated “including customs and import duties,”<sup>374</sup> and no account is to be taken of GRENLEC’s prior exemption under section 13 of the 1994 *ESA*.<sup>375</sup> Part I does not call for a determination of what *GRENLEC* actually paid for its assets, but what a third party which does not enjoy the immunity would have to pay to replace them<sup>376</sup> following the 2016 laws which eliminated the tax exemption. This reading of Part I, FTI argues, “harmonizes perfectly with Part II,<sup>377</sup> which also adopts the perspective of any market participant”, that is, one who does not benefit from GRENLEC’s exempted status and who, in determining GRENLEC’s profitability, would discount profits attributable solely to GRENLEC’s special exemption from customs and import duties. The Respondent’s position is that the Claimants should not get credit for a sum equivalent to customs and import duties that they never paid.
309. **In the Tribunal’s view**, replacement cost of a fixed asset necessarily includes “customs and import duties” because, as of the Valuation Date, 1 August 2016, the cost of replacing the plant and equipment would necessarily include the payment of customs and import duties at the time of importation.
310. Thus, while GRENLEC’s history of tax exemption would properly be reflected in a calculation of book value and depreciation, the value of fixed assets as of the Valuation Date cannot be discounted on the basis of a tax exemption that no longer existed.

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<sup>374</sup> *Ibid.*, Part I.

<sup>375</sup> Counter-Memorial, para. 301; 1994 *ESA*, s. 13 “During the continuance of the licence, all plant, machinery, equipment, meters, instruments, vehicles, fuel, lubricants and materials (including replacement parts and spares) imported by the Company for the purpose of the Company’s undertaking shall be exempt from all customs and other import duties and landing tax” (Ex. CE-0005).

<sup>376</sup> Popovic II, para. 4.5.4.

<sup>377</sup> Under the 1994 *ESA*, Second Schedule Part II, GRENLEC’s Goodwill is to be derived from GRENLEC’s net trading profits over the preceding five years after deducting “all customs and import duties (excluding customs and import duties on fuel) which the Company would, but for the provision of section 13, have had to pay during the aforementioned five completed financial years of the Company” (Ex. CE-0005).

**I. Whether the Claimants' Valuation of Fixed Assets Wrongly Included Assets Destroyed in Hurricane Ivan? (EC \$22.5 Million)**

311. Hurricane Ivan, the worst natural disaster in Grenada's recent history, caused massive damage across the island, including to the national electricity grid.<sup>378</sup>
312. The Respondent claims that 80% of GRENLEC's transmission lines were damaged or destroyed. However, Mr. Popovic's analysis assumes that only 18% of the transmission and distribution assets on the fixed asset register were damaged or destroyed.<sup>379</sup> He therefore includes in his valuation, according to the Respondent, assets which no longer exist as part of the enterprise.
313. It is common ground that much of the repair work was donated *pro bono* by other Caribbean countries, especially Cuba. However, no records were kept of whose workers did what and where. All that is known is that GRENLEC spent EC \$17.4 million to put its system back together.
314. Mr. Popovic assumed that the repair work (e.g. resurrecting power lines) was done by *pro bono* labour, and that the EC \$17.4 million was spent on replacement of "completely destroyed assets".<sup>380</sup>

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<sup>378</sup> See e.g., Ex. RE-0029 (estimating that, as a result of Hurricane Ivan, 80% of GRENLEC's distribution system was damaged).

<sup>379</sup> Mudge I, para. 76. A high-level, preliminary review of KPMG's application of the Second Schedule was performed by PwC, in support of the Counter-Memorial submission and as reflected in Mr. Mudge's expert report. See also Mudge I, para. 7.

<sup>380</sup> Mr. Popovic testified:

Q. Okay. So, just so I understand, we had established that GRENLEC has stated and nobody disputes, that 80 percent of the T&D system was damaged to some extent by Hurricane Ivan; correct?

A. That's correct.

Q. Okay. But your assumption is that the replacement costs that would be associated with fixing that system would only be equivalent to 18 percent of those assets?

A. Not fixing, but replacing completely destroyed assets.

Q. Okay. So, you made an assumption again, because nobody has information about this, that all of the money that GRENLEC spent was to replace assets that had been destroyed or had been so damaged that they were effectively destroyed, and that anything that was repaired was repaired *pro bono*?

A. That's correct.

315. The significance of attributing the entire EC \$17.4 million to replacement rather than repair is because “replacement” produces a new asset, shorter depreciation and higher value.<sup>381</sup>
316. In Mr. Popovic’s view, the proportionate value of assets destroyed must be equal to the proportionate value of assets replaced.<sup>382</sup> He thus removed the full cost of restoring GRENLEC’s T&D system (EC \$17.4 million) from the historical cost of GRENLEC’s (pre-Ivan) T&D assets, and added the same amount to the cost of GRENLEC’s (post-Ivan) T&D assets. The Claimants say FTI’s calculation is conservative because the amount

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<sup>381</sup> Mr. Popovic testified:

Q. Okay. And as we said yesterday, the choice between replacement and repairs has an effect on valuation, right?

A. It does.

Q. Okay. Because all other things being equal, if you decide that money was spent on replacement, it means you have a new asset, shorter depreciation, higher value; right?

A. That’s correct. (Transcript, 20 June 2019, p. 1065, ll. 1-9).

\* \* \* \* \*

...I would assign no value to it [*pro bono* labour] because it didn’t increase the value of the network, so it happened, a cost was spent, that cost repaired the existing assets and they were placed back in service. I didn’t add a value. I think that’s consistent. (Transcript, 20 June 2019, p. 1067, l. 19 to p. 1068, l. 2).

\* \* \* \* \*

Q...So, you chose, as you testified yesterday, to assume that 100 percent of the \$17.4 million was used for replacement, that every single dollar was used to replace destroyed assets; right?

A. Yeah, that combination of material and labor associated with that 17.4, 100 percent to replacement. (Transcript, 20 June 2019, p. 1068, l. 22 to p. 1069, l. 6)

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My understanding is the labor component of that 17.4 about 20 percent, and that’s why we ultimately made that assumption. (Transcript, 20 June 2019, p. 1077, ll. 6-8).

<sup>382</sup> Thus, Popovic I states as follows:

In my valuation, I assumed that, since GRENLEC fully restored its T&D system in 2004-2005 following Hurricane Ivan, the amount spent to do so was a reasonable estimate of the damage caused. That amount was EC \$17.4 million (consisting of the entire Hurricane Insurance Reserve Fund then available and EC \$1.4 million in GRENLEC cash). I thus assumed that EC \$17.4 million of the total historical costs had been replaced following Hurricane Ivan and was thus to be depreciated from that date. I depreciated the balance from the (much) earlier date of initial acquisition. In contrast, PwC subtracts a much larger proportion of historical costs (60% of EC \$62.2 million) and adds the EC \$17.4 million that was spent on repairs as an addition to historical cost to account for what was replaced. **In other words, PwC assumes that Hurricane Ivan destroyed 60% of GRENLEC’s T&D system (EC \$37 million) while restoration cost EC \$17.4 million...** PwC relies on “third party sources” for its assumption that “60% to 70%...[was] destroyed” and not placed back into service, while other reports indicate that 80% was merely “damaged” and later repaired and placed back into service. GRENLEC’s 2004 annual report states the latter conclusion. (Popovic Reply Report, paras. 4.6.3-4.6.5)



GRENLEC spent on restoring the distribution system did not include the significant *pro bono* efforts of other Caribbean utilities.<sup>383</sup>

317. Mr. Robert Mudge, retained by the Respondent, considered it reasonable to assume a much greater level of destruction than the 18% assumed by Mr. Popovic.
318. **The Tribunal accepts that** in the absence of contemporaneous records, it is difficult to assess precisely the damage inflicted on GRENLEC's fixed assets and thus on its valuation. The only solid figure is the global expenditure by GRENLEC of EC \$17.4 million. It seems reasonable to assume, as did Mr. Popovic, that the *pro bono* workers from abroad were largely assigned to repairing the transmission and distribution system, which is the type of work they were used to performing in their home countries.
319. Mr. Popovic assumed 80% of the EC \$17.4 million was for equipment (almost EC \$14 million). New equipment would add value to the fixed asset register.
320. As to the other 20%, the installation of new equipment required labour and that labour required to make operational new equipment also added net value to the GRENLEC operation and, according to Mr. Popovic, such labour is properly "capitalized" in the value of the asset.<sup>384</sup>

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<sup>383</sup> Blanchard II, para. 59, footnote 77.

<sup>384</sup> Mr. Popovic testified as follows:

Q...to my mind "repair" involves obviously some labor, to put an asset back into the condition that it can be used; "replacement" appears to suggest actually acquiring a new asset, which is less of a labor issue and more of materials or equipment issue.

THE WITNESS: Yeah, I think the distinction is exactly that. It is, when I think about a replacement, it is the labor to install that asset. And when they capitalize an asset, for instance, all the assets that remained on the Fixed Asset Listing that would have been destroyed, they would have included installation; right, in that – in the Fixed Asset Listing. All those Fixed Assets would have included installation. So, when we are – when we are thinking about the repair of an asset, we wouldn't add additional repair value because it already exists within the Fixed Asset Listing when it was first installed. If we took into account the *pro bono* labor and said, "Oh, they spent this amount of money on repair," that's labor, and then we added that to the existing listing, the assets in the existing listing that were aged, we'd be double-counting labor because they have a labor component on the original installation, and that's really the full value of the installation labor. The repair doesn't extend the life of the asset. It's just an expense spent to get that original asset back in its working condition, with all the value associated with that original asset.

Transcript, 20 June 2019, p. 1087, l. 21 to p. 1089, l. 6.

321. **In the Tribunal’s view**, Mr. Popovic made a reasonable extrapolation from the one “known” and important fact that GRENLEC spent EC \$17.4 million on repair and replacement. Mr. McLellan, who operated with even fewer facts than did Mr. Popovic, was unable to provide a convincing argument to the contrary.
322. In the result, the Tribunal accepts Mr. Popovic’s analysis of the financial impact of Hurricane Ivan on GRENLEC’s fixed assets.

**J. Conclusion**

323. The Tribunal will therefore proceed to an assessment of compensation according to the Second Schedule.

<b>Tribunal Decision on Second Schedule Calculation</b>	<b>EC \$’000</b>
<b>As claimed (revised Ellison-Popovic figures)</b>	<b>\$361,882</b>
<b>Tribunal adjustments</b>	
Amendment to value of buildings	\$0
Amendment to value of other fixed assets	\$0
Deferred tax liability	\$0
Contributions to hurricane reserve	-\$10,000
ESA depreciation	-\$7,300
Customer contributions to line extensions	-\$4,600
Accounts Receivable	-\$2,271
Non-PPE fixed assets (customs duties)	\$0
Customs Duties	\$0
Other	\$0
<b>Total Tribunal adjustments</b>	<b>-\$24,171</b>
<b>Second Schedule Valuation per the Tribunal</b>	<b>\$337,711</b>

324. Accordingly, making the appropriate adjustments, the Tribunal concludes that the Claimants are entitled to be compensated under the Second Schedule in the amount of 50% of EC \$337.711 million, being EC \$168.8555 million or USD \$62.53907 million. From this figure should be deducted the EC \$11.1 million paid to the Claimants by way of GRENLEC dividends from and after the date of the Repurchase Event (as hereinafter discussed). Therefore, the quantum of Second Schedule Compensation is assessed at EC \$168.8555 million minus EC \$11.1 million = EC \$157.7555 million or USD \$58,427,962.

## **XI. THE CLAIMANTS' REQUEST FOR PRE-AWARD AND POST-AWARD INTEREST**

325. The Claimants seek interest on the Award from 3 May 2017 until payment at the Grenadian Prime Lending Rate of 6%, compounded semi-annually.<sup>385</sup> The Claimants request the same rate and compounding period in respect of post-Award interest.
326. The award of interest is discretionary.
327. The Respondent disputes any entitlement to pre-award interest on the grounds that:
- (a) the Parties' claims, including the Claimants' remedies, are governed by Grenadian law,<sup>386</sup> and Grenadian law would not award interest in these circumstances;
  - (b) there existed a good faith dispute between the GOG and the Claimants that justified the non-payment of compensation until the Award.

### **A. Grenadian or International Law?**

328. The Claimants argue that an ICSID tribunal sits as an international tribunal applying international law. There is *jurisprudence constante* awarding compound interest in investor-state disputes.<sup>387</sup> Where, as here, "the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest."<sup>388</sup>

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<sup>385</sup> Memorial, para. 117, Reply para. 293.

<sup>386</sup> Counter-Memorial, para. 314.

<sup>387</sup> See e.g., *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award (16 June 2010) (Ex. CLA-0020), paras. 16-26 ("[T]here is now a form of 'jurisprudence constante' where the presumption has shifted from the position a decade or so ago with the result it would now be more appropriate to order compound interest, unless shown to be inappropriate in favour of simple interest, rather than vice-versa."); *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Award (27 November 2013) (Ex. CLA-0117), para. 261; *Ol European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award (10 March 2015) (Ex. CLA-0120), paras. 948-949; *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (16 September 2015) (Ex. CLA-0122), para. 524; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award (21 July 2017) (Ex. CLA-0127), para. 1125; *Caratube International Oil Company LLP and Devinci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Award (27 September 2017) (Ex. CLA-0128), para. 1226.

<sup>388</sup> John Gotanda, *Compound Interest in International Disputes*, (2004) Oxford U Comparative L Forum 1 (Ex. CLA-0100).

329. Moreover, the Claimants say, Grenadian law also awards compound interest on payment found to have been wrongfully withheld. The House of Lords in *Sempra Metals* noted that “[i]n the nature of things the proof required to establish a claimed interest loss will depend upon the nature of the loss and the circumstances of the case,” and that “the loss may be loss of an opportunity to invest the promised money.”<sup>389</sup> WRB is a sophisticated investor and would have invested the repurchase proceeds on receipt.<sup>390</sup> WRB would have earned a return with compound interest, as “almost all financing and investment vehicles involve compound interest.”<sup>391</sup>
330. In response, the Respondent refers to Sections 27 and 27A of the *West Indies Supreme Court Act*. Section 27 governs the award of pre-award interest and states that “nothing in this section...shall authorise the giving of interest upon interest,” that is, compound interest.<sup>392</sup> Section 27A, governing the award of interest on a “judgement debt,” likewise provides only for a default rate of *simple* interest at six per cent per annum.<sup>393</sup> Moreover, as *Sempra Metals* confirms, in cases “granting specific performance,” as WRB and GPP seek, “equity commonly awards simple interest only.”<sup>394</sup> In any event, the Claimants’ claim fails for lack of proof, per Lord Nicholls in *Sempra* at paragraph 96:

[A]n unparticularised and unproved claim simply for “damages” will not suffice. General damages are not recoverable. The common law does not assume that delay in payment of a debt will of itself cause damage. Loss must be proved.<sup>395</sup>

331. The Respondent says that the Claimants have failed to demonstrate any such loss.

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<sup>389</sup> *Sempra Metals Ltd. (formerly Metallgesellschaft Ltd.) v. Inland Revenue Commissioners et al.* [2007] UKHL 34 (Ex. RLA-0051) (“*Sempra Metals*”), para. 95

<sup>390</sup> As explained in Memorial (paras. 63-66), GPP sent its repurchase demand notice to Respondent on 22 March 2017, which started a 30-day period for Respondent to repurchase GPP’s GRENLEC shares pursuant to Section 7.9(b) of the SPA. On 3 April 2017, GPP agreed to extend the 30-day period to 3 May 2017.

<sup>391</sup> John Gotanda, *Compound Interest in International Disputes*, (2004) Oxford U Comparative L Forum 1 (Ex. CLA-0100).

<sup>392</sup> Act No. 17 of 1971 (Ex. RLA-0052), Chapter 339, s. 27.

<sup>393</sup> *Ibid.*, Chapter 339, s. 27A.

<sup>394</sup> *Sempra Metals* (Ex. RLA-0051), p. 653, para. 239 (per Lord Mance).

<sup>395</sup> *Ibid.*, p. 601, para. 96 (per Lord Nicholls).

332. **The Tribunal has concluded** that the GOG ought to have completed the GRENLEC share Repurchase on 3 May 2017 following the abrogation and narrowing of GRENLEC's monopoly by the 2016 legislation that came into effect on 1 August 2016.
333. The Award of interest and the compounding period, if any, is a matter for the Tribunal's discretion. The source of the Tribunal's remedial authority is the ICSID Convention and Rules of Procedure not the *West Indies Supreme Court Act*.
334. The Respondent has portrayed the Claimants throughout these proceedings as relentless capitalists determined to maximize their return on capital. The Tribunal has no doubt that had the repurchase price been paid on 3 May 2017, the Claimants would have made an income-generating investment forthwith.

**B. Did the Government Have a Good Faith Dispute with the Claimants Under the SPA so as to Deny the Claimants Any Entitlement to Pre-Award Interest**

335. The Respondent argues that the SPA relieves the GOG of any obligation to pay pre-award interest because of Section 7.9(c) of the SPA, which provides:

In the event of any good-faith dispute between the Parties **concerning whether a Repurchase Event has occurred**, the GOG shall be entitled to withhold its payment in respect thereof until the arbitration proceedings with respect thereto have been completed.<sup>396</sup> (emphasis added)

336. The Respondent argues that it “has in good faith disputed the occurrence of any Repurchase Event,” and pursuant to Section 7.9(c), the obligation to pay the repurchase price arises only once the Tribunal renders an award, and that any obligation to pay interest can only run from the date of the award.<sup>397</sup>
337. The Respondent has admitted the third Repurchase Event subject to its entitlement to the “extreme of wilful malfeasance” defence. Thus, the issue is whether “extreme or wilful malfeasance” defence was raised in good faith, as the Respondent says.

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<sup>396</sup> SPA (Ex. CE-0007/ Ex. RE-0089), s. 7.9(c)

<sup>397</sup> Counter-Memorial, paras. 305-312.

**(1) Is the Respondent Entitled to a Presumption of Good Faith?**

338. The Respondent points to the letter from the Prime Minister to the Claimants dated 2 May 2017 in which the Prime Minister undertook to address in good faith the Claimants' demands.<sup>398</sup>
339. The Tribunal has no reason to doubt the Prime Minister's good faith, or that of the Government, generally, in resolving the dispute.
340. At issue, however, is the much narrower issue of whether the "extreme or wilful malfeasance" allegations were made in good faith or raised *ex post facto* as a late-blooming defence. Any presumption of good faith would be a rebuttable presumption, and the Claimants allege that the documentary record shows conclusively that the "malfeasance" issue is a lawyer's after-the-fact concoction.

**(2) Does the Documentary Record Confirm or Deny the "Good Faith" of the Malfeasance Allegation?**

341. The Respondent relies upon a letter dated 2 May 2017, from the Attorney General of Grenada to the Claimants advising that, "[a]s [Claimants] are aware, under Section 7.9(c) of the SPA, the Government is under no obligation to make any payment if **there is a good-faith dispute** between the Parties concerning whether a Repurchase Event has occurred."<sup>399</sup> The Respondent then identified additional correspondence over the years which, it says, establishes historical roots to its claim of malfeasance,<sup>400</sup> thus corroborating its good faith.
342. As to whether the particulars of the "good faith" issue ought to have been disclosed earlier, the Respondent relies on the Tribunal's comment in pre-hearing proceedings that "[t]he

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<sup>398</sup> Ex. CE-0017, at p. 1.

<sup>399</sup> Ex. CE-0017, at p. 1.

<sup>400</sup> See generally Respondent's Table of Contemporaneous Evidence of Allegations and Assessments Regarding Conduct Satisfying the "Wilful Malfeasance" Standard, dated 25 June 2019.

Respondent is not obliged to answer a case which has not yet been formally set out in a Claimants' Memorial."<sup>401</sup>

343. The Claimants' position is that there was no "good faith" dispute but only a contrived "wilful malfeasance" defence concocted after the event "in a manner that violates [the Respondent's] obligations under the SPA, and its litigation strategy, far from justifying a departure from the ordinary payment of pre-award interest, mandates such payment."<sup>402</sup> The GOG's chief fact witness, Minister Bowen, seemed blissfully unaware of the malfeasance allegation, the Claimants say, when he affirmed on the witness stand that the Government would have been happy to have continued with the Claimants as "its electricity partner":

Q. And I take it that one possible outcome of those discussions was the WRB would remain a shareholder in GRENLEC and remain a partner with the Government?

A. Yes, that is right.<sup>403</sup>

\* \* \* \* \*

Q. Now, as a public servant, is it your practice to allow wilful malfeasors to remain partners with the Government in the electricity sector?

A. No. That's something we would not really look forward to, **provided we had information** on exactly what was going on at the point in time.<sup>404</sup>

344. If the Government had no "information" about alleged wilful malfeasance in the 2016 negotiations, it could not have been advancing in good faith a "wilful malfeasance" defence at the time of the 2016 legislation abrogating the 80-year monopoly.
345. The Claimants consider it "inconceivable" that the GOG would tolerate a wilful malfeasor as its primary partner in the electricity sector, a view the Claimants say is corroborated by the documentary record:

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<sup>401</sup> Ex. RE-0083, at p. 3.

<sup>402</sup> Reply Memorial, para. 257.

<sup>403</sup> Transcript, 18 June 2019, p. 587, ll. 15-17.

<sup>404</sup> Transcript, 18 June 2019, p. 587, l. 20 to p. 588 l. 4.

- (a) in its letter dated 27 April 2016, the Government did not allege WRB to be a wilful misfeasor. It simply stated that “the public interest must be viewed as overriding to the interests of WRB/GRENLEC” but expressed its “commitment to retaining WRB/GRENLEC as a relevant player in the development of the [Grenadian] energy sector”;<sup>405</sup>
- (b) on 2 May 2017, one day before the expiry of the extended period for the Government to complete the repurchase of GPP’s shares, the Government wrote to GPP, stating that it had “not accepted or agreed to the GPP Demand”<sup>406</sup> but did not allege “wilful malfeasance” or any other misconduct by Claimants;
- (c) on 9 May 2017, the Government said in a media release: “Our desire is to see WRB remain engaged in Grenada’s electricity market”;<sup>407</sup>
- (d) on 1 June 2017, Prime Minister Mitchell declared that the Government’s “wholehearted desire [was] to continue to have WRB here as a partner in [Grenada’s] development”;<sup>408</sup>
- (e) the Government’s stated reasons for adopting the 2016 ESA were not to address any alleged “wilful malfeasance” by the Claimants, but rather to “put Grenada’s energy sector on a more sustainable economic and environmental footing,”<sup>409</sup> to create “a more competitive energy sector,”<sup>410</sup> to “open[] the sector to domestic and

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<sup>405</sup> Letter from M. Sylvester (Government) to R. Blanchard (WRB), dated 27 April 2016 (Ex. CE-0044), at p. 2.

<sup>406</sup> Letter dated 2 May 2017 from Anthony C.K. Hood (Government) to G. Robert Blanchard, Jr. (GPP and WRB) (Ex. CE-0017), at p. 1.

<sup>407</sup> The Official Website of the Government of Grenada, Grenada Government’s Reaction to GPP/WRB’s move for Arbitration, dated 9 May 2017 (CE-0050).

<sup>408</sup> Transcript of part of address by Dr. Rt. Honourable Keith Mitchell, Prime Minister, dated 1 June 2017 (Ex. CE-0253), at p. 1.

<sup>409</sup> Grenada to Liberalize its Energy Generation Sector, The Official Website of the Government of Grenada, dated 21 October 2013 (Ex. CE-0036).

<sup>410</sup> *Ibid.*



foreign investment,”<sup>411</sup> and to obtain an “efficient and reliable operation,”<sup>412</sup> “fair and equitable [electricity] rate[s],”<sup>413</sup> and a “[t]ransition[] to renewable energy”;<sup>414</sup>

- (f) the Government’s “Explanatory Memorandum” outlining the rationale for the 2016 ESA, did not identify any concerns with the Claimants’ management of GRENLEC;<sup>415</sup>
- (g) The Government’s failure to follow the procedural terms of the “wilful malfeasance” exception under Section 7.9(a)(iv) of the SPA also suggests that its invocation of the exception was an afterthought.

346. It was only in its 29 June 2018 Counter-Memorial (15 months after the Repurchase Demand and almost two years after the enactment of the 2016 ESA) that the Government for the first time contended that Claimants were guilty of “wilful malfeasance”.

347. **In the Tribunal’s view**, there is no doubt that the Respondent has a “good faith” belief that the Claimants are not good corporate citizens and that their control of GRENLEC was, in the end, terminated in what the Government viewed as the public interest. Nevertheless, the issue of good faith in enacting the 2016 legislation is not the same thing as good faith in advancing a “wilful malfeasance” defence to negate the Repurchase Event created by curtailment of the monopoly. Any presumption of good faith in respect of the “malfeasance” allegation is rebuttable, and the documentary record refutes any contention that GOG’s good faith extended to the allegations first made in the Counter-Memorial of “extreme or wilful malfeasance” of such a nature “and to such a degree” as to relieve the Respondent of the obligation to pay Second Schedule compensation as required by Section

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<sup>411</sup> Government of Grenada, Draft Electricity Supply Bill, 2015 Explanatory Memorandum, dated 12 February 2015 (Ex. CE-0040).

<sup>412</sup> Government of Grenada, A New Developmental Framework for Grenada’s Electricity Sector, dated 31 December 2012 (Ex. RE-0286), at p. 4.

<sup>413</sup> *Ibid.*

<sup>414</sup> *Ibid.*

<sup>415</sup> Government of Grenada, Draft Electricity Supply Bill, 2015 and Explanatory Memorandum, dated 12 February 2015 (Ex. CE-0040), at pp. 1-3.

7.9 of the SPA. The Respondent's argument never convincingly addressed the proportionality requirement.

348. It is true that in December 1999, the local Directors expressed strong criticism of WRB at a press conference but, there is no contemporaneous evidence these criticisms were endorsed (or shared) by the Government of the day. Thereafter there were, as would be expected in the operation of a monopoly utility over 22 years, disagreements and criticisms of GRENLEC management. However, these criticisms do not justify the submission that the Respondent declined to complete the Repurchase because of good faith belief in a malfeasance defence.

349. The Tribunal concludes that had the Respondent seriously considered the Claimants guilty of "extreme or wilful malfeasance" before the exigencies of this litigation required coming up with a defence, the GOG would have applied to an ICSID tribunal for a Section 7.9(c) declaration of "extreme or wilful malfeasance" prior to abrogating the 80-year monopoly. In that way, the Respondent could have put in issue the Claimants' stewardship of GRENLEC *without* triggering a Repurchase Event, and thereby avoided the risk to which it is now exposed, namely a no-escape exposure to the allegedly harsh compensation provisions of the Second Schedule.

350. There is no reason why the Respondent should benefit from the use of more than USD \$58 million for almost three years without payment of interest. Accordingly, the Tribunal orders pre and post Award interest from 3 May 2017 until payment of the Award (including interest and cost) at the rate fixed from time to time for Grenada 91-day Treasury Bills compounded annually.

**C. The Award Should Take Into Account GRENLEC Dividends Paid After the Valuation Date?**

351. The wrongful refusal of the GOG to repurchase the shares left the Claimants as unwilling shareholders in GRENLEC, with continued management control and responsibilities. In the exercise of that control, the Claimants caused GRENLEC to continue to pay dividends

to GPP amounting to EC \$11.1 million up to 26 July 2019<sup>416</sup>. The Tribunal is thus faced with a number of options:

- (a) the Claimants' demand for pre-judgment interest with no deduction for GRENLEC dividends of EC \$11.1 million up to 26 July 2019;<sup>417</sup>
- (b) in the alternative, the Claimants cannot keep both dividends and collect pre-Award interest because pre-Award interest presupposes the Claimants would have taken the proceeds of the repurchase and made a revenue-generating investment elsewhere, whereas in fact the "proceeds" remained invested in GRENLEC (however unwillingly). The Claimants, it might be said, cannot be the beneficiary of a double investment. On this view, having caused dividends to be paid on the GRENLEC shares, the Claimants would not be entitled to pre-Award interest on the same monies notionally invested elsewhere;
- (c) the Claimants might be allowed pre-Award interest, on the net Award after first deducting a set-off equivalent to the amount of the GRENLEC dividends;
- (d) a fourth option is that the Claimants receive no pre-Award interest at all but that any compensation awarded for GRENLEC shares be reduced by the amount of the dividends received.<sup>418</sup>

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<sup>416</sup> The Claimants' letter to the Tribunal, dated 26 July 2019, at p. 8.

<sup>417</sup> *Ibid.*, at p. 8:

Claimants are not aware of any authority that, in a claim by a shareholder for specific performance of a put option, the receipt of dividends by the shareholder affects its claim to pre-award interest for breach of the put option. Nor has Respondent argued, let alone formally claimed, that the amount of dividends received by GPP should be offset against any pre-award interest awarded by the Tribunal (and any such claim presented at this late stage would be untimely and inadmissible).

<sup>418</sup> Letter from the Respondent, dated 26 July 2019, at p. 4:

That cannot be right. On Claimants' case, they should have received a certain amount of money for their shares on 3 May 2017.<sup>16</sup> Had that happened, Claimants would have ceased to be shareholders, and thus would have received no dividends between 3 May 2017 and the date of the award. Instead, the dividends that Claimants actually received during that period would have been received by the new shareholder – the Government, or whichever third party ultimately purchased the shares from the Government. Thus, on Claimants' own case, any compensation for their shares must be reduced by the amount of dividends they received between 3 May 2017 and the date of the award.

352. In the Tribunal's view, the third option is the most appropriate. The Claimants are not entitled to double compensation. Interest is only payable on monies which the Claimants have been denied. The relevant calculation appears above at paragraph 324.

## **XII. COUNTERCLAIM**

353. The Respondent's counterclaim alleges "unfair prejudice and oppression" under Section 241 of the *Companies Act of Grenada*<sup>419</sup> which specifically prohibits companies and their directors from taking any action that is "oppressive or unfairly prejudicial to, or that unfairly disregards the interests of [] any shareholder."<sup>420</sup>

354. The Respondent has not quantified its counterclaim. It requests that "the amount be determined in the course of these proceedings."<sup>421</sup>

355. According to the Respondents, there are no jurisdictional or other legal impediments to the Government's counterclaim being brought into these proceedings. The Tribunal is competent to determine "[a]ny dispute or difference between the Parties...arising out of or in connection with" the SPA.<sup>422</sup> The subject matter of the claim is "GPP's direct shareholding (and WRB's indirect shareholding) in GRENLEC."<sup>423</sup> Pursuant to Article 46 of the ICSID Convention, the Tribunal may thus "determine any incidental or additional claims or counterclaims" with respect of the Claimants' shareholding in GRENLEC.

356. In particular, the Respondent alleges:

- (a) the Claimants have used their management powers and their casting vote on the Board of Directors to run roughshod over the Respondent's and other minority

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<sup>419</sup> Counter-Memorial, para. 322.

<sup>420</sup> Ex. RE-0007, s. 241(2).

<sup>421</sup> Counter-Memorial, para. 341, states:

The Government further requests that the Tribunal make a final order compensating it in damages, in an amount to be determined in the course of these proceedings, following disclosure and further submissions by the Parties. Should the Tribunal find for [the] Claimants on any of their repurchase demand claims, the Government respectfully requests that this award of damages on Grenada's counterclaim be effected by set-off against any sums that the Tribunal may direct be paid to repurchase [the] Claimants' GRENLEC shares.

<sup>422</sup> Ex. RE-0089, s. 11.2.

<sup>423</sup> Memorial, para. 16.

shareholders' rights. Through their actions, WRB and GPP have routinely unfairly prejudiced the Government and its rights;

- (b) the Caterpillar purchase “debacle” – including, but not limited to, the deleterious effect on the electricity supply when the generators WRB pushed to acquire over the objections of the Grenadian directors on the Board began to suffer serious problems;<sup>424</sup>
- (c) the Claimants' significant improprieties in relation to the declaration and payment of dividends to the detriment of the Company, regardless of the need for capital investment to ensure its continued health of the utility.<sup>425</sup> There is no evidence that the Claimants have made any new equity investments in GRENLEC since the initial purchase in 1994;<sup>426</sup>
- (d) the Claimants took steps to obscure how GRENLEC actually funded the Special Dividend of EC \$57 million through the CIBC loans;
- (e) WRB's and GPP's excluded shareholders and their representatives from the decision-making to evaluate “legal actions that may be filed by the company (either directly or on behalf of shareholders), as well as supporting legal actions that may be filed by various shareholders, including the company's strategic investor [GPP]”<sup>427</sup> in response to the 2016 reform package;
- (f) causing GRENLEC to fund the dispute over GPP's shares<sup>428</sup> – even though any recovery on their claims in this arbitration would go to Claimants, not the Company.

357. The Claimants' position is that the Tribunal has no jurisdiction to deal with the counterclaim which is predicated on an alleged breach not of the SPA but of Grenadian law, and thus falls outside the jurisdiction of this Tribunal which, under Article 25(1) of

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<sup>424</sup> See *supra* Section VIII.C.(1).

<sup>425</sup> Mudge I, para. 74.

<sup>426</sup> *Ibid.*, Table 1.

<sup>427</sup> Ex. RE-0077, at p. 9.

<sup>428</sup> Ex. RE-0072.

the ICSID Convention (which governs this arbitration) is limited to disputes arising directly out of an investment:

The jurisdiction of the Centre shall extend to any legal dispute arising **directly** out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, to which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

358. The Claimants argue that the counterclaim does not arise **directly** from the SPA, which is not invoked, but rather from an alleged violation of the Grenadian *Companies Act*.<sup>429</sup>
359. **In the Tribunal’s view**, ICSID tribunals may accept jurisdiction if it is impractical to unbundle the claims (i.e. the causes of action “constitute[d] an indivisible whole,”<sup>430</sup> and the parties’ “reciprocal [contractual] obligations had a common origin, identical sources, and an operational unity.”)<sup>431</sup>
360. The allegations advanced in support of the Counterclaim track allegations raised in defence.

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<sup>429</sup> The Claimants say the Respondent’s counterclaim is analogous to that in *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction (10 May 1988) (“*Amco I*”), 1 *ICSID Rep.* 543 (1993) (Ex. CLA-0085), a case arising out of Indonesia’s seizure of Amco’s investment in a hotel and subsequent cancellation of Amco’s investment license. Indonesia counterclaimed that Amco had engaged in tax fraud in breach of Indonesian law. The *Amco II* Tribunal held that only disputes regarding obligations under an investment agreement “will fall under Article 25(1) of the [ICSID] Convention,” whereas disputes concerning obligations under general law “fall to be decided by the appropriate procedures in the relevant jurisdiction.” On the facts, the *Amco II* Tribunal held that “[t]he obligation not to engage in tax fraud is clearly a general obligation of law in Indonesia. It was not specially contracted for in the investment agreement and does not arise directly out of the investment” as required by Article 25(1) of the ICSID Convention. The Tribunal therefore declined *ratione materiae* jurisdiction over the counterclaim. In *Saluka Invs. B.V. v. Czech Republic*, Decision on Jurisdiction over the Czech Republic’s Counterclaim (7 May 2004) (“*Saluka*”) (Ex. CLA-0099), paras. 78-79, the claimant had brought claims against the Czech Republic under an investment treaty, and the Czech Republic asserted various heads of counterclaim, including “non-compliance with the general law of the Czech Republic.” The *Saluka* Tribunal declined jurisdiction over these counterclaims, finding that “the disputes underlying those heads of counterclaim in principle fall to be decided through the appropriate procedures of Czech law and not through the particular investment protection procedures of the Treaty.”

<sup>430</sup> *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Award (21 October 1983) (“*Klöckner v. Cameroon*”) (Ex. CLA-0075), at p. 17.

<sup>431</sup> *Ibid.*, at p. 65 (emphasis added).

361. While the Respondent indicated that its quantification of the Counterclaim would emerge in the course of proceedings, it never did, not even in the Respondent's closing submissions.
362. The facts alleged in supporting the Counterclaim have not been established. Accordingly, the counterclaim is dismissed but without costs.

### **XIII. COSTS**

#### **A. The Parties' Request for Costs**

363. The Claimants have submitted a claim for costs of USD \$8,156,400.51 plus interest (including advances made to ICSID). The Respondent seeks USD \$5,916,030.36 (including advances made to ICSID). The Parties have conferred and each advises that "both sides' costs were actually incurred and were reasonable in amount."<sup>432</sup> The questions before the Tribunal are whether either side's costs should be shifted to the opposing side and if so in what amount.
364. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD \$)

Arbitrators' fees and expenses	
Hon. Ian Binnie, C.C., Q.C.	118,649.73
Ms. Olfunke Adekoya SAN	89,824.59
Mr. Richard Boulton, Q.C.	93,796.75
ICSID's administrative fees	116,000.00
Direct expenses	61,673.68
<b>Total</b>	<b><u>479,944.75</u></b>

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<sup>432</sup> Claimants' Submission on Costs para. 2; Respondent's Submission on Costs para. 8.

365. The above costs have been paid out of the advances made by the Parties in equal parts. As a result, each Party's share of the costs of arbitration amounts to USD \$239,972.37.<sup>433</sup>
366. There is no doubt of the Tribunal's jurisdiction to award costs in respect of counsel and the experts as well as the costs of ICSID. Article 61(2) of the ICSID Convention provides as follows:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

367. The first Claimant, WRB Enterprises Inc., is a Florida company. In that jurisdiction, the "American rule" generally applies under which, as stated by the United States Supreme Court, "parties are ordinarily required to bear their own attorney's fees – the prevailing party is not entitled to collect from the loser."<sup>434</sup> On the other hand, Grenada generally follows the British practice of "loser pays". However, even under "loser pays" the winner does not necessarily obtain full indemnification. A distinction is made between "indemnity" costs (as are sought here by the Claimants) and "standard costs" which may be somewhat less, and which have to satisfy a test of proportionality as well as reasonableness.<sup>435</sup>

## **B. Relevant Factors**

368. In *Home Office v. Lownds*, the Lord Chief Justice for England and Wales identified a number of factors relevant to "reasonableness" and "proportionality" in the assessment of costs. The English guidelines are codified in amendments to the *Civil Procedure Rules* but in the Tribunal's opinion the guidelines reflect the evolving common law approach to cost

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<sup>433</sup> The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

<sup>434</sup> *Buckhannon Board and Care Home Inc. et al. v. West Virginia Department of Health and Human Resources et al.* 532 US 598 at 602 (2001); see also "Experiments on the Effects of Cost Shifting, Court Costs Efficient Settlement of Tort Claims and Discovery on the Efficient Settlement of Tort Claims", 33 Florida State University Law Review 85 (2005).

<sup>435</sup> *Home Office v. Lownds*, 2002 EWCA Civ 365 (21 March 2002) EWCA para. 4.



shifting and provide a useful list of considerations for present purposes (the importance and weight to be given to various factors will of course vary from case to case):

- (a) the amount of money involved;
- (b) the importance of the case to the parties;
- (c) the particular complexity of the matter or the difficulty or novelty of the questions raised;
- (d) the relative success of the contending parties;
- (e) whether a claimant which has succeeded in its claim in whole or in part exaggerated its claim;
- (f) the financial position of each party;
- (g) the manner in which a party has pursued or defended its case or a particular allegation or issue before as well as during the proceedings;
- (h) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute, including any payment into court or admissible offer of settlement;
- (i) the skill, effort, specialized knowledge and responsibility involved;
- (j) the time spent on the case;
- (k) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue.

369. The Tribunal comments on these factors as follows:

- (a) the Claimants suggest that the amount in dispute (excluding interest) is in excess of USD \$65 million. The Claimants have been substantially successful on most aspects of their claim. Indeed, it is evident that their recovery of Second Schedule compensation very substantially exceeds the Fair Market Value of their GRENLEC shares;

- (b) the claim is of substantial monetary importance to the Claimants. The GRENLEC shares constitute their major corporate asset. So far as the Respondent is concerned, the importance of the case is the “repatriation” of the controlling shares in the virtual monopoly supplier of electricity in the country. The Respondent’s view was and is that if the Claimants are entitled to anything they should receive no more than Fair Market Value. The Claimants, not surprisingly, insist on the substantial premium agreed to in the Share Purchase Agreement. The Tribunal’s Award will put a significant dent in Grenada’s public finances. In other words, the case is of great importance to both Parties;
- (c) from the Claimants’ perspective this was a simple collection case. They complain that unnecessary complexities were added by the Respondent in its resistance to the inevitable;
- (d) subject to some downward adjustments in the assessment of compensation, the Claimants have enjoyed substantial success;
- (e) although the Respondent considers the Claimants’ case to be exaggerated, the Claimants’ claim to Second Schedule compensation has prevailed;
- (f) both sides had ample resources to fund the arbitration;
- (g) the Claimants protest that the Respondent raised issues which “repeatedly and unjustifiably increased the complexity of the dispute and Claimants’ costs.”<sup>436</sup> This is true; however, when it is considered that compensation calculated in accordance with the Second Schedule greatly exceeds the fair market value of the GRENLEC shares, and that the Respondent is responsible to its electorate for the expenditure of public funds, the Respondent’s search for partial or even complete relief is understandable. In the particular circumstances of this case the “manner of presentation” is not a significant factor in the award of costs;

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<sup>436</sup> Claimants’ Submission on Costs, para. 9.

- (h) although government officials expressed a desire to negotiate in good faith a “fair” settlement, the Tribunal is not aware of any compromises being offered by either side. In any event there was no binding offer of settlement;
- (i) the case was comprehensively and skillfully presented by both sides;
- (j) the time spent on the case is of some concern. For example, the Claimants explain at footnote 38 of their Submission on Costs that “the legal fees and costs associated with the Claimants’ application for a Provisional Measure [to restrain the Government from abusing its regulatory power over GRENLEC to demand documents in excess of the documentary production ordered by the Tribunal] are USD \$886,596.74, representing fees and costs of White & Case and Mr. Charlie Friedlander incurred between 9 May 2018 and 8 July 2018. It is true that the Claimants’ application for the Interim Measure was successful, and was necessitated by the Government’s effort to “side-step” the agreed procedure for prehearing discovery of documents, and was therefore criticized by the Tribunal; nevertheless, the expenditure of USD \$886,596.74 on a relatively straight-forward application to resist the Government’s “regulatory” demand for documents lacks proportionality, in the opinion of the Tribunal;
- (k) in the Tribunal’s view it was unreasonable for the Respondent to pursue its “extreme or willful malfeasance” defense which was at odds with the contemporaneous documentary evidence.

### **C. Relevant ICSID Jurisprudence**

370. While ICSID Tribunals have frequently adopted the principle of “loser pays” this is not invariably the case. In *Krederi Ltd. v. Ukraine*,<sup>437</sup> the tribunal followed what it described as the “traditional practice” that each party bear its own costs “considering that the claims were not frivolous, were pursued and defended in good faith and with all due expedition.” In *Álvarez y Marín Corporación v. Republic of Panama*,<sup>438</sup> the tribunal decided that each

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<sup>437</sup> *Krederi Ltd. v. Ukraine*, ICSID Case No ARB/14/17, para. 740 (Award, 2 July 2018).

<sup>438</sup> *Álvarez y Marín Corporación S.A. and others v. Republic of Panama*, ICSID Case No ARB/15/14, para. 421 (Award, 12 October 2018).

party should bear its own costs and 50% of the arbitration costs.<sup>439</sup> ICSID Tribunals have also expressed concern where there is a significant disparity between the parties' respective bills of costs.<sup>440</sup> The general principle is that the award of costs may be guided by the particular facts of each case.

**D. The Claimants' Bill of Costs**

371. The Claimants' Bill of Costs (excluding advances made to ICSID) in relevant part seeks payment as follows:

**SUMMARY OF CLAIMANTS' COSTS AND FEES (USD \$)  
as of 26 July 2019**

A. White & Case LLP	5,813,011.30
B. Co-counsel: Charlie Friedlander	383,559.00
C. Outside Grenadian Counsel: Mitchell & Co.	181,826.80
D. Valuation experts: John Ellison & Thomas Popovic	1,171,521.86
E. Boaz Moselle	276,659.79
F. Jan Paulsson	33,332.50
G. Claimants (including fact witnesses)	56,516.89
<b>TOTAL as of 26 July 2019</b>	<b>7,916,428.14</b>

<sup>439</sup> See also *Anglo-Adriatic Group Limited v. Republic of Albania* ICSID Case No ARB/17/6.

<sup>440</sup> See e.g. *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, para. 588 (Award, 8 July 2016); *Churchill Mining PLC v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and *Planet Mining v. Republic of Indonesia*, ICSID Case No. ARB/12/40, paras. 552- 553 (Award, 6 Dec. 2016); *İçkale İnşaat Limited Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, para. 409 (Award, 8 March 2016); and *Renee Rose Levy and Grencitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, para. 202 (Award, 9 January 2015).

372. The Claimants do not assert any entitlement to a full cost indemnity as of right. In the Tribunal's view it is appropriate to have regard to the common law principles applicable to "standard costs" which include the principle of proportionality.

#### **E. The Proportionality Principle**

373. The proportionality principle was explained by the Lord Harry Woolf, then Lord Chief Justice of England and Wales, in *Home Office v. Lownds*<sup>441</sup> as follows:

2. Proportionality [formerly] played no part in the taxation of costs under the Rules of the Supreme Court. The only test was that of reasonableness. The problem with that test, standing on its own, was that it institutionalised, as reasonable, the level of costs which were generally charged by the profession at the time when the professional services were rendered. **If a rate of charges was commonly adopted it was taken to be reasonable and so allowed on taxation even though the result was far from reasonable.**

374. Lord Woolf's concern about automatic acceptance of the "going rate" as "reasonable" is borne out to some extent by the Claimants' reference to "the average claimant costs in the ninety ICSID arbitrations concluded between FY 2011 and FY 2017 [...] was of USD \$6,043,914.93."<sup>442</sup> According to the evolving common law on costs, "reasonableness" is not a matter of the "going rate" but must always be measured against proportionality.

375. The costs claimed in respect of the Interim Measure is one example of disproportionality. Another is the costs run up by the Claimants in respect of the "extra pleading". The Claimants rightly complained that the Government's Counter Memorial was deficient "with respect both to the Statutory Valuation [i.e. the Second Schedule] and the particulars and valuation of the counterclaim." This deficiency eventually involved the Claimants and their experts being permitted to file an additional reply pleading after the Government belatedly put its materials in evidence. The Claimants seek **USD \$926,150.82** in respect of the further filing and associated preparation. Given that the Claimants' experts had already worked up the Second Schedule data in preparing their reports filed with the

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<sup>441</sup> At para. 2.

<sup>442</sup> Claimants Costs Submissions, footnote 43.

Memorial, the expenditure of a further USD \$926,150.82 seems to the Tribunal to lack proportionality.

**F. Application of the Tests to the Facts**

376. The Tribunal concludes that some adjustment must be made in the costs of **USD \$8,156,400.51** as claimed. In addition to the disproportionality as compared with the Respondent's Bill of Costs of **USD \$5,916,030.36**, the Tribunal has already commented on the disproportionate **USD \$886,596.74** expended on the Interim Measures application in respect of a documents demand and the **USD \$926,150.82** in respect of the "extra pleading". The Tribunal further notes that the Claimants caused GRENLEC to pay **USD \$522,353.15** for legal and accounting fees in 2016 and 2017 that ought to have been paid from the outset by the Claimants. The inappropriateness of this payment has belatedly been acknowledged by the Claimants who undertook to repay said sum of USD \$522,353.15 to GRENLEC.<sup>443</sup>
377. The Tribunal notes a number of additional concerns. For example, the Claimants seek **USD \$33,332.50** for an opinion from Professor Jan Paulsson concerning enforcement of the "governing law" provision of the Special Purchase Agreement. The Respondent rightly challenged the admissibility of an expert opinion on a question of international law. The Tribunal agreed that Professor Paulsson's opinion simply constituted additional legal argument. The contents of the Paulsson report were adopted by the Claimants as part of their argument but, in the respectful opinion of the Tribunal, added little to the submissions already being made by Mr. Paul Friedland for the Claimants.
378. The Claimants' expenditure of **USD \$926,150.82** just for preparation of the final reply<sup>444</sup> is to be compared with the Respondent's total claim in respect of its accounting experts PwC and the Brattle Group for the entire case (including the hearing) of **USD \$1,177,261.50**, only **USD \$251,110.07** more, even though the Respondent's experts discharged a broader mandate including both a DCF analysis as well as a Second Schedule

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<sup>443</sup> See Claimants Costs Submissions, footnote 1. But the initial miscalculation was disreputable.

<sup>444</sup> See Claimants Costs Submissions, footnote 38.

analysis whereas the Claimants' experts were directed to and did focus almost entirely on the Second Schedule. It is true, of course, that the Tribunal ultimately accepted the expert evidence of the Claimants, but this was primarily dictated by the Tribunal's acceptance of the Claimants' legal argument that compensation is to be calculated according to the Second Schedule.

379. In the circumstances the Tribunal:

- (a) acknowledges the Claimants' undertaking to reimburse GRENLEC for the **USD \$522,353.15** for legal and accounting services that ought to have been paid by the Claimants in the first place;
- (b) orders the Respondent to reimburse the Claimants **USD \$239,972.37** in respect of the advances to ICSID;
- (c) reduces the balance of the Claimants' Bill of Costs of **USD \$7, 916,428.14** by 20% (i.e. **USD \$1,583,285.63**) for a resulting sum of **USD \$6,333,142.51** to be paid by the Respondent on account of attorney fees and disbursements;
- (d) the sum of **USD \$6,573,114.88** (being USD \$239,972.37 plus USD \$6,333,142.51) is therefore added to the Award.

#### **XIV. DISPOSITION**

380. For the foregoing reasons, the Tribunal renders the following Award:

- i. The present dispute is within the jurisdiction of the Centre and the competence of the Tribunal;
- ii. A declaration that a Repurchase Event occurred within the meaning of the Share Purchase Agreement (SPA) dated 14 September 1994, namely the 2016 legislative termination of the 80-year monopoly and the substitution of a shorter and narrower period of exclusivity which made the GRENLEC shares a fundamentally different investment than in 1994;

- iii. A declaration that Compensation for the repurchase of the Claimants' shares in GRENLEC is to be calculated in accordance with the Second Schedule of the SPA;
- iv. The Respondent is to pay the Claimants Second Schedule Compensation assessed at USD \$58,427,962;
- v. The Respondent is to reimburse the Claimants for advances to ICSID in the sum of USD \$239,972.37;
- vi. The Respondent is to pay the Claimants' Attorneys' Fees and Disbursements in the sum of USD \$6,333,142.51;
- vii. The Respondent is to pay pre-Award and post-Award interest on the amount listed in (iv) or the balance outstanding from time to time at the rate fixed from time to time for Grenada 91-day Treasury Bills compounded annually from 3 May 2017 until fully paid;
- viii. The Respondent is to pay interest on the amounts listed in (v) and (vi) or the balance outstanding from time to time at the rate fixed from time to time for Grenada 91-day Treasury Bills compounded annually from the date of the Award until fully paid;
- ix. The aforesaid sums are to be paid by the Respondent and repatriated by the Claimants exempt from all Grenadian taxes, levies and other duties.
- x. The Claimants are to honor their undertaking to reimburse GRENLEC for the improper payment of USD \$522,353.15 for legal and accounting services that ought to have been paid by the Claimants in the first place.



  
Ms. Olufunke Adekoya SAN  
Arbitrator

Date: 13 February 2020



Mr. Richard Boulton, Q.C.  
Arbitrator

Date: 24 February 2020



Hon. Ian Binnie, C.C., Q.C.  
President of the Tribunal

Date: 18 February 2020